

NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia

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This Article addresses the report by the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) concerning war crimes allegedly committed by the North Atlantic Treaty Organization (NATO) during the conduct of its war with Yugoslavia. International law regarding the conduct of war, or jus in bello, governs what are popularly thought of as "war crimes." This body of law is currently in flux; while the OTP is not in any sense a rule-making body, its actions may give some guidance as to the direction that the development of this body of law will follow.

The OTP considered NATO attacks on twenty-one targets in Yugoslavia as possible violations of existing jus in bello norms. The OTP categorized the issues raised by the accusations under the headings of environmental damage, use of depleted uranium projectiles, use of cluster bombs, and improper target selection. The first and last categories have the potential for the greatest impact on the formation of normative expectations regarding the conduct of war. The fourth problem can also be divided into two major subcategories: problems of discrimination and problems of proportionality.

In each instance, the OTP found that NATO's actions did not violate existing norms, although in one instance the panel found itself divided. These outcomes were correct. The reasoning underlying the outcomes, though, is troubling. The rules of law it states and applies would exonerate not only NATO, but also the perpetrators of far more deliberate and destructive acts. The OTP seems to ignore the development of the jus in bello during the past decade, and perhaps during the past three decades. While the OTP is to be applauded for its decisions, its report nonetheless contains troubling assumptions about current normative expectations relating to the conduct of war.

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I. INTRODUCTION

The 1999 war between the North Atlantic Treaty Organization (NATO) and Yugoslavia¹ has already had a significant effect on our understanding of the law pertaining to the use of force, or *jus ad bellum*, particularly as it relates to humanitarian intervention.² The war has also brought renewed attention to the norms regarding the conduct of war, or *jus in bello*. One recent example of this attention is the report by the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) concerning war crimes allegedly committed by NATO during the conduct of the war.³ On May 14, 1999, while the war was still in progress, the ICTY's then-prosecutor, Louise Arbour, established a committee to report on NATO's possible war crimes.⁴ In August, she met with legal scholars from several countries to discuss the allegations.⁵ The OTP's Final Report, issued on June 13, 2000, finds that none of the NATO actions complained of merits further attention by the ICTY.

This blanket exoneration of NATO is something of a mixed blessing. For those who have maintained that NATO's initiation of hostilities against Yugoslavia was a justifiable humanitarian intervention,

1. The names "Kosovo" and "Yugoslavia" are used throughout this Article for convenience only. Yugoslavia is used to refer to the Federal Republic of Yugoslavia; Kosovo is used to refer to the territory also known as Kosova or Kosovo and Metohija. No endorsement of any political position is intended by the use of either term.

2. See, e.g., Bruno Simma, *NATO, the U.N., and the Use of Force*, 10 EUR. J. INT'L L. 1 (1999); Aaron Schwabach, *The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia*, 11 PACE INT'L L. REV. 405 (1999); Aaron Schwabach, *Humanitarian Intervention and Environmental Protection: The Effect of the Kosovo War on the Law of War*, 6 COLUM. J. E. EUR. L. (forthcoming 2000); NOAM CHOMSKY, *THE NEW MILITARY HUMANISM: LESSONS FROM KOSOVO* 153 (1999).

3. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited June 19, 2000) [hereinafter Final Report].

4. See Final Report, *supra* note 3, ¶ 3.

5. Charles Trueheart, *War Crimes Court Is Looking at NATO; Prosecutor Reviews Yugoslav Attacks*, WASH. POST, Dec. 29, 1999, at A-20, available at 1999 WL 30310811.

there is some element of vindication in seeing NATO defendants exonerated. But for those who had hoped to see the initiation of a legal regime providing greater protection for civilians and the environment during wartime, the Report seems to go too far. It bases its findings not only on the facts, but also on interpretations of existing law that are more restrictive than those that have been proposed since the 1991 Gulf War. Those who are members of both groups may find the Final Report somewhat disconcerting.

II. INTERNATIONAL LAW RELATING TO NATO'S ALLEGEDLY ILLEGAL ACTS

A. *Scope of the OTP's Review*

Under the terms of the statute of the ICTY,⁶ the ICTY's prosecutor is not limited to investigating complaints from states, but "shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and nongovernmental organizations."⁷ A number of complaints were made to the prosecutor, many of them by the government of Yugoslavia and by nongovernmental organizations (NGOs).

The Final Report separates these complaints into two general categories. In the first category are complaints that "as the resort to force was illegal, all NATO actions were illegal[.]"⁸ Addressing these complaints would have required the Tribunal, designed as a court of the *jus in bello* and of international human rights law generally, to transform itself into a court of the *jus ad bellum*. The Final Report notes that "the legitimacy of the recourse to force by NATO is a subject before the International Court of Justice,"⁹—a more proper forum for that particular question. The Report also notes that "[t]he precise linkage between the *jus ad bellum* and the *jus in bello* is not completely resolved."¹⁰ The question of whether waging an aggressive war (as NATO did in this instance) is itself a crime was left open at Nürnberg, and has remained open since.¹¹ The Report thus "refrain[s] from assessing *jus ad bellum* issues," focusing "on whether or not individuals have committed serious

6. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) [hereinafter Security Council Resolution 808].

7. *Id.*; see also Final Report, *supra* note 3, ¶ 3.

8. Final Report, *supra* note 3, ¶ 2.

9. *Id.* ¶ 4.

10. *Id.* ¶ 32.

11. *Id.*

violations of international humanitarian law as assessed within the confines of the *jus in bello*.”¹²

Violations of the *jus in bello* constitute the second category of crimes of which NATO members were accused. Security Council Resolution 808, which created the ICTY, applies to “all parties and others concerned in the former Yugoslavia,” which includes the United States as well as the other NATO members.¹³ Resolution 808 is concerned with human rights violations, and refers to “obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949.”¹⁴ Although Resolution 808, unlike the Rome Statute,¹⁵ does not specifically mention environmental war crimes, the Final Report addresses environmental accusations as well.

Having decided that the ICTY would have jurisdiction to consider allegations of *jus in bello* violations by non-Balkan NATO members, the OTP then compiled a list of twenty-one targets in Yugoslavia that were allegedly bombed or otherwise attacked in a manner violating existing *jus in bello* norms.¹⁶ The OTP categorized the issues raised by the accusations under the headings of environmental damage, use of depleted uranium projectiles, use of cluster bombs, and improper target selection.¹⁷ The last category included the greatest number of incidents, and to some extent overlapped with the first.

B. Sources of International Law

In addressing these issues, the OTP considered both conventional and customary international law. Conventional international law consists of treaties and other international agreements. Of particular concern in this instance is Protocol I to the Geneva Conventions.¹⁸

Two of the NATO parties against whom allegations of war crimes had been made are not parties to Protocol I. The allegations against these countries, France and the United States, can only be considered under

12. *Id.* ¶ 34.

13. Security Council Resolution 808, *supra* note 6.

14. *Id.*

15. See U.N. DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183/9 (1998).

16. Final Report, *supra* note 3, ¶ 9.

17. *Id.* ¶¶ 14-39.

18. See *Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts*, 16 I.L.M. 1391, U.N. Doc. A/32/144 (1977) [hereinafter *Protocol I*]. A companion document, *Protocol II*, regulates armed conflicts which are not international in character, and would thus be applicable to the conduct of the Serb forces in Kosovo. 16 I.L.M. 1442, U.N. Doc. A/32/144 (1977).

customary international law, as can other allegations not covered by the Geneva regime.

In the absence of applicable conventional law, rules of international law may be derived from "international custom, as evidence of a general practice accepted as law."¹⁹ Customary law consists of those rules that, although not formalized by international agreement, are followed by states out of a sense of legal obligation (*opinio juris*). "General principles of law" have traditionally been seen as a third category of public international law.²⁰ However, general principles may also be viewed as "supplemental rules" or a "secondary source of law."²¹ Judicial decisions and the teachings of the most qualified publicists are merely a "subsidiary means for the determination of rules of law."²² In any event, judicial decisions, to the extent that a state actually observes them, *are* state practice, and thus form a basis for normative expectations.

A problem arises when considering what weight to give to the practice of the ICTY itself. The ICTY, like the International Court of Justice (ICJ) and other international "courts," is not a *stare decisis* court. Decisions of such courts are not mentioned as sources of international law in article 38(1) of the Statute of the ICJ except, perhaps, as a subset of "judicial decisions." Nonetheless, decisions of the ICJ and its predecessor, the Permanent Court of International Justice, are frequently treated as definitive statements of international law. There is a tendency to treat decisions of the ICTY similarly. The Final Report relies on two ICTY decisions²³ and one ICJ decision.²⁴

The Final Report itself does not enjoy similar status; it represents the deliberations of an adversarial entity rather than an impartial decision maker. While decisions of the ICTY tend to play an important role in the formation of normative expectations, the actions of the OTP, in and of

19. Stat. of the Int'l Court of Justice art. 38(1), 59 Stat. 1031, TS No. 993, 1976 U.N.Y.B. 1052 (1948). The statute is silent as to which nations are to be considered "civilized." If this term still has any meaning, it would probably include those nations which make good faith efforts to adhere to international human rights norms, while excluding those that engage in genocide, ethnic cleansing, rape, and torture.

20. *Id.*

21. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102(4), § 102 Reporter's Note 7 (1987).

22. Stat. of the Int'l Court of Justice, *supra* note 19.

23. See Final Report, *supra* note 3, ¶ 27 (citing Martić Rule 61 Hearing Decision, Trial Chamber I, Mar. 8, 1996, No. IT-95-11-1, available at <http://www.un.org/icty/ind-e.htm> (last visited July 15, 2000)); Final Report, *supra* note 3, ¶ 52 (citing the Kupreskić judgment, No. IT-95-16-T, Jan. 2000, available at <http://www.un.org/icty/kupreskić/trialc2/judgement/index.htm> (last visited July 15, 2000)).

24. See Final Report, *supra* note 3, ¶¶ 15, 26 (citing Legality of Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 242, ¶ 31).

themselves, do not. By controlling the types of cases which will be brought before the ICTY, however, the OTP plays an important role in determining the types of norms that will be formed. In this sense, the Final Report may provide important insight into the future formation and development of international human rights norms.

It seems reasonable to expect consistency from the OTP and, for that matter, from other international criminal tribunals confronted with similar situations. The Final Report shows that the OTP is concerned with maintaining such consistency.²⁵ This becomes particularly important when addressing NATO's use of cluster bombs.²⁶

C. *The Legal Regime Governing the Conduct of War*

The body of law relating to the conduct of war is somewhat artificially divided into the Hague and Geneva regimes—law arising from the Hague Conventions of 1899²⁷ and 1907²⁸ and law arising from the Geneva Conventions of 1949.²⁹ With regard to the Geneva Conventions of 1949, the OTP was concerned chiefly with Protocol I, a 1977 addition to the Geneva regime.³⁰ The Hague Conventions are not discussed specifically in the Final Report, but have become integrated into the body of customary international law.

The fundamental principle of law relating to the conduct of war, as set forth in the Declaration of St. Petersburg in 1868 and reiterated many times since, is that “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.”³¹ The 1899 and 1907 Hague Conventions provided that “the

25. See, e.g., Final Report, *supra* note 3, ¶5 (“[T]he committee has applied the same criteria to NATO activities that the Office of the Prosecutor [OTP] has applied to the activities of other actors . . . [including] allegations of crimes committed by Serb forces in Kosovo.”).

26. See *infra* notes 39–42 and accompanying text; see also Final Report, *supra* note 3, ¶27.

27. See Convention Respecting the Laws and Customs of War on Land, July 29, 1899, reprinted in JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100 (1918) [hereinafter 1899 Hague Convention].

28. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention].

29. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

30. See *Protocol I*, *supra* note 18.

31. William A. Wilcox, Jr., *Environmental Protection in Combat*, 17 S. ILL. U. L.J. 299, 303 (1993).

right of belligerents to adopt means of injuring the enemy is not unlimited.”³² This principle, along with the remainder of the Hague Conventions, has passed into the body of customary international law.³³ The Martens Clause of the 1907 Hague Convention, in turn, incorporates customary international law in order to fill any *lacunae* in the treaty regime governing state conduct during wartime.³⁴ Thus, the boundaries between the Hague Conventions and customary international law are fairly vague. Absent specific treaty provisions derogating from such customary law, the Hague Conventions form the core of a uniform and universally applicable body of customary international law relating to the conduct of war.

Customary international law does, however, allow derogation from certain norms in instances of military necessity.³⁵ The use of the military necessity exception is limited by the principles of proportionality, humanity, discrimination, and chivalry. Two of these principles, proportionality and discrimination, play a significant role in the Final Report.³⁶ Proportionality requires that the force used be proportional to the desired objective.³⁷ Discrimination requires that attackers distinguish military targets from civilian ones.³⁸

III. CATEGORIES OF ALLEGED VIOLATIONS

A. *Use of Depleted Uranium Projectiles and Cluster Bombs*

Accusations regarding NATO's use of depleted uranium projectiles and cluster bombs were given fairly short shrift by the OTP. NATO used depleted uranium projectiles and cluster bombs, but the use of these munitions is not illegal.³⁹ While the use of antipersonnel landmines may

32. 1899 Hague Convention, *supra* note 27, art. 22; 1907 Hague Convention, *supra* note 28, art. 22.

33. See Aaron Schwabach, *Environmental Damage Resulting from the NATO Military Action Against Yugoslavia*, 25 COLUM. J. ENV'T'L.L. 117 (2000).

34. 1907 Hague Convention, *supra* note 28, pmb1.

35. See, e.g., *United States v. List (Case 7)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 759, 1296 (1948). See generally W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 3 (1990).

36. See generally Final Report, *supra* note 3, ¶¶ 48-52, 69-89. Of the other two principles, chivalry relates to the use of subterfuge, while humanity requires that military forces avoid inflicting suffering, injury, or destruction beyond that actually necessary for the accomplishment of legitimate military objectives.

37. See, e.g., Florencio Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT'L.L. & POL'Y 793, 810 (1996).

38. See, *id.*

39. Depleted uranium tends to arouse a fair degree of anxiety whenever it is used, based largely on a misunderstanding of its nature. The enormous adverse publicity which it attracts would seem to outweigh its relatively limited benefits. The U.S. military, which used depleted

be illegal under customary international law, the extension of this prohibition to cluster bombs requires a double leap: First, it must be accepted that antipersonnel landmines are in fact illegal under customary international law, and second, it must be accepted that unexploded bomblets from cluster mines fall within the definition of "antipersonnel landmines." The OTP was unwilling to make this double leap. It also took pains to distinguish the allegations made against NATO from those made in the *Martic* case.⁴⁰ In *Martic*, a rocket with a cluster bomb warhead was fired into a civilian population center with the intent of terrorizing the population.⁴¹ Thus, the illegality of the action resulted from the nature of the target, rather than the weapon used. In contrast, NATO's cluster bombs were used against military targets.⁴²

B. *Damage to the Environment*

The OTP's discussion of damage to the environment provides the greatest disappointment. Several of NATO's attacks, most notably the attack on the petrochemical complex at Pancevo, resulted in the release of stored toxic chemicals into the air and water.⁴³ Although a report by the U.N. Environment Programs (UNEP) later found "that the Kosovo conflict has not caused an environmental catastrophe affecting the Balkans region as a whole," it did find that "pollution detected at some sites is serious and poses a threat to human health."⁴⁴ Some, or even most, of the pollution may have predated the NATO attacks.⁴⁵

The governing rules of conventional international law applied by the OTP were articles 35(3) and 55 of Protocol I.⁴⁶ Article 35(3) prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment."⁴⁷ Article 55 provides:

uranium munitions in Yugoslavia, has recently decided to phase out munitions made from highly toxic but much less controversial lead. See *Brass Hats Lead to Tungsten*, *ECONOMIST*, July 31, 1999, at 68.

40. See Final Report, *supra* note 3, ¶ 27 (citing Martić Rule 61 Hearing Decision, Trial Chamber I, Mar. 8, 1996, No. IT-95-11-1).

41. Martić Rule, *supra* note 23, ¶ 31; Final Report, *supra* note 3, ¶ 27.

42. Final Report, *supra* note 3, ¶ 27. If cluster bombs themselves were illegal, the nature of the target would, of course, be irrelevant.

43. For a full discussion of the attack on Pancevo and related issues, see Schwabach, *supra* note 33.

44. Final Report, *supra* note 3, ¶ 16 (quoting THE KOSOVO CONFLICT: CONSEQUENCES FOR THE ENVIRONMENT AND HUMAN SETTLEMENTS (1999), available at <http://www.grid.unep.ch/btf/final/index.html> (last visited July 15, 2000) [hereinafter UNEP Report]).

45. UNEP Report, *supra* note 44.

46. See Protocol I, *supra* note 18.

47. *Id.* art. 35(3).

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of 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.

Attacks against the natural environment by way of reprisals are prohibited.⁴⁸

The OTP recognized that neither France nor the United States has ratified Protocol I, but considered the possibility that article 55 in particular might reflect customary international law, despite the ICJ's contrary suggestion in *Legality of the Use of Nuclear Weapons*.⁴⁹

In applying the rules in articles 35(3) and 55, the OTP took an extremely stringent view of the level of harm required to trigger the rule. The Final Report notes that “‘widespread, long-term, and severe’ . . . is a triple, cumulative standard[.]”⁵⁰ This standard would not be met by “ordinary battlefield damage of the kind caused to France in World War I” because the harm “would need to be measured in years rather than months.”⁵¹

The OTP correctly found that NATO's actions did not rise to the level of criminal conduct. In reaching this conclusion, however, the OTP went much further than necessary in restricting the applicability of Protocol I. In the six decades between the “ordinary battlefield damage” caused to France in World War I and the promulgation of Protocol I, enormous advances were made in humanity's understanding of the environment. The OTP, however, is unwilling to find that the damage caused by oil spills and fires in the Gulf War met the Protocol I standard.⁵² In the case of the Gulf War, the harm is far greater, and the military utility many times less, than in the bombing of Pancevo. The OTP's interpretation would seem to leave the environmental provisions of Protocol I with almost no applicability.

The OTP's approach to Protocol I thus represents not a step forward toward greater accountability for environmental damage during wartime, but a step back to a pre-Gulf War standard. In reaching its conclusion, the OTP relies in part on article 8(2)(b)(iv) of the Statute of the

48. *Id.* art. 55.

49. Final Report, *supra* note 3, ¶ 15; Legality of Use of Nuclear Weapons, *supra* note 24, ¶ 31.

50. Final Report, *supra* note 3.

51. *Id.*; *cf.* Yuzon, *supra* note 37.

52. See Final Report, *supra* note 3, ¶ 15. The fires were set as reprisals, and thus were prohibited under article 55(2) of *Protocol I* even if they did not cause widespread, long-term, and severe damage. However, the OTP does not make this observation.

International Criminal Court,⁵³ making the astonishing declaration that the statute is “an authoritative indicator of evolving customary international law on this point.”⁵⁴ This solidarity among current and future international criminal tribunals is perhaps to be expected, but it has the unfortunate effect of excusing almost all environmental damage caused by war. A broader interpretation of Protocol I still would have exonerated NATO. The mere fact that it is difficult or impossible to distinguish damage caused by NATO’s actions from preexisting damage should have been sufficient.

The bombing of Pancevo was thus considered as simply another problem of target selection, and discussed under the customary international law principle of proportionality.

C. *Problems Relating to Target Selection*

The majority of the incidents resulting in complaints against NATO to the OTP were incidents in which questions of discrimination and/or proportionality were raised. The bombing of Pancevo, although resulting in no deaths, caused damage to the environment. In deciding that the damage caused was not disproportional to the military advantage gained, the OTP invoked the famous example of General Rendulic’s scorched earth policy in Norway. Tried at Nürnberg, Rendulic was acquitted of the charge of wanton devastation. His belief that there was a military necessity for his actions, even though incorrect, was not unreasonable and was a sufficient defense.⁵⁵ Proportionality is thus determined by a “reasonable military commander” standard.⁵⁶

Most of the other incidents complained of could be similarly dismissed. Five incidents, however, caused particular concern to the OTP: attacks on a passenger train, a refugee convoy, a radio and television station in Belgrade, the Chinese Embassy, and the village of Korisa. Each of these incidents received considerable media attention, mostly negative, at the time it occurred. Three of the targets—the

53. ROME STAT. ON THE INT’L CRIMINAL COURT, U.N. Doc. A/CONF. 183/9 (1998). At the time of this writing (August 2000), the statute has been signed by ninety-seven countries, including most of the NATO members (although not the United States). It has been ratified by only twelve: Belize, Fiji, France, Ghana, Iceland, Italy, Norway, San Marino, Senegal, Tajikistan, Trinidad & Tobago, and Venezuela. Of these twelve, only France and Italy were directly involved in the war with Yugoslavia. The statute will not enter into force until some time after it has been ratified or otherwise accepted by at least sixty countries. For more information, see *Rome Statute of the International Criminal Court as of 12 August 1999*, available at <http://www.un.org/law/icc/statute/status.htm> (last visited July 14, 2000).

54. Final Report, *supra* note 3, ¶ 21.

55. See *United States v. List*, *supra* note 35, at 1296.

56. See Final Report, *supra* note 3, ¶ 50; see also *id.* ¶ 28(b).

passenger train, the refugee convoy, and the Chinese Embassy—were destroyed more or less by accident, and thus present primarily problems of discrimination. The other two—the radio/television station and the village of Korisa—were targeted, and thus present primarily problems of proportionality.

1. Problems of Discrimination

Military commanders are required to direct combat operations against military objectives, and to take measures to ensure that targets attacked are in fact military objectives.⁵⁷ A military commander may violate this requirement by reckless or intentional conduct, but simple negligence will not suffice.

a. The Djakovica Convoy

NATO bombers destroyed civilian vehicles on several occasions, believing them to be military. In the most tragic of these incidents, between seventy and seventy-five ethnic Albanian refugees were killed when NATO planes attacked a convoy fleeing Djakovica.⁵⁸ The NATO forces were responding to reports that Serb forces were burning ethnic Albanian villages in the Djakovica region⁵⁹ and discontinued their attack as soon as they became aware of the presence of civilians.⁶⁰

The practice of NATO air forces throughout the war was to fly at altitudes in excess of 15,000 feet, out of reach of Yugoslavian anti-aircraft weaponry. Although this was not in itself reckless, it is difficult to determine the exact nature of a target on the ground from an altitude of three miles. The aircrews were thus forced to rely on instruments and intelligence reports in identifying targets. As a result of the Djakovica tragedy, NATO became “very, very cautious about striking objects moving on the roads,”⁶¹ and altered its rules of engagement to prohibit attacks on military vehicles when intermixed with civilian vehicles. In the case of Djakovica, the OTP found no difficulty in declaring that a reckless act had not occurred, especially in light of the immediate halt to the attack as soon as the presence of civilians was reported.

57. *See id.* ¶ 28.

58. *See id.* ¶¶ 63-70.

59. *Id.* ¶ 65.

60. *Id.* ¶ 69.

61. *Id.* ¶ 68.

b. The Grdelica Gorge Bridge

The destruction of the Leskovac railroad bridge at Grdelica Gorge, however, was more worrisome. Just after the NATO pilot charged with destroying the bridge fired his first missile, a train entered the bridge. At that point it was impossible to recall or disable the missile, which struck the train rather than the bridge. The pilot then circled around and fired a second missile at the other end of the bridge. At the time he fired the second missile, the bridge was obscured by smoke. The train had continued to move forward, and was struck by the second missile as well.⁶²

The OTP had no difficulty deciding that the damage caused by the first missile was an unavoidable accident.⁶³ While this conclusion seems reasonable, it also appears that the release of the second missile showed remarkably poor judgment.

In reaching its conclusion, the OTP considered both the explanation offered by NATO General Wesley Clark and a report by Ekkehard Wenz, a German critic of NATO's actions.⁶⁴ Clark testified that the pilot's only clue to the train's arrival was a very tiny point on a five-inch video screen. This seems to beg the question: If the pilot's instrumentation is inadequate, is it not reckless for him to fire at targets he can not actually see?

The OTP ignored this issue, however, focusing on the second bomb, which was fired into a cloud of smoke. The location of the train could not be determined either by eye or by instrument, but the pilot knew that the train was somewhere on the bridge. Of all of NATO's actions evaluated by the OTP, the firing of the second bomb comes the closest to recklessness, and the OTP committee found itself divided on the question.⁶⁵ Nonetheless, the OTP recommended no further investigation of the incident.⁶⁶

c. The Chinese Embassy

The July 5, 1999, destruction of the Chinese embassy in Belgrade differed from the preceding two incidents in that it directly injured a neutral country. The error occurred earlier in the target selection process than the errors at Djakovica and Grdelica Gorge. More than two months before the bombing, the building housing the embassy had been

62. *Id.* ¶ 59.

63. *See id.* ¶¶ 61-62.

64. *Id.*

65. *Id.* ¶ 62.

66. *Id.*

incorrectly identified as the Yugoslavian Federal Directorate for Supply and Procurement.⁶⁷ The target selection review process relied on incorrect information originally supplied by the United States National Imaging and Mapping Agency.⁶⁸ In an instance such as this, where the original information was incorrect, the review process served merely to revalidate the original error.⁶⁹

The bombing of the embassy killed three people and damaged relations between China and the NATO members, particularly between China and the United States. The United States Central Intelligence Agency (CIA) and the U.S. government apologized to the Chinese government and agreed to pay more than \$30 million in compensation.⁷⁰ One CIA employee was dismissed, and six were reprimanded.⁷¹

The Final Report recommends “that the OTP should not undertake an investigation concerning the bombing of the Chinese Embassy.”⁷² However, the reasoning behind this conclusion is somewhat disturbing. The OTP first determined that “the aircrew involved in the attack should not be assigned any responsibility for the fact that they were given the wrong target.”⁷³ This seems only fair. At 11:50 p.m., when the bombs were released, the Chinese Embassy would have been one large, darkened building among many, and its nature would not have been apparent even to a fairly close observer. In contrast to the situation at Gredelica Gorge, the true nature of the target did not become apparent immediately after launching the first bomb.

The Final Report also states, however, that “it is inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency.”⁷⁴ This is deeply disturbing, as it suggests that wherever the decision making process is sufficiently diffuse, individual responsibility vanishes. Although the Report notes approvingly that the “U.S. government also claims to have taken corrective actions in order to assign individual responsibility[,]”⁷⁵ it is difficult to see what incentive the United States has to pursue such a course. By “assigning individual responsibility,” the United States will expose its officials to possible

67. *See id.* ¶¶ 81-82.

68. *See id.* ¶ 83.

69. *See id.*

70. *Id.* ¶ 84.

71. *Id.*

72. *Id.* ¶ 85.

73. *Id.*

74. *Id.*

75. *Id.* ¶ 84.

criminal prosecutions. By keeping the process diffuse, the officials may continue to avoid responsibility.

There were valid political and diplomatic reasons to avoid a prosecution in the Chinese Embassy case. The two countries most directly involved, China and the United States, had already reached a diplomatic resolution.⁷⁶ Prosecution in the ICTY might have endangered that resolution, as well as reduced the incentive for states (as opposed to individuals) to take responsibility for similar actions in the future. In addition, as China was not a party to the conflict, the exacerbation of international tensions that would result from dragging the matter through the ICTY would probably outweigh any benefit.

The ICTY, of course, is not subject to the same jurisdictional limits as the ICJ, which can consider only actions brought by states. In one model of international relations, an international criminal tribunal should play the same role in reducing war crimes that a municipal criminal tribunal plays in reducing street crimes. When, for example, gang members assassinate a member of a rival gang and then pay compensation to the victim's family, municipal courts do not say, "Well, they've paid for the damages, so let's not bring criminal charges."

To extend this analogy to international criminal tribunals, however, would assume a degree of normativeness in international law that does not currently exist. Under present conditions, where the parties to a dispute are able to reach a mutually agreeable solution on their own, it seems preferable to allow them to do so, even if the ritual bloodletting on the part of the wrongdoer amounts to no more than the sacking of a solitary CIA scapegoat.

2. Problems of Proportionality

The attacks on the village of Korisa and on the Belgrade Radio and Television (RTV) station presented problems of proportionality. Each caused a relatively large number of civilian deaths in the course of achieving a relatively minor military advantage.

a. The Village of Korisa

The May 14, 1999, bombing of Korisa killed as many as eighty-seven civilians. At the time, it appears that NATO was unaware of the presence of civilians in Korisa, which was also the site of legitimate military targets.⁷⁷ The civilians who were killed may have been returning refugees, or may have been illegally confined by the

76. *See id.*

77. *See id.* ¶¶ 86-89.

Yugoslavian military as “human shields.”⁷⁸ The large number of civilian casualties seems to outweigh the military advantage gained; however, it does not appear that NATO intended to cause the casualties or was even aware that they might occur.

b. The RTV Station

The April 23, 1999, bombing of the Belgrade Radio and Television (RTV) station killed between ten and seventeen people. Although the RTV station was a civilian broadcasting station, military and civilian broadcasting systems in Yugoslavia were inextricably intertwined. Military communications were often routed through civilian systems, and vice versa.⁷⁹

The military advantage gained, however, was extremely slight. The communications functions of the RTV station were interrupted for only a few hours.⁸⁰ The attack came at 2:20 a.m.,⁸¹ a time when military communications traffic is probably less than in the daytime, and when civilian viewership is probably virtually nonexistent. The loss of a few pre-dawn hours of broadcasting hardly seems to justify the loss of ten or more human lives.

The destruction of the RTV station also involved an issue of discrimination. Unlike the issues in the Djakovica and Chinese Embassy bombings, and possibly the Grdelica Gorge bombing, the problem arose from a mistake of law rather than a mistake of fact. British, American, and NATO leaders announced that civilian media stations such as RTV were targeted because, in the words of British Prime Minister Tony Blair, the media “is the apparatus that keeps [Milosevic] in power and we are entirely justified . . . in damaging and taking on those targets.”⁸² Two weeks earlier, NATO had indicated that television stations would not be bombed if they included six hours of uncensored Western programming each day at specified hours.⁸³

The irony here, that the self-appointed defenders of freedom were threatening to destroy anyone who broadcast sentiments with which they disagreed, is rather stark. The OTP commented rather sharply on this: “At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a

78. *Id.* ¶ 89.

79. *Id.* ¶ 72.

80. *See id.* ¶ 78.

81. *Id.* ¶ 71.

82. *Id.* ¶ 74.

83. *Id.*

circumstance which does not, in and of itself, amount to a war crime[.]”⁸⁴ It concluded, however, that “NATO’s targeting of the [RTV] building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system[.]”⁸⁵ The OTP returned to contemplation of the proportionality problem after giving a mild warning that “if the attack on the [RTV] was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law.”⁸⁶

Killing ten people, let alone seventeen, to shut off a few hours of late-night television broadcasting seems disproportionate. The OTP solved this problem by introducing the idea that “[t]he proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident.”⁸⁷ Through this casualty-averaging method, the deaths resulting from the attack on the RTV station could “be seen as . . . part of an integrated attack against” the entire Yugoslav radio relay network.⁸⁸ As with many of the OTP’s other approaches in the Final Report, this extends further than necessary for this particular case. Casualty averaging seems to indicate that almost no single incident involving civilian deaths can ever be disproportionate unless it is part of a larger pattern of incidents involving excessive civilian deaths.

IV. CONCLUSIONS

The OTP’s Final Report seems to close the door to any prosecutions of NATO actors before the ICTY for acts committed during the Kosovo conflict. To this extent, it is to be applauded. NATO’s missteps during the war were acts of misfeasance rather than malfeasance, and in no way compare to the deliberate transgressions against international human rights norms by Yugoslavia before and during the war. The current prosecutor, Chief Prosecutor Carla del Ponte, has stated that investigating NATO’s possible wrongdoings is “not my priority, because I have inquiries about genocide, about bodies in mass graves.”⁸⁹

84. *Id.* ¶ 76. The OTP distinguished the situation in Yugoslavia from one in which radio broadcasts serve not to support the war effort but to incite the commission of genocide: “If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.” *Id.* ¶ 47.

85. *Id.* ¶ 76.

86. *Id.*

87. *Id.* ¶ 78; *see also id.* ¶ 52.

88. *Id.* ¶ 78.

89. Jerome Socolovsky, *NATO Bombing Conduct Probed*, ASSOCIATED PRESS ONLINE, Dec. 28, 1999, available at 1999 WL 28153769; *see also* Trueheart, *supra* note 5, at A-20.

Measured against the scale of the atrocities which have occurred within the last decade in the former Yugoslavia, NATO's errors in the Kosovo conflict were small. NATO committed no "war crimes" or violations of the *jus in bello* during its bombing campaign.

The continuing presence of NATO and Russian troops presents the ongoing possibility of violations of international criminal law. In the most appalling example, an eleven-year-old Kosovar Albanian girl, Meritas Shabiu, was raped, tortured, and murdered in January 2000. A U.S. Army Staff Sergeant, Frank Ronghi, has been arrested for the crime and his trial before a U.S. military court began on July 31, 2000.⁹⁰ Such a crime, committed by a soldier of an occupying force against a civilian in the territory of the former Yugoslavia, would be within the mandate of Resolution 808.

Several points in the Final Report, though, suggest that the ICTY is willing to consider only the most serious violations of international law. The OTP's report does not provide truly satisfactory resolutions to the issues presented by the second bomb at Grdelica Gorge, the Pancevo bombing, the Chinese Embassy bombing, and the destruction of the RTV station.

The firing of the second bomb at the Grdelica Gorge bridge would certainly be considered "reckless" by municipal criminal and tort law standards. The OTP's reading of Protocol I also sets an extremely high standard for environmental damage caused by war. While it seems evident, especially in light of the UNEP task force report,⁹¹ that NATO's action was not illegal, it seems almost equally evident that Iraq's action in setting fire to the oil wells of Kuwait *was* an environmental crime.⁹² The OTP, however, seems unwilling to entertain even this possibility.⁹³

The Final Report also contains two disturbing ideas. The first, arising in the context of the Chinese Embassy bombing, is that individual government officials can avoid criminal liability if the decision making process is sufficiently decentralized. The U.S. government presented two reasons for the accidental targeting of the embassy: "The dog ate

90. See *American Soldier to Be Tried for Kosovo Murder*, REUTERS NEWSWIRE, June 26, 2000, available at http://dailynews.yahoo.com/h/nm/20000626/ts/soldier_trial_dc_1.html (last visited July 6, 2000). On August 1, 2000, after pleading guilty, Ronghi was sentenced to life in prison without the possibility of parole. See *U.S. Peacekeeper Gets Life in Prison: Slain Girl's Dad Says "We Have Seen Justice Work"*, CHI. TRIB., Aug. 2, 2000, at 7, available at 2000 WL 3692616.

91. UNEP Report, *supra* note 44.

92. See, e.g., S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/687 (1991) (imposing liability on Iraq for damages, including environmental harm, inflicted on Kuwait during the Gulf War).

93. See *supra* note 52 and accompanying text.

our homework” (or, more precisely, “we were using the old map”) and “nobody’s in charge here.” The first excuse is absurd. Surely few professors would be inclined to sympathize with a student who failed to hand in an assignment on time because he or she was relying on the previous year’s syllabus. The second excuse encourages governments to disperse decision making functions to a sufficient degree to allow each official to maintain plausible deniability, without simultaneously providing an incentive to develop safeguards against mistakes such as the targeting of the Chinese Embassy.

The second disturbing idea embedded in the Final Report is the idea of casualty-averaging. By excusing the high civilian death toll from the RTV bombing on the grounds that the overall loss of life from attacks on communications facilities was low, the OTP seems to be disregarding a fundamental principle of international human rights law: that human lives have value not only in the aggregate but also in the individual. The murder of Merite Shabiu was no less a crime simply because no others lost their lives. If the loss of life at the RTV station was disproportionate to the military advantage gained, it was disproportionate even if no lives were lost at other television stations attacked by NATO.⁹⁴ Article 8(2)(b)(iv) of the Rome Statute, which the OTP considers “an authoritative indicator of evolving customary international law”⁹⁵ (at least in some areas), prohibits “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁹⁶

“An attack” would seem to mean a single act against a single objective. Any other definition creates a slippery slope ending in the conclusion that, since the loss of life during the war as a whole was not disproportionately high, no incident in the war violated the principle of proportionality. The reverse would also be true: If the civilian casualties in the war as a whole were disproportionately high, *every* action taken by the casualty-causing side during the war would be a war crime, which is an equally absurd result.

None of the NATO actions evaluated by the OTP should form the basis for a war crimes prosecution. The Final Report, however, introduces a great deal of legal reasoning going far beyond that necessary to support its conclusion. The decade since the Gulf War has seen a tremendous flowering of theories regarding the increasing protection of

94. See ROME STAT., *supra* note 53.

95. Final Report, *supra* note 3, ¶ 21; see also *supra* note 54.

96. ROME STAT., *supra* note 53, art. 8(2)(b)(iv).

civilians, civilian objects, and the environment during wartime. The Final Report takes a more traditional, restrictive view of the law in this area, which may be indicative of future trends in the field.