ROYAL AUSTRALIAN AIR FORCE
AIR POWER DEVELOPMENT CENTRE

Working Paper
03

Kosovo Targeting-A Bureaucratic & Legal Nightmare:
The Implications for US/Australian Interoperability

by Kathryn Cochrane

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SQNLDR Cochrane is grateful for editorial assistance of GPCAPT Alan Hemmingway of the Australian Defence College, Weston, and Dr John Mordike of the Aerospace Centre, RAAF Base Fairbairn.

> *'Our Parliament says you cannot strike that target … or our authorities won't allow your planes to take off from our country to strike that target.'*
>
> General Mike Short, NATO Air Commander[1]

Immediately prior to *Operation Allied Force*,[2] President Clinton of the United States of America (US) announced to the nation that he would not commit ground troops to Kosovo.[3] It was to be an air war — a re-run of the

1 *War in Europe,* BBC World documentary.

2 The NATO campaign against the Federal Republic of Yugoslavia in Kosovo. The mission objectives were to demonstrate the seriousness of NATO's opposition to Belgrade's aggression in the Balkans; to deter Milosevic from continuing and escalating his attacks on helpless civilians; and, damage Serbia's capacity to wage war against Kosovo in the future or spread the war to neighbours by diminishing or degrading its ability to conduct military operations. See US Department of Defense Report to Congress: Kosovo/Operation Allied Force After-Action Report, 31 January 2000, p7.

3 *War in Europe,* BBC World

successful use of air power in *Operation Desert Storm* in the 1991 Gulf War — and a strategy conducive to 'zero casualties' for US forces. The announcement played into the hands of President Milosevic of the Federal Republic of Yugoslavia (Serbia). Milosevic reactivated policies adopted by Serbia against Albanians in Kosovo immediately following World War II:

> We know how to deal with these Albanians. We've done this before! … In … 1946, they were murderers and bandits and killed their own kind. We killed them; it took several years, but we killed them all.[4]

The demographics of Serbia had changed since World War II. Milosevic would not allow Kosovar Albanians to outnumber Serbs.[5] Milosevic's solution was chillingly simple — kill the Kosovar Albanians in a campaign of ethnic genocide. It was a three-way tussle: an asymmetric war.[6] While NATO was conducting a conventional air war against Serbia's military forces, Serbia was conducting a brutal ground war against the irregular Kosovar forces and its own citizens in Kosovo. President Milosevic seized upon the NATO bombing blitz to conduct a media campaign demonising NATO. If President Milosevic could destroy NATO's credibility on the world stage, he could maintain his course of action in Kosovo. The scene was set for the targeting nightmare that followed.

Operation Allied Force was a fraught mission for the US's European NATO allies[7] who, after the devastation of World War II, were sensitive to conflict again occurring on European soil. NATO had to conduct its military mission in the context of an alliance of independent sovereign States taking decisions on the basis of consensus within the framework of policies and protocols of the North Atlantic Treaty arrangements. Each sovereign NATO State had its own relationship with the Federal Republic of Yugoslavia and the other members of NATO. This gave rise to a web of competing national interests separate from NATO — trade and commerce agreements, a shared history, religious ties, and participation in other alliances, such as membership of the European Union. NATO's intervention in Kosovo was ostensibly humanitarian for the benefit of the ethnic Albanians in Kosovo, a region within the Federal Republic of Yugoslavia.[8] The national interests of the NATO members were not

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4 *War in Europe,* BBC World: Conversation with President Milosevic recounted by General Wesley Clark (US Army) NATO Supreme Allied Commander, Europe.

5 *War in Europe,* BBC World.

6 Conventional wars envisage volunteer professional military forces trained in military doctrine, acting as an arm of the State fighting a 'hot' war within established laws of armed conflict. An asymmetric war does not conform to that model. It usually involves a professional military as an arm of the State on one side, and on the other side, the irregular or guerilla rebel forces of another State. Kosovo differed in that it was a three-way tussle of an international armed conflict between NATO and the Serbian forces, and an internal armed conflict between the Serbian State forces and the irregular forces of Kosovo (the Kosovo Liberation Army) and the civilian population. Michael Ignatieff observes that an asymmetric war is one 'where the competitive advantage lies in questioning all basic assumptions on how war is conducted, with the result that one party to the conflict does not play by the (legal and moral) rules'. *The Future of War*, broadcast on ABC's Radio National Background Briefing, 7 Jan 01. The party that does not 'play by the rules' is usually the irregular forces, as these forces are not bound as parties to the laws of war or the Second Additional Protocol to the Geneva Conventions of 12 August 1949.

7 North Atlantic Treaty Organisation under the North Atlantic Treaty of 4 April 1949. NATO comprises 19 nations: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom and the United States of America.

8 See UN Security Council Resolutions Nos 1160, 31 March 1998; 1199, 23 September 1998; 1203, 24 October 1998; and 1207, 17 November 1998, which charted the deteriorating humanitarian situation in Kosovo prior to NATO's intervention. This paper does not address the question of the legality of NATO's intervention in Kosovo, and whether there is an emerging rule of international law in relation to humanitarian intervention on the grounds of genocide. See articles: Christine Gray, *Legality of Use of Force: Provisional Measures* in International and Comparative Law Quarterly, Vol 49, Part 3, pp730-736; Kritsiotis, *Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, in International and Comparative Law Quarterly, Vol 49, April 2000, pp330-359; Momtaz, Djamchid, *NATO's humanitarian intervention in Kosovo and the prohibition on the use of force* in the International Review of the Red Cross, No 837, 31 March 2000; and Group Captain Bill Boothby, RAF Legal Branch, *The Use of Force to Prevent a Humanitarian Disaster* in The Royal Air Force Air Power Review, Vol 2, No 4, Winter 1999.

necessarily all well served by the intervention in Kosovo. Accordingly, not all member nations were equally committed to the intervention. For the air campaign to succeed, NATO had to maintain its political unity.

The fact that the national interests of individual NATO members were not directly at stake in the Balkans conflict resulted in two issues which were critical to the use of air power in *Operation Allied Force*. The first was the announcement by President Clinton that it was to be an air war only, with no intention on the part of the US or its allies to commit troops to a ground war in the Balkans. For the US, public acceptance of military intervention in some obscure part of the world where no obvious US national interest was involved relied on there being no body bags, no matter how worthy the cause. The US's European allies were equally unwilling to engage in a war in the historically volatile Balkans.[9] As Michael Ignatieff has observed, nations will go to war to defend human rights, but they will not die for human rights, and the risk is to be kept very, very low.[10] As a consequence of President Clinton's public announcement, President Milosevic knew his troops' activities on the ground would be largely unfettered by NATO's actions in the air. As the conflict progressed, it became apparent that air power can be unsuitable for situations where atrocities are happening on the ground: 'it (air power) cannot stop houses being burnt, or civilians being shot. This is a task for ground troops'.[11] Arguably, the unsuitability of air power for certain aspects of the mission was seen in the mistaken bombing of the civilian refugee convoy at Djakovica. The second critical issue followed from the first — the perception of a US policy of 'zero casualties' to achieve force protection.[12] The US Rules of Engagement included the restriction that strike aircraft were not to descend below 15,000 feet when deploying their missiles.[13] This led to mistakes caused by the inadequate visual identification of targets.

Above all else, for NATO to be successful, it was necessary to maintain unity in the face of the enemy. Member States as individuals, and NATO as a group, had to agree on the target list. Agreement of targets may have been a political imperative, but it was equally a legal requirement, governed by the individual member State's domestic law. Complexity increased when classic air power doctrine favoured by the US — to strike early and hard — was overtaken by NATO's decision to adopt a graduated approach.[14] Doctrinal issues are important, as they have a significant impact on how an air campaign is conducted. NATO's approach shifted the emphasis of the air campaign from strategic targets in Belgrade to tactical targets in Kosovo. General Mike Short, NATO's Air Commander, wanted to 'strike the headless snake' — Milosevic's command, control and communications and other strategic targets in downtown Belgrade on the first night of the conflict, rather than waste his assets on tactical targets in Kosovo.[15]

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9 See Report by Lord Robinson of Port Ellen, Secretary General of NATO, *Kosovo One Year On: Achievement and Challenge,* pp5-9, www.nato.int

10 Ignatieff, *The Future of War,* ABC Background Briefing.

11 *War in Europe,* BBC World, General Mike Short.

12 Charles J Dunlap, Jr. *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective* in the Journal of Legal Studies, pp95-106; *'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force,* Amnesty International Report EUR 70/18/00, June 2000, http://amnesty.org/ailib/aipub/2000/eur/57001800.htm; and *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing,* htpp://www.un.org/icty/pressreal/nato0061300.htm Ignatieff puts the proposition that the public at large are not prepared to risk military casualties in defence of human rights in third countries, and therefore considers the 'zero-casualty' policy to be a stable feature in future conflicts; *The Future of War,* ABC Background Briefing.

13 By contrast, the UK Rules of Engagement required visual identification of the target, which meant that the UK's strike aircraft were not constrained by the USA 15,000 feet rule. If the target could not be verified, it would not be attacked. A.P.V. Rogers, *Zero-casualty Warfare,* in International Review of the Red Cross, No 837, pp165-181, 31 March 2000. See also *War in Europe,* BBC World.

14 The initial phase of the air campaign was designed to degrade the Yugoslav Integrated Air Defence System, the Yugoslavian/Serb C^2 – command and control – infrastructure, airfields and aircraft and deployed heavy weapons in Kosovo, and then a wider operation to include high military value targets across Yugoslavia. See Ministry of Defence, Kosovo: Lessons from the Crisis, Chapter 7, presented to Parliament by the Secretary of State for Defence by Command of Her Majesty, June 2000.

15 *War in Europe,* BBC World.

Doctrinal issues aside, crucial differences in domestic law[16] between the NATO member States governed the extent to which each of the NATO allies could participate in the bombing campaign. The most significant difference for present purposes is that the US[17] is not a party to the 1977 First Additional Protocol to the Geneva Conventions, 12 August 1949 (Protocol 1).[18] Protocol 1 binds the US only to the extent that it reflects customary international law as it applies to targeting using air power.[19] Protocol 1 as treaty law bound only those NATO allies who had ratified Protocol 1.[20] As a treaty, Protocol 1 represents concurrently the codification of, and advancement on, customary international law as it stood immediately prior to the negotiation of the Treaty in 1977. It is largely because Protocol 1 binds the US only to the extent that it reflects customary international law that the US carried the bulk of the bombing sorties in the Kosovo campaign[21] — a campaign much criticised for its targeting decisions.[22]

During *Operation Allied Force* in Kosovo, the rules in Part IV of Protocol 1, which govern targeting, were the cause of significant tensions between those NATO allies who are bound in their domestic law by the provisions of Protocol 1 as treaty law, and the US and other allies who applied Protocol 1 only to the extent it reflected customary international law. The US also applied those provisions of Protocol 1, which, though not customary international law, were not controversial. These were provisions of Protocol 1 that attempted to refine or expand upon existing principles of customary international law, but were not themselves necessarily understood to be part of customary international law at the time Protocol 1 was being negotiated. The US does not accept that those provisions apply as a matter of law. Rather, the US applied the non-controversial provisions as a matter of policy, no doubt with more than a passing recognition of the power of the 'CNN factor'[23] in ensuring the US met the political expectations of the wider American public in the conduct of the air campaign in Kosovo.

It is important to note here that the US's public assertions that it 'applied Protocol 1' in the Kosovo conflict could lead the lay observer to believe that the US was applying Protocol 1 as treaty law consistent with its NATO allies; that is, that it was applying the full treaty provisions beyond customary international law, as a matter of law. If this were so, it could be said that Protocol 1 was in the process of crystallising into customary international law.[24] This, however, is not the case. US State practice in *Operation Allied Force* was consistent with its State practice in *Operation Desert Storm* in the 1990–1991 Gulf War, noting that Protocol 1 did not apply in the latter case.[25] The consequence of the US 'applying Protocol 1' as customary international law only is effectively to prevent Protocol 1 as treaty law from achieving customary international law status. This being the case, targeting law, the most critical issue for the use of air power, will continue for the foreseeable future to operate under two different standards — Protocol 1 as treaty law and Protocol 1 as customary international law — causing ongoing tension and confusion within alliances such as NATO.

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16 This includes the incorporation of treaties in domestic law, as well as the additional consideration of the effect of European Union directives on domestic law for members of NATO who are members of the European Union.

17 In addition to the US, NATO members France and Turkey are not parties to Protocol 1.

18 The four Geneva Conventions are: First Convention: Wounded and the Sick Armed Forces in the Field; Second Convention: Wounded and Sick Armed Forces at Sea; Third Convention: The Treatment of Prisoners of War; Fourth Convention: Protection of Civilians at Times of War.

19 In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (General List 958, July 1996), the International Court of Justice said of Protocol 1 that all States are bound by those rules in Protocol 1 which, when adopted, were merely the expression of pre-existing customary international law, such as the Martens clause (para 84). The advisory opinion of the ICJ is not binding, but it constitutes highly persuasive authority.

20 The First Additional Protocol to the Geneva Conventions of 12 August 1949 is a treaty within the terms of the Vienna Convention on the Law of Treaties, which is relevant to the interpretation of Protocol 1.

21 MODUK Kosovo: Lessons from the Crisis, para 7.32; *War in Europe,* BBC World.

22 Amnesty International Report; Final Report to the Prosecutor (ICTY)

23 The term is used to identify the impact media exposure of combat has had on the conduct of that combat.

24 For an exposition of the principles which govern the development of new rules of customary international law arising from the treaty-making process, see the North Sea Continental Shelf case: *Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands,* 3 ICJ Rep (1969).

25 Neither the US nor Iraq were parties to Protocol 1; the conflict was waged under customary international law.

Asymmetric wars, such as the Kosovo conflict, could be the crucible to test the utility of Protocol 1 as treaty law. In recent years, the predominant State practice in the conduct of an air campaign has been that of the US whose legal standard is Protocol 1 as customary international law. If nations who are parties to Protocol 1 as treaty law are precluded by their legal position from targeting certain military objectives in an air campaign, then those nations cannot demonstrate a strong pattern of State practice which differs from US State practice. The problem is to recognise a State practice of restraint in targeting: how can a nation demonstrate a considered State practice of deliberately refraining from targeting certain military objectives solely because of the provisions of Protocol 1 as treaty law? In short, those nations whose legal positions allow them to undertake the air sorties under customary international law will do so; it will be a pragmatic solution to the legal dilemma. Pragmatism alone may well defeat Protocol 1 as treaty law because of a lack of *positive* State practice to establish the new norms represented by Protocol 1 as treaty law.

Those provisions of Part IV of Protocol 1 which were not necessarily customary international law in 1977 when Protocol 1 came into being, but were logical extrapolations of customary international law and therefore not controversial, might now be regarded as being part of the customary international law.[26] An extensive examination of State practice and *opinio juris* (the belief of a State that the rule now applies as a matter of customary international law, and that the State is bound by that rule) of a significant number of the international community of nations would be required to determine if this were so. Be that as it may, differences arise between Australia and the US's legal regime in a number of critical areas of Protocol 1 that are innovations under treaty law, not reflective of, or declaratory of the 1977 customary international law. Those provisions have the effect of limiting attacks on what might otherwise be legitimate military objectives. The provisions of Protocol 1 to which the US does not accede are, *inter-alia*, those which limit attacks which would cause widespread, long-term and severe damage to the environment;[27] those which prohibit reprisals against civilians or civilian objects;[28] and the provision which prohibits attacks on works or installations containing dangerous forces, being dams, dykes and nuclear electrical generating stations.[29] The intention of this latter provision is to prohibit attacks which unleash the overwhelming forces of nature onto the landscape and community, through widespread flooding, fire, nuclear devastation or similar. For example, the provision would preclude a 'Dam Busters'[30] style attack on a dam, or breaching the irrigation dykes in the Netherlands.

Non-ratification[31] of Protocol 1 might also — but this is by no means clear — allow greater latitude in the application of the principle of proportionality, compared to the position of those nations which have ratified Protocol 1. This is not because there is any difference between customary international law and Protocol 1 as treaty law as to the existence of the principle of proportionality. The principle was always loosely understood to involve a judgment of relativity, but under customary international law there had been no attempt to quantify the relativity, *or to justify any particular result from an air sortie*. What appears to have happened is that the formulation of the customary international law principle of proportionality as a treaty provision has drawn attention to the assessment of what is 'proportionate'. At the same time, and by the same process of articulation of the pre-existing customary international law principle of distinction and principle of discrimination in Protocol 1 as treaty law,

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26 A full discussion of the extent to which Protocol 1 may vary customary international law is beyond the purpose and scope of this paper. See Greenwood, C, *Customary law status of the 1977 Additional Protocols* in Delissen A, and Tanja, G, Eds, (1991) Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven, Martinus Nijhoff Publishers, pp91-114. Also see ICRC Commentary on the Additional Protocols of 8 June 1977, Martinus Nijhoff Publishers, Geneva, 1987.

27 Articles 35(3) and 55.

28 Articles 51(6); 52(1); 53(c); 54(4); 55(2).

29 Article 56.

30 The attacks on the Eder and Mohne hydro-electric dams in Germany in World War II.

31 The US was an original signatory to Protocol 1 as treaty law, but did not then ratify the treaty prior to its coming into force in accordance with the terms of Article 95 of Protocol 1 (six months after two instruments of ratification or accession had been deposited): see Part II of the Vienna Convention on the Law of Treaties. The US did not ratify Protocol 1 because a military review of the terms of Protocol 1 concluded that Protocol 1 diminished the laws of war, rather than advancing them. See discussion by W Hays Parks, *Air War and the Laws of War* in The Air Force Law Review, 1990, p94 and following.

the obligation to protect civilians and civilian objects has attained a higher degree of sensitivity than was the case at customary international law prior to 1977. The legal measure has not changed, but its application has.

The written principle has led to the *need to justify* the civilian deaths from each air sortie as 'proportionate'. Under treaty law this has probably led to a more constrained assessment of the principle than was likely to have been the case when the principle was a general concept in customary international law. Politically, one incidental civilian death is now seen as too many. Rowe[32] argues that Protocol 1 had little influence on the conduct of the air campaign in Kosovo, and that the customary international law rules of proportionality and those relating to the distinction between civilian objects and military objectives would have been perfectly adequate. In my view Rowe is attributing to State practice of customary international law prior to the 1977 Protocol a greater degree of care in the prosecution of an attack to avoid collateral damage than was in fact the case. The Vietnam and Falklands wars are comparative examples where Protocol 1 did not apply. The 'CNN factor' cannot be underestimated in the way it has moved public expectations as to the conduct of war, and with it, some revisionism in the understanding of the pre-1977 position at customary international law.

The stresses within NATO in *Operation Allied Force* in Kosovo could readily be replicated in any joint military action undertaken by Australia and the US, where the air strike is launched from Australian sovereign territory or platform. It would not matter whether or not the operation was to take place under the auspices of a formal treaty alliance, such as ANZUS, or ad hoc under the authority of United Nations Security Council resolutions. Consistent with the position of the NATO member States, Australia would apply its own domestic law in the conduct of military missions within Australia or overseas. Importantly, Australia is a party to Protocol 1 as treaty law, which entered into force in Australian law on 21 December 1991.[33] If the US were to mount an operation from Australian sovereign territory or platform, it would be subject to Australia's domestic law. This is inherent in sovereignty at international law.[34] Applying the rules of the Vienna Convention on the Law of Treaties, Australia cannot countenance an act on Australian territory or within its extra-territorial legislative reach, or occurring under Australia's command and control, that might be contrary to Australia's international obligations under a treaty it has ratified. This is regardless of whether the treaty has been incorporated into Australian domestic law.[35] The effect of Protocol 1 on US/Australian interoperability can best be demonstrated by reference to the air campaign in Kosovo. Differences lie in what may be targeted as a 'military objective', as well as in nuances in interpretation of what is ostensibly the same rule of proportionality under Protocol 1 as a reflection of customary international law, and under Protocol 1 as treaty law.

'Military objectives' are the target list; those objects which military necessity requires to be weakened or destroyed in order to defeat the enemy. There is no definitive list of what constitutes a 'military objective'. The target list is ever shifting, tying military objectives as much to context[36] and technology, as to particular objects. Various attempts have been made to capture an exhaustive list of what history has shown by State practice to be

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32 Peter Rowe in *Kosovo 1999: The air campaign – Have the provisions of the Additional Protocol withstood the test?* in International Committee of the Red Cross Review, No 837, pp147-164, 31 March 2000.

33 Protocol 1 was ratified by Australia on 21 June 1991, being incorporated into Australia's domestic law by virtue of the *Geneva Conventions Amendment Act 1991*, No 27 of 1991, assented to on 4 March 1991 and commencing on 28 March 1991 (Gazette S81).

34 This position is reflected and implemented through *Defence (Visiting Forces) Act* 1963, and the *Agreement Concerning the Status of United States Forces in Australia* (SOFA). The SOFA, which has treaty status, specifically deals with issues of jurisdiction in relation to matters concerning US military personnel on Australian territory.

35 Part III of the Vienna Convention on the Law of Treaties, and particularly Article 26: *Pacta sunt servanda*: 'Every treaty in force is binding on the parties to it and must be performed by them in good faith'; and Article 27 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

36 An area of land has been held to be a military objective. So to taxis, where the taxis had been commandeered by a Paris military governor to transport Reservists to the front in World War I: 'Everything depends on circumstance'. A.P.V. Rogers, Law of the Battlefield, Manchester University Press, Chapter 2, pp27-46.

agreed military objectives.[37] Such attempts are largely nugatory. No sooner is a list devised than it is outdated by technological developments, or the next Revolution in Military Affairs.[38] At customary international law, no object is protected from attack if it constitutes a 'military objective', subject only to the qualification of the principle of proportionality discussed below. Protocol 1 codifies the customary international law concept of 'military objectives' as being:

> … limited to those objects which by their *nature*, *location*, *purpose* or *use* make an *effective* contribution to military action, and whose total or partial destruction, capture or neutralization, *in the circumstances ruling at the time*, offers a *definite* military advantage.

The abstract concept of the 'military objective' is probably further limited by Protocol 1 as treaty law. Under customary international law 'dual usage infrastructure' — those objects which concurrently serve a military and civilian purpose, such as the communications systems and electrical power grids, or factories which produce cars as well as military vehicles — may be targeted. However, it is probable that Protocol 1 as treaty law calls for a more precise and careful assessment of the principle of proportionality than may be the case at customary international law. That is, Protocol 1 as treaty law probably requires a more careful assessment of the likely effect on the civilian population and civilian objects, and the environment, before dual usage infrastructure may be targeted. Dual usage infrastructure is not, however, precluded from strike under Protocol 1 as treaty law, despite the assertions to that effect by human rights lobbyists.[39] It is a question of degree, not a case of any divergence of principle. It is therefore probably the most difficult aspect of managing a joint military operation between Australia and the US. Military commanders must reconcile possibly widely differing views of the obligation to take precautionary measures to limit the effects of an attack and collateral damage on dual-usage infrastructure.[40]

The US and Australian legal positions are consistent with respect to the principle of discrimination, which requires that means and methods of war which cannot be directed at a specific military objective are prohibited, as are attacks the nature of which strike civilian and military objects without distinction.[41] The principle is not subject to any overarching legal requirement to use any particular means or methods of war, except to the extent that the means or methods are prohibited at customary international law or treaty.[42] There is no legal requirement to use precision guided missiles. The practical application of the principle of discrimination may vary between the US and Australia in the types of weapons available in each nation's arsenal, and with respect to any limitations imposed by treaty law and domestic law. An otherwise allowable target may not be attacked

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37 For a discussion of the history of defining 'military objectives' see the ICRC Commentary on the Additional Protocols, note 24. See also Rogers, Law of the Battlefield, p33, which states that military objectives in the Hague Air Warfare Rules gave the following list: military forces; military works; military establishments or depots; factories constituting important and well known centres engaged in the manufacture of arms; ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes. This is in addition to the traditional targets of the enemy's war materiel, railways and telegraphs, barracks and accommodation for troops, military stores and factories and foundries manufacturing military supplies. In the Gulf War, the target list included leadership; command, control and communications; strategic air defences; airfields; nuclear, biological and chemical research and production, naval forces and port facilities; military storage and production; railroads and bridges; electrical power; oil refineries and distribution facilities; the Saddam Hussein's Republican Guard, Scud missiles, fixed surface to air missile sites, and breaching sites for the ground offensive.

38 A Revolution in Military Affairs (RMA) is where technology transforms the nature of combat. Historically there is an RMA every 30 years, the most recent being in the Gulf War of 1991. See COL M Goodyer, *Some Aspects of the Revolution in Military Affairs and the Impact on the ADF* in the Australian Defence Force Journal, No 145, November/December 2000, pp15-22.

39 See eg Penny Lewis, *Do Civilian Casualties Have Any Rights in War?* The Times, 8 August 2000, where the author classified the Radio Televisija Srbije as a 'non-military target'. See also Amnesty International Report.

40 Articles 57 and 58.

41 Article 51, and particularly 51(4) and the ICRC Commentary on the Additional Protocols.

42 Eg: starvation of the civilian population is prohibited at customary international law (Article 54), and some weapons such as dum-dum bullets and weapons which blind, are prohibited by treaty law.

if the available weapons system cannot, in the particular case, satisfy the principles of distinction, discrimination and proportionality.

All targeting decisions are subject to the overriding qualification of the customary international law principle of proportionality. The rule prohibits an aerial attack *on any allowable military object* which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[43] 'Excessive' is a highly subjective and relative term, and hence a concept more readily stated than applied. It has been said to be 'dangerously undefined'.[44] However, the standard is not one of minimal civilian deaths, or no civilian deaths. In short not all civilian deaths in war are unlawful. The Rendulic Rule[45] would govern decisions of military commanders and planners in the judgment to be made under the principle of proportionality. In effect the judgment is based on all the intelligence available to the military commander at the time of the attack; it is not a hindsight judgment. The Rendulic Rule applies equally to the US and Australia, the former as customary international law position, and the latter by virtue of a reservation made to Articles 51–58 of Protocol 1 when the treaty was ratified.[46]

Operation Allied Force's target list included the following strategic and tactical military objectives, with the bulk of the targets being tactical. Strategic targets included the Serb air defences, command and control facilities, the Yugoslav military (VJ) and police (MUP) forces headquarters in Belgrade, and supply routes. Tactical targets comprised military facilities, fielded forces, heavy weapons, and military vehicles and formations in Kosovo.[47] Specific objects included command posts, 10 military airfields, military aircraft, 34 road bridges, 11 railway bridges, 29 per cent of all Yugoslav/Serbian ammunition storage capacity, 57 per cent of petroleum reserve capacity, all Yugoslav oil refineries, tanks; armoured personnel carriers; artillery pieces and mortars; and military vehicles.[48] It is a predictable target list comprising traditional military objectives. No object of itself could be said to be controversial, even if from General Mike Short's view, the focus of the air campaign should have been more on strategic targets in Belgrade, and less on tactical targets in Kosovo. In so far as strikes on tactical targets in Kosovo gave rise to considerable angst for NATO, on reflection, General Short was probably correct.

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Against the Federal Republic of Yugoslavia[49] (the Final Report) was provided with the following list of incidents considered by human rights interest groups and others to be cases which gave rise to unlawful civilian deaths inflicted by NATO:

a. The civilian passenger train at the Grdelica Gorge, estimated civilian casualties of 10 deaths and 15 injuries;
b. Djakovica Convoy, estimated 75 civilian deaths and 100 injuries;
c. Djakovica Refugee Camp, five civilian deaths and 19 injured;
d. Surdulica , estimated 11 civilian deaths and 100 civilian injuries;

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43 Article 51(5)(b).

44 W. Hays Parks, *Air War and the Laws of War,* The Air Force Law Review.

45 Rendulic decision; re the trial of General Rendulic: United States v List, XI *Trials Of War Criminals Before The Nuremberg Military Tribunals 129996-1297 (1947-480)* cited in Hays Parks, *Air War and the Laws of War,* Air Force Law Review, p3. The Court said: 'The course of a military operation by the enemy is loaded with uncertainties …. It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made …. (T)he defendant may have erred … but he was guilty of no criminal act'.

46 The text of the Australian reservation provides: 'In relation to Articles 51-58 (of Protocol 1) inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time'.

47 Lord Robinson of Port Ellen, *Kosovo One Year On: Achievement and Challenge,* p14.

48 MODUK, Kosovo: Lessons from the Crisis.

49 The Final Report of the Prosecutor (ICTY).

e. Surdulica Sanitorium, 23 civilian deaths and many injuries;

f. Cuprija, 8 April 1999, one civilian death and five civilian injuries;

g. The Cigota Medical Institute, three civilian deaths;

h. Hotels Baciste and Putnik, one civilian death;

i. Pancevo Petrochemical Complex and Fertiliser Company, two separate strikes, no reported civilian casualties;

j. Nis Tobacco Factory, no reported civilian casualties;

k. A bus at Lu'anne, 39 civilian deaths;

l. A bus at Pec, 17 civilian deaths, and 44 civilian injuries;

m. Korisa village, 48–87 civilian deaths;

n. Belgrade TV and Radio Station, 23 April 1999, 16 civilian deaths (journalists);

o. Chinese Embassy, Belgrade, three civilian deaths and 15 civilian injuries;

p. Nis city centre and hospital, 13 civilian deaths and 60 injuries;

q. Istok Prison, 19 civilian deaths;

r. Belgrade Hospital, three civilian deaths and several injuries;

s. Journalists convoy Prizren-Brezovica Road, one civilian death and three injuries;

t. Belgrade heating plant, one civilian death;

u. Trade and industry targets; no information as to casualties

There is no doubt that civilians[50] and civilian objects were struck in the air campaign (eg hotels, hospitals, prison). However, both customary international law and Protocol 1 as treaty law are silent as to the effect in law of mistake and accidents. Civilian deaths and injury, and damage to civilian objects arising from mistake and accident are calamitous, but they are not necessarily unlawful. Calamity is grist to the media mill. NATO's use of the term 'collateral damage' juxtaposed against the media's graphic depictions of human misery and suffering portrayed NATO as cynical. President Milosevic used NATO's embarrassment to full effect in the publicity war he waged to lay the blame for the civilian deaths and misery in the war on NATO. The continuing effect of the media coverage is to give the high moral ground to the principle of distinction over the principle of proportionality.

The implication of the media coverage is that NATO acted unlawfully, where in fact the cruel reality of war is that innocent civilians die. The 'CNN factor' and human rights watch dog bodies, such as Amnesty International and Human Rights Watch, serve a valuable function in ensuring military forces take every possible precaution in attack to avoid mistakes and accidents in the prosecution of war. By exposing mistakes, media and human rights bodies have the effect of setting a very high benchmark for military performance. Those high standards must be met if public support for the prosecution of war is to be retained. However, the assertion of human rights bodies that *any* civilian deaths and injuries, and damage to civilian objects is unlawful, is disingenuous.

The issue for US/Australian military interoperability is in the judgment of what is 'excessive'. Reasonable minds can differ on this point, but a problem arises in the application of the principle of proportionality under Protocol 1 as treaty law and Protocol 1 as customary international law. The point is important, not least because a perceived breach of the principle of proportionality might be a war crime under the Rome Statute,[51] but also because ultimately it is not an issue capable of resolution by the inventiveness of those who plan the missions

50 NATO estimates there were between 488 and 527 civilian deaths: Lord Robinson of Ellen, *Kosovo One Year On: Achievement and Challenge,* and the Amnesty International Report estimates there to have been between 400 and 600 civilian deaths.

51 Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court, dated 17 July 1998 (but not yet in force).

and fly the sorties, or by tinkering with joint Rules of Engagement — even if there is room for improvements and compromise at the operational level. All the obligations under Protocol 1 as customary international law and treaty law are reduced to the formula that incidental loss of civilian life or damage to civilian property must not be 'excessive' against the direct and concrete military advantage anticipated by the attack. It is a subjective test; there is no certain legal measure. Except at the extreme, which logically introduces an element of recklessness or negligence, the tolerance level for incidental loss of civilian life and damage to civilian property becomes a question of degree. Where a decision falls in the continuum depends on the culture, history, the national psyche and, critically, the military doctrines of the participating nations.

Accordingly, it doesn't need to be an error of law for countries to hold significantly different assessments of what is excessive in relation to the military advantage anticipated, as was demonstrated by the tensions in NATO during *Operation Allied Force*. The subjectivity of the decision is further complicated by the fact that customary international law prior to the negotiation of Protocol 1 in 1977 probably allowed a greater latitude in the assessment. This occurred because militaries were not required to justify the number of civilian deaths in a precise way provided the deaths arose out of strikes on legitimate military objectives. Furthermore, based on the experience of World War II, Korea and Vietnam, there was probably a more widely held public acceptance that, unfortunately, innocent civilians do die in war.[52] The 'CNN factor' in conjunction with the articulation and explanation of the principle of proportionality under Protocol 1 as treaty law has challenged and eroded that proposition. Ultimately, the US would not be wrong in law if its decision of what is 'excessive' based on its military doctrine fell at the higher end of the spectrum, particularly if customary international law allows a greater tolerance on the measure of proportionality compared to Protocol 1 as treaty law. The solution here probably lies with the politicians rather than the military lawyers or operators.

If a particular sortie has gone awry it would require significant credible evidence that civilians were deliberately targeted as military objectives for the deaths to be considered unlawful. Despite precision guided missiles and sophisticated technology, war is the ultimate risk management nightmare. Air strikes are vulnerable to the vagaries of the weather, incorrect intelligence and the malfunction of sophisticated computers and guidance systems. Air crew might also make errors and incorrect judgments under the applicable Rules of Engagement, especially if they are engaged by the adversary's air defence weapons. As demonstrated in Kosovo there can be accidents and mistakes even when targeting has been subject to meticulous planning and careful consideration.

The attack on the Chinese Embassy in Belgrade fell into the category of mistake,[53] the attack being based on outdated intelligence of map grid-reference points for the air strike. The target was not verified by the usual target review processes. NATO thought it was striking the Yugoslav Federal Directorate for Supply and Procurement in Belgrade, a traditional and legitimate military objective. NATO was wrong! There were three civilian deaths and 15 injuries. Striking the Chinese Embassy was a serious mistake on the part of NATO, causing a significant breach in US/China diplomatic relations. It was not, however, a breach of customary international law or Protocol 1 as treaty law. The Chinese Embassy was not a military objective, but it was not the intended target. This is a case where the Rendulic Rule would apply both under Protocol 1 as treaty law for Australia, and otherwise at customary international law. The lesson here is the need for meticulous target verification processes to avoid such mistakes.

The attack on the Djakovica Convoy in Kosovo was similarly a mistake. NATO thought it was striking a military objective — a convoy of vehicles the shape of which suggested they were military vehicles, and the manner of their travelling being that usually adopted by military convoys; a slow pace and consistent distance between each vehicle. Again, NATO was wrong! The convoy was not military; it was a convoy of refugees fleeing Kosovo, and the vehicles were tractors with trailers. There is some suggestion that the Serbian military was using the

52 It would be a thesis in itself to verify this statement, but the experience of World War II, Korea, Malaysia/Borneo and Vietnam, the Cuban missile crisis and the nuclear threat, and claims of US Imperialism in the context of the Cold War, were high on the public conscience, probably until approximately the 1980s. The world was a very different place all those years ago.

53 *War in Europe,* BBC World; US Report to Congress, Kosovo/Operation Allied Force After-Action Report, Final Report of the Prosecutor (ICTY).

refugee convoy as a human shield, but so much confusion still surrounds this incident[54] that this has not been substantiated. If this were the case, however, the convoy would have been a legitimate military objective, the question then being whether striking it would be in breach of the principle of proportionality. Seventy-five civilian deaths and 100 civilian injuries as a result of a strike against a small number of Serb military vehicles and troops interspersed amongst the civilian population would be disproportionate. NATO's mistake arose out of a lack of visual confirmation of the target, because visual identification would have required the strike aircraft to descend below the 15,000 feet altitude set by the Rules of Engagement. The Rules of Engagement were later varied to allow Forward Air Control aircraft to descend to 5,000 feet and strike aircraft to descend to 8,000 feet, (for better visual identification and confirmation of targets).[55] The Djakovica convoy of refugees was not a legitimate military objective, but again the Rendulic Rule applies. The deaths were not unlawful. The incident, however, indicates a more significant issue for US/Australian interoperability.

The US Rules of Engagement for air strikes provided that strike aircraft not descend below 15,000 feet in any attack. The aim of the rule was to protect NATO strike aircraft and pilots from attack from the Serbian air defence systems; it was highly controversial. The rule encapsulated the dilemma facing NATO:

> Humanitarian considerations would require a pilot to get close to the target to identify it properly; military considerations would require the pilot to fly at a safe height to be at a reduced risk from anti-aircraft fire.[56]

This dilemma goes to the heart of the subtle changes brought about by the codification of customary international law in Protocol 1. Even though the principles of distinction and discrimination under Protocol 1 reflect customary international law, and extrapolating provisions of the main principles are not controversial in that they follow logically from the basic principle, the tensions within NATO during *Operation Allied Force* demonstrated a sociological phenomenon. The very articulation of the extrapolatory principles in Protocol 1 as treaty law has brought about a significant shift between customary international law as it was when Protocol 1 was negotiated in 1977, and Protocol 1 as treaty law. The shift brought about by the codification and extrapolation of customary international law is that Protocol 1 as treaty law probably bestows a higher level of protection of the civilian population over combatants than was the position at customary international law prior to Protocol 1.

This conflicts with received military doctrine. A principle of war is the economy of effort, which requires a military commander to husband resources, and to use only that level of force and materiel to achieve the particular mission within the overall objective. A military commander would be rightly condemned if forces under his command were recklessly deployed against the enemy with commensurate casualties of combatants. Furthermore, no individual combatant who is a member of a volunteer professional army is likely to have confidence in a military command which is profligate with the lives of its combatant force. It follows that at customary international law there is no legal obligation for military strike pilots to fly at an altitude which exposes them to more than the minimum risk, even if civilians deaths were incidental to that attack, provided the target was a legitimate military objective, and the number of deaths proportionate. Where does this principle stand in relation to Protocol 1 as treaty law? Ignatieff observes that the Americans are coming into international conflicts with a military violence whose legitimacy is always slightly in question because they are not prepared to take the ultimate mortal risks; that is, legitimacy of military power is displayed precisely by the capacity to sustain casualties and inflict them,[57] and not by some more restrained application of force.

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54 *The War in Europe,* BBC World. Also *How the War was Spun,* BBC World. There were two different strikes near each other; one seems to have been a case of the Serbian military using civilians as human shields, but it is not clear whether this was the case also with the Djakovica refugee convoy; see Brigadier-General Daniel Leaf. NATO struck both targets. See also Final Report of the Prosecutor (ICTY).

55 *The War in Europe,* BBC World.

56 Rogers, *Zero-Casualty Warfare,* International Review of the Red Cross.

57 Ignatieff, *The Future of War,* ABC Background Briefing.

The Kosovo conflict has been characterised as a humanitarian intervention. NATO deployed to protect the civilian ethnic populations of a foreign country from their own despotic leader. Who should carry the risk — the combatants? or the civilian population of the enemy nation NATO intended to protect? Ignatieff refers to the desiderata of western military violence as being two rules: zero casualties to yourself, and zero collateral damage to civilians. Protocol 1 as treaty law probably requires the combatant to carry the greater risk, and to take precautions to ensure that the strike pilot visually confirms the targets designated by strike command to be legitimate military objectives. The outcome is consistent with the expectations engendered by the 'CNN factor', while addressing the challenge posed by Michael Ignatieff. In light of Protocol 1, Australia may have to insist on Rules of Engagement that expose its forces to a more than minimal risk, and an obligation to protect civilians and civilian objects to a higher degree than may have been required of the US whose Rules of Engagement reflect the less constrained pre-1977 customary international law. The US Rules of Engagement are robust — even aggressive[58] — with respect to its own force protection, and protection of mission- essential equipment. Such robust Rules of Engagement tend to skew the equation in favour of the protection of one's own forces over the protection of the civilian population.

On this point, it is significant that the UK, as a party to Protocol 1, holds that it was a political rather than legal obligation to avoid collateral damage to civilians by the positive identification of the target by NATO strike pilots:

> Rules of engagement and concerns about collateral damage placed on us by our *political* (my emphasis) masters are, rightly, very tautly drawn. The discipline of our people is such that they will not drop their weapons unless they have clearly identified their assigned target and know precisely what they are doing.[59]

Whether the source of the UK position was legal or political, it is an example of State practice which may ultimately determine the nature of the obligation under Protocol 1 — that the combatant force must take such risk as is necessary to protect the civilian population, even if that means the combatant force carries higher than the minimum risk.

Another controversial incident in Kosovo, arising from a mistake by NATO was the bombing of the Nis market and hospital. NATO admitted that the strike intended for the Nis airfield missed its target. The cluster bombs used were seen as being the most suitable weapon to destroy Serbian aircraft, air defence systems and support military vehicles located at the airfield, but they actually exploded in the city centre. The reason the cluster bombs did not strike the designated target has not been established, though technical malfunction has been cited as a possible cause.[60] The Nis airfield is 'several blocks' from the Nis city centre, but the use of cluster bombs gave rise to 13 civilian deaths and 30–60 injuries when it struck the city centre and hospital. Cluster bombs are not illegal, but must be used in conformity with the principle of discrimination — that the means and methods of combat must be capable of being directed at a specific military objective.[61]

The Nis airfield is a lawful military objective, and the use of cluster bombs was ostensibly suited to the purpose; a range of sub-targets within the perimeter of the overall military objective of the airfield. It cannot be known whether, if the cluster bomb had hit the intended target, there would have been any incidental loss of civilian life, or injuries to civilians or damage to civilian objects in the city centre some distance from the target site. If that were to be the case, the use of the cluster bomb would probably have been unlawful for deployment in a residential area because of its indiscriminate effect. There is no evidence that the Nis market and the civilian population were the object of attack. The bombing is a sad example of accident in war; a strike at a legitimate

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58 The view of the author based on seminar discussions during the USPACOM Military and Operations Law Conference, Hawaii, 2-9 March 2001.

59 Rogers, *Zero-Casualty* Warfare, International Review of the Red Cross.

60 *The War in Europe,* BBC World, but whether this was the case was never confirmed. The cluster bombs used by the US were found to be faulty. The US ceased using that type of cluster bomb.

61 Article 51(4).

military objective, using the appropriate means, but which did not reach the intended target. The deaths by accident were not unlawful.

The NATO strikes on the railway bridge over the Grdelica Gorge and the Radio Televisija Srbije were criticised by Amnesty International as not being legitimate military objectives. Where the Chinese Embassy and the Djakovica Refugee convoy were cases of strikes on objects that were later found not to be legitimate military objectives, the attacks on the rail bridge at Grdelica Gorge, which struck an international passenger train, and Radio Televisija Srbije, were said to be cases of unlawful attacks on civilian objects. NATO holds that the rail bridge was the target of the air strike, not the train on the bridge. NATO has advised that the train was expected to have crossed over the bridge ten minutes prior to the attack, and that the pilot became aware that the train was on the bridge at the exact same time that the pilot launched his missiles; the pilot had passed the point of no return because his missiles had already locked on to the target, and could not be recalled. Having struck the bridge once, the pilot struck the bridge a second time in the knowledge that the international passenger train was on the bridge. The length of time between the first and second strikes is not known, but the suggestion is that the pilot had time to cancel the second strike, and should have done so.[62]

The rail line is the only military resupply railway line between Serbia and Kosovo. Striking the rail line at the bridge at the Grdelica Gorge would be the most effective method of decisively breaking that resupply route. The rail bridge would therefore have constituted an important military objective, even though it also served a dual civilian purpose as an ordinary international transport route. Neither Protocol 1 nor customary international law renders a military objective immune from attack because of its dual military and civilian function, or because of the presence of civilians, provided that the civilians are not the object of the attack, and provided that the incidental civilian deaths and injuries arising from the attack are not excessive under the principle of proportionality. The arrival of the train on the bridge was unexpected and unfortunate, but it did not render the 10 civilian deaths and 15 civilian injuries unlawful.

It is debatable whether the second strike at the bridge was unlawful. Customary international law and Protocol 1 as treaty law[63] require the cancellation of the second strike if it 'becomes apparent that the objective is not a military one', subject to the principle of proportionality. In this case, the object — the bridge — did not change its status as a lawful military objective. Whether the number of deaths and injuries and damage to civilian objects is 'excessive' is relative to one's expectations of a blood-free war, and the extent to which Protocol 1 as treaty law may require a minimalist assessment of what is 'excessive' under the principle of proportionality. In my view, the second attack was lawful because the military objective of destroying the rail bridge was fundamental to Serbia's ability to prosecute the war, and the deaths were not excessive. However, the second attack was probably not prudent when the angst caused to NATO by the 'CNN factor' is considered.

NATO's attack on Radio Televisija Srbije was also highly controversial, being characterised as a strike against a civilian object, and therefore unlawful. The air strike caused 16 civilian deaths, and 16 civilian injuries. The matter is further complicated by claims by NATO that, in contravention of customary international law and Protocol 1 as treaty law,[64] civilians were used as human shields. Evidence suggests that NATO had warned that the Radio Televisija Srbije was a target for attack, and journalists in Belgrade generally knew this; the only question was 'when?'[65] Amnesty International claims that NATO struck the television station because of its role in the propaganda war against NATO, which NATO had found galling and irksome.[66] NATO contends that Radio Televisija Srbije's propaganda role was not the basis for the attack, but that the station served a dual civilian and military purpose, its military purpose being that it formed part of President Milosevic's command, control and communications network. If the station did serve the command, control and communications function, it would be a military objective of some significance, and therefore the incidental loss of civilian lives, and injuries

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62 *The War in Europe,* BBC World; Final Report of the Prosecutor (ICTY); Amnesty International Report. 12.

63 Article 57(2)(b).

64 *The War in Europe,* BBC World; Final Report of the Prosecutor (ICTY).

65 Ignatieff, *The Future of War,* ABC, Background Briefing. Ignatieff states that it was known days before that the Radio Telisija Srbije was a target. The time of the strike was 0200 when staff were not expected to be in the building.

66 Final Report of the Prosecutor (ICTY).

to civilians and civilian objects would be lawful if judged as not excessive under the principle of proportionality. As previously noted, what is 'excessive' is a subjective judgment. If, however, the attack on Radio Televisija Srbije was solely because of its propaganda function, the attack would not have been lawful. Propaganda *per se* is not a lawful military objective under customary international law and Protocol 1,[67] and the morale of the enemy's civilian population is not considered to be a legitimate target. [68]

The US did not apply the controversial aspects of Protocol 1 as treaty law. At customary international law, the US is under no obligation to refrain from striking a legitimate military objective where civilians might be located, irrespective that the civilian population were being used as human shields. Customary international law and Protocol 1 as treaty law prohibit the use of the civilian population as shields to protect military objectives from attack or to impede military operations.[69] There is, however, no sanction at customary international law for breach of this provision by either party to a conflict[70]. Protocol 1 as treaty law, however, provides that any violation of the prohibition against using the civilian population as human shields does not release the parties to the conflict from their legal obligations with respect to the civilian population.[71] The outcome is that under Protocol 1 as treaty law, an unscrupulous party with the control of the civilian population can use that population to shield from attack a target which might otherwise be a legitimate military objective, and can do so with impunity. Indeed, paradoxically, Protocol 1 as treaty law begs unscrupulous parties to a conflict, such as President Milosevic of Serbia, to use the civilian population as human shields, because any strike on such a target by the opposing force is in violation of Protocol 1 as treaty law. The alleged violation of the laws of war by NATO in the strike on Radio Televisija Srbije was a powerful weapon in a conflict which was conducted as much through the media as it was in the battlespace, but the strike was not unlawful under customary international law, even if unpalatable.

The issue for US/Australian interoperability for air power is the dilemma posed for Australia by Protocol 1 as treaty law, in the obligation not to strike a legitimate military objective if Australia's intelligence reports are that there are civilians located as human shields in the vicinity of the target. The prohibition applies no matter how significant the target may be to the prosecution of the war. At customary international law, the US is under no such restraint. A *non sequitur* for air power in Protocol 1 as treaty law is the assumption that the party engaging in an air strike against a ground target can know that civilians have been deliberately located in the vicinity of the legitimate military objective to shield the target from attack. How can the airborne strike pilot make such a distinction from a bird's eye view of a target that has been identified by strike command to be a legitimate military objective?

Kosovo demonstrates that for any joint US/Australian military action, it will be very much the case of 'your planes cannot fly from our country to strike that target …'. In my view, however, the issues Australia has to address for interoperability with the US are only partly to be found in NATO's controversial targeting incidents in Kosovo. Kosovo highlighted the higher degree of protection to be afforded the civilian population by Protocol 1 as treaty law compared to Protocol 1 as customary international law. It juxtaposed the question of who should carry the risk in an air power campaign against what is 'excessive' loss of civilian life when attacking a legitimate military objective. It also points to the need to address the related issue of differences in Rules of Engagement between Australia and the US in so far as the US Rules of Engagement tend to favour zero US casualties over zero collateral damage. The conflict also demonstrated the limits on the use of air power as the primary force element in what arguably should have been a ground war; the use of air power was a contributory factor in targeting mistakes. Any US/Australian joint military action will need to carefully consider the force elements to be used in light of the mission objectives.

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67 Final Report of the Prosecutor (ICTY).

68 Article 51(2).

69 Articles 51(7), 57(5) and 58.

70 The customary international law principle was probably aspirational – "best endeavours" – rather than a prescriptive statement of law.

71 Article 51(8).

Not overtly an issue in the Kosovo conflict, but nonetheless relevant to interoperability between Australia and the US, are those targets which Australia is precluded from striking under Protocol 1 as treaty law, but which the US can strike. Protocol 1 precludes Australia from reprisals against civilians and civilian objects. This was not an issue in Kosovo, but could be a targeting issue in other scenarios. Australia is also precluded from striking targets which might cause widespread, long-term and severe damage to the natural environment, whether caused by the nature of the target, or by the means and methods employed, which would have the effect of prejudicing the health or survival of the population. This would include dams, dykes and nuclear electrical generating stations. A number of targets in Kosovo, such as oil refineries and petro-chemical plants, could well have been excluded from strike by Australia.

The legal test for damage to the environment is threefold — 'widespread', 'long-term' and 'severe'. The terms themselves are imprecise. Is the measure in years or months? How widespread is 'widespread'? At what point is damage 'severe'? Is the prohibition directed only to the use of nuclear weapons? Defining and understanding the legal limits imposed by environmental considerations in relation to target lists is critical to Australia's interoperability with the US. There is little jurisprudence on this point. The Final Report noted that there was great difficulty in assessing whether the environmental damage arising out of the Gulf War exceeded the threshold of Protocol 1.[72]

It would not be wise for Australia to allow environmentally sensitive targets to be removed from the target list because of the prohibition contained in Protocol 1 as treaty law. There is a need to establish the ground rules for interoperability between Australia and the US where attacks against certain targets might lead to significant environmental damage. Such targets are oil, petrol, chemical refineries or related production facilities, as well as atomic/radioactive, nuclear, and similar installations. As a practical measure, Australia would be well advised to establish a scientific database of these and related installations. This would provide a basis for future legal judgments should these environmentally sensitive sites ever be nominated as targets. Consideration might also be given to an analysis of means and methods to provide options to render those targets inoperative without recourse to kinetic weapons or other means that trigger the prohibition. Australia could not allow the US to strike targets which may give rise to significant damage to the environment from Australian sovereign territory or platform.

The sensitivity of NATO in justifying its targeting decisions in *Operation Allied Force* is surreal in the context of the asymmetric war that was Kosovo, where regular or irregular Serbian and Kosovar opponent forces either did not apply the laws of war and Protocol 1, or used Protocol 1 only as a political propaganda weapon. The destruction of the civilian population was the very aim of Serbia's war in Kosovo, but Serbia, and its civilian populations, expected NATO to 'play by the rules'. NATO was expected to apply the laws of war and Protocol 1 to protect Kosovo civilian populations from attack by the Serbian forces. NATO was to carry the risk and opprobrium of the military action. But it was Serbia that had committed acts of genocide against its own civilian populations, giving rise to NATO's intervention in the first place. It is a situation so absurd that it could potentially erode and destroy those very rules that give civilians some protection in war.

Differences between the US and Australian legal positions in relation to targeting is likely to be a significant continuing source of tension in any US/Australian joint military operations. This is because interoperability with the US may be largely summed up as 'not on our patch'. Australia must carefully consider the effect of its legal position on its ability to participate in a joint operation with the US. Joint *Kangaroo* exercises might be a useful vehicle to test the operation of Protocol 1 as treaty law, as practised by the Australian Defence Force, against Protocol 1 as customary international law, as practised by the US military forces.[73] The purpose of the exercise

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72 The Final Report of the Prosecutor (ICTY), p5, para 15. The Final Report is not intellectually satisfying in its discussion of the assessment of environmental damage.

73 W. Hays Parks, *Air War and the Laws of War,* The Air Force Law Review, p222, commented that war games conducted through the 1980s have 'proved repeatedly' that Protocol 1 will be one of the first casualties in a mid to high intensity conflict. He further observed that in joint war games conducted by Australia and the US in 1986 and 1987 specifically to evaluate Protocol 1, its provisions were found to be a 'war stopper' if followed scrupulously by a party to the conflict – that any military commander adhering to the requirements of Protocol 1 would be defeated by an opponent not following them. These observations are pertinent in the asymmetric war that was Kosovo.

would be to ascertain the extent to which the interoperability issues caused by the differences in the respective legal positions of Australia and the US can be ameliorated at the operational level, and to crystallise those aspects of law and military doctrine which demonstrate fundamental and irreconcilable obstacles to interoperability.