prosecution before a hybrid international-national judicial body.

The most difficult dilemma for the Secretary-General was how to deal with juvenile offenders, children as young as 14 who committed acts of extreme barbarity. The government of Sierra Leone had initially insisted that those responsible for the most egregious atrocities be brought to trial and punished if found guilty no matter their age. Human Rights groups, on the other hand, were opposed to trials of anyone under 18. Under the compromise that was reached, no one under 15 may be tried before the Special Court, and 15–18 year-old defendants will receive separate anonymous hearings and special counseling and will serve out their terms under parole in demobilization camps or foster homes, rather than a prison.7

Unlike the ICTY and ICTR which are not located in the states where the atrocities were committed, the Special Court is expected to be located at the headquarters of the UN peacekeeping operation in Freetown, Sierra Leone. This will enable the Court to have ready access to witnesses and evidence. The Special Court is also expected to move more quickly than the ICTY and ICTR, which each took more than two years to become fully operational, in part because the Special Court will have a narrower mandate and fewer defendants, and because the Special Court has the full backing of the government of Sierra Leone.8 UN officials have said that they expect to start hiring court staff, including prosecutors and defense lawyers by the end of the year.9

The cost of the Special Court is estimated at US $22 million for its first year of operation, compared to the ICTY and ICTR whose annual budgets each exceed $90 million. This estimated cost does not, however, include funding for detention facilities, investigations, translators, or defense counsel.10 While Security Council Resolution 1315 had suggested the mechanism of voluntary contributions to fund the Special Court, the Secretary-General has opted instead for assessed contributions from UN Member States (in which case the United States will be assessed 25 percent of the costs) on the grounds that "voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment."11

Michael P. Scharf*

*Michael P. Scharf is Professor of Law and Director of the Center for International Law and Policy, New England School of Law. He is also the Chairman of the American Society of International Law’s International Organizations Interest Group. He served previously as Attorney Adviser for Law Enforcement and Intelligence (1989–1991), and Attorney Adviser for United Nations Affairs (1991–1993), in the Office of the Legal Adviser of the US Department of State, where he played a role in the creation of the Yugoslavia Tribunal.

Further Reading

The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (4 October 2000).


For a comprehensive background on the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda see:


Notes


3. The Agreement is appended to the Report of the Secretary-General, id.

4. Id. at para 26.

5. Id. at para. 27.


7. Report of the Secretary-General, Supra, at paras. 32–37.


9. Id. at para. 70–71.

The Protection of the Civilian Population and NATO Bombing on Yugoslavia

Comments on a Report to the Prosecutor of the ICTY1

When the Security Council, on 25 May 1993, unanimously adopted the resolution2 establishing the International Tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia", the members of the Council had a definite idea of who the criminals were: members of the various groups fighting each other in that territory. This was so clear that no effort was made to further circumscribe the jurisdiction of the Tribunal. Any violation of international humanitarian law committed in that territory in 1991 or later comes within that jurisdiction. As the Tribunal was established in view of an ongoing conflict the end of which was not in sight, there is no final date for the events which are subject to the powers of the ICTR, in contradistinction to the situation in Rwanda, where the jurisdiction of the International Tribunal only relates to a relatively short period of time (January 1994 to December 1994). This broad definition of the powers of the ICTY also brings the act of any foreign intervening forces within the jurisdiction of that court,3 a consequence certainly not envisaged when the court was established, but inevitable in the light of the clear terms of the Statute. Thus, there is no doubt that any crime allegedly committed by NATO forces during their intervention triggered by the Kosovo crisis lies within the jurisdiction of the ICTY.

The NATO bombing campaign against the Federal Republic of Yugoslavia,
which took place between March and June 1999, triggered a considerable amount of critical comment from the legal community, not only from the point of view of the prohibition of the use of force (ius contra bellum), but also with regard to the law relating to the conduct of hostilities (ius in bello). A number of voices went clearly beyond critical comment. Both the Belgrade government and human rights groups in the West alleged that certain attacks violated the applicable law to the extent that they constituted war crimes. An important voice in this critical choir is that of Amnesty International.

The Prosecutor of the ICTY, thus, had to deal with a number of communications requesting her to institute criminal proceedings against those responsible for this bombing campaign. It was her duty to consider the matter and to make up her mind as to whether these claims and allegations warranted the initiation of an investigation which could lead to an indictment, in other words, whether there was a sufficient suspicion that war crimes falling within the jurisdiction of the Tribunal had been committed. In order to prepare that decision, the Prosecutor used a somewhat unusual procedure. She established an expert commission to evaluate both the law and the facts in this respect. The members of this expert group, however, have remained anonymous, thus inviting educated guesses as to who is behind the report of the group. The report, although technically speaking an internal document to prepare the decision of the Prosecutor, has indeed been rendered public. It became accessible on the website of the Tribunal, and must therefore be considered as an official document of the Office of the Prosecutor. The document carries considerable weight as being the official view of an international institution. It deserves, thus, to be analyzed very carefully.

Looking at its content, it is fair to say that the report is an interesting document. It reflects well current problems concerning the interpretation of the rules relating to the protection of the civilian population, in particular the protection of the environment, the definition of military targets and the practical application of the proportionality principle. The report, however, is more interesting in its general legal discussion than convincing in its conclusions regarding the application of the law to the particular facts.

As a matter of principle, the way in which the report deals with the assessment of the facts is correct. It proceeds in the manner of a worst possible case study. The factual assumptions on which the legal evaluation is based are those which are not advantageous for the alleged perpetrators. The documentary basis are, inter alia, a publication by the Ministry of Foreign Affairs of the FRY and a report by Human Rights Watch. In addition, the report also takes into account statements issued by NATO. It singles out the most serious incidents of the bombing campaign. It cannot be said that the report tries in any way to belittle the facts at issue.

The report starts the legal assessment with the question of the damage caused to the environment (paragraphs 14 et seq.). This fact alone is noteworthy. It reflects a growing concern that environmental devastation caused by war might jeopardize the life and health of future generations. On the other hand, if one looks at the actual content of what the report has to say on the protection of the environment in times of armed conflict, one is tempted to think that this priority given to environmental concerns is more apparent than real. Attempts to further develop the treaty law relating to the preservation of the environment in times of armed conflict have indeed encountered a strong resistance from certain military powers so that these efforts had to be dropped. But nevertheless, it is safe to say that despite this resistance, environmental considerations have indeed gained their established place not only in international law generally, but also in international humanitarian law.

In a first approach, the report uses Articles 35 paras. 3 and 55 of Protocol I Additional to the Geneva Conventions as the basic yardstick to determine the legality of any damage caused to the environment. It does not give a final answer to the question whether these provisions have become a rule of customary international law. The report simply finds that the damage caused by the NATO air campaign does not meet the triple cumulative threshold, established by these provisions, of being "widespread, long-term and severe". In interpreting this threshold, the report (para. 15) seems to stick to the rather restrictive definition which was the object of an agreed interpretation at the Geneva Diplomatic Conference which adopted Protocol I, thus denying any further development of the relevant law since 1977.

If one takes the factual findings of the "Balkan Task Force" established by the United Nations Environment Programme, the conclusion that there was no environmental damage exceeding the threshold of Protocol I is probably unavoidable. The only question which remains is whether the group should have gone beyond the UNEP study in assessing environmental damage. This might have meant asking too much.

It is interesting, however, that the assessment made by the group does not stop at this point. It also analyzes environmental damage in the light of the proportionality principle which is the usual test for the admissibility of collateral damage caused by attacks against military targets, and to which we will revert below. This is a somewhat ambivalent point. This line of argument could be used as a means to lower the difficult threshold of Articles 35 and 55 Protocol I: once it were established that collateral environmental damage was excessive in relation to a military advantage anticipated, it would also be unlawful even if it were not widespread, long-lasting and severe. A systematic interpretation of Protocol I would, then, lead to the conclusion that the environment is protected by the combined