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MANIPULATING INTERNATIONAL CRIMINAL PROCEDURE: THE DECISION OF THE ICTY OFFICE OF THE INDEPENDENT PROSECUTOR NOT TO INVESTIGATE NATO BOMBING IN THE FORMER YUGOSLAVIA

Anthony J. Colangelo*

I. INTRODUCTION

With the establishment of the International Criminal Court, an in-depth understanding of how international criminal judicial bodies function proves essential to United States foreign policy and academic legal evaluation. With the "war on terrorism" underway, this understanding must come immediately. The reality of present geopolitical relations has consecrated international law as part of national law, including United States law. We should know what we face.

In her address to the United Nations Security Council on June 2, 2000, Carla Del Ponte, Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY), stated that she had decided not to open a criminal investigation into any aspect of NATO’s 1999 air campaign against the Federal Republic of Yugoslavia (FRY).1 A primary purpose of the investigation would have been to examine civilian casualties resulting from the campaign as a possible violation of international law.2 Ms. Del Ponte laid out the reasoning for the decision not to investigate in the Prosecutor’s Report on the NATO Bombing Campaign.3 Her controversial decision not to prosecute is tantamount to a judgment of not guilty. Indeed, a decision not to prosecute here can be as important, or more important, than a judicial decision in terms of licensing a certain degree of civilian death or "collateral

* J.D. Candidate, Northwestern University School of Law, 2003. I would like to thank Professor Anthony A. D’Amato and Professor Douglass Cassel for their suggestions.
2 Final Report, supra note 1.
3 Id.
damage4 and the tactical methodology permitting those casualties under international law.

This Comment's first argument will analyze the Prosecutor's legal reasoning under international law and probe the Office of the Independent Prosecutor's (OIP) choice and evaluation of the evidence under the criteria of the ICTY Statute. It will criticize Ms. Del Ponte's decision in light of the numerous reports and accusations submitted to the OIP by governmental and nongovernmental organizations pursuant to the ICTY Statute's directive. Through an evaluation of these factors, the analysis will attempt to discern the standard for war crimes that the OIP applied to NATO and thereby answer the question: Did the Prosecutor give NATO a free pass under the international law governing armed conflict? That is, the Comment will first examine whether the Prosecutor uniformly applied the correct international legal standards to NATO bombings, whether the OIP ignored or minimized important evidence, and whether the Prosecutor took a one-sided NATO approach to the evidence. The discussion will then conclude that the OIP failed to present a convincing legal argument that no investigation was warranted. The second area of discussion will suggest that even though the evidence within the control of OIP indicates NATO war crimes violations, therefore providing grounds for an investigation, the OIP decision not to investigate may have been correct given the economic and political reality in which the ICTY was functioning. This Part will illustrate that despite evidence pointing to NATO violations of international law, the alliance actively implemented a policy of adherence to international legal norms. After presenting this program of compliance, the section will outline the severe resource restrictions with which the ICTY and OIP were faced in every decision to investigate, indict, and prosecute, as well as the political influences that accompanied these problems. The discussion will ultimately conclude that regardless of political influence, an OIP investigation into NATO conduct would have blocked important investigations and prosecutions involving war crimes atrocities of exceptional magnitude compared to the NATO mistakes—thus legitimating, but also necessarily limiting, the OIP decision within the ICTY reality.

The Prosecutor was forced to reach a conclusion5 and was faced with several choices: she could have absolved NATO of war crimes, she could have investigated and even prosecuted NATO, or she could have taken a middle of the road approach and condemned NATO without investigating its actions. She chose the last option.6 And although her decision in the end was correct, her means in arriving at this decision worked to enfeeble international criminal law and muddied the prescriptive boundary lines for prosecuting war crimes regarding innocent civilian death.

4 "Collateral damage" is the commonly used epithet for the unintended loss of civilian life in armed conflict.
5 Final Report, supra note 1, at para. 2.
6 Id.
II. BACKGROUND

In mid-1998, acting in response to reports of widespread massacre by the FRY against ethnic Albanians in Kosovo and the mass exodus of Albanians from their homes, the United Nations Security Council ordered the FRY to stop its assault on civilians. NATO made preparations for a military air campaign to ensure compliance with the Security Council demand and instigated settlement agreements with the FRY. In March of 1999, after the second of two attempts to reach an agreement with the FRY had failed, NATO initiated bombings against the FRY forces in Kosovo and elsewhere in Serbia. The NATO bombing campaign was designed to compel the FRY government to agree to stop its policy of ethnic cleansing. While the United Nations Security Council had not supported the NATO member-nations’ proposal to use armed force to pressure the FRY government into compliance, NATO maintained that the bombing demonstrated a “commitment to the full implementation of United Nations Security Council Resolution 1244.” However, during the period of NATO bombing from March to June 1999, the FRY government intensified its program of ethnic cleansing, murdering approximately 3,000 civilians. The NATO bombing itself is estimated to have claimed around 500 civilian lives.

Article 18 of the ICTY Statute governs prosecutorial initiatives. It provides:

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.

Pursuant to Article 18.1, numerous governmental and nongovernmental studies and requests seeking investigation into the legality of NATO’s conduct during the bombing campaign have been submitted to the OIP. Among these reports are:

10 Final Report, supra note 1, at para. 3 (emphasis added).
11 Civilian Deaths, supra note 9; “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force, AMNESTY INT’L REPORT 30 (June 2000) [hereinafter Collateral Damage] (describing in detail those instances which provide evidence of NATO war crimes violations); Federal Republic of Yugoslavia Ministry of Foreign Affairs, NATO Crimes in Yugoslavia (White Book) [hereinafter FRY White Book] (same).
public documents made available by NATO, the US Department of Defense and the British Ministry of Defence, . . . documents filed by the FRY before the ICJ [International Court of Justice], a large number of other FRY documents, and also the two volume compilation of the FRY Ministry of Foreign Affairs entitled *NATO Crimes in Yugoslavia (White Book)*. . . .

The Prosecutor’s office also examined “various documents submitted by Human Rights Watch, including a letter sent to the Secretary General of NATO during the bombing campaign, a paper on *NATO’s Use of Cluster Munitions*, and a report on *Civilian Deaths in the NATO Air Campaign,*” as well as “an Amnesty International Report entitled ‘Collateral Damage’ or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force.’”

After considering these governmental and NGO reports, the OIP decided not to open an investigation into the legality of NATO conduct during the Kosovo bombing campaign.

III. INTERNATIONAL LAW: MEASURING THE CAMPAIGN

NATO’s intervention proves hostile toward two fundamental tenets of international law regarding armed conflict: *jus ad bellum* (when force may be used) and *jus in bello* (how that force may be used). The Prosecutor correctly limited her analysis to issues of *jus in bello*, as the ICTY lacked jurisdiction to adjudicate matters of *jus ad bellum* and because “the legitimacy of the recourse to force by NATO is a subject before the International Court of Justice.”

Despite the Prosecutor’s conclusion not to investigate *jus in bello* violations, some examples of NATO conduct present serious questions under established norms of international law concerning the methods and policies utilized by NATO forces during the bombing and the loss of civilian life that resulted from such usage. Specifically, NATO’s choice of weaponry, system of target selection, and calculus of military advantage versus civilian casualty have come under heavy criticism.

12 Final Report, supra note 1, at para. 6.
13 Id.; *Civilian Deaths*, supra note 9; *Collateral Damage*, supra note 11; *FRY White Book*, supra note 11.
14 Final Report, supra note 1, at para. 6.
15 Id.; at paras. 4, 33.
Entrenched rules of international law mandate that armed forces take serious measures to protect against civilian casualties. These rules are set forth in a comprehensive manner in Protocol I Additional to the Geneva Conventions of 1949 under the Protection of Victims of International Armed Conflicts.\(^\text{17}\) Although Protocol I, adopted in 1977, has not been signed by three NATO members, France, Turkey, and the United States, the Protocol has become incorporated into the body of customary international law.\(^\text{18}\) As part of customary international law,\(^\text{19}\) the rules set out in this Protocol are binding upon all States, and even nonsignatories, such as the United States, fully recognize their obligations under its criteria concerning loss of civilian life in armed conflict.\(^\text{20}\) In fact, NATO assessed the success of the Kosovo mission in large part according to the Protocol’s *jus in bello* criteria of proportionality and discrimination relating to noncombatant immunity.\(^\text{21}\) Moreover, Article 3 of the ICTY Statute governing the Tribunal’s subject matter jurisdiction establishes jurisdiction over violations of the laws or customs of war embodied in the Additional Protocol I.\(^\text{22}\)

Article 48 to Protocol I outlines the cardinal international law doctrine requiring combatants to distinguish between military targets and civilians.\(^\text{23}\) Article 51(2) additionally warns that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”\(^\text{24}\) Further, Article 52(2) considers “military objectives” to be “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.”\(^\text{25}\)

\(^\text{17}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I].


\(^\text{19}\) In order to constitute customary international law, the custom must have taken hold through (1) state practice and (2) *opinio juris*, or “because the custom is believed to be binding.” J.L. Briery, *The Law of Nations: An Introduction to the International Law of Peace* 51–52 (6th ed. 1963).


\(^\text{23}\) Protocol I, supra note 17, at art. 48. Article 48 states: “In order to ensure respect for and protection of the civilian population and civilian objects, the 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.” *Id.*

\(^\text{24}\) *Id.* at art. 51.

\(^\text{25}\) *Id.* at art. 52.
The Protocol does not restrict its language to direct attacks on civilians. Rather, it looks to ensure civilian safety by forbidding indiscriminate attacks as well. Article 51(4) defines such illegitimate attacks to be “of a nature to strike military objectives and civilians or civilian objects without distinction.” Article 51(5)(a) further articulates an indiscriminate attack as “[a]n 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.”

Just as important, however, is Article 51(5)(b)’s reference to another fundamental principle of the international law governing armed conflict and the prevention of civilian loss of life: the principle of proportionality. Under this principle, civilian casualties must not outweigh the military objective or advantage obtained through the attack. According to the Protocol, an attack would violate this principle if 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.” This rule under Protocol I requires military command to engage in a calculation of the possible loss of civilian life.

According to Article 85 of Protocol I, a violation of the principles relating to protection of civilian life constitutes a “grave breach” of international law and is therefore considered a war crime. To ensure implementation of international law tenets protecting civilian life, the Protocol constructs a high precautionary standard for combatants to obey. Article 57 provides that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The Article then goes on to state, in detail that:

With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . . .
(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) . . . ;

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.\(^{33}\)

In fact, reflecting the language of the Protocol, the OIP states that Article 3 of the ICTY Statute requires commanders:

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.\(^{34}\)

Not surprisingly, reports from the Ministry of Foreign Affairs of the Federal Republic of Yugoslavia and the FRY White Book Report present scathing evidence of NATO war crimes during the bombing.\(^{35}\) Perhaps more interesting, however, is Amnesty International’s official statement concluding that “NATO forces violated the laws of war leading to cases of unlawful killing of civilians during the Kosovo conflict.”\(^{36}\) Also, in its report *Civilian Deaths in the NATO Air Campaign*, Human Rights Watch ambivalently stated: “In its investigation Human Rights Watch has found no evidence of war crimes. The investigation did conclude that NATO violated international humanitarian law.”\(^{37}\) Human Rights Watch later stated:

\(^{33}\) Id.

\(^{34}\) Final Report, supra note 1, at para. 28.


\(^{37}\) See *Civilian Deaths*, supra note 9. International humanitarian law is the law of armed combat designed to humanize war. This type of international law can be distinguished from international human rights law, which deals with the relations between State governments and their citizens.
We found that 500 civilians were killed and 90 targets were selected inappropriately because they were civilian targets. We concluded that these incidents, which violated the laws of war, did not, however, rise to the more serious level of "grave breaches" or war crimes that the tribunal is empowered to prosecute.\(^{38}\)

Despite these reports, Ms. Del Ponte declined to investigate. Her decision led international jurists to charge Ms. Del Ponte with flagrant partisanship and to condemn her decision not to open an investigation as "an inexcusable failure . . . irreparably discrediting the work of your tribunal [ICTY]."\(^{39}\)

In evaluating potential criminal conduct in the territory of the former Yugoslavia, the OIP committee maintains that it has universally applied the same criteria to all parties. The OIP outlined these criteria in its report:

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? And

2. Upon the reasoned evaluation of the information by the 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?\(^{40}\)

With regard to the following analysis, it is important to keep in mind that neither the Prosecutor nor the Tribunal had taken a conservative legal view of these criteria when bringing an indictment before the question of a NATO investigation surfaced.\(^{41}\) In fact, members of the ICTY Legal Officers have maintained that "objections to indictment based upon a disagreement with the facts as alleged in the indictment" do not constitute a valid defense, and that the ICTY Statute was designed to "account[] for the inevitable variations of proof at trial."\(^{42}\)

IV. THE LEGITIMACY OF THE LEGAL ANALYSIS IN THE FINAL REPORT

The OIP examined the civilian casualties resulting from the NATO attack according to standards of target selection, military objective, and proportionality that are ingrained in customary international law (via Protocol I) and incorporated into Article 3 of the ICTY Statute.\(^ {43}\) Against this customary international legal framework and whatever corollary appeared in the ICTY Statute, the Prosecutor’s report discussed the specific incidents

\(^{38}\) Id. (emphasis added).


\(^{40}\) Final Report, supra note 1, at para. 5.

\(^{41}\) Keegan & Mundis, supra note 22, at 128–29.

\(^{42}\) Id. at 131–32.

\(^{43}\) Final Report, supra note 1, at paras. 14–56; see also Expert Report, supra note 18, at para. 161.
that it felt were most symptomatic of war crimes violations. This Part will reexamine those same incidents using the same evidentiary sources that the OIP relied upon in its analysis.\textsuperscript{44} This examination will reveal critical deficiencies in the OIP legal analysis leading to its ultimate conclusion not to pursue an investigation.

A. The Attack on a Civilian Passenger Train at the Grdelica Gorge

On April 12, 1999, a NATO aircraft fired two laser-guided bombs at the railway bridge over the Grdelica Gorge.\textsuperscript{45} Both laser-guided bombs hit a passenger train crossing the bridge. The attack occurred at approximately 11:40 a.m. According to the OIP report, "at least ten people were killed in this incident."\textsuperscript{46} The OIP report recounts how

\begin{quote}
[after launching the first bomb, the person controlling the weapon, at the last instant before impact, sighted movement on the bridge. The controller was unable to dump the bomb at that stage and hit the train, the impact of the bomb cutting the second of the passenger coaches in half. Realising the bridge was still intact, the controller picked a second aim point on the bridge at the opposite end from where the train had come and launched the second bomb. In the meantime the train had slid forward as a result of the original impact and parts of the train were also hit by the second bomb.\textsuperscript{47}
\end{quote}

\textsuperscript{44} This Part will also mirror the Final Report in the chronological ordering of each particular incident as it appears in the OIP discussion.

\textsuperscript{45} Final Report, supra note 1, at para. 58.

\textsuperscript{46} Id. At the outset, this number itself is curious because both the Human Rights Watch account of the incident and the FRY White Book Report maintain that around twenty people were killed. Both reports list the names and ages of at least twelve of the casualties, and both note that the charred remains of at least five other unidentifiable passengers were found. See FRY White Book, supra note 11 ("Bridges and Transportation"); Civilian Deaths, supra note 9, at app. A ("Incidents Involving Civilian Deaths in Operation Allied Force"). For instance, the Human Rights Watch account describes how:

\begin{quote}
[it] in the evening, a four carriage civilian passenger train (No. 393) traveling the Belgrade to Ristovac line (on the Macedonian border) is hit as it crosses over the Grdelica Klisura gorge (Bistrica) bridge on the Juzna Morava river near Leskovac in southeastern Serbia, killing twenty. Killed are: Branimir Stanjanovic (6), Ivan Markovic (26), Ana Markovic (26), Jasmina Veljikovic (28), Simeon Todorov (31), Zoran Jovanovic (35), Petar Mladenovic (37), Verka Mladenovic (37), Divna Stanjanovic (41), Vidosav Stanjanovic (45), Radomir Jovanovic (45), and Svetomir Petkovic (65). Five others' remains are unidentified, and three persons are reported missing. Tanjug reports that about fifty civilian passengers are killed in the attack.
\end{quote}

\textsuperscript{47} Id. This language is strikingly similar to the NATO explanation of the event which the Final Report quotes immediately after its description "General Wesley Clark, NATO's Supreme Allied Commander for Europe and is here reprinted in full:

\begin{quote}
[This was a case where a pilot was assigned to strike a railroad bridge that is part of the integrated communications supply network in Serbia. He launched his missile from his aircraft that was many miles away, he was not able to put his eyes on the bridge, it was a remotely directed attack. And as he stared intently at the desired target point on the bridge, and I talked to the team at Aviano who was directly engaged in this operation, as the pilot stared intently at the desired aim point on the bridge and worked it, and worked it and worked it, and all of a sudden at the very last instant with less than a second to go he caught a flash of movement that came into the screen and it was the train coming in.
\end{quote}
Before beginning a legal analysis of the Grdelica Gorge incident and the incident of the attack on the Djakovica Convoy which follows, it is essential to elucidate the OIP’s misapplication or nonapplication of the mens rea standard supplied under the ICTY Statute for war crimes. In the Final Report, the OIP carefully instructs that in order to establish an unlawful attack under the ICTY Statute, the mens rea requirement of recklessness must be met, and Article 3 established the test against which such recklessness would be measured. The OIP Report’s focus on mens rea, however, proves problematic for two reasons. First, it is unclear to what extent the Prosecutor actually integrated a mens rea requirement into its deliberations of what indictments to pursue. Evidence suggests that the mens rea requirement enjoyed little or no clout in ICTY evaluations of whether indictments were sound. That is, the Trial Chambers did not consider a lack of mens rea evidence an impediment to pursuing an indictment. Second, it appears that the OIP Report continually misapplied the mens rea standard of recklessness by transposing an inconsistent, and indeed, more difficult-to-prove standard of deliberateness in its place with regard to NATO conduct. This subpart will deal primarily with the latter problem.

Accepting that the bridge was a legitimate military objective, two important issues surface regarding the attack. The first issue is why NATO had no knowledge of, and failed to detect the civilian passenger train that

Unfortunately he couldn’t dump the bomb at that point, it was locked, it was going into the target and it was an unfortunate incident which he, and the crew, and all of us very much regret. We certainly don’t want to do collateral damage.

The mission was to take out the bridge. He realised when it had happened that he had not hit the bridge, but what he had hit was the train. He had another aim point on the bridge, it was a relatively long bridge and he believed he still had to accomplish his mission, the pilot circled back around. He put his aim point on the other end of the bridge from where the train had come, by the time the bomb got close to the bridge it was covered with smoke and clouds and at the last minute again in an uncanny accident, the train had slid forward from the original impact and parts of the train had moved across the bridge, and so that by striking the other end of the bridge he actually caused additional damage to the train.”

Final Report, supra note 1, at para. 59 (quoting Press Conference, NATO HQ, Brussels (Apr. 13) [hereinafter Press Conference, NATO HQ, Brussels]).

48 See infra Part IV.B.
49 Final Report, supra note 1, at para. 10.
50 For instance, one Legal Officer in the ICTY Office of the Prosecutor has written that
51 In the course of rendering their decisions with regard to the form of indictments, the Trial Chambers have also determined what are not appropriate defence objections to the form of the indictment. Principal among those are objections to the indictment based upon . . . assertions that mens rea must be proven in order to establish the existence of a reasonable suspicion.

Keegan & Mundis, supra, at 22, at 131–32.
52 Although the standard of “deliberateness” proves inconsistent with the recklessness standard set forth in paragraph 10 of the Final Report, the deliberateness standard could be understood as “willfulness”: the mens rea standard that the Geneva Conventions, Additional Protocol I utilizes. Protocol I, supra note 17. Indeed, it is mysterious that the OIP chose to use recklessness instead of the customary willfulness standard. And, despite the author’s efforts, he could not discover what prompted the OIP’s novel use of the standard in paragraph 10, or from where the recklessness standard even came.
was approaching the bridge at the time the bombs were launched.\textsuperscript{53} The Final Report responds to this question by first asserting that "[i]t does not appear that the train was targeted \textit{deliberately}."\textsuperscript{54} However, even though the \textit{mens rea} standard relating to protection of civilian life turns on recklessness, not deliberateness, the Report mistakenly builds its analysis of this incident upon the foundation of a deliberateness standard.

The OIP discussion begins by quoting the explanation given by NATO's Supreme Allied Commander for Europe, General Wesley Clark. Clark insists that the train appeared "at the very last instant" and too late for the pilot to dump the bomb.\textsuperscript{55} Citing NATO videotape that demonstrated the speed at which the attack transpired, the Final Report concluded that the period of time in which the person controlling the bomb could have reacted was very short.\textsuperscript{56} Interestingly, the OIP reached this finding over evidence which exposed:

that this video was shown at three times speed, giving the impression to viewers that the civilian train was moving extremely fast. According to press reports, the United States Air Force attributed the speeded-up film to a technical fault... they did not consider it useful to publicly disclose this information after it was uncovered.\textsuperscript{57}

Here, the OIP relied too heavily on NATO evidence and should have questioned the validity of the tape and NATO's account of the incident through an investigation.

Nonetheless, assuming the pilot did not have ample time to dump the bomb before it hit the passenger train, another problem remains. The question of why NATO chose to destroy the bridge in mid-morning, and why it had no knowledge that there was or would be a passenger train approaching, still stands. NATO surely understood that the pilot would have an extremely limited view and little time to react should a train appear. In fact, this was essentially NATO's defense. Yet, it appears that NATO took unsatisfactory measures to make sure that unnecessary collateral damage would not result from the attack. According to Amnesty International,

NATO does not appear to have taken sufficient precautionary measures to ensure that there was no civilian traffic in the vicinity of the bridge before launching the first attack. The attacking aircraft—or another aircraft—could have overflown the area to ascertain that no trains were approaching the bridge. Had it done so, it might have been able to wait until the train had crossed before launching the attack.\textsuperscript{58}

Under the ICTY Article 3 standard, NATO's failure to take any steps to protect against civilian loss of life could be considered "reckless" within the purview of Article 57 of Protocol I, which demands that combatants:

\begin{footnotes}
\item[53] \textit{Final Report}, supra note 1, at paras. 59–62.
\item[54] \textit{Id.} at para. 59 (emphasis added).
\item[55] \textit{Id.}
\item[56] \textit{Id.}
\item[57] \textit{Collateral Damage}, supra note 11, at 30.
\item[58] \textit{Id.} at 33.
\end{footnotes}
do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and . . . but are military objectives . . . [and] take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.59

Even more troublesome are the accounts included in the FRY White Book Report concerning this NATO bombing incident. An official memo based on eye-witness evidence states: “On April 12, 1999, at about 11:39 a.m., the NATO aggressor launched an attack with three warplanes on the above mentioned bridges. The first plane flew over the bridges, the second one fired two missiles hitting the railway bridge and the passenger train on it . . . .”60 Hence, according to the FRY White Book version, a NATO plane flew ahead to survey the target and decided to launch the bombs anyway.

Despite evidence presented in both the Amnesty International and FRY White Book reports pointing to either the reckless or intentional destruction of civilian life in violation of international norms, the Final Report of the OIP failed to address the issue of NATO’s legal responsibility to take precautionary measures. Rather, the Final Report simply concludes that “[t]he passenger train was not deliberately targeted.”61 The OIP thoroughly discards the legal standard it had previously announced in the same report. In the OIP’s own words, Article 3 of the ICTY Statute unequivocally imposes criminal liability when combatants act “recklessly,” not deliberately.62 NATO’s failure to look to see if there was a civilian train approaching a railway bridge at 11:40 a.m. before firing missiles into the bridge could be deemed reckless under the OIP’s own standard.

The second issue concerns the conduct of the pilot, who, after he had already bombed the train once, decided to circle around and launch another bomb hitting the train a second time. The OIP Report cited General Clark’s description of the event in its evaluation of the incident:

The mission was to take out the bridge. He [the pilot] realised when it had happened that he had not hit the bridge, but what he had hit was the train. He had another aim point on the bridge, it was a relatively long bridge and he believed he still had to accomplish his mission, the pilot circled back around. He put his aim point on the other end of the bridge from where the train had come, by the time the time the bomb got close to the bridge it was covered with smoke and clouds and at the last minute again in an uncanny accident, the train had slid forward from the original impact and parts of the train had moved across the bridge, and so that by striking the other end of the bridge he actually caused additional damage to the train.63

Significantly, in its report, upon which the OIP relied to reach its conclu-

59 Protocol I, supra note 17, at art. 57.
60 FRY White Book, supra note 11 (“Bridges and Transportation”).
61 Final Report, supra note 1, at para. 62 (emphasis added).
62 Id. at para. 5.
63 Id. at para. 59 (citing Press Conference, NATO HQ, Brussels, supra note 47) (emphasis added).
sions, Amnesty International had interpreted this statement not as a legitimate answer for the pilot’s conduct, but rather as an inadvertent admission of guilt. The organization claimed,

NATO’s explanation of the bombing—particularly General Clark’s account of the pilot’s rationale for continuing the attack after he had hit the train—suggests that the pilot had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties. This would violate the rules of distinction and proportionality.  

In other words, that the pilot had full knowledge that a train was on the bridge, yet proceeded to launch bombs to destroy the bridge in order to fulfill his mission, could constitute a violation of Protocol I Article 57.

The OIP Report even admits that

[ t]he 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 . . . . Despite this, the committee is in agreement that, based on the criteria for initiating an investigation, this incident should not be investigated.  

The criteria, which in sum require that the “prohibitions” alleged are sufficiently well established violations of international humanitarian law, and that the information establishing the “prohibitions” is credible, seem easily satisfied here. In short, the OIP relied upon the damning Amnesty International report, quoted verbatim NATO statements which evidenced conduct inimical toward a codified rule of international law, and even proclaimed that the committee itself was divided as to whether the pilot’s conduct was reckless (and therefore in violation of international law), and still failed to find sufficient evidence to pursue an investigation. One would think that a divided committee would seek to resolve its own internal divisions through, at least, an investigation into the event in question. As a legal matter, the OIP decision not to pursue an investigation here was clearly premature.

B. The Attack on the Djakovica Convoy

In describing the NATO attack on a convoy of civilian refugees near Djakovica, the OIP Report qualifies its analysis by explaining that the “facts concerning this incident are difficult to determine,” but concludes that “[t]otal casualty figures seem to converge around 70–75 killed with approximately 100 injured.” The OIP Final Report recounts the incident utilizing the FRY White Book version:

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64 Collateral Damage, supra note 11, at 33 (emphasis added).
65 Final Report, supra note 1, at para. 62 (internal citation omitted).
66 Id. at para. 5.
67 Id. at paras. 62–63.
68 Id. at para. 63.
On April 14, 1999 [ . . . ] on the Djakovica-Prizren road, near the villages of Madanaj and Meja, a convoy of Albanian refugees was targeted three times. Mostly women, children and old people were in the convoy, returning to their homes in cars, on tractors and carts. The first assault on the column of over 1000 people took place while they were moving through Meja village. Twelve persons were killed on that occasion. The people from the convoy scattered around and tried to find shelter in the nearby houses. But NATO warplanes launched missiles on those houses as well, killing another 7 persons in the process. The attack continued along the road between [the] villages [of] Meja and Bistrazin. One tractor with trailer was completely destroyed. Twenty people out of several of them on the tractor were killed. In the repeated attack on the refugee vehicles, one more person was killed. In the discussion that follows this description, the OIP pays lip service to its obligation to “[a]ssum[e] the facts most appropriate to a successful [NATO] prosecution” by assuming, then misweighing, or not weighing at all, the facts according to the international principles embodied in Article 3 of the ICTY Statute. First, while the OIP asserts consequential and, indeed, inculminating evidence concerning NATO’s conduct during this raid, it wholly neglects an adequate evaluation of this evidence and effectively circumvents those rules of international humanitarian law it seeks to uphold.

Second, the OIP disregards important information presented in both the Human Rights Watch and Amnesty International reports concerning NATO’s failure to meet the accepted standard of military conduct. Pursuant to Articles 48, 51, and 52 of the Additional Protocol I, international law dictates that combatants must take extensive steps to distinguish between civilian and military targets. International law is so protective of civilian life that Article 50(3) of the Additional Protocol I goes so far as to state that “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.” Thus, even if the convoy had been military but had included civilians, NATO could not have legitimately attacked it without calculating its military advantage versus potential collateral damage. Again, Article 3 of the ICTY Statute unambiguously prescribes recklessness as the standard against which these precautionary necessities must be measured. Therefore, if NATO was reckless in its military target assessment and such recklessness resulted in the bombing of a
civilians dead and approximately one hundred injured, NATO would have breached international law.\textsuperscript{76}

The OIP Report notes: "NATO confirmed that the aircraft had been flying at an altitude of 15,000 feet (approximately 5 km) and that, in this attack, the pilots had viewed the target with the naked eye rather than remotely..."\textsuperscript{77} NATO itself 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.\textsuperscript{78}

NATO's high-altitude bombing technique was roundly criticized as creating "an asymmetric air campaign [that] routinely gave more weight to the protection of Allied military than to that of Yugoslavian civilians."\textsuperscript{79} NATO has presented no explanation that responds adequately to this criticism.\textsuperscript{80} Also significant is the fact that the bombings commenced at 11:10 a.m. and continued until approximately 1:00 p.m., constituting almost two full hours of attack.\textsuperscript{81} The OIP Report further notes NATO's doubt during the attack as to whether the convoy was civilian or military in nature.\textsuperscript{82} This doubt eventually led to NATO "suspending attacks until the target could be verified."\textsuperscript{83} In short, NATO pilots made naked-eye evaluations of a convoy 15,000 feet below them without using other identifying equipment, dropped bombs on the convoy for two hours without really knowing whether the convoy was civilian or military in nature, and then when doubt was raised as to the nature of the convoy, suspended the attack. The OIP Report chose to cite the Human Rights Watch Report here in discussing the altitude of the NATO bombing and the subsequent decision to halt the at-

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\textsuperscript{76} Ironically, the refugees that NATO killed in this bombing were precisely those people who NATO was trying to save: ethnic Albanian refugees. See Collateral Damage, supra note 11, at 35; see also THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 181 (Oxford Univ. Press 2000) ("The high altitude tactic... does weaken the claim of humanitarianism to the extent that it appears to value the lives of the NATO combatants more than those of the civilian population in Kosovo and Serbia, and especially the lives of the Kosovar Albanians that it was trying to protect.").

\textsuperscript{77} Final Report, supra note 1, at para. 67.

\textsuperscript{78} Final Report, supra note 1, at para. 64.

\textsuperscript{79} Buckley, supra note 21, at 262; see also THE KOSOVO REPORT, supra note 76, at 93 (stating that the NATO 15,000 feet policy "limit[s] pilots' ability to positively establish the military nature of targets. The large number of decoy targets hit suggests that pilots were not able to make positive visual identification before attacking").

\textsuperscript{80} According to Buckley, General Clark maintained that: "Risk reduction for noncombatants and protection of the innocent were put on par with risk assessment for training scenarios for military personnel... In other words, the ceiling for noncombatant risks was never higher than that for those in military training. Although meant to convey what extraordinary care was employed in bombing decisions, this claim morally equates risks to noncombatants with those to professional military in training." Buckley, supra note 21, at 262.

\textsuperscript{81} Final Report, supra note 1, at paras. 65, 67.

\textsuperscript{82} Id. at para. 67.

\textsuperscript{83} Id.
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The Human Rights Watch Report criticized the incident stating, "[T]he change in NATO rules of engagement indicates that the alliance recognized that it had taken insufficient precautions in mounting this attack, in not identifying civilians present, and in assuming that the intended targets were legitimate military objectives rather than in positively identifying them." Additionally, the OIP Report cites evidence in its possession pointing to the deliberate NATO bombing of civilians here, but dismisses this evidence because it is "not confirmed by any other source."

The OIP's conclusion not to pursue an investigation in the face of the Human Rights Watch argument that the OIP itself had quoted, as well as the existence of unconfirmed evidence pointing to NATO's criminality, is inconsistent. Disappointingly, the OIP begins its final analysis of the incident with the same unsatisfying answer that it used in the Grdelica Gorge incident: "[C]ivilians were not deliberately attacked . . . ." In the next paragraph, the OIP at least acknowledges the standard of recklessness. However, the recklessness standard surfaces almost as an afterthought and suddenly becomes qualified by an unrevealed "degree" requirement that, by the way, the NATO bombing did not meet. In fact, the OIP neglects to explicate what "degree of recklessness" is required in terms of the ICTY Statute or international law. The OIP explanation, or lack thereof, concerning its decision here leaves much to be desired. It is worth quoting some of the language of the OIP reasoning to drive the point home:

While there is nothing unlawful about operating at a height above Yugoslav air defences, it is difficult for any aircrew operating an aircraft flying at several hundred miles an hour and at a substantial height to distinguish between military and civilian vehicles in a convoy. In this case, most of the attacking aircraft were F16s with a crew of one person to fly the aircraft and identify the target.

Relying solely upon this OIP language, NATO's military strategy seems at odds with international law requirements of civilian identification and the recklessness standard that guards these requirements. Amnesty International plainly stated that "[t]he 15,000-feet rule effectively made it impossi-
ble for NATO aircrew to respect the fundamental rule of distinguishing between military objectives and civilians or civilian objects. The Amnesty International report supports this proclamation by quoting NATO generals who maintained that from the flight altitude pilots could not ascertain whether the targets were civilians. In fact, the only reason the OIP gives for not pursuing an investigation here is that NATO ceased the bombing when it became aware of the civilians. That the OIP forwarded this reason is certainly strange given that the Report had only one paragraph earlier undermined this rationale as a NATO defense by including the Human Rights Watch opinion. It is enough to read the Amnesty International conclusion concerning whether NATO's halting the attack saved the alliance from violating international law:

Indeed, according to NATO's own account, the second attack was called off when the slower aircraft were able to view the site through binoculars—which, it was implied, the faster bombers could not do. This suggests that NATO operational procedures may well have contributed to an indiscriminate attack, in breach of international humanitarian law. The fact that, in the wake of this incident, NATO said that it changed operational directives by ordering pilots to visually ascertain that no civilians are in the vicinity when identifying a target, raises the question of why such essential precautions were not implemented for the outset of the campaign.

Furthermore, the OIP Report not only insufficiently dealt with the evidence that it did present, suggesting NATO war crimes in the bombing of the Djakovica convoy, the Report also failed to confront evidence in its possession that further inculpated NATO under international law. One material issue that the OIP Report ignored was the Amnesty International and the FRY White Book documentation of NATO warplanes not only firing on the convoy, but then firing on the people fleeing the convoy and running into civilian houses. According to these reports, there were no military vehicles even in the area. The FRY White Book describes one such example:

Mostly women, children and old people were in the convoy, returning to their homes in cars, or tractors and carts. The first assault on the column... took place while they were moving through Meja village.... The people from the convoy scattered around and tried to find shelter in nearby houses. But, NATO warplanes launched missiles on those houses as well, killing... persons in the process.

92 Collateral Damage, supra note 11, at 43.
93 Final Report, supra note 1, at para. 69.
94 Id.
95 Collateral Damage, supra note 11, at 43.
96 Id. at 38; see also FRY White Book, supra note 11 ("Refugee Convoy, Civilian Casualties—A Drastic Example").
97 See Collateral Damage, supra note 11, at 38.
98 See FRY White Book, supra note 11 ("Refugee Convoy, Civilian Casualties—A Drastic Example").
It would be reasonable to think that firing missiles into civilian houses would result in the unnecessary and disproportionate death of civilians. That NATO did not consider this high probability of collateral damage, or considered it and proceeded regardless, could substantiate reckless conduct.

Also, the Human Rights Watch report indicates that NATO changed its story multiple times, first blaming the Serbs for the entire incident, before finally admitting to the bombing of civilians after coming under intense media pressure. The Amnesty International report compounds this implication and debunks the legitimacy of NATO’s statements by drawing from eyewitness journalist reports in diametrical opposition to NATO accounts. For example, the journalist reports suggest that NATO used cluster bombs and that there was absolutely no military component present in the convoy. Amnesty International even invalidated an audio tape, which NATO had attempted to use as evidence to explain the pilots’ perspective in the bombing, by showing that the tape was not a record of that particular incident and that NATO was either confused or lying when it relied upon the tape.

In fact, according to one NATO source: “Some NATO pilots had gone over and said it was too risky . . . another squadron came over. One will err on the side of caution and the other will be more gung-ho. There are the airborne and the forward air controllers too. One more gung-ho than the other.” While this statement does not support the contention that the NATO bombing of civilians in this instance was deliberate, it certainly detracts from NATO’s position that it was unaware that civilians were present in the convoy at the outset of the assault. This evidence casts a shadow on the legitimacy of NATO’s conduct regarding the bombing, particularly whether and at what time NATO knew that there were civilians on the ground, and certainly provides ample basis for ordering an investigation. The OIP presents an unsatisfying application of international law to the NATO bombing of the refugees on the Djakovica-Decane Road. This weak legal reasoning and the OIP’s failure to incorporate important evidence in its possession into this reasoning not only erodes the sense of justice basic to any independent prosecutorial decision, it also suggests that ulterior motives were at stake in the OIP decision not to pursue an investigation.

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99 See Civilian Deaths, supra note 9 (“Refugees on the Djakovica-Decane Road, Kosovo”); see also Collateral Damage, supra note 11, at 33. One large problem for NATO here was that it took the military at least five days to uncover what had actually happened. NATO spokesman Jamie Shea, who was caught in the unenviable position of changing the story, remarked: “Many believed we’d lost our moral rectitude.” JUDAH, supra note 35, at 261.

100 Collateral Damage, supra note 11, at 34. It is also significant that these journalists, Paul Watson and Robert Fisk, were writing for newspapers based in NATO countries: the Los Angeles Times and the Independent. Id. at nn.34–35.

101 Id. at 36.

102 JUDAH, supra note 35, at 260–61. Judah does not identify this NATO source. See id.

103 Final Report, supra note 1, at para. 68.
C. The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade

Unlike the Attack on the train at the Grdelica Gorge and the refugees on the Djakovica-Decane Road, NATO's bombing of the RTS central studio in downtown Belgrade, which resulted in the death of ten to seventeen civilians, was intentional and deliberate. Hence, a mens rea evaluation proves inapplicable here; rather, the only question before the OIP was whether the deliberate attack on the Serbian Radio Station in the center of Belgrade violated international law. Without a doubt, this NATO bombing incident was extremely contentious. It engendered widespread, global criticism and evidence demonstrates that it divided the NATO ranks, with some NATO members objecting to the bombing on the grounds that the RTS did not constitute a valid military target, and that therefore the attack violated the Geneva Conventions. As Amnesty International concluded:

If this information [NATO members' objections] is correct, it empties of all practical meaning NATO officials' assertion that a target deemed illegal by one nation would not be reassigned to another member. The case of RTS appears to indicate that NATO's way of dealing with such objections was to carry on bombing controversial targets without the participation of members who objected to the specific attacks.

In fact, reports have surfaced which describe the U.S. circumventing the NATO chain of command when operations utilized critical American weaponry such as Stealth bombers and cruise missiles.

The OIP found that despite (1) NATO's admitted motivation for target-
ing the RTS may have breached Article 52 of the Additional Protocol I; (2) the fact that NATO’s failure to warn civilians working in the radio station may have breached Article 57(2) of the Additional Protocol I; and (3) the magnitude of civilian casualties outweighed any “concrete and direct military advantage anticipated” defeating Additional Protocol I Article 51(5)(b), no investigation was begun. This subpart will examine each of these three events and explain how the OIP erroneously applied international law in its decision not to pursue an investigation.

According to the OIP Report, NATO sought to justify its attack on the grounds that the RTS served the dual purpose of military and civilian use. That is, because the FRY used civilian radio stations to transmit military messages, and, in NATO’s words, civilian television was “heavily dependent on the military command and control system and military traffic is also routed through the civilian system,” the radio stations were legitimate military targets. This view is compatible with international law. Nevertheless, as the subpart below will explain, because the measure of civilian casualties outweighed NATO’s actual or anticipated military advantage, the dual-use defense should not qualify.

Casting aside for the moment the question of dual-use, there is a preliminary aspect of NATO’s motivation behind bombing the RTS that hazards a breach of international law: NATO seems to have justified the bombing as means to disrupt FRY propaganda. The accepted judicial application of Article 52 of Additional Protocol I forbids belligerents from rooting an attack on civilians in the goal of destroying the enemy’s propaganda mechanism. Relying on this application, the OIP Report declares: “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 grounds alone may not meet the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by the Additional Protocols . . . .”

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109 Final Report, supra note 1, at para. 72 (quoting NATO Press Conference (Apr. 27, 1999)).
110 Id.
111 See the International Committee of the Red Cross (ICRC) (1956) list of acceptable military targets. “The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 635 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].
112 DEP’T OF DEF., REPORT TO CONGRESS: KOSOVO/OPTIONAL ALLIED FORCE AFTER-ACTION REPORT, at A-8 (Jan. 31, 2000); see also CORDESMAN, supra note 108, at 60.
113 See Collateral Damage, supra note 11, at 46 (describing why, under Article 52, the NATO attack on the RTS headquarters constituted a “war crime”). The description includes examples from “[t]he authoritative ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,” German Military Manuals, and the judgment of the Nuremberg Tribunal not to convict Hans Fritzsche, a Nazi propagandist, as a war criminal. Id.; see also Protocol I, supra note 17, at art. 52.
114 Final Report, supra note 1, at para. 76.
end or ends the attack on the RTS was directed.

The Kosovo/Operation Allied Force After-Action Report to Congress states: “NATO attacked the Serbian state television building in central Belgrade a facility used for propaganda purposes.” A reading of the Amnesty International, Human Rights Watch and even the OIP reports indicates that the propaganda rationale constituted the actual and underlying pretense for the NATO attack. At a press conference after the bombing, NATO stated that besides disrupting the command relays, the bombing was designed to “degrade the Federal Republic of Yugoslavia’s propaganda apparatus.” In the language that the OIP chose to quote, NATO elaborated:

[We need to] directly strike at the very central nerve system of Milosevic’s regime. This of course are those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned . . . . Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic’s control mechanism.

The attack could be seen as part of an overall NATO trend aimed at demoralizing the Serbian civilian population, which is a policy that presents problems under international law.

NATO comments further support the contention that propaganda was the prime impetus behind the attack. For example:

In an interview for a BBC television documentary, UK Prime Minister Tony Blair reflected on the bombing of RTS and appeared to be hinting that one of the reasons the station was targeted was because of its video footage of the human toll of NATO mistakes, such as the bombing of the civilian convoy at Djakovica, was being re-broadcast by Western media outlets and was thereby undermining support for the war within the alliance. “This is one of the problems about waging a conflict in a modern communications and news world . . . . We are aware that those pictures would come back and there would be an instinctive sympathy for the victims of the campaign.”

115 DEP’T OF DEF., supra note 112, at A-8 (emphasis added).
116 Collateral Damage, supra note 11, at 45 (quoting Moral Combat—NATO at War (BBC2 television broadcast, Mar. 12, 2000)); Civilian Deaths, supra note 9 (“Serb Radio and Television Headquarters”); Final Report, supra note 1, at 76.
117 Collateral Damage, supra note 11, at 44.
118 Final Report, supra note 1, at para. 74.
119 JUDAH, supra note 35, at 256 (validating the accusation of Yugoslav official Zivadin Jovanovic).
120 Collateral Damage, supra note 11, at 45 (quoting Moral Combat—NATO at War, supra note
In this vein, Yugoslav Ambassador Vladislav Jovanovic has asserted: "NATO needed to cover its crimes and has been engaged in a fierce anti-Serb, anti-Yugoslav propaganda campaign whose aim was to cover up the massive crimes against the civilian population and divert international attention onto other matters, such as the so-called crimes committed by Yugoslavia’s leadership." The United Nations account of the FRY August 12, 1999 Press Briefing describes: "He [Jovanovic] said the destruction of all Yugoslavia’s radio and television stations had been one way to prevent the truth coming out; even satellite broadcasting had been impossible because the satellite centre had been destroyed at the beginning of the war."

Moreover, the OIP Report itself evinces perhaps an even more convincing argument that the real motivation behind the RTS bombing was the destruction of FRY propaganda.

In a statement of 8 April 1999, NATO also indicated that the TV studios would be targeted unless they broadcast 6 hours per day of Western media reports: "If President Milosevic would provide equal time for Western news broadcasts in its programmes without censorship 3 hours a day between noon and 1800 and 3 hours a day between 1800 and midnight, then his TV could be an acceptable instrument of public information."

According to this statement, had Milosevic allowed for Western reporting to penetrate the propaganda apparatus of the RTS media, NATO would not have targeted the radio station and therefore would not have disrupted military communications. Furthermore, Human Rights Watch implied that bombing in downtown Belgrade was part of a strategy of "psychological harassment of the civilian population [rather] than for direct military effect." That is, "[e]ven if one could justify legal attacks on civilian radio and television, there does not appear to be any justification for attacking urban studios, as opposed to transmitters." Yugoslav Ambassador Jovanovic pointed out to the U.N. that

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116; see CORDESMAN, supra note 108, at 60. The idea that Serbia was using the media as a propaganda machine was, in fact, a NATO fear. Under a section called “The Problem of Collateral Damage,” Cordesman writes:

Serbia made immediate efforts to take advantage of this situation, and collateral damage proved to be a major problem in terms of world political and media perceptions. It manipulate[d] media coverage of collateral damage incidents. It provided carefully selected coverage on Serbian television that often failed to provide any evidence that the damage shown had been inflicted by NATO, or which mixed scenes of real collateral damage with scenes of what seem to have been Serbian artillery strikes.

Id.


122 Id.

123 Final Report, supra note 1, at para. 74.

124 Civilian Deaths, supra note 9 (“Serb Radio and Television Headquarters”).

125 Id.
[t]he aim of targeting all those civilian targets was not to diminish or undermine military capacity as claimed ... but to undermine the morale of the civilian population, to deprive it of its basic necessities and needs, to bring it to its knees and turn it against its own government and to make it an obedient and docile instrument of NATO's policy.  

Thus, evidence suggests that the actual goal of bombing the RTS was, in fact, to destroy the FRY propaganda and to erode the morale of the Serbian people. The OIP disappointingly failed to deal with the conflicts this evidence presents under international law.  

The next international legal issue concerns whether NATO provided “effective advance warning . . . of attacks which may affect the civilian population” pursuant to Article 57(2) of the Additional Protocol I. The OIP asserts that “[e]vidence on this point is somewhat contradictory.” In light of the “contradictory” evidence, the Report notes that “it is possible that casualties among civilians working at the RTS may have been heightened because of NATO’s apparent failure to provide clear advance warning of the attack, as required by Article 57(2).” But, “[o]n the other hand, foreign media representatives were apparently forewarned of the attack.” And, because Western journalists knew there might be an attack, “it would also appear that some Yugoslav officials may have expected that the building was about to be struck.”  

The OIP reasoning, that because NATO warned Western media that bombings might take place, Yugoslavian officials were supposed to have known the precise time and location that the RTS was targeted for bombing, is far-fetched. Amnesty International, for instance, stated: “Amnesty International does not consider the statement against official Serbian media . . . two weeks before the attack to be an effective warning to civilians, especially in light of other, contradictory statements by NATO officials and alliance members.” Furthermore, the OIP’s assertions that somehow the Yugoslavian government’s failure to warn its citizens that NATO bombing

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126 Press Briefing, supra note 121.
127 Final Report, supra note 1, at para. 76.

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 international humanitarian law. 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.

Id.

128 Protocol I, supra note 17, at art. 57, at 1416.
129 Final Report, supra note 1, at para. 77.
130 Id.
131 Id.
132 Id. (emphasis added).
133 Collateral Damage, supra note 11, at 52; see also Civilian Deaths, supra note 9 (“Serb Radio and Television Headquarters”) (“When the target was finally hit in the middle of the night . . . authorities were no longer taking threats seriously, given the time that had transpired since the initial warnings.”).
might occur “may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances,” proves equally dubious. One must keep in mind that OIP was supposedly conducting its analysis here from the perspective of an objective, independent prosecutor. The OIP reliance on such attenuated justifications of NATO conduct seriously calls into question the autonomy of the Office and reinforces the assertion that under the surface other factors were at play.

Lastly, the bombing may have breached the rule of proportionality articulated in Additional Protocol I Article 51(5)(b). A military attack violates international humanitarian law if it “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.” The OIP cites NATO statements which demonstrate that the NATO command knew ex ante that the attack would not effectively disable the military communications and, in fact, broadcasting was only interrupted for three hours.

As noted by General Wesley Clark, NATO “knew when we struck that there would be alternate means of getting the Serb Television. There’s no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us” . . . . [A]nother NATO spokesperson similarly described the dual-use Yugoslav command and control network as “incapable of being dealt a single knock-out blow.”

Despite the strong evidence that NATO knew it would achieve little or no military advantage from this bombing, and the OIP findings that “civilian casualties were unfortunately high,” the OIP concluded that the casualties “do not appear to be clearly disproportionate” and “recommend[ed] that the [Office of the Prosecutor] not commence an investigation related to the bombing of the Serbian TV and Radio Station.” The OIP Report qualified this conclusion by clarifying that the proportionality rule does not apply to specific incidents, but rather to the “overall assessment of the totality of civilian victims as against the goals of the military campaign.” This type of cumulative approach, however, has been heavily criticized as being inconsistent with the language and purpose of the Additional Protocol I and invalid under current international law. The International Committee of

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134 Final Report, supra note 1, at para. 77; see also JUDAH, supra note 35, at 268.
135 Protocol I, supra note 17, at art. 51, at 1413.
136 See Final Report, supra note 1, at para. 78; Collateral Damage, supra note 11, at 42.
137 Final Report, supra note 1, at para. 78.
138 Id. at paras. 77, 79.
139 Id. at para. 52.
140 See Bernard L. Brown, The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification, 10 CORNELL INT’L L.J. 134, 142 (1976); Gardam, supra note 29, at 407 (“It appears from the words ‘concrete and direct’ that the Protocol requires that proportionality be assessed in relation to each individual attack, rather than on a cumulative basis.”); see also Schmitt, supra note 29, at 150.
the Red Cross Commentary on Protocol I indeed clarifies that the Protocol's language "was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."\textsuperscript{4} It is difficult to imagine a military attack that, because of civilian casualties, would breach international law when those particular casualties are not considered alone, but are instead incorporated into the total number of civilian casualties in the entire combat effort, and then measured against the ultimate military goals of the effort.\textsuperscript{142} Because the ultimate military goals would depend on the subjective evaluation of the force pursuing those goals, it would appear that the faithful application of this principle could defeat much, if not all, of international humanitarian law regarding the protection of civilian life during armed conflict.

Evidence within the control of the OIP demonstrated that (1) NATO's admitted motivation for targeting the RTS may have conflicted with Article 52 of the Additional Protocol I; (2) NATO's failure to warn civilians working in the radio station may have conflicted with Article 57(2) of the Additional Protocol I; and (3) the magnitude of civilian casualties may have outweighed the "concrete and direct military advantage anticipated" defeating Additional Protocol I Article 51(5)(b). The recommendation of the OIP not to pursue an investigation in light of this evidence rested on an unstable legal argument, as well as an inadequate evaluation of the facts under international law.

D. The Attack on the Chinese Embassy

At 11:50 p.m. on July 5, 1999, NATO aircraft targeted and hit the Chinese Embassy in Belgrade. The attack resulted in the deaths of three Chinese citizens and extensive damage to the embassy and surrounding buildings.\textsuperscript{143} The United States readily admits that this instance came about because of a mistake in target selection.\textsuperscript{144} NATO had wrongly identified the building as the Yugoslav Federal Directorate for Supply and Procure-

\textsuperscript{141} INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON ADDITIONAL PROTOCOLS, supra note 111, at 684 (emphasis added).
\textsuperscript{142} See Johanna McGeary, The Road to Hell, TIME, Apr. 12, 1999, at 36, 36–41 (describing the damage caused to the civilian population through the NATO "cumulative effect" policy).
\textsuperscript{143} Final Report, supra note 1, at para. 80.
\textsuperscript{144} CORDESMAN, supra note 108, at 62–63. It is also worth noting here that NATO itself recognized that extreme measures needed to be taken when targeting densely populated and defended areas. Whether this works for or against NATO in the Chinese Embassy bombing, however, would be subject to debate. With regard to the bombing, a NATO Spokesperson said:

The way targeting works, particularly high value targets or a target area that you're going to go in that has a high threat—the higher the threat, the more value the target, the more time you would study it. . . . My feeling would be in an area like Belgrade that's probably the most highly defended area that U.S. forces and NATO forces have flown in, . . . that in an area like that, you're going to do a lot of study. . . . I don't know what happened.

\textit{Id.} at 63.
ment, which NATO considered a valid military target. The OIP Report quotes Under Secretary of State Thomas Pickering to explain how this mistake occurred:

The bombing resulted from three basic failures. First, the technique used to locate the intended target—the headquarters of the Yugoslav Federal Directorate for Supply and Procurement (FDSP)—was severely flawed. Second, none of the military or intelligence databases used to verify target information contained the correct location of the Chinese Embassy. Third, nowhere in the target review process was either of the first two mistakes detected. No one who might have known that the targeted building was not the FDSP headquarters—but was in fact the Chinese Embassy—was ever consulted.

The OIP Report confirmed this statement by diligently tracing the methodology NATO used in determining target selection and concluded that the NATO tactics were “inappropriate for use in aerial targeting as they provide only an approximate location.” The Report then comments on NATO’s decentralized mode of checking the accuracy of the target selection and implies that such a process might ultimately prove ineffective:

Such a circular process did not serve to uncover the original error and highlighted the system’s susceptibility to a single point of data base failure. The critical linchpin for both the error in identification of the building and the failure of the review mechanisms was thus the inadequacy of the supporting data bases and the mistaken assumption the information they contained would necessarily be accurate.

The Report even mentions evidence that a CIA agent attempted to inform NATO command on multiple occasions of his doubts as to the accuracy of the target. NATO’s target assessment program conflicted with the Protocol I Article 57(2) requirement that “those who plan or decide upon an attack shall... do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to spe-

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145 Final Report, supra note 1, at para. 80.
146 Id. at para. 81; see also Kosovo After-Action Review, Hearing Before the Senate Armed Services Comm., 106th Cong. (1999). NATO’s command structure seems to have presented problems throughout the campaign. Retired General Klaus Naumann, former Chairman of NATO MC reported: “NATO’s integrated command structure [is] no longer flexible and responsive enough to read quickly and decisively to unforeseen events.” Id.
147 Final Report, supra note 1, at para. 82.
148 Id. at para. 83.
149 Id. at para. 82. NATO however, maintains that had the agent been able to communicate his doubt effectively, this would have made no difference in the bombing because the agent thought that the building was still a valid target, just not the intended target:

He didn’t know what the targeted building was, but he didn’t think it was the correct building. He, in fact, thought that the building that was targeted was a valid military target, but he didn’t think it was as high a value target or as lucrative a target as the Federal Directorate of Supply and Procurement.

Cordesman, supra note 108, at 67.
cial protection but are military objectives."\(^{150}\)

Yet, despite what appears to be a violation, the OIP concluded not to assign responsibility for the mistake to any level of the NATO targeting process.\(^{151}\) The rationale behind not holding NATO members responsible seems to be that the target-selection infrastructure was so disorganized and decentralized, that it would be impossible to hold anyone accountable.\(^{152}\) Thus, the OIP effectively condones a dangerously incompetent target assessment system. This certainly sends a disturbing message. As Amnesty International stated:

> Although faulty maps and an incomplete database had been blamed for the error, [NATO Defense Secretary] Cohen stressed that the bombing would continue uninterrupted, even before these resources could be corrected . . . NATO was not taking sufficient safeguards in selecting and vetting targets for attack . . . While not all errors incur legal responsibility under international humanitarian law, all indications are that the very basic information needed to prevent this mistake was publicly and widely available at the time."\(^{153}\)

In its report, the OIP seemed to wholeheartedly endorse the assertion that NATO did not take measures sufficient to verify target selection as is necessary under international law.\(^{154}\) Hence, the OIP decision not to undertake an investigation because of the very reason for which the target assessment proved deficient—administrative disorganization—evades the purpose of international law in this context. Indeed, the OIP rationale provides no incentive for military organizations to remedy hazardous defects in their target-assessment systems; rather, it seems to encourage command decentralization, lack of responsibility and accountability, and uninformed ad hoc decisionmaking. Such a rationale should not serve as the legal justification not to pursue an investigation.

\textit{E. The Attack on Korisa Village}

On May 14, 1999, NATO aircraft dropped ten bombs (four laser-guided bombs and six gravity bombs) on the Yugoslav village of Korisa.\(^{155}\) In the Final Report, the OIP immediately announced that "[m]uch confusion seems to exist about this incident, and factual accounts do not seem to easily tally with each other."\(^{156}\) The conflicting nature and scarcity of information ultimately led to the OIP decision not to pursue an investigation in regard to this NATO bombing incident:

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\(^{150}\) Protocol I, supra note 18, at art. 57, at 1416; see also Belt, supra note 32, at 148-49 & n.212.

\(^{151}\) Final Report, supra note 1, at para. 85.

\(^{152}\) See id.

\(^{153}\) Collateral Damage, supra note 11, at 59-60.

\(^{154}\) See Final Report, supra note 1, at para. 83.

\(^{155}\) Collateral Damage, supra note 11, at 66; Civilian Deaths, supra note 9 ("Displaced Civilians in the Korisa Woods, Kosovo").

\(^{156}\) Final Report, supra note 1, at para. 86.
The committee is of the view that the credible information available is not sufficient to tend to show that a crime within the jurisdiction of the Tribunal has been committed by the aircrew or by superiors in the NATO chain of command. Based on the information available to it, the committee is of the opinion that OIP should not undertake an investigation concerning the bombing of Korisa.\footnote{Id. at para. 89 (emphasis added).}

The question of whether sufficient information was available to the OIP complicates the legal analysis of this incident. Here, the OIP might have very well been justified in not pursuing a \textit{prosecution} under the ICTY criteria.\footnote{See Keegan & Mundis, \textit{supra} note 22, at 131–32 (describing what would be valid criteria for an indictment).} However, the lower standard for pursuing an investigation asks “is the information credible and does it \textit{tend to show} that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign?”\footnote{Final Report, \textit{supra} note 1, at para. 5 (emphasis added).} Thus, it will be necessary to look to the “credible information available” and determine whether there existed sufficient evidence to “tend to show” a crime within the jurisdiction of the Tribunal in order to conclude whether the bombing resulted in an excessively high number of civilian casualties, and hence, signaled a breach of the rule of proportionality and discrimination.

Like the Chinese embassy bombing, this NATO attack was deliberate.\footnote{Id. at para. 88.} Despite NATO’s insistence that Korisa was a military target consisting of a military camp and command posts, the bombing killed approximately eighty-seven civilians, mostly Albanians, and around sixty were wounded.\footnote{Id. at paras. 86, 88.} Again, Articles 48 and 57 of Additional Protocol I protect against the disproportionate killing of civilian life and impose upon combatants the absolute obligation to take precautionary measures to protect against such casualties.\footnote{Article 57 of Additional Protocol I states, inter alia, that combatants must (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . . ; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; . . . [and that] an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated . . . . \footnote{Protocol I, \textit{supra} note 17, at art. 57, at 1416.} } Because of the standards these rules of proportionality and discrimination impose, the excessively high number of civilian deaths in the Korisa bombing should have engendered OIP skepticism toward NATO action in the evaluation of the incident.\footnote{See Gardam, \textit{supra} note 29, at 391.} It seems the OIP took the opposite approach.
Unlike the Chinese embassy attack in which NATO admitted that an error had occurred, NATO “continued to affirm the legitimacy of this particular attack” and maintained that “[t]here were never any doubts as to the validity of the target.”\textsuperscript{164} Both Human Rights Watch and Amnesty International call into question NATO’s assertion that Serbian military occupied Korisa.\textsuperscript{165} The Amnesty International Report affirms that there was a Serbian military presence near Korisa, but contends that the presence had been only temporary (lasting about 10 days) and had disappeared more than a month before the NATO bombing.\textsuperscript{166} This evidence tends to show that even if NATO had observed a military presence, it had not updated its target assessment to ensure the validity of the target at the time of the attack and ended up killing a disproportionate number of civilians.

The Yugoslav Government brought in foreign reporters to document the wreckage immediately after the bombing.

Reporters who visited the scene the day after the attack saw around 30 tractors still parked in the yard at Korisa, 20 of which had been burnt out. Some questioned whether this could really have been a military target, as it was in an exposed, open field where military hardware could not have been hidden. According to a Washington Post journalist, reporters at the scene had been unable to confirm either visually or by interviewing refugees that any military installations or personnel had been present that night.\textsuperscript{167}

To the extent that this account mirrors the description of the scene after the NATO attack on the civilian refugee convoy near Djakovica discussed above,\textsuperscript{168} the most disturbing aspect implicit in any parallel between the two instances is that NATO did not appear to alter or upgrade its target assessment methodology to protect against civilian loss of life after the Djakovica tragedy.

Operating under the assumption that NATO had no knowledge that so many civilians were present, the NATO identification methods proved inadequate in recognizing such a presence. In the view of an American Navy Lieutenant,

Article 48 is the cornerstone of customary international law concepts on the law of war and codified the requirement of distinction. Article 48 begins the important task of placing on the commander a requirement not only to balance

\begin{footnotes}
\textsuperscript{165} Collateral Damage, supra note 11, at 66; Civilian Deaths, supra note 9 (“Displaced Civilians in the Korisa Woods, Kosovo”).
\textsuperscript{166} Collateral Damage, supra note 11, at 62.
\textsuperscript{167} FRY White Book, supra note 11 (“Villages”); Collateral Damage, supra note 11, at 66 (referring to a NATO Press Conference on May 17, 1999); see also Steven Pearlstein, NATO Won’t Release Korisa Evidence, WASH. POST, May 21, 1999, at A26.
\textsuperscript{168} See supra Part IV.B.
\end{footnotes}
the ambiguities of necessity and proportionality, but also, the enormous obligation of affirmatively taking steps to distinguish the locos (and effect) of his actions. These requirements become a touchstone for the rest of Part IV of Protocol I on the role of the commander to protect civilians from the vagaries of war and the impact of the commander’s decisions on the methods and means of warfare.  

Yet, when asked by a reporter at NATO Headquarters as to the methodology the pilot used in validating the target and whether NATO knew that there were civilians and tractors on the scene, NATO spokesman Peter Daniel reacted: “I can’t tell you what is on the ground, I’m not on the ground and you’re not on the ground either. I’ve seen the footage.”

Here, Daniel’s statement strongly suggests that NATO did not know what was actually on the ground when it decided to fire the ten missiles and bombs. Then, when asked whether NATO mistakenly attacked the refugees and tractors, Daniel responded: “I am telling you . . . we believed this to be—and do believe this to be—a legitimate military target that was validated according to the pilot prior to launching the strike.” It is doubtful that the international laws of proportionality and discrimination would consider the death of eighty-seven civilians and the injury of sixty others as part of a legally “validated” military target assault.

According to NATO, the attack was valid because the pilot who dropped the first bombs on the target

“had to visually identify [the target] through the attack systems which are in the aircraft, and you know it was by night, so he did see silhouettes of vehicles on the ground and . . . . it was by prior intelligence a valid target . . . . Of course, and we have to be very fair, we are talking at night.”

This, however, does not provide a legitimate excuse or an affirmative defense under international law regarding the rule of discriminating between civilian and military targets. As one commentator has stated:

NATO took the decision to attack at night with full knowledge of the difficulties this would create in identifying the target and distinguishing civilians. It was not enough for the pilot to identify silhouettes of vehicles on the ground and attack on the basis that the presence of vehicles was consistent with prior intelligence that labeled the area a legitimate military target. . . . NATO should have taken precautions in accordance with Article 57(2) to confirm that the target remained legitimate and that there were no or few civilians present.

169 Belt, supra note 31, at 134.
170 Press Briefing, NATO, Call Me Irresponsible . . . The NATO Spokesman on the Korisa Incident, NATO Headquarters (May 15, 1999).
171 Id.
172 See Protocol I, supra note 17, at arts. 48, 51, 52, at 1412–14.
174 See Belt, supra note 31, at 134 (describing a commander’s obligation under Article 48 of the Additional Protocol I).
Such precautions could have included conducting the attack in daylight, obtaining updated intelligence about the area, and attacking from a lower altitude.\footnote{175}

The only other argument that NATO proposes in response to accusations regarding the high toll of civilian casualties is that Serbs had used civilians as human shields.\footnote{176} International law completely prohibits this type of military tactic.\footnote{177} However, as Human Rights Watch emphatically stated:

\begin{quote}
[S]uch violations of the laws of war do not in any account release an adversary from obligations to respect civilian immunity. An authoritative new commentary on humanitarian law states: "If one party to a conflict breaks this rule, this does not exempt the other side from the regulations applicable in military attacks. . . . The military commander must therefore take into account the column of refugees used by the adversary as a shield."\footnote{178}
\end{quote}

Therefore, even if Serb forces had used civilians as human shields this would not relieve NATO's burden of target verification under international law. Indeed, the question of target verification would be an entirely separate matter. And, NATO did not adequately verify the target or it would have been aware of the strong presence of civilian life.

In sum, nothing NATO presents as an explanation for the high civilian loss of life, be it that the attack occurred at night or that Serbs used refugees as human shields, absolves NATO from its obligation to adequately verify military targets and distinguish civilian targets. Moreover, Amnesty International, Human Rights Watch, FRY White Book, and eyewitness journalist reports indicate, and in some instances proclaim, NATO's failure to have adequately assessed the Korisa target.\footnote{179} Such consensus indicates that the OIP should have approached the incident assuming a war crimes violation. Yet, the OIP found that there was insufficient credible information available that would tend to show a breach of international law.\footnote{180} This decision can only be rooted in a one-sided evaluation of evidence in favor of NATO. Such a superficial evaluation hints that other factors influenced the OIP conclusions.

\footnotetext[176]{Collateral Damage, supra note 11, at 64.}
\footnotetext[177]{See Protocol I, supra note 17, at art. 51(7), at 1413.}
\footnotetext[179]{Collateral Damage, supra note 11, at 67; Civilian Deaths, supra note 9 ("Displaced Civilians in the Korisa Woods, Kosovo").}
\footnotetext[180]{Final Report, supra note 1, at para. 89.}
F. The OIP Catch-All: Imputability and Command Responsibility

As a final catch-all justification, the OIP states that “[i]n 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.”

On the contrary, the above discussion has demonstrated that the international law is clear and that the OIP failed to accurately apply that law; a failure which leaves the OIP refusal to investigate for fear of lack of evidence with which to impute liability to specific NATO actors unjustified. Alternatively, even if the OIP found that the law was uncertain with regard to something like imputability, at least one important function of the Tribunal consists of clarifying and implementing international standards under its jurisdiction. The Tribunal has pursued this task without hesitation with regard to command responsibility charges against Serb offenders, and there is no reason why such decisionmaking should not apply equally to NATO actors.

Moreover, just how the OIP concluded that there would be insufficient evidence deserves scrutiny. Although the OIP relied on NGO, Yugoslav, and NATO reports, the only entity with readily accessible information concerning specific actors and chain of command responsibility is NATO. However, as the OIP noted, “when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents. The committee has not spoken to those involved in directing or carrying out the bombing campaign.”

Thus, the OIP had little information about the specific incidents or the particular actors carrying out those missions, but it did have evidence that these instances signaled possible war crimes violations. Wouldn’t this lead an independent prosecutor to investigate?

The OIP deficiently applied international legal standards of target selection, military objective, and proportionality in its evaluation of the NATO conduct that it felt most indicated violations of international law. Through analytical shortcomings such as misinterpreting the requisite mens rea standard and a one-sided consideration of information within its control, the OIP Final Report failed to present a convincing legal argument for not pursuing an investigation into the civilian casualties that resulted from the NATO bombing campaign.

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181 Id. at para. 90.
182 ICTY Appeals Chamber Judgment, Celebici Case, Feb. 20, 2001, at paras. 190–98. The Appeals Chamber looked to customary law to decide the issue of command responsibility in the case, relying upon precedent, Article 87(3) of Additional Protocol I and the International Criminal Court Statute Article 28. Id.
183 Final Report, supra note 1, at para. 90.
V. REASONS BELOW THE SURFACE: RESOURCE ALLOCATION AND POLITICAL DEPENDENCE

This Part will present issues of resource allocation and political dependence of the Tribunal and the OIP as underlying reasons for why the Prosecutor decided not to pursue an investigation into NATO bombing. Subpart A will focus on the question of whether an investigation was feasible, taking into consideration the ICTY's dire resource situation and the direct political needs stemming from that situation against the backdrop of NATO's policy and methodology throughout the bombing campaign. Subpart B will briefly explore criticisms that the Tribunal was a purely political organ of NATO, and more specifically of the United States.

A. Resource Allocation and Its Direct Political Consequences

I would have assumed that NATO committed war crimes under international law for the purposes of an investigation. However, I would have reached the same conclusion not to pursue an investigation—but for different reasons. For resource reasons. If you think about it as a scale from one to ten, where you have war crimes violations occurring on the level of nine and ten on one side, as opposed to one and two on the other, and you only have a limited amount of resources, you want to go after the side that is committing the nine and ten degree violations.\textsuperscript{184}

—Justice Richard J. Goldstone,
Original Independent Prosecutor for the ICTY

Although the OIP fell short in its unconvincing and ultraconservative view of international law leading to the decision not to pursue investigations into NATO war crimes, the outcome of the decision might have been justifiable on other grounds. As this Comment has argued, strict and faithful application of the international legal standards governing protection of civilian life should have resulted in an investigation into NATO war crimes.\textsuperscript{185} Yet, such a devoted and universal adherence to the rule of international law in this regard may very well have been impossible given the political and economic realities under which the OIP and the ICTY were operating. This subpart will attempt to show that because of inadequate resources and allocation problems, the OIP may have been right in its decision not to investigate NATO conduct because such an investigation would have subtracted from limited resources needed to pursue more

\textsuperscript{184} Interview with Justice Richard J. Goldstone, Justice of the Constitutional Court of South Africa and Original Independent Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, at Northwestern University School of Law (Oct. 3, 2001).

\textsuperscript{185} See supra Part IV.
egregious war crimes violations. Moreover, resource dilemmas tended to fuel the politicization of the Tribunal and the OIP, making an investigation into NATO conduct functionally self-destructive for the ICTY. Here it becomes instrumental to recognize that issues of resource allocation and political influence are in no way mutually exclusive within the ICTY context; rather, one grows more or less directly out of the other. Yet, that political influence may have impacted the OIP does not taint the entire ICTY with an air of bias. Prosecutors traditionally enjoy a certain amount of discretion in whether or not to indict, prosecute and for that matter, investigate, and political motivations influence these decisions.

Before continuing, an important point should be made with regard to the criticism in the Comment thus far. The criticism is, first and foremost, concentrated on the legal analysis of the OIP. Evidence of certain instances of NATO conduct needed to be factored into this criticism insofar as such evidence supported the argument that the OIP fell down on the job—that is, the job of investigating the conduct or providing a valid explanation for not pursuing an investigation. Yet, it is equally important to understand that despite faulty implementation, NATO did infuse international legal standards of noncombatant immunity into its military policy from the inception of the bombing campaign. In obedience to the Protocol's proportionality requirement, NATO used precision-guided weapons almost exclusively in instances involving urban areas to protect against civilian casualties, five times more than were used in Operation Desert Storm by the United States. Moreover, NATO had officially listed three elements concerning its tactical approach to civilian loss of life: “attack only militarily significant targets, [use] extraordinary measures to minimize collateral damage; [and use the] highest percentage of precision weapon employment in his-

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186 For an objective and thorough account of the FRY program of “ethnic cleansing,” see THE KOSOVO REPORT, supra note 76, at 88–92.
187 The “politicization” referred to here deals with the politics growing out of the ICTY need for resources. The author is of the opinion that this “politicization” can be divorced from criticisms in Part V.B, infra, which would have the Tribunal created for the purpose of implementing NATO and U.S. foreign policy.
189 NATO Supreme Allied Commander General Wesley Clark pointed to “minimal collateral damage [which] required detailed risk analysis and use of precision munitions to avoid injury to innocent civilians” as one of the “four measures of merit to assure NATO’s military actions met its political will.” Buckley, supra note 21, at 261; see also CORDESMAN, supra note 108, at 60 (“NATO made a detailed effort to review the range of possible collateral damage for each target, and to plan its strikes so that the weapon used, the angle of approach, and the aim point would minimize collateral damage. This process was so exhaustive that NATO often had more strike aircraft available than cleared targets, and many important targets were avoided or sent back for review again and again.”); THE KOSOVO REPORT, supra note 76, at 94, 179–80.
190 See Protocol I, supra note 17, at art. 51, at 1413–14.
191 Belt, supra note 31, at 134.
The Kosovo/Operation Allied Force After-Action Report to Congress guaranteed that

during the course of the campaign, NATO developed mechanisms for delegating target approval authority to military commanders. For selected categories of targets—for example, targets in downtown Belgrade, in Montenegro, or targets likely to involve high collateral damage—NATO reserved approval for higher political authorities. Legal reviews of selected targets were conducted at successive echelons of the chain of command. Targets nominated for approval . . . received legal reviews in the field. Targets nominated that met the criteria requiring . . . approval received detailed legal scrutiny by the Legal Counsel to the Chairman of the Joint Chiefs of Staff and by the DOD General Counsel. Legal reviews involved evaluation of certain targets as valid military targets as governed by applicable principles of the laws and customs of armed conflict.

According to one source, all targets were approved by a military lawyer, who,

[sitting at his computer screen, would assess the targets in terms of the Geneva Conventions governing the laws of war. He would rule whether its value outweighed the potential costs in collateral damage. A military lawyer also applied the “reasonable-person standard” to the fine line separating military and civilian targets.

NATO’s attitude and methodology here are significant. While this approach to military planning does not exculpate NATO from any violations that might or might not have occurred during the bombing campaign, it does signal the alliance’s programmatic concentration on the international law governing collateral damage. The Independent International Commission on Kosovo has asserted, “the NATO campaign was more careful, in relation to its targeting, than was any previous occasion of major warfare conducted from the air. This care with targeting was partly an expression of declared policy, and it reflected the availability of ‘smart’ technology that had the capacity to be precise.”

In a world of unlimited resources where the OIP and the ICTY would be able to conduct contemporaneous investigations and prosecutions into each and every deserving instance of war crimes, NATO’s policy and precautionary measures might not enjoy much weight if the actual bombings indicated violations. However, this world was not the one in which the OIP

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192 Buckley, supra note 21, at 261 n.16.
193 DEP’T OF DEF., supra note 112 (emphasis added). General Clark also affirmed that “the political oversight of the more sensitive targets ensured that governments would support these decisions and rally public opinion.” Buckley, supra note 21, at 263.
and ICTY were functioning. Resource allocation and supply constituted essential elements to any OIP and ICTY decision. The bottom line is that NATO did not intentionally violate the laws of war; rather, the alliance was conscious of these legal standards and took measures, although sometimes inadequate, to adhere to them. This NATO course of action rightly shaped the OIP decision with regard to the administration of very limited resources.

In reality, the OIP faced two crucial questions in relation to NATO’s conduct and whether the evidence warranted opening an investigation. First, did the evidence sufficiently point to a violation of international law guaranteeing an indictment? Second, and perhaps more importantly, to what extent was pursuing an investigation here an efficient use of limited resources under the circumstances in which the OIP and ICTY were functioning?

To be sure, the OIP could have pursued an investigation only if the evidence evinced sufficient probability of obtaining an indictment. However, the special jurisdiction of the ICTY provided remarkable flexibility in this area. As one Legal Officer in the OIP has commented:

All of the [ICTY Trial Courts] . . . have decided that the basic requirement for a sufficient indictment, as set forth in the ICTY Statute and Rules, is a concise statement of the facts and of the crime or crimes with which the accused is charged. . . .

. . . While stating clearly that there was a “minimum level of information that must be provided by the indictment” in order for the indictment to be “valid as to its form”, [sic] the Trial Chamber held that “as a general rule, the degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions.”

Thus, the Tribunal’s construction of the ICTY Statute afforded the OIP unusual latitude in pursuing an indictment in order to ensure the prosecution of violations, and therefore, an indictment against NATO would most likely have been available to the OIP had it pursued investigations into NATO conduct.


197 Expert Report, supra note 18, at para. 9.

198 The way that the indictment process works under Article 19 of the ICTY Statute is that “when an indictment is presented by the Prosecutor it must, before an arrest warrant is issued, be confirmed by a member of the Trial Chamber who is satisfied that a prima facie case has been established by the Prosecutor. This has been interpreted to mean that there are reasonable grounds to believe that the accused has committed the crimes alleged.” Id. at para. 42.

The second, more discreet, but perhaps more consequential question concerning efficient resource allocation, however, requires a more complicated analysis. Despite the availability of indictments, the economic and political reality of the ICTY demands that when the OIP submits an indictment for confirmation to the Tribunal, the case is “trial ready.” The reason for this trial readiness is that the OIP must be almost certain of a conviction. Because of time and money restraints, the OIP and the ICTY in general simply cannot afford to try cases unless there is (1) a very high chance of conviction and (2) the defendant must also be a protagonist of the most egregious degree of war crime activity. The OIP is aware of this and is therefore exceedingly discriminating in the cases it chooses to investigate and prosecute. Because of this selective approach and the economic and political reasons underlying the approach, an OIP investigation into NATO would have been a misallocation of resources and ultimately harmful toward primary objectives of the ICTY, such as ensuring the prosecution and conviction of the major war crimes perpetrators in the former Yugoslavia. The Independent International Commission on Kosovo has reported that:

over 90% of the Kosovar Albanian population were displaced from their homes.

... [V]irtually all of those displaced were forced from their homes by members of the Yugoslav armed forces, Serbian police or paramilitary units, in a process routinely preceded by shelling, and subsequently accompanied by abuse, extortion, and killings...

... [T]he number of killings [is] in the neighborhood of 10,000 with the vast majority of the victims being Kosovar Albanians killed by FRY forces.

When faced with the question of into what investigation resources would go, the OIP correctly gave FRY investigations precedent.

To better understand this discriminatory policy and the resource pres-

201 Id. at paras. 65, 94–97. Section 1, entitled “Leadership Cases” outlines the OIP policy of going after only leaders, or higher level officials as opposed to low-level soldiers etc. The section argues that this type of policy is not only cost-effective, but communicates an important political message and remains consistent with UN Security Council objectives. Id.
202 Id. at para. 125.
203 THE KOSOVO REPORT, supra note 76, at 90–91.
204 Expert Report, supra note 18, at para. 125; see Wald, supra note 196, at 96.
sures placed on the OIP, it will be useful to briefly illustrate the grave resource problems that the ICTY in general, and the OIP in particular, encounter. It is telling that the ICTY’s inefficient resource use led to the establishment and mandate of an Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (Expert Report) under United Nations General Assembly Resolutions 53/212 and 53/213 on December 18, 1998.\(^\text{205}\) The UN mandate devotes one section of review exclusively to the OIP, which expressly encompasses “the optimum use of investigation personnel.”\(^\text{206}\) Still, the setup of the Tribunals in general presented complicated resource problems.\(^\text{207}\) For instance, the ICTY Statute had to be amended to add more Trial Chambers (from two to three), and until May of 1998, only one courtroom had been available.\(^\text{208}\) Moreover, adjudicating cases consumed tremendous resources resulting in prolonged pretrial detentions such that, by the time the Expert Group Report was issued, “after almost seven years and expenditures totalling $400 million, only 15 ICTY and ICTR [International Criminal Tribunal for Rwanda] have been completed.”\(^\text{209}\) Of the fifteen completed trials, eight were in the ICTY, seven persons in custody were convicted, and one was acquitted.\(^\text{210}\) This resource exhaustion is a result of many factors particular to the working of an International Criminal Tribunal, such as the overwhelming amount of evidence needed to resolve “knotty” legal issues, pretrial delays, the ongoing need for translation, and obtaining indicted persons for court appearance.\(^\text{211}\) Furthermore, all those who had been convicted appealed.\(^\text{212}\) The number of indictments was and is continually rising, such that the Trial Chambers has predicted that the ICTY would not finish its task until the unacceptable date 2016.\(^\text{213}\)

Despite having a comparatively substantial budget in relation to the other ICTY departments, resource shortage problems plague the OIP specifically as well.\(^\text{214}\) The legal complexity of establishing guilt beyond a rea-

\(^{205}\) Id. at paras. 1–13. The mandate itself states: “The Expert Group shall prepare an evaluation of the functioning and operation of the International Tribunal for the Former Yugoslavia . . . with the objective of enhancing the efficient use of the resources allocated to the Tribunals.” Id. at para. 4.

\(^{206}\) Id. at para. 9.

\(^{207}\) See Mundis, supra note 196, at 759.

\(^{208}\) Expert Report, supra note 18, at paras. 17, 20.

\(^{209}\) Id. at para. 35.

\(^{210}\) Id. at para. 29.

\(^{211}\) Id. at § IV (“The Tribunals”).

\(^{212}\) Id. at para. 29.

\(^{213}\) Mundis, supra note 196, at 770.

\(^{214}\) The 1999 budgetary appropriations percentage can be found under paragraph 179 of the Expert Report. According to the chart, the Prosecution for the ICTY receives 28.5% of the budget, second to the Registry’s 68.7%. The Expert Report notes that the OIP has a total budgeted staff of 346 and a vacancy rate of approximately 13%. This organ is divided into the Investigations Division and the Prosecution Division. Expert Report, supra note 18, at para. 113. In the early days, the Investigations
reasonable doubt with regard to the statutory crimes, the Prosecutor’s heavy burden of proof, relentless defense tactics, and noncooperation of States with regard to prosecutorial preparation all engender significant drains on OIP resources.\textsuperscript{215} The overwhelming bulk of this expenditure goes to investigations.\textsuperscript{216} Significantly, the Expert Report praised the OIP’s programs of selective discrimination with regard to investigations, and the concentration on prosecuting high-level officials. “As far as the Expert Group is able to judge, optimum use is made by the latter [OIP] of its well-trained and experienced investigation personnel, attorneys and support staff, again given the constraints under which they function.”\textsuperscript{217} By focusing on high-level perpetrators, the OIP most effectively communicates the ICTY message within the international theater because “[d]evoting huge resources to the prosecution of ‘small fry’ while vindicating the wholly understandable and justified emotions of individuals and families victimized by atrocities would leave major goals largely unattained.”\textsuperscript{218} Insofar as this policy relates to NATO, to say that NATO did not violate the laws of war might be wrong. However, to divert finite resources toward investigating NATO’s reckless conduct and military errors in pursuance of an otherwise legally calculated mission, and away from gross human rights violations like ethnic cleansing,\textsuperscript{219} would defeat the purpose of the ICTY.

Division had 110 members, with ten people assigned to each team. G. Anthony Wolusky, Prosecuting War Crimes in the Former Yugoslavia, 6 U.S. AIR FORCE ACAD. J. LEGAL STUD. 287, 290 (1995). This Division appears to have grown, such that by 1999, “182 posts have been budgeted . . . but 23 remain vacant.” Expert Report, supra note 18, at para. 114. The Expert Report also remarks:

In terms of total numbers, it is notable that, in comparison with national investigative and prosecutorial entities, whose missions are similar or even narrower in scope, the staff of the ICTY, though far smaller, has nevertheless been able to achieve remarkable investigative and prosecutorial coverage in respect of a relatively large number of individual targets in a broad Balkan geographical area.

\textit{Id.} at para. 113.

\textsuperscript{215} Expert Report, supra note 18, at paras. 61, 65, 143. The Expert Report maps three aspects peculiar to compiling a case in this type of international investigation:

(a) the lapse of time (at least two years and often more in some areas) between the commission of crimes and the investigations, which poses special forensic and other evidence gathering problems;
(b) the exacting nature of and different types of proof required, while the jurisprudence of Tribunals was developing, to establish the complex details comprising crimes proscribed by the Statutes;
(c) the difficulties associated with the numerous facets of military and political leadership analysis needed to achieve understanding and proof of relationships between levels of authority.

\textit{Id.} at para. 53.

\textsuperscript{216} See Mundis, supra note 196, at 768–69.

\textsuperscript{217} Expert Report, supra note 19, at para. 261.

\textsuperscript{218} Id. at para. 96; see also Wald, supra note 196, at 96 (“[Those accused] “are the senior officials who allegedly drew up the plans, strategies, and campaigns to achieve the vicious ends they had come to believe were legitimate state activities.”

\textsuperscript{219} THE KOSOVO REPORT, supra note 76, at 88. According to this Independent International Commission endorsed by the United Nations:

There is widespread agreement that FRY forces were engaged in a well-planned campaign of terror and expulsion of the Kosovar Albanians. This campaign is most frequently described as one of “ethnic cleansing,” intended to drive many, if not all, Kosovar Albanians from Kosovo, destroy the
Perhaps the most cumbersome onus with which the OIP must cope is the massive evidentiary and legal burden-of-proof needed to convict under the developing and, consequently, vague ICTY statutory standards. Because of nascent and evolving judicial guidelines for what is necessary to obtain a conviction, the Prosecutor must indict individuals for as many crimes as possible and present an oppressive amount of evidence and witness testimony—all of which considerably exhaust valuable resources.\textsuperscript{220} Nor is the investigatory work completed by the start of the trial.\textsuperscript{221} The structure of the ICTY proceedings and human rights law in general (e.g., presumption of innocence, non self-incrimination) necessarily requires the Prosecutor to prove every element of the crime against an uncooperative accused, usually resulting in protracted and extensive investigations even after the start of the trial.\textsuperscript{222} Moreover, this type of ex post evidence gathering tends to lead to the amending of indictments, further delaying the proceedings.\textsuperscript{223}

The critical takeaway is that the OIP must conduct a somewhat unfocused, yet painstaking and comprehensive investigation before it can bring an indictment.\textsuperscript{224} As the Expert Report comments, “[t]he goal of an investigations staff, once it has established that serious crimes have occurred . . . is to develop the evidence needed for the indictment and successful prosecution of those responsible . . . . Criminal prosecution can founder on the shoals of improper or slipshod investigation.”\textsuperscript{225} Single investigations frequently involve fieldwork spanning up to ten or more different countries, many of which present hostile environments still in the midst of conflict, as well as hundreds of witnesses.\textsuperscript{226}

\textsuperscript{220} Expert Report, \textit{supra} note 18, at para 65. The Expert Report notes that the Prosecutor has no choice but to implement this type of approach to obtaining a conviction.

\textsuperscript{221} In the absence of authoritative guidance from the Appeals Chamber enabling the prosecution to reduce the size of its case, without feeling that it will be found to have failed to sustain its burden of proof, it is very difficult to fault the prosecution’s position. And this, of course, has a significant bearing on the optimum use of prosecution counsel and support staff . . . . The investigator [in a national criminal justice system] carries out his functions against the background of well-settled and familiar rules of criminal law, criminal procedure and evidence. There is usually not much difficulty in knowing what facts or objects are of legal relevance. Such a well-defined environment does not exist in relation to the ICTY . . . .

\textsuperscript{222} Mundis, \textit{supra} note 196, at 769.

\textsuperscript{223} Id. at para. 127.

\textsuperscript{224} Wald, \textit{supra} note 196, at 100–01.

\textsuperscript{225} Id. at paras. 124, 126.

\textsuperscript{226} Id. at paras. 126, 133; see also id. at para. 133 tbl.1 (presenting investigative work underlying selected ICTY indictments). For example, the \textit{Tadic} and \textit{Borovnica} investigations dealt with eight countries, the \textit{Foca} investigation dealt with fourteen countries, and the “Celibici” investigation spanned ten countries. \textit{Id.}
The largest obstacle with regard to OIP investigations and arrests is the lack of State cooperation. Although the ICTY Statute contemplates total State cooperation, the political reality of the Tribunal’s work has not only severely discouraged State participation. States can actively “hinder the work of the Tribunal by discouraging witnesses from coming forward or passively failing to enforce ICTY summonses, subpoenas, or requests for information.” In addition, as the Expert Report found, “the Prosecutor is powerless when it is a question of obtaining custody [of the accused].”

Because of this sort of State hindrance, the OIP has become dependent on outside peacekeeping forces for evidence-gathering missions and executions of arrest warrants. By far the most incisive aspect of this dependence within the polemic concerning the OIP decision not to pursue an investigation into NATO is the fact that the peacekeeping operation that aids the OIP, called the SFOR, is comprised of NATO forces. The Expert Report unambiguously states: “[S]earch warrants are of no avail in Croatia or the Federal Republic of Yugoslavia, where there is no NATO force to provide security for the execution of such a warrant.” In a very real sense, if the OIP had decided to undertake an investigation into the NATO campaign it would have been biting the hand that feeds it. Such action would hazard the loss of indispensable aid in obtaining evidence against, and custody over, accused war crimes violators who had flagrantly pursued atrocities well above and beyond

227 Id. at paras. 143, 158.
228 Id. at para. 144.
229 Wald, supra note 196, at 114. Judge Wald astutely notes:

Sharply contrasting with Nuremberg and Tokyo, which followed unconditional surrender of Germany and Japan, is the context in which the Tribunal was created and still operates. The Dayton Accords that ended the Bosnia war was a political compromise that left many of the perpetra-
tors of war crimes still in power and many of the victims homeless and without a country.

Id. at 116.

230 Expert Report, supra note 18, at para. 158.
231 See Wolusky, supra note 214, at 295-97; see also Expert Report, supra note 18, at paras. 143-45; Wald, supra note 196, at 114.
232 Wald, supra note 196, at 88; Wolusky, supra note 214, at 297 (“This massive military force would seem to be the ideal ‘law-enforcer.’ With the geographic area of responsibilities assigned to the various NATO members (including the United States), comes the possibility that the NATO forces will encounter indicted war criminals and that they will also come across evidence of atrocities committed during the war.”).

233 Expert Report, supra note 18, at para. 144.
234 Another area of political tension for the OIP with regard to investigations might surface in relation to the role of the ICTY Registry. The OIP is financially dependent on the Registry such that the OIP does not have “administrative responsibility with regard to its own budget, its staff, including language staff and public information, and the care and protection of its potential witnesses during investigations and also, if necessary, while trials are in progress . . . under national judicial practice it would probably be questionable that, as is the case in ICTY, the Office of the Prosecutor and her entire staff physically be located in the same building and in such close proximity to the offices of the Chambers.” Id. at para. 133. The issue of whether the Registry influences OIP investigation choices has not been explored, but one could imagine such a relationship.
whatever NATO had done through its recklessness.\textsuperscript{235} It is understandable that the OIP chose not to follow a course of action that might have resulted in NATO forces aiding and enabling field investigations of NATO forces—indeed, it is difficult to imagine how such investigations would have proceeded.

\textbf{B. The ICTY and OIP as United States and NATO Political Tools}

The ICTY and the OIP have been criticized on the grounds that the Prosecutor restrained herself from pursuing an investigation into NATO conduct for purely political reasons.\textsuperscript{236} This criticism alleges that the bombing campaign and subsequent foundation of the ICTY were wholly motivated by NATO and U.S. foreign policy interests\textsuperscript{237} and that the OIP was simply a political tool because “the U.S. championed the creation of the Tribunal, and NATO countries supply the staff and evidence.”\textsuperscript{238} The argument points to the influence of United States Secretary of State during the campaign, Madeleine Albright, who had played a key role in establishing the Tribunal and had even appointed Ms. Del Ponte’s predecessor in the OIP, Louise Arbour.\textsuperscript{239} Albright had been central to the decision to bomb Kosovo and had also announced that the United States was the major provider of funds to key ICTY indictments.\textsuperscript{240}

These criticisms do not appear to be entirely baseless in the sense that NATO members did not seem to take seriously the possibility of an investigation or indictment. When asked at a NATO press conference about charges being brought against the alliance, NATO Spokesman Jamie Shea

\textsuperscript{235} See \textit{The Kosovo Report}, supra note 76, at 90, 180.


\textsuperscript{237} \textit{Judah}, supra note 35, at 231. According to senior foreign ministry official, Milisav Pajic, the official Yugoslav view of why NATO went to war is as follows:

“I don’t think Kosovo and Metohija was the real goal. It was to oppose the leadership of this country and introduce NATO here. It was a sort of ideological jihad. We did not want to accept the military occupation of this country and the legal basis for the separation of Kosovo... The Americans prevented an agreement. They were looking for excuses because their intention was to bomb Yugoslavia. Their plans were ready but an excuse was needed.”

\textit{Id.} (quoting senior foreign ministry official Milisav Pajic).

\textsuperscript{238} Gowans, \textit{supra} note 236.

\textsuperscript{239} \textit{Id.}

\textsuperscript{240} Professor Michael Mandel to the Canadian House of Commons (pt. 2), Feb. 22, 2000; see also Gowans, \textit{supra} note 236 (recounting how Albright is known as “the mother” of the Tribunal to its staff).
implicitly discounted the prospect by stating: “As you know, without
NATO countries there would be no . . . International Tribunal for the For-
mer Yugoslavia because NATO countries are in the forefront of those who
have established these tribunals, who fund these tribunals, and who support
on a daily basis their activities.” 241 Along these lines, Lester Munson of the
U.S. International Relations Committee responded to inquiries about possi-
ble OIP investigations into NATO conduct by stating: “You’re more likely
to see the U.N. building dismantled brick-by-brick and thrown into the At-
lantic than to see NATO pilots go before a U.N. Tribunal.” 242 Such state-
ments would seem to reinforce the charges of the Yugoslav ambassador to
the U.N., Vladislav Jovanovic, that the United Nations Security Council
would prefer to “‘sink its head in the sand’ and pretend not to see the real
picture in Kosovo . . . . The real control . . . did not belong to the United
Nations and Security Council but to one outside Power—the United States.” 243

The OIP should have taken the opportunity to adequately address these
claims in the Final Report. Instead, it appointed an ex-NATO lawyer, Wil-
liam Fenrick, to write up and issue what came across as a disappointingly
unconvincing rationale for the OIP decision. 244 Although the international
prominence of the United States and the NATO alliance is undeniable, it is
most likely a stretch to accuse these world players of having initiated and
funded an international tribunal solely to serve their own political
ends. 245 A more realistic perspective is that the ICTY was, in many ways, dependent
on United States and NATO funding and resources 246—and this is where
politics influenced the OIP. That is, it would have been difficult for the
OIP to justify investigating and prosecuting those who provided its funding

242 Jan Cienski & Joel-Denis Bellavance, We’ll Never Hand Pilots to Arbour: U.S. Official Disbe-
disbelief.html.
244 Gowans, supra note 236; see supra Part IV. According to this author’s opinion, Fenrick proba-
bly should have recused himself from the whole ordeal.
245 If U.S. and NATO self-interest was the sole factor in setting up the tribunal, it is unclear what
political end the tribunal served which would not have been served simply by NATO bombing and put-
ting an end to the Serb aggression. First, in the absence of the tribunal, NATO and U.S. action would
have come under much less scrutiny from the global community and the United Nations. The mere
presence of an active international criminal tribunal effectuates large-scale international observation and
evaluation of the events at issue which may not be present otherwise. A lower level of international
scrutiny would have allowed the U.S. and NATO to pursue interests more rigorously without having to
ensure (as much) compliance with international law. Second, the creation of an international tribunal
occurs at a significant fiscal and diplomatic cost to the U.S. and NATO countries. If the U.S could have
achieved what it wanted (the end of Serb aggression) by military intervention alone, it would seem
strange to spend resources to set up a criminal tribunal that would have the function of publicizing and
potentially adjudicating U.S. action as well.
246 See Wald, supra note 196, at 88, 114; Wolusky, supra note 214, at 296–97.
and enforcement capabilities while letting much more serious war criminals off the hook, especially where NATO conducted its campaign with an unprecedented eye toward protecting civilian life under international law.\textsuperscript{247}

VI. CONCLUSION

The OIP did not adequately apply established norms of international law concerning protection against collateral damage to the NATO bombing campaign. The result was a weak and unconvincing legal justification for not pursuing an investigation into NATO conduct. However, below the surface there may have existed a valid rationale not to pursue an investigation founded on judicial resource allocation. While it might be hard to deny that the ICTY dependence on NATO and the United States engendered inextricable political influences within the working of the Tribunal and the OIP, regardless of these influences, the OIP made the right decision under the circumstances not to investigate NATO conduct. Such an investigation would have emptied limited resources to pursue reckless incidents in an otherwise legally calculated campaign, and would have restricted the Prosecutor's ability to bring to justice severe war crimes violators.\textsuperscript{248}

Reliance on this practical resource argument would have allowed for the possibility that violations such as those committed by NATO could be prosecuted in the future practice of international tribunals if such tribunals had adequate resources, thus advancing the doctrine of protection of civilian life in armed conflict. This resource justification would have limited the OIP decision to the particular circumstances of the ICTY. In this way, the OIP could have remained faithful to the normative humanitarian mandate of preservation of innocent life without doctrinally modifying the threshold for pursuing investigations where the economic and political reality of a future tribunal may differ from that of the ICTY.

\textsuperscript{247} Author's interview with Joe Klein, during which Mr. Klein commented on interview with United States General Wesley Clark, October 11, 2001.

\textsuperscript{248} The Author would like to note, that even though the OIP took the correct course of action in this situation, NATO war crimes are still blameworthy. In the words of Howard Zinn:

\[W\]e have heard [NATO] pass off the bombing of Yugoslav civilians by telling us the Serb police have killed more than we have, so it's okay to bomb not just Serbs but Albanian refugees, not just adults but children . . . . There were those who defended the 1945 firestorm bombing of Dresden (100,000 dead?—we can't be sure) by pointing to the Holocaust. As if one atrocity deserves another. And with no chance at all that one could prevent the other. I have heard the deaths of several hundred thousand Japanese citizens in the atomic strikes on Hiroshima and Nagasaki justified by the terrible acts of the Japanese military in that war. I suppose if we consider the millions of casualties of all the wars started by national leaders these past fifty years . . . some righteous God might well annihilate the human race.