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The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia

Paolo Benvenuti*

Abstract

The author analyses the report on the NATO bombing campaign against Yugoslavia, prepared by the Review Committee created by the ICTY's Prosecutor, and observes that the recommendation that no investigation be commenced because 'either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence' appears prima facie questionable. The author points out the shortcomings of the Committee's 'Work Program' arising from the unbalanced evidence on which the Committee's statements are founded and by the restriction of the collateral damages of the campaign to the civilian casualties. Moreover, the Committee's assessment of general issues (damage to environment, legality of weapons, target selection, proportionality) shows a poor grasp of legal concepts, and deviates from well-established ICTY case law. The Committee's assessment of specific incidents is also characterized by shortcomings: inter alia, the report frequently slips from the level of individual criminal responsibility to that of state responsibility. In his conclusion, the author observes that other fora are likely to verify some of the incidents occurring during the bombing campaign. Proceedings have started before the European Court of Human Rights and there are grounds for the European Court to affirm its jurisdiction.

1 The Report of the Review Committee on the NATO Bombing Campaign and the Decision Not to Start an Investigation

On 13 June 2000, the International Criminal Tribunal for the Former Yugoslavia (ICTY) published on its website the 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of

* Professor of International Law, Faculty of Political Science, University of Florence.

Yugoslavia'. During and since the period of the campaign, the Prosecutor has received numerous requests that she investigate allegations concerning breaches of international humanitarian law (IHL) committed during the course of Operation Allied Force. On 14 May 1999, the Prosecutor, in order to assess the information received and to decide whether there was a sufficient basis to proceed, following an unusual procedure, established under her responsibility an ad hoc committee ('the Review Committee') in order to obtain advice on whether or not there was a sufficient basis to proceed with an investigation into some or all the allegations made or into other incidents related to the NATO bombing campaign.

The Review Committee in its report (completed at the end of May 2000) concluded with the recommendation that no investigation be commenced by the Office of the Prosecutor in relation to the NATO bombing campaign.¹ The grounds for this conclusion, as summarized by the Review Committee itself, are as follows:

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.²

The report of the Review Committee is merely advice to the Prosecutor. The Prosecutor maintains an inherent power under the Statute of the ICTY to decide whether or not an investigation should be started. It is submitted that — notwithstanding the recommendation of the Review Committee — an in-depth investigation should be started because the above-mentioned grounds, as summarized by the Review Committee, are insufficient to exclude that grave breaches of IHL within the competence of the Court may have occurred. If, in the opinion of the Review Committee, 'the law is not sufficiently clear', this ought to be the very reason for starting an in-depth investigation, thus allowing the ICTY to clarify the law (the role of ICTY in clarifying the content of IHL has been much more important than the bare statistics of the number of prosecutions would suggest).³ If, in the opinion of the Review Committee, 'investigations are unlikely to result in the acquisition of sufficient evidence of charges' (though such an opinion does not exclude the possibility that grave breaches of IHL may in fact have occurred), this would be a good reason for the Prosecutor to start an investigation making use of the very strong powers she (and the

¹ Report, at para. 91. For the Report, see www.un.org/icty/pressreal/nato061300.htm.

² *Ibid.*, at para. 90.

³ Ronzitti observes that this affirmation of the Committee 'is equivalent to a *non liquet*. Difficulties in interpretation are not a good excuse for not starting an investigation. There are fields of humanitarian law, as with any body of law, which are not *sufficiently* clear. However, the task of law interpretation and "clarification" is entrusted to the Tribunal, which thus cannot conclude by saying that it cannot adjudicate the case, since the law "is not clear". The *non liquet* is not part of the jurisprudence of the Hague Tribunal nor of any other tribunal.' Ronzitti, 'Is the Non Liquef of the Final Report by the Committee Established to Review the NATO Bombing Against the FRY Acceptable?', 840 *International Review of the Red Cross* (2000) 1020–1021.

Tribunal) have resorted to in other cases⁴ (such powers were not at the disposal of or used by the Review Committee).

But, on 2 June 2000, the Prosecutor informed the United Nations Security Council that she had decided to accept the recommendation not to commence a criminal investigation. One cannot exclude the possibility that, in future, the Prosecutor could change her attitude, but the impression is given that the Prosecutor's intent has been, on the whole, to prevent investigations against NATO officials, and to hide herself behind the 'technical opinion' of the Review Committee. This impression is reinforced by the fact that, in addressing the Security Council, the Prosecutor stated that she was satisfied that, 'although NATO had made some mistakes, it had not deliberately targeted civilians'.⁵ This statement goes further than the opinion of the Review Committee, according to which the law is not sufficiently clear and the acquisition of sufficient evidence is unlikely to support an investigation.

From the above-mentioned preliminary remarks, it follows that the recommendations contained in the report of the Review Committee appear to some extent to be debatable,⁶ and it is therefore useful to go through an analysis of the methodology and arguments used by the Review Committee in assessing the relevant facts and the related norms of IHL in order to reply to the two questions it formulated:⁷

- 1 Are the prohibitions alleged sufficiently well established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of these prohibitions may have occurred?
- 2 Upon the reasoned evaluation of the information by the Review Committee, is the information credible, and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign?

These are crucial questions which relate to important events of contemporary

⁴ According to Article 18(2) of the ICTY Statute: 'The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.' Moreover, according to Article 39 of the Rules of Procedure and Evidence: 'in the conduct of an investigation, the Prosecutor may: (i) summon and question suspects, victims and witnesses . . . collect evidence and conduct on-site investigations; (ii) undertake such other matters as may appear necessary for completing investigation . . . (iii) seek, to that end, the assistance of any authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and (iv) request such orders as may be necessary from a Trial Chamber or a Judge.' Ronzitti, *supra* note 1, at 1021, observes: 'no doubt evidence acquisition is a difficult and consuming task. However, this is not an excuse for not commencing an investigation. A quick perusal of these provisions [the ICTY Statute and the Rules of Procedure and Evidence] makes it clear that the Prosecutor enjoys substantial powers of collecting evidence and that the Committee's conclusion is unduly pessimistic.'

⁵ UN Security Council, Press Release, SC/6870, 2 June 2000.

⁶ For a critical comment of the conduct of Operation Allied Force with respect of IHL, see A. Gidron and C. Cordone, 'Faut-il juger l'OTAN?', *Le Monde diplomatique*, July 2000, 1, at 18–19.

⁷ Report, *supra* note 1, at para. 5.

international relations and touch on sensitive aspects of IHL. Therefore, the outcome of the matter will probably have a strong impact on the future activity of the ICTY and on the perspectives of international criminal justice, as well as on the future application of the rules of IHL. A great responsibility appears to have been placed in the hands of the Review Committee and of the Prosecutor, the ultimate bearer of such responsibility, in dealing with the NATO bombing campaign.

2 The Review Committee's Work Programme

A The Unbalanced Evidence on Which the Review Committee Made Its Findings

If we consider the importance of the questions before the Review Committee, it is clear from its 'Work Programme'⁸ that its approach was inadequate, such as to have a negative impact on the authority of its findings. The first aspect of this inadequate approach relates to the evidence on which the Review Committee made its findings. The Review Committee, in conducting its task, relied exclusively on documents received from outside sources: public documents made available by NATO and some NATO member countries; sources from the Federal Republic of Yugoslavia (FRY) including a compilation by the FRY Ministry of Foreign Affairs, entitled 'NATO Crimes in Yugoslavia'; and reports and documents coming from non-governmental organizations such as Human Rights Watch and Amnesty International, etc.⁹ The Review Committee stated that it relied *heavily* on NATO press statements,¹⁰ documents which may be considered as not being entirely reliable (at least in *bonam partem*) in the context of a war, where (as is often the case) the belligerents need the strong support of national and international public opinion. Moreover, a letter enclosing a questionnaire and a list of incidents was sent by the Review Committee to NATO on 8 February 2000 in order to receive more detailed information, to which NATO 'gave a *general reply*' on 10 May 2000.¹¹

The Review Committee does not, however, say that the Belgrade press statements received a similar *heavy* consideration. Furthermore, the Review Committee tells us that, not only did it not travel to the FRY, but it did not even solicit information from the FRY through official channels because — it explains — no such channels existed during the period when the review was being conducted. This appears to be an untenable excuse: why was the same questionnaire sent to NATO not also sent to the FRY? Why was it impossible for an international institution — furthermore, one claiming primacy over national jurisdictions — to solicit information through a letter addressed to the FRY authorities? What kind of official channel is needed? One may

⁸ *Ibid.*, at paras 6–13.

⁹ For a complete list, see *ibid.*, at para. 6.

¹⁰ *Ibid.*, at para. 7.

¹¹ *Ibid.*, at para. 12 (emphasis added).

observe that, in the same period, on 22 May 1999, the ICTY issued an indictment and an arrest warrant against Slobodan Milosevic and four other high officials of the FRY and that the indictment and warrant were sent to the Federal Minister of Justice of the FRY without raising any problem whatsoever of there being no official channel.¹²

It is evident that this aspect of the Work Program of the Review Committee risks undermining the fundamental value of impartiality which must characterize all the activities of the Office of the Prosecutor. Unfortunately, when one reads the report, it is easy to see that this risk is not avoided by the Review Committee: public statements coming from NATO or its member states' officials are usually decisive in establishing the facts considered by the Review Committee, without any substantial critical appraisal.¹³ In the penultimate paragraph of the report,¹⁴ the Review Committee finally and plainly admits its unbalanced approach:

The Committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. *It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given.*¹⁵

This blind trust by the Review Committee in NATO's reliability is undiminished despite the Committee's own acknowledgment of the inadequacy of some of the replies from NATO. The Committee states: 'the Committee must note, however, that when the Office of the Prosecutor requested NATO to answer specific questions about specific incidents, *the NATO reply was couched in general terms and failed to address the specific incidents.*'¹⁶ Moreover, the Committee did not take the trouble to speak 'to those involved in directing or carrying out the bombing campaign'.

In short, the Review Committee displays a one-sided attitude, hardly consistent with the Prosecutor's duty of impartiality and independence as envisaged in the ICTY Statute:¹⁷ the work of the Review Committee therefore appears to be undermined in its very foundation.

¹² Moreover, the danger concerning ICTY's powers arising from this Review Committee's approach should be noted. If official channels are formally needed in order to seek cooperation of states, the primacy and authority of the Tribunal could be seriously undermined.

¹³ See the comments below on specific incidents.

¹⁴ Report, *supra* note 1, at para. 90.

¹⁵ Emphasis added.

¹⁶ Emphasis added.

¹⁷ This aspect of the Review Committee's Report is underlined in a confidential report prepared by a jurist of the International Committee of the Red Cross. Some passages of this latter report are quoted in P. Hazan, *La Justice face à la guerre: Du Nuremberg à la Haye* (2000) at 219 *et seq.*: 'On est frappé (et mal à l'aise) en lisant le rapport de constater à quel point la commission se base sur les déclarations publiques d'officiels de l'Otan ou de ses pays membre pour établir les faits qu'il pose à la base de son analyse'. 'On peut raisonnablement se poser la question si cet *a priori* favorable par rapport à une des parties au conflit est bien compatible avec l'impartialité dont doit faire preuve un procureur' (*ibid.*, at 220).

B *The Relevance Given Exclusively to Civilian Casualties in Evaluating the Legality of the Bombing Campaign with Regard to Specific Incidents*

The second aspect of the inadequacy of the Review Committee's work relates to the choice of the facts to be investigated. On the one hand, the Committee prepared a list of general issues to be addressed: damage to the environment, the use of depleted uranium projectiles, the use of cluster bombs and target selection; on the other hand, the Committee has identified five specific incidents for consideration: the attacks on a passenger train at the Grdelica Gorge on 12 April 1999, on the Djakovica convoy on 14 April 1999, on the Serbian radio and television station in Belgrade on 23 April 1999, on the Chinese Embassy on 5 May 1999 and on Korisa village on 13 May 1999.

The Review Committee explains¹⁸ that, in conducting its review, it 'has focused primarily on incidents in which civilian deaths were alleged and/or confirmed', while 'the Committee's review of incidents in which it is alleged that fewer than three civilians were killed has been hampered by a lack of reliable information'. In other words, the attitude of the Committee was to carry out a legal evaluation of the facts taking into account only civilian deaths, while damage to civilian property was deliberately not considered. In fact, very deleterious consequences may result for civilians from material damage caused by an attack: therefore, it was essential to take such damage into account. Summing up, it is unsatisfactory to assess the lawfulness of an attack with regard to the principle of proportionality if damage to civilian property is not evaluated.

The fact that the Review Committee limited itself to the death toll has hampered its consideration of other questions: for example, in a strategic context, is the systematic destruction of bridges lawful even where they are far from the scene of the fighting? Some doubts are advanced on this topic in the Fourteenth Report of the Defence Select Committee of the UK House of Commons issued on 24 October 2000:

An examination of the choice of strategic targets during ... the campaign does not readily reveal a clear pattern of a graduated strategy of coercion or evidence of increasing coercive effectiveness. Some of the targets appear difficult to justify. No clear explanation of the decision to bomb the Danube bridges at Novi Sad yet appears to be given.¹⁹

Is the lawfulness of the systematic targeting of power stations, industries and factories beyond any doubt? The Fourteenth Report of the Defence Select Committee of the UK House of Commons went on to state:

[As the] air campaign moved into 'Phase 2A' [an intermediate phase comprising both strikes against Serb forces on the ground in Kosovo and strikes against 'strategic' targets in Serbia], UK and NATO targeteers made some efforts to identify and strike targets that were not just of military value to Serbian air defences military command and control and the field forces in Kosovo, but would also influence perceptions. There appear to have been two target audiences for this. The first was the Serbian people as a whole. There was a belief — or hope — in the UK and in the wider Alliance that Serbian morale would 'crack' and that the Serbian population

¹⁸ Report, *supra* note 1, at para. 13.

¹⁹ House of Commons, Defence Select Committee, Fourteenth Report, 23 October 2000, at para. 124.

would be encouraged by the air campaign to protest against the policies of the Milosevic government.²⁰

Is this not a good reason for the Prosecutor to look into these facts more carefully? The note which follows is not reassuring: 'however, air strikes targeted at the Serbian population in general were never at the heart of Alliance Strategy.'²¹ This statement may, however, be doubted. The affirmed intention not to target the Serbian population may be seen as a deliberate intent to conduct a campaign aimed at targeting (alleged) military objectives with the surreptitious (and intentional) goal of producing (enough) collateral damage (such damage being proportionate, one would think) to the Serbian population. Such damages would have brought the population to such an unbearable (but still proportionate and legitimate?) condition as to induce it to rebel against the government. This reasoning appears to be a twisting of the rule in Article 57 of Additional Protocol I to the Geneva Conventions ('Precautions in Attack'), which requires the warring parties to take care at all times to spare the civilian population and their property. This rule cannot be read as an authorization to the warring parties intentionally to produce proportionate damage to the civilian population and their property, while attacking military targets.

3 The Assessment of General Issues

A *Damage to the Environment*

After having established its work programme, the Committee begins its assessment of the general issues, the first of which is damage to the environment. First, the Committee correctly recalls the conventional rules governing the subject (Articles 35(3) and 55 of Protocol I), but the Committee misstates the situation when it affirms that Protocol I '*may reflect* customary international law':²² in fact, customary law is reflected by current conventional law as affirmed by the International Court of Justice (ICJ) in the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. According to the ICJ, Articles 35 and 55 of Protocol I 'embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage'.²³ The attribution of the opposite opinion to the ICJ²⁴ is a symptom of the inadequate approach of the Committee in carrying out its task. A further sign of superficiality is the statement that the notion of 'long-term' damage to

²⁰ *Ibid.*, at para. 99.

²¹ *Ibid.*, at para. 100.

²² Emphasis added.

²³ ICJ Reports (1996), at para. 31. At para. 33, the ICJ concludes: 'the Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of implementation of the principles and rules of the law applicable in armed conflict.'

²⁴ Report, *supra* note 1, at para. 15.

the environment is to be measured in years rather than in months. In fact, the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and its 'Understandings' define 'long-lasting' to mean 'lasting for a period of months, or approximately a season'.²⁵

Subsequently, the Committee preferred to carry out its examination of the damage to the environment from the perspective of the principle of proportionality. However, the use of proportionality cannot justify 'widespread, long-term and severe damage to the environment', which is forbidden in all cases. The principle of proportionality only applies below such a threshold.

I agree with the Committee that, even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population. But, at the same time, I do not find the reference to an article in which A.P.V. Rogers, former Director of the British Army Legal Service, quotes the UK defence doctrine adequate:²⁶ first, in a case implicating the evaluation of the legality of the conduct of the UK armed forces, quoting this British author who is a former officer of the UK armed forces themselves — among many authors who have accurately studied the subject²⁷ — does not appear appropriate. Secondly, from that quotation referring to the UK defence doctrine, the Committee draws an improbable (or even misleading) legal principle: 'indeed, military objectives *should not be targeted* if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.'²⁸ This language weakens the vigour of the rule in force; in fact, the rule in force should be formulated as follows: '*it is forbidden to target military objectives* if the attack is likely . . .'. This is a good example, which shows that it is not that the law is insufficiently clear, but rather that the legal reasoning of the Committee is inadequate.

Again, we may agree with the Committee that it is not an easy task to evaluate all the aspects connected to proportionality:

in order to fully evaluate such matters, it would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus, the likelihood of environmental damage flowing from their destruction), the extent to which NATO could reasonably have anticipated such environmental damage (for instance, could

²⁵ See Ronzitti, *supra* note 1, at 1023.

²⁶ The article is 'Zero-Casualty Warfare', 82 *International Review of the Red Cross* (2000) 165 *et seq.*

²⁷ Kiss, 'Les Protocoles additionnels aux Conventions de Genève de 1977 et la protection de l'environnement', in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1989) 229 *et seq.*; Bothe, 'The Protection of the Environment in Times of Armed Conflict', 34 *German Yearbook of International Law* (1991) 54 *et seq.*; Bouvier, 'Protection of the Natural Environment in Time of Armed Conflict', 285 *International Review of the Red Cross* (1991) 567 *et seq.*; Momtaz, 'Les règles relatives à la protection de l'environnement au cours des conflits entre l'Irak et le Koweït', 37 *Annuaire Français de Droit International* (1991) 203 *et seq.*; Antoine, 'International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict', 291 *International Review of the Red Cross* (1992) 517 *et seq.*; and Bouvier, 'Recent Studies on the Protection of the Environment in Time of Armed Conflict', 291 *International Review of the Red Cross* (1992) 554 *et seq.*

²⁸ Report, *supra* note 1, at para. 18 (emphasis added).

NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?) and whether NATO could reasonably have resorted to other (and less environmental damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure.²⁹

But, at the same time, one could expect that by virtue of the above consideration the Committee should have gone more in depth in the analysis of the conduct of NATO. But this was not done: the Committee was firm in its belief that ‘the notion of “excessive” environmental destruction is imprecise and the actual environmental impact, both present and long term, of the NATO bombing campaign is at present unknown and difficult to measure’,³⁰ and in its hypothesis (only an hypothesis, but in fact treated by the Committee as if it were a proven fact) that ‘the targeting by NATO of Serbian petro-chemical industries *may well have served* a clear and important military purpose’.³¹ *Ergo*, notwithstanding the logic, there is no room for recommending that the Prosecutor should commence an investigation.³²

B The Legality of the Use of Dubious Weapons

1 Depleted Uranium Projectiles

The assessment concerning arms, in particular of the use of depleted uranium (DU) projectiles and cluster bombs, is also disappointing. With regard to the use of depleted uranium projectiles (31,000 projectiles were reported to have been fired on FRY), the Committee, after ascertaining that there is no specific ban on their use and that they appear to be dubious weapons,³³ took into consideration the legitimacy of their use from the limited viewpoint of the protection of the environment and, moreover, did so without any serious analysis.³⁴ Inexplicably, the Committee omits fundamental questions concerning the relevance of other principles governing weapons and their use. In fact, the principle of unnecessary suffering (aimed at protecting combatants) and the principle of distinction (aimed at protecting civilians)³⁵ should also have been taken into account by the Committee, particularly in view of some fears recently

²⁹ *Ibid.*, at para. 24.

³⁰ *Ibid.*, at para. 23.

³¹ *Ibid.*, at para. 22 (emphasis added).

³² *Ibid.*, at para. 25.

³³ The Committee observes: ‘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 the use of such projectiles violate general principles of the law applicable to use of weapons in armed conflict.’ *Ibid.*, at para. 26.

³⁴ *Ibid.*, at para. 26. The Committee limits itself to the following comment: ‘It is acknowledged that the underlying principles of the law of armed conflict such as proportionality are applicable also in this context; however, it is the Committee’s view that the analysis undertaken above with regard to environmental damage would apply, *mutatis mutandis*, to the use of depleted uranium projectiles by NATO. It is therefore the opinion of the Committee, based on information available at present, that the Office of the Prosecutor should not commence an investigation into use of depleted uranium projectiles by NATO.’

³⁵ On these principles, see Benvenuti, ‘Weapons, Uncontrolled Availability of Weapons and War Crimes’, 55 *La Comunità Internazionale* (2000) 4 *et seq.*

expressed about a ‘Kosovo syndrome’ (similar to the ‘Gulf War syndrome’). This omission is all the more inexplicable because the ICTY’s Statute explicitly extends the jurisdiction of the Tribunal to violations of the laws and customs of war, including the ‘employment of poisonous weapons and other weapons *calculated to cause unnecessary suffering*’.³⁶ This provision, notably, does not require that specific weapons are the object of an ad hoc treaty ban. However, the Committee, in stressing the absence of a DU weapons treaty ban, seems to condition the ‘unnecessary suffering’ principle to a requirement of a ban being in force. Although the jurisdiction of the International Criminal Court (ICC) is limited to cases in which specific weapons are forbidden by treaty,³⁷ there is no corresponding requirement in the ICTY Statute, and the Committee was wrong to act as though there was such a requirement.

The Committee appears to have been afraid of widening its inquiry and, because of such fears, it had no qualms about misinterpreting to the point of absurdity the Advisory Opinion of the ICJ in the *Legality of Nuclear Weapons* case. ‘Indeed’, the Committee observes, relying on the ICJ Advisory Opinion,³⁸ ‘even in the case of warheads and other weapons of mass-destruction — those which are universally acknowledged to have the most deleterious environmental consequences — it is difficult to argue that the prohibition of their use is in all cases absolute.’ This could even be understood to mean that according to the Committee’s view the humanitarian problems of Kosovo could have been solved through the use of nuclear warheads against FRY.

Leaving aside the specification that depleted uranium projectiles are labelled as conventional weapons and that ‘other weapons of mass destruction’ such as biological and chemical weapons have been outlawed by specific legal instruments, it is necessary to remind the members of the Review Committee that the ICJ affirmed that the rules and principles of IHL apply to nuclear weapons. The ICJ stated³⁹ that such weapons ‘would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law’. The ICJ abstained from concluding definitively ‘whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

³⁶ ICTY Statute, Article 3 (emphasis added).

³⁷ The solution adopted at the Rome Conference was first to limit war crimes in international armed conflict for use of illicit weapons to three specific hypotheses. They are: (1) ‘employing poison or poisoned weapons’; (2) ‘employing asphyxiating, poisonous or other gases and all analogous liquids, materials and devices’; (3) ‘employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions’. Moreover, a fourth very broad hypothesis was added: ‘Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international law of armed conflict ...’, but this appears as a mere declaration of good intent. In fact, following the sentence quoted above, there is added: ‘provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute by an amendment.’ See Benvenuti, *supra* note 35, at 10–11.

³⁸ Report, *supra* note 1, at para. 26.

³⁹ ICJ Reports (1996), at para. 105.

circumstance of self-defence, in which the very survival of a State would be at stake', an extreme circumstance clearly not applicable to Kosovo. Further comments are superfluous, except to add that the Foreign Affairs Select Committee of the UK House of Commons, after reviewing the Kosovo war, expressed doubt about the use of DU weapons and recommended that 'the Government set out their view of the circumstances in which it will be both acceptable and lawful for depleted uranium munitions to be used by the United Kingdom or its allies in conflicts involving British forces'.⁴⁰

2 Cluster Bombs

With regard to the use of cluster bombs, the Committee very rapidly concluded that there are no grounds here for a potential prosecution in the absence of specific treaty provisions prohibiting or restricting their use and in the absence of any indication that such weapons have been used by the Allied forces against FRY towns in the fashion of the 'Orckan rocket case' against Zagreb.⁴¹

However, these two grounds are insufficient to exclude the illegality of cluster bombs in other circumstances, if one evaluates them according to the traditional principles governing the use of weapons, in particular their use from aircraft flying above 15,000 feet. This is an altitude which makes it difficult to select accurately the military objectives in the targeted area, and to control properly the trajectory of the projectiles, in conformity with the principle of distinction. It is odd that the Committee did not have at least some doubts, as did some states participating in Operation Allied Force. The Foreign Affairs Select Committee of the UK House of Commons in its Report of 23 May 2000, after reviewing the Kosovo campaign, reached the following conclusion: 'We recommend that the UK Government consider carefully the experience of the use of cluster bombs in the Kosovo campaign to determine in future conflicts whether they are weapons which pose so great a risk to civilians that they fall foul of the 1977 Protocol and should not be used in areas where civilians live.'⁴² Furthermore, the Defence Select Committee of the UK House of Commons in its Report of 23 October 2000 on the UK's contribution to the bombing campaign concluded as follows: 'our major contribution to the bombing campaign was in the form of unguided cluster bombs — a contribution of limited military value and questionable legitimacy.'⁴³

⁴⁰ House of Commons, Foreign Affairs Select Committee, Fourth Report, 23 May 2000, at para. 151.

⁴¹ Report, *supra* note 1, at para. 27.

⁴² House of Commons, Foreign Affairs Select Committee, *supra* note 40, at para. 150.

⁴³ House of Commons, Defence Select Committee, Fourteenth Report, *supra* note 19, at para. 305. Note that over 50 per cent of the bombs dropped by the RAF were cluster bombs (*ibid.*, at para. 147). The main limitations of a cluster bomb is 'that it works most effectively when deployed by low flying aircraft (which also have to fly directly over the target)... A report of *Flight International*, purportedly based on [UK Ministry of Defence] operational analysis, suggested that only 31 per cent of cluster bombs hit their targets and a further 29 per cent cannot be accounted for' ('Kosovo Bombing Misses the Target, Says MoD Report', *Flight International*, 15–21 August 2000, at para. 148). 'The Secretary of State's claim that cluster bombs are "the most effective weapons" for an anti-armour ground attack task does not, we

C Target Selection

1 The Principle of Distinction and the Duty to Adopt Precautionary Measures

The Review Committee also dealt with the complex legal issues relating to ‘target selection’. First, the Committee calls the reader’s attention to the substance of the applicable law:

in combat, military commanders are required: (a) to direct their operations against military objectives, and (b) when directing 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. . . [T]he commanders deciding on an attack have the 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 (c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.⁴⁴

But it is a pity that, to this correct presentation of the law in force, the Committee adds a muddling ‘clarification’ which highlights again the vagueness of its approach to legal concepts:

attacks which are not directed against military objectives (particularly attacks directed against civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage *may constitute* the *actus reus* for the offence of unlawful attack under Article 3 of the ICTY Statute.⁴⁵

The above quotes leave no doubt that such attacks are committed wilfully: if we agree that the law is more than mere opinion, we have to say that the Committee should rather have affirmed very clearly that such attacks *must* be regarded as war crimes.

The reader’s confusion grows when the Committee subsequently explains:

a determination that inadequate efforts have been made to distinguish between military objectives and civilians and 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.⁴⁶

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

believe, apply to the circumstances of this campaign. At the very least, their reputation as an indiscriminate weapon risks international condemnation, undermining popular support for an action. The UK needs a more discriminatory anti-armour system in order to move to an early end to reliance upon recourse to these weapons in inappropriate circumstances’ (*ibid.*, at para. 150).

⁴⁴ Report, *supra* note 1, at para. 28.

⁴⁵ *Ibid.* (emphasis added).

⁴⁶ *Ibid.*, at para. 29.

this does not mean that they are generally adequate, so as to excuse violations occurring in a small number of cases. In practice, it is only when each attack is considered in its specific circumstances that it is possible to say whether or not all practicable precautions have been taken and whether or not the attack constitutes a breach of IHL. The concern deriving from the Committee's comment (a concern reinforced on reading the subsequent part of the report) is that, according to the view expressed, one could be induced to think that war crimes occur and should be prosecuted only if committed in the context of a plan or of a large-scale commission, when the inadequacy of precautionary measures is deliberate on the part of the warring party. This approach is inconsistent with the case law of the ICTY itself.⁴⁷

2 *The Notion of Military Objective*

Subsequently the Committee dwells upon the notion of 'military objectives' and accepts the widely shared definition contained in Article 52 of Additional Protocol I:

Where objects are concerned, the definition has two elements: (a) their nature, location, purpose or use must make an effective contribution to military action and (b) their total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time.⁴⁸

The Committee concludes that:

although the Protocol I definition of military objective is not beyond criticism, it provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks. . . The definition is . . . generally accepted as part of customary law.⁴⁹

The most sensitive aspect to clarify, according to the above definition, as the Committee explains, is the question of dual-use objects:

when the definition is applied to dual-use objects which have some civilian uses and some actual or potential military use (communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict.⁵⁰

In order to try to clarify the problem, the Committee quotes⁵¹ the opinion of Major General A.P.V. Rogers, former Director of British Army Legal Service, who, as I noted above, may not be the most appropriate source to quote.

Moreover, the Committee refers to the list of categories of military objectives proposed by the International Committee of the Red Cross (ICRC) in 1956,⁵² the 'Rules for the Limitation of Danger Incurred by Civilian Population in Time of War'; it is a

⁴⁷ See, in particular, Appeals Chamber Judgment of 15 July 1999, *Tadic* case (IT-94-1-A), at paras 285–286; Trial Chamber Judgment of 3 March 2000, *Blaskic* case (IT-95-14-T), at para. 798. See also the Separate Opinion of Judge Cassese to the Appeals Chamber Judgment of 26 January 2000, *Tadic* case (IT-94-1-A), at para. 13.

⁴⁸ Report, *supra* note 1, at para. 36.

⁴⁹ *Ibid.*, at para. 42.

⁵⁰ *Ibid.*, at para. 37.

⁵¹ *Ibid.*, at para. 38.

⁵² *Ibid.*, at para. 39.

pity to rely on a dated document which was written before the substantial contribution of the 1977 Protocols. But, what is more regrettable is the fact that the document never made it beyond the draft stage. It was never adopted because it lacked support at the 1957 International Red Cross Conference in New Delhi.⁵³ Nor has the draft ever been updated since then. However, even this outdated draft states that the lines and means of communication (railway lines, roads, bridges, tunnels and canals) are considered military objectives only if ‘of *fundamental* military importance’; furthermore, industries are considered military objectives only if ‘of *fundamental* importance for the conduct of war’.⁵⁴

After stating the above premises, the Committee, in order to describe the set of targets used during the Kosovo war, recalls that ‘at the NATO Summit in Washington on April 23, 1999, alliance leaders decided to intensify the air military campaign by expanding the target set to include military-industrial infrastructure, media, and other strategic targets’.⁵⁵ And again it quotes the NATO Internet Report, ‘Kosovo One Year On’, which described the targeting thus:

the air campaign set out to weaken the Serb military capabilities, both strategically and tactically. Strikes on tactical targets, such as artillery and field headquarters, had a more immediate effect in disrupting the ethnic cleansing in Kosovo. Strikes against strategic targets, such as government ministries and refineries, had long term and broader impact on the Serb military machine. The bulk of NATO’s efforts against tactical targets was aimed at military facilities, fielded forces, heavy weapons, and military vehicles and formations in Kosovo and southern Serbia. . . Strategic targets included Serb air defences, command and control facilities, Yugoslav military (VJ) and police (MUP) forces headquarters, and supply routes.⁵⁶

Finally, the Committee comments that:

most of the targets referred to in the quotations above are clearly military objectives. The precise scope of ‘military-industrial infrastructure, media and other strategic targets’ as referred to in the US statement and ‘government ministries and refineries’ as referred to in the NATO statement is unclear. Whether the media constitutes a legitimate target group is a debatable issue. If media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.⁵⁷

Again, the approach used by the Committee in this comment does not appear to be very consistent: the objects indicated as ‘unclear’ (industrial infrastructure, media, ministries, refineries) are not per se military objectives, they are under the protection of the principle of distinction; they lose that protection only if they are actually (not potentially) used at the time for military purposes. I should add that, in case of doubt whether a civilian object is being used to make an effective contribution to military action, it shall be presumed not to be so used.

⁵³ See F. Bugnion, *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre* (1994) 840–841.

⁵⁴ Emphasis added.

⁵⁵ Report, *supra* note 1, at para. 45.

⁵⁶ *Ibid.*, at para. 46.

⁵⁷ *Ibid.*, at para. 47.

3 The Principle of Proportionality and the Kupreskic Case

If an object is considered as a military target, any attack must nevertheless be subject to the principle of proportionality. The Committee gives a rather misleading example in its opening in order to signify the problems of the application of the principle: '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.' Such a case is not a problem of proportionality at all: a refugee camp is not per se a military object.

Leaving aside such nonsense, I agree that the evaluation of proportionality is not a simple task. An objective approach must be used: the reference by the Committee, in order to find an objective element, to the concept of the 'reasonable military commander' can be accepted.

What cannot at all be accepted is the Committee's way of evaluating the functioning of the principle of proportionality. The Committee explicitly rejects the statement of the ICTY in the *Kupreskic* Judgment.⁵⁸ The ICTY on that occasion held that:

in case of repeated attacks, *all or most of them falling within the grey area between indisputable legality and unlawfulness*, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.⁵⁹

The Committee, on the contrary, took the view that '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'.⁶⁰

First, as regards method, the task assigned to the Review Committee was the evaluation of certain belligerent conduct during the Kosovo war, in order to determine whether such conduct constituted 'probable cause' in order to submit it to the ICTY prosecution procedure. In carrying out that task, the Committee must not question the law as it is applied by the ICTY. According to the systematic organizational logic of the Tribunal, it would have been judicious for the Committee (whatever the individual opinions of its members) not to set aside the ICTY interpretation of the principle of proportionality in IHL: by doing so, the Committee acted *ultra vires*.

Furthermore, the Committee's view is founded on a misunderstanding of the ICTY's literal affirmation. In fact, the ICTY referred to attacks *falling within the grey area between indisputable legality and unlawfulness*, while the Committee referred to attacks *all of which are deemed to have been lawful*. This is no trivial difference: the ICTY's affirmation relates only to specific problematic behaviour, which can best be shown in the following example.

Depleted uranium projectiles could be said to be 'grey area' weapons (as the

⁵⁸ *Ibid.*, at para. 52.

⁵⁹ Emphasis added.

⁶⁰ Emphasis added.

Committee itself recognizes).⁶¹ Following the Committee's reasoning, one might say that if I conclude that the use of one DU projectile causes proportionally acceptable damage to the civilian population in a specific attack, then I also have to conclude that the use of 31,000 DU projectiles (each of them causing the same single and proportionally acceptable damage) is within the boundaries of lawfulness.

This mechanical conclusion may be doubted if one accepts the ICTY's reasoning, when the multiple use of such 'grey area' weapons appears to cause unbearable damage to civilians (and soldiers) because of the mysterious and often fatal illnesses they reportedly are likely to cause.⁶²

Finally, the Committee intentionally twists the ICTY's approach to the principle of proportionality as set out in the *Kupreskic* Judgment, in order to reach an inconsistent general conclusion: 'the Committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilians victims as against the goals of the military campaign.'

D *The Principle of Proportionality and How It Is Assessed*

According to this deviant approach, the Committee refers to the casualty figures of the Operation Allied Force bombing campaign, which appears to be approximately 500 civilians killed. Based on such a figure, the Committee draws the following general assessment:

during the bombing campaign, NATO aircraft flew 38,400 sorties, including 14,484 strike sorties. During these sorties, 23,614 air munitions were released... [I]t appears that approximately 500 civilians were killed during the campaign. [Therefore] these figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.

In fact, the Committee follows an approach (as I observed above) according to which an individual act which may amount to a war crime — as generally accepted and affirmed in IHL conventions and in ICTY's case law — only becomes relevant when it is committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

It is true that the Committee admits that 'all targets must meet the criteria for military objectives. If they do not do so, they are unlawful. A general label is insufficient.'⁶³ But the Committee gives just such a general label: '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.'⁶⁴ Thus, in the Committee's view, the requirement for the legitimacy of the attack is no longer the objectivity of the 'reasonable military commander', as one would expect: it is sufficient that the objects attacked are *perceived to be legitimate* by the attacking belligerent in order to exclude its responsibility.

⁶¹ Report, *supra* note 1, at para. 26. See the main text in section 3.B above, and *supra* note 33.

⁶² See also my observations at section 2.B above.

⁶³ Report, *supra* note 1, at para. 55.

⁶⁴ Emphasis added.

The following remark of the Committee follows from this reasoning:

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 and 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.⁶⁵

We are able to follow the reasoning up to here and we expect that the Committee is going to check if the verification of targets has been appropriately done. This is not the case. The Committee is content with a general label (moreover, in the absence of any proof): ‘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.’⁶⁶

First, we need to know from the Committee what happened in the *small minority of cases* where even specific and sporadic conduct may have amounted to a war crime. Secondly, it is a fact that modern technology was not so reliable during the Kosovo war. It is useful to quote on this point the Report of the Defence Select Committee of the UK House of Commons:

The most serious shortcomings in UK capabilities shown up by the air campaign was the lack of precision-guided weapons capable of being used in all weathers against static and mobile targets. RAF ground-attack aircraft are optimized for low-level attacks against static targets. At the outset of the Operation Allied Force we were told that the intention was for the RAF to use only precision-guided weapons. Bombing at medium altitude, however, meant that it was difficult to distinguish targets with the necessary certainty to avoid civilian casualties. More importantly, the RAF’s precision-bombing capability relied on a laser designation of targets, which could not be used through cloud cover. Although some in the Ministry of Defence (MoD) were clearly surprised at how much of an effect this would have on the RAF’s precision strike capability others were not. Poor weather and cloud cover persisted through the campaign — over two-thirds of the 78 days of the bombing campaign were affected by these conditions — so that laser designated weapons often could not be used. By the end of the campaign, precision-guided weapons had accounted for only 24 per cent of the weapons used by the RAF.⁶⁷

⁶⁵ Report, *supra* note 1, at para. 56.

⁶⁶ Emphasis added.

⁶⁷ House of Commons, Defence Select Committee, Fourteenth Report, *supra* note 19, at para. 140. And again: ‘In response to its difficulties experienced in delivering guided munitions, the RAF reactivated its ability to use unguided (“dumb”) bombs from medium altitude. Neither the requirement for precision attack nor the poor weather conditions in this part of Europe could have come as a surprise. Given that, it is cause for some concern that the ability of pilots to use “dumb” bombs accurately had to be reactivated. The RAF had to conduct trials *during the campaign* to establish the degree of confidence in the accuracy of gravity bombs, and pilots in the theatre were not trained for their use. . . . The MoD acknowledged that this form of attack was a suboptimal choice, and it is pursuing options to give it an all-weather precision capability. MoD witnesses nevertheless argued that the accuracy of “dumb” bombs is considerable and that it was sufficient to meet the stringent criteria of the rules of engagement against certain types of targets, though not all. We note a recent report stating that only 2 per cent of the 1000lb unguided bombs could be confirmed as hitting the target. Even accepting that a larger percentage may have hit the target but could not be confirmed as so doing, this is a distressingly low figure and at variance with the tenor of the evidence provided by the MoD. We were told that since there is less to go wrong with a “dumb

4 The Assessment of Specific Incidents

The Committee, after completing the evaluation of the general issues, turns to an assessment of five specific incidents: the five specific incidents which, in the Committee's view, are the most problematic:

- 1 the attack on a passenger train at the Grdelica Gorge on 12 April 1999;
- 2 the attack on the Djakovica convoy on 14 April 1999;
- 3 the attack on the Serbian radio and television station in Belgrade on 23 April 1999;
- 4 the attack on the Chinese Embassy on 5 May 1999; and
- 5 the attack on Korisa village on 13 May 1999.

A *The Attack on the Grdelica Gorge Bridge*

With regard to the attack on a civilian passenger train at the Grdelica Gorge, we learn that 'it is the opinion of the Committee that the bridge was a legitimate military objective',⁶⁸ but the Committee does not go on to explain the basis on which its opinion is founded. It is possible that the Committee considered that the reasoning of General Clark, NATO's Supreme Allied Commander for Europe, was sufficient: 'this was a case where a pilot was assigned to strike a railroad bridge that is part of the integrated communications supply in Serbia.'⁶⁹

The pilot, after hitting with a first bomb the train approaching the bridge, aware of the collateral damage already produced, targeted the bridge a second time (notwithstanding the presence in the zone of smoke and clouds which made visibility difficult),⁷⁰ again hitting the train which at that moment was on the bridge (an unforeseen event?). The recognized parameters for an evaluation of this event are the rules according to which 'those who plan or decide an attack shall . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated', and the rule according to which 'an attack shall be cancelled or suspended if it becomes apparent . . . that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁷¹

Was the pilot's conduct consistent with these parameters? It is significant that

bomb", the risk of collateral damage against certain targets may actually be lower. The key point of course is that their acceptability depends crucially on the type of target attacked, and in particular on the risk of collateral damage or casualties associated with such targets.' *Ibid.*, at paras 144–145. Moreover, at para. 178: 'At the outset of the campaign it was intended that all weapons used would be precision-guided: in fact the majority of weapons used were not.'

⁶⁸ Report, *supra* note 1, at para. 62.

⁶⁹ *Ibid.*, at para. 59.

⁷⁰ *Ibid.*, at para. 59.

⁷¹ Article 57(2)(a)(iii) and (b) of Protocol I.

‘the Committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO (Weapons System Officer)’. A reasonable person could have expected that the Committee should have looked more carefully into these facts,⁷² but inexplicably the conclusion is the following: ‘despite this, the Committee is in agreement that, based on the criteria for initiating an investigation . . . this incident should not be investigated.’ Moreover, the Committee observes that ‘in relation to whether there is information warranting consideration of command responsibility, the Committee is of the view that there is no information from which to conclude that an investigation is necessary into the criminal responsibility of persons higher in the chain of command’: but we know that NATO did not give information to the Committee on specific incidents and that the Committee has not spoken to those involved in directing or carrying out the bombing campaign.

B The Attack on the Djakovica Convoy

Similar shortcomings are present in the analysis of the attack on the Djakovica convoy. NATO, at first, denied its responsibility for the attack (attributing it to Yugoslav Migs) but was later forced by the evidence to acknowledge the facts. The Committee observes that NATO ‘claimed that although the cockpit video showed the vehicles to look like tractors, when viewed with the naked eye from the attack altitude they appeared to be military vehicles’.⁷³ Therefore, one can deduce that there was at least a doubt with regard to the military character of the target. Moreover, the Committee observes that ‘while there is nothing unlawful about operating at the 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’.⁷⁴ The fundamental elements of the case have been expressed with clarity by the Committee, and one might therefore expect an appropriate review. Unfortunately, without saying what is the basis for its conclusion (and remember that NATO did not give information to the Committee on specific incidents nor has the Committee spoken to those involved in directing or carrying out the bombing campaign), the Committee concludes as follows:

While this incident is one where it appears the aircrews 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.⁷⁵

This is an inadequate explanation, if one takes into account that the report

⁷² According to the Report of the ICRC jurist, quoted by Hazan, *supra* note 17, at 221: ‘Il est douteux que cette règle ait bien été respectée dans le cas concret, et la commission admet d’ailleurs avoir eu des doutes à ce sujet. On ne peut par conséquent que regretter que le procureur ait refusé de pousser plus avant son enquête.’

⁷³ Report, *supra* note 1, at para. 67.

⁷⁴ *Ibid.*, at para. 69.

⁷⁵ *Ibid.*, at para. 70.

assumes that the altitude of the aircraft played a negative role, that the pilot had contradictory indications with regard to the nature of the target and that, notwithstanding the doubts about the target, the pilot had accepted the high risk of error. In this regard, does the general duty to take precautions in the attack, as embodied in Article 57 of Protocol I, not have any meaning?

C *The Attack on the Serbian TV and Radio Station*

The bombing of the Serbian TV and radio station (RTS) in Belgrade⁷⁶ is discussed at length by the Committee. The Committee accepts that the TV station was attacked intentionally, and uncritically accepts the thesis advanced by NATO in press conferences — and denied by the FRY — according to which ‘the bombing of the TV studios was part of a planned attack aimed at disrupting and degrading the C3 (Command, Control and Communication) network’.⁷⁷

The Committee also takes into account that the attack ‘was also justified on the basis of the propaganda purpose to which it was employed’.⁷⁸ The supposed dual-use of the RTS broadcasting facilities leads the Committee into a discussion which remains — frankly speaking — nebulous, because of the vague language:

[If] the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, *the legal basis was more debatable*. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such ground alone *may not meet* the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by Additional Protocols. . . While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, *it is unlikely* that either these purposes would offer the ‘concrete and direct’ military advantage necessary to make them a legitimate military objective. . . NATO *believed* that Yugoslav broadcast facilities were ‘used entirely to incite hatred and propaganda’ and alleged that the Yugoslav Government had put all private TV and radio stations in Serbia under military control (NATO press conferences of 28 and 30 April 1999). . . At worst, the Yugoslav Government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime. . . The committee finds that if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality *might well be questioned* by *some* experts in the field of IHL.⁷⁹

After these confused and confusing remarks, which make it impossible to understand the opinion of the Committee about the legal regime of broadcasting

⁷⁶ On this incident, see the comment of A. Gidron and C. Cordone, ‘L’attaque contre les studios de la Télévision serbe’, *Le Monde diplomatique*, July 2000, 18–19.

⁷⁷ Report, *supra* note 1, at para. 72.

⁷⁸ *Ibid.*, at para. 74.

⁷⁹ *Ibid.*, at para. 76 (emphasis added). In the Report prepared by the ICRC jurist (quoted by Hazan, *supra* note 17, at 222) we read: ‘Le moins que l’on puisse dire c’est que, étant donné l’importance de la controverse publique sur cette affaire (sans parler de son importance intrinsèque), une enquête plus approfondie pour établir les faits et donc la nature de l’objectif militaire ou non des studios aurait été utile pour établir s’il y avait lieu ou non à procédure pénale.’

stations in armed conflict, the Committee comes up with an argument which could cut, in its opinion, all discussions: 'It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power.'⁸⁰

But the Committee's argument greatly complicates the problem, because from this remark it appears that the hitting of the RTS studios was not an unwanted, collateral effect of the attack. In fact, according to the Committee, the attack had two intentional goals: a primary military goal, and a secondary non-military goal. In other words, the civilian casualties as 'collateral damage' appear to be caused wilfully. After all, this deliberate 'collateral' infliction of civilian casualties is confirmed by the Committee's remarks about the 'effective advance warning' that 'shall be given of attacks which may affect the civilian population, unless circumstances do not permit'.⁸¹

The Committee notes that it could be possible that the number of casualties among civilians working at the RTS may have been increased because of NATO's apparent failure to provide clear advance warning of the attack, as required by Article 57(2). The Committee now tries to argue that black is white:

foreign media representatives were apparently forewarned of the attack. As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. . . Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians . . . it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

The responsibility of Yugoslav officials for not following the extremely surreptitious NATO warning is consistent only with the upturned realities of *Alice in Wonderland*.⁸²

The remaining part of the Committee's reasoning is focused on checking the compatibility of the attack with the principle of proportionality. The Committee observes that 'it appeared that NATO realized that attacking the RTS building would only interrupt broadcasting for a brief period. Indeed, broadcasting allegedly recommenced within hours of the strike, thus raising the issue of the importance of the military advantage gained by the attack *vis-à-vis* the civilian casualties incurred.'⁸³ The Foreign Affairs Select Committee and the Defence Select Committee of the UK

⁸⁰ Report, *supra* note 1, at para. 76.

⁸¹ Article 57(2)(c) of Protocol I.

⁸² According to Report of the ICRC jurist, this is a reasoning 'qui frise la perversité' (see Hazan, *supra* note 17, at 222–223).

⁸³ Report, *supra* note 1, at para. 78.

House of Parliament have expressed some doubts.⁸⁴ This is not the case, though, for the Committee: ‘The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident (see in this regard para. 52 above, referring to the need for an overall assessment of the totality of civilians victims against the goals of the military campaign)’.⁸⁵ ‘The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control building of the Yugoslav radio relay network which were “essential to Milosevic’s ability to direct and control the repressive activities of his army and special police forces in Kosovo” (NATO press release, 1 May 1999)’. In other words, in the Committee’s view, the civilian casualties caused by the specific attack on the RTS studios had to be watered down into the context of the entire war campaign against the C3 network. This means that a war crime is relevant only if committed as a part of a policy or as a part of a large-scale commission. Did the Committee at least take note of ICTY case law before proceeding with its unlikely theories?

D *The Attack on Korisa Village*

The review of the further two cases — the attack on the Chinese Embassy and the attack on Korisa village — is no more satisfactory. The reconstruction of the facts comes from NATO with no effort to be critical by comparing NATO’s account with different sources. Moreover, the link between the facts and the conclusion of not undertaking an investigation is not made clear by the Committee.

With regard to the attack on Korisa village, the Review Committee starts by observing that ‘much confusion seems to exist about this incident, and factual accounts do not seem to tally easily with each other’,⁸⁶ and passively accepts the version of ‘NATO spokespersons’ who ‘continued to affirm the legitimacy of this particular attack’.⁸⁷ The reader is not informed in any way about the precautionary measures provided for in Article 57 of the Protocol I, except that ‘according to NATO

⁸⁴ The Foreign Affairs Select Committee of the House of Commons observes: ‘The bombing of broadcasting stations has given rise to particular controversy. . . . But was it lawful to bomb a broadcasting station which clearly had civilian purposes and had civilians working in it? . . . We do not have evidence either to confirm or to deny the proposition that Serbian radio or television stations were being used for military purposes or to incite ethnic cleansing. Had the Chief of Defence Intelligence been permitted to give evidence to us, perhaps we would be in a better position to make a judgment on this important issue. We recommend that the Government set out the reasons for the attacks on broadcasting stations in order to make clear the legal justification’ (at para. 152). The House of Commons, Defence Select Committee, Fourteenth Report, states: ‘Quite apart from the bombing errors that were made and which might be expected in such an operation, the bombing of “leadership nodes” raised the problem that such targets were not unambiguously military. The attack on 23 April on the Belgrade TV station was very controversial. The tower was regarded both as a legitimate leadership target in such a coercive campaign and also, as an element of Serbian communications, a legitimate military target. But that cannot disguise the fact that it was also a civilian facility’ (at para. 122). ‘The attack on the TV station — though undoubtedly of some military worth — appears to have been only marginal in its effects on Serbian command and control capabilities’ (at para. 124).

⁸⁵ Report, *supra* note 1, at para. 78.

⁸⁶ *Ibid.*, at para. 86.

⁸⁷ *Ibid.*, at para. 86.

all practicable precautions were taken'.⁸⁸ Moreover, concerning 'some information indicating that displaced Kosovar civilians were forcibly concentrated within a military camp in the village of Korisa as human shields',⁸⁹ the only note of the Committee is that 'the Yugoslav military forces may thus be at least partially responsible for the deaths there', on the one hand forgetting that the behaviour of the attacked forces does not release the attacking forces from the respect of the principle of proportionality (according to the Committee, 'it appears that a relatively large number of civilians were killed'), and, on the other hand, omitting to ask the Prosecutor to undertake an in-depth investigation on the facts of Korisa for a particularly heinous crime allegedly committed by persons belonging to Yugoslav military forces.

E The Attack on the Chinese Embassy

With regard to the attack on the Chinese Embassy, the reconstruction of the facts, according to the Report of the Foreign Affairs Select Committee of the UK House of Commons,⁹⁰ is not as clear as is explained by the Review Committee which relies on US Government sources.

Moreover, the Review Committee underlines that NATO, and the US in particular, have accepted international 'inter-state' responsibility for hitting a clearly civilian object: 'The USA has formally apologized to the Chinese Government and agreed to pay US\$28 million in compensation to the Chinese Government and US\$4.5 million to the families of those killed or injured. The CIA has also dismissed one intelligence officer and reprimanded six senior managers. The US Government also claims to have taken corrective actions in order to assign individual responsibility and to prevent mistakes such as this from occurring in the future.'⁹¹

In other words, here the Committee reports the commendable behaviour of the responsible state which plainly accepts the consequences of its wrongful act according to the generally recognized rules on state responsibility. But the Committee does not explain the reason why, in addition to state responsibility (according to the Hague and Geneva Conventions a belligerent party shall be responsible for all acts committed by persons forming part of its armed forces and shall be liable to pay compensation), a

⁸⁸ *Ibid.*, at para. 89.

⁸⁹ An event denied by the Yugoslav authorities.

⁹⁰ At para. 154 we read: 'Critics have charged that NATO bombed the Embassy deliberately. John Sweeney reiterated to us allegations which appeared originally in an article he wrote jointly for *The Observer* on 17 October. Citing unnamed NATO sources, Mr Sweeney and his associates claimed that the Embassy was targeted by NATO because it was being used to transmit Yugoslav army (VJ) communications to Milosevic's forces in the wake of NATO's destruction of the VJ's own transmitters. In a subsequent article Mr Sweeney challenged the CIA's assertion that it has used outdated maps, maintaining that the correct coordinates for the Chinese Embassy were in NATO's air target computer at the Combined Air Operations Centre at Vicenza, Italy. Mr Sweeney pointed to the precision of the air strikes, which he says destroyed only the Embassy's communications facilities, as further evidence in support of his claim. Similar, but more detailed, written evidence was received from a Danish journalist, Mr Jens Holsoe.'

⁹¹ Report, *supra* note 1, at para. 84.

parallel criminal responsibility does not arise for the individual persons acting wrongfully. Certainly, it is not my intention to affirm that in the law of armed conflict the presence of a wrongful act of a state automatically brings about the individual criminal responsibility of the person committing such act (only the so-called ‘grave breaches’ of IHL are regarded as war crimes), but the Committee should have explained why in this case the parallel does not work. In fact, this could be an appropriate issue to submit to the evaluation of the ICTY.

5 Final Remarks: A Role for the European Court of Human Rights?

Having completed an examination of the report, for which the Prosecutor has accepted full responsibility, I do not have a specific final comment to add. One-sided attitudes, the vague use of legal concepts, the disregard for ICTY case law, the shortcomings in legal reasoning and in selecting relevant facts, and the reluctance to start in-depth investigations of its own, are the preamble for a document which is largely inadequate to its task.⁹² But I have to make a final criticism, to myself also: in fact, in coming to the end of my analysis, I have a feeling of dissatisfaction with it. I am aware that my comments are characterized by a regrettable move away from the proper ground of the conduct of the individual allegedly responsible for the commission of war crimes, to the ground of the conduct of the state allegedly responsible, at the international level, for violations of IHL: there is no clear-cut distinction between the two levels in my comments, and perhaps the second level is prevalent. I confess, it is a quite embarrassing confusion, because my comments relate to a report prepared by a committee working in the framework of an international criminal tribunal, that is to say an international body with the task of assessing individual positions, not in the framework of an inter-state tribunal (such as the ICJ) evaluating state positions. I apologize for this approach, but I realize that I have been led in this direction by the approach of the Review Committee itself and I have not been able to avoid this unwanted consequence while I was following its reasoning.

I will try to explain the reason for this outcome as follows. State responsibility has a wide scope because it includes all violations of IHL and, furthermore, it has a more ‘objective’ character; while individual responsibility has a narrower scope because it includes only ‘grave breaches’ of IHL and, furthermore, in this regard, the subjective element of the conduct is much more relevant. It is this latter ‘individual’ perspective which is of proper interest for the ICTY. But the Review Committee has focused mainly

⁹² According to Hazan, *supra* note 17, the confidential document prepared by the jurist of the ICRC concludes as follows: ‘Ni le TPI, ni la justice internationale en général, ni le droit international humanitaire ne sortent grandis du rapport de la commission établie par le Procureur du Tribunal pénal pour l’ex-Yougoslavie. . . Le clair parti pris dans l’établissement des faits, les approximations ou les erreurs juridiques en font un document peu crédible et indéfendable face à un juriste qui connaît bien le droit international humanitaire’ (Hazan, *supra* note 17, at 219).

on the first perspective, that of the state, so as to deny the international responsibility of the state as such (relying on the alleged obscurity of the law and on an alleged difficulty in obtaining evidence). In fact, the affirmation of state responsibility for violations of IHL is a precondition for the criminal responsibility of individuals. In order to ascertain such individual responsibility, it is necessary to determine in addition whether the violation of IHL can be regarded as a grave breach and whether the subjective element of the crime exists: these are investigations concerning individual behaviour, and the most appropriate body to do this is the ICTY. Therefore, the Committee has done its best to deny the international responsibility of the state as such, in order to achieve an *a priori* exclusion of the role of the ICTY in evaluating the positions of individuals. I may add that the plan of the Review Committee was shrewd, but that the poor results are in front of us. My only hope is that the final report of the Review Committee and its acceptance by the Prosecutor will not damage beyond repair the standing of the ICTY or undermine the promising outlook for international criminal justice generally.

With regard to the evaluation of the specific facts of the bombing campaign against the FRY, we cannot say that the matter is definitely closed. There are domestic courts with a very broad competence under various jurisdictional principles, including the universality principle. In fact, the District Tribunal of Belgrade, on 21 September 2000, sentenced, *in absentia*, some of the highest government authorities of NATO and NATO countries to 20 years' imprisonment, *inter alia*, for grave breaches of the Geneva Conventions and of the laws and customs of war: but I would have preferred by far that ICTY, rather than the jurisdiction of a state involved, had taken on the case.

Moreover, judicial criminal investigations have started in some countries with regard to the use of depleted uranium projectiles. Unfortunately, these national jurisdictions, in accomplishing their task on this legally sensitive matter, will not take advantage of the authoritative guidance of the ICTY's case law.

Perhaps, there are other jurisdictional *fora* for specific incidents, although not operative at the criminal level. In particular, the European Court of Human Rights has received an application⁹³ in which the plaintiffs allege, with regard to the attack on the RTS Belgrade studios, that there has been a violation of the rights to life and to freedom of expression by those states which are both parties to the European Convention on Human Rights (ECHR) and members of NATO.

Four brief comments may be made here. First, according to the European Court's case law, the concept of contracting parties' jurisdiction (embodied in Article 1 of the ECHR⁹⁴) extends to acts committed by state organs (including the military) outside the

⁹³ Application No. 52207/99, *Bankovic and Others*.

⁹⁴ Article 1 reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

national territory of that state.⁹⁵ This solution appears much more convincing if one reads Article 1 together with Article 15 (concerning the applicability of the ECHR in time of war — see the further comment below). But, even if one accepts a restricted concept of jurisdiction, linked to the territory of the state allegedly responsible, it is possible to consider that the illicit conduct involved may have been carried out in substantial part in the territory of at least some of the accused states.⁹⁶

Secondly, the European Court's competence cannot be rejected simply because the state parties to the ECHR were acting under the flag of NATO. In fact, on the one hand, the NATO system is very far from creating a true transfer of governmental powers: the conduct of the individual states remains largely autonomous.⁹⁷ Moreover, it is clear that NATO does not have a jurisdictional system of protection of human rights of its own (which may otherwise have been deemed, according to the European Court's jurisprudence, to be an adequate substitute for the European Court's judicial guarantee).⁹⁸

Thirdly, in the case under consideration, a principal issue to be determined will be whether the situation existing at the relevant time was such as to enable the respondent states to derogate, pursuant to Article 15(1) of the ECHR,⁹⁹ from certain ECHR obligations. It may be observed here that, if derogations to rights recognized by the ECHR were to be considered admissible at the relevant time (notwithstanding the absence of full information given to the Secretary-General of the Council of Europe of the measures taken and the reasons therefor, as required by Article 15(3)), this would be only on the condition that the derogated measures are not inconsistent with other

⁹⁵ On this aspect, see Condorelli, 'L'imputazione à l'Etat d'un fait internationalement illicite: solution classiques et nouvelles tendances', 189 *Recueil des cours* (1984-VI) 91 *et seq.* Condorelli observes that such extension is apt 'de réduire au minimum (si non éliminer) l'iniquité inhérente au fait que des comportements d'Etats dans ce domaine [i.e. human rights], illicites s'ils surviennent dans un lieu donné, soient à qualifier comme parfaitement licites lorsqu'ils surviennent ailleurs' (*ibid.*, at 91). See also Gaja, 'Art. 1', in S. Bartole, B. Conforti and G. Raimondi (eds), *Commentario alla Convenzione Europea dei diritti dell'uomo* (2001) 5–6.

⁹⁶ The European Court of Human Rights in the *Dozd and Janoushek v. France and Spain* case, ECHR (1992) Series A, No. 240, at para. 919, affirmed that the responsibility of the states concerned 'can be involved because of acts of their authorities producing effects outside their territory'.

⁹⁷ It is well known that NATO, when approached by entities such as the ICRC and Amnesty International asking for respect for IHL during the bombing campaign, rejected such steps and affirmed that member states are individually responsible for respecting IHL. In fact, NATO does not have a mechanism suitable for imposing respect for IHL and for assuring a common interpretation of IHL as between member states (see Gidron and Cordone, *supra* note 6, at 18).

⁹⁸ On this aspect, see Bultrini, 'Il controllo degli atti comunitari nella giurisprudenza degli organi di Strasburgo', *Comunicazioni e studi*, vol. 21 (1997) 83 *et seq.* in particular, pp. 309 *et seq.*; Jacqué, 'Communauté européenne et Convention européenne des droits de l'homme', in L.E. Pettiti, E. Decaux and P.H. Imbert (eds), *La Convention européenne des droits de l'homme* (2nd ed., 1999) 83 *et seq.*; Gaja, *supra* note 95, at 8–9; and P. De Sena, *La nozione di giurisdizione nei trattati sulla tutela dei diritti dell'uomo* (2000) 154 *et seq.*

⁹⁹ According to Article 15(1): 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law' (emphasis added). On this aspect, see Cataldi, 'Art. 15', in Bartole, Conforti and Raimondi, *supra* note 95, at 401 *et seq.*

obligations of international law, including with international humanitarian law. Moreover, with specific regard to the right to life, no derogation is allowed 'except in respect of deaths *resulting from lawful acts of war*'.¹⁰⁰ In other words, the European Court, in order to verify whether states have infringed the ECHR in situations in which IHL is applicable, has to verify if the states have abided by obligations of IHL.

Fourthly, I cannot avoid observing that Article 15 of the ECHR suggests a further comment with regard to the European Court's 'jurisdiction' that I have considered above. Article 15 states clearly that the ECHR is applicable — to some extent — in wartime. War is an exercise of sovereign power per se not limited to national territory; it is entirely normal that in time of war a belligerent state may extend its coercive 'jurisdiction' and control to the territory of the adversary country (moreover, in the specific case, one could say that this has happened through control of Yugoslav airspace). Therefore, it would be very improper to affirm that the ECHR in time of war is applicable only within the national territory of the state involved, i.e. that respect for the ECHR in time of war by a state party should be evaluated only with regard to sovereign coercive acts committed within the national territory, not with regard to similar coercive sovereign acts committed abroad. Article 15 does not contain any elements which would justify such a narrow and incoherent interpretation.

¹⁰⁰ Article 15(2) (emphasis added).