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## NATO, the War over Kosovo, and the ICTY Investigation

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# NATO, THE WAR OVER KOSOVO, AND THE ICTY INVESTIGATION

ANDREAS LAURSEN\*

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## INTRODUCTION

The age-old maxim, *inter arma silent leges* ("in times of war, the laws are silent") often applies to situations in which states perceive their vital interests to be involved,<sup>1</sup> and has found a contemporary expression in Dean Acheson's famous utterance that "[t]he survival

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1. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 1 (1974) (citing the Cuban missile crisis as an example of such a situation where vital interests of the state were threatened).

of states is not a matter of law.”<sup>2</sup> Despite this acknowledgement, states traditionally have not been able to escape community judgment, especially in a variety of non-judicial fora,<sup>3</sup> when using force for self-defense or national survival.

In the twenty-first century, the legal merits of a state's decision to use force (*jus ad bellum*) and the actual implementation of such a decision (*jus in bello*) are likely to be of concern to “third parties” other than the “persuasive,” but rather ineffectual college of international lawyers.<sup>4</sup> Today, judicial bodies are increasingly likely to scrutinize decisions to resort to force and other forms of hostilities. Among recent international incidents involving the use of force, the NATO bombing campaign against the Federal Republic of Yugoslavia (“F.R.Y.”), Operation Allied Force (“OAF”), has been and continues to be subject to scrutiny in a variety of international fora, including international courts.<sup>5</sup>

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2. Dean Acheson, *Remarks*, 57 PROC. AM. SOCT'Y INT'L L. 14 (1963) (“The propriety of the Cuban quarantine [was] not a legal issue. The power, position and prestige of the United States had been challenged by another state; the law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.”).

3. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 138 (1995) (discussing international scrutiny of the defensive measures taken by states, focusing on armed force even when used in self-defense).

4. See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 121-22 (1986) (detailing the importance of third party judgments in the appraisal of the legitimacy of a state's decision to use armed force); see also Oscar Schachter, *The Invisible College of International Lawyers*, 72 N.W. U. L. REV. 217, 217-218 (1977) (discussing the role of international lawyers through the metaphor of an invisible college). At its ninety-fifth annual meeting, the American Society of International Law reviewed the past, present, and future status of an “increasingly visible college.” American Society of Int'l Law, 95th Annual Meeting, *The Visible College of International Law*, available at <http://www.asil.org/am2001.htm> (last visited Jan. 25, 2002). Among the condemnations of NATO from “world public opinion” is “The Commission of Inquiry to Investigate U.S./NATO War Crimes against the People of Yugoslavia.” On June 12, 2000, the Commission found political and military leaders from NATO guilty of war crimes. *Id.* The chief prosecutor was the former U.S. Attorney General and founder of the International Action Center, Ramsey Clark. See International Action Center, *War Crimes Tribunal Finds U.S. and NATO Guilty* (discussing the final judgment of the commission of inquiry to investigate U.S. and NATO war crimes against the citizens of Yugoslavia), at <http://www.iacenter.org/warcrimes/wct2000.htm> (last modified June 12, 2000).

5. See, e.g., *infra* notes 10-20 and accompanying text (analyzing the depth of

NATO's OAF campaign against the F.R.Y. began on March 24, 1999 and was suspended on June 10, 1999.<sup>6</sup> During this period, NATO planes made approximately 38,000 sorties, of which around one-third were actual attack missions, and delivered 23,614 pieces, totaling around 6,000 tons of munitions. Approximately thirty-five percent of these were Precision Guided Munitions.<sup>7</sup> Although other figures have been raised, there appears to be general agreement that approximately five hundred Yugoslav civilians were killed during the seventy-eight day campaign.<sup>8</sup> Of these, two-thirds were killed in

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judicial scrutiny of the NATO campaign in Kosovo).

6. See *NATO—Statement by the Secretary General on Suspension of Air Operations*, in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974-1999* 309 (Heike Krieger ed., 2001) (announcing the suspension of NATO's air operations in Yugoslavia). Subsequently, General Clark, the NATO commander, issued the order to suspend the bombing on June 10, 1999, at 3:36 PM. See WESLEY CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO AND THE FUTURE OF COMBAT* 373 (2001) (providing a narrative of General Clark's order to end the air operations).

7. See NATO Official Report, *Kosovo One Year On: The Conduct of the Air Campaign* [hereinafter NATO Report] (discussing the selection of targets and the combat sorties flown by Allied Forces), available at <http://www.nato.int/kosovo/repo2000/conduct.htm> (last modified Oct. 30, 2000); W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489 (2001) (noting the percentages for precision guided munitions in Yugoslavia). The bombing campaign was expanded during its operation from the original fifty-one targets and 366 aircraft to just short of one thousand targets and around nine hundred aircraft. CLARK, *supra* note 6, at 425.

8. See HUMAN RIGHTS WATCH, *CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 5* (2000) [hereinafter HRW REPORT] (estimating that between 489 and 528 civilians were killed during the bombing campaign); see also NATO Report, *supra* note 7 (quoting and adopting the Human Rights Watch's estimate of casualties). In a memorandum to the British Parliament, House of Commons, the Serbian Information Center estimated that 1,500 civilians were killed and 8,000 injured, while the Serbian Unity Congress "flatly refute[d] the figure of 500 civilians killed" and estimated the real number to be 2.193 casualties. See Select Committee on Foreign Affairs, *Memorandum Submitted by Serbian Information*, app. 27, para. 9 (discussing the extent of the damage caused by armed intervention), available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/28ap41.html> (last visited Jan. 24, 2002); Select Committee on Foreign Affairs, *Memorandum submitted by Serbian Unity Congress*, app. 38, para. 15 (refuting the estimates given by NATO and Humans Rights Watch of civilians killed during the bombing of Yugoslavia), available at <http://www.parliament.the-stationary-office.cc.uk/cgi-bin/htm> (last visited Jan. 24, 2002).

only twelve incidents.<sup>9</sup>

Several organizations and international bodies have severely criticized NATO's bombing campaign. Most prominently, at least among judicial investigations, is the case at the International Court of Justice ("I.C.J."), assessing the legality of OAF.<sup>10</sup> On April 29, 1999,

9. See HRW REPORT, *supra* note 8, at 5 (concluding that "twelve incidents accounted for 303 to 352 civilian deaths").

10. The issue of humanitarian intervention has generated an overwhelming amount of literature: See *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824, 824-862 (1999) (discussing the topic of humanitarian intervention and including contributions from Louis Henkin, Richard Falk, and W. Michael Reisman); Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 14-20 (1999) (discussing the threat or use of force by NATO without Security Council authorization); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 24-27 (1999) (arguing that NATO's actions in Yugoslavia are illegal under international law but suggesting that under certain circumstances, a group of states may be able to use force without U.N. authorization in order to prevent large scale atrocities); Antonio Cassese, *A Follow Up: Forcible Humanitarian Countermeasures and Opinion Necessitatis*, 10 EUR. J. INT'L L. 791, 792-799 (1999) (examining the views expressed by states during and since the Kosovo conflict); *Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000*, 49 INT'L & COMP. L.Q. 876, 877-943 (2000) (compiling the views of Ian Brownlie, Christine Chinkin, Christopher Greenwood, and Vaughan Lowe, all of whom presented memoranda to the British House of Commons regarding the NATO action in Yugoslavia); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001) 7-20 (analyzing the use of war to achieve humanitarian goals); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000) 242-285 (discussing the limits of humanitarian in Kosovo). See generally THE DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS* (DUPI 1999) (reporting on the legal and political aspects of intervention in situations where states cause conflicts which have humanitarian consequences affecting the whole international community); THE [DUTCH] ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, *ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW, HUMANITARIAN INTERVENTION* (2000) (discussing generally humanitarian intervention and specifically the policy goals of the Netherlands); THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* [hereinafter *THE KOSOVO REPORT*] (2000) (reporting on the armed conflict and the humanitarian aspects of the conflict in Kosovo); THE COUNCIL ON FOREIGN RELATIONS, *HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE: THREE OPTIONS PRESENTED AS MEMORANDA TO THE PRESIDENT* (2000) (suggesting appropriate United States policy for humanitarian intervention).

the F.R.Y. instituted proceedings before the I.C.J. against ten NATO member states, accusing them of violating the international legal obligation not to use force against another state.<sup>11</sup> The F.R.Y. also filed a request for interim measures of protection, asking the Court to order a halt to the bombing. On June 2, 1999, the Court refused to issue such an order because it found that it lacked *prima facie* jurisdiction in eight of the cases.<sup>12</sup> With regard to two of the cases, against Spain and the United States, the Court held that it manifestly lacked jurisdiction, and these two cases were removed from the list.<sup>13</sup> The remaining eight states have subsequently presented their arguments concerning the jurisdictional issue to the Court. The F.R.Y. was originally given until April 5, 2001 to respond, but this deadline has since been extended until April 5, 2002.<sup>14</sup>

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11. See, e.g., Case Concerning Legality of Use of Force (Yugoslavia v. U.K.), 1999 I.C.J. (June 2), available at I.C.J. 1999 WL 1693064; Case Concerning Legality of Use of Force (Yugoslavia v. Belg.) 1999 I.C.J. (June 2), available at 1999 WL 1693067; Case Concerning Legality of Use of Force (Yugoslavia v. Can.), 1999 I.C.J. (June 2), available at 1999 WL 1693068; Case Concerning Legality of Use of Force (Yugoslavia v. Neth.), 1999 I.C.J. (June 2), available at 1999 WL 1693069; Case Concerning Legality of Use of Force (Yugoslavia v. Port.), 1999 I.C.J. (June 2), available at 1999 WL 1693070; Case Concerning Legality of Use of Force (Yugoslavia v. Spain), 1999 I.C.J. (June 2), available at 1999 WL 1693071; Case Concerning Legality of Use of Force (Yugoslavia v. Fr.), 1999 I.C.J. (June 2), available at 1999 WL 1693250; Case Concerning Legality of Use of Force (Yugoslavia v. Italy), 1999 I.C.J. (June 2), available at 1999 WL 1693066; Case Concerning Legality of Use of Force (Yugoslavia v. U.S.), 1999 I.C.J. (June 2), available at 1999 WL 1693065; Case Concerning Legality of Use of Force (Yugoslavia v. F.R.G.), 1999 I.C.J. (June 2), available at 1999 WL 1693596; (identifying Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, the United Kingdom, and the United States as the states which the F.R.Y. has instituted actions against).

12. See JIANMING SHEN, *The I.C.J.'s Jurisdiction, in THE LEGALITY TO USE FORCE CASES 480-95* (Sienho Yee & Tieya Wang eds., 2001) (critiquing the I.C.J.'s decision).

13. See Case Concerning the Legality of Use of Force (Yugoslavia v. Spain), 1999 I.C.J. (June 2), available at 1999 WL 1693071; Case Concerning the Legality of Use of Force (Yugoslavia v. U.S.), 1999 I.C.J. (June 2), available at 1999 WL 1693065.

14. Considering the change of government in the F.R.Y., the future of the cases is at present unclear. See *Yugoslav Sees Closer Ties To U.S. Soon*, WASH. POST, Nov. 6, 2000, at A31 (stating that the new leadership in the F.R.Y. will likely foster stronger ties with Europe and the United States), available at 2000 WL 25426539.

In a separate case, several family members of individuals killed during NATO's attack on the Serbian television station ("RTS") filed a separate claim entitled *Bankovic and Others v. The Contracting States*,<sup>15</sup> at the European Court of Human Rights ("ECHR") in Strasbourg.

In addition to many other judicial initiatives,<sup>16</sup> there were attempts to investigate and prosecute NATO leaders and personnel at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). The Office of the Prosecution ("OTP") at the ICTY received several requests to investigate NATO conduct during Operation Allied Force. Among these, was a request sent to Chief Prosecutor, Louise Arbour, from Professor Michael Mandel of Osgoode Hall Law School, on behalf of a number of international lawyers.<sup>17</sup> On May 14, 1999, the chief prosecutor decided to establish

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15. The European Court of Human Rights received the complaint, Application no. 52207/99, on October 21, 1999. See *infra* notes 132-164 and accompanying text (analyzing the case before the ECHR). See Nicolas Rufford & Emily Milich, *Families to Sue Britain over Belgrade Blitz*, THE SUNDAY TIMES (London), July 16, 2000, at 32 (summarizing the details of the suit); *Serbs Take Britain to Court over NATO Bombs*, THE ELECTRONIC TELEGRAPH, July 17, 2000 (discussing the families' claim that the attack on the television station violated international law), available at [www.telegraph.co.uk](http://www.telegraph.co.uk) (last visited Jan. 24, 2002); The Belgrade Centre for Human Rights, *Press Briefing: Bankovic v. NATO States*, available at [www.bgcentar.org.yu](http://www.bgcentar.org.yu) (last visited Oct. 11, 2000).

16. Among other initiatives, a Dutch organization, the Permanent Commission with Regard to (Dutch) War Crimes Against Yugoslavia, has attempted to use Dutch courts to force the Dutch government to cease participation in Operation Allied Force. N.M.P. Steijnen, *The First Experiences with Legal Action Against NATO War Crimes Before Domestic Courts in the Netherlands*, 51 REV. OF INT'L AFF. 45, 45-48 (2000). In September 2000, NATO heads of governments were "prosecuted" and "convicted" at the District Court in Belgrade. See *Hearing at Trial of NATO Leaders Starts*, TANJUG, Sept. 18, 2000 (discussing the trial of NATO leaders held in absentia), available at <http://www.kosovo.com/news/kfn00918.html> (last visited Jan. 24, 2002). A number of the accused, including SACEUR (Supreme Allied Commander Europe) General Wesley Clark, were sentenced to twenty years in prison in absentia. *Id.*

17. See *Notice of the Existence of Information Concerning Serious Violations of International Humanitarian Law Within the Jurisdiction of the Tribunal; Request that the Prosecutor Investigate Named Individuals for Violations of International Humanitarian Law and Prepare Indictments Against Them Pursuant to Articles 18.1 and 18.4 of the Tribunal Statute*, May 6, 1999 (requesting an investigation by the Tribunal), available at <http://counterpunch.org/complaint.html> (last visited Jan. 24, 2002). Louise Arbour was professor of law at Osgoode Hall

a Committee to evaluate the accusations against NATO and to advise her of the need for a formal investigation.<sup>18</sup> The Committee delivered its report at the end of May 2000.<sup>19</sup> On June 2, 2000, Carla del Ponte, Arbour's successor, informed the U.N. Security Council that she intended to follow the recommendations in the Report to not initiate a formal investigation.<sup>20</sup>

The OTP subsequently made its report public ("OTP Report").<sup>21</sup> The OTP Report deals with *jus in bello* questions, such as damage to the environment in the F.R.Y., the use of depleted uranium and cluster bombs, and the question of target selection.<sup>22</sup> In addition, the OTP Report subjects five individual attacks to specific evaluation.<sup>23</sup> Two prominent non-governmental organizations ("NGOs"), Amnesty International<sup>24</sup> and Human Rights Watch,<sup>25</sup> also issued

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Law School before becoming a judge. She was subsequently appointed chief prosecutor at the ICTY.

18. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 3 [hereinafter *OTP Report*] (setting forth the Tribunal's statute allowing the prosecutor to initiate investigations and the chief prosecutor's May 14, 1999 decision to establish a committee to assess the allegations against NATO), available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Jan. 24, 2002).

19. See *id.* (recommending "that no investigation be commenced by the OTP in relation to the NATO bombing campaign or incidents occurring during the campaign").

20. See Charles Trueheart, *U.N. Tribunal Rejects Calls for Probe of NATO; No Kosovo War Crimes Found*, WASH. POST, June 3, 2000, at A9 (reporting on the chief prosecutor's decision to follow the committee's recommendation not to initiate an investigation), available at A092000 WL 19612391.

21. See *OTP Report*, *supra* note 18.

22. See *id.* paras. 14-27 (analyzing whether environmental damage and the use of certain types of weapons constituted war crimes).

23. See *id.* paras. 57-89. The Report briefly discusses the linkage between the law concerning recourse to force and the law concerning how force is used. *Id.* paras. 30-34.

24. See AMNESTY INTERNATIONAL, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000) [hereinafter AMNESTY REPORT] (providing case studies and background information on the violations of the laws of war during Operation Allied Force).

25. See HRW REPORT, *supra* note 8, at 3-6 (providing case studies and background on the crisis in Kosovo).



substantial reports dealing with the conduct of OAF.

Although comparable in subject matter, the OTP Report can reasonably be identified as the most "important" of the three.<sup>26</sup> The possible conclusions of the OTP Report would have had further reaching consequences for the investigated states, the ICTY, international humanitarian law, and international criminal law. Viewing the mandates of the three organizations can briefly highlight the qualitative difference, not in legal wisdom but in potential reach and influence. Human Rights Watch's mandate is to investigate and expose human rights violations and hold abusers accountable.<sup>27</sup> Amnesty International works broadly to promote adherence to the Universal Declaration of Human Rights and other internationally recognized human rights instruments.<sup>28</sup> Their most formidable "weapons" are information campaigns. Juxtaposed to these mandates, the ICTY has the authority to prosecute individuals who have committed serious violations of international humanitarian law in the former Yugoslavia.<sup>29</sup> States are obligated to cooperate with the

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26. Indeed, a number of comparisons have been made among the three reports. This is partly due to the fact that they were issued more or less at the same time but primarily due to the differing conclusions reached by the reports. Among its general conclusions, Amnesty International stated that "[i]n one instance, the attack on the headquarters of the Serbian state radio and television (RTS), NATO launched a direct attack on a civilian object, killing sixteen civilians. Such attack breached article 52 (I) of Protocol I and therefore constitutes a war crime." AMNESTY REPORT, *supra* note 24, at 25. In contrast, Human Rights Watch found "no evidence of war crimes. The investigation did conclude that NATO violated international humanitarian law." HRW REPORT, *supra* note 8, at 3. Finally, the OTP Report concluded that the "[s]election of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified." OTP Report, *supra* note 18, para. 90.

27. See generally Human Rights Watch, *Who We Are, What We Do* (setting forth the mission and activities of the Human Rights Watch Organization), at <http://www.hrw.org/about/whoweare> (last visited Jan. 31, 2002).

28. See generally Amnesty International, *Statute of Amnesty International* (establishing the scope and mission of the organization), available at <http://web.amnesty.org/weg/aboutai> (last visited Jan. 31, 2002).

29. See STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 1 (2000) [hereinafter TRIBUNAL STATUTE] (setting forth the competence of the International Tribunal), available at <http://www.un.org/icty/basic/statute.stat2000.htm> (last visited Feb. 16, 2002).

ICTY in connection with the investigations and prosecutions.<sup>30</sup>

The differences in the mandates and authority between the two NGO's and the ICTY have a number of implications, especially with regard to who is held responsible.<sup>31</sup> Moreover, the three organizations differ in the way each may be subject to varying degrees of political or other extra-judicial influence that may affect the conclusions of their reports.

A fundamental difference between the mandates is found in Article One of the ICTY Statute, which enables the tribunal to prosecute individuals.<sup>32</sup> As Benvenuti puts it,

State responsibility has a wide scope because it includes all violations of [international humanitarian law] and, furthermore, it has a more "objective" character; while individual responsibility has a narrower scope because it includes only the "grave breaches" of [international humanitarian law] and, furthermore, in this regard the role of the subjective element of the conduct is much more relevant.<sup>33</sup>

With regard to the latter, the OTP report notes that "[t]he *mens rea* for the offence is intention or recklessness, not simple negligence."<sup>34</sup> It is therefore probable that the OTP report may conclude that prosecution cannot be recommended because the subjective element is judged to be negligence and therefore insufficient for prosecution, even if a certain rule is considered to have been violated.

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30. See *id.* art. 29 (mandating co-operation by states with the tribunal).

31. See *infra* notes 33-34 and accompanying text (contrasting the ICTY's power to prosecute individuals with the mission and scope of the NGOs).

32. See TRIBUNAL STATUTE, *supra* note 29, art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . .").

33. Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 526 (2001).

34. *OTP Report*, *supra* note 18, para. 28. See also International Committee of the Red Cross, Commentaries, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 3474, [hereinafter *ICRC API Commentary*] (discussing the need for wrongful intent or recklessness for prosecution), available at <http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=30&Expand=5#5> (last visited Feb. 18, 2002).

Finally, it is worthwhile to briefly consider the differences between the NGOs and the ICTY with regard to the potential for political pressure. It is hardly fair to randomly accuse the OTP of succumbing to political pressure, whether in the present case of the NATO investigation or in any other case. On the other hand, one ought not discount completely the political environment in which the ICTY operates.<sup>35</sup> Three of the states investigated by the OTP are permanent members of the United Nations Security Council and have, in spite of the Tribunal's formal independence, significant influence on its future.<sup>36</sup> The fact that NATO member states constitute the core of the Stabilization Force ("SFOR") in Bosnia, and subsequently the force in Kosovo ("KFOR"), means that the force being investigated is the same force upon which the OTP and the Tribunal is heavily dependent for arresting fugitives from previous Balkan wars. In any case, it would be naive to completely discount the political reality of the Tribunal.

One example is the initial indictment against Slobodan Milosevic, which was completed in approximately fifty days during the conflict between NATO and the F.R.Y. in 1999.<sup>37</sup> Although some Western observers viewed the indictment as a possible impediment to negotiations between NATO and Milosevic, it is somehow difficult to imagine that the indictment just happened to be finalized at that particular time, that it just happened to be limited in content to the conflict in Kosovo, and that it did not include the far more substantial allegations related to Croatia and Bosnia.<sup>38</sup>

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35. See generally *U.N. Prosecutor Defends Her NATO Decision*, NAT'L POST, June 14, 2000, at A11 (summarizing the criticisms of the chief prosecutor's decision not to initiate a criminal investigation into OAF), available at A112000 WL 22979429.

36. See *United Nations Security Council Members* (listing the United States, France, and the United Kingdom as permanent members of the U.N. Security Council), at <http://www.un.org/Docs/scinfo.htm#MEMBERS> (last visited Feb. 16, 2002).

37. See Indictment of Slobodan Milosevic, IT-99-37 (May 27, 1999). See also Marlise Simons, *Milosevic to Face Charges Covering Three Wars in Balkans*, N.Y. TIMES, Aug. 31, 2001 (discussing the additional charges issued against Milosevic including genocide in the massacres in Bosnia and accusations of war crimes in Croatia).

38. Louise Arbour, however, maintains that "nobody gave us this case." MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 119 (2000). In

The focus of the present essay is an analysis of the treatment of the NATO action by the OTP Report. After some brief general remarks about the Report, this essay discusses the following three issues. First, it discusses use of cluster bombs in the Yugoslavian conflict. Next, the essay discusses two specific incidents that occurred during NATO's bombing campaign: the bombing of the RTS in Belgrade and the attack on a refugee convoy near Djakovica. In discussing these incidents, the essay refers to the observations by Amnesty International, Human Rights Watch, and others.

A number of additional issues covered by the OTP Report will not be addressed: Hence, the essay does not discuss, for example, whether the potential damage to the environment violated the laws of armed conflict.<sup>39</sup> Furthermore, this essay will not address a number of additional issues related to OAF, including deliberations in NATO concerning the use of electronic or cyber warfare and the question about a possible naval blockade of the Montenegrin coast in order to cut off the oil supply to the F.R.Y.

## I. GENERAL REMARKS ON THE OTP REPORT

Following the publication of the OTP Report, the issue became one of authorship.<sup>40</sup> Substantial parts of the Report's discussion of the principles of warfare were drawn from an article written by

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contrast, Simon Chesterman finds that "political considerations appeared to lie behind the decision to indict President Milosevic" during the NATO air campaign. Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute*, in *CIVILIANS IN WAR* 151 (Simon Chesterman ed., 2001).

39. Soon after the termination of Operation Allied Force, the Balkans Task Force (jointly set up by the United Nations Environmental Programme and the United Nations Centre for Human Settlements (Habitat)) issued a report dealing with the environmental consequences of the Kosovo conflict. See Balkan Task Force, *The Kosovo Conflict: Consequences for the Environment & Human Settlements* (discussing the state of the environment and human settlements in the Federal Republic of Yugoslavia before and after the conflict), available at <http://www.grid.unep.ch/btf/final/index.html> (last visited Jan. 24, 2002).

40. See Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. INT'L L. 531, 531-32 (2001) ("The members of this expert group have remained anonymous, thus inviting educated guesses as to who is behind the report of the group.").

William Fenrick, Senior Legal Advisor at the OTP.<sup>41</sup> One might expect acknowledgement of this source, even if the OTP Report is not an academic work. It is, however, hard to find anything fundamentally wrong with such an approach. Indeed, one would expect that the considerations of principles related to warfare and the protection of civilians are universally applicable. Even so, the missing acknowledgement is surprising. Considering the importance of the OTP Report, one might also expect that resources are on hand to research and write a new report, thus avoiding the "cut and paste" method.<sup>42</sup>

Whether due to the "cut and paste" approach or not, the OTP Report is incoherent.<sup>43</sup> Among other things, one may inquire why, considering the Report is not an academic work, we are treated to some of the criticism of the definition of a military target found in the Additional Protocol I (1977) to the 1949 Geneva Conventions ("API"). This is particularly puzzling when the discussion is very brief, and ends with the conclusion that the API definition is "the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks."<sup>44</sup> One may also ask why the NATO campaign has to be considered in the context of aerial bombardments during the Second World War.<sup>45</sup>

Furthermore, the Report exhibits a lack of consistency.<sup>46</sup> At one

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41. See generally William J. Fenrick, *Attacking the Enemy Civilians as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539 (1997) (detailing the various principles of warfare).

42. It is, in this context, somewhat remarkable and no doubt a sign of the times that a private organization such as Human Rights Watch apparently is able to invest more resources in the investigation of the occurrences in the F.R.Y. than is the OTP.

43. See *infra* notes 50-53 and accompanying text (stating that the OTP Report lacks consistency and questioning the report's research methodology and factual conclusions).

44. *OTP Report*, *supra* note 18, paras. 40-42.

45. See *id.* para. 43 (comparing the NATO campaign to air attacks during WWII). The lacking relevance of a World War II perspective is further emphasized by the Report itself when it states that "technology, law and the public consensus of what is acceptable, at least in demonstrably limited conflicts, had evolved by the time of the 1990-91 Gulf Conflict." *Id.* para. 44.

46. See *infra* notes 51-52 and accompanying text.

point, it states that sixteen persons were killed during the attack on RTS, but states elsewhere that "between [ten] and [seventeen] people are estimated to have been killed."<sup>47</sup> Similarly, the Report states that "[w]hether the media constitutes a legitimate target group is a debatable issue," but then finds that "the media as such is not a traditional target category."<sup>48</sup> These few examples illustrate a more general failure of the Report to draw firm and clear conclusions.

Finally, one may question the proficiency and comprehensiveness of the research into factual circumstances of the incidents that the Report evaluates.<sup>49</sup> In the introductory section, the Report lists the materials that have been consulted and remarks that "the information available was adequate for making a preliminary assessment of incidents in which civilians were killed or injured."<sup>50</sup> According to the Report, the F.R.Y. was not visited or asked to provide information because no official channels of communication existed.<sup>51</sup> The subsequent sentence is somewhat surprising and contradictory when it states that the F.R.Y. "submitted a substantial amount of material."<sup>52</sup> How was this possible if no channels of communication existed between the OTP and the F.R.Y.? The Report further states that "very little information" was accessible concerning "communication targets," such as the RTS.<sup>53</sup> It is difficult to understand how the Report can reconcile these findings with the statement that the amount of information was "adequate."

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47. *Id.* paras. 9, 71.

48. *Id.* paras. 47, 55.

49. *See generally id.* (noting that the committee drafters considered, among other sources, public NATO documents, I.C.J. documents, scholarly studies, and newspaper reports in drafting the OTP Report).

50. *Id.* paras. 6-7 (stating that the committee relied solely on public domain sources and documents in conducting research for the OTP Report).

51. *See id.* para. 7 (commenting that, although the committee did not visit F.R.Y., it relied on reports by the Human Rights Watch in addition to NATO press releases).

52. *Id.*

53. *See OTP Report, supra* note 18, para. 8 (observing that, in addition to communication targets, the committee was unable to obtain sufficient information on civilian residential targets, civilian power facility targets, and environmental targets).

## II. CLUSTER BOMBS

During and after OAF, NATO was criticized for its use of cluster bombs.<sup>54</sup> This criticism was directed partly at the actual use against certain targets, such as the bombing near the city of Nis on May 7, 1999, where a number of civilians were killed, and partly at the high dud rate of cluster munitions, which left an unknown number of unexploded bombs scattered throughout Serbia and Kosovo.<sup>55</sup>

The OTP Report's treatment of the use of cluster bombs is both unsatisfactorily brief and incomprehensive in manner.<sup>56</sup> The paragraph analyzing the issue draws three conclusions: (1) cluster bombs are not illegal weapons; (2) individual unexploded bombs from a cluster bomb are not legally comparable to landmines; and (3) cluster bombs were not used during Operation Allied Force in a manner similar to the *Martić* case, where cluster bombs were used against civilians in the Croatian capital Zagreb.<sup>57</sup>

While Amnesty International agreed that international humanitarian law does not include cluster bombs among prohibited weapons, the organization found that "NATO failed to meet its obligations to take necessary precautions by using cluster weapons in the vicinity of civilian concentrations, thereby violating the prohibition of indiscriminate attacks under Article 51(4) and (5) of Protocol I."<sup>58</sup>

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54. See, e.g., Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 120-48 (2000) (examining and critiquing the negative repercussions of cluster bombing campaigns through analysis of three case studies in Croatia, Kosovo, and Chechnya).

55. See HRW REPORT, *supra* note 8, app. A (incident 48) (estimating that the number of civilians killed at Nis was fourteen, and further estimating the total number of civilians killed as a result of cluster bombing campaigns to be between ninety and one hundred fifty); see also *Ticking Time Bombs: NATO's Use of Cluster Munitions in Yugoslavia*, 11 HUM. RTS. WATCH 6(D) (1999) (determining that the average dud rate for cluster bombs is roughly five percent).

56. See OTP Report, *supra* note 18, para. 27 (conceding that, although there is no specific treaty provision dealing with the use of cluster bombs, they must be used in conformity with general treaty provisions governing the use of all weapons).

57. See *id.*

58. AMNESTY REPORT, *supra* note 24, at 59.

The OTP Report does not consider whether NATO employed cluster bombs in any manner different to the *Martić* case, which might have been incompatible with international law.<sup>59</sup> One could at least expect that the OTP Report would initially find that NATO did not intend to hit a hospital and a market place in Nis. NATO's explanation for this incident was that the cluster bombs were aimed at the airport near Nis but due to a malfunction, one or more containers holding the bombs opened too soon after release from the NATO aircraft, scattering the bombs over the city.<sup>60</sup> This explanation is parallel to the OTP Report's conclusion that civilians were not the intended targets.<sup>61</sup> Even if this is accepted, it does not necessarily follow that NATO or NATO personnel do not have any responsibility—criminal or other—for the deaths in Nis. This possibility is never addressed in the OTP Report, in spite of Amnesty International's conclusion that NATO did not take sufficient precautions.<sup>62</sup>

### III. THE TV STATION ATTACK

Early in the morning of May 23, 1999, NATO aircraft attacked *RadioTelevizija Srbija* ("RTS") in the center of Belgrade. There was, as Amnesty International puts it, "no doubt that NATO hit the intended target."<sup>63</sup> The central questions in connection with this controversial attack are: (1) whether the TV station constituted a legitimate military target; and (2) if so, whether the number of

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59. See *OTP Report*, *supra* note 18, para. 28.

60. See AMNESTY REPORT, *supra* note 24, at 57 (quoting Major General Jertz who stated that, although analysts speculated that a technical malfunction or inadvertent release may have caused the cluster bombs to miss their targets and cause civilian casualties, the Department of Defense was unsure what specifically caused the error).

61. See *OTP Report*, *supra* note 18, para. 27 (concluding that NATO's use of cluster bombs was not analogous to the use of cluster bombs in Zagreb, which were designed to terrorize and harm civilians).

62. See AMNESTY REPORT, *supra* note 24, at 59 (asserting that the fact of a technical malfunction would not obviate the violation of international law because the initiation of the bombing campaign during the day may have led to more civilian casualties and, thus, may fail to satisfy the requirement of reasonable precautionary measures to avoid civilian losses).

63. See *id.* at 46



civilian casualties was proportional to the military advantage expected from the partial or complete destruction of the TV station. The key to answering the first question is found in Article 52 (2) of the API:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>64</sup>

Hence, the first question to be addressed pertains to the purpose or use of the RTS, *i.e.*, the function at the specific time. It is possible that the RTS had a dual role, functioning as a civilian television station while at the same time playing some kind of military role, presumably connected to military communications. As the OTP Report puts it, “[t]o the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use.”<sup>65</sup>

In order to evaluate the attack, one may consider the following three possibilities: (1) that the RTS was used for civilian broadcasting, including propaganda, which often did not accurately reflect objective facts but which in no way could be characterized as incitement to international criminal activity, for example, genocide; (2) that the RTS’ broadcasts could be characterized as incitement to genocide; or (3) that the RTS functioned as in situation (1) and, in addition, had a military function.<sup>66</sup>

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64. International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Part IV, art. 57 (2) (June 8, 1977) [hereinafter *Protocol I*] available at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/f6c8b9fee14a77fdc125641e0052b079?OpenDocument> (last visited Feb. 18, 2002).

65. *OTP Report*, *supra* note 18, para. 55.

66. It is, of course, possible to imagine other combinations, such as the RTS both inciting to genocide and having a military function. Such further combinations, however, have not been seriously suggested at any point and are not

## A. RTS AS A PROPAGANDA ORGAN

A number of statements from NATO leaders and spokespersons indicate that RTS was perceived as a propaganda tool.<sup>67</sup> Amnesty International refers to a meeting between the organization and NATO officials during which the officials “insisted that the attack was carried out because RTS was a propaganda organ and that propaganda is direct support for military action.”

Other examples include the British Minister for International Development, Clare Short, who stated that “the propaganda machine [RTS] which is prolonging the war and meaning more and more of this brutality continues, is a legitimate target” and that “a propaganda machine that creates false propaganda constantly is a legitimate target and that’s why it was hit.”<sup>68</sup>

United States Pentagon spokesman Kenneth Bacon stated that “[RTS] has misreported on what’s going on in a way that has, I think, made it extremely difficult, impossible probably, for the Serb people to grasp the full magnitude of the problem in Kosovo.”<sup>69</sup> As an example, he mentioned that the RTS characterized the Kosovar delegation to the Rambouillet negotiations that preceded the bombing campaign as “terrorists and drug dealers” while the station failed to mention the ethnic cleansing taking place in Kosovo.<sup>70</sup>

Television stations (“the installations of broadcasting and television stations”) were included in a 1956 draft of API’s definition of “military targets.”<sup>71</sup> This inclusion is occasionally emphasized as

discussed further.

67. See *infra* notes 77-80.

68. See, e.g., *Briefing by the International Development Secretary, Ms. Clare Short, and the Chief of Joint Operations, Admiral Sir Ian Garnett*, Apr. 23, 1999 [hereinafter *Short & Garnett Briefing*], available at <http://www.kosovo.mod.uk/brief230499.htm> (last visited Feb. 17, 2002).

69. *Department of Defense News Briefing*, Apr. 23, 1999 [hereinafter *DOD Briefing*], available at [www.defenselink.mil/news/Apr1999/t04231999\\_t0423asd.html](http://www.defenselink.mil/news/Apr1999/t04231999_t0423asd.html) (last visited Feb. 17, 2002).

70. See *id.* (asserting that control of the media, as much as control of security and military forces, is one of the central “pillars” of Milosevic’s regime).

71. See *ICRC API Commentary*, *supra* note 34, para. 2002 n.3 (establishing the Draft Rules for the Limitations of Dangers incurred by the Civilian Population in Time of War).

an indication that television stations generally constitute military targets. It is important to note, however, that "even if [the potential targets] belong to one of [the listed target] categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage."<sup>72</sup>

Furthermore, it is noteworthy that in the following year, the International Red Cross abandoned the draft, which contained a list of installations that are believed to be military targets, and subsequently adopted a more abstract definition of a military target found in the current version of the API.<sup>73</sup> Since 1956, the traditional notion of what constituted a military target may have changed.<sup>74</sup> Hence, the API draft from 1956 can only be considered of historical interest today.

Few are probably inclined to deny that the state-run Serbian radio and television stations were employed for propaganda and failed to broadcast a truthful rendition of events related to Kosovo.<sup>75</sup> The question, however, remains whether this alone made the RTS a legitimate military target under API's definition. Does propaganda provide an "effective contribution to military action" and would its destruction offer a "definite military advantage?" In constructing an argument for the inclusion of television stations in the definition of military target, one might emphasize the central role of propaganda during military conflicts in general, and perhaps specifically, in the

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72. *Id.* See also Fenrick, *supra* note 7, at 496 (writing that the 1956 list "included the installations of broadcasting and television stations provided that they were of fundamental military importance").

73. See Fenrick, *supra* note 7, at 495 (concluding that a shift from a "list-oriented" definition of military targets to a "situation dependant" approach would likely result in a more limited class of defined military targets and presumably, would lead to more limited conflict).

74. Developments could, of course, also have moved in the opposite direction, becoming more permissive of attacks on broadcasting stations.

75. See, e.g., *Bankovic and Others v. The Contracting States also Parties to the North Atlantic Treaty*, Complaint, Eur. Ct. H.R. 52207/99, para. 123 [hereinafter *Bankovic Complaint*] ("There is no doubt that RTS was a State controlled media and certain programmes output by RTS were used as propaganda tools."), available at [http://www.bgcentar.org.yu/dokumenti/e\\_bankovic2.pdf](http://www.bgcentar.org.yu/dokumenti/e_bankovic2.pdf) (last visited Feb. 17, 2002).

Kosovo conflict.<sup>76</sup> Most may, however, find that the inclusion of propaganda as a military target will stretch the definition far, possibly too far.<sup>77</sup> Furthermore, it appears very difficult to quantify the impact of propaganda from a certain outlet on the military action.<sup>78</sup>

More importantly, there are potential threshold problems that will arise if propaganda is deemed to be a military target.<sup>79</sup> For example, the issue of what constitutes propaganda and who will define it comes to mind. If the Voice of America at times broadcasts official editorials from the United States Department of State, reflecting the official view of the U.S. government, does this constitute propaganda?<sup>80</sup> Does it make a difference if the Voice of America does not allow the Serbian government to broadcast similar editorials? Does propaganda have to be false or incorrect? What about withholding information? The Israeli media is partly subjected to military censorship, which may prevent Israeli media outlets from broadcasting information relating to a certain story. The general rationale behind this is state security. Does this fact make the Israeli media a legitimate target? What if, in a hypothetical case, twenty persons were killed in an incident and the censor allowed the incident to be mentioned but either refused to disclose casualty

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76. See generally Vaughan Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 INT'L & COMP. L.Q. 934, 942 (2000) (conceding that broadcasting stations serving only as media conduits for civilian audiences may play a powerful role in support of the war effort).

77. See *id.* (noting the inherent difficulties in attempts at quantifying contributions of e.g. propaganda to the war effort). See also George H. Aldrich, *Yugoslavia's Television Studios as Military Objectives*, in 1 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 149-50 (1999) (concluding that the RTS and other broadcasting stations did not, through their propaganda, make an effective contribution to military action).

78. Compare *Fritzsche case*, 41 AM. J. INT'L L. 326 (1947) (acquitting *Fritzsche*, a German national who was charged with the commission of war crimes for participating in Nazi broadcasts and disseminating Nazi propaganda), with *Streicher case*, 41 AM. J. INT'L L. 293 (1947) (finding *Streicher* guilty of war crimes for inciting persecution and unrest through participation in Nazi media news dissemination).

79. See *infra* notes 94-106 and accompanying text (analyzing the inherent difficulties in classifying media outlets as military targets).

80. See *Felicity Barringer, Voice of America Under Pressure to Toe U.S. Line*, N.Y. TIMES, Oct. 8, 2001, at C11.

figures or claimed that none was killed?

Generally, targeting propaganda outlets appears to be too open-ended and has the potential to substantially undercut the protection of civilian objects. The OTP Report is equivocal on this point by concluding that the legality of the attack on the RTS was “debatable” if the justification was that the target was a propaganda organ.

## B. GENOCIDE

A series of statements from NATO spokespersons conveyed the organization's belief that the RTS encouraged atrocities against the Kosovar-Albanian population and even incited genocide.<sup>81</sup> At the Pentagon, U.S. officials stated that the “Serb TV [was] as much a part of Milosovic's murder machine as his military . . . .”<sup>82</sup> The British had similar concerns, voiced by their Under Secretary of State:

We are very clear that the station that was hit [RTS] recently was an absolutely key part of the hate campaign from the Serbian regime. . . . So we are not talking about an independent media in that sense, we are talking about a core part of preparation of the Serbian people and the confusion of the Serbian people as to actually the situation around the country, what is actually happening in Kosovo, but even more importantly pouring out racist attacks in a constant barrage in order to create the background for the ethnic cleansing that has then taken place, not just here but in previous campaigns by the Serbian regime.<sup>83</sup>

In spite of these and similar statements, the OTP Report determined that “it was not claimed that the [Serbian TV- and radio stations] were used to incite violence akin to *Radio Milles Collines* during the Rwandan genocide, which might have justified their

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81. See *infra* notes 94-96.

82. See *DOD Briefing*, *supra* note 69 (observing that the Serbian television broadcasts failed to convey an accurate portrayal of the nature of Milosevic's “ethnic cleansing” campaigns).

83. *Briefing by the Under Secretary of State Mr. John Spellar, and The Deputy Chief of Defence Staff (Commitments), Air Marshal Sir John Day*, April 24, 1999 available at <http://www.kosovo.mod.uk/brief240499.htm>. (last visited Feb. 17, 2002). See also *Short & Garnett Briefing*, *supra* note 68 (affirming that “the television station is a source of propaganda that is prolonging this war and causing untold suffering to the people of Kosovo”).

destruction.”<sup>84</sup> In the complaint to the ECHR, the plaintiffs argued that even though the British Ministry of Trade and Industry claimed that RTS broadcasts “included propaganda inciting genocide and racial hatred,” there was no proof to substantiate these allegations.<sup>85</sup> Thus, while the question of incitement to genocide does not arise in the context of the Serbian TV station, potential attacks against such broadcasting facilities do, however, raise a number of difficult and challenging problems *in abstracto*.<sup>86</sup>

Even if the definition of a military target found in API is accepted as authoritative, it is very difficult to place institutions that incite genocide within this definition. One author argues that “[t]here is, of

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84. Compare *OTP Report*, *supra* note 18, para. 76 (contrasting NATO’s belief that the Yugoslav government used broadcast networks as a tool to “incite hatred and propaganda” with more direct instances of incitement to encourage ethnic violence), with *Prosecutor v. Ruggiu*, 2000 I.C.J. 16 (June 1) (finding defendant Ruggiu guilty of using public radio broadcasts as a means for “incitement to commit genocide”), available at [www.icty.org/ENGLISH/cases/Ruggiu/judgement/rug010600.htm](http://www.icty.org/ENGLISH/cases/Ruggiu/judgement/rug010600.htm) (last visited Feb. 2, 2002). Georges Ruggiu worked for *Radio Television Libre des Milles Collines*. *Id.* On June 1, 2000, the Court concluded:

Those acts [committed by Georges Ruggiu] were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.

*Id.* Based on this, the Tribunal found Ruggiu guilty “of the crime of direct and public incitement to commit genocide and of crimes against humanity (persecution).” *Id.*

85. See generally *Bankovic Complaint*, *supra* note 75 (invoking Article 2 (right to life), Article 10 (freedom of expression), and Article 13 (the right to an effective remedy) of the Geneva Convention against the NATO forces).

86. See generally *Israeli Defense Forces, IDF Spokesperson’s Announcements*, Oct. 12, 2000 (detailing Israeli attacks against Palestinians radio and broadcast facilities on the ostensible basis that these facilities were inciting violence). On October 12, 2000, two reservists from the Israeli Defence Forces (IDF), apparently by mistake, entered the Palestinian controlled area near the West Bank city of Ramallah. *Id.* Subsequent to being taken into custody by Palestinian police force, they were lynched by a mob. *Id.* In retaliation, the IDF carried out a number of helicopter borne attacks. *Id.* Among the targets were the Palestinian radio station, the Voice of Palestine, because the station, according to the Israelis, “played a key role in the incitement [that led to the lynching of the two reservists].” *Id.*

course, no necessary relationship between the use of a facility to commit a war crime and the classification of that facility as a military objective.”<sup>87</sup> On the surface at least, a broadcasting station that incites genocide does not make an effective contribution to military activities and its destruction would, therefore, not constitute a clear military advantage. On the contrary, to the extent the armed forces participate in the genocide, this would appear, from a cynical point of view, to detract from their contribution to legal military efforts.

One could argue, however, that the genocide was an integral part of the military campaign, in which case military “success” had to be measured according to the number of civilian casualties from a specific ethnic group. From such a perspective, the criteria of “effective contribution” would have been fulfilled. Even such a distorted deliberation, however, would not account for “definite military advantage” if the enemy regarded the genocide as being without military significance.

As the above comments demonstrate, “extra-military” arguments fit poorly within the context and terminology found in the API. In addition, once such arguments are introduced, it would make it easier for a military force to attack a broadcasting station that does not incite genocide. Consider a revolutionary government that announces over its radio stations that it intends to destroy all private property in territory it has occupied. If such a policy is assumed to violate Article 53 of the Fourth Geneva Convention, does said statement make the radio stations legitimate military targets? Clearly, it does not. One can argue that there is a huge difference between genocide and the destruction of private property. This is beyond doubt, but the point is that if “extra-military” arguments are introduced, it is difficult, if not impossible to distinguish formally between the two examples.

Based on the notion of a “generalized right to prevent the continuing commission of crimes,” one may, however, “suggest that a facility which is being used to incite the commission of serious violation of international humanitarian law or to provide the location for the commission of such an offence may be lawfully attacked even

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87. Fenrick, *supra* note 7, at 496.

if it did not meet the criteria for a military objective.”<sup>88</sup> Concepts such as “some generalized right” are difficult for lawyers to conceptualize and to use as justification, for example, of an attack on a radio station. However, this proposal may be the best option at present. The legitimate and moral goal of stopping genocide outweighs the concerns related to conceptualization.

Specifically, in the context of humanitarian intervention such as the Kosovo conflict, however, one may be able to suggest an additional justification for attacking a broadcasting station that incites genocide.<sup>89</sup> This justification is based on a well-known legal principle, *in maiore minus*, and assumes that *jus ad bellum* considerations may aid and support the interpretation of the *jus in bello* corpus.<sup>90</sup>

The questions concerning the legality of resorting to the use of force and the actual conduct of hostilities have traditionally been separated.

It is a basic premise of the law of war (or of armed conflict) radically to separate *jus in bello* from *jus ad bellum*, a premise without which it would be impossible to apply the fundamental principle that underlie the whole edifice of *jus in bello*, i.e., the principle of the equality of the parties.<sup>91</sup>

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88. Fenrick, *supra* note 7, at 497 (observing that the second objective seized by anti-Milosevic protestors was the RTS, thus evidencing the fact that the broadcast station served as a “symbol of the regime”).

89. See *infra* notes 89-92 and accompanying text (analyzing alternative bases for attacking media outlets that incite genocide).

90. See generally Christopher Greenwood, *Jus Ad Bellum and Jus In Bello in the Nuclear Weapons Advisory Opinion*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 247 (Laurence Boisson Chazournes et. al. eds., 1999) (examining the dichotomy between the application of the *jus ad bellum* and the *jus in bello* in the U.N. Advisory Opinion on the permissibility of nuclear armament under existing legal norms).

91. George Abi-Saab, *The Concept of “War Crimes,”* in INTERNATIONAL LAW IN THE POST-COLD WAR 111 (Sienho Yee et. al. eds., 2001). See also Protocol I, *supra* note 64, pmbl. (confirming that the Convention, along with the four 1949 Geneva Conventions, must be fully applied “. . . without any adverse distinction based on the nature or origin of the armed conflict”); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 241 (2000) (asserting that “the separation between ‘jus ad bellum’ and ‘jus in bello’ results in the uniform, neutral application of the latter . . . and avoids . . . preliminary disputes on the character of the war as just or aggressive”).



The reason for this separation is to be found in the fact that humanitarian law of armed conflict is intended to protect individuals, primarily vulnerable and helpless individuals such as civilians, the sick, and the wounded. Such a purpose is better achieved by avoiding any considerations about how the conflict originated. Considering this principled background, it would not, however, be unreasonable to let *jus ad bellum* justifications, such as humanitarian intervention, influence, or aid in the interpretation of *jus in bello* rules, as long as the goal and objective is a better, more comprehensive protection of individual persons.<sup>92</sup>

The stated purpose of and justification for Operation Allied Force was based on humanitarian intervention "to stop the killing in Kosovo and the brutal destruction of human lives and properties; to put an end to the appalling humanitarian situation that is now unfolding in Kosovo," and was initiated in order to save the Kosovar-Albanian civilian population from deportation, deprivation, or worse.<sup>93</sup> If it is possible to justify a sustained bombing campaign in order to stop genocide, it would appear, *a fortiori*, to be justifiable to take measures to halt incitement to genocide, as propagated by a radio or television station.

### C. MILITARY FUNCTION

Surprisingly, it is difficult to find clear statements from NATO alleging that the RTS had a military function. Amnesty International quotes NATO officials as saying that the RTS was "used as radio relay stations and transmitters to support the activities of the F.R.Y.

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92. See Cristopher Greenwood, *Self Defense and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 273-88 (Y. Dinstein ed., 1989) [hereinafter Greenwood, *Self Defense*] (recognizing the connection between "*jus ad bellum*" and "*jus in bello*" in his assertion that the use of force for humanitarian purposes must be limited to what is necessary and proportionate to achieving the humanitarian purposes of the operation). This principle, Greenwood argues, necessarily restricts the range of what may be lawfully attacked. See Cristopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L. Q. 926, 933 (2000); Greenwood, *supra* note 90, at 265-66 (reflecting on the application of humanitarian norms to the 1996 I.C.J. Advisory Opinion on nuclear weapons).

93. Excerpts from Statement to the Press by the Secretary General of NATO, Press Release 045 (1999), available at <http://www.nato.int/docu/pr/1999/p99-045e.htm> (last visited Mar. 22, 2002).

military and special police forces.”<sup>94</sup> The OTP Report uses this statement as proof of the RTS’s military function.<sup>95</sup> Amnesty International, however, firmly maintains that NATO subsequently emphasized that the RTS was attacked solely because it was an organ of propaganda.<sup>96</sup>

Likewise, Human Rights Watch appears to doubt that the RTS had a military function.<sup>97</sup> Furthermore, the complaint to the ECHR holds that “there was and is no evidence that the RTS building in Belgrade was, at any point, part of Milosovic’s ‘war machine’”<sup>98</sup> and that “it [had] never been claimed by the respondent Governments that it was used to relay military communications.”<sup>99</sup> The OTP Report quotes NATO statements from April 27, 1999, four days after the attack, indicating that the RTS did have a dual-use function.<sup>100</sup> General Wesley Clark then stated, “As I said, it’s essentially a dual-nature system . . . military [radio] traffic is also routed through the civilian system.”<sup>101</sup>

The OTP Report clearly states the questions that are central to the attack on the RTS.<sup>102</sup> The OTP Report, however, fails to conclude

94. AMNESTY REPORT, *supra* note 24, at 47 (noting a discrepancy between NATO comments regarding the targeting of RTS relay stations as part of Milosevic’s “media infrastructure”).

95. *See OTP Report, supra* note 18, para. 76.

96. *See* Amnesty International, News Release-EUR 70/29/00, June 13, 2000: *Amnesty International’s Initial Comments on the Review by the International Criminal Tribunal for the Former Yugoslavia of NATO’s Operation Allied Force* (reiterating the explanation given by NATO for the bombing of RTS).

97. *See* HRW REPORT, *supra* note 8 (contending that the RTS had a legitimate public interest and was not merely a tool of the military regime).

98. Bankovic Complaint, *supra* note 75, para. 20.

99. *Id.* para. 178.

100. *See OTP Report, supra* note 18, para. 72 (stating that NATO officials justified the attack in terms of the dual military and civilian use of the RTS).

101. NATO: NATO’s Role in Kosovo, Press Conference, *Comments by Jamie Shea and General Wesley Clark*, SACEUR, NATO HQ, Apr. 27, 1999, available at <http://www.isn-lase.ethz.ch/cgi-bin/isn/. . . ~1999@10-1999@4~confer@2~1999@2~&lang=en> (last visited Feb. 2, 2002).

102. *See OTP Report, supra* note 18, para. 55 (“To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use.”).

whether and to what degree the RTS or its components were in fact part of the C3 structure or had any other military function. The Report also fails to determine whether the RTS was a legitimate target according to the criteria in API. In fact, the OTP Report does not even identify NATO's justification for its attack on the RTS.<sup>103</sup> The OTP Report states that the attack was legal to the extent that NATO attempted to disrupt the F.R.Y.'s C3 network,<sup>104</sup> whereas the legality of the attack was "debatable" if it was justified only because the RTS was a propaganda organ.<sup>105</sup>

As mentioned above, the Committee behind the Report found that it possessed enough information to make a sound evaluation. When examining the most controversial attack during the entire campaign, it should have been possible to determine whether the target was a legal target or not.

#### D. PROPORTIONALITY

Quite a lot has been made of the fact that the attack only disrupted the RTS's television broadcast for a few hours.<sup>106</sup> Critics note this fact as proof that the bombing did not provide a "definite military advantage."<sup>107</sup> This argument, however, appears to be based on a confusion of various aspects of the attack. If it is assumed that normal television broadcasts do not constitute a legitimate military

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103. See *id.* para. 75 ("As indicated. . .the attack *appears* to have been justified by NATO as part of a more general attack aimed at disrupting the F.R.Y. Command, Control and Communications network. . .") (emphasis added).

104. See *OTP Report, supra* note 18, para. 75 (stating that the attack was legally acceptable "insofar as the attack was actually aimed at disrupting the communications network. . .").

105. See *id.* para. 76.

106. See *id.* para. 78 (surmising that NATO realized attacking RTS would only briefly interrupt broadcasting).

107. See Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1107 (2001) (stating "that it is difficult to see how such a short interruption could achieve a degree of military advantage" given the short duration in which the RTS returned to the air); Aaron Schwabach, *NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, 9 TUL. J. INT'L & COMP. L. 167, 182 (2001) ("Killing ten people, let alone seventeen, to shut off a few hours of late-night television broadcasting seems disproportionate.").

target, then the duration of the interruption cannot influence the legality of the attack. What is determinative is how the attack influenced any military components or communications, which may, in the first place, legitimize the attack. One may be able to draw a conclusion based on an analogy to the amount of time it took to restore the civilian television signal and assume that the restoration of military communications would take a similar amount of time. This, however, would appear to be mere speculation. Hence, it is not particularly useful and does not further a legal analysis when Amnesty International, for example, observes that "NATO deliberately attacked a civilian object, killing [sixteen] civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality."<sup>108</sup>

Assuming that the RTS was a legitimate military target, the subsequent question must concern whether the number of casualties—sixteen civilian Serbs—was proportional to the military advantage gained by destroying the TV station. API prohibits indiscriminate attacks.<sup>109</sup> Included among the types of attacks that are considered indiscriminate is "an attack 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."<sup>110</sup> The question of excess is most often referred to as the principle of proportionality.

How are we to weigh the loss of sixteen lives *vis-a-vis* the military advantage gained by the destruction of the TV station and the resulting temporary disruption of military communication? The treatment of this essential question in the OTP Report is confusing. In reviewing the applicable law regarding target selection, the OTP

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108. AMNESTY REPORT, *supra* note 24, at 51. Fundamentally, the issue of proportionality only arises with regard to attacks on military targets. A deliberate attack on a civilian object can never be justified and the issue of proportionality never enters into the equation.

109. See 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 51(4), 1125 U.N.T.S. 3 (1979).

110. *Id.* art. 51(5)(b).

Report states that questions arising in the context of the proportionality principle must be addressed on "a case by case basis."<sup>111</sup> This approach parallels the view that potential war crimes are individual crimes that have to be evaluated case by case.<sup>112</sup>

Nonetheless, the OTP Report determines that when analyzing the attack on the RTS, the legal evaluation of "the proportionality of the attack should not be premised on a specific incident."<sup>113</sup> This means the individual attack on the RTS and the civilian casualties are not the main focus. Rather, the attack on the RTS must be viewed as one phase of "an integrated attack" against multiple objects. The legal evaluation must take into account this plurality of targets, which constitutes the overall strategic goal, the Yugoslav C3 structure.<sup>114</sup>

If consistently applied, the logic presented by the OTP Report will end by weighing the total number of casualties, around five hundred,<sup>115</sup> against the entire Operation Allied Force. Even if the total number of civilian casualties was limited in light of the extent and intensity of the bombing campaign, it is questionable whether such a comparison is useful for anything.<sup>116</sup>

An initial complaint is that the accumulation of targets in the OTP Report, allegedly belonging to the same "integrated attack," is based on a collection of NATO press releases.<sup>117</sup> The more serious

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111. See *OTP Report*, *supra* note 18, para 50.

112. See Benvenuti, *supra* note 33, at 519 ("Even specific and sporadic conduct may have amounted to a war crime.").

113. *OTP Report*, *supra* note 18, para. 78

114. See *id.* (including transmitter towers and electricity supplies as components of the Yugoslav C3 structure).

115. See HRW REPORT, *supra* note 8, at 5 (estimating the number of civilian casualties in the Yugoslav conflict).

116. See Dep't. of Def., *Kosovo/Operation Allied Force After-Action Report*, Report to Congress, Dec. 12, 1999 (addressing the total number of casualties and concluding that "[d]espite [the weather and terrain] NATO conducted the most precise and lowest collateral damage air operation in history"), available at [www.defenselink.mil/pubs/kaar02072000.pdf](http://www.defenselink.mil/pubs/kaar02072000.pdf) xiv (last modified Jan. 31, 2000); THE KOSOVO REPORT, *supra* note 10, 183-84 (noting that the Commission was impressed by the minor civilian damage relative to the magnitude and duration of the war).

117. See generally *OTP Report*, *supra* note 18, para. 78 (describing the formation of an integrated attack on numerous targets).

problem, however, is whether it is permissible to dilute the significance of a single attack by pouring it into the sea of integrated attacks.<sup>118</sup> At least two aspects of this question must be addressed: (1) the authority of the approach followed by the OTP Report; and (2) to what extent the approach is acceptable.

### *I. The Kupreskic Case*

According to the OTP Report, the foundation for the integrated attack theory appears to be a somewhat backward interpretation of *dictum* delivered by the ICTY Trial Chamber in the *Kupreskic* case.<sup>119</sup> The Tribunal concluded that repeated, individual legal attacks might be illegal because the described pattern of attacks places the “lives and assets” of civilians in great jeopardy.<sup>120</sup> The OTP Report completely misconstrues the Trial Chamber’s *dictum* by concluding that it meant to compare the total number of casualties with the overall goals of the military action.<sup>121</sup> Thus, while the Tribunal determined, in a hypothetical case, that a series of legal attacks may be deemed illegal when accumulated, the OTP Report stipulates that an attack that is illegal in and of itself (due to excessive civilian casualties) becomes legal when viewed in the

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118. See Benvenuti, *supra* note 33, at 524 (noting the Committee’s view on the necessity of watering down the specific attack on the RTS by viewing it in the larger context of the war against the Yugoslav C3).

119. See Prosecutor v. Kupreskic, No. IT-95-16-T, at 207 (I.C.T.Y. Jan. 14, 2000) (“[I]n the case of repeated attacks, all or most of them falling within the gray area between indisputable legality and unlawfulness, it might be warranted to conclude the cumulative effect of such acts entails that they may not be in keeping with international law.”); see OTP Report, *supra* note 18, para. 52 (interpreting the *Kupreskic* case). The *Kupreskic dictum* seems to echo Judge Lauterpacht’s reflections on “the imperceptible line between impropriety and illegality” in the Voting Procedures Case, 1955 I.C.J. 67, at 120. See generally Benvenuti, *supra* note 33, at 517 (concluding that the Committee misconstrued the statement of the ICTY in the *Kupreskic* judgment).

120. See Prosecutor v. Kupreskic, No. IT-95-16-T, at 207 (I.C.T.Y. Jan. 14, 2000).

121. See OTP Report, *supra* note 18, para. 52 (stating that the committee interprets the *Kupreskic* judgment to refer to “an overall assessment of the totality of civilian victims as against the goals of the military campaign”). The OTP Report characterizes the Trial Chamber’s statements as “progressive” and implies that the Trial Chamber was stating *lex ferenda* rather than *lex lata*. *Id.*

context of the "integrated attack" theory.<sup>122</sup>

This is a highly original use of precedence. For one thing, it raises a serious issue of double standards at the tribunal. The accused in the *Kupreskic* case, Croats from the former Yugoslavia, could be judged according to the broad interpretation adopted by the Trial Chamber, but when investigating the NATO countries, the OTP Report adopts a significantly narrower standard, to the extent that the standards are reconcilable at all. Moreover, it would appear to be untraditional for a prosecutorial authority to undercut the court that may subsequently decide the case.<sup>123</sup> If a court has adopted a broad interpretation that works to the detriment of the accused, prosecutors will rarely fail to follow through. One possible explanation is, of course, that the prosecutorial authority is looking for reasons not to prosecute.

## 2. *Is the "Integrated Attack" Approach Correct?*

The next fundamental question relates to whether an attack, such as the one against the RTS, should be judged individually or rather, as implied by the OTP Report, be viewed in a larger context. A number of authors advocate that the individual attack against the individual target must be the point of concern. Bernard Brown, for example, found that "both policy factors and the language of the [articles of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts] support a 'case by case' interpretation of military advantage."<sup>124</sup>

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122. *Id.* However, even if the OTP Report believes that the *dictum* is *lex ferenda*, this would not reasonably justify the opposite interpretation.

123. See Benvenuti, *supra* note 33, at 517 (arguing that the "[c]ommittee must not question the law as it is applied by the ICTY").

124. Bernard L. Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 CORNELL INT'L L. J. 134, 142 (1976) (writing before the final adoption of the API, which does not seem to alter his observations). See also Schwabach, *supra* note 107, at 184 (criticizing the OTP Report for disregarding a basic tenet of human rights law: "that human lives have value not only in the aggregate but also in the individual"); Randy W. Stone, Comment, *Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo*, 50 CATH. U. L. REV. 501, 521 (2001) (explaining that the proportionality principle requires the weighing of potential military advantage against civilian casualties for every attack in a military operation).

Such a case-by-case approach appears, however, to be too narrow and unrealistic in practice. A number of states entered declarations concerning the issue during the negotiations of API. Italy, for example, noted that the evaluation of the military advantage, which forms part of the principle of proportionality, must be considered on the basis of "the attack as a whole and not in relation to each action regarded separately."<sup>125</sup> To this, the API Commentary replied, "[t]hese statements, which all have the same tenor, seem redundant; it goes without saying that an attack carried out in a concerted manner in numerous places can only be judged in its entirety."<sup>126</sup> This commentary does not, however, contribute to a more thorough understanding of what "an attack carried out in a concerted manner" includes. Does it cover the entire Operation Allied Force, as the OTP Report intimates? In that case, the principle of proportionality is a reality without any normative constraint or content.<sup>127</sup>

Therefore, it is hardly surprising that the API Commentary finds that "[Article 57 (2)(a)(iii)] like Article 51 . . . is not concerned with strategic objectives but with the means to be used in a specific tactical operation."<sup>128</sup> Louise Doswald-Beck, who partly accepts the mentioned declarations, proposes a similar interpretation.<sup>129</sup> This

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125. *ICRC API Commentary*, *supra* note 34, para. 2218 n.15.

126. *Id.*

127. *See generally* Schwabach, *supra* note 107 (criticizing "casualty averaging" as a method which will never deem a single incident resulting in civilian deaths as disproportionate absent a larger scheme of incidents resulting in excessive civilian deaths); William Fenrick, *The Rule of Proportionality in Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 107 (1982) (stating that assessing a military benefit on an overly broad basis may virtually preclude applying the proportionality principle until the end of the war). Such a broad basis would make it hard to make any meaningful evaluation at all.

128. *ICRC API Commentary*, *supra* note 34, para. 2207.

129. *See* Fenrick, *supra* note 41, at 548 (*quoting* Louise Doswald-Beck, *THE VALUE OF THE 1977 GENEVA PROTOCOLS FOR THE PROTECTION OF CIVILIANS*, reprinted in *ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION* 137, 156 (Michael A. Meyer ed., 1989)). One is left wondering why the comments by Doswald-Beck, which Fenrick finds particularly relevant, were not included in the OTP Report, considering that substantial parts of Fenrick's article have been incorporated into the Report. *See also* Greenwood, *Self Defense*, *supra* note 92, at 278-79 (referring to the principle of proportionality found in Article 51 as imposing a "requirement of tactical proportionality"). Greenwood also operates with a strategic



interpretation narrows the scale substantially, and Doswald-Beck provides an example in which six military targets are considered as one attack when weighing the military advantage and the principle of proportionality.<sup>130</sup> This interpretation fundamentally differs from the list of targets that the OTP Report suggests belong to the same "integrated attack." The limitation to "a given tactical operation" is both sound and reasonable as opposed to the "integrated attack" approach adopted by the OTP Report, which, as pointed out, logically will end up comparing the complete number of casualties to the entire bombing campaign, thereby robbing the principle of proportionality of any restraining power.

#### E. THE COMPLAINT TO THE EUROPEAN COURT OF HUMAN RIGHTS

Relatives of persons killed during the attack on the RTS have made a complaint to the ECHR in Strasbourg.<sup>131</sup> The complaint asks the Court to find that member states of NATO violated articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the European Human Rights Convention ("the Convention").<sup>132</sup>

##### 1. *The Question of Admissibility*

The initial question for the ECHR was whether the complaint was admissible.<sup>133</sup> The answer to this question turned on the interpretation

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proportionality, which by contrast, is derived from the overall justification for the use of force, *i.e.*, *jus ad bellum*.

130. See Fenrick, *supra* note 41, at 548 (quoting Doswald-Beck, *supra* note 129, at 137, 156); see also Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 105, 179 (Dieter Fleck ed. 1995) (adding his voice in favor of a wider contextual evaluation). The breadth of Oeter's evaluation, however, remains unclear. He mentions not only that the reference point of the "required balancing is not the gain of territory or other advantage expected from the isolated action of a single unit, but the wider military campaign," but also that the individual attacks have to be placed in their operative context, which would indicate something narrower than "the wider military campaign." *Id.*

131. See Bankovic Complaint, *supra* note 75.

132. *Id.*

133. See Bankovic v. Belgium, App. No. 52207/99, Eur. Ct. H.R., para. 54 (Decision on Admissibility of Dec. 19, 2001) (articulating the issue as whether the

of the term “jurisdiction” in Article 1 of the Convention.<sup>134</sup> Applying the rules of interpretation found in the 1969 Vienna Convention on the Law of Treaties,<sup>135</sup> the Court determined that the term “jurisdiction” in Article 1 encompasses an essentially territorial notion.<sup>136</sup> The Court, however, proceeded to acknowledge that non-territorial bases of jurisdiction might be contemplated, although they would be exceptional and require special justification.<sup>137</sup> The Court’s jurisprudence contains examples of jurisdiction beyond the purely territorial, most notably, in the present context, the *Loizidou* Case.<sup>138</sup> Hence, the Court needed to determine whether circumstances

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applicants and their deceased relatives fell within the jurisdiction of the respondent State as resulting from an “extra-territorial act”), *available at* <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=218042346&Notice=0&Noticemode=&RelatedMode=0> (last visited Feb. 17, 2002).

134. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 1, 312 U.N.T.S. 221 (1950) [hereinafter European Convention].

135. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

136. See *Bankovic*, App. No. 52207/99, paras. 16-18, 59-66 (applying relevant international law to determine the meaning of the phrase “within their jurisdiction”).

137. See *id.* para. 61.

138. *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. (1995) (analyzing the right to peaceful enjoyment of property situated in the northern, Turkish-occupied part of Cyprus), *available at* <http://hudoc.echrcoe.int/Hudoc1doc/HEJUD/sift/505.txt> (last visited Jan. 30, 2002). The Court found that “the concept of ‘jurisdiction’ under [Article 1] is not restricted to the national territory of the High Contracting Parties.” *Id.* para. 62. The Court further observed that “bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory.” *Id.* The Inter-American Commission on Human Rights similarly found that:

[U]nder certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain . . . [and] while [jurisdiction] most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad.

*Coard v. United States*, Case 10,951, Inter-Am. C.H.R. 109/99, para.37 (1999), *available at* [www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm](http://www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm) (last visited Jan. 30, 2002).

surrounding the bombing of the RTS were equally exceptional “such that they amounted to the extra-territorial exercise of jurisdiction by a Contracting State.”<sup>139</sup>

The Court determined that the required exceptional circumstances were absent in the RTS bombing case, primarily by distinguishing it from the *Loizidou* decision.<sup>140</sup> In *Loizidou*, Turkey’s army had exercised “effective control” over part of Cyprus. Generally, the Court recognizes extra-territorial jurisdiction where the respondent state, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of the territory, [exercises] all or some of the public powers normally to be exercised by that Government.”<sup>141</sup> When the *dicta* from *Louizidou* and other cases dealing with extra-territoriality are construed in this manner, it becomes obvious that NATO did not exercise the requisite “effective control.”<sup>142</sup>

Furthermore, Cyprus is a party to the European Convention on Human Rights. If Turkey’s *de facto* control over the northern part of Cyprus had not been held to bring that territory within the jurisdiction of Turkey, the inhabitants of this part of Cyprus would “have found themselves excluded from the benefits of the Convention.”<sup>143</sup> The F.R.Y., however, is not a party to the

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139. Bankovic, App. No. 52207/99, para. 74.

140. See *id.* para. 75 (distinguishing the “effective control” criteria established in the *Loizidou* case).

141. *Id.* para. 71.

142. See Bankovic Complaint, *supra* note 75, paras. 75-89 (noting that the applicants had, in part, argued that NATO control over Yugoslavia’s air space could be likened to Turkey’s control over northern Cyprus, particularly since the use of precision guided munitions gave the use of air power great impact on the ground without using ground troops); Bankovic, App. No. 52207/99, paras. 46-53 (discussing the submission of the applicants).

143. Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., para. 78 (2001) (finding that if Turkey, a Contracting State, was not held to have jurisdiction within the meaning of Article 1 due to its effective overall control, it would result in a “regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards. . .”), available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=218052618&Notice=0&Noticem ode=&RelatedMode=0> (last visited Feb. 17, 2002). See Bankovic, App. No.

Convention. Thus, the Court's decision to hold the Complaint inadmissible does not deprive F.R.Y. civilians of rights they would otherwise possess under the European Convention.

When considering extra-territorial jurisdiction, it is somewhat unclear whether both "effective control," as stipulated under *Bankovic*, and the loss of otherwise held rights must be present. This arguably appears to be the case.<sup>144</sup> Thus, the decision in the *Bankovic* case appears to have closed the somewhat open-ended *dictum* pertaining to extra-territorial exercise of jurisdiction found in the *Loizidou* judgment.<sup>145</sup>

In essence, the Court has now firmly limited the application of the Convention to Europe.<sup>146</sup> For example, if soldiers from a Contracting State on a peace-keeping mission mistreat detained locals, it would appear that the mistreated persons could not seek final redress through the ECHR even if the mission resulted in "effective control" outside Convention territory.<sup>147</sup>

One can debate whether such consequences are desirable or not. As to the possible policy considerations behind the Court's decision, one may suggest that the increasing use of national and international tribunals to correct real and imagined wrongs may have played a part.<sup>148</sup> Although all potential "extra-territorial complaints" would

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52207/99, para. 80 (discussing the Cyprus case).

144. The Court's statement that 'the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States' makes little sense if the 'conduct' does not reach the level of 'effective control' and, thus, indicates that both criteria have to be present in order for a complaint to be admissible under Article 1. See *Bankovic*, App. No. 52207/99, para 80.

145. See *Bankovic*, App. No. 52207/99, para 80.

146. See *id.* ("The Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in legal space (*espace juridique*) of the Contracting States.").

147. In general, it appears questionable whether traditional peace-keeping missions would entail "effective control," although this cannot be ruled out. As a potential complaint scenario that would be excluded according to the present analysis, one may consider the mistreatment of Somali civilians by both European and Canadian forces in Somalia in 1992/93.

148. One need only consider the case of Belgium, where a number of cases have been instigated against individuals, including Ariel Sharon, Yasser Arafat, Saddam Hussein, and Fidel Castro. See Marlise Simons, *Human Rights Cases Begin to Flood into Belgium Courts*, N.Y. TIMES, Dec. 27, 2001, at A8. The future of many

not be considered frivolous, the ECHR may have had a realistic fear of being inundated by complaints from around the world. Furthermore, it is difficult to entirely dismiss the concern expressed by the governments regarding possible consequences for future collective military actions, including U.N. actions.<sup>149</sup>

## 2. *Human Rights Law and Humanitarian Law*

Since the Court found that *Bankovic* did not come within the jurisdiction of the respondent states, the subsequent questions become somewhat academic but still interesting: 1) which rights protected by the Convention were in fact violated; and 2) how the Court would examine this issue.

The right to life will briefly be considered. Initially, it may appear surprising that an act of war or armed conflict such as the bombing of the RTS can be evaluated under human rights standards. This surprise is based on the traditional division between the (international) law of peace and the (international) law of war, where human rights belong to the former category. From a principled perspective, however, an “integral linkage [exists] between the law of human rights and humanitarian law because they share a ‘common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.’”<sup>150</sup>

Moreover, this division is not apparent from a human rights perspective and the European Convention from 1950 states explicitly which rights may be derogated from during wartime and which will

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of the cases pending in Belgium is uncertain following a recent I.C.J. judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). The I.C.J. found that Belgium “failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.” See Judgment on Feb. 14, 2002, *available at* [www.icj-cij.org](http://www.icj-cij.org).

149. See *Bankovic*, App. No. 52207/99, para 43.

150. *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. 109/99, para.37 (1999) *available at* [www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm](http://www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm) (last visited Jan. 30, 2002) (quoting *Abella v. Argentina*, Case 11.137, Inter. Am. C.H.R., No. 55/97, para. 158 (1997), *available at* <http://cidh.org/annualrep/97eng/97ench3a10an.htm> (last visited Jan. 27, 2002)).

remain in effect.<sup>151</sup>

In addition, during the past decades, there has been an increasing convergence between rules from human rights law and rules from international humanitarian law. One author is able to date the beginning of this development to the United Nations Human Rights Conference in Teheran in 1968. In Teheran, international humanitarian law was "transformed into a branch of human rights law and termed 'human rights in armed conflicts . . .'"<sup>152</sup>

Furthermore, post-Cold War developments have added to the attraction of applying international humanitarian law to human rights. One author noted "[t]he change in direction toward intrastate or mixed conflicts—the context of contemporary atrocities—has drawn humanitarian law in the direction of human rights law."<sup>153</sup> Additionally, both the Inter-American and the European human rights regimes have recently examined cases that included aspects of armed conflict and international humanitarian law.<sup>154</sup>

Finally, any remaining doubt about the continued relevance of human rights during war or armed conflict has been removed by the

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151. See European Convention, *supra* note 134, art. 15.1 (stating that in times of war or other public emergency, rights can be derogated to the extent that there is an exigent situation). There is no derogation from Article 2 unless deaths result from lawful acts of war. *Id.*

152. See Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, in *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* 39-40 (Frits Kalshoven & Yves Sandoz eds., 1989).

153. Meron, *supra* note 91, at 244.

154. See Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 INT'L REV. RED CROSS 505 (1998) (discussing how the Commission decided to apply international humanitarian law in a case concerning internal armed conflict); Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 38 INT'L REV. RED CROSS 513, 519 (1998) (analyzing how the ECHR has addressed international humanitarian law in situations involving displacement of civilian populations, detention and treatment of detainees, and conduct of military operations and unlawful killings); see also David Weissbrodt & Beth Andrus, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV. INT'L L. J. 59, 62 (1988) (suggesting that the Commission could apply principles of humanitarian law to the U.S. military operation in Grenada, in which sixteen patients were wounded at a mental institution).

International Court of Justice in its 1996 Advisory Opinion concerning nuclear weapons:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>155</sup>

Confirming the continued relevance of human rights during armed conflict, the International Court also emphasizes that the evaluation of a potential violation of the right to life claim must be conducted with reference to international humanitarian law.<sup>156</sup> This *dictum* appears to fit well with Article 15 of the European Convention, which deals with possible derogation from the rights protected by the

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155. International Court of Justice Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, para. 25 (July 8, 1996) [hereinafter Advisory Opinion] available at [www.icj-cij.org](http://www.icj-cij.org). (last visited Feb. 2, 2002).

156. See also *Abella v. Argentina*, Case 11.137, Inter. Am. C.H.R., No. 55/97, para. 161 (1997) (quoting the Inter-American Commission on Human Rights as stating, "the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations"), available at <http://cidh.org/annualrep/97eng/97ench3a10an.htm> (last visited Jan. 27, 2002); see also *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. 109/99, para. 42 (1999) (stating that "the analysis of petitioner's claims under the Declaration within their factual and legal context requires reference to international humanitarian law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations"), available at [www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm](http://www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm) (last visited Jan. 30, 2002). In *Coard*, for example, the Commission found that it had to refer to international humanitarian law in order to determine whether the detention of persons in the context of the United States's intervention in Grenada in 1983 was arbitrary. *Id.*

Convention.<sup>157</sup> According to Article 15, the right to life protected by Article 2 is non-derogable during times of war or other public emergencies, "except in respect of deaths resulting from lawful acts of war."<sup>158</sup> Determining the lawfulness of acts of war appears best done according to *jus in bello*.

The ECHR has, on occasion, made implicit use of international humanitarian law, most notably in cases concerning the situation in southeastern Turkey.<sup>159</sup> Aisling Reidy, however, finds that the Court may be reluctant to make explicit references to international humanitarian law, in spite of considering a humanitarian law context. He notes that this reluctance might be due to the scarcity of cases dealing with situations where international humanitarian law is applicable, such as the one contained in the complaint against the NATO member states.<sup>160</sup>

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157. See *id.* art. 15.1 ("In time of war or other public emergency threatening the life of the nation of any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation . . .").

158. *Id.* art. 15.2.

159. See, e.g., *Ergi v. Turkey*, No. 66.1997/850/1057, Eur. Ct. H.R., para. 80 (1998) (discussing the death of a villager in southeastern Turkey, and how the Court was not convinced that the Turkish security forces directly caused the death), available at <http://www.echr.coe.int> (last visited Jan. 27, 2002). The Court, however, went on to examine the planning and conduct of the security operation during which Havva Ergi was killed, and found that there was "no information to indicate that any steps or precautions had been taken to protect the villagers." *Id.* The Court emphasized that the responsibility of a state may be engaged where it fails to "take all feasible precautions in the choice of means and methods of a security operation. . . ." *Id.* para. 79 (emphasis added). The emphasized passage is found in API, Article 57 (2, a, ii). The Inter-American Commission on Human Rights has made more explicit use of international humanitarian law. For example, in the *Tablada* case, the Commission held it was competent to, and at times, had to "apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the American Convention by reference to these rules." *Abella*, Case 11.137, Inter. Am. C.H.R., No. 55/97, para. 157.

160. See Reidy, *supra* note 154, at 516, 528 (noting that the potential for enforcement of humanitarian law through the ECHR system has yet to be fully exploited); see also European Court of Human Rights, Press Release, *Luisa Diamantina Romero de Ibanez and Roberto Guillermo Rojas v. UK Inadmissible*, July 19, 2000, available at <http://www.echr.coe.int.english/200/jui%5Faug/belgrano.eng.htm> (last visited Jan. 27, 2002). The case concerned the sinking of the Argentinean cruiser *General Belgrano* on May 2, 1982, by British naval forces during the Falklands War. *Id.* The Court found that the complaint had



When considering the potential for the future application of international humanitarian law before the European Court of Human Rights, one must be mindful of the boundaries established in the *Bankovic* decision, particularly in cases involving the right to life.<sup>161</sup> As part of their argument for admissibility, the applicants relied both on the *ordre public* mission of the Convention and on Article 15 for a broad understanding of the term jurisdiction.<sup>162</sup> The Court, however, dismissed both approaches and emphasized that the Convention is a "constitutional instrument for *European* public order" and that Article 15 must "be read subject to the 'jurisdiction' limitation enumerated in Article 1."<sup>163</sup> Considering how narrowly the Court construed the term "jurisdiction" with regard to extra-territorial acts, it seems doubtful that more traditional armed conflict situations will reach the Court. If it is accepted that international humanitarian law will only flourish at the European Court in such traditional inter-state armed conflict situations, it appears unlikely that international humanitarian law will play a substantive part in the Court's judgments in the near future.

#### IV. THE ATTACK AT DJAKOVICA

One point of criticism directed at NATO's actions in OAF concerned the altitude from which several NATO attacks were conducted. The altitude was particularly central in the context of a number of attacks near Djakovica on April 14, 1999. For several days, the specific circumstances surrounding the attacks were in dispute. Most observers now seem to agree that NATO aircraft attacked one or more convoys of Albanian refugees due to mistaken identification. As many as seventy-five civilians are believed to have been killed. It is still unclear whether any military vehicles were part

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not been submitted within the six month allotted time period stipulated in ECHR, Article 35(1).

161. See *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R., para. 85 (Decision on Admissibility of Dec. 19, 2001) (declaring that the applicant's complaint was inadmissible), available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=218042346&Notice=0&Noticemode=&RelatedMode=0> (last visited Feb. 17, 2002).

162. See *id.* paras. 49, 79.

163. *Id.* paras. 62, 80.

of the convoy. It is reasonable to conclude, however, that the NATO aircraft did not intentionally target the civilian convoys in order to hit the refugees, even if the OTP Report does mention one source believing this to be the case.<sup>164</sup>

The important question is not whether the convoy constituted a military target, but rather, whether NATO took sufficient precautions in order to determine and verify that the target was legitimate. According to the API, Article 57(2)(a)(i), those who plan or decide upon an attack shall *inter alia* do “everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects. . .”<sup>165</sup> The difficulties connected to the interpretation of the word “feasible” are legion.<sup>166</sup> At the time of ratification, a number of countries entered their understanding of the word, understanding the term “everything feasible” to mean “everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations.”<sup>167</sup> The API Commentary emphasizes that the general reference to “the success of military operations” involves a risk of depriving the rule of any significant normative content.<sup>168</sup>

The API Commentary itself does not attempt to formulate any precise definition and merely states that any interpretation is fundamentally a question of “common sense and good faith.”<sup>169</sup> Concerning the obligation to distinguish and the altitude of fifteen thousand feet, the OTP Report found that “[t]he fifteen thousand feet minimum altitude adopted for part of the campaign may have meant that the target could not be verified with the naked eye”. It appears, however, “that with the use of modern technology, the obligation to

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164. See *OTP Report*, *supra* note 18, para. 66 (stating that the OTP has a source that alleges to have recorded a conversation that would establish that the attack on the convoy was deliberate even though the pilot knew it was comprised of civilians).

165. *Protocol I*, *supra* note 64, art. 57 (2)(a)(i).

166. See *infra* notes 167-169 and accompanying text (analyzing the difficulty of defining the term “feasible”).

167. *ICRC API Commentary*, *supra* note 34, para. 2198 (discussing different delegations’ interpretation of the words “everything feasible”).

168. *Id.*

169. *Id.*

distinguish was effectively carried out in the vast majority of cases during the bombing campaign.”<sup>170</sup> This finding naturally leads one to question to what extent the obligation to distinguish was respected in the residual small minority of cases.<sup>171</sup>

Regarding the attack at Djakovica, there was at least some doubt about what was observed on the ground. “NATO itself claimed that although the cockpit video showed the vehicles to look like tractors, when viewed with the naked eye from the attack altitude they appeared to be military vehicles.”<sup>172</sup> If one indicator, the video, conveyed one thing and the other indicator, the eye of the pilot, conveyed something else, it would be fair to conclude that there was some degree of doubt about what was being observed. Interestingly, the OTP Report implicitly commends NATO for suspending the attack as soon as the presence of civilians was “suspected.”<sup>173</sup> According to this rendition, attacks are apparently allowed if there is doubt, as long as the attackers do not actually “suspect” civilian presence. Here, suspicion would seem to demand some cognition beyond mere doubt. Such an understanding goes against the general principle found in the API. For example, Articles 50(1) and 52(3) hold that in case of doubt, persons and objects are presumed to be civilian in nature.<sup>174</sup>

#### A. PRECAUTIONARY MEASURES

The OTP Report failed to evaluate the legality of the individual attack near Djakovica. The Report dismisses the idea that precautions taken, or not taken, can be judged with reference to “a specific incident” and proceeds to determine that to the extent “precautionary measures have worked adequately in a high percentage of cases then the fact they have not worked well in a small number of cases does

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170. *OTP Report, supra* note 18, para. 56.

171. *See* Benvenuti, *supra* note 33, at 519 (explaining that in the *majority* of cases, the use of modern technology enhanced the obligation to distinguish between civilian and military targets) (emphasis added).

172. *OTP Report, supra* note 18, para. 67.

173. *See id.* para. 70.

174. *See Protocol I, supra* note 64, arts. 50(1), 52(3) (setting forth provisions that distinguish civilian people and objects from military targets).

not necessarily mean they are generally inadequate.”<sup>175</sup> This interpretation of international humanitarian law is, of course, a perfect fit with the overall findings of the OTP Report concerning the NATO air campaign.

This statement is problematic for several reasons. First, it allows the attacker, in this case NATO, to excuse a few transgressions or mistakes as long as they are seen in a sufficiently broad perspective. Such an approach may, as noted by Paolo Benvenuti, lead to the misconception that “war crimes occur and should be prosecuted only if committed in the context of a plan or of a large-scale commission, when the inadequacy of precautionary measures is deliberate on the part of the warring party.”<sup>176</sup> Benvenuti adds that “it is only when each attack is considered in its specific circumstances that it is possible to say whether or not all practicable precautions have been taken and whether or not the attack constitutes a breach of [international humanitarian law].”<sup>177</sup>

Second, even if the statement on the surface may generally appear to be correct, it cannot possibly be correct at any given time.<sup>178</sup> Consider, for example, an attack against a railroad bridge, which is considered to be a legitimate military target. Prior to the attack, a number of precautions are taken, but at no point is the train schedule consulted. Assume ten of such bridges are attacked. The first nine attacks are carried out smoothly with no collateral damage because no trains were close to the bridges at the time of the attacks. During the tenth and final attack, a train happens to be on the bridge. Can we, based on the *dictum* of the OTP Report, conclude that since everything went well in nine of ten cases, that sufficient precaution

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175. OTP Report, *supra* note 18, para. 29.

176. Benvenuti, *supra* note 33, at 515.

177. *Id.*

178. See *id.* at 514-515. Benvenuti comments:

Certainly, everybody agrees that, if precautionary measures have worked well in a small number of cases, it does not necessarily mean that they are generally inadequate. But the Committee forgets to stress that the corollary is also true: if the precautionary measures have worked adequately in a very high percentage of cases, this does not mean that they are generally adequate, so as to excuse violations occurring in a small number of cases.

*Id.*

had been taken? It would appear so, but is this legally correct? If the final attack had been the first, it would have been obvious that the precautions had been insufficient.

In a similar fashion, we may consider attacks carried out from an altitude of fifteen thousand feet. Assume ten attacks take place. Assume, also, that a number of precautions have been taken, but in reality the pilots are unable to determine positively whether the convoy on the ground contains civilian vehicles. In nine of the ten cases, it turns out that the convoys consisted solely of military vehicles. The tenth convoy attacked, however, was civilian. Can we conclude that because the first nine convoys happened to be military, that the attackers had fulfilled their obligations under Article 57 of the API?

What consequences do these deliberations have for a legal evaluation of the NATO attack near Djakovica? Amnesty International posits that the decision by NATO to conduct attacks from an altitude of fifteen thousand feet "may well have contributed to an indiscriminate attack, in breach of international humanitarian law."<sup>179</sup>

Similarly, Human Rights Watch concludes that the fact that NATO subsequently altered its procedures "indicates that the alliance recognized that it had taken insufficient precautions in mounting this attack, in not identifying the civilians present, and in assuming that the intended targets were legitimate military objectives rather than in positively identifying them."<sup>180</sup>

The Report from the OTP finds that the altitude, combined with other circumstances, such as the speed of the aircraft, make it difficult for the crew to distinguish civilian from military vehicles.<sup>181</sup>

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179. AMNESTY REPORT, *supra* note 24, § 5.3.

180. HRW REPORT, *supra* note 8, at 23 (quoting a NATO officer, after the incident, as stating that "we got to be very, very cautious about striking objects moving on the roads"). Another NATO officer is quoted as stating that "if military vehicles were intermingled with civilian vehicles, they were not to be attacked, due to the collateral damage." *Id.* Despite these directives, the attack was still carried out and the above commentary by NATO officers shows that they believed the precautions were insufficient. *Id.*

181. See OTP Report, *supra* note 18, para. 69 ("[I]t is difficult for any aircrew operating an aircraft flying at several hundred miles an hour and at a substantial

The Report concluded that the crew would have benefited from observing the potential target from a lower altitude.<sup>182</sup> The Report, however, does not find proof of recklessness, which is a requirement for criminal prosecution.<sup>183</sup>

One may read the OTP deliberation as an implicit confirmation that NATO violated Article 57 of the API, but that the *mens rea* failed to qualify the violation for prosecution.<sup>184</sup> If this reading is accepted, the three reports concur regarding this specific incident. Yet, to the detriment of the OTP Report and the future of international humanitarian law, clear conclusions are never drawn.

### B. MORE MORAL CONSIDERATIONS

In addition to the preceding *lex lata* observations, it may be worthwhile to contribute a few ethical or *lex ferenda* considerations, which may assist in the interpretation of the elusive demands of Article 57.<sup>185</sup> Each mission flown or each attack conducted involves a certain risk of unwanted casualties, such as casualties among friendly forces or among civilians. As proven during Operation Allied Force, the risk may not materialize very often. It is often possible to shift the risk between the NATO pilot and the civilian on the ground. If the pilot flies at a high altitude, he reduces the risk to himself, but civilians on the ground become harder to identify.<sup>186</sup> The risk, by contrast, is shifted towards the pilot if he flies low in order to make a positive identification of the target.<sup>187</sup>

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height to distinguish between military and civilian vehicles.”).

182. See *id.* para. 70.

183. See *id.* paras. 69-70 (declining to prosecute NATO based upon the Djakovica bombing).

184. See *id.* (failing to find the requisite degree of recklessness to warrant a recommendation to prosecute).

185. See *Protocol I, supra* note 64, art. 57 (requiring armed forces to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding . . . injury to civilians and damage to civilian objects”).

186. See *generally OTP Report, supra* note 18, paras. 69-70 (recognizing the tension between the pilot’s decision to fly at a high altitude in order to avoid detection and the need to fly low in order to minimize civilian casualties).

187. See CLARK, *supra* note 6, at 183. In addition to the obvious concern for the life of the individual pilot, General Clark’s determination not to lose any aircraft was also guided by strategic concerns:

These considerations are valid in any armed conflict. Michael Waltzer, for one, describes a similar situation during the Korean War. There, the specific question concerned whether to employ artillery against suspected enemy positions with a high risk of civilian casualties, or to send out a patrol in order to identify enemy positions more precisely. He writes:

Even if the proportions work out favorably [*i.e.*, only limited civilian casualties] . . . we would still want to say, I think, that the patrol must be sent out, the risk accepted, before the big guns are brought to bear. The soldiers sent on patrol can plausibly argue that they never chose to make war in Korea; they are soldiers nevertheless; there have obligations that go with their war rights, and the first of these is the obligation to attend to the rights of civilians—more precisely, of those civilians whose lives they themselves endanger.<sup>188</sup>

Deliberations such as these are now partly guided by API. In reality, however, the partial guidance only helps to solve the easy questions and lets the subtle situations such as the example from Kosovo go unresolved. Based on deliberations outlined above, which conclude that radio stations can be legitimate targets in cases where they incite genocide, one may also consider whether *jus ad bellum*

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If I wanted to keep this campaign going indefinitely, we had to protect our air fleet. Nothing would hurt us more with public opinion than headlines that screamed "NATO LOSES TEN AIRPLANES IN TWO DAYS." Take losses like that, divide it into the total number of aircraft committed, and the time limits of the campaign would be clear.

*Id.* However, whether the flying altitude is determined by concerns for the individual pilot, or is based on strategic concerns, or a combination of the two, it is immaterial for both the legal and moral evaluation.

188. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 155 (1991). Michael Ignatieff stated:

High tech warfare is governed by two constraints – avoiding civilian casualties and a avoiding risks to pilots – that are in direct contradiction. To target effectively you have to fly low. If you fly low, you lose pilots. Fly high and you get civilians. Low flying Apache helicopters could both target ethnic cleansers and avoid civilian casualties, but by week six the alliance had not even approved their deployment in Kosovo, believing the risks to crews from ground fire were still too high. As the campaign went onto its second month, the alliance's moral preferences were clear: Preserving the lives of their all-volunteer service professionals was a higher priority than saving innocent foreign civilians.

IGNATIEFF, *supra* note 38, at 62.

considerations may assist the interpretation of *jus in bello* rules in the present case. If an attack on a radio station can be justified by *in majore minus*, the following parallel appears appropriate to draw: if Operation Allied Force is legally justified as a humanitarian intervention, *i.e.*, to save the Kosovar-Albanian population, it would be hard to justify an allocation of the risk of casualties onto the Kosovar-Albanian population in order to avoid losses among NATO pilots.

The OTP Report makes references to similar deliberations. The Report finds that "the application of the definition [of a military target] to particular objects may also differ depending on the scope and objectives of the conflict."<sup>189</sup> These latter "objectives" may be presumed to be closely intertwined with the reasons for the initiation of Operation Allied Force, *i.e.*, *jus ad bellum*. It is, however, doubtful whether this OTP statement lends itself to the interpretation proposed here. As Michael Bothe observes, the OTP Report fails to investigate the question of whether:

Traditional considerations of military necessity and military advantage have a legitimate place in a conflict the declared purpose of which is a humanitarian one, namely to promote the cause of human rights. The thought would deserve further consideration that in such type of a conflict, more severe restraints would be imposed on the choice of military targets and of balancing test applied for the purposes of the proportionality principle that in a normal armed conflict.<sup>190</sup>

The Independent International Commission on Kosovo ("Commission") submitted a proposal with a similar interpretation. The Commission advocates that the International Red Cross draft a new convention to cover military operations during humanitarian interventions that would restrain the use of force to a further degree than what is currently permitted under the laws of armed conflict.<sup>191</sup>

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189. OTP Report, *supra* note 18, para. 37.

190. Bothe, *supra* note 40, at 535.

191. See THE KOSOVO REPORT, *supra* note 10, at 184 ("A less ambitious alternative, recommended by Amnesty International, would be to accept stricter adherence to the existing standards in international law, particularly as already embodied in Protocol I.").



## CONCLUSION

When the member states of NATO decided to initiate Operation Allied Force, few governments probably contemplated that they risked defending their actions before an international court. The increasing presence and importance of international courts appear to be the way of the future, whether one likes it or not.<sup>192</sup> The ICTY is one court before which NATO leaders will not have to appear. Although the Court clearly had jurisdiction, the prosecutor at the Court decided to follow the advice of the Committee that no formal investigation be initiated.<sup>193</sup> Even if one is inclined to agree with the conclusion of the OTP Report, it is very difficult to accept the reasoning and the ambiguities of the Report.<sup>194</sup> An inability or unwillingness to determine the facts, as well as a subsequent inability to apply legal rules to those facts, mars the OTP Report.

The aversion to drawing concrete and firm conclusions has further consequences beyond bringing peace of mind to NATO leaders.<sup>195</sup> As W.J. Fenrick notes, "to the extent the media is identified as a separate target category, Operation Allied Force may represent an attempt to broaden rather than narrow the range of objects regarded as lawful military objectives."<sup>196</sup> The OTP Report did not retard such a development, which it could have done by clearly stating that television stations are not military targets unless they fulfill the criteria in API, Article 52(2). Deliberations concerning the targeting

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192. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001) ("[A]n unprecedented movement has emerged to submit international politics to judicial procedures."); see also Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150, 151-53 (2001) (discussing the benefits of the growing international judicial system).

193. See generally *OTP Report*, *supra* note 18 (declining to recommend the prosecution of NATO leaders before the ICTY).

194. See Natalino Ronzitti, *Is the Non Liqueur of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?*, 82 INT'L REV. RED CROSS 1017-28 (2000) (setting forth a critique, different from the present, of the OTP's reasoning in deciding not to recommend the prosecution of alleged NATO war crimes).

195. See General Wesley Clark, Remarks at a Book Signing in Washington, D.C. (July 17, 2001) (indicating that General Clark finds that the OTP Report "exonerated" NATO).

196. Fenrick, *supra* note 7, at 495.

of television stations tie in with broader discussions regarding the use of military force.

During Operation Allied Force, many Americans advocated more substantial attacks on strategic targets in Serbia, including in Serbian cities. This advocacy is connected to recent theories about the use of air power to target the infrastructure of the enemy state. As J.W. Crawford comments, potential consequences would be "the indirect targeting of the civilian population, euphemistically referred to as 'popular support.'"<sup>197</sup> This development might be effective from a military point of view, but it is hardly recommendable from a humanitarian point of view. Even if the OTP Report did not intend to encourage the trend toward broadening the range of lawful military targets, the equivocal findings of the Report do not impede such a finding.<sup>198</sup>

Furthermore, the Report's interpretation of the principle of proportionality is detrimental to humanitarian concerns. The wide interpretation of what should be included in the evaluation of the expected military advantage threatens the normative restraint of the principle of proportionality. Even if it is agreed that an evaluation of each individual attack would be too narrow, the logic of the OTP Report seems irreconcilable with reasonable humanitarian considerations.

Moreover, in light of the conclusions drawn here, it would have been preferable if the OTP had conducted a formal investigation. On the whole, there seems to be enough doubt to warrant such a formal investigation, and the doubt should not necessarily benefit NATO in

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197. J.W. Crawford, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 FLETCHER FORUM OF WORLD AFF. 101-102 (1997) (discussing the debate of military necessity, targets, and proportionality of attacks).

198. See THE KOSOVO REPORT, *supra* note 10, at 179 (finding that targeting infrastructure and other facilities considered basic to civilian survival is "questionable under the Geneva Conventions [of 1949] and Protocol I [API]," but has been consistently practiced in wartime since World War II). In this context, it is regrettable that the OTP Report does not stand firm on legal protection. See Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT'L. REV. RED CROSS 147 (2000) (discussing how the conflict in Kosovo did not fit "within those types of armed conflict envisaged by the drafters of Additional Protocol I . . .").

the present circumstances.<sup>199</sup> Finally, additional and necessary facts, which were clearly absent from the OTP Report in spite of assertions to the contrary, could have been established and some of the problematic interpretations could have been challenged and amended.

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199. See THE KOSOVO REPORT, *supra* note 10, at 184 (“NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of ‘military necessity’ in context.”). The Commission also accepted the final view of the OTP Report “that there is no basis in available evidence for charging specific individuals with criminal violations of the laws during the NATO campaign. Nevertheless, some practices do seem vulnerable to the allegation that violations might have occurred, and depend for final assessment upon the availability of further evidence.” *Id.*