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Legal and Ethical Lessons of NATO's Kosovo Campaign
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Commentary

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As had been forewarned, the immediate effect of Operation Allied Force, which was in fact directed against targets in Serbia as well as Kosovo province, was an increase in the terror directed against the Muslim Albanian population. While NATO claimed that only military targets were being attacked, it soon became clear that civilians and civilian objects were suffering damage—sometimes because of "clever" bombs going astray but also, it seems, from NATO's desire to avoid casualties among its own personnel, which led to aircraft flying beyond anti-aircraft range resulting in mistakes in targeting. Cluster bombs, the range of which is difficult or impossible to control, were among the ordinance dropped rendering civilian casualties virtually inevitable. While it was claimed that bridges over the Danube, television studios and electricity-generating establishments were legitimate military objectives, questions regarding the rule of proportionality in relation to collateral damage, both under customary law and Protocols I and II, have to be examined.

The Economist Intelligence Unit reported, perhaps in the light of more recent developments with some exaggeration, that the NATO bombing "inflicted enormous damage on Yugoslavia's economy and infrastructure. . . . Yugoslavia will sink below Albania and become the poorest country in Europe."[1] The Secretary General of the United Nations stated in a press release of April 28, 1999:

> The civilian death toll is rising, as is the number of displaced. There is increasing devastation to the country's infrastructure, and huge damage to [its] economy. For example, Mr. Sommarugua [President of the International Committee of

1. *Globe and Mail* (Toronto), 23 August 1999.

> the Red Cross after visiting Yugoslavia] told me that the destruction of the three bridges in Novi Sad also cut off the fresh water supply to half of that city's population of 90,000 people.[2]

No fewer than 350 cluster bomb attacks were launched against Serb forces (it was later discovered that NATO claims of destruction of Serb tanks and other military installations were unrealistic) and:

> [O]fficially it is acknowledged that between five and ten per cent of the bombs would have failed to detonate, although unofficial estimates put it higher. . . . Although the civilian casualty toll from incidents involving unexploded munitions has dropped from five a day in the first month after the air campaign ended to the present one or two a day Lt. Col. Flanagan [Australian program manager of the United Nations mine action coordinate center in Pristina] said he needed NATO's help to meet the challenge of making Kosovo safe for the population, especially in rural areas, 'Any help we could get from NATO would be appreciated, but at the moment KFOR [Kosovo Protection Force] is not addressing the problem unless there is an emergency humanitarian or operational reason'. He said 'children were being maimed because the cluster bombs looked like toys and were extremely sensitive. If you pick up a cluster bomb it will explode, it is even more dangerous than a mine. Anything can detonate a cluster bomb'. Colonel Flanagan said NATO had supplied the coordinates for the cluster bomb attacks which had helped his teams to trace some of the unexploded bomblets. However, not all the coordinates had proved accurate.[3]

Given the nature of this statement, one is inclined to enquire whether it did not embarrass those participants in the NATO campaign which were parties to Protocol II as amended[4] of the 1990 Conventional Weapons Convention.[5]

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2. Statement by Secretary-General Kofi Annan on Kosovo Crisis, Press Release SG/SM/6972, Apr. 28, 1999, available at http://www.globalpolicy.org/security/issues/Kosovo334.htm. For a breakdown of the damage done to Yugoslavia's economy, see Ved Nanda, *Legal Implications of NATO's Armed Intervention in Kosovo*, *in* INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 313, 319 (M. Schmitt ed., 2000)(Vol. 75, US Naval War College International Law Studies).

3. Michael Evans, *NATO Bombs Still Killing Kosovars*, THE TIMES (London), Aug. 16, 1999.

4. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *adopted* May 3, 1996, 35 INTERNATIONAL LEGAL MATERIALS 1206, 1209 (1996).

5. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excesively Injurious or to Have Indiscriminate Effects, *adopted* Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* THE LAWS OF ARMED CONFLICT 179 (D. Schindler and J. Toman eds., 3d ed. 1988). The unamended Protocol II is at 185.

While NATO certainly did not use booby-traps, Colonel Flanagan's description of cluster bombs as "toy-like and attractive to children" brings them very close to the definition of such weapons: "any device or material which is designed, constructed, or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act."[6]

Colonel Flanagan also expressed some criticism of NATO's unwillingness to assist in clearing these weapons which again draws attention to the Protocol and its obligation to give notice of a minefield and arrange for its clearance:

> 1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed. . . .
>
> 2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.
>
> 3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area . . . to the extent permitted by such party, technical and material assistance necessary to fulfill such responsibility.[7]

For the main part, KFOR and those members of NATO contributing thereto remained in control of most of Kosovo and would appear, at least at the time of Colonel Flanagan's remarks, as not being as cooperative as some of them are obligated to be. Finally, it may be asked whether by using weapons coated in depleted uranium there has not been a breach of the basic principle of customary law that weapons likely to cause unnecessary suffering may not be used, while for parties to Protocol I[8] there would appear to have been also a breach of Article 35, which forbids "methods or means of warfare which are intended *or may be expected*, to cause widespread, long-term and severe damage to the environment" (emphasis added) as such usage must have envisaged.

As has been pointed out, the bombing campaign was not as successful as NATO might have hoped. It extended over seventy-eight days and at no time

6. *Id.*, art. 2(4).
7. *Id.*, art. 10.
8. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 INTERNATIONAL LEGAL MATERIALS 1391 (1977) [hereinafter Protocol I].

was there any contact between ground troops and no fatalities were suffered by NATO air personnel. Since the aerial campaign was affected by weather conditions as well as the accuracy of the crews, observation of targets was sometimes difficult.[9] While the United States was not a party to Protocol I, both Canada and the United Kingdom were. It is therefore necessary as regards these participants to refer to the relevant Articles of that instrument. It should also be noted that in so far as the United States was concerned it was under the customary law obligation to confine its offensive activities to military and not civilian targets. In accordance with Protocol I:

> *Article 48 - Basic rule*
>
> [T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.
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> *Article 51 - Protection of the civilian population*
>
> 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.
>
> . . . .
>
> 3. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threat of violence the primary purpose of which is to spread terror among the civilian population is prohibited.

There has never been any suggestion that NATO operations were in any way directed at causing terror, but NATO never concealed that there was inherent in its policy an intention to create a situation in which the Yugoslav population would be so discomforted as to rise up and overthrow the government seated in Belgrade. This eventually occurred but not as a direct consequence of the bombing campaign.

Article 51 continues:

> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (a) those which are not directed at a specific military objective;
>
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

9. *See, e.g.*, Nanda, *supra* note 2, at 319.

(c) those which are employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each case, are of a nature to strike military objectives and civilian objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive[10] in relation to the concrete and direct military advantage anticipated.

Article 52 - General protection of civilian objects

. . . .

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

3. In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.

In the case of the bombing campaign undertaken by NATO, it would often appear, *prima facie,* that the question may also be asked whether the distinction demanded by Protocol I of those States which were parties to it was always respected.

Perhaps one of the clearest instances of acceptance of ethical principles in modern international law is that which governs the punishment of those guilty of war crimes, genocide and crimes against humanity. To the extent that Serbian or Kosovar Albanians committed any of these offenses, they must answer at a trial before the International Criminal Tribunal for the former

10. *See, e.g.,* William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MILITARY LAW REVIEW 91 (1982).

Yugoslavia (ICTY) established by the United Nations. The ICTY has no *dies ad quem* and so enjoys jurisdiction until it is declared *functus officio* or there is a clear statement that conflict in the territories of the former Yugoslavia has come to an end. *Prima facie,* members of the NATO forces who may have committed offenses against the law of armed conflict are as amenable to the jurisdiction of the Tribunal as are any other offenders. In fact, the ICTY established a committee to investigate this issue, which, concluded that no further investigation was necessary and no attempt has been made to indict any NATO personnel.[11]

Since the operation was essentially aerial, the ambit subject to the law of armed conflict was somewhat limited. The provision of Protocol I defining grave breaches is almost certainly an expression of the customary law with regard to protection of civilians and so is not confined solely to parties to the Protocol. However, that instrument's language is specific:

> 3. [T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully . . . and causing death or serious injury to body or health:
>
> (a) making the civilian population or individual civilians the object of attack;
>
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or danger to civilian objects. . . . [12]

One English newspaper report lends support to the argument that such breaches did occur: "So wild was the bombing that ministers found themselves having to call journalists, make-up girls, hospital staff and even whole villages 'legitimate targets of war', blithely rewriting the Geneva Convention to suit themselves."[13]

There can be no doubt that if the rule of law or ethical standards are to prevail in the future, it is essential that the law concerning war crimes, genocide and crimes against humanity be attached to all individuals, military, political or civilian, and not merely to those against whom "we" are taking action. As has been mentioned a committee established by the ICTY Office of

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11. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *reprinted* in 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), and *reprinted* herein as Appendix A [hereinafter Report to the Prosecutor].
12. Protocol I, *supra* note 8, art. 85 (3) (a) and (b).
13. Simon Jenkins, *A Victory for Cowards* , THE TIMES (London), June 11, 1999.

the Prosecutor (OTP) in accordance with Article 18 of its Statute[14] did investigate allegations lodged against NATO. Some of its comments bear reproduction. As regards the legality of the NATO recourse to force without United Nations sanction, the Report states

> [T]he *jus ad bellum* regulates when states may use force and is, for the most part, enshrined in the UN Charter. In general, states may use force in self defence (individual or collective) and for very few other purposes. In particular, the legitimacy of the presumed basis for the NATO bombing campaign, humanitarian intervention, without prior Security Council authorization, is hotly debated. That being said . . . the crime related to an unlawful decision to use force is the crime against peace or aggression. While a person convicted of a crime against peace may, potentially, be held criminally responsible for all of the activities causing death, injury or destruction during a conflict, the ICTY does not have jurisdiction over crimes against peace.[15]

Consequently, the Report was confined to examining only allegations that NATO might have committed acts contrary to the *jus in bello*.

In so far as it was alleged that the use of depleted uranium (DU) constituted a breach of the law of armed conflict, the Report stated:

> There is no specific treaty ban on the use of DU projectiles. There is a developing scientific debate and concern expressed regarding the impact of the use of such projectiles and it is possible that, in future, there will be a consensus view in international legal circles that use of such projectiles violate general principles of the law applicable to use of weapons in armed conflict. No such consensus exists at present. . . . It is acknowledged that the underlying principles of the law of armed conflict such as proportionality are applicable in this context; however it is the committee's view . . . based on information available at present, that the OTP should not commence an investigation into use of depleted uranium projectiles by NATO.[16]

A similar hesitancy to condemn the use of cluster bombs is to be found in the Report.

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14. "The 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 organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed." S.C. Res. 827 (May 25, 1993), U.N. Doc. S/25704, at 36-40 (1993), *reprinted in* 32 INTERNATIONAL LEGAL MATERIALS 1165, 1192 (1993).
15. Report to the Prosecutor, Appendix A, ¶ 30.
16. *Id.*, ¶ 26.

> There is no specific treaty provision which prohibits or restricts the use of cluster bombs, although, of course, cluster bombs must be in compliance with the general principles applicable to the use of all weapons. Human Rights Watch [which had submitted documentary evidence concerning alleged NATO offences] has condemned the use of cluster bombs alleging that the high 'dud' or failure rate of the submunitions (bomblets) contained inside cluster bombs converts these submunitions into antipersonnel landmines which it asserts, are now prohibited under customary international law. Whether antipersonnel landmines are prohibited under current customary international law is debatable, although there is a strong trend in that direction. There is, however, no general legal consensus that cluster bombs are, in legal terms, equivalent to antipersonnel landmines . . . . It is the opinion of the committee, based on information presently available, that the OTP should not commence an investigation into use of cluster bombs as such by NATO.[17]

While it was hesitant to condemn the use of particular weaponry, the committee did make some general comments concerning legal issues relating to target selection. Here we may detect some hints of a commander's responsibility to have concern for ethical principles.

> [I]n combat, military commanders are required a) to direct their operations against military objectives, and b) when directing their operations against military objectives, to ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated. Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence under Article 3 of the ICTY Statute.[18] The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:
>
> (a) to do everything practicable to verify that the objectives to be attacked are military objectives,
>
> (b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and

17. *Id.*, ¶ 27.
18. Concerning violations of the laws or customs of war.

(c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

One of the principles underlying international humanitarian law, constituting an expression of high ethical standards, is the principle of distinction, which obligates military commanders to distinguish between military objectives and civilian persons or objects. The practical application of this principle is effectively encapsulated in Article 57 of Protocol I which, in part, obligates those who plan or decide upon an attack to 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.' The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.[19]

Once again, it would seem that the committee was unwilling to find that NATO might in fact have breached the law, even though it might be argued that the decision not to suffer casualties and to fly beyond the range of anti-aircraft artillery militated towards ineffective targeting, especially in cloudy weather. Moreover, the number of incidents listed in the Report to the prosecutor[20] involving civilian casualties, some of which were quite heavy, might suggest that the accuracy of targeting was inadequate in quite a large number of cases.[21]

19. Report to the Prosecutor, Appendix A, ¶¶ 28–9.
20. *See id.*, ¶¶ 9 and 53.
21. See for example, *id.*, ¶¶ 58–70, dealing with attacks on a civilian train and a convoy of Albanian refugees.

The Report to the Prosecutor went into some detail as to what might be defined as a military objective,[22] but once again fails to be dogmatic as to the policy adopted by NATO. Perhaps more important in so far as the future is concerned is its comments on proportionality, a concept that owes its origins to ethical standards:

> 48. The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effect. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. [Is the same true if they are collecting aluminum pots to be converted into aircraft or munitions?] Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is ploughing a field in the area. Unfortunately, most of the applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.
>
> 49. The questions which remains unsolved once one decides to apply the principle of proportionality include the following:
>
> (a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
>
> (b) What do you include or exclude in totaling your sums?
>
> (c) What is the standard of measurement in time or space? and
>
> (d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects? [Once again, an ethical question for said commander]
>
> 50. The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and

22. *See id.*, ¶¶ 35–47.

> differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the '*reasonable military commander*'.[23] Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.[24]

Despite the somewhat confident expression to be found in this last sentence, the entire approach adopted in the Report to the Prosecutor emphasizes how difficult it will always be to reach an acceptable common understanding of what constitutes ethical standards of behavior.

> City planners rarely pay heed to the possibility of future warfare. Military objectives are often located in intensely populated areas and fighting occasionally occurs in such areas, Civilians present within or near military objectives must, however, be taken into account in the proportionality equation even if a party to the conflict has failed to exercise its obligation to remove them.[25]

In the *Kupreskic* case the ICTY addressed the issue of proportionality as follows:

> 526. As an example of the way in which the Martens clause[26] may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58[27] (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise

23. Emphasis added.
24. Report to the Prosecutor, Appendix A.
25. *Id.*, ¶ 51
26. "[I]n cases not included in the Regulation . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, *as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.*" Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *in* THE LAWS OF ARMED CONFLICT, *supra* note 5, at 70 (emphasis added).
27. Protocol I, *supra* note 8, regarding "Precautionary Measures."

> excessively the lives and assets of civilians, contrary to the demands of humanity.'[28]

This formulation . . . can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, is somewhat ambiguous and its application far from clear. It is the committee's view where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign. . . .

54. During the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike sorties. During these sorties 23,614 munitions were released . . . . [and] it appears that approximately 500 civilians were killed during the campaign. These figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.

55. The choice of targets by NATO includes some loosely defined categories such as military-industrial infrastructure and government ministries and some potential problem categories such as media and refineries. All targets must meet the criteria for military objectives. If they do not do so, they are unlawful. A general label is insufficient. The targeted components of the military-industrial infrastructure and of government ministries must make an effective contribution to military action and their total or partial destruction must offer a definite military advantage in the circumstances ruling at the time. Refineries are certainly traditional military objectives but tradition is not enough and due regard must be paid to environmental damage if they are attacked. The media as such is not a traditional target category. . . . As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is sued to incite crimes . . . it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

28. Prosecutor v. Kupreskic et al., Judgement, I.C.T.Y. No. IT-95-16-T, Jan. 14, 2000, ¶ 542.

> 56. The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.
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> 57. In the course of its review, the committee did not come across any incident which, in its opinion, required investigation by the OTP. . . .

The committee examined five specific incidents of attacks the legality of which might have been doubtful, but in each case came to the conclusion that there was no reason to refer the matter to the Prosecutor. One is left with a somewhat uncomfortable feeling with the committee's statement in its penultimate paragraph:

> [T]he committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information received, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.[29]

It may well be that, noting all the efforts to define proportionality and to assess the role of ethical considerations, one comes to the conclusion that the findings of the committee might be correct. However, it is submitted that one cannot but feel that the report might have contributed more to vindicating the rule of law and recognizing the significance of ethical standards as equally operative for all parties, had it recommended to the Prosecutor the possibility of referring to the ICTY some of the issues it examined. The Tribunal might not in all cases have agreed with individual recommendations, particularly in view of the fact in some instances the Report to the Prosecutor itself refers to a "trend

29. Report to the Prosecutor, Appendix A, ¶ 90.

developing," or to particular cases being controversial or—clearly an issue for judicial determination—that in some instances "the law is not sufficiently clear."

The Serbs, particularly as a result of pressure from Russia, its traditional ally, and in face of the threat by NATO that a land offensive would be launched, finally accepted terms almost identical with those rejected at Rambouillet prior to the commencement of the bombing campaign. Among the terms accepted was an arrangement for Kosovo to be temporarily administered by an international body supported by some military and police personnel brought in from Yugoslavia, thus preserving that State's concern with its national sovereignty. Kosovo was divided into areas of administration with civil affairs to some extent controlled by the United Nations Mission in Kosovo (UNMIK). Since it was recognized that returning Kosovar Albanians, supported by the KLA, might pursue a policy of revenge against the remaining Serb population, it was agreed that the KLA would be disarmed and that KFOR would ensure the safety of the Serbs. It was not long before it became clear that the KLA was not going to be overly cooperative regarding the surrender of arms and KFOR not excessively effective in preventing attacks on the Serbs.

Further, KLA leaders made it clear that they intended to regard themselves as an interim government determined on secession, whatever the view of NATO or KFOR. The French defense minister commented on this state of affairs:

> [T]here's an unseemly scramble for power, influence and wealth within the KLA. . . . The Kosovars don't understand that we're here not to support them but to support human rights for all and ensure political power is held to account. On the other hand, to expect the KLA to willingly disband when they see a continued threat from paramilitaries under effective protection by French and Russian troops [in their respective administrative areas], and to refuse to recognize provisional mayors when UNMIK hasn't assigned a single municipal administrator, is just farcical.[30]

This seems to overlook that, officially at least, it was never part of NATO's policy to assist the Kosovars in doing anything to question or endanger Yugoslavia's sovereignty over the area. As the occupation by KFOR continued, it became clear that, on paper at least, the KLA and its *soi disant* political leadership were proving a little more cooperative, although KFOR's protective activities became more and more essential for the Serb population.

30. THE TIMES (London), Aug. 14, 1999.

The growing willingness to allow the KLA—originally denounced as a gang of terrorists—to push its political aims and failure to prevent attacks upon the local Serbs raise questions as to the extent to which NATO was sustaining its contention that its intervention was ethical based on the needs to protect humanitarian principles. In fact, the ethical and humanitarian character of NATO's policy became even more questionable when it reneged somewhat on its promises to assist in the rehabilitation and rebuilding of Yugoslavia, unless the then government was replaced by one that was more "democratic." It is true that this has now ensued, but this fact does not lend support to the idealistic grounds on which NATO claims to have acted originally.

In assessing the validity of the NATO bombing campaign from both legal and ethical standpoints, it becomes necessary to ask whether the campaign achieved its purpose. That is to say, whatever its legality might have been, was the action justified because of what was ultimately achieved? It is clear from the above comments, and in the light of the continuing trouble in Kosovo and the threats of conflict spreading in the area, that the writer is not happy with either the legal or ethical grounds on which NATO claimed to be acting. Since similar situations denying human rights in the most obscene manner might recur, it is clearly necessary to consider what, if any, process can be introduced to prevent similar unilateral and questionable punitive or enforcement action in the future. Perhaps this might be achieved by adopting a policy somewhat like the following:

> When a government is unwilling or unable to protect, or persistently infringes the human rights of large segments of its population, or the government structure has so disintegrated that law and order have virtually ceased to exist, it may then well be time for the United Nations to take over the administration until such time as normal conditions have been restored. . . . To some extent this is already happening in Bosnia and Kosovo. . . . However it would perhaps be more desirable that this be done not on an *ad hoc* basis—nor by a group of states assuming such authority unto itself—but on the basis of a permanent United Nations body made up of trained personnel from a variety of countries. . . . The members of such administrative or governing commissions should not be drawn from nationals of the great powers among whom, despite the end of the cold war, political rivalries and maneuvering is still likely to take place. [31]

31. *See* Leslie Green, 23rd Annual Conference of the Canadian Council on International Law, 1994 CANADIAN COUNCIL ON INTERNATIONAL LAW PROCEEDINGS 6, 26; 26th Annual Conference of the Canadian Council on International Law, 1997 CANADIAN COUNCIL ON INTERNATIONAL LAW PROCEEDINGS 31, 37.

If such a policy were adopted, there might be less doubt as to the legal or ethical basis for the intervention and a more substantial foundation for contending that it is in accordance with the rule of law and the maintenance of ethical principles.