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Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict

Tania Voon

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POINTING THE FINGER: CIVILIAN CASUALTIES OF NATO BOMBING IN THE KOSOVO CONFLICT

TANIA VOON*

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* LL.B. (Hons) (Melb); B.Sc. (Melb); A.Mus.A. Solicitor, Mallesons Stephen Jaques, Melbourne, Australia. Candidate for LL.M., Harvard Law School 2000 - 2001. An earlier version of this essay was submitted as part of my LL.M. studies, in which I have been generously supported by the Australian Federation of University Women (Queensland and Victorian branches), the Foundation for Young Australians, the International Chapter P.E.O. Sisterhood, and Mallesons Stephen Jaques. I would like to thank my husband, Andrew Mitchell, for his comments on an earlier draft of this essay.

*Better by far to risk the lives of one's own combatants than the lives of "enemy" infants. This is a strenuous demand. But we haven't even attempted to meet it.*¹

INTRODUCTION

Over a period of eleven weeks from March 24, 1999 until June 9, 1999, the North Atlantic Treaty Organization ("NATO") conducted a bombing campaign against the Federal Republic of Yugoslavia ("FRY").² Thirteen of NATO's nineteen members participated in the operation,³ which was conducted in the name of the alliance as a whole,⁴ with the United States supplying most of the intelligence and sixty-five to eighty percent of the aircraft and precision ordnance.⁵ NATO's stated justification for the campaign was to support "the political aims of the international community: a peaceful, multi-

1. Jean Bethke Elshtain, *Kosovo and the Just-War Tradition*, in *KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS* 363, 365 (William Joseph Buckley ed., 2000) [hereinafter, *CONTENDING VOICES*].

2. See Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 1, at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited June 13, 2000) [hereinafter *Final Report*].

3. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 628, 632 (1999); Michael Ignatieff, *The Virtual Commander: How NATO Invented a New Kind of War*, NEW YORKER, Aug. 2, 1999, at 30, 32; HUMAN RIGHTS WATCH, VOL. 12, NO. 1(D), CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 10 (2000) [hereinafter *HUMAN RIGHTS WATCH*] (stating that the thirteen states were: Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States).

4. AMNESTY INTERNATIONAL, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA: "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 11 (2000), at <http://www.amnesty.org/ailib/intcam/kosovo/index.html> [hereinafter *AMNESTY INTERNATIONAL*]. There were some allegations that the United States was also carrying out a separate military operation of its own to support the NATO attacks. See *id.* at 14.

5. See *id.* at 12; see also Ignatieff, *supra* note 3, at 30 (indicating that the other members of the coalition made essential contributions to aircrews and garnered political support for the operation).

ethnic and democratic Kosovo in which all its people can live in security and enjoy universal human rights and freedoms on an equal basis.”⁶ In other words, NATO intervened primarily to end a humanitarian crisis.⁷ This intervention came at some humanitarian cost. Approximately 500 confirmed civilian deaths resulted from NATO’s bombing campaign,⁸ and around 6,000 civilians were wounded.⁹

The International Criminal Tribunal for the former Yugoslavia (“Tribunal”) decided in June 2000 not to investigate complaints about NATO’s conduct of the campaign. It has issued no indictments in this regard. The Tribunal’s decision was made having regard to reports by Amnesty International and Human Rights Watch condemning aspects of NATO’s campaign under international law.¹⁰ Subsequently, in October 2000, the Independent International Commission on Kosovo (“Commission”) released its report accepting the Tribunal’s decision. However, the Commission noted that the Tribunal was concerned with the narrow question of whether there was a basis for charging particular individuals with crimes,¹¹ and posited that some aspects of the bombing campaign “seem vulnerable to the allegation that violations might have occurred and depend, for final assessment, on the availability of further evidence.”¹²

This Critical Essay aims to evaluate NATO’s conduct of the

6. LORD GEORGE ROBERTSON OF PORT ELLEN, *KOSOVO ONE YEAR ON: ACHIEVEMENT AND CHALLENGE* 11 (2000).

7. Javier Solana, Secretary-General of NATO, *Fresh Cause for Hope at the Opening of the New Century*, in *CONTENDING VOICES*, *supra* note 1, at 218; General Wesley K. Clark, Supreme Allied Commander, Europe, *The Strength of an Alliance*, in *CONTENDING VOICES*, *supra* note 1, at 253; *cf.* Morton H. Halperin, United States Department of State, *Winning the Peace: America’s Goals in Kosovo*, in *CONTENDING VOICES*, *supra* note 1, at 227.

8. *Final Report*, *supra* note 2, para. 53; HUMAN RIGHTS WATCH, *supra* note 3, at 5 (noting that sixty-two to sixty-six percent of these deaths resulted from twelve incidents).

9. *See* TIM JUDAH, *KOSOVO: WAR AND REVENGE* 264 (2000).

10. *See generally* AMNESTY INTERNATIONAL, *supra* note 4; HUMAN RIGHTS WATCH, *supra* note 3.

11. *See* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT* 178 (2000), available at <http://www.kosovocommission.org> reports [hereinafter INDEPENDENT COMMISSION].

12. *See id.* at 5.

bombing campaign in light of the Tribunal's decision, and to derive lessons and recommendations from the manner in which the campaign was conducted for the protection of civilians in future cases of military interventions on humanitarian grounds. The discussion below focuses on civilian deaths and injuries caused by the bombing, largely ignoring issues concerning civilian property and infrastructure, the huge numbers of refugees arising from the Kosovo conflict, and the environmental damage caused by NATO.¹³ The Essay commences by explaining the decision of the Tribunal, and then separates the issues of the legality of the use of force by NATO on the one hand, from the legality of the manner in which force was used on the other. The bulk of this Essay is concerned with the latter issue. The general obligations of NATO in conducting the campaign are then outlined, followed by a detailed examination of five specific incidents of bombing.

I. DECISION OF THE TRIBUNAL PROSECUTOR

In mid-1999, the Tribunal began receiving allegations of crimes committed by NATO during its bombing campaign against the FRY. The crimes alleged included that: NATO deliberately and unlawfully attacked civilian infrastructure targets; NATO deliberately or recklessly attacked the civilian population; and NATO deliberately or recklessly caused excessive civilian casualties by trying to fight a "zero casualty" war for their own side.¹⁴ The allegations arose from various sources, including academics, a Russian Parliamentary Commission, and the FRY itself.¹⁵

On June 2, 2000, the Prosecutor for the Tribunal, Carla Del Ponte, advised the United Nations Security Council of her decision that

13. See generally UNITED NATIONS ENVIRONMENT PROGRAMME AND UNITED NATIONS CENTRE FOR HUMAN SETTLEMENTS (HABITAT), *THE KOSOVO CONFLICT: CONSEQUENCES FOR THE ENVIRONMENT & HUMAN SETTLEMENTS*, U.N. Sales No. E.00.III.D.98 (1999); Ida L. Bostian, *Hazardous Materials and Energy: The Environmental Consequences of the Kosovo Conflict and the NATO Bombing of Serbia*, COLO. J. INT'L ENVTL. L. & POL'Y 1999 Y.B. 230 (2000).

14. See *Final Report*, *supra* note 2, para. 2 (detailing NATO's alleged crimes).

15. Press Release, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000) [hereinafter ICTY Press Release].

there was no basis for investigating the allegations of crimes committed by NATO personnel during the campaign, indicating that “[a]lthough NATO had made some mistakes, it had not deliberately targeted civilians.”¹⁶ A representative of the Russian Federation immediately challenged the decision as premature, and also expressed reservations about the politicization of the Tribunal’s work.¹⁷ In addition, the FRY’s then Information Minister suggested that the Tribunal was siding with the aggressor, and that it had become an accomplice to NATO’s crimes.¹⁸

The Prosecutor rejected the claim of politicization, and subsequently released the committee report on which the decision was based (“Final Report”).¹⁹ She stated that this was an unusual step, as reasons for the Tribunal’s decisions were not ordinarily made available to the public in the absence of an indictment. She also explained that the Final Report represented the culmination of an extensive factual examination and legal analysis performed by a committee established in May 1999 specifically to review the bombing campaign (“Committee”).²⁰ The Committee’s criteria in determining whether an investigation by the Office of the Prosecutor was warranted were as follows:

a) the existence of alleged prohibitions that are sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution;

b) application of the law to the particular facts that reasonably suggests that a violation of these prohibitions may have occurred; and

16. Press Release, U.N. SCOR, Prosecutor for International Tribunal Briefs Security Council, U.N. Doc. SC/6870 (June 2, 2000).

17. *Id.*

18. UN Wire, *War Crimes: UN Declares “No Basis” for Opening NATO Probe* (June 5, 2000), at <http://www.unfoundation.org/unwire/archives/UNWIRE000605.cfm#19>.

19. *See generally Final Report, supra* note 2.

20. ICTY Press Release, *supra* note 15. In addition to the general question of target selection, the Committee specifically examined NATO’s use of cluster bombs and depleted uranium projectiles and the collateral environmental damage inflicted by the campaign. These aspects of the Final Report are beyond the scope of this essay.

c) credible information that tends to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the campaign.²¹

II. JUS AD BELLUM AND JUS IN BELLO

The phrase *jus ad bellum* refers to the rules governing the use of force, i.e. when resort to armed conflict is allowed; *jus in bello* refers to the rules governing the actual conduct of armed conflict, i.e. what behavior is allowed within a war, also known as the law of armed conflict or international humanitarian law.²² *Jus ad bellum* is today largely derived from the United Nations Charter. Article 2(4) of the Charter prohibits members from using or threatening to use force against "the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."²³ This prohibition applies to all states because it has become part of customary international law.²⁴ Exceptions apply where force is used in self-defense²⁵ or pursuant to a Security Council Resolution.²⁶ The rules of *jus in bello* that are relevant to NATO's bombing campaign will be discussed in Part III of this Essay below.

Many commentators have suggested that NATO's use of force against the FRY was contrary to the United Nations Charter and international law.²⁷ Others have acknowledged the technical illegality of NATO's actions while maintaining that they were nevertheless

21. *Final Report*, *supra* note 2, para 5.

22. *See generally* PETER MALANCZUK, MODERN INTRODUCTION TO INTERNATIONAL LAW, 306-41 (7th ed. rev. 1997) (discussing the role of *jus ad bellum* in international wars, civil wars, and the right to self-determination).

23. U.N. CHARTER art. 2, para. 4.

24. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97 (June 27) (indicating that both the U.N. Charter and customary international law "flow from a common fundamental principle outlawing the use of force in international relations.").

25. U.N. CHARTER, art. 51.

26. *See generally id.* at arts. 39-51 (outlining U.N. Security Council procedures when confronted by breaches of peace and acts of aggression).

27. *Law and Right: When They Don't Fit Together*, ECONOMIST, Apr. 3, 1999, at 19-20; *Gowned Warriors*, ECONOMIST, May 15, 1999, at 52.

“legitimate” in some other sense.²⁸ Still others have suggested that the NATO conduct assisted in the creation of a new right of humanitarian intervention under customary international law.²⁹ The International Court of Justice is currently hearing several claims by the FRY against various NATO countries alleging that their resort to force was illegal,³⁰ although the FRY’s claim against the United States was dismissed for want of jurisdiction.³¹ While it is beyond the scope of this Essay to assess the strength of the FRY’s claims, it is worth noting that on one view, if NATO’s resort to force were itself illegal, all of its forceful actions were illegal, including the entire bombing campaign.³²

The Tribunal has the power to prosecute persons responsible for crimes against humanity when committed in armed conflicts;³³ thus, its jurisdiction typically extends to questions arising under *jus in*

28. See, e.g., Kofi Annan, *The Effectiveness of the International Rule of Law in Maintaining International Peace and Security*, in *CONTENDING VOICES*, *supra* note 1, at 221; Michael Walzer, *Kosovo*, in *CONTENDING VOICES*, *supra* note 1, at 333, 335; INDEPENDENT COMMISSION, *supra* note 11, at 186; *cf. Oh What a Lovely War!*, *ECONOMIST*, Apr. 24, 1999, at 50.

29. See generally Dr. Klinton W. Alexander, *NATO’s Intervention in Kosovo: the Legal Case for Violating Yugoslavia’s National Sovereignty in the Absence of Security Council Approval*, 22 *HOUS. J. INT’L L.* 403 (2000) (arguing that nations can no longer rely on the principles of non-intervention and national sovereignty to protect them from the use of force when the State is committing gross human rights violations against its own people); Bartram S. Brown, *Humanitarian Intervention and Kosovo: Humanitarian Intervention at a Crossroads*, 41 *WM. & MARY L. REV.* 1683 (2000) (stressing that the use of force for humanitarian intervention is legal but that the parties relying on the principle, such as NATO and the United States, must now more clearly define its application); Walter Gary Sharp, Sr., *Operation Allied Force: Reviewing the Lawfulness of NATO’s Use of Military Force to Defend Kosovo*, 23 *MD. J. INT’L L. & TRADE* 295 (1999).

30. Press Release 99/17, International Court of Justice, *Yugoslavia Institutes Proceedings Against Ten States for Violation of the Obligation Not to Use Force Against Another State and Requests the Court to Order that the Use of Force Cease Immediately* (Apr. 29, 1999), at http://www.icj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9917_19990429.htm; *Gowned Warriors*, *supra* note 27 at 52.

31. See *Legality of the Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 1, para. 30 (June 2) (indicating that a State must accept jurisdiction of the court before the merits of particular acts can be assessed).

32. *Final Report*, *supra* note 2, paras. 2, 30.

33. *Id.* at para. 31.

bello, but not *jus ad bellum*.³⁴ Accordingly, the Final Report did not assess the legality of NATO's resort to force.³⁵ In restricting its assessment to the manner in which the bombing campaign was conducted, the Committee implicitly rejected the view that individual actions involved in circumstances where resort to force is itself unlawful are necessarily unlawful themselves. The Committee indicated that it considered this separation of the two questions to be "in accord with the most widely accepted and reputable legal opinion."³⁶

It is indeed generally recognized today that *jus in bello* applies regardless of whether the conflict itself is lawful or unlawful.³⁷ This recognition makes sense in logic and policy. If it were not so, an aggressor (already prepared to initiate an unjust war) might feel free to engage in outrageous methods of warfare – since all its actions would in any case be regarded as unlawful. Moreover, if there are moral limits to the principle of independent operation of *jus in bello* and *jus ad bellum*, they would tend to be applicable only in the reverse case, where a person engaged in a just war wished to use otherwise unlawful means of armed conflict. For example, Walzer suggests that, in extreme, catastrophic circumstances only, a response to aggression might validly breach the usual rules about the conduct of war.³⁸ In the case of NATO's attack on the FRY, regardless of whether the attack itself was lawful, NATO had no justification for conducting the attack in an unlawful manner. No NATO member states were subject to aggression by the FRY. If anything, NATO had an obligation to apply humanitarian standards even more care-

34. See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 41-88 (2d ed. rev. 1999) (discussing the complex relationship between crimes against humanity and war crimes).

35. See *Final Report*, *supra* note 2, paras. 4, 31, 34 (affirming that the Tribunal's jurisdiction is limited to *jus in bello* and therefore that the Committee "deliberately refrained" from investigating any of the *jus ad bellum* issues).

36. *Id.* at para. 34.

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, pmbl., 1125 U.N.T.S. 3, [hereinafter Additional Protocol I]; see also MALANCZUK, *supra* note 22, at 306; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394 (1993); cf. KARMA NABULSI, *JUS AD BELLUM/JUS IN BELLO*, in *CRIMES OF WAR* (Roy Gutman & David Rieff eds., 1999) at 223 [hereinafter KARMA NABULSI].

38. MICHAEL WALZER, *JUST AND UNJUST WARS* 231-32 (2d ed. 1999).

fully³⁹ in view of its assertion that the attack was warranted on humanitarian grounds.⁴⁰ Accordingly, the remainder of this Essay concentrates on the legality of NATO's conduct of the bombing campaign rather than the resort to force itself.

III. NATO'S GENERAL OBLIGATIONS IN RELATION TO CIVILIANS

A. THE GENEVA CONVENTIONS AND CUSTOMARY INTERNATIONAL LAW

The Fourth Geneva Convention of 1949 ("Fourth Geneva Convention")⁴¹ provides specific requirements for the treatment of civilians in the course of war. Although the Fourth Geneva Convention relates mainly to particular classes of civilians,⁴² it does provide some general protections to civilians as a whole. The 1977 Additional Protocol I ("Additional Protocol I") to the Geneva Conventions⁴³ contains much more extensive protections for civilians, including highly detailed provisions regarding the targeting of civilian populations. The Fourth Geneva Convention and Additional Protocol I have been widely ratified, and apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."⁴⁴ The FRY has ratified both the Fourth Geneva

39. INDEPENDENT COMMISSION, *supra* note 11, at 165-66; Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 844 (1999); cf. Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 855-56.

40. ROBERTSON, *supra* note 6, at 10-11, 22.

41. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

42. For example, it relates to civilians in enemy territory or occupied territory, wounded and sick civilians, and families separated by fighting. *See generally* GRETCHEN M. KEWLEY, *EVEN WARS HAVE LIMITS: THE LAW OF ARMED CONFLICTS* 65-71 (2nd ed. 2000).

43. *See generally* Additional Protocol I, *supra* note 37.

44. Fourth Geneva Convention, *supra* note 41, art. 2; *see also* Additional Protocol I, *supra* note 37, art. 1, para. 3 ("This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protections of war victims, shall apply

Convention and Additional Protocol I. Sixteen of the nineteen NATO member countries are parties to Additional Protocol I – all but France, Turkey, and the United States.⁴⁵ All nineteen NATO member countries are parties to the Fourth Geneva Convention, some with reservations. Thus, as NATO's bombing campaign escalated the Kosovo crisis into an international armed conflict,⁴⁶ the relevant provisions regarding the treatment of civilians would seem to apply to both the FRY and most NATO countries.

In its Final Report, the Committee noted that the United States and France have not ratified Additional Protocol I, but recognized that some of the provisions of Additional Protocol I might be part of customary international law.⁴⁷ Indeed, it is widely accepted that the rules contained in the Fourth Geneva Convention and many of the rules in Additional Protocol I have attained the status of customary international law.⁴⁸ Thus, non-parties are obliged to comply with much of the Fourth Geneva Convention and Additional Protocol I. Moreover, the United States has expressly supported many of the provisions of Additional Protocol I and has acknowledged that others form part of customary international law.⁴⁹ The United States appeared to regard the conflict in the FRY as subject to international humanitarian law when it proclaimed that the apparent beating by the FRY of three captured American soldiers violated the Third Geneva Convention of 1949.⁵⁰ In addition, the United States and other NATO

in the situations referred to in Article 2 common to those Conventions.”).

45. The sixteen countries (some of which have entered reservations to Additional Protocol I) are: Belgium, Canada, Czech Republic, Denmark, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, and the United Kingdom.

46. HUMAN RIGHTS WATCH, *supra* note 3, at 16.

47. *Final Report*, *supra* note 2, paras. 15, 42.

48. INDEPENDENT COMMISSION, *supra* note 11, at 177; *see also* AMNESTY INTERNATIONAL, *supra* note 4, at 9; KARMA NABULSI, *supra* note 37, at 113-14; HUMAN RIGHTS WATCH, *supra* note 3.

49. Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987); *see also* HUMAN RIGHTS WATCH, *supra* note 3, at 6.

50. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see* Murphy, *supra* note 3, at 635.

countries conducted their campaign planning in a manner cognizant of their responsibilities under international law, for example, using military lawyers to assess targeting proposals under the Geneva Conventions.⁵¹ Accordingly, it is appropriate in principle to regard the Additional Protocol I rules relating to civilians as applicable to the NATO campaign against the FRY.

B. PRINCIPLES OF ATTACK

1. *Distinction*

Article 48 of Additional Protocol I imposes an obligation on parties to an armed conflict to distinguish between civilian populations and combatants, and between civilian objects and military objectives, and to direct operations solely against the latter. For the purposes of Additional Protocol I, a civilian is any person other than medical personnel and chaplains who: (a) is not a member of the armed forces of a party to the conflict, or of a militia group, volunteer corps or regular armed forces professing allegiance to a government or authority not recognized by the detaining power; and (b) does not take up arms spontaneously to resist invading forces.⁵² Civilian objects are all objects that are not military objectives.⁵³ Military objectives are 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, offer a definite military advantage.⁵⁴ In the case of doubt about whether an object normally dedicated to a civilian purpose, such as a church or school, is being used for military action, it is to be presumed not to be so used.⁵⁵ This "rule of distinction" has been generally accepted, including by the United States,⁵⁶ as a rule of customary

51. Ignatieff, *supra* note 5, at 33-34; *but see* JUDAH, *supra* note 9, at 258 (noting that military lawyers only rejected one target during the Kosovo intervention).

52. *See* Additional Protocol I, *supra* note 37, art. 50 (defining "civilians").

53. Additional Protocol I, *supra* note 37, art. 52, para. 1.

54. *Id.*, art. 52, para. 2.

55. *Id.*, art. 52, para. 3.

56. *See* MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR 30-31 (1991); *see also* Horace B. Robertson, Jr., *The Principle of the*

international law.⁵⁷

Article 51(7) of Additional Protocol I specifically prohibits the use of civilians to render certain areas immune from military operations, for example to shield military objectives from attacks. In the context of the Kosovo conflict, this means that while NATO was obliged to draw a distinction between civilians and combatants, the FRY could not take advantage of this obligation by rounding up civilians to convert military bases into civilian objects. At the same time, Article 51(8) of Additional Protocol I specifically provides that a violation of these prohibitions does not release parties to the conflict from their legal obligations with respect to civilians. Thus, NATO could not point to actions of the FRY as justifying otherwise unlawful attacks by NATO on civilians.⁵⁸ Despite any use of civilians as shields, NATO was required to comply with the rule of distinction as well as the other Additional Protocol I rules for the protection of civilians.

2. Precaution

Additional Protocol I recognizes that military operations are likely to inflict some damage upon civilians. Article 57 therefore imposes specific obligations on parties to a conflict to take precautions to avoid such incidental injuries, codifying pre-existing customary law.⁵⁹ Parties must take "constant care" to spare the civilian population, civilians, and civilian objects,⁶⁰ including (in the case of air strikes) taking all reasonable precautions to avoid the loss of civilian lives and damage to civilian objects.⁶¹ Specific precautions to be taken include:

(a) to do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects but are military ob-

Military Objective in the Law of Armed Conflict, 8 U.S. AIR FORCE ACAD. J. LEGAL STUD. 35, 43, 46 (1998).

57. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 7 (1996); Robertson, *supra* note 56, at 35

58. *But see* ROBERTSON, *supra* note 6, at 14 (explaining that Serbia exploited NATO's efforts to avoid civilian casualties and insinuating that NATO's acts during the air strikes should therefore be excused).

59. MIDDLE EAST WATCH, *supra* note 56, at 49.

60. Additional Protocol I, *supra* note 37, art. 57, para. 1.

61. *Id.* art. 57, para. 3.

jectives;

(b) to take all feasible precautions in the choice of means and methods of attack with a view to avoiding or minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects; and

(c) to give effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit.⁶²

3. *Indiscriminate Attacks*

Article 51(4) of Additional Protocol I prohibits parties to a conflict from engaging in indiscriminate attacks, being attacks that: are not directed at a specific military objective; employ a method or means of combat which cannot be directed at a specific military objective; or employ a method or means of combat the effects of which cannot be limited as required by Additional Protocol I, and that are, therefore, of a nature to strike military objectives and civilians or civilian objects without distinction. Article 51(4) may be regarded as a residual protection, because engaging in indiscriminate attacks as defined would likely breach other rules of Additional Protocol I. However, this provision does suggest that a party cannot escape liability for such a breach by blaming its own poor technology.

4. *Proportionality*

An indiscriminate attack includes any attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.⁶³ This is related to the principle of proportionality under customary and conventional international law⁶⁴—the notion that parties must attempt to ensure that any incidental damage caused to civilians by an attack is proportionate to the military advantage to be attained. In other words, parties to a conflict may only conduct attacks that are militarily necessary, i.e. indispensable for ending the war by weak-

62. *Id.* art. 57, para. 2.

63. *Id.* art. 51, para. 5(b).

64. See Gardam, *supra* note 37, at 391 (defining “proportionality”).

ening the military forces of the enemy.⁶⁵ Furthermore, the degree of military necessity must be balanced against the interests of humanity.⁶⁶ Specifically, Article 57(2) of Additional Protocol I requires parties to a conflict to:

(a) refrain from deciding to launch any attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated; and

(b) cancel or suspend an attack if it becomes apparent that the objective is not a military one 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, that would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁷

Although there is some debate as to the extent to which the concept of proportionality forms part of customary international law, in practice it is generally accepted as a necessary part of the military decision-making process.⁶⁸

C. GENERAL ASSESSMENT

The political leaders of NATO spoke the language of ultimate commitment and practiced the warfare of minimum risk. As commander, [General Wesley K. Clark] was placed in an often impossible position: being asked to wage a war that was clean yet lethal, just yet effective, moral yet ruthless.⁶⁹

Apart from certain allegations with respect to the bombing of the Chinese Embassy,⁷⁰ there is no suggestion that NATO deliberately or

65. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 3-6 (1996) (defining and discussing the concept of "military necessity").

66. *Id.* at 14.

67. Additional Protocol I, *supra* note 37, art. 57, para. 2.

68. William J. Fenrick, *Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Attacking the Enemy Civilian as a Punishable Offense*, 7 *DUKE J. COMP. & INT'L L.* 539, 545 (1997).

69. Ignatieff, *supra* note 5, at 36.

70. See discussion *infra* Part IV.D.

intentionally targeted civilians in its campaign. So much was agreed on by the Committee⁷¹ and the Commission.⁷² Nevertheless, refraining from intentionally targeting civilians was only one of NATO's obligations during the bombing campaign.⁷³ A more crucial question is whether NATO's planning, rules of engagement and methods of attack complied in general with the rules of distinction, precaution and proportionality, and against indiscriminate attacks.

As highlighted above, NATO itself took serious account of the need to avoid civilian casualties in its planning and target selection process.⁷⁴ Decision-makers in the campaign included not only NATO members and NATO Secretary-General, Javier Solana,⁷⁵ but also (particularly in the case of operations using sensitive American assets such as planes with stealth technology) the United States Pentagon, Joint Chiefs of Staff, the President Clinton, and other high-level Defense Department officials.⁷⁶ These decision-makers established and made daily use of a comprehensive computerized target development and review system during the NATO campaign, assessing military significance, possible collateral damage, and legal and moral obligations.⁷⁷ However, in most cases, pilots and weapons system officers were not in a position to verify that the targets remained legitimate. For example, the pilots were generally unable to obtain visual confirmation that civilians had not moved into the target area before the planes approached. Amnesty International criticized NATO for focusing on the planning phase without giving enough attention to subsequent verification, by the attacking force, to ensure

71. *Final Report*, *supra* note 2, para. 54.

72. INDEPENDENT COMMISSION, *supra* note 11, at 180.

73. See discussion *supra* Part III.A.

74. ROBERTSON, *supra* note 6, at 14-15, 24-25; see also HUMAN RIGHTS WATCH, *supra* note 3, at 12 ("From the very beginning of Operation Allied Force, minimizing civilian casualties was a major declared NATO concern."); see Clark, *supra* note 7, at 253; but see AMNESTY INTERNATIONAL, *supra* note 4, at 12 (noting that NATO did not publicly state which rules were being applied and how they were being interpreted).

75. JUDAH, *supra* note 9, at 237; Clark, *supra* note 7, at 253.

76. Ignatieff, *supra* note 5, at 30-31, 34; see also JUDAH, *supra* note 9, at 266-69.

77. Ignatieff, *supra* note 5, at 33.

the intelligence relied on was accurate and up to date.⁷⁸

As a method of warfare, aerial bombardment is ill-adapted to comply with the rules of distinction and proportionality, and against indiscriminate attacks. In some circumstances, the tactic may itself be a disproportionate method of achieving a military objective.⁷⁹ If aerial bombardment is used, the need to take all reasonable precautions to prevent civilian casualties (for example, in selecting targets and weapons and in determining flight patterns and times) becomes crucial. A common criticism of the NATO campaign was that it represented a "zero casualty war" for NATO, reflected in its decision to conduct high-altitude bombing, to avoid a ground war,⁸⁰ and in the actual result of zero NATO casualties.⁸¹ While NATO airplanes did sometimes fly below 15,000 feet,⁸² at least in the first half of the campaign that was the minimum height determined by the rules of engagement.⁸³ Once a target was determined, pilots could attack only on visual recognition of the target⁸⁴, but not necessarily on confirmation of its appropriateness as a target. Typically, this involved searching for the Designated Mean Point of Impact ("DMPI") through two four-inch-square target monitors.⁸⁵ In some cases, lower-level flying may not have increased the pilot's ability to distinguish between civilian objects and military objectives, so flying at 15,000 feet would not of itself affect the legality of the conduct of the campaign. However, in other cases it appears that flying lower would indeed have made it easier for pilots to identify civilians and avoid or minimize incidental loss of life or civilian property.⁸⁶

78. AMNESTY INTERNATIONAL, *supra* note 4, at 18-19.

79. Gardam, *supra* note 37, at 407.

80. Walzer, *supra* note 38, at 334.

81. INDEPENDENT COMMISSION, *supra* note 11, at 181; *see Messy War, Messy Peace*, ECONOMIST, June 12, 1999 at 15.

82. ROBERTSON, *supra* note 6, at 25; *see* Ignatieff, *supra* note 5, at 35.

83. AMNESTY INTERNATIONAL, *supra* note 4, at 16; HUMAN RIGHTS WATCH, *supra* note 3, at 10.

84. Ignatieff, *supra* note 5, at 34.

85. *See id.* at 30, 34.

86. HUMAN RIGHTS WATCH, *supra* note 3, at 2; *see* AMNESTY INTERNATIONAL, *supra* note 4, at 17.

The Commission considered that the “high-altitude tactic . . . weaken[s] the claim of humanitarianism to the extent that it appears to value the lives of the NATO combatants more than those of the civilian population in Kosovo and Serbia.”⁸⁷ Nevertheless, it considered that despite a series of mistakes, the overall low level of civilian damage was unprecedented:

The Commission is impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of “military necessity” in the context.⁸⁸

NATO itself also referred to the “remarkably few civilian casualties” resulting from the campaign.⁸⁹ Yet, while NATO cannot be criticized for improving on the level of “collateral damage” inflicted by its campaign compared with previous conflicts, congratulations are not necessarily in order. NATO’s use of precision-guided munitions in approximately one-third of its attacks⁹⁰ and its computerized target-planning system might explain a reduction in the level of collateral damage. However, the fact remains that in several cases NATO’s attacks were difficult to justify under the laws of armed conflict. In addition, the civilian toll may have been relatively low, but the absence of a single allied casualty is even more striking. Indeed, Elshtain goes so far as to suggest that the manner in which this war was conducted turned the principle of civilian immunity into a principle of *combatant* immunity.⁹¹ If NATO has improved on past conduct, there is room for much greater improvement.

87. INDEPENDENT COMMISSION, *supra* note 11, at 181; see Falk, *supra* note 39, at 856 (stating that NATO’s tactics shifted the risk of harm from the intervening NATO forces onto the civilian population of the FRY, thus seriously damaging the humanitarian rationale).

88. INDEPENDENT COMMISSION, *supra* note 11, at 183-84.

89. ROBERTSON, *supra* note 6, at 22; see also JUDAH, *supra* note 9, at 259 (repeating NATO officials’ claim that “fewer accidents happened in this war than in almost any other one in history.”).

90. AMNESTY INTERNATIONAL, *supra* note 4, at 24.

91. Elshtain, *supra* note 1, at 365.

IV. REEVALUATING THE CONDUCT OF THE CAMPAIGN: FIVE ATTACKS

The Committee reviewed twenty-one specific incidents alleged to involve NATO crimes,⁹² and focused on the five incidents that it considered most problematic.⁹³ These incidents provide an array of factual circumstances involving civilian casualties, and a valuable insight into the thinking of NATO as well as the Committee. The Committee recommended that the Prosecutor not commence an investigation into any of these incidents, but in most cases offered limited reasoning for its decision, as outlined below.

A. PASSENGER TRAIN AT GRDELICA GORGE

On April 12, 1999, a NATO aircraft launched a laser-guided bomb towards the Leskovac railway bridge in eastern Serbia. The mission was to destroy the bridge, which was allegedly part of a communications supply network being used by FRY forces in Kosovo. According to NATO,⁹⁴ after launching the bomb, the person controlling the weapon⁹⁵ (the “controller”) saw movement on the bridge but was unable to dump the bomb, which then struck a civilian passenger train traveling over the bridge. The controller saw that the bridge had not been hit and launched a second bomb at the opposite end of the bridge. At this time the bridge was “covered with smoke and clouds.”⁹⁶ The bomb hit the train, which had slid forward as a result of the original impact.⁹⁷ At least ten people were killed, and at least fifteen were injured.

A United States Defense Department official expressed regret for

92. See *Final Report*, *supra* note 2, para. 9 (cataloging each of the incidents by date and by the number of civilians killed or injured).

93. *Id.* at para. 57.

94. See *id.* at para. 60 (describing how a German national casts some doubt on NATO’s version of events).

95. There was some dispute about whether this person was the pilot or a second crew-member (a Weapons System Officer). *Final Report*, *supra* note 2, paras. 59-60.

96. *Id.* at para. 59.

97. *Id.* at para. 58.

the accident,⁹⁸ while NATO General Wesley Clark offered similar sentiments.⁹⁹ NATO's explanation focused on the fact that the attack was "remotely directed." In other words, the controller could not see the bridge with his naked eye from his position in the aircraft, but saw the bridge only by viewing it on a five-inch screen. The controller's focus on the aim point within that screen meant that he only saw the train appear (on both occasions) when he had already locked the bomb on target.¹⁰⁰

The Committee accepted NATO's claim that the controller was targeting the bridge and not the train, and determined that the bridge was a legitimate military objective.¹⁰¹ While the Committee was divided as to "whether there was an element of recklessness in the conduct" of the controller in launching the second bomb, it determined that neither the first nor the second attack should be investigated by the Office of the Prosecutor.¹⁰² It stated that this decision was based on the relevant criteria identified above,¹⁰³ but did not specify which of the criteria had not been met in this case.

NATO's bombing of the Leskovak railway bridge is a deeply troubling example of NATO's approach to the campaign against the FRY. NATO's response to the incident appeared to suggest that the civilian casualties could be excused because the method of attack, aerial bombing via remote direction, prohibited verification of the target as a military objective. Even assuming that the bridge was a legitimate military target (but for the temporary presence of civilians in the train), it is difficult to reconcile this suggestion with the laws of armed conflict. If the bombing method used did not allow the

98. *See id.* at para. 59 (quoting U.S. Deputy Defense Secretary John Hamre in the aftermath of the incident).

99. *See Final Report, supra* note 2, para. 59 (quoting Gen. Wesley Clark, NATO's Supreme Allied Commander for Europe: "it was an unfortunate incident which [the controller], and the crew, and all of us very much regret . . . it was really unfortunate.").

100. *See id.* at para. 59 (contending that before both impacts, the controller realized only belatedly that the bomb would hit the train).

101. *Id.* at paras. 61-62.

102. *Id.* at para. 62.

103. *See supra* Part I (listing the three criteria the Committee utilized to determine if further investigation was required).

controller to identify the target or distinguish between the target and civilians, it is arguable that it should not have been used, as it would violate the rule of distinction and amount to an indiscriminate attack. In fact, it seems unlikely that the method prevented verification of the target. There is no evidence in the relevant reports that the pilot was unable to fly over the targeted bridge first to verify that there were no civilians or civilian objects in the area.¹⁰⁴ An earlier review at the planning stage of the passenger train timetables or movements, and advance warning to civilians, could also have reduced the risk to civilian lives. The apparent failure to take any of these measures constituted a breach of NATO's obligations to take all reasonable precautions to avoid loss of civilian life and damage to civilian objects.

The launch of the second bomb in this incident is even more problematic. After the initial launch, the controller was aware of the presence of civilians in the area and, presumably, the direction in which the train was traveling. Therefore, the impossibility of viewing the whole bridge on a tiny screen provides even less justification for launching the second bomb than the first. Moreover, the fact that the bridge was now obscured by smoke does not exonerate the controller for hitting the train a second time. On the contrary, the covering of smoke should have made the controller even more hesitant to continue—he was required to take “constant care” to spare civilians.¹⁰⁵ As Amnesty International points out, NATO's explanation of the second bombing suggests that the controller understood the mission to be to destroy the bridge, regardless of the cost in civilian casualties.¹⁰⁶ Such a failure to balance the civilian cost against the military advantage to be achieved by the mission violates the rule of proportionality. There was no suggestion by NATO that any anticipated concrete and direct military advantage in this case outweighed the incidental cost to civilians of bombing the train. Accordingly, it had a specific obligation under Article 57(2) of Additional Protocol I to cancel or suspend the attack once the presence of civilians became apparent.

104. AMNESTY INTERNATIONAL, *supra* note 4, at 31-32.

105. Additional Protocol I, *supra* note 37, art. 57, para. 1.

106. AMNESTY INTERNATIONAL, *supra* note 4, at 31.

B. DJAKOVICA CONVOY

On April 14, 1999, NATO bombs targeted a convoy of Albanian refugees traveling on the Djakovica-Prizren road.¹⁰⁷ This road was an important supply and reinforcement route for the Yugoslav Army and the Yugoslav Special Police Forces (“MUP”), and NATO later claimed the MUP had been conducting ethnic cleansing operations in the area in preceding days.¹⁰⁸ That morning, NATO forces claimed to have seen a series of burning villages, and concluded that the MUP and the Yugoslav military (“VJ”) were working through them, setting them alight and expelling the Kosovar Albanians. At around 1030 hours, a NATO pilot saw uniformly dark green vehicles that appeared to be troop transports near the freshest burning house. Two F-16s bombed the convoy, hitting the lead vehicle and others. A third NATO aircraft dropped several bombs on a nearby convoy identified as a VJ convoy. NATO continued its aerial attack for two and a half hours,¹⁰⁹ until 1300 hours, when an order was apparently issued suspending further attacks until the target could be verified.¹¹⁰ Around seventy to seventy-five people were killed in this incident, and around one hundred injured.¹¹¹

The NATO aircraft involved in this incident were flying at an altitude of 15,000 feet or higher, in order to avoid Yugoslav air defenses, and the pilots viewed their targets with the naked eye rather than remotely.¹¹² NATO claimed that while the cockpit video revealed that the vehicles attacked appeared to be tractors, when viewed with the naked eye from that altitude, they looked like military vehicles, due to their movement, size, shape, color, spacing and speed. In any case, there had been reports of Yugoslav forces using

107. I have largely relied on the facts as stated by the Committee in the Final Report. See *Final Report*, *supra* note 2, paras. 63-64 (stating that the “precise facts concerning this incident are difficult to determine”, and that the Committee assumed “the facts most appropriate to a successful prosecution”).

108. *Id.* at para. 64.

109. See *id.* at para. 65 (describing the attack).

110. *Id.* at para. 67.

111. *Id.* at para. 63.

112. *Final Report*, *supra* note 2, para. 64.

civilian vehicles.¹¹³ Nevertheless, Human Rights Watch reported that NATO subsequently changed its rules of engagement so that military vehicles intermingled with civilian vehicles were not to be attacked, suggesting that “the alliance recognized that it had taken insufficient precautions in mounting this attack.”¹¹⁴

The Committee concluded that NATO did not deliberately attack civilians in this incident and that no investigation was warranted:

While there is nothing unlawful about operating at a height above Yugoslav air defences, it is difficult for any aircrew operating an aircraft flying at several hundred miles an hour and at a substantial height to distinguish between military and civilian vehicles in a convoy. . . . While this incident is one where it appears the air crews could have benefited from lower altitude scrutiny of the target at an early stage, the committee is of the opinion that neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges.¹¹⁵

The Committee seemed to be influenced by the fact that the attacks ceased as soon as the presence of civilians was suspected, because they emphasized it twice.¹¹⁶

It seems clear, from NATO's own explanation of this incident, that if the pilots had flown down below 15,000 feet, perhaps as low as 5,000 feet,¹¹⁷ they would have recognized the vehicles in the target area as tractors rather than military vehicles. In other words, they would have been able to fulfill their obligation to distinguish between civilian objects and military objectives. By employing a means of combat that did not enable them to do so, NATO was arguably engaging in an indiscriminate attack under Article 51(4)(c) of Additional Protocol I. Not only was such an attack “of a nature” to strike military objectives and civilians or civilian objects without distinc-

113. *Id.* at para. 67.

114. HUMAN RIGHTS WATCH, *supra* note 3, at 23, cited in *Final Report*, *supra* note 2, para. 68. See also AMNESTY INTERNATIONAL, *supra* note 4, at 17 (indicating that after this incident, NATO altered its rules of engagement to require visual confirmation that civilians were not in the target area before beginning an attack).

115. *Id.* at paras. 69-70.

116. *Id.*

117. AMNESTY INTERNATIONAL, *supra* note 4, at 17.

tion—it actually did so. While flying low enough to verify the target may have involved some additional risk to the pilots, it was up to NATO to determine whether the target was sufficiently important to warrant taking that additional risk.¹¹⁸ Whether the target was sufficiently important could have been determined as a preliminary matter at the planning stage, and then reviewed at the stage of execution based on the pilot's assessment of the immediate situation. If it was not sufficiently important, in circumstances where there was a real danger of incidental damage to civilians or civilian objects if the targets were misidentified, the attack should not have been carried out.¹¹⁹ In carrying out the attack at such a high altitude that proper target verification was impossible, NATO failed to take all feasible precautions to minimize civilian injury and damage in violation of Article 57(2) of Additional Protocol I and, once again, unduly favored military over civilian lives in breach of the rule of proportionality.

C. SERBIAN RADIO AND TELEVISION STATION

During the night of April 23, 1999, NATO intentionally bombed the central radio and television studio of the Serbian broadcasting corporation. Between ten and seventeen civilians were killed. NATO claimed the attack was legitimate because of the FRY's use of the station for military purposes, with military traffic being routed through the civilian system, and due to its role as a component of the FRY's command, control and communications network.¹²⁰ In addition, NATO suggested that the bombing was justified because the broadcast facilities were part of President Milosevic's control mechanism and the propaganda machinery supporting its war effort.¹²¹

The Committee determined that, to the extent that the attack was directed at disrupting the FRY's communications network, the sta-

118. See A.V.P. Rogers, *Zero-Casualty Warfare*, INT'L REV. RED CROSS, March 2000, at 165, 179 (arguing that if there was any doubt about the validity or necessity of a target, NATO should not have carried out the attack).

119. *But see* Walzer, *supra* note 28, at 334-35 (describing the moral political argument for intervening in cases such as this).

120. *Final Report*, *supra* note 2, paras. 72-73.

121. *Id.* at para. 74.

tion was a legitimate target.¹²² However, it stated that using the station's propaganda role to justify the attack "might well be questioned by some experts in the field of international humanitarian law."¹²³ The Committee considered, nevertheless, that any such justification was incidental to the primary goal of disabling the FRY's military command and control system.¹²⁴ Without stating definitively that the station was a legitimate target, the Committee continued its analysis on the assumption that it was. In contrast, Amnesty International suggested not only that the target was a civilian object,¹²⁵ but also that the attack proceeded in the face of dispute within NATO itself as to the legality of the target.¹²⁶ The Commission regarded such an attack on the basis of propaganda as "politically unwise and legally dubious."¹²⁷ Similarly, Human Rights Watch questioned the legitimacy of the target, and reflected that even if civilian radio and television constituted a legitimate target, there were no apparent reasons for attacking urban studios rather than transmitters.¹²⁸

In 1956, the International Committee of the Red Cross ("ICRC") compiled a list of acceptable military objectives, including the installations of broadcasting and television stations "of fundamental military importance."¹²⁹ The station might well have met that criterion in terms of its function in military communications. Although by its nature it would not ordinarily contribute to military action, it is possible that it was in fact used in contributing to military action and that its partial destruction or neutralization offered a definite military advantage as required by Article 52(2) of Additional Protocol I. However, the fact that the station may have been used to broadcast FRY propaganda (for example, in support of President Milosevic or against NATO) is indirectly connected to military action at best. It would be extremely difficult for NATO to uphold its claim of legiti-

122. *Id.* at para. 75.

123. *Id.* at para. 76.

124. *Id.* at para. 76.

125. AMNESTY INTERNATIONAL, *supra* note 4, at 25.

126. *Id.* at 13.

127. INDEPENDENT COMMISSION, *supra* note 11, at 221.

128. HUMAN RIGHTS WATCH, *supra* note 3, at 27.

129. *Final Report*, para. 39.

macy on that basis.

Assuming that the station was a legitimate military objective (to the extent that it was involved in military communications as claimed by NATO), the attack appears to have breached the rule of proportionality. The attack only interrupted broadcasting for a few hours during the night, as NATO had predicted. The Committee nevertheless considered that while the civilian casualties were "unfortunately high," they were not clearly disproportionate. It determined it necessary to focus not on the isolated attack on the station, but on the attack's role as part of an integrated strategy of targeting the Yugoslav command and control network as a whole. On that basis, it recommended that the Prosecutor not commence an investigation into the attack.¹³⁰ However, even accepting that the attack was part of an integrated strategy, it must have played a minimal role, given the prompt re-commencement of broadcasting. It is difficult to see how such a short interruption could achieve a degree of military advantage justifying the sacrifice of seventeen civilian lives.

There was some dispute as to the advance warnings of the strike given by NATO. Amnesty International suggested that NATO had indicated it did not give any specific warning to avoid danger to its pilots, although Western journalists reportedly were advised by a CNN contact to stay away from the station.¹³¹ The families of civilians killed later commenced legal proceedings against station management, alleging that management was aware of the impending attack and chose not to advise their employees, presumably "to arouse Western anger, cause dissension in NATO ranks and rally support at home for the continued defence of the nation."¹³² The Committee appeared to conclude that the fact that some Western journalists were advised of the attack meant that NATO had issued a warning to their employers, that Yugoslav officials were also aware of the attack, and that the advance notice by NATO was sufficient in the circumstances.¹³³

130. *See id.* at paras. 77-79.

131. AMNESTY INTERNATIONAL, *supra* note 4, at 15; *Final Report*, *supra* note 2, para. 77.

132. JUDAH, *supra* note 9, at 261.

133. *See Final Report*, *supra* note 2, para. 77.

If NATO did not in fact warn anyone of the attack, it almost certainly breached its obligation to take precautions against civilian injury. Although Article 57(2) of Additional Protocol I removes the need to give warnings where “circumstances do not permit,” a blanket NATO policy against warnings to avoid risk to pilots would not qualify for such an exemption. NATO does not seem to have provided any specific justification for a failure to warn in this case. Furthermore, if NATO warned CNN and/or Yugoslav officials of the attack, it would still arguably fall short of its duty to give “effective” advance warnings. The effectiveness of the warning needs to be judged against whether civilians as a group are made aware of the attack, not just Western civilians. Only if NATO actually warned Western civilians likely to be affected, either via CNN or some other means, and did everything feasible to warn Yugoslav civilians, would it have discharged its obligation under international law.

D. CHINESE EMBASSY

On May 7, 1999, several NATO missiles hit the Chinese Embassy in Belgrade.¹³⁴ Three Chinese citizens were killed in this attack, and approximately fifteen injured. Extensive damage was also caused to the embassy and surrounding buildings. Both NATO and the United States government, through the Central Intelligence Agency (“CIA”), stated that the Chinese Embassy was hit by mistake; the intended target was the Yugoslav Federal Directorate for Supply and Procurement, considered a legitimate target due to its role in military procurement.¹³⁵ The mistake allegedly arose from the land navigation techniques used to locate the intended target, and the inaccuracy of military and intelligence databases used to verify target information.¹³⁶ In addition, although at a late stage mid-level intelligence officers apparently suspected that the target had been wrongly identified, the problem was not brought to the attention of senior managers who might have been able to intervene.

The Chinese government and many of its citizens were outraged by the attack. Violent protests took place in Beijing and normal busi-

134. *Id.* at para. 80.

135. *Id.*

136. *Id.* at para. 81; *see generally* Ignatieff, *supra* note 3, at 34.

ness with the United States was suspended.¹³⁷ The Committee noted that NATO and various United States government representatives, including President Clinton,¹³⁸ had issued a formal apology to the Chinese government and had agreed to pay \$28 million in compensation to the government and \$4.5 million to the families of the dead and injured. The Committee also referred to U.S. government claims that it had taken disciplinary and corrective actions to prevent such mistakes in future.¹³⁹

The Committee found that although the Chinese Embassy was “clearly a civilian object and not a legitimate military objective,”¹⁴⁰ neither aircrew nor senior military commanders involved in the attack should be assigned responsibility since neither group was responsible for providing the inaccurate target information. Therefore, the Committee recommended that the Prosecutor conduct no investigation.¹⁴¹ Strangely, although the Committee stated expressly that NATO had not deliberately targeted civilians in the incidents at Grdelica Gorge and Djakovica, it made no such specific finding in the Chinese Embassy bombing incident. The Committee nevertheless appeared to accept the United States claim that the bombing was accidental, and examined the reasons for the accident in detail. There is no suggestion in its Final Report that the Committee considered claims that the bombing was in fact deliberate, despite suggestions from some quarters (including China itself)¹⁴² that this was the case.¹⁴³

There may be no way of ever knowing whether the attack on the Chinese Embassy was deliberate. If it was, there is no question that this would violate numerous laws of armed conflict, as the Embassy

137. *Bombs in Belgrade, Bricks in Beijing*, ECONOMIST, May 15, 1999, at 41; *America Says Sorry, Again*, ECONOMIST, Jun 19, 1999, at 39.

138. *See Bombs in Belgrade, Bricks in Beijing*, *supra* note 137, at 41.

139. *Final Report*, *supra* note 2, para. 84.

140. *Id.* at para. 84.

141. *Id.* at para. 85.

142. *Anger in China*, ECONOMIST, May 15, 1999, at 15; *Bombs in Belgrade, Bricks in Beijing*, *supra* note 137, at 41; *see generally America Says Sorry, Again*, *supra* note 138, at 39.

143. John Sweeney et al., *NATO Bombed Chinese Deliberately*, THE GUARDIAN, Oct. 17, 1999, at 1; *see also Truth Behind America's Raid on Belgrade*, THE GUARDIAN, Nov. 28, 1999 at 4.

was clearly a civilian object and there was no claimed military advantage in attacking it. However, even assuming that the attack was a mistake, the fact that such a mistake could be made at all suggests serious problems with the NATO campaign. In particular, it suggests that NATO took inadequate precautions in the planning process to ensure that its information was valid, and paid insufficient attention to verifying the nature and location of the target once it had been determined. It would have been a fairly simple exercise to verify the location of the target on the ground, or at least to verify that the databases and maps relied on had been created using reliable methods. NATO did not meet its obligation to do "everything feasible" to verify the nature of the target in this case.¹⁴⁴ In addition, NATO's subsequent determination to continue the bombing campaign using the same faulty maps and databases rather than suspending the campaign until they had been remedied¹⁴⁵ suggests a failure to take seriously the rules of proportionality and precautions in subsequent bombing.

E. KORIŠA VILLAGE

On May 14, 1999, NATO aircraft dropped ten bombs on the village of Koriša, killing up to eighty-seven civilians, mainly refugees, and injuring approximately sixty others. NATO maintained that a nearby Serbian military camp and command post were the primary targets, and therefore that the bombing was legitimate.¹⁴⁶ The attack took place in the dark, beginning at 2330 hours.¹⁴⁷ NATO explained that:

the pilot . . . had to visually identify [the target] . . . and you know it was by night, so he did see silhouettes of vehicles on the ground and as it was by prior intelligence a valid target, he did do the attack . . . *So for the pilot flying the attack, it was a legitimate target . . .* Of course, and we have to be very fair, we are talking at night. If there is anybody sleeping somewhere in a house, you would not be able to see it from the perspective of a pilot. But once again, don't misinterpret it. It was a military target which had been used since the beginning of conflict over there and we have all

144. See Additional Protocol I, *supra* note 37, at art. 57(2) (laying out this standard of verification).

145. AMNESTY INTERNATIONAL, *supra* note 4, at 53-54.

146. *Id.* at para. 86.

147. *Id.* at para. 87.

sources used to identify this target in order to make sure that this target was still a valid target when it was attacked.¹⁴⁸

The Committee emphasized, as NATO did, that the attack occurred at night and that the military camp and command post were legitimate military objectives. It acknowledged NATO's claim that it had taken all practicable precautions to determine civilians were not present, and that NATO believed the area to be completely cleared of civilians. The Committee also stated that "[t]here is some information indicating that displaced Kosovar civilians were forcibly concentrated within a military camp in the village of Koriša as human shields and that Yugoslav military forces may thus be at least partially responsible for the deaths there."¹⁴⁹ Although it found that a "relatively large number of civilians were killed," the Committee determined that there was insufficient credible information to tend to show a crime by the aircrew or their superiors within the jurisdiction of the Tribunal.¹⁵⁰

As mentioned above, the possibility of Yugoslav forces using civilians as military shields has little or no bearing on NATO's obligations to avoid targeting civilians. NATO was required under Article 51(8) of Additional Protocol I to comply with the rule of distinction regardless of how or why civilians might come to be in the target area. Despite NATO's repeated references to the attack being conducted in the dark of night, this fact also provides no reason for lowering the standards applicable to its actions. NATO took the decision to attack at night with full knowledge of the difficulties this would create in identifying the target and distinguishing civilians. It was not enough for the pilot to identify silhouettes of vehicles on the ground and attack on the basis that the presence of vehicles was consistent with prior intelligence that labeled the area a legitimate military target. Amnesty International determined that it was unclear whether or not FRY forces or military installations were present in Koriša at the time of the bombing. However, assuming that the target would have been a military objective were it not for the presence of civilians,

148. *Id.* at para 88 (quoting a NATO General) (emphasis added in original).

149. *Id.*; see also ROBERTSON, *supra* note 6, at 14 (referring to the "cynical Serb use of . . . human shields.").

150. *Final Report*, *supra* note 2, para. 89.

NATO should have taken precautions in accordance with Article 57(2) to confirm that the target remained legitimate and that there were no or few civilians present.¹⁵¹ Such precautions could have included conducting the attack in daylight, obtaining updated intelligence about the area, and attacking from a lower altitude.

CONCLUSION

It is difficult to resist the conclusion that the conduct of NATO's bombing campaign against the FRY in early 1999 entailed several breaches of the laws of armed conflict with respect to civilians. While these breaches may not necessarily be of a kind suitable for prosecution by the Tribunal, whether due to an absence of evidence, an absence of identifiable individuals who can be properly held accountable, or for jurisdictional reasons, they should not be forgotten. A key factor leading to the breaches was that NATO was conducting a war on humanitarian grounds, sanctioned not by the United Nations but by the public in NATO member countries. As "public support for intervention was conditioned on the prospect of minimal casualties" for members,¹⁵² in too many cases NATO appeared to give absolute precedence to the lives of its forces over those of the civilian population, including the Kosovar Albanians it was fighting to protect. Thus, in several incidents the primary beneficiaries of NATO's precision weapons technology were the aircrew, who were able to direct attacks from higher altitudes at lower risk to themselves, rather than the civilians.

There is no easy way to measure the life of a NATO pilot against that of a Serbian or Kosovar Albanian civilian, and NATO commanders had a responsibility to both. However, NATO's responses to many cases of civilian casualties and damage indicated a misunderstanding of, or an unwillingness to abide by, its obligations to civilians under international law. Although NATO apparently attempted to minimize incidental damage to civilians at the planning stage, it paid insufficient attention to verifying the information it re-

151. See HUMAN RIGHTS WATCH, *supra* note 3, at 23-24 (describing how the attack on the Koriša village was not in compliance with the rules laid out in the Protocol about verifying the presence of civilians).

152. Falk, *supra* note 39, at 851; see also Clark, *supra* note 7, at 253.

lied on at that stage, and to ensuring that each target remained a legitimate military objective right up to the point of attack (for example, by requiring meaningful confirmation by the pilots of the absence of civilians). In explaining accidents involving civilians, NATO referred to the difficult conditions of attack, such as high altitude, darkness and small video screens, shirking its responsibility for choosing to act under those conditions. As Amnesty International has recommended, NATO must learn from the civilian losses that it imposed in the Kosovo conflict by ensuring that all of its member states accede to Additional Protocol I and commit to the highest standards of international humanitarian law.¹⁵³ NATO also should refine its command structure and review its rules of engagement in the light of the need to verify targets to the extent possible.

At a broader international level, the civilian casualties of the NATO bombing reveal the critical need for development of the laws of armed conflict in the context of humanitarian intervention. As evidenced by the Kosovo conflict, the temptation in such cases may be to reduce the risk to the military in combat at the expense of civilians. The Commission has suggested that the ICRC, or other appropriate expert body, prepare a new legal convention covering UN peacekeeping and humanitarian intervention.¹⁵⁴ Such a convention would need to make clear that the laws of armed conflict apply equally, or even more strictly, to conflicts in the name of peace or humanity. A “zero casualty” policy is unlikely to comply with these laws, and the risk of injury or death for military personnel may therefore be higher than it was for NATO pilots in Kosovo. This may mean that humanitarian intervention in some cases becomes politically infeasible. However undesirable such a result may be, it cannot justify a selective approach of the laws of armed conflict.

153. AMNESTY INTERNATIONAL, *supra* note 4, at 12.

154. INDEPENDENT COMMISSION, *supra* note 11, at 184.