

2006

NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion

Anne-Sophie Massa

Recommended Citation

Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*, 24 BERKELEY J. INT'L LAW. 610 (2006).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol24/iss2/9>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?

By
Anne-Sophie Massa^{*}

*Prosecutors will have to exercise their discretionary powers in total impartiality, avoiding the semblance of appearing on the side of the victors or the powerful.*¹

I. INTRODUCTION

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. The ICTY [International Criminal Tribunal for the Former Yugoslavia] 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.²

* J.S.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall); former Rotary World Peace Fellow (2003-2005); Joint Masters Degree in Law and in International and Area Studies, University of California, Berkeley, 2003-2005; LL.M., 2003, University of Cambridge (United Kingdom); LL.B., 2000, University of Liège (Belgium). The author wishes to thank Professor Caron for providing valuable assistance with her research for this article as well as being a source of constant inspiration and support throughout her studies at Boalt Hall. Neelam Ihsanullah also deserves special thanks for her excellent editing efforts and her thoughtful suggestions.

1. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 175 (2005).

2. Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U.

From March 24 to June 10, 1999, the North Atlantic Treaty Organization ("NATO") engaged in a bombing campaign against the Federal Republic of Yugoslavia ("FRY") in response to the atrocities committed by Serbian forces against the ethnic Albanian population in Kosovo. Code-named "Operation Allied Force," the campaign resulted in the deaths of approximately 500 innocent civilians while injuring more than 800 others.³ Both the number of casualties and the circumstances in which they occurred gave rise to the question of whether NATO forces had committed war crimes and should be held criminally responsible for their actions before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Many viewed the incidents as sufficiently serious for an investigation to be conducted by the Tribunal.

However, on June 2, 2000, after considering her team's assessment of NATO's conduct in the campaign, the Prosecutor of the ICTY, Carla del Ponte, who had taken over for former Prosecutor Louise Arbour on September 15, 1999, concluded "that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign."⁴ While conceding that some mistakes were made by NATO, the Prosecutor nevertheless announced that she was "satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign."⁵

The decision by the Prosecutor of the Tribunal not to investigate, while favorably welcomed by NATO members and some writers,⁶ generated strong and persistent criticism from the majority of scholars,⁷ who questioned the Prosecu-

INT'L L. REV. 765, 812 (2002).

3. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 53, 90 [hereinafter OTP Report], available at <http://www.un.org/icty/pressreal/nato061300.htm>. See also HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN: THE CRISIS IN KOSOVO para. 26 (2000), available at <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (estimating that between 489 and 528 civilians were killed during NATO's bombing campaign).

4. Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000), available at www.un.org/icty/pressreal/p510-e.htm.

5. *Id.*

6. See, e.g., RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY 199-207 (2004); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 540 (2003); 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 (2001).

7. See, e.g., Côté, *supra* note 1; 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 (2001); Natalino Ronzitti, *Is the non liquet 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, 1020 (2000) (considering that "[b]ecause of its deficiencies, the Report does not constitute the definite and conclusive element on which a decision not to proceed may be grounded"); Laursen, *supra* note 2; Paul Tavernier, *Responsabilité Pénale? L'action du Tribunal Pénal International pour l'Ex-Yougoslavie, in KOSOVO AND THE INTERNATIONAL COMMUNITY* 157 (Christian Tomuschat ed., 2002); Michael Mandel, *NATO's Bombing of Kosovo under International Law Politics and Human Rights in International Criminal Law*, 25 FORDHAM INT'L L.J. 95 (2001); PIERRE HAZAN, JUSTICE IN A TIME OF WAR 133-39 (James Thomas Snyder trans., 2004).

tor's impartiality and expressed their suspicions that political rather than legal considerations, had influenced her decision.⁸

Discretion is one of the cornerstones of the prosecutorial office, guaranteeing a prosecutor the ability to be both independent and effective in the discharge of her functions. The scope of a prosecutor's discretion varies among national systems. But, at the international level, the Prosecutor of the ICTY has been vested with a wide degree of discretion. The aim of this contribution is to determine whether the decision not to investigate the NATO bombing campaign falls within the proper limits of the Prosecutor's exercise of discretion or whether it illustrates the potential abuses that such an attribute might produce.

Following a brief presentation of Operation Allied Force (Section II) and an analysis of the jurisdiction of the ICTY over NATO's bombing campaign (Section III), this article will examine the alleged war crimes committed by NATO (Section IV), study the Final Report of the Review Committee established by the Prosecutor (Section V), and discuss the decision of the Prosecutor not to prosecute in the light of prosecutorial discretion (Section VI). Some concluding remarks will consider the adjustments made to the scope of prosecutorial discretion at the international level by the Statute of the International Criminal Court and whether we should be optimistic about the exercise of discretion by the Prosecutor in the future (Section VII).

II.

OPERATION ALLIED FORCE

In reaction to the climate of violence prevailing in Kosovo in early 1999, and more particularly to the heinous massacre of forty-five Albanian civilians by Serb forces in the village of Racak on January 15, 1999, the United States, Germany, France, Italy and Russia decided to convene a conference in Rambouillet, France.⁹ The two-week negotiations, from February 6 to 22, 1999, were nothing less than an ultimatum addressed to the Federal Republic of Yugoslavia, whose presence at the table was guaranteed by the threat of air strikes. The peace agreement provided for substantial autonomy for Kosovo, with possible independent status to be discussed after a three-year period, as well as a strong NATO presence to ensure the agreement's implementation.¹⁰ Although the

8. See, e.g., Tavernier, *supra* note 7, at 161; Côté, *supra* note 1, at 180; HAZAN, *supra* note 7, at 133-39; Benvenuti, *supra* note 7, at 505; KERR, *supra* note 6, at 203.

9. HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 56-59 (2001).

10. *Id.* at 58-59. For an in-depth analysis of the Rambouillet negotiations, see Emmanuel Decaux, *La Conférence de Rambouillet: Négociation de la Dernière Chance ou Contrainte Illicite?*, in KOSOVO AND THE INTERNATIONAL COMMUNITY, *supra* note 7, at 45-64 (contending that the solution to the conflict negotiated at Rambouillet was the only reasonable option and that it did not fall within Article 52 of the Vienna Convention which voids a treaty concluded under the threat to use force in violation of the UN Charter); Eric Herring, *From Rambouillet to the Kosovo Accords: NATO's War Against Serbia and Its Aftermath*, in THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS 225, 225-28 (Ken Booth ed., 2001) (arguing that the peace agreement negotiated at Rambouillet was unworkable and that NATO's war did not result in a better peace in terms of human rights in Kosovo).

Kosovar delegation accepted the agreement under the convening states' pressure, the Serb delegation, opposed to NATO military presence on the ground, refused to sign.

Following the breakdown of the negotiations at Rambouillet and the increased attacks against the Albanian population that had created a massive flood of refugees,¹¹ NATO decided to engage in a military intervention against Serbia with the objective of putting an end to, or at least disturbing, the campaign of ethnic cleansing taking place in Kosovo.¹² However, the NATO air strikes, far from stopping the humanitarian crisis, "added a new dimension"¹³ to it, thereby contributing to the greatest exodus of refugees since the Second World War.¹⁴ Eventually, Slobodan Milosevic bowed to NATO demands, and the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia signed the Military Technical Agreement at Kumanovo, Macedonia, on June 9, 1999.¹⁵ This agreement, which laid down the principles for a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of Serbian military, police, and paramilitary forces, was officially accepted by the international community with the adoption of Security Council Resolution 1244 one day later,¹⁶ and resulted in the suspension of the air strikes.¹⁷

In the early days of the intervention, the criticism emerged that the Alliance was failing to comply with the rules of warfare.¹⁸ Despite NATO's public statements during the campaign that it was acting in accordance with the principles laid down in the Geneva Conventions and Additional Protocol I,¹⁹ several incidents, during which numerous civilians were killed and injured, called into question the official declarations of the Alliance. Decisions made by NATO officials regarding the choice of targets, the means of attack, and the selection of

11. On the situation of refugees in Kosovo, see Jim Whitman, *The Kosovo Refugee Crisis: NATO's Humanitarianism versus Human Rights*, in *THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS*, *supra* note 10, at 164-83.

12. See, e.g., HUMAN RIGHTS WATCH, *supra* note 3, para. 5.

13. John Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 1998 CANADIAN Y.B. INT'L L. 303, 322.

14. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 271 (2000); see also RICHARD N. HAASS, *INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD* 166-67 (1999) (explaining how the "initiation of the air campaign coincided with an intensification of military pressure by Serbian ground forces against the people of Kosovo," giving rise to the refugee crisis).

15. International Security Force for Kosovo Online Homepage, Background to the Conflict, <http://www.nato.int/kfor/kfor/intro.htm> (last visited Mar. 3, 2006).

16. S.C. Res. 1244, ¶ 2, U.N. Doc. S/RES/1244 (June 10, 1999); see Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, S/1999/682, available at <http://www.un.org/peace/kosovo/s99682.pdf>.

17. International Security Force for Kosovo Online Homepage, *supra* note 15.

18. Int'l Comm. Red Cross, *The Balkan Conflict and Respect for International Humanitarian Law* (Apr. 23, 1999), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/9946AD4CBB6F813FC1256B66005CB83B>.

19. See, e.g., Jamie Shea, NATO Spokesman, & David Wilby, Air Commodore, Transcript of Press Conference (Mar. 26, 1999), available at <http://www.nato.int/kosovo/press/p990326a.htm>.

weapons employed were highly questionable in as many as ninety incidents,²⁰ including the attack on the Radio-Television Station, the bombing of several refugee convoys, and the use of cluster bombs and depleted uranium in densely populated areas.

In order to evaluate whether the Prosecutor of the ICTY properly exercised discretion in deciding not to initiate investigations into NATO's controversial decision-making regarding the planning and the implementation of the military operation, it must first be established that the ICTY had jurisdiction over the bombing campaign and that the allegations against NATO were far from frivolous. We will examine these two issues in Sections III and IV, respectively.

III.

JURISDICTION OF THE ICTY OVER OPERATION ALLIED FORCE

The jurisdiction of the ICTY over serious violations of international humanitarian law committed in Kosovo is indisputable under the mandate established by UN Security Council Resolution 827, and has been repeatedly reaffirmed by the UN Security Council in its resolutions on Kosovo,²¹ as well as by the Tribunal itself.²²

A close look at both the mandate and the Statute of the ICTY is necessary to assess whether the Tribunal's jurisdictional scope encompasses the conflict in Kosovo, in general, and NATO's military intervention, in particular.

A. Mandate of the ICTY

On May 25, 1993, the Security Council adopted Resolution 827, establishing an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. During the first years of its activity, the ICTY focused on the atrocities perpetrated in Bosnia-Herzegovina and Croatia. However, the Tribunal began to get involved in the Kosovo situation in 1998, when the conflict between the Kosovo Liberation Army ("KLA") and the FRY forces intensified in the province.

Although the roots of the conflict in Kosovo are often traced back over seven centuries to the defeat of the Serbs by the Ottoman Turks in 1389, "[i]t has been argued that the spark that ignited the Balkan wars was Serbian President Slobodan Milosevic's decision to remove Kosovo's autonomy in 1999."²³

20. HUMAN RIGHTS WATCH, *supra* note 3, para. 16.

21. See, e.g., S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 1160, ¶ 17, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1203, ¶ 14, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1207, ¶ 4, U.N. Doc. S/RES/1207 (Nov. 17, 1998).

22. Sonja Boelaert-Suominen, *The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict*, 82 INT'L REV. RED CROSS 217, 227 (2000); see also Tavernier, *supra* note 7, at 161 (explaining that Security Council Resolution 827 and the Statute of the Tribunal establish the ICTY's jurisdiction over Kosovo and that the subsequent Security Council Resolutions on Kosovo only confirmed this interpretation).

23. SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 207 (2000).

Kosovo, which had been granted the status of an "autonomous region" under Tito's leadership in 1974, witnessed the rise of Serbian nationalism and human rights abuses in the 1990s without garnering the attention of the international community.²⁴ Promoting a non-violent approach, Kosovar Albanians responded to the revocation of their autonomy by declaring their independence and creating a parallel state in 1991.²⁵

However, the intensification of violence toward the Albanians led to the emergence of an armed group, the KLA, in 1996,²⁶ which "criticized the 'passive' approach of the ethnic Albanian leadership and promised to continue their attacks until Kosovo was free from Serbian rule."²⁷ Confrontations between the KLA and the Serbian police forces continued until the Drenica incident, which took place between February 28 and March 5, 1998. The killing of more than eighty people, including at least twenty-four women and children, by Serbian special forces in that incident "marked the beginning of the Kosovo conflict in the terms of the laws of war" and eventually caught the international community's attention.²⁸

On March 10, 1998, then-ICTY Prosecutor Louise Arbour declared that she was empowered to investigate the crimes being committed in Kosovo.²⁹ The Security Council supported the Prosecutor's decision when it "urge[d] the Office of the Prosecutor of the International Tribunal established pursuant to resolution 827 . . . to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction."³⁰ As one author explains, "[i]n the light of the mandate of the Tribunal, and in view of its jurisdictional competence . . . , there was no need for a separate Security Council resolution authorizing the Tribunal's involvement in Kosovo."³¹ In other words, all resolutions adopted by the Security Council in connection with the Kosovo situation did not really expand the existing jurisdiction of the Tribunal; the resolutions only reasserted the Tribunal's existing jurisdiction over Kosovo.³²

The Prosecutor subsequently conducted a series of investigations in Kosovo with the repeated support of the Security Council.³³ In response to the refusal of FRY authorities to continue to deliver visas to the Tribunal's personnel, the Security Council "call[ed] for prompt and complete investigation, including international supervision and participation, of all atrocities committed against

24. HUMAN RIGHTS WATCH, *supra* note 9, at 20-29.

25. *Id.* at 28-29; CHESTERMAN, *supra* note 23, at 207.

26. HUMAN RIGHTS WATCH, *supra* note 9, at 30.

27. *Id.* at 32.

28. *Id.* at 38-39.

29. Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., The Prosecutor's Statement Regarding the Tribunal's Jurisdiction over Kosovo (Mar. 10, 1998), available at <http://www.un.org/icty/pressreal/p302-e.htm> [hereinafter Prosecutor's Statement on Jurisdiction]; see Boelaert-Suominen, *supra* note 22, at 221.

30. S.C. Res. 1160, *supra* note 21, ¶ 17.

31. Boelaert-Suominen, *supra* note 22, at 229.

32. Tavernier, *supra* note 7, at 161.

33. Boelaert-Suominen, *supra* note 22, at 222.

civilians and full cooperation with the International Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations.”³⁴ The persistent opposition by Belgrade authorities to the investigations of the Prosecutor resulted in a new Security Council resolution, which “deplor[ed] the continued failure of the Federal Republic of Yugoslavia to cooperate fully with the Tribunal”³⁵ and reminded “the authorities of the Federal Republic of Yugoslavia, the leaders of the Kosovo Albanian community and all others concerned to cooperate fully with the Prosecutor in the investigation of all possible violations within the jurisdiction of the Tribunal.”³⁶

Because Article 25 of the United Nations Charter obliges all Member States to “accept and carry out the decisions of the Security Council,” the creation of the ICTY by the Security Council under Chapter VII of the Charter and its empowerment to exercise jurisdiction over the whole territory of the former Yugoslavia deprived the FRY of any legal foundation to oppose the conduct of investigative activities by the Prosecutorial office within Kosovo.³⁷ Thus, the mandate of the ICTY clearly encompasses its involvement in the Kosovo situation. We now turn to the ICTY Statute.

B. Jurisdiction of the ICTY over Kosovo

On 24 March 1999, 19 European and north [sic] American countries have said with their deeds what some of them were reluctant to say with words. They have *voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal*, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts.³⁸

Article 1 of the ICTY Statute defines the jurisdiction of the Tribunal in the following terms: “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 in accordance with the provisions of the present Statute.” The subject matter, territorial, and temporal jurisdictions of the Tribunal are successively described in Articles 2 to 8 of the Statute.³⁹

The Tribunal has jurisdiction *ratione materiae* over genocide, crimes against humanity, and war crimes.⁴⁰ As the question of whether the acts com-

34. S.C. Res. 1203, *supra* note 21, ¶ 14.

35. S.C. Res. 1207, *supra* note 21, pmb.

36. *Id.* ¶ 4.

37. Boelaert-Suominen, *supra* note 22, at 230.

38. Press Release, Louise Arbour, Prosecutor of the Int'l Criminal Tribunal of the Former Yugo. and the Int'l Criminal Tribunal of Rwanda, Introductory Statement at the Launch of the ICC Coalition's Global Ratification Campaign (May 13, 1999), available at <http://www.un.org/icty/pressreal/p401-e.htm> (emphasis added).

39. Statute of the International Tribunal, arts. 1-8, May 25, 1993, 32 I.L.M. 1192, 1192-94, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute].

40. *Id.* arts. 1-5, 32 I.L.M. at 1192-94.

mitted by NATO fall within the substantive jurisdiction of the Tribunal will be discussed *infra* in Section IV, we will for now limit our discussion to the territorial and temporal jurisdictions of the ICTY.

With regard to the Tribunal's jurisdiction *ratione loci*, Article 8 of the Statute asserts that "[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land, surface, airspace and territorial waters."⁴¹ Kosovo clearly falls within the scope of the tribunal's territorial jurisdiction, as it is part of the territory of the former Yugoslavia.⁴² This was confirmed by the Security Council in Resolution 1244, when it authorized an international civil presence that would allow Kosovo to benefit from "substantial autonomy within the Federal Republic of Yugoslavia."⁴³

Article 8 of the Statute defines the Tribunal's jurisdiction *ratione temporis* as "extend[ing] to a period beginning on 1 January 1991."⁴⁴ The Security Council specified that it would run from that time to "a date to be determined by the Security Council upon the restoration of peace."⁴⁵ The absence of an end date to its temporal jurisdiction makes it possible for the Tribunal to exercise its jurisdiction over crimes committed in the various stages of the Yugoslavian crisis.⁴⁶ The situation in Kosovo, with the core of the hostilities taking place from 1998 to 1999 and ending with the suspension of NATO's air strikes, undoubtedly falls within the temporal limitations of the Tribunal's jurisdiction.

ICTY Prosecutor Arbour correctly interpreted both the territorial and temporal jurisdictions of the Tribunal when she declared that "the Statute of the Tribunal, adopted by the United Nations Security Council in May 1993, empowers the Tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This jurisdiction is ongoing and covers the recent violence in Kosovo."⁴⁷ Moreover, in the particular context of Operation Allied Force, former Prosecutor Arbour confirmed the jurisdiction of the Tribunal:

I have received requests from persons and groups urging me to indict various NATO and other officials for war crimes in relation to the air strikes conducted in Serbia. There is no doubt in my mind that the jurisdiction of the Tribunal over Kosovo is well known to all, and indeed has never been contested by anyone except the FRY. The Tribunal has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war, which have been committed since 1991, or continue to be committed anywhere in the former Yugoslavia, by *anyone*.⁴⁸

41. *Id.* art. 8, 32 I.L.M. at 1194.

42. Tavernier, *supra* note 7, at 160.

43. S.C. Res. 1244, *supra* note 16, ¶ 10.

44. ICTY Statute, *supra* note 39, art. 8, 32 I.L.M. at 1194.

45. S.C. Res. 827, *supra* note 21, ¶ 2.

46. Tavernier, *supra* note 7, at 161.

47. Prosecutor's Statement on Jurisdiction, *supra* note 29.

48. Press Release, Louise Arbour, Prosecutor of the Int'l Criminal Tribunal of the Former Yugo. and the Int'l Criminal Tribunal of Rwanda, Statement of the Prosecutor (Mar. 31, 1999),

Thus, as one scholar states, it is clear that “the ICTY. . . has temporal and territorial jurisdiction over offences defined in Art. 2 to 5 of the Statute that would have been committed by NATO forces against targets on the territory of Kosovo or of the rest of the FRY from March 24 to June 10, 1999.”⁴⁹ The following section examines whether the incidents that occurred during the bombing campaign fall within the scope of the crimes defined in the ICTY Statute.

IV. DID NATO COMMIT WAR CRIMES?

Not all of NATO's actions were beyond any doubt lawful, and . . . some of the humanitarian law violations committed by NATO forces appear to be covered by Art. 3 of the ICTY Statute.⁵⁰

Whether NATO forces committed war crimes in the course of the military intervention against Serbia has been the subject of much controversy among scholars. However, the allegations implicating the Alliance were credible and sufficiently serious to warrant opening an investigation.

A. Crimes Under the Jurisdiction of the ICTY

Articles 2 to 5 of the ICTY Statute confer jurisdiction to the Tribunal over genocide, crimes against humanity, and war crimes. However, with respect to NATO's intervention against Serbia, it seems that only the last category of offenses might have been committed by the Alliance.⁵¹ This section will therefore focus on this particular type of international crime.

War crimes are commonly classified into four distinct categories: (1) crimes against persons not taking part in the hostilities (civilians, prisoners of war, etc.), such as murder, acts of torture, and sexual violence; (2) crimes against enemy combatants or civilians involving prohibited methods of warfare, such as intentional direct attacks against civilians, indiscriminate attacks having excessive effects on civilians, and attacks causing long-term, widespread and severe damage to the natural environment; (3) crimes against enemy combatants or civilians involving prohibited means of warfare, such as the use of poisoning weapons and the use of weapons causing unnecessary suffering; and (4) crimes against specially protected people and objects, such as attacks against religious and medical personnel and attacks against religious or cultural edifices.⁵²

available at <http://www.un.org/icty/pressreal/p391e.htm> (emphasis added).

49. Michael Cottier, *Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000*, in 44 *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 505, 508-09 (Horst Fischer et al. eds., 2001).

50. *Id.* at 535.

51. *E.g., id.* at 509-10.

52. *See, e.g.,* ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 54-57 (2003). Cassese also mentions a fifth, lesser category—crimes consisting of improperly using protected signs and emblems, such as a flag of truce, the emblem of the Red Cross, etc. *Id.* at 57.

The jurisdiction of the ICTY over war crimes is addressed in two provisions, Articles 2 and 3 of the Statute.⁵³ The former, which addresses the “grave breaches of the Geneva Conventions of 1949,” covers the Geneva Law aimed at the protection of certain categories of persons; whereas the latter, entitled “Violations of the Laws and Customs of War,” encompasses the Hague Law limiting the means and methods of warfare and has been recognized by the Tribunal as “a general clause covering all violations of international humanitarian law not falling under Art. 2 of the Statute”⁵⁴ as long as the following requirements are met:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁵⁵

For its violation to amount to a war crime, a rule of international humanitarian law must therefore be conventional—the most important international instrument in this regard being the Additional Protocol I to the Geneva Conventions of 1949—or have the status of customary international law, and a violation of the rule must entail individual criminal responsibility. In this context, a dis-

53. Article 2 of the ICTY Statute reads:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) willfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

ICTY Statute, *supra* note 39, art. 2, 32 I.L.M. at 1192.

Article 3 of the ICTY Statute reads:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

Id. art. 3, 32 I.L.M. at 1192-93.

54. Cottier, *supra* note 49, at 510.

55. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

tion must be made between the NATO member states that had ratified the Additional Protocol I at the time of the intervention and those that had not done so, namely the United States, France,⁵⁶ and Turkey. The application of the Additional Protocol I by the ICTY to the attacks conducted by military forces belonging to the first category of states is indisputable.

As far as the military operations planned and conducted by forces from the second category of states are concerned, however, "the ICTY thus can only exercise jurisdiction over violations of relevant rules of AP I if these rules reflect customary international law and if their violation gives rise to individual criminal responsibility under customary international law."⁵⁷ The high number of ratifications of the Additional Protocol I,⁵⁸ the inclusion of many of that treaty's principles in numerous military manuals, and the application of these principles by non-party states constitute evidence of the customary character of the main principles of the Protocol.⁵⁹ For instance, the obligations imposed on troops under the U.S. Military Code are largely similar to those binding the member States of NATO.⁶⁰ The most important principles of the Additional Protocol I, conventional by nature and customary in part,⁶¹ are therefore arguably applicable to NATO.

Yet, not all violations of international humanitarian law amount to war crimes and result in the charging of individuals.⁶² The following sub-section will briefly review the principles of international humanitarian law giving rise to individual criminal responsibility, and to which NATO's actions were submitted.⁶³

56. Since the intervention in Kosovo, France has ratified Additional Protocol I (April 11, 2001). See International Committee of the Red Cross, States Party to the Geneva Conventions and Their Additional Protocols, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf) (last updated Apr. 12, 2005).

57. Cottier, *supra* note 49, at 511-12.

58. As of April 12, 2005, 163 States have ratified Additional Protocol I to the Geneva Conventions. See International Committee of the Red Cross, *supra* note 56.

59. Cottier, *supra* note 49, at 512.

60. By including the principles of Additional Protocol I in its Military Code, the United States thus avoided a main criticism that resulted from Operation Desert Storm in Iraq in 1991, when the disparities between U.S. and U.K. troops with regard to the obligations they had to respect under international humanitarian law led the U.K. to refuse to participate in some operations.

61. Cottier, *supra* note 49, at 512.

62. INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT* 178-79 (2000); Cottier, *supra* note 49, at 528.

63. For additional analysis of the intervention in light of international humanitarian law, see, e.g., AMNESTY INT'L, "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS?: VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000); Frédéric de Mulinen, *Distinction Between Military and Civilian Objects, in KOSOVO AND THE INTERNATIONAL COMMUNITY*, *supra* note 7, at 103; Philippe Weckel, *Les Devoirs de l'Attaquant à la Lumière de la Campagne Aérienne en Yougoslavie, in KOSOVO AND THE INTERNATIONAL COMMUNITY*, *supra* note 7, at 129; Sergey Alexeyevich Egorov, *The Kosovo Crisis and the Law of Armed Conflicts*, 82 INT'L REV. RED CROSS 183 (2000); Konstantin Obradović, *International Humanitarian Law and the Kosovo Crisis*, 82 INT'L REV. RED CROSS 699 (2000); Péter Kovács, *Intervention Armée des Forces de l'OTAN au Kosovo: Fondement de l'Obligation de Respecter le Droit International Humanitaire*, 82 INT'L REV. RED CROSS 103 (2000); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*,

B. Principles of International Humanitarian Law

As a matter of principle, questions of *ius ad bellum* must be strictly separated from the *ius in bello*: Invoking a right to 'humanitarian intervention' does not alter legal obligations under humanitarian law and cannot justify violations of this branch of international law.⁶⁴

The purpose of international humanitarian law is "to moderate the conduct of armed conflict and to mitigate the suffering which it causes."⁶⁵ It follows that persons who are not or are no longer participating in the hostilities, such as civilians, wounded and sick combatants, and prisoners of war, must be protected during the conflict and allowed to benefit from humanitarian care. The core rules of international humanitarian law consist of the principles of distinction, proportionality, and precaution in the attack, as well as the idea of limiting the use of certain types of weapons.⁶⁶ While these principles have been codified in various instruments including Additional Protocol I to the Geneva Conventions, they also seem to be recognized as part of customary international law.⁶⁷

1. The Principle of Distinction

According to the principle of distinction, set forth in Article 48 of the Additional Protocol I, a war is waged only against the armed forces of the enemy and thus requires distinctions to be drawn between civilians and combatants and between civilian property and military objectives. The main consequence of the principle of distinction is that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."⁶⁸ In other words, the civilian population and civilian property—the latter being "all objects which are not military objectives"⁶⁹—must be protected in all circumstances.⁷⁰

It follows that "[t]he attempt to define exactly what constitutes a military objective is an essential step in making the principle of distinction operative."⁷¹

7 DUKE J. COMP. & INT'L L. 539; Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INT'L REV. RED CROSS 147 (2000); James A. Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned*, 82 INT'L REV. RED CROSS 129 (2000); HUMAN RIGHTS WATCH, *supra* note 3.

64. Cottier, *supra* note 49, at 514.

65. HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE* 1 (2d ed. 1998).

66. On the principles of international humanitarian law, see A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (1996); Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 105 (Dieter Fleck ed., 1995).

67. See Oeter, *supra* note 66, at 153 (principle of distinction); Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, *supra* note 50, at 209, 212 (duty to protect and respect civilians); ROGERS, *supra* note 66, at 14 (rule of proportionality).

68. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(2), Dec. 12, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Protocol I].

69. *Id.* art. 52(1), 1125 U.N.T.S. at 27.

70. *Id.* arts. 51(2), 52(1), 1125 U.N.T.S. at 26, 27.

71. Oeter, *supra* note 66, at 155.

The definition of "military objective" offered by Article 52(2) of the Additional Protocol I⁷² combines an objective element (the effective contribution to military action made by the object) with a subjective element (the definite military advantage conferred by the neutralization of the object).⁷³ Only when both criteria are met in a specific instance can an object be considered a military objective.⁷⁴ Whereas the traditional military objectives are relatively easy to identify

72. According to the definition contained in the Protocol, "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." Protocol I, *supra* note 68, art. 52(2), 1125 U.N.T.S. at 27.

73. For an analysis of the concept of military advantage, see ROGERS, *supra* note 66, at 33-46; Oeter, *supra* note 66, at 153-69.

74. Both the International Committee for the Red Cross and the doctrine have attempted to set up a non-exhaustive list of military objectives. However, it is important to remember that it is not sufficient for an object to be on the list in order to be considered a military objective; the two cumulative criteria of article 52 must be met. The following is the proposed list of categories of military objectives drawn up by the ICRC in 1956:

I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:

(1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting. (2) Positions, installations or constructions occupied by the forces indicated in subparagraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces). (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and others organs for the direction and administration of military operations. (4) Stores of arms or military supplies [sic], such as munition dumps, stores of equipment or fuel, vehicles parks. (5) Airfields, rocket launching ramps and naval base installations. (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance. (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance. (8) Industries of fundamental importance for the conduct of the war: (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material; (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces; (c) factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military; (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c); (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption. (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.

II. The following however, are excepted from the foregoing list:

(1) Persons, constructions, installations or transports which are protected under the Geneva Conventions I, II, III, of August 12, 1949; (2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities.

III. The above list will be reviewed at intervals of not more than ten years by a group of Experts composed of persons with a sound grasp of military strategy and of others concerned with the protection of the civilian population.

INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2002 n.3 (Yves Sandoz et al. eds., 1987).

in the light of the requirements of Article 52, the task is much harder with regard to those objects employed for both civilian and military purposes, commonly referred to as dual purpose objects, such as roads, bridges, railway lines, broadcasting facilities.

The said objects will obviously make an effective contribution to the ordinary commerce of life in general (including military activity), but this is not the same as saying that they make an effective contribution to military action. Nor will their destruction (taken as a whole) necessarily lead to a 'definite military' advantage.⁷⁵

Importantly, Article 52(3) of the Additional Protocol I explains that in case of doubt as to whether a possible use makes an effective military contribution, an object normally dedicated to civilian purposes must be presumed civilian.

Violating the principle of distinction and launching an attack against civilian populations or individual civilians constitutes a grave breach of the Geneva Conventions and the Additional Protocol I,⁷⁶ and falls within the categories of grave breach and "violation of the laws or customs of war" under Articles 2 and 3 of the ICTY Statute,⁷⁷ respectively.⁷⁸ The direct attack on civilian property qualifies as a grave breach under Article 2 of the ICTY Statute⁷⁹ and is also covered by Article 3 of the ICTY Statute.⁸⁰

2. The Principle of Proportionality

The principle of proportionality, in turn, prohibits an attack that "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."⁸¹ In practice, the application of this principle gives rise to a series of critical issues, as it is difficult to "assess the value of innocent human lives as opposed to capturing a particular

Turning to the doctrine, the most notable tentative list of military objectives has been proposed by A.P.V. Rogers in 1996:

military personnel and persons who take part in the fighting without being members of the armed forces; military facilities, military equipment, including military vehicles, weapons, munitions and stores of fuel, military works, including defensive works and fortifications, military depots and establishments, including War and Supply Ministries; works producing or developing military supplies and other supplies of military value, including metallurgical, engineering and chemical industries supporting the war effort; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads as well as tunnels and canals; oil and other power installations; communications installations, including broadcasting and television stations and telephone and telegraph stations used for military communications.

Rogers, *supra* note 66, at 37.

75. Rowe, *supra* note 63, at 151.

76. See Protocol I, *supra* note 68, art. 85(3)(a), 1125 U.N.T.S. at 42.

77. See ICTY Statute, *supra* note 39, art. 2(a), (c), 32 I.L.M. at 1192.

78. See *id.* art. 3, 32 I.L.M. at 1192-93; Fenrick, *supra* note 63, at 553-55, 559.

79. See ICTY Statute, *supra* note 39, art. 2(d), 32 I.L.M. at 1192.

80. See *id.* art. 3, 32 I.L.M. at 1192-93; Fenrick, *supra* note 63, at 553-55, 559.

81. Protocol I, *supra* note 68, arts. 51(5)(b), 57(2)(b), 1125 U.N.T.S. at 26, 29.

military objective.”⁸² Some issues raised are the extent to which not only direct, but also indirect, incidental injury or damage to the civilian population must be taken into consideration;⁸³ the extent to which the military leadership must endanger its own forces in order to avoid civilian casualties;⁸⁴ and the extent to which the respect for proportionality must be assessed in the context of the attacks as a whole.⁸⁵

Launching an attack in violation of the principle of proportionality amounts to a “grave breach” of the Additional Protocol I⁸⁶ and constitutes a “violation of the laws or customs of war” under Article 3 of the ICTY Statute.⁸⁷

3. The Principle of Precaution

The principle of precaution in the attack is based on the idea that in order for the principles of distinction and proportionality to be effective in practice, they must be implemented through a series of precautionary measures.⁸⁸ This principle has been codified in Article 57 of the Additional Protocol I, which establishes a number of precautions that must be taken at different levels of the military hierarchy in order to avoid civilian casualties.

A first precaution, which applies to all levels of the military structure, requires that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”⁸⁹

A second precaution, which applies to “military planners and commanders who give the orders for the execution of those plans,”⁹⁰ obliges them to do everything feasible to verify that the targets to be attacked are strictly military objectives,⁹¹ to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects,”⁹² and to refrain from launching an attack which may be expected to be disproportionate.⁹³

82. Fenrick, *supra* note 63, at 546; see also Oeter, *supra* note 66, at 178-79 (emphasizing the “subjective assessment and balancing” of the principle of proportionality in practice); ROGERS, *supra* note 66, at 17 (referring to the case “where in adopting a method of attack that would reduce incidental damage the risk to the attacking troops is increased”).

83. On indirect damage, see Rowe, *supra* note 63, at 152-53.

84. Fenrick, *supra* note 63, at 546, 548-49; ROGERS, *supra* note 66, at 17.

85. See Oeter, *supra* note 66, at 179 (positing that “only in the framework of the more complex overall campaign plan of a belligerent can one assess the relative military value of the specific purpose of an individual attack”).

86. See Protocol I, *supra* note 68, art. 85(3)(b), 1125 U.N.T.S. at 42.

87. See ICTY Statute, *supra* note 39, art. 3, 32 I.L.M. at 1192-93.

88. Oeter, *supra* note 66, at 183.

89. Protocol I, *supra* note 68, art. 57(1), 1125 U.N.T.S. at 29.

90. ROGERS, *supra* note 66, at 69.

91. Protocol I, *supra* note 68, art. 57(2)(a)(i), 1125 U.N.T.S. at 29.

92. *Id.* art. 57(2)(a)(ii), 1125 U.N.T.S. at 29.

93. *Id.* art. 57(2)(a)(iii), 1125 U.N.T.S. at 29 (also defining a disproportionate attack as one that would “cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

A third precaution, which not only applies to military planners and commanders but also to the members of the armed forces who carry out the attack,⁹⁴ asks for the cancellation or suspension of an attack

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.⁹⁵

A fourth precaution requires that the attacking forces give an "effective advance warning" for the attacks that may affect the civilian population, "unless circumstances do not permit" otherwise.⁹⁶ Concretely, the warning can take the form of radio and television broadcasts in a language that the population understands or the dropping of leaflets.⁹⁷ On the other hand, the warning "would have to be short-term to avoid essential equipment being removed from a building to be attacked."⁹⁸

Article 57(3) contains a final precaution: "[w]hen a choice is possible between several military objectives for obtaining a similar advantage, the objective to be selected shall be the attack on which it may be expected to cause the least danger to civilian lives and to civilian objects."

The violation of the principle of precaution does not constitute a war crime in itself. Nevertheless, if a violation of the principle leads to a direct attack on civilians or civilian property, or an indiscriminate attack, the lack of precaution indirectly contributes to the commission of war crimes covered either by Articles 2 or 3 of the ICTY Statute.⁹⁹

4. The Use of Weapons

Lastly, the Additional Protocol I, while it does not prohibit the use of specific types of weapons, contains a general provision which asserts that the right of the parties to choose a means of warfare is not unlimited.¹⁰⁰ More specifically, Article 35(2) bans the use of weapons "of a nature to cause superfluous injury or unnecessary suffering."¹⁰¹ As far as the protection of the environment is concerned, Article 35(3) excludes the use of means of warfare that would

94. ROGERS, *supra* note 66, at 69. Thus, pilots who are unable to identify a target should refrain from bombing and cancel the attack on their own initiative. *But see* Oeter, *supra* note 66, at 185-86 (stating that it remains in doubt whether the obligation affects ordinary soldiers in the lower levels of the military hierarchy who implement the attack).

95. Protocol I, *supra* note 68, art. 57(2)(b), 1125 U.N.T.S. at 29.

96. *Id.* art. 57(2)(c), 1125 U.N.T.S. at 29.

97. ROGERS, *supra* note 66, at 61.

98. Rowe, *supra* note 63, at 154.

99. *See* Cottier, *supra* note 49, at 529 (explaining that the failure to take required precautions which could have avoided civilian casualties "might give rise to responsibility for reckless killing of civilians which constitutes a grave breach of the AP" and "might be taken into account by judges when reflecting on the proportionality of incidental casualties in relation to military advantage").

100. Protocol I, *supra* note 68, art. 35(1), 1125 U.N.T.S. at 21.

101. *Id.* art. 35(2), 1125 U.N.T.S. at 21.

cause "widespread, long-term and severe damage to the natural environment."¹⁰² Beside the Additional Protocol I, several conventions prohibit the use of specific weapons, such as chemical¹⁰³ and biological¹⁰⁴ weapons and land mines.¹⁰⁵

Article 3 of the ICTY Statute recognizes that the "employment of . . . weapons calculated to cause unnecessary suffering" amounts to a violation of "the laws or customs of war" and therefore constitutes a war crime.¹⁰⁶

In sum, "[a]rmed forces thus are restricted in their choice of means and methods of waging war and must take certain precautions in planning and conducting attacks against specific targets."¹⁰⁷ However, individuals may only be held criminally responsible for serious violations of humanitarian law constituting war crimes if both an objective and subjective element are present. The following section examines these elements.

C. Individual Criminal Responsibility

The objective element, or *actus reus*, required in cases of direct individual criminal responsibility may "be inferred from the substantive rule of international humanitarian law allegedly violated."¹⁰⁸ In other words, for the objective element to be satisfied, a violation of international humanitarian law amounting to a war crime must have occurred.

Although the existence of a war crime is necessary to hold an individual directly criminally responsible for its commission, this objective element alone is insufficient. In addition to the *actus reus*, the *mens rea* or subjective element is also required. The ICTY has defined the *mens rea* as requiring "intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."¹⁰⁹ With respect to war crimes,

102. *Id.* art. 35(3), 1125 U.N.T.S. at 21. For a commentary on what constitutes "widespread, long-term and severe damage to the environment," see Oeter, *supra* note 66, at 116-18.

103. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

104. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

105. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, S. Treaty Doc. 105-1, at 45 (1997), 1342 U.N.T.S. 168; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Dec. 3, 1997, 36 I.L.M. 1507.

106. ICTY Statute, *supra* note 39, art. 3(a), 32 I.L.M. at 1192.

107. Cottier, *supra* note 49, at 515.

108. CASSESE, *supra* note 52, at 54.

109. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 674 (May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>. Accord Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 322 (Nov. 16, 1998), available at <http://www.un.org/icty/celebi/trialc2/judgement/index.htm>; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 241, 243 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index>

however, the Tribunal has added that the *mens rea* "includes both guilty intent and recklessness which may be likened to serious criminal negligence."¹¹⁰

At the same time, according to the doctrine of superior responsibility, military and civilian superiors may be held responsible for the crimes of their subordinates if they failed to prevent the crimes from occurring or to punish them once they had taken place.¹¹¹

D. War Crimes Allegedly Committed by NATO

Various incidents that occurred during the bombing campaign against Serbia present the constitutive elements required to consider that a war crime has been committed and that the authors of the attacks and the military commanders should individually be held criminally responsible. The following examines four of these incidents;¹¹² each illustrates a different facet of Operation Allied Force's controversial planning and implementation phases. The bombing of Radio-Television seriously challenges the scope of what constitutes a military objective. The attack on a civilian passenger train crossing a bridge and on several refugee convoys casts doubt on NATO's respect for the principle of precaution. Lastly, the use of cluster bombs in the bombing of a densely populated area runs counter to the clear prohibition of indiscriminate attacks under the principle of distinction.

1. The Radio-Television Station Incident

On April 23, 1999, NATO aircrafts bombed the Serbian State Television and Radio in Belgrade without denying that it was their intended target.¹¹³ The nature of the target is at issue in this case. As discussed *supra*, the Statute of the ICTY has recognized the principle of distinction by classifying attacks against civilian objects and civilians as war crimes.

Whether the Radio-Television Station qualifies as a military objective is controversial because television stations may constitute dual-use objects. The International Committee for the Red Cross has included television stations on their list of potential military objectives; however, this list is not determinative. The ICRC itself underscored that the nature of the target must still be resolved on a case-by-case basis; that the "military objective" requirements provided by the Additional Protocol I must be met in each particular instance; and that, even if the targets "belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances

.htm.

110. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 152 (Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trial1/judgement/index.htm> [hereinafter Blaskic case].

111. ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 94-5 (2002).

112. For another analysis of the first two incidents, see Cottier, *supra* note 49, at 516-35.

113. AMNESTY INT'L, *supra* note 63, at 47.

ruling at the time, offers no military advantage.”¹¹⁴

NATO repeatedly insisted it had carried out the attack on the Radio-Television Station because the station was playing a propaganda role in the conflict.¹¹⁵ The Alliance ostensibly bombed the infrastructure because the station refused to broadcast six hours of Western media reports on a daily basis.¹¹⁶ However, even the Committee set up by the Prosecutor of the ICTY determined that “[d]isrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by the Additional Protocols.”¹¹⁷

At the same time, however, NATO contended that the television station was a dual-purpose object because it was part of the military broadcast network. Yet, “there is no public evidence that the RTS was in fact used for C3 [Command, Control, and Communication] purposes.”¹¹⁸ Even if one accepts NATO’s argument, it is difficult to see how the requirement of a “definite military advantage” was met when broadcasting resumed approximately three hours after the bombing¹¹⁹ and NATO knew beforehand that the broadcasting would only be minimally affected by the attack.¹²⁰ Furthermore, as one scholar notes, “NATO may have had more effective alternative means to counter the Serb propaganda without bombing a dual-use, if not civilian, object and without risking the lives [sic] of civilians by jamming the radio and television programs and communicating its own ‘truth’ to the Serbian population.”¹²¹ In this context, it is more than reasonable to conclude that the television station was a civilian objective, which indicates that the material element of the war crimes covered by Articles 2 and 3 of the ICTY Statute (attack against civilian objectives and civilians) is fulfilled.

The question that remains is whether the commanders who ordered the at-

114. INT’L COMM. RED CROSS, *supra* note 74, ¶ 2002; *see also* Cottier, *supra* note 49, at 520 (explaining that “the approach of drawing up lists of military objectives was abandoned in favour of the general definition in Art. 52 AP I” and furthermore that a categorical approach is vulnerable to being applied in a way “which reverses the presumption that objects ‘normally dedicated to civilian purposes... shall be presumed not to be so used’”).

115. AMNESTY INT’L, *supra* note 63, at 48.

116. In earlier statements, NATO had indicated that it would target TV studios unless they broadcasted six hours per day of Western media programming. *See, e.g.,* Cottier, *supra* note 49, at 517; OTP Report, *supra* note 3, ¶ 74; Robert M. Hayden, *Biased Justice: ‘Humanrightsism’ and the International Criminal Tribunal for the Former Yugoslavia*, in *YUGOSLAVIA UNRAVELED* 259, 265 (2003).

117. OTP Report, *supra* note 3, ¶ 76.

118. Cottier, *supra* note 49, at 518; *see also* Hayden, *supra* note 116, at 265 (explaining that “no one has suggested that RTS studios played any military role” or that the studios were integrated into military facilities in any way).

119. AMNESTY INT’L, *supra* note 63, at 51; *see also* Cottier, *supra* note 49, at 519 (noting that “Yugoslav State broadcasters were able to easily move operations to other facilities after the strike” on the RTS).

120. AMNESTY INT’L, *supra* note 63, at 51; Cottier, *supra* note 49, at 523.

121. Cottier, *supra* note 49, at 519.

tack and the soldiers who carried it out acted with the required *mens rea*. With regard to the commanders, the most plausible interpretation, supported by various authors, is that they knew the role played by the television station in the conflict and the fact that the television station constituted a civilian objective,¹²² but nevertheless deliberately ordered the attack because they wanted to undermine the morale of the enemy.¹²³ Under this interpretation, the NATO commanders possessed the intent and knowledge required. Even if they did not intentionally order the bombing of a civilian objective, but rather thought that the station was a military objective, their responsibility might still be engaged: an incorrect interpretation of the legal definition of military objective is a "mistake of law," and such mistakes might not exclude their responsibility. In addition, with regard to the war crime of attacking civilians, the mental element is met in both interpretations, as "willful" may denote a *mens rea* of either intent or recklessness according to the ICTY.¹²⁴

Nevertheless, even if one concludes that the Radio-Television Station was in fact a military objective, the commanders might still incur individual criminal responsibility under Article 3 of the ICTY Statute if the civilian casualties were excessive in relation to the military advantage anticipated. As one scholar notes, "there is no evidence that the effected military advantage, if any, was considerable. The broadcasts were interrupted for only approximately three hours in the middle of the night. It indeed appears that NATO was aware that the attack would not disrupt broadcasting for a long period."¹²⁵ On the other hand, NATO forces were aware that a significant number of civilians were present in the buildings of the Radio-Television Station. Whether precautions were taken before and during the attack should therefore be reviewed. Notably, NATO failed to warn these civilians even though it knew that the building was staffed twenty-four hours. In summary, "it is difficult to see how the probable death or injury of a substantial number of civilians could not be qualified as excessive when compared to an anticipated military advantage of disrupting broadcasting for a few hours past 2 AM."¹²⁶

With respect to the soldiers who carried out the attack, their situation differs slightly from that of their commanders. The soldiers, as low-rank army members, may not have known the exact role played by the television station in the conflict and therefore may have thought that the station fell within the definition of a military objective. Their responsibility for the bombing would not necessarily be engaged; even though they must have known that in cases of doubt the civilian character of an objective should always be presumed. How-

122. Cottier, *supra* note 49, at 519, Hayden, *supra* note 116, at 265.

123. See, e.g., Cottier, *supra* note 49, at 519; Hayden, *supra* note 116, at 265; see also AMNESTY INT'L, *supra* note 63, at 49 (explaining that attacking a civilian facility in an effort to undermine the enemy's morale falls outside the acceptable interpretation of what constitutes a military objective).

124. See Blaskic case, *supra* note 110, ¶ 152.

125. Cottier, *supra* note 49, at 525.

126. *Id.* at 526.

ever, as the ICTY has affirmed in the *Blaskic* case, the reckless attack of civilians resulting from a lack of precaution also engages individual criminal responsibility.¹²⁷ To the extent that there is evidence that the pilots did not take all necessary precautions during the attack to protect the civilian population, the soldiers' responsibility would also be implicated.

2. *The Grdelica Railroad Bridge Incident*

During an attack that occurred in the middle of the day on April 12, 1999, two bombs hit a civilian passenger train while it was crossing a bridge. The object of the attack was the bridge, not the train. Whereas the dropping of the first bomb on the train is attributable to the Alliance's failure to verify the train schedules and the high altitude that apparently prevented the pilots from getting a precise view of the target at the time of the attack; the dropping of the second bomb is inexplicable. The pilot must have realized that the bomb dropped in the first attack had hit the train instead of the bridge. The explanations given by NATO's representatives are highly problematic, as they suggest that the pilot dropped the second bomb because he "had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties."¹²⁸

This incident raises the issues of whether the pilot who dropped the second bomb may incur individual criminal responsibility for war crimes under Articles 2 and 3 of the ICTY Statute (willful killing of civilians and indiscriminate attack causing excessive civilian casualties or damage); and whether his military superior may be held accountable on the basis of the doctrine of superior responsibility. As far as the pilot is concerned, one interpretation is that he consciously and deliberately attacked the train, a clearly civilian objective, because it was located on the bridge, his initial target.¹²⁹ Another is that the pilot did not intend to target the train as such. However, even in the latter hypothesis, he may still be held responsible for the reckless killing of civilians because he did not take sufficient precautions.¹³⁰ Indeed, "[h]e could simply have cancelled the attack or waited until the view on the bridge cleared."¹³¹ His responsibility might also be engaged if he "was aware that a high number of civilian casualties would result from the attack and if these casualties would be excessive in relation to the military advantage anticipated."¹³² It follows that the material and mental elements required seem present and that the pilot might incur individual criminal responsibility.

As long as the pilot misunderstood his orders and the commanders neither

127. *Blaskic* case, *supra* note 110, ¶ 152.

128. AMNESTY INT'L, *supra* note 63, at 36.

129. See Cottier, *supra* note 49, at 532.

130. As Michael Cottier notes, "He should have known that the train, which was already partly on the bridge of only about 50 metres long, would almost inevitably be affected by a bomb targeted against the bridge, and as it appears that he could have avoided the death of some civilians had he taken feasible and warranted precautions." *Id.* at 533.

131. *Id.* at 532.

132. *Id.* at 533.

explicitly nor implicitly ordered the attack of the train, the latter may not be held directly responsible. However, their responsibility as superiors may be implicated if they failed to punish the pilot once the crime had been committed.¹³³ No serious investigation of the incident seems to have occurred at any point after the attack.¹³⁴ Moreover, the commanders' direct responsibility is clearly engaged if they ordered the bombing of the bridge regardless of the presence of civilians in or around the target.¹³⁵

3. The Djakovica-Decan Road Incident

On April 14, 1999, NATO bombed several refugee convoys, killing seventy ethnic Albanians and wounding over 100 others. At first, NATO did not recognize its responsibility for the attack and blamed Yugoslav forces. Later, it admitted that aircrafts from the Alliance had carried out the bombing but argued that the pilots thought they were attacking military vehicles.¹³⁶ However, only tractors and wagons were hit, and there is no evidence that military vehicles were present among them.¹³⁷ Even so, it must be recalled that the "presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."¹³⁸

This attack raises the issue of whether the pilots and their commanders are responsible for the willful killing of civilians, a war crime under Article 2 of the ICTY Statute. The pilots could argue that they committed a mistake of fact, which negates the mental element required. However, this defense may not be invoked when the mistake results from negligence.¹³⁹

In this case, the pilots clearly mistook the convoy for a military column due to their failure to take sufficient precautions to distinguish between civilian and military objectives. Indeed, NATO itself recognized that the altitude at which the pilots were required to fly, 15,000 feet and above, had been a factor in the misidentification of the convoy and that none of the aircraft involved in the attack descended to low altitudes to double check the nature of the target.¹⁴⁰ The fact that NATO modified its rules of engagement after this incident and asked its pilots to fly as low as 6,000 feet in order to get a visual confirmation of the ab-

133. *Id.* at 534.

134. "On 15 April 1999 Amnesty International called on NATO to conduct an inquiry into this attack. NATO officials who met with Amnesty International delegates in Brussels said they were not aware of the second bomb being dropped by the pilot. Assistant Secretary General Buckley said that if General Clark's account is that the pilot fired a second time at the bridge, it must mean that there was an internal investigation and the pilot was cleared." Nevertheless, it is difficult to imagine how a serious investigation could have led to the clearance of the pilot with regard to his criminal conduct. AMNESTY INT'L, *supra* note 63, at 37.

135. See Cottier, *supra* note 49, at 533 (stating that "such orders or training would have to be revised to be fully compatible with the requirements of international humanitarian law").

136. AMNESTY INT'L, *supra* note 63, at 37-38.

137. *Id.* at 39.

138. Protocol I, *supra* note 68, art. 50(3), 1125 U.N.T.S. at 26.

139. CASSESE, *supra* note 52, at 251.

140. AMNESTY INT'L, *supra* note 63, at 45-47.

sence of civilians in the vicinity of the target shows that the prior rules of engagement were not satisfactory under international humanitarian law.¹⁴¹ The lack of proper precautions resulted in the death of innocent civilians, and the pilots should therefore incur individual criminal responsibility for the reckless killing of civilians.

The responsibility of their military superiors should also be engaged; it appears that no serious investigation was conducted afterward and that NATO simply satisfied itself with the "high altitude" factor to explain the incident.¹⁴² Because the high altitude at which the pilots were flying prevented them from properly identifying their target and seems to run counter to the principle of precaution in the attack, their military superiors should have carried out a more serious investigation.

4. *The Niš Incident*

On May 7, 1999, in the middle of the day, cluster bombs were dropped in two residential areas in the city of Niš, around the market place and the main hospital, killing fourteen civilians while injuring about thirty others.¹⁴³ According to Amnesty International, "the bombs fell on a busy part of town at a time when people were out in the streets and at the market, not protecting themselves in the bomb shelters where they had spent the night."¹⁴⁴ This time, NATO neither denied the attack nor its use of cluster bombs; it instead maintained that the incident had resulted from a weapon that had missed its objective, and that the real targets of the attack were a nearby airfield used by the Serbian army and the aircraft, air defense systems, and support vehicles located there, "targets to which cluster munitions are appropriately suited."¹⁴⁵

In the Niš incident, the use of cluster bombs seems to have been a significant factor in the death of civilians.¹⁴⁶ Although NATO claimed it only used cluster bombs in areas where no civilian casualties could result from the attack,¹⁴⁷

[t]he fact that cluster weapons were used on a target in proximity to a civilian area, and at a time of day when civilians were on the streets and most likely to be harmed, raised serious concerns as to whether NATO was indeed taking the proper steps to distinguish between military targets and civilians and civilian objects, and whether it was taking all the necessary precautions to ensure that civilians were not put at risk.¹⁴⁸

Because cluster bombs often miss their target, their use results in indiscriminate

141. *Id.* at 18.

142. *Id.* at 39-40, 45-47.

143. *Id.* at 57; HUMAN RIGHTS WATCH, *supra* note 3, paras. 90-91.

144. AMNESTY INT'L, *supra* note 63, at 57.

145. *Id.* (quoting NATO officials at a May 8, 1999 press briefing).

146. See HUMAN RIGHTS WATCH, *supra* note 3, paras. 89-90.

147. AMNESTY INT'L, *supra* note 63, at 57.

148. *Id.* at 58.

attacks that may violate the principle of distinction.¹⁴⁹ The fact that the United States decided to issue a directive asking for the restriction of the use of cluster bombs in the aftermath of the Niš incident evidences the fact that the choice of weapons used during the intervention was not appropriate and violated the principles of international humanitarian law.

Both the criminal responsibility of the pilot and his superiors might be engaged for the commission of war crimes encompassed by Articles 2 and 3 of the ICTY Statute, specifically as an attack resulting in excessive civilian loss or damage and/or the wilful killing of civilians.¹⁵⁰ The military superiors who ordered the attack knew that their intended target lay within the vicinity of a residential area; consequently, they must have been aware that by using cluster bombs to attack the target during daytime without warning the population, the resulting casualties would be excessive in relation to the military advantage anticipated. However, even if such knowledge is not proved, the superiors might still incur criminal responsibility for the wilful killing of civilians due to a lack of precautions, as the required *mens rea* also encompasses recklessness.

A close examination of these four incidents that occurred in the course of Operation Allied Force reveals that the conduct of NATO was sufficiently questionable to warrant an investigation for possible war crimes. In its refusal to investigate NATO's bombing campaign, the ICTY quietly made clear that political circumstances would ultimately circumscribe the actions taken by the Tribunal.¹⁵¹

V.

THE REPORT OF THE REVIEW COMMITTEE

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. 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.¹⁵²

Finally responding to the arguments made by scholars, NGOs, and individual states like Russia, who urged that an investigation into the NATO bombing campaign be conducted,¹⁵³ ICTY Prosecutor Louise Arbour established a Committee on May 14, 1999 to determine whether there was "a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing."¹⁵⁴

Nothing in the Statute of the ICTY expressly authorized the Prosecutor to

149. The Independent International Commission on Kosovo notes that sixty percent of the British Royal Air Force's cluster bombs missed their intended target in the course of NATO's intervention. INDEP. INT'L COMM'N ON KOSOVO, *supra* note 62, at 358 n.34.

150. See ICTY Statute, *supra* note 39, arts. 2, 3, 32 I.L.M. at 1192-93.

151. Tavernier, *supra* note 7, at 159.

152. Laursen, *supra* note 2, at 812.

153. Danner, *supra* note 6, at 538; KERR, *supra* note 6, at 200.

154. OTP Report, *supra* note 3, ¶ 3.

set up a Committee of this type.¹⁵⁵ Rather, the power to establish the Committee resulted from the guarantee of independence of the Prosecutor as enunciated in Article 16 of the Statute; the prosecutor is only prohibited from seeking or receiving instructions from any government or other source not seeking or receiving assistance or advice.¹⁵⁶ It was nevertheless clear that, notwithstanding the findings of the Committee, the ultimate decision to investigate belonged solely to the Prosecutor, and that she alone bore the responsibility and the consequences of that decision.¹⁵⁷

The approach taken by the Prosecutor in establishing the Committee was both unusual and innovative, and the move was well received by some scholars who welcomed the public exposure that the Report of the Committee would receive.¹⁵⁸ Nevertheless, the initial intent of Louise Arbour and her successor Carla Del Ponte was to keep the process confidential. The public and NATO officials were only informed of the Committee's existence and work after the London *Observer* disclosed that the Prosecutor was gathering information on alleged war crimes committed by NATO.¹⁵⁹ Later on, in response to the criticism, even from within the Tribunal, of her refusal to investigate, Del Ponte publicly released the Report of the Committee to explain how she had reached her decision.¹⁶⁰

A. Critique of the Methodology

The Report gives rise to serious criticism.¹⁶¹ One critique of the Report concerns the sources considered by the Committee in elaborating its report and the different weight given to these sources. On the one hand, the Committee set up by the Prosecutor concedes that it

conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences. . . . It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The Committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents.¹⁶²

As one academic notes, the assumptions of the Committee here are problematic. Documents like the press statements relied on by the Committee are not entirely reliable as, in times of war, parties to the conflict aim to attract the firm

155. Ronzitti, *supra* note 7, at 1020.

156. Daniel D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 135 (2005).

157. Benvenuti, *supra* note 7, at 504; Ronzitti, *supra* note 7, at 1020.

158. See, e.g., Côté, *supra* note 1, at 180-81; Cottier, *supra* note 49, at 537.

159. Danner, *supra* note 6, at 538-39.

160. HAZAN, *supra* note 7, at 133.

161. For a critique of the ICTY Report, see Laursen, *supra* note 2; Benvenuti, *supra* note 7; Mandel, *supra* note 7; Ronzitti, *supra* note 7.

162. OTP Report, *supra* note 3, ¶ 90.

support of public opinion, either at the national or international level.¹⁶³ In addition, the "blind trust by the Review Committee in NATO's reliability"¹⁶⁴ was not diminished even when NATO, questioned in writing by the Committee on general matters and specific incidents, only gave a "general reply."¹⁶⁵ This illustrates that the Alliance was not as cooperative as the Committee tended to lead one to believe and makes one wonder whether "this *a priori* favoritism to one of the parties of the conflict is compatible with the Prosecutor's avowed impartiality."¹⁶⁶

Meanwhile, the Committee explained that it "did not travel to the FRY and it did not solicit information from the FRY through official channels as no such channels existed during the period when the review was conducted."¹⁶⁷ Nevertheless, as one scholar observes, claiming the absence of channels as the reason for not giving FRY documents the same weight as NATO ones is untenable, because the Committee also recognized that it had received "a substantial amount of material concerning particular incidents" from the FRY.¹⁶⁸ How could this have happened without some vehicle for communicating with the FRY?

Helfer and Slaughter have come up with a set of criteria to determine whether international courts and tribunals effectively exercise their functions. One of their criteria, the existence of an independent fact-finding capacity—or the "ability to elicit credible factual information on which to base the tribunal's decisions,"¹⁶⁹—"helps counter the perception of self-serving or 'political' judgments."¹⁷⁰ In the case of the Report requested by the Prosecutor, it does not seem that the facts "have been independently evaluated,"¹⁷¹ as the Review Committee gave considerable weight to NATO's interpretations of the facts, even though they often were far from satisfactory.

To sum up, it is difficult to consider that the sources of documentation on which the Committee based its report were adequate and, more importantly, balanced. Rather, as one author explains, the Committee "display[ed] a one-sided attitude, hardly consistent with the Prosecutor's duty of impartiality and independence as envisaged in the ICTY Statute: the work of the Review Committee therefore appears to be undermined in its very foundation."¹⁷²

163. Benvenuti, *supra* note 7, at 506.

164. *Id.* at 507.

165. OTP Report, *supra* note 3, ¶ 12.

166. HAZAN, *supra* note 7, at 136 (quoting 1999 internal and confidential report of the International Committee for the Red Cross).

167. OTP Report, *supra* note 3, ¶ 7.

168. *Id.*; Laursen, *supra* note 2, at 777.

169. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 303 (1997).

170. *Id.*

171. *Id.*

172. Benvenuti, *supra* note 7, at 507.

B. Critique of the Content

The content of the Report presents various deficiencies, both in general and more specifically in its interpretation of international humanitarian law.¹⁷³ One general criticism is the fact that the Report failed to draw firm and clear conclusions.¹⁷⁴ For instance, instead of clearly determining the incidence of the use of the Radio-Television Station for propaganda purposes, it stated that the nature of the station was "debatable."¹⁷⁵

With respect to the interpretation of international humanitarian law, the Committee's legal reasoning in this area was often vague and unsatisfactory, particularly in reference to the definition of crimes against humanity¹⁷⁶ and the principles of distinction¹⁷⁷ and proportionality.¹⁷⁸ Regarding possible crimes against humanity, the Report concluded that "[i]f one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity."¹⁷⁹ As one scholar notes, "this purely quantitative line of reasoning in fact is flawed, despite the apparently correct conclusion that no acts of genocide nor crimes against humanity were committed by NATO forces."¹⁸⁰ Indeed, the high number of victims is not a condition *sine qua non* for the definition of crime against humanity to be met, and in some instances, no death or injury is even required, as in the case of widespread or systematic deportations.¹⁸¹

Another criticism derives from the Committee's interpretation of the principle of distinction, which presents an inaccurate reading of how the principle of precaution should be assessed in practice. The Report states that:

a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.¹⁸²

But, the Committee ignores the fact that even "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

173. For an in-depth analysis of the content of the Report, see, e.g., *id.*; Laursen, *supra* note 2; Ronzitti, *supra* note 7.

174. See Laursen, *supra* note 2, at 777, 789-90; Benvenuti, *supra* note 7, at 522-23.

175. OTP Report, *supra* note 3, ¶ 76.

176. See, e.g., Cottier, *supra* note 49, at 509-10.

177. See, e.g., Benvenuti, *supra* note 7, at 514-16.

178. See, e.g., *id.* at 517-19; Ronzitti, *supra* note 7, at 1025-26; Laursen, *supra* note 2, at 790-96.

179. OTP Report, *supra* note 3, ¶ 90.

180. Cottier, *supra* note 49, at 509.

181. *Id.*

182. OTP Report, *supra* note 3, ¶ 29.

number of cases.”¹⁸³ Rather, each attack must be examined separately, taking into consideration its particularities, in order to assess whether all feasible measures of precaution have been taken.¹⁸⁴

Finally, the Committee’s interpretation of the principle of proportionality is hardly acceptable in the light of international humanitarian law and appears even to contradict the rulings of the ICTY. First, the Report only concentrated on incidents that involved civilian deaths. In doing so, it deliberately decided not to take into consideration damage to civilian property, even though such damage can significantly affect the civilian population. As one scholar asserts, “it is unsatisfactory to assess the lawfulness of an attack with regard to the principle of proportionality if damage to civilian property is not evaluated.”¹⁸⁵ Second, with respect to the Radio-Television Station attack, the Report concludes that “[t]he proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident”¹⁸⁶ and refers to the important *Kupreskic* case decided by the ICTY Trial Chamber in January 2000.¹⁸⁷ However, as one author points out, “[t]he 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.”¹⁸⁸ In the *Kupreskic* case, the ICTY held that “in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law.”¹⁸⁹ From this finding, the Report deduces that an illegal attack may be legal when viewed in the broader context of the entire bombing campaign, an inference that is incompatible with the ICTY ruling and the common interpretation of the principle of proportionality in the literature.¹⁹⁰

C. Critique of the Conclusion Reached

Finally, the very substance of the conclusions reached by the Committee has also been criticized, as the reasons put forward to justify the recommendation not to investigate are weak excuses rather than compelling legal arguments. At the end of its proceedings, the Committee concluded that

[o]n the basis of the information reviewed . . . neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents [were] justified. In all cases, either the law [was] not sufficiently clear or investigations [were] unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for

183. Benvenuti, *supra* note 7, at 514-15.

184. *Id.* at 515.

185. *Id.* at 508.

186. OTP Report, *supra* note 3, ¶ 78.

187. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment (Jan. 14, 2000), available at <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>.

188. Laursen, *supra* note 2, at 793.

189. Kupreskic case, *supra* note 187, ¶ 526.

190. Laursen, *supra* note 2, at 793-96.

particularly heinous offences.¹⁹¹

With regard to the first reason advanced, the lack of clarity of the law, a critic rightfully notes:

This is equivalent to a non liquet. Difficulties in interpretation are not a good excuse for not starting an investigation. There are aspects of international humanitarian law, as in any body of law, which are not sufficiently clear. However, it is precisely the task of the Tribunal to interpret and "clarify" the law; it cannot therefore conclude by saying that it cannot adjudicate the case, since the "law is not clear."¹⁹²

Turning to the second justification, the difficulty in obtaining sufficient evidence to substantiate an indictment, "[e]vidence acquisition is undoubtedly a difficult and time-consuming task. Yet this is no excuse for not commencing an investigation."¹⁹³ Both the ICTY Statute and the Rules of Procedure and Evidence provide the Prosecutor with a wide range of power for gathering evidence that does not justify the pessimistic conclusion of the Committee.

In conclusion, because of "the clear partiality taken in the establishment of facts, the legal approximations and errors" demonstrated by the Committee in its report, "[n]either the ICTY, nor international law in general nor international humanitarian law has come out greater from the report of the commission established by the prosecutor of the ICTY."¹⁹⁴

VI.

THE DECISION NOT TO PROSECUTE AND THE CONCEPT OF PROSECUTORIAL DISCRETION

Some degree of selectivity was required, but there was an important distinction between the exercise of prosecutorial discretion and 'selective prosecution'. 'Selective prosecution' is understood in this context to mean partiality or bias on the part of the prosecutor, rather than the exercise of discretion based on fixed criteria.¹⁹⁵

A. The Notion and Scope of Prosecutorial Discretion

"Discretion" is generally defined as "the power to choose between two or more permissible courses of action."¹⁹⁶ It is sometimes added that this choice must be made "in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances."¹⁹⁷ The notion of discretion is particularly important in the context of international criminal justice, as a prosecutor may only discharge his functions efficiently if he is vested with some de-

191. OTP Report, *supra* note 3, ¶ 90.

192. Ronzitti, *supra* note 7, at 1020-21.

193. *Id.* at 1021.

194. HAZAN, *supra* note 7, at 135 (quoting 1999 internal and confidential report of the International Committee for the Red Cross).

195. KERR, *supra* note 6, at 178.

196. Danner, *supra* note 6, at 518.

197. Ntanda Nsereko, *supra* note 156, at 124.

gree of discretion in the exercise of his powers. However, discretion has both positive and negative aspects.¹⁹⁸ Indeed, "[i]f prosecutorial discretion on one hand ensures prosecutorial independence on the international scene, it is also potentially a source of danger that can impair the right to a fair trial and the integrity of the whole international criminal judicial system."¹⁹⁹

1. Prosecutorial Discretion: National versus International Systems

[I]t is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system.²⁰⁰

In most countries, an independent representative of the executive, commonly named the prosecutor, initiates criminal proceedings. However, the scope of this function varies from one country to another. While the prosecutor is involved in both the investigation and the decision to prosecute in some countries, such as France, he is only vested with the power to prosecute and does not participate in the investigating phase in others, such as Britain.²⁰¹ In the context of the International Tribunal for the Former Yugoslavia, the first approach has been favored. Article 16 of the Statute asserts that "[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law."²⁰²

In addition to its scope, the implementation of the prosecutorial function also differs among judicial systems. Some civil law systems have adopted the approach under which the prosecutor has the obligation to prosecute every time there is sufficient evidence to support a charge. On the other hand, common law systems favor the approach under which the existence of evidence does not automatically result in prosecution, allocating a wide degree of discretion to the prosecutor to decide whether to initiate a prosecution.²⁰³

At the international level, international criminal law has elected the second approach, a practice easily explained by the large number of potential suspects in cases of widespread violations of humanitarian law.²⁰⁴ By their very nature as temporary bodies dealing with specific conflicts, ad hoc tribunals like the ICTY have also influenced prosecutorial policy;²⁰⁵ that is, "both the nature of the courts, as well as the extensive nature of the crimes, impose on the Prosecutor a strategy of selecting and concentrating on the most serious cases."²⁰⁶

198. Danner, *supra* note 6, at 518.

199. Côté, *supra* note 1, at 165.

200. Council of Europe, Recommendation of the Comm. of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System and Explanatory Memorandum, Doc. No. Rec(2000)19E, at 21 (2001).

201. Ntanda Nsereko, *supra* note 156, at 126 nn.5-6; *see also* Danner, *supra* note 6, at 512-13.

202. ICTY Statute, *supra* note 39, art. 16(1), 32 I.L.M. at 1196-97.

203. Ntanda Nsereko, *supra* note 156, at 127-28.

204. Côté, *supra* note 1, at 165.

205. Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145, 150 (2005).

206. *Id.*

Article 18 of the ICTY Statute affirms that “[t]he Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”²⁰⁷ Although one scholar interprets the terms of this provision as vesting the Prosecutor with a nondiscretionary duty to prosecute,²⁰⁸ others note that the Tribunal itself has “in the last ten years, recognized a clear prosecutorial discretion as to the decision to investigate and to indict individuals.”²⁰⁹

2. Scope of Prosecutorial Discretion

To reduce the risk of actual or perceived illegitimacy, the Prosecutor must himself take steps to ensure that he reaches his decisions in a fair and nondiscriminatory way. He must, in short, demonstrate that he adheres to good process in his decision making. The hallmarks of good process in this context are principled decision making, reasoned decision-making, and, most important, impartiality. Impartiality, in turn, suggests qualities of fairness and evenhandedness among the possible targets of investigation and prosecution.²¹⁰

Prosecutorial discretion, as understood in the context of the ICTY, applies to both the investigation and prosecution phases.²¹¹ As has been recognized by the International Tribunals for the Former Yugoslavia and Rwanda, the Prosecutor is entitled to exercise her discretionary power to not only decide which situations to investigate, but also to select the individuals who will be indicted, amend or withdraw an indictment, and choose the prosecutorial strategy.²¹²

In practice, it seems that the Prosecutor will apply a series of criteria in exercising her discretionary power. However, the lack of transparency makes it difficult to identify these criteria with any certainty.²¹³ Some scholars urge the promulgation of a set of *ex ante* standards that would “minimize arbitrariness in discretionary decision making.”²¹⁴ Be that as it may, it is generally accepted that the Prosecutor will look into only

the most important cases . . . , which involves a consideration by her of factors such as the nature and seriousness of the crime, the military rank or the governmental position of an alleged perpetrator, the significance of the legal issue involved in the case, the prospect for arresting the suspect, and the impact of the case on the resources of her Office.²¹⁵

207. ICTY Statute, *supra* note 39, art. 18(1), 32 I.L.M. at 1197.

208. See Ntanda Nsereko, *supra* note 156, at 136 (“this peremptory language suggests a duty and not discretion on the part of the Prosecutors to indict”).

209. Côté, *supra* note 1, at 165.

210. Danner, *supra* note 6, at 536-37.

211. Côté, *supra* note 1, at 166.

212. *Id.* at 167; Ntanda Nsereko, *supra* note 156, at 135-37; cf. Danner, *supra* note 6, at 520-21 (listing most of the same tasks as coming within the discretion of the Prosecutor for the International Criminal Court).

213. Côté, *supra* note 1, at 168.

214. Danner, *supra* note 6, at 538; see also Côté, *supra* note 1, at 171-72; Ntanda Nsereko, *supra* note 156, at 143-44.

215. Morten Bergsmo et al., *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 121, 135 (Louise Arbour et al.

Whereas some of these criteria appear to be rather objective and straightforward, others involve a subjective approach and are therefore more problematic. Only by determining the limitations to prosecutorial discretion will we be able to define the scope of an acceptable subjective appreciation by the Prosecutor.

3. Limitations to Prosecutorial Discretion

With respect to prosecutorial discretion, one issue that arises is to what degree it is subject to external control, without compromising the independence of the Prosecutor or undermining the Prosecutor's role in the criminal justice system.²¹⁶

The ICTY has affirmed that prosecutorial discretion is not without limits²¹⁷ and that the Prosecutor should act in accordance with recognized principles of human rights and the ICTY's Statute and Rules of Procedure and Evidence.²¹⁸ It further emphasized the strong relationship between prosecutorial discretion and prosecutorial independence, the latter being recognized by Article 16(2) of the ICTY Statute. This guarantee of independence can be ensured by different means, each limiting the discretion of the Prosecutor.

An essential limitation to prosecutorial discretion relates to the political context of the situation in which the crimes have occurred. Indeed, the Prosecutor should refrain from founding her decision to prosecute on political considerations. Two former Prosecutors of the ICTY, Louise Arbour and Richard Goldstone, have strongly supported this approach. Arbour has argued that

[a]n independent Prosecutor must be able to stand apart from national politics, the interests of individual States and the goals of any particular foreign policy. Indeed, not only must the Prosecutor stand *apart* from such considerations, he or she must stand *above* them, and be fully prepared without fear or favour to contradict them or to challenge political pressures which may seek to influence the course of justice.²¹⁹

Goldstone has adopted the same position, adding that such independence is preferable to "having politicians dictate to a prosecutor who should or should not be indicted and when indictments should be issued."²²⁰

A similar approach has been chosen by the International Association of Prosecutors, a non-governmental and non-political organization whose purpose is "to promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences."²²¹ Article 2.1 of the Association's Standards states that "[t]he

eds., 2000), *quoted in* Côté, *supra* note 1, at 168.

216. Jallow, *supra* note 205, at 154.

217. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment in the Appeals Chamber, ¶ 602 (Feb. 20, 2001), *available at* <http://www.un.org/icty/celebici/appeal/judgement/index.htm>.

218. *Id.* at ¶¶ 602, 604.

219. Louise Arbour, Keynote Speech at the International Conference on War Crimes Trials (Nov. 8, 1998), *quoted in* KERR, *supra* note 6, at 178.

220. RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 132 (2000).

221. The International Association of Prosecutors, About the Association, <http://www.iap.nl.com/estab.htm> (last visited Feb. 23, 2006).

use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.”²²²

Helfer and Slaughter also identify the attributes of “neutrality and demonstrated autonomy from political interests” as necessary for an international tribunal to discharge its functions effectively:²²³ “The challenge for a court seeking to present itself as a judicial rather than a political body is thus to demonstrate its independence from . . . political authorities.”²²⁴ The prosecutor of an international tribunal should therefore be “willing to brave political displeasure,”²²⁵ as “secrecy and compromise are the hallmarks of diplomacy, not law.”²²⁶

Another limitation to prosecutorial discretion directly relates to the principle of equality and highlights the danger of double standards. One of the core principles underlying the rule of law is that “the law applies with equal force and obligation to all.”²²⁷ It follows that “international Prosecutors will have to exercise their discretionary powers in total impartiality, avoiding the semblance of appearing on the side of the victors or the powerful.”²²⁸ But, the criticism levied against the ICTY—that it exercised a form of victor’s justice by unfairly targeting Serbs while ignoring the atrocities committed by Croats and Bosnians²²⁹—only seemed more accurate after the Prosecutor decided not to prosecute NATO forces. This could have important and unintended consequences for the Prosecutor, the Tribunal, and the pursuit of justice. As one academic notes,

If the tribunals are to have any chance of deterring future conflict and contributing to social reconstruction . . . it [sic] needs the independence to prosecute all serious violations of international humanitarian law. Prosecuting the losers while leaving the winners immune will risk sending a contradictory message of accountability. Instead of promoting accountability, the tribunal’s failure to prosecute the winners may actually promote impunity by teaching the lesson that atrocities will not be punished as long as one prevails in battle.²³⁰

A final means of limiting the discretionary power of the Prosecutor consists of allowing judicial review of prosecutorial decisions. Whereas the “[s]eparation of the prosecuting body and the Court is a fundamental element of a fair trial . . . , prosecutorial functions may be made accountable to judicial review in cer-

222. The International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, <http://www.iap.nl.com/stand2.htm> (last visited Feb. 23, 2006).

223. Helfer & Slaughter, *supra* note 169, at 313.

224. *Id.*

225. *Id.* at 314.

226. *Id.*

227. Ruti Teitel, *Bringing the Messiah Through the Law*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 177, 188 (Carla Hesse & Robert Post eds., 1999).

228. Côté, *supra* note 1, at 175.

229. On this point, see Victor Peskin, *Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213 (2005).

230. *Id.* at 228.

tain circumstances.”²³¹ However, the ICTY’s Rules of Procedure and Evidence evince a clear reluctance to allow substantial judicial review over prosecutorial decisions.²³² In addition to deciding whether to investigate and who to investigate, the Prosecutor has the freedom to conduct her investigation without any judicial control.²³³ Only at the closing stage of the investigation does Rule 47 require a judge to review and confirm an indictment before it is served to the accused.²³⁴ This limited judicial control is further qualified by the fact that the Prosecutor’s decision not to prosecute is not subject to review because it could affect her independence.²³⁵

B. Application of the Notion of Prosecutorial Discretion to the NATO Case

If a real investigation had been opened, it is very likely that the Prosecutor would have taken the same decision but without giving rise to an appearance of bias. If the main goal of the Prosecutor in publishing that Report was to reaffirm her independence and impartiality in the eyes of the international community, it was not achieved.²³⁶

As discussed *supra*, the decision to initiate an investigation belongs to the Prosecutor of the ICTY alone. The Prosecutor had the Committee’s Report at her disposal when forming her assessment, but was by no means obliged to follow its recommendations, the report being “merely advice to the Prosecutor.”²³⁷ However, as has already been emphasized in the previous section, “[b]ecause of its deficiencies, the Report does not constitute the definite and conclusive element on which a decision not to proceed may be grounded.”²³⁸ If the Prosecutor had taken other elements into consideration, she would most likely have reached a different decision, thus following the recommendation of Antonio Cassese, a former Judge and President of the Tribunal, who stated that Operation Allied Force deserved to be investigated.²³⁹ Nevertheless, “the impression is given that the Prosecutor’s intent has been, on the whole, to prevent investigations against NATO officials, and to hide herself behind the ‘technical opinion’ of the Review Committee.”²⁴⁰

In the light of the standards apparently used by the Prosecutor in deciding when to initiate investigations²⁴¹ and the unique character of Operation Allied Force, it seems that most of the criteria were met in the NATO case. Moreover, in the specific context of an intervention based on humanitarian grounds, the ad-

231. Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 85 (2004).

232. *Id.* at 86.

233. CASSESE, *supra* note 52, at 408.

234. Ntanda Nsereko, *supra* note 156, at 137.

235. *Id.*

236. Côté, *supra* note 1, at 183.

237. Benvenuti, *supra* note 7, at 504.

238. Ronzitti, *supra* note 7, at 1020.

239. *Id.* n.7.

240. Benvenuti, *supra* note 7, at 505.

241. See discussion *supra* Section VI.A.2.

herence to the rules of humanitarian law should be particularly rigorous.²⁴² The protection of the civilian population cannot be solely a reason to go to war; this goal must also be implemented throughout the course of the intervention. In this humanitarian context, the war crimes allegedly committed were serious. As former ICTY Judge Georges Abi-Saab notes,

NATO intervention was 'to protect the Kosovar populations against Serb atrocities'. NATO should have limited itself to military objectives and avoided all indiscriminate strikes likely to hit civilians. It is, thus, not acceptable that an army, intervening without having been attacked, in the name of ensuring respect for international law, act in a manner that minimizes risks for itself while maximizing them for civilians. And that is what the American policy to avoid any casualties among NATO soldiers implies.²⁴³

In addition, the legal issues involved were significant. The Prosecutor was confronted with the question of whether the rules of international criminal law equally bind direct parties to a conflict and third party forces that intervene militarily for humanitarian purposes. The resolution of this issue would have had a considerable impact on future U.N. peacekeeping operations and other humanitarian interventions. Other more specific legal questions were also at stake, such as the nature of radio and television stations and the circumstances in which they may constitute military targets. This issue is of particular importance in the light of the growing role played by the media in warfare. The Review Committee's conclusion that the law was unclear in some instances should have encouraged the Prosecutor to investigate, as it would have permitted clarification of the law by the judges should the case have reached that stage in the proceedings.²⁴⁴

Beyond the aforementioned criteria, the limitations to prosecutorial discretion discussed *supra* should also have informed the Prosecutor in her decision-making process. Consequently, she should have refrained from taking political considerations into account and departing from the principle of equality. With regard to the first restriction, one scholar argues that

[t]reating the tribunal as one that perceived itself as merely a propaganda arm of NATO, is the only way to make sense of its violation of the most basic principles of judicial impartiality. This is apparent above all in its failure to charge NATO leaders for the crimes they committed in the bombing campaign, something it was legally required to do by its Statute, not to mention morally required to do by the facts of the case.²⁴⁵

Without going that far, it is nevertheless legitimate to believe that the Prosecutor ultimately decided not to initiate an investigation as a result of pressure from NATO officials, thereby taking into account political considerations that were unacceptable in light of her duties of independence and impartiality.²⁴⁶ As far as

242. INDEP. INT'L COMM'N ON KOSOVO, *supra* note 62, at 179.

243. See HAZAN, *supra* note 7, at 134-35 (quoting *Le Temps* June 9, 2000 interview).

244. For a similar view, see Cottier, *supra* note 49, at 530.

245. Mandel, *supra* note 7, at 96-97.

246. See, e.g., HAZAN, *supra* note 7, at 138-39 (asking, "How far did the pressure go? Would the great Western states have abandoned all support for the tribunal, as they had threatened under their breath for so long?").

the second restriction of equality before the law is concerned, some feel that the decision not to prosecute "was enough to raise suspicion as to the Prosecutor's impartiality and the use of double standards in the exercise of her discretion when applied to 'friendly' powers."²⁴⁷

Had Serbian rather than NATO forces perpetrated the alleged crimes considered by the Committee, the Serbian actors would very likely have been subjected to an investigation. The ICTY, for example, indicted Bosnian Serb leaders Radovan Karadzic and Ratko Mladic in 1995 for the killing of civilians during the bombing of Sarajevo.²⁴⁸ The number of victims mentioned in their initial indictment—twenty dead and fifty wounded²⁴⁹—suggests that the bombing of the Radio-Television Station by the Alliance, which resulted in the death of at least sixteen civilians, presents the same level of gravity. Meanwhile, Milan Martić, the President of the self-proclaimed Republic of Serbian Krajina, was indicted for the bombing of the city of Zagreb, in the course of which cluster bombs were employed;²⁵⁰ the use of this type of weapon appears to have been a crucial element in the indictment.²⁵¹ Even though NATO's attack on Niš does not seem to have been intentionally directed against civilians, "one can only wonder why the Prosecutor has not, thus far, seen NATO's use of cluster bombs against the city of Niš as being as serious as the Krajina Serbs' use of cluster-bomb warheads against the city of Zagreb."²⁵²

Lastly, the limited judicial scrutiny over the Prosecutor's decisions also failed to curb her discretion, as it did not allow a judge to review her refusal to investigate. The debate surrounding the scope of judicial interference with prosecutorial discretion is fascinating and essential, especially as some view the Prosecutor as the "Achilles heel of the tribunal"²⁵³ and the judges as the guarantors of the Tribunal's independence. Indeed, in exercising pressure on the Prosecutor, "NATO's leading nations gave indirect and unintentional homage to the judges' independence; it was because these Western states believed in the ICTY's impartiality that they wanted to escape its judgment."²⁵⁴

To conclude, "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 the present circumstances."²⁵⁵ Amnesty International shared this position, recommending that "[t]he International Criminal Tribunal for the former Yugoslavia should investigate all credible allegations of serious violations of interna-

247. Côté, *supra* note 1, at 180.

248. Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-I, Initial Indictment, ¶ 44 (July 24, 1995), available at <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>.

249. *Id.*

250. Prosecutor v. Martić, Case No. IT-95-11, Initial Indictment, ¶¶ 8, 9 (July 25, 1995), available at <http://www.un.org/icty/indictment/english/mar-ii950725e.htm>.

251. Hayden, *supra* note 116, at 262.

252. *Id.*

253. HAZAN, *supra* note 7, at 138.

254. *Id.* at 139.

255. Laursen, *supra* note 2, at 813-14.

tional humanitarian law during Operation Allied Force with a view of bringing to trial anyone against whom there is sufficient admissible evidence.”²⁵⁶

By accepting full responsibility for the conclusions of the Committee Report, refusing to conduct an investigation of NATO's bombing campaign against Serbia, and privileging political over legal imperatives when serious war crimes may have been committed, however, the current Prosecutor of the ICTY undermined her predecessor's vision of the Tribunal as an “international forum that, even in its short history, has demonstrated its competence, its integrity, and its transparency.”²⁵⁷ In doing so, the Prosecutor has abused the discretion allocated to her by the Tribunal's Statute, leading some to hope that “the final report of the Review Committee and its acceptance by the Prosecutor will not damage beyond repair the standing of the ICTY or undermine the promising outlook for international criminal justice generally.”²⁵⁸

VII.

CONCLUDING REMARKS: THE INTERNATIONAL CRIMINAL COURT AND A CALL FOR JUSTICE IN THE FUTURE

If the Prosecutor becomes identified with any political agenda other than seeking justice, the role of the Court in providing an impartial, independent forum for individuals accused of the most serious crimes will be severely compromised.²⁵⁹

The on-going discussion regarding the scope of prosecutorial discretion took an interesting turn during the creation of the International Criminal Court (“ICC”). Although the negotiations over the ICC occurred before NATO's intervention and the debate following Carla del Ponte's decision not to investigate, it is nevertheless interesting to examine how the international community envisioned the new prosecutor of the ICC and how the NATO case, hypothetically, would have been dealt with had the ICC exercised jurisdiction over it.

A. An Independent Prosecutor for the International Criminal Court?

One of the most controversial and harshly debated issues during the negotiations leading up to the establishment of the ICC was the scope of the Prosecutor's powers.²⁶⁰ Originally, the International Law Commission had vested the Prosecutor with the power to investigate only in situations referred to the Court by a State Party or the Security Council. The Commission was concerned about creating an independent prosecutor who would be allowed to initiate investigations on her own, as giving a prosecutor such powers raised a potential risk for “politically motivated or frivolous proceedings.”²⁶¹

256. AMNESTY INT'L, *supra* note 63, at 32.

257. Arbour, *supra* note 38.

258. Benvenuti, *supra* note 7, at 527.

259. Danner, *supra* note 6, at 537.

260. *Id.* at 513; Ntanda Nsereko, *supra* note 156, at 138.

261. Danner, *supra* note 6, at 513.

During the negotiations, however, the allocation of *proprio motu* powers to the Prosecutor became a central issue. Each side invoked the fear of politicization of the Court and acknowledged that, whatever the outcome of the debate, the decision on *proprio motu* powers would have a fundamental effect on the structure and functioning of the new Court.²⁶² On the one hand, supporters of a prosecutor with *proprio motu* powers emphasized the importance of the Prosecutor being able to initiate investigations on the basis of information gathered by non-state actors such as NGOs and the decrease in independence and credibility that a system only based on the referral of political institutions, namely states and the Security Council, would create.²⁶³ On the other hand, opponents claimed that

the Prosecutor could become either a 'lone ranger running wild' around the world targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, NGOs, and other groups who would seek to use the power of the ICC as a bargaining chip in political negotiations.²⁶⁴

Powerful states, such as Russia, China, and the United States, fiercely opposed the idea of a prosecutor who "would use the powers to intrude into their internal affairs and thereby infringe upon their sovereignty."²⁶⁵

While "[t]he delegates at Rome found making the Court formally subordinate to political institutions, and especially to the Security Council, incompatible with the purpose of the ICC,"²⁶⁶ they, at the same time, took the concerns of the powerful states into consideration and recognized the necessity of some kind of judicial oversight over the prosecutor's exercise of discretion.²⁶⁷

B. The Scope of Judicial Review over Prosecutor's Actions

The outcome of this compromise has been described by some authors as "a most progressive and fair prosecutorial regime,"²⁶⁸ and the independence of the Prosecutor from "direct political control [has been] rightly celebrated as a salutary development."²⁶⁹

Article 15(1) of the ICC Statute stipulates that "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."²⁷⁰ However, the subsequent paragraphs of the article contain an important restriction to the Prosecutor's discretion when the Prosecutor is not acting in response to a referral from a State Party or the Security

262. *Id.*

263. *Id.* at 514.

264. *Id.* at 513-14.

265. Ntanda Nsereko, *supra* note 156, at 138; *see also* Danner, *supra* note 6, at 537-38 (discussing the strong opposition of the United States to an independent ICC Prosecutor).

266. Danner, *supra* note 6, at 514.

267. Ntanda Nsereko, *supra* note 156, at 138. *See* Brubacher, *supra* note 201, at 86.

268. Ntanda Nsereko, *supra* note 156, at 137.

269. Danner, *supra* note 6, at 515.

270. Rome Statute of the International Criminal Court, art. 15(1), July 17, 1998, 2187 U.N.T.S. 90, 100 [hereinafter ICC Statute] (emphasis added).

Council, but rather on his own. The Prosecutor must request authorization from the Pre-Trial Chamber, composed of three judges, before initiating any investigation. Only when the Chamber "considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court" will it approve the commencement of an investigation.²⁷¹

In addition, although the Prosecutor may still decide not to investigate, Article 53 specifies that if his decision is based only on the discretionary determination that "an investigation would not serve the interests of justice,"²⁷² the Pre-Trial Chamber must be informed.²⁷³ The Chamber may then review the decision on its own initiative, and it will only be effective if confirmed by the Chamber.²⁷⁴ Similarly, whereas the Prosecutor may decide not to prosecute a situation referred to him by a State Party or the Security Council,²⁷⁵ he must inform both the institution that made the referral and the Pre-Trial Chamber when the sole ground of his decision is that a prosecution would be contrary to the "interests of justice."²⁷⁶ Once again, the Prosecutor's decision not to prosecute will only be effective following a confirmation from the Pre-Trial Chamber if it has decided to review that decision²⁷⁷ or the institution that made the referral has requested it do so.²⁷⁸

As a scholar notes, "[g]enerally speaking, the Prosecutor of the ICC has ample discretion to effectively discharge his mandate. However, compared to his counterparts before the national courts and the ad hoc Tribunals, the Prosecutor's discretion is considerably restricted, particularly by the powers of the Pre-Trial Chamber."²⁷⁹

C. Conclusion

To those used to prosecutors with absolute or untrammelled discretion, the restrictions placed on the Prosecutor [of the ICC] may appear intrusive and obstructive. Nevertheless, given the volatile political environment in which the Court operates, the interests of states that may be at stake and the profile of the individuals that are likely to appear before the Court, the restrictions are justified. They ensure transparency and accountability in the exercise of the Prosecutor's powers. They serve to shield the Prosecutor from accusations of initiating politically motivated prosecutions.²⁸⁰

Looking at the NATO case and the decision of the Prosecutor not to investigate, it is particularly interesting to imagine what would have happened if the scope of prosecutorial discretion had been governed by the Statute of the Inter-

271. *Id.* art. 15(4), 2187 U.N.T.S. at 100.

272. *Id.* art. 53(1)(c), 2187 U.N.T.S. at 118.

273. *Id.* art. 53(1)(c) *in fine*, 2187 U.N.T.S. at 118.

274. *Id.* art. 53(3)(b), 2187 U.N.T.S. at 119.

275. *Id.* art. 53(2), 2187 U.N.T.S. at 118-19.

276. *Id.* art. 53(2)(c) *in fine*, 2187 U.N.T.S. at 118-19.

277. *Id.* art. 53(3)(b), 2187 U.N.T.S. at 119.

278. *Id.* art. 53(3)(a), 2187 U.N.T.S. at 119.

279. Ntanda Nsereko, *supra* note 156, at 141.

280. *Id.* at 141-42.

national Criminal Court, which would have allowed for review of the Prosecutor's decision by the Pre-Trial Chamber. While the Prosecutor would have certainly argued that her decision was justified by the fact that an investigation would not have served the interests of justice, it is reasonable to believe that the Chamber would not have confirmed the decision and that the Prosecutor would have been compelled to conduct an investigation. The opinions of two judges of the ICTY concerning NATO's bombing campaign and the choice made by Carla Del Ponte tend to support this outcome.²⁸¹ Whether or not such investigations would have resulted in the indictment of senior officials from the Alliance is not what really matters. Rather, opening an investigation would have given the impression, in the eyes of the international community, that justice was equally exercised against the weak and the powerful.

The evolution in the scope of prosecutorial discretion at the international level and the increasing judicial review over prosecutor's actions recognized in the Statute of the International Criminal Court are therefore most welcome, as they represent an important step toward a more impartial discharging of justice, insulated from the political pressures of powerful governments. Hopefully, these changes will be reflected in the future work of the ICC, and the safeguards contained in the Rome Statute will help prevent future abuses of discretionary power.

281. Both Judge Cassese and Abi-Saab criticized NATO's bombing campaign and the former expressly recommended for an investigation to be opened. *See* discussion *supra* Section VI.B.