ARMED CONFLICT AND HUMANITARIAN INTERVENTION
INTERNATIONAL STANDARD RULES OF ENGAGEMENT

Hugh Stanton Watson*

INTRODUCTION

On 24 March 1999, members of the North Atlantic Treaty Organisation (NATO) commenced military action against a sovereign State for the first time in the Alliance's 50-year history. The action took 79 days of sustained and widespread air strikes against military and other targets in the Federal Republic of Yugoslavia (FRY). During the campaign many innocent people died[1] and some parts of Serbian cultural heritage were damaged[2] as a result of the targeting of locations in civilian areas and NATO's numerous bombing mistakes. It culminated in a ceasefire and a NATO peacekeeping force in the Yugoslav province of Kosovo.[3]

There has been great debate in diplomatic and academic circles on the legality of NATO's actions under international law that has tended to focus on the presence or absence of justification for NATO intervention in the first place. It has been claimed that since NATO acted unilaterally and without the explicit authority of the Security Council it breached Article 2(4) of the United Nations Charter prohibiting the use of force. This claim relies on a strict reading of Article 2(4) and the intentions behind its formulation. Yet others have claimed that the intervention could be justified since it was provoked by evidence of extensive human rights violations by the FRY forces against the Kosovar Albanians. Fundamental to the second claim are two propositions. First, Article 2(4) could be interpreted broadly to allow the use of force to uphold human rights. Secondly, State practice during the past 50 years has shown that

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[1] Such as the 17 people killed on 28 April 1999 in Surdulica when a NATO precision guided missile landed in a residential area 300 metres from the targeted barracks: News Digest for April 1999, Keesing's Record of World Events 42899.

[2] Such as Belgrade's 16th century Rakovica Monastery: Thomas, "NATO and international law", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/thomas.htm> (visited 5 May 2000).

[3] Currie, "NATO's humanitarian intervention in Kosovo: making or breaking international law?" [1998] Canadian Yearbook of International Law 303-331.

international law permits intervention in the domestic affairs of States on humanitarian grounds.

It appears that the discussions on Kosovo have tended to ignore the legality and implications of NATO's conduct *during* the conflict (governed by *jus in bello),* as opposed to the legality of the *initiation* of the conflict (governed by *jus ad bellum).*[4] The following issues have therefore arisen:

1. Despite the conventional separation of *jus in bello* and *jus ad bellum*, an ethical approach to the legality of humanitarian intervention suggests that humanitarian intervention should be conducted in a humanitarian manner. If not, it becomes illegal in nature.
2. NATO's humanitarian intervention could be considered illegal because it was not conducted in a humanitarian manner. Specifically, NATO's choice of an air campaign over a ground war, its choice of civilian targets and its use of depleted uranium weapons in that campaign could be considered to have breached international humanitarian law. In making this argument, NATO's political and practical constraints when dealing with the Kosovo crisis are acknowledged.
3. The conduct of the Kosovo campaign indicates the need for greater regulation of humanitarian intervention to ensure both its legality and integrity.

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[4] There is a conventional division in the law of armed conflict between *jus in bello* (law in war) and *jus ad bellum* (law to war) or, more accurately, *jus contra bellum* (law against war). *Jus ad bellum* and *jus in bello* are deemed to have distinct purposes. *Jus ad bellum* has the primary function of averting or terminating armed conflict and threats to the peace. Where that primary endeavour fails, *jus in bello* has the secondary, but nonetheless vital, office of mitigating the impact and consequences of the armed conflicts that occur despite *jus ad bellum. Jus ad bellum* consists principally of the proscription against the use of war, and the exceptions to the proscription. They are embodied in Articles 1, 2(4), 39-51 and Chapter VII of the United Nations Charter, and the 1974 United Nations General Assembly Resolution on the Definition of Aggression. *Jus in bello* has two principal subdivisions that are often termed as "Geneva"' and "Hague" law, in reference to the treaties upon which each is founded. Geneva law derives from the 1949 Geneva Conventions and 1977 Additional Protocols, and is concerned with the protection of the victims of armed conflict. Hague law is derived from the 1899 and 1907 Hague Conventions, and is concerned with the methods and means of warfare. *Jus in bello* is the essential content of international humanitarian law: see generally McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 1-2.

4. Greater regulation of humanitarian intervention may be possible through the formulation and adoption of an international Convention embodying standard rules of engagement.

HUMANITARIAN INTERVENTION

Defining Humanitarian Intervention

Humanitarian intervention refers to the compromise of a State's sovereignty without the State's consent in order to aid a group or groups of its inhabitants considered to be experiencing human rights violations and other suffering. Two general means of humanitarian intervention are conceivable. First, the intervention could take a non-military form, such as the transporting of food, medical and other essential supplies into the territory of the State without its consent. Secondly, the intervention could take the form of military action against the State to force it to stop the actions alleged to be causing the suffering. The first is beyond the scope of this article, which will concern itself solely with the second form. Thus, "humanitarian intervention" in this context refers to armed intervention in response to human rights violations and other suffering.

Two important preliminary issues should be considered before analysing NATO's conduct in Kosovo as a case of humanitarian intervention. First, it is necessary to consider whether NATO's action in Kosovo was indeed humanitarian intervention in the light of statements by NATO officials. Secondly, it is necessary to review briefly the debate on the legality of humanitarian intervention as a course of action so as to provide a context for the ethical argument on the regulation of humanitarian intervention.

NATO's Action in Kosovo

There has been a tendency for NATO representatives to deny that the action in Kosovo was humanitarian intervention, or indeed that any single factor or doctrine served as justification for the intervention. Instead, they emphasised the role of "fact-based factors".[5] David Andrews, Legal Adviser to the United States Department of State, commented that:[6]

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[5] Charney, "NATO's campaign in Yugoslavia", (1999) 93 American Journal of International Law 828, 829.

[6] Andrews, "Testing the limits of sovereignty: the year in review", transcript of speech at the 13th Annual United States Pacific Command International Military Operations and

> many of the NATO States – including the US – had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action that was not justified by self-defense or the authorization of the Security Council. As a result, NATO decided that its justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory. As presented by NATO Secretary General Solana, these factors included: the failure of FRY to comply with the demands of the Security Council under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to take a clear decision adequate to deal with that disaster; and the serious threat to peace and security in the region posed by Serb actions.

The question that arises is whether, in the face of such a denial, NATO's intervention could be properly characterised as humanitarian intervention. Arguably, this is possible. Regardless of how the intervention was characterised in official statements such as that of Andrews', there can be little doubt that the vital motivation in the decision to intervene was humanitarian. NATO acted to stop the continuing human rights violations by the FRY forces in Kosovo. NATO would not have resorted to force but for the presence of the apparent human rights violations. Indeed, the other factors identified – the FRY's non-compliance with Security Council Resolutions, the danger of a humanitarian disaster, the problem of Security Council inaction and the threat to peace and security in the region – all derive from the humanitarian problem.

The true primacy of NATO's motivations is evident in several comments. For example, Andrews acknowledges that:[8]

> NATO member States went through an intensive discussion in Brussels in establishing the basis for their decision to use force in Kosovo. All were agreed that NATO may not stand by while the population of Kosovo was subjected to a policy of brutal expulsions and atrocities on a massive scale... Yet, as NATO considered the matter, no single factor or doctrine seemed, by itself, to be entirely

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Law Conference, Manila, 13-17 March 2000 at 6.

[7] Ibid 6-7.

[8] Ibid 5.

> satisfactory to all participants as a justification under traditional legal standards.

This supports the view that NATO's real concern was the need to stop the continuing violations of Kosovar human rights, even if such a motivation was not widely accepted as legal in the absence of Security Council authorisation. NATO was also concerned with the *danger* and continuation of a humanitarian catastrophe in Kosovo, implying that the catastrophe might already exist in Kosovo.[9] The primacy of this concern in motivating NATO's actions was confirmed in the United Kingdom's Oral Pleadings in the proceedings the FRY launched in the International Court of Justice after the start of the intervention, which referred to the intervention as being "directed exclusively to averting humanitarian catastrophe".[10]

Thus, it could be said that NATO's motive in Kosovo was based primarily on humanitarian concerns and despite the denials of various NATO representatives could be deemed to be humanitarian intervention.

The Legality of Humanitarian Intervention

Humanitarian intervention as a course of action is problematic because it involves the use of force by one or more States against the territorial integrity or political independence of another, particularly when the United Nations has not authorised it. *Prima facie*, this contravenes Article 2(4) of the United Nations Charter. Generally, there is disagreement over whether humanitarian intervention is an exception to this provision.

(i) International Treaty Law

The United Nations Charter is the main source of international treaty law. Article 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

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[9] Letter dated 9 October 1998 from NATO Secretary-General Solana to the North Atlantic Council: Simma, "NATO, the United Nations and the use of force: legal aspects", (1999) 10 European Journal of International Law 1, 7.

[10] Legality of Use of Force (Yugoslavia v United Kingdom), Oral Pleadings, International Court of Justice Document CR/99/23, para 17; Falk, "Kosovo: a 'good' or 'bad' war?" (1999) 93 American Journal of International Law 841, 843.

> independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[11]

Debate continues over the actual extent of the prohibition. The prohibition has at least two recognised exceptions, both of them found in the United Nations Charter. The first is self-defence, found in Article 51. The second is coercive action by United Nations forces or other forces authorised by the Security Council under Chapters VII-VIII. One view is that besides these exceptions, Article 2(4) should be a ban on all uses of force, particularly since allowing for other exceptions could result in an abuse of the rule. Another view is that the use of force in the case of humanitarian intervention could be legal, even when not authorised by the Security Council. This view tends to rely partly on a hierarchical interpretation of the United Nations' purposes and partly on State practice.

Typical arguments for the strict interpretation of Article 2(4) and the restriction of intervention to the cases provided in Article 51 and Chapters VII and VII may be found in the work of authorities such as Professors Derek Bowett and Ian Brownlie.[12] They tend to point to the need to interpret the provision in the light of the principles on which the organisation was established: "to save succeeding generations from the scourge of war."[13] They find any interpretation that compromises these principles unacceptable. Support for this strict interpretation of Article 2(4) is found cases such as *Corfu Channel Case (Merits),*[14] where the International Court of Justice held that:

> the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law.[15]

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[11] The Court in Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States) [1986] International Court of Justice Reports 14 confirmed that this prohibition was unparalleled in customary international law.

[12] For example Bowett, "The interrelation of theories of intervention and self-defense" in Moore JN (editor), Law and Civil War in the Modern World (1974, The John Hopkins University Press, Baltimore and London) 44-46; Brownlie, "Humanitarian intervention" in ibid 219-220, 226-227.

[13] See Preamble to the United Nations Charter.

[14] [1949] International Court of Justice Reports 4.

[15] Ibid 35; Abiew FK, The Evolution of the Doctrine and Practice of Humanitarian Intervention (1999, Kluwer Law International, The Hague) 91, 92 especially note 81.

While the case did not directly concern the principle of humanitarian intervention, the argument is that the Court's judgment should be interpreted as condemning all intervention involving the use of force, including humanitarian intervention.[16]

In contrast, authorities such as Professors Julius Stone and Richard Lillich argue that Article 2(4) should not be interpreted as an absolute proscription for the use of force. Instead, it allows force to be used in a way that does not threaten the "territorial integrity or political independence of a State", and if action is in conformity with the United Nations' major purposes.[17] The claim here is that Article 2(4) is not against the use of coercion *per se*, but rather the use of force unlawfully against territorial integrity and political independence. Thus, Article 2(4) does not preclude humanitarian intervention since the latter does not seek to challenge a State's territorial boundaries or its political independence. Instead, it seeks to uphold human rights in conformity with the Charter as expressed in Article 1(3).[18]

Fernando Teson is a more recent exponent of this approach.[19] Teson argues that a plain reading of Article 2(4) does not support an absolute prohibition of the use of force. On the contrary, the words, "or in any other manner inconsistent with the purposes of the United Nations", serve a qualifying purpose. In this interpretation of the provision, three distinct prohibitions are identified when force is used, namely:

1. when it is against the territorial integrity of any State;
2. when it is against the political independence of any State; or
3. when it is otherwise inconsistent with the purposes of the United Nations.[20]

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[16] Ibid.

[17] Stone J, Aggression and World Order: A Critique of United Nations Theories of Aggression (1958, Maitland Publications, Sydney) 95; Lillich, "Humanitarian intervention: a reply to Ian Brownlie and a plea for constructive alternatives" in Moore JN (editor), Law and Civil War in the Modern World (1974, The John Hopkins University Press, Baltimore and London) 236-242.

[18] Article 1(3) states that one of the purposes of the United Nations is "to achieve international cooperation...in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[19] Teson FR, Humanitarian Intervention: An Inquiry into Law and Morality (1988, Transnational Publishers, New York).

[20] Ibid 130-131.

Teson claims that since Article 2(4) is expressed this way, it is not an outright prohibition of force. Instead, it should be interpreted to mean that the use of force does not fall within the prohibition when it does not involve territorial conquest or political subjugation, and it is consistent with the purposes of the United Nations. This implies that if humanitarian intervention is consistent with the purposes of the United Nations, it is not covered by the prohibition.[21] As Article 1(3) indicates, it is irrefutable that the defence of human rights is one of the primary purposes of this body.

(ii) State Practice

The debate on the legality of intervention when not characterised as self-defence under Article 51, carried out by the United Nations or authorised by the Security Council under Chapters VII and VIII becomes more complex within the context of State practice. Here, a distinction should be made between unauthorised unilateral humanitarian intervention (unauthorised intervention by a single State) and unauthorised multilateral humanitarian intervention (unauthorised intervention by a regional organisation or group of States).

Those who argue the legality of unauthorised unilateral humanitarian intervention tend to point to supportive State practice. Examples are India's intervention in Eastern Pakistan/Bangladesh (1971), Vietnam's actions against Cambodia (1979), Tanzania's intervention in Uganda (1979), and the American invasions of Grenada (1983) and Panama (1989), all of them justified partly by reference to humanitarian concerns.[22] Commentators who reject this line of argument say that in every example, the State relied on other justifications to defend its actions, such as invitation, reprisal, self-defence, and defence of their nationals or those of third party States. These extra justifications show a lack of conviction or *opinio juris*[23] in the sufficiency of the humanitarian intervention defence.

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[21] Ibid 131.

[22] Currie, "NATO's humanitarian intervention in Kosovo: making or breaking international law?" [1998] Canadian Yearbook of International Law 309.

[23] Opinio juris is one of two elements necessary for the creation of customary international law, the other being settled practice. Opinio juris is the belief that the rule is binding: North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] International Court of Justice Reports 3, 77-78.

Others argue for the legality of unauthorised multilateral humanitarian intervention. They point to the intervention by the Economic Community of West African States, or ECOWAS, in Liberia (1990) and Sierra Leone (1998), and the intervention by the United States, United Kingdom and France in northern Iraq (1991).[24] While the action in Liberia appears to have greater precedential value since it was retroactively legitimised by the Security Council, critics state that developing States have opposed the action in Sierra Leone as being more driven by political concerns.

Thus, customary international law does not provide a certain basis for either unilateral or multilateral humanitarian intervention not authorised by the United Nations.

(iii) Unauthorised Humanitarian Intervention

When an unequivocal basis in treaty or customary international law for unauthorised humanitarian intervention is absent, some commentators use ethics to legalise the practice. In essence, the argument extends the human rights justification for a liberal interpretation of Article 2(4). The argument in favour of legality is exemplified in Teson's work. He proposes an ethical theory of international law and suggests that the only way to justify a broader interpretation of the prohibition is to presuppose this ethical theory.[25] Fundamental to his proposal is the concept that the rights of States, such as the right to sovereignty, should be seen as being derived from the rights of the individuals who inhabit and constitute the State.[26]

Teson argues that States and governments are created to protect the rights of individuals. They are accorded this power on condition they exercise it for this purpose. This proposition implies that only those governments that are representative and respect the rights of their constituents could be said to possess State rights under international law. Where a government engages in actions that violate the rights of its constituents, it ceases to be a government that is deemed to represent its constituents, thus waiving the privilege of having its own rights respected and protected under

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[24] Currie, "NATO's humanitarian intervention in Kosovo: making or breaking international law?" [1998] Canadian Yearbook of International Law 309, 312-313, 316.
[25] Teson FR, Humanitarian Intervention: An Inquiry into Law and Morality (1988, Transnational Publishers, New York) 129.
[26] Ibid 111-114.

international law.[27] Therefore, according to Teson, it is arguable that if a State breaches the rights of its inhabitants, it loses simultaneously its legitimacy and rights under the United Nations Charter. This allows other States to compromise its sovereignty and territorial integrity, which are guaranteed under Articles 2(4) and 2(7). It is on the basis of this ethical analysis that Teson argues that humanitarian intervention, whether authorised or not, could be considered legal.[28]

'Humanitarian' Humanitarian Intervention – an Ethical Argument

Even if Article 2(4) is interpreted broadly, and State practice and ethical theory support the legality of initiating humanitarian intervention, this has little bearing on the problem presented by situations such as the Kosovo conflict. In this conflict, it is the conduct of the intervening party, not the intervening act itself, which is of questionable legality.

It is accepted generally that the legality of engaging in conflict and the legality of the conduct of that conflict are separate matters. The methods used in a conflict are not made legal or illegal by the legality or otherwise of the conflict itself. Similarly, a conflict is not made legal or illegal because of the legality or otherwise of the methods used in that conflict.[29] This proposition is expressed in the division in the international law of armed conflict between *jus ad bellum* and *jus in bello,* discussed above.

Nevertheless, it is possible to formulate an ethical argument whereby the two fields of law are considered interdependent as they apply to humanitarian intervention. This argument posits that unless humanitarian intervention satisfies the requirements of *jus in bello*, it cannot be considered to meet the demands of *jus ad bellum*, and thus cannot be considered legal. It can be constructed by following a logical progression similar to Teson's, discussed above. If the initial justification for humanitarian intervention is an ethical one, to uphold the primacy of human rights over State rights, it follows that the process or conduct of humanitarian intervention should be characterised as upholding human rights by observing international humanitarian law.

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[27] Ibid 112-113.
[28] Ibid 153.
[29] McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 2.

The same argument that allows States rights to be ignored when their constituents' human rights are violated should also be applied to cases of humanitarian intervention. If such intervention is characterised as violating human rights as well, through the neglect of international humanitarian law, the intervention should lose its legitimacy under international law, just as a State would if it violated the human rights of its constituents. This argument should apply whether or not the intervention is legal under Article 51 or Chapters VII-VIII of the United Nations Charter.

NATO'S CAMPAIGN: INHUMANE INTERVENTION?

Irrespective of whether the *initiation* of the intervention in Kosovo is legal with reference to a broad interpretation of Article 2(4), State practice or human rights considerations, it appears that the *conduct* of the intervention would fail the ethical arguments for legality. The intervention involved breaches of human rights and various conventions on humanitarian law.[30] Arguably, the intervention was illegal in the positivist or the ethical sense.

The Conduct of NATO's Campaign

NATO could have violated international humanitarian law in the conduct of its campaign in three ways: (1) pursuit of an aerial bombing campaign; (2) deliberate targeting of civilian infrastructure; and (3) use of prohibited weapons.

(i) NATO's Aerial Bombing Campaign

As stated above, NATO's strict policy of aerial bombing resulted in civilian deaths and the destruction of Serbian infrastructure and sites of historical and cultural significance. Arguably, the policy was in violation of fundamental humanitarian law principles of necessity and proportionality concerning the use of force.

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[30] NATO's intervention in Kosovo began as an internal conflict. As such, it was indisputably subject to international humanitarian law when foreign troops acted against one or more of the parties: Roberts, "The laws of war: problems of implementation in contemporary conflicts" in European Commission, Law in Humanitarian Crises: How can International Humanitarian Law be Made More Effective in Armed Conflicts? Volume 1 (1995, Office for Official Publications of the European Communities, Luxembourg) 15.

Necessity as a norm was first codified in Article 23(g) of 1907 Hague Convention IV prohibiting acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". The International Military Tribunal at Nuremberg characterised the wanton destruction of cities, towns or villages or devastation not justified by military necessity as a war crime.[31] This norm and the closely related principle of proportionality were codified together in 1977 as Additional Protocol I of the 1949 Geneva Conventions. Article 51(5)(b) prohibits attacks that:

> may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57(2)(b) provides that:

> an attack should be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Causing civilian casualties and damage to civilian property are not offences *per se* under Protocol I. The substantive limitation is that such loss should be necessary for and proportionate to the military objective. In Kosovo, it was foreseeable that NATO's aerial campaign that consisted mainly of high altitude bombing would cause extensive civilian casualties and destruction of civilian infrastructure. The losses were not proportionate to or necessary for achieving a halt to the human rights breaches in Kosovo and the forced withdrawal of the FRY forces.

Two main points could be made on the necessity of a high altitude bombing campaign. First, it is arguable that other courses of action were available to NATO and preferable as a campaign. Instead of the unilateral

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[31] Refer generally to the judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg (1946), Misc No 12 (1946, HM Stationery Office, London).

use of force, NATO could have provided assistance to the Kosovo Liberation Army (usually known as KLA) in securing an independent Kosovo.[32] However, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*[33] indicates that this would constitute an illegal intervention under Protocol I.[34] Alternatively, NATO could have placed more pressure on the FRY through the Security Council rather than NATO's military action.[35]

NATO claimed that diplomatic means were properly used or exhausted in the Kosovo conflict. However, this is questionable given Russia's exclusion from diplomatic participation prior to NATO's recourse to war, the uncompromising nature of the Holbrook/Rambouillet proposals and the absence of any clear diplomatic efforts to induce China and Russia to shift their vetos from Security Council-sponsored action to abstentions.[36] Nonetheless, the use of diplomatic pressure on the FRY would not have stopped the human rights violations that provoked the intervention. In this sense, it is arguable that a preferable alternative could have been a NATO strategy that combined ground assault with air attacks.[37] Ground troops would have made it more difficult for the FRY forces to continue and increase their abuse of human rights in the Balkans. Ground troops could also have helped to prevent the mass exodus of Kosovar refugees and minimised the collateral damage.

However, the above arguments ignore the domestic political difficulties raised by a ground war for NATO countries. This includes the certain loss of public support for the intervention provoked by the increase in NATO casualties resulting from a ground war.[38] It ignores also the time-consuming preparations needed for the organisation and deployment of a

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[32] Falk, "Kosovo, world order, and the future of international law", (1999) 93 American Journal of International Law 847, 851.

[33] (Nicaragua v United States) [1986] International Court of Justice Reports 14.

[34] In this case, the International Court found that the financial and logistic support, training, supply of weapons, and intelligence that the United States gave to the contras in Nicaragua for the latter's military and paramilitary activities constituted a clear breach of the principle of non-intervention: ibid 242.

[35] Bothe, "Editorial: Kosovo – many questions, few answers", [January-April 1999] International Peacekeeping 1, 2.

[36] Falk, "Kosovo, world order, and the future of international law", (1999) 93 American Journal of International Law 847, 850.

[37] Ibid 851.

[38] Ibid.

force of the size required for it to be effective in the mountainous terrain and conditions in Kosovo. In fact, it would have required around 175,000 troops.[39] As a consequence, the FRY's ethnic cleansing program could have ended even before any ground forces were ready for Kosovo.

There is a second reason why the aerial campaign could be questioned as necessary or proportionate under Protocol I. It became evident early on during the campaign that it was proving ineffective to stop the human rights violations that occurred. On the contrary, the campaign had provoked or provided a cover for increased ethnic cleansing by the FRY forces, thereby causing more Kosovar Albanians to be displaced.[40]

Arguably, it was foreseeable that a high aerial bombing campaign would raise the risk of collateral damage to Serbia's infrastructure, environment, cultural heritage and communication network. It was foreseeable also that the campaign would cause the further oppression of Kosovar Albanians. Since the campaign was being conducted on their behalf, they were most at risk to become scapegoats for the suffering of the whole population under the bombing. From this perspective, the risk posed by the campaign to innocent people was clearly disproportionate to its likely success in ending the Kosovar Albanians' oppression and forcing the FRY to withdraw.

The results of the bombing further emphasise its disproportionate nature. Whilst there is a dispute between the FRY and NATO over the actual figures, it is not disputed that many innocent civilians died. This suffering was not limited to the FRY forces responsible for the human rights breaches, but extended to Serbian civilians who had nothing to do with the acts of the FRY forces. Indirectly, the Kosovar Albanians themselves were affected by NATO's campaign.

The argument on the proportionality of the campaign could be answered with reference to the circumstances surrounding the campaign. As United States President Clinton acknowledged shortly after the bombing was suspended, NATO had expected the FRY President Milosevic to submit after a few days of the campaign. In its initial stages, the bombing was

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[39] Ignatieff, "The future of war", transcript of lecture presented at the London School of Economics, Radio National's Background Briefing Program, at <www.abc.net.au/rn/talks/bbing/s140710.htm> (visited 11 June 2000).

[40] Falk, "Kosovo, world order, and the future of international law", (1999) 93 American Journal of International Law 847, 852.

confined to military targets, which was certainly proportionate to the objective of forcing the withdrawal of the FRY troops from Kosovo.

It is arguable that when this limited bombing was proven inadequate, it was reasonable for NATO to intensify the attack until the goal was achieved. If NATO had stopped midway, its credibility as the defender of European security would have been jeopardised. Further, it could be argued that the intensified bombing and its expansion to civilian targets were proportionate to the accelerated ethnic cleansing in Kosovo as soon as the war started. It was highly foreseeable that ethnic cleansing in the region would have continued unchecked if the bombing had ended prematurely.[41]

(ii) Targeting of Civilians and Civilian Infrastructure

There is ample evidence to suggest that NATO forces deliberately targeted elements of Serbian civilian infrastructure that had little, if any, relation to the actions of the FRY forces in Kosovo. NATO's actions constituted a direct contravention of the international humanitarian law rules of distinction (the duty to avoid collateral damage), necessity and proportionality. The basis and content of the rules of necessity and proportionality have been discussed above. The rule of distinction is set out in Article 48 of Protocol I, which provides as follows:

> Parties to...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.

Article 52(2) defines the concept of "military objectives" as follows:

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

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[41] Falk, "Kosovo, world order, and the future of international law", (1999) 93 American Journal of International Law 847, 851.

The effect of Article 52(2) is to provide an exception to the general prohibition on the targeting of civilian objects in Article 48. It allows civilian targets to be classified and attacked as military objectives where they "make an effective contribution to military action". However, the destruction of these targets should offer "a definite military advantage". This applies to the so-called "dual use" targets, namely, objects that serve both civilian and military functions, such as transport infrastructure.

There are several examples of NATO targeting civilian objects, arguably in contravention of the principle of distinction. NATO bombs destroyed a large number of bridges in Serbia during the conflict, sometimes causing serious civilian casualties in the process[42] and there were attacks on Serbia's traffic, power and water infrastructure.[43] Questions on the "military advantage" from these actions should be asked. While advantages from the destruction of power and water installations are clearer, it was questionable whether the FRY military would (and in the event, did) suffer any significant inconvenience proportionate to the severe disruption to civilian life that resulted.[44]

Questions should also be asked about NATO's stated purposes for disrupting the FRY's military command and supply network (through deprivation of power and supply routes). Bridges that were hundreds of kilometres away from those areas where forces were active (for example, in Novi Sad) arguably could not be considered necessary for an "effective contribution to military action". As such, their destruction could not be said to offer a definite military advantage. Indeed, it has been suggested that NATO did not seek a military advantage by the bombings. Instead, it aimed to demoralise the civilian population to gain a political advantage by engendering popular opposition to the Serbian leadership. Comments such as the following support this conclusion:[45]

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[42] Bothe, "Editorial: Kosovo – many questions, few answers", [January-April 1999] International Peacekeeping 1, 2.

[43] Other civilian targets included food processing plants, oil refineries and civilian airports: Hayden, "Humanitarian hypocrisy", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/hayden.htm> (visited 5 May 2000).

[44] Bothe, "Editorial: Kosovo – many questions, few answers", [January-April 1999] International Peacekeeping 1, 2.

[45] Hayden, "Humanitarian hypocrisy", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/hayden.htm> (visited 5 May 2000).

> Just focussing on fielded forces is not enough... The people have to get to the point that their lights are turned off, their bridges are blocked so they can't get back to work.

NATO could have contravened the principle of distinction in other ways besides the targeting of civilian infrastructure. An example is the attack on Television Serbia during the night of 22 April 1999 when only civilians were in the building, causing 20 deaths. This could be argued as a direct contravention of the principle of distinction set out in Article 48.[46] It has been said that the studio was never an important military target although it may have been used as an "instrument of propaganda and repression".[47]

Another example is NATO's attacks on Serbian chemical plants. In April 1999, NATO warplanes bombed three major industrial plants near Belgrade, releasing more than 10,600 times the accepted safety levels of the carcinogen, vinyl-chloride monomer (VHM) into the air. It poisoned the air, land, crops and Danube River. This result was foreseeable since the United States built the plants.[48] Article 56 of Protocol I prohibits attacks on "dams, dykes and nuclear electrical generating stations", which are referred to as "dangerous forces". If this list of targets is not exhaustive and the plants are considered "dangerous forces", NATO's attacks could have offended the prohibition.

It is important to note that NATO's choices of targets were not necessarily deliberate contraventions of international humanitarian law principles. Differing interpretations of the principles contributed to the problem. NATO's choices were in fact made by reference to the international humanitarian law principles of proportionality and distinction,[50] but this did not stop disagreement among NATO members on the legality of the decisions under international humanitarian law. For example, France disputed the legality of the attacks on bridge targets and the United

[46] Thomas, "NATO and international law", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/thomas.htm> (visited 5 May 2000).
[47] News Digest for April 1999, Keesing's Record of World Events 42900.
[48] Cohn, "Jurist forum: no 'victor's justice' in Yugoslavia: NATO must be held accountable for its war crimes", Jurist at <jurist.law.pitt.edu/forumnew4.htm> (visited 5 May 2000).
[49] Ibid.
[50] Ignatieff, "The future of war", transcript of lecture presented at the London School of Economics, Radio National's Background Briefing Program, at <www.abc.net.au/rn/talks/bbing/s140710.htm> (visited 11 June 2000).

Kingdom disputed the attacks on power installations. The latter also refused to fly the mission that bombed Radio Television Serbia on 22 April 1999.[51]

(iii) The Use of Prohibited Weapons

It is arguable that NATO's action violated international humanitarian law when it made use of weapons prohibited under international humanitarian law. In particular, NATO's use of weapons containing depleted uranium[52] may have breached the international humanitarian law prohibitions on unnecessary suffering and indiscrimination. The prohibition of unnecessary suffering, fundamental to *jus in bello* in general and the law of arms control in particular, derives from the Preamble to the 1868 Declaration of St Petersburg, which states that: [53]

> the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy...this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable...the employment of such arms would, therefore, be contrary to the laws of humanity.

This prohibition of indiscrimination is embodied in Article 51(4) of Protocol I, which provides the following:

> Indiscriminate attacks are prohibited. Indiscriminate attacks are:
> (a) those which are not directed at a specific military object;
> (b) those which employ a method or means of combat which cannot

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[51] Ibid.

[52] Depleted uranium is used in shells to enable the better penetration of targets. As the shell hits the target, it burns and releases uranium oxide into the air. This is most dangerous when inhaled by a person, where it releases radiation during the life of that person: Thomas, "NATO and international law", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/thomas.htm> (visited 5 May 2000). One speck of depleted uranium dust lodged in a lung could cause cancer. Depleted uranium has been linked to Gulf War Syndrome and high levels of stillbirths. Birth defects and leukemia among Iraqi children have followed its large-scale use in the Gulf War: Cohn, "Jurist forum: no 'victor's justice' in Yugoslavia: NATO must be held accountable for its war crimes", Jurist at <jurist.law.pitt.edu/forumnew4.htm> (visited 5 May 2000).

[53] McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 212.

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;

and consequently, in each case, are of a nature to strike military objectives and civilian or civilian objects without distinction.

The argument that the use of depleted uranium weapons contravenes the international humanitarian law principles of unnecessary suffering and indiscrimination rests on the potentially deleterious and random radioactive effects of such weapons on civilians. It has been claimed that the accumulated fallout from the use of depleted uranium shells in bombing Serbia could produce a Hiroshima/Nagasaki after effect on civilians.[54]

However, this argument could be of limited validity since the International Court of Justice in its Advisory Opinion rejected similar claims on the effects of nuclear weapons in *Legality of the Threat or Use of Nuclear Weapons.*[55] The Court held that since the immediate *blast* effect, and not the subsequent poisonous radioactive effect of the weapon, was intended, the principles could not apply to the radioactive effects of the weapons. The same reasoning would apply to depleted uranium weapons. However, the indiscrimination principle could still apply to the *blast* effect.[56]

(iv) Conclusion

Clearly, the issues on the necessity, proportionality and discrimination of NATO's bombing campaign are complex, considering especially the political and practical restraints that seemed to preclude other courses of action. The problems in interpreting the governing principles are also relevant. However, it is arguable that even if a high-altitude bombing campaign was NATO's only means to address the Kosovo situation, humanitarian considerations could have limited the campaign's scope to a greater degree. It could have concentrated on the FRY troops in Kosovo rather than on Serbian civilian targets. Also, there was no apparent reason for using depleted uranium weapons and its use could have been more limited.

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[54] Thomas, "NATO and international law", Kosovo and Yugoslavia: Law in Crisis, Jurist: The Law Professors' Network at <jurist.law.pitt.edu/thomas.htm> (visited 5 May 2000).

[55] [1996] International Court of Justice Reports 226.

[56] McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 245.

REGULATION OF HUMANITARIAN INTERVENTION

Assuming that NATO's action constituted humanitarian intervention and various aspects of the conduct of NATO's campaign breached international humanitarian law, two questions arise. The first concerns the implications of the facts for the legality of the action. The second concerns the appropriate means to avoid such breaches in future.

The first question on the legality of NATO's conduct in the conflict could be answered in two ways. First, according to the relationship between *jus ad bellum* and *jus in bello*, it could be argued that the illegality of certain aspects of NATO's campaign, although reprehensible in nature, has no bearing on the legality of its engagement in the conflict in the first place. The action's legality would depend on the interpretation of Article 2(4) of the United Nations Charter and existing State practice. Secondly, under the ethical approaches to the concept of humanitarian intervention described above, it could be argued that the illegality of NATO's conduct deprives the action of its humanitarian nature, and in turn, its legitimacy.

Regardless of how the first question is answered, there remains the problem posed by the second question concerning the means used to avoid the types of violations perpetrated by NATO. Whether or not NATO's action is rendered illegal by its conduct, the conduct provides the basis for a strong argument for greater regulation of humanitarian intervention. Greater regulation is needed to ensure two things: first, that humanitarian intervention implements international humanitarian law; and secondly, that humanitarian intervention retains its own integrity.

Implementing International Humanitarian Law

Implementing international humanitarian law in conflict situations is a problem, generally speaking. It is neither new nor as widely discussed as the issues of *jus ad bellum*. It is being increasingly seen as the central problem of the laws of war. In the words of Sir Frank Berman, Legal Adviser to the United Kingdom Foreign and Commonwealth Office:[57]

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[57] Roberts, "The laws of war: problems of implementation in contemporary conflicts", in European Commission, Law in Humanitarian Crises: How can international humanitarian law be made more effective in armed conflicts? Volume 1 (1995, Office for Official Publications of the European Communities, Luxembourg) 17.

> It seems to many that the problem is not to discover what the law is, or how to apply it in a particular case, or even whether the existing rule is 'satisfactory' or not, but rather how to secure or compel compliance with the law at all.

There is a distinction between the *implementation* of legal norms and their *enforcement*. Whilst it is true that the two processes overlap to the extent that both are ultimately concerned with the maintenance of legal norms, they are fundamentally different. *Implementation* refers to the use of measures to ensure the observance of the law in prospect. *Enforcement* is the process of penalisation for violation of the norm and therefore presupposes the failure prior to the implementation or maintenance of the norm.[58] It is arguable that the current structure of the international legal system favours enforcement over implementation.

There is no question on the means available to *enforce* international humanitarian law regarding the sorts of violations perpetrated by NATO in the Kosovo campaign. In the past, this function has been served by institutions such as the International Criminal Tribunals at Nuremberg and Tokyo in 1945, the Criminal Tribunals for the former Yugoslavia and Rwanda in the 1990s and various municipal court martial proceedings. In future, it will be served by the International Criminal Court to be established on the basis of its Statute signed in Rome in 1998. By comparison, the means for ensuring the *implementation* or observance of the law to minimise the need for enforcement are scarce. To facilitate a more consistent implementation of international humanitarian law in instances of humanitarian intervention, other options should be explored.

The current means of implementation are found in the 1907 Hague Conventions[59] and the 1949 Geneva Conventions and Additional Protocols. They provide that States are obliged to engage in the dissemination of international humanitarian legal norms and provide appropriate training, at the very least in their armed forces and, if possible, to a wider audience.[60]

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[58] McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 57.

[59] Article 47 of the 1949 Geneva Convention I; Article 48, 1949 of the 1949 Geneva Convention II; Article 127 of the 1949 Geneva Convention III; Article 144 of the 1949 Geneva Convention IV; Article 83(1) of the 1977 Additional Protocol I; Article 19 of the 1977 Additional Protocol II; Article 1 of the 1907 Hague Convention IV.

[60] The obligations assumed by States in respect of humanitarian jus in bello should be

The real question is how this dissemination could be achieved and this aspect is left to the discretion of individual States. No guidance is provided in the relevant Conventions.

At present, international humanitarian law is disseminated in two main ways. The first is through the work of several international organisations and institutions, in particular, the International Red Cross and Red Crescent Societies.[61] These organisations hold regular national and international instructional courses on international humanitarian law to which legal officers and commanders of the armed forces, *inter alia*, are invited.[62] The difficulty with this method of dissemination of information is that States are not obliged to participate in them.

The second is through the incorporation of instruction on international humanitarian law norms in the training of armed forces by the States themselves. However, there are problems with this method. For example, there is the question of the utility in requiring military personnel, trained for rapid response to dynamic situations, to memorise the voluminous and complex rules of international humanitarian law.

In answer, the quantity of information needs to involve only a level of *lay* knowledge on the legal requirements and prohibitions of international humanitarian law, in such fundamental matters as the immediate treatment of captured or surrendered enemy personnel, treatment of civilians, and use of weapons. These are matters that military personnel could be required to make instant decisions on, which could have considerable legal significance and consequences. The quality of information depends on the personnel's ranks and roles. As Major-General APV Rogers remarks:[63]

> Commanders and staff officers require manuals which are written in clear straightforward and non-legal language, [in some cases with explanatory examples]. Junior officers probably need a pamphlet

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fulfilled through military regulation and training before they have effect in conflict situations. If inadequate information is not given in advance, a soldier would be unable to recognise as unlawful an order to kill prisoners of war or unarmed civilians: McCoubrey H, International Humanitarian Law: Modern Developments in the Limitation of Warfare (1998, 2nd edition, Aldershot, Ashgate Dartmouth) 67.

[61] For example, the International Institute of Humanitarian Law at San Remo is an academic institution at the forefront of work in this area: ibid 75.

[62] Ibid 73-75.

[63] Ibid 68-69.

> explaining the basic principles of the laws of war. Soldiers and junior non-commissioned officers do not need a manual at all, a brief summary being all that is required. Standard rules of engagement cards may well suffice.

Another problem relates to the training in *jus in bello* norms that forms part of most military training programs conducted for national armed forces. Unfortunately, not all armed forces of States conduct *jus in bello* training.[64] The challenge therefore is to create a means to disseminate international humanitarian law principles to which the maximum number of States is subject. The answer could be in the form of a new international Convention that embodies standard rules of engagement for application in cases of humanitarian intervention to regulate conduct during such intervention.

Standard Rules of Engagement and International Humanitarian Law

Technically, rules of engagement are directives from national authorities that delineate the circumstances and limitations under which a State's armed forces will initiate and/or continue combat engagement with other forces.[65] They constitute a fundamental form of restraint on the use of force. Conventional national rules of engagement have a dual purpose. They express policy objectives (to delineate how force could be used to further national policy and to preclude actions that could be contrary to national policy) and ensure that actions do not offend international law.[66]

Rules of engagement are particularly useful in implementing international humanitarian law because they overcome the "two-book mentality". This is the idea that operational instructions and international humanitarian law are independent of one another.[67] Since rules of engagement "convert" humanitarian rules into operational rules, there is no longer a question of two separate books, but one.[68] While the rules could vary according to the

[64] Ibid 68.

[65] Chairman of the Joint Chiefs of Staff, Instruction 3121.01A, Standard Rules of Engagement for US Forces, Enclosure A, 15 January 2000; Schmitt, "Clipped wings: effective and legal no-fly zone rules of engagement" in Schmitt MN (editor), The Law of Military Operations, (1998) 72 International Law Studies 239, 261-262.

[66] Ibid 246-247.

[67] Shearer, "Rules of engagement and the implementation of the law of naval warfare", (1988) 14 Syracuse Journal of International Law and Commerce 767, 777.

[68] Shearer, "International Humanitarian Law and Naval Operations" in Quatre études du droit international humanitaire: Etudes présentées à la Dixième Table Ronde de l'Institut

conflict situation and the armed forces deployed (navy, air force and army), they tend to follow a standard layout. They consist usually of an Introduction followed by several annexes, namely, the Rules, Definitions, Supporting Directions and Procedures, and Weapons States.

Thus typically, the Introduction defines the scope and function of rules of engagement and set down general principles for their execution, including the right of self-defence, the principles of necessity, minimum and proportional force, and distinction. The Definitions annexe, whilst self-explanatory, includes important definitions on *Parties* to the conflict, *Hostile Act* and *Hostile Intent,* upon which the rules concerning the *Levels of Force* would depend. The Supporting Directions and Procedures annexe details items such as General Prohibitions on types of weapons used and directions for Warning and Firing procedures. There would also be a *Weapons States* annexe that describes the appropriate state of readiness of weapons authorised for use in the action.[69]

The main *Rules of Engagement* annexe usually states the following:

- the mandate and objectives of the action to which the standard rules of engagement apply;
- the specific rules of engagement which would include at least the rules on the *Levels of Force* and *Weapons Systems* authorised;
- the *Reactions* appropriate to the particular contingencies likely to be faced by the force in the particular situation; and
- the rules on *Mission Accomplishment* that detail the appropriate means for accomplishing the objective(s) of the action.

The layout above could incorporate the precepts of international humanitarian law in several ways. The primary norms on necessity, proportionality and distinction, as suggested in the layout above, could be stated in the Introduction. They could also be incorporated in the substantive *Rules of Engagement* as far as they are relevant to the particular

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international de driot humanitaire (1985, Geneva, Institut Henry-Dunant) 34.

[69] This layout is based loosely on the United Nations Temporary Administration in East Timor, Peace-Keeping Force Rules of Engagement Issued by the Force Commander: Issue 1, 5 February 2000; Directive for the Development of United Nations Rules of Engagement, November 1998. Both documents are classified "United Nations Restricted"; hence, their contents cannot be cited directly.

action. Other principles, such as those limiting the use of certain weapons and means of warfare as set out in the Hague Conventions could also be incorporated in this section. The right of self-defence could be part of the Introduction annexe, although it would also be incorporated implicitly in the rules on the *Levels of Force* authorised.

An International Convention on Standard Rules of Engagement

(i) Arguments For

As mentioned above, there is no imperative on national armed forces to formulate rules of engagement subject to international humanitarian law, although many States do. According to Major-General APV Rogers,[70] rules of engagement are presently just one of the means available to States to effect the obligation on the disseminating international humanitarian law. It is argued here that the standard rules of engagement could be a way of overcoming the implementation problem of international humanitarian law, particularly in relation to humanitarian intervention. The incorporation of standard rules of engagement, embodying all the fundamental principles of international humanitarian law, in an international Convention has the potential to ensure more consistent compliance with the principles in situations of conflict.

Such a Convention should be formulated expressly for application to instances of humanitarian intervention, rather than international armed conflict in general. There are two reasons for defining the Convention in this way. First, and more importantly, as discussed above, there is a particular ethical, and by extension, legal, imperative for humanitarian intervention to be more regulated so that it truly embodies and reflects humanitarian principles. Secondly, while theoretically there is no reason why the standard rules of engagement could not apply to any situation of conflict, in reality, States are more likely to agree to the stricter regulation of missions based on humanitarian grounds.

Rules of engagement embodied in the Convention could follow the model presented by the 1994 and 2000 United States Chiefs of Staff Standing

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[70] See Shearer, "International humanitarian law and naval operations" in Quatre études du droit international humanitaire: Etudes présentées à la Dixième Table Ronde de l'Institut international de driot humanitaire (1985, Geneva, Institut Henry-Dunant) 34.

Rules of Engagement.[71] The model sets down general rules of engagement that govern the use of force by air, naval and land forces, which may be supplemented for specific operations.

By following this model[72] in the Convention, the first annexe to the rules of engagement after the Introduction could contain the basic rules of engagement applicable to all operations, with specific annexes for Seaborne Forces, Air Operations and Land Operations. The basic rules of engagement (especially those relating to *Levels of Force)* and certain definitions in the Definitions annex (especially those relating to *Parties* to the conflict, *Hostile Act* and *Hostile Intent)* would necessarily be of a general nature. This would allow their amplification in ways that are appropriate when applied to the particular circumstances of each conflict. However, references to the fundamental principles of necessity, proportionality and distinction would need to be absolute. They could take the form of restatements of the Articles in Protocol I from which they derive. Examples are Articles 48, 51(5)(b), 52(2) and 57(2)(b) discussed above.

The standard annexe on Supporting Directions or Procedures (known as *Supplemental Measures* in the United States) could follow.[73] It could include catalogues of draft rules of engagement, grouped into appendices for general measures, airborne, seaborne and land operations that decision-makers at the correct level could turn to when drafting rules on mission accomplishment for a particular operation.

It should be possible to draft specific rules of engagement for the appendices that embody the international humanitarian law principles of necessity, proportionality and distinction, thus emphasising the obligation to avoid collateral damage. For example, with the evident disproportionate degree of collateral damage in the Kosovo conflict in mind, the air operations rules of engagement could contain particular rules prohibiting the striking of *dual use* targets. Examples of such targets are roads, bridges and water installations, unless they are located within the primary area of enemy forces activity.

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[71] See generally, Chairman of the Joint Chiefs of Staff, Instruction 3121.01A, Standard Rules of Engagement for US Forces, Enclosure A, 15 January 2000; Schmitt, "Clipped wings: effective and legal no-fly zone rules of engagement" in Schmitt MN (editor), The Law of Military Operations, (1998) 72 International Law Studies 239.
[72] Ibid 261.
[73] Ibid 262.

The final enclosure would probably be a Dictionary/Glossary of abbreviations, acronyms, terms and definitions.[74]

Such standard rules of engagement could be modified easily and applied by States in any future cases of humanitarian intervention and international armed conflict. Their particular efficacy would lie in the fact that they would remove several steps from the process of dissemination so as to ensure that the relevant humanitarian principles are not diluted. They would also provide both the pressure and the means necessary for States to apply international humanitarian law more directly. These steps would thus ensure that international humanitarian law is applied more consistently in different cases of conflict.

(ii) Arguments Against

Numerous arguments could be made against the potential utility and effectiveness of a Convention on standard rules of engagement.

First, States could be unwilling to limit their military options by subscribing to the obligations in such a Convention. However, there are a number of responses to this stand. If the Convention is limited in its application to instances of humanitarian intervention, more States could be supportive on the ground that such cases are not as common as general international armed conflict situations. Further, humanitarian intervention tends to be multilateral in nature and if pre-existing basic rules of engagement for the participating States exist, the complex problem of coordinating their national rules of engagement is eliminated. At present, States support the Geneva Conventions, the Additional Protocols, and the Hague Conventions. If the rules are based on them, there is no reason why States would not continue to be supportive, even if it is only in principle.

Secondly, States have in practice ignored international humanitarian law rules in conflict situations despite the existing Conventions. However, it is arguable that States would accept the rules of engagement more and the Rules themselves would carry greater weight if they were more specific to each type of operation. Also, the International Criminal Court's imminent jurisdiction should make States more accepting of the Convention since it incorporates enforceable international humanitarian law rules.

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[74] Ibid.

The third, and perhaps strongest, argument against the Convention is the lack of guarantee that standard rules of engagement would be interpreted and applied consistently. States have always been able to interpret international humanitarian law principles in liberal ways that accord with their own domestic or political objectives. If States interpret and apply the Convention differently in accordance with their own dictates the integrity of the Convention would be affected. The disagreement of France and the United Kingdom with certain bombing missions in Serbia referred to earlier provides a particularly striking example of this possibility.

Although there is no quick or easy solution to this problem, nonetheless the possibility of discrepancies in interpretation could be lessened if the rules are drafted with more specific applications in mind. As a result, different rules should be drafted for airborne, seaborne and land operations.

The United Nations Precedent

A precedent for establishing an international Convention on standard rules of engagement could be found in the recent measures of the United Nations. The Directive for the Development of United Nations Rules of Engagement dated November 1998 shows the organisation's commitment to international humanitarian law. The Directive provides for standard rules of engagement to assist in the planning of peacekeeping operations. In addition, the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law in August 1999 sets out the fundamental principles and rules of international humanitarian law that apply to forces under the United Nations' command and control.[75]

The above documents provide a platform for the formulation of international standard rules of engagement. Their current application to United Nations forces suggests that they serve as appropriate standards for States in general.[76]

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[75] Annan K, Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, ST/SBG/1999/13, 6 August 1999, extracted in (1999) 5:4-5 International Peacekeeping 160.

[76] Ibid 160-161. However, it should be noted that Section 1.2 of the Bulletin affirms the 1994 Convention on the Safety of United Nations and Associated Personnel and its provisions on the protective regime for United Nations personnel involved in missions. Under this Convention, attacks on United Nations personnel are criminalised. This is a fundamentally different approach to humanitarian law, under which it is legal to attack combatants: Zwanenburg, "The Secretary-General's bulletin on observance by United Nations Forces

A final point should be made on the Convention's application in the context of the Directive and Bulletin. United Nations forces engaging in humanitarian intervention would be governed presumably by the Directive and Bulletin even after the making of the Convention. The Convention would apply primarily to forces engaging in humanitarian intervention under the authorisation of the United Nations but not under its command, or without United Nations authorisation. Examples of the former are the United States-led intervention in Somalia in 1992 and the intervention by NATO and the Western European Union in Yugoslavia between 1992 and 1995. An example of the latter is NATO's intervention in Kosovo.

CONCLUSION

To sum up, there are no easy solutions. Variations in circumstances and interpretation could mean that an international Convention on standards of engagement would be unable to guarantee that future humanitarian interventions would apply the rules governing international humanitarian law more consistently in practice. Nevertheless, a Convention would assist to disseminate and implement international humanitarian law principles. Further, the drafting of separate rules for airborne, seaborne and land operations in the Convention should translate into the minimisation of the recurrence of collateral damage of the sort experienced in Kosovo.

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of international humanitarian law: some preliminary observations", (1999) 5:4-5 International Peacekeeping 133, 135. This approach is also inappropriate for a Convention of the sort proposed in this article.