

Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives

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Introduction

In May 2000 Dragiša Krsmanović, the Serbian Public Prosecutor, began the indictment for war crimes of the leaders of the United States of America (USA), the United Kingdom (UK), France, and Germany, and the former North Atlantic Treaty Organisation (NATO) Secretary-General Javier Solana.² These charges, laid in the Serbian Supreme Court, related to alleged violations by NATO forces of the Geneva Convention on the conduct of war. These violations were alleged to have occurred in the course of NATO attacks upon Serbia during 1999, operations which were undertaken to persuade the Yugoslav Government to comply with United Nations Security Council Resolutions 1160, 1199 and 1203.³ These resolutions had required Yugoslavia's withdrawal from the province of Kosovo. During enforcement operations conducted from 24 March to 8 June 1999 NATO was alleged to have breached the Convention by using cluster bombs, and by attacking civilians, residential areas, and non-military targets.⁴

Ironically, Yugoslav President Slobodan Milosevic and four other Yugoslav Serbs have themselves since been indicted by the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, also for war crimes and crimes against humanity.⁵ In this case these crimes were allegedly committed against the Kosovo Albanians.⁶

A situation such as the collapse of the former Federal Republic of Yugoslavia is one fraught with dangers and difficulties for the international community. Not least of the difficulties have been legal, including the prosecution of political and military leaders by international courts. As with the trial of Libyan suspects in the Lockerbie case,⁷ the development of rules and procedures of international criminal trials have been influenced more by political considerations than by legal. But we can say with some confidence that an international criminal legal system is slowly developing. This is consistent with a growing sophistication in public international law, originally confined to state-to-state relations. It was unusual to prosecute war leaders in international courts, but they were always liable to sanctions of some kind, however ineffective.

Perhaps more problematic however is the question whether the Serbian public prosecutor had a good case. Was NATO guilty of war crimes? The most serious war crime was traditionally levying war without just cause. Although the basis of Serbia's action against NATO and the allies was more narrowly focused, alleging the illegal use of cluster bombs, and attacking civilians, residential areas, and non-military targets, the whole basis of NATO's actions may possibly be challenged. For most purposes, the law of war may be divided into two parts: the legitimacy of the resort to force, and the rules governing the conduct of hostilities, often called *jus ad bellum* and *jus in bello* respectively. Both changed markedly in the course of the twentieth century.⁸ This paper will consider the broader question of whether NATO's actions in attacking Yugoslavia were lawful (*jus ad bellum*). It will also look briefly at some of the legal ramifications of the more recent USA-led global war on terrorism, which also raises questions of the legality of the use of force in non-traditional military operations. The narrower question of a breach of the laws of war, by attacking civilian targets (*jus in bello*), will be left to other writers.

The scope of international law

Public international law regulates relations between nations. That part which relates to military action is generally known as the Law of Armed Conflict, or anciently as the Laws of War. War is both a state of “armed, physical contest between nations”, and “a legal condition of armed hostility between states”.⁹ In common with those aspects of international law which do not relate directly to the Law of Armed Conflict, the sources of international law include written and unwritten rules, treaties, agreements, and customary law. These principally relate to states, for states were for long the dominant – if not sole – participants in international diplomacy and law.

The notions of sovereignty and statehood were once among the most important aspects of public international law. Its heyday was perhaps in the late nineteenth century, when sovereign states enjoyed almost unfettered independence of action. These were subject only to the regulation of their diplomatic and military action, principally by the Law of Armed Conflict, or the Laws of War.¹⁰

The traditional juristic theory of territorial sovereignty, with the King being supreme ruler within the confines of his kingdom, originated as two distinct concepts. The King acknowledged no superior in temporal matters, and within his kingdom the King was emperor.¹¹ If the Holy Roman Emperor had legal supremacy within the *terrae imperii*, the confines of the empire, theories of the sovereignty of kings were not needed, for they had merely de facto power.¹² Sovereignty remained essentially de jure authority.¹³ This was not merely power without legitimacy.¹⁴ Mediaeval jurists cared not whether the emperor had jurisdiction and authority over kings and princes, but focused on his power to usurp the rights of his subjects. Whether this power was de facto or de jure was unimportant.¹⁵

But to have sovereignty, a state must have a permanent population, it must have a defined territory, it must have a government, and it must have the capacity to enter into diplomatic relations.¹⁶ No other entity could be regarded as a sovereign state, whatever its de facto power, and leaderless populations and ethnic groups within states generally lacked sovereign status and so the protection of international law.

Traditionally only a territorial state was regarded as an international person, capable of having rights and duties under international law.¹⁷ That entities other than states can be subjects of international law is not even now a universally accepted idea, and exactly what entities do have this status is an even more controversial topic. As Hall has noted, primarily international law governs the relations of independent states, but “to a limited extent ... it may also govern the relations of certain communities of analogous character”.¹⁸ Lawrence also wrote that the subjects of international law are sovereign states, “and those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons”.¹⁹ Whereas these scholars tended to define subjects of international law as states and certain unusual exceptions, there are others who go further in opening up the realm of reasonable subjects of the law of nations. Notable among them is Sir Hersch Lauterpacht. In his view:

International practice shows that persons and bodies other than states are often made subjects of international rights and duties, that such developments are not inconsistent with the structure of international law and that in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the preconceived notion as to who can be the subjects of international law.²⁰

The status of organizations in international law is less controversial than the assumption of rights and duties by individuals or groups of individuals. In 1949 the International Court of

Justice recognized the United Nations as an international person,²¹ thereby beginning the process whereby an ever increasing number of modern international organizations are recognized as having personality at international law. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state.²²

While it is possible for organizations and individuals to be subjects of international law, states remain the dominant agents in world politics and the dominant actors in international law. This dominance has led some theorists to distinguish 'subjects' of the law from 'objects' of the law, suggesting that although entities other than states may have rights and duties in international law, these rights are conferred upon them by states and, presumably, may be taken away by states.²³ It is now more correct to regard international law as a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law.²⁴ These rules include *jus cogens*,²⁵ *jus in bello*,²⁶ *jus ad bellum*,²⁷ and *opinio juris*.²⁸

The latter is particularly important, for it is in the views of the jurists and in the state practice which is influenced by such opinions that the germs of international law lie. Imperial constitutional law was developed not in the courts so much as in the opinions of the law officers of the Crown. It was the practice that evolved out of these opinions which eventually influenced the courts. They followed, but did not invent, doctrines such as that of colonial legislative territoriality.²⁹ The same influences were at work in international law. Sometimes practice influenced the law, sometime the formulation of the law by jurists had a direct – though often delayed – influence on the development of international law. For instance, the sixteenth century Spanish theologian Francisco de Vitoria argued that the Indians in the conquered territories, having no just cause for war, had rights of ownership which the invading Spaniards could not lawfully interfere with.³⁰ This was based on notions of natural law.³¹ Although Vitoria's view may not have greatly influenced the politics of the contemporary Spanish government, it was not without its supporters. Indeed, much of modern international law was developed in Iberia in the wake of the Spanish and Portuguese colonial expansion.

The scope of the Laws of War

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In the thirteenth century Thomas Aquinas wrote that, "in order that a war may be just three things are necessary. In the first place, the authority of the prince, by whose order the war is undertaken ..."³² His second and third requirements for a just war, like those of his predecessor St Augustine bishop of Hippo, were a just cause, and right intent. If these were the only requirements for the use of force to be lawful, the NATO bombing campaign in the former Yugoslavia in early 1999, though intended to achieve peace in Kosovo, would appear lawful. The laws of war have advanced much since St Thomas lived, and ironically, the United Nations Charter, designed to promote peace, enshrines a growing tendency to prohibit all wars not waged in self-defence -³³ though it does allow collective self-defence,³⁴ and the restoration of international peace.³⁵ This has left little room for the "just war", a concept which has nevertheless increasingly reared its head in the laws of war.³⁶

The legality of any given action by the international community, or by an individual country or group of countries depends upon whether the action is justified by international law. The NATO air strikes on the former Yugoslavia early in 1999 were designed to force compliance with United Nations resolutions, but were not expressly authorised by the United

Nations.³⁷ Nor did they resemble traditional peacekeeping missions, or defensive military actions, such as the British action for the recovery of the Falkland Islands from Argentine invaders in 1982.³⁸ That is not to say, however, that NATO acted unlawfully in bombing Yugoslavia. But what was the legal basis for its action?³⁹ Are there any lessons for other military campaigns, such as those conducted recently by the United States of America and its allies in Afghanistan, as part of a global “war” on terrorism?

Traditionally the laws of war were concerned with the regulation of warfare,⁴⁰ usually, though not exclusively, state warfare.⁴¹ Additionally, since the nineteenth century there has been significant growth in the laws of humanity, or human rights.⁴² It has been said that these two strands have joined.⁴³ There has been much concentration on humanitarian law, and especially the punishment of war criminals.⁴⁴ But the basic question of when it is lawful to start an offensive war has been largely ignored.⁴⁵

The basic sources of the law of armed conflict are written and unwritten rules, treaties, agreements, and customary law.⁴⁶ A treaty is an agreement between entities, both or all of which are subjects of international law possessed of international personality and treaty-making capacity. All sovereign states enjoy the right to make treaties. Some self-governing colonies, protectorates, and international organisations have the capacity to enter into agreements, though their right to do so is usually limited.⁴⁷

Custom is general state practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement.⁴⁸

It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.⁴⁹ They have now been extended to the modern phenomenon known as wars of national liberation. These revolutions, are defined by Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949, in 1977 as:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵⁰

There have long been efforts to codify the rules of war, generally in terms of the conduct of hostilities (*jus in bello*), but also the legality of the use of force (*jus ad bellum*). One early modern attempt was by Francis Lieber, whose *Instructions for the Government of Armies of the United States in the Field*, was promulgated by President Abraham Lincoln in 1863.⁵¹ But articles of war, governing the army in the field, had been issued since early times, and reached their culmination in England in the seventeenth century.⁵²

The first major international attempt at codification was the Hague Peace Conference, 1899. At the conference a number of conventions on the rules and laws of war were reduced to writing. In 1907, another conference, at The Hague, revised the rules and made them more detailed. It also had a greater emphasis upon the legality of the use of force. The resulting Law of The Hague recognised that the total avoidance of war should be their ultimate goal. But it recognised that war is sometimes unavoidable, and was to this extent a legitimate means of settling disputes between nations.⁵³

The Kellogg-Briand Pact 1928 (Pact of Paris) codified the customary laws of war with respect to *jus ad bellum*. It was signed by 65 countries, including the USA, who all thereby

renounced aggressive war as an instrument of national policy.⁵⁴ In Article 1, “the high contracting parties condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”. The Treaty had the effect of outlawing war as an instrument of national policy (with respect to the signatories), and advanced the concept of aggressive war as being contrary to international law – though it did not give rise to it - as this could be traced to Thomas Aquinas if not earlier.

In 1945 almost all nations signed the United Nations Charter, thereby promising to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.⁵⁵ Hence, aggressive war, as such, has been eliminated from among the lawful means of conducting international relations.⁵⁶ Yet, the use of armed force has not ceased. International law has recognised this. In particular, the laws of armed conflict apply not only to situations of declared war, but to any situation of international armed conflict and, to a more limited degree, armed conflicts which are not of an international character.

The use of armed force pursuant to a decision or recommendation of the United Nations (United Nations), in accordance with Article 42 of its Charter, is not “war” in the strict technical sense. In 1950-53, 53 of the 59 members of the United Nations contributed in some way to the police action in Korea.⁵⁷

Background to the present troubles in the Balkans

The present troubles of Yugoslavia, and the states which before its collapse in 1991 comprised the old republic, is a consequence of its complex and often violent history. This has involved a complex mix of languages, races and religions, due to the location of the country, and the various invasions. Particularly important was the Turkish occupation of much of the country for several centuries until the end of the nineteenth and the early years of the twentieth century.⁵⁸

Serbia historically comprised a Slavonic race of Orthodox religion. Montenegro also was populated by a Slavonic race adhering to Orthodoxy, as was Macedonia. Croatia and Slovenia were also Slavonic, but its peoples were Catholics, as the countries had long been under Hungarian domination.⁵⁹

The people of Bosnia and Herzegovina were racially Serbian, but the Turks had forcibly converted the majority to Islam after the occupation began in 1463. Substantial numbers of Islamic Slavs were also found in the south of Serbia. In the province of Kosovo 90% of the population was Albanian. In the province of Vojvodina in the north there was a large Hungarian minority. The autonomy of both was ended 1990. Additionally, 20% of Macedonias population were Albanian.⁶⁰

The Albanian Kosovars are Muslims, but, unlike the population of Bosnia and Herzegovina they are not Slavs. Kosovo was of great historic importance to Serbs being the site of a series of famous battles with the invading Turks. Thus, its importance is much greater to Serbia than its size or population would suggest.⁶¹ After the death of Communist dictator Tito, the federal republic of Yugoslavia proved unable to survive the tensions caused by its divergent racial and religious mix. The UN and NATO sought to bring an end to the chaos.

Offensive war

Could NATO attacks upon Yugoslavia be classified as an unjustified offensive war? This is an important question, for if so, it would then not merely be arguably *ultra vires* the North

Atlantic Treaty,⁶² but also contrary to the laws of war. The London Charter of 1945, establishing the International Military Tribunal, Nuremberg, contained the first definitions of crimes against peace and of crimes against humanity.

Article 6 (a) defined crimes against peace:

namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Article 6 (b) defined war crimes:

namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, ... wanton destruction of cities, towns and villages, or devastation not justified by military necessity;

Principle VI of the International Law Commission in 1950 confirmed the criminality of the acts defined in Article 6 of the London Charter. But the Kellogg-Briand Pact 1928 had already made waging an aggressive war potentially subject to international sanctions, though not a crime for which individual criminal liability could arise until after the Second World War.⁶³

The United Nations and the use of offensive war

The United Nations Charter Article 1 states that:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.⁶⁴

United Nations Charter Article 2 (in part):

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

7. Nothing contained in the present Charter shall authorize the United Nations to interfere in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁶⁵

The General Assembly has power to discuss, consider, and recommend. The Security Council alone has power to act. According to Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁶⁶

United Nations Charter Article 41 then provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁶⁷

If non-military measures are ineffective, United Nations Charter Article 42 allows more direct action:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take 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.⁶⁸

However, while the UN itself can take military action, it does not necessarily exclude the possibility of unilateral action by individual countries. This is stated in United Nations Charter Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶⁹

The threat or use of force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Aggressive war is no longer a legitimate instrument of national policy, but nor is the use of force limited or reserved to the United Nations.

Many international lawyers argued that current legal views of the United Nations Charter did not accommodate the bombing of the former Yugoslavia. This was because the action was neither based on a Security Council decision under Chapter VII,⁷⁰ nor pursued in collective self-defence under Article 51, the only two justifications for the use of force that are currently available under international law.⁷¹ Whether this view of international law is correct depends on whether the laws of war have now accommodated, or are in the process of accommodating, wars conducted for humanitarian purposes (or to reduce the risk of widespread war).

The use of force without the approval of the United Nations

The exercise of independent action by NATO is not necessary contrary to the United Nations Charter. Article 52 (in part) states that:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.⁷²

Such regional arrangements might be seen to include NATO. However, even assuming that NATO is covered by this article, the authority conferred by it is limited.

Article 53 continues:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been any enemy of any signatory of the present Charter.⁷³

The UN also reserved a right to be kept informed of any actions taken by these regional arrangements or agencies.

Article 54 provides that:

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.⁷⁴

But NATO officials were reluctant to describe the organisation as a regional organisation, nor were its actions authorised or approved by the United Nations. Yet Article 1 allows, or even requires that member nations:

take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁷⁵

But police action is only allowed to suppress a breach of international law. What had Yugoslavia done? It had not invaded or threatened a neighbour. As the Secretary-General's statement to the press following the meeting of the North Atlantic Council on 27 October 1998 made clear, the air attacks on Yugoslavia were:

in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis.⁷⁶

Could this be seen as a new element to international law, a duty or authority to take active military steps to prevent war?

Police action by NATO

In late March 1999 aircraft of the North Atlantic Treaty Organisation (NATO) began bombing military and strategic targets in Serbia and Montenegro, the rump of Yugoslavia. This was intended to persuade the Yugoslav Government, headed by Slobodan Milosevic, to comply with United Nations Security Council Resolutions 1160, 1199 and 1203.⁷⁷ NATO is not itself an agency of the United Nations, but that did not mean that its actions were illegitimate.

The North Atlantic Treaty was signed at Washington, DC, on 4 April 1949. It was modelled to some extent on the Rio Pact (the Inter-American Treaty of Reciprocal Assistance) of 2 September 1947. But the principle purpose of the North Atlantic Treaty Organisation is collective defence, rather than maintaining international peace and security.

The North Atlantic Treaty is the political framework for an international alliance designed to prevent aggression or to repel it, should it occur. The signatory countries state their desire to live in peace with all peoples and all governments. Reaffirming their faith in the principles of the United Nations, they undertake in particular to preserve peace and international security and to promote stability and well-being in the North Atlantic area.

To achieve these goals, they signed their names to a number of undertakings in different fields. They agreed, for example, to settle international disputes by peaceful means, in order to avoid endangering international peace, security and justice. They also agreed to refrain from the threat or use of force in any way that would not be consistent with the purpose of the United Nations. They undertook to eliminate conflict in their international economic policies and to encourage economic collaboration between their countries.

Under this Treaty, the member countries therefore adopted a policy of security based on the inherent right to individual and collective self-defence accorded by Article 51 of the United Nations Charter, while at the same time affirming the importance of co-operation between them in other spheres.⁷⁸

The text of the Treaty consists of 14 Articles, and is preceded by a Preamble that emphasises that the Alliance was created within the framework of the United Nations Charter and outlines its main purposes.

Article 1 defines the basic principles to be followed by member countries in conducting their international relations, in order to avoid endangering peace and world security.

The parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security, and justice, are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.⁷⁹

Article 2, inspired by Article 1 of the United Nations Charter, defines the aims which the member countries will pursue in their international relationships, particularly in the social and economic spheres, and their resulting obligations.

In Article 3, signatories state that they will maintain and develop their ability, both individually and collectively, to resist attack.

Article 4 envisages a threat to the territorial integrity, political independence or security of one of the member countries of the Alliance and provides for joint consultation whenever one of them believes that such a threat exists.

Article 5 is the core of the Treaty whereby member countries agree to treat an armed attack on any one of them, in Europe or Northern America, as an attack against all of them. It commits them to taking the necessary steps to help each other in the event of an armed attack.

Although it leaves each signatory free to take whatever action it considers appropriate, the Article states that, individually and collectively, the member nations must take steps to restore and maintain security. Joint action is justified by the inherent, individual and collective right of self-defence embodied in Article 51 of the United Nations Charter. But it is agreed that measures taken under the terms of the Article shall be terminated when the Security Council has acted as necessary to restore and maintain international peace and security.

Article 6 defines the area in which the provisions of Article 5 apply. However it does not imply that events occurring outside that area cannot be the subject of consultation within the Alliance. The preservation of peace and security in the North Atlantic Treaty area can be affected by events elsewhere in the world, and the North Atlantic Council must therefore, as a matter of course, consider the overall international situation.

In Articles 7 and 8 member nations stipulate that none of their existing international commitments conflict with the terms of the Treaty and that they will not enter into any commitments in the future which do so. In particular, they state that rights and obligations pertaining to membership of the United Nations are unaffected by the Treaty, as is the primary role of the United Nations Security Council in the sphere of international peace and security.

Article 7:

This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.⁸⁰

NATO was designed for defensive operations, but it is now being used, perhaps not offensively, but in an international policing role. This is perhaps a manifestation of what has been called the “New World Order”.⁸¹

NATO attacks on Yugoslavia

Why did NATO attack Yugoslavia? The clearest official explanation of the initial circumstances is in the Secretary-General's statement to the press following the meeting of the North Atlantic Council on 27 October 1998:

Two weeks ago, NATO issued an Activation Order (ACTORD) for limited air operations and a phased air campaign against Yugoslavia. We took this decision in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis.

From the outset we have insisted on full and unconditional compliance by President Milosevic with United Nations Security Council Resolutions 1199 and 1203. Since the ACTORD was issued, we have continued to put President Milosevic under pressure. General Naumann, the Chairman of the Military Committee, General Clark, NATO's Supreme Allied Commander in Europe (SACEUR) and I have been to Belgrade to make it clear to him in person that he has no option but to comply. I have also written to President Milosevic twice to stress the gravity of the situation.

It is this pressure and our credible threat to use force which have changed the situation in Kosovo for the better. NATO's unity and resolve have forced the Yugoslav Special Police and military units to exercise restraint and reduce their intimidating presence in Kosovo. We have been able to reduce the level of violence significantly and to achieve a cease-fire that has held, despite some sporadic incidents.

This improvement in the security situation in Kosovo has first and foremost allowed an immediate improvement in the humanitarian situation. International relief organisations have restarted their operations in Kosovo. They now have unrestricted access for their convoys. Thousands of displaced persons have returned to their villages. At the same time, the improvement in the security situation is creating the conditions for a meaningful political dialogue to begin between Belgrade and the Kosovar Albanians.

Over the past few days, NATO's aerial surveillance assets and the Kosovo Diplomatic Observer Mission have been verifying whether Mr. Milosovic's actions match the commitments he has made to us.

I am pleased to report that over the past 24 hours, over 4,000 members of the Special Police have been withdrawn from Kosovo. Police and military units that are normally based in Kosovo are now moving back in their barracks together with their heavy weapons. Check points have been dismantled. In addition, most police and military units that are normally based elsewhere in Yugoslavia have left Kosovo. The security forces are returning to the level they were before the present crisis began.

Despite these substantial steps, NATO's objective remains to achieve full compliance with United Nations Security Council Resolutions 1199 and 1203. As a result, we have decided this evening to maintain the ACTORD for limited air operations. Its execution will be subject to a decision and assessments by the North Atlantic Council. We will also maintain our ACTORD for the phased air campaign and will continue our activities under Phase Zero. We have requested our Military Authorities to remain prepared to carry out these air operations should they be necessary and to maintain forces at appropriate readiness levels for operations under both ACTORDs.

The North Atlantic Council will keep the situation in Kosovo under constant review. If we see evidence of substantial non compliance in the future with UNSC Resolution 1199, then we will be ready to use force. We know that President Milosevic only moves when he is presented with the credible threat of force. The burden of proof of compliance clearly rests with him.

The Kosovar Albanians must equally comply with the UNSC Resolutions and cooperate with the international community. I call on the Kosovar Albanian armed groups to maintain the ceasefire that they have declared.

Our immediate focus will now be on ensuring the effectiveness of the verification regime. Our NATO verification flights over Kosovo are beginning. We welcome the

possible association of Russia and other partner countries in NATO's air verification regime.

NATO and the OSCE have been working closely together to coordinate their activities in carrying out the verification mission. The Alliance is also expediting planning for a NATO force for the extraction of the OSCE verifiers on the ground in Kosovo. We welcome UNSC Resolution 1203 which endorses the establishment of the two verification missions.

Despite the progress we have made, this crisis is far from over. A lot of work remains to be done. It is high time that the two parties in the conflict understand that the international community will not tolerate a continuation of the status quo. There has been too much human suffering. Clearly, a political solution must be found. I urge both sides to take advantage of the opportunity that now exists to move the political process forward and to secure this unique opportunity to work for a better future for Kosovo, and also for Yugoslavia as a whole.⁸²

NATO clearly justified its military actions in political terms by relying on a desire to enforce UN Security Council resolutions. The Statement on Kosovo issued at the Ministerial Meeting of the North Atlantic Council, Brussels, 8 December 1998, elaborates on this:

1. NATO's aim has been to contribute to international efforts to stop the humanitarian crisis in Kosovo, end the violence there and bring about a lasting political settlement. NATO's decisions in October made a crucial contribution to the withdrawal of forces of the Federal Republic of Yugoslavia (FRY) from Kosovo and helped avert a humanitarian disaster. The Alliance's enhanced state of military readiness continues.

2. The security situation in Kosovo remains of great concern to us. Since the beginning of November, violent incidents provoked in some cases by Serbian security forces and in others by armed Kosovar elements have increased tension. These incidents show that both the Belgrade authorities and the armed Kosovar elements have failed to comply fully with the requirements set out in UN Security Council Resolutions 1160, 1199 and 1203. We call upon the armed Kosovar elements to cease and desist from provocative actions and we call upon the FRY and Serbian authorities to reduce the number and visibility of MUP special police in Kosovo and abstain from intimidating behaviour.

3. We insist that both sides maintain scrupulously the ceasefire and comply fully with the UN Security Councils resolutions. We also expect them to facilitate the war crimes investigations by the International Criminal Tribunal for the former Yugoslavia (ICTY). In this connection, we deplore the denial of visas to ICTY investigators. Continued violence between FRY and Serbian forces and armed Kosovar elements jeopardises prospects for a political settlement for which an opportunity now exists.

4. We remain fully convinced that the problems of Kosovo can only be resolved through a process of open and unconditional dialogue between the authorities in Belgrade and representatives of the Kosovar leadership. We therefore strongly urge all parties to move rapidly in a spirit of compromise and accommodation to conclude the negotiating process led by Ambassador Hill in which they are engaged. We reaffirm our support for a political solution which provides an enhanced status for Kosovo, a substantially greater degree of autonomy and meaningful self-administration, and which preserves the territorial integrity of the FRY, and safeguards the human and civil rights of all inhabitants of Kosovo, whatever their ethnic origin. We believe that stability in Kosovo is linked to the democratisation of the FRY and we support those who are genuinely engaged in that process. In this regard, we condemn recent actions taken by President Milosevic to suppress the independent media and political pluralism in Serbia. We welcome the steps the Government of Montenegro has taken to protect the independent media, promote democratic reforms and ensure respect for the rights of all its citizens.

5. We will continue the Alliance's air verification mission, Operation "Eagle Eye", in accordance with the agreement between the FRY and NATO, and communicate periodically to the UN Secretary-General NATO's views on compliance.

6. We intend to cooperate fully with the OSCE Kosovo Verification Mission (KVM). The security and safety of the OSCE verifiers is of the utmost importance to us. We call on the FRY government to meet its responsibilities in this regard, as set out in UNSCRs 1199 and 1203 and the OSCE-FRY agreement of 16th October. We expect the FRY and Serbian authorities, as well as the Kosovar communities, to cooperate fully with the OSCE KVM, in particular by respecting its freedom of movement and right of access and by ensuring that its personnel are not subject to the threat or use of force or interference of any kind. We also expect the FRY and Serbian authorities to continue to allow unhindered access to international relief organisations including by issuing the necessary visas.

7. The North Atlantic Council has authorised an Activation Order (ACTORD)⁸³ for a NATO-led Extraction Force, Operation "Joint Guarantor". We will quickly deploy the standing elements of this force in the Former Yugoslav Republic of Macedonia to provide the ability to withdraw personnel of the OSCE KVM in an emergency. We greatly appreciate the cooperation and support of the authorities of the Former Yugoslav Republic of Macedonia for providing facilities for the basing of NATO forces.

8. We welcome the willingness of Partner countries to join with NATO in contributing to the solution of the Kosovo crisis either by participating in the NATO-led air verification mission or by offering the use of their airspace or other facilities in support of NATO's efforts. We will continue to consult closely with all Partner countries on the Alliance's actions in respect of the Kosovo crisis.⁸⁴

Whilst legal justification was not absent, it was perhaps not apparent from these statements how unusual the use of active military force by NATO was. NATO territory had been neither attacked nor threatened with attack. NATO took action to enforce Security Council resolutions designed to safeguard a people from their opponents, neither of whom were within the borders of NATO.

Authority for NATO action in the Balkans

The obligations of third parties in a civil war historically were to remain neutral, or to aid the government but not the rebels. But exceptions to the general rule have become so common that the exceptions seem to have become the rule.⁸⁵ Now the development of the international humanitarian law seems to allow police actions in situations which hitherto were regarded as being of domestic concern only.⁸⁶

The development of the idea that self-determination is a legal right has challenged the distinction between internal and international armed conflicts. It has extended the humanitarian law of war in its entirety to new realms, and it has eroded the prohibition of the use of force espoused in the Charter of the United Nations.⁸⁷ Some lawyers would agree that a trend in the international community towards a better balance between the security of states, and the security of people is emerging. United Nations Secretary-General Kofi Annan, speaking to the Commission on Human Rights in Geneva, on 7 April 1999, at the height of the air campaign has also acknowledged this.⁸⁸

If the action was not unlawful, it was either based on a new interpretation of the United Nations Charter in line with modern international law; an exceptional deviation from international law; or an attempted shift of international law to a new position where, in humanitarian crises, the sovereignty of states has to yield to the protection of peoples.⁸⁹

Given the overwhelming direction of modern developments in international law in favour of outlawing war, it would be difficult to see NATO attacks on Yugoslavia as being solely based on a new interpretation of the United Nations Charter.

It is more in keeping with the reality of the world to see it as an attempted shift of international law to a new position where, in humanitarian crises, the sovereignty of states has to yield to the protection of peoples. Yet whether any such status has been reached is doubtful. It has sometimes been argued that intervention in order to protect the lives of persons situated within a particular state, and not necessarily nationals of the intervening state, is permissible in strictly defined situations. But it is hard to reconcile this with article 2(4) of the United Nations Charter, unless the meaning of “territorial integrity” is distorted.⁹⁰ Given the lack of unanimity even within NATO, the action cannot be seen as an attempt to shift of international law to this new position.

It would be unsatisfactory for the action can be seen merely as an exceptional deviation from international law. Because there is little evidence that the situation in Yugoslavia was sufficiently unusual to justify an exception.

The point at which repeated practice hardens into a rule of law is uncertain. Higgins has suggested that this is “at the point at which states regard themselves as legally bound by the practice”.⁹¹ Since no such perception was present, the police action in Kosovo can at best be described as an exceptional deviation from international law, which might in due course harden into a rule that in humanitarian crises, the sovereignty of states has to yield to the protection of peoples.

More difficult still was the possibility that NATO forces were in breach of the *jus in bello*, the rules governing the conduct of hostilities. In a report entitled, “‘Collateral Damage’ or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force”, Amnesty International examined a number of attacks indicating that NATO did not always meet its legal obligations in selecting targets and in choosing means and methods of attack. They concluded that “[t]he 23 April 1999 bombing of the headquarters of Serbian state radio and television, which left 16 civilians dead, was a deliberate attack on a civilian object and as such constitutes a war crime”.⁹² However, the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia concluded that NATO had not acted unlawfully in this or any other action.⁹³ Since in the conduct of operations judgements must be made on military grounds, it is inevitable that occasionally armed forces exceed the lawful bounds of action. Such situations may amount to war crimes. But this paper is concerned with *jus ad bellum* rather than *jus in bello*, and so consideration of the use of force on the battlefield are left to others, whilst this paper considers authority for the use of armed force in general.

International counter-terrorism operations

Two years after the events in the Balkans which forms the background and much of the substance of this paper, military and air forces led by the USA were again engaged in “police” operations, this time against terrorists and their allies in Afghanistan, the al-Qaida and the Taliban.⁹⁴ Again NATO was involved, though less directly than formerly.

Frank Taylor, the United States Ambassador at Large and Co-ordinator for Counter-terrorism briefed the North Atlantic Council, NATO’s top decision-making body, on 2 October 2001 on the results of investigations into the 11 September terrorist attacks against the United States. As a result of the information he provided to the Council, it was resolved that the individuals who carried out the attacks belonged to the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.⁹⁵

For the first time in NATO's history, Alliance assets were deployed in support of Article 5 operations. This article states that an armed attack against one or more of the Allies in Europe or North America shall be considered as an attack against all.⁹⁶ NATO contributed five Airborne Warning and Control Systems aircraft (AWACS) to the United States and also deployed elements of its Standing Naval Forces to the Eastern Mediterranean. The naval assets of Standing Naval Force Mediterranean (STANAVFORMED), which were participating in Exercise Destined Glory 2001 off the southern coast of Spain, were re-assigned in order to provide an immediate NATO military presence in the Eastern Mediterranean.⁹⁷ The United Nations Security Council indirectly endorsed the military operations, with Resolutions 1373 and 1378 reaffirming the inherent right of individual or collective self-defence.⁹⁸ It did not however become directly involved in the operations. In part this was because the operations were not aimed at a state, but rather terrorist cells operating within Afghanistan.⁹⁹

But at the same time, disquiet was growing at the uncertain aims of the operations,¹⁰⁰ and the treatment of prisoners by the American authorities, particularly those sent to the Guantanamo Bay detention centre.¹⁰¹ The Government of the USA has decided that it will apply the rules of the 1949 Geneva Convention to at least some detainees.¹⁰² The jurisdiction of the military over enemy belligerents, prisoners of war or others charged with violating the laws of war is fairly clear.¹⁰³ But political factors have ensured that the USA authorities have treated prisoners taken during its recent operations in Afghanistan in an especially strict manner.¹⁰⁴ However, the laws of war applies if there is armed conflict, and the USA has been reluctantly compelled to acknowledge this, in practice if not officially. Failure to comply with such norms would seriously weaken the claim by the USA to be acting in accordance with international law in its operations in Afghanistan. Either the operation is one in which there is international armed conflict – in which case the detainees are automatically entitled to the protection of the Geneva Conventions, or it is not. If the detainees are “merely” terrorists, and not entitled to this protection, then it is not an international armed conflict. The particular difficulty for the USA is that it has treated Taliban members as terrorists, though they represented the *de facto* Government of Afghanistan.¹⁰⁵

It is doubtful whether these operations will have a significant influence on the development of international law, given the lack of a clear consensus in favour of the operations and an uncertainty as to their underlying rationale. In this there is a contrast to the Balkan operations, where the international community was generally united. Whilst Balkan operations were motivated by humanitarian concerns, or a desire to prevent the extension of existing civil war, the motivation (and ultimate intentions) for operations in Afghanistan were much less clear.¹⁰⁶ Though these operations can be seen as part of a global policing exercise, the absence of a direct humanitarian element, and the lack of a genuine international coalition, will deny them the same precedent value as the Balkan operations.

An attack by the armed forces of a country upon the USA would clearly constitute an attack envisaged by Article 5. But the terrorists, whilst they may have enjoyed close ties with the *de facto* rulers of Afghanistan, were in no sense part of the military infrastructure or apparatus of Afghanistan. Whilst there is no doubt Article 5 directly authorised the use of force in such circumstances, its target was more problematic. The legal issues involved are distinct- perhaps relating more to *jus in bello*, than *jus ad bellum*.

Conclusion

Traditionally the laws of war were concerned with the regulation of warfare between states.¹⁰⁷ Since the nineteenth century there has been significant growth in the laws of humanity, or human rights.¹⁰⁸ It has been said that these two strands have joined.¹⁰⁹ The law of armed

conflict is only one of a group of principles guiding nations in times of conflict.¹¹⁰ It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.¹¹¹ They have now been extended to the modern phenomenon known as wars of national liberation.¹¹²

The NATO attacks on Yugoslavia in 1999 make it clear that the law of armed conflict applies in all international armed conflicts, including not merely wars of national liberation,¹¹³ but also police actions by the international community to the laws of humanity, or human rights.¹¹⁴ But whilst the use of force by the international community in the pursuit of peace may be lawful, operations remain subject to rules of conduct established by international law.

Wars of secession may well replace the anti-colonial wars of the 1950s, 1960s and 1970s as the national liberation struggles of the twenty-first century. So far, the United Nations and the regional organisations (especially the OAU) have been extremely reluctant to apply the right to self-determination to secessionist struggles. Current events, however, may force upon us a serious rethinking of the types of groups that are entitled to self-determination and to the active military protection of the international community.¹¹⁵ It is doubtful however whether the recent military operations in Afghanistan will have the same degree of influence on the development of international law. But they do show that where operations are conducted by the forces of the liberal western democracies, mere authority to wage war is not enough. The conduct of operations, including the treatment of prisoners, must also comply with the norms of international law.

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²“Charges laid against NATO leaders”, Daily News (31 August 2000) <<http://www.medijaklub.cg.yu/eng/news/archive/2000/avgust/30serbia.htm>> at 9 February 2002; Amnesty International, “‘Collateral Damage’ or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force” News Release Issued by the International Secretariat of Amnesty International - Amnesty International Public document - AI Index EUR 70/025/2000 - News Service Nr. 102 – 9 June 2000; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia <<http://www.un.org/icty/pressreal/nato061300.htm>> at 28 May 2002

³S/RES/1160 (1998); S/RES/1199 (1998); S/RES/1203 (1998).

⁴As announced in her address to the UN Security Council on Friday 2 June 2000, the Chief Prosecutor of the ad hoc tribunals for Balkan war crimes trials, Carla Del Ponte, decided not to open a criminal investigation into any aspect of NATO’s 1999 air campaign against the Federal Republic of Yugoslavia; ICTY Press Release (Exclusively for the use of the media. Not an official document) - Office of the Prosecutor - PR/ P.I.S./ 510-e. - The Hague – 13 June 2000.

⁵Slobodan Milosevic was charged with one count of violations of the laws or customs of war (Article 3- Murder), and four counts of crimes against humanity (Article 5- deportation, murder, persecution on political, racial or religious grounds). Individual responsibility was pursuant to Article 7(1) of the ICTY Statute, and superior responsibility under Article 7(3) of the Statute; International Criminal Tribunal for the former Yugoslavia <<http://www.un.org/icty/indictment/english/mil-ai010629e.htm>> at 10 February 2002.

⁶The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the former Yugoslavia (“the Statute of the Tribunal”), charges Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojanic, Vljeko Stojiljkovic with crimes against

humanity and violations of the laws or customs of war (case No. IT-99-37-I); International Criminal Tribunal for the former Yugoslavia <<http://www.un.org/icty/indictment/english/mil-ai010629e.htm>> at 10 February 2002.

⁷See the Lockerbie Trial Briefing, University of Glasgow School of Law <<http://www.ltb.org.uk/>> at 9 February 2002. The LTB Unit is an independent and impartial organisation, whose only purpose is to offer guidance and information to those with an interest in the Lockerbie trial. The stories posted on the Web site are taken from reputable news sources and are selected for their news value. The LTB Unit does not necessarily endorse any of the views expressed in these stories.

⁸Ian Brownlie, *International Law and the Use of Force by States* (1963).

⁹Hugo Grotius, *De Jure Belli ac Pacis* (1625).

¹⁰International law has been called "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another"; *West Rand Central Gold Mining Co v. The King* [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. See also Sir Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds), *The Laws of War- Constraints on Warfare in the Western World* (1994); J. Ilingham and J.C. Holt (eds), *War and Government in the Middle Ages* (1984).

¹¹Ullmann, 'This Realm of England is an Empire' 30(2) *Journal of Ecclesiastical History* (1979) 175-203.

¹²In Roman law it was originally considered that the emperor's power had been bestowed upon him by the people, but when Rome became a Christian State his power was regarded as coming from God. In America also God had been recognized as the source of government, although it is commonly thought in a republican or democratic government "all power is inherent in the people".

¹³J.P. Canning, 'Law, sovereignty and corporation theory, 1300-1450' in J.H. Burns (ed), *The Cambridge History of Mediaeval Political Thought c.350-c.1450* (1988) 465-7. Emperor Frederick I Barbarossa saw the advantages of Roman law and legal science for his ambitions and his inception of absolutism. This led to the growth of royal absolutism, and eventually to the emergence of opposition to this, throughout Europe; See Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993) 12.

¹⁴J.P. Canning, "Law, sovereignty and corporation theory, 1300-1450" in J.H. Burns (ed), *The Cambridge History of Mediaeval Political Thought c.350-c.1450* (1988) 467-471.

¹⁵Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993) 30.

¹⁶The Montevideo Convention on the Rights and Duties of States, signed 26 December 1933; Manley Ottmer Hudson (ed), *International Legislation* (1931-50) vol 6, 620. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law.

¹⁷Public International Law regulates the relations between nations. The basic sources of international law are written and unwritten rules, treaties, agreements, and customary law. Custom is general state practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement.

¹⁸William E. Hall, *A Treatise on International Law* (8th ed, 1924). Nor is he alone, similar views being expressed by other writers- George Schwarzenberger, *A Manual of International Law* (1st ed, 1947) 48; Wolfgang Friedmann, *The Changing Structure of International Law* (1964) 213-5.

¹⁹T.J. Lawrence, *The Principles of International Law* (7th ed, 1923) 69.

²⁰Lauterpacht, 'The Subjects of the Law of Nations' 63 *LQR* (1947) 444.

²¹*Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion (April 11, 1949) 4 ICJ Rep 179.

²²

I [The United Nations Organization] is a subject of international law and capable of possessing international rights and duties, and ... it has capacity to maintain its rights by bringing international claims.

-*Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion (April 11, 1949) 4 ICJ Rep 179.

²³George Schwarzenberger and E.D. Brown, *A Manual of International Law* (6th ed, 1976) 42.

²⁴Hedley Bull, *The Anarchical Society* (1977) 127; Lauterpacht, 'The Subjects of the Law of Nations' 63 *LQR* (1947) 444; Dame Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963) 1; Philip Jessup, *A Modern Law of Nations* (1968); J.G. Castel, *International Law: Chiefly as Interpreted and Applied in Canada* (3rd ed, 1976) 1.

²⁵"Compulsory law." A peremptory norm of international law; one that all states must observe.

²⁶"The law during war." The law regulating combat or the waging of war.

²⁷Ian Brownlie, *International Law and the Use of Force by States* (1963).

²⁸"The views of the jurist." The opinions of legal writers.

²⁹Daniel O'Connell & Ann Riordan, *Opinions on Imperial Constitutional Law* (1971) vi.

³⁰Francisco de Vitoria, *De Indis* trans in Anthony Pagden & Jeremy Lawrance (eds), *Vitoria: Political Writings* (1991) 239-251, 291-292. It need hardly be added that Vitoria was not without opponents, or that Spanish practice seldom adhered to his precepts; James Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (1994) 79ff.

³¹*Ius naturale*, a system of which was rationally knowable by and applicable to all humanity.

³²St Thomas Aquinas, 'Summa theologica', Secunda secundae, Quaestio XL (de bello), quoted in John Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83.

³³Y Dinstein, *War, Aggression and Self-Defence* (2nd ed, 1994); M S McDougal and F Feliciano, *The International Law of War* (1994); L Damrosck and D J Scheffer (eds), *Law and Force in the New International Order* (1991); A Cassese, *Violence and Law in the Modern Age* (1988); J Murphy, *The United Nations and the Control of International Violence* (1982); Julius Stone, *Conflict through consensus* (1977); Frederick H Rusell, *The Just War in the Middle Ages* (1975); R A Falk, *Legal Order in a Violent World* (1968); Ian Brownlie, *International Law and Use of Force by States* (1963); M S McDougal and F Feliciano, *Law and Minimum World Public Order* (1961); D W Bowett, *Self-Defence in International Law* (1958); Julius Stone, *Legal Controls of International Conflict* (2nd ed, 1959); Julius Stone, *Aggression and World Order* (1958); H Waldock, 'The Regulation of the Use of Force by Individual States in International Law' 81 *Recueil des Cours de l'Académie de droit international* 415. See, for instance, Vitoria in the sixteenth century; Francisco de Vitoria, 'De Indis et de Jure Belli Relectiones' ss 14, 29, 60, 203 trans in Anthony Pagden and Jeremy Lawrance (eds), *Vitoria: Political Writings* (1991) and cited in S Bailey, *Prohibitions and Restraints in War* (1972) 11.

³⁴By states acting in accordance with Article 51.

³⁵By the Security Council in accordance with Article 42.

³⁶The evolution may be traced in T M Franck, *Fairness in International Law and Institutions* (1995) ch 8; Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283; M Walzer, *Just and Unjust Wars* (2nd ed, 1977); S Bailey, *Prohibitions and Restraints in War* (1972). The concept of the just war largely disappeared after the Peace of Westphalia; L Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 *American Journal of International Law* 20.

³⁷During the bombing there was a conspicuous absence of legal argument in defence of the action from NATO itself. Member countries relied on whatever justification they preferred; Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24.

³⁸Alberto Coll and Anthony Arend (eds), *The Falklands War- Lessons for Strategy, Diplomacy and International Law* (1985).

³⁹See Anthony Arend and Robert Beck, *International Law and the Use of Force: beyond the UN Charter paradigm* (1993); James Gow, *Triumph of the lack of will: international diplomacy and the Yugoslav war* (1997).

⁴⁰Gretchen Kewley, *International Law in Armed Conflicts* (1984).

⁴¹Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988). Laws were allowed, in the view of St Thomas Aquinas in the thirteenth century, if it was by sovereign authority, accompanied by a just cause, and supported by the right intention of the belligerents; St Thomas Aquinas, 'Summa theologiae', Secunda secundae, Quaestio XL (de bello), quoted in John Eppstein, *The Catholic Tradition of the Law of Nations* (1935) 83; Von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 *American Journal of International Law* 669.

⁴²Geoffrey Best, *War and Law since 1945* (1994); L C Green, *The Contemporary Law of Armed Conflict* (1993); C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles* (1984); M Bothe, K Partsch and W Solf, *New Rules for Victims of Armed Conflict* (1982); J Pictet, *Humanitarian Law and the Protection of War Victims* (1982); Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980); A Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979); F Karlshoven, *The Law of Warfare* (1973); G. Draper, 'The Geneva Convention of 1949', 114 *Recueil des Cours de l'Académie de droit international* 59; G Draper, 'Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols', 164 *Recueil des Cours de l'Académie de droit international* 1. Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations', (1988) 131 *Australian Defence Force Journal* 41-44.

⁴³Lt-Col Frank Thorogood, rtd, 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.

⁴⁴Lt-Col Frank Thorogood, rtd, 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16; Gerry Simpson, 'Nuremberg Revisited? The United Nations War Crimes Tribunal for the Former Yugoslavia', *International Law News* (February 1994). There is, however, no unified system of sanctions in international law; W M Reisman, 'Sanctions and Enforcement' in C Black and R A Falk (eds), *The Future of the International Legal Order* (1971) 273; S Schwebel (ed), *The Effectiveness of International Decisions* (1971); G Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', (1956) 19 *Modern Law Review* 1; J Brierly, 'Sanctions' (1932) 17 *Transactions of the Grotius Society* 68.

⁴⁵Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: a Critical History of the Laws of War' (1994) 35 *Harvard International Law Review* 72. See J Ilingham and J C Holt (eds), *War and Government in the Middle Ages* (1984).

⁴⁶Maurice H Keen, *The Laws of War in the Late Middle Ages* (1965). International law has been called "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another"; *West Rand Central Gold Mining Co v The King* [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. Standard histories of the laws of war include Adam Roberts and Richard Guelff (eds), *Laws of War* (1982) and Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980).

⁴⁷Examples where treaties with native peoples were regarded as binding in international law include those with the Cherokees, 20 September 1730; J Almon, *A Collection of all the Treaties of Peace, etc* (1772) vol 2, p 13; J Dumont, *Corps universal diplomatique de droit des gens* (1726-32) vol 8 part 2 p 162; C Jenkinson, *A Collection of all the Treaties of Peace* (1785) vol 2 p 315.

⁴⁸G Glahn, *Law Among Nations: An Introduction to Public International Law* (1992).

⁴⁹This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

[The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

⁵⁰Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977). See M Bothe, KJ Partsc and WA Solf, *New rules for victims of armed conflicts, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (1982); Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).

⁵¹'Instructions for the Government of Armies of the United States in the Field', General Orders No. 100, reprinted in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (1973).

⁵²'Laws and Ordinances of Warre 1639' reprinted in Charles Clode (ed), *Military Forces of the Crown* (1869) vol 1, App VI.

⁵³Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

⁵⁴Signed at Paris, 27 August 1928, instrument of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, 2 March 1929; Lt-Col PM Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; RH Ferrell, *Peace in Their Time* (1952).

⁵⁵Charter of the United Nations and Statutes of the International Court of Justice (1945).

⁵⁶The International Criminal Court, established pursuant to the 1998 Rome Statute of the International Criminal Court, came into existence 1st July 2002. This will try persons accused of breaches of crimes established by Articles 5, 6, 7 and 8 of the Statute; <http://www.un.org/law/icc/statute/romeFra.htm> at 29 May 2002.

⁵⁷See Department of Public Information, *Korea and the United Nations* (1950).

⁵⁸See Aleksander Pavkovi'c, *The Fragmentation of Yugoslavia: nationalism in a multinational state* (1997).

⁵⁹Bogdan Denitch, *Ethnic Nationalism: the tragic death of Yugoslavia* (1996).

⁶⁰See R Hayden, 'Imagined communities and real victims: self-determination and ethnic cleansing in Yugoslavia' (1996) 23(4) *American Ethnologist* 788; and A Smith, 'The Ethnic sources of Nationalism' (1993) 35(1) *Survival* 49.

⁶¹For Serbian history and its impact upon the dissolution of Yugoslavia see Tim Judah, *The Serbs: history, myth, and the destruction of Yugoslavia* (1997); S Woodward, *Balkan Tragedy: Chaos and dissolution after the Cold War* (1995).

⁶²Article 1 of which requires the alliance to act in conformity with the Charter of the United Nations, which allows offensive action which is consistent with the purposes of the United Nations Charter.

⁶³Lt-Col PM Boyd, 'The Law of Armed Conflict; Definition, Sources, History' (1991) 86 *Australian Defence Force Journal* 19, 24; RH Ferrell, *Peace in Their Time* (1952). Article 6(a) of the Charter for the International Military Tribunal (the Nuremberg Charter) made waging an aggressive war an offence; Charter of the International Military Tribunal, 8 August 1945;

<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html#Charter> at 29 May 2002; see also the "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" *Yearbook of the International Law Commission* (1950) vol. II.

⁶⁴Charter of the United Nations and Statutes of the International Court of Justice Art 1 (1945).

⁶⁵Charter of the United Nations and Statutes of the International Court of Justice Art 2 (1945).

⁶⁶Charter of the United Nations and Statutes of the International Court of Justice Art 39 (1945).

⁶⁷Charter of the United Nations and Statutes of the International Court of Justice Art 41 (1945).

⁶⁸Charter of the United Nations and Statutes of the International Court of Justice Art 42 (1945).

⁶⁹Charter of the United Nations and Statutes of the International Court of Justice Art 51 (1945).

⁷⁰Articles 39-51, action with respect to threats to the peace, breaches of the peace, and acts of aggression.

⁷¹Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24, 25.

⁷²Charter of the United Nations and Statutes of the International Court of Justice Art 52 (1945).

⁷³Charter of the United Nations and Statutes of the International Court of Justice Art 53 (1945).

⁷⁴Charter of the United Nations and Statutes of the International Court of Justice Art 54 (1945).

⁷⁵Charter of the United Nations and Statutes of the International Court of Justice Art 1 (1945).

⁷⁶(1989) 4 *NATO Review* 12.

⁷⁷Official Records of the Security Council, 53rd year 1998.

⁷⁸'The North Atlantic Treaty' in *The North Atlantic Treaty Organisation: Facts and Figures* (1989) 376-8.

⁷⁹'The North Atlantic Treaty' in *The North Atlantic Treaty Organisation: Facts and Figures* (1989) 376-8.

⁸⁰'The North Atlantic Treaty' in *The North Atlantic Treaty Organisation: Facts and Figures* (1989) 376-8.

⁸¹Gerard Baudson, *The New World Order and Yugoslavia* (1996); Wg-Cdr Peter May, RAAF rtd, 'International Legal Order: A Reality or Merely a Regulative Idea?' (1992) 92 *Australian Defence Force Journal* 15-19.

⁸²(1998) 4 *NATO Review* 12.

⁸³An ACTORD puts the national forces designated for the operation under the operational command of the Major NATO Commander responsible, in this case SACEUR, and authorises him to begin operations at a specified time.

⁸⁴(1999) 1 *NATO Review* 21.

⁸⁵Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 33.

⁸⁶Indeed, this is scarcely surprising given that, the words of the Appeals Chamber of the International Tribunal on War Crimes in the former Yugoslavia in the Tadic case, "[t]he conflicts in the former Yugoslavia have both internal and international aspects"; case no. It-94-1-AR 72, p 43.

⁸⁷Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 52.

⁸⁸Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24, 25.

⁸⁹Ove Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention' (1999) 3 *NATO Review* 24-25. There is certainly much evidence for this latter possibility; D J Scheffer, 'Towards a Modern Doctrine of Humanitarian Intervention' (1992) 23 *University of Toledo Law Review* 253.

⁹⁰Malcolm Shaw, *International Law* (4th ed, 1997) 802; J P Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention' (1974) 4 *California Western International Law Review* 203; R B Lillich, 'Intervention to Protect Human Rights' (1969) 15 *McGill Law Journal* 205; R B Lillich, 'Forcible Self-Help by States to Protect Human Rights' (1967) 53 *Iowa Law Review* 325.

⁹¹Dame Rosalyn Higgins, *The Development of International Law through the Political Organ of the United Nations* (1963) 6.

⁹²Amnesty International; News Release Issued by the International Secretariat of Amnesty International - Amnesty International Public document - AI Index EUR 70/025/2000 - News Service Nr. 102 – 9 June 2000.

⁹³Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia <<http://www.un.org/icty/pressreal/nato061300.htm>> at 9 February 2002.

⁹⁴The Taliban movement was formed in Kandahar in 1994 by Islamic students who take a radical approach to interpreting Islam. The Taliban captured Kabul in September 1996 from Mujahedin regime. The government of Burhan-ul Din Rabani ousted. The Taliban government in Kabul has been recognized only by Pakistan, Saudi Arabia and United Arab Republic- all of whom have since withdrawn recognition <<http://www.afghan-info.com/TALIBAN.HTM>> at 25 January 2002.

⁹⁵NATO Update (3 October 2001) <<http://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1>> at 25 January 2002.

⁹⁶The North Atlantic Treaty, Washington D.C. - 4 April 1949.

⁹⁷'Operation Active Endeavour', Allied Forces Southern Europe (15 January 2002), <<http://www.afsouth.nato.int/operations/Endeavour/default.htm>> at 25 January 2002.

⁹⁸xx

⁹⁹The difficulties this has caused are not confined to the treatment of prisoners of war, though the discussion will be confined to this one issue.

¹⁰⁰Ewen MacAskill, 'Legal warning on war aims', *The Guardian* (London), 4 October 2001.

¹⁰¹Alexandra Poolos, 'Afghanistan: Treatment Of Prisoners At Guantanamo May Injure U.S.-British Alliance' 21 January 2001 (Radio Free Europe/Radio Liberty); 'White House Debates Status Of Detainees' 29 January 2002 (Reuters).

¹⁰²'US will apply Geneva rules to Taliban fighters', *Los Angeles Times*, 8 February 2002.

¹⁰³*Johnson v Eisentrager*, 339 US 763, 70 S Ct 936 (1950) at 286.

¹⁰⁴For a failed attempt to apply for a writ of habeas corpus on behalf of the prisoners, see *Coalition of Clergy, lawyers and professors v Bush* (unreported), US District Court Central District of California, A Howard Matz J, February 2002, case No. CV 02-570 AHM (JTLx). The failure was procedural for lack of standing and jurisdiction.

¹⁰⁵'The president has ... determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status; Secretary of Defence Donald Rumsfeld and General Richard Myers Department of Defence, News Briefing - United States Department of Defence
News Transcript (8 February 2002)
<http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html> at 29 May 2002.

¹⁰⁶Robin Oakley, 'Blair to brief Bush on war efforts', *CNN.com*, 6 November 2001, <http://www.cnn.com/2001/WORLD/europe/11/06/gen.blair.bush.oakley/> at 27 February 2002.

¹⁰⁷Gretchen Kewley, *International Law in Armed Conflicts* (1984).

¹⁰⁸Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations' (1998) 131 *Australian Defence Force Journal* 41-44; F de Mulinen, 'The law of war and the armed forces' (1978) 202 *International Review of the Red Cross* 20-45.

¹⁰⁹Lt-Col Frank Thorogood, rtd, 'War Crimes: How Do We Define Them and Punish the Criminals?' (1996) 119 *Australian Defence Force Journal* 4-16.

¹¹⁰Georg Schwarzenberger, *International Law* (1968) vol 2, 'The Law of Armed Conflict'.

¹¹¹This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

[The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

¹¹²Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977); G Abi-Saab, 'Wars of national liberation in the Geneva Conventions and Protocols' (1979) 165(4) *Recueil des Cours de l'Académie de droit international* 353-445; D Schindler, 'The different types of armed conflicts' (1979) 163(2) *Recueil des cours de l'Académie de droit international* 117-163

¹¹³Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977).

¹¹⁴Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations' (1998) 131 *Australian Defence Force Journal* 41-44.

¹¹⁵For but two examples of writers who have seen Yugoslavia as critical to the development of modern humanitarian law and the laws of war, see Major John Hutcheson, 'The Genocidal Events in Bosnia-Herzegovna and the International Community's Ability to Deter Future 'Ethnic Cleansing'' (1999) 138 *Australian Defence Force Journal* 11-18; P Akhavan, 'Punishing war crimes in the former Yugoslavia: A critical juncture for the New World Order' (1993) 15 *Human Rights Quarterly* 262-89.