Is the *non liquet* of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?

by
NATALINO RONZITTI

1. Until very recently, the punishment of war crimes was a task entrusted to domestic tribunals. Nuremberg and Tokyo were exceptions only in part, since the winner, which occupied the whole territory of the loser, established the two Tribunals. The winner was able to exercise its jurisdiction after the complete *debellatio* of the enemy. National jurisdictions are often accused of partiality: they do not indict their own nationals for war crimes or, if they do, inflict only lenient penalties; conversely, national tribunals are more severe towards crimes committed by nationals belonging to the enemy State. One of the reasons why international tribunals have been established is that war crimes, and international crimes in general, should not go unpunished. Belligerents should be equal before the law and if their nationals commit war crimes they should be punished, whether they belong to the winning or the losing side. Equality and not partiality should be the characteristic of the international tribunals.

NATALINO RONZITTI is Professor of International Law at the University LUISS G. Carli, Faculty of Law, Rome.

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, nobody could imagine that soldiers of permanent members of the Security Council would run the risk of being submitted to its jurisdiction. The Tribunal was set up in order to punish the serious crimes committed by Serbs, Croats and other nationals in the territory of the former Yugoslavia. The United States, one of the permanent members which welcomed the Tribunal, refused some years later to sign the Statute of the International Criminal Court, *inter alia* for fear that members of its armed forces might be judged by an international tribunal and that a prosecutor from a "rogue State" might indict US military personnel without a sound basis for incrimination.[1]

The NATO air campaign against the Federal Republic of Yugoslavia (FRY) has made the unthinkable come true! Soldiers of Western countries, not only nationals of the republics born of Yugoslavia's dissolution, are subject to the jurisdiction of the Tribunal. Indeed, the ICTY's jurisdiction covers, *ratione temporis*, crimes committed since 1991; *ratione loci*, crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia; and, *ratione personae*, all individuals having committed a crime within the competence of the Tribunal.[2] *Ratione materiae*, the Tribunal has jurisdiction to prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.[3]

2. Any violation of international humanitarian law committed during the NATO air campaign against the FRY is clearly within the competence of the Tribunal, whose Statute spells out when the court's jurisdiction begins but not when it ends. In other terms, the *dies a quo* is indicated but not the *dies ad quem*. During the air campaign and thereafter, individuals and NGOs addressed several reports to the

1 The US position is well explained by D. J. Scheffer, "The United States and the International Criminal Court", *American Journal of International Law*, Vol. 93, January 1999, pp. 12-22.

2 Statute of the International Criminal Tribunal for the former Yugoslavia, Arts 1, 6 and 8.

3 *Ibid.*, Arts 1 and 2 to 5.

Office of the Prosecutor of the ICTY, pointing out what they regarded as war crimes committed by NATO soldiers.[4] It was also claimed that NATO was responsible for having committed genocide, because of the number of victims among the civilian population. This accusation, which was submitted by the FRY when it instituted proceedings before the International Court of Justice,[5] clearly lacks any serious foundation. Genocide requires the *dolus specificus*, i. e. the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. And this was not the motivation of the forceful action by NATO.

3. More controversial were other accusations made, and in particular the allegation that NATO had violated the laws and customs of war in conducting its air campaign. Under Article 18 of the ICTY Statute, the Prosecutor enjoys very broad powers. He/she may initiate investigations *ex officio*, question suspects, victims and witnesses and prepare the indictment after having determined that a *prima facie* case exists. Neither Article 18 of the Statute nor Article 39 of the Rules of Procedure say anything about the pre-investigation phase. It is submitted that, before initiating an investigation, the Prosecutor makes an evaluation of the information in his/her possession. The information may be obtained upon the Prosecutor's initiative or received from outside sources, such as governments, United Nations organs and intergovernmental or non-governmental organizations, in conformity with the first paragraph of Article 18. Only after a careful assessment of this information does the Prosecutor "decide whether there is sufficient basis to proceed".

4. In order to assess the information on war crimes allegedly committed during the NATO bombing, the Prosecutor of the ICTY set up a committee on 14 May 1999. It was mandated to

4 See, for instance, the document submitted by a group of lawyers to the Office of the Prosecutor at http://jurist.law.pitt.edu/icty.htm and other material quoted by the Final Report, para. 6 (*infra*, note 6).

5 *Legality of Use of Force*, ICJ, Request for Provisional Measures, CR 99.

advise the Prosecutor whether there was sufficient basis to start an investigation. The advice of the Committee was that no investigation be conducted.[6] The Report of the Committee is a mere recommendation and the Prosecutor is not obliged to follow it. Moreover, this "committee procedure" is not mentioned in any article of the Tribunal's Statute or Rules of Procedure. Thus the establishment of the Committee is under the complete responsibility of the Prosecutor. He/she is the only person who has the power to decide whether an investigation should begin. This is important, for the Committee Report contains many unclear points and a *non liquet*, even if it ends with the recommendation not to start an investigation. This means that the Prosecutor has formed her own assessment, taking into account the Committee Report and other elements. Because of its deficiencies, the Report does not constitute the definite and conclusive element on which a decision not to proceed may be grounded. This is even more true if the statement by a former judge and President of the Tribunal that the NATO air campaign deserved an investigation by the Tribunal is taken into account.[7]

5. Which are the main flaws of the Committee Report? The reason why the Committee did not recommend an investigation by the Office of the Prosecutor can be found in the penultimate paragraph of the Report. It says that it is not worth starting an investigation, since "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". Hence the Committee has given two reasons. Let us comment on them separately.

The law is not sufficiently clear. – This is equivalent to a *non liquet*. Difficulties in interpretation are not a good excuse for not starting an investigation. There are aspects of international humanitarian

6 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (hereinafter *Report)*, published on 13 June 2000. See ‹www.un.org/icty› or 39 ILM (2000), p. 1257.

7 A. Cassese, in *La Re pubblica*, 26 March 2000, p. 17. According to him, an "inquiry" is needed.

law, as in any body of law, which are not sufficiently clear. However, it is precisely the task of the Tribunal to interpret and "clarify" the law; it cannot therefore conclude by saying that it cannot adjudicate the case, since the "law is not clear". The *non liquet* is not part of the ICTY's jurisprudence or that of any other tribunal. It should also be pointed out that one of the main achievements of the Tribunal has been the clarification of controversial rules of humanitarian law, taking into account State practice and developments in this field.

It is difficult to obtain sufficient evidence to substantiate an indictment. – Evidence acquisition is undoubtedly a difficult and time-consuming task. Yet this is no excuse for not commencing an investigation. Article 18 of the ICTY Statute gives the Prosecutor the "power to question suspects, victims and witnesses" and to "collect evidence". Article 39 of the Rules of Procedure says that the Prosecutor may "summon and question suspects". He/she can "undertake such other matters as may appear necessary for completing the investigation..." and "request such orders as may be necessary from a Trial Chamber or a Judge". A quick perusal of these provisions makes it clear that the Prosecutor enjoys substantial powers for collecting evidence and that the Committee's conclusion is unduly pessimistic.

6. Even though the Committee argues that the law is not sufficiently clear, the Report contains several statements that may constitute a precedent. This is true not only for international law relating to weapons but also for other bodies of law, such as the rules applicable to aerial bombardment, a method of warfare that for a long time was not subject to any treaty law and is now covered by Protocol I of 1977, which has set the same rules for land, naval and aerial bombardment.[8] The Committee's findings on the lawfulness of depleted uranium weapons and of two specific incidents: the attack on the Serbian radio and TV station and the attack on a bridge during which a civilian passenger train was hit are reviewed below.

8 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

7. *Depleted uranium weapons (DU)* were used in the Gulf War by the Coalition, and more specifically by the United States, in order to penetrate the Iraqi tanks and specially reinforced buildings. Rumours that this kind of weapons spread material that is dangerous not only for the natural environment but also for the health of human beings were circulated immediately after the end of the war and the appearance of the "Gulf War syndrome".[9] Since the Kosovo campaign, newspapers have from time to time reported cases of leukaemia contracted by KFOR soldiers, and this disease is attributed to contamination caused by depleted uranium weapons. The Committee Report is correct in saying that there is no rule of conventional law banning DU projectiles. It also quotes the ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons,[10] in which the Court, after having affirmed that the rules and principles of international humanitarian law apply to nuclear weapons, stated that the use of such weapons "would generally be contrary to the rules of international law applicable in armed conflict".[11] However, the ICJ did not rule out the lawfulness of the use of such weapons in an extreme circumstance of self-defence, threatening the very existence of a State.

With regard to environmental considerations, the test lies in Articles 35 and 55 of Protocol I, which, as stated by the ICJ in its Opinion, "embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage".[12] The Committee Report is correct in stating that Article 55 of Protocol I "may... reflect customary international law". It is not correct to attribute the contrary view to the ICJ Advisory Opinion.[13] According to the Court the bulk of the norms which protect the natural environment are customary international law, as can be inferred from the passage just quoted. A weapon falls under Articles 35 and

9 See W. M. Arkin, "The environmental threat of military operations", in R. J. Grunawalt, J. E. King and R. S. McClain (eds), *International Law Studies 1996, Protection of the Environment During Armed Conflict*, Vol. 69, Naval War College, Newport RI, p. 128.

10 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

11 *Ibid.*, para. 105 E, p. 265.

12 *Ibid.*, para. 31, p. 242.

13 *Report*, para. 15.

55 of Protocol I if it causes "widespread, long-term, and severe" damage to the natural environment. To clarify the three conditions laid down by the two provisions of Protocol I, reference is usually made to the ENMOD Convention.[14] As far as "long-term" damage is concerned, the Committee affirms that "the notion of 'long-term' damage in Additional Protocol I would need to be measured in years rather than months..." .[15] This view runs counter to the understanding in terms of the ENMOD Convention, which says that long-lasting means "lasting for a period of months, or approximately a season". Having said that, the present writer agrees with the view that DU weapons cannot be considered as prohibited by contemporary international law. It is up to the international community to ban such weapons by drafting and adopting an *ad hoc* treaty.

8. The lawfulness of the attack on the *Serbian radio and TV station* in Belgrade is even more controversial. Radio and TV are dual-use objects, which can be employed for civilian use as well as for military purposes. If they are used for military communication, it is clear that they can be targeted. If they are used only for propaganda, their destruction does not give a "definite military advantage" within the meaning of Article 52, paragraph 2 of Protocol I. The bombing caused the death of civilian persons. Assuming that the radio and TV station was a military target, the other question to answer is whether the death of civilians had to be considered collateral damage within the meaning of Article 51, paragraph 5(b) of Protocol I, *i. e.* damage which would not be "excessive in relation to the concrete and direct military advantage anticipated".

Here only the question whether the radio and TV station in Belgrade was a military objective is reviewed. In its long analysis, the Committee Report concludes that the building was a legitimate military target, even if this conclusion is surrounded by *caveats* and caution. In doing so, the Report sets a precedent, and its conclusions are

14 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, 10 December 1976.

15 *Report*, para. 15.

acceptable. The view that media are a legitimate military objective, or may become one, is supported by the compilation of military objectives made by the ICRC in the context of its 1956 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. According to that list of military objectives (which should have become an annex to Article 7, paragraph 2 of the Draft Rules), "installations of broadcasting and television stations" are military objectives.[16] It must be added that radio and TV stations are used (or can easily be used) for military purposes, i.e. for C3 (Command, Control and Communication). Moreover, there are instances in which the media are used to incite the population to commit war crimes and crimes against humanity, as happened in Rwanda. As the Report states: "If the media is the nerve system that keeps a warmonger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective."[17] In such a case, the media may be targeted as a military objective, particularly also by those States which are not bound by Protocol I, such as the United States, whose broad definition of military objective is not in keeping with the narrow delimitation given by Protocol I.[18]

9. The attack on the *Leskovac railway bridge* and the destruction of a passenger train that was crossing it during the attack is one of the most controversial incidents reviewed by the Committee. The mission was conducted with laser-guided bombs, which were released twice. Soon after the release of the first bomb, the train appeared.

16 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 632, note 3.

17 *Report*, para. 15.

18 See *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP 9A, Washington, D.C., 1989, p. 8-3 and note 11). On the legality of targeting the Belgrade TV and radio station views differ. See e.g. G. Aldrich, "Yugoslavia's television studios as military objectives", *International Law FORUM du droit international*, vol. I, No. 3, 1999, pp. 149-150; H. McCoubrey, "Kosovo, NATO and international law", *International Relations*, Vol. XIV, No. 5, 1999, p. 40; P. Rowe, "Kosovo 1999: The air campaign. Have the provisions of Additional Protocol I withstood the test?", *IRRC*, No. 837, March 2000, pp. 156-157; Amnesty International, *NATO/Federal Republic of Yugoslavia, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, June 2000, pp. 46-53.

However, according to the Report the pilot "was unable to dump the bomb at that stage".[19] The train was hit. Since the bridge was still intact, the pilot released a second bomb directed at the "opposite end from where the train had come". The intention was to hit the bridge, which no doubt was a military objective, and not the train. The question is whether the pilot had the obligation to stop the attack when he realized that the train was crossing the bridge. On this point the Committee admits that it "has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO [Weapons Systems Officer]".[20] However, the Committee concludes: "Despite this, the committee is in agreement that, based on the criteria for initiating an investigation (...) this incident should not be investigated."[21] One of the criteria selected by the Committee for recommending initiation of an investigation is whether the application of the law to the particular facts suggests that a violation has been committed.[22] In the case under review the Report is completely insufficient. The Committee should have assessed more thoroughly the incident related to the second bomb. Since several people were killed or injured, the rule of proportionality should have been looked into. Assuming that the bridge was a legitimate military objective, as we believe it was, the Committee should have assessed whether the second attack falls under Article 52, paragraph 2(b), i.e. whether it could be expected to cause incidental damage (loss of civilian life, injury to civilians and damage to civilian objects) that would be excessive in relation to the concrete and direct military advantage anticipated from the destruction of the bridge.

However, the Report seems to adopt a broad interpretation of the rule of proportionality. In doing so, it repudiates the doctrine established by the ICTY in that regard. Indeed, in the *Kupreskic* Judgment, quoted in the Report, the Trial Chamber stated that the cumulative effects of repeated attacks, falling in the grey area between lawful and unlawful acts, could give rise to a violation of the rule of

19 *Report*, para. 58.
20 *Report*, para. 62.
21 *Ibid.*
22 *Report*, para. 5.

proportionality.[23] The Trial Chamber asserted that its finding was an application of the Martens Clause. The Committee disavowed the Trial Chamber's conclusion and embraced a completely opposite view in stating that the lawfulness of the attacks, under the rule of proportionality, should be judged taking into account the "overall assessment of the totality of civilian victims as against the goal of the military campaign".[24] In brief, in the Committee's view, the mere cumulation of attacks cannot turn them into unlawful conduct. This statement is reminiscent of the reservation made by most NATO countries on ratifying the 1977 Protocol I, according to which, when assessing the rule of proportionality and the military advantage anticipated from an attack, the attack must be considered as a whole and not only isolated or particular parts of the attack.[25]

10. In conclusion, the Report of the Committee established by the ICTY Prosecutor cannot be considered entirely satisfactory. According to the Committee, two criteria should be taken into account in order to avoid formulating an arbitrary or capricious indictment: 1. the alleged act should be clearly prohibited by international humanitarian law, and 2. there must be sufficient evidence to prove that a crime may have been committed.[26] In so doing the Committee was right and avoided the formulation of a vague indictment not substantiated by any evidence of the facts and their criminality. However, a *non liquet* conclusion does not meet the first of the two criteria established for not formulating an indictment. The Committee, instead of saying that the law is vague, should have squarely admitted that the alleged facts, even if proven, were not considered as amounting to a war crime. The Report gives the impression that norms of international law are sometimes not looked into very deeply. As a paradigmatic example, we may mention the Report's

23 Case No: IT-95-16-T, 14 January 2000.

24 *Report*, para. 52.

25 See A. Roberts/R. Guelff, *Documents on the Laws of War*, 3rd. ed., Oxford University Press, 2000, for the text of the declaration made on signature or ratification of Protocol I, e.g. by Belgium (p. 501), Germany (p. 504), Italy (p. 506), the Netherlands (p. 508) or the United Kingdom (p. 510).

26 *Report*, para. 5.

statement that genocide was not committed, since the number of deaths and casualties was low (495 civilians killed and 820 wounded, according to FRY sources). Even though the crime of genocide evokes mass killing, the material element of the crime may consist in causing the death of a small number of individuals in comparison to the entire population, provided that this material element is coupled with the intent of killing the group as such. As said above, such a *mens rea* element could not be imputed to NATO pilots and planners.

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Résumé

Rapport final du Comité chargé d'examiner la campagne de bombardements de l'OTAN contre la République fédérale de Yougoslavie: le *non liquet* est-il acceptable?

par NATALINO RONZITTI

Toute violation du droit international humanitaire commise par quelque partie que ce soit au cours de la campagne militaire des forces de l'OTAN contre la République fédérale de Yougoslavie peut tomber sous la juridiction du Tribunal pénal international pour l'ex-Yougoslavie (TPIY). Préparé sur instruction du procureur du TPIY, le rapport mentionné en exergue examine différents incidents qui, à première vue, devraient faire l'objet d'une enquête criminelle contre des membres des forces de l'OTAN. Il conclut qu'aucun incident ne justifie l'ouverture d'une procédure pénale. L'auteur revoit les conclusions d'un œil critique: il s'insurge notamment contre ce raisonnement qui recommande de ne pas ouvrir une enquête sous le prétexte que le droit n'est pas clair (non liquet). *Le droit en sort diminué, estime Ronzitti.*