

A. Amnesty International, NATO Intervention in Yugoslavia, “Collateral Damage” or Unlawful Killings?

[See also ECHR, *Bankovic and Others v. Belgium and 16 Other States*]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Amnesty International, Eur 70/018/2000 6 June 2000, *NATO/Federal Republic of Yugoslavia, “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, London June; footnotes partially reproduced, paragraph numbers added by us; available on <http://www.amnesty.org>]

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NATO/FEDERAL REPUBLIC OF YUGOSLAVIA “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? Violations of the Laws of War by NATO during Operation Allied Force [...]

5.1 Attack on Grdelica railroad bridge, hitting passenger train: 12 April

1. On 12 April, a civilian passenger train crossing a bridge in Grdelica, southern Serbia, was hit by two bombs. The attack took place in the middle of the day. At least 12 civilians reportedly died. NATO admitted that its aircraft had bombed the bridge and hit the train, but said that the target had been the bridge itself and that the train had been hit accidentally. At a press conference on 13 April, General Clark, Supreme Allied Commander, Europe (SACEUR), explained that the pilot’s mission had been to destroy the railroad bridge. He launched the weapon from a distance of several miles unaware that the train was heading towards the bridge:

“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. 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.”

1. General Clark then gave the following account of how the pilot returned to drop another bomb on the bridge, striking the train again, even though he had realized that he had hit the train instead of the bridge in the first attack.

“The mission was to take out the bridge.... He believed he still had to accomplish his mission. 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 the bridge 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.”

1. The video of the cockpit view of both attacks was shown at the press conference on 13 April. Several months later it was reported in Germany's Frankfurter Rundschau newspaper that this video was shown at three times speed, giving the impression to viewers that the civilian train was moving extremely fast. [...] Jamie Shea, NATO spokesperson, told Amnesty International in Brussels that, due to the volume of videotape that analysts had to review each day during the campaign, the tapes were speeded up to facilitate viewing. [...]
2. 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.
3. Also, 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.
4. Yet, even if the pilot was, for some reason, unable to ascertain that no train was travelling towards the bridge at the time of the first attack, he was fully aware that the train was on the bridge when he dropped the second bomb, whether smoke obscured its exact whereabouts or not. This decision to proceed with the second attack appears to have violated Article 57 of Protocol I which requires an attack to “be cancelled or suspended if it becomes clear that the objective is a not a military one ... or that the attack may be expected to cause incidental loss of civilian life...which would be excessive in relation to the concrete and direct military advantage anticipated.” Unless NATO is justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack – an argument that NATO has not made – the attack should have been stopped.
5. Further questions about this attack were raised in the *New York Times* on 14 April, which reported that while NATO officials had refused to name the type of weapon or aircraft involved, officials in Washington had said that the plane had been an American F-15E, firing an AGM-130 bomb. General Clark had only referred to the aircraft pilot as being involved, but the F-15E carries a crew of two: the pilot and a weapons officer who controls the bombs. According to this report, the AGM-130 is at first guided by satellite, but as it nears its target, the pilot or weapons officer can guide it, using a video image. [...]

5.3 Serbian state television and radio: 23 April

1. In the early morning of 23 April, NATO aircraft bombed the headquarters and studios of Serbian state television and radio (*Radio Televizija Srbije* – RTS) in central Belgrade. There was no doubt that NATO had hit its intended target. The building was occupied by working technicians and other production staff at the time of the bombing. There were estimated to be at least 120 civilians working in the building at the time of the attack. At least 16 civilians were killed and a further 16 were wounded. A news broadcast was blacked out as a result. RTS broadcasting resumed about three hours after the bombing.
2. At the press conference later that day, NATO's Colonel Konrad Freytag placed this attack in the context of NATO's policy to "disrupt the national command network and to degrade the Federal Republic of Yugoslavia's propaganda apparatus." He explained: "Our forces struck at the regime leadership's ability to transmit their version of the news and to transmit their instruction to the troops in the field." In addition to housing Belgrade's main television and radio studios, NATO said the building "also housed a large multi-purpose communications satellite antenna dish."
3. On the day of the attack Amnesty International publicly expressed grave concern, saying that it could not see how the attack could be justified based on the information available which stressed the propaganda role of the station. The organization wrote to NATO Secretary General Javier Solana requesting "an urgent explanation of the reasons for carrying out such an attack." In a reply dated 17 May, NATO said that it made "every possible effort to avoid civilian casualties and collateral damage by exclusively and carefully targeting the military infrastructure of President Milosevic." It added that RTS facilities "are being used as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represented legitimate military targets."
4. At the Brussels meeting with Amnesty International, NATO officials clarified that this reference to relay stations and transmitters was to other attacks on RTS infrastructure and not this particular attack on the RTS headquarters. They insisted that the attack was carried out because RTS was a propaganda organ and that propaganda is direct support for military action. The fact that NATO explains its decision to attack RTS solely on the basis that it was a source of propaganda is repeated in the US Defence Department's review of the air campaign, which justifies the bombing by characterizing the RTS studios as "a facility used for propaganda purposes." No mention is made of any relay station.
5. 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 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 were aware that those pictures would come back and there would be an instinctive sympathy for the victims of the campaign."
6. The definition of military objective in Article 52(2) of Protocol I, accepted by NATO, specifies that

"military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite military advantage*." [emphasis added by Amnesty International]

1. Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility

on such grounds stretches the meaning of “effective contribution to military action” and “definite military advantage” beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the RTS headquarters cannot be considered a military objective. As such, the attack on the RTS headquarters violated the prohibition to attack civilian objects contained in Article 52 (I) and therefore constitutes a war crime.

2. The authoritative ICRC Commentary on the *Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* interprets the expression “definite military advantage anticipated” by stating that “it is not legitimate to launch an attack which only offers potential or indeterminate advantages.” More recently the commentary on the German Military Manual states, “If weakening the enemy population’s resolve to fight were considered a legitimate objective of armed forces, there would be no limit to war.” And, further on, it says that “attacks having purely political objectives, such as demonstrating military power or intimidating the political leaders of the adversary” are prohibited. British Defence doctrine adopts a similar approach: “the morale of an enemy’s civilian population is not a legitimate target.”
3. It is also worth recalling in this context the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda Ministry of the Third Reich, including as head of its Radio Division from November 1942. The prosecution asserted that he had “incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities.” The Tribunal acknowledged that Fritzsche had shown in his speeches “definite anti-Semitism” and that he had “sometimes spread false news”, but nevertheless found him not guilty. The Tribunal concluded its judgment in this case as follows:

“It appears that Fritzsche [*sic*] sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. *His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.*”
[See American Journal of International Law, vol. 41 (1947), p.328.] [emphasis added by Amnesty International]

1. On the issue of the legitimacy of attacking a television station in general, reference has been made to a list of categories of military objectives included in a working document produced by the ICRC in 1956, the Draft Rules for the Limitations of Dangers incurred by the Civilian Population in Time of War. [Note 53: this list is mentioned in the ICRC Commentary on the Additional Protocols, paragraph 2002, note 3; available on <http://icrc.org/ihl>] In paragraph (7) the list included “The installations of broadcasting and television stations.” However, the French text of the Draft Rules made clear that such installations must be of “fundamental military importance.” Also, Article 7 of the Draft Rules stated that even the listed objects cannot be considered military objectives if attacking them “offers no military advantage.”
2. Whatever the merit of the Draft Rules, it is doubtful that they would have supported the legitimacy of the attack on the RTS headquarters. In any case the Draft Rules were discussed at the 1957 International Conference of the Red Cross, for which they had been prepared, but in the following years the approach of drawing up lists of military objectives was abandoned in favour of the approach eventually adopted by Protocol I in Article 52.

3. The attack on the RTS headquarters may well have violated international humanitarian law even if the building could have been properly considered a military objective. Specifically, that attack would have violated the rule of proportionality under Article 51(5)(b) of Protocol I and may have also violated the obligations to provide effective warning under Article 57(2)(c) of the same Protocol.
4. Article 51(5)(b) prohibits attacks “which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated.” The ICRC Commentary specified that “the expression ‘concrete and direct’ 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.” NATO must have clearly anticipated that civilians in the RTS building would have been killed. In addition, it appears that NATO realized that attacking the RTS building would only interrupt broadcasting for a brief period. SACEUR General Wesley Clark has stated: “We 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.” In other words, NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.
5. Article 57(2)(c) of Protocol I requires that “Effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” Official statements, issued prior to the RTS bombing, on whether NATO was targeting the media were contradictory. On 8 April, Air Commodore Wilby stated that NATO considered RTS as a “legitimate target in this campaign” because of its use as “an instrument of propaganda and repression.” He added that radio and television would only become “an acceptable instrument of public information” if President Milosevic provided equal time for uncensored Western news broadcasts for two periods of three hours a day. And on the same day, General Jean Pierre Kelche, French armed forces chief, said at a press conference, “We are going to bust their transmitters and their relay stations because these are instruments of propaganda of the Milosevic regime which are contributing to the war effort.”
6. But [...] Jamie Shea [...] wrote to the Brussels-based International Federation of Journalists on 12 April that “Allied Force targets military targets only and television and radio towers are only struck if they are integrated into military facilities...There is no policy to strike television and radio transmitters as such.”
7. It appears that the statements by Wilby and Shea came after some members of the media had been alerted to the fact that an attack on the television station had already been planned. According to Eason Jordan, the President of CNN International, in early April he received a telephone call from a NATO official who told him that an attack on RTS in Belgrade was under way and that he should tell CNN’s people to get out of there. [...]
8. John Simpson, who was based in Belgrade for the BBC during the war, was among the foreign correspondents who received warnings from his headquarters to avoid RTS after the aborted attack. [...]
9. UK Prime Minister Tony Blair blames Yugoslav officials for not evacuating the building. “They could have moved those people out of the building. They knew it was a target and they didn’t. And I don’t know, it was probably for, you know, very clear propaganda reasons ... There’s no point – I mean there’s no way of waging war in a pretty way. It’s ugly. It’s an ugly business.”
10. Amnesty International does not consider the statement against official Serbian media made by Air Commodore Wilby 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. As noted above, Western journalists have reported that they were warned by their employers to stay away from the television station before the attack, and it would also appear that some Yugoslav officials may have expected that the building was about to be attacked. However, there was no warning from NATO that a specific attack on RTS headquarters was imminent. NATO officials in Brussels told Amnesty International that they did not give a specific warning as it would have endangered the pilots.

11. Some accounts in the press have suggested that the decision to bomb RTS was made by the US government over the objections of other NATO members. According to the writer Michael Ignatieff, "within NATO command allies were at loggerheads: with British lawyers arguing that the Geneva Conventions prohibit the targeting of journalists and television stations, and the US side arguing that the supposed 'hate speech' broadcast by the station foreclosed its legal immunity under the conventions." [...]
12. [...] However, if in fact the UK or other countries did object and abstain from participating in this attack, they may not be absolved of their responsibility under international law as members of an alliance that deliberately launched a direct attack on a civilian object. [...]

B. ICTY, Prosecutor's Report on the NATO Bombing Campaign

[See also ECHR, *Bankovic and Others v. Belgium and 16 Other States*]

[Source: ICTY Prosecutor's office, *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 13 June 2000; available on <http://www.icty.org/sid/10052>]

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [...]

IV. Assessment

[...]

vi General Assessment of the Bombing Campaign

1. During the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike sorties. During these sorties, 23,614 air munitions were released (figures from NATO). As indicated in the preceding paragraph, it appears that approximately 500 civilians were killed during the campaign. These figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.
2. [...] All targets must meet the criteria for military objectives [...]. If they do not do so, they are unlawful. [...] The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster

support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

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

B. Specific Incidents [...]

i) *The Attack on a Civilian Passenger Train at the Grdelica Gorge on 12/4/99*

1. On 12 April 1999, a NATO aircraft launched two laser guided bombs at the Leskovac railway bridge over the Grdelica gorge and Juzna Morava river, in [south-] eastern Serbia. A 5-carriage passenger train, travelling from Belgrade to Ristovac on the Macedonian border, was crossing the bridge at the time, and was struck by both missiles. [...] At least ten people were killed in this incident and at least 15 individuals were injured. The designated target was the railway bridge, which was claimed to be part of a re-supply route being used for Serb forces in Kosovo. 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 it 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.
2. It does not appear that the train was targeted deliberately. [...] The substantive part of the explanation, both for the failure to detect the approach of the passenger train and for firing a second missile once it had been hit by the first, was given by General Wesley Clark, NATO's Supreme Allied Commander for Europe and is here reprinted in full:

[See *supra* Part A., [1] and [2]]

[...]

General Clark then showed the cockpit video of the plane which fired on the bridge:

"The pilot in the aircraft is looking at about a 5-inch screen, he is seeing about this much and in here you can see this is the railroad bridge which is a much better view than he actually had, you can see the tracks running this way.

Look very intently at the aim point, concentrate right there and you can see how, if you were focused right on your job as a pilot, suddenly that train appeared. It was really unfortunate.

Here, he came back around to try to strike a different point on the bridge because he was trying to do a job to take the bridge down. Look at this aim point – you can see smoke and other obscuration there – he couldn't tell what this was exactly.

Focus intently right at the centre of the cross. He is bringing these two crosses together and suddenly he recognises at the very last instant that the train that was struck here has moved on across the bridge and so the engine apparently was struck by the second bomb.” (Press Conference, NATO HQ, Brussels, 13 April).

1. Some doubt has since been cast on this version of events by a comprehensive technical report submitted by a German national, Mr Ekkehard Wenz, which queries the actual speed at which the events took place in relation to that suggested by the video footage of the incident released by NATO. The effect of this report is to suggest that the reaction time available to the person controlling the bombs was in fact considerably greater than that alleged by NATO. Mr. Wenz also suggests the aircraft involved was an F15E Strike Eagle with a crew of two and with the weapons being controlled by a Weapons Systems Officer (WSO) not the pilot.
2. The committee has reviewed both the material provided by NATO and the report of Mr. Wenz with considerable care. It is the opinion of the committee that it is irrelevant whether the person controlling the bomb was the pilot or the WSO. Either person would have been travelling in a high speed aircraft and likely performing several tasks simultaneously, including endeavouring to keep the aircraft in the air and safe from surrounding threats in a combat environment. If the committee accepts Mr. Wenz's estimate of the reaction time available, the person controlling the bombs still had a very short period of time, less than 7 or 8 seconds in all probability, to react. Although Mr Wenz is of the view that the WSO intentionally targeted the train, the committee's review of the frames used in the report indicates another interpretation is equally available. The cross hairs remain fixed on the bridge throughout, and it is clear from this footage that the train can be seen moving toward the bridge only as the bomb is in flight: it is only in the course of the bomb's trajectory that the image of the train becomes visible. At a point where the bomb is within a few seconds of impact, a very slight change to the bomb aiming point can be observed, in that it drops a couple of feet. This sequence regarding the bomb sights indicates that it is unlikely that the WSO was targeting the train, but instead suggests that the target was a point on the span of the bridge before the train appeared.
3. It is the opinion of the committee that the bridge was a legitimate military objective. The passenger train was not deliberately targeted. The person controlling the bombs, pilot or WSO, targeted the bridge and, over a very short period of time, failed to recognize the arrival of the train while the first bomb was in flight. The train was on the bridge when the bridge was targeted a second time and the bridge length has been estimated at 50 meters. [...] It is the opinion of the committee that the information in relation to the attack with the first bomb does not provide a sufficient basis to initiate an investigation. The committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation [...], this incident should not be

investigated. In relation to whether there is information warranting consideration of command responsibility, the committee is of the view that there is no information from which to conclude that an investigation is necessary into the criminal responsibility of persons higher in the chain of command. Based on the information available to it, it is the opinion of the committee that the attack on the train at Grdelica Gorge should not be investigated by the OTP. [...]

iii) The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade on 23/4/99

1. On 23 April 1999, at 0220, NATO intentionally bombed the central studio of the RTS [...] the centre of Belgrade. [...] While there is some doubt over exact casualty figures, between 10 and 17 people are estimated to have been killed.
2. The bombing of the TV studio was part of a planned attack aimed at disrupting and degrading the C3 (Command, Control and Communications) network. In co-ordinated attacks, on the same night, radio relay buildings and towers were hit along with electrical power transformer stations. At a press conference on 27 April 1999, NATO officials justified this attack in terms of the dual military and civilian use to which the FRY communication system was routinely put [...].
3. At a [...] press conference on 23 April 1999, NATO officials reported that the TV building also housed a large multi-purpose communications satellite antenna dish, and that "radio relay control buildings and towers were targeted in the ongoing campaign to degrade the FRY's command, control and communications network". In a communication of 17 April 1999 to Amnesty International, NATO claimed that the RTS facilities were being used "as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represent legitimate military targets" (Amnesty International Report, [...] [See supra Part A., [10]].)
4. Of the electrical power transformer stations targeted, one transformer station supplied power to the air defence co-ordination network while the other supplied power to the northern-sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system. In this regard, NATO indicated that "we are not targeting the Serb people as we repeatedly have stated nor do we target President Milosevic personally, we are attacking the control system that is used to manipulate the military and security forces." More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which it was employed: "[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." In a similar statement, British Prime Minister Tony Blair was reported as saying in The Times that the media "is the apparatus that keeps him [Milosevic] in power and we are entirely justified as NATO allies in damaging and taking on those targets" (24 April, 1999). 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."
1. NATO intentionally bombed the Radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate military objective and; if it was, were the civilian

casualties disproportionate to the military advantage gained by the attack? For the station to be a military objective within the definition in Article 52 of Protocol I: a) its nature, purpose or use must make an effective contribution to military action and b) its total or partial destruction must offer a definite military advantage in the circumstances ruling at the time. The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as military objectives [...]. The list prepared by Major General Rogers included broadcasting and television stations if they meet the military objective criteria [...]. As indicated in paras 72 and 73 above, the attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosevic in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

2. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the “effective contribution to military action” and “definite military advantage” criteria required by the Additional Protocols [...]. The ICRC Commentary on the Additional Protocols interprets the expression “definite military advantage anticipated” to exclude “an attack which only offers potential or indeterminate advantages” and interprets the expression “concrete and direct” as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209 [Available on <http://www.icrc.org>]). While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, it is unlikely that either of these purposes would offer the “concrete and direct” military advantage necessary to make them a legitimate military objective. NATO believed that Yugoslav broadcast facilities were “used entirely to incite hatred and propaganda” and alleged that the Yugoslav government had put all private TV and radio stations in Serbia under military control (NATO press conferences of 28 and 30 April 1999). However, it was not claimed that they were being used to incite violence akin to Radio Mille Collines during the Rwandan genocide, which might have justified their destruction [...]. At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime (see in this regard the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda ministry alleged to have incited and encouraged the commission of crimes. The IMT held that although Fritzsche clearly made strong statements of a propagandistic nature, it was nevertheless not prepared to find that they were intended to incite the commission of atrocities, but rather, were aimed at arousing popular sentiment in support of Hitler and the German war effort [...]. [See *supra* Part A., [16]]. 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. In a press conference of 9 April 1999, NATO declared that TV transmitters were not targeted directly but that “in Yugoslavia military radio relay stations are often combined with TV

transmitters [so] we attack the military target. If there is damage to the TV transmitters, it is a secondary effect but it is not [our] primary intention to do that.” A NATO spokesperson, Jamie Shea, also wrote to the Brussels-based International Federation of Journalists on 12 April claiming that Operation Allied Force “target[ed] military targets only and television and radio towers are only struck if they [were] integrated into military facilities ... There is no policy to strike television and radio transmitters as such” [...] [See *supra* Part A., [22]].

3. Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.

Although NATO alleged that it made “every possible effort to avoid civilian casualties and collateral damage” (Amnesty International Report, [See *supra* Part A., [10]]), some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted “effective warning of attacks which may affect the civilian population, unless circumstances do not permit” as required by Article 57(2) of Additional Protocol I. [...]

On the other hand, foreign media representatives were apparently forewarned of the attack (Amnesty International Report, [See *supra* Part A., [23] and [24]]). As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. Consequently, UK Prime Minister Tony Blair blamed Yugoslav officials for not evacuating the building, claiming that “[t]hey could have moved those people out of the building. They knew it was a target and they didn’t ... [I]t was probably for ... very clear propaganda reasons.” [See *supra* Part A., [25]]. Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

1. Assuming the RTS building to be a legitimate military target, it appeared that NATO realised that attacking the RTS building would only interrupt broadcasting for a brief period. Indeed, broadcasting allegedly recommenced within hours of the strike, thus raising the issue of the importance of the military advantage gained by the attack vis-à-vis the civilian casualties incurred. The FRY command and control network was alleged by NATO to comprise a complex web and that could thus not be disabled in one strike. 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” [See *supra* Part A., [20]] [...] The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident. [...] With regard to these goals, the strategic target of these attacks was the Yugoslav command and control network. The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were “essential to Milosevic’s ability to direct and control the repressive activities of his army and special police forces in Kosovo” (NATO press release, 1 May 1999) and which comprised “a key element in the Yugoslav air-defence network” (*ibid.* 1 May 1999). Attacks were also

aimed at electricity grids that fed the command and control structures of the Yugoslav Army (*ibid.* 3 May 1999). Other strategic targets included additional command and control assets such as the radio and TV relay sites at Novi Pazar, Kosovaka and Krusevac (*ibid.*) and command posts (*ibid.* 30 April). Of the electrical power transformer stations targeted, one transformer station supplied power to the air-defence coordination network while the other supplied power to the northern sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system (*ibid.* 23 April 1999). [...] Not only were these targets central to the Federal Republic of Yugoslavia's governing apparatus, but formed, from a military point of view, an integral part of the strategic communications network which enabled both the military and national command authorities to direct the repression and atrocities taking place in Kosovo (*ibid.* 21 April 1999).

2. On the basis of the above analysis and on the information currently available to it, the committee recommends that the OTP not commence an investigation related to the bombing of the Serbian TV and Radio Station. [...]

V. Recommendations

1. The committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The committee must note, however, that 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. The committee has also assigned substantial weight to the factual assertions made by Human Rights Watch as its investigators did spend a limited amount of time on the ground in the FRY. Further, the committee has noted that Human Rights Watch found the two volume compilation of the FRY Ministry of Foreign Affairs entitled NATO Crimes in Yugoslavia generally reliable and the committee has tended to rely on the casualty figures for specific incidents in this compilation. If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity. Further, in the particular incidents reviewed by the committee with particular care [...] the committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences. [...]

Discussion

I. Qualification of the conflict and applicable law

1.
 - a. How would you qualify the conflict between the Kosovo Liberation Army (UCK) and the forces of

the Federal Republic of Yugoslavia (FRY)? Was it an international or a non-international armed conflict? A case of internal violence? A war of national liberation? What about the conflict between NATO and the FRY? (GC I-IV, Art. 2; P I, Art. 1; P II, Art. 1)

- b. If the conflict between the UCK and the FRY was a non-international armed conflict, did NATO's intervention against the FRY internationalize it? If yes, why? Does this change the nature of the relations between the FRY and the UCK?
 - c. Would the conflict have become international if NATO had intervened against the UCK? Why? Does this mean that the applicable law varies according to whether a third State intervenes alongside a State or against a State?
 - d. Since NATO is not a party to the Geneva Conventions and their Additional Protocols, is it nevertheless bound by IHL? If yes, why? Since NATO members are not all bound by the same IHL instruments, how is it possible to determine which instruments are applicable to NATO? Is NATO only bound by IHL rules applicable to all its members? Or is NATO, as an international organization, only bound by customary IHL?
2. Does the lawful or unlawful nature of NATO's intervention in regard to *jus ad bellum* influence what rules of IHL are applicable? Are all acts committed during an unlawful operation automatically unlawful under IHL? Or are *jus ad bellum* and IHL two separate sets of rules? (P I, Preamble, para. 5)

II. Attack against the bridge

1.
 - a. In regard to IHL, what do you make of NATO's use of high-altitude aerial attacks during its intervention in the FRY? Are such attacks prohibited? Do they allow for respect for the fundamental principles of IHL such as proportionality and the distinction between civilian objects and military objectives? Is it sufficient, as stated in the ICTY Prosecutor's Report, that "*the obligation to distinguish was effectively carried out in the vast majority of cases*" (Our emphasis, **See** Part B., para. 56)? (P I, Arts 51(4)(b)-(c) and 57(2)(a)(ii); CIHL, Rules 11-12 and 17)
 - b. Can a bridge be a military objective? Under what conditions? How would you define the notion of military objective? Does the Prosecutor's Report seem to accept that the bridge was a military objective? What criteria did he or she use to reach a decision? Are NATO's declarations alone sufficient to establish the legitimacy of a military target under IHL? (P I, Art. 52(2); CIHL, Rule 8)
 - c. If a civilian train is hit during an attack in which it "was not deliberately targeted" (**See** Part B., para. 62), does this constitute a violation of IHL? A war crime? "Collateral damage"? How would you define collateral damage? Is it damage caused to civilians or civilian property during an attack that otherwise respects the principle of proportionality? Is the latter respected when the military objective destroyed is a bridge and the "collateral damage" is civilians? Even if the damage is due to "an uncanny accident" (See Part A., para. 2)? (P I, Art. 57; CIHL, Rules 15-21)
 - d. In the light of the information available to you, do you believe that the attack on Grdelica bridge was in accordance with IHL? Only the first attack, if the attackers were unaware that a train was arriving on the bridge? Did NATO respect the principle of precaution? What other precautions could NATO have taken? Had it been able to take more measures, under IHL should it have? Is your reply different for the first and second attack? What do you think of the Committee's conclusion on this event (See Part B., para. 62 *in fine*)? (P I, Arts 51(5)(b) and 57(2)(b); CIHL, Rules 14 and 19)

III. Attacks against the Serbian State radio and television buildings

1. a. According to IHL, did the RTS (Serbian radio-television buildings) in Belgrade constitute a military objective? Would it constitute a military objective if it was not “an acceptable instrument of public information”, meaning that it does not allow “equal time for uncensored Western news broadcasts for two periods of three hours a day” (**See** Part A., para. 21)? If we accept this position, does it mean that the FRY forces could have considered a television station from a NATO member State as a military objective and destroyed its buildings for the same reasons? (P I, Art. 52; CIHL, Rules 7-10)
- b. Were the RTS facilities a military objective if they were used “as radio relay stations and transmitters to support the activities of the FRY military [...] forces” (**See** Part B., para. 73)? If they were used for propaganda? As an instrument to instigate hatred and violence, like Radio Mille Collines in Rwanda? (P I, Art. 52; CIHL, Rules 7-10) [**See** France, Radio Mille Collines]
- c. The Prosecutor’s Report estimates that the number of victims “does not appear to be clearly disproportionate” to the “concrete and direct military advantage” obtained by the bombing. On what criteria do you think this balance should be judged? What responsibility do military commanders have in this regard? (P I, Arts 51(5)(b) and 52; CIHL, Rule 14)
- d. Did the NATO forces respect the principle of precaution when they bombed the RTS? (P I, Art. 57(2)(c); CIHL, Rule 20) Is the warning that NATO supposedly gave sufficient under P I, Art. 57? Even if it was given only to foreign journalists?
2. Do journalists benefit from special status in IHL? Do they have the status of protected persons? Is this status relevant in this case? Even if they contribute to the war effort by broadcasting “hate speech” (See Part A., para. 27)? [**See** Protection of Journalists]

IV. Conclusions of the Report

1. a. What do you think of the Report’s conclusion (**See** Part B., para. 90)? Where is the law “not sufficiently clear”? In relation to which specific incidents? Is it not the role of a tribunal such as the ICTY to clarify the law? Indicate, for all the incidents in the case, whether it was the law, the facts or both which were not clear enough. Why would investigations probably not produce sufficient results?
- b. Would the ICTY have had jurisdiction to judge the alleged perpetrators of war crimes committed by NATO forces? Why did it not do so? Is the choice made by the ICTY to concentrate on the worst criminals justified? [**See** UN, Statute of the ICTY [Part C., Art. 1]]