The Kosovo crisis and the law of armed conflicts

by
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During a visit to the Federal Republic of Yugoslavia at the end of September 1999, the author of this article was able to take stock, on the spot, of the consequences of NATO's military operation known as "Allied Force".

From the standpoint of international law, the operation amounted to the use of armed force without the authorization of the United Nations Security Council, for the purpose of providing support to one of the parties to an armed conflict of a non-international nature which was taking place between the central authorities of the Federal Republic of Yugoslavia (FRY) and the armed separatists of the Kosovo Liberation Army (KLA). NATO's armed intervention, which took the form of an air and sea offensive, led to the internationalization of the armed conflict in Yugoslavia.

Under Article 2 common to the four Geneva Conventions of 12 August 1949 for the protection of war victims, those Conventions and their Additional Protocol relating to the protection of victims of international armed conflicts (Protocol I) "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is

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not recognized by one of them". In addition, provisions laid down in the Hague Conventions of 1907 and in a number of other treaties are also applicable. The rules set forth in all these legal instruments and which, for the most part, have not only treaty but also customary law status, applied to the relations between the FRY and NATO after 24 March 1999, the day when the hostilities began. At the outbreak of the conflict all NATO countries were party to the 1949 Conventions, and the majority were also bound by the Additional Protocols thereto.

Despite the use of highly accurate weapons designed, according to a statement by the Alliance's leadership, to ensure that the operation was a bloodless one, NATO's military operations were accompanied by violations of fundamental rules and principles of the law of armed conflicts (international humanitarian law). In particular, during the course of its operations NATO forces violated provisions of Part IV, Section I of Additional Protocol I, on the general protection of civilians against effects of hostilities. In the terms of its Article 49, para. 3, the provisions of Section I "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land ...".

Articles 51 and 52 of Protocol I stipulate that attacks (i.e. acts of violence) must be limited strictly to combatants and military objectives, and that the civilian population and civilian objects shall not be the object of attacks or of reprisals; the Protocol defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

According to information supplied by the Yugoslav authorities, during the 78 days of the military operation over 1,300 civilians — including some 400 children — died, and thousands were seriously injured. The civilian population of Yugoslavia is still at risk from cluster bombs which failed to explode during NATO rocket attacks. There are currently thought to be between 30,000 and 50,000 unexploded cluster bombs in Kosovo (in addition to the mines laid by the rebels fighting against the Yugoslav army).

Furthermore, the question arises as to what "definite military advantage" (in the sense of Article 52) NATO forces acquired by disabling power stations, television centres, bridges and other such installations on Yugoslav territory. Clearly, the notion of targeting acquires new meaning where extremely accurate weapons are used.

Use of certain weapons: risk of a "Kosovo syndrome"?

The deployment of peace-keeping forces in Kosovo after over two months of NATO bombing and rocket attacks against Yugoslavia once again focused the attention of the foreign media on the so-called "Persian Gulf War syndrome". This expression is used to refer to the symptoms of a mysterious illness which, eight years later, continues to affect numerous groups of military personnel who took part in Operation *Desert Storm* in 1991. Thus far, some 90,000 Americans have asked to undergo medical tests to determine whether their health was in some way damaged at that time. Coinciding with the conflict in Yugoslavia, a renewed interest in tracking down the causes of the illnesses arose when a number of Western military experts asserted that the root of the problem lies in the fact that the shells used during the military activities in the Gulf contained radioactive substances. According to their calculations, a total of some 700,000 such shells were fired at Iraqi troop positions during the war. Their structure included components consisting of depleted uranium.

The story of the production of shells filled with depleted uranium goes back to the 1970s when, thanks to the efforts of Soviet specialists, ground troops began to enjoy the protection of tanks which the new "dynamic" armour-plating technology rendered virtually invulnerable to the existing anti-tank shells of the Western powers. This led American designers to develop the idea of using depleted uranium rods in their ammunition. Owing to its physical properties, depleted uranium has an extremely high density (2.5 times that of steel) and exceptional hardness. However, at the moment of impact such shells become a source of radiation sickness. Specialists believe that the sudden heating up of the depleted uranium produces a large number of radioactive particles (measuring between 1 and 5 microns), which spread out over a radius of up to 50 metres from the point of

explosion of the shell. The damage caused by these particles stems, on the one hand, from the immediate effect of radiation penetrating the human body and, on the other hand, from the radioactive contamination of the air and surroundings (items of equipment, fortified structures, etc.). There is therefore a risk not only of receiving a direct dose of radiation, but also, as a result of inhaling the dust, of suffering subsequent sickness due to radioactive isotopes lodged in the body.

The validity of these alleged causes of the "Persian Gulf syndrome" is backed up by recently published information concerning the results of tests carried out on British war veterans. It was found that the amount of radioactive substances contained in the bodies of former military personnel exceeded permissible levels. Of the thirty individuals tested, almost half were found to have suffered seriously from the effects of radiation. Furthermore, the veterans' considerable concern about the consequences of the deterioration in their health is accentuated by the claims now being made by learned physicians that the active presence in the human body of radioactive substances may trigger genetic mutations which may then be passed on to the progeny.

It has been reported by the media that some 12,000 shells filled with depleted uranium were used in the bombardment of Yugoslavia. Whether their use will give rise to after-effects will become evident in the very near future. NATO member countries should act speedily to prevent the emergence of a "Kosovo syndrome". One of the first to have understood the risk of a "Kosovo syndrome" was the Belgian government. According to statements made by its military command, the Belgian units deployed to the Balkans to serve as a peace-keeping contingent were issued with directives ordering adherence to the following safety measures: "Avoid areas where bombing has taken place and where there are fragments of armour plating from tanks (do not go closer than 50 metres); if it is necessary to operate in areas where destruction has occurred, use gas masks that can filter out radioactive dust, and protective gloves."[1]

1 On the depleted uranium issue, see *Nezavisimoye obozreniye* (Independent Military Review), No. 49, 1999, special supplement to *Nevavisimaya gazeta* (Independent Newspaper).

In the light of the foregoing, the question clearly arises as to whether there should not now be a further protocol to the 1980 Convention on the Use of Certain Conventional Weapons.

Attacks against the civilian population and civilian objects, and their effects

NATO's attacks have led to a significant increase in the number of displaced persons and refugees from all of Yugoslavia's ethnic communities and faiths, without exception. The partial destruction or total obliteration of dozens of civilian installations on Yugoslav territory (power stations, television centres, medical establishments, pharmaceutical, chemical and tobacco works, mechanical engineering facilities, car factories, construction sites and many other industrial sites), where some 600,000 people were previously employed, has resulted in some 2.5 million people being left virtually without any means of subsistence. According to preliminary information, the economic damage caused to Yugoslavia by NATO's military action exceeds 100 billion US dollars.

There is every reason to believe that the NATO strikes resulted in the laying waste (for example, through the contamination by petrochemical substances of power stations, drinking water installations and ground water) of facilities that are essential to the survival of the civilian population, the protection of which is provided for under Article 54 of Protocol I.

Article 56 of Protocol I prohibits attacks on works and installations containing dangerous forces. Although this provision refers solely to the protection of dams, dykes and nuclear electrical generating stations, *de lege ferenda* it should also apply to such installations as the petrochemical plant in Panchevo, the destruction of which caused severe atmospheric pollution of the town and its surrounding area by chemical substances, some of which can result in cancerous diseases and genetic mutations.

It should be noted that NATO has violated Article 55 of Protocol I, according to which it is prohibited to use "methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the

health or survival of the population". This relates first and foremost to the destruction of oil refineries, petrochemical facilities and oil storage tanks on Yugoslav territory, as a result of which the natural environment was seriously contaminated, not only in the FRY itself but also in other European countries. The task of assessing the ecological situation should be entrusted to a competent international commission made up of independent experts.

The destruction during the course of NATO's military action of dozens of historical and architectural monuments, schools, institutes of higher education and libraries is a violation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and also of Article 53 of Protocol I, under the terms of which it is prohibited to commit any acts of hostility "directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".

Attention should be drawn to the fact that some of the above-mentioned serious violations by NATO of the rules and principles of international humanitarian law (attacks of a non-selective nature affecting the civilian population or civilian installations, attacks on works and installations containing dangerous forces, the targeting of the civilian population or individual civilians, the targeting of undefended locations and demilitarized zones, etc.) are qualified by the 1949 Geneva Conventions and Additional Protocol I thereto as war crimes. This entails the material responsibility of the corresponding subject of international law and the criminal responsibility of the individual persons having committed the said crimes.

The main characteristic of the law governing armed conflicts, as one of the branches of modern international law, is that the process of its codification and progressive development over many years has had to take into account the confrontation between the principle of humanity and that of military expediency. In turn, one of the main forces that has driven this process over a period of centuries has been the continual improvement of the means and methods of conducting armed warfare. And now, as we leave the second millennium behind us, specialists are talking — not without justification — about sixth-generation wars. The distinguishing feature of this stage in the

development of means and methods of conducting warfare is the fact that, against a background of stockpiled nuclear weapons, there is now a process of creating, accumulating and using so-called high-accuracy weapons. The existence and use of precisely such means of annihilation and destruction (in Iraq in 1991, and in Yugoslavia in 1999) are what need to be covered by the scope and application of the rules and principles of the law of armed conflicts.

As for the situation in Yugoslavia, such weapons were used in the course of a so-called internationalized armed conflict of a non-international nature, in the sense that prior to the start of the NATO operation there was an internal armed conflict in the FRY, the parties to which were the Yugoslav armed forces and the so-called Kosovo Liberation Army. After the intervention began, the subjects of international law who were bound to observe the rules of the law of armed conflicts were Yugoslavia, the NATO member countries and the North Atlantic Alliance itself.

As has already been pointed out, NATO's action took the form of an air and sea offensive, i.e., the type of military action that has thus far been the least subject to regulation by international law. All of the foregoing has been stated in an attempt to highlight the complexity of the circumstances and thus the context in which the NATO action against the FRY should be analysed, with reference to the current rules and principles of the law of armed conflicts.

Humanitarian law in crisis?

Did NATO's action in Yugoslavia give rise to a crisis in the system of rules and principles that constitute the law of armed conflicts? Obviously not. The situation should be viewed from a broad perspective, taking account of all the facts and circumstances that influence the development of modern international law (and at the same time the state of modern international law and order) in general, and the law of armed conflicts in particular.

The terms "humanitarian intervention" and "humanitarian catastrophe" do not carry any significant legal weight from the standpoint of international law. At best, they may be ascribed to the conceptual vocabulary of political science, sociology and so on.

International legal instruments in general, and the sources of the law of armed conflicts in particular, do not contain any definition of such concepts.

Human rights law relies on the concept of flagrant and massive violations of human rights in a given State, the extent of which may constitute grounds for the international community to take action under Chapter VII of the United Nations Charter, i.e., to put a stop to such violations on the grounds that they affect the interests of the entire international community. In such a case, however, the United Nations Charter specifies that the corresponding decisions and measures shall be taken by the United Nations Security Council.

In the spring of 1999, for the first time since the beginning of the post-war period, this function was, so to speak, appropriated by NATO. However, according to the latest information, the situation in Yugoslavia did not involve flagrant and massive violations of human rights on a scale that would justify a military operation against that country, even on the basis of a Security Council decision. The figures put forward for the number of ethnic Albanians who were allegedly victims of the FRY's reaction to the activities of the KLA turned out to be exaggerated.

In late 1999, the Organization for Security and Co-operation in Europe (OSCE) published two reports concerning human rights violations in Kosovo. The authors of the reports concluded that, prior to the start of NATO's military action against Yugoslavia, the rebel province had not been affected either by violence against the civilian population or by any "ethnic cleansing". Of course, there had been cases of violations of the rights of Albanians and even killings, but these had not been on a massive scale. After 24 March, when NATO aircraft dropped the first bombs on Belgrade, the situation changed dramatically. The persecution of the inhabitants of Kosovo by the Serb authorities became systematic, more than a million people were driven from their homes, and several thousand were killed. The tragedy of those people was thus a direct result of the "humanitarian intervention" undertaken by the West. The fact that thousands of civilians died — not before, but after the start of the

military operation — constitutes grounds for invoking the responsibility of the leaders of NATO's member States and of the Alliance itself.[2]

In any case, no right to a so-called "humanitarian intervention" may legitimately be asserted as a means of ensuring respect for the Geneva Conventions and Additional Protocol I, as mentioned in Article 1 of the said treaties, since coercive measures (and it is precisely such measures that are at issue here) involving the use of armed force can be brought to bear only after a decision to that effect by the United Nations Security Council.

How does one go about getting the parties to a conflict to recognize the applicability of international humanitarian law in each individual case? First and foremost, a decision in that regard has to be taken by the United Nations in the form of a Security Council resolution. In practice, however, the applicability of humanitarian law to a given conflict is frequently confirmed by the ICRC, whose opinion is largely heeded. Influence can also be brought to bear on the State in question by third countries, but without the use of force. In the interests of clarifying the legal situation it would be desirable to enlist the services of the United Nations International Court of Justice in The Hague.[3]

Concluding remarks

Throughout the military operations in spring 1999, the United States and NATO did not lose a single soldier, whereas avoiding casualties among the civilian population of Yugoslavia proved to be impossible. Thus, anyone wishing to qualify this conflict as the "first war without casualties" must make that assertion subject to a major reservation. Will situations similar to the conflict in Yugoslavia be the norm in the future?

Clearly, we can deduce that the triumph of modern technology is conducive to bringing about a decline in the moral values of politicians.

2 *Izvestia*, 7 December 1999.

3 See H. P. Gasser, *International Humanitarian Law*, Russian edition, Moscow, 1995, p. 33.

Furthermore, the question of banning or limiting the use of the most barbaric forms of conventional weaponry remains high on the agenda, as does the need to resolve the issue of implementing the rules of the law of armed conflicts and of strengthening the procedures for determining responsibility for their violation. This is true at both the national and international levels. It is vital to further improve the legal basis for solving humanitarian problems that arise during armed conflicts of a non-international nature, in particular also in internal armed conflicts which take on an international dimension.

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Résumé

Le Kosovo et le droit des conflits armés

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L'auteur rappelle que l'ensemble du droit international humanitaire relatif aux conflits armés internationaux était applicable au récent conflit des Balkans, suite à l'intervention armée de l'OTAN contre la République fédérale de Yougoslavie. Ce droit n'aurait pas été respecté par les forces de l'OTAN dans plusieurs contextes, notamment en ce qui concerne le choix des objectifs susceptibles d'être attaqués. Un trop grand nombre de civils aurait péri sous les bombes et toutes sortes d'installations auraient été attaquées et détruites illégalement. Par ailleurs, au cours de ce conflit, l'expérience a montré que l'emploi de munition contenant de l'uranium appauvri devrait être interdite par le droit international. Toutefois, même après cette guerre, le droit international humanitaire n'est pas remis en question. Mais il faut en renforcer les procédures, afin d'aboutir à une meilleure mise en œuvre des obligations humanitaires.