

MARS
MARCH
2000
VOLUME 82
N° 837



Revue fondée en 1869
et publiée par le
Comité international
de la Croix-Rouge
Genève

Review founded in 1869
and published by the
International Committee
of the Red Cross
Geneva

REVUE INTERNATIONALE DE LA CROIX-ROUGE

Débat humanitaire: droit, politiques, action

INTERNATIONAL REVIEW OF THE RED CROSS

Humanitarian Debate: Law, Policy, Action

MARS
MARCH
2000
VOLUME 82
N° 837

Revue fondée en 1869
et publiée par le
Comité international
de la Croix-Rouge
Genève

Review founded in 1869
and published by the
International Committee
of the Red Cross
Geneva

REVUE INTERNATIONALE DE LA CROIX-ROUGE
Débat humanitaire: droit, politiques, action

INTERNATIONAL REVIEW OF THE RED CROSS
Humanitarian Debate: Law, Policy, Action

Mission de la Revue internationale de la Croix-Rouge

La *Revue internationale de la Croix-Rouge* est un périodique publié par le Comité international de la Croix-Rouge (CICR) qui entend favoriser la réflexion sur la politique, l'action et le droit international humanitaires et, en même temps, renforcer le dialogue entre le CICR et les autres institutions ou personnes intéressées par l'humanitaire.

● La *Revue* est au service de l'analyse, de la réflexion et du dialogue sur l'humanitaire en temps de conflit armé et d'autres situations de violence collective. Elle porte une attention particulière à l'action humanitaire elle-même, mais elle entend également contribuer à la connaissance de son histoire, à l'analyse des causes et des caractéristiques des conflits – pour mieux saisir les problèmes humanitaires qui en découlent – et à la prévention de violations du droit international humanitaire. La *Revue* entend stimuler un débat d'idées.

● La *Revue* sert de publication spécialisée sur le droit international humanitaire, rédigée à la fois pour un public académique et pour un public général. Elle cherche à promouvoir la connaissance, l'examen critique et le développement de ce droit. Elle stimule le débat entre, notamment, le droit international humanitaire, le droit des droits de l'homme et le droit des réfugiés.

● La *Revue* est un vecteur de l'information, de la réflexion et du dialogue relatifs aux questions intéressant le Mouvement international de la Croix-Rouge et du Croissant-Rouge et, en particulier, à la doctrine et aux activités du Comité international de la Croix-Rouge. Ainsi la *Revue* entend-elle contribuer à promouvoir la cohésion au sein du Mouvement.

La *Revue* s'adresse à plusieurs publics à la fois, notamment aux gouvernements, aux organisations internationales gouvernementales et non gouvernementales, aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, aux milieux académiques, aux médias et à toute personne spécifiquement intéressée par les questions humanitaires.

Mission of the International Review of the Red Cross

The *International Review of the Red Cross* is a periodical published by the International Committee of the Red Cross (ICRC). Its aim is to promote reflection on humanitarian policy and action and on international humanitarian law, while at the same time strengthening the dialogue between the ICRC and other organizations and individuals concerned with humanitarian issues.

● The *Review* is a forum for thought, analysis and dialogue on humanitarian issues in armed conflict and other situations of collective violence. While focusing particular attention on humanitarian action per se, it also strives to spread knowledge of the history of such activity, to analyse the causes and characteristics of conflicts – so as to give a clearer insight into the humanitarian problems they generate – and to contribute to the prevention of violations of international humanitarian law. The *Review* wishes to encourage the exchange of ideas.

● The *Review* is a specialized journal on international humanitarian law, intended for both an academic and a more general readership. It endeavours to promote knowledge, critical analysis and development of the law. Its also fosters the debate on such matters as the relationship between international humanitarian law, human rights law and refugee law.

● The *Review* is a vector for information, reflection and dialogue on questions pertaining to the International Red Cross and Red Crescent Movement and, in particular, on the policy and activities of the International Committee of the Red Cross. The *Review* thus seeks to promote cohesion within the Movement.

The *Review* is intended for a wide readership, including governments, international governmental and non-governmental organizations, National Red Cross and Red Crescent Societies, academics, the media and all those interested by humanitarian issues.

La crise du Kosovo et le droit international humanitaire

The Kosovo crisis and international humanitarian law

- 5** *Éditorial*
- 8** *A note from the Editor*
- 11** **Conflict in the Balkans: Human tragedies and the challenge to independent humanitarian action**
PIERRE KRÄHENBÜHL
- 31** **After the Kosovo conflict, a genuine humanitarian space: A utopian concept or an essential requirement?**
BÉATRICE MÉGEVAND ROGGO
- 49** **L'action de l'Agence centrale de recherches du CICR dans les Balkans durant la crise des réfugiés kosovars**
THIERRY SCHREYER
- 67** **Common Article 1 of the Geneva Conventions revisited: Protecting collective interests**
LAURENCE BOISSON DE CHAZOURNES and LUIGI CONDORELLI

-
- 89** « L'intervention d'humanité » de l'OTAN au Kosovo
et la règle du non-recours à la force
DJAMCHID MOMTAZ
- 103** Intervention armée des forces de l'OTAN au Kosovo
PÉTER KOVÁCS
- 129** International humanitarian law and the Kosovo crisis:
Lessons learned or to be learned
JAMES A. BURGER
- 147** Kosovo 1999: The air campaign
PETER ROWE
- 165** Zero-casualty warfare
A. P. V. ROGERS
- 183** The Kosovo crisis and the law of armed conflicts
SERGEY ALEXEYEVICH EGOROV
- 193** Peace-enforcement actions and humanitarian law :
Emerging rules for "interventional armed conflict"
MICHAEL H. HOFFMAN
- 205** Information warfare
WILLIAM CHURCH
- 217** The International Criminal Tribunal for the former
Yugoslavia and the Kosovo conflict
SONJA BOELAERT-SUOMINEN

Faits et documents

Reports and documents

- | | | |
|------------|---|---|
| 253 | Organisation du Traité de l'Atlantique Nord: déclaration par le Comité international de la Croix-Rouge | North Atlantic Treaty Organization: Statement by the International Committee of the Red Cross |
| 263 | Resolution adopted by the NATO Parliamentary Assembly on 15 November 1999 concerning the armed intervention in Kosovo | |
| 265 | Adhésion de Monaco aux Protocoles additionnels aux Conventions de Genève du 12 août 1949 | Accession to the Protocols Additional to the Geneva Conventions of 12 August 1949 by Monaco |
| 266 | Conventions de Genève du 12 août 1949 et Protocoles additionnels du 8 juin 1977 (au 31 décembre 1999) | Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977 (as at 31 December 1999) |

Divers

Miscellaneous

- | | | |
|------------|--|--|
| 275 | Attribution du Prix Paul Reuter | Award of the Paul Reuter Prize |
| 277 | Conseil des Délégués, Genève, 29-30 octobre 1999 | Council of Delegates, Geneva, 29-30 October 1999 |
| 278 | Table des matières 1999 | Contents 1999 |

Un texte paraissant dans la *Revue* n'engage que son auteur. En publiant un article dans la *Revue*, ni la rédaction ni le CICR ne prennent position au sujet des opinions exprimées par son auteur. Seuls les textes signés par le CICR peuvent lui être attribués.

Texts published by the *Review* reflect the views of the author alone and not necessarily those of the ICRC or of the *Review*. Only texts bearing an ICRC signature may be ascribed to the institution.

E

ditorial

«Les troubles qui ont ensanglanté la péninsule des Balkans [...] s'étaient soulevées contre l'autorité [...] la répression [...] fut terrible [...] Multipliant massacres et tortures...»¹ — Était-ce en 1999? Non, en 1875. La guerre des Balkans, de 1875 à 1878, fut l'un des tout premiers conflits armés auquel le droit de Genève, élaboré depuis peu, était applicable. C'est alors que les Sociétés nationales de la Croix-Rouge et le CICR se lancèrent dans leurs activités humanitaires. Ce fut aussi le premier conflit qui souleva des questions d'ordre juridique concernant la mise en œuvre du nouveau droit international humanitaire, en particulier quand il s'est agi de qualifier cette guerre de conflit armé international ou de conflit armé non international.

La guerre est avant tout le résultat affligeant de vains efforts visant à résoudre des problèmes réels sans recourir à la force et à régler pacifiquement des conflits évidents. Pour tous les êtres humains — hommes, femmes et enfants —, la guerre est synonyme de souffrances, de destructions et, bien trop souvent, d'anarchie et de criminalité. Tout en évoquant avec humanité les souffrances des générations qui ont vécu dans cette région troublée et des générations qui y vivent encore, la Revue s'intéresse aujourd'hui à quelques aspects de la crise la plus récente qui a frappé les Balkans: l'intervention armée des États membres de l'OTAN dans la République fédérale de Yougoslavie pendant le premier semestre de 1999, en réaction aux crimes commis au Kosovo. La Revue a invité des juristes militaires, des experts en droit international humanitaire et des praticiens de l'humanitaire venus d'horizons différents à s'exprimer sur des questions liées à l'action humanitaire et au droit international humanitaire dans ce conflit. Le rédacteur en chef regrette qu'il se soit avéré impossible d'inclure un article rédigé par un auteur serbe.

Trois auteurs du CICR plantent le décor et décrivent à grands traits les défis que doit relever l'action humanitaire dans les Balkans. Les auteurs ont joué (et jouent encore) un rôle important dans les activités déployées par le Comité international au Kosovo et en Serbie. Plusieurs articles abordent des questions d'un caractère plus juridique. Leurs auteurs examinent les critères qu'ont dû respecter ceux qui ont préparé et mené des opérations militaires, et ils accordent une attention particulière aux violations du droit international humanitaire qui se sont produites au cours des hostilités actives. Les questions relatives aux différentes interprétations des règles régissant le choix des objectifs militaires sont au centre de leurs préoccupations. Un bref commentaire sur la guerre des systèmes d'information ouvre des horizons nouveaux mais alarmants, et un article consacré au Tribunal pénal international pour l'ex-Yougoslavie examine quelles sont les possibilités pour cette juridiction d'enquêter sur les crimes commis pendant le conflit du Kosovo et de poursuivre leurs auteurs.

Conformément à son mandat, la Revue ne publie que des articles et d'autres documents portant sur des questions juridiques qui concernent la mise en œuvre du droit international humanitaire, ou sur des problèmes que rencontre l'action humanitaire en faveur des victimes de conflits armés. Tout débat sur les causes d'un conflit déterminé ou sur la légitimité d'une intervention militaire sort du cadre de sa mission. Toutefois, la réaction de la communauté internationale face à la crise du Kosovo a soulevé des questions fondamentales quant aux méthodes de mise en œuvre du droit international humanitaire, en particulier des Conventions de Genève de 1949 et de leur Protocole additionnel I de 1977. À cet égard, l'article des professeurs Condorelli et Boisson de Chazournes fait le point sur l'interprétation — qu'elle soit ancienne ou apparue récemment — de l'obligation contenue dans l'article premier commun aux Conventions de Genève, à savoir que les États parties à des traités de droit international humanitaire ont le devoir de «faire respecter» les engagements humanitaires dans les conflits armés. Le professeur Montaz va plus loin et se penche sur le fondement juridique de l'intervention de l'OTAN dans les Balkans. En publiant son analyse des arguments avancés par les deux parties — analyse réaliste et reposant sur des recherches approfondies —, la Revue ne prend toutefois pas position sur ses conclusions.

Au moment de mettre sous presse, la rédaction de la Revue a appris la disparition de Konstantin Obradović, professeur à l'Institut de politique et d'économie internationales à Belgrade. Expert en droit international humanitaire bien connu, Kosta Obradović avait accepté avec enthousiasme de collaborer au présent numéro. Malheureusement, il n'a pas pu honorer sa promesse. Il nous a quittés trop tôt.

LA REVUE

A note from the Editor

“The troubles which had steeped the Balkan peninsula in blood (...) rebellion against the government (...) the rising was put down (...) with appalling cruelty (...) terrible tale of torture and massacre ...”¹ — That was in 1999? No, in 1875. The war in the Balkans of 1875 to 1878 was one of the very first armed conflicts to which the new Geneva law was applicable and where National Red Cross Societies and the ICRC were actively engaged in their humanitarian tasks. It was also the first conflict in which questions of a legal nature arose with regard to the implementation of modern international humanitarian law, in particular the classification of the war as an international or a non-international armed conflict.

War is first and foremost the dismal result of failed endeavours to settle real problems and solve evident conflicts peacefully, without recourse to force. For men, women and children alike, war means suffering, destruction and, all too often, lawlessness and crimes. While looking back with compassion to the sufferings of past and present generations in that troubled region, the Review turns its attention to a few aspects only of the most recent crisis in the Balkans: the armed intervention by NATO member States in the Federal Republic of Yugoslavia in the first half of 1999, in response to crimes committed in Kosovo. The Review has invited military lawyers, experts in international humanitarian law and humanitarian practitioners from various backgrounds to comment on issues related to humanitarian action and international humanitarian law in this conflict. The Editor regrets that it proved impossible to include an article by a Serbian author.

Three authors from the ICRC set the stage and outline the challenges of humanitarian action in the Balkans. All of them played

(and still play) an important role in the activities deployed by the International Committee of the Red Cross in Kosovo and Serbia. Several articles discuss questions of a more legal nature. They examine the yardsticks which those who prepared and implemented military operations had to respect, and give particular attention to violations of international humanitarian law which occurred in the course of the active hostilities. Issues relating to the varying interpretations of the rules on targeting are the focal point of their concern. A short commentary on information warfare opens up new and alarming horizons, and an account of the International Criminal Tribunal for the former Yugoslavia considers the possibilities of this court to investigate and punish crimes committed during the Kosovo conflict.

In conformity with its mandate, the Review publishes only articles and documentary material on legal issues pertaining to the implementation of international humanitarian law or on problems related to humanitarian action for victims of armed conflict. Any debate on the causes of a given conflict or on the legitimacy of a military intervention is beyond its remit. However, the international response to the crisis in Kosovo raised fundamental questions as to methods of implementing international humanitarian law, in particular the 1949 Geneva Conventions and their Additional Protocol I of 8 June 1977. In this connection, the article by Professors Condorelli and Boisson de Chazournes reviews important past and newly evolving interpretations of the famous injunction of Article 1 common to the Geneva Conventions, namely that States party to humanitarian treaties have an obligation "to ensure respect" for humanitarian commitments in armed conflict. Professor Momtaz goes a step further and examines the legal basis for NATO's intervention in the Balkans. In publishing his well-researched and sober analysis of arguments advanced by both sides, the Review does not take any stand with regard to his conclusions.

Juste before going to press, the Review's editorial team learnt that Konstantin Obradović, professor at the Institute of International

¹ Pierre Boissier, *History of the International Committee of the Red Cross: From*

Solferino to Tsushima, Henry Dunant Institute, Geneva, 1963/1985, p. 298.

Politics and Economics in Belgrade, has passed away. A well-known expert in international humanitarian law, Kosta Obradović enthusiastically accepted to contribute to this edition. Unfortunately, he was unable to do so. He will be sorely missed.

THE REVIEW

Conflict in the Balkans: Human tragedies and the challenge to independent humanitarian action

by

PIERRE KRÄHENBÜHL

The sight of endless columns of distraught men, women and children, on tractors or on foot, carrying the fewest of possessions with them, had an air of chilling familiarity in the Balkans of the 1990s. Images of Vukovar, of Srebrenica and of the Krajina came to mind. This time the place was Kosovo, where the break-up of the former Yugoslavia is commonly considered to have begun and where inter-communal violence had inexorably returned. Tens of thousands of persons were fleeing for their lives, fearing the worst for relatives left behind and facing the prospect of being uprooted for a prolonged period of time. Behind their apparent anonymity lay countless individual destinies, family and community legacies, that were being irreparably shattered. Once again, the most brutal forms of violence were being turned against civilians and new historical and emotional fault-lines carved into the region's collective memory.

PIERRE KRÄHENBÜHL is an ICRC delegate. During the Kosovo crisis he was head of the Task Force Balkans at ICRC headquarters. He holds a degree in political science and international relations.

The international community, repeatedly criticized for its lack of decisive action in the conflicts in Croatia and Bosnia-Herzegovina, had hard choices to face. The negotiations at Dayton, while bringing an end to the Bosnian war, had failed to address the Kosovo question in any specific manner.¹ The emergence of the Kosovo Liberation Army (KLA) in the years that followed, its growing capacity to hit at the Serbian security forces and the latter's increasingly indiscriminate operations had put the future of Kosovo back at the top of the international agenda. In the early autumn of 1998, the Yugoslav leadership, facing the threat of air strikes by the North Atlantic Treaty Organization (NATO), had accepted the deployment of some 2,000 members of the Kosovo Verification Mission (KVM) under the authority of the Organization for Security and Co-operation in Europe (OSCE). By Christmas of that year, however, the truce appeared to be unravelling and the search for a solution shifted to Dayton-like talks convened at Rambouillet in France.

The reasons for their failure remain a subject of controversy. As a result, however, the Balkans were propelled into a chapter quite distinct and unprecedented in nature and in scope. On 23 March 1999, the NATO Secretary-General authorized air strikes against the Federal Republic of Yugoslavia with the declared aim of putting an end to ethnic violence in Kosovo. It was the Western alliance's first active military engagement in its fifty-year history. Almost within hours, a campaign in Kosovo that showed every sign of a policy to expel the population of Albanian origin from the province was launched by the Yugoslav armed and security forces. This combination of conflicts — one internal, the other international — was to have far-reaching consequences, first and foremost in human terms. But it was also to assume great significance in the political, military and humanitarian fields.

The present paper looks at some of the main challenges, both operational and conceptual, that the 1999 Kosovo conflict has

¹ For an account of the Dayton peace talks and the references to Kosovo therein see,

inter alia, Richard Holbrooke, *To End a War*, Random House, New York, 1998.

raised from the perspective of the International Committee of the Red Cross (ICRC). It will place particular emphasis on the dilemmas faced in dealing with the consequences of ethnic violence and on the interaction with military alliances such as NATO in this environment, as well as pointing out some of the implications that this conflict has had for humanitarian action in general and independent humanitarian responses in particular. While focusing clearly on the events in 1999, the paper will nevertheless draw on earlier experiences in the Balkans in order to place recent developments in their regional and historical context.

The ethnic cleansing process and the moral dilemmas

The ICRC began its activities in the Balkans ten years ago as a result of growing disturbances in Kosovo. In 1990, its delegates started visits to detainees, many of whom were of Albanian origin, in prisons throughout the then Socialist Federal Republic of Yugoslavia. Thereafter came the wars in Croatia and Bosnia-Herzegovina with their distressing toll of people killed, detained or forcibly displaced. More and more the ICRC delegates were faced with the traumatic consequences of the process known as “ethnic cleansing”. Particularly unsettling was the realization that the instruments of international humanitarian law provided no overall response to this brutal form of warfare. Indeed, the very notion that civilians or persons no longer taking part in combat should be spared and allowed to remain in their homes is one that the logic of ethnic separation turns upside down. Distinctions between civilians and combatants disappear and every means becomes authorized in the attempt to uproot the “other” and to erase in the process any trace of his or her personal, communal, religious or social past.

This development has placed countless staff members of the ICRC, expatriate and local, in an acute dilemma. On the one hand, they could decide to evacuate civilians facing direct threats to their lives to other parts of a country or abroad — and run the risk of being blamed of contributing thereby to the very process of ethnic cleansing. They could on the other hand turn away in despair — and face the

prospect of being accused of indifference towards people in grave danger. In most cases their response to this dilemma has been to do whatever was in their power to save lives.

In its activities to protect civilians, the ICRC has been successful on numerous occasions. Over the last ten years it has visited some 48,000 detainees in Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia. It has helped to restore contact between persons separated by conflict by forwarding over 18 million Red Cross messages and, in the case of the Kosovo crisis in 1999, by using the latest technological facilities such as satellite phones and the Web. There have been thousands of families reunited and prisoners released under the auspices of the ICRC. At the same time, there have been tragic failures to protect civilians in many other places. While Srebrenica does not stand *alone*, it certainly stands *apart* in terms of the international community's collective inability to ensure protection for thousands of men, women and children who were brutally murdered or forcibly displaced. The ICRC shares part of that responsibility.

In Kosovo, many of the parameters and patterns of violence were similar. When tension in the province increased in March 1998, the ICRC rapidly stepped up its operational capacity to meet growing needs in terms of assistance and protection. Over the next three months the number of staff rose from two to thirty expatriates and from half a dozen local colleagues to over a hundred. Since the effectiveness of this fast expanding operation hinged on proximity to those people most urgently requiring Red Cross help, a high degree of mobility in the field was of paramount importance, together with an ability to operate both in territory under the control of the Serbian forces and in areas believed to be KLA-held.

This was possible to a large extent throughout the most severe phase of the conflict, between late June and late September 1998. The KLA was mounting ever more daring operations, including the temporary seizure of towns such as Oraovac/Rahovec in early July. The Serb forces for their part were retaliating with operations that were driving more and more civilians out of their homes and villages. Some 20,000 sought refuge in neighbouring Albania and over 120,000 were believed to have been displaced inside Kosovo or to the

Republic of Montenegro. The ICRC field teams were providing much needed relief to several tens of thousands of displaced persons, in particular to those hiding in remote forests on the mountain sides. Mobile medical teams composed of Kosovo Albanian doctors and ICRC nurses travelled across the lines to give medical treatment to the wounded unable to reach the province's hospitals. The ICRC also expanded its protection work, visiting a growing number of prisoners held under the authority of the Serbian Ministry of Justice. By early 1999, close to 900 such persons were being visited on a regular basis. In parallel, Kosovo Serbs and Kosovo Albanians were being registered as unaccounted for. The Serb community in Kosovo had reported some 140 persons as abducted, allegedly by the KLA in the summer of 1998.

The increasingly violent events, which included selective killings of civilians, raised real concern about a return to the most drastic forms of ethnic warfare. Aware of the dilemmas faced in Croatia and Bosnia, as well as of the potentially devastating consequences for countless human beings in such a precarious environment, the ICRC considered the possibility of going public in order to give the parties directly concerned an incontrovertible reminder of their responsibilities. The ICRC is commonly perceived as not outspoken enough in the face of extreme acts of violence witnessed by its delegates in a variety of contexts. In general it does indeed opt first and foremost for access to people and places affected by humanitarian problems, rather than for more public forms of intervention. It is also keenly aware that *speaking out* about violations certainly does not automatically imply better *protecting* those exposed to the violence. No conflicts in recent history have received such intense media coverage and international public and political scrutiny as those in the Balkans. Despite this, the logic of ethnic separation was all too often carried through to its bitter conclusion. On the other hand, there was the belief that after so many atrocities, an organization such as the ICRC had a moral obligation to alert public attention to an escalating tragedy.²

² A position paper was prepared and released on 15 September 1998. See "ICRC

position paper on the crisis in Kosovo", *IRRC*, No. 325, December 1998, p. 725.

In the period between the deployment of the KVM personnel (from October 1998) and the beginning of the peace talks in Rambouillet (February 1999), the ICRC operation continued to focus on assisting countless persons unable or fearing to return to their homes. Particular emphasis was placed on the issue of visiting prisoners and accounting for missing persons. In effect, as negotiators prepared to assemble at the French *château*, the ICRC was busy submitting proposals on these matters for inclusion in a possible agreement. Preparations were being made in the field and at headquarters to deal with the priorities of a Dayton-like post-conflict environment in Kosovo. But matters were to turn out very differently.

An international armed conflict begins

As the second round of Paris-based talks broke down, there were growing signs of the imminence of military action by the NATO alliance against Yugoslavia, the most tangible one being the withdrawal of the KVM monitors who had played a significant role in stabilizing events over the previous six months. As the decision of the Secretary-General of NATO to authorize air-strikes drew nearer, the ICRC was having to define its priorities and *modus operandi* for what would be an unprecedented situation. First, it prepared to notify the different parties, the 19 NATO member States and the Federal Republic of Yugoslavia of the full applicability of the four Geneva Conventions and of their obligations thereunder. Secondly, it confirmed the vital necessity to operate in close proximity to those most affected. In other words, the ICRC decided to keep international and local staff operational throughout Yugoslavia, including Kosovo. In the latter region, a team of 19 expatriates were kept on standby in anticipation of the many needs to come. It was never thought that their task — or for that matter the task of their colleagues who remained in Belgrade and Podgorica — would be easy. Anti-Western feelings generated in the Serb entity of Bosnia-Herzegovina during NATO strikes in September 1995 had given an indication of possible reactions, although the intensity of the attacks in the case of Yugoslavia was incomparably higher. It nevertheless came as a serious disappointment and setback when a combination of factors, including an increasing

presence of uncontrolled elements in the streets of Pristina and objective security constraints on the mobility of the staff based there, forced the ICRC to withdraw its team from Kosovo on 29 March 1999.

As events unfolded with unthinkable speed and Kosovo Albanian refugees began crossing into Albania and the Former Yugoslav Republic of Macedonia (FYR Macedonia), it became apparent that the broader humanitarian community would be dealing with a crisis of daunting proportions. This led the ICRC and the International Federation of Red Cross and Red Crescent Societies to adopt an integrated and regional approach so as to better mobilize resources — both human and material — from within the International Red Cross and Red Crescent Movement and allocate them in the most efficient way possible. Thanks in part to this approach, the Red Cross was able to respond to needs both *inside* and *outside* Yugoslavia. Indeed, the capacity both to provide relief and medical support to refugees fleeing Kosovo and help tens of thousands arriving in Albania, FYR Macedonia and Montenegro to establish communication lines with their relatives, *and* to assist people affected by the NATO bombing raids in Yugoslavia or to visit NATO prisoners of war held in Belgrade, was a unique feature of the Red Cross operation. It was its distinct added value.

Kosovo remained the painful exception after the 29 March withdrawal. Throughout the following weeks, the ICRC's priority was to negotiate its return to Pristina; a top-level commitment to this effect was given by the Yugoslav leadership during a visit by the ICRC President to Belgrade on 25-26 April. The actual resumption of operations in the province began on 24 May, three weeks before the end of the conflict and the deployment of the international security force KFOR.³

³ For more insight into specific aspects of the activities carried out by the ICRC, by the International Federation and by the

many National Red Cross or Red Crescent Societies involved, see the ICRC's website: www.icrc.org.

Interaction with military forces and crisis management

Beyond the operational challenges and decision-making, the Kosovo conflict was unprecedented in several respects as regards handling it. One salient feature of the recent Balkan wars in general has been the staggering degree of attention they have attracted, both politically and through the media coverage of their diverse phases. This gave rise to a constant and at times very strong pressure on all players to demonstrate their ability to take action.

The results in the field of crisis management were of varying nature. Crisis management may be defined as the combination of political and possibly military action on the one hand, to deal with the *causes* of a conflict, and of humanitarian action to address the *consequences* of situations of violence on the other. In the Bosnia-Herzegovina conflict, the dividing lines between these forms of intervention had become blurred. In many ways the deployment of the United Nations Protection Force (UNPROFOR), despite many of its real achievements, had come to exemplify the reluctance of the international community to seize the political high ground. UNPROFOR was given an impossible *quasi*-humanitarian role, which generated confusion between military and non-military forms of humanitarianism. Matters were finally clarified somewhat during the run-up to and the negotiating of the Dayton peace agreement. From the treaty's provisions, agreed to by the respective former warring parties, emerged clear mandates for the NATO-led Implementation — and later Stabilization — Force (IFOR and SFOR). The ICRC interacted with it in a variety of fields, namely the process for the release and transfer of prisoners at the end of hostilities, the issue of missing persons, the threat posed by anti-personnel landmines, etc. There is no doubt that from this interaction a more predictable dialogue and a better understanding emerged.

As the Kosovo crisis flared again in early 1999, the international political community and the Western military alliance seemed intent on acting more decisively and rapidly to curb the excesses of ethnic violence. Furthermore, as tens and then hundreds of thousands of refugees began flooding into Albania and FYR Macedonia within

days of NATO launching its air campaign, its member States declared their intention to reverse the impact of ethnic cleansing and ensure a swift return home for the Kosovo Albanians.

In the meantime, though, there was the priority of providing assistance to the fleeing refugees. The solidarity shown by the population in Albania and FYR Macedonia was in many ways exemplary. The scale of the displacements was nonetheless stretching the capacity of the respective governments beyond limits. This most visible effect of the Kosovo conflict — the mass population movements — had not been anticipated in such numbers by any of the players involved, be they political, military or humanitarian. Responding to those huge displacements was to prove one of the most critical issues in the early phase of the crisis and brought with it a further novel trend. The militarization of humanitarian assistance in the case of Yugoslavia went further than anything experienced in the case of UNPROFOR in Bosnia. NATO contingents deploying in Albania and stationed in FYR Macedonia were establishing camps for refugees, handing them over subsequently to non-governmental organizations, and at times continuing to ensure security around the perimeter. Military personnel became involved in attempts to reunite families and in several other forms of relief provision. NATO also made some of its vast logistic resources available to humanitarian agencies to transport their own material into the region more quickly.

This development has prompted much debate. On the one hand there are claims that without the mobilization many of those in need would have faced extreme hardship or worse, and on the other there are the voices that express concern about the lack of distinction between humanitarian and political forms of intervention. The ICRC belongs to the second category, and on several occasions its President made known the organization's position on principle that the two issues must remain separate at all times. For those of us dealing with the operational coordination of field activities, NATO's humanitarian *Allied Harbor* or *Shining Hope* operations had some of the following implications.

First of all, it should be stressed that from the very outset of the international armed conflict, NATO headquarters agreed to

establish direct and separate communication lines for the ICRC. This positive development was seen as an acknowledgement of the predictable interaction in Bosnia-Herzegovina. In concrete terms, it gave the ICRC a channel to review security concerns, to intervene with NATO on the conduct of hostilities and the humanitarian consequences of its bombardments and to discuss openly some of the more contentious questions faced in the course of the war.

There was, however, a very significant difference between the type of relations existing with IFOR/SFOR and those with the NATO units involved in Operation *Allied Force*, owing to the dissimilar nature of the operations carried out. In Bosnia-Herzegovina, the NATO deployment was the result of a negotiated settlement, signed by former warring parties in Dayton and Paris and confirmed by means of a United Nations Security Council resolution. Whether the respective authorities in Bosnia-Herzegovina were at ease or not with all of the agreement's provisions, they had committed themselves to their implementation. The ICRC had been given its own tasks under Dayton⁴ and these provided for a significant latitude for interaction with NATO contingents that were part of the peace-building operation.

In the Kosovo conflict, the circumstances were very different from an ICRC perspective. It was easy to understand why many Western governments, involved in the military campaign against Yugoslavia and aware of the impact that the harrowing scenes from Kosovo were having on public opinion, felt compelled to mobilize some of their resources to ease the dire plight of tens of thousands of refugees. But NATO units were no longer in a peace-implementation mode; they had become parties to a conflict, something that was bound to have an impact on the type of interaction that could be envisaged by the ICRC. The decision to be operational *inside* and *outside* Yugoslavia meant that the ICRC would have to rely on its own, separate logistics set-up. Seen from Belgrade, the distinction between

⁴ The provisions in the Dayton peace agreement referring to the ICRC were pub-

lished in *IRRC*, No. 311, March-April 1996, pp. 243-245.

NATO's military operation and the humanitarian activities it was carrying out in northern Albania was not self-evident. Since the ICRC has been given a responsibility by the community of States to respond to all needs resulting from a conflict and to engage in humanitarian diplomacy on all sides, it had to be perceived as separate from the different forms of State-driven humanitarian intervention.

At times, this position is viewed as making too many concessions to the party held responsible for countless violations of international humanitarian law in Kosovo. This is because all too often, humanitarian action is reduced in people's minds to the mere — albeit important — act of delivering assistance. Here the ICRC is fundamentally different, for in addition to relief distributions its delegates in the field carry out a broad range of what are known as protection activities. They seek to obtain access to prisoners of war; when violations occur they contact the authorities with the aim of changing patterns of behaviour by security and other forces; they seek to reunite dispersed families and search for missing persons. The fact that no framework was maintained in which the ICRC could carry out these activities in Kosovo was a very negative development. On the other hand, the ICRC President was the first in April 1999 to confront the highest Yugoslav leadership directly with findings — including first-hand accounts — concerning the behaviour of the armed and security forces in Kosovo at the very time when such violations were being committed.

There was no protection for civilians inside Kosovo during that dramatic period from March to June last year. Neither on the ground, nor from the air. To go back to Kosovo in order to make an — albeit modest — contribution to improving that situation was a top priority for the ICRC. This meant negotiating a return, and negotiating it in Belgrade. The ICRC was occasionally asked whether it was not naive to believe that it would be allowed back, considering the disastrous circumstances on the ground. In the heat of the moment, this was felt to be an entirely theoretical question. Thousands of men, women and children were in the open, without shelter, and their lives were in extreme danger. Each and every ICRC delegate felt impelled to make a determined bid to reach them. There is a strong conviction

that the ultimately successful outcome of the approaches and negotiations in Belgrade — and the possibility to return to Pristina as the war was still raging — was due in no insignificant part to the independence of the ICRC's operation.

Challenges for independent humanitarian action

There are many other reasons why nothing will ever quite be the same in the field of humanitarian action after the 1999 Kosovo conflict. The way in which the conflict developed, the scale of the crisis and the fact that its every facet was under political or public scrutiny has generated a broad and critical *lessons-learned* debate. There are several aspects that deserve an attentive and open review.

For a start, within days of the conflict erupting in late March a great deal of criticism was levelled at international humanitarian agencies for their apparent lack of preparedness and for their slow response to the mounting refugee crisis in Albania and FYR Macedonia. Several commentators have pointed out that but for NATO's extensive mobilization of resources, the situation would have been very critical indeed. Other observers have raised the question whether this crisis did not in effect signal the end of independent forms of humanitarian action.

From an ICRC point of view, there is no difficulty in acknowledging that it and most other humanitarian organizations were overwhelmed by the speed and scale of events. It did take several days for the ICRC to establish an operational capacity in Albania, where field staff grew from two to over 70 expatriates and local staff from half a dozen to over 200, and in FYR Macedonia, where the proportionate increase was only slightly lower. The feeling is that it was not so much preparedness that was lacking, for the ICRC had a strong set-up throughout Yugoslavia with a proven operational capacity, but rather that the planning process centred on the wrong scenario. In hindsight, it is clear that expectations of a successful outcome at Rambouillet had been exaggerated. It is probably fair to say that in this regard the ICRC was not alone. In addition, even if the prospect of a spiralling conflict in the aftermath of Rambouillet had been taken into better account, it would have been impossible to put contingency

stocks in place for, say, half a million refugees without raising alarm, or eyebrows, in many circles.

Speed is also a very relative notion. In relation to the Balkans, an environment considered by the West as close and strategic, the pressure to be present and perceived as operational in the shortest possible amount of time is overwhelming. There are many other contexts in which for a variety of reasons, some political, others logistic, humanitarian responses are slow in developing. Arising in what are in contrast viewed as more remote corners of the globe, such situations attract less attention and result in less pressure for speed.

Of greater significance is the question of the appropriateness, effectiveness and efficiency of the various responses to the crisis. The integrated and regional approach adopted by the International Red Cross and Red Crescent Movement is currently being evaluated by a team of independent experts. The Office of the United Nations High Commissioner for Refugees (UNHCR) has conducted an independent review of its own operation. This increased reliance on detailed assessments of the management and impact of humanitarian operations should contribute to greater transparency and is a trend that ought to be explored further. To the best of my knowledge the relief activities carried out by NATO have not to date been independently reviewed. That also would be an important contribution to the overall debate.

The Kosovo conflict has set a further milestone in the ongoing argument between the advocates of a "right to intervene" and those who uphold the principles of independent humanitarian action. The former see such a right as a new form of solidarity shown by some peoples towards others being oppressed by their State or authorities. This solidarity can result in political and/or humanitarian action in which moral principles outweigh classic notions of State sovereignty. The Kosovo conflict, with the subsequent deployment of an international security force and the establishment as provided for in United Nations Security Council Resolution 1244 (10 June 1999) of an international civil administration in the province, is currently viewed as the most recent and clear-cut example of this new trend.

It is considered particularly significant that this line of thinking, translated into action, has allowed the almost complete

return of the hundreds of thousands of refugees, something that the international community had largely failed to achieve in the case of Croatia and Bosnia-Herzegovina. This massive and speedy return of so many dispossessed and traumatized people was both unexpected and positive. Unfortunately, even this form of political intervention has not yet found an answer to the true malediction of Balkan conflicts, which has caused so much irreparable pain and lasting hatred: the policy of ethnic cleansing. Indeed, the victory of the Western alliance has enabled the Kosovo Albanians to return home but it has not, despite the deployment of 40,000 KFOR military personnel and between 10,000 and 12,000 civilians within the framework of the United Nations Mission in Kosovo (UNMIK), found the key to restoring inter-ethnic dialogue and cohabitation. A very large number of Kosovo Serbs and members of the Roma and other communities have in turn faced eviction and murder or have disappeared without trace.

These observations should on no account be seen as a superficial criticism. The complexity of responding to the types of atrocities witnessed in the Balkans in the last decade cannot be underestimated. Nor can the major attempt currently being made in Bosnia-Herzegovina and Kosovo by the international community to bring greater stability to the region. The intention is merely to underscore the fact that the many different forms of crisis management adopted in the region in the last ten years have failed to curb the very logic of ethnic separation. The "right to intervene" has, in my opinion, changed little in that regard.

Interestingly, one outcome has been the confirmed need for independent and neutral humanitarian responses. To give but one example, it is worth analysing the situation of detainees held in Serbia as a result of the internal conflict. Unlike the Dayton peace agreement and the Rambouillet document, no provisions on the release of prisoners or the search for missing persons were incorporated in the Military Technical Agreement (MTA), signed by NATO and the Yugoslav Army on 9 June 1999 or in Security Council Resolution 1244. This has left Kosovo Albanian detainees transferred out of Kosovo at the end of hostilities in a kind of political and legal vacuum ever since. The ICRC negotiated with the Serbian Ministry of Justice

in July 1999 to obtain access to them. Consent was given, and the ICRC has visited some 2,000 detainees and restored contact between them and their relatives in Kosovo; about 1,000 of them had been reported as missing by their next of kin. In the meantime, over 350 of the total number of detainees have been released and transferred under ICRC auspices back to Kosovo. Similarly, in the search for missing persons,⁵ the fact that the ICRC is in formal contact with the authorities in both Pristina and Belgrade was considered to be a major asset by UNMIK, which recognized the lead role of the Red Cross in both the prisoner and missing persons issues.

Ultimately, the prisoners' situation can be resolved only at the political level. This is a clear indication that the humanitarian dimension does have its own limits. It does, however, have a lot to offer in relying on its own distinct attributes.

Another characteristic of the ICRC's operational philosophy is also relevant to the discussion about coherent and effective humanitarian action, namely the principle of *universality* that governs the work of the Red Cross. Political and military action may be selective, whereas the ICRC's mandate requires it to try to be present and carry out its activities on all fronts. It goes without saying that there are countries in which the ICRC has tried in vain for several years now to become operational, faced by the reluctance of the authorities or problems of perception. Its delegates are nonetheless working today in well over 40 parts of the world, where conflicts are often taking place far from Western or other television cameras. They include such complex environments as Colombia, Afghanistan, Sierra Leone and Algeria. These are places that have not witnessed — and are not likely to witness — such massive military interventions as was the case in Kosovo. Yet the people affected will be just as much in need of support and protection.

⁵ At the time of writing, the number of persons registered by the ICRC as unaccounted for is 2,900, consisting of 2,400

Kosovo Albanians, 400 Serbs and a number of Roma, Montenegrins, etc.

Kosovo did absorb a disproportionate amount of resources in comparison with so many other situations in which the suffering was equally if not more acute. For the ICRC, as for many other organizations, there was the challenge of maintaining a balance in terms of mobilization. Significantly enough, none of the staff who had to be mobilized for the Balkans conflict were withdrawn from any of the ICRC's African, Asian or Latin American operations. It can consequently be said that while a considerable amount of attention will sometimes be devoted to one particular event or place, many other tragedies will continue to require a humane response.

A legitimate humanitarian gesture?

Thus the challenge to independent forms of humanitarian action during the Kosovo crisis was real, and the ultimate consequences are difficult to anticipate in their entirety. Each and every individual involved should attach prime importance to their ability to question their own performance and the capacity of their team and organization to achieve the objective of protecting and assisting those most in need. None of the players on the ground had an overall view, all had their weaknesses and failures. This includes the ICRC.

To my mind, there is a more substantive issue at the heart of this ability to question: what is it that leads us to believe that humanitarian action is legitimate by definition? It may seem bizarre to challenge the principle, recognized as sound across so many cultural divides, that helping someone else in need is noble beyond the shred of a doubt. The right to be assisted and protected in war is the very essence of the provisions of the Geneva Conventions, and they have been ratified almost universally, so why re-open that discussion?

There is obviously no intention here to suggest that the moral and philosophical foundations upon which humanitarian action is based should be called into question. On the contrary, it is the *way* in which humanitarian work is carried out in so many places that deserves critical reviewing. The legitimacy of the humanitarian *gesture* is intimately connected with the ability to consider the "other", the person in need, as a human being, something which the repeated use of the expression "victim" tends to make more difficult. It strips of all

human dignity the man, woman or child whom it is supposed to define. Of even greater concern is the apparently widespread inability to recognize that in order to be truly legitimate, the humanitarian *gesture* must be seen and felt as a potentially two-way process. In other words, a sincere attempt to place oneself in the other person's shoes, trying to understand how profoundly unsettling or humiliating an act of assistance may be under certain circumstances and to accept how painful it can be to have to rely on an outsider, is crucial. In essence, it means believing that some day one may oneself require assistance or protection in one form or another and imagining how one would then wish to be treated.

Today, humanitarian action on a worldwide scale remains the preserve of a limited number of mainly Western aid agencies. This has fostered a perception that the West is almost naturally at the giving end, that humanitarian action takes place from north to south and that it is a one-way street. There, rather than in some of the more visible implications of the Kosovo crisis, lies the real danger to the future of humanitarian action in general and independent humanitarian action in particular. It is a risk that the militarization of humanitarian responses will certainly not help to avert. Nor will an increased reliance on a presumed "right to intervene". All too rarely is any serious thought given to the fact that the situation may one day be reversed by others deciding to act on this "right" themselves.

Admittedly, the ICRC has nothing to be complacent about. It, too, is perceived in a number of contexts as an affluent Western, Christian organization, working from a Geneva-based headquarters that has given it an identity alien to so many cultural environments around the globe. Like others, the ICRC must accept a burden of proof to the contrary. However, it may have a unique opportunity of addressing this long-term challenge. First of all, by becoming a truly nomadic institution, less attached to its place of origin, not necessarily at home in any one place but very much so wherever it operates. Secondly, by engaging itself more genuinely in the International Red Cross and Red Crescent Movement. This extraordinary worldwide network of National Societies in 177 countries has the unparalleled potential of making the humanitarian gesture into a process that gives

the communities concerned a sense of sharing in it, of belonging as partners. There is no need to idealize these National Societies, which have weaknesses and contradictions of their own, but in the Balkans, as in so many other conflict areas, things would be very different for the ICRC were it not for the National Red Cross Societies of the countries directly concerned.

It is often asked how the ICRC could preserve its identity in such a process. Contrary to some expectations, the partnerships with the many National Societies from third countries, as well as those of Albania, FYR Macedonia and Yugoslavia, were in fact a vital aspect of the ICRC's identity in the Balkans. They contributed to an image of the Red Cross *in action* and significantly broadened the overall response. Effective management of that partnership process brings genuine added value to the ICRC's operations.

Of the many lessons of the Kosovo crisis, that most European of wars, finding the key to enhancing the legitimacy of humanitarian work in conflicts around the world may well be the one with the most far-reaching consequences. Rediscovering that "what is good for the other is good for me" could do a great deal for the renewal of independent humanitarian action.



Résumé

Conflit dans les Balkans : tragédies humaines et défis pour l'action humanitaire indépendante

par PIERRE KRÄHENBÜHL

Cet, article, dû à la plume d'un des responsables de l'action humanitaire du CICR dans les Balkans, décrit quelques-unes des principales problématiques vécues dans le cadre du conflit du Kosovo en 1999. Il revient également sur les limites des différentes interventions, politiques, militaires et humanitaires, sur la décennie écoulée, qui n'ont pas réussi à épargner aux peuples des Balkans les horreurs et la souffrance qu'on connaît. Le CICR, quant à lui, a été confronté à des dilemmes majeurs dans son action sur le terrain et l'article retrace une partie de cette expérience. Un des éléments clés était bel et bien le défi de confirmer l'identité de l'action indépendante du CICR dans un environnement humanitaire en transformation. Face à ces dilemmes, l'auteur conclut son analyse par une réflexion sur la notion de légitimité du geste à but humanitaire.

After the Kosovo conflict, a genuine humanitarian space: A utopian concept or an essential requirement?

by
BÉATRICE MÉGEVAND ROGGO

Quand on sait faire les choses, ça finit par se savoir
Paul Cézanne, painter

Many words have been put to paper and much has been said on radio and TV about the most recent Balkan crisis — the Kosovo conflict of spring 1999. Analyses, lessons learned, evaluations, conferences and seminars of all kinds have taken place in several Western countries, gathering a select number of representatives of humanitarian agencies, governments and the military — both national armies and NATO. Those representatives have ended up becoming a sort of members of a “club”, meeting over and over again to repeat largely the same things on the same subjects.

BÉATRICE MÉGEVAND ROGGO is a delegate of the International Committee of the Red Cross. She has carried out missions in many parts of the world, including the Balkans, and is currently working in Geneva as a coordinator of the ICRC's activities for Western Europe and North America.

Having participated in some of those gatherings, I have come to the conclusion that a number of ideas expressed there merit further comment. There also are a few concepts that likewise deserve to be drawn to attention. Not in order to “convert” others to the way the International Committee of the Red Cross thinks, but to plead for the concept of an independent and genuine “humanitarian space” which can best serve the interest of all those — men, women and children — who become victims of a conflict. We have been fighting to preserve that humanitarian space not only in the Balkans, but also in Angola, Afghanistan, Iraq, Sierra Leone, Burundi, Ethiopia and Eritrea, Chechnya, Colombia, East Timor and countless other places. I believe that the concept has been increasingly blurred and disputed in the recent debates, and that its universality, which must be preserved in all conflicts and in any country, has been threatened by the recent Balkan crisis.

One of the purposes of this paper, though it originated from observations made in the aftermath of the Kosovo conflict, is precisely to remind the reader that — while the whole Western world held its breath at the sight of state-of-the-art military technology being deployed in the Balkans and the primal suffering of hundreds of thousands of civilians — dozens of other conflicts dragged on and millions of other innocent men, women and children continued to be killed, wounded, maimed or forcibly displaced on virtually all continents. And humanitarian agencies kept struggling to alleviate that suffering as well.

In this paper the following issues will also be questioned: the reduction of humanitarian action to essentially providing relief aid through appropriate logistics, thus forgetting the basic protection of the individual foreseen in international humanitarian law; the tendency to “level down” the humanitarian concept and humanitarian action to accommodate all components (multilateral and bilateral aid, military and civilian operations); the worrisome trend towards substituting political for humanitarian action; the even more worrying tendency to label almost anything as “humanitarian”, thus creating dangerous confusion among the general public, but above all among the victims of a conflict.

On the other hand, I shall not go into the legitimacy of “humanitarian wars” or “humanitarian interventions” — in other words the *jus ad bellum* that differs substantially from the *jus in bello*, or international humanitarian law, with which the ICRC is concerned. Nor shall I embark on the difficult task of defining what a “humanitarian intervention” is or is not. Many articles and books have already been written on the subject, and I would not be in a position to add anything substantial to this debate.

Beyond Kosovo, millions of people in distress

In 1999 the disturbing evidence that whatever happens in Europe from the humanitarian point of view is seen through a magnifying glass, compared with other tragedies far away from our borders, was striking indeed. It was not new, of course, nor was it really surprising: we all tend to be more sensitive to the suffering of people who are close to us, geographically as well as culturally and physically. There is an “identification factor” in the conflicts in Europe which makes the sight of suffering less bearable than when innocent people agonize under distant skies. It had already surfaced during the Bosnian war and it was confirmed in Kosovo.

At a less visceral level, however, the concern for the suffering inflicted upon human beings ought to be the same. This is possibly the main thing that sets humanitarian organizations — at least most of them — apart from politicians and military alike. They are not concerned with strategic, economic and political considerations; all they care about is helping the men, women and children affected by war, wherever it takes place. It can sound commonplace, but it is not, really: “The entire body of international humanitarian law is based on the idea that it is possible to separate humanitarian concerns from political concerns.”¹ Nowadays, however, strategic and tactical interests tend to prevail over humanitarian considerations. Sheer selfless concern for the plight of hapless men, women and children caught up in a conflict is

¹ Y. Sandoz, “Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la

Croix-Rouge en ex-Yougoslavie”, *Revue suisse de droit international et de droit européen*, 1993, p. 461 ff.

not as widespread or as ordinary as one might think when watching the TV in times of international crises, and few are genuinely committed to it. This accounts for the loneliness several humanitarian agencies have experienced and still experience in so many places around the world. Most of today's wars are waged in countries or regions where the so-called international community has little or no strategic, economic or political interests at all. No Western army is particularly keen on intervening purely for humanitarian reasons in those countries, though the figures and the type of violations of human rights and international humanitarian law can easily be compared to, and often exceed, those in the Balkans.

The indifference and forgetfulness shown at political and military decision-making levels towards those conflicts and those people is painful to watch and impossible for humanitarian workers to accept. The many time- and energy-consuming evaluations carried out since the end of the Kosovo conflict in June 1999 have left an unpleasant aftertaste of self-centred contemplation intended to draw lessons that we all know will not be applied to any major humanitarian crisis outside Europe.

Are the military more rapid and more effective than humanitarian agencies?

The strong presence of representatives of the military — both at national and Alliance levels — in those seminars, conferences, etc., and their very affirmative stands in the ensuing discussions, have been the clearest indication that the military henceforth want to be, and possibly already are, indispensable players in the humanitarian response to political crises (provided that they take place within European borders).

This is no place to debate the validity and legitimacy of such an aspiration. Humanitarian emergencies and needs are frequent and huge enough for many different players to help alleviate the suffering of people in distress. The question is, instead, the way the military carry out a humanitarian intervention.

There have been repeated claims over recent months that modern, professional armed forces are faster and more effective in the

delivery of humanitarian assistance than their civilian counterparts. A much-cited example is that of Zaire in 1996. Another is the first weeks of the Kosovo crisis, with the human tragedy in Albania and Macedonia unfolding daily on our TV screens. Still, what about Somalia? What about Sierra Leone? What about Burundi? What about all those conflicts, forgotten or not, where humanitarian workers were and are left to cope alone, where there are no cameras to film uniformed men and women distributing shelter material and food and show them to pleased audiences at home, in order to prove that the military are not “bad guys” and that public money is not only used to fight?

The Somali catastrophe of 1991-92 is a good example of what humanitarian staff can achieve despite the absence of any political and military intervention. Somalia in the early nineties was a turning point for several reasons. It was the first “collapsed State” the humanitarian community had to contend with: the whole country had become a sort of no man’s land, the situation was one of all-out violence inducing countrywide famine and the suffering of hundreds of thousands of civilians was almost unprecedented, even by African standards. A whole town — Baidoa — had been turned in June-July 1992 into an open-air “terminal ward”, where the ICRC and the local Red Crescent alike would tour with trucks at dawn and collect dead bodies of men, women and children like municipal trucks collect garbage bags in our urban environment. Baidoa was a silent place, where the only sound was that of our cars moving around and of gunfire all over. It was a colourless place, where bodies, the rags covering them, streets, houses and camels were all of the same colour: that of the mud and dust carpeting everything.

Working in Somalia was, for the few humanitarian workers present in the country — basically the ICRC, Save the Children Fund and *Médecins sans Frontières* — a highly risky business. Several of them, including three ICRC expatriates, were killed and countless were those who, at one time or another of their stay in Somalia, brushed against death. Stray bullets were as ordinary as the air we breathed and getting through to the next day alive was a sort of Russian roulette. Yet Somalia remains, almost ten years later, possibly

the brightest example of what humanitarian agencies can and do accomplish. Life was hard; work was even harder. Lots of compromises had to be accepted, including armed escorts, in order to achieve the goal of saving lives. But a handful of humanitarian workers managed it, through patience, humility, adaptability. And the trust of donors. In the space of a few weeks more than a million Somalis were saved, through the ICRC network of community kitchens (all run by women who did not care about the clan divisiveness), from a sure death by starvation. Helicopters, freighters, small boats and hundreds of trucks were used to keep the pipeline going all the way to the most remote parts of Somalia. I could easily cite other examples of lonely and effective work in messy and dangerous situations.

I am not writing this out of a sort of nostalgia for “the good old days”, but because I have been struck at a number of seminars, workshops, etc. on Kosovo by the repeated assertion that the military are indispensable in today’s humanitarian crises since they have logistics, know-how and resources which the humanitarian agencies lack.

The question is not whether the humanitarian workers or the military can do the job faster or with more means. The question is: *Who does what, and why?* Let us not be naïve, but face up to the current reality: Western armed forces “can deliver positive political visibility on their home front in a way that NGOs can only dream of. (...) Although the informed tax-payer would surely spurn the relatively high costs of humanitarian interventions by their army in foreign countries, the continued ability of the military to earn credit from politicians is probably still unrivalled, provided, that is, that they do not come home in body bags.”² It would be absurd and inappropriate to claim that the military cannot support humanitarian operations. The involvement of armed forces for such purposes is not new; we can trace examples all the way back to the time of Alexander the Great or, closer to us, during the Napoleonic wars and into the 20th century.

² N. Stockton, “The role of the military in humanitarian emergencies: Reflections”, *Refugee Participation Network*, Issue 23, January-April 1997.

Their engagement in humanitarian operations, however, was never devoid of political and strategic interests: "Sometimes assistance was seen as a humane gesture to the vanquished, but it was invariably mixed with the desire to help secure loyalty from newly subject populations."³ In our day and age, dominated by *realpolitik* and by the ever-growing influence of the media, things do not appear to be that different: "(...) the temptation to use humanitarian assistance as a pawn to achieve political goals (or worse, its use to cover up the shortcomings of the international community when it is unable to prevent or address conflict situations) is often there."⁴

There are two functions that can be unanimously acknowledged as pertaining to the military in what has been called the "humanitarian arena":⁵ ensuring that the environment is safe for humanitarian action to be carried out, and giving logistic support to the work of humanitarian agencies. For very often the question is, how can humanitarian workers be effective when the environment is such that any attempt to help puts their lives in jeopardy? They have to be able to perform their job in the best possible conditions. This requires not only a secure environment — which can indeed be provided by the military, but also financial resources — which must be provided by the donors' governments. If the donors bet on their national armies rather than fund the humanitarian agencies, because the military can be more easily controlled and are interesting in terms of visibility, then those agencies will find themselves in dire straits and will most probably not have the logistics, pipelines and human resources they desperately need. This is, first and foremost, what humanitarian organizations ask governments and military alike to provide them with.

3 J. Nederveen Pieterse, "Humanitarian intervention and beyond", in J. Nederveen Pieterse (ed.), *World Orders in the Making*, MacMillan Press, 1998, p. 31.

4 A. Donini, "Beyond neutrality: On the compatibility of military intervention and

humanitarian assistance", in *The Fletcher Forum of World Affairs*, No. 2, 1995, p. 40.

5 T. G. Weiss, "Humanitarian action in war zones", in J. Nederveen Pieterse (ed.), *op. cit.* (note 3), p. 31.

The humanitarian gesture should not be brought down to the mere provision of relief supplies

The debate that has taken place since the end of the Kosovo conflict has essentially focused on the setbacks (on the humanitarian agencies' side) or the success (on the military side) of relief operations in Albania, Macedonia, Montenegro and Kosovo itself. All efforts and results have been evaluated according to a quantitative approach, and good or bad marks have been assigned accordingly.

Few people, however, have spoken up for what appears to be the very essence of any humanitarian intervention: the protection of the individual. I do not mean protection in terms of security only, but also, as provided for by the Geneva Conventions, in terms of respect for a human being's physical and moral integrity.

One of the pillars of international humanitarian law — and thereby of the ICRC's work — is that those two aspects are inseparable. Any kind of relief operation is seen by the ICRC as an integral part of the broader protection concept. Relief can be a means of protecting civilians in a war, but it is of course not the only one. And sometimes it is not even the most relevant one.

In order to provide the protection laid down by international humanitarian law, the ICRC must be in a position to work on all sides and to remain on speaking terms with all parties to a conflict. How could it otherwise envisage protecting persons detained by one side or the other, or assist the wounded and the homeless, if it were not able to "cross the lines"? This is one of the main reasons why the ICRC kept expatriate staff stationed in Belgrade throughout the whole conflict. Such a presence enabled its delegates to assist impartially all civilians in need throughout the region — in Albania and Macedonia, of course, but also in Montenegro and Serbia proper, without forgetting Kosovo, where the ICRC was able to return a few weeks before the end of the war. That uninterrupted presence in Belgrade allowed ICRC delegates to visit the three US prisoners of war in Belgrade and to re-establish a link with their families, while other delegates visited the two Serb prisoners of war held by the US Army in Germany. And since the end of the conflict in June, it has enabled regular visits to take place to more than 2,000 Kosovar

detainees held in Serbian prisons, as well as efforts to resolve the missing persons issue that is a tragic and enduring legacy of any conflict, especially in the Balkans.

To accomplish all this, it is essential that at any time during a conflict the impartiality and neutrality of humanitarian operations be respected and preserved. It is no easy task for an ICRC delegate to assist and protect impartially and neutrally all victims of a war. Like any other human being they have their own ideas and feelings which they sometimes find hard to conceal or overcome. But because of their commitment to the principles that govern Red Cross action, they have to do so. It is a hard test of discipline and self-control. Some give up on the way, as they find it too difficult to accept and abide by those principles. Those who carry on, however, will find out after a while that it is also a manner of reducing reality to its simplest expression, in that we deal with only two categories: those who suffer, whom we endeavour to protect and assist; and those who cause suffering, to whom we make confidential representations aimed at obtaining respect for and enforcement of the rules of international humanitarian law. These two categories are not carved into stone, for victims can and often do become aggressors, and vice versa. In the final analysis there are simply human beings, bad or good depending on circumstances. If we ICRC delegates become embroiled in considerations of political opportunity, of partisanship, of dividing the world into good guys and bad guys, we lose sight of the only truth humanitarian workers need to carry out their work: a man or a woman can become a victim at any time, and when that happens he or she is entitled to our protection and assistance.

Such protection and assistance can, however, be given only if a truly humanitarian space is available and respected by all.

What is a humanitarian space?

A humanitarian space is more than a physical area, it is a concept in and through which impartiality and non-partisanship govern the whole of humanitarian action.

Is it an unrealistic dream? I do not think so, of course! But in any case, the whole Red Cross idea is a dream, the dream of a man

who, 141 years ago, thought that a humanitarian space was not only necessary but feasible. In those early days not many shared his belief. Facts, however, have proved that his ideas were reasonable and realistic. Conflicts have changed greatly since Henry Dunant's experience in Solferino. At that time, and until after the First World War, only soldiers were involved in and victims of war: they fought, won or lost, were wounded, killed or taken prisoner. They needed assistance and protection, and the Red Cross was to provide both. Then came the Second World War, with its unprecedented toll of civilian suffering, casualties and devastation. The Red Cross experienced great difficulty in giving the civilian victims either protection or assistance, overwhelmed as it was both by the scale of the tragedy and by its political dimension. The very purpose of the four Geneva Conventions of 1949 was to provide it with new and more adequate legal tools. In the second half of the twentieth century, however, and especially in the last decade, civilians have become the almost exclusive victims of conflicts which are fought because of them, via them and on their behalf. Nowadays civilians account for 90 per cent of war-related casualties.⁶ They have become targets, whereas the military are tending to wage war with means that render them increasingly immune from harm.

The war in and for Kosovo was an excellent example of this. When the international conflict began on 24 March 1999, it was clear from the start that the Western powers were not prepared to accept casualties among their own forces (the so-called "zero casualty" strategy). And indeed there were none. However, those same Western powers caused casualties among the civilians in Serbia — or even in Kosovo, for that matter — by conducting military operations which, by their very nature, would reduce to a minimum the risks run by the military yet leave the civilians exposed.

The war was called "humanitarian". A tragic contradiction in terms, for how can a war — essentially something that causes destruction, losses and unspeakable suffering — be "humanitarian"?

⁶ Stockton, *op. cit.* (note 2), p. 14.

Even if the motives are of a humanitarian nature — defending the basic rights of any human being — war itself cannot be “humanitarian”. This most inappropriate label, widely used in the propaganda communiqué of spring 1999, has been very detrimental to the humanitarian concept itself, and to humanitarian action as such. The “merging” of military and humanitarian operations has been facilitated by this gross contradiction in terms, and the ensuing confusion has grown exponentially. Bombing and wounding or making people homeless was labelled as “humanitarian” as providing relief and assistance to the Kosovar victims of the Serb military operations within Kosovo. The same military that bombed Serbia provided aid in Albania and Macedonia.

In the face of such a glaring inconsistency how could the message be put over, in those circumstances, that “humanitarian” means impartial and neutral — two core principles for all types of humanitarian intervention? And how were the humanitarian workers and organizations to be distinguished from the “humanitarian” soldiers shooting a gun with one hand and carrying a bag of flour in the other? What could possibly be done to ensure that, even though armed forces were inside and around refugee camps, those camps would be considered a “humanitarian space”, thus entitled to protection, and not a military target?

There is a sign borne by all Red Cross vehicles and premises all over the world: it is a gun with a red X superimposed upon it, and it means that no weapons are allowed in. This sign has not been adopted because of a general aversion to arms, but because it was recognized that — for the red cross emblem to be effective — it had to be protective in itself. And the only way to accomplish that was to exclude any other kind of protection and place all individuals within Red Cross premises on an equal footing. This is a humanitarian space in physical terms. But even more important is the concept of a humanitarian space in moral terms, namely a space that is not delimited, that is made up of tolerance and respect for each and every individual once they are wounded or captive, displaced persons or refugees, no matter to which side they belong. In that humanitarian space, both moral and physical, humanitarian organizations are allowed

to intervene according to their principles of neutrality and impartiality, which must be fully recognized and respected by all parties. Then, and only then, the humanitarian gesture becomes not only possible, but effective.

During the Kosovo conflict there was little, if any, humanitarian space left. The extremely politicized international context in which the war was prepared, decided and conducted left almost no room for it. Impartiality and neutrality became terms heard with increasing suspicion, taken instead to mean that the ICRC was “on the other side”, whoever it was talking to. For the reasons explained above, the confusion between military and humanitarian operations was at times almost paroxysmal. The criterion of efficiency at all costs (and what costs ...!) became the essential parameter to which all others were to be subordinated. Little consideration was given to the fact that some humanitarian agencies — despite their initial very real and fully acknowledged difficulties in responding appropriately to the tremendous material needs — had experience and know-how which can, at times, be more valuable than the availability of countless trucks, helicopters and planes. Even less consideration was given to the huge mess that the transformation of humanitarian action into a sort of “humanitarian stock market” would create, or to the extensive and persistent damage it would entail for years to come.

Even more worrying is the failure to consider all this in the aftermath of the Kosovo conflict, at those conferences and seminars I mentioned in the beginning.

“Simplifying” humanitarian action

Paired with the globalization and “commercialization” of humanitarian action is another trend which has also emerged in recent months, namely that of wishing to “make things less complicated” by trying to reduce humanitarian action to a couple of simplified — and simplistic — concepts based, once again, on speed, efficiency and effectiveness.

I have no intention of implying that those are not important criteria, or that humanitarian action should be slow, inefficient and ineffective. However, agreement should first be reached as to the

parameters to be used to evaluate efficiency and effectiveness. In terms of relief, this is relatively easy. But relief, as already pointed out above, is not all that humanitarian action means. How are speed, effectiveness and efficiency to be measured when confronted with the need for protection of individuals or communities? Are those “marketing” criteria applicable to the humanitarian space mentioned above? That space is above all a certain state of mind, and it concerns all parties to a conflict, at all levels of the military and political hierarchy, down to the last soldier or policeman or civil servant, or civilian for that matter.

A humanitarian space is the result of a culture that upholds humane conduct. The Western world should be to the fore in promoting such a culture. But it cannot express its willingness to make our world more humane by putting the corresponding labels on things and adopting a “market-oriented” approach in terms of humanitarian action. Above all, the so-called international community should acknowledge and accept those differences between the military approach and that of the humanitarian agencies, so as to avoid the confusion that creates such difficulties should avoid eliminating those differences between the military and the humanitarian approach that seem to be so difficult to handle in times of crisis, and even afterwards.

When the community of States decided to give a specific mandate to the ICRC to assist and protect all victims of international — and possibly internal — armed conflicts, and assigned to the Office of the High Commissioner for Refugees the task of assisting and protecting civilians compelled by war to flee their country, it did so because it recognized the impossibility for governments to act impartially and neutrally when humanitarian action is required.

In recent years, however, a basic contradiction in the international community’s behaviour and stance has become increasingly apparent: the more time goes by, the more often governments tend to favour a bilateral approach in humanitarian matters rather than a multilateral one, be it with the United Nations or with the Red Cross/Red Crescent Movement. Or at least the stance is ambiguous: governments give to international humanitarian organizations with one hand, while actively promoting bilateral initiatives — very often through their respective armies and/or National Societies — with the

other in order to boost their image and media feedback. In this day and age, when humanitarian action seems bound to become first and foremost a media business, and the first one to display its flag on the spot is the winner of the “media war”, there is no such thing as bilateralism. In the rush for visibility and prime-time, with the ensuing corollary of “tragedy dumping”, there seems to be little room left for humanitarian action as originally conceived and translated into reality when the 1949 Geneva Conventions and the 1951 Convention relating to the Status of Refugees were signed and ratified.

Differences between the work of humanitarian agencies and that of the military must be not only identified, but also maintained and respected. Nobody can better explain this than a high-ranking military officer who has had extensive experience of military and humanitarian intervention in the Balkans and who advocates a clear distinction between military and civilian tasks: “Military operations may require considerable experience and a certain state of mind, but the same applies to humanitarian assistance. It demands a thorough understanding of the needs of the people, good access to and relationships with local authorities and with other governmental and non-governmental organizations, patience and a self-sacrificing attitude. These things do not always easily sit in a military mind.”⁷ For that matter, why should the military wish to become humanitarian workers? As Major-General Brinkman cleverly put it: “Experience shows it is very difficult to be a guard and a nurse at the same time.”⁸ And it can be added that more often than not people tend to forget that humanitarian work is a profession and that humanitarian agencies are evolving more and more into professional enterprises working according to very strict criteria of accountability. The military can perfectly well perform certain jobs — as indicated above — within the framework of major humanitarian operations, provided nobody forgets that military operations and humanitarian programmes have divergent and sometimes even contradictory and irreconcilable requirements.

⁷ Maj.-Gen. J. W. Brinkman, “Humanitarian intervention: A military view”, in J. Nederveen Pieterse (ed.), *op. cit.* (note 3), p. 176.

⁸ *Ibid.*

Any further merging at times of political and humanitarian crises would mean creating further confusion and losing track of our respective identities. Humanitarian agencies and the military can cooperate — as they have so often done in the past — but in full respect for their differences and “corporate identities” and with a clear separation — rather than integration — of their respective functions. It is not an easy job, for sure, because neither the humanitarian agencies nor the various national armies, and consequently the components of NATO, are homogeneous among themselves. A real effort is being made within the humanitarian community to come to some sort of agreement on basic principles and procedures according to which humanitarian action should be carried out. There is also a lot of work being done to achieve the same kind of basic agreement between the military and the humanitarian agencies through the CIMIC (Civil-Military Cooperation) concept. This seems to be the appropriate way of doing things, rather than wanting to artificially mould the whole of humanitarian action into a hybrid construction where everybody would do everything.

Conclusions

The humanitarian community today is confronted with a major challenge: that of preserving the existence of means of assistance and protection genuinely free of political considerations and influence. More and more often in the past months and years it has been noticed — and even said explicitly — that humanitarian action has become a substitute for political initiatives and solutions. It has come to serve as a sort of showpiece that eases the governments’ conscience while giving scope for “political” gesticulations which often conceal the lack of any real political action. In recent years, humanitarian assistance has become the West’s favoured response to political crises beyond its borders: “This is partly the result of it being a lowest common denominator among donor governments that can no longer agree — or fund — strategic aims in marginal areas of the global economy.”⁹

⁹ M. Duffield, “Containing systemic crises”, in J. Nederveen Pieterse (ed.), *op. cit.* (note 3), p. 88.

As mentioned above, the ICRC's impartiality and institutional neutrality are viewed with growing suspicion that is increasingly difficult to dispel. The Kosovo conflict has clearly confirmed a trend already detected in other conflict situations: humanitarian aid is more and more often combined with political and economic leverage. Humanitarian assistance is being increasingly pressed into a non-humanitarian role and is therefore on the way to losing its neutrality and impartiality. The integration of military and humanitarian operations — rated as a success in Macedonia and even more so in Albania in April–May 1999 — has led to a deterioration in the quality of the humanitarian space. As one of the many consequences, the risks for humanitarian workers — who are often hard for an outsider to distinguish from members of armed forces actively involved in military and humanitarian operations labelled “humanitarian interventions” — have grown accordingly.

It is to be hoped that decision-makers at all levels, be they civilians or military, will end up understanding how precious the Red Cross principles of impartiality and neutrality are, and how beneficial those principles can be to any humanitarian operation, whether by the Red Cross or not, aimed at truly protecting and assisting the victims of conflicts throughout the world.

Many government and military officials seem to understand this. Even so, when they go “into action” they find it difficult to abide by their commitments. We therefore constantly have to struggle to remind everybody, when a war breaks out and for as long as it lasts, that a space set aside for humanitarian action is the *conditio sine qua non* for bringing protection and assistance to those human beings who are entitled to them.

In these circumstances there is no “all or nothing” solution. The military should not be sidelined, nor should they be taking over responsibilities and tasks from humanitarian agencies: “Doing nothing (...) [is] highly questionable. (...) Doing everything (...) [is] equally chimerical.”¹⁰ But “doing something” is a viable alternative for us all.

¹⁰ O. Ramsbotham/T. Woodhouse, *Humanitarian Intervention in Contemporary*

Conflicts, Polity Press, Cambridge, 1996, p. 218.

Moreover, we should all remember that: "There are no easy solutions (...). Engagement must be patient, informed, flexible and determined."¹¹ And, I would like to add, it should be as close as possible to all those who are in distress and need our help.



Résumé

Après la crise du Kosovo, un véritable espace humanitaire : une utopie peu réaliste ou une condition essentielle ?

PAR BÉATRICE MÉGEVAND-ROGGO

Sur la base des expériences faites par le CICR au cours de l'action humanitaire pendant la crise du Kosovo, l'auteur plaide pour le concept d'un « espace humanitaire », condition essentielle pour atteindre les victimes de conflits, assurer leur protection et leur apporter l'assistance dont ils ont besoin. L'auteur rappelle que l'action humanitaire en situation de conflit armé ne doit pas se limiter à la distribution de secours alimentaires. Le « geste humanitaire » doit assurer aux victimes un minimum de sécurité également : la « protection ». Par ailleurs, l'auteur examine des questions d'actualité comme le rôle des forces armées dans l'action humanitaire, les rapports entre l'aide bilatérale et les actions multilatérales, ou encore la fâcheuse tendance consistant à se contenter d'organiser des actions d'assistance au lieu de chercher des solutions politiques durables aux conflits qui sont à la base de la catastrophe humanitaire. Pour conclure, on rappelle qu'il n'y a pas de réponses faciles aux nombreuses questions qui se posent aujourd'hui à tous ceux qui s'intéressent à l'avenir de l'action humanitaire. Il paraît toutefois évident que l'action humanitaire doit se conformer aux deux principes qui guident l'action de la Croix-Rouge : la neutralité et l'impartialité.

¹¹ *Ibid.*, p. 219.

L'action de l'Agence centrale de recherches du CICR dans les Balkans durant la crise des réfugiés kosovars

par

THIERRY SCHREYER

Mars 1999. Au Kosovo, le conflit prend une tournure encore plus dramatique que lors des mois précédents ; des centaines de milliers d'hommes, de femmes et d'enfants, victimes de combats qui n'épargnent plus les civils, sont jetés sur les routes. Le chaos est total, ne laissant à personne la possibilité de se préparer à cet exode. Certains se réfugient dans les forêts voisines, d'autres cherchent à atteindre le village d'un proche où la situation serait moins dangereuse ; mais pour la majorité, cette longue route les mènera en Albanie, au Monténégro ou dans l'ex-République yougoslave de Macédoine.

Qu'elles proviennent du Kosovo ou de n'importe quelle autre région en guerre, les victimes de conflits armés obligées de fuir leur région ou leur pays se retrouvent immanquablement démunies, tributaires de l'aide humanitaire, de la générosité des États prêts à les accueillir ou de celle des populations désireuses de leur venir en aide, comme ce fut le cas en Albanie et en Macédoine. Les besoins sont

THIERRY SCHREYER est délégué du CICR depuis 1991. Il était en poste en Albanie pendant la crise des réfugiés (1999). Il est actuellement responsable des activités de protection du CICR dans les Balkans et en Europe centrale.

immédiats — nourriture, médicaments, eau potable, abris — et le Comité international de la Croix-Rouge, avec d'autres, tente d'y répondre.

Il est toutefois une douleur moins connue, une souffrance morale forcément moins visible que le dénuement matériel; cette angoisse, c'est celle d'être sans nouvelles d'un père ou d'un frère qui a pu être arrêté; de ne pas savoir ce que sont devenus ses enfants dont on a été séparés dans une colonne de réfugiés, ou encore de n'avoir plus aucun contact avec un parent resté derrière, parce que trop fier, trop vieux ou trop malade pour avoir pu fuir, alors que toutes les communications sont coupées.

L'Agence centrale de recherches (ACR) du CICR essaie de répondre à ces besoins spécifiques. La crise du Kosovo a été un immense défi qu'il a fallu relever en travaillant en étroite collaboration avec les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge de nombreux pays. L'ACR et les Sociétés nationales ont également innové, afin de mettre au service des victimes les moyens technologiques d'aujourd'hui.

L'Agence centrale de recherches

La souffrance des victimes due à la séparation d'avec leurs proches n'est pas nouvelle. En 1870 déjà, le CICR organise l'échange d'information entre les belligérants de la guerre franco-prussienne et leurs familles, afin de permettre à ces dernières de connaître leur sort. Jusqu'alors, l'information était inexistante et les familles dans l'incertitude. Depuis cette première démarche, le CICR, à travers son Agence centrale de recherches, n'a cessé de développer des moyens lui permettant de remettre en contact les personnes séparées par les conflits. Si ses premières interventions ont été en faveur des prisonniers de guerre, ses activités se sont rapidement développées également en faveur des civils. En 1936, lors de la guerre d'Espagne, l'ACR formalise l'échange de messages Croix-Rouge (lettre sur papier ouvert dont le texte est d'ordre strictement familial) entre les personnes séparées par les lignes de front.

L'ACR s'appuie sur des bases juridiques pour mener ses actions de recherches en cas de conflit armé: les Conventions de

Genève du 12 août 1949 pour la protection des victimes de la guerre et leurs deux Protocoles additionnels du 8 juin 1977 (l'un applicable aux conflits armés internationaux et l'autre aux conflits armés non internationaux). Ces textes consacrent le principe de l'intégrité de la famille, le droit à la correspondance familiale, ainsi que le droit des familles à connaître le sort de leurs membres. Dans d'autres types de situations, l'ACR peut agir en vertu du droit d'initiative du CICR et de son rôle d'intermédiaire neutre.

Il faut toutefois souligner que la responsabilité première revient aux États, lesquels devraient assumer l'échange d'information, en particulier dans le cas où ils détiennent des prisonniers. Malheureusement, force est de constater que le CICR doit bien trop souvent se substituer à des États n'assumant pas leurs responsabilités.

Situation générale au moment de la crise des réfugiés

Lors de l'afflux de réfugiés en Albanie et en Macédoine, le CICR est présent dans ces deux pays depuis plusieurs années. Les contacts déjà établis avec les autorités et les Sociétés nationales respectives faciliteront grandement son action. Cependant, à l'instar des autres organismes humanitaires, le CICR a été surpris par l'ampleur et la rapidité de l'arrivée des réfugiés. L'ACR, notamment, ne disposait pas d'une structure capable de répondre immédiatement aux besoins qui allaient se révéler gigantesques. C'est à travers les témoignages des réfugiés que le CICR a tenté d'en évaluer l'ampleur. Le premier jour de l'exode, soit le 26 mars, 150 personnes passeront la frontière albanaise. Le 3 avril, 160 000 y auront déjà trouvé refuge, puis 230 000, le 6 et 300 000, le 13. Au total, près de 500 000 personnes se retrouveront en Albanie, 245 000 en Macédoine, 40 000 au Monténégro.

Le CICR n'est plus au Kosovo depuis la fin mars 1999. Il n'y a d'ailleurs plus aucune organisation présente qui puisse fournir des informations quant à la réalité de la situation sur le terrain. Les seuls contacts avec le Kosovo sont les postes frontières de Blace, en Macédoine, et de Kukës, en Albanie. Nous avons tous en mémoire les images de ces colonnes de personnes atteignant, exténuées, les postes frontières; le Kosovo est devenu *terra incognita* et les humanitaires en

sont réduits à attendre l'arrivée des victimes, incapables d'aller au devant d'elles ; ce fait a grandement déterminé l'action de l'ACR qui, bien que son rôle soit de remettre en contact les familles, n'a pas accès à une partie des victimes. Le rôle d'intermédiaire neutre du CICR lui permet en général d'être présent dans les différentes régions touchées par un conflit, assurant le contact avec les personnes ayant fui ces mêmes régions. Dans la crise du Kosovo, ce lien aussi est brisé.

On trouvera peut-être là une des raisons de la très forte pression médiatique que l'ACR a subie durant toute la crise au Kosovo ; il n'est pas possible de faire le décompte des contacts que l'institution a eus avec les journaux, les chaînes de télévision et de radio du monde entier au sujet de ses programmes de rétablissement des liens familiaux. Cet intérêt a été positif, dans la plupart des cas, notamment en ce qui concerne la collaboration avec les radios internationales ou locales pour la diffusion des noms des réfugiés. Parfois, des journalistes ont fait eux-mêmes un travail de recherche après avoir eu connaissance de cas suivis par le CICR. La plupart des médias ont également fait connaître les difficultés rencontrées sur le terrain, ce qui a certainement permis une meilleure compréhension de l'action humanitaire.

On notera, cependant, que de nombreux journalistes ont eu tendance à s'intéresser exclusivement aux histoires impliquant de jeunes enfants séparés de leur famille, négligeant d'autres drames concernant, par exemple, des personnes âgées. Ces cas aussi auraient mérité d'être relatés et portés à la connaissance du public.

C'est donc uniquement depuis l'Albanie, la Macédoine et le Monténégro que l'action a pu être menée. Des délégués ont été envoyés sur place. Ils ont été soit détachés du siège de Genève, soit mis à disposition par les délégations du CICR dans les pays voisins, tels que la Bosnie-Herzégovine ou la Croatie, ou encore par des Sociétés nationales. Parallèlement, il a fallu mettre en place des structures permettant à plusieurs dizaines de personnes, réparties dans trois pays, de travailler dans les meilleures conditions possibles, d'engager localement du personnel et d'assurer sa formation en l'espace de quelques jours.

Au chapitre des difficultés rencontrées, il faut également mentionner le fait qu'en Albanie, les réfugiés bénéficiaient d'une totale

liberté de mouvement. Cet élément, en soi très positif, est à mettre au crédit des autorités albanaises, mais il n'a pas facilité le travail de recherches. En revanche, les réfugiés en Macédoine n'étaient pas autorisés à sortir des camps, ce qui a permis une localisation plus aisée.

Très rapidement, des dizaines de milliers de personnes ont été évacuées de la Macédoine vers des pays tiers — l'Allemagne, la Suisse, la Turquie, pour ne citer que ceux-ci — nécessitant d'effectuer des recherches dans un grand nombre de pays différents. Ces évacuations ont été organisées par les États, en coopération avec le Haut Commissariat des Nations Unies pour les réfugiés (HCR) et l'Organisation internationale pour les migrations (OIM), qui ont établis des critères d'acceptation qui leur étaient propres¹. Le CICR a toutefois pu présenter aux ambassades concernées des cas qu'il considérait comme prioritaires et réalisé ainsi des regroupements familiaux. Cependant, ces programmes d'évacuation n'ont pas été étendus à l'Albanie, et le CICR à Tirana a parfois rencontré beaucoup de difficultés pour obtenir de certains pays les visas nécessaires à de tels regroupements. Des personnes vulnérables — âgées, mais aussi des enfants — n'ont ainsi pu être réunies avec leur famille directe, faute d'avoir obtenu l'autorisation de l'ambassade concernée. L'effort des États pour accueillir plusieurs dizaines de milliers de réfugiés depuis la Macédoine est louable, mais il est regrettable qu'il n'ait pas toujours été prolongé en faveur de personnes seules et vulnérables se trouvant en Albanie.

Le réseau mondial des Sociétés nationales a joué un rôle déterminant en ce qui concerne la poursuite des recherches dans les pays tiers et la possibilité pour l'ACR d'offrir ses services aux réfugiés dans ces mêmes pays. Toutes les Sociétés n'ont naturellement pas été impliquées au même titre ; pour les plus exposées, cette crise a également été un important défi à relever. Elles ont également dû développer leurs structures, afin de faire face à l'afflux de demandes émanant

¹ Au total, plus de 90 000 personnes ont été transférées de Macédoine vers des pays tiers.

des familles déjà établies dans le pays, mais également face à celles provenant des réfugiés arrivant de Macédoine ou d'ailleurs. En outre, les Sociétés nationales ont été le relais indispensable de l'ACR dans le cadre des regroupements familiaux, et elles sont fréquemment intervenues auprès de leurs autorités respectives pour soutenir tel ou tel dossier.

Les Sociétés de la Croix-Rouge albanaise, macédonienne et monténégrine ont pu compter sur des branches réparties sur tout leur territoire. Ces structures ont permis au CICR de développer rapidement son action dans toutes les régions des pays concernés, bien que leur degré de préparation ait été insuffisant, au vu de l'ampleur des besoins. Là aussi, un effort particulier a été consenti par ces Sociétés pour fortifier leurs structures, que ce soit en termes de personnel — et donc de formation — ou de matériel. Il faut souligner que la plupart des personnes impliquées étaient des volontaires à qui un engagement exceptionnel était demandé. L'action de rétablissement des liens familiaux n'aurait jamais pu se développer sans leur dévouement.

L'action de l'ACR en faveur des réfugiés kosovars

Impossibilité de travailler au Kosovo, grande mobilité des réfugiés à travers l'Albanie et transferts vers des pays tiers, tout semblait réuni pour que les personnes n'aient que peu de chance de se retrouver dans un avenir proche. En outre, l'absence du CICR au Kosovo a rendu impossible l'utilisation des moyens traditionnels de l'Agence, en particulier les messages Croix-Rouge, qui ne pouvaient pas être distribués².

Parallèlement aux demandes des réfugiés eux-mêmes, les Sociétés nationales et le CICR ont été confrontés aux demandes des familles se trouvant déjà en pays étranger, souvent depuis de longues années. Ces personnes étaient souvent désemparées de n'être que les témoins impuissants, via les journaux télévisés, du drame qui se jouait

² Le message Croix-Rouge a été largement utilisé lors du conflit bosniaque, notamment parce qu'il était le seul moyen de communication encore existant. Le CICR en a distribué

plus de 18 millions, mais il était alors présent, avec les Croix-Rouge locales, sur tout le territoire.

dans les Balkans. Il n'était pas rare de recevoir des appels désespérés de personnes sans nouvelles de leurs proches ou ayant reconnu l'un d'eux lors d'un reportage télévisé à un poste frontière à la sortie du Kosovo. Ne sachant s'il valait mieux rester chez eux à attendre un éventuel appel ou se rendre dans la région pour y entamer des recherches, ces personnes se sont tournées vers la Croix-Rouge.

Le défi était donc triple :

— informer la population encore au Kosovo du sort de ceux qui avaient fui ;

— rassurer rapidement les familles se trouvant à l'étranger ;

— réunir les familles séparées.

A ces fins, l'ACR a mis sur pied trois programmes complémentaires :

Programmes de radio

Le CICR, en coopération avec les Sociétés nationales albanaise, macédonienne et monténégrine, a donné la possibilité aux chefs de familles kosovars d'inscrire leur nom, leur nouvelle localisation (camps, familles d'accueil) et le nombre des membres de leur famille les accompagnant sur des listes *ad-hoc*. Avec leur accord, ces informations ont ensuite été diffusées sur les ondes de Radio Tirana et de Radio Kukës, toutes deux captées au Kosovo.

Ces programmes ont également été un formidable moyen pour informer les personnes se trouvant en Suisse, en Allemagne, aux États-Unis, etc. C'est pourquoi, en collaboration avec la BBC, Voice of America, Radio France Internationale et Deutsche Welle, les mêmes informations furent transmises lors de leurs émissions en langue albanaise. Ils ont toutefois été victimes de leur succès. Au total, plus de 25 000 familles utiliseront ce service, débordant largement les possibilités des radios internationales dont les durées de programmes étaient trop courtes. De ce fait, les noms collectés vers la fin de la crise n'ont jamais été lus par les radios.

Il n'en reste pas moins que les Sociétés nationales et les délégations du CICR sur le terrain ont reçu de nombreux appels téléphoniques suite aux émissions de radio, confirmant que l'information passait, que le message essentiel parvenait aux destinataires : nous

sommes vivants! Lors du retour du CICR au Kosovo, en juin 1999, de nombreux témoignages ont été recueillis de personnes ayant appris par ce biais que leur famille était saine et sauve.

Téléphones satellites

Malgré le succès des émissions de radio, il aurait été présomptueux d'imaginer que tous les cas allaient se résoudre de cette manière. Les réfugiés ayant dû quitter leur maison, souvent dans l'urgence, n'avaient pu emporter que peu d'affaires personnelles. Pourtant, ce que des milliers d'entre eux considéraient peut-être comme le plus important, à leur arrivée en Albanie ou ailleurs, était un simple bout de papier qu'ils gardaient précieusement. Sur ce papier, le numéro de téléphone d'un fils, d'un frère ou d'une tante à l'étranger, un contact qui pourrait les aider dans cette période particulièrement difficile.

Les réfugiés en Macédoine ont pu compter sur le réseau téléphonique local. En revanche, en Albanie et au Monténégro, l'infrastructure existante n'a pas permis de faire face à la demande; à Kukës, par exemple, les rares cabines téléphoniques ont été prises d'assaut nuit et jour ne permettant qu'à un petit nombre d'y avoir accès, sans même mentionner la question du coût des communications pour des réfugiés souvent démunis. L'ACR a donc mis à la disposition des réfugiés plusieurs dizaines de téléphones par satellite, gérés par des équipes mobiles visitant les camps et les villages, comme dans le sud de l'Albanie, ou dans des lieux fixes, comme au poste frontière de Kukës. Afin que le plus grand nombre en profite, les communications, gratuites, ont été limitées à une minute par « chef de famille ». L'émotion était grande, il fallait dire le plus de choses possibles en un laps de temps relativement court, donner des nouvelles des autres, de ceux étant décédés ou se trouvant dans un autre camp, demander des nouvelles d'un ami; mais là encore, l'essentiel était de dire que l'on était en vie. Il faut souligner qu'il a été très difficile de s'en tenir à une minute par appel et qu'une certaine souplesse a été de mise.

Dès son retour au Kosovo, le CICR a utilisé les téléphones par satellite, d'abord pour ses propres besoins, puis pour les réfugiés qui rentraient chez eux.

Au total, plus de 125 000 communications téléphoniques ont eu lieu, permettant le rétablissement du lien familial. C'était la première fois que l'ACR utilisait ce moyen à grande échelle. Depuis, ces mêmes téléphones ont permis à des milliers de déplacés timorais en Asie du Sud-Est d'entrer en contact avec leur famille. Il est probable qu'il deviendra très rapidement un outil standard de la panoplie de moyens à disposition de l'ACR.

Site WEB

Il y a longtemps que l'informatique est utilisée dans le cadre du rétablissement des liens familiaux. Le CICR gère en effet toutes les informations qu'il rassemble sur les victimes de la guerre dans des bases de données constituées dans ses délégations à travers le monde. Parmi les 70 banques de données existantes, on peut notamment citer celles relatives à la guerre du Golfe où figurent les identités de près de 100 000 prisonniers de guerre; ou encore les quelques 124 000 noms d'enfants non accompagnés du Rwanda.

Cependant, si le CICR dispose d'un site WEB présentant l'institution depuis plusieurs années, l'Internet n'avait jamais été utilisé pour rétablir les liens familiaux pendant un conflit, bien que l'idée avait déjà été envisagée. Elle s'est concrétisée à l'occasion de la crise du Kosovo, notamment par le fait que cette population utilisait déjà largement les moyens de communication modernes. Il a donc été aisé d'intégrer ce média. La diaspora, présente principalement en Suisse et en Allemagne, pouvait elle aussi y avoir facilement accès. En collaboration avec les Sociétés nationales concernées, un site WEB a ainsi été développé, qui pouvait être consulté par tout un chacun, soit auprès des Sociétés de la Croix-Rouge, soit à partir de n'importe quel ordinateur à travers le monde.

Le principe était de permettre aux personnes réfugiées d'inscrire leur nom et leur lieu d'accueil provisoire sur une liste, accessible sur Internet, afin être ainsi localisées. Chaque nom était relié à un lieu, en général le bureau CICR le plus proche; un simple « clic », et il était possible d'envoyer un message électronique à un destinataire. Physiquement, ce message était imprimé au bureau CICR, puis distribué. Par ce système — en fait, la version électronique du message

Croix-Rouge —, le délai de distribution du message était raccourci de manière significative.

De nombreuses difficultés techniques sont apparues sur le terrain, ce site s'adressant notamment à une population réfugiée dont une bonne partie n'était pas équipée de l'électricité, encore moins d'un ordinateur, sans même parler d'un branchement possible à l'Internet. L'ACR s'est montrée ambitieuse ; à l'instar de ce qui s'est fait pour les téléphones par satellite, il avait été prévu d'envoyer des équipes à la rencontre des réfugiés, munies d'ordinateurs portables ayant accès à l'Internet via les satellites. En outre, des « points fixes » furent créés dans les bureaux CICR dans la région ou dans ceux des Sociétés nationales des pays concernés par ce programme.

Le système fut pleinement déployé en Macédoine où, en plus d'un site fixe à Skopje, les équipes dans les camps étaient à même de se brancher. Il ne l'a été que partiellement en Albanie où seuls les deux sites fixes de Tirana et Kukës purent être établis. Il faut ici souligner le travail de la Croix-Rouge américaine qui, en plus d'un support technique, a mis à disposition quelque vingt délégués chargés de gérer cet aspect du travail CICR. Cependant, malgré l'énergie déployée, le site WEB ne fut véritablement opérationnel qu'au moment où les réfugiés rentrèrent en masse au Kosovo, fin juin. Il n'a donc pas été possible de le tester « grandeur nature ».

Cette brève expérience pilote aura permis de prendre la mesure des défis techniques rencontrés sur des terrains où les infrastructures de télécommunication sont fragilisées ou inexistantes.

Des personnes particulièrement vulnérables

Téléphones satellites, émissions de radio, site WEB, tous ces moyens avaient pour but de rétablir le lien familial. Malgré cela, de nombreuses personnes ont perdu toute trace de leurs proches et parmi elles, des enfants et des vieillards pour lesquels l'ACR a mis sur pied des programmes de recherches spécifiques.

Les enfants non accompagnés ou séparés

Deux catégories d'enfants non accompagnés sont à distinguer : les enfants totalement isolés de leur famille, mais pris en charge

par des tiers, et les enfants séparés, recueillis par des membres de leur famille, mais qui sont sans nouvelles de leur mère et de leur père. Dans les deux cas, l'âge limite était de 18 ans. En ce qui concerne la crise des réfugiés, le CICR a surtout dû faire face à une problématique d'enfants séparés.

Les enfants non accompagnés/séparés ont été systématiquement enregistrés par l'ACR, de même que les parents à la recherche de leurs enfants. Au total, le CICR a eu connaissance de plus de 1 000 cas. Les circonstances ayant mené à la séparation étaient diverses: lorsqu'ils étaient encore au Kosovo, beaucoup de parents avaient placé leurs enfants chez des membres de leur famille habitant un village qui semblait à l'abri des combats; obligés de partir, les parents se retrouvaient en Macédoine, par exemple, alors que les enfants étaient partis en Albanie ou au Monténégro. Dans le chaos de l'exode, il est arrivé que des femmes, n'arrivant plus à porter leurs enfants, les installent sur la charrette ou dans la voiture d'un voisin. N'avançant plus au même rythme, la famille se trouvait séparée. Plus dramatiques ont été les cas d'enfants malades ou blessés qui sont restés seuls dans les hôpitaux au Kosovo, alors que les parents, dont on imagine la souffrance, devaient partir sans pouvoir prendre leur enfant avec eux. Plusieurs de ces enfants, dont des bébés, ont été retrouvés dans ces mêmes hôpitaux par le CICR, dès son retour au Kosovo.

Dès qu'un cas était enregistré par un bureau du CICR, les données personnelles étaient immédiatement transmises dans les autres délégations qui les comparaient avec leurs propres données, permettant, parfois, d'obtenir des réponses positives. En outre, les noms des enfants et des parents étaient transmis sur les ondes des radios locales et internationales, des listes affichées dans les camps de réfugiés, les centres collectifs et sur l'Internet. Sur le terrain, des recherches actives ont été effectuées, afin d'obtenir un maximum d'informations, d'interviewer d'éventuels témoins avec, toujours, le handicap de ne pas être présent au Kosovo. Des recherches ont été menées par les Sociétés nationales dans de nombreux pays.

Tout cela a permis que le CICR puisse réunir 150 enfants avec leur famille en moins de trois mois. La plupart de ces regroupements familiaux — suite logique et heureuse des recherches — ont eu

lieu entre la Macédoine et l'Albanie, mais également entre l'Albanie et le Monténégro, la Suisse et l'Allemagne.

Qu'est-il advenu des centaines d'autres enfants que le CICR n'a pas pu réunir à leurs parents? Pour beaucoup d'entre eux, les retrouvailles ont été spontanées, parfois suite aux émissions de radio. Dans bien des cas, malheureusement, les enfants sont retournés au Kosovo avec leur famille d'accueil, et, sur place, le CICR continue de rechercher activement leurs parents.

Les personnes âgées

Les personnes âgées de plus de 60 ans et seules étaient également considérées comme vulnérables. Plusieurs dizaines de cas ont été suivis par le CICR.

Il n'est bien sûr pas question de mettre une échelle de valeur dans la souffrance et le désespoir, mais les personnes âgées, comme les enfants, sont souvent les plus vulnérables dans des situations conflictuelles. Contrairement aux enfants, les vieillards ne sont pas forcément recueillis par une famille; ils doivent se débrouiller seuls, même malades, et compter sur la pitié ou la compassion de personnes plus vigoureuses partageant leur sort. Tout devient un problème: faire la queue pour la nourriture, pour atteindre les toilettes dans un camp ou pour se rendre à l'infirmerie d'un centre collectif. Parfois incapables de prendre soin d'elles-mêmes, ces personnes vivent, outre les problèmes communs à tous les réfugiés, ceux spécifiques liés à la vieillesse. Elles ont tout perdu, ont été obligées de fuir leur maison; leurs souvenirs d'une vie sont détruits; séparées de leurs proches, elles ont bien peu d'espoir de pouvoir se reconstruire un futur. Tous les vieillards n'étaient heureusement pas dans cette situation, et il y a eu beaucoup de générosité et d'entraide parmi les réfugiés. Mais, dans une telle crise, comment s'occuper encore d'une personne vieille, invalide, malade, alors que l'on doit déjà faire survivre sa famille?

Leurs familles ont été recherchées selon les mêmes critères que les enfants séparés. Là aussi, un certain nombre de regroupements familiaux ont pu être menés à bien, y compris avec l'étranger. Mais, les délégués présents à Kukës à la fin de la crise garderont certainement longtemps en mémoire l'image de ces onze vieillards, malades et inva-

lides, parfois atteints mentalement et totalement seuls au monde, derniers résidents d'un camp de tentes prévu pour des milliers de réfugiés, alors que tous étaient déjà de retour au Kosovo. Les familles de ces onze vieillards n'avaient pu être retrouvées, malgré les recherches, et c'est dans une remorque tirée par un tracteur qu'ils sont rentrés chez eux, toujours seuls, lors de la fermeture définitive du camp, en juillet 1999.

Les personnes arrêtées

Le CICR a recueilli auprès des réfugiées de nombreux noms de personnes supposées avoir été arrêtées par les forces de sécurité yougoslaves. Les personnes arrêtées sont protégées par le second Protocole additionnel de 1977, relatif aux conflits armés non internationaux. Le CICR est intervenu sans délai auprès des autorités à Belgrade, afin d'obtenir confirmation de l'arrestation de ces personnes.

Fin juin, le CICR a reçu de la part des autorités notification officielle de près de 2 000 personnes détenues en relation avec le conflit. Elles ont été immédiatement visitées et enregistrées dans une douzaine de lieux de détention. Il faut rappeler ici que le but des visites est de s'assurer du traitement des détenus et des conditions de détention, et d'aider les autorités à y apporter les améliorations nécessaires. Le CICR a également pu transmettre des messages Croix-Rouge, dûment censurés par les autorités détentrices et par l'ACR, entre les détenus et leurs familles.

À ce jour, le CICR a participé, à la demande des autorités, au transfert jusqu'au Kosovo de plus de 300 détenus libérés. Dans ce cas, l'institution a agi en tant qu'intermédiaire neutre³.

La question des personnes disparues

Malgré les efforts pour éviter la rupture de contact, malgré les recherches actives effectuées sur le terrain, malgré l'implication des Sociétés nationales à travers le monde, la question des personnes disparues reste inmanquablement posée après chaque conflit. Des années

³ De janvier à septembre 1999, le CICR a visité 184 000 personnes, dont 21 000 pour la

première fois, dans plus de 1 400 lieux de détention répartis dans près de 50 pays.

après la fin des combats, on est encore sans nouvelles de civils, de femmes, d'enfants, de vieillards, et de soldats ou de combattants jamais revenus du front. Les disparus deviennent très rapidement des oubliés, et les familles se retrouvent seules avec leurs incertitudes et leur douleur, cherchant des réponses qu'elles risquent malheureusement d'attendre très longtemps.

Chypre: 1993 personnes toujours portées disparues depuis 1974;

Azerbaïdjan/Arménie: 2600 personnes toujours portées disparues, certaines depuis 1990;

Croatie/Serbie: 3191 personnes toujours portées disparues, certaines depuis 1991;

Bosnie-Herzégovine: 18404 personnes toujours portées disparues, certaines depuis 1992.

Ce ne sont là que quelques exemples. Combien viendront s'ajouter à cette liste à la fin des conflits en Tchétchénie ou à Timor-Est?

Au Kosovo, on ne connaît pas encore le nombre exact de disparus. A ce jour, l'ACR a recueilli auprès des familles les noms de plus de 2500 personnes de toutes origines ethniques. L'Institution, dans le cadre de son mandat, récolte toutes les informations relatives aux disparus. Au-delà des demandes de recherches reçues des familles, l'ACR collabore également avec d'autres organismes, en particulier ceux en charge de l'exhumation et de l'identification des corps, et s'assure que les familles ont reçu les informations disponibles. Parallèlement, le CICR continue ses recherches actives sur le terrain, essaie d'obtenir des informations auprès de témoins et soumet, au nom des familles, les cas aux autorités susceptibles de pouvoir fournir des informations.

La volonté des parties de chercher et de fournir des réponses est essentielle; sans cet engagement et sans une réelle détermination, les demandes légitimes des familles ne seront pas entendues. Dans le dossier du Kosovo, on se trouve au début du difficile processus qui leur permettra de connaître le sort de leurs proches. Il est donc trop tôt pour juger de la détermination des parties à faire toute la lumière sur la question des disparus. Il faut espérer que les dirigeants

mettront plus de célérité à prendre ce problème en main que les responsables en charge de ce dossier dans d'autres cas (en Bosnie-Herzégovine par exemple, sur un total de 20 273 demandes reçues, seules 1 869 ont trouvé réponse à ce jour).

La clarification du sort des disparus est un élément-clé d'un processus de réconciliation au terme d'un conflit. Les familles, qui vivent quotidiennement dans l'incertitude, ne sont pas à même de surmonter le traumatisme causé par la disparition d'un proche si aucune indication n'est fournie. Comment envisager un dialogue entre communautés si le sort de milliers de personnes n'est pas élucidé? Pour mieux se faire entendre, les familles de disparus se fédèrent, au Kosovo et en Serbie; elles créent des associations qui pourront alors jouer plus facilement un rôle actif dans ce dossier, en particulier dans les forums où cette question sera abordée. Le CICR soutient ces associations et travaille en étroite collaboration avec elles.

Conclusion

Le CICR a repris ses activités au Kosovo au début du mois de juin 1999, quelques semaines avant le retour des réfugiés. En l'espace de quelques jours, près de 800 000 personnes sont rentrées chez elles, après avoir passé un peu plus de trois mois en exil. Il n'y a probablement pas d'exemple depuis la Seconde Guerre mondiale d'un aussi vaste mouvement de population effectué dans un laps de temps aussi court.

Par ailleurs, la brièveté de la crise explique en partie pourquoi seuls 150 enfants séparés ont été réunis à leurs parents, alors que près de 1 000 autres cas avaient été récoltés. Il n'est pas possible, en l'espace de quelques semaines, de mettre en place des structures permettant de répondre aux besoins de 800 000 personnes, et ce d'autant qu'aucune mesure particulière n'avait été planifiée. L'ACR a besoin d'un minimum de temps pour mettre en place un réseau efficace dans les pays où il travaille, afin de se donner un maximum de chances que des recherches aboutissent. Des procédures doivent être établies et suivies en ce qui concerne la récolte, le traitement et la confidentialité des données, chaque personne étant un cas particulier. Qu'il y ait 1 000, 10 000 ou 800 000 personnes ne change rien à ce problème.

Les organisations humanitaires ont naturellement une responsabilité envers les victimes, et qui est d'autant plus importante que la vie de celles-ci est souvent en jeu. Pour l'ACR, même si les activités de rétablissement du lien familial ne sauvent pas forcément des vies, accepter une demande de recherches n'est pas un acte anodin. Cette responsabilité ne s'arrête qu'au moment où le demandeur a obtenu une réponse, laquelle, malheureusement, n'est pas toujours favorable. Le résultat d'une recherche, qui peut prendre des mois, voire des années, n'aboutit pas systématiquement à l'échange d'un message Croix-Rouge ou à un regroupement familial ; il arrive également qu'il faille annoncer la mort d'un proche ou que, malgré les efforts déployés, aucune trace de la personne n'ait été trouvée.

Peut-on tirer un bilan des activités de rétablissement des liens familiaux lors de la crise des réfugiés ? L'ACR ne se résume pas en chiffres, et les statistiques ne suffisent pas à démontrer la complexité d'une situation ou les difficultés objectives rencontrées sur le terrain. Naturellement, il faut tendre à l'exhaustivité, tenter de répondre à tous les cas, mais cela ne se fait pas en quelques semaines, ni même quelques mois, comme on le constate dans les dossiers de personnes disparues. Où se situe la limite ? A partir de combien de familles réunies, de combien de messages échangés ou de prisonniers visités une action peut-elle être considérée comme satisfaisante ? Quel que soit le bilan, il est nécessaire de tirer les leçons d'une crise et de tenter d'améliorer ce qui peut l'être, afin de répondre plus vite et plus efficacement la prochaine fois. Mais la difficulté proviendra toujours du fait qu'une crise n'est jamais la réplique de la précédente, et que ceci empêche l'utilisation systématique de schémas préétablis. Les lignes et les procédures mises sur pied dans les Balkans serviront dans le futur, mais devront toujours être adaptées et réévaluées, afin de répondre le mieux possible aux besoins des victimes.



*Abstract***Activities of the ICRC's Central Tracing Agency in the Balkans during the Kosovar refugee crisis**

by THIERRY SCHREYER

Any mass movement of civilians leaving their homes under the pressure of war creates a number of urgent humanitarian problems. Refugees have to be fed and given shelter and medical care, etc. However, refugees also want to know the whereabouts of and what happened to relatives who stayed at home, were lost on the way or were arrested. It is the task of the ICRC's Central Tracing Agency to restore contact between the victims of conflict situations and, if necessary, to help reunite separated family members, especially children and their parents. The article deals with the last chapter of the Balkan crisis, with its immense and rapid flow of refugees out of Kosovo, and describes the Central Tracing Agency's response to it.

Common Article 1 of the Geneva Conventions revisited: Protecting collective interests

by

LAURENCE BOISSON DE CHAZOURNES and LUIGI CONDORELLI

At a time when the international community as a whole (States, international organizations, non-governmental organizations) is searching for an international public policy¹ for the promotion of humanitarian considerations, it is important to identify the legal principles on which such action could be based. This is all the more relevant as recourse to armed force is increasingly viewed as a means to an end in that context. When it comes to promoting values and interests of a collective character, the rudimentary nature of the international legal order is obvious. It is a system better acquainted, if not to say more at ease, with bilateral and contractual instruments and techniques. Notions such as *jus cogens*, *erga omnes* obligations and international crimes of the State are all important concepts. However, if they are to have due effect, there is a need for legal institutions and mechanisms to give them their full meaning. In that regard, the four Geneva Conventions for the protection of war victims, of 12 August 1949,² and their two Additional Protocols of 1977³ offer some interesting prospects.

LAURENCE BOISSON DE CHAZOURNES and LUIGI CONDORELLI are professors at the Department of Public International Law and International Organization, Faculty of Law, University of Geneva.

Some fifty years ago, the drafting of these Conventions led to the inclusion in their common Article 1 of a provision that provides the nucleus for a system of collective responsibility.⁴ It has since evolved and has furthermore attracted considerable attention. For this reason, the scope and content of that provision will first be assessed. The various dimensions it has acquired throughout its existence, and especially in the course of the last decade, will then be highlighted. Comments on the quasi-constitutional nature of such a norm in a society in search of a collective identity will be offered in conclusion.

Scope and content of common Article 1

Article 1 common to the four Geneva Conventions reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". This provision was reiterated in Article 1, paragraph 4, of Additional Protocol I. As such, the obligation to respect and ensure respect

¹ For an elaboration of the concept of international public policy, see V. Gowlland-Debbas, "The right to life and genocide: the Court and an international public policy", L. Boisson de Chazournes/P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 317. See also the dissenting opinion of Judge Koroma in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports, 1996, p. 556 ff.

² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War.

³ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International

Armed Conflicts (Protocol I), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both of 8 June 1977.

⁴ See L. Condorelli/L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, p. 18. Written at a time when Article 1 was seen rather as a sort of stylistic clause devoid of real legal weight, this article attempted, through study of early developments in international practice and following a prospective logic, to bring to light the various implications and effects of the duty to "respect and ensure respect". Fifteen years later, the present work re-examines this question, placing emphasis on aspects consonant with contemporary issues.

(which will also be referred to as common Article 1) applies to international conflicts and, indeed, to non-international conflicts to the extent that the latter are covered by common Article 3. While conflicts of a non-international character as defined by Additional Protocol II are not explicitly covered by the obligation to respect and to ensure respect, they can nonetheless be considered as indirectly falling within the purview of the provision, insofar as Protocol II is merely an elaboration of common Article 3 of the four Geneva Conventions, a fact stated in its Article 1, paragraph 1.

The obligation to respect and to ensure respect for humanitarian law is a two-sided obligation, for it calls on States both “to respect” and “to ensure respect” the Conventions. “To respect” means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. “To ensure respect” means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict.

Some argue that such an interpretation was not the one originally envisaged by the drafters. They hold that Article 1 was not elaborated with the intention of imposing on States obligations which did not also derive from the other provisions of the Geneva Conventions. While this may be the case, an examination of the *travaux préparatoires* reveals that the negotiators at least bore in mind the need for the parties to the Conventions to do everything they could to ensure universal compliance with the humanitarian principles underlying the Conventions.⁵

This is nonetheless a minor consideration, since the historical interpretation of an international instrument can never prove decisive in identifying the current status of a legal norm. Far more relevant in this respect is the meaning conferred by international practice as it has developed since the instrument was adopted. Indeed, over the last half century the practice of States and international organizations,

⁵ Jean S. Pictet (ed.), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 21.

buttressed by jurisprudential findings⁶ and doctrinal opinions, clearly supports the interpretation of common Article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take active part in ensuring compliance with rules of international humanitarian law by all concerned, but also to react against violations of that law. Moreover, common Article 1 speaks of an obligation to respect and to ensure respect “in all circumstances”, making the obligation unconditional and, in particular, not subject to the constraint of reciprocity.⁷

It is now widely accepted that the obligation contained in common Article 1 is binding on all States and competent international organizations. In its recent advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice reinforced this assertion, noting that “a great many rules of humanitarian law applicable in armed conflict are so fundamental” that “these fundamental rules are to be observed by all States whether or not they have ratified the Conventions that contain them”.⁸ The same Court, in its earlier decision on merits in the landmark *Nicaragua Case*, had specifically demonstrated the fact that the obligation referred to in common Article 1 forms part of customary international law.⁹

In diplomatic circles, common Article 1 has come to be seen by many as implying a universal obligation for States and international organizations (be they regional or universal) to ensure that this body of law is implemented wherever a humanitarian problem arises.

⁶ As for case law, see in particular the *in terminis* precedent, *infra*, notes 9 and 23.

⁷ This is in contrast to the obligation arising under the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907). On the difference between the obligation discussed here and the one provided for in the 1907 Hague Convention, see *op. cit.* (note 4), p. 18.

⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports, 1996, para. 79.

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, para. 220. This idea (already anticipated in Condorelli/Boisson de Chazournes, *loc. cit.* (note 4), pp. 20-22) led the Court to decide that a State commits an internationally wrongful act in breach of common Article 1 if it induces a party to a non-international armed conflict to act in a manner contrary to the humanitarian principles embodied in common Article 3.

The issue of implementation of international humanitarian law has thus become a more central feature in the activities of States and international organizations.¹⁰

Having set out the scope and content ascribed to common Article 1, attention will now focus on the various dimensions this provision has acquired over the years. First of all it is necessary to ascertain, on the basis of contemporary practice, what precise obligations are attached to the obligation to “respect [international humanitarian law] in all circumstances”. Emphasis will then be placed on the corresponding obligation to “ensure respect”.

The obligation to respect international humanitarian law in all circumstances

The significance of this obligation has already been stressed: the rule compels all subjects of law to which it is addressed to take all measures required by international humanitarian law, and to behave in all circumstances according to the rules and principles of this law. These circumstances are not necessarily confined to times of war. Various obligations are also binding upon States in peacetime, as is for example the obligation to disseminate international humanitarian law and to incorporate it in domestic legal systems. Contemporary practice, bolstered by the work of the ICRC, underscores the crucial importance of these obligations more than ever,¹¹ since compliance with the aforesaid duties in peacetime is obviously an essential factor in guaranteeing respect for international humanitarian law in times of armed conflict.

This said, international humanitarian law was nonetheless devised with war in mind, and with the aim of getting parties to a conflict to behave according to the rules applicable in such times. As

¹⁰ See A. Roberts, “Implementation of the laws of war in late 20th century conflicts”, Part I, *Security Dialogue* (SAGE Publications, Oslo), vol. 29, no. 2, June 1998, p. 142.

¹¹ See, e.g., Resolution 1 of the 27th International Conference of the Red Cross and Red

Crescent (Geneva, 1999), with annexed declaration “The power of humanity” and “Plan of action for the years 2000-2003”, in *IRRC*, No. 836, December 1999, pp. 878-895, or website: <http://www.redcross.alertnet.org/en/conference/proceedings.asp>.

pointed out above, common Article 1 clearly indicates that the State is under an obligation to do everything it can to ensure that the rules of international humanitarian law are respected both by its organs and by other entities under its jurisdiction (which in this context encompasses territorial jurisdiction as well as control exercised over individuals beyond national borders). It is thus obvious that the armed forces of a State must abide by the rules of international humanitarian law not only in their own national territory but also when fighting abroad. The decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of “Dusko” Tadic is a case in point, as the ruling stresses how important it is for a State’s armed forces abroad to respect humanitarian law.¹²

The contribution of the 1999 Judgment in the *Tadic* case, however, is both more significant and less obvious than it would appear at first glance. In that case, the ICTY establishes that a State violates its obligations under international law not only when its armed forces abroad breach humanitarian rules, but also when the culprits, irrespective of their nationality, are persons acting under the command and control of the State, even if they do not belong to its armed forces. This effective control need only be of a general character, and it is not necessary to establish that every violation has been performed under the specific control of, or following a precise order emanating from, an organ of the State in question. This finding, especially when compared to the much more prudent and restrictive

¹² *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Judgment, The Hague, 15 July 1999, Case No. IT-94-1. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) – Provisional Measures*, Order of 8 April 1993, ICJ Reports, 1993, p. 1, and Order of 13 September 1993, p. 325. On these, L. Boisson de Chazournes, “Les ordonnances en indication de mesures conservatoires dans l’affaire relative à l’application de la Convention pour la prévention et la répression du crime de

génocide”, *Annuaire français de droit international*, vol. XXXIX (1993), pp. 514-539. — In the human rights area see *Cyprus v. Turkey*, No. 8007/77, European Commission of Human Rights, *Decisions and Reports* 13 (1977), p. 85; *Loizidou v. Turkey*, 23 March 1995, *Yearbook of the European Court of Human Rights*, 38 (1995), p. 245. More generally see L. Condorelli, “L’imputation à l’État d’un fait internationalement illicite: solutions classiques et nouvelles tendances”, *Recueil des cours de l’Académie de La Haye*, tome 189 (1984-VI), pp. 9-222, esp. pp. 86-92.

position taken by the International Court of Justice on the issue¹³ (the “Tadic test” being undoubtedly less strict than the “Nicaragua test”), constitutes a highly significant jurisprudential development whose importance for the future of international humanitarian law must not be underestimated.

Circumstances in which a foreign State’s armed forces can be engaged in military operations abroad may occur in the context of peace-keeping or peace-making operations undertaken directly or indirectly by the United Nations, and all the more so since the post-Cold War awakening of the Security Council. When such actions are merely “authorized” by the Security Council and the armed forces taking part thus remain under the command and control of the State to which they belong, the obligation to abide by international humanitarian law obviously rests wholly on that State. Nonetheless, the UN’s duty in such cases will be to make sure that an operation launched with its endorsement and pursuant to its interests is carried out in conformity with the dictates of international law.¹⁴ It is therefore the UN’s special responsibility to *ensure respect* for international humanitarian law. On the other hand, if the operation is implemented directly by forces of the UN (e.g., Blue Helmets), in other words by its own organs placed under the “operational command” of the Secretary-General or his representative, its action directly involves the responsibility of the UN itself, notably with regard to the observance of humanitarian rules.¹⁵ Despite this, the national contingents making up such forces also remain entities of their respective States. The latter do not relinquish control over them and retain, at the very least, “disciplinary command” over their personnel. This dual link — UN entity/State

¹³ *Loc. cit.* (note 9), paras 109 and 115-116.

¹⁴ See L. Condorelli, “Le statut des forces de l’ONU et le droit international humanitaire”, *Rivista di Diritto Internazionale*, Anno 78, fasc. 4, 1995, pp. 881-906. Also sharing this view is D. Shrager, “The United Nations as an actor bound by international humanitarian law”, in L. Condorelli/A.-M. La

Rosa/S. Scherrer (eds.), *Les Nations Unies et le droit humanitaire/The United Nations and International Humanitarian Law*, Éditions Pedone, Paris, 1996, p. 330 ff.

¹⁵ On this point, see Shrager, *ibid.*, and also C. Emanuelli, “Les Forces des Nations Unies et le droit international humanitaire”, *ibid.*, pp. 345-370.

entity — entails a two-pronged responsibility as to compliance with international humanitarian law.¹⁶

This interpretation of common Article 1 is endorsed today by the UN Secretary-General's Bulletin of 6 August 1999 entitled "Observance by United Nations forces of international humanitarian law", written "for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control".¹⁷ This document sets out the obligations of the UN with regard to the conduct of its forces, but alludes also to certain duties of States whose forces are participating in UN operations, with particular reference to the repression of breaches (Section 4) and the application of domestic law (Section 2).

The case of the conflict in ex-Yugoslavia illustrates and confirms that when engaging troops in military operations abroad, States have a duty to use their military personnel thus deployed to search for individuals accused of war crimes.¹⁸ This was underscored by the establishment of the International Criminal Tribunals as venues for prosecution, heightening the need for cooperation in finding and bringing alleged criminals to justice. In other words this obligation, provided for by the Geneva instruments, is applicable wherever a State's armed forces might be operating, and not merely in that State's territory.¹⁹

These recent developments in international practice as to the circumstances in which respect for international humanitarian law

¹⁶ See Condorelli, *op. cit.* (note 14); also, by the same author, "Conclusions générales", in Condorelli/La Rosa/Scherrer, *op. cit.* (note 14), pp. 445-474.

¹⁷ UN Doc. ST/SGB/1999/13 of 6 August 1999; also available on the UN website (under "Peace and Security" heading): http://www.un.org/peace/st_sgb_1999_13.pdf. See Anne Ryniker, "Respect du droit international humanitaire par les forces armées des Nations Unies", *IRRC*, No. 836, December 1999,

pp. 795-805, with text of the said UN document appended (in French and English).

¹⁸ See Articles 49, 50, 129, 146 common to the Geneva Conventions, and Article 85 of Additional Protocol I.

¹⁹ See A.-M. La Rosa, "Forces multinationales et instances pénales internationales: obligation de coopération sous l'angle de l'arrestation", H. Ascensio/E. Décaux/A. Pellet (eds.), *Droit international pénal*, Éditions Pedone, Paris (to be published shortly).

is required must not overshadow the general scope of the principle embodied in common Article 1. In truth, no circumstance can be invoked in support of any given breach of the obligations concerned. None of the legally recognized means apt to “remedy” the illegality of violations of international law — be it self-defence, recourse to counter-measures, consent of the victim or state of necessity — are of consequence or can be claimed as circumstances precluding wrongfulness in this particular field. This is because international humanitarian law escapes the general logic of reciprocity that normally prevails in the international legal system. There is no need to dwell on this already well-established principle;²⁰ suffice it to recall once again the above-mentioned Advisory Opinion of the International Court of Justice in 1996, in which the Court, confirming that “a great many rules of humanitarian law [are] so fundamental [that they] are to be observed by all States whether or not they have ratified the conventions that contain them”,²¹ bases this assessment on its characterization of such rules as “intransgressible principles of international customary law”. While the exact significance and implications of the formula “intransgressible principles” may be debatable, this semantic innovation must at the very least be construed as crystallizing the notion that no circumstance may justify a “transgression” of such rules.²²

Recently the ICTY has itself taken an even clearer stance on the issue by rejecting what it termed the “*tu quoque* principle”, namely the argument based on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. Rebutting this argument, the Tribunal stressed that “... the bulk of this body of law lays down absolute obligations, namely obligations that are

²⁰ A point already illustrated by Condorelli/Boisson de Chazournes in *op. cit.* (note 4).

²¹ *Loc. cit.* (note 8), para. 79.

²² L. Condorelli, “Le droit international humanitaire, ou l’exploration par la Cour d’une *terra à peu près incognita* pour elle”, in L. Boisson de Chazournes/P. Sands, *op. cit.* (note 1), p. 234 ff. Also worthy of note is the

fact that even when in “... an extreme circumstance of self-defence in which its survival is at stake”, a State could not justifiably transgress those fundamental humanitarian principles. The dubious formulation of the final part of the 1996 Advisory Opinion entitled *Legality of the Threat or Use of Nuclear Weapons* should not be given a contrary interpretation. *Ibid.*, p. 239 ff.

unconditional or in other words not based on reciprocity". The Tribunal added: "This concept is already encapsulated in common Article 1 of the 1949 Geneva Conventions ...".²³

From the fact that such fundamental rules may not be infringed in any circumstances, it follows that the Security Council cannot request States to implement sanctions in violation of humanitarian law. In other words, although Article 103 of the Charter asserts that the obligations of UN members under the Charter — thus including the duty under Article 25 to accept and carry out the decisions of the Security Council — prevail over their obligations under any other international agreement, this provision cannot apply to "Geneva law" obligations binding States as well as the UN itself, as these obligations stem from "intransgressible" norms that may never be justifiably contravened, either by the former or by the latter.

The various dimensions of the obligation to ensure respect

In its judgment of 14 January 2000, the International Criminal Tribunal for the former Yugoslavia stressed that "[as] a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather (...) they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations."²⁴

The Geneva Conventions and Additional Protocol I provide means by which States can perform their obligation not only to respect, but also to "ensure respect" for international humanitarian law in all circumstances. They may, for instance, convene meetings of the High Contracting Parties in application of Article 7 of Protocol I;

²³ *The Prosecutor v. Zoran Kupreskic and others*, ICTY Trial Chamber, Judgment, The Hague, 14 January 2000, Case No. IT-95-16-T, para. 517.

²⁴ *Ibid.*, para. 519.

resort to the Protecting Powers institution and its substitutes; enforce the system of repression of grave breaches (in particular those calling for the greatest measure of mutual assistance in criminal matters); or call upon the International Fact-Finding Commission established under Article 90 of Additional Protocol I.²⁵

The obligation to ensure respect for humanitarian principles can also be implemented through other channels, such as diplomatic action or public denunciation, as did, for example, the ICRC in the 1980s during the Iran-Iraq war when it made several public appeals to all Contracting Parties to ensure respect for the Geneva Conventions.²⁶ The obligation can also find application through the principle of universality of jurisdiction, which requires States either to try or to extradite alleged criminals in accordance with rules and principles of international law.

It is most interesting, however, to consider the meaning of Article 1 within the framework of the United Nations, for which common Article 1 has in the last ten years almost become a basic norm of behaviour. This evolution has paralleled the growing interest taken by the UN in the "management of crises and armed conflicts", be they international, internal or internationalized, although the Security Council rarely categorizes as such the armed conflict or crisis with which it is dealing.²⁷

From an institutional standpoint, it is worth noting that the negotiators of Additional Protocol I established a relationship between the law of the United Nations and the body of rules applicable in times of armed conflict.²⁸ In its early years, the UN had no

²⁵ See L. Condorelli, "L'inchiesta ed il rispetto degli obblighi di diritto internazionale umanitario", *Scritti degli allievi in memoria di Giuseppe Barile*, Padova, CEDAM, 1995, pp. 225-308.

²⁶ *Op. cit.* (note 4), p. 27 ff.

²⁷ With regard to the conflict in Bosnia and Herzegovina, see L. Condorelli/D. Petrovic, "L'ONU et la crise yougoslave", *Annuaire français de droit international*, vol. XXXVIII, 1992, pp. 31-60.

²⁸ See É. David, "Méthodes et formes de participation des Nations Unies à l'élaboration du droit international humanitaire", pp. 87-113, and L. Boisson de Chazournes, "Les résolutions des organes des Nations Unies, et en particulier celles du Conseil de sécurité, en tant que source de droit international humanitaire", Condorelli/La Rosa/Scherrer, *op. cit.* (note 14), pp. 149-173.

desire to deal with the law of armed conflict, since it was busy promoting the prohibition of recourse to force and saw no point in being involved in conflict management. The situation changed in the late 1960s, in particular with the Teheran Conference on Human Rights (1968) and its ensuing Declaration. The Additional Protocols bridged the divide, allowing *jus in bello* to be dealt with by the United Nations.

Through its Article 89, Protocol I in fact opened the door to enforcement of international humanitarian law within the UN framework.²⁹ This article places the High Contracting Parties under a most stringent obligation to ensure respect for principles of humanitarian law, since they have expressly undertaken to act “in co-operation with” the United Nations in certain circumstances, namely when “serious violations” occur. The chosen formula clearly implies that the UN possesses the necessary jurisdiction to adopt appropriate measures to react to serious violations of international humanitarian law, for how otherwise could States “co-operate” with it if it was not competent to “operate” in the matter. This idea, a seed planted at the end of the 1970s, germinated in the 1980s and finally blossomed in the 1990s, as the awakening of the Security Council brought this provision to life and by the same token enhanced and even added new prospects for application of Article 1 common to the Geneva Conventions.

Within the UN system, the General Assembly, the Security Council and the Commission on Human Rights have on various occasions condemned violations of humanitarian principles.³⁰ Among the means used to deal with such violations were calls to abide by the existing rules; offers of good offices; dispatch of observer missions;³¹ and initiation of operations dedicated to peace-keeping,

²⁹ Article 89 of Protocol I reads as follows: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”

³⁰ L. Boisson de Chazournes, “The collective responsibility of States to ensure respect for humanitarian principles”, in A. Bloed *et al.* (ed.), *Monitoring Human Rights in Europe*, Kluwer Academic Publishers, The Netherlands, 1993, pp. 247-260.

³¹ e.g., ONUSAL in El Salvador, UN Doc. S/RES/693 of 1991.

peace-enforcement or peace-building³² whose mandate has included, *inter alia*, the promotion of humanitarian principles. The establishment by the Security Council of the International Criminal Tribunals for the former Yugoslavia³³ and for Rwanda³⁴ also falls within the purview of a collective willingness to ensure respect for international humanitarian law in cases where serious violations occur.

The same has to be said of the Rome Statute of 17 July 1998, creating the International Criminal Court (ICC), which was negotiated within the framework of a diplomatic conference convened under the aegis of the UN, the preparatory work having been concluded in its entirety within the UN framework and under the consistent encouragement of its organs. In this connection, the role assigned by the Statute to the Security Council should not be forgotten: Article 13(b) gives the Security Council the power to "trigger" the judicial mechanism of repression when it identifies as a threat to the peace a situation in which serious violations of humanitarian principles giving rise to criminal responsibility seem to have been perpetrated.

The steady deterioration in the situation of the Israeli-occupied Palestinian territories led first the Security Council, then the General Assembly, to add another dimension, as yet unexplored, to the obligation to ensure respect for humanitarian law.³⁵ Both

³² e.g., UNTAC in Cambodia, UN Doc. S/RES/745 of 1992.

³³ Established by Security Council Resolution S/RES/827 (1993) of 25 May 1993, with amendments to the Statute in Resolution S/RES/1166 (1998) of 13 May 1998.

³⁴ Established by Security Council Resolution S/RES/955 (1994) of 8 November 1994, with amendments to the statute in Resolution S/RES/1165 (1998) of 30 April 1998.

³⁵ In Resolution S/RES/681 (1990) of 20 December 1990, the Security Council, "gravely concerned at the dangerous deterioration of the situation of all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel ..., called upon:

5. the High Contracting Parties to the said Convention to ensure respect by Israel, the Occupying Power, for its obligations under the Convention in accordance with article 1 thereof; and requested:

6. the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea, expressed in this report, of convening a meeting of the High Contracting Parties to the said Convention to discuss possible measures that might be taken by them under the Convention and, for the purpose, to invite the Parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on relevant matters, and report thereon to the Council."

organs called upon the UN Secretary-General, in cooperation with the International Committee of the Red Cross, to convene a meeting of the High Contracting Parties to the Fourth Geneva Convention. Referring to common Article 1, they asked each party for a meaningful contribution to this meeting. The Security Council and the General Assembly found, within the meaning of common Article 1, explicit grounds for collective responsibility with respect to the situation in the occupied territories.

A conference of the High Contracting Parties was eventually held on 15 July 1999. Adjourned very rapidly, it was seen by many as a non-event; this may be due to the current evolution of political circumstances in the Middle East and to a willingness to deal with this question outside the multilateral context of the United Nations. However, as was stressed during preparations for the conference, the High Contracting Parties did feel a need to meet more frequently in order to discuss issues relating to the application of the Geneva Conventions and Additional Protocols, and the role of the UN organs in identifying such a need should be underlined. In this regard, it is regrettable that the Plan of Action adopted in November 1999 at the 27th International Conference of the Red Cross and Red Crescent does not adequately reflect these concerns,³⁶ all the more so since such international meetings are also a useful means of heightening public awareness of humanitarian law and bringing issues of implementation and compliance under scrutiny, notably by NGOs and other members of international civil society.

Last but not least, the Security Council has taken another step in determining that gross violations of humanitarian law on a large scale constitute a threat to, or breach of, the peace under Article 39 of the Charter of the United Nations.³⁷ Specific counter-measures would then be required under the Charter's Chapter VII. Suffice it to mention Resolution 688 of 5 April 1991 condemning "the repression of the Iraqi civilian population in many parts of Iraq,

³⁶ *Loc. cit.* (note 11).

³⁷ For a thoughtful examination of this practice, see I. Österdahl, *Threat to the Peace:*

The Interpretation by the Security Council of Article 39 of the UN Charter, Iustus Förlag (Juridiska Föreningen i Uppsala), Uppsala, 1998.

including (...) in Kurdish populated areas” and Resolution 794 of 3 December 1992 “determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security” or the numerous resolutions denouncing the massive violations of humanitarian principles committed in Bosnia-Herzegovina³⁸ or, of late, in Kosovo.³⁹ These illustrate the new spin given by the Security Council to the obligation to ensure respect for humanitarian law.

Under Chapter VII a wide array of measures may be undertaken, ranging from so-called peaceful measures, such as economic sanctions, to military action. The Security Council has resorted to all means at its disposal to promote respect for humanitarian principles, going as far as euphemistically authorizing States to “use all necessary means” (up to and including armed force) to help implement its decisions, for instance to guarantee the safe conduct of humanitarian aid operations and dispatch of such aid.

A further step was taken in June 1999 when the Security Council gave its *ex post facto* political blessing to NATO air raids intended to put an end to violations of humanitarian law.⁴⁰ The legality of such action has been, and still is, hotly debated, some seeing it as prohibited by international law although morally justified,⁴¹ while others consider that a legal basis already exists or is emerging, justifying the use of force as an *ultima ratio* when required to ensure respect for humanitarian principles in a situation of humanitarian concern.⁴²

³⁸ See, e.g., Security Council Resolutions 941 (1994) of 23 September 1994, 1019 (1995) of 9 November 1995, or 1034 (1995) of 21 December 1995.

³⁹ See, e.g., Security Council Resolutions 1199 (1998) of 23 September 1998, 1203 (1998) of 17 November 1998, or 1239 (1999) of 14 May 1999.

⁴⁰ Security Council Resolution S/RES/1244 (1999) of 10 June 1999.

⁴¹ B. Simma, “NATO, the UN and the use of force: Legal aspects”, *European Journal of International Law*, vol. 10, no. 1, 1999, pp. 1-22.

⁴² A. Cassese, “*Ex iniuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian counter-measures in the world community”, *European Journal of International Law*, vol. 10, no. 1, 1999, pp. 23-30, and C. Greenwood, *International Humanitarian Law and the Laws of War, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, available at the Dutch Ministry of Foreign Affairs’ website: <http://www.minbuza.nl/English/sumconferences.html>.

Reliance upon the use of force, prompted by humanitarian considerations, to ensure respect for international humanitarian law has thus blurred the distinction between *jus ad bellum* and *jus in bello*. There is an evident trend towards militarization in the implementation of international humanitarian law. This may give rise to questions as to the risk of selective implementation of norms and principles of humanitarian law, owing to the political nature of the Security Council's decision-making process.

However, it might be useful to recall that those who are entitled to use force to achieve respect for international humanitarian law are, of course, themselves obliged to comply with its provisions in the conduct of their operations. In other words, the purpose of the intervention (*jus ad bellum*) in no way alters the *jus in bello* obligations which the intervening forces must scrupulously respect.

Another issue of great importance is the interplay of the principle of non-intervention and international humanitarian law, when the application of measures under Chapter VII is decided by the Security Council. Certain countries and representatives of international civil society have thus repeatedly called for the implementation of a "*droit d'ingérence humanitaire*"⁴³ (a fashionable and well-publicized French formula for a "right to interfere" for which an appropriate translation in English has not yet been found), showing the unease that failure to intervene arouses in contemporary international society. Some argue that the principle of non-intervention should be overridden in the event of grave and massive violations of humanitarian law, while others think it too closely related to the tenet of sovereignty to be disregarded. Nonetheless, it goes without saying that the debate must be placed in its proper perspective, that of the existing international legal system, which comprises UN law.

Most striking in this context is the fact that gross violations of humanitarian principles are regarded as matters of international

⁴³ See in particular M. Bettati/B. Kouchner (eds.), *Le devoir d'ingérence*, Denoël, Paris, 1987. For a critical appraisal of the notion, see

O. Corten/P. Klein, *Droit d'ingérence ou obligation de réaction?*, 2nd ed., Bruylant/Éditions de l'Université de Bruxelles, Brussels, 1996.

concern and not, to quote Article 2, paragraph 7, of the UN Charter, as “matters which are essentially within the domestic jurisdiction of any State”. Moreover, it should be stressed that measures taken under Chapter VII to remedy violations of humanitarian principles should not be considered as a breach of the principle of non-intervention in the internal affairs of States. These measures in fact benefit from the exception also stated in Article 2, paragraph 7, according to which the said principle “shall not prejudice the application of enforcement measures under Chapter VII”. The “novel” issue of international humanitarian interventions, and the political scene in the aftermath of the Gulf War in the early 1990s, must be taken into account in attempting to explain the substance of Resolution 688 of 5 April 1991 and more specifically its reference to Article 2, paragraph 7, of the Charter.⁴⁴ Practice has since tended to reconcile all these parameters, albeit sometimes at the political price of omitting any specific reference to the Charter’s relevant chapter.

Humanitarian assistance decided by the Security Council under Chapter VII does not conflict with the safeguard of domestic jurisdiction. Nonetheless, humanitarian assistance on the basis of Chapter VII should meet certain requirements: it must be provided to people in need, and in conformity with the principle of non-discrimination. These criteria are similar to those prescribed by general international law, under which, to avoid claims of intervention in the internal affairs of a State, “an essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind” and is “limited to the purposes allowed in the practice of the Red Cross, namely, to ‘prevent and alleviate human suffering’ and ‘to protect life and health and to ensure respect for the human being’”.⁴⁵ The fundamental nature of these humanitarian principles has to be considered by the Security Council in selecting the measures to be taken, as well as by States, international organizations and other players when providing humanitarian assistance.

⁴⁴ UN Doc. S/RES/688 of 5 April 1991. For a political and legal interpretation of Resolution 688, see P. Malanczuk, “The Kurdish crisis and allied intervention in the aftermath of the Second Gulf War”, *European Journal*

of International Law, vol. 2, no. 2, 1991, pp. 114-132.

⁴⁵ *Nicaragua v. USA*, *loc. cit.* (note 9), para. 243.

This consideration is even more important in situations where recourse to force for humanitarian purposes tends to obstruct, or to detract from attention given to, other means of supplying assistance. Moreover, international humanitarian law, finding application in all circumstances, also takes effect in the phase which follows recourse to force and in which its unconditional and non-discriminatory nature are key features.⁴⁶

Hence, the United Nations, having assumed the obligation to ensure respect for international humanitarian law, must adopt a number of measures in order to fulfil this duty. A recent example illustrating the scope of this development was the “open debate” launched by the Security Council in September 1999 on the protection of civilians in armed conflict. This debate was based on a report by the Secretary-General⁴⁷ and held in response to a wish expressed by the Council’s President⁴⁸ for recommendations as to means “to improve both the physical and legal protection of civilians in situations of armed conflict”. The Secretary-General met this request by suggesting a broad array of potential measures, either preventive or repressive, which fall within the logic of “ensuring respect” for international humanitarian law. While the tangible results of this debate are not particularly significant, the Council does clearly express in its final resolution “its deep concern at the erosion in respect for international humanitarian (...) law”, as well as “its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council’s disposal”.⁴⁹ Equally worthy of note is the number of States which alluded in the debate to collective responsibility linked to respect for international humanitarian law, some going so far as to refer explicitly to common Article 1 in this instance.

⁴⁶ With regard to these principles, attention is drawn to the measures decided by the European Union in autumn 1999 to deliver fuel to the municipalities headed by political coalitions opposed to Slobodan Milosevic in Yugoslavia.

⁴⁷ UN Doc. S/1999/957, of 8 September 1999.

⁴⁸ UN Doc. S/PRST/1999/6, of 12 February 1999.

⁴⁹ Security Council Resolution 1265 (1999), of 17 September 1999.

Concluding remarks about the quasi-constitutional nature of common Article 1

Undoubtedly, the obligation to respect and to ensure respect for humanitarian principles in all circumstances has acquired a special status not only in United Nations law, but more generally in the international legal order. This provision consequently belongs to a select group of norms and principles held by the international community to be of cardinal importance for the promotion of “elementary considerations of humanity”:⁵⁰ the Martens Clause⁵¹ is one; the obligation to respect and to ensure respect is another. Such norms play what may be termed a “constitutional role” in a system of collective security where humanitarian values have become a reason for the adoption of a large number of measures. Such a constitutional role is even more important given the proliferation of *sui generis* conflicts in which a wide range of non-State contenders (local warlords, drug traffickers ...) can be acknowledged as fully fledged parties. Hence, South Africa’s representative to the United Nations, speaking on behalf of the Non-Aligned Group, recently referred to common Article 1 in much the same way as one would to a constitution, as an instrument of both great importance and flexibility, stating that it “constitutes the collective responsibility of the United Nations”.⁵²

Another trend to be noted is the increasing role played by the United Nations Security Council, a body that has become the

⁵⁰ This formula was used by the ICJ in the *Corfu Channel Case* (United Kingdom v. Albania), 9 April 1949. On humanitarian principles as equivalent to these “elementary considerations of humanity”, see P.-M. Dupuy, “Les ‘considérations élémentaires d’humanité’ dans la jurisprudence de la Cour internationale de Justice”, R.-J. Dupuy (ed.), *Droit et justice — Mélanges en l’honneur de Nicolas Valticos*, Paris, Editions A. Pedone, 1999, p. 117.

⁵¹ According to this provision, in cases not covered by the Conventions, the Protocol or other international agreements, or in the case of denunciation of these agreements, “civil-

ians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”— Protocol I, Art. 1; see also the Geneva Conventions I (Art. 63), II (Art. 62), III (Art. 142), and IV (Art. 158).

⁵² This remark was made during the open debate convened on 16 September 1999 by the Security Council to discuss issues concerning the protection of civilians in armed conflicts. UN Doc. S/PV.4046 (summary), 17 September 1999.

main proponent of common Article 1. This entails a risk of selectivity insofar as political considerations might prevent the Council from acting unconditionally, i.e. in all circumstances where action is called for. Similarly, there remains a risk that the Council's recourse to humanitarian assistance may become a pawn of political interests, rather than the object of meaningful political action. To prevent this, the obligation to ensure respect for humanitarian law should be interpreted in a broad sense, so as also to include the search for peaceful means of conflict resolution based on respect for the values and principles of the UN Charter. While preventive action may be one such means, promoting meaningful negotiations might indeed be another.⁵³



⁵³ See the proposals made by the Secretary-General in his report to the Security Council on Protection of Civilians in

Armed Conflicts, UN Doc. S/1999/957, of 8 September 1999.

Résumé

L'article premier commun aux Conventions de Genève revisité : protéger les intérêts collectifs

par LAURENCE BOISSON DE CHAZOURNES et LUIGI CONDORELLI

Avec l'article premier commun aux Conventions de Genève et au Protocole additionnel I, les États parties à ces traités « s'engagent à respecter et à faire respecter [les obligations humanitaires] en toutes circonstances ». En engageant la responsabilité de la communauté des États parties aux principaux traités humanitaires à prendre les mesures qui s'imposent pour assurer le respect du droit humanitaire par un État tiers (notamment si cet État est une partie à un conflit armé), cette disposition contribue à la constitution d'un ordre public international. Les auteurs examinent tout d'abord les nouveaux développements par rapport à l'obligation de respecter le droit humanitaire (jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie, nouvelles règles pour les opérations militaires conduites sous l'autorité des Nations Unies, etc.). Ils se penchent ensuite sur la pratique récente concernant l'obligation de faire respecter le droit international humanitaire, sans cacher les problèmes qui se posent, notamment pour l'indépendance de l'action humanitaire par rapport aux pouvoirs politiques.

« L'intervention d'humanité » de l'OTAN au Kosovo et la règle du non-recours à la force

par

DJAMCHID MOMTAZ

Le Kosovo a été, tout au long du XX^e siècle, un foyer de tensions et de violence entre la population de souche albanaise de ce territoire et les Serbes. L'origine des atrocités qui suscitérent l'intervention des forces armées de l'OTAN, le 24 mars 1999, remonte au début des années 90. Pour faire face aux velléités indépendantistes des Albanais, les autorités de Belgrade eurent recours à la force, tout en mettant fin au statut d'autonomie dont le Kosovo jouissait depuis 1974 au sein de la République fédérale de Yougoslavie. La proclamation unilatérale de la République du Kosovo par les insurgés, en 1991, et le début des opérations militaires de l'Armée de Libération du Kosovo (UCK) en 1996 ne faisant qu'exacerber la colère des Serbes, leurs réactions furent sans merci et entraînèrent une nouvelle flambée de violence.

En vue d'apaiser la tension, l'Organisation pour la Sécurité et de la Coopération en Europe (OSCE) prit, à partir de 1997, par le biais de son groupe de contact¹, l'initiative de convaincre les autorités yougoslaves d'accorder une autonomie substantielle au Kosovo. L'échec des négociations devait amener le Conseil de Sécurité à adopter, le

DJAMCHID MOMTAZ est professeur de droit international à la faculté de droit et de sciences politiques de l'Université de Téhéran. Il est membre associé de l'Institut du Droit international.

31 mars 1998, dans le cadre du Chapitre VII de la Charte des Nations Unies, la résolution 1160, par laquelle il appuyait l'octroi d'une « véritable autonomie administrative » au Kosovo, tout en affirmant son attachement à la souveraineté et à l'intégrité territoriale de la République fédérale de Yougoslavie. L'usage excessif et indiscriminé de la force par la Yougoslavie causa de nombreuses victimes et fut à l'origine de l'afflux d'un nombre impressionnant de réfugiés. Alarmé par l'imminence d'une « catastrophe humanitaire », le Conseil de sécurité adoptait, le 23 septembre 1998, la résolution 1199, par laquelle il affirmait que la détérioration de la situation au Kosovo constituait une menace pour la paix et la sécurité de la région. Par cette résolution, adoptée aussi dans le cadre du Chapitre VII, le Conseil exigeait la reprise des négociations et le retour sans entrave des réfugiés, ainsi que le retrait du Kosovo des unités de sécurité de la République fédérale de Yougoslavie.

Le refus de la Yougoslavie d'appliquer les dispositions de ces deux résolutions et l'incapacité du Conseil de sécurité à décider de mesures coercitives, en raison de l'opposition de la Fédération de Russie et de la Chine, amenèrent l'OTAN à lancer, le 13 octobre 1998, un ultimatum à la Yougoslavie pour qu'elle se plie aux exigences du Conseil de sécurité.

L'imminence des frappes aériennes de l'OTAN fit céder la Yougoslavie, qui accepta la signature de deux accords : le premier, le 16 octobre 1998, avec l'OSCE, par lequel était créée une mission de vérification chargée de s'assurer de l'application des résolutions du Conseil de sécurité ; le second, conclu un jour plus tôt avec l'OTAN, qui l'autorisait à mettre en place une mission aérienne de vérification du retrait des unités de sécurité yougoslaves du Kosovo. Le Conseil de sécurité, par sa résolution 1203, adoptée le 24 octobre, toujours dans le cadre du Chapitre VII, approuvait et appuyait ces accords et exigeait qu'ils soient « appliqués promptement et dans leur intégralité ».

Les tergiversations de la Yougoslavie et les nouveaux massacres de civils par les Serbes, le 15 janvier 1999 à Racak, devaient amener l'OTAN, le 30 janvier, à réitérer sa menace d'employer la

¹ Composé des ministres des Affaires étrangères de l'Allemagne, des Etats-Unis, de

la Fédération de Russie, de la France, de l'Italie et du Royaume-Uni.

force. L'échec des négociations et la reprise de la campagne militaire au Kosovo par les forces serbes conduisirent finalement l'OTAN à recourir, le 24 mars 1999, à la force contre la Yougoslavie, sans avoir préalablement obtenu l'autorisation du Conseil de sécurité.

En ce qu'elle viole la règle du non-recours à la force, consacrée par la Charte des Nations Unies, l'intervention de l'OTAN est contraire tant à la lettre qu'à l'esprit de celle-ci, et ne se justifie guère par l'interprétation extensive de certaines de ses dispositions. Néanmoins, vu qu'elle était destinée à mettre un terme à une catastrophe humanitaire et qu'elle n'a pas été condamnée par le Conseil de sécurité ni par les États (sauf rares exceptions), on est en droit de se demander si elle n'est pas conforme à une règle coutumière établie ou en gestation. Question à laquelle la Cour internationale de Justice pourrait être amenée à répondre, suite à la requête introductive d'instance de la République fédérale de Yougoslavie, en date du 29 avril 1999, sur la licéité de cette intervention.

«L'intervention d'humanité» est contraire à la Charte des Nations Unies

Les ultimatums de l'OTAN et les frappes aériennes menées par les États membres de cette organisation sont en contradiction avec les engagements pris par ces derniers lors de leur adhésion à la Charte des Nations Unies. Conformément à l'article 2, alinéa 4 de la Charte, les États sont en effet tenus de s'abstenir « dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force ».

D'après l'article 51 de la Charte, cette interdiction ne porte toutefois pas atteinte au « droit naturel de légitime défense individuelle ou collective dans le cas où un membre des Nations Unies est l'objet d'une agression armée ». L'article 42 prévoit une seconde exception à cette règle, dans la mesure où le Conseil de Sécurité peut recourir à la force ou autoriser un tel recours pour maintenir ou rétablir la paix, les mesures nécessaires à cette fin pouvant être prises, selon l'appréciation du Conseil, par tous les membres de l'organisation ou par certains d'entre eux.

Depuis, l'Assemblée générale des Nations Unies a eu l'occasion, à plusieurs reprises, d'adopter des Déclarations qui mettent en

exerger le principe contenu dans l'article 2, alinéa 4 de la Charte. Telle est la « Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies ». Selon cette Déclaration, « aucun État membre ou groupe d'États n'a le droit d'intervenir directement ou indirectement, pour quelque raison que ce soit, dans les affaires intérieures ou extérieures d'un autre État. En conséquence, non seulement l'intervention armée, mais aussi toute autre forme d'ingérence » sont contraires au droit international².

Dans l'arrêt qu'elle a rendu, en 1986, à l'occasion du différend opposant le Nicaragua aux États-Unis, la Cour internationale de Justice insistait sur l'importance de telles Déclarations. Pour la Cour, « l'effet de consentement au texte de telles résolutions ne peut être interprété comme celui d'un simple rappel ou d'une simple spécification de l'engagement conventionnel pris dans la Charte », mais « il peut au contraire s'interpréter comme une adhésion à la valeur de la règle ou de la série de règles énoncées par la résolution et prises en elles-mêmes »³.

De même, le Protocole II additionnel aux Conventions de Genève de 1949, qui vise précisément des situations telles que celles qui ont prévalu au Kosovo, insiste sur le principe de non-intervention. Il y est en effet précisé qu'aucune disposition de ce Protocole « ne sera invoquée en vue de porter atteinte à la souveraineté d'un État ou à la responsabilité du gouvernement de maintenir ou de rétablir l'ordre public (...) »⁴.

Ainsi, la Charte des Nations Unies et le droit international positif ne semblent pas prévoir spécifiquement le droit d'intervention d'humanité comme une exception à la règle du non-recours à la force. La majorité de la doctrine s'est prononcée dans ce sens.

² Résolution 2625 (XXV) du 24 octobre 1970.

³ Affaires des activités militaires et paramilitaires au Nicaragua et contre celui-ci, C.I.J. Recueil 1986, p. 100.

⁴ Article 3 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), du 8 juin 1977.

Néanmoins, dans la mesure, par deux fois, où le Conseil de sécurité, dans le cadre des résolutions 1199 et 1203, souligne la « nécessité de prévenir » la catastrophe humanitaire au Kosovo, on est en droit de se demander si cet appel n'équivaut pas à une invitation à recourir à la force. Cette question est d'autant plus pertinente que la formule utilisée par le Conseil de sécurité est identique à celle qui figure à l'article premier de la Convention du 9 décembre 1948 pour la prévention et la répression du crime de génocide. Conformément à cette Convention, les États contractants s'engagent à « prévenir » ce crime. C'est justement pour éviter une telle situation que les États membres de l'OTAN se seraient vus obligés de recourir à la force⁵.

Il est vrai que le caractère génocidaire de la politique de purification ethnique pratiquée par les Serbes au Kosovo ne fait guère de doute. Une telle affirmation est d'ailleurs fondée sur la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie, dont la compétence s'étend aux crimes commis au Kosovo. Pour ce Tribunal, les déportations massives ainsi que des conditions d'existence imposées à une population civile susceptibles d'entraîner sa destruction physique partielle ou totale « peuvent être interprétées comme le premier pas dans un processus d'élimination »⁶. Une telle qualification ne peut pour autant justifier le recours à la force.

C'est bien la conclusion à laquelle la Cour est parvenue dans sa décision concernant le différend opposant le Nicaragua aux États-Unis. Pour la Cour « le recours unilatéral à la force ne saurait être une méthode appropriée pour vérifier et assurer le respect » des droits de l'homme⁷. En fait, la Cour ne faisait que confirmer sa jurisprudence de 1949 dans l'affaire du détroit de Corfou. A cette occasion, elle avait déjà qualifié le prétendu droit d'intervention autorisant l'intervention armée d'un État sur le territoire d'un autre État de « manifestation

⁵ Argument soutenu par la Belgique à l'audience publique de la C.I.J. tenue le 10 mai 1999 dans l'affaire « Licéité de l'emploi de la force » (Yougoslavie c. Belgique), CR 99/15, p. 17.

⁶ Décision du 11 juillet 1996 dans l'affaire Kardzic-Mladic. Voir Hervé Ascensio et Rafaëlle Maison, « L'activité des Tribunaux pénaux internationaux pour l'ex-Yougoslavie (1995-1997) et pour le Rwanda (1994-1997) », *AFDI*, 1997, pp. 395-396.

⁷ *Loc. cit.* (note 3), pp. 267-268

d'une politique de force qui, dans le passé, a donné lieu à des abus les plus graves» et qui n'a plus sa place dans le système des Nations Unies. Pour la Cour, «quelles que soient les déficiences présentes de l'Organisation internationale, ce prétendu droit ne saurait trouver aucune place dans le droit international». Selon la Cour, «entre États indépendants, le respect de la souveraineté territoriale est l'une des bases essentielles des rapports internationaux»⁸.

Le CICR, pourtant soucieux d'assurer l'aide humanitaire, n'en partage pas moins cette opinion. Pour Yves Sandoz, l'intervention armée d'un État «pour mettre fin à des violations graves et massives des droits de l'homme n'a pas sa place dans le système prévu par l'ONU»⁹. De même, d'après le Président Cornelio Sommaruga, dans le cadre de ce système, «le recours à la contrainte reste envisageable comme une ultime démarche face à des situations extrêmes de détresse»¹⁰.

Ainsi, l'intervention armée des États membres de l'OTAN en dehors du système des Nations Unies et sans l'autorisation expresse du Conseil de sécurité est contraire à la Charte, et ce malgré la noblesse de la cause qui l'a suscitée. Telle est l'argumentation soutenue par le président de la Fédération de Russie, la qualifiant d'agression ouverte¹¹. Trois jours après le début des frappes aériennes de l'OTAN, conjointement avec le Bélarus, la Russie soumettait un projet de résolution au Conseil de sécurité en vue de les condamner¹². Il fut rejeté par douze des quinze membres du Conseil, seules la Chine et la Namibie la cautionnant. Comment ce refus du Conseil de sécurité doit-il être interprété?

⁸ Affaire du détroit de Corfou, C.I.J. Recueil 1949, p. 35.

⁹ Yves Sandoz, «Droit ou devoir d'ingérence, droit à l'assistance: de quoi parle-t-on?», *RICR*, n° 795, mai-juin 1992, p. 227.

¹⁰ Cornelio Sommaruga, «Action humanitaire et opérations de maintien de la paix», *RICR*, n° 801, mai-juin 1993, p. 267.

¹¹ Cité par le représentant permanent de la Fédération de Russie aux Nations Unies lors de son intervention devant le Conseil de sécurité, 24 mars 1999, S/PV.3988, p. 3.

¹² Doc. S/1999/328.

L'interprétation de la Charte ne justifie pas l'intervention d'humanité

L'un des fondements juridiques de la requête de la République fédérale de Yougoslavie devant la Cour internationale de Justice est la violation de l'article 53, alinéa 1 de la Charte par les États membres de l'OTAN. Conformément à cette disposition, aucune action coercitive ne sera entreprise par les organismes régionaux sans l'autorisation du Conseil de sécurité, règle à laquelle l'OTAN ne s'est pas conformée. En pratique, l'exigence d'une autorisation expresse et positive, concrétisée par le vote d'une résolution du Conseil de sécurité en bonne et due forme n'a pas été toujours respectée. C'est ainsi qu'au Libéria, les sanctions économiques décidées par la CEDEAO (Communauté économique des États de l'Afrique de l'Ouest) ont été mises en œuvre, en 1992, par les forces d'interposition de cette organisation, qui s'est contentée d'informer le Conseil de sécurité après coup. Dans le cas du Kosovo, on peut se demander si l'absence de condamnation des frappes aériennes de l'OTAN par la résolution 1244 du 10 juin 1999, adoptée par le Conseil de sécurité après la fin des hostilités, peut être considérée comme une autorisation tacite *post facto* et à effet rétroactif de cette action coercitive¹³.

Se fondant sur une interprétation littérale de l'alinéa 2 de l'article 4 de la Charte, quelques juristes américains ont soutenu, dès la fin des années 60, que cette disposition n'interdisait que les seuls recours à la menace ou à l'emploi de la force dirigés contre « l'intégrité territoriale ou l'indépendance politique d'un État »¹⁴. *A contrario*, on pourrait soutenir que le recours à la force armée destiné uniquement à prévenir les violations graves et systématiques des droits de l'homme ou à y mettre fin, comme ce fut le cas de l'intervention de l'OTAN, serait licite, et ce d'autant plus que la promotion et le respect des droits de l'homme figurent en bonne place parmi les buts des Nations Unies auxquels se réfère précisément ce paragraphe. Il est intéressant de noter

¹³ Djamchid Momtaz, « La délégation par le Conseil de sécurité de l'exécution de ses actions coercitives aux organisations régionales », *AFDI*, 1997, p. 113.

¹⁴ Voir entre autres, Richard B. Lillich, « Self-help by states to protect human rights », *Iowa Law Review*, Vol 53, 1967.

que cette thèse a été rejetée avec véhémence, dès cette époque, par Ian Brownlie, aujourd'hui avocat de la République fédérale de Yougoslavie dans l'affaire de la licéité de l'emploi de la force l'opposant aux États membres de l'OTAN¹⁵. Le Professeur Brownlie reprend devant la Cour l'argumentation qu'il avait jadis développée. Pour lui, il ressort clairement des travaux préparatoires de la Charte que l'inclusion du membre de phrase « contre l'intégrité territoriale ou l'indépendance politique de tout État » exclut toute intervention justifiée par des motifs spéciaux, et qu'il a été ajouté sur la demande des petits États soucieux de s'assurer plus de garanties contre les velléités des grandes puissances¹⁶. Cette explication paraît convaincante. Le fait que les États membres de l'OTAN se soient engagés avant l'intervention à respecter la souveraineté et l'intégrité territoriale de la République fédérale de Yougoslavie, conformément aux résolutions pertinentes du Conseil de sécurité, ne saurait pour autant rendre licite leur action. L'interprétation de l'alinéa 2 de l'article 4 dans un sens favorable à l'inclusion de l'exception d'humanité à la règle de l'interdiction de recours à la force n'est d'ailleurs pas conforme à la pratique étatique et n'a pas reçu, à ce jour, l'aval de la majorité de la doctrine.

L'interprétation extensive de l'article 51 de la Charte a été enfin invoquée par la résolution de l'Assemblée générale de l'OTAN, adoptée en novembre 1998 comme fondement juridique de l'intervention humanitaire. Il a été soutenu que la défense des intérêts communs de la communauté internationale justifiait le recours à la légitime défense, du moins collective, des États¹⁷. Dans le cas du Kosovo, comme il a été rappelé, l'imminence d'une catastrophe humanitaire mettant en cause des obligations de nature *erga omnes* aurait justifié l'intervention.

La question de l'interprétation de la notion de légitime défense s'était posée dans le différend opposant le Nicaragua aux

¹⁵ Ian Brownlie, « Humanitarian intervention », in John Norton Moore (ed.), *Law and Civil War in the Modern World*, Johns Hopkins University Press, Baltimore and London, 1974, pp. 217-228.

¹⁶ Intervention à l'audience publique de la C.I.J., tenue le 10 mai 1999 dans l'affaire relative à la licéité de l'emploi de la force, CR 99/14, p. 24.

¹⁷ Doc. OTAN AR 295 SA 1998.

États-Unis. La Cour limite le recours à la légitime défense aux cas d'agression armée. A son avis, « dans le droit international en vigueur aujourd'hui, qu'il s'agisse de droit international coutumier ou du système des Nations Unies, les États n'ont aucun droit de riposte armée collective à des fins ne constituant pas une agression armée »¹⁸. Il est vrai que, dès cette époque, deux des juges, à savoir l'Américain Schwebel et l'Anglais Jennings, s'étaient prononcés en faveur d'une interprétation large de la notion de légitime défense, mais que leur opinion était minoritaire¹⁹. L'usage, même excessif, de la force par la République fédérale de Yougoslavie contre une partie de sa population ne saurait donc être assimilé à une agression.

Ainsi, le recours à l'interprétation des articles pertinents de la Charte pour justifier l'action militaire de l'OTAN n'est pas d'un grand secours. C'est sans doute la raison pour laquelle les États membres de l'OTAN ne se sont pas engagés, sauf exceptions, dans cette voie²⁰. A cet égard, l'intervention du représentant des Pays-Bas devant le Conseil de sécurité est significative. S'adressant aux États qui persistent, selon lui, à considérer les frappes aériennes comme contraires à la Charte, il exprime le souhait qu'ils réaliseront un jour que la Charte des Nations Unies n'est pas l'unique source du droit international²¹.

Le droit d'intervention d'humanité en gestation

Il a été soutenu que, dans les cas extrêmes, l'intervention armée pourrait être nécessaire à la défense de certaines valeurs universelles. L'OTAN fait de cette assertion le point fort de son argumentation. Les chefs d'État et de gouvernement participant à la réunion du Conseil atlantique, tenue à Washington les 23 et 24 avril 1999, ont insisté sur le fait que la crise du Kosovo remettait fondamentalement en cause des valeurs que défendent les États participant aux opérations militaires de l'OTAN : la démocratie, les droits de l'homme et la pri-

¹⁸ C.I.J. Recueil 1986, p. 110.

¹⁹ *Ibid.*, pp. 331-348 et 543-544.

²⁰ Voir l'intervention du représentant de l'Argentine devant le Conseil de sécurité, le 10 juin 1999, S/PV.4011, p. 19.

²¹ *Ibid.* p. 12.

mauté du droit. Javier Solana, secrétaire général de l'OTAN, prenait soin de préciser, à la veille des frappes aériennes, qu'elles visaient à mettre un terme aux violentes attaques perpétrées par les forces armées et les forces de police serbes, ainsi qu'à affaiblir leurs capacités de prolonger la catastrophe humanitaire²².

C'est dans ce sens que le président de la République française, Jacques Chirac, s'était prononcé. Il estimait que « la situation humanitaire constituait une raison qui peut justifier une exception à une règle, si forte et si ferme soit-elle »²³. La question qui se pose est finalement de savoir si la communauté internationale pourrait rester passive face aux violations massives des droits de l'homme, du fait de l'incapacité du Conseil de sécurité d'autoriser le recours à la force, suite au veto d'un membre permanent de ce Conseil. Il a été soutenu que, dans ce cas, il existait une « véritable obligation d'intervenir »²⁴, et ce d'autant plus, comme le Président Clinton n'a pas manqué de le relever, qu'il existait au sein du Conseil de sécurité un clair consensus sur le fait que les atrocités commises au Kosovo n'étaient pas acceptables²⁵. C'est bien la thèse soutenue par le secrétaire général des Nations Unies, Kofi Annan. Loin de condamner l'action de l'OTAN, il la légitime en se fondant sur le fait que, lorsque la paix est fortement menacée et qu'un drame humain est en train de s'accomplir, la communauté internationale serait en droit de recourir à la force si le Conseil de sécurité est dans l'incapacité de le faire²⁶. Ainsi, une règle de droit international pourrait s'effacer devant l'impérieuse nécessité de porter secours à des civils en danger.

Ces affirmations se sont révélées correctes dans le cas du Kosovo. Il existe en effet un « faisceau d'indices » dans ce sens²⁷ : plus

²² Communiqué de presse 99 (040) du 23 mars 1999.

²³ *Le Monde*, 8 octobre 1998.

²⁴ Intervention du représentant de la Belgique à l'audience publique de la C.I.J. tenue le 10 mai 1986 dans l'affaire de la licéité de l'emploi de la force, CR 99/15, p. 15.

²⁵ Déclaration de William Jefferson Clinton devant la 54^e session annuelle de l'Assemblée

générale des Nations Unies, 21 septembre 1999.

²⁶ Kofi A. Annan, « Two concepts of sovereignty », *The Economist*, 18 September 1999, et discours prononcé le 30 avril 1999 à l'Université de Michigan.

²⁷ Alain Pellet, « La guerre du Kosovo : le fait rattrapé par le droit », *Forum du droit international*, Vol. 1, 1999, pp. 158-163.

précisément, la non-saisine de l'Assemblée générale de l'affaire, au titre de la résolution Dean Acheson, permettant à cette dernière de recommander, en cas de paralysie du Conseil de sécurité, le recours à la force ; mais surtout, la résolution 1244 du Conseil de sécurité adoptée après la cessation des opérations militaires de l'OTAN. Le Conseil se garde en effet de condamner l'intervention de cette organisation, approuvant bien au contraire ses buts de guerre par l'annexion à cette résolution de la Déclaration des présidents et des ministres des Affaires étrangères du Groupe des huit après la réunion tenue le 6 mai 1999 à Petersberg.

La question reste néanmoins posée de savoir si une règle générale d'origine coutumière s'est d'ores et déjà cristallisée, autorisant, en cas de catastrophe humanitaire, le recours à la force sans l'accord exprès du Conseil de sécurité. On pourrait, certes, se référer aux précédents des opérations militaires menées par certains États européens au Congo en 1962, à celles de l'Inde au Pakistan oriental en 1971, du Viet Nam au Cambodge en 1978, et de la Tanzanie en Ouganda en 1979. Toutes ces opérations furent menées sous l'emblème humanitaire. Aucune de ces campagnes militaires ne reçut l'aval du Conseil de sécurité, qui s'est d'ailleurs gardé de les condamner par la suite. Dans un domaine où la pratique étatique est rare, ces précédents ne peuvent être sous-estimés. Ils constituent autant d'éléments en faveur du développement du droit international coutumier dans le sens de l'acceptation de l'exception humanitaire.

On ne peut prétendre pour autant qu'une telle règle se soit formée. De toute évidence, plus de circonspection s'impose. D'abord parce que, dans ce cas, le processus de formation de la règle coutumière est fondé sur une pratique manifestement illégale et qu'en définitive, elle ébranlerait une norme impérative du droit international.

Cette question a connu un regain d'intérêt ces derniers temps, intérêt ravivé par les événements du Kosovo²⁸. La doctrine s'ac-

²⁸ Voir l'importante étude de Dino Kritsiotis, « Reappraising policy objections to humanitarian intervention », *Michigan Journal*

of International Law, Vol. 19, Summer 1998, pp. 1005-1050.

corde généralement pour constater que, « dans ce domaine, le droit international évolue progressivement »²⁹. On pourrait ainsi envisager, exceptionnellement et dans des conditions strictement définies, la possibilité de recourir à la force, cette nouvelle exception à la règle du non-recours à la force ne pouvant être envisagée qu'en cas de violation systématique et grave des droits de l'homme, avec la connivence des autorités étatiques ou par suite de l'écroulement des institutions publiques. Dans tous les cas, l'intervention devrait être menée par un groupe d'États agissant dans le cadre d'une organisation régionale.

Il reste à espérer que la Cour internationale de Justice saisira l'occasion qui lui a été offerte par la République fédérale de Yougoslavie de se prononcer sur cette question litigieuse. Elle pourrait aussi le faire si la demande de la Fédération de Russie et du Bélarus pour un avis consultatif recevait l'aval de l'Assemblée générale. Par une proposition conjointe, ces deux États ont suggéré, dans le cadre du Comité de la Charte, que la Cour se prononce sur la question de savoir si « le droit international contemporain autorise un État ou un groupe d'États à recourir à la force armée sans décision du Conseil de sécurité prise conformément au Chapitre VII de la Charte, en dehors des cas de légitime défense individuelle ou collective prévus à l'article 51 de la Charte »³⁰.

De son côté, lors de sa session de 1999, l'Institut de Droit international vient d'inscrire à son ordre du jour la question de « la compétence des organisations internationales autres que les Nations Unies de recourir à la force armée », inscription qui sera incontestablement de nature à approfondir plus avant le débat sur cette question controversée.

²⁹ Voir plus particulièrement les contributions de Antonio Cassese, « *Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in World Community?* », *European Journal of International Law*, Vol. 10, n° 1, 1999, pp. 23-30; Bruno Simma, « Nato, the

UN and the use of force: legal aspects », *ibid.*, pp. 1-22.

³⁰ Rapport du Comité Spécial de la Charte des Nations Unies et du raffermissement du rôle de l'Organisation, AG Doc. Officiels, 54^e session, Supplément n° 33 (A/54/33), pp. 13 et suiv.

Conclusion

La reconnaissance du droit des organisations régionales de recourir à la force armée pour mettre fin à une catastrophe humanitaire est une question préoccupante. Elle ne créerait en réalité qu'un simple « droit d'ingérence humanitaire » en faveur de ces organisations régionales, qui resteraient libres de recourir à la force d'une manière sélective. Il y a fort à craindre que les intérêts des États membres de ces organisations et leurs impératifs de sécurité, plus particulièrement ceux de la puissance militaire dominante, soient les éléments décisifs de toute prise de décision de recourir à la force armée. L'humanitaire risquerait ainsi d'être un paravent permettant aux grandes puissances de mener à bien leur propre politique.

A défaut de pouvoir imposer une véritable « obligation d'ingérence humanitaire » aux États, il serait judicieux d'encourager les membres permanents du Conseil de sécurité de s'engager unilatéralement à ne pas recourir au veto à chaque fois que le Conseil de sécurité sera amené à traiter d'une catastrophe humanitaire. Une telle solution aurait l'avantage non seulement d'éliminer tout obstacle aux prises de décision de la part du Conseil de sécurité, mais de créer une véritable « obligation d'intervention » à la charge des États membres de l'Organisation des Nations Unies, avec l'aval du Conseil de sécurité.



*Abstract***NATO'S "humanitarian intervention" in Kosovo and the prohibition of the use of force**

by DJAMCHID MOMTAZ

After a careful analysis of the law regarding the use of force in international relations and the practice of States since 1945, the author concludes that the United Nations Charter leaves no room for a "humanitarian intervention" in the internal affairs of a State. In his opinion NATO's armed intervention in the Balkans in the spring of 1999 therefore has no legal basis under the UN Charter. He goes on to say, however, that the question whether NATO's action against the Federal Republic of Yugoslavia may not be justified by an existing or an emerging rule of customary law should be examined. Such a discussion should take into account, on the one hand, the magnitude of the humanitarian disaster to be averted, and on the other hand the absence of objections by the Security Council or (with rare exceptions) by States. The author concludes with an appeal to the permanent members of the Security Council not to use their veto when deciding on action to be taken in the event of humanitarian disasters.

Intervention armée des forces de l'OTAN au Kosovo

Fondement de l'obligation de respecter le droit international humanitaire

par
PÉTER KOVÁCS

La campagne militaire internationale lancée par l'Organisation du Traité de l'Atlantique Nord (OTAN) contre la République fédérale de Yougoslavie, dans le but d'empêcher une catastrophe humanitaire au Kosovo, a déjà fait couler beaucoup d'encre, et sans doute va-t-elle le faire encore. L'auteur de cette contribution laissera de côté la brûlante question de la légitimité d'une action militaire internationale contre un État sans l'autorisation préalable du Conseil de sécurité, car cette question mérite des analyses approfondies, dont les premiers fruits ont déjà vu le jour¹. Il ne traitera pas non plus de la responsabilité internationale de la République fédérale de Yougoslavie (RFY) dans le génocide perpétré au Kosovo, ni de la responsabilité individuelle de ses dirigeants devant le Tribunal pénal international pour l'ex-Yougoslavie (TPIY), dont les actes d'inculpation ont été délivrés en mai 1999. Il se limitera donc à la question souvent posée :

Péter Kovács est professeur de droit international public aux facultés de droit de l'Université catholique Péter Pázmány, Budapest, et de l'Université de Miskolc (Hongrie). — Le sujet de cet article a été présenté au Symposium, organisé par la Croix Rouge hongroise, à l'occasion du 50e anniversaire des Conventions de Genève (Budapest, 27-28 septembre 1999).

dans quelle mesure le droit international humanitaire a-t-il limité la capacité d'action de l'Alliance atlantique ?

La nature juridique du conflit

Etant donné que les raids aériens sur la Yougoslavie ont été lancés par une organisation interétatique, l'OTAN, il est *prima facie* évident qu'il faut classer cette situation comme un conflit armé international, selon les termes des Conventions de Genève. Cependant, il ne faut pas oublier que la situation est beaucoup plus compliquée si l'on en observe la cascade d'événements successifs et enchevêtrés : comme le Comité international de la Croix-Rouge l'a souligné, « depuis le début des opérations de l'OTAN contre la République fédérale de Yougoslavie, deux conflits simultanés et imbriqués l'un dans l'autre ont lieu dans le pays : d'une part celui entre la Yougoslavie et les États membres de l'OTAN (qui a débuté le 24 mars 1999) et, d'autre part, celui entre les forces yougoslaves et l'Armée de libération du Kosovo (UCK), qui date d'avant les derniers événements. »²

Ce dernier appartient-il à la famille des conflits armés internes, ou se situe-t-il dans le cadre des conflits armés d'origine interne, mais déjà internationalisés ? Ou encore, peut-on le ranger carrément parmi les conflits armés internationaux ? Cette question sera sans doute longuement débattue devant le Tribunal pénal international pour l'ex-Yougoslavie à La Haye — si le procès a vraiment lieu un jour...

En ce qui concerne les obligations juridiques incombant aux États membres de l'Alliance atlantique, cette distinction n'a qu'une valeur relative. En effet, les rapports entre la RFY et ces pays ont présenté, dès que ces États ont commencé les frappes, toutes les caractéristiques du conflit armé international. On a pu également mesurer la

¹ Voir, entre autres, A. Cassese, « *Ex iniuria ius oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?* », *European Journal of International Law*, vol. 10, n° 1, 1999, pp. 23-30, et B. Simma, « *Nato, the UN and the use of force: legal aspects* », *ibid.*, pp. 1-22.

² CICR, « Le conflit dans les Balkans et le respect du droit international humanitaire », du 26 avril 1999, *RICR*, n° 834, juin 1999, pp. 403-407 (également sur internet : www.cicr.org).

sagesse des codificateurs de Genève de 1949, car il n'y a pas eu de déclaration de guerre et les ambassadeurs ne sont normalement pas parties au conflit. On a donc assisté à des événements qui seraient inconcevables dans une guerre proprement dite. De même, les traités bilatéraux n'ont apparemment pas pris fin par le simple fait des hostilités et, d'une manière plutôt bizarre, certains membres de l'OTAN ont pu concilier la pleine adhésion à la politique des frappes, en tant que membres fidèles de l'organisation, et le refus d'être qualifiés de « belligérants », sur le motif qu'ils n'apportaient qu'un soutien logistique aux opérations.

Qui était donc partie au conflit, l'OTAN ou ses États membres pris individuellement? Même si l'on peut évoquer des raisons pour nier la qualité belligérante des organisations internationales (en particulier de l'ONU)³, l'auteur de ces lignes estime, en ce qui concerne l'opération armée au Kosovo, qu'il serait erroné, aussi bien politiquement que juridiquement, de faire un choix. Dans l'opération *Force alliée*, il s'agissait d'une action concertée avec une responsabilité solidaire de l'organisation et de ses États membres⁴.

Les obligations de respecter le droit humanitaire incombant aux forces onusiennes dans des opérations de maintien de la paix

Quelles sont les règles du droit international humanitaire qui doivent s'appliquer en l'espèce?

Il faut souligner la difficulté de la situation résultant du fait que la partie « belligérante » était officiellement une organisation inter-

³ Voir notamment C. Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, Collection Bleue, Wilson et Lafleur, Montréal, 1995, pp. 30-38.

⁴ La théorie de la responsabilité solidaire de l'ONU et des pays fournisseurs de troupe est partagée par Condorelli, mais contestée par Emanuelli, qui estime que l'ONU est exclusivement responsable. — L. Condorelli, « Le statut des forces des Nations Unies et le droit international humanitaire », C. Emanuelli

(éd.), *Les casques bleus : policiers ou combattants?*, Collection Bleue, Wilson et Lafleur, Montréal, 1997, p. 109, et C. Emanuelli, « Les forces des Nations Unies et le droit international humanitaire », L. Condorelli/A.M. La Rosa/S. Scherrer (éds.): *Les Nations Unies et le droit international humanitaire*, Actes du Colloque international à l'occasion du cinquantième anniversaire de l'ONU (Genève, 1995), Pédone, Paris, 1996, p. 368.

nationale non partie aux Conventions humanitaires internationales, celles-ci étant des traités interétatiques. De plus, il n'y a pas de précédent. Il est vrai qu'auparavant, l'OTAN avait déjà entamé une action (qu'on pourrait qualifier de coercitive) en libérant les alentours de Sarajevo, ville menacée et terrorisée par les forces serbes de Karadzic et de Mladic. Mais cette action, maintes fois sollicitée par le gouvernement de la Bosnie-Herzégovine, a été effectuée sur mandat du Conseil de sécurité. C'est pourquoi on estime que les frappes aériennes aux alentours de Sarajevo ont été lancées pour le compte de l'ONU. De fait, les règles du droit des conflits armés étaient applicables *mutatis mutandis* aux forces onusiennes. Il ne faut d'ailleurs pas perdre de vue que la pratique onusienne est beaucoup plus établie en matière d'opérations de maintien de la paix qu'en matière d'imposition de la paix.

Faute de mieux, regardons quand même les règles applicables aux forces de l'ONU. Les casques bleus des Nations Unies ont été utilisés à de nombreuses reprises dans des opérations de maintien de la paix, et dans ce domaine, on peut donc parler d'une pratique bien établie⁵. En revanche, les deux grandes opérations d'imposition de la paix ont été imparfaites. La première, lancée en Corée, selon la résolution 377(V) — et également connue sous le nom de « Union pour la Paix » ou « résolution Dean Acheson » —, s'est caractérisée par le rôle contesté de l'Assemblée générale et la paralysie du Conseil de sécurité, à cause de l'utilisation abusive du droit de veto des membres permanents.

Quant à la seconde opération, *Tempête du désert*, elle a été réalisée par une coalition *ad hoc*, même si le Conseil de sécurité a assumé ses responsabilités lors des sanctions contre l'Irak, et même s'il a donné mandat de libérer le Koweït. En effet, les articles 45 à 47 de la Charte des Nations Unies sur l'emploi de la force par les Nations Unies et la mise en place du Comité d'état-major ont été délibérément oubliés par le Conseil de sécurité ; en outre, la chute du mur de Berlin n'a pas réussi à changer l'attitude des membres permanents en la

⁵ P. Tavernier, *Les casques bleus*, PUF, Paris, 1996.

matière. On ne peut donc pas parler d'une pratique statutaire constante, mais plutôt d'une pratique généralisée de « l'*ad-hoc-isme* », pour emprunter les termes de Luigi Condorelli⁶.

Malgré ces imperfections, l'applicabilité du droit international humanitaire aux forces des Nations Unies n'a pas échappé à l'attention des experts. Comme règle générale, Alain Pellet remarque que « le Conseil de Sécurité a l'obligation absolue de respecter le *jus cogens* et la Charte des Nations Unies. (...) Ce sont les limites, et les seules limites, à son action. Pour le reste, il bénéficie d'un pouvoir d'appréciation qui ne peut faire l'objet d'aucun contrôle »⁷. A ce titre, on peut certainement prétendre que les opérations militaires de l'ONU doivent aussi obéir aux normes impératives du droit international, et en particulier à celles qu'on peut déceler dans le droit humanitaire.

La présence du *jus cogens* dans le droit humanitaire, affirmée par plusieurs auteurs⁸, a-t-elle été confirmée par la Cour internationale de Justice? Dans son avis consultatif, rendu sur la licéité des armes nucléaires, la Cour a évité de se prononcer sur ce point, même sous forme d'un *obiter dictum*, comme l'avaient suggéré plusieurs délégations nationales. La Cour a en effet dit :

« Il a été soutenu au cours de la présente procédure que ces principes et règles du droit humanitaire font partie du *jus cogens* tel que le définit l'article 53 de la Convention de Vienne sur le droit des traités du 23 mai 1969. La question de savoir si une règle fait partie du *jus cogens* a trait à la nature juridique de cette règle. La demande que l'Assemblée générale a adressée à la Cour

⁶ *Op. cit.* (note 4), p. 92.

⁷ A. Pellet, « Peut-on et doit-on contrôler les actions du Conseil de Sécurité? », *Le chapitre VII de la Charte des Nations Unies*, Colloque de Rennes, Société française pour le droit international (éd.), Pédone, Paris, 1995, p. 237.

⁸ J. Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, Institut Henry-Dunant, Genève, 1973, p. 18; L. Condorelli/

L. Boisson de Chazournes, « Quelques remarques à propos de l'obligation des États de « respecter et de faire respecter » le droit international humanitaire en « toutes circonstances », C. Swinarski (éd.), *Études et essais sur le droit humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, CICR/Martinus Nijhoff, Genève/La Haye, 1984, pp. 17 et 33.

soulève la question de l'applicabilité des principes et règles du droit humanitaires en cas de recours aux armes nucléaires et celle des conséquences que cette applicabilité aurait sur la licéité du recours à ces armes; mais elle ne soulève pas la question de savoir quelle serait la nature du droit humanitaire qui s'appliquerait à l'emploi des armes nucléaires. La Cour n'a donc pas à se prononcer sur ce point.»⁹

Par ailleurs, la Cour a toujours été plutôt réticente quand, d'une manière plutôt abstraite, elle a fait allusion au caractère à la fois conventionnel et coutumier des «principes généraux du droit humanitaire»¹⁰. La Cour avait déjà dû se prononcer sur la nature des règles du droit humanitaire dans l'arrêt rendu sur l'affaire du Détroit de Corfou, où elle a relevé l'existence des «considérations élémentaires d'humanité»¹¹. Plus tard, elle a développé ses considérations dans l'arrêt rendu à propos de l'affaire du Nicaragua :

«La Cour considère que les États-Unis ont l'obligation, selon les termes de l'article premier des quatre Conventions de Genève, de «respecter» et même de «faire respecter» ces Conventions, car une telle obligation ne découle pas seulement des Conventions elles-mêmes, mais des principes généraux du droit humanitaire dont les Conventions ne sont que l'expression concrète.»¹²

«(...) les principes généraux du droit humanitaire incluent une interdiction particulière acceptée par les États pour les activités se déroulant dans le cadre de conflits armés qu'ils soient ou non de caractère international. En vertu de ces principes généraux du droit humanitaire [les États] ont l'obligation de ne pas encourager des personnes ou des groupes prenant part au conflit (...) à violer l'article 3 commun aux quatre Conventions de Genève du 12 août 1949.»¹³

⁹ Licéité de la menace et de l'emploi de l'arme nucléaire, avis consultatif du 8 juillet 1996, C.I.J. Recueil 1996, par. 83, p. 36.

¹⁰ Activités militaires et paramilitaires au Nicaragua et contre celui-ci, arrêt du 27 juin 1986, C.I.J. Recueil 1986, pp. 113-114.

¹¹ Détroit de Corfou, arrêt du 9 avril 1949, C.I.J. Recueil 1949, p. 22.

¹² *Loc. cit.* (note 10), par. 220, p. 104.

¹³ *Ibid.*, par. 254, p. 119.

La Cour a souligné l'importance de la coutume dans le corps du droit humanitaire dans son avis consultatif rendu concernant la licéité des armes nucléaires :

« De nombreuses règles coutumières se sont développées, de par la pratique des États et font partie intégrante du droit international pertinent en l'espèce. Il s'agit des « lois et coutumes de la guerre » selon l'expression traditionnelle. (...) Les principes cardinaux contenus dans les textes formant le tissu du droit humanitaire sont les suivants. Le premier principe est destiné à protéger la population civile et les biens de caractère civil et établit la distinction entre combattants et non-combattants ; les États ne doivent jamais prendre pour cible des civils, ni en conséquence utiliser des armes qui sont dans l'incapacité de distinguer entre cibles civiles et cibles militaires. Selon le second principe, il ne faut pas causer des maux superflus aux combattants : il est donc interdit d'utiliser des armes leur causant de tels maux ou aggravant inutilement leurs souffrances ; en application de ce second principe, les États n'ont pas un choix illimité quant aux armes qu'ils emploient. »¹⁴

« C'est sans doute parce qu'un grand nombre de règles du droit humanitaire applicable dans les conflits armés sont si fondamentales pour le respect de la personne humaine (...) que la Convention IV de La Haye et les Conventions de Genève ont bénéficié d'une large adhésion des États. Ces règles fondamentales s'imposent d'ailleurs à tous les États qu'ils aient ou non ratifié les instruments conventionnels qui les expriment, parce qu'elles constituent des principes intransgressibles du droit international coutumier. »¹⁵

Dans cet avis consultatif, la Cour est arrivée à constater que la majeure partie du droit international humanitaire relève du droit coutumier :

« La large codification du droit humanitaire et l'étendue de l'adhésion aux traités qui en ont résulté ainsi que le fait que les

¹⁴ *Loc. cit.* (note 9), par. 75, p. 34, et par. 78, p. 35.

¹⁵ *Ibid.*, par. 79, p. 35.

clauses de dénonciation contenues dans les instruments de codification n'ont jamais été utilisées, ont permis à la communauté internationale de disposer d'un corps de règles conventionnelles qui étaient déjà devenues coutumières dans leur grande majorité et qui correspondaient aux principes humanitaires les plus universellement reconnus. Ces règles indiquent ce que sont les conduites et comportements normalement attendus des États.»¹⁶

La Cour a souligné également que le suivi scrupuleux des dispositions du droit humanitaire est un facteur constitutif pour assurer la proportionnalité des actes en cas de légitime défense: «(...) un emploi de la force qui serait proportionné conformément au droit de la légitime défense doit, pour être licite, satisfaire aux exigences du droit applicable dans les conflits armés, dont en particulier les principes et règles du droit humanitaires»¹⁷.

Comment ces règles humanitaires doivent-elles être observées par les forces des Nations Unies?

Dans les années 50 et 60, l'approche de l'ONU était plutôt pragmatique. L'obligation de respecter les règles du droit international humanitaire a été confirmée pour chaque opération par les accords spéciaux conclus entre les Nations Unies et les pays fournisseurs de troupes.

Ralph Zacklin, un expert juridique au bureau du conseiller juridique du secrétaire général des Nations Unies, a décrit le contenu de ces accords par les termes suivants: «L'accord sur les opérations de maintien de la paix que les Nations Unies concluent avec chaque État membre appelé à fournir des contingents dispose que les conventions internationales applicables à la conduite du personnel militaire et au droit international humanitaire doivent être observés. Les États qui fournissent des troupes pour ces opérations doivent s'assurer que les militaires appartenant à leur contingent sont instruits de ces conventions. La législation nationale et les instructions de mise en œuvre de ces traités sont également applicables.»¹⁸

¹⁶ *Ibid.*, par. 82, p. 36.

¹⁷ *Ibid.*, par. 42.

¹⁸ R. Zacklin, «Le droit applicable aux forces d'intervention sous les auspices de l'ONU» *op. cit.* (note 7), p. 198.

L'intervention en Corée a été, on le sait, maintes fois critiquée, surtout en ce qui concerne la légitimité de l'opération, et ce, alors qu'elle a servi une juste cause. Les règles humanitaires dont l'observation incombaient aux forces d'intervention ont été formulées par le chef d'état-major américain d'une manière qu'on peut qualifier d'adéquate et de correcte, car dans sa lettre datée du 5 juillet 1951 adressée au secrétaire général, il s'est référé aux Conventions de La Haye de 1907 et aux Conventions de Genève de 1949, que les forces avaient pour instruction d'observer à tout moment¹⁹.

Les dispositions des traités applicables aux forces agissant sous les auspices des Nations Unies à Chypre, en Irak et en Somalie²⁰, au Rwanda, en Haïti, en Angola et en Croatie²¹, ont suivi le chemin tracé, avec un résultat mitigé. Ralph Zacklin exprime des doutes quant au respect du principe de la proportionnalité, quant au choix des cibles et à l'emploi de types de munition lors de l'opération *Tempête du désert* ou lors de l'intervention de l'ONUSOM²².

Partageant l'idée que les forces des Nations Unies ne peuvent pas agir dans « un vacuum juridique »²³, Paul Tavernier constate à juste titre qu'« il est en effet admis depuis longtemps que les forces de maintien de la paix doivent respecter les règles du droit international humanitaire afin de pouvoir bénéficier elles-mêmes de la protection qu'elles prévoient. L'Institut de droit international (...) s'était prononcé en ce sens dès 1971. »²⁴ Selon Emmanuelli, l'Institut a admis cette idée en 1963 déjà²⁵.

De nombreuses questions ont été cependant soulevées pour l'application concrète de ces principes. L'une d'entre elles, particulièrement intéressante, est l'émergence de la possibilité d'une opposition entre normes contradictoires. Cette éventualité — bien que très peu probable — a été évoquée par Patrick Daillier :

¹⁹ Doc. ONU S/2232. Voir Zacklin, *ibid.*, p. 149.

²⁰ *Ibid.*, p. 197.

²¹ Voir D. Shraga, « The United Nations as an actor bound by international humanitarian law », in Condorelli/La Rosa/Scherrer, *op. cit.* (note 4), p. 325.

²² *Op. cit.* (note 18), pp. 196-197.

²³ Shraga, *op. cit.* (note 21), p. 338.

²⁴ *Op. cit.* (note 5), pp. 99-100.

²⁵ Emmanuelli, *op. cit.* (note 4), p. 350.

« Pour ce qui est des forces des Nations Unies, de l'examen de la pratique il apparaît qu'elles sont soumises à toutes les règles du droit de la guerre et du droit humanitaire qui ne sont pas en contradiction avec les principes de la Charte. La principale difficulté pourrait provenir d'une contradiction entre le droit international général — en particulier les Conventions de Genève de 1949 — et les dispositions des résolutions obligatoires du Conseil de Sécurité, mais c'est une éventualité qui semble devoir rester exceptionnelle. »²⁶

En réalité, l'élaboration minutieuse des résolutions du Conseil de sécurité et le pouvoir dont les membres permanents sont crédités excluent l'hypothèse de la violation du droit humanitaire par la création d'une norme qui l'enfreindrait.

« Le risque est plus grand, en fait, s'agissant des forces d'intervention au titre de la légitime défense collective. Le paradoxe des armes modernes — plus sélectives que les anciennes — est qu'en autorisant le choix d'un plus grand nombre de cibles tout en respectant le critère de la proportionnalité et de discrimination entre cibles civiles et militaires, elles autorisent (ou justifient?) des destructions qui pèseront sur le sort des populations civiles pendant une période plus longue après la fin de l'intervention militaire. Contrairement aux vœux des défenseurs des droits de l'homme, le déséquilibre entre pertes des personnels militaires et pertes dans la population civile joue en défaveur de cette dernière. »²⁷

C'est à la fin des années 80 que les Nations Unies ont de plus en plus senti le besoin d'un code applicable aux opérations militaires. La référence valait certainement pour la reconnaissance de l'obligation coutumière imposée aux casques bleus, conformément au dictum déjà cité de la Cour internationale de Justice. Mais pour trouver une base juridique plus solide que le simple rappel du droit international humanitaire, l'ONU a décidé de se charger de la formulation des normes juridiques.

²⁶ P. Daillier, « L'action de l'ONU : élargissement et diversification de l'intervention des Nations Unies », *op. cit.* (note 7), p. 149.

²⁷ *Ibid.*

Un pas important a été fait lorsque l'Assemblée générale a adopté, par la résolution 49/59, le texte de la Convention de New York du 9 décembre 1994 sur la sécurité du personnel des Nations Unies. Il couvre toute opération décidée par l'organe compétent de l'ONU, conformément à la Charte des Nations Unies, mais écarte « du champ d'application de la convention toute action coercitive menée en vertu du chapitre VII de la Charte et à laquelle s'applique le droit des conflits armés internationaux »²⁸.

Comment pallier les lacunes du droit applicable aux actions coercitives de l'ONU?

Le CICR a offert ses bons offices pour convaincre les experts des Nations Unies que la formulation d'un code militaire onusien était possible et qu'un document qui en résume les règles servirait mieux le but des militaires qu'un renvoi simple « aux principes et à l'esprit »²⁹. Ces efforts ont récemment abouti, car, le 6 août 1999, le secrétaire général des Nations Unies a promulgué, dans son Bulletin, un véritable code sur l'observation du droit international humanitaire par les forces des Nations Unies³⁰. Cette « Circulaire » semble combler les lacunes évoquées, car ses dispositions s'appliquent aux situations de conflit armé où les forces des Nations Unies sont effectivement engagées avec un mandat qui inclut l'usage de la force. Il s'applique indifféremment aux actions de coercition et aux opérations de maintien de la paix³¹.

La formulation des règles codifiées par la Circulaire du secrétaire général ressemblent à celles figurant dans différents textes préparés par le CICR à des fins de diffusion³². Elles sont la quintessence des Conventions de 1949 et de leurs Protocoles additionnels :

²⁸ Nguyen Quoc/P. Daillier/A. Pellet, *Droit international public*, 6^e éd., LGDJ, Paris, 1999, Paris, p. 935.

²⁹ Voir CICR, Extrait de droit international humanitaire : Réponse à vos questions – Question n° 18 www.cicr.org.

³⁰ « Respect du droit international humanitaire par les forces des Nations Unies », *Circulaire du Secrétaire général des Nations Unies*, ST/SGB/1999/13 du 6 août 1999. Voir égale-

ment A. Ryniker, « Respect du droit international humanitaire par les forces des Nations Unies », *RICR*, n° 836, décembre 1999, pp. 795-805, avec texte en annexe.

³¹ Circulaire, *ibid.*, article premier, par. 1.1.

³² P. ex. CICR, *Règles essentielles des Conventions de Genève et de leurs Protocoles additionnels*, Genève, 1983, ou F. de Mulinen, *Le droit de la guerre et les forces armées*, Institut Henry-Dunant, Genève, 1981.

- obligation de distinction entre civils et combattants, objets civils et objectifs militaires (article 5, par. 1) ;
- principe de la précaution, pour éviter ou diminuer les dommages causés aux civils (article 5, par. 3) ;
- interdiction des attaques sans discrimination ; interdiction des représailles contre les civils (article 5, par. 5) ;
- droit limité dans le choix des moyens et méthodes de combat (article 6, par. 1) ;
- interdiction d'utiliser du gaz asphyxiant ou d'autres armes interdites (article 6, par. 2) ;
- interdiction de lancer des attaques causant des dommages étendus, durables et graves à l'environnement (article 6, par. 3) ;
- interdiction de causer des maux superflus ou des souffrances inutiles (article 6, par. 3 et 4) ;
- interdiction de donner l'ordre qu'il n'y ait pas de survivants (article 6, par. 5) ;
- interdiction d'attaquer les monuments historiques, les œuvres d'art, les lieux de culte, les musées ou les bibliothèques, etc. (article 6, par. 6) ;
- interdiction d'attaquer ou de détruire des objets indispensables à la survie de la population (article 6, par. 7) ;
- interdiction d'attaquer les ouvrages et installations contenant des forces dangereuses (article 8, par. 8) ;
- obligation de protéger les personnes hors de combat (article 7, par. 1) ;
- interdiction de tuer, de torturer ou d'infliger des punitions collectives (article 7, par. 2) ;
- obligation de protéger les femmes contre le viol, la prostitution forcée, etc. (article 7, par. 3) ;
- protection des enfants (article 7, par. 4) ; etc.

Par l'incorporation de règles précises des traités humanitaires de 1949 et 1977 dans sa Circulaire, le secrétaire général a fait un geste important et courageux pour la pleine application du droit international humanitaire par les forces de l'ONU³³.

33 Voir aussi Ryniker, *op. cit.* (note 30).

Il reste à clarifier les dispositions relatives à la mise en œuvre des règles et à la sanction en cas de violation par un membre des forces onusiennes. Dès le début, les pays fournissant des contingents ont conservé leur droit et leur obligation de contrôler le comportement des forces mises à disposition de l'ONU, même si la responsabilité du contrôle est partagée entre l'État et l'organisation. Comme le CICR l'a rappelé, «il convient de souligner que les casques bleus restent tenus, par leur législation nationale, de respecter les instruments du droit international humanitaire auxquels leur pays d'origine est lié. En conséquence, s'ils violent le droit, ils peuvent être poursuivis devant leurs tribunaux nationaux»³⁴.

L'éventualité d'une violation du droit humanitaire par les forces onusiennes n'est pas une hypothèse d'école. La presse internationale a fait état d'actes de tortures qui auraient été commis en Somalie par certains membres du contingent italien de l'ONUSOM, dont la preuve était une séquence de magnétoscope. L'inculpation de neuf militaires du contingent canadien en Somalie témoigne de la réalité de l'obligation de réprimer des violations du droit humanitaire³⁵. L'article 4 de la Circulaire du secrétaire général le formule ainsi : «En cas de violation du droit international humanitaire, les membres du personnel militaire d'une force des Nations Unies encourent des poursuites devant les juridictions de leur pays.»

Après avoir parcouru «la pratique limitée découlant des actions coercitives et de l'expérience plus vaste acquise dans le cadre des opérations de maintien de la paix», Zacklin constate donc, à juste titre, que «d'une manière générale, le droit international humanitaire et les éléments du droit des conflits armés qui ont acquis le statut de droit coutumier sont applicables quant au fond, sinon en droit, aux actions coercitives des Nations Unies»³⁶. Condorelli est déjà prêt à affirmer que «c'est bien tout le corpus du *jus in bello* qui entre en jeu, la seule réserve étant que, vu que l'Organisation des Nations Unies n'est pas un État, le droit international humanitaire s'appliquera (...) *mutatis mutandis*»³⁷.

34 *Op. cit.* (note 29).

35 Zacklin, *op. cit.* (note 18), p. 198.

36 *Ibid.*, p. 199.

37 Condorelli, en Condorelli/La Rosa/Scherrer, *op. cit.* (note 4), pp. 469-470.

Les obligations du droit humanitaire incombant à l'Alliance atlantique et à ses États membres

Selon Patrick Daillier, «les forces d'une coalition d'États sont soumises au droit coutumier et aux normes conventionnelles acceptées par l'État qui assure le commandement des forces multinationales»³⁸. Mais que se passe-t-il quand les engagements conventionnels d'un État sont moins nombreux ou moins stricts que ceux des autres membres de la coalition? Pour plus de clarté, rappelons que les pays membres de l'Alliance atlantique ne sont pas tous formellement liés par le premier Protocole additionnel aux Conventions de Genève³⁹ (les États-Unis, la France et la Turquie n'y ont pas encore adhéré). Il y a quelques années, Françoise Hampson a déjà attiré l'attention au défi d'un futur conflit de normes à l'intérieur l'OTAN⁴⁰. En effet, vu l'importance de l'acquis du Protocole I, notamment la codification des principes de la précaution et de la proportionnalité, la question se pose de savoir jusqu'où l'état-major de l'OTAN s'est penché sur le respect des règles de 1977. Avait-il l'obligation de le faire?

Il va sans dire qu'aucune partie aux instruments de Genève ne peut se soustraire à leur respect selon l'argument qu'elle ne fait rien d'autre que suivre la position de l'organisation. Depuis l'adoption des Conventions de 1949, le principe *si omnes* n'est plus applicable, et les parties contractantes doivent observer les dispositions concrètes «en toutes circonstances»⁴¹. Il est vrai que si l'on devait trancher uniquement sur la base des principes classiques du droit des traités, la réponse serait assez nuancée et s'approcherait d'une situation «à deux vitesses»⁴². On ne peut cependant pas perdre de vue l'exemple que le secrétaire général a osé donner, en reprenant presque mot à mot, dans sa Circulaire, les dispositions du Protocole I, et ce, apparem-

³⁸ *Op. cit.* (note 26), p. 149.

³⁹ Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), 8 juin 1977.

⁴⁰ F. Hampson, «States' military operations authorized by the United Nations and international humanitarian law»,

Condorelli/ La Rosa/Scherrer, *op. cit.* (note 4), p. 397.

⁴¹ Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949, article 1.

⁴² Convention de Vienne sur le droit des traités, article 40, par. 4.

ment sans se faire trop de souci quant au nombre d'États membres qui sont parties aux traités mentionnés⁴³.

Il y a d'ailleurs un facteur qui facilite notre raisonnement. Il est à noter que, même en s'abstenant de l'adhésion formelle, les États Unis ont incorporé un grand nombre de dispositions du Protocole I de 1977 dans leur code militaire, comme en témoigne le document *Air Force Intelligence and Security Doctrine*⁴⁴. Dans ce document fort intéressant, qui s'occupe plus spécialement des règles de droit international relatives au choix des objectifs militaires⁴⁵, se trouvent des définitions quasi identiques à celles du Protocole I. En ce qui concerne la définition des objectifs militaires, par exemple, on peut lire la règle suivante : « Military objectives are 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 offers a definite military advantage »⁴⁶. Cette définition nous rappelle à l'article 52, par. 2 du Protocole I : « Les attaques doivent être strictement limitées aux objectifs militaires. En ce qui concerne les biens, les objectifs militaires sont limités aux biens qui, par leur nature, leur emplacement, leur destination ou leur utilisation apportent une contribution effective à l'action militaire et dont la destruction totale ou partielle, la capture ou la neutralisation offre en l'occurrence un avantage militaire précis. »

La conformité est à constater aussi ailleurs. Ainsi, la définition du lien requis entre les installations industrielles et l'appui donné aux forces armées qui fait de ces installations un objectif légitime satisfait aux prescriptions du droit de 1977 : « Factories, workshops and plants that directly support the needs of the enemy's armed forces are also generally conceded to be legitimate military objectives. »⁴⁷ Le texte américain considère les moyens de communication comme objectif militaire. Toutefois, il ne précise pas la situation des installations

⁴³ Au 31 janvier 2000, 156 États sont liés par le Protocole I.

⁴⁴ Federation of American Scientists, Intelligence Resource Program: *Air Force Intelligence and Security Doctrine*, www.fas.org/irp/doddir/usaf.

⁴⁵ Chapitre 4: *Targeting and international law*.

⁴⁶ *Loc. cit.* (note 44), A 4.2.2.

⁴⁷ *Ibid.*, A 4.2.2.1.

contenant des forces dangereuses ou des barrages: «Controversy exists over whether, and under what circumstances, other objects such as civilian transportation and communication systems, dams, and dikes can properly be classified as military objectives. Modern transportation and communication systems are deemed military objectives because they are used for military objectives.»⁴⁸

Le document évoque cependant le principe de proportionnalité d'une manière conforme à l'article 51, par. 4 et 5 du Protocole I, et met en garde contre les «dommages collatéraux» aux vies humaines et aux biens de caractère civil.

«Precautions in Attack. — Only a military objective is a lawful object of the attack. Therefore, constant care must be taken when conducting military operations to spare nonmilitary objects and persons, and positive steps must be taken to avoid or minimize any civilian casualties or damage. The principle of proportionality must always be followed, which prohibits an attack when the expected collateral civilian casualties or damage to civilian objects is excessive or disproportionate to the military advantage anticipated by the attack.»⁴⁹

«Incidental Civilian Casualties Must Be Minimized. — Attacks are not prohibited against military objectives even though they may cause incidental injury or damage to civilians. In spite of precautions, such incidental casualties are inevitable during armed conflict. This incidental injury or damage must not outweigh the expected direct military advantage. That is, the potential military advantage must be balanced against the probable degree of incidental injury or damage to civilians. If an attack is carried out efficiently, using the principle of economy of force, against a military installation, it would not likely be violate this rule. On the other hand, if the attack were directed against objects used mainly by the civilian population in an urban area (even though they might also be military objectives) its military objectives would have to be carefully weighed against

⁴⁸ *Ibid.*, A 4.2.2.2.

⁴⁹ *Ibid.*, A 4.3.

the risks to civilians. Required precautionary measures are reinforced by traditional military doctrines such as economy of force, concentration of effort, target selection for maximization of military advantage, avoidance of excessive collateral damage, accuracy of targeting and conservation of resources.»⁵⁰

La définition des armes frappant sans discrimination est compatible avec les textes de Genève: «Indiscriminate Weapons. — The law on armed conflict also prohibits the use of any weapon that cannot be directed at a military target. However, a weapon is not unlawful simply because its use may cause incidental civilian casualties. An indiscriminate weapon is one that cannot be controlled, through design or function. Some weapons are considered indiscriminate because, although they can be directed at a military objective, they may have otherwise uncontrollable effects that cause disproportionate civilian injuries or damage. Biological weapons are an example.»⁵¹

On peut également constater la concordance entre le texte américain et le Protocole I en matière de protection des églises et des établissements culturels ou à but caritatif, malgré le fait que les États-Unis ne sont pas non plus parties à la Convention de 1954 de La Haye sur la protection des biens culturels: «Religious, Cultural and Charitable Buildings and Monuments. — Because they are not used for military purposes, buildings devoted to religion, art or charitable purposes, as well as historical monuments, may not be the object of air bombardment. However, combatants have a duty to identify such places with distinctive and visible signs. When such buildings are used for military purposes, they may qualify as military objectives and may be attacked. Lawful military objectives are not immune from attack because they are located near such buildings, but all possible precautions must be taken to spare the protected buildings.»⁵²

On peut donc constater que les obligations imposées aux forces aériennes américaines sont très proches de celles qui lient formellement presque la totalité des autres pays membres de l'Alliance

⁵⁰ *Ibid.*, A 4.3.

⁵¹ *Ibid.*, A 4.7.2.

⁵² *Ibid.*, A 4.5.2. — voir article 53 du Protocole I.

atlantique, en tout cas ceux qui ont effectivement participé aux raids aériens. Ainsi les règles les plus importantes du Protocole I sont-elles opposables à l'Alliance. Par l'incorporation unilatérale des règles conventionnelles (en partie coutumières), les autorités militaires américaines ont réussi à éviter les controverses, apparues lors de l'opération *Tempête du désert* entre les bombardiers américains et britanniques, sur l'interprétation divergente du principe de la proportionnalité, et qui ont abouti à un refus britannique de participer à certaines opérations⁵³.

L'application des règles conventionnelles et coutumières dans l'opération *Force alliée*

L'opération *Force alliée*, censée être un *Blitzkrieg*, a duré finalement environ 70 jours. Les opérations militaires se sont limitées aux raids air-sol et à l'activité des batteries antiaériennes yougoslaves, pour se terminer par l'acceptation par le gouvernement de la RFY des conditions de paix de l'Alliance atlantique. L'accord a été avalisé par le Conseil de sécurité, par la résolution 1244 du 10 juin 1999.

La moitié des opérations aériennes ont été effectuées par les forces américaines et l'autre moitié par les alliés européens⁵⁴. Suite à quelques erreurs militaires commises au cours des bombardements, l'Alliance atlantique a été très critiquée et a reçu plusieurs avertissements. Les critiques et les mises en demeure ont été lancées aussi bien par le CICR que par le haut commissaire des Nations Unies pour les droits de l'homme, et elles ont concerné essentiellement le choix des objectifs à bombarder. Parallèlement, les mêmes organismes et les mêmes personnalités ont condamné très fermement la chasse aux Kosovars et les autres crimes de guerre perpétrés par les forces régulières et paramilitaires de l'armée yougoslave. Notre article se limite toutefois à l'examen des critiques adressées à l'OTAN.

⁵³ Hampson, *op. cit.* (note 39), p. 400.

⁵⁴ Background Briefing by a Senior US Official, Toronto, 21 September 1999, www.nato.int/docu/speech/1999/s990921a.htm.

Après avoir présenté une note verbale, au lendemain des premières opérations, rappelant aux parties les obligations « découlant du droit international humanitaire et en particulier des quatre Conventions de Genève de 1949 »⁵⁵, Cornelio Sommaruga, président du CICR, a exprimé ses inquiétudes de la manière suivante : « Il est important de souligner notre préoccupation quant aux effets, en termes humanitaires, des frappes aériennes de l'OTAN sur la République fédérale de Yougoslavie, où les civils — terrés nuit après nuit dans des abris antiaériens — vivent dans la peur, la souffrance physique et l'angoisse quant au sort des membres de leur famille et de leurs voisins. »⁵⁶ Deux semaines après, le CICR a critiqué ouvertement l'organisation :

« Au cours de la première semaine des frappes aériennes, le nombre des morts et des blessés civils est en fait apparu comme faible. Toutefois, à mesure que l'offensive aérienne s'intensifiait et que le CICR, avec la Croix-Rouge yougoslave, a mené des évaluations des besoins humanitaires sur place, une augmentation correspondante du nombre des victimes civiles serbes, ainsi que des dommages plus importants infligés aux biens civils ont été observés. La destruction d'installations industrielles a privé des centaines de milliers de civils de leurs moyens d'existence. Des incidents majeurs ont impliqué des civils : d'une part la destruction d'un train de voyageurs sur un pont et, d'autre part, l'attaque de véhicules civils au Kosovo. Dans les deux cas on a déploré des morts et des blessés. (...) En vertu du droit international humanitaire, les parties au conflit doivent prendre toutes les précautions possibles lorsqu'elles lancent des attaques. Cela inclut de renoncer à des missions, s'il apparaît que l'objectif n'est pas de nature militaire ou que l'attaque risque de causer incidemment des pertes en vies humaines, qui seraient excessives par rapport à l'avantage militaire attendu. »⁵⁷

⁵⁵ CICR, communication à la presse n° 99/15 du 24 mars 1999.

⁵⁶ Discours de Cornelio Sommaruga, Président du CICR, Genève, 6 avril 1999.

⁵⁷ Déclaration du CICR du 26 avril 1999, *RICR*, n° 834, juin 1999, p. 405.

Le président Sommaruga s'est rendu sur place pour se faire une idée de la situation. Il a exprimé «son inquiétude quant aux conséquences humanitaires des opérations aériennes de l'OTAN (...) Rappelant que le CICR était résolu à venir en aide aux victimes, il s'est déclaré profondément bouleversé par ce qu'il avait vu, ainsi que par les témoignages des souffrances évoquées par des personnes qui [avaient] fui le Kosovo pour l'Albanie, l'ex-République yougoslave de Macédoine et le Monténégro, et par celles qui ont subi les frappes aériennes de l'OTAN.»⁵⁸ Le CICR et la Croix-Rouge yougoslave ont distribué des colis humanitaires aux victimes des bombardements, devenues, le plus souvent, des sans-abri.

Dans les milieux des Nations Unies, Mary Robinson, haut commissaire des Nations Unies pour les droits de l'homme, a exprimé ses préoccupations quant à l'application réelle du principe de la proportionnalité: «In the NATO bombing of the Federal Republic of Yugoslavia, large numbers of civilians have incontestably been killed, civilian installations targeted on the basis that they are or could be of military application, and NATO remains the sole judge of what is or is not acceptable to bomb. In this situation, the principle of proportionality must be adhered to by those carrying out the bombing campaign. (...) The principle of proportionality: It surely must be right to ask those carrying out the bombing campaign to weigh the consequences of their campaign for civilians in the Federal Republic of Yugoslavia.»⁵⁹

Le haut commissaire a également insisté sur le droit de regard du Conseil de sécurité sur les opérations: «The principle of legality. It surely must be right for the Security Council of the United Nations to have a say in whether a prolonged bombing campaign in which the bombers choose their targets at will is consistent with the principle of legality under the Charter of the United Nations.»⁶⁰

⁵⁸ CICR, communication à la presse n° 99/23 du 26 avril 1999.

⁵⁹ Report on the Human Rights situation involving Kosovo, submitted by Mary Robin-

son, High Commissioner for Human Rights, Geneva, 30 April 1999, OHCHR/99/04/30/A.

⁶⁰ *Ibid.*

Louise Arbour, procureur général auprès du TPIY, a pour sa part souligné la compétence de son Tribunal sur tous les acteurs prenant part au conflit. Et elle a fait allusion à la soumission volontaire des États à la juridiction du TPIY, tout en regrettant l'absence d'un engagement conventionnel de l'OTAN. Elle a par ailleurs rappelé l'obligation des États de réprimer les bavures :

« On 24 March 1999, 19 European and North American countries have said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts.

« Having said that, I am obviously not commenting on any allegations of violations of international humanitarian law supposedly perpetrated by nationals of NATO countries. I accept the assurances given by NATO leaders that they intend to conduct their operations in the Federal Republic of Yugoslavia in full compliance with international humanitarian law. I have reminded many of them, when the occasion presented itself, of their obligation to conduct fair and open-minded investigations of any possible deviance from that policy, and of the obligation of commanders to prevent and punish, if required. »⁶¹

Les considérations du procureur ont été également incluses dans le discours du haut commissaire pour les droits de l'homme⁶².

Human Rights Watch, apprécié pour sa campagne conséquente en faveur du respect des droits de l'homme, a exprimé aussi ses inquiétudes concernant le choix de cibles. Après avoir rappelé les bavures connues, elle a souligné son impression que le choix de certaines entreprises comme objectif était lié au fait que leurs propriétaires étaient des proches de Slobodan Milosevic⁶³.

⁶¹ Statement by Justice Louise Arbour, Prosecutor ICTY and ICTR, Press Release, The Hague, 13 May 1999, JL/PIU/401-E.

⁶² *Loc. cit.* (note 59).

⁶³ www.hrw.org/press/1999/may/nato0512.htm.

Quelle a été la réaction de l'OTAN à ces remarques et critiques? — Dans la première phase des opérations, les dirigeants de l'organisation ont insisté sur le fait que les cibles visées étaient uniquement des objectifs militaires faisant partie de la défense antiaérienne⁶⁴. Il serait nécessaire de les attaquer pour atteindre le but recherché de la campagne militaire: anéantir la capacité de la RFY de mener des attaques contre la population du Kosovo et arriver à une solution politique de la crise du Kosovo⁶⁵. Dans la deuxième phase, commencée au début d'avril, le but militaire était la dégradation progressive de l'armée serbe et de la police spéciale par les attaques lancées contre les facilités logistiques, les routes d'approvisionnement et contre les forces mêmes⁶⁶. Sur la liste des cibles, l'OTAN a clairement fait figurer les raffineries et les stocks de pétrole, les ponts, les passerelles des autoroutes et les antennes de radiocommunications⁶⁷. L'éventualité de dommages collatéraux est apparue dans le discours de l'OTAN, mais on était de l'avis que les dommages causés aux biens civils étaient minimes⁶⁸.

Après la première bavure, l'OTAN a reconnu l'erreur du pilote et a promis de mener des investigations approfondies. Par la suite, les responsables de l'OTAN ont à plusieurs reprises exprimé leurs profonds regrets devant la mort de civils. Ils ont ainsi essayé d'éviter de donner l'impression d'appliquer le critère «deux poids — deux mesures», attitude négative qui avait été perceptible lors de la campagne *Tempête du désert*⁶⁹. Les autorités atlantiques ont confirmé que leurs forces armées étaient liées, entre autres, par la règle de la précau-

64 Javier Solana, secrétaire général, NATO Press Release, 25 March 1999.

65 NATO Press Release, 23 March 1999.

66 *Objectives by Phase*, www.nato.int/pictures/1999/990401/b990401b.gif.

67 Voir p. ex. *Kosovo Targeting*, www.nato.int/pictures/1999/990402/b990402e.gif; www.nato.int/pictures/1999/990405/b990405h.gif; ou bien *Belgrade Targeting*, www.nato.int/pictures/1999/990404/b990404.gif; www.nato.int/pictures/1999/990405/b990405e.gif.

Maps and aerial views of post-and prestrikes used during the Press Conference by Air Commodore David Wilby, 6 April 1999, www.nato.int/structure/medialib/1999/m990406a.htm.

68 Statement by the NATO Secretary General, Press Release, 12 April 1999.

69 Voir la comparaison entre l'attitude américaine et l'attitude britannique lors de la guerre du Golfe, faite par Hampson, *op. cit.* (note 39), p. 408, et la critique de la première.

tion et l'obligation d'éviter des dommages collatéraux⁷⁰. Selon elles, les pertes civiles étaient plutôt imputables soit à une tragique coïncidence de circonstances (p. ex. la destruction d'un train civil sur le pont de Luzan)⁷¹, soit à des erreurs humaines (p. ex. la destruction partielle de l'ambassade de Chine à Belgrade, à cause d'une carte géographique désuète)⁷² ou techniques (p. ex. dommages causés à l'hôpital de Nis)⁷³. Après certaines attaques dont le but n'était pas vraiment évident⁷⁴, d'autres ont été lancées vers la fin avril contre des entreprises chimiques⁷⁵. Plus tard, des bombes au graphite ont touché des centrales électriques⁷⁶, des lignes à haute tension⁷⁷ ou des transformateurs électriques⁷⁸.

Suite au nombre croissant d'erreurs de cibles, dont plusieurs ambassades ont été victimes⁷⁹, des initiatives ont été lancées, visant à réduire le pouvoir du commandant suprême des forces de l'OTAN (SACEUR)⁸⁰, ou à réviser la procédure de sélection des cibles. Une des initiatives a été attribuée par la presse au ministre allemand des affaires étrangères, Joschka Fischer.

⁷⁰ NATO Statement on bombing of a refugee convoy in Kosovo, Associated Press, 15 April 1999. Voir également les déclarations de Jamie Shea et du général Giuseppe Marani, lors de la conférence de presse du 15 avril 1999 sur l'incident qui a eu lieu sur le chemin entre Prizren et Dakovica, www.nato.int/docu/speech/1999/s990415a.htm.

⁷¹ NATO Press Release, 2 May 1999.

⁷² OTAN, communiqué de presse, 8 mai 1999. Voir aussi la déclaration du 9 mai du porte-parole militaire, Walter Jertz, et une déclaration commune de MM. Tenet, directeur de la CIA, et Cohen, ministre de la défense américaine, reconnaissant le caractère erroné des informations utilisées pour la sélection des objectifs, *New York Times*, 9 mai 1999.

⁷³ Reuters, 7 mai 1999 ; voir aussi les bombardements de Surdulica, le 27 avril, et de Novi Sad, le 6 mai.

⁷⁴ Une entreprise d'appareils ménagers électriques a été détruite à Cacak, et aucun indice relevant un quelconque rôle militaire n'a été découvert, AFP, 1^{er} avril.

⁷⁵ P. ex. fin mars à Pancevo ; d'autres entreprises ont été touchées la nuit du 24-25 avril.

⁷⁶ P. ex. le 22 mai la centrale thermique de Kostalac et la centrale hydro-électrique de Bajina Basta. Ce jour-là, les raids aériens auraient visé presque la totalité des centrales électriques, selon la presse internationale.

⁷⁷ Le 24 mai 1999, à Novi Sad et à Nis.

⁷⁸ Le 8 mai 1999, à Belgrade, quatre transformateurs ont été temporairement paralysés.

⁷⁹ Il s'agit des ambassades espagnole, hongroise, indienne, norvégienne, suédoise et suisse.

⁸⁰ Voir la presse du 10 mai 1999.

Il faut cependant se rappeler que de nombreux témoignages et rumeurs portaient sur le fait que les forces yougoslaves utilisaient des civils comme boucliers humains⁸¹, qu'elles réquisitionnaient des établissements civils (hôtels, écoles, postes) à des fins militaires⁸², ou que les territoires bombardés étaient réaménagés avec des corps et des objets civils endommagés⁸³, ainsi que des positions militaires placées dans un environnement civil⁸⁴.

Selon l'appréciation des autorités atlantiques, jamais un tel niveau de professionnalisme et une telle précision n'ont été atteints dans une opération militaire, mais le rapport entre cible visée et cible directement touchée a été de 50 %⁸⁵ (pour apprécier ce chiffre il faut noter, malgré tout, qu'au cours de la Seconde Guerre mondiale, on a reconnu la précision comme suffisante si la bombe larguée tombait à environ 1,5 km de la cible⁸⁶). Pour sa part, le général Wesley Clark, commandant suprême des forces de l'OTAN, a récapitulé la philosophie de l'action militaire dans les Balkans : détruire l'appareil militaire et paramilitaire, la logistique, les instruments de la propagande étatique et l'approvisionnement pétrolier, pour empêcher les autorités de la RFY de continuer leur politique au Kosovo⁸⁷. Le ministre américain de la défense, William S. Cohen, a souligné la détermination des forces engagées de limiter les « dommages collatéraux » au sein de la population civile⁸⁸.

81 A Cirez, 20 000 personnes, à Klina, 500 personnes, à Srbica, 20 000 personnes. Voir USIA, Kosovo erasing history: Ethnic cleansing in Kosovo — Atrocities and war crimes by location, www.usia.gov/regional/eur/balkans/kosovo/hrreport/atrocit.htm.

82 Voir l'exemple de l'Hôtel Jugoslavija à Belgrade qui est devenu le siège des paramilitaires de M. Seseljs, appelé « les tigres », bombardé le 9 mai 1999.

83 Kosovska Mitrovica, *op. cit.* (note 81), et Djakovica, conférence de presse de général Dan Lead à Bruxelles, Magyar Nemzet, 20 avril 1999.

84 *Loc. cit.* (note 54).

85 *Ibid.*

86 *Ibid.*

87 Général Wesley K. Clark, Effectiveness and determination, 2 June 1999, www.nato.int/kosovo/articles/a990602a.htm.

88 Secretary of Defense William S. Cohen et général Henry Shelton, Chairman of the Joint Chiefs of Staff, at the Informal NATO Ministerial Briefing, Toronto, 21 September 1999, www.nato.int/docu/speech/1999/s990921b.htm.

Conclusions

Il est certainement trop tôt pour donner, déjà maintenant, une appréciation globale de l'opération *Force alliée*. On peut constater que, malgré la complexité de la situation juridique, liée aux engagements conventionnels différents des pays membre de l'OTAN, les règles applicables aux forces engagées dans le conflit ont été très proches des règles pertinentes du Protocole additionnel I de 1977.

Par l'incorporation unilatérale des dispositions humanitaires dans leur code militaire, les États-Unis ont comblé la lacune juridique qui aurait pu apparaître sans cela. Cette incorporation a concerné également les dispositions qu'on pourrait difficilement qualifier de « coutumières ». A ce titre, on attribue une importance primordiale à l'apparition du principe de la proportionnalité et à la règle selon laquelle il faut éviter les « dommages collatéraux » au cours d'opérations lancées contre les objectifs militaires. Comme on le sait, ces dispositions ont été méticuleusement rédigées lors de la Conférence diplomatique de Genève (1974-1977), et elles appartiennent aujourd'hui aux normes conventionnelles largement acceptées. Peut-être peut-on les ranger parmi les fruits de l'évolution progressive du droit international, notion supplétive de celle de la codification dans le langage onusien.

Ceci dit, les règles du droit international humanitaire applicables dans le conflit yougoslave sont assez claires et, de fait, très proches de celles appliquées par les Nations Unies. Il faut en outre rappeler qu'il y a, à côté du droit humanitaire écrit, le corps des règles coutumières. La pratique des Nations Unies montre que la différence entre les deux corps juridiques est de moins en moins tangible, ce qui amène l'ONU à exiger le respect des règles les plus importantes de 1977. La reconnaissance de règles du droit humanitaire qui appartiennent au *jus cogens* a facilité l'acceptation de règles nouvelles par les États, règles qu'ils ont essayé de refléter également dans la propagande médiatique.

Le code est prêt, il ne reste qu'à l'appliquer. Mais là est le vrai problème. Bien que, statistiquement, le nombre de bavures soit resté au-dessous du seuil de tolérance, on a du mal à réconcilier un tel raisonnement avec l'esprit du droit humanitaire. A ce titre, le meilleur moyen de prévenir des violations du droit est l'établissement des faits et la constata-

tion de la responsabilité individuelle de ceux qui sont à l'origine de son non-respect.

Souvenons-nous du fameux incident dit de Hull (Dogger Bank), en 1904, qui présente beaucoup de similarités avec les événements de 1999 dans les Balkans. Tous les étudiants en droit international sont censés savoir que le responsable de la tragédie des pêcheurs britanniques est le contre-amiral Rojdiestvensky, même si, selon la commission d'établissement des faits, «le contre-amiral a agi de bonne foi et [que] son honneur militaire n'est pas en cause». C'est pourquoi, loin d'affaiblir le crédit humanitaire de l'opération, l'investigation approfondie des bavures est essentielle.

Abstract

Armed intervention in Kosovo: the legal basis of the NATO forces' obligation to respect international humanitarian law

by PÉTER KOVÁCS

This article first considers how to explain the applicability of international humanitarian law to NATO's armed intervention in the Federal Republic of Yugoslavia during the Kosovo crisis. Despite the fact that NATO, as a regional governmental organization, is not a party to the various treaties of humanitarian law, the individual States participating in the campaign were bound to respect international humanitarian law in its entirety. In the author's opinion the United States, though not party to the 1977 Additional Protocol I, has unilaterally agreed to respect the content of these new rules on the conduct of military operations – it has incorporated many of them in its own military regulations – and was therefore bound to abide by them. In this context, the author also discusses the latest developments with regard to the applicability of international humanitarian law to forces acting under UN authority. The article finally examines the way the international rules affecting the conduct of military operations were respected by the intervening forces, with particular emphasis on the well publicized failures.

International humanitarian law and the Kosovo crisis: Lessons learned or to be learned

by

JAMES A. BURGER

The premise of this article is that the Kosovo crisis was a significant event in regard to the law of armed conflict. The event started off as a humanitarian crisis with refugees pouring out of Kosovo into neighbouring regions, especially Albania and the Former Yugoslav Republic of Macedonia. NATO initiated military action not specifically authorized by the UN, but consistent with and in support of previous UN decisions.¹ The legal basis for military intervention will not be addressed beyond relating it to the issue that is the focus of the following paper, namely the application of the law of armed conflict to the campaign in Kosovo. This article considers *jus in bello*, and not *jus ad bellum*. But the causation of the conflict must be taken into account in evaluating the military actions taken. In this regard the crisis was caused by a humanitarian situation which had important effects on neighbouring States and upon regional stability. Major human rights violations were taking place

JAMES A. BURGER is a retired U.S. Army Judge Advocate who served, among other assignments, as the Legal Advisor for IFOR in Sarajevo. He is at present a civilian attorney working with the U.S. Office of the General Counsel for the Secretary of Defense. — The opinions expressed in this article are those of the author, and do not represent the positions or policies of the United States or its Department of Defense.

within Kosovo. There was a massive movement of refugees forced out of Kosovo. It was feared that the conflict would spread. NATO nations decided that they had a legitimate right to intervene by taking military action.²

The questions to be addressed in this article are: what was the application of the law of armed conflict to this crisis, how was it applied, and what can be learned from it? However, the application of appropriate rules, such as those that apply to targeting, the treatment of participants who fall into hostile hands and other victims of the conflict, cannot be adequately judged without consideration of the underlying causes and reasons for the action. Were the military actions appropriate and proportionate to the stated political objectives and results? The rules that apply to refugees, war crimes issues, and the authority to govern within the context of a military operation also depend upon the situation caused by the underlying crisis. Are the laws in existence appropriate for the needs of peace-keeping operations? I believe that the need to consider causation will be evident in the following analysis.

The air war and targeting issues

The first and probably the foremost question concerns application of the law of armed conflict to the air war.³ The use of

¹ Acting under Chapter VII of the UN Charter the UN Security Council called in its Resolution 1199 of 23 September 1998 for the withdrawal of Serbian security forces from Kosovo. It decided that there was "a threat to peace and security in the region", and called upon the participants to improve the situation and initiate negotiations to bring this about.

² NATO Secretary General Javier Solana stated that Resolution 1199 gave the Alliance the right to use force: "We have the legitimacy to act to stop a humanitarian catastrophe". *Financial Times*, 10/8/98. See also Solana, "NATO's success in Kosovo", *Foreign Affairs*, Vol. 78, November/December 1999, pp. 114-120.

³ The question of the use of force in the Kosovo air campaign was submitted to the International Court of Justice by the Federal Republic of Yugoslavia, which complained about attacks against civilians, civilian objects, protected objects, etc. The Court declined to make a decision on jurisdictional grounds. See "Legality of use of force", *Yugoslavia v. United States of America*, ICJ *Press Communiqué* 99/33 of 2 June 1999. The same decision has been taken in the cases brought against other NATO nations involved in the air campaign.

force in the Kosovo crisis was largely through air power. Air power was openly announced as a means to stop the acts that were being perpetrated against the civilian population, and to force the Serbian government to agree to the settlement which had been accepted by the Kosovar Albanian delegation at Paris in March of 1999. If the Serbians would withdraw their forces, the air attack could be stopped. Suffice it to say here that the need to intervene to save lives and restore regional stability established the political objective for NATO's effort. There was a specific purpose for the military actions, and they must be judged at least in part on what the nations using the force were trying to achieve. The position of the NATO nations was that they were intervening to stop an ongoing crisis of international significance, and would use only so much force as was necessary to achieve the objective.

Targeting must always be judged primarily upon whether the targets were valid military objectives.⁴ In this regard the targeting process in Kosovo was not secret. It was well covered on the television and in newspapers. Initial targets hit were Serbian surface-to-air missile sites, military installations and troop concentrations. These clearly were military objects. Other targets used for both civilian and military purposes, such as bridges, roads and communications facilities, also were attacked. The law of armed conflict provides that attacks may be made only against objectives 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.”⁵

Bridges and roads were used to send military forces into Kosovo, whereas communications facilities were used to send orders to military forces and receive their reports, spread Serbian propaganda,

⁴ Protocol I additional to the Geneva Conventions of 12 August 1949, Art. 48 (Basic rule): “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects

and military objectives and accordingly shall direct their operations only against military objectives.”

⁵ Protocol I, Art. 52.2.

and generally prolong the war. Their damage or destruction was consistent with the definition of “military objective”.

Attack on a military objective also must take into account principles of the law of armed conflict that impose limits on collateral injury to civilians not taking part in hostilities and collateral damage to civilian objects, including cultural property. Collateral damage is unintended damage to property that is not itself part of a valid military objective, but is incidental to attack of that objective. The law of armed conflict establishes a duty to take reasonable precautions, consistent with mission accomplishment and force protection, to minimize incidental loss of life or injury to civilians and damage to civilian objects.⁶ Attacks that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects must not cause damage “excessive in relation to the concrete and direct military advantage anticipated”.⁷ “Military advantage” is not restricted to tactical gains. One must take into account the full context of a war strategy.

This obligation was taken into consideration by planners when targeting military objectives in Serbian cities. In those cases, an effort was made to limit risk to the civilian population and civilian objects though the use of precision-guided munitions, or by scheduling attacks at times, such as at night, when civilians were less likely to be present. Precision-guided munitions, the so-called “smart bombs”, and cruise missiles made famous in the 1991 Gulf War⁸ and used again in Yugoslavia, were the weapons of choice and used wherever possible. The law of armed conflict prohibition on indiscriminate attacks⁹ was

⁶ Protocol I, Art. 57.2(a)(ii): Those who plan or decide upon an attack must “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects.”

⁷ Protocol I, Art. 57.2(a)(iii).

⁸ For a description of law of war issues in the 1991 Coalition effort to liberate Kuwait, see U.S. Department of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, April 1992, pp. 605-632.

⁹ Protocol I, Art. 51.4, provides: “Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol...”

implemented through command guidance to call off an attack if weather or other circumstances prevented an aircrew from identifying and accurately targeting the military objective assigned to it for attack.

Collateral damage, however, cannot be completely excluded. Nor can mistakes in targeting, such as the bombing of the Chinese Embassy in Belgrade, which was the most obvious example during the Kosovo campaign.¹⁰ The inquiry into the cause of the incident indicated that it was brought about by a mistake in intelligence. The wrong building was identified in the targeting process. While there was some scepticism that such a mistake could be made, mistakes in conflict, though regrettable, are inevitable. The law of armed conflict prohibits the intentional targeting of civilian objects not being used for military purposes. It requires a good faith effort in planning an attack to take “feasible” precautions to minimize injury to the civilian population or civilian objects. “Feasible precautions” are defined as those measures that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹¹

A particularly difficult issue during the conflict was the decision to attack “dual use facilities” such as power plants, oil and petroleum depots, and buildings or building complexes used for civilian and military purposes. When a civilian object is put to military use, it loses its protected status.¹² The law of armed conflict does not permit the presence of the civilian population to render an otherwise valid military objective immune from attack. Parties to a conflict are

¹⁰ Embassies must be protected as civilian objects.

¹¹ Protocol I, Art. 57.2(ii) and (iii), and definition given in the declaration made by Italy on ratification of the 1977 Protocol I additional to the Geneva Conventions of 1949. This definition was subsequently incorporated into Article 1.5 of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980 Convention on Prohibitions

or Restrictions on the Use of Certain Conventional Weapons.

¹² The rule is that civilian objects are protected, but if, “by their nature, location, purpose or use” in the circumstances ruling at the time, they meet the definition of a military objective, they lose their status as civilian objects and become legitimate targets. See Protocol I, Art. 52, paras 1 and 2.

forbidden to make use of civilians to shield military objectives from attack.¹³ Their use for that purpose is itself a violation of the law of armed conflict.

There are circumstances when targeted facilities by their nature serve both military and civilian purposes. For example, communications facilities or power plants necessarily have a dual use.¹⁴ There may be no intention to disregard the rules, but these facilities cannot be considered protected from attack if they are being used for military purposes. In the Kosovo air campaign, in acknowledgement of the limited political objectives, an effort was made to distinguish as much as possible the military from the civilian aspects of these dual use targets. Planners endeavoured to strike targets in such a way that the military purpose for their attack would be obtained while minimizing, as far as practicable, the impact on the civilian nature of the target. Examples were the destruction, in a large building, of that part that was being used for military purposes. Another was cutting off power or communications lines, but doing so in such a way as to allow restoration as soon as possible for civilian uses once hostilities had ended.

The Kosovo air campaign witnessed an unprecedented review of targeting.¹⁵ Reviews were conducted at NATO headquarters among the member States, and also by individual States participating in the air campaign.¹⁶ There were military, political and legal reviews. Legal officers advising on operational law matters at each major command headquarters, at NATO headquarters in Brussels, military headquarters at SHAPE in Mons, Belgium, and in the NATO and national commands participating in NATO military actions, were involved in targeting decisions. There was recognition both of the

¹³ Protocol I, Art. 51. 7.

¹⁴ Note that this is not a question here of works or installations containing dangerous forces which are protected under Protocol I, Art. 56. The latter, e.g. dams and nuclear power plants, are objects the destruction of which could release dangerous forces and cause widespread injury among civilians.

¹⁵ The standards for review are clearly set out in Protocol I, Art. 57.2 (i), (ii) and (iii): Precautions in attack.

¹⁶ Today's laws of armed conflict clearly require a legal review of military actions. There must be legal advisors, and commanders must take legal rules into consideration. Protocol I, Art. 82.

obligation to follow the rules and of the fact that by limiting civilian damage the political and military objectives were better served.

Great effort was made to limit attacks to military targets, and to limit the extent of collateral injury to the civilian population and damage to civilian objects. In many cases targets were rejected because of their location in the vicinity of civilian housing or other civilian objects such as churches or hospitals,¹⁷ or if collateral damage might be expected to be politically if not legally excessive.¹⁸ Accurate aerial photography and sophisticated weaponry made this possible. In those cases where dual use targets had been designated for attack, attack approval was given at highest levels, often with strict strike parameters (such as previously described) so as to minimize the risk of collateral civilian injury or damage to civilian objects. In all cases there had to be a military connection, and the targets were determined to be military objectives.

Prisoners of war

A significant issue arose with the capture of three American soldiers in the Former Yugoslav Republic of Macedonia by Serbian forces. At first there was some confusion over the status of these personnel. They had been part of the UN preventive deployment force (UNPREDEP) in Macedonia, but the mandate for this force had just expired. They were not in Macedonia for the purpose of the conflict, but they were soldiers of a State participating in an international armed conflict who were taken prisoner on the territory of a neutral State. The Third Geneva Convention relative to the Treatment of Prisoners of War provides that prisoners of war include:

“Members of the armed forces of a Party to the conflict as well as members of militias or volunteer [civilian] corps forming part of such armed forces.”¹⁹

¹⁷ Protocol I, Art. 53: Protection of cultural objects and places of worship.

¹⁸ *Loc. cit.* (note 6).

¹⁹ 1949 Geneva Convention relative to the Treatment of Prisoners of War, Art. 4.A(1).

Members of the armed forces of a party to an international armed conflict who fall into the power of the enemy are prisoners of war. There is no distinction made as to where or how they are taken prisoner.

Some persons thought initially that it would be better to assert that the captured soldiers were illegal detainees, allowing the United States to demand their immediate release, rather than waiting until the end of active hostilities, as is the customary practice and the obligation for release or repatriation under the Third Convention.²⁰

It was clear that the nation taking the prisoners and the nation to whom the soldiers belonged were participating in hostilities. It was an international armed conflict between States. The laws of international armed conflict applied, and so did the Geneva Prisoner of War Convention. The United States correctly took the position that they were prisoners of war, and quickly announced this publicly. The prisoners were visited by delegates of the ICRC, and subsequently were released as fighting continued, even though under the Third Convention they could have been held until the cessation of active hostilities. The U.S. decision proved to be the right decision, because the soldiers were better protected under the clear rules provided by the Third Convention than under any vague human rights rules which could be applied to persons otherwise detained.

Another question of interest was the status of Kosovar Albanians who were taken into detention by Serbian forces, or Serbians who were taken as prisoners by the KLA (Kosovar Liberation Army). At issue was whether the conflict between the Serbian forces and the KLA had risen to the level of a non-international armed conflict covered by Article 3 common to the four Geneva Conventions of 12 August 1949²¹ or by the provisions of Protocol II additional to the 1949 Geneva Conventions and pertaining to non-international conflicts.²² I believe that both treaties were applicable in the circumstances that existed. Those are the exact type of persons Article 3 of the

²⁰ *Ibid.*, Art. 118. The release must take place "without delay" after active hostilities have ended.

²¹ Art. 3 common to each of the four 1949 Geneva Conventions provides basic protection for non-international armed conflicts. Protocol II provides more detailed protection,

including protection under Art. 5 thereof, for detained persons.

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II).

Conventions and Protocol II were designed to protect. Once the hostilities became an international armed conflict (with the commencement of the air campaign), the rules of the Third Geneva Convention clearly applied between the States participating in the conflict. This included the potential situation in which the NATO forces might receive a Serbian prisoner from the Kosovar forces. The rules could have been applied by and in regard to Kosovar participants, if the KLA or the Serbian forces had announced that they would be bound by such rules.

KFOR and rebuilding the civilian structure

After the military conflict ended, the United Nations Security Council authorized the deployment of KFOR (Kosovo Force),²³ which was established by NATO. It was premised upon an agreement of the Serbians and upon negotiation of a separate agreement with the Kosovar Albanians. These agreements, based on principles established at Rambouillet and Paris in February and March 1999, included conditions for the complete withdrawal of all Serbian forces from Kosovo, and the demilitarization and transformation of the KLA. The UN Security Council ratified the peace plan and established a separate UN civilian organization, the United Nations mission in Kosovo (UNMIK), to deal with the civilian issues.²⁴ This raises the question whether the laws of armed conflict are applicable to the military force in a peace operation, and what rules apply to protect the civilian population. The provisions of the Fourth Geneva Convention on belligerent occupation apply during an armed conflict. With the cessation of open hostilities, KFOR was not an occupying force.²⁵ Its authority was not based on the imposition of military control by a State upon another State, but on the authorization by the United

²³ UN Security Council Resolution 1244 of 10 June 1999.

²⁴ *Ibid.*

²⁵ Art. 6 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in

Time of War of 12 August 1949 provides that application of its provisions ceases upon the close of military activities, but that they may continue to apply during a regime of occupation.

Nations to keep the peace. In this regard a decided effort is under way to fully implement the civilian part of the UN regime as soon as possible.

If the law of armed conflict does not apply, what rules do apply? What rules are relevant as a template for protection of the civilian population? The basis for KFOR and UNMIK is UN Security Council Resolution 1244 (1999). It authorized KFOR to do all that was necessary militarily to keep the peace, and UNMIK to do all that was necessary to restore civilian order and government. This situation no longer required an application of rules of armed conflict, but of civilian control authorized by the UN and supported by a military peace-keeping force. One of the objectives of the United Nations regime was to re-establish all of the civil rights that must be provided by a legitimate democratic government, thus also including those laid down in generally accepted human rights conventions.²⁶ It must, however, be recognized that this is an interim situation where a conflict has been ended, but civilian control has not yet been restored. There are a multitude of general human rights rules which apply in any situation, but those which apply to a regime of belligerent occupation are not appropriate. There are very difficult problems in Kosovo. A clear example is the difficulty to proceed with judicial actions when there is no agreement on the national laws that apply. Kosovo is still part of Yugoslavia, but the majority ethnic Albanian population will not accept Yugoslav laws.

If the peace does not hold and conflict breaks out anew, the rules of international armed conflict would again apply. This was the solution in respect to the law of armed conflict used by NATO forces both in Bosnia and in Kosovo. The law of armed conflict was applied to situations where the circumstances made them applicable. Recently the UN Secretary-General has issued instructions to UN peace-keeping forces that they are to observe the rules of international armed conflict in their operations. The text states:

²⁶ In the Dayton Peace Agreement the parties specifically agreed to observe the International Covenant on Civil and Political Rights,

the Covenant on Economic, Social and Cultural Rights, etc. See Annex I to the Dayton General Framework Agreement of December 1995.

“They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defense.”²⁷

In this regard it is noted that the instructions in the Secretary-General’s Bulletin may be overly broad in that not all participants in peace-keeping operations are party to Protocols I and II or to some of the other agreements referenced in the bulletin. However, the principle is clear that the laws of armed conflict should apply to peace-keeping forces in the appropriate circumstances.²⁸

Provision of civilian relief

The immediate problem for KFOR and UNMIK was entering to restore order in Kosovo so that the civilian population could return, and then to enable relief to be provided to those who remained and to those who were returning. So many homes had been destroyed by the end of the conflict that many were without shelter, and winter was soon to come. Homes and living areas had to be made safe from mines placed during the war. But the legal responsibility of military forces is limited under the Fourth Geneva Convention and the Additional Protocols of 1977.²⁹ Articles 68 to 71 of Protocol I lay down some detailed rules in regard to providing relief to civilians, such as the duty to provide food and medical supplies and to allow the provision of such relief. However, this is an obligation which applies to armed conflict or military occupation, and not to a peace-keeping force.³⁰

²⁷ Observance by United Nations forces of international humanitarian law, UN Secretary-General’s Bulletin of 6 August 1999, ST/SGB/1999/13. See also IRRIC, No. 836, December 1999, pp. 812-817.

²⁸ For example, the U.S. Chairman of the Joint Chiefs of Staff Instruction 5810.01 (12 August 1966), which preceded the Secretary-General’s Bulletin, declares as a matter of policy (para. 4a): “The Armed Forces of the United States will comply with the law of war during the conduct of all military

operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, will apply law of war principles during all operations that are characterized as Military Operations Other Than War.”

²⁹ See, e. g., *loc. cit.* (note 25).

³⁰ Protocol I, Art. 69, provides for basic needs in occupied territories to be met, such as food, shelter and medical relief, and Art. 75 provides for fundamental guarantees for persons “in the power” of a party to a conflict.

The provision of relief to civilians outside military conflict situations properly remains a State obligation that may be tasked to military forces, but it is not an obligation imposed by international law upon military forces. The United Nations in Kosovo has taken upon itself to rebuild a civilian structure that had been completely destroyed. It also has taken upon itself the task of providing relief to a population devastated by the recent conflict. There has to be a civilian police authority to keep order, but there also must be food, shelter and medical supplies. A working government and a system of laws have to be re-established. The NATO military authorities rightly wished to leave this task as much as possible in the hands of the UN, and to provide the security to allow the civilian authorities to do what was necessary. But to a great extent the function of policing and civilian relief has been taken on by the military forces until the civilian structure can be re-established. Their task is difficult, and it is made more difficult because the applicable rules are not always entirely clear or appropriate for the problems that need to be addressed.

War crimes

Lastly, to what extent are the acts committed against civilians by Serbian forces or their agents in Kosovo war crimes? In the situation that preceded the international armed conflict, actions by the Serbian military forces led to the massive movement of refugees out of the country. Atrocities were committed which precipitated the conflict. It was recently estimated by a U.S. State Department report to the U.S. Congress that there may have been as many as 10,000 deaths brought about by the Serbian military operations in Kosovo.³¹ One of the most flagrant was the killing of 45 villagers in the town of Rajak. The bodies of the victims were found with their eyes gouged out, bound, and some decapitated. It might be debated whether the law of armed conflict applied to these acts, and whether they took place during a situation of non-international armed conflict under common

³¹ "Report to Congress", *New York Times*, 10 December 1999, p. 12.

Article 3 of the Geneva Conventions or after the conflict became international. This question was rendered moot, however, when the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Milosevic and other Serbian officials for the war crimes committed in Kosovo.³² ICTY asserted jurisdiction over all alleged war crimes in Kosovo.

More recently ICTY announced that it was looking into reports that NATO pilots had committed war crimes by bombing civilian targets. At the same time the Chief Prosecutor announced that these reports were not at the top of her priorities, and that she had more important things to look at.³³ ICTY subsequently announced that NATO actions were not being investigated, but merely that the prosecutor met with and received information from a variety of individuals and groups urging investigation.³⁴ In this regard, the above discussion that targets were selected because they were military in nature, and that great care was taken to consider the legal rules applicable, are appropriate considerations. Nations and their military commanders listened to their legal experts, and were well aware that their actions would be critically appraised.

Both IFOR/SFOR and then KFOR were given their supporting role for the International Criminal Tribunal for the former Yugoslavia by the North Atlantic Council. ICTY has the authority to investigate and to prosecute war crimes, and its authority applied equally to Kosovo as it did to Bosnia.³⁵ The types of support provided include security for ICTY personnel, intelligence information pertaining to security or their mission, some logistics support, and most sensitive assistance in detaining persons indicted for war crimes. Unlike in Bosnia, investigations in Kosovo were quickly started. There

³² Besides President Milosevic, also indicted were Milan Milutinovic (President of Serbia), Nikola Sainovic (Deputy Prime Minister, FRY), Dragoljub Ojdanic (Chief of Staff of the FRY Army) and Vlajko Stojiljkovic (Minister of Internal Affairs of Serbia). See ICTY press release JL/PIU/403-E, 27 May 1999.

³³ AP press release, 28 December 1999, and "UN Tribunal Plays Down Scrutiny of NATO Acts", *New York Times*, 30 December 1999.

³⁴ ICTY press statement, 30 December 1999.

³⁵ The authority of ICTY is based on the UN Security Council resolution under which it was set up, and applies to all of former Yugoslavia.

was no argument over whether KFOR should be involved in making detentions. In this regard there was no danger of dealing with a still existing military threat, as had been the case in the early days of IFOR. Also, rules for detention had already been established by IFOR and SFOR and served as a point of departure for similar procedures in KFOR.

The rule which I participated in formulating as Legal Advisor to the IFOR Commander was that the NATO forces would not hunt out war criminals, but they would detain indicted war criminals if they came across them in the course of their normal military operations, and hand them over to the ICTY authorities. ICTY and the military authorities are more used to each other's missions and to working together. But it is still a problem that the responsibility to make the detentions falls, out of necessity, upon military rather than civilian authorities. KFOR can make detentions based upon ICTY indictments, or it can act under general rules of the laws of armed conflict or its own rules of engagement to stop crimes committed in its presence, but not based on mere suspicion of criminal activities.³⁶ Military authorities neither can nor should replace civilian authority to arrest civilian offenders, including war criminals.

Conclusion

Important lessons can be learned from the conflict in Kosovo. The special problems in targeting are a consequence of modern war and society. As has been the experience of all wars of the past century and a half, the fact that military and civilian targets are inter-mixed is part of modern industrialized society. Dual use does not preclude attack of a military objective, but the increased precision of weapons also makes it possible to limit and distinguish between the two aspects of targets, and to make a special effort to limit civilian casualties and collateral damage. The existence of modern weapons

³⁶ "Rules of Engagement for open publication", reprinted in Appendix 5 to the KFOR ROE, a NATO document dated 7 June 1999.

which permit soldiers to distinguish between civilian objects and military objectives provides not only a military advantage, but also added opportunities for those who are planning the targeting in order to comply with national or alliance policy objectives, with military campaign objectives (as determined by policy objectives), and with the laws of armed conflict. In Kosovo the extent to which legal advice was sought and considered in planning and targeting was an extremely important aspect of the conduct of the conflict. 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.³⁷ This is an important lesson to be learned from the Kosovo conflict as regards applying the rules to actual conflict situations.

However, it would be wrong to assume that these are the only lessons. Other significant issues included the determination of who were prisoners of war, the rules applicable to the investigation and prosecution of war crimes, and, perhaps most importantly, determination of the extent of application of the law of armed conflict to a situation that changed from conflict to peace-keeping. Even where the law of armed conflict technically does not apply, it serves as an indispensable template for military conduct. As I observed earlier, the conflict was precipitated by a humanitarian crisis of huge dimensions. It presented the problem of how the world community can deal with such a crisis. Bringing relief to victims of a conflict is as much a responsibility under the laws of armed conflict as is the responsibility to limit the use of force and make discriminating decisions in choosing targets. But once the UN or nations acting in a peace-keeping capacity decide to intervene in a crisis situation, what rules will apply? Are there sufficient rules to provide guidance to rebuild the civilian structure, bring war criminals to justice, and bring the hostile parties together? Indeed there are. And this too is one of the lessons learned from the Kosovo crisis.

³⁷ Protocol I, Art. 82 requires that parties to that treaty "ensure that legal advisers are

available, when necessary, to advise military commanders".

There is a very significant issue in the Kosovo experience of how well the laws of armed conflict do apply to peace-keeping missions. One aspect is the status of the rules to be followed by the forces themselves, and I have noted in this regard the UN Secretary-General's Directive of 6 August 1999. There is no question that the forces should be trained in and ready to apply the rules in appropriate situations. But the bigger question is to know what rules apply to the broader humanitarian situation. The laws of armed conflict may specifically not apply, but there is a need to apply forms of protection to victims in a peace-keeping situation similar to those provided for in a conflict situation. There is a period after the conflict ceases and before peace is truly re-established that must be considered as well. Much of the responsibility necessarily belongs to the civilian authority in the peace-keeping mission, and the military forces take on a supporting role. Responsibilities and rules must be studied in this light. This might be the most important lesson learned from the Kosovo conflict.



Résumé

Le droit international humanitaire et la crise du Kosovo — Une leçon pour l'avenir

par JAMES A. BURGER

L'auteur passe en revue quelques problèmes importants qui se sont posés pendant l'intervention des troupes de l'OTAN au Kosovo et intéressant sur le plan du droit international humanitaire. La première question est évidemment celle de savoir si le droit des conflits armés était applicable à la campagne militaire ou non, question à laquelle l'auteur répond par l'affirmative. Vue sous l'angle juridique, la situation prévalant au Kosovo après la fin des hostilités actives est cependant moins claire. L'auteur analyse ensuite, entre autres, les règles juridiques relatives à la conduite des hostilités, telles que codifiées par le Protocole I de 1977, ainsi que la question du statut des combattants (appartenant aux différentes forces armées) tombés aux mains de l'adversaire. En conclusion, Burger souligne le rôle important que les juristes militaires et experts en droit international humanitaire ont joué dans ce conflit, notamment comme conseillers des officiers chargés de désigner les objectifs des attaques aériennes. L'action militaire au Kosovo aurait selon lui permis de faire des expériences précieuses quant à la mise en œuvre du droit international humanitaire en vigueur.

Kosovo 1999: The air campaign

Have the provisions of Additional Protocol I withstood the test?

by
PETER ROWE

The air campaign began on 24 March 1999. It ended with the conclusion of the Military Technical Agreement between the International Security Force and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia of 9 June 1999.¹ Between these two dates 10,484 strike sorties were flown by NATO aircraft and 23,614 munitions were released.² No NATO casualties were reported arising out of these strike sorties. The damage or destruction caused in Kosovo alone was in the order of “181 ... in the tank category, 317 in the [armoured personnel carrier] category, 600 in the military vehicles, and 857 in the artillery and mortars [categories].”³ In addition, many targets were attacked in other parts of the Federal Republic of Yugoslavia (FRY). This article will attempt to analyse the campaign from the standpoint of the obligations imposed by Additional Protocol I of 1977⁴ and will draw upon the debates in the United Kingdom Parliament to illustrate how, in practical terms, the Protocol was viewed by those responsible for the actions of the armed forces of one of the NATO member States.⁵

The political and military objectives of the campaign were stated to be “to stop the killing in Kosovo and the brutal destruction of human lives and properties; to put an end to the appalling

humanitarian situation that is now unfolding in Kosovo and create the conditions for the refugees to be able to return; to create the conditions for a political solution to the crisis in Kosovo based upon the Rambouillet agreement.”⁶ These objectives were often stated, in short, to be to “have a major impact on Belgrade’s war machine (...) to degrade its ability to carry out the current acts of violence in Kosovo (...) to attack, degrade, disrupt and further diminish the capacity of the Serb war machine to perpetrate these atrocities against its own people”.⁷

These objectives set a difficult task for international humanitarian law to control. This was largely because the conflict did not fit within those types of armed conflict envisaged by the drafters of Additional Protocol I or by those States which had become High Contracting Parties to it. There were no ground forces engaged in combat against each other, but only attacks from the sea, and more particularly from the air, against targets on land. The principal aim was, in reality, to compel FRY to remove its forces from Kosovo, a part of its own territory, after which the other political aims could be achieved. The conflict was, therefore, quite unlike any other. Denied the persuasive value of precedent in a situation where their air attacks were largely unopposed by enemy forces, NATO military commanders and politicians were forced to think through the consequences of each military action.

¹ See also Security Council Resolution 1244 of 10 June 1999.

² Lord Robertson, *Kosovo: An Account of the Crisis*, Ministry of Defence, London, 1999.

³ Brigadier-General Corley at NATO press conference on the Kosovo Strike Assessment, 16 September 1999.

⁴ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵ The UK carried out 15.4% of all NATO strike sorties but it released only 4.2% of all air-delivered munitions (author’s analysis of figures to be found in *op. cit.* (note 2)).

⁶ Secretary-General of NATO at NATO press conference, 1 April 1999. See also the Foreign Secretary, H.C.Debs. Vol. 331, col. 887, 18 May 1999; Vol. 329, col. 665, 19 April 1999; *Joint Statement on the Kosovo After Action Review*, presented by the Secretary of Defense William S. Cohen and General Henry H. Shelton, Chairman of the Joint Chiefs of Staff, before the United States Senate Armed Forces Committee, 14 October 1999; Shea, Briefing on Kosovo, NATO, 30 April 1999 — none of these statements are identical.

⁷ General Wesley K. Clarke, Supreme Allied Commander Europe (SACEUR), at NATO press conference, 1 April 1999.

A legitimate target

The Protocol is quite clear on what are *not* legitimate targets, namely, civilians and civilian objects.⁸ Military objectives, on the other hand, may be attacked. The problem is in defining such an objective. Thus, Article 52(2) limits military objectives 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.”⁹

Article 52(2) makes use of two phrases that may be said to be designed to limit military action. First, the object must make “an effective contribution” to military action and, secondly, its destruction etc. must offer “a definite military advantage”. In an armed conflict involving the armed forces of a State engaging the armed forces of another State these limiting phrases give rise to little difficulty, since it will not be difficult to show that an enemy’s military equipment, or civilian objects used for military purposes, make an effective contribution to military action in some way or other and, if destroyed, would offer a definite military advantage. Thus, all military structures or equipment (whether used for attack or defence) or command and control centres would clearly be military objectives. Objects which have a dual use, such as bridges, railway lines, roads and so on, would also be military objectives providing they satisfy the two limitations set out above.¹⁰

There is, however, a danger of taking too academic an approach to what is essentially a practical test of legitimacy. It is, no doubt, for this reason that a number of States indicated on ratification

⁸ Protocol I, Art. 48, combined with the other provisions of Part IV.

⁹ For a discussion of the history of this concept see Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977*, ICRC/Martinus Nijhoff, Geneva, 1987, and for an attempt to draw up indicative categories of military objectives see the *ICRC Draft Rules for the Limitation of Dangers Incurred by the*

Civilian Population in Time of War, 1956, Art. 7, reprinted *ibid.*, p. 632. See also Art. 8(1)(a) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹⁰ See D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 160 (by Stefan Oeter).

of Protocol I that “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”¹¹

How does all this apply to the Kosovo air campaign? Given the non-involvement of ground forces the air campaign was predicated on the political and operational objectives described above. There were substantial military assets and personnel within Kosovo during the conflict, but it is unlikely that the majority of these were involved in attacks upon the Kosovar Albanian population who were not taking a part in the hostilities.¹² NATO’s objectives included the protection of this category of civilian from “the brutal destruction of human lives and properties” and, it must be assumed, not the protection of the KLA fighters. Nevertheless, since it was clear that the Kosovar Albanian population could not be protected effectively unless the FRY military presence was removed from the Kosovo region, this became the primary political goal. The situation can be likened (in fact but not in law) to the unlawful occupation of the territory of another State as in the Falklands/Malvinas conflict (1982) or the invasion of Kuwait by Iraq in 1990, where military campaigns were directed at removing the respective unlawful occupiers. There can be little doubt that FRY military assets were, therefore, legitimate targets since their destruction etc. would offer a definite military advantage if their presence in Kosovo was “removed”. Especially would this be the case where the attack is considered as a whole.

Members of the armed forces of FRY would be legitimate combatants who might also lawfully be attacked.¹³ Whether police officers can be attacked depends upon whether they are members of a force that has been incorporated into the armed forces of a State,¹⁴ or civilians who have taken a direct part in hostilities.¹⁵ It is not clear

¹¹ Reservation (i) entered by the UK upon ratification of Protocol I, 28 January 1998, see *IRRC*, No. 322, March 1998, p. 186 ff., and www.icrc.org/ihl. — The German reservation is identical, see Fleck, *op. cit.* (note 10), p. 162.

¹² E.g., the Kosovo Liberation Army (KLA).

¹³ Protocol I, Art. 43(2).

¹⁴ Protocol I, Art. 43(3).

¹⁵ Protocol I, Art. 51(3). See C. de Rover, “Police and security forces”, *IRRC*, No. 835, September 1999, p. 638.

whether the police forces who were active in Kosovo and who took part in actions against Kosovar Albanian civilians were members of a force that had been incorporated into the FRY armed forces. If they were not, the issue arises as to whether they took a "direct part in hostilities". By using the term "hostilities" the Protocol clearly envisaged armed conflict between the armed forces of States. The FRY police were not attacking NATO forces but a particular group of their own fellow-citizens. They were therefore doing something which NATO forces wished to prevent. The difficulty, however, is that even if it could be argued that they were taking a "direct part in hostilities" by attacking members of the Kosovar population, they would only be legitimate targets while they were so acting. This is in marked contrast to members of the armed forces who may be attacked at any time simply because they have that particular status. It is possible that such a distinction might be made by individual members of ground forces had they been involved, but unrealistic to have expected NATO aircrew to be able to make this distinction from their operational height.

The difficulty with dual purpose objects such as bridges, roads, railway lines, power stations, broadcasting facilities and the like is to determine whether the potential targets of this type make an "effective¹⁶ contribution to military action" and whether their destruction etc. would offer "a definite¹⁷ military advantage". The limiting effect of these words is particularly significant here. The said objects will obviously make an effective contribution to the ordinary commerce of life in general (including military activity), but this is not the same as saying that they make an effective contribution to military action. Nor will their destruction (taken as a whole) necessarily lead to a "definite military" advantage. The dangerous line of thinking is that merely *because* the military may make use of an object (and they are unlikely to do so unless it is necessary) that object becomes a military objective

¹⁶ For the history of the inclusion of this adjective, see M. Bothe, K. J. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague/Boston/London, 1982, pp. 325/6.

¹⁷ The Oxford English Dictionary defines "definite" as "clear and distinct, not vague".

and, as such, a legitimate target. Were this argument to be taken to its logical conclusion, every civilian object that could possibly be used by the military would become a military objective.¹⁸

The limiting phrases referred to above try to prevent this forbidden line of reasoning. It is, however, still possible to argue that only the destruction of all forms of certain types of dual purpose object would make an effective contribution to military action and offer a definite military advantage. If there are, for instance, two bridges across a strategically significant river, the destruction of one only may give no military advantage; only the destruction of both would achieve this objective. Similar arguments can be presented for the destruction of all telecommunications centres and all power generating facilities,¹⁹ but they run into problems of direct or indirect collateral damage, discussed below.

Collateral damage

Attacks on military objectives may be indiscriminate if the injury or damage to civilians, civilian objects, or a combination of these, is expected to be excessive in relation to the concrete and direct military advantage anticipated.²⁰ Any other incidental injury or damage is considered to be collateral and one of the unavoidable consequences of armed conflict in modern times.

Incidental injury to civilians or to civilian objects may be direct or indirect. Direct injury or damage needs no further explanation, but indirect damage is often overlooked. To take an example, suppose all the electricity generating stations are destroyed by air attack to deprive the enemy military forces of all sources of power in bulk. Should this be achieved it may hamper the effectiveness, to some extent,²¹ of the enemy military forces, but it is likely that it will also

¹⁸ Note the comment of the Defence Secretary in the House of Commons: "Milosevic set out to create a military machine in which there was an intimacy between his military and every other aspect of society." H.C.Debs. Vol.304, col. 364, 26 May 1999.

¹⁹ *Op. cit.* (note 10), p. 161.

²⁰ Protocol I, Art 51(5)(b). This should of course be taken into account in planning attacks, see Art. 57(2)(a)(iii).

²¹ Military forces operating in the field will have their own electricity generating equipment.

lead to the deaths of many civilians (particularly those most vulnerable on health grounds) for a variety of reasons, from the inability of hospitals to carry out their normal functions to sewage appearing on the streets and resultant disease.²² Again, attacks that lead to pollution of the environment²³ may have a similar effect, as will the presence of unexploded weapons in civilian areas.

Mistakes in targeting

During the air campaign there were a number of mistakes made when an unintended civilian object was attacked. These ranged from the air strike on a train on 12 April 1999 and the bombing of a convoy near Prizren on 14 April²⁴ to the attack on the Chinese Embassy on 5 May. Different reasons were given for each mistaken attack.²⁵ The Protocol is silent as to the effect of a mistake in these circumstances. Since the mistakes were ones of fact alone, the issue becomes that of whether the attack was against a military objective

²² See the speech of Mrs Mahon, MP, who stated that "In Novi Sad, which was bombed continuously, the sewage works are damaged beyond repair and the drinking water has gone. That will cause health problems for a long time." H.C.Debs. Vol. 333, col. 610, 17 June 1999.

²³ For concern voiced by MPs see the speech of Mr Dalyell, MP, who expressed the view that "The environmental consequences of bombing know no borders." H.C.Debs. Vol. 330, col. 893, 5 May 1999. Mrs Mahon, MP, concluded that "the bombing of petrochemical works and nitrate fertiliser plants in Pancevo and other areas has released considerable quantities of toxic chemicals into the Danube and into the atmosphere." *loc. cit.* (note 22).

²⁴ Brigadier-General Leaf at NATO press conference, 19 April 1999.

²⁵ In bombing the Chinese Embassy NATO believed that it was attacking the Federal Directorate of Supply and Procurement for the Yugoslav Army. See H.L.Debs. Vol. 600, col. 989, 10 May 1999. British Ministers explained such mistaken attacks as follows: "I must be blunt with the House; one cannot wage a military campaign of this intensity without mistakes. There have been 6,000 bombing sorties over the past seven weeks, and very few have resulted in the wrong target being attacked." The Foreign Secretary, H. C. Debs. Vol. 331, col. 26, 10 May 1999. Alternatively, a Government Minister may refer to the "evil actions of the enemy" as a justification. See the Minister's reply, when questioned by a member in the House of Lords: "I have in front of me an appalling and sickening document. It is a chronology of the atrocities committed in Kosovo by Serbian forces ... I hope that he [the member] will study it as carefully as I have studied the protocol that he sent me." H. L. Debs. Vol. 601, col. 149, 18 May 1999.

and — if the facts had been as those who carried out the attack believed them to be — whether the injury or damage to civilians or civilian objects was caused indiscriminately.²⁶

Warning of attack

It is often thought that the obligation, in the 1907 Hague Regulations,²⁷ of a commander to warn the authorities before commencing a bombardment is a reflection of a past age of warfare.²⁸ It is, however, replicated in modern form in Article 57 of Protocol I. During World War II such warnings were given, “particularly in the case of objectives situated in occupied territory”.²⁹ In the air campaign in 1999 such warnings might have been given to enable the civilians located within a particular military objective, or close to one, to avoid the consequences of the attack. The often-quoted phrase “surprise in attack is the key to victory” does not have a great deal of significance if the attacking State has complete supremacy of the air, is virtually immune from the defensive measures of the attacked State and wishes, for political purposes, to avoid civilian casualties. Such a warning would, of course, be feasible only if the military objective was fixed, otherwise upon receipt of a warning it could be moved. Moreover, any warning would have to be short-term to avoid essential equipment being removed from a building to be attacked. Whether such a warning would be effective in protecting the civilians working within the building concerned would turn upon whether the attacked State’s authorities permitted them to leave.³⁰

²⁶ This is the effect of the word “expect” in Art. 51(5)(b) and 57(2)(a)(iii). In addition, all feasible precautions to avoid prohibited attacks would need to have been taken, in the circumstances ruling at the time (Arts. 52(2) and 57).

²⁷ Art. 26, 1907 Hague Convention IV.

²⁸ See in general T. Meron, *War Crimes Law Comes of Age*, Clarendon Press, Oxford, 1998, chapters 1-5.

²⁹ *Op. cit.* (note 9), p. 686. For a modern discussion, see R. K. Goldman, “The legal regime governing the conduct of Operation Desert Storm”, *University of Toledo Law Review*, Vol. 23, 1992, p. 384.

³⁰ The obligation to remove civilians from the vicinity of a military objective is contained in Art. 58(1), Protocol I. National law may, however, be at variance with this.

The air campaign and the role of the UK Parliament

No vote is required to be taken in the UK Parliament to commit British forces to an armed conflict, this being a decision made by the Government under the royal prerogative.³¹ Ministers may, however, be questioned in either House and will make frequent statements as to the conduct of any particular conflict. The air campaign over FRY was no exception. There were arguments presented by members of both Houses of Parliament that the whole enterprise was unlawful under international law or that the actual campaign was being conducted badly (or illegally³²) but such views were expressed by only a very small minority. The reason for this is to be found more in the realms of psychology than in a detailed analysis of the legal position. When the armed forces are committed to a particular conflict it is easy to have independent judgment controlled by a desire to avoid appearing 'disloyal' to those undertaking the fighting or to believe that it is the 'duty' of Parliament to support them.³³

It was the NATO attack on particular buildings in Belgrade, the mistaken attacks and the loss of civilian life that caused much debate. Insight is given in the various ministerial statements as to the reasons or explanations for such attacks. There is, however, no detailed analysis of the applicability of the 1949 Geneva Conventions for the protection of war victims nor of Protocol I to particular situations, merely a statement that "action by our forces is in strict conformity with international humanitarian law including the 1949 Geneva Conventions and their additional protocols (*sic*)".³⁴ An interesting

³¹ Mr Corbyn, MP, stated that "60 days into the bombardment, there has been no substantive vote in the British Parliament on the authority of the Government to proceed with the bombardment of Yugoslavia." H.C.Debs. Vol. 331, col. 923, 18 May 1999.

³² See, e.g., Lord Jenkins of Putney, who stated: "Is not the whole operation contrary to what is laid down in the convention [Protocol I], and particularly in Articles 51 and 52?" H.L.Debs. Vol. 601, col. 148, 18 May 1999.

³³ "I deplore the criticisms of the chair-borne aces who are so critical of the actions of NATO's air and ground crews." Mr Wilkinson, MP, H.C.Debs. Vol. 923, col. 955, 18 May 1999. Compare, however, Mr. Clark, MP (a critic of the bombing campaign): "I wholly reject any suggestion that to say these things is unpatriotic in some way." H.C.Debs. Vol. 331, col. 923, 18 May 1999.

³⁴ The Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, H.L.Debs. Vol. 600, col. 1000, 10 May 1999, and Vol. 601, col. 148, 18 May 1999.

feature of this particular conflict was that it was carried out by NATO and ministers were therefore required to make statements on the conduct of particular operations even though British forces might not have been involved.

The attack on the TV station on 23 April drew much comment. In the House of Lords the Minister stated that the reasons for attacking it were that "the media has been used to incite racial hatred and to mobilise the Serbs. Therefore, where media facilities are relevant to military operations or the capacity of Milosevic to continue his campaign of terror, they will be considered as possible targets... It is the propaganda machine that helps to keep the military machine moving."³⁵ There was no analysis here of the limiting conditions contained in Article 52(2) of Protocol I, referred to above. Thus, did the TV station make "an effective contribution to military action" and would its destruction offer a "definite military advantage"? If so, how? It might well be argued that, like electricity generating stations and telecommunications centres, an attack on a TV station is likely to have little impact unless this is followed up by denying the enemy all, or at least a substantial amount, of these facilities. This is especially the case where the attack on a structure, such as a TV or radio station, is likely to involve the death of, or injury to, civilians.

Since the political objectives of the campaign included action to "stop the killing in Kosovo [and] to put an end to the appalling humanitarian situation (...) unfolding", the targets chosen for attack had to be selected to achieve this. One MP noted that a number of Kosovars were being picked out from groups of other civilians by FRY officials and he argued that he would extend targets to include "motor spare parts depots and major data recording departments (...) Yugoslavia's identity registration system (...) inland revenue and national insurance departments, the military pensions departments and the national records departments."³⁶ There is a certain logic to this, since it would have made it much more difficult for FRY officials to isolate particular ethnic groups, but it would also be difficult to determine whether back-up

³⁵ H.L.Debs. Vol. 600, col. 38, 41, 26 April 1999.

³⁶ Mr Campbell-Savours, MP, H.C.Debs. Vol. 331, col. 943, 18 May 1999.

copies of such documents were not stored in one or more computer systems and whether such action would offer a definite military advantage.

The principal concern of members of both Houses of Parliament was the killing of civilians as a result of the bombing raids. They wanted to be assured that as much care as possible was being taken to avoid such collateral damage and mistaken attacks. The Foreign Secretary told the House of Commons Defence Select Committee, before the air campaign began, that "a tiny number [of the 5,000 combat aircraft available to NATO] have a capability for night-time bombing or for the kind of precision bombing which increasingly the legal authorities expect us to engage in."³⁷ Events showed, however, that even with aircraft possessing these qualities, bombing from the air does result in unplanned damage and loss of civilian life. Indeed, the Gulf War 1990-91 had illustrated this.³⁸

One decision that some argued increased the risk of such unwanted damage was the height at which NATO aircraft flew. It was asserted that by setting the height at 15,000 feet the politicians were guarding against the possibility of aircrew casualties and, in so doing, were transferring the risks to the civilian population. The Foreign Secretary assured the House of Commons that the decision to fly at this height was "entirely an operational matter for the military. Politicians would be extremely foolish to override the military on the height at which our pilots fly."³⁹

This leads to another issue, namely, who approved the targets to attack? Was it military commanders or the relevant government ministers? Given that this was a NATO action and the air forces of a number of nations were involved, the issue is likely to be less clear-cut than when a State is engaged alone in an armed conflict with another. The Secretary of State for Defence informed the House of Commons

³⁷ 17 February 1999, Q. 318.

³⁸ See F. Hampson in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, Routledge and Sweet & Maxwell, London, chap. 5, pp. 95-100.

³⁹ H.C.Debs. Vol. 331, col. 864, 18 May 1999. Some aircraft "operated down to 6,000 feet when target identification or weapons delivery profile required it." *Op. cit.* (note 2).

that "I personally approve some of the targets, but for most, I have now delegated the decisions to the operational commanders. This allows them to make decisions quickly and to respond to changing requirements. However, I retain the ultimate authority and responsibility for those decisions."⁴⁰ The corresponding Minister in the House of Lords gave a much more bland statement. She told the House that "all targets are selected and approved at the highest levels in NATO and that rigorous criteria are used to assess the suitability of any target, including its military utility and the risk of environmental damage or civilian casualties."⁴¹ The conclusion must be that government ministers were involved in the approval of some targets where the consequences of the bombing might give rise to political implications, otherwise the military commanders were left to make the decisions by themselves. The point is a practical one, since in an armed conflict involving the use of air power alone the decision as to whether to attack a particular target is likely to be taken by a high-ranking military commander or a senior government minister. It is, therefore, quite unlike a land campaign where decisions to use weapons are most often taken by the lowest, or lower, ranks. In the circumstances of an air campaign alone it is much more likely that legal advice will be available to a high-ranking commander and that the precautions required prior to an attack can, and should, be taken.

A further concern expressed in Parliament was the effect of using cluster bombs and depleted uranium weapons by NATO forces. The Foreign Secretary assured the House of Commons Select Committee on Foreign Affairs that neither *anti-personnel* cluster bombs nor depleted uranium weapons were being used.⁴²

⁴⁰ H.C.Debs. Vol. 329, col. 667, 19 April 1999.

⁴¹ H.L.Debs. Vol. 600, col. 907, 6 May 1999. Note that the Royal Air Force "refused at least twice to bomb targets given it by American commanders during the Gulf war because the risk of collateral damage (...) was too high." Tenth Report of the House of Commons Select Committee on Defence, 1991, H. C. 287/1, p.38.

⁴² *Seventh Report, Kosovo: Interim Report*, H.C. 188, 20 July 1999, Q. 156. Letter to the Chairman of the Committee from the Secretary of State for Foreign and Commonwealth Affairs, 26 April 1999, *ibid.*, p. 74. Cluster bombs were distinguished by the Minister from anti-personnel mines banned by the 1997 Ottawa Treaty, H.C.Debs. Vol. 304, col. 370, 26 May 1999.

Who is liable if breaches of international humanitarian law occur as a result of the bombing campaign in circumstances where the government minister has devolved decisions on targeting to military commanders? Clearly the latter will be, but what of the former? He or she has not ordered the attack to take place but is unlikely to be held personally responsible unless he or she was actually, or should have been, aware of the circumstances.⁴³

Finally, a member of the House of Lords suggested that some of the NATO actions amounted to the "murder" of innocent civilians⁴⁴ and thus, by inference, national law also applied to govern the actions of those who carried out the bombing raids. This is not, however, the position under English law where, at the very least, liability for murder or manslaughter is coextensive with a killing amounting to a breach of international humanitarian law.

Did Protocol I add anything?

It may seem an extreme position to conclude that Protocol I had little impact or influence upon the conduct of this particular air campaign, yet it might be argued that all the detailed rules so carefully drafted in 1977 were of little consequence. If the Protocol had never come into existence, would the air campaign have been conducted any differently? The answer, I regret to say, is likely to be in the negative. The customary international law rules of proportionality and those relating to the distinction between civilian objects and military objectives⁴⁵ would have been perfectly adequate. For the reality of the situation is that those objects which military commanders wished to attack, for whatever reasons, were attacked. There is no evidence that the rigours of the limitations imposed on the definition of a military objective were applied to attacks against dual purpose objects. In

⁴³ Art. 86(2), Protocol I. The term "superiors" is wider than "commanders" and "should be seen in terms of a hierarchy encompassing the concept of control." *Op.cit.* (note 9).

⁴⁴ H.L.Debs. Vol. 600, col. 865, 6 May 1999.

⁴⁵ See the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, preambular para.: "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."

any event, the Protocol is, when it comes to the test, very weak in determining what may and what may not be attacked. There is no argument over attacking military personnel and their equipment. It is when civilians are most likely to be placed in danger that Protocol I, designed to protect them, shows its faults.

It is, for instance, common for those who make the targeting decisions to exaggerate (albeit unwittingly) the contribution to military action and the military advantage to be gained from a particular bombing mission and, in addition, to expect the "smart" weapons to produce precision bombing (and thus leave civilians untouched).⁴⁶ The reason for this is that Protocol I sets the dividing line between an indiscriminate attack (illegal) and one that is not (legal) on the basis of expectation before the attack is commenced. At this stage of military operations those planning the attack are at their most optimistic and civilians are at most risk. The position has been reached where the well-established principle of distinction between civilian objects and military objectives has been rendered of little practical significance when some military advantage in the destruction of the object is discernible and smart weapons are used. Add to this a political objective of attempting to persuade a foreign government to take a particular action within its own territory, and it becomes much easier to argue that anything that affects that government's actions becomes a military objective, wherever it is situated.

Is reform of international humanitarian law necessary?

Those who formulate international humanitarian law, particularly in treaty form, must always guard against the dangers of creating unrealistic expectations in times of armed conflict. In practical terms the aerial (or artillery) bombing of objects in heavily populated cities carries with it much greater responsibility to avoid civilian casualties than does a similar discharge of high explosives in a battle area, given that in such an area civilians are unlikely to be present. Although

⁴⁶ It is consequently unlikely that a breach of international humanitarian law took place,

since Art. 85(3)(a) or (b) of Protocol I would not apply.

Part IV of the Protocol refers to the protection of the civilian population and civilian objects, protection of the former is clearly more important than of the latter.⁴⁷ The protection of civilians during an armed conflict must therefore be the primary restraint upon military action.

How is this restraint to be achieved? Articles 51 and 57 of Protocol I are fine so far as they control “crude” methods of bombing, but they do not deal effectively with attacks using smart weapons, targeted at an alleged military objective.

The “do-nothing” option does not seem appropriate since the increased use of “smart” and “not so smart” weapons is clearly foreseeable,⁴⁸ if only because it appears to be more acceptable to bomb targets within a city by using such weapons than by using free-fall bombs. For the reasons stated above, in particular the relative ease with which a State can convince itself not only that a selected target is a military objective, but also that mistakes in targeting are rare when compared with the number of bombing raids or that the enemy’s actions are much worse, it seems not unreasonable for the law to take into account the development of these smart weapons. Moreover, these “smart” weapons can go “dumb”, as failures in their guidance systems are not uncommon. If the political and military leaders of all States were asked the question “do you wish to prevent as many civilian casualties as possible during an international armed conflict,” a substantial majority would be likely to answer in the affirmative. As argued above, it seems clear that the law, in Part IV of Protocol I, does not achieve this.

Proposals to amend the definition of a military objective in Article 52(2) or the definition of an indiscriminate attack in Article 51 are unlikely to succeed, since any reformulation would create as

⁴⁷ The protection of civilian objects in Part IV is essentially centred on the protection of the civilian population, as indeed is Protocol III to the 1981 Conventional Weapons Convention. For attempts to protect the environment, and thus the civilian population, see R. Falk in G. Plant (ed.), *Environmental*

Protection and the Law of War, Belhaven Press, London/New York, 1992, pp. 91-95.

⁴⁸ See *The Times*, 23 September 1999, interview with Lord Robertson: “the public (...) expect precision attacks. So, in terms of future procurement, nations will have to buy weapons that are relevant.”

many definitional problems as exist in the current law. These articles may be left to deal with what may be styled as the normal run of military operations. This suggests that an additional norm is needed to deal with the problem addressed in this paper, namely, the protection of the civilian population from air-delivered "smart" weapons. The fact that relatively few civilians will be killed or injured in these circumstances (compared with an indiscriminate attack using free-fall bombs or poorly guided missiles) should not affect the legal regime involved. One possibility, it is suggested, may be to add an additional protocol to the 1981 Conventional Weapons Convention and draw upon the analogy of Article 2(3) of Protocol III to that Convention. Thus, it could be provided that:

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.⁴⁹

The term "concentration of civilians" could be given the meaning found in that Protocol, as "any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads". Should an attack be carried out within a concentration of civilians the key concept would then be to determine whether all "feasible precautions" had been taken to avoid the prohibited damage. Given the Oxford English Dictionary definition of "feasible" as "practicable, possible, easily or conveniently done",⁵⁰ an attacking State which did not take such steps would be in

⁴⁹ This is more specific than Art. 57(2)(ii), Protocol I, since it deals with attacks where there is a concentration of civilians.

⁵⁰ On ratification of the Additional Protocols on 28 January 1998 the UK stated that it

understood "feasible" to mean "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations" *loc. cit.* (note 11), statement (b).

breach of the provision. The steps required to be taken would clearly depend upon the circumstances existing at the time, but a planner would have to consider various possibilities, such as the guidance system malfunctioning, a mistake as to the proposed target itself and whether the attack should be carried out only when the objective can be clearly identified. The possibility of anti-aircraft missiles, or other defensive measures, will also need to be considered, as well as the height from which an attack should be launched. There is no balancing act here, as there is in Article 51(5)(b) of Additional Protocol I, between destroying the military objective and the expectation of civilian deaths or injury or the destruction of civilian objects. The obligations upon the attacking State are therefore much greater under this proposed addition to the law. It would also be necessary to provide that a breach of this provision would be classed as a war crime under the Rome Statute of the International Criminal Court (1998)⁵¹ for which an individual might be indicted.

An alternative approach is to tackle the problem from the standpoint of the State's responsibility to pay compensation to civilians (or to those claiming on their behalf) for injury and damage to them caused by a failure to take all feasible precautions to prevent such loss or damage by those who, acting on behalf of the State, have attacked targets within an area where there is a concentration of civilians. The liability of a State to pay compensation is, of course, well settled although the mechanisms for doing so are not.⁵² Like criminal responsibility, any obligation to pay compensation must be incumbent upon all States involved in an international armed conflict and not merely the defeated State. It should also be awarded by an independent body whose deliberations are open to the public, so that the accountability of military or political leaders for actions or omissions during an armed conflict may be transparent, as it is in criminal cases. To achieve this objective, international criminal courts would need to have jurisdiction to prosecute

⁵¹ At present it is not. See Art. 8 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9.

⁵² See H. P. Gasser, "International humanitarian law", in Hans Haug, *Humanity for All*, Henry Dunant Institute, Geneva, 1993, pp. 87-88.

States, the only punishment available in this type of case being the payment of compensation to the victims of the military action.

The two proposals made above require an alteration to existing treaty arrangements, which may be considered, at the present time, to be unrealistic of achievement. At the very least States should be encouraged to set out in a public document the grounds by which they assert that their actions are in conformity with international humanitarian law. In particular, where an air campaign is mounted, an expectation that a State will assert why a particular object is a military objective will heighten the awareness of those who make decisions about individual targets upon the fact that their actions will be judged by the law. This is no new phenomenon, since in any democratic State a government's actions are normally limited by legal boundaries. These boundaries are to be found mainly in Additional Protocol I or in customary international law.



Résumé

Kosovo 1999 : les opérations aériennes — Les dispositions du Protocole additionnel I à l'épreuve

par PETER ROWE

La campagne militaire de 1999 contre la République fédérale de Yougoslavie a été caractérisée par un engagement massif de l'aviation des forces armées de l'OTAN. L'article analyse les opérations aériennes sous l'angle des règles du droit international humanitaire et, notamment, des nouvelles dispositions du Protocole I de 1977 relatives à la protection de la population civile et des biens de caractère civil. Selon l'auteur, les règles de conduite établies par le nouveau droit sont adéquates, même si elles n'ont pas toujours été respectées. Toutefois, il propose de renforcer la protection contre les attaques dans les régions à forte concentration civile (villes, quartiers résidentiels, etc.). L'auteur examine également la réaction des milieux politiques britanniques, notamment à travers les débats du Parlement au sujet de l'intervention militaire dans les Balkans.

Zero-casualty warfare

by

A. P. V. ROGERS

There can be no doubt that the political and military planners of the NATO air campaign in the Kosovo conflict of 1999 were determined that it should be carried out strictly in accordance with the law of armed conflict.

“The targets were exclusively military — every effort was made to avoid collateral damage — planes only fire at targets when we are confident that we can strike accurately — some aircraft in the first operation returned without dropping ordnance. Targets are carefully selected and continuously assessed to avoid collateral damage.”¹

“Others, and I have said continually this week that our aim is to hit the target and not to cause collateral damage to any surrounding areas. You have seen the effects of the bombs that we have dropped and the missiles that we have launched. We need to put those on the target, so if someone is in the cockpit and he has got to see the target all the way down to the ground he has to make sure that he can see that target and if he doesn't he is professional enough to not hit that target and bring his bombs back.”²

“Rules of engagement and concerns about collateral damage placed on us by our political masters are, rightly, very tautly drawn. The discipline of our people is such that they will not drop their weapons unless they have clearly identified their assigned target and know precisely what they're doing.”³

A. P. V. ROGERS is a Fellow of the Lauterpacht Research Centre for International Law, University of Cambridge, and a former Director of Army Legal Services, United Kingdom.

These are sentiments that experts in the law of armed conflict would heartily endorse.

Despite problems caused by cloud cover, care was taken to ensure that only military objectives were hit. There were, inevitably, some instances of collateral damage.⁴ But, by and large, things seemed to go well until an attack on a vehicle column by NATO aircraft operating at 15,000 feet raised an important question about the law of armed conflict: what is the precise legal obligation on an attacker to identify the target as a military objective before he launches his attack?

Background

Until the development of air power in this century, wars tended to be fought by opposing armies or navies in a series of short but bloody battles. While civilians suffered from the effects of armies on the march and from evacuation, billeting and requisitioning, they were rarely directly affected by the fighting unless they were inhabitants of a besieged town.⁵ During the static trench warfare of the First World War, they were usually evacuated from the front line area and out of range of artillery fire.

Air power enabled the belligerents to strike well behind enemy lines, at the lines of communication and logistics that kept enemy armies supplied. By cutting them off from reinforcements, fuel, food and ammunition, their ability to fight was severely curtailed. However, this meant striking at areas that were likely to be populated by civilians, thus increasing the risk of civilian casualties. In the First World War military casualties were still extremely heavy, since the tank

¹ Jamie Shea, at the NATO press briefing on 26 March 1999, website: www.nato.int.

² Air Commodore David Wilbey, at the NATO press briefing on 1 April 1999.

³ Air Chief Marshal Sir Richard Johns, "Air power in a new era", *Royal Society of Arts Journal*, 3-4 of 1999, p. 99.

⁴ As when a bomb fell 600 metres short of the target, at Aleksinac. There was also the incident on 12 April when missiles were fired

at a railway bridge near Leskovac, just as a train from Belgrade to Thessaloniki was crossing it.

⁵ Indeed, the preamble to the Declaration of St. Petersburg of 1868 proclaimed that the only legitimate object of war was to weaken the military forces of the enemy and that, for this purpose, it was sufficient to disable the greatest possible number of men.

was in its infancy and only sheer weight of numbers — allowing for such losses — could win through against the hail of enemy shrapnel and machine-gun bullets; civilian casualties were relatively light.⁶ This was about to change. The senior commanders of the war, of course, deeply regretted the death, wounds and sickness of their men, but the sense of military duty to defeat the enemy at any cost seemed to prevail. The more junior commanders, who would rise to high rank in the next war, were determined to ensure that in future military casualties would be reduced.

Things were to change in other ways too. The heavy demands of the large but mobile conscript armies that were put into the field in the Second World War and their increasing reliance on mechanization meant that civilians had to be employed in factories producing weapons, warships and military aircraft, their armaments and components, and in installations producing the fuel to drive vehicles and the raw materials such as steel needed to build ships. The emphasis of targeting was shifting away from enemy combatants to the equipment and supplies on which they depended, but at great cost to the enemy's civilian population. Though still protected by the law of armed conflict from direct attack, they were not protected from incidental damage caused as a by-product of attacks on war production facilities. Bombing was still far from precise.

Guerrilla warfare, in which fighters merge with the civilian population, tends to increase civilian casualties. It has taken its sad toll in many post-1945 conflicts. Guerrillas prefer to launch attacks out of civilian anonymity at the enemy's weak points, often using tactics such as ambush very successfully. Finding it hard to identify and grapple with the guerrillas, their adversaries, the regular forces, are inclined to overreact with their countermeasures or with heavier weapons, in either case to the detriment of the civilian population. The situation is exacerbated when guerrillas, partisans, freedom fighters or other armed factions are engaged in combat in towns or populated areas.

⁶ For the British Empire forces, 908,371 military battle deaths and 2,090,212 military wounded out of a mobilized military strength

of 8,900,000. See the table in the *British Army Review*, August 1996, p. 79.

Regular forces are unable to deploy their armoured vehicles to best advantage and their opponents, from the cover of civilian buildings, can deploy light weapons and anti-tank grenades very effectively at short range. Such fighting entails severe casualties, not only for the troops involved but also for the civilian inhabitants who get caught up in the hostilities. In circumstances like that, the Russian proposal to set up safe corridors to allow the civilian population to escape the fighting in Grozny is in keeping with the principles of the law of armed conflict. Of course, those corridors must genuinely be safe and, preferably, monitored by international organizations such as the ICRC or OSCE.

The understandable modern attitude of military commanders that they will not expose their subordinates to unnecessary risks tends to increase the danger to civilians. This attitude is not limited to the West. After the casualties suffered by the Russian army in its attempts to invade the Chechen capital in January 1995, it tried new tactics in its campaign of 1999. Marshal Igor Sergeev, the Russian Defence Minister, was reported as saying that Russia was relying on the massive use of firepower to keep down its casualties and that artillery and air force was being used to "destroy the Chechen gangs and their camps". It was estimated that Russia had deployed 100,000 troops against President Maskhadov who had 20,000 to 30,000 experienced guerrillas with light weapons.⁷

There has also been growing pressure, especially in the West, to reduce military casualties to a minimum, otherwise public support for the campaign is likely to fall away. Indeed, there is almost an expectation now of few, if any, casualties, especially if the country is not directly threatened by military operations. The British task force suffered 256 military battle deaths and 777 military wounded out of a mobilized military strength of 9,500 in its campaign to retake the Falkland Islands in 1982.⁸ This was tolerated by the British public, perhaps because it was thought that British interests were at stake. But there would have been lower tolerance in the Gulf War of 1991 or in

⁷ *The Independent*, 4 November 1999.

⁸ *Op. cit.* (note 6), p. 80.

the Kosovo conflict of 1999, since neither directly affected the British people. In the event, the casualties were slight. There were 17 British military battle deaths in the Gulf;⁹ there has been none yet in Kosovo.¹⁰

The result of these trends has been a steady increase in the ratio of civilian to military casualties in armed conflicts despite the efforts of diplomats and international lawyers to emphasize the principle of civilian immunity.¹¹ There has been growing public awareness, possibly since the Vietnam War, of these civilian casualties. Media reports, often broadcast at the same time as events unfold in a campaign, have a very immediate impact and influence on the public. This is known as "the CNN factor". The public are shocked by images of women and children killed or injured in war and are likely to have a low tolerance of such casualties, especially, again, if they perceive that national interests are not at stake. The situation is probably exacerbated by their unduly high expectations of the accuracy of smart weapons. As the NATO air campaign in Kosovo went on and mistakes occurred, there was an almost tangible sense of public discomfort. This could have led to pressure to call off the air strikes.

Requirements concerning methods and means of warfare

So the political and military imperative is for weapons and tactics that, so far as possible, prevent own casualties, hit military

⁹ *Ibid.* According to Erik Durschmied, *The Hinge Factor*, Hodder & Stoughton, 1999, Iraqi military losses were over 100,000 whereas Coalition forces suffered a total of 192 killed, of whom 35 died from "friendly fire" and two were killed dismantling a bomb. "In military terms, such a ratio is called the *Zero Factor*."

¹⁰ "NATO won the Kosovo conflict without a single life lost in combat operations on its own side (...) for just two aircraft lost", Nick Cook, "War of extremes", *Jane's Defence*

Weekly, 7 July 1999. Two Gurkha engineers, Lt. Gareth Evans and Sgt. Baram Rai, were killed dealing with unexploded ordnance during the operation.

¹¹ According to the Swiss Federal Office for Civilian Protection, the ratio of the First World War was 200 military: 1 civilian; in the Second World War nearly 1:1 and in the Vietnam War, 1 military: 20 civilians. See M. Sassoli/A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 145.

objectives accurately and reduce incidental death, injury and damage to an absolute minimum.¹² It has been said that:

“The next key requirement [for air power in a new era] is to increase stand-off capability for weapons which have pinpoint delivery accuracy to achieve maximum strategic effect, with minimum collateral damage and minimum risk to the weapon carrier and launcher.”¹³

Smart weapons, a universal panacea?

In the Gulf War of 1991, Royal Air Force (RAF) Tornado aircraft were used initially to attack Iraqi airfields by dropping JP233 bombs from a low altitude above the target. Low-altitude attacks were meant to defeat enemy radar and increase the element of surprise. But the RAF suffered the loss of five aircraft in seven days and so aircraft were switched to dropping 1,000lb iron bombs from 20,000 feet where they were out of range of anti-aircraft guns but from where the bombing was less accurate.¹⁴ In response to demands for smart technology, the RAF used Buccaneer aircraft fitted with laser target designators to pinpoint targets, along with Tornados carrying laser-guided weapons in order to minimize collateral damage. The thermal imaging and laser designation pod (TIALD) was rushed into service. These changes dramatically improved targeting accuracy.¹⁵

Some argue that stand-off weapons remove any element of humanity from warfare, which is reduced to a cold and ruthless

¹² “While such errors were inevitable, observers contend, widespread public faith early on in the campaign in the ability of modern surveillance systems and smart weaponry to restrict collateral damage heightened reaction against the bombing campaign when civilian casualties did occur and led to intense pressure at times on politicians to call a halt to the attacks ... If politicians insist on minimum — and perhaps even zero — attrition rates among their military personnel in future air campaigns, a range of new weapons, up to and includingUCAVs, will need to be

introduced as soon as the technology allows. The alternative for the military is to brace civilians — politicians, media and public alike — for the realities of attrition in parallel with an increased investment in equipment and tactics that support manned close air support and battlefield air interdiction missions at low as well as high altitudes.” Cook, *op. cit.* (note 10).

¹³ Johns, *op. cit.* (note 3), p. 96.

¹⁴ Charles Allen (ed.), *Thunder and Lightning*, HMSO, 1991, p. 74, 80.

¹⁵ *Ibid.* p. 81/2.

activity carried out with clinical precision. The further from the target an attack is launched, the less the attacker is aware of the human cost involved because he does not see the effects of the attack. It is sometimes said that this results in a dehumanization of warfare. It may be thought that because personnel launching stand-off weapons are attacking inanimate objects, such as airfields or bridges, but do not know of the destruction and misery that is being caused on the ground, they are not so aware of the problem of collateral damage.¹⁶ This is not always true in the case of smart technology. The laser designator system used by the Buccaneers had a built-in video camera that recorded what appeared on the navigator's screen as he guided the laser designator on to the target. As a result, air crews and ground staff could see exactly what was happening.¹⁷

Media reports of allied bombing during the Gulf War and Kosovo air campaigns gave the impression that the weapons deployed were mainly smart weapons and that these weapons were unerringly accurate. Of course, that is far from the truth. Smart weapons are capable of delivery with considerable accuracy, but that capability is only one of many factors that affect accurate targeting. The effects of air defence measures, which can deflect missiles from their course; the strains under which air crew may be operating at the time of weapons release, such as avoiding surface-to-air missiles; the quality of intelligence about the identity of the proposed target;¹⁸ the technical problems of identifying and hitting targets on the ground from the air; the possible failures of guidance systems; the limitations of target recognition techniques;¹⁹ and ordinary human fallibility can all affect the

¹⁶ *Ibid.*, p. 137: "Aircrew usually had the comfort of being remote from the destruction caused by their bombs or rockets."

¹⁷ *Ibid.*, pp. 113-114: "That really brought it home (...) we were actually killing people"

¹⁸ According to Wing Commander Greg Bagwell, "Precision weapons", *Royal Air Force Air Power Review*, Spring 1999, p. 7, the Al Firdos bunker in Baghdad was assessed as a communication node but, unknown to allied intelligence, it was also being used as a

civilian air raid shelter. The Chinese Embassy in Belgrade was hit by mistake on 7 May 1999 owing to the use of faulty intelligence at the planning stage which went unnoticed through subsequent checks. See the report in *The Independent*, 11 May 1999.

¹⁹ Where thermal, acoustic or radar "blueprints" of enemy military equipment are programmed into a weapon's memory. *Op. cit.* (note 18), p. 7.

outcome of an attack. Guidance and reconnaissance systems are usually affected by cloud, rain or smoke.²⁰ Furthermore, even if the target is accurately hit, that does not mean that there will be no collateral damage.²¹

In view of the cost of smart weapons,²² they tend to be used sparingly. Only about 9% of the total tonnage of air delivered weapons during the Gulf War consisted of precision munitions and these were delivered mainly at strategic or operational level targets.²³

Autonomous weapons,²⁴ such as cruise missiles, may seem to be the perfect answer to the problem of accurate targeting, but they generally provide no imagery of the attack and they also suffer from a serious drawback: they cannot adjust to last-minute changes of circumstances. Even against static targets that can be extremely problematic, for instance when a civilian refugee column crosses a bridge just as the autonomous weapon strikes. This is a scenario that can be avoided where the weapon is being guided by line of sight to the target. Against mobile targets, such as enemy troops on the ground, autonomous weapons are not easy to deploy effectively. Older systems like Paveway are more flexible in these situations.²⁵

It seems that smart weapons are not as yet the solution to the problem of incidental damage nor are they as good as the public

²⁰ Apart from the new US joint direct attack munition (JDAM) which can be deployed from altitudes above cloud cover. See *Joint Statement on the Kosovo After Action Review*, Department of Defense, 14 October 1999.

²¹ *Op. cit.* (note 14), p. 81: "... in reality you cannot have a surgical war. There is no such thing. For a bomb to go down an elevator shaft is just luck. It probably has a CEP — a computer error probability — of maybe 30-40ft. That can make the difference between hitting the place you're aiming for and the one next door which is full of civilians." Incidentally, other authors define CEP as "circular error probable", i.e. the radius of a circle centred on the target within which 50% of all bombs

dropped will land. Bagwell, *op. cit.* (note 18), p. 14. Bagwell, p. 8, also comments that "the explosive force of a 500lb warhead does not constitute keyhole surgery!"

²² *Ibid.*, p. 13, quotes \$9,000 for a simple GPS guided bomb and \$500,000 for a Block III Tomahawk missile.

²³ *Ibid.*, p. 3.

²⁴ Defined by Bagwell, *op. cit.* (note 18), p. 14, as those requiring no human input during the final phase of flight.

²⁵ At the NATO press briefing on 18 April 1999, an account was given of how a pilot launched an attack against a radar and, noticing that the site was close to a church, pulled his weapon off the target so that it exploded harmlessly in a wood.

may have been led to believe. They are certainly more capable of accurate delivery than dumb bombs, but there are various other factors affecting possible incidental damage, not least the “circular error probable” which means that this risk, while much reduced, is not eliminated, especially in populated areas. Autonomous weapons bring with them a degree of inflexibility that means that the human element in guiding weapons on to the target will remain necessary in many cases in the foreseeable future.

The Incident of 14 April 1999

In the Kosovo conflict of 1999, pilots minimized danger to themselves by attacking from an altitude of 15,000 feet, where they were out of range of most hand-held surface-to-air missiles and anti-aircraft artillery,²⁶ until the Yugoslav air defences had been degraded to such an extent that they could safely fly at lower altitudes.²⁷

On 14 April 1999, NATO pilots, flying at 15,000 feet and apparently looking for opportunity targets in Kosovo, attacked what they thought was the lead vehicle of a column of military vehicles. The following day there were numerous media reports that a refugee column had been attacked near Djakovica. Pictures on BBC World²⁸ showed scenes of carnage near the village of Meja. According to Serb reports, 64 civilians were killed, including three Serb policemen who were escorting them. The Serb-run Media Centre in Pristina claimed that a second, smaller column was hit on the road from Prizren to Djakovica in which six people were killed and 11 wounded. On 15 April, the NATO spokesman, Jamie Shea, expressed deep regret at the daily press briefing for loss of life to civilians from the attack the previous day on a convoy travelling between Prizren and Djakovica.²⁹

There was some confusion about the incident in the days that followed. Survivors referred to a low-level attack by a MiG aircraft

²⁶ *Op. cit.* (note 10).

²⁷ Lord Robertson, *Kosovo: An Account of the Crisis*, Ministry of Defence, London, 1999, p. 13.

²⁸ At 1800 hours BST on 17 April 1999.

²⁹ NATO press briefing, 15 April 1999.

and reporters talked about machine gun or cannon fire. Robert Fisk, one of NATO's fiercest critics, visited three reported strike locations on the Prizren-Dakovica road: at Velika Krusa, Gradis and Terezifki,³⁰ he collected munitions parts and noted serial numbers. At Gradis, he said, there was evidence of strafing, similar to A10 strikes in the Gulf War, as well as bombing.³¹ At the NATO press briefings reporters tried to ascertain precisely which attack Jamie Shea had been referring to, as there were at least two attacks on convoys in the area. A tape was played describing an attack on a column of three vehicles near Djakovica, but it was later stated that this did not relate to a refugee convoy.

General Marani answered press questions about attacks from an altitude of 15,000 feet. He said that target identification was more complex and was carried out correlating more information, not only what the pilot could see but other information he had before leaving and before arriving in the area, which he received from other aircraft, from other weapons systems not necessarily on board his aircraft. In other words, it was, he said, very much a team effort and not a case of a single pilot acting on his own initiative.

A full explanation was given on 19 April by Brigadier-General Dan Leaf.³² He described two incidents on 14 April, both involving the use of 500lb laser-guided bombs. The first was north-west of Djakovica and involved an attack at 11:10 GMT on a vehicle whose crew were considered to be responsible for the burning of houses. This was followed at 11:48 GMT by an attack on a group of vehicles in a courtyard. That produced a secondary explosion consistent with the igniting of a gasoline store. The second incident involved a large convoy of more than 100 vehicles on a major road south-east of Djakovica. The first 20 vehicles were uniform in shape and colour and they maintained a set pace and spacing, indicative of military movement. The possibility of IDPs (internally displaced persons) being in the convoy was discussed but intelligence material indicated that this

³⁰ Or possibly Terzick Most Zrze.

³¹ *The Independent*, 17 April 1999.

³² To be found on www.fas.org/man/dod/docs99/s990419b.htm.

was a military convoy. The lead vehicles of the convoy were attacked by F-16 and Jaguar aircraft, starting at 12:19 GMT. Not all the attacks were successful. Some anti-aircraft fire was encountered. Doubts began to assail the military planners because it was unusual for the Serbian forces to travel in such large convoys, so A-10 aircraft, which are slower and more stable than F-16s, were called in to check and further attacks on the convoy were suspended at 13:00 GMT. On reports that the convoy consisted of both military and civilian vehicles, all attacks were cancelled and aircraft withdrawn at 13:20 GMT.

What are the legal requirements?

For States party to Geneva Protocol I of 1977,³³ the duty, before carrying out an attack, is to “do everything feasible to verify that the objectives to be attacked are (...) military objectives”.³⁴ Feasible precautions may be defined as those which are “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.³⁵

Humanitarian considerations would require a pilot to get close to the target to identify it properly; military considerations would require the pilot to fly at a safe height to be at reduced risk from anti-aircraft fire. This is a conflict that cannot be resolved easily.

Also relevant here is the rule of doubt. In case of doubt whether a person is a civilian or whether an object is normally dedicated to civilian purposes, the Protocol lays down a presumption of civilian status.³⁶

³³ At the time of the Kosovo conflict, for example, the USA and France were not party to Protocol I but Germany and the UK were.

³⁴ Protocol I, Art. 57, para. 2(a)(i).

³⁵ The United Kingdom made a declaration of understanding to this effect when ratifying Protocol I. See *IRRC*, No. 322, March 1998, pp. 186 ff. — The Conventional Weapons Convention of 1981 contains similar language in the Amended Mines Protocol of 1 May 1996, Art. 3, para. 10.

³⁶ Protocol I, Arts 50, para. 1, and 52, para. 3. With regard to Art. 50, para. 1, the United Kingdom, on ratification of the Protocol, made a statement of understanding that the rule applied “only in cases of substantial doubt still remaining after the assessment (...) has been made, and not as overriding a commander’s duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of the Protocol.” *Ibid.*

For States not party to the Protocol, customary law nevertheless requires their forces to attack only military objectives and that means distinguishing them from civilian objects. The precise standard of care is not clear. It is certainly not higher than the “do everything feasible” standard imposed by Protocol I. At the very least, customary law would require those responsible for attacks not to attack persons or objects which they know or believe to be civilian.

Responsibilities in attack³⁷

Whether or not a State is party to the Protocol, its armed forces are required to respect the customary rule of proportionality which attempts to balance military and humanitarian considerations. In applying this rule, the military decision-maker has to consider various factors when deciding what weapon or tactics to use, the object being to neutralize the military target with the least possible incidental damage or loss:

- a. the importance of the target and urgency of the situation;
- b. intelligence about the proposed target, i.e., what it is being, or will be, used for and when;
- c. what weapons are available, their range, accuracy and radius of effect;
- d. conditions affecting accuracy of targeting such as terrain, weather, night or day;
- e. factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zone and whether they are inhabited, or the possible release of hazardous substances as a result of the attack;
- f. the risks to his own troops posed by the various options open to him.³⁸

³⁷ This passage is adapted from the author's text in the *Model Manual on the Law of Armed Conflict*, ICRC, Geneva, 1999.

³⁸ The United Kingdom, on ratification of Protocol I, declared that “Military commanders and others responsible for planning,

deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.” *Loc. cit.* (note 35).

Smart weaponry, if available, has increased the options open to the attacker. From a legal point of view, he needs not only to assess what feasible precautions can be taken to minimize incidental loss, but also to make a comparison between different tactics or weapons so as to be able to choose the least damaging course of action compatible with military success.

Application of the principle of proportionality is more easily stated than applied in practice, as by adopting a method of attack that would reduce incidental damage, the risk to the attacking troops may be increased. The law is not clear as to the degree of care required of the attacker and the degree of risk that he must be prepared to take.³⁹

As the author has written previously: "... Military necessity cannot always override humanity. In taking care to protect civilians, soldiers must accept some element of risk to themselves. The rule [of proportionality] 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."⁴⁰

This approach is reflected in British defence doctrine:

"Targeting. A key issue for commanders and planners is deciding what constitutes a legitimate target and how it may be attacked. This revolves around the principles of distinction and proportionality. Attacks should be limited to combatants and other military objectives. The civilian population and civilian objects must not be deliberately targeted; the morale of an enemy's civilian population is not a legitimate target and attacks designed to spread terror among the civilian population are expressly prohibited. Even military objectives should not be targeted if an

³⁹ Bagwell, *op. cit.* (note 18), p. 9, thinks that this should be dealt with in rules of engagement: "... some targets could require such guaranteed accuracy that the aircraft/platform might be placed at increased risk to enemy defences. In this case the ROE will need to make the desired identification

criteria extremely clear so that crews, who are effectively judge and jury, will be able to take the right course of action."

⁴⁰ A. P. V. Rogers, "Conduct of combat and risks run by the civilian population", *Military Law & Law of War Review*, 1982, p. 310.

attack is likely to cause (collateral) civilian casualties or damage which would be excessive in relation to the direct military advantage which the attack is expected to produce. The law stipulates that the military worth of the target needs to be considered in relation to the circumstances at the time. Therefore, a commander needs to have an up-to-date assessment of the significance of a target and the value of attacking it. If there is a choice of weapons or methods of attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental civilian casualties or damage. However, he is entitled to take into account factors such as his stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces. Nevertheless, there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avoid or reduce collateral damage to the enemy's civil population."⁴¹

Responsibilities in defence

It is not only the attackers who have a responsibility for protecting civilians from the effects of armed conflict. This is a general responsibility which falls not only on the armed forces but also on the civilian administration and political leadership. For States party to Protocol I this specifically requires, so far as possible, the removal of civilians from the vicinity of military objectives, avoiding locating military objectives in or near densely populated areas as well as taking steps like the provision of shelters to protect civilians.⁴² Unfortunately, there is evidence to suggest that some States do not merely fail to comply with these requirements of international law, but deliberately put military assets close to protected objects or place civilians in military locations with the intention of protecting military objectives from attack or even in the hope of attracting international condemnation of the enemy if civilians are killed or civilian objects destroyed. Those

⁴¹ *British Defence Doctrine* (JWP 0-01) issued by the British Minister of Defence in 1996.

⁴² Protocol I, Art. 58.

carrying out attacks in such circumstances are not relieved of their obligation to attack military objectives only and reduce incidental damage as much as possible, but in considering the rule of proportionality, any tribunal dealing with the matter would be obliged to weigh in the balance in favour of the attackers any such illegal activity by the defenders.⁴³

Applying the legal requirements in practice

It seems, at least in some cases of aerial attacks against targets on the ground, that the question of the risk to the attacker is not such an important consideration in practice.

If the target is sufficiently important, higher commanders may be prepared to accept a greater degree of risk to the aircraft crew to ensure that the target is properly identified and accurately attacked. No-risk warfare is unheard of. Risks may be taken, for example, to rescue pilots who have been shot down or in deploying forces on reconnaissance or target identification missions in enemy-held territory.

However, if the target is assessed as not being worth that risk and a minimum operational altitude is set for their protection, the aircrew involved in the operation will have to make their own assessment of the risks involved in verifying and attacking the assigned target. If their assessment is that (a) the risk to them of getting close enough to the target to identify it properly is too high, (b) that there is a real danger of incidental death, injury or damage to civilians or civilian objects because of lack of verification of the target, and (c) they or friendly forces are not in immediate danger if the attack is not carried out, there is no need for them to put themselves at risk to verify the target. Quite simply, the attack should not be carried out.

Rules of engagement could make this clear with a test like: "Are you sure that the target is a military objective? If you are in any doubt, would you or friendly forces be placed in danger if the attack were not carried out? If not, the attack is NOT to be carried out."

⁴³ See A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, p. 79.

Individual responsibility

Of course, cases will occur when members of the armed forces will not be able to make such cool calculations reminiscent of a jury in a criminal trial. In the heat of the moment, they may release their weapons even if not sure that the target is a military objective and even if not in danger themselves. Any tribunal considering the matter subsequently would be concerned with the proportionality principle. They would be assessing the importance of the target in relation to the incidental damage expected. However, the risk to attacking forces is an important factor to be taken into consideration when applying the proportionality principle. In dealing with the case, the tribunal would have to put themselves in the position of the armed forces member concerned, taking all the surrounding circumstances into account, so as to experience the situation as he experienced it at the time, before considering the question of culpability.

Operational reality is recognized in the Statute of the International Criminal Court. This makes the infliction of incidental loss or damage an offence only if the attack is launched intentionally in the knowledge that it will cause incidental civilian loss of life, injury or damage which would be clearly excessive in relation to the concrete and direct military advantage anticipated.⁴⁴ The use of the word “clearly” ensures that the court would be involved only in cases where the excessiveness of incidental damage was obvious, not in cases that involved errors of judgement by commanders in the field.⁴⁵

A member of the armed forces doing his level best in difficult circumstances to comply with the law of armed conflict would have nothing to fear from a subsequent inquiry, even if he made a mistake under pressure.

Conclusion

The law does not demand that there be no casualties in armed conflict. However, the law, political expediency and public

⁴⁴ Statute of the International Criminal Court, Art. 8, para. 2(b)(iv).

⁴⁵ Roy S. Lee (ed.), *The International Criminal Court*, Kluwer Law International, 1999, p. 111.

sentiment combine to demand that casualties, whether among members of the armed forces or among the civilian population, should be reduced to the maximum extent that the exigencies of armed conflict will allow. An important element of this endeavour is verification of the target, because attacking the wrong target is likely to lead to unnecessary casualties. Target verification requires reasonable care to be exercised. The precise degree of care required depends on the circumstances, especially the time available for making a decision. In the event of doubt about the nature of the target, an attack should not be carried out, with a possible exception where failure to prosecute the attack would put attacking forces in immediate danger.

●

Résumé

Une guerre sans victimes

par A. P. V. ROGERS

L'obligation de faire la distinction entre objectifs militaires, d'une part, et personnes et objets civils, d'autre part, est à la base des règles internationales qui régissent la conduite des hostilités. Exemples concrets à l'appui, l'auteur démontre que grâce au développement de l'armement et à un changement certain des mentalités, la règle fondamentale de la distinction est aujourd'hui mieux respectée que ce n'était le cas, par exemple, pendant la Première Guerre mondiale ou la Seconde. Cependant, le nombre de victimes civiles des récents conflits est proportionnellement beaucoup plus élevé que le nombre des victimes militaires. Par ailleurs, les opérations au Kosovo prouvent que les dommages collatéraux qui frappent la population civile font partie de la réalité même des opérations conduites avec le matériel de guerre le plus moderne. Sur cette toile de fond, l'auteur examine la portée et les limites des possibilités de mener des opérations militaires « sans victimes » et leurs conséquences. Il conclut avec un rappel que seul le respect absolu des obligations du droit international humanitaire peut garantir la survie de l'homme en cas de conflit armé.

The Kosovo crisis and the law of armed conflicts

by

SERGEY ALEXEYEVICH EGOROV

During a visit to the Federal Republic of Yugoslavia at the end of September 1999, the author of this article was able to take stock, on the spot, of the consequences of NATO's military operation known as "Allied Force".

From the standpoint of international law, the operation amounted to the use of armed force without the authorization of the United Nations Security Council, for the purpose of providing support to one of the parties to an armed conflict of a non-international nature which was taking place between the central authorities of the Federal Republic of Yugoslavia (FRY) and the armed separatists of the Kosovo Liberation Army (KLA). NATO's armed intervention, which took the form of an air and sea offensive, led to the internationalization of the armed conflict in Yugoslavia.

Under Article 2 common to the four Geneva Conventions of 12 August 1949 for the protection of war victims, those Conventions and their Additional Protocol relating to the protection of victims of international armed conflicts (Protocol I) "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is

SERGEY ALEXEYEVICH EGOROV is Professor of International Law at the Diplomatic Academy of the Ministry of Foreign Affairs, Russian Federation, Moscow. — Translated by the ICRC from the Russian original.

not recognized by one of them". In addition, provisions laid down in the Hague Conventions of 1907 and in a number of other treaties are also applicable. The rules set forth in all these legal instruments and which, for the most part, have not only treaty but also customary law status, applied to the relations between the FRY and NATO after 24 March 1999, the day when the hostilities began. At the outbreak of the conflict all NATO countries were party to the 1949 Conventions, and the majority were also bound by the Additional Protocols thereto.

Despite the use of highly accurate weapons designed, according to a statement by the Alliance's leadership, to ensure that the operation was a bloodless one, NATO's military operations were accompanied by violations of fundamental rules and principles of the law of armed conflicts (international humanitarian law). In particular, during the course of its operations NATO forces violated provisions of Part IV, Section I of Additional Protocol I, on the general protection of civilians against effects of hostilities. In the terms of its Article 49, para. 3, the provisions of Section I "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land ...".

Articles 51 and 52 of Protocol I stipulate that attacks (i.e. acts of violence) must be limited strictly to combatants and military objectives, and that the civilian population and civilian objects shall not be the object of attacks or of reprisals; the Protocol defines military objectives as "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".

According to information supplied by the Yugoslav authorities, during the 78 days of the military operation over 1,300 civilians — including some 400 children — died, and thousands were seriously injured. The civilian population of Yugoslavia is still at risk from cluster bombs which failed to explode during NATO rocket attacks. There are currently thought to be between 30,000 and 50,000 unexploded cluster bombs in Kosovo (in addition to the mines laid by the rebels fighting against the Yugoslav army).

Furthermore, the question arises as to what “definite military advantage” (in the sense of Article 52) NATO forces acquired by disabling power stations, television centres, bridges and other such installations on Yugoslav territory. Clearly, the notion of targeting acquires new meaning where extremely accurate weapons are used.

Use of certain weapons: risk of a “Kosovo syndrome”?

The deployment of peace-keeping forces in Kosovo after over two months of NATO bombing and rocket attacks against Yugoslavia once again focused the attention of the foreign media on the so-called “Persian Gulf War syndrome”. This expression is used to refer to the symptoms of a mysterious illness which, eight years later, continues to affect numerous groups of military personnel who took part in Operation *Desert Storm* in 1991. Thus far, some 90,000 Americans have asked to undergo medical tests to determine whether their health was in some way damaged at that time. Coinciding with the conflict in Yugoslavia, a renewed interest in tracking down the causes of the illnesses arose when a number of Western military experts asserted that the root of the problem lies in the fact that the shells used during the military activities in the Gulf contained radioactive substances. According to their calculations, a total of some 700,000 such shells were fired at Iraqi troop positions during the war. Their structure included components consisting of depleted uranium.

The story of the production of shells filled with depleted uranium goes back to the 1970s when, thanks to the efforts of Soviet specialists, ground troops began to enjoy the protection of tanks which the new “dynamic” armour-plating technology rendered virtually invulnerable to the existing anti-tank shells of the Western powers. This led American designers to develop the idea of using depleted uranium rods in their ammunition. Owing to its physical properties, depleted uranium has an extremely high density (2.5 times that of steel) and exceptional hardness. However, at the moment of impact such shells become a source of radiation sickness. Specialists believe that the sudden heating up of the depleted uranium produces a large number of radioactive particles (measuring between 1 and 5 microns), which spread out over a radius of up to 50 metres from the point of

not recognized by one of them". In addition, provisions laid down in the Hague Conventions of 1907 and in a number of other treaties are also applicable. The rules set forth in all these legal instruments and which, for the most part, have not only treaty but also customary law status, applied to the relations between the FRY and NATO after 24 March 1999, the day when the hostilities began. At the outbreak of the conflict all NATO countries were party to the 1949 Conventions, and the majority were also bound by the Additional Protocols thereto.

Despite the use of highly accurate weapons designed, according to a statement by the Alliance's leadership, to ensure that the operation was a bloodless one, NATO's military operations were accompanied by violations of fundamental rules and principles of the law of armed conflicts (international humanitarian law). In particular, during the course of its operations NATO forces violated provisions of Part IV, Section I of Additional Protocol I, on the general protection of civilians against effects of hostilities. In the terms of its Article 49, para. 3, the provisions of Section I "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land ...".

Articles 51 and 52 of Protocol I stipulate that attacks (i.e. acts of violence) must be limited strictly to combatants and military objectives, and that the civilian population and civilian objects shall not be the object of attacks or of reprisals; the Protocol defines military objectives as "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".

According to information supplied by the Yugoslav authorities, during the 78 days of the military operation over 1,300 civilians — including some 400 children — died, and thousands were seriously injured. The civilian population of Yugoslavia is still at risk from cluster bombs which failed to explode during NATO rocket attacks. There are currently thought to be between 30,000 and 50,000 unexploded cluster bombs in Kosovo (in addition to the mines laid by the rebels fighting against the Yugoslav army).

Furthermore, the question arises as to what “definite military advantage” (in the sense of Article 52) NATO forces acquired by disabling power stations, television centres, bridges and other such installations on Yugoslav territory. Clearly, the notion of targeting acquires new meaning where extremely accurate weapons are used.

Use of certain weapons: risk of a “Kosovo syndrome”?

The deployment of peace-keeping forces in Kosovo after over two months of NATO bombing and rocket attacks against Yugoslavia once again focused the attention of the foreign media on the so-called “Persian Gulf War syndrome”. This expression is used to refer to the symptoms of a mysterious illness which, eight years later, continues to affect numerous groups of military personnel who took part in Operation *Desert Storm* in 1991. Thus far, some 90,000 Americans have asked to undergo medical tests to determine whether their health was in some way damaged at that time. Coinciding with the conflict in Yugoslavia, a renewed interest in tracking down the causes of the illnesses arose when a number of Western military experts asserted that the root of the problem lies in the fact that the shells used during the military activities in the Gulf contained radioactive substances. According to their calculations, a total of some 700,000 such shells were fired at Iraqi troop positions during the war. Their structure included components consisting of depleted uranium.

The story of the production of shells filled with depleted uranium goes back to the 1970s when, thanks to the efforts of Soviet specialists, ground troops began to enjoy the protection of tanks which the new “dynamic” armour-plating technology rendered virtually invulnerable to the existing anti-tank shells of the Western powers. This led American designers to develop the idea of using depleted uranium rods in their ammunition. Owing to its physical properties, depleted uranium has an extremely high density (2.5 times that of steel) and exceptional hardness. However, at the moment of impact such shells become a source of radiation sickness. Specialists believe that the sudden heating up of the depleted uranium produces a large number of radioactive particles (measuring between 1 and 5 microns), which spread out over a radius of up to 50 metres from the point of

explosion of the shell. The damage caused by these particles stems, on the one hand, from the immediate effect of radiation penetrating the human body and, on the other hand, from the radioactive contamination of the air and surroundings (items of equipment, fortified structures, etc.). There is therefore a risk not only of receiving a direct dose of radiation, but also, as a result of inhaling the dust, of suffering subsequent sickness due to radioactive isotopes lodged in the body.

The validity of these alleged causes of the "Persian Gulf syndrome" is backed up by recently published information concerning the results of tests carried out on British war veterans. It was found that the amount of radioactive substances contained in the bodies of former military personnel exceeded permissible levels. Of the thirty individuals tested, almost half were found to have suffered seriously from the effects of radiation. Furthermore, the veterans' considerable concern about the consequences of the deterioration in their health is accentuated by the claims now being made by learned physicians that the active presence in the human body of radioactive substances may trigger genetic mutations which may then be passed on to the progeny.

It has been reported by the media that some 12,000 shells filled with depleted uranium were used in the bombardment of Yugoslavia. Whether their use will give rise to after-effects will become evident in the very near future. NATO member countries should act speedily to prevent the emergence of a "Kosovo syndrome". One of the first to have understood the risk of a "Kosovo syndrome" was the Belgian government. According to statements made by its military command, the Belgian units deployed to the Balkans to serve as a peace-keeping contingent were issued with directives ordering adherence to the following safety measures: "Avoid areas where bombing has taken place and where there are fragments of armour plating from tanks (do not go closer than 50 metres); if it is necessary to operate in areas where destruction has occurred, use gas masks that can filter out radioactive dust, and protective gloves."¹

¹ On the depleted uranium issue, see *Nezavisimoye obozreniye* (Independent Military Review), No. 49, 1999, special supple-

ment to *Nevavisimaya gazeta* (Independent Newspaper).

In the light of the foregoing, the question clearly arises as to whether there should not now be a further protocol to the 1980 Convention on the Use of Certain Conventional Weapons.

Attacks against the civilian population and civilian objects, and their effects

NATO's attacks have led to a significant increase in the number of displaced persons and refugees from all of Yugoslavia's ethnic communities and faiths, without exception. The partial destruction or total obliteration of dozens of civilian installations on Yugoslav territory (power stations, television centres, medical establishments, pharmaceutical, chemical and tobacco works, mechanical engineering facilities, car factories, construction sites and many other industrial sites), where some 600,000 people were previously employed, has resulted in some 2.5 million people being left virtually without any means of subsistence. According to preliminary information, the economic damage caused to Yugoslavia by NATO's military action exceeds 100 billion US dollars.

There is every reason to believe that the NATO strikes resulted in the laying waste (for example, through the contamination by petrochemical substances of power stations, drinking water installations and ground water) of facilities that are essential to the survival of the civilian population, the protection of which is provided for under Article 54 of Protocol I.

Article 56 of Protocol I prohibits attacks on works and installations containing dangerous forces. Although this provision refers solely to the protection of dams, dykes and nuclear electrical generating stations, *de lege ferenda* it should also apply to such installations as the petrochemical plant in Panchevo, the destruction of which caused severe atmospheric pollution of the town and its surrounding area by chemical substances, some of which can result in cancerous diseases and genetic mutations.

It should be noted that NATO has violated Article 55 of Protocol I, according to which it is prohibited to use "methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the

health or survival of the population". This relates first and foremost to the destruction of oil refineries, petrochemical facilities and oil storage tanks on Yugoslav territory, as a result of which the natural environment was seriously contaminated, not only in the FRY itself but also in other European countries. The task of assessing the ecological situation should be entrusted to a competent international commission made up of independent experts.

The destruction during the course of NATO's military action of dozens of historical and architectural monuments, schools, institutes of higher education and libraries is a violation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and also of Article 53 of Protocol I, under the terms of which it is prohibited to commit any acts of hostility "directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".

Attention should be drawn to the fact that some of the above-mentioned serious violations by NATO of the rules and principles of international humanitarian law (attacks of a non-selective nature affecting the civilian population or civilian installations, attacks on works and installations containing dangerous forces, the targeting of the civilian population or individual civilians, the targeting of undefended locations and demilitarized zones, etc.) are qualified by the 1949 Geneva Conventions and Additional Protocol I thereto as war crimes. This entails the material responsibility of the corresponding subject of international law and the criminal responsibility of the individual persons having committed the said crimes.

The main characteristic of the law governing armed conflicts, as one of the branches of modern international law, is that the process of its codification and progressive development over many years has had to take into account the confrontation between the principle of humanity and that of military expediency. In turn, one of the main forces that has driven this process over a period of centuries has been the continual improvement of the means and methods of conducting armed warfare. And now, as we leave the second millennium behind us, specialists are talking — not without justification — about sixth-generation wars. The distinguishing feature of this stage in the

development of means and methods of conducting warfare is the fact that, against a background of stockpiled nuclear weapons, there is now a process of creating, accumulating and using so-called high-accuracy weapons. The existence and use of precisely such means of annihilation and destruction (in Iraq in 1991, and in Yugoslavia in 1999) are what need to be covered by the scope and application of the rules and principles of the law of armed conflicts.

As for the situation in Yugoslavia, such weapons were used in the course of a so-called internationalized armed conflict of a non-international nature, in the sense that prior to the start of the NATO operation there was an internal armed conflict in the FRY, the parties to which were the Yugoslav armed forces and the so-called Kosovo Liberation Army. After the intervention began, the subjects of international law who were bound to observe the rules of the law of armed conflicts were Yugoslavia, the NATO member countries and the North Atlantic Alliance itself.

As has already been pointed out, NATO's action took the form of an air and sea offensive, i.e., the type of military action that has thus far been the least subject to regulation by international law. All of the foregoing has been stated in an attempt to highlight the complexity of the circumstances and thus the context in which the NATO action against the FRY should be analysed, with reference to the current rules and principles of the law of armed conflicts.

Humanitarian law in crisis?

Did NATO's action in Yugoslavia give rise to a crisis in the system of rules and principles that constitute the law of armed conflicts? Obviously not. The situation should be viewed from a broad perspective, taking account of all the facts and circumstances that influence the development of modern international law (and at the same time the state of modern international law and order) in general, and the law of armed conflicts in particular.

The terms "humanitarian intervention" and "humanitarian catastrophe" do not carry any significant legal weight from the standpoint of international law. At best, they may be ascribed to the conceptual vocabulary of political science, sociology and so on.

International legal instruments in general, and the sources of the law of armed conflicts in particular, do not contain any definition of such concepts.

Human rights law relies on the concept of flagrant and massive violations of human rights in a given State, the extent of which may constitute grounds for the international community to take action under Chapter VII of the United Nations Charter, i.e., to put a stop to such violations on the grounds that they affect the interests of the entire international community. In such a case, however, the United Nations Charter specifies that the corresponding decisions and measures shall be taken by the United Nations Security Council.

In the spring of 1999, for the first time since the beginning of the post-war period, this function was, so to speak, appropriated by NATO. However, according to the latest information, the situation in Yugoslavia did not involve flagrant and massive violations of human rights on a scale that would justify a military operation against that country, even on the basis of a Security Council decision. The figures put forward for the number of ethnic Albanians who were allegedly victims of the FRY's reaction to the activities of the KLA turned out to be exaggerated.

In late 1999, the Organization for Security and Cooperation in Europe (OSCE) published two reports concerning human rights violations in Kosovo. The authors of the reports concluded that, prior to the start of NATO's military action against Yugoslavia, the rebel province had not been affected either by violence against the civilian population or by any "ethnic cleansing". Of course, there had been cases of violations of the rights of Albanians and even killings, but these had not been on a massive scale. After 24 March, when NATO aircraft dropped the first bombs on Belgrade, the situation changed dramatically. The persecution of the inhabitants of Kosovo by the Serb authorities became systematic, more than a million people were driven from their homes, and several thousand were killed. The tragedy of those people was thus a direct result of the "humanitarian intervention" undertaken by the West. The fact that thousands of civilians died — not before, but after the start of the

military operation — constitutes grounds for invoking the responsibility of the leaders of NATO's member States and of the Alliance itself.²

In any case, no right to a so-called "humanitarian intervention" may legitimately be asserted as a means of ensuring respect for the Geneva Conventions and Additional Protocol I, as mentioned in Article 1 of the said treaties, since coercive measures (and it is precisely such measures that are at issue here) involving the use of armed force can be brought to bear only after a decision to that effect by the United Nations Security Council.

How does one go about getting the parties to a conflict to recognize the applicability of international humanitarian law in each individual case? First and foremost, a decision in that regard has to be taken by the United Nations in the form of a Security Council resolution. In practice, however, the applicability of humanitarian law to a given conflict is frequently confirmed by the ICRC, whose opinion is largely heeded. Influence can also be brought to bear on the State in question by third countries, but without the use of force. In the interests of clarifying the legal situation it would be desirable to enlist the services of the United Nations International Court of Justice in The Hague.³

Concluding remarks

Throughout the military operations in spring 1999, the United States and NATO did not lose a single soldier, whereas avoiding casualties among the civilian population of Yugoslavia proved to be impossible. Thus, anyone wishing to qualify this conflict as the "first war without casualties" must make that assertion subject to a major reservation. Will situations similar to the conflict in Yugoslavia be the norm in the future?

Clearly, we can deduce that the triumph of modern technology is conducive to bringing about a decline in the moral values of politicians.

² *Izvestia*, 7 December 1999.

³ See H. P. Gasser, *International Humanitarian Law*, Russian edition, Moscow, 1995, p. 33.

Furthermore, the question of banning or limiting the use of the most barbaric forms of conventional weaponry remains high on the agenda, as does the need to resolve the issue of implementing the rules of the law of armed conflicts and of strengthening the procedures for determining responsibility for their violation. This is true at both the national and international levels. It is vital to further improve the legal basis for solving humanitarian problems that arise during armed conflicts of a non-international nature, in particular also in internal armed conflicts which take on an international dimension.

Résumé

Le Kosovo et le droit des conflits armés

par SERGEY ALEXEYEVICH EGOROV

L'auteur rappelle que l'ensemble du droit international humanitaire relatif aux conflits armés internationaux était applicable au récent conflit des Balkans, suite à l'intervention armée de l'OTAN contre la République fédérale de Yougoslavie. Ce droit n'aurait pas été respecté par les forces de l'OTAN dans plusieurs contextes, notamment en ce qui concerne le choix des objectifs susceptibles d'être attaqués. Un trop grand nombre de civils aurait péri sous les bombes et toutes sortes d'installations auraient été attaquées et détruites illégalement. Par ailleurs, au cours de ce conflit, l'expérience a montré que l'emploi de munition contenant de l'uranium appauvri devrait être interdite par le droit international. Toutefois, même après cette guerre, le droit international humanitaire n'est pas remis en question. Mais il faut en renforcer les procédures, afin d'aboutir à une meilleure mise en œuvre des obligations humanitaires.

Peace-enforcement actions and humanitarian law: Emerging rules for “interventional armed conflict”

by

MICHAEL H. HOFFMAN

The millennium just past offers a useful historical context for lawyers, soldiers and policy-makers who have to plan and conduct peace-enforcement missions. There has been an unspoken assumption about peace-enforcement operations.¹ They are thought to be so unlike traditional wars that they cannot be accommodated within an easily acquired framework of international humanitarian law. Any differences that may separate peace enforcement from other conflict-related military operations are, however, not profound and should not deny peace enforcers access to rules of international humanitarian law.

States are reluctant to characterize use of force in the peace-enforcement context as equivalent to military operations in other conflict environments. Furthermore, State practice does not encourage the notion that rules of international humanitarian law can

MICHAEL H. HOFFMAN is the American Red Cross Officer for International Humanitarian Law. He is a retired Lieutenant-Colonel in the US Army Reserve. The opinions expressed in this article are those of the author and do not necessarily reflect those of the American Red Cross. He wishes to acknowledge the assistance of Sonia Pathak in conducting research for this article.

be applied to peace enforcement in a predictable, systematic manner. Nonetheless, developments at the close of the 20th century point in a positive direction. Events during the Kosovo conflict, and after, demonstrate that rules for interventional armed conflict are beginning to take form.

Is humanitarian intervention compatible with international humanitarian law?

The 20th century witnessed more than a few motivations for war. Some wars were fought to further the interests of ruling élites, some to build empires, some to advance ethnic ambitions, some to serve ideological fervour, some to support nationalistic dreams, some to destroy peoples and civilizations, some to achieve freedom, and some simply to survive in the face of raw aggression. By the closing centuries of the last millennium concrete, treaty-based rules had been set in place to regulate warfare. With the exception of peace operations, we now have a clear consensus that these rules apply, in some form, during every armed conflict. The motives driving any given war are irrelevant to the obligation to apply international humanitarian law.

The use of force under Chapter VII of the UN Charter remains a curious exception to this consensus. In most instances, State policy assumes only piecemeal application of the modern law of armed conflict during peace-enforcement missions. Though the armed forces of the Federal Republic of Germany are instructed that the “rules of international humanitarian law shall also be observed in peace-keeping operations and other military operations of the United Nations”,² such guidance is atypical. States seem uneasy with the notion that peace-enforcement units should apply all or most of international humanitarian law during their missions as standard operating

¹ As used in this article, the term “peace enforcement” refers to military operations conducted under Chapter VII of the UN Charter and to similar operations conducted by intergovernmental organizations at the regional level.

² *Humanitarian Law in Armed Conflicts — Manual*, Ministry of Defence, Federal Republic of Germany, 1992, para. 208.

procedure. For political leaders, this may reflect unease at the prospect of telling the public that their armed forces are engaged in combat. Whatever its reason, such hesitation generates uncertainty for policy-makers and military planners alike. This was apparent when NATO launched military operations against Yugoslav territory and forces in March 1999.

A journalist posed this question to a senior Cabinet member during the opening days of the campaign: "Javier Solana, when he announced the air strikes, said that this wasn't an unconditional war against Yugoslavia and it wasn't against the Serb people. Would you also make those statements, and what would your message be to liberal Serbs who have been critical of President Milosevic in the past who are now rallying round the flag because they feel their country is under attack?" — The answer was: "This is not a war, it is an operation designed to prevent what everybody recognises is about to be a humanitarian catastrophe: ethnic cleansing, savagery in a physical way, the driving out of people from their own home villages and the likes of the war crimes that we saw at Rajac. That is what we are in there to prevent, that is not war, it is a humanitarian objective very clearly defined as being that."³

Nonetheless NATO set out to secure its objective through military means. Perhaps because the military character of this operation was paramount, NATO members never denied that their forces were bound by the rules of international humanitarian law. NATO officials pointedly invoked rules of war during the conflict. However, they did not apply the law of military occupation (a subset of those rules) to follow-up operations in Kosovo. This is but the latest intervention marked by uncertainty, inconsistency and ambivalence in the face of facts that pointed toward armed conflict and the necessity to apply its rules.⁴

³ Secretary of State for Defence, United Kingdom, Briefing of 25 March 1999, www.mod.uk/news/kosovo/brief250399.htm.

⁴ In this article, the terms "international humanitarian law", "law of war" and "rules of war" are used interchangeably to cover all

aspects of the law of The Hague and of Geneva law. There is some disagreement as to whether the term "international humanitarian law" pertains to Geneva law only or whether it covers both.

Some background to the application of international humanitarian law

State practice seems 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 United Nations rather than as State actors bound by those rules. At most, they would assert, such missions are regulated by customary rules of international humanitarian law. Sometimes, State practice also seems linked to an assumption that peace-enforcement missions are something new in warfare and cannot be held to the same rules that apply in other armed conflicts.

Chapter VII of the UN Charter empowers the UN Security Council to authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.” Nothing in this language inherently argues against full application of international humanitarian law, but States have accorded a special status to Chapter VII operations. As they are conducted at the behest of the Security Council, they seem to have been endowed with unique political as well as legal character and are treated as something different from inter-State conflict.

Intervention under Chapter VII in the Korean War was marked by application of the Geneva Convention relative to the Treatment of Prisoners of War, and during the Gulf War all forces were governed by the rules of international armed conflict. These precedents did not, however, pave the way for continued expansion of that practice. Chapter VII forces operating in Somalia and Haiti sometimes applied international humanitarian law, as witnessed by their cooperation with ICRC protection delegates who visited detainees. But the decision to apply those rules was developed *ad hoc*, without benefit of a policy assuring clarity and consistency in meeting these challenges.

In December 1994 the UN Security Council adopted the Convention on the Safety of United Nations and Associated Personnel. On the face of it, this treaty provides for the protection of

UN staff on mission and punishment for those who attack them within a peacetime, law enforcement-oriented context. Article 2 specifies that the treaty does not apply to situations in which "the law of international armed conflict applies". Unfortunately, this language only increased the uncertainty surrounding Chapter VII deployments, for the treaty was adopted in response to attacks on UN personnel during peace-enforcement missions. This left the inference that States considered the law of international armed conflict inapplicable to peace enforcement. However, that interpretation would run contrary to military realities in the field. This contradiction between theory and reality only compounds the challenge involved in merging international humanitarian law with Chapter VII operations.

Operational realities quickly overcame NATO's initial reluctance to characterize military operations in Kosovo (conducted without Chapter VII authorization) as being a "war". However, follow-on military activities in Kosovo by NATO members remain shrouded in legal ambiguity, as they have not adopted the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to regulate their activities. Their presence in Kosovo is sanctioned by a Chapter VII resolution,⁵ but this is not enough to close a serious gap in their legal authority. The resolution authorizes the Secretary-General "with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo."⁶

This mandate was achieved through the use of armed force. The agreement for the withdrawal of Yugoslav forces provides that "the bombing campaign will terminate on complete withdrawal

⁵ UN Security Council Resolution 1244, of 10 June 1999.

⁶ *Ibid.*, para. 10.

of FRY [Federal Republic of Yugoslavia] forces ...”⁷ It also stipulates: “The international security force (KFOR) shall have the right: (a) to monitor and ensure compliance with this agreement and to respond promptly to any violations and restore compliance, using military force if required. This includes necessary actions to: (1) enforce withdrawals of Federal Republic of Yugoslavia forces; ...”⁸

Though international humanitarian law does not furnish precise guidance on what constitutes military occupation, Kosovo has plainly come under foreign military control through the use of force. The international military contingent in Kosovo reasonably qualifies as an occupation force. Nothing found in the UN Charter, or elsewhere in international law, grants the United Nations any authority to administer the territory of a sovereign State. The only available authority for such action is found in that part of international humanitarian law regulating the powers and duties of occupation forces.

The law of military occupation has not been invoked to justify or support KFOR or the UN Interim Administration Mission in Kosovo (UNMIK). This adds yet another precedent for the employment of Chapter VII-sanctioned force without complementary obligations under the rules of international humanitarian law. Fortunately, that unfavourable momentum is slowed by important countervailing events.

International humanitarian law and intervention operations: the Kosovo precedent

NATO’s military operations during the Kosovo conflict were not authorized under Chapter VII, and KFOR and UNMIK operate there without reference to the law of military occupation. Nonetheless, NATO has established an important precedent for the application of international humanitarian law to intervention

⁷ Letter from the Secretary-General to the President of the Security Council, S/1999/682, of 15 June 1999. See the appended Military Technical Agreement between the International Security Force (“KFOR”) and

the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Art. II(e).

⁸ *Ibid.*, Appendix B(4).

operations. From the viewpoint of NATO member States, their operations were conducted in response to an international humanitarian threat, rather than for the pursuit of State interests. Ultimately, NATO members sought and received Chapter VII authority to move into Kosovo. Under those circumstances, NATO's commitment to follow rules of war during the conflict provides a compelling precedent for their use where relevant in all Chapter VII operations.

From the first days of the conflict, NATO statements demonstrated an intent to follow the law of war rules on targeting. While discussing military operations at a press conference in the early days of the conflict, a NATO spokesman said that "the targets were exclusively military — every effort was made to avoid collateral damage — planes only fire at targets when we are confident that we can strike accurately — some aircraft in the first operation returned without dropping ordinance. Targets are carefully selected and continuously assessed to avoid collateral damage."⁹

Two months later, a like message was delivered at a US Department of Defense press briefing. When a journalist asked: "To what extent are targets like power plants and other utilities designed to have a psychological impact on Milosevic, based on the fact that those are the ones that greatly inconvenience his people?", he received the following reply: "Once again, the targets are not directed whatsoever at the Serbian people. These are directed at his ability to coordinate his military forces in the field, his ability to attack innocent civilians, the IDPs and refugees, and his ability to command and control his fielded forces. Anything that contributes to that in a military fashion will be attacked, but we certainly have no intention of causing any problem for the Serbian population. That's not a military target. But once again, you need to go back. Milosevic knows exactly what his targets are and what things he needs to maintain a military force, and those will be attacked."¹⁰

⁹ NATO Press Conference, 26 March 1999, www.nato.int/kosovo/press/p990326a.htm.

¹⁰ Defense Link, US Department of Defense News Briefing, 22 May 1999, www.defenselink.mil/news/May1999/to5221999_to522asd.html.

Likewise, NATO invoked the rules of war on treatment of captured enemy forces. A spokesman for the US Department of Defense made the following point at a press briefing after three US service members were captured: "... We, of course, are of the mind that these individuals should not have been abducted in the first place, that they should be released immediately. We believe, of course, that they should not be used as any kind of bargaining chip, since this is contrary to the Geneva Convention ..."¹¹

At another press conference a little over a month later, another statement was made on the application of the Third Geneva Convention relative to the Treatment of Prisoners of War: "Let me start and give you a few details about the release of the two EPWs, former EPWs (enemy prisoners of war) today at the border between Hungary and Yugoslavia. There wasn't press coverage of this because, as some of you may know, Article 13 of the Third Geneva Convention says: 'Prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity'. So there was no press coverage for the turnover."¹²

In conclusion, NATO had declared that it was implementing Geneva rules for treatment of prisoners of war, and following rigorous targeting practices. NATO took the initiative to point out its application of rules of war in a conflict where a Security Council resolution was ultimately obtained in support of its follow-on military presence in Kosovo. This leaves little room for the view that Chapter VII operations are exempt from rules of international humanitarian law.

Emerging rules for interventional armed conflict

On 6 August 1999 UN Secretary-General Kofi Annan issued to United Nations forces their first standing guidance on the application of international humanitarian law.¹³ The guidance he gives

¹¹ *Ibid.*, 7 April 1999, www.defenselink.mil/news/April1999/to4071999_to407asd.html.

¹² *Ibid.*, 18 May 1999, www.defenselink.mil/news/May1999/to5181999_to518asd.html.

¹³ *Observance by United Nations forces of international humanitarian law*, Secretary-General's Bulletin, ST/SGB/1999/13, of 6 August 1999. Reprinted in *IRRC*, No. 836, December 1999, pp. 812-817.

them is based on the premise that peace-enforcement operations cannot be categorized as traditional armed conflict. For example, Section 8 of the Bulletin begins with the instruction that: "The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention." In contrast, the Third Geneva Convention relative to the Treatment of Prisoners of War plainly identifies such detainees as "Prisoners of War." Article 12 of the Convention begins "Prisoners of war (...) in the hands of the enemy Power (...)"

Unlike the Geneva Conventions of 1949, the Secretary-General's Bulletin does not address the application of international humanitarian law within the context of inter-State armed conflict. However, as one reads on, the next sentence stipulates regarding such detainees that: "Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949 (...)" The Bulletin, then, expressly extends the practice of applying international humanitarian law in UN operations, without waiting for a solution to all legal questions. The Secretary-General's Bulletin contains detailed guidance on Geneva law issues relative to treatment and protection of civilians, detainees, and wounded and sick combatants. It contains detailed guidance on Hague law issues relative to means and methods of combat.

The legal status of this Bulletin is open to debate. Can the Secretary-General issue rules and regulations for the conduct of State-deployed forces on UN missions? Some of the guidance relies on treaties that have not been ratified by all States participating in Chapter VII operations, and for the forces involved this poses serious questions about their capacity to work together. Nonetheless, the Bulletin offers a way forward.

In the past, Chapter VII operations have been saddled with unnecessary legal ambiguity about the application of rules of war. The Bulletin provides a foundation for legal advisors, commanders and civil authorities tasked to implement peace-enforcement operations. In the future, they can ask *which* rules of international humanitarian law apply. In the past, the question was whether *any* of those rules applied.

It is appropriate here to recall the Martens Clause: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."¹⁴

Surely, the dictates of the public conscience would require the fullest possible application of international humanitarian law where UN-sponsored forces (or those sponsored by a regional organization) are engaged in combat or military occupation. The Secretary-General's Bulletin provides the first step. A workable legal context would furnish the second.

As with other, less destructive human activities, the characteristics of armed conflict are susceptible to change in their specifics. That such operations may have distinctive legal, political or operational characteristics setting them apart from other military operations is not extraordinary. It should no longer keep us from moving to develop and implement clear, usable standards of international humanitarian law.

The Geneva Conventions of 1949 formalized customary law on the categorization of armed conflicts. In accordance with customary practice, armed conflicts were categorized as international or internal in character. These categories are open to further development or addition as the humanitarian imperative demands.

Intervention is an integral part of peace enforcement. Units so deployed cannot be classified as parties to internal armed conflict. Chapter VII forces applied rules of international armed conflict during the Gulf War, but there is likewise still no constituency pressing to apply such rules on the basis that peace-enforcers are parties to international armed conflict. The rules of internal armed conflict do not provide a

¹⁴ 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, preambular para.

realistic framework for their operations. Nor can we routinely look toward the rules for international armed conflict if we reject the notion that peace-enforcers are also belligerents, participating within the established legal framework for international armed conflict.

Peace enforcers are interveners. Their operations are intervention operations. We need not lose further time in developing rules for them simply because we cannot place them within existing legal constructs for war. Armed conflict that involves peace enforcers is interventional conflict. Along with internal and international armed conflict, interventional armed conflict is also a reality of modern war. International humanitarian law can best move forward if we take that into account. When the Geneva Conventions of 1949 were adopted, it required something of a conceptual breakthrough to accept and adopt rules for internal armed conflict. Historically, States had been willing to consider treaty-based rules for international conflict only. We have no such challenge here. The debate is over what rules to apply to peace-enforcement operations, not whether established rules apply at all.

The concept of interventional armed conflict provides a practical, descriptive framework within which to focus and refine rules for peace operations. We now have experience with application (albeit uncertain and inconsistent) of international humanitarian law in a wide range of peace operations. Finally, we have a concrete framework in rules proffered by the Secretary-General of the United Nations.

Peace-enforcement operations represent a shift in the nature of armed conflict — they do not fall within the framework of internal armed conflicts, and many do not regard them as falling within the framework of international armed conflict. However, armed conflict they remain. Such shifts in the nature of warfare may not be frequent, but they have taken place over the centuries. From a humanitarian viewpoint we should be prepared to deal with them. We can develop realistic, practical rules for peace enforcement within the framework of interventional armed conflict. Our predecessors of the late 19th to mid-20th centuries adopted a workable framework to implement international humanitarian law in the context of their times. We need to match their spirit of innovation in our own.

●

Résumé

Mesures d'imposition de la paix et droit humanitaire : nouvelles règles pour les interventions armées

par MICHAEL H. HOFFMAN

Au cours des dernières années, le Conseil de sécurité a autorisé, à plusieurs reprises, le recours à la force en vertu du chapitre VII de la Charte des Nations Unies. D'autres actions militaires collectives contre un État ont eu lieu en dehors du cadre fixé par la Charte (par exemple, l'intervention de l'OTAN au Kosovo). Les questions de savoir si le droit international humanitaire est applicable et quelle en est la justification ont suscité de longue date des débats, sans qu'une réponse acceptée par tous y soit donnée. En examinant la pratique des États, l'auteur arrive à la conclusion que, faute d'une codification explicite du droit international applicable à ces actions, les normes du droit international humanitaire sont tout de même invoquées par les forces qui participent à de telles opérations militaires. Les règles, publiées récemment par le secrétaire général des Nations Unies sous le titre « Respect du droit international humanitaire par les forces des Nations Unies », semblent confirmer ce constat.

Information warfare

by

WILLIAM CHURCH

For nearly ten years, rumours of a new type of war have captured the imagination of military planners, but the Kosovo crisis demonstrated that the present has caught up with the future. Some of these rumoured technologies and tactics have turned into military doctrine, and now the United Nations has been asked by a world power to explore this shift in methods of warfare.

These changes fall under the popular name of Information Warfare (IW), but in military jargon it is part of a much larger strategic shift that goes by the name of Information Operations (IO) and Revolution in Military Affairs (RMA). Regardless of the wrapping, the content is the same. It is exploiting for subversive purposes an enemy's use of high-tech computer and telephone systems in both military and civilian infrastructures.

Since the definition of Information Warfare is still in the development phase and varies according to each country that formulates it, the best method of understanding the application of such

WILLIAM CHURCH is managing editor of the Centre for Infrastructural Warfare Studies (CIWARS) and of RMA Watch, Glasgow (UK). He is currently working on a doctoral thesis at the University of Glasgow on international humanitarian law and information warfare. — This article was compiled from a range of sources. The primary source is CIWARS Intelligence Report, 1997 and 1998 issues. See www.iwar.org/ciwars.html. For a review of the United States policy on Information Operations (Warfare) see www.iwar.org/USJointIO.html. For that of other countries, see www.iwar.org/country.html.

warfare is to examine how it has been and could be used. This paper examines the use of IW by dividing it into two separate categories:

- IW without concurrent use of physical force — in time of peace;
- IW concurrent with physical force — during armed conflict.

Information warfare without concurrent use of physical force

Prior to starting this section, it is important to ask one important question: how can the term Information Warfare be used if there is no war? The answer goes back to an early 19th century definition of war by the well-known German military theoretician Carl von Clausewitz who understood war as a “continuation of politics by other means”. In terms of IW, “other means” might be seen as not very different from the naval practice of firing a warning shot across the bow of a ship, except that it is done with computers in a silent but nonetheless effective mode.

Approximately two years ago, IW was used to disrupt the transfer of money from one arm of a Middle Eastern terrorist group to another. This terrorist financier’s bank account was covertly broken into and the money was diverted. In a similar move at the beginning of the Kosovo conflict, methods were discussed and approved to put pressure on President Milosevic; these included tampering with or breaking into his bank accounts and disrupting his personal communications.

In the first instance, the break into the banking system was successful. Conversely, there is no evidence that an attempt was made to break into the Serbian President’s accounts or to disrupt his personal communications. However, what is significant are the questions surrounding the methods and results. For example, breaking into a financial account involved breaking the laws of the State where the account was domiciled, and, if successful, it had to involve intercepting and cracking the secure communications code of the international banking system. But breaking into banking systems raises more questions with regard to criminal law than to international humanitarian law, although in that case it was carried out as a hostile act in the context of a conflict situation. The example also provides an opportunity

to speculate further about extensions of this strategy. Most stock market trading is conducted in an electronic mode today, and there have already been examples of accidents that could be duplicated by an IW tactic. For example, in 1998 a bond trader-trainee hit the wrong button on his computer and initiated a market panic that wiped out several hundred million dollars of market value in one day.

Not only could this situation be duplicated by breaking into or corrupting a stock market's computer, but it is exactly the type of scenario that is being practised for both offence and defence strategies by a number of modern armies today. The goal would be to financially cripple a nation's economy so that it could not continue an aggressive arms purchase programme.

The closer the possibility of physical force in armed conflict, the more aggressive the IW tactics. The United States' Presidential Commission on Critical Infrastructure Protection (PCCIP) in 1998 cited the need to prepare for a number of IW tactics that it believes could be used against the United States. They include the disruption of electricity and/or telecommunications systems to hinder military mobilization or induce civilians to question the cost of the pending war.

As tensions mounted in the months immediately preceding the armed intervention in Kosovo, the United States military computer infrastructure was increasingly probed and in some cases its operation was hindered. This occurrence was code-named Solar Sunrise and although it was later discovered not to have been directed by the Federal Republic of Yugoslavia or any of its supporters, it sent a strong warning signal to the US armed forces.

A similar eventuality was presented at the Future of War Conference in St. Petersburg in February 1999. This time, however, the Falklands War was used as an example. IW could conceivably have been used by Argentina to disrupt the electricity, telephone and transport services of London and thus the mobilization itself; this might have delayed the sailing of the fleet and gained Argentina more time to resupply air-to-air and air-to-ground missiles or raise the political stakes for the British Prime Minister. It might be easy to discard such "what if" scenarios if it were not for the fact that they are taken directly from current military doctrine.

IW has also been speculated to be the next effective weapon to be used by terrorists and guerrilla armies as a means of compulsion. Colombian guerrilla forces are already targeting civilian electricity systems: over thirty pylons carrying power lines have been blown up in the last year. Considering that IW techniques are already being used on the battlefield to hinder the Colombian army's communications, the idea of IW actions aimed at the civilian infrastructure may not be that far-fetched. There are consequently any number of reasons to turn our attention to international humanitarian law.

Information warfare use concurrent with physical force

This section, which is intended to give a summary overview rather than a complete catalogue of IW use, details six areas thereof; for the sake of convenience, they are described in terms of primary and secondary usage. This delineation is based on known doctrine and capabilities. Considerations on primary usage are based on what is known and probable, while secondary usage is still speculative.

Primary usage

IW can be used to disrupt the use of precision bombs. Their increased use will undoubtedly be accompanied by a correlative growth in the development of IW for defence purposes. These types of bombs — popularly called “smart bombs” — premiered in the 1991 Gulf War between the Coalition countries and Iraq almost ten years ago. Since then, the use of such weapons has increased from eight per cent in that war to over 35 per cent in the Kosovo conflict. Precision bombing is meant to allow for the targeting of military facilities that are surrounded by civilian buildings, as was repeatedly the case in both the Gulf and Kosovo campaigns, and that is also the heart of the problem. The bombs are directed either by transponders surreptitiously placed on the target or by coordination of GPS (Global Positioning Satellite) signals which can identify exact locations on the earth and guide a bomb to that location. IW may be used to jam or corrupt the signals that direct the bombs.

However, a hand-held GPS jammer capable of misdirecting a precision bomb is now available at a cost of under \$10,000. Considering the close proximity of some military facilities to civilians, this raises a question of responsibility:

- Who is responsible for the effects of misdirection and of collateral damage?
- If it is known that the enemy has this capability, should precision bombs no longer be used, as they might become indiscriminate weapons?

Unfortunately, GPS jammers are not the only threat to “precision bombs”. The modern military have developed Electronic Magnetic Pulse (EMP) weapons capable of scrambling the operating system of computers and telecommunications facilities. These weapons are best described as similar to placing a magnet next to a computer disk and then discovering that all the information on the disk has been wiped clean. EMP weapons — used as primary weapons and as a countermeasure — have their own share of problems: they tend to be indiscriminate, with the EMP blast hitting more than its target. Civilians in hospitals on computer-controlled life-support systems, vital power-generating facilities and transport systems could be affected. Once again this raises the issue of collateral damage and responsibility for the use of IW weapons.

In both the Gulf and Kosovo conflicts, the overall infrastructure became a target and international humanitarian law experts have reviewed this tactic at length. The purpose of this paper, however, is to examine the use of IW instead of physical force. In other words, the computer systems of the targeted nation would be broken into and corrupted by inserting a computer virus or by other means, and this would naturally hinder their use for a period of time, without the cost of physical reconstruction as is now faced in Kosovo.

As far-fetched as this might seem, the facts show that this tactic was considered and rejected for the intervention in Kosovo. It can therefore only be assumed that the core capabilities were in place and that perhaps, by the next war, there will be confidence in their use. In fact, the core concept of limited damage was tested on 5 May 1999 using a device called a “soft bomb”: pieces of graphite were dropped

on electric wires and caused a temporary short-circuit in the system. This test was successful, with a five-hour outage, so it only stands to reason that the search for "soft" means will continue.

The next area of IW is the potential use of these "soft" means to break into computer systems that control a country's infrastructure, with the result that the civilian infrastructure of a nation would be held hostage. Once again, this tactic was considered but rejected in Kosovo; it does, however, bring up the question of future use. Likewise rejected was the idea of electronically severing Yugoslavia's Internet connection, which would have affected both the military and civilian population and could have had a devastating effect on businesses that use the Internet to control their vital business functions, like modern electricity and water systems. Hospitals in many countries are using the Internet to access records and even for expert guidance during medical procedures.

Also, such action might disrupt any of the transnational energy-sharing agreements which are becoming increasingly popular in this globalized and privatized world. Targeting of the civilian infrastructure in this manner raises an interesting question as to the targeting process and its overall effect, which some experts have suggested could develop into indiscriminate use owing to the interrelated character of global and national infrastructures. For example, electricity is shared between Laos and Thailand, between Venezuela and Brazil, between Canada and the United States and between Indonesia and Singapore, while Malaysia, providing half of Singapore's water, is a particularly drastic case in point.

This problem also extends to telecommunications. East and South-East Asia would be a good example, as the entire land and underwater telephone cable system is linked and is susceptible to interruption at any point. For example, action against one of the countries there would strand much of Asia's telecommunication traffic and force it all to fall back on limited satellite capacity. This raises the issue of damage to neutral or third-party countries.

The third primary area of IW with concurrent physical force is the "hacking" of military systems as reported in the Kosovo conflict. It has been confirmed that the Yugoslav air force's missile

defence system was manipulated; an example would be placing false targets on the computer screen or a simple disruption of the system. Much of this activity falls into the category of ruses of war, but it has a much larger potential.

One of the most obvious examples is hacking into nuclear missile systems and causing an inadvertent launch, or changing the target acquisition database on conventional missiles or bombs so as to cause intentional civilian damage and thereby sway public opinion. This is not as far-fetched as it sounds. Many of these functions are controlled by a targeting database that is constantly updated, even in peacetime. That database might become a primary target for destruction and corruption. This will be especially true as modern military thinking moves to what is called a direct-fire concept, which involves a combination of instant battle damage assessment by remote means, simulation analysis, and subsequent retargeting by feeding the information into on-site fire systems which then fire again with very little human intervention. It might be appropriate to examine, from the standpoint of international humanitarian law, the liability for a mis-directed strike based on IW techniques, or the responsibility for supervising a direct-fire system (which would obviously hinder the effectiveness of that system in a combat situation).

Secondary usage

This part deals with issues more directly related to the conventional battlefield and revolves around acts of perfidy or the targeting of sick and wounded soldiers. Unlike most of the areas summarized above there is no hard evidence that these tactics have been used, but they have been considered at military seminars and in discussion groups.

An act of perfidy may involve the use of the enemy's flag or uniform or the feigning of injury or death, with the intent to betray the enemy's confidence and to inflict damage upon him. It is this intent — meaning to draw the enemy closer by deception in order to kill him — that distinguishes perfidy from a battlefield ruse. The concept of perfidy may be relatively easy to define in the physical world. However, as we have already seen, the new battlefield is not always

visually physical. Modern armies use a combination of electronic sensors worn by their personnel or placed on their equipment. Infrared and motion detectors are used to highlight enemy movements which might be hidden by darkness or obstacles. This electronic battlefield is displayed on a combat-hardened laptop so that the entire battlefield can be monitored. This is the environment that is most susceptible to IW.

One countermeasure would be for an enemy to use or wear the other army's transponders so as to look like a friendly force, and might be deemed equivalent to wearing the enemy's uniform. This could be done by hacking into the system, altering the image and bypassing the encryption verification process, or by simple physical possession of the transponder.

An enemy might also mask the infrared signal — by an adaptation of the technology used by the Stealth bomber — so as to appear to be dead or immobile and giving off very low body heat. An army unit on patrol using the infrared identification combat system would register the object and the very low level of heat emitted. Seeing no movement and assuming that the object was lifeless, the unit might approach it with less caution. — Such signal-masking, however, presupposes the use of technology that is still at an experimental stage. There is no documented use of it at this stage.

Finally, an effective target might be the medical records of the enemy, for the purpose of delaying treatment or causing death once the soldier is under treatment. In this scenario, the enemy's computer system would be entered and selective data fields, such as blood type, would be altered. Such action could cause additional deaths. Once the problem was discovered, it would cause additional confusion and delays in the treatment of patients. It is believed that such interference is still very much theoretical. But it belongs to a category of capabilities that need exploration in order to forestall them, especially if the civilian population might become the target.

The above discussion covers the most obvious uses of IW, but there is one final area that needs exploration. It is the use of IW in psychological warfare and in the intelligence arena. While psychological warfare (PSYOP) is not new, some of its techniques might be

creating new problems. The goal of PSYOP is to affect the attitudes of the enemy soldiers and of the civilians who support them. Operations Tokyo Rose and Axis Sally during World War II are two examples. Another is the dropping of leaflets urging soldiers to surrender because of an impending invasion or giving a civilian population an unfavourable view of the war in the hope that they will cease to support it. There is no uniform answer as to whether modern uses of PSYOP are contrary to criminal law or international humanitarian law, but there may well be grounds for discussion of moral issues, as the Internet is being increasingly used for PSYOP and intelligence efforts.

On a different level there is the use of the Internet by groups in East Timor and Mexico to gain world support and expose alleged human rights abuses. However, following the same line of thinking, if such acts lead to vandalizing websites or sending “e-mail bombs” — flooding an e-mail account with messages — they may be seen as acts of terrorism.

The moral question comes into play when misinformation is knowingly put on the Internet to incite domestic tension. Last year Malaysia arrested two people who were allegedly spreading rumours on the Internet about racial strife between the Malays and the ethnic Chinese. Since neighbouring Indonesia was already experiencing ethnic violence, there may have been justifiable fear of it spreading. During the Asian financial crisis of 1997 rumours of bank collapses were spread on the Internet, no doubt with the intention of creating additional unrest. No State was found to be behind the above incidents, but the fact that they occurred begs the question of possible recurrences in the future.

The path forward

In November 1998, Russia requested the United Nations to examine the use of IW and develop an opinion regarding the need to amend international humanitarian law to govern IW or to promote some form of arms control agreement. With its Resolution A/RES/53/70 of 4 January 1999, entitled “Developments in the field of information and telecommunications in the context of international security”, the General Assembly agreed to examine these issues.

One of the first questions to explore might be the relationship between IW acts and the UN Charter's prohibition of the use of force. The question is: is the use of IW without physical force as a coercive strategy a use of force in the sense of the Charter? That same question has for example been answered by the negative with respect to economic pressure.

Finding an answer to the issues raised by IW may not be as simple as it sounds. What about situations where the use of IW produces the same end results as physical force? For example, disrupting telecommunications systems by means of a computer virus can be viewed as comparable to bombing the telephone switchboard. Both can be repaired and the intention of neither is to cause the loss of human life. If the destruction of Kosovo's oil pumping and distribution system were computer-focused, or if the Yugoslav command and control systems were silenced by using IW means to corrupt the entire nation's telephone, satellite, radio and television installations, would such action be considered as a prohibited use of force? In addition, and perhaps more importantly, how could Yugoslavia have responded to these acts, and with which justification? This last question is perhaps addressed more to nuclear-capable countries, since some countries have already classified IW as a potential weapon of mass destruction.

The starting point of any reflection might be to rationalize IW in terms of current thinking on the use of force. Since much of IW focuses on infrastructure facilities shared both by civilians and by the military, international humanitarian law may be an appropriate forum to examine this issue.

A high priority might be to examine the use of precision bombs and the effect of their being corrupted. Is such use covered by the provisions of Protocol I? The same question must be asked with respect to the corruption of the targeting database and the use of EMP weapons. It is my opinion, based on military experience and not on legal expertise, that the perfidious use and targeting of medical records will sort itself out over time, once practical experience has shown its lethal effect for both sides. Combatants may develop a tacit understanding to abstain from this behaviour because of the complications it adds to the battlespace.

This situation is reminiscent of the relative ease in which the 1995 Protocol on Blinding Laser Weapons was concluded. Everyone involved understood that such weapons were not good for the waging of war and some even doubted their practical application. The Protocol stands today as one of the few examples of a weapon being prohibited before its actual use.

IW will not lend itself to easy solutions in terms of arms control. The equipment needed to wage effective IW can be as simple as a personal computer, a telephone line, and "hacker" software that is readily available on the Internet. This does not mean that we have a world full of potential "cyber soldiers", because it is a long way from the possession of a single machine to developing a coordinated strike capability that uses the modern command and control system needed to wage a military campaign, as opposed to a single hack into a computer system.

Conclusion

I hope I have given an idea of the potential problems involved in the use of IW and indicated a number of possible solutions. IW has been tabled by the United Nations, which will work its way through the various issues. The discussion would benefit if experts in international humanitarian law would also examine the issues raised in this paper. It should be possible to discover a path forward in the right direction.

●

Résumé

La guerre des systèmes d'information (« Information Warfare »)

par WILLIAM CHURCH

Depuis quelques années, une nouvelle notion est apparue dans le vocabulaire des personnes s'intéressant aux affaires militaires et de sécurité internationale : la guerre des systèmes d'information ou, en anglais, Information Warfare. Cette méthode de guerre permet à un belligérant d'affecter et de perturber les programmes informatiques de l'adversaire, par exemple en modifiant les données qui devraient guider un missile dit « intelligent » vers son objectif. L'auteur en examine différents aspects, notamment sous l'angle du droit international humanitaire en vigueur. Il conclue que la récente décision des Nations Unies de s'intéresser à ce sujet est fondée et nécessaire.

The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict

by

SONJA BOELAERT-SUOMINEN

The purpose of this article is to discuss the legal basis for the activities of the International Criminal Tribunal for the former Yugoslavia (ICTY) in relation to Kosovo. The article starts with an account of the general background against which the Tribunal was established in 1993. The events which led to the Tribunal's involvement with Kosovo in 1998/99 in particular are summarized in the second part. The third part discusses in detail the Tribunal's mandate in respect of Kosovo, and highlights some of the jurisdictional prerequisites that need to be met under various provisions of the ICTY Statute. The article ends with observations on the division of labour between the Tribunal and the judicial authorities in Kosovo.

SONJA BOELAERT-SUOMINEN has law degrees from the University of Leuven and from Harvard Law School, and a Ph.D. from the London School of Economics. At the time of writing this article she was with the Legal Advisory Section of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). The views expressed in this article are those of the author and do not necessarily represent those of the United Nations.

The ICTY and the conflict in the former Yugoslavia from 1991 to 1995

Unlike the International Military Tribunals of Nuremberg and Tokyo, which were established after the defeat and surrender of the Axis countries, the ICTY was set up in 1993 at a time when the conflict in the Socialist Federal Republic of Yugoslavia (SFRY) was still ongoing. It will be recalled that the outward disintegration of the SFRY began when Slovenia and Croatia proclaimed their independence on 25 June 1991.¹ The Yugoslav People's Army (JNA) forces moved against Slovenia on 27 June 1991. A peace agreement was reached on 8 July 1991. This was followed by fighting in Croatia, which started in July 1991 between Croatian military forces on the one hand, and the JNA, paramilitary units and the "Army of the Republic of Srpska Krajina" on the other. Major assaults on Vukovar and Dubrovnik took place before the end of 1991. Macedonia sought international recognition as an independent republic from December 1991 onwards, but because of difficulties over its name, it was not admitted to the UN until April 1993 under the provisional name of FYROM (the 'Former Yugoslav Republic of Macedonia').² It is the only former Yugoslav republic that has thus far not been the scene of any fighting.

Bosnia and Herzegovina proclaimed its independence on 6 March 1992. This was challenged militarily by JNA forces and their allies who had withdrawn from Croatia. Initially, they were opposed by Croats and Muslims who fought side by side in Bosnia and Herzegovina. On 27 April 1992, Serbia and Montenegro³ declared

¹ For a chronology of the conflict consult, for instance, L. Silber and A. Little, *Yugoslavia: Death of a Nation*, 2nd ed., Penguin Books, BBC, London, 1996; W. Zimmerman, *Origins of a Catastrophe: Yugoslavia and its Destroyers — America's Last Ambassador Tells What Happened and Why*, Times Book, New York, 1996; C. Rogel, *The Breakup of Yugoslavia and the War in Bosnia*, Greenwood Press, Westport, Conn., 1998; M. Glenny, *The Fall of Yugoslavia*, revised ed., Penguin Books (USA), 1996, pp. 129-130.

² See R. Rich, "Recognition of States: The collapse of Yugoslavia and the Soviet Union", *European Journal of International Law*, Vol. 4, 1993, pp. 38-53; I. Janev, "Legal aspects of the use of the provisional name for Macedonia in the United Nations system", *American Journal of International Law*, Vol. 93, 1999, pp. 155-160.

³ Macedonia, as will be explained below, sought to establish its independence from the SFRY as well.

that they continued the legal personality of the former Yugoslavia, and would henceforth be known as the Federal Republic of Yugoslavia (FRY).⁴ In response to international pressure, the JNA ostensibly withdrew from the territory of Bosnia and Herzegovina, a process which was allegedly completed by 19 May 1992. Soon after, the erst-while alliance between Croats and Muslims broke down and the first clashes between these two parties were reported in Central Bosnia.

In the summer of 1992, news about the establishment of concentration camps started to reach the outside world. By the end of that year, 6,000 UNPROFOR troops had been sent to Bosnia. The Vance-Owen plan was agreed in January 1993. Shortly thereafter, the ICTY was established via the mechanism of Security Council resolutions, adopted under Chapter VII of the UN Charter, as a measure aimed at restoring international peace and security.⁵ Barely three months later the Security Council, by Resolution 827 (1993) of 25 May 1993, adopted a statute for the Tribunal. The first judges were elected on 17 September 1993, and the Tribunal commenced its work in The Hague on 17 November 1993. On 4 November 1994, the Tribunal issued its first indictment.⁶ However, the establishment of the Tribunal failed to deter further atrocities.⁷ Active hostilities in Bosnia and Herzegovina ceased only with the signing of the Dayton peace agreement in December 1995.

Since its establishment, the ICTY has become a fully-fledged international criminal institution, with the infrastructure,

⁴ However, as will be seen below, the legal status of this claim is still controversial.

⁵ Resolution 808 (1993) of 22 February 1993. — The companion tribunal for Rwanda (the ICTR) was likewise established via the mechanism of a Security Council resolution as a measure taken under Chapter VII. However, the ICTR was set up when the armed conflict in Rwanda had largely ended, following the take-over of the country by the former rebels.

⁶ In the case of *Dragan Nikolic*, alleged commander of a camp at Susica, in north-eastern Bosnia and Herzegovina, set up

within one month after the take-over by Serbian forces of the Bosnian city of Vlasenica, in April 1992; Press Release, Registry, CC/PIO/022-E, 4 October 1995.

⁷ The marketplace bombing in Sarajevo occurred in February 1994; in May 1995, the Croatian army recaptured areas in Slavonia; in July 1995, the safe area of Srebrenica was taken over by the Serbs; the following month, Croatia captured the Krajina area. Serious violations of international humanitarian law were committed in each of these and in other instances.

prosecutorial, judicial and administrative procedure necessary to the fulfilment of its mandate as set out in Security Council Resolution 827 (1993) of 25 May 1993. The Tribunal consists of three organs: the Chambers, the Office of the Prosecutor and a Registry. It now has three Trial Chambers each made up of three judges, and an Appeals Chamber, made up of five judges. It currently has a budget of nearly \$100 million and employs more than 700 staff members.⁸

The Office of the Prosecutor has a dual role: investigating violations of international humanitarian law and prosecuting cases of such violations in court. Since its inception in 1993, 91 individuals have been publicly indicted.⁹ Additional undisclosed indictments may also have been confirmed.¹⁰ A deliberate effort was made to devote resources to investigate alleged offences in an even-handed manner.¹¹ Of the publicly named indictees, a small number were Muslim, around fifteen were Croats and the largest number were Serbs. Up until the beginning of 1998, the investigative and prosecutorial activities of the ICTY concerned crimes committed in Croatia and in Bosnia and Herzegovina from 1991 to 1995. As will be explained in the next section, the Tribunal's public involvement in Kosovo began in 1998, when the Prosecutor established a first investigative team focusing on Kosovo.

Chronology of the ICTY's involvement in Kosovo

While the wars were being waged in Slovenia, Croatia, and Bosnia and Herzegovina, the situation in Kosovo was tense. In the

⁸ General Assembly, 54th session, Security Council, 54th year, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/54/187, S/1999/846, 25 August 1999, p. 9, para. 2.

⁹ ICTY Fact Sheet, 17/11/99, PIS/FS-55.

¹⁰ Since 1997, the ICTY Prosecutor has pursued a strategy aimed at high-level offenders and at issuing indictments under seal. The first time the use of sealed indictments came

to light was in the cases of *Slavko Dokmanovic*, arrested on 27 June 1997, and *Milan Kovacevic*, arrested on 10 July 1997. See P. Tavernier, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", *IRRC*, No. 321, November-December 1997, p. 616.

¹¹ W. Fenrick, "The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", *Journal of Armed Conflict Law*, Vol. 3, 1998, p. 198.

mid-1990s a faction of the Kosovo Albanians formed the Kosovo Liberation Army (KLA, or UCK), which fought the Serbian police forces from mid-1996 on. The Tribunal's public focus on Kosovo can be traced back to March 1998, when the then Chief Prosecutor, Justice Louise Arbour, publicly confirmed that the territorial and temporal jurisdiction of the Tribunal covered any serious violations of international humanitarian law taking place in Kosovo, emphasizing that she was empowered to investigate such crimes.¹² The immediate cause for this public statement was the marked intensification, from February 1998 onwards, of the conflict between the KLA and the FRY forces. According to the Prosecutor's information at that time, a number of Kosovo Albanians and Kosovo Serbs were killed or wounded, whilst the FRY forces engaged in a campaign of shelling of predominantly Kosovo Albanian towns and villages, widespread destruction of property and expulsions of the civilian population from areas in which the KLA was active.¹³

Also in response to the intensifying conflict, the UN Security Council passed Resolution 1160 on 31 March 1998 "condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo" and imposed an arms embargo on the FRY. Acting under Chapter VII of the UN Charter, the Security Council agreed that the Prosecutor should begin gathering information related to violence in Kosovo that may fall under the Tribunal's jurisdiction. The Prosecutor proceeded to request information from States and organizations about violent incidents in Kosovo. Subsequently the General Assembly, in May 1998, approved a budget request enabling the Prosecutor to recruit a team to undertake preliminary investigations.¹⁴

¹² Press Release, Office of the Prosecutor, 10 March 1998, CC/PIO/302-E.

¹³ *The Prosecutor against Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić and Vlatko Stojiljković*, Case No. IT-99-37-I, Indictment of 22 May 1999, para. 25.

¹⁴ General Assembly, 53rd session, Security Council, 53rd year, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/53/219, S/1998/737, 10 August 1998, p. 31, para. 118.

During the next six months, the ICTY conducted investigations in Kosovo against the backdrop of a steadily worsening situation. On 7 October 1998, the Belgrade authorities suddenly declared that they would no longer issue visas to the ICTY investigators whose activities the FRY considered a violation of its sovereignty.¹⁵ The Prosecutor's reaction to this refusal was firm. In a public statement she said that the jurisdiction of the Tribunal was not conditional upon the consent of the Belgrade authorities, but that it was up to the ICTY Judges to interpret such jurisdiction and for the Security Council to modify or to expand it. She forwarded a letter to President Milosevic informing him that it was her intention to resume investigations in Kosovo and to personally visit the areas where some of the alleged crimes had been committed.¹⁶

This was underscored by Resolution 1203 adopted on 24 October 1998, in which the Security Council called for prompt and complete investigation of all atrocities and full cooperation with the ICTY. Yet on 4 November 1998, the FRY authorities again refused.¹⁷ In response, the Security Council passed Resolution 1207 on 17 November 1998, calling upon the authorities of the FRY and the leaders of the Kosovo Albanian community to cooperate fully in such an investigation. Meanwhile, in an attempt to defuse tensions in Kosovo, negotiations were conducted between the President of the FRY, representatives of NATO, and the Organization for Security and Co-operation in Europe (OSCE). It was agreed, in addition, that the OSCE would establish a Kosovo Verification Mission (KVM) to observe compliance on the ground and that NATO would establish an aerial surveillance mission. The establishment of the two missions was endorsed by UN Security Council Resolution 1203. On 16 October 1998 an "Agreement on the OSCE Kosovo Verification Mission" was concluded, pursuant to which "verifiers" were deployed throughout Kosovo in the autumn and winter of 1998/99. However, the

¹⁵ Press Release, Office of the Prosecutor, 7 October 1998, CC/PIU/351-E.

¹⁶ Press Release, Office of the Prosecutor, 15 October 1998, CC/PIU/353-E.

¹⁷ Press Release, President, 5 November 1998, JL/PIU/359-E; letter by ICTY President McDonald to the Security Council, 6 November 1998.

deployment of OSCE verifiers failed to halt even the escalation of hostilities. In one incident, on 15 January 1999, 45 unarmed Kosovo Albanians were murdered in the village of Racak.¹⁸ The Tribunal's Chief Prosecutor travelled to Skopje (Macedonia) with the intention of proceeding to Kosovo to investigate the reported atrocities in Racak, but was refused entry by the FRY authorities.¹⁹

The six-nation Contact Group established by the 1992 London Conference on the Former Yugoslavia met on 29 January. It was agreed to convene urgent negotiations between the parties to the conflict, under international mediation. These led to initial negotiations in Rambouillet, near Paris, from 6 to 23 February, followed by a second round in Paris, from 15 to 18 March. At the end of the second round of talks, the Kosovar Albanian delegation signed the proposed peace agreement, but the talks broke up without a signature from the FRY delegation. Thus, the intense peace negotiations conducted under international auspices ended in failure. On 20 March, the OSCE Kosovo Verification Mission was withdrawn from the region. On 24 March 1999, NATO began launching air strikes (Operation *Allied Force*) against the FRY. According to the ICTY Prosecutor, the FRY and Serbia reacted by intensifying their systematic campaign of persecutions, deportation and murder waged against the ethnic Albanians in Kosovo.²⁰ On 26 March 1999, the Prosecutor of the ICTY took the unusual step of addressing herself directly to President Milosevic and other senior officers, reminding them of their obligations under international law.²¹

On 22 May 1999, the ICTY issued its most significant indictment thus far, when it charged a sitting head of State and several other high-level officials of the governments of the FRY and Serbia with war crimes and crimes against humanity in relation to the conflict in Kosovo.²² According to an announcement made on 27 May 1999 by the ICTY Chief Prosecutor, an indictment²³ and arrest

¹⁸ *Loc. cit.* (note 13), paras 27-28.

¹⁹ Press Release, Office of the Prosecutor, 20 January 1999, CC/PIU/379-E.

²⁰ *Loc. cit.* (note 13), paras 23-37.

²¹ Press Release, Office of the Prosecutor, 26 March 1999, JL/PIU/389-E.

²² *Loc. cit.* (note 13).

²³ *Ibid.*.

warrant²⁴ had been issued against five individuals: Slobodan Milosevic, the President of the FRY, Milan Milutinovic, the President of Serbia, Nikola Sainovic, Deputy Prime Minister of the FRY, Dragoljub Ojdanic, Chief of Staff of the Yugoslav Army and Vljako Stojiljkovic, Minister of Internal Affairs of Serbia. This indictment and the ensuing arrest warrant are notable on several counts. The indictment is the first in the history of this Tribunal to charge a head of State during an ongoing armed conflict with the commission of serious violations of international humanitarian law. Furthermore, the indictment and the arrest warrants were sent simultaneously to the Federal Minister of Justice of the FRY, to all UN member States, and to Switzerland.²⁵ In an equally unprecedented move, the United Nations member States were also ordered to make inquiries to discover whether any of the accused had assets located in their territory and, if so, to freeze such assets until the accused are taken into custody.²⁶ Moreover, it is the first indictment issued in relation to the conflict that engulfed Kosovo in 1999. The indictment alleges that, between 1 January and late May 1999, forces under the control of the five accused persecuted the Kosovo Albanian civilian population on political, racial or religious grounds.

By the date of the indictment, it was reported that approximately 740,000 Kosovo Albanians, that is about one-third of the entire Kosovo Albanian population, had been expelled from Kosovo. Thousands more were believed to be internally displaced. An unknown number of Kosovo Albanians have been killed in the operations by FRY forces and by the Republic of Serbia.²⁷ Specifically, the

²⁴ Warrants of Arrest and Orders for Surrender against all the accused, Case No. IT-37-I, of 24 May 1999.

²⁵ Pursuant to Sub-Rule 55 (D) of the Rules and Procedures of Evidence of the ICTY.

²⁶ *Ibid.*

²⁷ NATO claimed that by the end of May 1999, over 230,000 refugees had arrived in the Former Yugoslav Republic of Macedonia, over 430,000 in Albania and some 64,000 in Montenegro. In addition, approximately 21,500 had reached Bosnia and over 61,000

had been evacuated to other countries. Within Kosovo itself, an estimated 580,000 people had been rendered homeless. Furthermore, NATO estimated that by the end of May, 1.5 million people, i.e. 90% of the population of Kosovo, had been expelled from their homes, that some 225,000 Kosovar men were believed to be missing, and that at least 5,000 Kosovars had been executed. Some of these figures are controversial. The ICTY has, as will be seen below, received reports of around 11,000 deaths.

five indictees are charged with the murder of over 340 persons identified by name in an annex to the indictment. Each of the accused is charged with three counts of crimes against humanity (persecutions, murder and deportation) and one count of violations of the laws or customs of war. The Prosecutor gave the clarification that whilst the present indictment was based exclusively on crimes committed since the beginning of 1999 in Kosovo, she would be able to expand on the charges, suggesting that incidents committed in Croatia and Bosnia might well be added, as well as charges against other suspects of crimes in Kosovo.²⁸

On 3 June 1999, the FRY accepted the terms brought to Belgrade by EU envoy Ahtisaari and Russian envoy Chernomyrdin. NATO suspended air strikes over the FRY on 9 June 1999, the day on which the “international security force” (KFOR) and military representatives of the FRY and the Republic of Serbia signed a Military Technical Agreement (MTA). This agreement immediately entered into force; the FRY forces and their allies thereupon ceased hostilities in Kosovo and commenced a phased withdrawal. On 20 June 1999 FRY forces were certified as being out of Kosovo and NATO declared a formal end to its bombing campaign against the FRY. On 21 June 1999 KFOR and the KLA concluded a Demilitarization Agreement whereby the KLA undertook to cease hostilities immediately (including firing of all weapons, attacking, detaining or intimidating civilians in Kosovo, and reprisals), and to demilitarize itself within 90 days.²⁹

On 10 June the UN Security Council passed a resolution (1244) welcoming the acceptance by the FRY of the principles on a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of its military, police and paramilitary forces. This resolution, adopted by a vote of 14 in favour and none against, with one abstention (China), made known the Security Council’s decision to deploy “international civil and security presences” in Kosovo, under UN auspices. The Security Council thus authorized member States and relevant international organizations to

²⁸ Press Release, The Hague, 27 May 1999, JIL/PIU/403-E.

²⁹ Source: NATO website.

establish the international security presence and decided that its responsibilities would include deterring renewed hostilities, demilitarizing the KLA, and establishing a secure environment for the return of refugees and displaced persons and in which the international civil presence could operate. The Security Council also authorized the UN Secretary-General to establish the international civil presence and requested him to appoint a Special Representative to control its implementation. On 12 June 1999, Secretary-General Kofi Annan presented to the Security Council an operational concept of what has since come to be known as the United Nations Interim Administration Mission in Kosovo (UNMIK). The FRY officially lifted the state of war on 26 June 1999.

Six months after these events, Kosovo has undergone profound changes, and most of Kosovo's Albanians are no longer suffering from the repressive FRY regime. However, the international community is now gravely concerned about the plight of Kosovo's current non-ethnic-Albanian minorities, especially the Serb and Roma (gypsy) populations. According to the United Nations High Commissioner for Refugees, more than 164,000 have left Kosovo, whilst others have moved to enclaves under the protection of KFOR.³⁰ As will be discussed later on in this article, several of these minorities are now being subjected to revenge attacks.

In a briefing to the Security Council on 10 November 1999, the newly appointed Chief Prosecutor for the Tribunal, Carla del Ponte, reported that after five months of investigation by forensic specialists from 14 countries, the Tribunal has received reports of 11,334 bodies in 529 gravesites, including sites where bodies were found exposed. Approximately 195 of those sites, she reported, had been examined to date, and 2,108 bodies had been exhumed from gravesites. The Chief Prosecutor added that this figure did not necessarily reflect the total number of actual victims from the sites so far investigated because there was evidence of tampering with graves.

³⁰ Human Rights Watch, *Federal Republic of Yugoslavia, Abuses against Serbs and Roma in the New Kosovo*, August 1999, Vol. 11, No. 10 (D).

There were also a significant number of sites where the precise number of bodies could not be counted. She announced that 300 mass graves would need to be examined in the year 2000.³¹

Legal basis for the ICTY's involvement in Kosovo

1. Mandate

The jurisdiction of the ICTY over serious violations of international humanitarian law committed in Kosovo is indisputable under the mandate established by UN Security Council Resolution 827, and has been repeatedly reaffirmed by the UN Security Council in its resolutions on Kosovo, as well as by the Tribunal itself.

The legal basis for the Security Council's involvement in Kosovo is formed by Security Council resolutions adopted under Chapter VII of the UN Charter. The most important of these is Resolution 827 (1993) of 25 May 1993, on the establishment of the ICTY and the adoption of its Statute, which was preceded by a series of resolutions taken under the same chapter.³² In one of these, Resolution 808 (1993) of 22 February 1993,³³ the Security Council requested the UN Secretary-General to prepare a draft Statute for an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Security Council did not indicate how such an international tribunal was to be established. It was left to the Secretary-General to examine the options. In his report to the Security Council, the Secretary-General explained that the treaty approach would not be suitable: it would require considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there

³¹ Press Release, SC/6749, 10 November 1999, 4063rd Meeting of the Security Council.

³² For good documentary sources consult S. Trifunovska (ed.), *Yugoslavia Through Documents. From its Creation to its Dissolution*, Martinus Nijhoff Publishers, The Hague, 1994; D. Bethlehem M. Weller, *The Yugoslav Crisis in International Law: General Issues*,

Part I, Vol. 5, Cambridge International Documents Series, Grotius/Cambridge University Press, 1997.

³³ See Report of the Secretary-General, pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, paras 4-11.

could be no guarantee that ratifications would be received from those States (read: the successor States of the SFRY) and which should be parties to the treaty if the treaty were to be truly effective. The Secretary-General then suggested that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. He argued in his report that such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.³⁴

Establishing an international criminal tribunal by way of a Security Council resolution was an unprecedented move, and not without legal risks. Unsurprisingly, the legitimacy of the Tribunal's establishment has been widely commented upon,³⁵ and was challenged in the very first case which the Tribunal had to examine on its merits.³⁶ In *Prosecutor v. Dusko Tadic* the Defendant argued, *inter alia*, that the Security Council had exceeded its powers under Chapter VII, because that Chapter did not authorize the Council to create a judicial tribunal as a measure to address a threat to international peace and security. In reply, the Appeals Chamber held that Chapter VII in general and Article 41 of the UN Charter in particular conferred on the Security Council a broad, although not unlimited, discretion regarding the measures which are appropriate to address a threat to international peace and security. It further reasoned that since the Council had already determined that the war crimes perpetrated in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been

³⁴ *Ibid.*, paras 18-30.

³⁵ See for instance, A. Pellet, "Le Tribunal criminel international pour l'ex-Yougoslavie", *Revue Générale de Droit International Public*, Vol. 98, 1994, pp. 12-32; E. David, "Les tribunaux pénaux internationaux", Lecture Notes, San Remo, 28 May 1998 (on file with author), paras 12.16-12.25; Ch. Greenwood, "The development of international humanitarian law", *Max Planck Yearbook of United*

Nations Law, Vol. 2, 1998, pp. 99-109; S. Murphy, "Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia", *American Journal of International Law*, Vol. 93, 1999, pp. 63-64.

³⁶ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ("Tadic Jurisdiction Decision"), pp. 5-24.

seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII.³⁷ It is not certain, however, whether the matter of the legality of the establishment of the Tribunal by way of a Chapter VII resolution has therefore been laid to rest.³⁸

In the light of the mandate of the Tribunal, and in view of its jurisdictional competence, which will be discussed below, there was no need for a separate Security Council resolution authorizing the Tribunal's involvement in Kosovo. Nevertheless, in view of the steadily worsening situation in Kosovo in the year leading up to NATO's Operation *Allied Force*, the Security Council repeatedly confirmed the ICTY's (and in particular, the Prosecutor's) jurisdiction over that territory. In Resolution 1160 of 31 March 1998, mentioned above, the Council requested the Prosecutor to begin gathering information related to violence in Kosovo that may fall under the Tribunal's jurisdiction.³⁹ In Resolution 1203 of 24 October 1998, the Security Council called "for prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full cooperation with the International Criminal Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations". When on 4 November 1998, the FRY authorities reiterated their refusal to let the Prosecutor conduct investigations in Kosovo,⁴⁰ the Security

³⁷ *Ibid.*, paras 28-40.

³⁸ A Croat indictee, whose surrender the Tribunal has sought for years, has recently turned to the European Court of Human Rights in the hope of stalling or preventing his surrender by Croatia to the Hague Tribunal. In his individual petition to the ECHR he challenges, *inter alia*, the legitimacy of the ICTY's establishment as an ad hoc tribunal under Chapter VII of the UN Charter and its independence from the UN Security Council. He also alleges that its jurisdiction entails unjustified primacy

over a national jurisdiction: Application No. 51891/99 of 2 November 1999, *Mladen Naletilic v. Republic of Croatia*, European Court of Human Rights, Strasbourg. The applicant is indicted by the ICTY together with Vinko Martinovic for his alleged involvement in the ethnic cleansing of the Mostar Municipality: Press Release, Registry, 22 December 1998, CC/PIU/377-E.

³⁹ UN Security Council Resolution 1160, 31 March 1998, para. 17.

Council passed Resolution 1207 on 17 November 1998, calling upon the authorities of the FRY and the leaders of the Kosovo Albanian community to cooperate fully with the Prosecutor in the investigation of all possible violations within the jurisdiction of the Tribunal.

Under Article 25 of the UN Charter, all UN member States are obligated to “accept and carry out the decisions of the Security Council”, including, of course, those taken under Chapter VII in matters affecting international peace and security. Furthermore, Article 103 of the Charter stipulates expressly that in “the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement”, the Charter obligations prevail. In addition, Article 2 (7) of the UN Charter makes clear that intervention by the Security Council under Chapter VII of the Charter cannot be opposed by member States on the ground that the matters concerned would fall within their domestic jurisdiction.⁴¹ Therefore, since the ICTY was established under Chapter VII of the UN Charter with power to prosecute serious violations in the (entire) territory of the former Yugoslavia, the FRY could not legitimately oppose the conduct of investigative activities by the ICTY Prosecutor in relation to Kosovo. In addition, any UN member State, including the FRY, is obligated to arrest suspects and surrender them to the Tribunal for trial. No State may rely upon its internal law as a justification for failing to comply with its international obligations in this respect. For instance, if the ICTY has made a request for assistance to a State, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and whether or not its municipal laws, for example, authorize extradition or surrender of suspects in the subject matter at hand.⁴²

⁴⁰ Press Release, President, 5 November 1998, JL/PIU/359-E, and letter by President McDonald to the Security Council, 6 November 1998.

⁴¹ The author is of the view that serious violations of human rights and humanitarian law can no longer be regarded as falling exclusively within the sovereignty of States.

⁴² Greenwood, *op. cit.* (note 35), pp. 106/7.

In this connection it should be noted, however, that the legal status of the FRY under international law is still controversial.⁴³ On 27 April 1992 the two remaining SFRY republics, Serbia and Montenegro, declared that they were the legal successor to the SFRY and would henceforth be known as the "Federal Republic of Yugoslavia". In addition, a formal declaration was adopted to the effect that the "Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally".⁴⁴ Most UN member States, however, officially dispute that the FRY would simply be the continuation of the SFRY. They take the view that the SFRY has ceased to exist and claim that the FRY needs to apply afresh to the UN for membership. Since it has not done so, it has been claimed that the FRY is not a member of the UN. In recent legal proceedings before the International Court of Justice, several NATO countries put forward similar claims arguing that the FRY could not be considered a party to the ICJ Statute since it was not a UN member.⁴⁵ The ICJ decided, once again, that there was no need for it to decide this question, in view of its earlier finding that the declaration by which the FRY accepted the ICJ's jurisdiction did not apply *ratione temporis*. Only two judges addressed the issue of

⁴³ Rich, *op. cit.* (note 2), p. 53. See also S. Rosenne, "Automatic treaty succession", in J. Klabbers and R. Lefeber, *Essays on the Law of Treaties*, Martinus Nijhoff Publishers, The Hague, 1998, pp. 97-106; M. Craven, "The Genocide Case, The law of treaties and State succession", *British Yearbook of International Law*, Vol. 68, pp. 127-164.

⁴⁴ As noted by the International Court of Justice, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. FRY)*, General List No. 91, Decision on Preliminary Objections, 11 July 1999, para. 17.

⁴⁵ Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom all based themselves on resolutions of the General Assembly and the UN Security Council in arguing that the Federal Republic of Yugoslavia is not a member State of the United Nations or a party to the ICJ Statute as a successor State to the former Socialist Federal Republic of Yugoslavia, and that Yugoslavia cannot, therefore, rely on the Court's Statute in establishing jurisdiction in these cases. *Legality of Use of Force*, I.C.J. General List No. 99/25, Request for Provisional Measures, decision of 2 June 1999.

Yugoslavia's UN membership, arguing against it, whereas the FRY Judge *ad hoc* believed that Yugoslavia is a member of the United Nations.⁴⁶

The present author is of the view that the legal basis for denying the FRY lack of status within the United Nations is tenuous. In addition, because the Chapter VII powers of the Security Council are mandatory only for UN member States, one wonders how the imposition of Chapter VII measures on a State which is supposedly no longer a UN member could possibly be justified. Furthermore, it should be noted that while the FRY is currently barred from participating in the activities of the General Assembly and the work of the UN, the Economic and Social Council and many other subsidiary organs, it has not been formally expelled or suspended from the UN organization, and continues to be listed as a UN Charter party. Finally, it needs to be stressed that the uncertain status of the FRY as a UN member should not be confused with its status under multilateral treaties, nor with its obligations under international humanitarian law. "Yugoslavia" continues to be mentioned as party to all conventions, and it has repeatedly confirmed, in response to explicit questions, that it considers itself bound by these.⁴⁷

2. Jurisdictional aspects

The Tribunal's mandate is to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in order that such violations be halted and effectively redressed, that an end be put to such crimes, that their perpetrators be brought to justice and that peace be restored and maintained. Pursuant to Article 1 of the Statute the Tribunal has jurisdiction in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991: grave breaches

⁴⁶ *Ibid.* In the Genocide Case the ICJ also decided that it was not necessary to decide the question of the status of the FRY within the United Nations, *loc. cit.* (note 44).

⁴⁷ For the practice of the UN Human Rights Committee in regard to the ICCPR see M. Kamminga, "State succession in respect of human rights treaties", *European Journal of International Law*, Vol. 7, pp. 469-484.

of the Geneva Conventions (Article 2); violations of the laws and customs of war (Article 3); genocide (Article 4) and crimes against humanity (Article 5).

Territorial jurisdiction

World War II engulfed many nations and ultimately extended throughout much of the world. There was no obvious restriction to the competence *ratione loci* of the International Military Tribunals established after the Second World War. By contrast, the ICTY's competence is geographically limited. Articles 1 and 8 of the Statute confer jurisdiction to try offenders for crimes committed in the territory of the former Yugoslavia only.⁴⁸ Before it disintegrated, the SFRY was made up of six republics. What is now known as the Federal Republic of Yugoslavia (FRY) comprises only the rump of what used to be the Socialist Republic of Yugoslavia (SFRY), namely Serbia and Montenegro. Regardless of the legal status that Kosovo may have enjoyed under domestic law prior to — and during — the break-up of the SFRY, there is no doubt that it is covered by the ICTY's geographical jurisdiction provision.

During NATO's Operation *Allied Force*, there were several press reports speculating on the spread of the Kosovo crisis to Macedonia (Former Yugoslav Republic of Macedonia — FYROM). Since Macedonia used to form part of the SFRY, the ICTY would undoubtedly be competent to try any violations of the laws of armed conflict committed in the territory of the FYROM, had the Kosovo crisis spread to that territory. Similar conclusions would be drawn if the Kosovo conflict had spread to the other republics which emerged after the collapse of the SFRY, i.e. the Republics of Croatia and Slovenia and of course the Republic of Bosnia and Herzegovina.

⁴⁸ Article 1 of the ICTY Statute reads as follows: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." This is clarified in Article 8 as follows: "The territorial

jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

Temporal jurisdiction

Articles 1 and 8 of the ICTY Statute indicate that there is also a temporal limitation to the jurisdiction of the ICTY. The Tribunal can be seized only of cases involving offences committed in the SFRY since 1 January 1991. The *dies a quo* mentioned in the Statute therefore left enough leeway for the Prosecutor to start investigating potential crimes in Kosovo, three years after the conclusion of the Dayton accords which signified the end of hostilities in Bosnia and Herzegovina.⁴⁹ It should be noted that there is no express end to the competence *ratione temporis* of the Tribunal in its Statute: Articles 1 and 8 mention only a *dies a quo*, but not a *dies ad quem*. Paragraph 2 of Resolution 827 (1993) of 25 May 1993, by which the Security Council adopted the ICTY Statute, states that the Tribunal is established “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace”. Consequently, since the Tribunal was set up as a measure for the restoration of international peace and security, it would be up to the Security Council to decide that the ICTY has served its purpose.⁵⁰ Thus far, the Security Council has not amended the Statute or taken other action to set a date for the end of the temporal jurisdiction. For example, at this point in time there has been no resolution that peace has been restored in the SFRY. Another way in which the Tribunal’s jurisdiction might — conceivably — end is when there are no longer any serious violations of international humanitarian law that would need to be brought before the ICTY. For the first time since the

⁴⁹ The Report of the Secretary-General on the establishment of the Tribunal shows that the date of 1 January 1991 was deliberately chosen so as not to prejudge the characterization of the conflict and in order to cover the widest possible range of violations of international humanitarian law. S/25704, para. 16, p. 17. See also Pellet, *op. cit.* (note 35), para. 23, pp. 32/33.

⁵⁰ Greenwood, *op. cit.* (note 35), p. 106. In fact, some feared that the Security Council would decide that the ICTY’s task would come to an end with the conclusion of the Dayton/Paris agreements in December 1995. Tavernier, *op. cit.* (note 10), pp. 653/4.

ICTY's establishment, its Chief Prosecutor has suggested a date for the completion of the pre-indictment investigative activities by her office. In a recent statement she indicated that in addition to the 19 ongoing investigations, another 17 will have to be completed before the Prosecutor can indicate to the Security Council that the Tribunal's investigative mandate is exhausted. These investigations, numbering 36 in total, and involving around 150 suspects, should be completed progressively over the next four years, thus by the end of 2004.⁵¹

On the other hand, as will be explained below, any decision of the Tribunal on its competence *ratione temporis* is narrowly linked to the definition of armed conflict. Except for the charge of genocide (Article 4), the Prosecutor needs to prove for each other category of charges, i.e. grave breaches (Article 2), violations of the laws or customs of war (Article 3) and crimes against humanity (Article 5), that there was a sufficient nexus between the alleged offence and an armed conflict.

Existence of armed conflict

The test for the existence of armed conflict formulated by the Appeals Chamber in the *Tadic Jurisdiction Decision* was formulated in very broad terms as follows: "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".⁵²

In light of this test there is little doubt that the conflict in Kosovo, which between March and June 1999 involved the FRY, the KLA and NATO countries and was waged mainly in the territory of the FRY, falls within the jurisdiction of the Tribunal. This does not mean that it may be easy to pinpoint the exact date on which the armed conflict in Kosovo started. The FRY claimed before NATO's Operation *Allied Force* that the FRY operations in Kosovo against the KLA were simply aimed at suppressing an internal terrorist movement, and that the ensuing hostilities did not rise to the threshold level

⁵¹ Press Release, Office of the Prosecutor, 22 December 1999, PR/P.I.S./457-E.

⁵² *Tadic Jurisdiction Decision*, p. 37, para. 70.

of armed conflict required for the application of international humanitarian law.⁵³ By contrast, in July 1998 the ICTY Prosecutor made clear that she was firmly of the view that the situation in Kosovo represented an armed conflict within the terms of the mandate of the Tribunal.⁵⁴ Many of the resolutions adopted by the Security Council before NATO's Operation *Allied Force*, which were discussed above, can be seen as authoritative endorsements of the Prosecutor's view that the conflict in Kosovo reached the requisite level of intensity to be considered an armed conflict for the purposes of the 1949 Geneva Conventions and under Article 3 of the ICTY Statute. On the other hand, it will be more difficult to deny the status of armed conflict to the hostilities between NATO and the FRY as a result of Operation *Allied Force*. There is little doubt that these reached the level of intensity necessary to trigger the application of international humanitarian law.

As pointed out by the Appeals Chamber in the *Tadić Jurisdiction Decision*, international humanitarian law applies generally, from the initiation of armed conflicts, and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved.⁵⁵ The above chronology of the Kosovo crisis shows that there may be some uncertainty as to the precise date of the end of the "armed conflict" in Kosovo. Yet regardless of this difficulty in that some charges under the ICTY Statute must be linked to the existence of an armed conflict, it would be impossible to prejudge the temporal limits to the Tribunal's jurisdiction. Its mandate may include crimes committed against individuals or populations after the formal end of hostilities in Kosovo, and even after the armed conflict, as a matter of law, ceased to exist.

⁵³ The FRY views Kosovo as an internal problem and believes it has the sovereign right to use armed force to fight "terrorism" and prevent secession of a part of its territory. Statement to the Security Council, 24 March 1999, Press Release SC/6657. — Hundreds of ethnic Albanians arrested in Kosovo in the spring of 1999 are now being tried in Serbia, mostly on charges of terrorism: "Kosovo mob

kills elderly Serb and beats 2 others", *International Herald Tribune*, 30 November 1999.

⁵⁴ Communication by the ICTY Prosecutor to the Contact Group (established by Dayton) on 7 July 1998.

⁵⁵ *Tadić Jurisdiction Decision*, para. 70, p. 37.

In its decision of 2 October 1995 on jurisdiction in the *Tadic* case, the Appeals Chamber pointed out that the temporal scope of the applicable rules clearly reaches beyond the actual hostilities, in particular insofar as detainees and other protected persons are concerned.⁵⁶ This is confirmed by a series of provisions of the 1949 Geneva Conventions for the protection of war victims and of their 1977 Additional Protocols stating that certain categories of persons will continue to benefit from the protection of international humanitarian law for as long as necessary. Article 6 of the Fourth Geneva Convention, on the protection of civilians, stipulates that it applies “from the outset of any conflict or occupation mentioned in Article 2”, and that it shall cease to apply “on the general close of military operations”. However, it also specifies that protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by that convention. Similar provisions relating to the cessation of POW status are included in the Third Geneva Convention on the protection of prisoners of war: Article 5 thereof stipulates that it shall apply to them from the time they fall into the power of the enemy and until their final release and repatriation. Article 6 of the same Convention provides that prisoners of war “shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict”.

These provisions have been expanded by Article 3 of Protocol I, on international armed conflict, which has abolished the cut-off date of one year after the close of military operations in the case of occupied territory.⁵⁷ Without a doubt, the most striking provision in this regard is Article 2 of Additional Protocol II, on non-

⁵⁶ *Tadic Jurisdiction Decision*, paras 67-70, pp. 36-37.

⁵⁷ See Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions*

of 12 August 1949, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, paras 157/8, which mentions (para. 148) that the article was accepted by consensus in the preparatory committee and at the plenary conference.

international armed conflict. It specifies in paragraph 2 that at the end of the conflict all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for such reasons, shall continue to benefit from the provisions regarding humane treatment. Consequently, for people who are detained, the thrust of the above provisions is the same: as long as these people are not released, repatriated or re-established, they will continue to benefit from the protection of the Geneva Conventions.

Consequently, once certain persons are protected by the conventions, this protection does not cease merely because of the end of the armed conflict. Together, the above provisions would enable the ICTY Prosecutor to investigate and prosecute crimes committed against persons who continue to be detained at various locations in Serbia or Kosovo, and even against persons detained after the end of the conflict in Kosovo. For example, there are a great number of ethnic Albanians who were reportedly taken into custody by Serbian forces during the NATO bombing campaign. In August 1999, human rights groups claimed that 2,000 Albanian Kosovars were in detention in Serbia, that at least 1,500 others were unaccounted for, and that the lists were growing daily.⁵⁸ On 20 October 1999, the United Nations human rights office revealed that it had asked the government of the FRY for a list of all Kosovar citizens being held in Serbia. The number of detainees cited in this request had risen to more than 5,000. This figure includes not only those detained during NATO's Operation *Allied Force*; the FRY Justice Minister was asked to account for all Kosovars detained in the territory before March 1999, those held in Serbia after that date and all who have been released from Serbian prisons. The FRY government has since acknowledged that approximately 1,900 Kosovar Albanians are being held in 13 different detention facilities in Serbia.⁵⁹ Hundreds of those detained during Operation *Allied Force* are now facing terrorism charges in the FRY.⁶⁰

⁵⁸ These are estimates cited in the appeal launched on 6 August 1999 by six human rights groups – four from Kosovo and two international. Source: Human Rights Watch website.

⁵⁹ Human Rights Watch, 8 November 1999.

⁶⁰ *Loc. cit.* (note 53).

A second example of the potential far-reaching temporal jurisdiction of the Tribunal are atrocities committed against minorities in Kosovo since the end of NATO's Operation *Allied Force*. A senior NATO military official has admitted that nearly six months after NATO's air campaign against Serbia, ethnic violence remains the alliance's biggest headache, calling it a situation of "reverse ethnic cleansing".⁶¹ According to a recent OSCE report on the human rights situation in Kosovo since the end of NATO's Operation *Allied Force*, the desire for revenge has been the primary motive for the vast majority of human rights violations that have taken place. Kosovo Serbs, Roma, Muslim Slavs and others who are perceived to have collaborated actively or passively with the Serb security forces have been targeted for killing, expulsion, harassment, intimidation, house-burning and abduction.⁶²

It is difficult to prejudge in the abstract whether such instances would fall under the jurisdiction of the ICTY. Except for the charge of genocide, the ICTY Statute requires a nexus with the armed conflict in Kosovo, even if the act or acts to which the charge relates would not be a war crime (Articles 2 or 3) but would amount to a crime against humanity (Article 5).⁶³ Proving the link with an armed conflict may be difficult, especially when the perpetrators are civilians who are carrying out revenge attacks against the few remaining non-ethnic Albanian citizens of Kosovo. For now, the ICTY is keeping its options open and is investigating reports of atrocities committed after the end of NATO's Operation *Allied Force*. For example, in a reaction to reports of the killings of 14 Serb villagers near Lipljan, around

⁶¹ Statement by Admiral Guido Venturoni, Chairman of the NATO Military Committee, to AFP, 10 November 1999.

⁶² "As Seen, As Told", 2nd part, 6 December 1999, Report by OSCE, Mission in Kosovo/Office for Democratic Institutions and Human Rights.

⁶³ Art. 5 of the ICTY Statute is drafted in a manner which is in some respects more restrictive than customary international law,

but which also omits reference to some of the previous requirements for acts to constitute crimes against humanity under general international law. As noted in the *Tadic* Opinion and Judgment, the inclusion of the condition that crimes against humanity be committed "in armed conflict" is no longer required by customary international law. *Tadic* Opinion and Judgment, 7 May 1997, pp. 236-237, para. 627.

mid-July 1999, the Prosecutor instructed ICTY investigators to begin an investigation in cooperation with KFOR and UNMIK. She explicitly confirmed that the ICTY's jurisdiction covers all serious violations of international humanitarian law committed in the territory of the former Yugoslavia, including Kosovo, since 1991, and that this jurisdiction includes offences committed before and after the formal end of the NATO bombing campaign on 20 June 1999.⁶⁴

Existence of an international armed conflict

In order to successfully press charges under Article 2 of the Tribunal's Statute in relation to the Kosovo conflict, it would not be sufficient for the Prosecutor to prove that the level of hostilities on that territory reached the intensity of an armed conflict. It would have to be established that the conflict between the parties was international in nature, and that the accused committed one of the crimes referred to in Article 2 of the Statute against victims or property protected by the Geneva Conventions.⁶⁵

Determination of the character of the conflict in the SFRY has generated substantial ICTY jurisprudence. At various times, the following main groups, entities or States have faced each other as belligerents on the territory of the SFRY: (a) the SFRY, which was succeeded on 27 April 1992 by the FRY and was engaged in armed conflict against one or more of the following: Slovenia, Croatia and Bosnia; (b) Croatia was engaged in armed conflict against the SFRY, the so-called Republic of Serbian Krajina (RSK), the FRY and Bosnia; (c) Bosnia was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska (RS), Croatia, the HVO (the Bosnian-Croat entity) and the Bosnian Muslim faction controlled by Fikret Abdic; (d) Slovenia was engaged in armed conflict with the SFRY;⁶⁶ after the escalation of the conflict in Kosovo, the following parties need to be added: (e) the FRY engaged in armed conflict against the KLA and NATO.

⁶⁴ Press Release, Office of the Prosecutor, 24 July 1999, PR/P.I.S./422-E.

⁶⁵ *Tadic Jurisdiction Decision*, pp. 44-48, paras 79-84; *Prosecutor v. Tadic*, Judgment,

Case No. IT-94-1-AR72, App. Ch., 15 July 1999, p. 33, para. 80 (*Tadic Appeal Decision*).

⁶⁶ Fenrick, *op. cit.* (note 11), p. 220.

The starting point for determining the character of the conflict in the former Yugoslavia for the purposes of Article 2 of the ICTY Statute is the *Tadic Jurisdiction Decision*. The Appeals Chamber ruled that the conflicts in the former Yugoslavia had both internal and international aspects, and that the Security Council members who adopted the Statute were well aware of this.⁶⁷ In other words, the Appeals Chamber decided that there were potentially several distinct conflicts and refused to accept that all of these should automatically be regarded as a single armed conflict, wholly international in character.⁶⁸ The Chamber went on to lay down a general framework for the classification of the armed conflicts in the former Yugoslavia,⁶⁹ but left it to the various Trial Chambers to determine whether the international nature of the armed conflict was established in the cases where Article 2 charges were brought.⁷⁰

On the basis of the above framework, several Trial Chambers subsequently determined the character of the conflict in the period relevant to the respective indictments.⁷¹ On 15 July 1999, the Appeals Chamber pronounced its judgment on the appeal lodged by the accused *Duško Tadic* and the cross-appeal lodged by the Prosecution against the Judgment of Trial Chamber II of 7 May 1997. The Appeals Chamber denied *Duško Tadic's* appeal on all grounds. As for the cross-appeal by the Prosecution, the Appeals Chamber held, *inter alia*, that there was an international armed conflict and, in consequence, that the grave breaches regime of the 1949 Geneva Conventions applied. The Appeals Chamber set out a new test, the "overall control test", for establishing the necessary link between an armed faction in a *prima facie* local conflict waged on the territory of a State and an outside armed force (belonging to a foreign nation) to justify the conclusion that a conflict is international. It also decided that the victims in that case were "protected persons" under the Fourth Geneva Convention.

⁶⁷ *Tadic Jurisdiction Decision*, pp. 39-43, paras 72-77.

⁶⁸ *Ibid.*, p. 39, para. 72.

⁶⁹ *Ibid.*, pp. 39-43, paras 72-77.

⁷⁰ *Ibid.*, p. 39, para. 72.

⁷¹ For a detailed discussion of this jurisprudence, see W. Fenrick, "The application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia", *IRRC*, No. 834, June 1999, pp. 317-329.

The decision of the Appeals Chamber is remarkable in that it distances itself explicitly from the decision rendered by the ICJ in 1986 in the Nicaragua case: the ICTY Appeals Chamber holds that in matters of State responsibility, international law does not always require the same degree of control for the purpose of attribution of acts of individuals or groups to a particular State.⁷² After a thorough analysis of international case law and State practice, the Appeals Chamber concluded that the extent of the requisite State control varies, and that international law provides for three tests. The first one is that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganized groups. The second one is a test of overall control applying to armed groups, whilst the third is one of assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions).⁷³

Furthermore, the Appeals Chamber made a powerful contribution to the cause of international humanitarian law by de-linking the concept of protected persons (in this case civilians) with nationality, stressing the need to look at substantial relations more than formal bonds. The Chamber took into account the fact that in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. In its own words, “ethnicity may become determinative of national allegiance”.⁷⁴

How this jurisprudence can be applied to the Kosovo conflict remains to be determined. In the first indictment relating to crimes committed in Kosovo, charges were brought under Article 5 of the ICTY Statute (crimes against humanity) and Article 3 of the Statute (violations of the laws or customs of war). Under both these articles the Prosecutor only needs to prove that there was a nexus with an armed conflict, but the question of the character of the armed conflict (international or non-international) is not relevant.

⁷² *Tadic Appeal Decision*, pp. 50-51, para. 123.

⁷³ *Tadic Appeal Decision*, p. 60, para. 141; p. 69, para. 156.

⁷⁴ *Tadic Appeal Decision*, pp. 72-74, paras 164-169.

After the *Tadic Appeal Judgment* of 15 July 1999, there are two or three scenarios that can be envisaged to establish the existence of an international armed conflict in relation to the Kosovo crisis: (a) there was a classic inter-State armed conflict between two or more States; (b) there was an internal armed conflict alongside an international armed conflict; (c) there was a *prima facie* internal armed conflict, but one local faction was acting as an agent of another State which exerted “overall control” over this faction. There is little doubt that the conflict between NATO States and the FRY as a result of Operation *Allied Force* was international in character, either because it can be regarded as a “classic” conflict between several States or because NATO States intervened militarily by sending their troops to the territory of the FRY. In the view of the present author, the legal justification for the intervention put forward by NATO States⁷⁵ — which is in any case immaterial for the ICTY’s mandate — does not affect this characterization. However, whilst the conflict between the FRY and the NATO countries involved in Operation *Allied Force* was most probably international in nature, the question of the character of the conflict between the KLA and the FRY remains.

On the assumption that the hostilities between the FRY and KLA reached the requisite level of intensity, prior to the NATO intervention in March 1999, this conflict was internal in character, unless one regards the KLA as a national liberation movement under Article 1(4) of Additional Protocol I and therefore as a force fighting against colonial domination, alien occupation or a racist regime. Protocol I does not define what movements are seeking self-determination and would qualify as “national liberation movements”; neither do the two instruments referred to in the provisions, i.e., the United Nations Charter and the Friendly Relations Declaration.⁷⁶ The possible status of the KLA as a national liberation movement would require

⁷⁵ Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV).

⁷⁶ For recent scholarly exchanges on this subject, consult the debates on website <http://www.jurist.law.pitt.edu/academic.htm>.

an assessment of the causes for which the KLA purportedly fights, which belong to the realm of *jus ad bellum*. Such an assessment would also imply, *vice versa*, that the FRY government would need to be characterized either as an occupying force (alien or colonial) or a racist regime. It should be noted too that the categories enumerated under Article 1(4) of Protocol I, although they may be subject to some expansive interpretations, are limitative and do not, in principle, include a struggle for secession unless the secession is effective.⁷⁷ In the light of the foregoing, it remains unclear whether one could successfully argue before the ICTY that the KLA should be regarded as a national liberation movement under Article 1(4) of Additional Protocol I.

If Article 1(4) of Protocol I does not apply, the question is whether the NATO intervention from March 1999 onwards transformed the character of the conflict between the FRY and KLA into an international armed conflict. In order for the FRY-KLA conflict to be international, it is necessary to establish a link between the KLA and NATO forces. On the assumption that the KLA is an organized military group, and on the basis of the Appeals Chamber decision in the *Tadic* case, it would have to be demonstrated that the KLA acted as an agent of the ten NATO countries involved in Operation *Allied Force* by being under the “overall control of the latter”. The overall control test, in the words of the ICTY’s Appeals Chamber, requires proof of “control by a State over subordinate *armed forces or militias or paramilitary units* (...) of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)”. This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any

⁷⁷ For a doctrinal and prospective analysis of the hypothesis of secession under Additional Protocol I see E. David, *Principes de*

droit des conflits armés, 2nd ed., Bruylant, Brussels, 1999, pp. 162-171.

alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) *has a role in organizing, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.”⁷⁸

Finally, it should be remembered that in judging the merits of the allegations of US involvement in Nicaragua, the ICJ resolved that both bodies of *jus in bello* applied, concurrently but separately, to the different parties in the conflict. In a well-known paragraph the World Court stated: “The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflict of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.”⁷⁹ This double characterization of the conflict for purposes of *jus in bello* certainly has undesirable consequences. For instance, whilst a NATO soldier captured during Operation *Allied Force* by the FRY forces will be entitled to prisoner-of-war status, a KLA combatant will not: the latter may be prosecuted for having taken up arms against his government.

Personal jurisdiction: nationality of the perpetrator

As an international criminal tribunal, the ICTY is competent only to prosecute individual offenders for serious violations of international law and to impose individual criminal sanctions. Its mandate extends only to “natural persons” and excludes the prosecution of

⁷⁸ *Tadic Appeal Decision*, pp. 58-59, para. 137.

⁷⁹ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, *I.C.J. Reports 1986*, p. 104, para. 219.

groups, organizations, corporations or States. This is, to a certain extent, a departure from the Statutes of the International Military Tribunals of Nuremberg and Tokyo. Article 9 of the Nuremberg Charter enshrined a procedure under which the IMT could declare certain groups or organizations criminal. If such a declaration was issued, Article 10 allowed the competent national authorities of any signatory State to bring individuals to trial for membership of these groups or organizations. In such cases the criminal nature of the group or organization was considered proven and no further proof was required. In execution of these provisions, the IMT declared the following organizations criminal: the Leadership Corps of the Nazi Party; the Gestapo; the SD (the State Security Service); and the SS.⁸⁰ A group of French jurists had suggested that a similar provision, with some safeguards, could be envisaged for the ICTY.⁸¹ The suggestion was rejected by the United Nations Secretary-General.⁸² The results are laid down in Article 6 of the ICTY Statute, which provides that the Tribunal has jurisdiction only over natural persons, and in Article 7, which addresses several aspects of the principle of individual criminal responsibility.

Similarly, the Statute does not allow for the prosecution of legal persons other than natural persons, such as corporate entities or States. Again, the latter question is still controversial under current international law.⁸³ However, it should not be overlooked that other fora or tribunals may be competent to examine the responsibility of States for violations of the laws of armed conflict. A good example are the cases which are currently pending before the ICJ: the *Genocide Case* brought in 1993 by Bosnia and Herzegovina against the FRY,⁸⁴ the *Legality of the Use of Force Case*, brought in 1999 by the FRY against

⁸⁰ Judgment of the International Military Tribunal, Nuremberg, 1 October 1946. For a discussion of subsequent national trials see *Law Reports of Trials of War Criminals*, Vol. XV, UN War Crimes Commission, 1949, pp. 150-154.

⁸¹ Pellet, *op. cit.* (note 35), pp. 39-40.

⁸² Report of the Secretary-General, *op. cit.* (note 33), para. 51; Pellet, *op. cit.* (note 35), pp. 39-40.

⁸³ M. Casillo, "La compétence du Tribunal pénal pour la Yougoslavie", *XCVIII Revue Générale de Droit International Public*, Vol. 98, 1994, pp. 77-80.

⁸⁴ *Loc. cit.* (note 44).

ten NATO countries,⁸⁵ and also the case brought recently by Croatia against the FRY, charging the latter with violations of the Genocide Convention.⁸⁶

An important element of the competence *ratione personae* (personal jurisdiction) of the ICTY, and of international criminal law in general, is the principle of individual criminal responsibility. Article 7 of the ICTY Statute addresses several aspects of this issue. The first subparagraph of this article indicates that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible. The second subparagraph encompasses the principle that heads of State, government officials and persons acting in an official capacity should not be entitled to rely on the plea of immunity. This provision draws upon the precedents following the Second World War. The text of the article contains two further provisions. First, it affirms that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, and secondly, that it will not be a factor mitigating punishment.

Under the ICTY Statute, the nationality of the perpetrator is of no consequence. Any person who belongs to a party to the conflict, and commits any of the crimes enumerated or referred to in Articles 2 to 5 of the ICTY Statute, can be prosecuted before the Tribunal. Early on in NATO's Operation *Allied Force*, the Prosecutor acknowledged that she had received requests from persons and groups urging her to indict various NATO and other officials for war crimes in relation to the air strikes conducted in Serbia. She stated that there was no doubt in her mind that the jurisdiction of the Tribunal over Kosovo was "well known to all, and indeed has never been contested by anyone except the FRY". She further reaffirmed that the Tribunal has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the laws and

⁸⁵ *Loc. cit.* (note 45).

⁸⁶ "Croatia institutes proceedings against Yugoslavia for violations of the Genocide

Convention", I.C.J. Press Communiqué 99/38 of 2 July 1999, and I.C.J. General List No. 118.

customs of war which have been committed since 1991 or continue to be committed, anywhere in the former Yugoslavia, "by anyone". Finally, she promised to review all information provided to her which may suggest the commission of crimes within the jurisdiction of the ICTY, but that she would disregard unsubstantiated conclusions and political diatribe.⁸⁷ The Prosecutor has repeatedly confirmed these intentions publicly. In her introductory statement at the launch of the ICC Coalition's global ratification campaign, on 13 May 1999, she stated more specifically that on 24 March 1999, 19 European and north American countries had "said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts".⁸⁸

Since taking office the ICTY's new Prosecutor has made several statements clarifying the activities and the priorities of her office in relation to Kosovo. She confirmed, *inter alia*, that apart from the five high-level individuals already indicted, the "Office of the Prosecutor of the ICTY may investigate and prosecute other individuals, on a case by case basis, who may have committed particularly serious crimes during the course of the armed conflict".⁸⁹

Finally, in her recent briefing to the Security Council, the ICTY's Chief Prosecutor rejected accusations that the Tribunal was carrying out investigations only in one direction. While admitting that no data had been issued yet, she confirmed that her office was dealing with cases where the perpetrators were Serbs, Muslims and from the KLA.⁹⁰

⁸⁷ Press Release, Office of the Prosecutor, 31 March 1999, CC/PIU/391-E.

⁸⁸ Press Release, Office of the Prosecutor, 13 May 1999, CC/PIU/401-E.

⁸⁹ Press Release, Office of the Prosecutor, 29 September 1999, PR/P.I.S./437-E.

⁹⁰ Press Release, SC/6749, 10 November 1999, 4063rd Meeting of the Security Council.

The division of labour between the ICTY and national jurisdictions – the role of UNMIK

Pursuant to Article 9(1) of the Statute, the ICTY and national tribunals have concurrent jurisdiction. However, Article 9(2) stipulates that the ICTY shall have primacy over national courts. Furthermore, since the ICTY was set up under Chapter VII of the UN Charter, all UN member States are required to cooperate with the Tribunal.⁹¹ They are obligated to arrest suspects and surrender them to the Tribunal for trial. Moreover, States may not rely upon their internal law as a justification for failing to comply with their international obligations in this respect. Therefore, if the ICTY has made a request for assistance to a State, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and regardless of whether its municipal laws, for example, authorize extradition or surrender of suspects in the subject matter at hand.⁹²

Conversely, in establishing the ICTY it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. The Secretary-General believed that national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. Articles 9 and 10 of the Statute reflect this goal. As mentioned above, Article 9 stipulates that there is concurrent jurisdiction of the ICTY and national courts, subject to the primacy of the International Tribunal. At any stage of the procedure, the ICTY may formally request the national courts to defer a case to its competence.

Article 10 of the Statute reflects the principle of *non bis in idem*. This holds that a person shall not be tried twice for the same crime. Given the primacy of the ICTY, the principle of *non bis in idem* would preclude subsequent trial before a national court. However, Article 10 stipulates also that the principle of *non bis in idem* should not preclude a subsequent trial before the International Tribunal in the

⁹¹ This follows from Articles 25 and 103 of the UN Charter, and several Security Council resolutions on the matter. See Resolution 827, para. 4.

⁹² Greenwood, *op. cit.* (note 35), pp. 106/7.

following two circumstances: (a) the characterization of the act by the national court did not correspond to its characterization under the Statute; or (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served.⁹³

When the Security Council adopted the Tribunal's mandate in 1993, it obviously could not predict the Kosovo crisis and the transitional solution devised in Resolution 1244 of 10 June 1999, in which the Security Council decided to allow the establishment of international civil and security presences in Kosovo under Chapter VII of the UN Charter. The resolution reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2". However, this confirmation seems to be far outweighed by other considerations listed in the resolution, such as "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo" and the determination that "the situation in the region continues to constitute a threat to international peace and security". UNMIK, the UN-led "civilian presence", has been given the monumental task of setting up a civilian administration, including a judicial system, in a part of the FRY.

On 12 July 1999, in his follow-up report to the Council, the Secretary-General presented a comprehensive framework of the UN-led international civil operation in Kosovo. The tasks of UNMIK envisaged by the UN are unprecedented and immense. Its principal role is to pave the way for a stable, democratic multi-ethnic and autonomous Kosovo. To this end, the Security Council has vested in the UN Mission authority over the territory and people of Kosovo,

⁹³ Secretary-General's Report, *op. cit.* (note 33), paras 64-68.

including all legislative and executive powers, as well as the administration of the judiciary. Among its key tasks, UNMIK has been assigned the responsibility to promote the establishment of substantial autonomy and self-government in Kosovo; perform basic civilian administrative functions; facilitate a political process to determine Kosovo's future status; support key infrastructure reconstruction and humanitarian and disaster relief; maintain civil law and order; promote human rights; and assure the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo. UNMIK will conduct its work in five integrated phases and is ultimately geared to the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

It is clear that the ICTY has neither the mandate, nor the resources, to function as the primary investigative and prosecutorial agency for all criminal acts committed on the territory of Kosovo. Under UNMIK's guidance, judges and court officers are now being established on a multi-ethnic basis in the territory. The ICTY Prosecutor has made clear that the investigation and prosecution of offences, which may fall outside the scope of the jurisdiction of the ICTY described above, would be properly the responsibility of UNMIK, assisted by KFOR.⁹⁴ However, even for crimes falling under its Statute, the ICTY would have concurrent jurisdiction with the judicial authorities in Kosovo. It would be up to the Tribunal to decide whether it wishes to exercise its jurisdiction over such crimes or whether it would encourage the local judiciary institutions to exercise their jurisdiction in accordance with their relevant national laws and procedures.

●

⁹⁴ Office of the Prosecutor, Press Release, 29 September 1999, PR/P.I.S./437-E.

Résumé

Le Tribunal pénal international pour l'ex-Yougoslavie et le conflit du Kosovo

par SONJA BOELAERT-SUOMINEN

Le Tribunal pénal international pour l'ex-Yougoslavie a été créé en 1993 en application de décisions prises par le Conseil de sécurité sur la base du Chapitre VII de la Charte des Nations Unies. En vertu de son mandat statutaire, le Tribunal est habilité à instruire des dossiers et à engager des poursuites contre les auteurs de toutes les violations graves du droit international humanitaire commises sur l'ensemble du territoire de l'ex-Yougoslavie depuis 1991. Jusque récemment, les activités du Tribunal ont porté essentiellement sur des crimes commis entre 1991 et 1995 en Croatie et en Bosnie-Herzégovine. L'accent a été mis publiquement sur le Kosovo à partir de 1998, lorsque le procureur a constitué une première équipe chargée de mener une enquête portant essentiellement sur ce territoire. Le rôle du Tribunal au Kosovo repose sur des bases juridiques solides étant donné son mandat et sa compétence statutaire, qui est limitée sur le plan géographique mais non dans le temps. Toutefois, il ne fait pas de doute que, si l'on s'en tient aux faits, la crise du Kosovo a ouvert un nouveau chapitre de l'histoire du Tribunal.

Organisation du Traité de l'Atlantique Nord : déclaration par le Comité international de la Croix-Rouge

Conseil de l'Atlantique Nord, réunion du 22 décembre 1999 à Bruxelles
Déclaration du Président du Comité international de la Croix-Rouge,

CORNELIO SOMMARUGA

Je voudrais d'abord très vivement remercier le Conseil de l'Atlantique Nord de m'avoir invité à m'adresser à vous à un moment aussi capital de l'histoire. Nous parvenons au terme d'une année qui a été marquée par le 50^e anniversaire des Conventions de Genève de 1949, et bien sûr celui de l'OTAN, et nous voyons poindre l'aube du nouveau millénaire. Le moment est venu aussi de procéder à une évaluation de la crise des Balkans, un événement qui a retenu toute l'attention de la communauté internationale, y compris l'OTAN et le CICR. Enfin, comme vous le savez probablement, c'est aussi pour moi un moment très particulier, car dans quelques jours je laisserai la présidence du CICR à mon successeur, M. Jakob Kellenberger. J'ai occupé ce poste pendant 12 ans, et j'arrive maintenant au terme de mon troisième mandat.

Mais la raison principale pour laquelle je m'adresse à vous est sans doute le nombre croissant de questions et de situations auxquelles l'OTAN et le CICR ont été confrontés pendant ces dernières années. Des discussions de fond ont lieu aux niveaux appropriés, mais je ressens la nécessité de passer en revue brièvement les sujets principaux avec la plus haute autorité politique de l'Alliance. Trois questions, que je voudrais évoquer aujourd'hui, préoccupent tout particulièrement le CICR.

La première est la validité et la pertinence des Conventions de Genève de 1949 — le fondement du droit international humanitaire — même dans les conflits contemporains. En effet, leur applicabilité aux conflits armés ne saurait être contestée. Les Conventions, ratifiées

par 188 États, dont tous les pays membres de l'OTAN, sont parfaitement claires à cet égard. Elles sont complétées par leurs deux Protocoles additionnels de 1977, d'autres traités humanitaires et le droit coutumier applicable, qui tous énoncent les règles applicables dans les conflits armés internationaux et non internationaux. Et j'exhorte les États membres de l'OTAN qui ne sont pas encore parties aux Protocoles à les ratifier.

Un examen attentif de ces règles prouve à l'évidence qu'elles sont suffisantes pour couvrir la plupart des situations auxquelles le personnel militaire et les civils peuvent être confrontés lors d'un conflit armé. Les violations sont moins dues aux carences des règles qu'au manque de volonté de mettre en œuvre le droit international humanitaire. Voilà qui nous conduit au problème de la responsabilité: non seulement celle des combattants, mais aussi celle de l'ensemble de la hiérarchie, jusqu'à l'échelon le plus élevé, qu'il soit civil ou militaire.

L'article premier commun aux quatre Conventions de Genève est ainsi libellé: «Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances.» En adhérant aux Conventions de Genève, 188 États ont donc pris l'engagement de garantir en toutes circonstances le respect des dispositions des Conventions. Cette obligation impose de veiller à ce que les traités soient universellement respectés et d'employer tous les moyens disponibles pour réaliser cet objectif: pressions diplomatiques, pressions dans le cadre des organisations internationales et pressions économiques, dans la mesure où des exceptions sont faites en faveur des groupes les plus vulnérables de la population. Cette obligation va-t-elle jusqu'à autoriser l'emploi de la force? Le droit international humanitaire ne le prévoit pas, mais il ne l'exclut pas non plus. C'est une question qui doit être abordée à la lumière des dispositions de la Charte des Nations Unies, comme le prévoit le Protocole I de 1977.

Il est essentiel qu'une organisation comme l'OTAN prenne en considération les obligations internationales de chacun de ses membres lorsqu'elle agit en application de son mandat.

La deuxième question que je souhaite soulever touche à la relation entre, d'une part les acteurs militaires et politiques, et d'autre part les acteurs humanitaires. Cela fait maintenant plusieurs années que

l'OTAN et le CICR ont établi des relations constructives à différents niveaux, au siège à Bruxelles, avec le SHAPE, dans différentes écoles de l'OTAN et dans les domaines opérationnels. En 1996, le SHAPE et le CICR ont signé un Mémorandum d'accord destiné à conférer à leur relation une structure spécifique, fondée sur la formation au droit international humanitaire, et à permettre à nos deux organisations de mieux se connaître l'une l'autre. Au printemps 1999, au plus fort de la crise du Kosovo, le Conseil de l'Atlantique Nord avait exprimé le souhait que l'OTAN ait des relations directes avec le CICR, reconnaissant ainsi le caractère particulier de notre mandat.

Le CICR estime que l'action humanitaire est régie par les principes d'humanité, d'impartialité et de neutralité, et doit être menée indépendamment des objectifs et des considérations politiques et militaires. Cette action suppose que non seulement une assistance mais aussi une protection soient apportées aux victimes d'un conflit armé ou de la violence interne, comme le prévoient le droit et les principes humanitaires. Il faut pour cela respecter un certain nombre de règles, notamment adopter une attitude strictement non discriminatoire à l'égard des victimes et ne pas prendre parti. L'action humanitaire est aussi, de par sa nature, non coercitive car elle ne peut jamais être imposée par la force. Ce sont précisément les principes de la neutralité et de l'indépendance — que des forces armées portant assistance aux victimes peuvent difficilement observer — qui permettent au CICR d'intervenir dans toute situation, quelle qu'elle soit, partout dans le monde. Je suis profondément convaincu que la gestion efficace et complète d'une crise exige que de bonnes relations de travail et un dialogue constructif soient établis entre tous les acteurs concernés. La nécessité d'une approche globale des situations de conflit étant posée, il faut harmoniser les opérations et s'efforcer de créer une synergie. En effet, il n'y a pas de place pour la concurrence quand des vies humaines sont en jeu : il nous incombe à tous, pour le bien de l'humanité, d'adopter une approche concertée de la gestion des conflits et d'agir de façon plus cohérente. Néanmoins, il me faut une fois encore souligner qu'une approche concertée ne signifie pas que les activités humanitaires peuvent être subordonnées à des considérations militaires ou politiques.

Il est donc essentiel, lorsqu'une action sur le terrain est envisagée, de respecter le caractère spécifique de chacune de nos organisations, leurs mandats respectifs et les limites imposées par les règles et les principes qui régissent leurs opérations. Dans les activités humanitaires du CICR, seules les victimes comptent, mais un degré de complémentarité peut exister entre les différents acteurs sur le terrain, dans le cadre des principes que je viens de mentionner.

Mon dernier message est un appel formel à l'OTAN — en soi, en tant que centre de convergence, ou par le biais de ses États membres. L'Alliance doit contribuer à promouvoir le droit international humanitaire et honorer l'obligation qui lui incombe de respecter et de faire respecter cet ensemble de règles, notamment à travers une mise en œuvre adéquate, une application scrupuleuse et au besoin la prise de sanctions pénales. Cela doit également couvrir le respect de l'emblème de la Croix-Rouge ou du Croissant-Rouge. Respecter le droit international humanitaire, c'est non seulement alléger les souffrances de ceux qui vivent un conflit armé, mais aussi faciliter le rétablissement d'une paix durable.

Le droit international humanitaire évolue en permanence, en partie en raison des progrès rapides de la technologie militaire. L'un de ses principes cardinaux est l'interdiction d'utiliser des armes ou des méthodes qui causent des maux superflus, ou qui frappent sans discrimination à la fois des objectifs militaires et des civils, ou des biens civils. Il comporte aussi des restrictions ou des interdictions plus spécifiques, qui ont été renforcées ces deux dernières années par deux nouveaux instruments, l'un sur les mines antipersonnel, l'autre sur les armes laser aveuglantes. Quoi qu'il en soit, les États doivent se demander si les armes qu'ils possèdent, ou qu'ils envisagent d'acquérir, sont compatibles avec les principes que je viens d'évoquer.

Parmi les armes qui posent problème, permettez-moi de mentionner d'abord les bombes à dispersion et les munitions à base d'uranium appauvri, qui ont été utilisées récemment et dont les effets à long terme sur la population civile exigent un examen minutieux. Une nouvelle génération d'armes, que l'on appelle les armes « non létales », est actuellement mise au point. Ce terme pourrait, à première vue, sembler éminemment humanitaire, mais si on y regarde de plus près, il

apparaît clairement que ces armes seront létales dans certaines circonstances. Certaines ont d'ores et déjà été interdites, et d'autres pourraient ne pas être compatibles avec les principes en vigueur. Le CICR considère que, pour ce qui concerne les règles du droit international humanitaire, il n'est pas possible d'examiner sous une seule étiquette tout un éventail d'armements. Nous encourageons l'OTAN à étudier cette question très attentivement, et à se pencher tout particulièrement sur ses aspects militaires, médicaux et juridiques. Le CICR serait heureux d'engager un dialogue avec l'OTAN sur la question.

Enfin, en ce qui concerne les violations des règles internationales humanitaires, les États ont l'obligation de poursuivre les personnes accusées de crimes de guerre, ou de les livrer pour qu'elles soient traduites en justice. La communauté internationale a créé des tribunaux ad hoc, dont l'un revêt une importance particulière pour l'Europe et pour l'OTAN. Je parle, bien sûr, du Tribunal international pénal pour l'ex-Yougoslavie. Il est de la plus haute importance que tous les États montrent clairement aux criminels de guerre qu'ils seront tenus pour responsables des crimes qu'ils ont commis et qu'ils devront subir les conséquences de leurs actes. En juillet 1998, la communauté internationale adoptait le Statut d'une Cour pénale internationale compétente pour les crimes de guerre, le crime de génocide, les crimes contre l'humanité et le crime d'agression. J'appelle les 19 États membres de l'OTAN à signer et ratifier ce traité capital. Je sais que certains membres de l'OTAN ont déjà entrepris d'amender leur législation pour préparer la ratification du Statut, et je tiens à les assurer de mon plein soutien.

Ces trois messages — l'applicabilité du droit international humanitaire dans toutes les situations de conflit armé; la complémentarité des approches militaire, politique et humanitaire d'une crise, dans le plein respect de leurs différences; et la responsabilité de l'OTAN vis-à-vis du droit international humanitaire — touchent aux principales préoccupations du CICR dans ses relations futures avec l'OTAN. Vous voulez œuvrer pour la paix et la sécurité, nous voulons aider et protéger les victimes des conflits armés et de la violence interne; nos objectifs respectifs sont compatibles et peuvent être complémentaires. J'appelle donc à un dialogue accru entre l'OTAN et le CICR, car nous pouvons travailler ensemble dans le cadre du droit international.

North Atlantic Treaty Organization: Statement by the International Committee of the Red Cross

North Atlantic Council, meeting of 22 December 1999, Brussels
Statement by the President of the International Committee of the Red Cross, **CORNELIO SOMMARUGA**

First of all I would like to thank the North Atlantic Council most warmly for inviting me to speak at such a significant moment in history. We are approaching the end of a year marked by the 50th anniversary of the 1949 Geneva Conventions, and indeed of NATO, as well as the eve of a new millennium. This is also a time for assessment of the Balkan crisis, an issue taken very seriously by the entire international community, including NATO, and including the ICRC. Finally, as you probably know, this is also a special time for me personally, as in a few days I will be handing over the presidency of the ICRC to my successor, Mr Jakob Kellenberger. I have held this post for 12 years, and I am now coming to the end of my third presidential mandate.

But the main reason for my addressing you today is no doubt the increasing number of topics and situations which have confronted both NATO and the ICRC over the last few years. They are discussed in detail at the appropriate levels, but there is a need for me to review briefly the most important among them with the highest political authority of the Alliance. There are at least three matters of particular concern to the ICRC that I would like to raise here today.

The first is the validity and relevance of the 1949 Geneva Conventions — the basis of modern international humanitarian law — even in present-day conflicts. Indeed, their applicability to armed conflicts cannot be challenged. The Conventions, ratified by 188 States, including all NATO member countries, are quite clear in this respect. They are supplemented by their two Additional Protocols of 1977, other humanitarian treaties, and the relevant customary law, all of which lay down rules applicable in both international and non-international armed conflicts. And I urge those few NATO member States which have not yet become party to these Protocols to do so.

From a close look at those rules it appears obvious that they are sufficient to cover most of the situations that military personnel and civilians may face in armed conflicts. The reasons for violations are to be found in lack of willingness to implement international humanitarian law rather than in the inadequacy of the rules themselves. This brings us to the issue of responsibility: the responsibility of combatants, but also of all individuals along the chain of command, up to the highest level of the authorities, be they civilian or military.

Article 1 common to the four Geneva Conventions reads: "The High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances". By adhering to the Geneva Conventions, therefore, 188 States have committed themselves to ensuring compliance with the provisions of the Conventions in all circumstances. This obligation includes seeing to it that the treaties are universally respected and employing all available means to achieve that goal: diplomatic pressure, pressure within the framework of international organizations, and economic pressure, insofar as exceptions are made in favour of the most vulnerable population groups. Does this obligation go as far as to authorize the use of force? International humanitarian law does not provide for such an option, nor does it rule it out. This is an issue that needs to be addressed in the light of the provisions of the United Nations Charter, as stated in 1977 Protocol I. It is essential that an organization such as NATO takes into consideration the international obligations of each of its members when taking action in accordance with its mandate.

The second matter I wish to raise is the relationship between military and political players on the one hand and humanitarian players on the other. For several years now NATO and the ICRC have developed constructive contacts at different levels, at headquarters in Brussels, with SHAPE, in different NATO schools and in operational areas. In 1996 SHAPE and the ICRC signed a Memorandum of Understanding aimed at giving their relationship a specific structure based on training in international humanitarian law, and at making our two organizations more familiar with one another. In the spring of 1999, at the height of the Kosovo crisis, the North Atlantic Council expressed the wish that NATO interact directly with the ICRC, thus acknowledging the special nature of our mandate.

The ICRC views humanitarian action as being governed by the principles of humanity, impartiality and neutrality, and being carried out independently of political and military objectives and considerations. This action involves affording the victims of armed conflict or internal violence not only assistance but also protection, as provided for by humanitarian law and principles. These imply compliance with a number of rules, including not taking sides and adopting a strictly non-discriminatory attitude vis-à-vis the victims. Humanitarian action is also inherently non-coercive, since it can never be imposed by force. It is precisely the principles of neutrality and independence — which armed forces bringing assistance to victims can hardly observe — that allow the ICRC to work in any situation, all over the world. I firmly believe that effective and comprehensive crisis management calls for good working relations and constructive dialogue among all the players involved. In view of the need for a comprehensive approach to conflict situations, operations must be harmonized and efforts focused on creating synergy. Indeed, there is no room for competition when human lives are at stake: it is our common responsibility, for the sake of humanity, to adopt a concerted approach to conflict management, and to act in a more consistent manner. Nevertheless, I must stress once again that a concerted approach does not mean that humanitarian activities can be subordinated to military or political considerations.

It is therefore essential, when considering action in the field, to respect the specific nature of each of our organizations, their respective mandates, and the limits imposed by the rules and principles guiding their operations. In the ICRC's humanitarian activities, the victims are the only concern, but a degree of complementarity can be found between different players in the field, within the framework of the principles I have just mentioned.

My last message is a formal appeal to NATO — as such, as a focal point, or through its member States — to contribute to the development of international humanitarian law, and to fulfil its duty to respect and ensure respect for that body of rules, notably through proper implementation, faithful application, and the imposition of penal sanctions when required; this should also cover respect for the red cross or red crescent emblem. Respecting international humanitar-

ian law not only helps alleviate the plight of those caught up in armed conflict, but also facilitates the return to lasting peace.

International humanitarian law is constantly evolving, partly in response to the rapid development of military technology. One of its cardinal principles is the ban on using weapons or methods that cause unnecessary suffering or superfluous injury, or that may cause damage indiscriminately to both military objectives and civilians or civilian objects. There are also more specific restrictions or prohibitions, which have been supplemented during the last two years by two new instruments on anti-personnel mines and blinding laser weapons. In any event, States must consider whether the weapons they possess or are thinking of acquiring are compatible with the principles I have just outlined.

Among weapons that raise questions, let me first mention cluster bombs and depleted uranium munitions, which have been used recently and whose long-term effect on the civilian population requires careful consideration. Then there is a new generation of weapons under development, the so-called "non-lethal" weapons. This term might at first glance seem eminently humanitarian, but on closer inspection it becomes clear that some such weapons will be lethal under certain circumstances. Some have already been prohibited, and others may not be compatible with existing principles. The ICRC considers that, as regards the rules of international humanitarian law, it is not possible to examine a whole range of weapons under one label. We encourage NATO to consider this issue very carefully, with special reference to its military, medical and legal aspects. The ICRC would welcome a dialogue with NATO on this subject.

Finally, when it comes to violations of international humanitarian rules, States are under an obligation to prosecute persons alleged to have committed war crimes, or to hand them over for prosecution. The international community has created ad hoc tribunals, one of them being of particular relevance for Europe and NATO. I refer, of course, to the International Criminal Tribunal for the former Yugoslavia. It is of paramount importance that all States send a clear signal to war criminals that they will be held responsible for the crimes they have committed and will have to face the consequences of their

acts. Going further, in July 1998 the international community adopted the Statute of a permanent International Criminal Court with jurisdiction over war crimes, genocide, crimes against humanity, and the crime of aggression. I call on all 19 NATO member States to sign and ratify this crucial treaty. I know that some members of NATO are already amending their national laws to prepare for ratification of the Statute, and would like to offer them my wholehearted support.

These three messages — the applicability of international humanitarian law in all armed conflict situations; the complementarity of the military, political and humanitarian approaches to a crisis, with full respect for their differences; and NATO's responsibility regarding international humanitarian law — are the ICRC's main concerns in preparing its future relations with NATO. You want to work for peace and security, we want to assist and protect the victims of armed conflict and internal violence; our respective aims are compatible and may be complementary. I hereby call, therefore, for a closer dialogue between NATO and the ICRC, as we can work together within the framework of international law.

Resolution adopted by the NATO Parliamentary Assembly on 15 November 1999 concerning the armed intervention in Kosovo

Respecting and Ensuring Respect for International Humanitarian Law¹

The Assembly,

Commending NATO's decision to intervene to stop massive human rights violations in Kosovo;

Appreciating the contribution of the countries in the region of South-Eastern Europe — members of the Euro-Atlantic Partnership Council — to this intervention;

Stressing that the use of force has long been subject to restraints under international humanitarian law (IHL), and praising the Government of the Netherlands for its role in the adoption of the pioneering Hague Conventions on the laws of war in 1899 and 1907;

Calling political and military authorities' attention to the Geneva Conventions of 1949 and their Additional Protocols of 1977 as the core of modern IHL and to the role of the International Committee of the Red Cross (ICRC) in ensuring the respect of these rules;

Reminding States that many provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977 are considered customary international law;

Emphasizing that the aim of IHL is the protection of victims of war including by regulation of the conduct of hostilities;

Reminding all States of their obligation, under the Geneva Conventions, not only to "respect" but also to "ensure respect" of IHL "in all circumstances";

Gravely concerned that civilians and civilian objects are increasingly the target of violence in post-Cold War conflicts;

¹ 1999 Annual Session, Amsterdam, 15 November 1999, Committee Resolution; <http://www.naa.be/publications/resolutions/99cc-res248.html> — See also *NATO and Hu-*

manitarian Intervention, Plenary Resolution adopted the same day; <http://www.naa.be/publications/resolutions/99as-res319-e.html>

Insisting therefore that it is more important than ever, on the occasion of the 50th anniversary of the Geneva Conventions and the 100th anniversary of the first Hague Convention, that States and non-State actors are aware of their responsibility to promote the knowledge, respect and application of IHL;

Urges member governments and parliaments of the North Atlantic Alliance:

to pursue the development of conflict mediation strategies and if this fails to ensure that all weapons and their use in armed conflict are consistent with applicable international humanitarian law;

to develop and implement comprehensive programmes of IHL education for all military and police personnel to be deployed in war, peace-keeping and peace-support operations;

to pursue actively the prosecution of war crimes by enshrining IHL rules in their national legislations, by supporting international war crime tribunals, and by ratifying the Statutes of the International Criminal Court without delay;

to ratify, if they have not done so, Protocols I and II of the Geneva Conventions and to sign and ratify the Ottawa Convention on anti-personnel mines without delay;

to ascertain that IHL becomes an integral component of the Euro-Atlantic Partnership Council (EAPC) work programme;

to take advantage of the legal expertise and assistance provided by the ICRC to improve their own implementation of IHL and its respect by other States.

Adhésion de Monaco aux Protocoles additionnels aux Conventions de Genève du 12 août 1949

Monaco a adhéré sans faire de déclaration ni de réserve, le 7 janvier 2000, aux Protocoles additionnels aux Conventions de Genève du 12 août 1949 relatifs à la protection des victimes des conflits armés internationaux (Protocole I) et non internationaux (Protocole II), adoptés à Genève le 8 juin 1977. Les Protocoles entreront en vigueur pour Monaco le 7 juillet 2000.

Monaco est le 156^e État partie au Protocole I et le 149^e au Protocole II.

Accession to the Protocols Additional to the Geneva Conventions of 12 August 1949 by Monaco

Monaco acceded on 7 January 2000, without making any declaration or reservation, to the Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977. The Protocols will come into force for Monaco on 7 July 2000.

This accession brings to 156 the number of States party to Protocol I and to 149 those party to Protocol II.

Conventions de Genève du 12 août 1949 et Protocoles additionnels du 8 juin 1977

ratifications, adhésions

et successions

au 31 décembre 1999

Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977

ratifications, accessions

and successions

as at 31 December 1999

1. Abréviations

R/A/S Ratification /Adhésion /
Déclaration de succession

R/D Réserve / Déclaration

D90 Déclaration prévue par
l'article 90 du Protocole I

1. Abbreviations

R/A/S Ratification/Accession/
Declaration of succession

R/D Reservation/Declaration

D90 Declaration under Article 90
of Protocol I

2. Dates

Les dates indiquées sont celles du jour de réception par le dépositaire de l'acte officiel transmis par l'État qui ratifie, adhère, succède ou fait la déclaration selon l'article 90 du Protocole I.

2. Dates

The dates indicated are those on which the depositary received the official instrument from the State which ratified, acceded to or succeeded to a treaty or made the declaration under Article 90 of Protocol I.

3. Entrée en vigueur

Les Conventions et les Protocoles entrent en vigueur pour chaque État six mois après la date indiquée; pour les États faisant une déclaration de succession, l'entrée en vigueur intervient rétroactivement au jour de l'accession à l'indépendance.

3. Entry into force

The Conventions and the Protocols enter into force for States six months after the date given in the present document; for States which have made a declaration of succession, entry into force takes place retroactively, on the day of their accession to independence.

Les Conventions de Genève sont entrées en vigueur le 21 octobre 1950. Les Protocoles additionnels sont entrés en vigueur le 7 décembre 1978.

4. Noms des pays

Le nom figurant dans la liste peut être différent du nom officiel de l'État concerné.

5. Modifications apportées depuis le 1^{er} janvier 1999

Ratifications, adhésions

ou successions au Protocole I

Kenya	23. 2. 1999
Irlande	19. 5. 1999
Nicaragua	19. 7. 1999

Ratifications, adhésions

et successions au Protocole II

Kenya	23. 2. 1999
Irlande	19. 5. 1999
Cuba	23.12.1999
Nicaragua	19. 7. 1999

Déclaration prévue par l'article 90 (Protocole I)

Royaume-Uni	17. 5. 1999
Irlande	19. 5. 1999
Panama	26.10.1999

6. Note

Palestine: en date du 21 juin 1989, le Département fédéral suisse des affaires étrangères a reçu de l'Observateur permanent de la Palestine auprès de

The 1949 Geneva Conventions entered into force on 21 October 1950. The 1977 Additional Protocols entered into force on 7 December 1978.

4. Names of countries

The name of a State given in the list may differ from its official name.

5. Changes since 1 January 1999

Ratifications, accessions

or successions to Protocol I

Kenya	23. 2. 1999
Ireland	19. 5. 1999
Nicaragua	19. 7. 1999

Ratifications, accessions

or successions to Protocol II

Kenya	23. 2. 1999
Ireland	19. 5. 1999
Cuba	23.12.1999
Nicaragua	19. 7. 1999

Declaration under Article 90 (Protocol I)

United Kingdom	17. 5. 1999
Ireland	19. 5. 1999
Panama	26.10.1999

6. Note

Palestine: On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to

l'Office des Nations Unies à Genève une lettre informant le Conseil fédéral suisse « que le Comité exécutif de l'Organisation de Libération de la Palestine, chargé d'exercer les fonctions de Gouvernement de l'État de Palestine par décision du Conseil National Palestinien, a décidé en date du 4 mai 1989, d'adhérer aux quatre Conventions de Genève du 12 août 1949 et à leurs deux Protocoles additionnels ». Le 13 septembre 1989, le Conseil fédéral suisse a informé les États qu'il n'était pas en mesure de trancher le point de savoir s'il s'agissait d'un instrument d'adhésion, « en raison de l'incertitude au sein de la communauté internationale quant à l'existence ou non d'un État de Palestine ».

7. Totaux

États parties aux
Conventions de Genève 188

États parties au
Protocole additionnel I 155

Nombres d'États parties au
Protocole additionnel II 148

États ayant fait la déclaration prévue
par l'article 90 (Protocole I)
56

États membres
des Nations Unies 188

the United Nations Office in Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

7. Totals

States party to the
Geneva Conventions 188

States party to
Additional Protocol I 155

States party to
Additional Protocol II 148

States having made the declaration
under Article 90 56

Member States
of the United Nations 188

États membres de l'ONU ou parties au Statut de la Cour internationale de Justice qui ne sont pas parties aux Conventions de Genève de 1949: Érythrée, Îles Marshall, Nauru.

UN member States or States party to the Statute of the International Court of Justice which are not party to the 1949 Geneva Conventions: Eritrea, the Marshall Islands, Nauru.

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	Dgo	R/A/S	R/D
Afghanistan	26 09 1956	R					
Albania	27 05 1957	R X	16 07 1993	A		16 07 1993	A
Algeria	20 06 1960						
	03 07 1962	A	16 08 1989	A X	16 08 1989	16 08 1989	A
Andorra	17 09 1993	A					
Angola	20 09 1984	A X	20 09 1984	A X			
Antigua and Barbuda	06 10 1986	S	06 10 1986	A		06 10 1986	A
Argentina	18 09 1956	R	26 11 1986	A X	11 10 1996	26 11 1986	A X
Armenia	07 06 1993	A	07 06 1993	A		07 06 1993	A
Australia	14 10 1958	R X	21 06 1991	R X	23 09 1992	21 06 1991	R
Austria	27 08 1953	R	13 08 1982	R X	13 08 1982	13 08 1982	R X
Azerbaijan	01 06 1993	A					
Bahamas	11 07 1975	S	10 04 1980	A		10 04 1980	A
Bahrain	30 11 1971	A	30 10 1986	A		30 10 1986	A
Bangladesh	04 04 1972	S	08 09 1980	A		08 09 1980	A
Barbados	10 09 1968	S X	19 02 1990	A		19 02 1990	A
Belarus	03 08 1954	R X	23 10 1989	R	23 10 1989	23 10 1989	R
Belgium	03 09 1952	R	20 05 1986	R X	27 03 1987	20 05 1986	R
Belize	29 06 1984	A	29 06 1984	A		29 06 1984	A
Benin	14 12 1961	S	28 05 1986	A		28 05 1986	A
Bhutan	10 01 1991	A					
Bolivia	10 12 1976	R	08 12 1983	A	10 08 1992	08 12 1983	A
Bosnia and Herzegovina	31 12 1992	S	31 12 1992	S	31 12 1992	31 12 1992	S
Botswana	29 03 1968	A	23 05 1979	A		23 05 1979	A
Brazil	29 06 1957	R	05 05 1992	A	23 11 1993	05 05 1992	A
Brunei Darussalam	14 10 1991	A	14 10 1991	A		14 10 1991	A
Bulgaria	22 07 1954	R	26 09 1989	R	09 05 1994	26 09 1989	R
Burkina Faso	07 11 1961	S	20 10 1987	R		20 10 1987	R

l'Office des Nations Unies à Genève une lettre informant le Conseil fédéral suisse « que le Comité exécutif de l'Organisation de Libération de la Palestine, chargé d'exercer les fonctions de Gouvernement de l'État de Palestine par décision du Conseil National Palestinien, a décidé en date du 4 mai 1989, d'adhérer aux quatre Conventions de Genève du 12 août 1949 et à leurs deux Protocoles additionnels ». Le 13 septembre 1989, le Conseil fédéral suisse a informé les États qu'il n'était pas en mesure de trancher le point de savoir s'il s'agissait d'un instrument d'adhésion, « en raison de l'incertitude au sein de la communauté internationale quant à l'existence ou non d'un État de Palestine ».

7. Totaux

États parties aux
Conventions de Genève 188

États parties au
Protocole additionnel I 155

Nombres d'États parties au
Protocole additionnel II 148

États ayant fait la déclaration prévue
par l'article 90 (Protocole I)
56

États membres
des Nations Unies 188

the United Nations Office in Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

7. Totals

States party to the
Geneva Conventions 188

States party to
Additional Protocol I 155

States party to
Additional Protocol II 148

States having made the declaration
under Article 90 56

Member States
of the United Nations 188

États membres de l'ONU ou parties au Statut de la Cour internationale de Justice qui ne sont pas parties aux Conventions de Genève de 1949: Érythrée, Îles Marshall, Nauru.

UN member States or States party to the Statute of the International Court of Justice which are not party to the 1949 Geneva Conventions: Eritrea, the Marshall Islands, Nauru.

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	Dgo	R/A/S	R/D
Afghanistan	26 09 1956	R					
Albania	27 05 1957	R X	16 07 1993	A		16 07 1993	A
Algeria	20 06 1960						
	03 07 1962	A	16 08 1989	A X	16 08 1989	16 08 1989	A
Andorra	17 09 1993	A					
Angola	20 09 1984	A X	20 09 1984	A X			
Antigua and Barbuda	06 10 1986	S	06 10 1986	A		06 10 1986	A
Argentina	18 09 1956	R	26 11 1986	A X	11 10 1996	26 11 1986	A X
Armenia	07 06 1993	A	07 06 1993	A		07 06 1993	A
Australia	14 10 1958	R X	21 06 1991	R X	23 09 1992	21 06 1991	R
Austria	27 08 1953	R	13 08 1982	R X	13 08 1982	13 08 1982	R X
Azerbaijan	01 06 1993	A					
Bahamas	11 07 1975	S	10 04 1980	A		10 04 1980	A
Bahrain	30 11 1971	A	30 10 1986	A		30 10 1986	A
Bangladesh	04 04 1972	S	08 09 1980	A		08 09 1980	A
Barbados	10 09 1968	S X	19 02 1990	A		19 02 1990	A
Belarus	03 08 1954	R X	23 10 1989	R	23 10 1989	23 10 1989	R
Belgium	03 09 1952	R	20 05 1986	R X	27 03 1987	20 05 1986	R
Belize	29 06 1984	A	29 06 1984	A		29 06 1984	A
Benin	14 12 1961	S	28 05 1986	A		28 05 1986	A
Bhutan	10 01 1991	A					
Bolivia	10 12 1976	R	08 12 1983	A	10 08 1992	08 12 1983	A
Bosnia and Herzegovina	31 12 1992	S	31 12 1992	S	31 12 1992	31 12 1992	S
Botswana	29 03 1968	A	23 05 1979	A		23 05 1979	A
Brazil	29 06 1957	R	05 05 1992	A	23 11 1993	05 05 1992	A
Brunei Darussalam	14 10 1991	A	14 10 1991	A		14 10 1991	A
Bulgaria	22 07 1954	R	26 09 1989	R	09 05 1994	26 09 1989	R
Burkina Faso	07 11 1961	S	20 10 1987	R		20 10 1987	R

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Burundi	27 12 1971	S	10 06 1993	A		10 06 1993	A
Cambodia	08 12 1958	A	14 01 1998	A		14 01 1998	A
Cameroon	16 09 1963	S	16 03 1984	A		16 03 1984	A
Canada	14 05 1965	R	20 11 1990	R X	20 11 1990	20 11 1990	R X
Cape Verde	11 05 1984	A	16 03 1995	A	16 03 1995	16 03 1995	A
Central African Republic	01 08 1966	S	17 07 1984	A		17 07 1984	A
Chad	05 08 1970	A	17 01 1997	A		17 01 1997	A
Chile	12 10 1950	R	24 04 1991	R	24 04 1991	24 04 1991	R
China	28 12 1956	R X	14 09 1983	A X		14 09 1983	A
Colombia	08 11 1961	R	01 09 1993	A	17 04 1996	14 08 1995	A
Comoros	21 11 1985	A	21 11 1985	A		21 11 1985	A
Congo	04 02 1967	S	10 11 1983	A		10 11 1983	A
Congo (Dem. Rep.)	24 02 1961	S	03 06 1982	A			
Costa Rica	15 10 1969	A	15 12 1983	A		15 12 1983	A
Côte d'Ivoire	28 12 1961	S	20 09 1989	R		20 09 1989	R
Croatia	11 05 1992	S	11 05 1992	S	11 05 1992	11 05 1992	S
Cuba	15 04 1954	R	25 11 1982	A		23 12 1999	A
Cyprus	23 05 1962	A	01 06 1979	R		18 03 1996	A
Czech Republic	05 02 1993	S X	05 02 1993	S	02 05 1995	05 02 1993	S
Denmark	27 06 1951	R	17 06 1982	R X	17 06 1982	17 06 1982	R
Djibouti	06 03 1978	S	08 04 1991	A		08 04 1991	A
Dominica	28 09 1981	S	25 04 1996	A		25 04 1996	A
Dominican Republic	22 01 1958	A	26 05 1994	A		26 05 1994	A
Ecuador	11 08 1954	R	10 04 1979	R		10 04 1979	R
Egypt	10 11 1952	R	09 10 1992	R X		09 10 1992	R X
El Salvador	17 06 1953	R	23 11 1978	R		23 11 1978	R
Equatorial Guinea	24 07 1986	A	24 07 1986	A		24 07 1986	A
Estonia	18 01 1993	A	18 01 1993	A		18 01 1993	A
Ethiopia	02 10 1969	R	08 04 1994	A		08 04 1994	A
Fiji	09 08 1971	S					
Finland	22 02 1955	R	07 08 1980	R X	07 08 1980	07 08 1980	R
France	28 06 1951	R				24 02 1984	A X
Gabon	26 02 1965	S	08 04 1980	A		08 04 1980	A
Gambia	20 10 1966	S	12 01 1989	A		12 01 1989	A
Georgia	14 09 1993	A	14 09 1993	A		14 09 1993	A
Germany	03 09 1954	A X	14 02 1991	R X	14 02 1991	14 02 1991	R X

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Ghana	02 08 1958	A	28 02 1978	R		28 02 1978	R
Greece	05 06 1956	R	31 03 1989	R	04 02 1998	15 02 1993	A
Grenada	13 04 1981	S	23 09 1998	A		23 09 1998	A
Guatemala	14 05 1952	R	19 10 1987	R		19 10 1987	R
Guinea	11 07 1984	A	11 07 1984	A	20 12 1993	11 07 1984	A
Guinea-Bissau	21 02 1974	A X	21 10 1986	A		21 10 1986	A
Guyana	22 07 1968	S	18 01 1988	A		18 01 1988	A
Haiti	11 04 1957	A					
Holy See	22 02 1951	R	21 11 1985	R X		21 11 1985	R X
Honduras	31 12 1965	A	16 02 1995	R		16 02 1995	R
Hungary	03 08 1954	R X	12 04 1989	R	23 09 1991	12 04 1989	R
Iceland	10 08 1965	A	10 04 1987	R X	10 04 1987	10 04 1987	R
India	09 11 1950	R					
Indonesia	30 09 1958	A					
Iran (Islamic Rep. of)	20 02 1957	R X					
Iraq	14 02 1956	A					
Ireland	27 09 1962	R	19 05 1999	R X	19 05 1999	19 05 1999	R X
Israel	06 07 1951	R X					
Italy	17 12 1951	R	27 02 1986	R X	27 02 1986	27 02 1986	R
Jamaica	20 07 1964	S	29 07 1986	A		29 07 1986	A
Japan	21 04 1953	A					
Jordan	29 05 1951	A	01 05 1979	R		01 05 1979	R
Kazakhstan	05 05 1992	S	05 05 1992	S		05 05 1992	S
Kenya	20 09 1966	A	23 02 1999	A		23 02 1999	A
Kiribati	05 01 1989	S					
Korea (Dem. People's Rep.)	27 08 1957	A X				09 03 1988	A
Korea (Republic of)	16 08 1966	A X	15 01 1982	R X		15 01 1982	R
Kuwait	02 09 1967	A X	17 01 1985	A		17 01 1985	A
Kyrgyzstan	18 09 1992	S	18 09 1992	S		18 09 1992	S
Lao People's Dem. Rep.	29 10 1956	A	18 11 1980	R	30 01 1998	18 11 1980	R
Latvia	24 12 1991	A	24 12 1991	A		24 12 1991	A
Lebanon	10 04 1951	R	23 07 1997	A		23 07 1997	A
Lesotho	20 05 1968	S	20 05 1994	A		20 05 1994	A
Liberia	29 03 1954	A	30 06 1988	A		30 06 1988	A
Libyan Arab Jamahiriya	22 05 1956	A	07 06 1978	A		07 06 1978	A
Liechtenstein	21 09 1950	R	10 08 1989	R X	10 08 1989	10 08 1989	R X

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Lithuania	03 10 1996	A					
Luxembourg	01 07 1953	R	29 08 1989	R	12 05 1993	29 08 1989	R
Macedonia	01 09 1993	S X	01 09 1993	S X	01 09 1993	01 09 1993	S
Madagascar	18 07 1963	S	08 05 1992	R	27 07 1993	08 05 1992	R
Malawi	05 01 1968	A	07 10 1991	A		07 10 1991	A
Malaysia	24 08 1962	A					
Maldives	18 06 1991	A	03 09 1991	A		03 09 1991	A
Mali	24 05 1965	A	08 02 1989	A		08 02 1989	A
Malta	22 08 1968	S	17 04 1989	A X	17 04 1989	17 04 1989	A X
Mauritania	30 10 1962	S	14 03 1980	A		14 03 1980	A
Mauritius	18 08 1970	S	22 03 1982	A		22 03 1982	A
Mexico	29 10 1952	R	10 03 1983	A			
Micronesia	19 09 1995	A	19 09 1995	A		19 09 1995	A
Moldova (Republic of)	24 05 1993	A	24 05 1993	A		24 05 1993	A
Monaco	05 07 1950	R					
Mongolia	20 12 1958	A	06 12 1995	R X	06 12 1995	06 12 1995	R
Morocco	26 07 1956	A					
Mozambique	14 03 1983	A	14 03 1983	A			
Myanmar	25 08 1992	A					
Namibia	22 08 1991	S	17 06 1994	A	21 07 1994	17 06 1994	A
Nepal	07 02 1964	A					
Netherlands	03 08 1954	R	26 06 1987	R X	26 06 1987	26 06 1987	R
New Zealand	02 05 1959	R X	08 02 1988	R X	08 02 1988	08 02 1988	R
Nicaragua	17 12 1953	R	19 07 1999	R		19 07 1999	R
Niger	21 04 1964	S	08 06 1979	R		08 06 1979	R
Nigeria	20 06 1961	S	10 10 1988	A		10 10 1988	A
Norway	03 08 1951	R	14 12 1981	R	14 12 1981	14 12 1981	R
Oman	31 01 1974	A	29 03 1984	A X		29 03 1984	A X
Pakistan	12 06 1951	R X					
Palau	25 06 1996	A	25 06 1996	A		25 06 1996	A
Panama	10 02 1956	A	18 09 1995	R	26 10 1999	18 09 1995	R
Papua New Guinea	26 05 1976	S					
Paraguay	23 10 1961	R	30 11 1990	A	30 01 1998	30 11 1990	A
Peru	15 02 1956	R	14 07 1989	R		14 07 1989	R
Philippines	06 10 1952	R				11 12 1986	A
Poland	26 11 1954	R X	23 10 1991	R	02 10 1992	23 10 1991	R

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Portugal	14 03 1961	R X	27 05 1992	R	01 07 1994	27 05 1992	R
Qatar	15 10 1975	A	05 04 1988	A X	24 09 1991		
Romania	01 06 1954	R X	21 06 1990	R	31 05 1995	21 06 1990	R
Russian Federation	10 05 1954	R X	29 09 1989	R X	29 09 1989	29 09 1989	R X
Rwanda	05 05 1964	S	19 11 1984	A	08 07 1993	19 11 1984	A
Saint Kitts and Nevis	14 02 1986	S	14 02 1986	A		14 02 1986	A
Saint Lucia	18 09 1981	S	07 10 1982	A		07 10 1982	A
Saint Vincent Grenadines	01 04 1981	A	08 04 1983	A		08 04 1983	A
Samoa	23 08 1984	S	23 08 1984	A		23 08 1984	A
San Marino	29 08 1953	A	05 04 1994	R		05 04 1994	R
Sao Tome and Principe	21 05 1976	A	05 07 1996	A		05 07 1996	A
Saudi Arabia	18 05 1963	A	21 08 1987	A X			
Senegal	18 05 1963	S	07 05 1985	R		07 05 1985	R
Seychelles	08 11 1984	A	08 11 1984	A	22 05 1992	08 11 1984	A
Sierra Leone	10 06 1965	S	21 10 1986	A		21 10 1986	A
Singapore	27 04 1973	A					
Slovakia	02 04 1993	S X	02 04 1993	S	13 03 1995	02 04 1993	S
Slovenia	26 03 1992	S	26 03 1992	S	26 03 1992	26 03 1992	S
Solomon Islands	06 07 1981	S	19 09 1988	A		19 09 1988	A
Somalia	12 07 1962	A					
South Africa	31 03 1952	A	21 11 1995	A		21 11 1995	A
Spain	04 08 1952	R	21 04 1989	R X	21 04 1989	21 04 1989	R
Sri Lanka	28 02 1959	R					
Sudan	23 09 1957	A					
Suriname	13 10 1976	S X	16 12 1985	A		16 12 1985	A
Swaziland	28 06 1973	A	02 11 1995	A		02 11 1995	A
Sweden	28 12 1953	R	31 08 1979	R X	31 08 1979	31 08 1979	R
Switzerland	31 03 1950	R	17 02 1982	R X	17 02 1982	17 02 1982	R
Syrian Arab Republic	02 11 1953	R	14 11 1983	A X			
Tajikistan	13 01 1993	S	13 01 1993	S	10 09 1997	13 01 1993	S
Tanzania (United Rep of)	12 12 1962	S	15 02 1983	A		15 02 1983	A
Thailand	29 12 1954	A					
Togo	06 01 1962	S	21 06 1984	R	21 11 1991	21 06 1984	R
Tonga	13 04 1978	S					
Trinidad and Tobago	24 09 1963	A					
Tunisia	04 05 1957	A	09 08 1979	R		09 08 1979	R

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	R/D	R/A/S	R/D	D90	R/A/S	R/D
Turkey	10 02 1954	R					
Turkmenistan	10 04 1992	S	10 04 1992	S		10 04 1992	S
Tuvalu	19 02 1981	S					
Uganda	18 05 1964	A	13 03 1991	A		13 03 1991	A
Ukraine	03 08 1954	R X	25 01 1990	R	25 01 1990	25 01 1990	R
United Arab Emirates	10 05 1972	A	09 03 1983	A X	06 03 1992	09 03 1983	A X
United Kingdom	23 09 1957	R X	28 01 1998	R X	17 05 1999	28 01 1998	R
United States of America	02 08 1955	R X					
Uruguay	05 03 1969	R X	13 12 1985	A	17 07 1990	13 12 1985	A
Uzbekistan	08 10 1993	A	08 10 1993	A		08 10 1993	A
Vanuatu	27 10 1982	A	28 02 1985	A		28 02 1985	A
Venezuela	13 02 1956	R	23 07 1998	A		23 07 1998	A
Viet Nam	28 06 1957	A X	19 10 1981	R			
Yemen	16 07 1970	A X	17 04 1990	R		17 04 1990	R
Yugoslavia	21 04 1950	R X	11 06 1979	R X		11 06 1979	R
Zambia	19 10 1966	A	04 05 1995	A		04 05 1995	A
Zimbabwe	07 03 1983	A	19 10 1992	A		19 10 1992	A

See/voir: www.icrc.org/ihl

CENTRE DE DOCUMENTATION JURIDIQUE, CICR
CENTER FOR LEGAL DOCUMENTATION, ICRC

Attribution du Prix Paul Reuter

Le Prix Paul Reuter, destiné à récompenser des œuvres marquantes dans le domaine du droit international humanitaire, a été décerné le 12 février 2000 à

ILIAS BANTEKAS, chargé de cours à la faculté de droit, Université de Westminster, Royaume Uni,

pour sa thèse *Principles of Individual Responsibility for Violations of International Humanitarian Law after the ICTY* (Le Tribunal pénal international pour l'ex-Yougoslavie et le principe de la responsabilité individuelle en matière de violations du droit international humanitaire).

La thèse de Ilias Bantekas a été retenue, car elle étudie pratiquement toutes les jurisprudences qui ont appliqué et interprété le droit international humanitaire et aborde ainsi un sujet d'une grande actualité. Cet ouvrage constituera une source d'informations précieuse pour tous les juristes qui se préoccupent de la mise en œuvre du droit international humanitaire et de la responsabilité des individus envers ces règles.

Créé en 1983, grâce au don fait au CICR par feu le professeur Paul Reuter, professeur honoraire de l'Université de Paris, membre de l'Institut de droit international, le Fonds Reuter a deux objectifs. Ses revenus servent, d'une part, à encourager une œuvre ou une entreprise dans le domaine du droit international humanitaire et sa diffusion et, d'autre part, à financer le Prix Paul Reuter, doté d'une somme de 2 000 francs suisses.

C'est la sixième fois que le Prix Reuter, qui est habituellement décerné tous les trois ans, a été attribué depuis la création du Fonds. Il sera remis au lauréat par le président du CICR, Jakob Kellenberger, au cours d'une cérémonie qui aura lieu au mois de juin.

Award of the Paul Reuter Prize

The Paul Reuter Prize for outstanding work in the sphere of international humanitarian law was awarded on 12 February 2000 to

ILIAS BANTEKAS, lecturer in law at the University of Westminster, United Kingdom,

for his thesis entitled *Principles of Individual Responsibility for Violations of International Humanitarian Law after the ICTY* [International Criminal Tribunal for the former Yugoslavia].

Ilias Bantekas' thesis was chosen because it examines virtually every case in which international humanitarian law has been applied and interpreted, and deals with a subject of great topicality. The thesis will be a mine of information for legal experts concerned with the implementation of humanitarian law and with the responsibility of individuals under those rules.

The Reuter Fund was set up in 1983 through a donation made to the ICRC by the late Paul Reuter, Professor Emeritus at the University of Paris and member of the Institute of International Law. Its purpose is twofold: to encourage the publication of works on international humanitarian law or other initiatives in that field and to finance the Paul Reuter Prize, which is worth 2,000 Swiss francs and is awarded every three years.

This is the sixth time that the Reuter Prize has been awarded since the Fund was set up. It will be presented to Mr Bantekas by ICRC President Jakob Kellenberger at a ceremony in June.

INTERNATIONAL COMMITTEE OF THE RED CROSS

Conseil des Délégués, Genève, 29-30 octobre 1999

Le texte des résolutions adoptés par le Conseil des Délégués est disponible sous forme d'une brochure. Prière de s'adresser à

Comité international de la Croix-Rouge
Centre d'information publique
19, avenue de la Paix
CH-1202 Genève

LA REVUE

Council of Delegates, Geneva, 29-30 October 1999

The text of the resolutions adopted by the Council of Delegates is available as a special publication. To order, please contact

International Committee of the Red Cross
Public Information Centre
19 Avenue de la Paix
CH-1202 Geneva

THE REVIEW

Revue internationale de la Croix-Rouge International Review of the Red Cross

Table des matières – Contents **1999**

Volume 81, N^{os} 833-836

PAUL GROSSRIEDER, Un avenir pour le droit international humanitaire et ses principes?	833/11
ADAM ROBERTS, The role of humanitarian issues in international politics in the 1990s	833/19
FASIL NAHUM, The challenges for humanitarian law and action at the threshold of the twenty-first century: An African perspective	833/45
JEAN-DANIEL TAUXE, Faire mieux accepter le Comité international de la Croix-Rouge sur le terrain	833/55
LARRY MINEAR, The theory and practice of neutrality: Some thoughts on the tensions	833/63
JAN EGELAND, Peace-making and the prevention of violence: The role of governments and non-governmental organizations	833/73
RÉMI RUSSBACH, Conflits armés, prévention et santé publique	833/85
JONATHAN MOORE, The humanitarian development gap	833/103
DANIEL WARNER, The politics of the political/humanitarian divide	833/109
TOM HADDEN AND COLIN HARVEY, The law of internal crisis and conflict	833/119
GILBERT HOLLEUFER, Peut-on célébrer le 50 ^e anniversaire des Conventions de Genève?	833/135
JEAN PICTET, De la Seconde Guerre mondiale à la Conférence diplomatique de 1949	834/205
CATHERINE REY-SCHYRR, Les Conventions de Genève de 1949: une percée décisive (première partie)	834/209
YVES SANDOZ, Le demi-siècle des Conventions de Genève	834/241

DAVID FORSYTHE, 1949 and 1999: Making the Geneva Conventions relevant after the Cold War	834/265
MARIE-JOSÉ DOMESTICI-MET, Cent ans après La Haye, cinquante ans après Genève: le droit international humanitaire au temps de la guerre civile	834/277
ALBERTO T. MUYOT AND VINCENT PEPITO F. YAMBAO, Steps taken to ensure implementation of international humanitarian law in the Philippines	834/303
WILLIAM J. FENRICK, The application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia	834/317
ROBERT J. MATHEWS AND TIMOTHY L. H. MCCORMACK, The influence of humanitarian principles in the negotiation of arms control treaties	834/331
ANDRÉ DURAND, Le Comité international de la Croix-Rouge à l'époque de la première Conférence de La Haye (1899)	834/353
VÉRONIQUE HAROUËL, Les projets genevois de révision de la Convention de Genève du 22 août 1864 (1868-1898)	834/365
Les voix de la guerre: Appel solennel	
People on War — Solemn Appeal	
Testimonios sobre la guerra: Llamamiento solemne	835/457
ALAN MUNRO, Humanitarianism and conflict in a post-Cold War world	835/463
ALI SAID ALI, The future of development work in the Red Cross and Red Crescent Movement — Between the need for assistance and the requirements of prevention	835/477
FRANÇOIS BUGNION, Le droit international humanitaire à l'épreuve des conflits de notre temps	835/487
CATHERINE REY-SCHYRR, Les Conventions de Genève de 1949: une percée décisive (seconde partie)	835/499
EDOARDO GREPPI, The evolution of individual criminal responsibility under international law	835/531
CHRISTA ROTTENSTEINER, The denial of humanitarian assistance as a crime under international law	835/555

- ROBIN M. COUPLAND, FRCS, AND PETER HERBY, Review of the legality of weapons: a new approach 835/583
- JEAN-MARIE HENCKAERTS, New rules for the protection of cultural property in armed conflict 835/593
- IAN HLADIK, The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity 835/621
- CEES DE ROVER, Police and Security Force 835/637
- CORNELIO SOMMARUGA, *Même la guerre a des limites...* 836/713
- DIETRICH SCHINDLER, Significance of the Geneva Conventions for the contemporary world 836/715
- DANIEL THÜRER, The “failed State” and international law 836/731
- ANNA SEGALL, Economic sanctions: legal and policy constraints 836/763
- CHARLES GARRAWAY, Superior orders and the International Criminal Court: Justice delivered or justice denied 836/785
- ANNE RYNIKER, *Respect du droit international humanitaire par les forces des Nations Unies – Quelques commentaires à propos de la Circulaire du Secrétaire général des Nations Unies du 6 août 1999* 836/795
- XXVII^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge – 27th International Conference of the Red Cross and Red Crescent
- YVES SANDOZ, Conférence internationale de la Croix-Rouge et du Croissant-Rouge: un plan d’action pour l’humanitaire 836/819
- Keynote address by LOUISE FRÉCHETTE, Deputy Secretary-General of the United Nations 836/830
- Keynote address by DR ASTRID N. HEIBERG, President of the International Federation of Red Cross and Red Crescent Societies 836/837

Keynote address by CORNELIO SOMMARUGA, President of the International Committee of the Red Cross	836/842
XXVII ^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge: Résolutions	836/849
27th International Conference of the Red Cross and Red Crescent: Resolutions	836/877
CORNELIO SOMMARUGA, Le droit international humanitaire au seuil du troisième millénaire: bilan et perspectives	836/903

Croix-Rouge et Croissant-Rouge — Red Cross and Red Crescent

STEVEN DAVEY AND JEAN-LUC BLONDEL, The International Red Cross and Red Crescent Movement's involvement in public advocacy campaigns	833/149
MONIKA AMPFERL, La recherche des Allemands prisonniers ou portés disparus au cours de la Seconde Guerre mondiale — Une page de l'histoire du Service de recherches de la Croix-Rouge allemande	834/387
MICHAEL A. MEYER, The relevance of the 50th anniversary of the Geneva Conventions to National Red Cross and Red Crescent Societies: reviewing the past to address the future	835/649
JEAN-MARIE HENCKAERTS, Study on customary rules of international humanitarian law: Purpose, coverage and methodology	835/660
PETER HERBY, Arms availability and the situation of civilians in armed conflict — Summary of an ICRC study for the 27th International Conference of the Red Cross and Red Crescent	835/669
JAN EGELAND, Arms availability and violations of international humanitarian law	835/673
JEAN-PHILIPPE LAVOYER, Centenaire de la Conférence internationale de la Paix (La Haye, 1899)	835/678
Conseil des Délégués, Genève, 29-30 octobre 1999/ Council of Delegates, Geneva, 29-30 October 1999	836/925
Commission permanente de la Croix-Rouge et du Croissant-Rouge. Election de cinq membres/Standing Commission of the Red Cross and Red Crescent. Election of five members	836/925

Attribution de la médaille Henry Dunant/Henry Dunant Medals awarded	836/927
Assemblée générale de la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge/ General Assembly of the International Federation of Red Cross and Red Crescent Societies	836/928
Reconnaissance de la Croix-Rouge du Gabon/ Recognition of the Gabonese Red Cross Society	836/930

Comité international de la Croix-Rouge — International Committee of the Red Cross

Cornelio Sommaruga, Président du Comité international de la Croix-Rouge (1987-1999) Cornelio Sommaruga, President of the International Committee of the Red Cross (1987-1999)	836/931
JACQUES FORSTER, Cornelio Sommaruga: la force de la conviction	836/933
Composition du Comité international de la Croix-Rouge Nouveau directeur du droit international et de la communication/New director for international law and communication	836/940 836/942

Faits et documents — Reports and Documents

Les principaux défis auxquels le CICR doit faire face en 1999 — Conférence de presse / The principal challenges which the ICRC has to face in 1999 — Press conference	833/158
Mise en œuvre du droit international humanitaire Enforcement of international humanitarian law through national criminal legislation	833/162 833/166
Le Centre Henry Dunant pour le dialogue humanitaire début ses activités/The Henry Dunant Center for Humanitarian Dialogue begins its work	833/169
Le CICR dans le monde 1998/The ICRC worldwide 1998	833/172

Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre et Protocoles additionnels du 8 juin 1977 / Geneva Conventions of 12 August 1949 for the Protection of War Victims and Additional Protocols of 8 June 1977	833/174
Le conflit dans les Balkans et le respect du droit international humanitaire/The Balkan conflict and respect for international humanitarian law	834/403
Le Comité international de la Croix-Rouge réaffirme sa politique de «porte ouverte» sur son rôle pendant et après la Seconde Guerre mondiale/The International Committee of the Red Cross reaffirms “open door” policy on its role during and after World War II	834/412
Adhésion de la République du Kenya aux Protocoles additionnels aux Conventions de Genève du 12 août 1949/ Accession to the Protocols Additional to the Geneva Conventions of 12 August 1949 by the Republic of Kenya	834/416
Déclaration du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord selon l'article 90 du Protocole I/ Declaration of the United Kingdom of Great Britain and Northern Ireland in accordance with Article 90 of Protocol I	834/417
Ratification des Protocoles additionnels aux Conventions de Genève du 12 août 1949 par l'Irlande/Ratification of the Protocols Additional to the Geneva Conventions of 12 August 1949 by Ireland	834/418
Nouveaux membres du Comité international de la Croix-Rouge/New members of the international Committee of the Red Cross	835/685
Chronique semestrielle des Services consultatifs	835/687
Adhésion de Cuba au Protocole II additionnel aux Conventions de Genève du 12 août 1949 / Accession to Protocol II Additional to the Geneva Conventions of 12 August 1949 by Cuba	835/694
Ratification des Protocoles additionnels aux Conventions de Genève par la République du Nicaragua/Ratification	

of the Protocols Additional to the Geneva Conventions by the Republic of Nicaragua	836/943
Déclaration du Panama selon l'article 90 du Protocole I/ Declaration of Panama in accordance with Article 90 of Protocole I	836/944
Decision by the International Criminal Tribunal for the former Yugoslavia concerning testimony by ICRC personnel	836/945

Livres et revues — Books and reviews

Jonathan Moore (ed.), <i>Hard choices: Moral dilemmas in humanitarian intervention</i> (FRÉDÉRIC MÉGRET)	833/182
T.M.C. Asser Instituut (ed.), <i>Yearbook of international humanitarian law</i> (HANS-PETER GASSER)	833/186
Françoise Bouchet-Saulnier, <i>Dictionnaire pratique du droit humanitaire</i> (ANNE RYNIKER)	833/189
Anne-Marie La Rosa, <i>Dictionnaire de droit international pénal: termes choisis</i> (MARC HENZELIN)	833/191
Marianne Dubach-Vischer, <i>Mit Boot und Stethoskop</i> (FRANÇOISE PERRET)	833/193
Michel Deyra, <i>Droit international humanitaire</i> (ANTOINE BOUVIER)	834/423
Véronique Harouel, <i>Histoire de la Croix-Rouge</i> (ADOLFO J. BETETA H.)	834/424
Michael A. Meyer and Hilaire McCoubrey (eds), <i>Reflections on law and armed conflicts. The selected works on the laws of war by the late Professor Colonel G.I.A.D. Draper, OBE</i> (MICHAEL BOTHE)	834/427
Caroline Moorehead, <i>Dunant's Dream — War, Switzerland and the history of the Red Cross</i> (HANS-PETER GASSER)	834/429
Ameur Zemmali, <i>Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire</i> (HABIB SLIM)	834/433
Publications récentes/Recent publications	834/438
Roberta Cohen and Francis M. Deng, <i>Masses in Flight: The Global Crisis of Internal Displacement</i> (DANIEL HELLE)	835/695

Publications récentes/Recent publications	835/701
Judith Gardam (ed.), <i>Humanitarian Law</i> (HANS-PETER GASSER)	836/946
Roy Gutman and David Rieff (eds), <i>Crimes of War — What the public should know</i> (PIERRE HAZAN)	836/948
Sylvain Vité, <i>Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire</i> (ERICH KUSSBACH)	836/951
William G. O'Neill, <i>A Humanitarian Practitioner's Guide to International Human Rights Law</i> (RETO MEISTER)	836/954
Publications récentes/Recent publications	836/958

Divers — Miscellaneous

Le Fonds Paul Reuter — The Paul Reuter Fund — Fondo Paul Reuter	834/440
Training Seminar on International Humanitarian Law for University Teachers	836/959
How Does Law Protect in War? - Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law	836/960

F O R U M is a periodical publication from
the International Committee of the Red Cross.

The latest edition:

F O R U M: War, Money and Survival

Geneva, 2000

price per copy: 20 Swiss francs

Do economic conditions cause war? Who profits? How do people cope?

In more than 100 illustrated pages of articles by decision-makers, journalists and academics from the humanitarian and business worlds, *War, Money and Survival* looks at the complex interactions between war and the economy.

F O R U M: War, Money and Survival is organized under four main section headings:

Globalization and War

The relationship between globalization and warfare.
The effect of aid conditionality on war-torn countries.

Money and War

The economic rationale for war. Non-governmental actors in war.
The humanitarian market.

Survival and War

Examples of coping mechanisms in wartime: in refugee camps
and in Afghanistan, Sierra Leone and the Sahara.

International Aid

The impact of humanitarian assistance on local economies. How humanitarian
and development organizations cope with today's complex emergencies.

To order, please contact:

International Committee of the Red Cross

Public Information Centre

19 Avenue de la Paix, CH-1202 Geneva, Switzerland

fax: ++41 22 733 20 57

e-mail: dc_com_cip.gva@icrc.org



Information for authors and guidelines for the submission of manuscripts

The *International Review of the Red Cross* invites readers to submit articles on subjects relating to humanitarian action, law or policy or any issue of interest to the International Red Cross and Red Crescent Movement (see *Mission of the Review* on the inside front cover).

The decision whether or not to publish a text in the *Review* is taken by the editor, who also determines the date of publication. The main criteria applied are originality and academic standard. If necessary, an expert opinion will be sought.

Language: Manuscripts should be submitted in either French or English. Texts are published in the original version together with a summary in the other language.

Length: *Articles* should be no longer than 20 printed pages (around 8,000 words). *Book reviews* should not exceed three printed pages (around 1,000 words). Authors of articles are kindly asked to provide a summary, comprising 100 to 200 words, depending on the length of the original.

Footnotes: Authors are requested to keep the number and length of footnotes to the minimum necessary for ensuring comprehension of the text, and for indicating the sources used and relevant literature. Footnotes should be numbered consecutively from the beginning of the manuscript.

Bibliographical references:

(a) Books: author's name, title of book, edition (for example, 2nd ed.), publisher, place and year of publication, and page(s) referred to;

(b) Articles in periodicals or collective publications: author's name, title of the article and, in the case of:

- *periodicals:* name of periodical, volume, year, and page(s) referred to;
- *collective publications:* names of editors (eds), title of publication, publisher, place and year of publication, and page(s) referred to.

Manuscripts should be sent to the *Review* on paper together with a copy on diskette, or by e-mail, in which case a paper copy should also be sent by post or fax. Authors are invited to submit texts in one of the following word-processing programmes:

WordPro Millennium or 97

Word for Windows 6.0, 95 or 97

Biographical notes: Articles submitted for publication should be accompanied by two to three lines of biographical information on the author.

The *Review* reserves the right to edit articles. Manuscripts, whether or not accepted for publication, will not be returned. Authors of published articles will receive off-prints of their contributions.

La *Revue internationale de la Croix-Rouge/International Review of the Red Cross* paraît quatre fois par an, en mars, juin, septembre et décembre. Elle publie des textes en langue française ou en langue anglaise, accompagnés d'un résumé dans l'autre langue.

Les articles de la *Revue* sont également accessibles sur le site Web du CICR : <http://www.cicr.org> – rubrique « publications/périodiques »

Rédacteur en chef: Hans-Peter Gasser

Adresse:

Revue internationale de la Croix-Rouge
Avenue de la Paix 19
CH – 1202 Genève, Suisse
T (+41 22) 734 60 01
F (+41 22) 733 20 57
e-mail : review.gva@icrc.org

Prix de l'abonnement annuel:

USD 30/ CHF 40/ Euro 25

Numéro individuel:

USD 8/ CHF 12/ Euro 7.50

Paie ment sur facture uniquement

The International Review of the Red Cross/Revue internationale de la Croix-Rouge is published four times a year, in March, June, September and December. The *Review* publishes articles in French or in English, with a résumé in the other language.

Articles appearing in the *Review* are also accessible on the ICRC Web site: <http://www.icrc.org> – heading “publications/periodicals”

Editor: Hans-Peter Gasser

Address:

International Review of the Red Cross
19 Avenue de la Paix
CH–1202 Geneva, Switzerland
T (+41 22) 734 60 01
F (+41 22) 733 20 57
e-mail : review.gva@icrc.org

Annual subscription rate:

US Dollars 30 / 40 Swiss francs/ Euro 25

Single copy:

US Dollars 8/ 12 Swiss francs/ Euro 7.50

Payment on receipt of invoice

Conception graphique / Design:

Kohler & Tondeux
Atelier de Création Graphique Genève

Impression / Printing:

Atar Roto Presse SA Genève

Comité international de la Croix-Rouge

Organisation impartiale, neutre et indépendante, le Comité international de la Croix-Rouge (CICR) a la mission exclusivement humanitaire de protéger la vie et la dignité des victimes de la guerre et de la violence interne, et de leur porter assistance. Il dirige et coordonne les activités internationales de secours du Mouvement dans les situations de conflit. Il s'efforce également de prévenir la souffrance par la promotion et le renforcement du droit et des principes humanitaires universels. Créé en 1863, le CICR est à l'origine du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

JAKOB KELLENBERGER

président

President

ANNE PETITPIERRE

vice-présidente

Vice-President

JACQUES FORSTER

vice-président permanent

permanent Vice-President

RENÉE GUISAN

PAOLO BERNASCONI

LISELOTTE KRAUS-GURNY

SUSY BRUSCHWEILER

JACQUES MOREILLON

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

DANIEL THÜRER

JEAN-FRANÇOIS AUBERT

GEORGES-ANDRÉ CUENDET

ÉRIC ROETHLISBERGER

ERNST A. BRUGGER

JEAN-ROGER BONVIN

JAKOB NÜESCH

PETER ARBENZ

ANDRÉ VON MOOS

OLIVIER VODOZ

GABRIELLE NANCHEN

JEAN DE COURTEN

JEAN-PHILIPPE ASSAL

JACQUELINE AVRIL

REVUE INTERNATIONALE
DE LA CROIX-ROUGE
MARS 2000

INTERNATIONAL REVIEW
OF THE RED CROSS
MARCH 2000

VOLUME 82 N° 837

Dans ce numéro

**La crise
du Kosovo et le
droit international
humanitaire**

In this issue

**The Kosovo
crisis and
international
humanitarian law**