THE BOMBING OF KOSOVO AND THE MILOSEVIC TRIAL
REFLECTIONS ON SOME LEGAL ISSUES

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I. INTRODUCTION

On 29 June 2001, following intense diplomatic negotiation, Slobodan Milosevic was transferred to the United Nations Detention Unit of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. The ICTY's Office of the Prosecutor (OTP) had earlier issued three separate indictments against him[1] regarding events in Bosnia, Croatia and Kosovo whilst he was President of Serbia and subsequently of the Federal Republic of Yugoslavia (FRY).[2]

Milosevic initially appeared before the ICTY on 3 July 2001. After various preliminary hearings his trial began in earnest on 12 February 2002 by which time the ICTY's Appeals Chamber had ordered that the three indictments be heard together, expected to be the most important and longest trial before the ICTY. Under these orders, evidence only in respect of the charges relating to Kosovo, where the most recent of the events were alleged to have occurred, were to be adduced at the outset. Later, and if appropriate, the ICTY would adduce evidence relating to Croatia and Bosnia.[3] However, the ICTY's timetable for the trial[4] could

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[1] Bosnia – Prosecutor v Milosevic, Initial Indictment, 22 November 2001: Croatia – Prosecutor v Milosevic Initial Indictment, 8 October 2001: Kosovo – Prosecutor v Milosevic et al, Second Amended Indictment, 29 October 2001.

[2] For a history of the elections resulting in Milosevic's presidency see Prosecutor v Milosevic et al, Second Amended Indictment, 29 October 2001, paras 3-4.

[3] The Appeals Chamber held that for the purposes of this trial, the three indictments were deemed to be one: Prosecutor v Milosevic, Case No IT-02-54-AR73 (Prosecutor v Milosevic) Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002.

[4] Since the allegations and breadth of events were so complex, the ICTY was anxious that Milosevic received a fair and expeditious trial. Before the substantive trial started, the Prosecutor was ordered to be ready for trial concerning Bosnia and Croatia by 1 July 2002: Prosecutor v Milosevic, Order for Commencement of Trial, 4 February 2002. That part of the case on Kosovo was due to end by mid-September 2002: Black, "Milosevic unbowed as trial adjourns", Guardian Weekly, 1-7 August

be complicated by Milosevic's severe heart ailment, raising fears that the trial faced possible abandonment.[5]

The fact that the trial initially dealt solely with events in Kosovo has inevitably meant that some details of the North Atlantic Treaty Organization (NATO) campaign conducted against FRY from 24 March – 9 June 1999 (the campaign) were to be revisited.[6] In the early stages of the trial, the Prosecutor provided background details of the Serb forces' actions in Kosovo, alleging that NATO had no choice but to act to force the Milosevic regime to cease its policies of "ethnic cleansing". The Prosecutor stressed that Milosevic was clearly warned that NATO would act decisively if he did not change his policies and his non-response resulted in "the NATO campaign he brought upon himself."[7]

Following the Trial Chamber's ruling that he could raise issues concerning the NATO campaign as they could be relevant to his defence,[8] Milosevic made several serious counterclaims against NATO. He referred to NATO's actions as "monstrous crimes"[9] occurring during "NATO aggression" and argued that the bombing constituted "crimes of genocide...crimes against humanity and war crimes..."[10] themselves crimes falling within the competence of the

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2002, 3. The Appeals Chamber later confirmed the maximum 14-month time limit the Trial Chamber had imposed on the Prosecutor for completing her case. This was subject to review due to illness or other unforeseen circumstances: Prosecutor v Milosevic, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002.

[5] Simpson, "Serbs refuse to accept blame for war crimes", Sydney Morning Herald, 10 August 2002, 21.

[6] This action was called "Operation Allied Force". Ironically, the start date of Operation Allied Force coincided with the House of Lords decision in R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte (Amnesty International and others intervening) (No 3) [1999] 2 All England Reports 897. Some international lawyers hailed this case as a "highly public triumph of law over politics in the international arena": Byers M (ed), The Role of Law in International Politics: Essays in International Relations and International Law (2000, Oxford University Press, Oxford) 1. This "euphoria" contrasts pointedly with the ongoing debate and controversy on the legality of NATO's actions and responsibility for the resultant injury and damage.

[7] Prosecutor v Milosevic, Prosecutor's Opening Statement, 13 February 2002, 165.

[8] ICTY Weekly Update 215, 12 April 2002.

[9] Prosecutor v Milosevic, Accused's Opening Statement, 15 February 2002, 413.

[10] Ibid 14 February 2002, 70.

ICTY.[11] His tactics struck a chord with many Serbs particularly those who saw themselves as victims of the events that unfolded in FRY.[12]

Notwithstanding his emotional language, it was possible that either the overall conduct of Operation Allied Force or specific events during the campaign could have constituted the crimes he alleged. However, they had been previously addressed and the OTP had subsequently dismissed them. On 14 May 1999, even before the campaign ended, the Prosecutor had established a committee (the Committee) to examine certain aspects of NATO's conduct. The Committee had to determine whether the Prosecutor should be advised to begin an *ex officio* investigation into certain allegations that NATO personnel had committed serious violations of international humanitarian law during the campaign, pursuant to Article 18 of the ICTY Statute.[13]

When the Committee issued an interim report in December 1999, the Prosecutor directed the Committee to update its list of potentially relevant incidents and prepare a series of general and specific questions for NATO in February 2000. Following NATO's response in May 2000, the Committee issued its final report in June 2000 (the Report).[14] The Report raised some interesting issues relating to international law. Whilst recognising that mistakes were made and "errors of judgment" could have occurred,[15] the Committee concluded that on the available evidence it would recommend that NATO's actions during Operation Allied Force would not be investigated. The Prosecutor accepted all the recommendations, ceased further investigation and informed the United Nations Security Council of her decision in early June 2000.

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[11] See Articles 2-5 of the ICTY Statute.

[12] Simpson, "Serbs refuse to accept blame for war crimes", Sydney Morning Herald, 10 August 2002, 21.

[13] Article 18 of the ICTY Statute provides that "[t]he Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

[14] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, 39 International Legal Materials 1257, also available at <www.un.org/icty/pressreal/nato061300.htm> (visited October 2002).

[15] The Report para 90.

The matter has not ended there because important issues are unresolved. The Committee's final conclusions and reasons as outlined in the Report have attracted a significant degree of criticism.[16] Questions as to the legality of the campaign and the possible culpability of NATO personnel for specific incidents continue to be debated vigorously.[17]

Besides the current proceedings against Milosevic, the issues were raised in a recent decision of the European Court of Human Rights (ECHR). In *Bankovic and Others v Belgium and 16 Other Contracting States*,[18] it was argued (unsuccessfully) that NATO's control over the airspace of parts of FRY during the campaign amounted to "effective control" since they formed an area within the jurisdiction of NATO member states for the purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[19] Further, the underlying legality of the campaign was the centre of the ongoing action FRY had instigated in the International Court of Justice (ICJ), alleging that the respondent NATO member states violated their international obligations by bombing FRY territory.[20]

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[16] See for example Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Horst F and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505-537.

[17] See for example the various commentaries cited by Zimmerman and anor in "Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Status of Kosovo" (2001) 70 Nordic Journal of International Law 423, 423 note 1.

[18] European Court of Human Rights, Grand Chamber, 12 December 2001, Application 52207/99.

[19] The Court ruled that the claim brought against all NATO states party to the European Convention by the relatives of those killed in the bombing of the Serbian Television and Radio Station (RTS) was inadmissible since there was no jurisdictional link between the states and those killed. As such, the latter were not responsible under the European Convention: ibid paras 82, 84.

[20] Legality of Use of Force, (Yugoslavia v Belgium), (Yugoslavia v Canada), (Yugoslavia v France), (Yugoslavia v Germany), (Yugoslavia v Italy), (Yugoslavia v Netherlands), (Yugoslavia v Portugal), (Yugoslavia v United Kingdom). During Operation Allied Force on 26 April 1999, FRY recognised the ICJ's compulsory jurisdiction and commenced proceedings against ten NATO member states on 29 April 1999 by requesting provisional measures under Article 73 of the ICJ Statute. The ICJ refused this request on 2 June 1999. Inter alia, FRY claimed that the NATO member states violated several international obligations banning the use of force:

Unlike the Nuremberg[21] and Tokyo War Crimes Tribunals[22] there are no limits on the nationality of a person whom the ICTY or the International Criminal Tribunal for Rwanda (ICTR) could indict. All that is needed is that the alleged acts fall within the temporal and geographical limits provided in their respective statutes, and are crimes for which the relevant tribunal had competence.[23] Indeed, the limitation on the competence of military tribunals formed after World War II to apply the same standard of behaviour to Allied personnel who might have committed similar crimes has significantly undermined their credibility.[24]

The specific terms of the respective *ad hoc* tribunal Statutes did not allow for similar criticism. As a result, the ongoing debate on the campaign quite clearly raised the (perhaps unforeseen) possibility that members of the armed forces of NATO member states could find themselves before the ICTY. This remains a particularly sensitive point, even more so in the context of concerns the United States expressed on the recently established International Criminal Court (ICC).[25]

Legality of Use of Force (Yugoslavia v Belgium), Application by FRY filed with the ICJ, 29 April 1999. FRY claimed also that following the bombing, one million children were endangered and hundreds of thousands of citizens exposed to poisonous gases. For jurisdictional reasons, the present proceedings concern only eight NATO member States. On 22 March 2002, the ICJ extended the time limit for FRY to respond to the respondent states' preliminary objections until 7 April 2003.

[21] The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (Charter of the International Military Tribunal), 82 United Nations Treaty Series 279, 284 created the International Military Tribunal in Nuremberg.

[22] A Charter created the International Military Tribunal for the Far East whose terms were included in a Special Proclamation issued by General MacArthur, the Supreme Commander for the Allied Powers, on 19 January 1946 (Treaties and Other International Acts Series, No 1589 at 3). Article 5 of the Charter gives the military tribunal the "power to try and punish Far Eastern war criminals."

[23] The actions of NATO personnel in Kosovo, as well as those allegedly committed by Serb forces under Milosevic's command, fell within the geographical and temporal boundaries of the ICTY's competence. Article 1 of the ICTY Statute provides that the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.

[24] Bassiouni MC, Crimes Against Humanity in International Criminal Law (1999, 2nd ed, Kluwer Law International, The Hague) 525-526.

[25] The United States' strident resistance to the recently created ICC was based mainly on fears that its own military personnel could be subject to charges in "politically motivated" prosecutions in this court. In an interesting parallel, the Rwandan

The Prosecutor chose to proceed against Milosevic initially in relation to Kosovo probably because these events were within recent memory. From the start, the substantive Milosevic trial had become a worldwide "media event" thrusting Operation Allied Force into the international limelight again. Milosevic represented himself and *inter alia* cross-examined high profile witnesses such as Paddy Ashdown (former British Liberal Democrat leader), NATO General Klaus Naumann and William Walker (American head of the Kosovo monitoring mission) regarding NATO's actions.[26]

Owing to the ongoing debate and renewed interest in the claims regarding NATO's actions, there should be careful reflection on the Report's contents. In theory at least the Prosecutor could revisit the Report and conduct an investigation but this would seem unlikely. If nothing else, recent events have highlighted again the unsatisfactory nature of important aspects in the Report.

The more controversial legal issues the Report raised should be considered within the context of the political dimensions of NATO's decision to proceed with Operation Allied Force. It is argued below that the Report was an inappropriate basis for assessing grave allegations against NATO personnel. Both the "general issues" and "specific incidents" in the Report are analysed, raising important questions of law that were not appropriately or correctly dealt with. It would seem that the Report in essence satisfies no one. As a result, ongoing and fresh comments and allegations regarding NATO's actions, such as those raised in *Milosevic*, will only serve to maintain, and perhaps reinforce doubts on how the Prosecutor had dealt with them. This has the unfortunate effect of diminishing the credibility of the otherwise increasingly successful work of the ICTY.

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government, disappointed with the OTP's failure to prosecute French military officers on charges related to events in Rwanda in 1994, is reportedly in the process of indicting them to face charges before its domestic courts. A French parliamentary commission had in 1998 cleared the French government of any involvement in the 1994 genocide: Fondation Hirondelle, ICTR News, 20 August 2002.

[26] Black, "Milosevic unbowed as trial adjourns", Guardian Weekly, 1-7 August 2002, 3.

II. BACKGROUND TO OPERATION ALLIED FORCE

In 1949, ten European states,[27] Canada and the United States created NATO, which has been characterised as "the most successful military alliance in history."[28] Its role is primarily to safeguard and promote its member states' freedom and security and provide for their "collective defence", a procedure initiated for the first time following the attacks on 11 September 2001 in the United States.[29] When the Cold War ended, NATO redefined its role culminating in the new NATO-Russia Council in which 19 member states[30] and Russia plan to be "equal partners in areas of common interest".[31] During the 1990s, NATO formulated a series of "strategic concepts". Its 1999 strategic concept declared that areas in and around Kosovo and FRY needed "[a] new level of international engagement...to build security, prosperity and democratic civil society, leading in time to full integration into the wider European family".[32]

Operation Allied Force was the "first large-scale military action" NATO undertook in its 50-year history.[33] This campaign was directed mainly at Serb military targets in Kosovo.[34] Instead of being an act of self-defence, many regarded Operation Allied Force (though NATO

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[27] Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Denmark, Iceland, Italy, Norway and Portugal.

[28] The Economist, "A Moment in Truth", 2 May 2002 at <www.economist.com> (visited May 2002).

[29] Following the attacks in New York and Washington DC, NATO formally invoked Article 5 of its constituent instrument, the Treaty of Washington (in force 24 August 1949). The treaty inter alia provides that if there was an armed attack against one or more NATO member states in Europe or North America it would be deemed an attack against them all. If this occurred, each of them could exercise the right of individual or collective self-defence under Article 51 of the United Nations Charter.

[30] Belgium, Canada, Czech Republic, Denmark, France, Germany, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States.

[31] "NATO-Russia Relations: A New Quality", Declaration by the Heads of State and Government of NATO Member States and the Russian Federation, Rome, 28 May 2002.

[32] NATO Press Release 99/12, 30 January 1999 quoted in Gray C, International Law and the Use of Force (2000, Oxford University Press, Oxford) 32.

[33] Wedgwood, "NATO's Campaign in Yugoslavia" (1999) 93 American Journal of International Law 828, 828.

[34] Operation Allied Force also targeted certain sites in Serbia and Montenegro: Detter I, The Law of War (2000, Cambridge University Press, Cambridge) 93.

itself had not forcefully promoted it as such[35]) as humanitarian intervention.[36] It was designed to halt Serbia's attempts to "ethnically cleanse" a significant proportion of Kosovo through the forced expulsion of its ethnic Albanians.[37] Shortly after Operation Allied Force ended, NATO Secretary-General Lord Robertson concluded that the campaign "achieved our objectives of reversing ethnic cleansing, and forcing President Milosevic to withdraw his forces."[38]

In *Milosevic*, the Prosecutor alleged that in the period leading up to the campaign, Serb forces had murdered thousands of ethnic Albanians and deported a further 800,000 people.[39] The United Nations High Commissioner for Refugees estimated that during the first eight days of Operation Allied Force, Serb forces expelled 220,000 persons from Kosovo. The Organization for Security and Cooperation in Europe (OSCE) Verification Mission estimated that over 90% of the Kosovo Albanian populations - approximately 1.45 million people - were displaced by the campaign.[40] NATO claimed that, as a result of its actions and the "secure environment" it helped to establish in the area, many of them subsequently returned home safely.[41] In contrast, Milosevic contended that they had fled from NATO's bombing, not from Serb forces.[42]

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[35] When Operation Allied Force began, NATO justified its actions primarily on the moral and political dimensions of what had allegedly occurred in Kosovo earlier, instead of relying on express legal reasons: Gray C, International Law and the Use of Force (2000 Oxford University Press, Oxford) 32. In particular, the United States emphasised the campaign's objectives instead of using an international law basis: Wedgwood, "NATO's Campaign in Yugoslavia" (1999) 93 American Journal of International Law 828, 829.

[36] See for example Brown, "Humanitarian Intervention at a Crossroads" (2000) 41 William and Mary Law Review 1683, 1690.

[37] Ibid.

[38] Lord Robertson, "NATO in the new millennium" (1999) 47:4 NATO Review 3, available at <www.nato.int> (visited August 2002).

[39] By March 1999, the United Nations High Commissioner for Refugees estimated that there were 260,000 displaced persons in Kosovo: Steiner HJ and anor, International Human Rights in Context: Law, Politics, Morals (2000, 2nd ed, Oxford University Press, Oxford) 654.

[40] Steiner HJ and anor, ibid.

[41] Lord Robertson, "NATO in the new millennium" (1999) 47:4 NATO Review 3, available at <www.nato.int> (visited August 2002).

[42] Fisher and anor, "Defiant, Milosevic Begins his Defense by Assailing NATO", New York Times, 15 February 2002, available at <www.nytimes.com> (visited February 2002).

The (alleged) Serbian policy in Kosovo presented a moral and legal dilemma to the states opposing Milosevic's regime. It raised an (apparent) legal conflict between the *jus cogens* prohibition of the use of force[43] and the desire of NATO member states to take what was considered as necessary forceful action to prevent widespread abuses of human rights.[44] Despite the ambiguity under current international law on the justification of this right of humanitarian intervention,[45] NATO's decision to act in the prevailing circumstances was widely characterised as "the right thing to do." This was especially so in light of the haunting images emerging from media reports from the area[46] and the dire consequences resulting from the international community's failure to act decisively in Rwanda and Bosnia.

Besides the humanitarian considerations, NATO probably had no choice but to intervene from a political viewpoint since it had backed itself into a corner in certain respects. It faced resistance from crucial members of the United Nations Security Council and Russia's probable veto of further action under Chapter VII of the United Nations Charter.[47] At the same time, the Serbian government had remained defiant when presented with the Rambouillet Agreement that France and the United Kingdom (both NATO member states) had brokered.[48]

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[43] See Case Concerning Military and Paramilitary Activities in and against Nicaragua (1986) International Court of Justice Reports 14 para 190.

[44] Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 American Journal of International Law 834.

[45] It has been said that the terms of the United Nations Charter leave "no room for a "humanitarian intervention" in the internal affairs of a State": Momtaz, "NATO's 'humanitarian intervention' in Kosovo and the prohibition of the use of force" (2000) 82 International Review of the Red Cross 89.

[46] See for example Reisman, "Kosovo's Antinomies" (1999) 93 American Journal of International Law 860.

[47] Prior to Operation Allied Force, the Security Council adopted three resolutions under Chapter VII of the Charter relating to Kosovo: Resolutions 1160 (31 March 1998), 1199 (23 September 1998) and 1203 (24 October 1998). These resolutions did not authorise the use of force but in effect reaffirmed FRY's sovereignty and territorial integrity: Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 American Journal of International Law 834, 835.

[48] Negotiations between the parties in conflict took place in Rambouillet between 6-23 February 1999 and in Paris between 15-18 March 1999. The Kosovar Albanian delegation agreed reluctantly to the resultant peace agreement, essentially a non-negotiable set of demands. The so-called "contact group" (France, Germany, Italy, Russia, United Kingdom and United States) presented the agreement to the Belgrade government but Milosevic rejected it: BBC News, "Milosevic rejects foreign troops"

Also, once the operation began, NATO felt that it could not abandon its campaign before securing Milosevic's submission.[49] In this regard, NATO believed that the campaign's continuation and intensification would lead to widespread dissatisfaction with Milosevic, forcing him to give some form of autonomy to Kosovo or risk losing power himself.[50] As such, it has been suggested that the campaign involved a "punitive element" designed to ensure a definitive settlement of the stand-off.[51]

Nevertheless, despite any real or apparent justification (legal or otherwise) for the commencement and ongoing conduct of NATO's campaign, the specific actions undertaken, especially those resulting in significant civilian casualties, required close and independent scrutiny to ascertain whether crimes within the ICTY's competence had been committed. In this respect and following "numerous requests" to do so,[52] the Prosecutor formed the Committee to review the events that transpired during Operation Allied Force.

III. GENERAL COMMENTS ON THE REPORT

The 24-page Report has 91 paragraphs. Its primary objective is to address two main questions posed by the Committee:[53]

1. Are the prohibitions alleged sufficiently well established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of the prohibitions may have occurred?
2. Following the committee's reasoned evaluation of the information, is the information credible and does it tend to show that individuals during the NATO campaign may have committed crimes within the ICTY's jurisdiction?

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at <http://news.bbc.co.uk/1/hi/world/europe/295892.stm> (visited February 2002).

[49] Falk, "Kosovo, World Order, and the Future of International Law" (1999) 93 American Journal of International Law 847, 851.

[50] Byman D and anor, The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might (2002, Cambridge University Press, Cambridge) 28.

[51] Detter I, The Law of War (2000, Cambridge University Press, Cambridge) 96.

[52] The Report para 1.

[53] Ibid para 5.

After dealing with the preliminary matters relating *inter alia* to its mandate, the Report mainly addressed the several substantive elements of the campaign, focusing on several general issues and five specific incidents deemed the "most problematic".[54] At the end of its brief two-paragraph recommendations, it concluded:[55]

> On the basis of information available, the committee recommends that no investigation be commenced by the OTP in relation to the NATO bombing campaign or incidents occurring during the campaign.

At the outset, the Committee did not address the campaign's legality as such, noting that this remained the subject of FRY's proceedings in the ICJ.[56] Indeed, this question did not fall squarely within the ICTY's competence as it had no jurisdiction over breaches involving the use of force. However, the Committee felt that if NATO's actions amounted to an unlawful use of force, they could constitute a "crime against peace or aggression", which also fell outside the ICTY's jurisdiction.[57]

The Committee based its review on publicly available information.[58] It did not travel to FRY nor did it independently examine or verify the background details. As such, the Report's whole basis rested on the Committee's reliance on information given by others, including NATO member states and NATO's own information and press statements, which it assumed were "generally reliable" and "honestly given".[59] Somewhat paradoxically, it admitted that NATO did not fully cooperate with the OTP,[60] "failed to address the specific incidents" and

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[54] This will be discussed further below: see ibid para 57.
[55] Ibid para 91.
[56] Ibid para 4.
[57] Ibid paras 4 and 30.
[58] For the information the Committee reviewed before reaching its conclusions see ibid para 6.
[59] Ibid para 90.
[60] It has been suggested that NATO's actions in this regard may constitute a breach of the obligation of all United Nations member states to cooperate with the ICTY under Article 29 of the ICTY Statute. See Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Fischer H and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505-537.

gave only a "general reply" to the OTP's questions in February 2000.[61]

Without drawing any adverse conclusions on the veracity of the information the Committee received, this contextual background cannot help but call into question the force of its conclusion that "neither an in-depth investigation....as a whole nor investigations related to specific incidents" were justified on the basis that such investigations were "unlikely to result in the acquisition of sufficient evidence."[62] It appears that the Committee, and by implication the Prosecutor, were resigned to the fact that an uncooperative NATO would not allow for the production of any additional significant and relevant evidence. This was despite the states' obligations to cooperate with the ICTY under the ICTY Statute.

Further, the Committee concluded that since the law on particular aspects raised by the circumstances was "not sufficiently clear", this somehow justified its recommendation that the Prosecutor should not investigate NATO's actions. Instead of providing an acceptable justification for its final conclusions, this seemed to be a wholly unconvincing reason upon which a decision to discontinue an investigation was based. It ignored the important "truth seeking" role of tribunals such as the ICTY. This was even more significant in light of Amnesty International's suggestion in a report which the Committee had also reviewed that there had been no substantive investigation into the allegations concerning civilian deaths arising from the campaign (besides the bombing of the Chinese Embassy).[63]

The very nature of international criminal tribunals such as the ICTY and ICTR and the unique factual circumstances with which they are concerned meant that periodically they had to delve into hitherto unchartered legal areas. Indeed, the *ad hoc* tribunals have started to break new legal ground with their jurisprudence in important areas of international humanitarian law such as genocide and rape.[64] Surely this

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[61] The Report para 90.
[62] Ibid.
[63] Amnesty International, "Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force", June 2000, 28.
[64] See for example the ICTR judgment in Prosecutor v Akayesu Case No ICTR-96-4-T, 2 September 1998 and the ICTY judgment in Prosecutor v Furundzija Case No IT-95-17/1-T, 10 December 1998.

was a significant and positive by-product of their activities and it therefore beggared belief that the OTP should not investigate matters because the prevailing circumstances did not give rise to "clear" and appropriate legal principles.

The international community has come to expect that the *ad hoc* tribunals, and in the future the ICC and other international courts and tribunals such as the Special Court for Sierra Leone, would clarify and expand important unresolved legal questions arising from alleged gross violations of human rights. Over the past decade the applicable legal principles in areas of international criminal and humanitarian law have continued to evolve and develop in response to specific incidents. This reflects the "sea change" in international political will that to a far greater extent is now accepting of the need for a more rigorous and effective set of rules to regulate the activities of those in power. This may be a slow process, but a process it remains, as the inexorable trend intensifies towards a "globalisation of justice".[65]

A determination of these new and emerging principles of law plays a crucial role in setting standards by which the behaviour of individuals will be judged. It is important that the standards are themselves subject to revision so as to reflect properly the changes in what is, and what is not, viewed as acceptable behaviour internationally. It is naive and unrealistic to expect that a finite code exists for every situation. The Committee's conclusions on this point, and by implication their adoption by the Prosecutor, may only be regarded as unsatisfactory and out of touch with the increasingly rapid development of international criminal and humanitarian law. As such, it is clearly unacceptable to decide against an investigation just because the relevant law may not be absolutely certain at the time.

IV. GENERAL ISSUES CONSIDERED BY THE COMMITTEE

Paragraphs 14-56 of the Report addressed six general issues:

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[65] The Rome Statute received the requisite 60 ratifications within an unexpectedly short period despite the United States' resistance and entered into force on 1 July 2002. This testifies to an emerging international political landscape. By 20 August 2002, the Statute received 78 ratifications: <www.iccnow.org> (visited August 2002).

(a) Damage to the Environment
(b) Use of Depleted Uranium Projectiles
(c) Use of Cluster Bombs
(d) Legal Issues Related to Target Selection
(e) Casualty Figures
(f) General Assessment of the Bombing Campaign.

While those issues covered several significant legal questions, much of this part of the Report reflected a restatement on how the Committee viewed the relevant international law principles.

(a) Environmental Damage

When considering the issue of environmental damage, the Committee felt that Articles 35(3) and 55 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 (Additional Protocol I)[66] had a "very high threshold of application."[67] Although it referred to the ICJ's Advisory Opinion in *Legality of Nuclear Weapons*[68] it suggested incorrectly that the Court had cast doubt on whether Article 55 also represented customary international law.[69] It concluded that the required threshold of damage was not breached in this case although (a) there was an obligation to avoid excessive long-term damage to the natural environment even when bombing legitimate military targets; (b) "excessive" in this context could not be clearly defined; and (c) the real impact of the campaign at that time was "unknown and difficult to measure."[70]

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[66] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.
[67] The Report para 15.
[68] [1996] International Court of Justice Reports 242.
[69] The Report para 15. This was what the ICJ actually said in para 31: "The Court notes further-more that Articles 35, para 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions" (emphasis added): Legality of Nuclear Weapons [1996] International Court of Justice Reports 242.
[70] The Report para 23.

The Committee referred to Article 8(b)(iv) of the Rome Statute of the ICC (Rome Statute)[71] finding that actual or constructive knowledge of the grave environmental effects of a military attack was needed before an offence could exist. Yet in the next paragraph the Committee acknowledged how difficult it was to establish the requisite *mens rea.* It seemed to suggest at this point that it was almost impossible to find the level of intent needed to constitute the particular offence if incontrovertible evidence was absent. This realisation, coupled with its inability to be precise on the excessive damage threshold, gave the impression that the Committee found this issue just "too hard" and therefore should not be pursued.

By not recommending further investigation, particularly in light of the ongoing reports and estimated cost of the environmental damage,[72] the Committee effectively buried this question before its proper consideration, even though verification by United Nations expert missions[73] of the long term environmental effects of NATO's actions existed. At the very least, the Committee, and ultimately the Prosecutor, would have been more prudent to suggest some form of "watching brief" over any long-term environmental damage. This would allow the damage to be monitored and a final recommendation made on an informed basis. To its credit, the Committee had tried to identify what details would be needed to fully evaluate this question but having done so it still based its recommendation solely on the information, or perhaps the lack of information, before it. A better approach would be to review the matter over time or when additional details became available.

Even though the Committee's recommendations on this point were not binding on the Prosecutor,[74] once it was recommended that no further investigation be instigated, it was expected that this would end the

[71] (1998) 37 International Legal Materials 999; see Article 8(b)(iv) of the Rome Statute which provides the acts included in the definition of "War Crimes".

[72] It has been estimated that Operation Allied Force caused in excess of US$3 billion worth of environmental damage: Planet Ark, "NATO bombing damaged environment – Serbian experts", 14 October 1999 at <www.planetark.org> (visited October 1999).

[73] See Dahl, "Serb town still waiting for NATO bombing clean-up", Planet Ark, 2 May 2002 at <www.planetark.org> (visited May 2002).

[74] 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?" (2000) 82 International Review of the Red Cross 1017, 1020.

matter, at least in the absence of overwhelming contrary information. Further, much of the information would not be forthcoming if the Prosecutor did not use the investigative powers of its office under the ICTY Statute. The Prosecutor's decision not to review the ongoing situation ensured that this would not eventuate.

(b) Depleted Uranium Projectiles and Cluster Bombs

The Committee concluded correctly that there was no specific treaty prohibition on the use of depleted uranium projectiles (DUPs) and cluster bombs.[75] It also noted the practical difficulties *Legality of Nuclear Weapons*[76] posed when determining a blanket prohibition on such weapons in customary international law. This is not to deny the significant dangers such weapons and their use can cause. In fact, it is estimated that some 31,000 rounds of DUPs were fired during the campaign and NATO had also used them in earlier operations.[77] As a result and in view of reports on the ongoing damage and injury such weapons caused during Operation Allied Force,[78] it is to be hoped that appropriate international action will be taken in this regard.

(c) Target Selection and Casualty Figures

The Committee provided a long discussion on the applicable legal principles as to how targets were selected for a military strike. The important issue here was the need to distinguish between military objectives (comprising the two elements of "effective contribution to military action" and "definite military advantage" as defined in Article 52 of Additional Protocol I)[79] and civilian persons or objects.[80] The

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[75] The Report paras 26-27.

[76] [1996] International Court of Justice Reports 242.

[77] It appears that NATO forces had also deployed such weapons in earlier campaigns in Kuwait, southern Iraq, Bosnia and Yugoslavia: Chigara, "Humanitarian Intervention Missions: Elementary Considerations, Humanity and the 'Good Samaritan'" [2001] Australian International Law Journal 66.

[78] Landmine Action, a coalition of over 50 charity groups, has determined that unexploded bombs, including cluster bombs, have killed 58 people and injured a further 97 in Kosovo from June 1999 to May 2001: Holden, "NATO left legal legacy in Kosovo – report", Planet Ark, 26 March 2002 at <www.planetark.org> (visited March 2002).

[79] Article 52 of Additional Protocol I inter alia provides that "[i]n so far as objects are concerned, military objectives are limited to those objects which by their nature,

Committee referred to various criticisms of this definition of military objects but noted that it was part of customary international law.[81] Even after this distinction was made, the Committee confirmed that the principle of proportionality continued to apply to operations against military objectives, so that injury and damage to civilians and civilian property should not be disproportionate to any expected military advantage. However, the *mens rea* component for an offence here was expressed in terms different to that used in the Rome Statute on environmental damage, where intention or recklessness (not mere negligence) had to be present.

The Committee found it difficult to apply the proportionality principle noting that different people ascribed differing relative "values" to military advantage *vis-à-vis* civilian injury and damage. This reflected a common criticism of the relevant international law principles – that it was easy to state the principle but very difficult to apply it in practice.[82] The Committee therefore turned to the ICTY Trial Chamber decision in *Kupreskic,*[83] which it regarded as "a progressive statement of the applicable law with regard to the obligation to protect civilians."

Despite purporting to rely on that decision, the Committee adopted a different "cumulative effect" approach. It looked at the absolute numbers in relation to Operation Allied Force (38,400 sorties, 10,484 strike sorties and 23,614 bombs released) and concluded that in this context the civilian casualties indicated no intention to target civilians. No reference was made at this point to the "recklessness" test, which should have been a relevant factor as the campaign was conducted at a height of 15,000 feet,[84] a strategy that was successfully employed to

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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."

[80] The Report para 29.

[81] Ibid para 42.

[82] See for example Fenrick W, "Prosecuting Violations of Combat Limitations" in Protecting Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice, Speeches and Proceedings of the Red Cross Symposium, 8 December 2000 (2001, Red Cross, Netherlands) 82-83.

[83] Prosecutor v Kupreskic, Kupreskic, Kupreskic, Josipovic, Papic and Santic Case No IT-95-16-T, Judgment, 14 January 2000.

[84] The issue of civilian casualties due to "high altitude" bombing has also become a major issue of contention in the ongoing allied campaign in Afghanistan: see for

reduce and in fact eliminated the number of possible NATO casualties.[85] Indeed, at the start of the Report the Committee referred to allegations of recklessness in relation to NATO's "zero casualty" war,[86] but then did not properly address this issue later.

It seems paradoxical that when discussing one of the "problematic" incidents later in the Report, namely the attack on the Djakovica convoy, the Committee seemed to regard the fact that bombing, conducted "at a substantial height" was a mitigating factor.[87] On the contrary, it should be noted that many casualties were civilians and refugees whom NATO intended to protect in the first place. As such, it would be more appropriate if NATO were held to a more rigorous standard[88] especially when the Security Council did not authorise the campaign. Yet the reality was quite different. Instead of protecting ethnic Albanians from Serb forces, the very nature and conduct of the campaign seemed to have been designed to minimise harm to NATO personnel. Meanwhile, maximum political, diplomatic and economic pressure was being used to force the Milosevic regime to submit.[89]

By adopting an approach based on absolute numbers, the Committee gave no assistance on what level of civilian deaths *would* have been disproportionate. It was very much a "gut feeling" response to an extremely serious set of facts. Further, having found this "quantitative" approach useful, the Committee turned to it again later in the Report when concluding that no evidence existed to justify charges of crimes against humanity or genocide.[90] One can only speculate as to what the Committee's response would be if more than 1,000 civilians died. Whilst it could be a relevant factor, reference to the number of civilian

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example, Filkins, "Disastrous US high-tech war killed hundreds", New York Times, 22 July 2002, available at <www.nytimes.com> (visited July 2002).

[85] During the 78-day campaign, NATO sustained zero battlefield casualties: Byman D and anor, The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might (2002, Cambridge University Press, Cambridge) 89.

[86] The Report para 2.

[87] Ibid para 70.

[88] Falk, "Kosovo, World Order, and the Future of International Law" (1999) 93 American Journal of International Law 847, 855.

[89] Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 American Journal of International Law 834, 840.

[90] The Report para 90.

casualties in this way was a flawed approach to these crimes, even though the Committee's ultimate conclusion might have been correct.[91]

Given the uncertainties, it would have been preferable had matters relevant to the proportionality of NATO's actions been referred for further investigation and, if subsequently deemed appropriate, determined ultimately by the ICTY. The Committee's approach could give the impression that the threshold required before a crime was committed was exceedingly high and that civilian loss of life was not a serious matter when weighed up against strikes on purported military targets. This would contrast with the evolving trend of international humanitarian law that would rightly demand increased scrutiny of military actions involving civilian casualties.

V. SPECIFIC INCIDENTS CONSIDERED BY THE COMMITTEE

Before concluding there was no incident during Operation Allied Force that necessitated an OTP investigation, the Committee discussed five incidents in detail:

(a) the attack on a Civilian Passenger Train at the Grdelica Gorge on 12 April 1999;
(b) the attack on the Djakovica Convoy on 14 April 1999;
(c) the bombing of RTS in Belgrade on 23 April 1999;
(d) the attack on the Chinese Embassy on 7 May 1999; and
(e) the attack on Korisa Village on 13 May 1999.

The attack on the civilian train and the bombing of RTS were perhaps the most controversial legally, although the bombing of the Chinese Embassy had significant political ramifications. The Chinese Embassy bombing was the subject of a detailed internal inquiry and the United States subsequently paid compensation to China.[92]

The main questions arising from the Gorge train attack concerned the circumstances of the second bomb strike, namely, was the pilot under a

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[91] Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Fischer H and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505, 509.
[92] See the Report para 84.

legal obligation to halt the attack on the bridge once he realised that a civilian train was on it? On this point, the Committee was divided, mainly because the pilot's conduct (or that of the weapons system officer (WSO) on board the plane) could have evinced "an element of recklessness."[93] Yet, in the very next sentence it was "in agreement" that the incident should not be investigated "based on the criteria for initiating an investigation" found in paragraph 5 of the Report. This is difficult to reconcile because some Committee members acknowledged that the requisite standard of diligence required under international humanitarian law was not met, with great civilian loss of life.

Further, no reference was made to any explicit orders given to the pilot/WSO apart from the fact that the mission's aim was "to take out the bridge". There is probably little dispute that the bridge itself was a legitimate military target but the surrounding circumstances changed radically once the crew became aware that a train was on the bridge. If, for example, the pilot/WSO were acting under orders to destroy the bridge "at all costs", then the question of command responsibility could be relevant,[94] including Article 57 of Additional Protocol I.[95] The Committee had relied on the lack of available information, but again, this was unconvincing particularly when one recalls that NATO did not cooperate adequately with the Committee. Given the facts, it should have recommended that all details relating to this incident be investigated but instead it dismissed its own doubts.

The Committee's view on the RTS attack gave rise to many concerns. It considered at length whether the station was a legitimate military

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[93] Ibid para 62.

[94] Cottier ,"Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Fischer H and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505, 533-534.

[95] Article 57(1) of Additional Protocol I provides inter alia that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. Article 57(2) provides that "[w]ith respect to attacks, the following precautions shall be taken: (b) An attack shall be cancelled or suspended 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..."

objective and couched the discussion in caveats depending on the reasons for the attack. Clearly there were circumstances where operations such as the RTS bombing could be legitimate. One only has to refer to *Prosecutor v Nahimana, Barayagwiza and Ngeze*[96] to understand the media's power. Similarly, if the station was an integral part of Yugoslavia's C3 (Command, Control and Communications) network, this could also justify action.

However, the Committee was not entirely consistent in its assessment of the reasons for this attack. Although its discussion began by stating that the RTS bombing was planned to disrupt and degrade the C3,[97] it later cast doubt on this conclusion. Instead, it concluded quite correctly that an attack on the station simply because it was part of the propaganda machinery would be questionable in international law,[98] because this would not represent a legitimate target.[99]

It would appear that this was what happened. As Operation Allied Force continued, NATO member states condoned a "loosening" of the engagement rules and targeted restrictions to achieve their political and humanitarian goals.[100] This meant that what fell outside the scope of permissible targets could also be attacked. The Committee seemed at times to recognise this by raising doubts on the legitimacy of the RTS attack. However, quoting a NATO press release circulated during the attack, it concluded that the attack was part of "an integrated attack against numerous objects" essential to the Belgrade government's direction and control of its forces in Kosovo.[101] This conclusion was unconvincing especially when detailed information was absent.

In reaching this conclusion, the Committee had "conveniently" adopted its own version of the "cumulative" approach despite the civilian nature of the deaths and injury. Once more, the Committee applied an

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[96] Case No ICTR-99-52-T. This is the so-called "media trial" currently before Trial Chamber I of the ICTR, involving the "hate-radio" station Radio Television Libre des Mille Collines SARL.
[97] The Report para 72.
[98] Ibid para 76.
[99] See also ibid para 47.
[100] Byman D and anor, The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might (2002, Cambridge University Press, Cambridge) 141.
[101] The Report para 78.

incorrect reading of the Trial Chamber's words in *Kupreskic* by testing the proportionality issue within the context of the totality of the campaign. As such, it could dismiss an incident such as this even though it recognised that there were "high" civilian casualties. Further, despite the fact that this was a target where it would be reasonable to expect the casualties to be non-military, the Committee found that the action did "not appear to be clearly disproportionate".[102]

It was also disappointing that the Committee did not raise the issue of proportionality in another specific incident, namely, the attack on Korisa village where a large number of civilians died or were injured. The Committee's perspective was that once NATO confirmed (and continued to assert) that this target was a legitimate military objective, the matter ended, unless there was more information to the contrary.[103] This would create a catch 22 situation because without an investigation no such information would be likely to emerge.

The Committee also implied that NATO's advance warning of the impending strike on RTS was somehow sufficient even though it was not directed to the Yugoslav authorities.[104] It was somewhat surprising that it concluded that the authorities themselves could be at least partly responsible for the casualties by not passing on any information they might have learnt "by chance".[105] In any case, there was no evidence to show that NATO tried to ensure that the warning went to those working in the station, and more than 100 civilians were reported to be in the building during the attack.[106]

VI. CONCLUDING REMARKS

Under the ICTY Statute, the Prosecutor is responsible for investigating and prosecuting alleged perpetrators of crimes falling within the

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[102] Ibid para 79.
[103] Ibid para 89.
[104] Article 57(2)(c) of Additional Protocol I requires that "[e]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."
[105] Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Fischer H and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505, 524.
[106] Ibid 525.

ICTY's competence.[107] Article 16(2) emphasises that the Prosecutor is independent in this regard and cannot "seek or receive instructions from any Government or from any other source." Thus, it is for the Prosecutor alone to evaluate the available information in order to determine whether it justifies the initiation of an investigation and eventual prosecution.[108]

As a necessary corollary, the Prosecutor's decision *not* to indict, investigate or prosecute is final and not subject to review by the ICTY or any other body. This is so even though it may lead to third party criticism of both the Prosecutor and, even more significantly, the overall functioning of the *ad hoc* tribunals.[109] It is instructive to note that the Committee confirmed that there is a threshold test, namely, "credible evidence tending to show that crimes within the jurisdiction of the ICTY may have been committed",[110] beyond which the Prosecutor has a "legal entitlement", but by implication not a legal *obligation* to act. Similarly, on the basis of its investigations, the Prosecutor may drop charges against the accused.[111]

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[107] Article 16(1) of the ICTY Statute.

[108] It should be noted that even though the Prosecutor could initiate investigations "on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations", the ICTY Statute in Article 18 provides that this does not limit the Prosecutor's independence concerning the final decision on whether to proceed and how to do it.

[109] For example in July 2002 the Rwandan government responded to an earlier report to the United Nations Security Council by the Prosecutor and the ICTR, criticising both the Prosecutor and the ICTR for their "failure to indict and apprehend genocide suspects still at large": Hirondelle, ICTR News, 9 August 2002. It has also accused the Prosecutor of succumbing to "pressure from certain governments" in her decisions as to whether or not to proceed against particular individuals: Hirondelle, ICTR News, 19 August 2002.

[110] The Report para 5.

[111] A recent example is the Prosecutor's decision to drop all charges against former Rwandan military officer, Major Léonidas Rusatira, who was arrested in May 2002 and awaiting extradition from Belgium to the ICTR to face genocide charges. The ICTY accepted the Prosecutor's motion requesting the withdrawal of the indictment against the accused on 12 August 2002. This was subject to the reservation that "a withdrawal of the indictment does not preclude the Prosecutor from seeking an indictment on the same counts or other counts in the future, based on evidence gathered in ongoing investigations": Hirondelle, ICTR News, 15 August 2002. Following this decision, the Rwandan Minister of Justice, Jean de Dieu Mucyo, was highly critical of the Prosecutor's actions, stating that "this goes to show the incompetence of the tribunal. Either the prosecutor doesn't know her case or else

Since the Prosecutor is free to determine whom it will prosecute, he or she may decide to "target" certain alleged perpetrators or perhaps particular individuals or types of individuals or both. Indeed, under some pressure from the United Nations, the Prosecutor has developed a "completion strategy" for the ICTY that will see all investigations finalised by the end of 2004, and any additional trials completed by 2010.[112] Under this strategy, the OTP will concentrate its focus on those alleged perpetrators representing the "highest-ranking political, military, paramilitary and civilian leaders" from the various ethnic groups in FRY.[113]

From the OTP's perspective, its acceptance of the Report and the Committee's recommendation not to proceed with an investigation marked the end of its interest in Operation Allied Force. In other words, the decision was final. The Prosecutor was not bound to accept the recommendations but decided to do so. In the circumstances, it may be assumed that she assessed the events and information contained in the Report and possibly other information before deciding.[114] On the other hand, if it were assumed she did not act or decide objectively, it would compromise the office, its independence and its integrity.

NATO's bombing during three months in 1999 has left some unresolved questions and remained the source of ongoing controversy. For example, when the Committee proceeded to apply its own interpretation of the relevant legal principles, it sometimes fell into error and at the minimum appeared not to consider the principles deeply.[115] This was so even though some of its conclusions, including

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there has been some pressure": Hirondelle, ICTR News, 19 August 2002.

[112] Refer Graham Blewitt, Deputy Prosecutor ICTY, Speech delivered at the XVIth Quadrennial Congress of the International Academy of Comparative Law, Brisbane, Australia, 19 July 2002. Similarly, the United Nations has requested the ICTR to complete its work by 2007/2008. As part of this process, the Security Council adopted unanimously Resolution 1431 on 14 August 2002 approving the appointment of 18 ad litem (supplementary) judges to help speed up trials before the ICTR: Hirondelle, ICTR News, 15 August 2002.

[113] Speech by Claude Jorda J, President of the ICTY, to the United Nations Security Council on 26 July 2002.

[114] 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?" (2000) 82 International Review of the Red Cross 1017, 1020.

[115] Ibid 1026.

that such actions did not constitute genocide, could ultimately be correct.

Although the OTP might have regarded the Report as a definitive analysis of NATO's actions, it was an inadequate response to events that continue to have significant effect in personal and political terms. The Committee had reviewed the events on the basis of limited information and without an independent verification of the details.[116] Further, the Report exposed some of the uncertainties raised by existing international law. Indeed this was, and quite unacceptably, a reason the Committee gave to justify its recommendations not to proceed with an investigation. This had the expected and ultimate effect of denying the ICTY the opportunity to clarify the principles.

Following the recent ECHR decision in *Bankovic*,[117] there are presently no proceedings by which victims or their relatives may seek a remedy for the results of the campaign. It remains to be seen if the current ICJ proceedings will deal in a substantive way with some of the important and unresolved legal issues that were canvassed but not addressed by the Committee.[118] In any event, the proceedings may continue for a number of years before the ICJ is in a position to deliver its judgment.

Overall, one cannot but help get the impression, perhaps unfairly, of a "whitewash" designed so as not to divert the OTP from the tasks that the NATO member states expect it to perform in an increasingly timely fashion in accordance with its completion strategies. Commentators have hailed NATO's campaign as a "high-water mark" in the development and legitimisation of a legal right in international law to

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[116] Interesting parallels may be drawn between the Report and the United Nations report dated July 2002 dealing with Israeli action in the Palestinian refugee camp in Jenin between 3-18 April 2002. The authors of the report did not visit the area and were barred by Israel from doing so. Further, Israel did not provide it with any information. The report concluded that although Israel's actions could have been reckless or illegal, there was no evidence to support the Palestinian claims of a massacre. United Nations Secretary-General Kofi Annan described the report as a "fair representation of a complex reality."

[117] European Court of Human Rights, Grand Chamber, 12 December 2001, Application 52207/99.

[118] Article 34(1) of the Statute of the ICJ provides that "[o]nly states may be parties in cases before the Court". As a result, the ICJ is not open to application by individual victims or their relatives, nor does it allow action against individual NATO personnel.

use force for the purposes of humanitarian intervention. Others could not regard it as such due to the "irresponsible manner"[119] of its conduct. Professor Antonio Cassese views it as an illegal act whose conduct and consequences (in terms of civilian casualties) breached important aspects of international humanitarian law.[120] Clearly there remains the strong suggestion that aspects of the campaign could constitute crimes within the ICTY's jurisdiction.

The Report has probably satisfied no one in terms of its assessment of the campaign and left a number of concerns. The Committee's recommendations cannot be regarded as representing a clear finding that NATO did not commit any crimes within the ICTY's competence or breaches of international humanitarian law.[121] As a result, many people may, quite justifiably, argue that this is not "justice being seen to be done", and in this respect it represents a cloud over the increasingly effective and positive work of the OTP and the ICTY. Regardless of whether Milosovic is eventually successful in doing so, this is clearly a perceived weakness in the ICTY's administration of justice that he is keen to exploit.

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[119] An-Na'im, "NATO on Kosovo is Bad for Human Rights" (1999) 17 Netherlands Quarterly of Human Rights 229 quoted in Steiner HJ and anor, International Human Rights in Context: Law, Politics, Morals (2000, 2nd ed, Oxford University Press, Oxford) 655.

[120] Cassese A, International Law (2001, Oxford University Press, Oxford) 298. He was a judge of the ICTY between 1993-2000 and its President between 1993-1997.

[121] Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000" in Fischer H and ors (eds), International and National Prosecution of Crimes Under International Law (2001, Berlin Verlag, Germany) 505, 535.