Unexploded Bomb: Voice, Silence and Consequence at the Hague Tribunals – A Legal and Rhetorical Critique

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UNEXPLODED BOMB: VOICE, SILENCE, AND CONSEQUENCE AT THE HAGUE TRIBUNALS
A LEGAL AND RHETORICAL CRITIQUE

TIMOTHY WILLIAM WATERS*

Voice—Information—Argument—Style—Structure—Consequence—Silence

I. INTRODUCTORY WORDS

In the spring of 1999, the atmosphere in Kosovo was, as near to the literal sense of the word as possible, explosive. In response to increasingly brutal mistreatment of ethnic Albanians by Serbian and Yugoslav forces—which in due course led to the expulsion of over one million Albanians, the killing of thousands more, and the indictment of Belgrade’s leaders for these acts by the International Criminal Tribunal for the Former Yugoslavia—NATO air forces bombed strategic and tactical targets throughout Serbia. For seventy-eight days, in its first major operation and a defining moment in the history of air combat, NATO released thousands of bombs and missiles over Yugoslavia, killing several thousand soldiers and civilians.2

Bombs of every description: great dumb steel bombs, smart bombs, gravity bombs, cluster-bombs with micro-munitions, sea-launched and air-launched cruise missiles, fuel-air munitions, armor-penetrating shells tipped with depleted ura-
nium. Bombs that most often hit military targets, that almost always exploded, that usually destroyed, and that sometimes killed.

Still, this is not about the bombs, but what came after them and what did not: what words, what silences, and what consequences.

There were many consequences: the withdrawal of Yugoslav forces, the return of Albanian refugees, the flight of Serbs and Gypsies, the establishment of a U.N. protectorate, the reaffirmation of NATO's prestige and purpose, and the eventual transfer of Slobodan Milošević to The Hague. But one consequence that did not ensue was the indictment or investigation of anyone for the aerial attacks.

Many voices criticized the wisdom or legality of the bombing and the way it was done; some pressed the Tribunal to indict NATO, which itself seemed extraordinarily sensitive to public opinion about a war whose purposes went well beyond the organization's traditional aims of self-defense. On May 14, 1999, with the war still underway, in response to "numerous requests that she investigate allegations that senior political and military figures from NATO countries committed serious violations of international humanitarian law[.]." the Tribunal's Prosecutor "established a committee to assess the allegations and material accompanying them, and advise the Prosecutor and Deputy Prosecutor whether or not there is a suffi-


4. Inquiry, supra note 3, ¶ 1.
cient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing.” 5 After an extensive internal review, 6 the Committee publicly issued its Inquiry on June 13, 2000. 7 It recommended against investigating any official from NATO or its member states. 8 That is its recommendation concerning each specific allegation 9 and its general conclusion, 10 a recommendation the Prosecutor publicly accepted 11 —and the only time the Prosecution has publicized an affirmative intent not to investigate. The Inquiry’s formal title—a Final Report to the Prosecutor 12—is instructive: Unless something is occurring beyond public view, inquiry into NATO’s actions is closed.

Of course, a lot has happened since Kosovo, so why should we care what the Inquiry says—especially if, as many suppose, NATO’s intervention was justified and the Prosecution got it right? We should care because the Inquiry—uniquely among all documents to come out of the ICTY—can tell us how the Prosecution views its role as a legal institution in a world of politics and power. The Inquiry is the one document that shows how the Prosecution responded to a question

5. Inquiry, supra note 3, ¶ 3.
7. Id. The Prosecutor announced her intention not to investigate in an address to the U.N. Security Council on June 2, 2000. Id.
9. See, e.g., Inquiry, supra note 3, ¶¶ 25-27 (recommending not to “commence an investigation”).
10. See id. ¶¶ 90-91.
12. In full, as it reads on the front page: “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.” Id.
and a crisis directly implicating the core interests of the most powerful states and its own institutional interests, and it is the one document showing us a Prosecution choosing not to act. By closely examining not its outcomes, but its sources, its arguments, and its style, we may understand how this Prosecution makes decisions—and to understand that is to understand something of the future for international criminal law.

At its conclusion, the Inquiry neatly summarizes the reasoning behind its findings:

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.\^\textsuperscript{13}

The reasons for not investigating are therefore three-fold—one interpretative, one evidentiary, and one substantive: a belief that the governing law is insufficiently clear, an estimate that investigation would be unlikely to produce sufficient evidence, and a belief that the absence of sufficiently serious ("particularly heinous") offences argues against liability.

A number of scholars have addressed the Inquiry, but all have focused on weaknesses in the Inquiry’s substantive legal analysis of NATO’s actions.\^\textsuperscript{14} I take a different approach. I

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\^\textsuperscript{13} Id. ¶ 90.

am emphatically not concerned with the innocence or guilt of NATO officials, about which reasonable people may disagree; indeed, precisely because the Inquiry’s one-off conclusions might be reasonable, it is more productive to focus on how it reached them. I ask what the Inquiry says about the Prosecution’s decision-making mindset to see what that might show us about the shape of future prosecutorial decision-making; my method is a rhetorical analysis of a document that may have a defining impact on the jurisprudence of the ad hoc Tribunals and the new International Criminal Court (ICC).15

Many of these same scholars assume the Inquiry was the compromised product of direct political pressure. I do not. There is no evidence in the Inquiry that the Prosecution succumbed to pressure from NATO. Perhaps it did—and NATO’s opportunities to apply pressure are obvious16—but it is at least as reasonable to suppose that the individuals who populate that institution appreciated the pressures and genuinely believed that they had resisted them—that, whatever the complexities, they had made an institutionally independent conclusion, and that the Inquiry is the result.

Not only on the facts, but also on interpretations of existing law that are more restrictive than those that have been proposed since the 1991 Gulf War.”). See also Benvenuti, supra note 8, at 503; Thilo Marauhn, Environmental Damage in Times of Armed Conflict—Not “Really” a Matter of Criminal Responsibility?, 82 Int’l Rev. Red Cross 1029 (2000); Natalino Ronzitti, 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?, 82 Int’l Rev. Red Cross 1017 (2000).

15. In this Article I seek to avoid a “substantive critique” of the Inquiry’s findings and instead focus on a “rhetorical critique.” By “substantive critique,” I mean an analysis of the Inquiry’s findings of fact and law. In contrast, by “rhetorical critique,” I mean an analysis of the peripheral or constructive elements that constitute those findings: methods of argument and stylistics as clues about intention, valuation, identity, self-image, and belief about law. Sometimes I have found it necessary in making a rhetorical critique to disagree on a substantive point; in the main, I believe my argument valid whether or not one agrees with the Inquiry’s outcomes. It might be helpful for some readers to supply their own opening sentence, such as: “NATO conducted itself in accordance with humanitarian law; the Inquiry therefore got the right outcome, but its way of getting it is deeply troubling.” I have refrained from taking a position out of methodological conviction, but readers are entirely free to guess at my substantive opinions; indeed, it is hard to imagine that, reading this Article, they would not.

16. See infra notes 339-48 and accompanying text.
But that should not end our inquiry. If the Inquiry was the product of direct interference, then we have a serious problem to address. But if, instead, this deeply flawed document really was the product of an independent review, then the problem is perhaps even more grave. Direct interference, though a danger, can be policed; subtler limits on a court are the more troubling threat, and the fact that cooptation might be effected through persons sincerely committed to a court’s independence simply underscores the institutional nature of the problem. The question we must consider is this: Is a court, constituted and situated as the Tribunal and ICC are, institutionally capable of asking the questions about law-politics that its advocates suppose it can, and that it must if it is to fulfill the promise of international legal justice?

This Article argues that the Inquiry raises serious concerns about the compliant attitude the Prosecution took toward NATO’s liability. It makes an original contribution to debate about the new Court through a case study of the overlooked, but troubling, effects of a prosecution’s discretion not to act. But more, it argues that the Inquiry’s structure and style entrench a worrisome immaturity in our approach to international justice—to the detriment of the ICC—where it could have contributed to positive change. As we shall see, the Inquiry is evidence that the new Court’s prospects are limited; our aspirations and our strategies may have to be adjusted ac-

17. Two Prosecutors oversaw the Inquiry: Louise Arbour, who commissioned it, and Carla Del Ponte, who published it. (William J. Fenrick has also publicly acknowledged his role as a principal author.) Had there been only one, we might be inclined to assign credit or blame to her for the Inquiry. As it is, we may better see the persistent, patterned response of an institution: not of a single Prosecutor, but of the Prosecution. This institutional effect will be as great in the new ICC, regardless of its Prosecutor’s personal qualities. See Kenneth W. Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts, 93 Am. J. Int’l L. 361, 378 (1999) (citing Justice Richard Goldstone, Conference Luncheon Address at Symposium, Prosecuting International Crime: An Inside View, 7 Transnat’l L. & Contemp. Probs. 1 (1997) (noting the creation of an institutional “community of law” around the Tribunals)); cf. Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 95 Am. J. Int’l L. 7, 27 (2001) (describing the ICC as a process of “acculturation engaging thousands of diplomats, advisers, academics, and activists who represented states, international organizations, and NGOs”). See generally Cass R. Sunstein, Bad Incentives and Bad Institutions, 86 Geo. L.J. 2267, 2280 (1998) (discussing the effects of institutional incentives).
cordingly, because a court that produces answers—even right answers—for the wrong reasons may never fulfill that promise.

A. The Argument in Brief

The argument proceeds like this: The Inquiry's determinative status in law—why it matters and

18. The Inquiry addresses events that occurred during the conflict between the Federal Republic of Yugoslavia (F.R.Y.) and NATO in early 1999. The following background is included for readers' reference; the Article does not rely on a particular account of the historical record or the conflict. NOEL MALCOLM, Kosovo: A SHORT HISTORY 56-57 (1999). It was long part of the Ottoman Empire, which won a decisive battle against Serb-led forces there in 1389. Id. at 58-80. After the Balkan Wars and First World War, the territory became part of the new Yugoslav kingdom; Orthodox Serbs, though a minority among the mostly Muslim Albanians, were politically dominant. Id. at 267. Under Tito's postwar communist regime, Kosovo was an autonomous province within Serbia but also had a separate federal personality. Id. at 314-16. At first Serbs retained control, but after the 1974 constitutional reforms Kosovo's Albanians increasingly dominated the province. Id. at 327. The treatment of Kosovo's Serbs became one of the major grievances driving the rise of Serb nationalism after Tito's death in 1981. Id. at 337-69. Consolidating his power in Serbia and, later, the new Federal Republic of Yugoslavia, Slobodan Milošević orchestrated the effective abolition of Kosovo's autonomy in 1989 and initiated repressive policies against Albanians. Id. at 341-44. See generally Tim Judah, Kosovo: War and Revenge (2002).

The Conflict: Resistance was initially pacifist, but from 1997 on, armed guerrilla movements—especially the Kosovo Liberation Army (KLA or UÇK)—began attacks, to which Serb forces responded with increasingly harsh suppression; by mid-1998, a serious conflict was underway. See Judah, supra, at 73. NATO countries in particular pressed for restored autonomy and the withdrawal of Serb forces; they threatened intervention and brokered a ceasefire that allowed international observers to operate in Kosovo from late 1998. See Peter Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, 12 EUR. J. INT’L LAW 437, 438-42 (2001) (briefly outlining the course of the conflict and the diplomatic developments related to it). Fighting continued, however, and the number of refugees and internally displaced rose to perhaps a quarter of a million. Judah, supra, at 233. By February 1999, talks in Rambouillet on a political settlement broke down, and on March 24, 1999, NATO began its bombing campaign. Id. at 197-228. In the days that followed, Serbs initiated a massive expulsion campaign, killing several thousand Albanians and forcing more than one million more to flee. Report on the Situation of Human Rights in Kosovo, FRY, U.N. High Commissioner for Human Rights, U.N. Doc. E/CN.4/2000/10 (Sept. 7, 1999). On June 10, 1999, Milošević agreed to NATO's occupation of Kosovo. There
how it disposes of important legal issues. Part III discusses how the Inquiry uses sources: By favoring some and disfavoring others, it creates voice and authority that preempt serious legal analysis. After defining "progressive" and "consensual" legal interpretation, Part IV explores the Inquiry's curiously selective approach to consistency in legal argument about proportionality, targeting, and authority—in contrast to the Prosecution's practice in other cases. Part V examines the distorting effects of stylistics—perspective, context, and authorial voice. Part VI returns to the question of consistency and intention: Whatever the seriousness of NATO's actions, the Prosecution does not seem serious in considering them. This lack of seriousness is pregnant in the structure and the very public existence of the Inquiry. Finally, Parts VII and VIII move from the evidence to its implications: The Inquiry's timidity evinces an institutional failing with consequences for the ICC and for our ability to ask questions about the changing nature of war.

B. Background: Operations and Incidents in Operation Allied Force

NATO's Operation Allied Force was almost entirely conducted from the air in a massive operation: More than 38,000 sorties released over 23,000 munitions over 78 days. NATO struck Serb units engaging in expulsions and fighting the KLA in Kosovo, as well as strategic military, political, and infrastructure targets throughout Serbia. NATO held daily press briefings and provided extensive, if controlled, publicity about its decision-making and operations, such as pilot cockpit video.19 In all, about 500 civilians were killed by NATO bombing in a


number of incidents. The Inquiry considers five of the most serious or controversial incidents in detail:

**THE TRAIN ON THE GRDĚLICA GORGE BRIDGE:** On April 12, 1999, two NATO laser-guided bombs struck a five-carriage passenger train crossing the Leskovac railway bridge over the Grđelica Gorge on the Južna Morava River in eastern Serbia, killing at least ten people and injuring at least fifteen.

**THE DJAKOVIĆA REFUGEE COLUMN:** On April 14, 1999, bombs launched in a series of attacks from NATO aircraft flying above 15,000 feet struck one (or two) column(s) of vehicles carrying primarily or solely refugees, killing about 70 and injuring about 100.

**THE RTS STUDIOS:** Early on April 23, 1999, NATO intentionally launched cruise missiles into the central studios of Radio Televizija Srbija (RTS) in Belgrade, killing between ten and seventeen people. The incident provoked protests from news media and rights groups.

**THE CHINESE EMBASSY:** On the night of May 7, 1999, NATO missiles struck the embassy of the People's Republic of China in Belgrade, killing three Chinese citizens, injuring about fifteen others, and causing extensive damage to the embassy and surrounding buildings. The U.S. claimed it had mistakenly identified the building as Yugoslav Federal Directorate for Supply and Procurement. The incident caused a diplomatic rift, and the United States later paid China reparations.

**KORIŠA VILLAGE:** On May 14, 1999, ten NATO bombs struck the village of Koriša on the Prizren-Priština highway,

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20. See Inquiry, supra note 3, ¶ 53 (noting an F.R.Y. report's estimate of 495 civilians killed and 820 wounded); Human Rights Watch, Civilian Deaths in the NATO Air Campaign (Feb. 2000), at http://www.hrw.org/reports/2000/nato ("as few as 488 and as many as 527 Yugoslav civilians were killed").


22. Id. ¶¶ 63-64.

23. Id. ¶ 71.


25. Inquiry, supra note 3, ¶ 80.

26. Id. ¶¶ 81-82.
killing about eighty-seven civilians and injuring about sixty others, mostly refugees.27

**General Issues:** The Inquiry also addresses theater-level use of depleted uranium munitions and cluster bombs,28 environmental damage,29 target selection,30 and casualty figures.31

C. **Organization of the Inquiry**

The Inquiry is organized into five sections: (I) a discussion of its background and mandate (paragraphs 1-4); (II) an overview of the criteria for review (paragraph 5); (III) its work program, listing the incidents and documents reviewed (paragraphs 6-13); (IV) the assessment, divided into general issues and the five specific incidents (paragraphs 14-89); and (V) recommendations recapitulating those made in the assessment (paragraphs 90-91). The Inquiry uses Serbian (not Albanian) geographical and political nomenclature, and this Article follows its practice.

II. **A Determinative Silence: The Status of the Inquiry in International Law**

Before we examine the Inquiry's sources, structures, and style, we must consider an important preliminary question: Why do the Inquiry's words matter? After all, the Inquiry was not submitted to the Tribunal,32 and indeed there would have been no purpose since it does not request any action. The Prosecution was under no obligation to inquire about NATO and owed the Tribunal no explanation of its decision not to investigate. The Inquiry is not, therefore, a court document any more than a press release is.

Still, the Inquiry is remarkable for its extensive explication of the Prosecution's methods and procedures, and as a

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27. Id. 86.
28. Id. 26-27.
29. Id. 14-25.
30. Id. 28-52.
31. Id. 53.
32. By "Tribunal" I mean the Chamber, the International Criminal Tribunal for the Former Yugoslavia (ICTY), or the International Criminal Tribunal for Rwanda (ICTR) as a whole, as distinct from its Prosecution. "The Court" means the ICC. Variant usage will be clear from context or noted explicitly.
contemporaneous statement of its institutional self-image; no other public document from the Tribunal goes into such detail about the rationale for its operation or substantive arguments. For this reason alone it is a valuable document for scholars interested in considering the Tribunal's role in developing the infrastructure of international law. The Inquiry is determinative in one important sense: Because of it, there will be no other definitive pronouncement about the bombing campaign because the Prosecution, within its rights, declined to bring the matter to the Tribunal's attention. One power the Prosecution possesses is the ability to decide whether or not to proceed to court—in that sense, its determination not

33. See Public Statement, Amnesty International, Amnesty International's Initial Comments on the Review by the International Criminal Tribunal for the Former Yugoslavia of NATO's Operation Allied Force (June 13, 2000), at http://web.amnesty.org/library/index/engeur700302000?open&of=eng-385 (“Amnesty International welcomes the unusual publication by the ICTY of the reasoning behind the decision not to open an investigation related to NATO's bombing campaign. The organization believes that this step contributes greatly to the Tribunal's transparency, offering important perspectives on the interpretation of the laws of war.”).

34. Cf. James Vorenberg, Decent Restraint of Prosecutorial Discretion, 94 Harv. L. Rev. 1521, 1523 (1981) (“[T]he existence of trials cannot check prosecutorial powers not dependent on trial. These powers include the prosecutor's wide discretion in making decisions about charging . . . and allocating investigative resources.”). Most discussion of discretion asks if the decision to prosecute was correct or legal. See Oyler v. Boles, 368 U.S. 448, 456 (1962) (upholding selective enforcement not based on unjustifiable standards or arbitrary classifications); Vorenberg, supra, at 1539-40 (noting that Yick Wo v. Hopkins, 118 U.S. 356 (1886), was the only instance in which the Supreme Court found an abuse of prosecutorial discretion). Less discussed is discretion in deciding not to prosecute. Cf. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 22 (1969) (“[T]he power not to prosecute may be of greater magnitude than the power to prosecute, and it certainly is much more abused because it is so little checked.”); Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium 228 (2002) (calling prosecutorial independence “the foundational principle of the [Rome] Statute” and explaining that “[t]his means independence in deciding whether or not to initiate an investigation and in deciding whether or not to pursue a particular individual”); Sarah J. Cox, Prosecutorial Discretion: An Overview, 15 Am. Crim. L. Rev. 383, 392 (1976) (“[I]n prosecution . . . decisions not to charge, or not to prosecute further, represent an area of discretion which is for the most part both unreviewed and unreviewable.”). See also generally Wayne R. LaFave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532 (1970).
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to proceed imparts as much legal authority as the matter likely ever will have.\textsuperscript{35}

More than that, the Inquiry is a \textit{public} document: The Prosecution determined the Tribunal's silence but did not remain silent itself. Observers inevitably will compare future investigations to the arguments in the Inquiry and will judge future air campaigns—and the ICC's efforts to police them—against its standards. Observers have as much interest in knowing which issues do not constitute crimes as which do, even if that determination is effected by a lower authority.\textsuperscript{36} The Inquiry establishes an informal but influential minimum estimate of liability whose higher reaches are described in court decisions; it creates a negative imprint of the law, giving guidance as to where it will not tread.\textsuperscript{37}

Because the outcome (no investigation) would have been identical if the Inquiry's reasoning had not been elaborated,\textsuperscript{38}

\textsuperscript{35} In this sense, it is also clearly more legally decisive than reports on the NATO campaign produced by groups such as Human Rights Watch or Amnesty International. \textit{See} Laursen, \textit{supra} note 14, at 772.

\textsuperscript{36} Schwabach, \textit{supra} note 14, at 171-72 ("While decisions of the ICTY tend to play an important role in the formation of normative expectations, the actions of the OTP, in and of themselves, do not. By controlling the types of cases which will be brought before the ICTY, however, the OTP plays an important role in determining the types of norms that will be formed. In this sense, the \[Inquiry\] may provide important insight into the future formation and development of international human rights norms.").

\textsuperscript{37} The Inquiry does not bind the Prosecutor, \textit{see} Inquiry, \textit{supra} note 3, \textit{¶} 3 (noting that Article 18 of the Tribunal's Statute provides for the Prosecutor to assess information received and decide if there is sufficient basis to proceed), yet it may guide the strategic thinking of the Prosecution and parties to future conflicts, informing their assessments of what will be thought acceptable conduct.

\textsuperscript{38} Indeed, the outcome had been announced six months earlier. \textit{See} Press Release, International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor, Statement by Madame Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (Dec. 30, 1999), \textit{at} http://www.un.org/icty/pressreal/p459-e.htm:

\begin{quote}
NATO is not under investigation by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia. There is no formal inquiry into the actions of NATO during the conflict in Kosovo.

During the past six months, the Prosecutor has met with and received information from a variety of individuals and groups urging an investigation of NATO's actions during the Kosovo conflict, including members of the Russian Duma and several international
the content and style of its internal argumentation represent its main contribution. Also, because the outcome would have been identical even if the Inquiry had never been made public, the purposes of its *presentation* are a legitimate object of inquiry— a matter to which we shall return. It matters less what conclusions were reached than how they were reached and how they were presented.

Still, since the Tribunal has issued no other inquiries, what is the proper basis for comparison? Though primarily considering the text of the Inquiry, this Article also refers to indictments issued by the Prosecution; is it even apposite to compare them? Yet this seeming methodological objection is perhaps the strongest argument for proceeding. Other inquiries may exist or not, but we cannot know because the Prosecution has chosen not to publish them; the lack of directly comparable material is a *consequence* of the Prosecution’s own critical choices, and so one has every right to expect that the Inquiry represents as equally final and equally felt an assessment as any indictment.39 The fact that the Inquiry does not look like an indictment is not a methodological difficulty, it is the central question we must address: Why does it not?

Voice—Information—Argument—Style—Structure—Consequence—Silence

III. THE PROSECUTOR’S GAZE: INFORMATION AND AUTHORITY

... A story that was the subject of every variety of misrepresentation, not only by those who then lived but likewise in succeeding times: so true is it that all transactions of preeminent importance are wrapped in doubt and obscurity; while some hold for certain facts the most precarious hearsays, others turn facts

legal experts. As with any other information provided to the Prosecutor, this information is reviewed by her staff.

39. The Prosecutor reserves the right to revisit the NATO matter should more information become available. This is also true for indictments, a number of which have been amended or withdrawn; this does not make them any less “final,” or effective, on the day of their issuance. See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, adopted Feb. 11, 1994, amended July 17, 2003 (28th rev.), Rules 47, 50-51, U.N. Doc. IT/32/REV.28 (2003) (regarding submission, amendment, and withdrawal of indictments by the Prosecutor), available at http://www.un.org/icty/legaldoc/index.htm.
into falsehood; and both are exaggerated by posterity.

—Tacitus

We begin with the Inquiry's use of sources, because the bias it exhibits is so pervasive and foundational. Any examination of the Inquiry has to consider the rhetorical and substantive effects of its being, in effect, a quotation: Such a large portion of the Inquiry is drawn directly from NATO sources that the Inquiry's view, in a significant part, is NATO's. So often its phrasing and its very words are NATO's, with all that implies for argument, perspective, tone, manufacture of sympathy, authorship, and authority. We will examine, first, its quantitative reliance on certain sources, then its qualitative biases and the effects these have on its view of authority, and then how it responds to the absence of information.

A. Creating a Univocal Record

By its own account, the Committee relied exclusively on documents, most of which were in the public domain. It lists a broad array of sources, but in fact NATO and its members' military and political leadership contributed the great majority of the sources around which the Inquiry is structured. In the five incidents discussed in the Inquiry, at least 23 separate NATO or NATO-related sources are cited, compared with only six non-NATO sources.

In fact, the degree of reliance on NATO is even greater than these numbers suggest: Citations from two of the non-NATO sources, Human Rights Watch and Amnesty International, consist almost entirely of quotations from NATO. If
we incorporate these observations into a table, it looks like this:45

**TABLE I: SOURCES CITED IN THE INQUIRY**

<table>
<thead>
<tr>
<th>Incident</th>
<th>NATO Source</th>
<th>Other Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grdelica</td>
<td>U.S. Deputy Defense Secretary John Hamre,46 SACEUR General Wesley Clark 47</td>
<td>Ekkehard Wenz 48</td>
</tr>
<tr>
<td>Train</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Djakovica</td>
<td>NATO press conference of April 15, 1999;49 SACEUR General Wesley Clark;50</td>
<td>F.R.Y. Ministry of Foreign Affairs</td>
</tr>
<tr>
<td>Convoy</td>
<td>NATO Colonel Ed Boyle;51 CFAC General Michael Short;52</td>
<td>Report;53 unspecified source;54</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Serb TV footage;55 Human Rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Watch56</td>
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</tbody>
</table>

45. The list includes sources that discuss circumstances relating to the attacks in Kosovo and does not include sources that discuss the general state of the law, such as ICRC Commentary on the Additional Protocols.

46. Inquiry, supra note 3, ¶ 59 (without citation to the source of Hamre’s statement).

47. Id. ¶ 59 (citing to “Press Conference, NATO HQ, Brussels, 13 April [1999]”).

48. Id. ¶ 60 (referring to a “comprehensive technical report” by Ekkehard Wenz, a German national).

49. Id. ¶ 64.

50. Id. ¶ 68 (citing a quotation from Clark in an unidentified Human Rights Watch report).

51. Id. (citing a quotation from Boyle in an unidentified Human Rights Watch report).

52. Id. (citing “guidance” issued by Short in an unidentified Human Rights Watch report).

53. Id. ¶ 63. The Inquiry uses this report to frame its initial description of the incident but first says “[t]he precise facts about this incident are difficult to determine.” Id.

54. Id. ¶ 66 (referring to a report on file with the Office of the Prosecutor (OTP)). This may possibly be a report by Ekkehard Wenz, the German national noted above. See id. ¶ 6(g) (noting that the Committee had reviewed a report by Wenz on the Djakovica incident, although no explicit citation to any such report is made in the Inquiry).

55. Id. ¶ 67.

56. Id. ¶ 68 (report not identified).
In four of the five incidents considered, the Inquiry relies predominantly upon the very source whose potential liability is at issue: in two a single non-NATO source is cited, while in two others only NATO or U.S. Government sources are cited.

Yet the imbalance—the reliance on NATO’s voice—goes well beyond mere numerical preponderance in the sources. In addition to relying on a larger number of NATO sources, the

<table>
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<tr>
<th>Incident</th>
<th>NATO Source</th>
<th>Other Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>RTS TV Station</td>
<td>NATO press conferences of April 9, April 27, April 23, April 28, and April 30, 1999; U.K. Prime Minister Tony Blair (twice); NATO statement of April 8, 1999; NATO press releases of May 1, May 3, April 30, April 23, and April 21, 1999; NATO communication to Amnesty International dated April 17, 1999; Letter from NATO spokesman Jamie Shea to the International Federation of Journalists, dated April 12, 1999; unspecified NATO sources</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>Korista Village</td>
<td>unspecified NATO spokespersons; unspecified NATO officials; NATO General Gertz; unspecified NATO source</td>
<td>none</td>
</tr>
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57. Id. ¶ 72, 73, 76, 78.
58. Id. ¶ 74 (citing a statement by Blair on April 24, 1999); Id. ¶ 77 (citing AMNESTY INTERNATIONAL, supra note 44, quoting Moral Combat—NATO at War (BBC2 television broadcast, Mar. 12, 2000)).
59. Id. ¶ 74.
60. Id. ¶ 78 (citing AMNESTY INTERNATIONAL, supra note 44, quoting Moral Combat—NATO at War (BBC2 television broadcast, Mar. 12, 2000)).
61. Id. ¶ 78.
62. Id. ¶ 73 (citing AMNESTY INTERNATIONAL, supra note 44, at 42).
63. Id. ¶ 76 (citing AMNESTY INTERNATIONAL, supra note 44, at 42).
64. Id. ¶ 77 (citing AMNESTY INTERNATIONAL, supra note 44, at 42, 47).
65. Id. ¶ 77 (citing AMNESTY INTERNATIONAL, supra note 44, at 42, 47 (referring to warnings given to foreign journalists prior to the attack)).
66. Id. ¶¶ 80-81, 84. It seems likely that the information in ¶ 83 also derives from U.S. Government sources, as it discusses internal decision-making processes about targeting.
67. Id. ¶ 81.
68. Id. ¶ 86.
69. Id. ¶ 87.
70. Id. ¶ 88 (quoting Gertz from the NATO press conference of May 15, 1999).
71. Id. ¶¶ 88-89.
Inquiry gives those sources far more space as direct citation or reformulation. Indeed, the space devoted to NATO sources is extraordinarily disproportionate, with the narrative about all five incidents almost entirely constructed from them. The most extreme example is the discussion of the Grdelica Gorge train incident, with seven paragraphs of direct quotation from General Wesley Clark at a NATO press conference.

B. From Utopia to Apology: Favoring Unfavorable Formulations of Fact

Looking beyond quantitative reliance, we now consider how information is used and the conceptual contexts into which it is inserted. In an indictment, a prosecutor is free to develop the facts most favorable to successful prosecution. The facts are rarely so favorable in reality or in court; still, it would be naïve to suppose that prosecutors never avail themselves of the chance to make arguments they hope they will be able to win later. Yet despite explicitly applying this utopian standard, the Inquiry seems to assume the “facts least favorable to the prosecution”—an apologia for the defendant. The evidence is impressionistic, but compelling: The Inquiry is far more likely to accept NATO statements at face value or assign them a positive, and often decisive, interpretation. We will consider how the Inquiry’s treatment of sources creates authority.

1. Words are not Petards: Treatment of NATO Sources

A petard is an antiquated explosive, of no contemporary value but surviving in language to remind us how rare the weapon is that cannot be turned on its master. A prosecutor

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72. This measurement does not include the discussions of Koriša and the Chinese embassy, for which no ratio is mathematically expressible.
73. Inquiry, supra note 3, ¶ 59 (attributing the statements to Clark and citing to “Press Conference, NATO HQ, Brussels, 13 April [1999]”).
74. With apologies to Martti Koskenniemi.
75. Cf. Vorenberg, supra note 34, at 1537-38 (describing indictment proceedings).
76. Inquiry, supra note 3, ¶ 64 (“Assuming the facts most appropriate to a successful prosecution . . .”).
77. See, e.g., William Shakespeare, Hamlet act 3, sc. 4, at 332 (Harold Jenkins ed., Methuen & Co. 1982) (“For 'tis the sport to have the enginer Hoist with his own petard, and't shall go hard/But I will delve one yard
can do no better than to damn a defendant with his own words, to cut through denials or difficulties of proof and force him to concede that, indeed, he once said so himself.

In war there are many weapons, and words are weapons too; NATO knew that and used them, holding daily press conferences throughout the campaign to control the flow of information and turn it to its purposes. In the process, NATO put into the public domain a wealth of information about its actions and intentions, which observers might use to establish facts to NATO's detriment in ways it might not have anticipated.

It might be supposed, then, that having decided to use NATO information almost to the exclusion of other sources, the Committee would turn a critical eye to that information to see what unintended revelations it could pry from it. Yet in no instance does the Inquiry use these sources to hoist NATO with its own petard—an uncritical reliance that conflates the suspect's subjective opinions with proofs of objective fact. For example, the sources for the conclusion that the train destroyed on the bridge at Grdelica appeared not to have been targeted deliberately—the heart of the matter—are U.S. Deputy Defense Secretary John Hamre and General Clark. Although General Wesley Clark is quoted for seven paragraphs, there is no indication that the Prosecution is looking for signs of inconsistency, insincerity, unanswered questions, or any suggestion that things are not as NATO says. The general is simply given the floor.

The Inquiry's reliance on sources partial to NATO affects its conclusions on the most fundamental questions of liability. In considering NATO's strike on RTS, for example, the Inquiry asks whether the attack was against a propaganda organ (an illegal target) or a dual-use element of the command and control system (a legitimate target). It concludes that "[i]t appears . . . 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.\textsuperscript{80} Whatever its merit, that conclusion is nothing but reportage of the suspect's opinion, drawn from NATO's own public statements.\textsuperscript{81}

The Inquiry's discussion purports to be answering the following question: "[W]as the station a legitimate military objective; and if it was, were the civilian casualties disproportionate to the military advantage gained by the attack?\textsuperscript{82} On this matter a suspect's opinion is not dispositive, nor even terribly interesting; the nature, purpose, or use of RTS as a military or non-military objective is not subject to NATO's post hoc preference. Yet in deciding the facts of the incident, the Inquiry relies entirely on NATO's stated subjective belief that it was attacking justified targets.\textsuperscript{83} The Inquiry says that it "appears" NATO's interest in destroying the propaganda capacity of the F.R.Y. was incidental to its primary aim—based only on

\textsuperscript{80} Inquiry, supra note 3, p 76.

\textsuperscript{81} Id. (citing, \textit{inter alia}, a NATO press conference of April 9, 1999, and a letter from NATO spokesman Jamie Shea to the International Federation of Journalists dated April 12, 1999, in support of its conclusion).

\textsuperscript{82} Id. p 75. Additional Protocol I (1977) to the Geneva Conventions of 1949, art. 52(2)-(3), provides the standard definition of a legitimate military objective:

\begin{enumerate}
\item Attacks shall be limited strictly to military objectives. In so far as objects are concerned, 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.
\item In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.
\end{enumerate}


\textsuperscript{83} \textit{See} Inquiry, \textit{supra} note 3, p 76 (citing a NATO press conference of April 9, 1999, and a letter from NATO spokesman Jamie Shea to the International Federation of Journalists dated April 12, 1999, [both dated before the attack in question] to the effect that it was not targeting television transmitters as such but rather military targets with which the transmitters were integrated, and therefore the damage was secondary; the relevance of comments about transmitters to the attack on the actual television studios is not clear).
NATO's assertion. Perhaps its assertion accords with the best legal interpretation of the facts, but that is not for NATO to say. The Prosecution’s responsibility is to decide the matter, not to delegate it to the suspect.

The same reliance occurs here, where, addressing the apparent fact that NATO knew its bombing of RTS would not actually interrupt transmissions (a matter of importance for a proportionality analysis), the Inquiry sets the attack in a broader context constructed entirely from NATO *ibidem*:

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, Kosovacka 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 F.R.Y. integrated air-defence system (*ibid*, 23 April 1999). The radio relay and transmitting station near Novi Sad was also an important link in the air defence command and control communications network. 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).84

The sentence following is a recommendation not to investigate.85

The consistent, nearly exclusive, and always sympathetic use of NATO sources undercuts the normal prosecutorial exercise of creating a utopian prima facie (or even merely balanced) case. All human and institutional sources bias toward their interests, so relying on them rarely constitutes the interpretation most favorable to objective enquiry unless they are used to damn a defendant with his own words. That never happens in the Inquiry.86

2. Words are Shields: Treatment of Non-NATO Sources

The Inquiry treats NATO sources with considerable deference; the few non-NATO sources are received far more critically and are subjected to greater scrutiny. The deference shown NATO is therefore not simply a function of a universal deference towards all sources—the Prosecution evidently can be critical when it wishes to be. In fact, it turns the traditional arsenal of lawyerly skepticism and scrutiny on non-NATO

84. Id. ¶ 78.
85. Id. ¶ 79. Similarly, in considering the Koriša attack, the Inquiry notes, "According to NATO, all practicable precautions were taken and it was determined that civilians were not present." This statement is followed two sentences later by the recommendation not to investigate. Id. ¶ 89.
86. The Inquiry's seeming reticence to hoist NATO with its own petard cannot be explained by saying that NATO did not manufacture that particular weapon. Indeed, there is an apparently unintended near-hoisting when the Inquiry cites a passage from a Human Rights Watch report that quotes NATO officials. Id. ¶ 68 (not specifying the report). The Human Rights Watch report is apparently excerpted in order to draw out a point favorable to NATO, ignoring the harmful argument embedded in its original context: The original Human Rights Watch report cited uses the NATO commanders' comments about NATO's increasing caution to argue that "the change in NATO rules of engagement indicates that the alliance recognized that it had taken insufficient precautions in mounting this attack [on the Djakovica convoy]." Id. Human Rights Watch cites the NATO officers to show that they were aware of insufficient precautions taken to identify civilians in this attack. However, the Inquiry cites the passage as support for its own assertion that "NATO has consistently claimed that it believed the Djakovica convoy to be escorted by military vehicles at the time of the attack." Id.
sources in a manner that shows it knows how to wield weapons, to go on the attack to protect a position.

One form this scrutiny takes is a corroboration test for non-NATO sources: In at least two instances, the Inquiry dismisses further consideration of a report principally because it lacks corroboration. A Yugoslav report (claiming that intercepted conversations between NATO pilots showed that an attack on a civilian convoy was made with foreknowledge) is demoted in value, not simply as non-credible but as "not [being] confirmed by any other source." 87 Similarly, examining environmental damage, the Committee notes that it "has been hampered in its assessment of the extent of environmental damage in Kosovo by a lack of alternative and corroborated sources regarding the extent of environmental contamination . . . ." 88

Corroboration is a legitimate standard, but it is not applied consistently in the Inquiry; it is never applied against unconfirmed NATO-related sources or in any instance in which rejecting a factual claim would increase liability. NATO declarations are simply accepted in isolation or, given the overlapping plethora of NATO sources, are corroborated by other NATO declarations. Of course, a hobgoblinish insistence on corroborative consistency can mislead; if a suspect's story is plausible it need not be corroborated, whereas accusations must almost always be. 89 The requisite consistency is not between suspect and accuser, however, but between two suspects or accusers: In no other instance has the Prosecution made a suspect's denials probative. 90 Of course, corroboration will

87. Id. ¶ 66.
88. Id. ¶ 17. It is curious to raise corroboration objections regarding damage in Kosovo: At all times since the Inquiry began, Kosovo has been under international supervision, and the Prosecution's access to the province is unrestricted, so it could investigate the matter directly itself if corroboration were its main concern.
90. Perhaps there are unknown instances in which investigation was halted because a suspect provided a plausible explanation for his actions, but that is partly a question of publicity—a matter to which we shall return.
never be obtained if investigation is halted the moment the suspect denies liability.

Non-NATO sources that survive this harsher scrutiny are neutralized in a different way: They are used mostly to establish facts that are unchallenged or uncontroversial—such as the existence of a bombing attack or the exact number of dead—rather than to examine questions of responsibility, mens rea, and notice, for which NATO sources are used. Concern with bias cannot be the reason, since the potential for bias in NATO's statements is too obvious to ignore, and yet NATO's words constitute the overwhelming bulk of the Inquiry's evidence. Even if we accept the decision not to use other sources, two questions arise: (1) Why rely on NATO sources so uncritically? (2) Why rely on them at all—why issue a report that has the effect of exonerating NATO if there is insufficient information—instead of remaining silent?

3. Voice and Authority

To this point we have considered how the Inquiry uses its (mostly NATO) sources. What does the Inquiry reveal about why it uses them in these ways? Underlying the different treatment given to individual items is a patterned distinction in the Committee's approach to informational authority, which effectively predetermines its choices about the value of facts and, with them, its view of what happened. Quotation quotes both a voice and a view.

The Inquiry notes that the committee "has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given." In no other document does the Prosecution adopt an operating assumption that a potential suspect's statements are "generally reliable." Most are silent on the matter, and unsurprisingly, the clear implication in them is that the subject, in denying or explaining away moral or legal culpability, and even in describing the facts, may be lying.

91. As the Human Rights Watch report demonstrates, it is possible to construct critical arguments about liability using NATO sources. See Inquiry, supra note 3, ¶ 68.
92. Id. ¶ 90.
Yet evidence was readily available to the Prosecution, both in the Inquiry and outside it, that NATO was not always truthful. The Inquiry itself acknowledges shortcomings:

The committee must note, however, that when the [Prosecutor] requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents.\footnote{Inquiry, supra note 3, ¶ 90.}

That is another way of saying that NATO’s answers were evasive or unresponsive, raising questions as to why its other statements were seen as “generally reliable” or “honestly given.”

One prominent example of how NATO’s approach to information was more nuanced than the Committee allows is actually discussed in the Inquiry, though with a different focus. Following its attack on a train at Grdelica, NATO showed cockpit video of missiles striking the train; a German national supplied the Prosecution with an analysis suggesting the video had been sped up.\footnote{Id. ¶ 60. The individual, Ekkehard Wenz, was acting in a private capacity. The speed with which the attack occurred—in which a pilot launched two separate munitions that struck a moving train only seconds apart—was an important element in NATO’s explanations terming the event an accident. See id. ¶ 59 (quoting General Wesley Clark’s description of the incident at a NATO press conference on April 13, 1999).}

The fact that NATO had indeed sped up the video\footnote{NATO later acknowledged (before the Inquiry was issued) that the tape had been sped up three times, but claimed it was a mistake. Agence France Presse, \textit{Tape of NATO Strike on Train Shown at Three Times Normal Speed} (Jan. 6, 2000); Supreme Headquarters Allied Powers Europe (SHAPE), \textit{Reports that NATO showed videos of the bombing of a passenger train on a bridge in Yugoslavia last spring at three times the normal speed remain at the center of media attention, in SHAPE News Summary & Analysis, Kosovo-Comments, at http://www.fas.org/man/dod-101/ops/2000/lsa070100.htm (Jan. 7, 2000).} surely raises serious questions about NATO’s reliability and intentions—questions one might understandably generalize to the wider set of NATO’s statements.\footnote{The Inquiry also notes that NATO “initially denied, but later acknowledged, responsibility for” the attack on a refugee column near Djakovica on 14 April 1999.” Inquiry, supra note 3, ¶ 64. On NATO’s series of statements about this attack, all of which would have been available to the

(questioning of witnesses concerning the identity of voices on a taped radio transmission; Krstic had maintained that the tape was not of his voice).
the video analysis as bearing only on the narrow facts of the incident.\textsuperscript{98} We shall return to this case in some detail.

NATO’s handling of access to information\textsuperscript{99} was also the subject of public debate, as the Committee must have known.\textsuperscript{100} Indeed, it is difficult to see how any observer could believe that NATO was simply a disinterested supplier of truth about events in which it was involved, unaffected by its war aims; at a minimum, no observer could credibly think such a view uncontroversial. When NATO supplied public\textsuperscript{101} information, see Human Rights Watch, Under Orders: War Crimes in Kosovo 444-46.

\textsuperscript{98} The Inquiry does not reach the most relevant conclusion that Wenz’s analyses suggest: that the tape may have been \textit{deliberately} sped up by NATO for the purpose of making the pilot’s reaction time appear shorter. Instead, the Inquiry phrases it this way: “A comprehensive technical report submitted by a German national, Mr Ekkehard Wenz . . . 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.” Inquiry, supra note 3, ¶ 60. With regard to analysis of the incident, this is indeed a reasonably fair summary of Wenz’s argument. With regard to the broader question of NATO’s general reliability, the formulation appears crafted to avoid the obvious implication that NATO may have manipulated the evidence deliberately and lied.

\textsuperscript{99} “Correspondents travelling with NATO forces . . . were also granted ‘selective’ or ‘filtered’ access, a constraint often reinforced by their sense that the side they were covering was in the right.” International Council on Human Rights Policy, Journalism, Media and the Challenge of Human Rights Reporting 99 (2002).

\textsuperscript{100} NATO itself acknowledged such disputes at its assessment press conference in September 1999. Gen. Wesley K. Clark, Supreme Allied Commander, Europe, and Brigadier Gen. John Corley, Chief, Kosovo Mission Effectiveness Assessment Team, Press Conference on the Kosovo Strike Assessment (Sept. 16, 1999) (transcript available at http://www.nato.int/kosovo/press/p990916a.htm) (referring to various news reports suggesting that the NATO bombing was ineffective and that NATO deliberately lied about or distorted bombing figures).

\textsuperscript{101} Even within NATO governments, information was not necessarily reliable. See, e.g., John Barry & Evan Thomas, The Kosovo Cover-Up, Newsweek, May 15, 2000, at 22 (reporting that ranking American military officials had “buried” a U.S. Air Force damage report, later obtained by Newsweek, showing that the air campaign had been far less effective than NATO had publicly claimed and noting that “[a]ll during the Balkan war, Gen. Wesley Clark, the top NATO commander, was under pressure from Washington to produce positive bombing results from politicians who were desperate not to commit ground troops to combat”).
mation, it did so because it felt it was in its interest to do so; when it withheld information and when, possibly, it dissimulated or lied, its interests were the same—this would have been the logical assumption for the Prosecution to make and the logical public strategy to adopt. The assumption of truthfulness became even more tenuous for NATO statements made after the Prosecution began its Inquiry, as even the most virtuous individual or institution feels the incentives of self-interest if it knows its comments will be scrutinized for criminal liability. Statements NATO made after the Inquiry began should have had attached to them an assumption that they likely and logically were the self-interested statements of an organization intent on protecting itself. The Inquiry belatedly admits it assumed the opposite.

Why would the Prosecution assume that NATO was truthful? In the Inquiry we find no explanation. In failing to account for its reasoning, the Committee left itself open to a different assumption by its readers—that it may not have made a considered assessment at all but rather was determined to grasp an evidentiary advantage by assuming the authority of NATO’s representations. This merely returns us to the question: why? The answer, in the absence of explanation, is speculative and, for that reason, all the more troubling.

We shall return to this question of motive at the end. We turn now to another matter at which we previously hinted: how the Prosecution responds to information not before it. We have seen how the Committee’s assumptions distort the information it presents to us, but behind that lie further questions about what (other) information the Committee had: Was the availability of information the result of the merest incident or chance, or was there a discernible pattern in how the Prosecution came to see some things and not others? Where did it direct its gaze, and where did it not? What did the Prosecutor not see?

C. What The Prosecutor Purports Not to See: Creating the Absence of Information

In appearance, the podestà undertook the initial investigations according to due process. An inquisitio into a murder case was begun by the authorities, who questioned both medical experts and credible wit-
nesses. Fundamental to the due process of inquisitio, however, was the assumption that the magistrates had every right to investigate persons of ill repute (mala fama) and that the testimonies were given by credible Christian witnesses. The Jews, by definition, were people of bad repute. 102

The Prosecution’s reliance on NATO sources is all the more striking when one recalls that NATO was not forthcoming with probative information. If NATO had demonstrated good faith and fully opened its archives, then (critical) reliance on NATO sources might indeed have sufficed to make a sufficient determination. As we have seen, the Inquiry itself acknowledges that this (admittedly unlikely) event did not happen. 103 Faced with NATO’s effective refusal to cooperate, the Committee simply turned to public documents. In the Inquiry, there is no meaningful suggestion that this is a problem.


It is . . . not true that my Office was asking for general access to all archives in Yugoslavia . . . . The Requests for assistance and information send [sic] to the authorities in Belgrade are concrete about the documents sought . . . . It is clear from this application that there are a number of outstanding Requests, some of which are 20 months old. The best results and fair results . . . are only possible to achieve if [sic] best possible documents are made available in a timely manner.
1. The Standard Invocation

At intervals throughout its text and at the end of its discussion of each specific incident, the Inquiry notes, using similar language, that based on the information available to it, it does not recommend investigation.104 Its summation provides one example: "On the basis of information available, the committee recommends that no investigation be commenced by the [Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign."105 This is a formulaic invocation; prosecutors reasonably wish to remind observers that their decisions are based upon judicious assessment of the best information to show their non-capricious nature and reserve the right to revise if new information comes to light.

The Inquiry's almost exclusive reliance on NATO-related sources does not mean that it exhaustively mines those sources. Almost all information comes from public statements made during or shortly after the war, or from a single communication from NATO in response to the Prosecution's queries.106 The Inquiry does not always rely on these sources to its own complete satisfaction; as has been noted, it complains, in the end, about NATO's failure to be more forthcoming.107 In addition, the Committee notes on at least six occasions that it lacks necessary information.108

The prospect of obtaining sufficient evidence is a factor in determining whether or not to proceed with an investigation, as the Inquiry acknowledges.109 What if the likelihood of conviction depends on access to information in the hands of enti-

104. Inquiry, supra note 3, ¶ 62, 70, 79, 85, 89.
105. Id. ¶ 91.
106. Id. ¶¶ 6(i), 12, 90. NATO responded to the request but apparently did not grant access to its archives; the Inquiry notes only "public documents made available by NATO, the US Department of Defense and the British Ministry of Defence" and "the response to a letter containing a number of questions sent to NATO by the OTP." Id. ¶¶ 6(b), 6(i); see also id. ¶ 12 ("[The committee] prepared a list of general questions and questions related to specific incidents. A letter enclosing the questionnaire and incident list was sent to NATO on 8 February 2000. A general reply was received on 10 May 2000."); id. ¶ 90 (referring to "the NATO reply").
107. Id. ¶ 90.
108. Id. ¶¶ 7, 8, 13, 17, 23, 24.
109. See id. ¶ 5.
ties hostile to investigation? As a practical matter, this may make it so difficult to proceed that prudence counsels against wasting resources unlikely to yield information sufficient for conviction—and that is a determination about which prosecutors reasonably have considerable discretion. Every prosecutor selects his sources; inevitably, not only truth but also the politics of the possible play a role in determining what to rely on and what claims to advance. This gives prosecutors valuable discretion in a world in which formally legal matters are set in broader political contexts. Still, we expect prosecutors to make the best case they can and to maintain some real measure of professional independence, much as we expect courts to.

The Committee acknowledges that it did not approach the Federal Republic of Yugoslavia (F.R.Y.).\textsuperscript{110} Certainly, it might have been reasonable to suppose that F.R.Y. officials would be unlikely to cooperate; in any event, there were no official channels between the Tribunal and Belgrade.\textsuperscript{111} Thus the only available evidence of consequence was and is in the archives of NATO and its member states. What was the Prosecution's strategic response to this?

2. Means of Securing Information

The Prosecution has tools at its disposal to pressure states and individuals that do not cooperate in providing information, such as initiating proceedings before the Chamber\textsuperscript{112} and reporting to the Security Council;\textsuperscript{113} in addition, it can

\textsuperscript{110} Id. \textsection 7.

\textsuperscript{111} Id. ("[T]he committee did not travel to the FRY and it did not solicit information from the FRY through official channels as no such channels existed during the period when the review was conducted."). The Inquiry nonetheless acknowledges it took cognizance of reports written by the F.R.Y. Id. \textsection 6(c), 7.


\textsuperscript{113} See Inquiry, supra note 3, \textsection 5; OTP Address, supra note 103 (excerpting the text of the Prosecutor's scheduled address to the Security Council and discussing, \textit{inter alia}, Croatia's continued non-cooperation).
use publicity to encourage states to bring economic and political pressure to bear on recalcitrant actors. Yet a reader of the Inquiry will not see mention of such actions taken against NATO. Instead, the Committee did not attempt to interview NATO officials, and while it requested information in writing from NATO, as noted above, the Committee itself acknowledges that the answers were not satisfactory, though they were deemed sufficient to conclude there was no liability.

Yet it requires a close reading to note this. Indeed, the Inquiry’s restrained choice of language about NATO’s response is interesting: A more prosecutorial tone would have noted NATO’s obligation to provide satisfactory information and then made much of NATO’s reticence—its refusal—to do so. The Prosecution’s attitude toward NATO may be con-


But was it lawful to bomb a broadcasting station which clearly had civilian purposes and had civilians working in it? . . . We do not have evidence either to confirm or deny the proposition that Serbian radio or television stations were being used for military purposes or to incite ethnic cleansing. Had the Chief of Defence Intelligence been permitted to give evidence to us, perhaps we would be in a better position to make a judgment on this important issue.
trasted with its zeal in pursuing documents from the successor states of the former Yugoslavia—and with its willingness to draw conclusions about the effect of non-compliance on its investigations.\textsuperscript{118} Of course, there can be no obligation without a request, nor any obligation if the Prosecution declares itself satisfied—and without an obligation refused, there can be no non-cooperation to report.\textsuperscript{119} To be sure, NATO’s refusal never reached the levels of repeated defiance that the F.R.Y./Serbian and Croatian governments demonstrated in the face

We recommend that the Government set out the reasons for the attacks on broadcasting stations in order to make clear the legal justification.

\textit{Foreign Affairs Select Committee, Fourth Report,} 2000, HC 28-1, at 152, \textit{in} Benvenuti, \textit{supra} note 8, at 524 n.84.

\textsuperscript{118} Compare this excerpt from the Prosecutor’s report to the Security Council in 2000:

Where Croatia perceives co-operation to be against its political or narrow security interests, a real difficulty still exists. One long-standing problem, namely the provision of Croatian material for use as evidence in the Kordic trial, remains unresolved, and time is fast running out for full compliance with the Court orders that are still outstanding in that case. And in relation to the 1995 Croatian campaign against Serbs in Croatia, known as Operation Storm, we still face a stubborn refusal to allow access to witnesses and documents that are essential for the completion of our investigations. Our work has been seriously delayed as a result.

\textsuperscript{119} Indeed, the Prosecution’s substantial coercive powers are not available to the Committee absent an investigation, \textit{see} Benvenuti, \textit{supra} note 8, at 504-5, though this merely begs the question of why no investigation was initiated. \textit{Cf.} The International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor, \textit{Request by The Prosecutor Under Rule 7 bis (b) That the President Notify the Security Council of the Failure of the Republic of Croatia to Comply with Its Obligations under Article 29} (July 28, 1999) ¶ 2 (119 requests for cooperation), ¶¶ 6-8 (requests concerning military operations “Flash” and “Storm”), and ¶ 3 (weekly meetings between Croatian and Tribunal officials), \textit{at} http://www.un.org/icty/latest/index.htm.
of repeated requests. But then, as far as we know, NATO was never asked a second time.

Considered in light of the information NATO actually provided and the minimal steps the Prosecutor took to secure it, the formulaic invocation about available information seems inapoposite, because the body most likely to have the "available information" is the very one under consideration for investigation—and the Prosecution was fully aware of this. Why then would it invoke the formula attesting to the diligence of its efforts, save to gloss over this fact and defend against the observation that the "information available to it" was incomplete, suspect, and insufficient to form an opinion, and that it had evidently not taken steps to secure more information? Perhaps, of course, it genuinely believed that this information, from this source, sufficed. Whatever the reason, the formula, the invocation, creates a buffering sense of completion; it does not openly or easily admit questions about why this information was available and other information was not.

A prosecutor cannot act on information he does not know; but at the same time, he abuses his discretion if he takes steps to ensure that he does not find out something on which he would have to act. Timidity—excessive caution—can be an abuse of discretion.\textsuperscript{120} If a lack of information is, in some significant part, consequent upon the Prosecutor's own decision not to take steps to secure it, then it makes little sense to declare the information insufficient and less to draw legal conclusions from it.\textsuperscript{121} One does not have to reach the Inquiry's substantive outcomes to see why such methods are unsatisfactory and give rise to concern about the Prosecution's posture towards the potential accused or the seriousness of its purpose. Saying there is insufficient information in the Prosecution's

\begin{itemize}
\item \textsuperscript{120} Cf. Rome Statute of the International Criminal Court, July 17, 1998, art. 17, 37 I.L.M. 999, 1012 [hereinafter Rome Statute] (providing complementary jurisdiction if a domestic court has proven unable or unwilling to prosecute). Thanks to Professor Steven Ratner for bringing this comparison to my attention.
\item \textsuperscript{121} Cf. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 184 (2000) ("The Commission accepts the view of the [Inquiry] that there is no basis in available evidence for charging specific individuals . . . . Nevertheless, some practices do seem vulnerable to the allegation that violations might have occurred, and depend for final assessment upon the availability of further evidence.")
\end{itemize}
UNEXPLODED BOMB

possession is a distraction from the issue of a potential suspect's real, if presently unknown, liability—and from the more important question as to why the Prosecutor would be satisfied to present observers with such a bootstrapped non sequitur.

D. "Another Interpretation is Equally Available": Explaining an Incident

Let us consider one incident in more detail, because it shows the deformative consequences of the Inquiry's deference to the reliability—the authority—of NATO's voice and of its strangely myopic vision. The attack at Grdelica is a fit example because it centers on what a pilot did not see, what NATO did not show, and what the Prosecution chose not to say.

Recall the basic facts not in dispute: A NATO plane fired two missiles in succession, both of which struck a passenger train on a bridge, killing at least ten and injuring fifteen. The Inquiry accepts in passing that the bridge was the "designated target"—conceding an issue of core importance in deciding liability. Yet even reading the NATO sources the Inquiry itself cites, it is not at all obvious that the target was the bridge instead of the train on it. The Inquiry does not inquire why a pilot, "[r]ealising the bridge was still intact" but also realizing that he had just hit a civilian train, would decide to target the bridge a second time, this time with full knowledge that the train was still on it—a train that, as it turned out, he hit a second time.

One could easily imagine a case lying for recklessness in launching the second missile against a bridge over which a passenger train was known to be passing; if the missile was in fact aimed at the train, willful intent to kill protected persons could be made out. The Prosecution does not make, or even consider, either. It appears to consider the matter, in that it discusses and dismisses the suggestion that the train itself, and not the bridge, was targeted—but its discussion, whatever its

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122. Inquiry, supra note 3, ¶ 61.
123. Id. ¶ 58.
124. Id.
125. Id.
126. Cf. Schwabach, supra note 14, at 183 ("The firing of the second bomb at the Grdelica Gorge bridge would certainly be considered 'reckless' by municipal criminal and tort law standards.").
merits, actually addresses only the first missile. Evidence concerning the intended target of the second missile that hit the train is not discussed; instead, after declaring that there is no liability for the first missile, the Inquiry then notes that:

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 [the weapons systems officer]. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation (see para. 5 above[128]), this incident should not be investigated.129

Thus the whole discussion actually concerns only the first bomb, while the second is reduced to an unexplicated notation about divergent views on liability within the Committee,130 followed by the formulaic recommendation not to investigate. If, to the Committee’s own divided mind, the second bomb presented the only possible locus of a reckless mens rea, surely it would constitute the more interesting incident and warrant more discussion. Yet all the weight is placed on the first bomb, which, when defused, takes the second with it.

This singular passage—so heavily weighted to the view most favorable to NATO because it is NATO’s view—represents the only suggestion of debate within the Committee (and thus the only clear indication of an editorial hierarchy within the Committee131) and the only indication that NATO might have come near liability for any action. As was noted, video analysis showing that the pilot in fact had more time to delib-

127. The only mention is in quotation of General Clark’s comments at the NATO Press Conference, NATO HQ, Brussels, April 13, 1999, in Inquiry, supra note 3, ¶ 59.

128. The criteria require that there be a prospect of obtaining sufficient information and that “the prohibitions alleged [be] sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution . . . . The Prosecutor may, in her discretion require that a higher threshold be met before making a positive decision that there is sufficient basis to proceed under Article 18(1).” Id. ¶ 5.

129. Id. ¶ 62 (noting also that there is no information warranting investigation of the chain of command).

130. Id. ¶ 59.

131. Cf. id. ¶ 8, 9, 10 (describing interim steps in creating the Inquiry), 12 (describing the Prosecutor’s involvement).
erate was ultimately thought neither to affect the outcome nor, more importantly, to raise doubts about the wisdom of relying on NATO to construct an opinion about that outcome.

This need not mean that either the pilot or NATO command was liable for the attack. Mistakes are made in war, as the Inquiry points out,\(^\text{132}\) so the matter may simply not rise to the level of seriousness required,\(^\text{133}\) or it might be thought that a single (two-part\(^\text{134}\)) decision to launch the missiles, even with grisly results, could be explained away by a skillful defense. Rather, we consider the Inquiry's approach to these facts. Here we see all the deformations observed above: reliance on NATO sources, demotion of non-NATO sources, failure to consider alternatives and consequent location of an almost dispositive authority in the favored sources, and willingness to close debate despite clear lack of sufficient information. Perhaps, had the Committee inquired about why the pilot fired a

\(^{132}\) Id. ¶ 90 (noting NATO's acknowledgement that it had made mistakes during the campaign).

\(^{133}\) A claim of insufficient seriousness seems problematic in comparative perspective. In January 2003 the U.S. Air Force conducted proceedings preliminary to a court martial for two pilots who killed four Canadian soldiers in a friendly-fire incident in Afghanistan on April 17, 2002. The pilots were charged with involuntary manslaughter, aggravated assault, dereliction of duty, and failure to exercise good leadership, with possible sentences of 64 years. The defense suggested that systemic organizational and communications failures were to blame and that the U.S. pursued the case out of deference to an important ally. See David M. Halbfinger, Court-Martial Hearing Begins for U.S. Pilots, N.Y. TIMES, Jan. 15, 2003, at A16. See also DeNeen L. Brown, Canadian Troops' Fire Preceded U.S. Airstrike, WASH. POST, Nov. 28, 2002, at A28 (describing the preliminary investigation and suggesting that evidence tending to mitigate liability was not included in the report). The charges are analogous to those which logically would have obtained in the Grdelica case had it been pursued. This suggests that the U.S. does not believe on principle that negligence or "an element of recklessness," see Inquiry, supra note 3, ¶ 62, if found, fails to rise to a justiciable level or that it is insufficiently serious to investigate. See David M. Halbfinger, Pilots Ignored Rules on Attacks, Commander Testifies, N.Y. TIMES, Jan. 16, 2003 (discussing this incident and noting both that the pilots who shot down U.S. helicopters in Iraq in 1993 faced similar proceedings and that an AWACS radar officer was court-martialed for dereliction of duty in the same incident and acquitted in 1994).

\(^{134}\) The discussion does not make it entirely clear if the pilot (or whoever controlled the weapon) had more time before the first bomb, the second, or both, although the logical conclusion from the cockpit video having been sped up is that he had more time than NATO suggested before each launch. See Inquiry, supra note 3, ¶¶ 59-61.
second time, it would have produced a satisfactory answer; per-
haps, had it found no answer, it could have deferred an opin-
ion pending further information. Perhaps, but in the real
world it did neither of these things. It did nothing, and by
doing nothing it determined that no liability lay.

Beyond questions of correctness, the Inquiry’s alternative
explanation clearly falls within that category of interpretation
and characterization that is the art of lawyering—but here it
was put to the purpose of minimizing contrary evidence. Is
this just due diligence? Of course, a responsible prosecutor
does not leap at any scheme to indict no matter how implausi-
ble. Perhaps the Prosecution was considering defenses
NATO might raise; yet there is no sense of a “gut guess” or a
“but can we prove it?” approach. The a priori reliability the
Inquiry accords NATO effectively decides the outcome; the
Committee’s estimate is not an “alternative,” it is the preferred
interpretation. Views about the pilot’s actions may differ, but
readers judging the Inquiry could well conclude that another
interpretation of its approach is equally available and more
compelling.

Voice—Information—Argument—Style—Structure—
Consequence—Silence

IV. DIFFICULTY: FRAMING A DEFEATIST DISCOURSE ABOUT
LEGAL ARGUMENT

Although the “most favorable” formulation convention-
ally refers to issues of fact, it also may bear upon the contin-
uum of argument about law. In addressing the relevant legal
standards, the Inquiry asserts curiously marginal interpreta-
tions unfavorable to a finding of liability. In particular, its rhe-
torical posture repeatedly emphasizes the difficulty of defining
standards or applying the law, and its attitude toward consen-
sus and progressiveness in legal interpretation varies signifi-
cantly from its practice in other cases.

135. Cf. Sunstein, supra note 17, at 2273 (“Often . . . a prosecutor will drop
a case at an early stage, after issuing subpoenas, or considering the defend-
ant’s state of mind, or simply deciding, after an ‘all things considered’ judg-
ment, that this is not the kind of case that calls for a formal criminal investi-
gation, even if there was a technical violation of law . . . . This use of
prosecutorial discretion . . . is a major, if overlooked, safeguard of liberty
under law.”).
A. *The Verge of Consensus: Progressive and Conservative Approaches*

We may distinguish between progressive and conservative consensual approaches to legal argument; each offers benefits and risks. Progressiveness implies willingness to depart from, or lead, consensus about law—*to forge a new consensus through evolving standards.* Such an approach is highly flexible but also risks the legitimacy that comes from acting only on settled matters, since an overly creative prosecutor will find himself accused of inventing law. In contrast, conservative consensualism asserts that *nullem crimen* and legal certainty discourage juridical novelty, partly to protect defendants. Such an approach increases confidence, but also foregoes op-

136. I do not use "progressive" to mean "having ideological commitments on the left." Rather, I use "progressive" to mean "willing to advocate change." It supposes one need not be bound by an existing consensus that is not in accord with one's view of what the law properly should be—and therefore incorporates politically "regressive" (or "reactionary") views as well. Advocates for reactionary causes may (indeed likely will) have the same disregard for the constraints of centrist consensus that political progressives have.

137. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 Am. J. Int'l L. 316, 319-20 (1999) ("For policy-oriented jurisprudence, 'law' is the process through which members of a community seek to clarify and secure their common interest .... [This is a] dynamic conception of law.").

138. *Cf. Developments in the Law: International Criminal Law*, 114 Harv. L. Rev. 1943, 1977 (2001) ("[I]nstitutional designers should flush out any underacknowledged aims that may in the future motivate prosecutions sub silentio. For example, international lawyers may be driven to seek prosecution in order to expand the substantive scope of international humanitarian law .... International tribunals amenable to flexible interpretation may be able to advance the law more quickly than the convention process permits.").

139. *See Bruno Simma & Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 Am. J. Int'l L. 302, 305 (1999) ("If tribunals exceed the discretion inherent in the delegation [of authority to create norms], they act ultra vires and are prone to lose not only their legal authority but also their political influence . . . .")

opportunities to change the law, since a prosecutor who waits for true consensus may not risk bringing controversial indictments.\footnote{141} The formal consensus on how law is made is closer to the conservative consensual model; even progressive advocates phrase their arguments as if they already constitute a consensus, and the action therefore always plays out in defining the verges of consensus.\footnote{142} At the same time, observers have praised the Tribunal for its progressive expansion of the law.\footnote{143} We need not decide which is the better view. Either may be an acceptable posture for a prosecutor to adopt, for consistency is the real test: does he employ a \textit{consistently} conservative or progressive approach? If not, why does he deviate when he does?

As a first approximation (although one we will find too simplistic to encompass the full depth of the problem we confront), we may say that the Prosecution's approach to progres-

siveness in the Inquiry seems to differ from its approach in other cases. The Inquiry generally adopts a consensus-bound approach; in its other cases, however, the Prosecution shows a willingness to make progressive arguments. We shall consider why this is so.

The Inquiry expresses a distrust of progressiveness, advocating a conservative, consensual approach to its role in explicating law. In its introduction, the Inquiry notes that its standard for evaluating an investigation's reasonableness requires that "the prohibitions alleged [be] sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution . . . ." Lack of a present "consensus view in international legal circles" is specifically identified as a reason why liability for the use of depleted uranium projectiles may not lie, and the lack of a "general legal consensus" concerning the status of cluster bombs is alluded to as a reason why liability may not lie for their use.

One consequence of rejecting progressiveness is that liability for NATO is made less likely. Because of the very different kind of war NATO fought, most of its actions did not fall clearly into the same factual patterns as cases previously brought by the Prosecution, and the logical theories upon which to base liability—such as for strategic bombing or use of prohibited weapons—likewise have been less tested in the combat of trial. But despite limited precedent, saying that on the facts NATO incurred no liability remains a matter of interpretative discretion; there is no such thing as an estimate of liability on the facts alone, because law can prescribe liability for any set of facts. When a prosecutor opines as to what the law is, or means, or what would make out liability, he materially affects the determination the law ultimately makes about

144. It uses the word once, to describe the cumulation test used in the Kupreškić Judgment (Prosecutor v. Kupreškić, IT-95-16-T, J. of Trial Chamber II (Jan. 14, 2000)), with which it disagrees. See Inquiry, supra note 3, ¶ 52.
145. Id. ¶ 5.
146. Id. ¶ 26.
147. Id. ¶ 27. Likewise, concern about the absence of a clear consensus seems to inform the Inquiry's discussion of the targeting of the RTS studios, see id. ¶ 47 (referring to the legitimacy of the media as a target as a "debatable issue," implying a non-consensual debate about the matter), and its explicit rejection of minority arguments for liability based on jus ad bellum analysis.
the facts, and it cannot be said that the prosecutor is simply applying settled law. He is advancing an interpretation.\textsuperscript{148}

If it can be shown that a prosecutor is making marginal interpretative choices in an inconsistent fashion, it becomes difficult to know, without more, if his choice falls within the reasonable bounds of discretion. If, furthermore, it can be shown that a prosecutor's marginal interpretations actually reduce the scope of liability or preclude certain fact patterns from serious consideration, then it is difficult to see why he is not engaged in a \textit{progressive restriction} of liability; this may be sensible, though curious, as it is not normally the function of a prosecutor. These tendencies can indeed be shown by a careful reading of the Inquiry and a comparison with the Prosecution's other arguments: Indeed, the Inquiry appears not simply consensual, but also strangely cautious, in a way the Prosecution often is not. We will consider two kinds of problems with the Inquiry's approach to consensus and consistency: one internal to the document, and one external and comparative.

B. \textit{Selective Consistency: Approaching Consensus}

First, although the Inquiry unquestionably is consistent in finding no liability for NATO, it is not consistent in its response to the supposed presence or lack of consensus, raising questions about lack of consensus when it does not appear to be a legitimate concern, or seeming less punctilious about novelty when consensus does exist.

For example, the Inquiry specifically notes the lack of \textit{itself} precedent as a supporting reason for not assigning liability for use of depleted uranium projectiles.\textsuperscript{149} A record of charging or not charging a crime argues for similar treatment when-

\textsuperscript{148} See, e.g., O'Connell, \textit{supra} note 143, at 349 ("The act of applying a treaty or a rule of custom will necessarily involve interpretation, clarification and/or addition. When international courts and tribunals or other institutions are established, this fact has to be recognized."); Wiessner & Willard, \textit{supra} note 137, at 317-21. \textit{See generally Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument} (1989) (surveying "schools" or theoretical and methodological approaches to international law); Ratner & Slaughter, \textit{supra} note 142, at 293-5 (identifying seven methods of international legal scholarship and describing how they are used to evaluate legal theories and developments).

\textsuperscript{149} Inquiry, \textit{supra} note 3, ¶ 26 ("In view of the uncertain state of development of the legal standards governing this area, it should be emphasised that
ever similar facts arise, but surely the absence of prior uranium-related charges is related to the total absence of uranium-based weapons in the war before the NATO bombing. The lack of analogous fact patterns cannot give guidance about consistent charging, and the Prosecution cannot rely on precedential argument merely because the wars preceding NATO’s war were as low-tech as they were brutal. The Inquiry confronts a novel situation, yet argues as if the novel facts before it are consonant with a conservative charging history, and interprets the matter as a question of consensus in part defined by its own lack of precedent. Other examples may clarify this curious usage, and hint how it is indeed consistent in another way.

1. Restraining the Court: The Kupreškic Cumulation Test

How does the Prosecution respond when there is other evidence about precedent and consensus? The most singular instance of selective interpretation is the Inquiry’s treatment of the Kupreškic Chamber’s dicta about cumulative liability; it is worth considering in some detail, especially as it incorporates an external comparison into the Inquiry’s text. This is the passage the Inquiry cites:

526. As an example of the way in which the Martens clause[150] may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58[151] (or of the corresponding customary rules). However, in case of re-

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the use of depleted uranium or other potentially hazardous substances . . . has not formed the basis of any charge laid by the Prosecutor.”).

150. The Martens clause refers to a declaration, inserted in various conventions on humanitarian law, “provid[ing] a minimum threshold of humanitarian treatment by combatants even in the absence of specific treaty language.” Theodor Meron, Customary Law, in Crimes of War 113, 114 (Roy Gutman & David Rieff eds., 1999).

peated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.152

The Chamber seems to contemplate a standard of cumulative liability for borderline incidents in a legal gray zone "between indisputable legality and unlawfulness" that evince a recklessness not visible in any single instance but only in the pattern. Observers might differ about the value of this standard, or its odds of surviving further scrutiny. But it is undeniably a standard the Chamber suggests it might favor, and a standard that would expand the scope of liability.

Yet the Inquiry actually disagrees with the Chamber’s proposed standard and seeks to limit its potential to expand liability, arguing instead that the Chamber’s standard is properly a measure of total civilian deaths measured against the campaign in toto.

This formulation in Kupreskic can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear. It is the committee’s view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.153

The Chamber’s judgment, on its face, refers to no such thing. Nothing in the Inquiry’s analysis indicates a basis for this posture, such as a belief that the Chamber did not really

mean it, or that a progressive standard would not prevail on appeal;\(^\text{154}\) it does not cite to any authority.\(^\text{155}\) Its only objection is that the test is of ambiguous import and unclear application—which might be seen as offering the Prosecution scope for developing or clarifying a progressive standard to its benefit, rather than reasons to retire from the field.

This reticence cannot be from a lack of lawyerly skill, since, as we have seen, the Inquiry produces an admirably assertive "clarification" of what the Chamber meant. Though it may be a plausible gloss, it definitely restricts the scope of liability;\(^\text{156}\) it undeniably advances a lower standard for liability despite the opportunity to develop other plausible interpretations. Moreover, this is a matter of law, not of fact about which the Prosecution would have an obligation to bring forward exculpatory information; a court's determination as to what constitutes the correct legal interpretation is a gift the prosecution never need return.\(^\text{157}\) Instead, the Prosecution simply disagrees with the Chamber and turns down the opening.

154. On appeal, the Kupreskic judgment was overturned, with the Appeals Chamber finding that the Prosecution case, and the Amended Indictments, had serious flaws. Prosecutor v. Kupreskic, IT-95-16-A, App. J. \textipa{\textbf{I}}\textipa{\textbf{I}} 79-125, 306-326, 372-378 (Oct. 23, 2001), available at http://www.un.org/icty/indictment/english/jov_ci031008e.htm. Nothing in the appellate judgment would appear to reject the lower court's dicta concerning a theory of responsibility, and in any event the Inquiry was written long before the appeal was decided.

155. \textit{But see} Ronzitti, supra note 14, at 1026 n.25 (noting similarities between the Inquiry's view and reservations made by various NATO countries on ratifying Protocol I).

156. \textit{See} Benvenuti, supra note 8, at 517-8; \textit{see also} Laursen, supra note 14, at 793-94; Ronzitti, supra note 14, at 1026-7 (both making very similar critiques).

157. \textit{Cf.} Benvenuti, supra note 8, at 517 (suggesting that because the Committee's task was to determine if there was "probable cause" to investigate, it had no right to set aside the Court's interpretation, and so was acting ultra vires); Laursen, supra note 14, at 793-94 ("[I]t would appear to be untraditional for a prosecutorial authority to undercut the court that may subsequently decide the case. If a court has adopted a broad interpretation that works to the detriment of the accused, prosecutors will rarely fail to follow through. One possible explanation is, of course, that the prosecutorial authority is looking for reasons not to prosecute."). Some authors note an analogous situation in the Inquiry's interpretation of the ICJ's Advisory Opinion on the legality of nuclear weapons, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226, which arguably attributes a view on the customary law status of Protocol I, Articles 35(3) and 55 contrary
Of course, the Prosecution routinely disagrees with the Chamber—when the Chamber limits defendants' liability. Indeed, prosecutors are normally expected to be more assertive than their courts; prosecutors inevitably seek to push the pocket while couching their probes in the language of precedent or legal certainty, and it is supposed that judges restrain this impulse. Here, there is no need, as the Prosecution has fully internalized the process of review and decided in advance that only the most conservative approach is warranted. The Tribunal’s jurisprudence offers no other instance in which the Prosecution has argued that liability ought to be less than the Chamber expressly has indicated it might accept. At the time the Inquiry was written, the Chamber’s test would have presented the Prosecution with, at the least, a tempting opportunity; the Committee treats it like a threat to be disposed of.

Yet the Kupreskic gray zone test proves to have its uses after all: The Inquiry itself later expressly invokes Kupreskic when it asserts that “[t]he proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident,”158 citing its own discussion of Kupreskic to show “the need for an overall assessment of the totality of civilian victims as against the goals of the military campaign.”159 Regardless of the quality of this argument, it is almost surely not what Kupreskic says: The cited dictum does not deny—or even speak to—liability for a single attack if it otherwise meets the legal standards, but rather proposes a standard for multiple attacks when each alone does not. Yet the Prosecution uses the Kupreskic formulation—after reinterpreting and rejecting it—to suggest that culpability must be considered in overall context. The practical result of this rejection and cooptation is to reduce the scope of liability Kupreskic offered. The Prosecution has turned the Chamber’s argument on its head—and in the process finds as a matter of law that there is no liability for

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158. Inqur, supra note 3, ¶ 78. Cf. id. ¶ 50 (“The answers to these questions [about applying the principle of proportionality] are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker.”).

159. Id. ¶ 78 (emphasis added).
aggregated incidents, for single incidents, or, as we shall see, for anything at all.

C. Emphasizing Difficulty: (Not) Applying the Principle of Proportionality

Alongside its selective treatment of legal arguments, the Inquiry repeatedly emphasizes the practical difficulties inherent in the interpretative enterprise, discouraging expansion of liability through the fact pattern. Here, rather than insisting that there is no consensus, the Prosecution argues that while the law may be clear, it is impossible to apply. We have seen hints of this in its treatment of Kupreskić, in the rest of the Prosecution's discussion of proportionality—so central to the most interesting issues arising in the NATO campaign and likely to arise in future wars—the Prosecution finds it difficult to apply proportionality in general and equally hard in specific cases. Not only does the Prosecution find it so: at every opportunity, the Inquiry emphasizes it.

1. Difficulty with the General Principle

Here is the Inquiry's main comment on analyzing proportionality:

160. Cf. Lowe, supra note 82, at 942 ("The problems arise not from the law, but rather from the making of factual judgments in concrete cases on the application of a perfectly clear rule, often on the basis of dated and incomplete information . . . .").

161. Proportionality is a central concept of humanitarian law, and is governed both by custom and, especially, treaty:

As formulated in Additional Protocol I of 1977, attacks are prohibited if they cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that is excessive in relation to the anticipated concrete and direct military advantage of the attack. This creates a permanent obligation for military commanders to consider the results of the attack compared to the advantage anticipated.

Horst Fischer, Proportionality, Principle of, in CRIMES OF WAR, supra note 150, at 294, 294.

162. Disproportionate force and illegitimate targeting seem the most likely areas for liability given that NATO did not use ground troops, and so was less likely to commit the sorts of interpersonal atrocities underlying many of the indictments the Prosecution has issued in other cases. See discussion on targeting infra Part IV.C.2.
The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.\footnote{163} . . . Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.\footnote{164}

It is difficult to know where to begin critiquing such a truism. Yes, this is hard stuff, but it is what courts do; prosecutors are not supposed to stress the difficulty of mounting an investigation under the existing law. Yes, measurement is difficult, and it seems implicit in proportionality, which weighs trade-offs, that no \textit{a priori} calculus of the loci and limits of liability

\footnote{163. In this discussion, the Inquiry describes two paradigmatic situations safely within any consensus: "[B]ombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area." \textit{Inquiry, supra} note 3, ¶ 48. In addition, the Inquiry notes that bombing whose principal purpose is to kill, terrorize, or demoralize the civilian population—such as occurred at Hamburg, Dresden, and Tokyo during World War II—would now be illegal under Additional Protocol I, and improved targeting technology affects what warring parties may aim at or hit as collateral damage. \textit{Id.} ¶ 43. \textit{See also} W. Michael Reisman, \textit{Scenarios of Implementation of the International Criminal Court}, in \textit{The Rome Statute of the International Criminal Court: A Challenge to Impunity} 281, 281-283 (Mario Politi & Guiseppe Nesi eds., 2002) (discussing the dynamic interrelationship of military technology, strategy, and international criminal jurisprudence).

\footnote{164. \textit{Inquiry, supra} note 3, ¶ 48. The Inquiry then lists questions that "remain unresolved once one decides to apply the principle of proportionality," noting that "[t]he answers to these questions are not simple," \textit{id.} ¶¶ 49-50:

\begin{itemize}
  \item [a)] What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?
  \item [b)] What do you include or exclude in totaling your sums?
  \item [c)] What is the standard of measurement in time or space? and
  \item [d)] To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?
\end{itemize}

\textit{Id.} ¶ 49.
could ever be derived\textsuperscript{165}—indeed, it is implicit in the very notion of disproportionate force that some uses of force are proportionate, that it is sometimes acceptable to take innocent lives for military objectives. Yet equally implicit is the corollary that some number of lives is too many and that this is precisely what the law must determine; the Prosecution’s argument, for all its reasoned tone, effectively denies this can be done.\textsuperscript{166}

No one denies the difficulties inherent in prosecuting a case predicated on proportionality, but who normally has an interest in emphasizing that difficulty? A common defense strategy is not to deny the underlying action but to claim that it is unclear in law, impossible to categorize as criminal without risking the limits of legal certainty, and therefore \textit{nullem crimen}. Indeed, what is most interesting about the Inquiry’s disputations on proportionality is that they are made in a general mode, as a commentary on the meaning of the law, not its application to this case.\textsuperscript{167} Before turning to the evidence, the Inquiry asserts as a general principle that proportionality is exceedingly difficult to apply. The Inquiry’s call and response about proportionality’s difficulties look as if they were drawn from a defense brief.

\textit{An example—environmental damage}. The Inquiry considers damage to the environment and use of depleted uranium projectiles in its general discussion.\textsuperscript{168} Noting that the Additional Protocol’s provisions about environmental damage have a very high threshold of application, the Inquiry proposes that “[e]nvironmental] effects are best considered from the underlying

\textsuperscript{165} Cf. Christoph Schreuer, \textit{Is There a Legal Basis for the NATO Intervention in Kosovo?}, 1 INT’L L. F. 151, 153 (1999) (noting, in the context of Kosovo, that “[p]roportionality is more difficult to assess”).

\textsuperscript{166} In a similar manner, it notes the difficulty concerning assessing excessive environmental damage: “Unfortunately, the customary rule of proportionality does not include any concrete guidelines to this effect.” \textit{Inquiry, supra} note 3, \S\ 20.

\textsuperscript{167} The only concrete mention is an oblique reference to information about civilian war deaths without comment on any relationship to proportionality; the mention rebuts the notion that the mere fact of civilian deaths might be proof of disproportionality. \textit{See id.} \S\ 51.

\textsuperscript{168} The Inquiry’s discussion of uranium is derivative of its general environmental analysis, noting “it is the committee’s view that the analysis undertaken above (paras. 14-25) with regard to environmental damage would apply, \textit{mutatis mutandis}, to the use of depleted uranium projectiles by NATO,” and recommending no investigation. \textit{Id.} \S\ 26.
principles of the law of armed conflict such as necessity and proportionality." Although proportionality and necessity are its preferred mode, the Inquiry does not see much promise in them. It does identify certain thresholds—the language of thresholds and tests is used here more than anywhere else in the Inquiry—noting, for example, that

> [e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment . . . military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce

and that "[a]t a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable." But these thresholds regurgitate the most obvious and uncontroversial minimums, while again the Inquiry explicitly emphasizes the difficulty of the enterprise:

> It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice.

Even when it purports to lay out the requirements for establishing the relevant mental state of a commander, its threshold acts more to forestall analysis than to initiate it:

> The requisite mens rea on the part of a commander would be actual or constructive knowledge as to the grave effects of a military attack; a standard which would be difficult to establish for the purposes of prosecution and which may provide an insufficient

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169. *Id.* § 15 (noting also that the "conditions for application [of the Additional Protocol] are extremely stringent and their scope and content imprecise").

170. *Id.* § 18 (citing A.P.V. Rogers, *Zero-Casualty Warfare*, 82 Int’l. Rev. Red Cross 177-8 (March 2000)).

171. *Id.* § 22.

172. *Id.* § 19.
basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity.173

It probably would be difficult, and certainly very progressive, to identify a consensus around a threshold of damage that would easily capture the effects of NATO’s actions.174 The question, however, is whether the Inquiry aims to minimize or emphasize difficulties surrounding the lack of consensus. Regardless of the empirical question about the existence of a consensus, the opportunity is there to clarify and refine the standards to (prosecutorial) advantage. The Inquiry does not do this; instead, it reinforces the admitted difficulties in the process of establishing liability.175 It may be that the threshold for environmental damage is sky-high and decades-long; the Inquiry does not lower it all, nor reduce it by even a day.

2. Aiming Away from the Target: Discursive Closure

The Prosecution is not a passive object, neutrally observing the creation of consensus upon which it then acts. It is itself an actor, advancing consensus through a synthetic pro-

173. Id. ¶ 23 (noting the Hostages case before the Nuremberg Military Tribunals, which acquitted the German General Rendulic of charges of wanton devastation for a “scorched earth” policy in the Norwegian province of Finnmark that Rendulic believed to be justified by military necessity, citing 11 TRIALS OF WAR CRIMINALS 1296 (1950)).

174. The Inquiry discusses in passing the differing opinions of ecologists and others concerning damage levels, and notes a lack of consensus concerning depleted uranium weapons. Inquiry, supra note 3, ¶¶ 15, 26:

There is a developing scientific debate and concern expressed regarding the impact of the use of [depleted uranium] projectiles and it is possible that, in future, there will be a consensus view in international legal circles that use of such projectiles violate general principles of the law applicable to use of weapons in armed conflict. No such consensus exists at present.

175. See Marauhn, supra note 14, at 1031 (“[T]he Committee has not only failed to follow the [ICTY] in one of its main achievements, namely the clarification of controversial rules of humanitarian law, but has added to the already existing ambiguities in interpretation of the applicable rules on the protection of the environment”); Schwabach, supra note 14, at 175 (“The OTP’s interpretation would seem to leave the environmental provisions of Protocol I with almost no applicability . . . . The OTP’s approach to Protocol I thus represents not a step forward toward greater accountability for environmental damage during wartime, but a step back to a pre-Gulf War standard.”).
cess—or discouraging that process by failing to act—based on its valuations and values. Such is the case with issues of targeting. Given the nature of NATO's long-distance operations, as well as the Inquiry's own professed preference for campaign-level analysis, the most interesting questions for clarifying the scope of international humanitarian law were likely to be command responsibility for strategic bombing and high-flight rules rather than "shooter" cases. By elaborating tests and thresholds, even without reaching NATO's actions, the Prosecution could have put the world on notice about liability for, and the seriousness of, aerial bombardment. Yet, given its broader assumption of difficulty, it is perhaps unsurprising that, although the Inquiry actually devotes considerable space to strategic bombing and targeting, it says surprisingly little that clarifies the law. We are therefore concerned with what the Inquiry did not discuss, and how the alchemy of discursive defeatism and reliance on NATO sources terminates debate in the act of beginning it.

Consider the Inquiry's general approach to targeting and distinction. The Inquiry notes that most of the targets de-

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176. See, e.g., Theodor Meron, War Crimes Law Comes of Age: Essays 298 (1998) (noting the "synergistic relationship among the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, and the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction").

177. There has been lively debate on the efficacy of high-level bombing. See, e.g., Barry & Thomas, supra note 101; Press Conference on the Kosovo Strike Assessment, supra note 100 (noting comments of a NATO pilot that "as the war progressed I . . . increased my altitudes . . . because it was tactically smarter").


179. Some discussion of the Inquiry's substantive conclusions seems unavoidable in order to develop the argument here; the point, as always, is the decisional and conceptual limitations those conclusions reveal.

180. The principle of distinction refers to the obligation to distinguish between military and civilian objects. See Frédéric de Mulinen, Distinction Between Military and Civilian Objects, in Kosovo and the International Community: A Legal Assessment, supra note 8, at 103, 122-25 (surveying target distinction and discussing the NATO case). In considering targeting, the core questions are: Were the categories of targets legal in their particulars? Did NATO take sufficient steps to distinguish military from civilian in conducting its high-flight bombing campaign? See Additional Protocol, supra note 82, arts. 48, 51-52, 57, 85(3), 1125 U.N.T.S. at 25-27, 42 (establishing obligations to protect and to take precautions, and declaring attacks on civil-
scribed in the Cohen, Shelton Joint Statement on Kosovo given to the U.S. Senate181 and in NATO's after-battle report182

are clearly military objectives. The precise scope of "military-industrial infrastructure, media and other strategic targets" as referred to in the U.S. statement and "government ministries and refineries" as referred to in the NATO statement is unclear. Whether the media constitutes a legitimate target group is a debatable issue.183

At a substantive level, one could hardly argue with the suggestion that most objects NATO acknowledged targeting were, as the Inquiry notes, "clearly military objectives."184 The question, of course, is the others. It might be that the majority of actions by the warring parties in the former Yugoslavia were directed against "clearly military objectives"—as were most actions by the Third Reich or the Japanese Empire; acknowledging that tells us nothing about liability for those instances—many or few—when the target was not clearly military. Yet after noting the existence of targets not clearly licit under the Additional Protocol, the Inquiry says nothing more: only media is briefly considered,185 while the "unclear" categories of "military-industrial infrastructure," "government ministries and refineries," and "other strategic targets" are not defined at all.186 At a minimum, an opportunity to clarify matters has

181. Identified only as the "Cohen, Shelton Joint Statement on Kosovo given to the US Senate," Inquiry, supra note 3, ¶ 45.
183. Inquiry, supra note 3, ¶ 47.
184. Id. Cf. Aldrich, supra note 24, at 149 (noting that almost all of NATO's targets were "classic examples of legitimate military objectives").
185. It is discussed again in connection with the analysis of the RTS attack. See Inquiry, supra note 3, ¶¶ 71-79.
186. Cf. Joy Gordon, Cool War, HARPER'S MAGAZINE, Oct. 2002, at 44 (noting a Washington Post article dated June 23, 1991, in which Pentagon officials acknowledged that the targeting of Iraq's electrical grid during the Gulf War was intended to undermine the civilian economy and that they were aware of, and intended, the likely effects of the bombing on water and sewage systems).
been foregone; the Inquiry's determination is not based on a fuller discussion, but on the observation that NATO's own description\(^\text{187}\) of its targets falls into two categories: clearly military and unclear.

When its discussion briefly resumes, the Inquiry initially appears to adopt a more searching analysis: Targets must be considered individually, not in blanket categories;\(^\text{188}\) attacks on military-industrial infrastructure and ministries "must make an effective contribution to military action and their . . . destruction must offer a definite military advantage in the circumstances ruling at the time";\(^\text{189}\) attacks on refineries must be considered in light of potential environmental damage;\(^\text{190}\) and media may only be targeted "to the extent particular media components are part of the C3 (command, control and communications) network."\(^\text{191}\) Then, as we have seen, having raised these issues, the Inquiry says that "[a]s a general statement . . . it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives."\(^\text{192}\) This regurgitation of NATO's perceptions actually closes the general discussion, so recently opened, of these unsettled issues.

The Inquiry employs a similar closing device when it refutes allegations that NATO's high-flight bombing strategy was criminal as such\(^\text{193}\) by noting that although "[t]he 15,000 minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye[,] with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases . . . ."\(^\text{194}\) While the Inquiry's assertion that NATO distinguished targets "in the vast majority of cases" is almost certainly true, it inevitably prejudices and preempts the targeting debate even for the minority of cases in which NATO admit-

\(^{187}\) The Inquiry's analysis immediately follows and is explicitly based on quotations from two NATO sources—the Cohen/Shelton Joint Statement and NATO's report, *Kosovo One Year On*. Inquiry, supra note 3, ¶ 47.

\(^{188}\) *Id.* ¶ 55.

\(^{189}\) *Id.*

\(^{190}\) *Id.*

\(^{191}\) *Id.*

\(^{192}\) *Id.*

\(^{193}\) *Id.* ¶ 56.

\(^{194}\) *Id.*
tedly did not meet the obligation. As with proportionality, so with target distinction: The Inquiry advances a pre-emptive campaign-level analysis, subsuming all individual incidents, however disproportionate in their particulars, to a global assessment.

3. Difficulty in Specific Cases

When it turns to specific cases, the Inquiry makes no more headway past the difficulties it has adumbrated; its argument leads inexorably to the conclusion that proportionality is very hard—to define and apply in most real-life cases. Indeed, as we have seen with Kupreškić, even though the Inquiry accepts that it may be necessary to assess proportionality "on a case by case basis," the Prosecution's argument is even more discouraging about finding liability for a single collateral killing than for a sustained bombing campaign. Here is an example.

The RTS bombing: This is how the Inquiry frames its analysis of the attack on the RTS studios:

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.

Based on its own assertion about the general state of the law, the Inquiry could have declared forthrightly that bombing a media outlet solely engaged in propaganda efforts is ille-
But in addressing the particular facts—and NATO's public admission that it very much had propaganda in mind—it supposes the legality of the attack "might well be questioned by some experts," implying there is not consensus on the issue. In the general discussion, as an abstract rule, it asserted liability; applying the rule to the facts (or rather, a version of the facts that should be most favorable to the Prosecution), liability is only an opinion. Even accepting the Inquiry's formulation that only "some experts" might question the legality of attacking a media outlet, why not consider that hypothetical scenario? That would have afforded an opportunity to develop standards on military objectives—which it asserts are in need of clarification—without coming to a conclusion in this case. Yet in the next sentence, as we have seen, the Inquiry declares that in fact NATO targeted RTS with the "primary goal" of attacking the command and control sys-

198. "The media as such is not a traditional target category . . . 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." Id. ¶ 55. Earlier, the Inquiry notes interpretations that include broadcast facilities as legitimate military objectives. See id. ¶¶ 38-40 (discussing Major General A.P.V. Rogers, LAW ON THE BATTLEFIELD 37 (1996); Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 632-633 (Y. Sandoz et al. eds., 1987); W. Hays Parks, Air War and the Law of War, 32 A.F.L. REV. 1, 135-45 (1990)).

199. See Inquiry, supra note 3, ¶ 74 (referring to a NATO statement of April 8, 1999, that warned the F.R.Y. that its media would be targeted unless it broadcast six hours of Western media reports each day, and quoting NATO as saying: "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."); see also Laursen, supra note 14, at 789 (noting Amnesty International's assertion that NATO emphasized to it that RTS was targeted solely because of its propaganda activities).

200. Earlier in the same paragraph, the Inquiry characterizes the legal basis for attacks aimed at disrupting propaganda efforts as "more debatable." Inquiry, supra note 3, ¶ 76.

201. Even if incapacitating a propaganda machine was only a secondary purpose, it still would have been possible to explore the legitimacy of that secondary purpose. Cf. Benvenuţă, supra note 8, at 523 (discussing NATO's admissions).
tem and only an "incidental aim" of disabling a propaganda machine, closing the opportunity for a hypothetical exploration.

So the Inquiry proceeds to discuss proportionality on the unexamined assumption that the station was a legitimate target. It does not suggest that the number of civilian deaths was acceptable as such, focusing instead on the question of damage and the likely military advantage gained. It initially presents the problem in a manner that seems to highlight the potential for clarifying liability:

[I]t 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 military advantages of a specific incident thus appear to be under consideration, but here is how the Inquiry continues:

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 . . . . The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident . . . . [T]he 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).

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202. Inquiry, supra note 3, ¶ 77-78.
203. Id. (discussing also the need for effective warning). See discussion of warning as an instance of *tu quoque* argument *infra* Part V.A.
204. Inquiry, supra note 3, ¶ 78.
205. Id.
This passage advances a core factual assertion and a core argument: RTS was part of a larger command and control structure; and if an incident is part of a larger campaign or integrated attack, it must be considered in that context. Whatever the facts, the argument is problematic as a matter of rule formation: The Inquiry is asserting a novel standard, taking the bare, acknowledged fact that NATO knew it would gain little from the attack—which one would think likely to increase NATO’s liability—and deriving a proof of its own prior assertion that only the larger context matters in proportionality analysis. It does not ground this analysis in proofs of consensus, but instead, as we have seen, on an extraordinary reading of the very test in Kupreskić that the Inquiry has already rejected.

And the effect? The Inquiry’s insistence that individual incidents cannot be the focus of proportionality analysis raises the threshold for liability until it can capture only massive, repeated, and systematic uses of disproportionate force at the theater or campaign level. That is a possible standard, but not one that consensus or even the Prosecution’s own previous

206. Another instance of source bias: After citing a litany of NATO assertions about the goals of its campaign, the Inquiry confirms, in its own voice, that these were the goals, although that view’s correctness is the legal issue. Id.

207. Id.; see discussion supra Part IV.B.1.

208. The Inquiry develops the preference for theater-level analysis elsewhere as well. For a discussion of the principle of distinction see, e.g., Inquiry, supra note 3, ¶ 29:

[A] determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.

Cf. Benvenuti, supra note 8, at 514-15 (“[T]he Committee forgets to stress that the corollary is also true: if the precautionary measures have worked adequately in a very high percentage of cases, this does not mean that they are generally adequate, so as to excuse violations occurring in a small number of cases . . . the concern deriving from the Committee’s comment . . . is that . . . one could be induced to think that war crimes occur and should be prosecuted only if committed in the context of a plan or of a large-scale commission, when the inadequacy of precautionary measures is deliberate on the part of the warring party. This approach is inconsistent with the case law of the ICTY itself.”) (citing Prosecutor v. Tadic, IT-94-1-A, App. J. ¶¶
charging pattern would require,\textsuperscript{209} and it unquestionably makes proportionality analysis more difficult.\textsuperscript{210} Yet it also makes analysis easier: Among the arabesques and assertions about the proper measure of military advantage, the other half of the equation at the heart of proportionality—that civilian deaths are in the balance—is never actually discussed.

4. Making a Difficult Distinction: Proportionality and Wanton Destruction

In emphasizing the doctrine's difficulty, the Inquiry is staking out a conservative consensual position; yet on analogous facts, the Prosecution evidently finds the law easier to apply, given its frequent and assertive use of closely related charges of "wanton destruction not justified by military necessity" in other cases.\textsuperscript{211} If its sole objection was to "proportion-

\textsuperscript{209} Cf. Laursen, \textit{supra} note 14, at 791-93 (discussing the choice of an individual or campaign-level focus); \textit{id.} at 806-08 (critiquing the Inquiry's statistical approach to precautionary measures in light of Additional Protocol I, Article 57(a)(i)); Schwabach, \textit{supra} note 14, at 184 ("[T]he OTP seems to be disregarding a fundamental principle of international human rights law: that human lives have value not only in the aggregate but also in the individual."). \textit{But see} United Kingdom Reservations to Protocol I, Additional Protocol, \textit{supra} note 82, 1125 U.N.T.S. at 432-33 (asserting that military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack). Even if the U.K. reservations defeat claims of consensus, however, they could hardly be relied upon to assert a countervailing non-consensual (and restrictive) consensus, yet that is what the Inquiry does.

\textsuperscript{210} Cf. Laursen, \textit{supra} note 14, at 792 ("If consistently applied, the logic presented by the OTP Report will end by weighing the total number of casualties, around five hundred, against the entire Operation Allied Force. Even if the total number of civilian casualties was limited in light of the extent and intensity of the bombing campaign, it is questionable whether such a comparison is useful for anything."); Schwabach, \textit{supra} note 14, at 182 ("Casualty averaging seems to indicate that almost no single incident involving civilian deaths can ever be disproportionate unless it is part of a larger pattern of incidents involving excessive civilian deaths.").

\textsuperscript{211} "Wanton destruction not justified by military necessity, a violation of the laws or customs of war as recognized by Article 3(b), 7(1) and 7(3) of the Statute of the Tribunal," has been charged, \textit{inter alia}, in: Prosecutor v. Radovan Karadžić and Ratko Mladic, IT-95-5-I, Initial Indictment, ¶¶ 22, 26, 27, 36, 40, 41, Counts 5, 7 (July 24, 1995), \textit{available at} http://www.un.org/icty/indictment/english/kar-ii950724e.htm; Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2, Am. Indictment, Counts 38, 41 (Sept. 30, 1998),
ality" as a discrete category, why not explore the implications of this variant form? I do not suggest that the Prosecution ought to be indiscriminate, zealous, or bloody-minded in the face of clear limits on the facts or the law’s development; if proportionality were really so weak a reed, the Prosecution ought to say so—though perhaps with some hint of regret, or some effort to see if there is not some way to apply it. Yet here there is no discussion of alternative grounds; here there is no regret, only a hard-edged certitude that the matter is too difficult to take up.

No matter how difficult the application of the law to the facts may be, the Inquiry’s arguments inevitably define liability and necessarily affect the law’s locus and shape. The Inquiry’s emphasis on difficulty is little more than a manifestation of the Prosecution’s selective approach to consensus and progressiveness: When the Prosecution states that, on these facts, it is too difficult to apply proportionality or decide if a target is legitimate, it implicitly locates liability beyond the threshold of the instant case; when it falls back on formulae about the difficulty of deciding, it abdicates prosecutorial responsibility in the name of caution, yet makes law in the process. By not un-


213. Cf. Ronzitti, supra note 14, at 1020-21, arguing that the Committee’s recommendation not to investigate is equivalent to a non liquet. Difficulties in interpretation are not a good excuse for not starting an investigation. There are fields of humanitarian law, as with any body of law, which are not sufficiently
dertaking a serious analysis *despite* the difficulty, the Inquiry foregoes an opportunity to develop the law on proportionality and the rules of air war, regardless of the outcome in this instance. We may think this reasonable, but we must recognize it as a choice: By denying, almost as a matter of law, that proportionality analysis is even feasible, the Inquiry chooses to set the limit of liability somewhere safely far above the bombers, flying three miles high.

5. *Easier for Some: The Careful Prosecutor and the Reasonable Commander*

The Inquiry does not suppose proportionality analysis is equally difficult for everyone. Suggesting that combatants' actions cannot be understood from a purely civilian perspective, it argues for a "reasonable military commander standard[,]"\(^{214}\) saying that "[a]lthough there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained."\(^ {215}\) This proposed standard of deference to military commanders' subjective assessments is very broad; the Inquiry notes it is "unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants."\(^ {216}\) This standard—whatever its merits in letting military expertise trump civilian determinations\(^ {217}\)—is not clear. However, the task of law interpretation and 'clarification' is entrusted to the Tribunal, which thus cannot conclude by saying that it cannot adjudicate the case, since the law 'is not clear.' The *non liquet* is not part of the jurisprudence of the Hague Tribunal nor of any other tribunal.

\(^ {214}\) *Inquiry, supra* note 3, ¶ 50 (placing the phrase in quotations, but not citing to a specific source).

\(^ {215}\) *Id.*

\(^ {216}\) *Id.*

\(^ {217}\) Criticism of the Inquiry's standard arises from the consensus view that civilians, not military experts, ultimately decide such matters. *Cf.* Bothe, *supra* note 14, at 535 ("[The Inquiry's proposal] is not really a satisfactory solution, at least not unless the reasonable military commander is defined in more civilian terms. In democratic systems, the values pursued by the military and those by society at large cannot be far apart. The value system on the basis of which the military is operating has to conform to that of the civil society, not *vice versa.*").
clearly fixed in international law;\textsuperscript{218} rather, the Prosecution itself proposes a novel standard biased toward lower liability for commanders. This seems to contradict its stated position that it will avoid progressive interpretations not clearly in the legal mainstream.\textsuperscript{219}

Even more problematic is the Prosecution’s inconsistency in advancing its standard: A similar subjective deference\textsuperscript{220} has never been proposed for the perspective of military commanders from the former Yugoslavia in any of the Prosecution’s indictments. Why, then, does the Prosecution deviate from its established position and practice here? One explanation might be ethical: Absent clear standards, prosecutors bias toward less liability to protect defendants. Yet such protection can be achieved simply by noting a lack of consensus; one need not propose—and help create—a lower standard, though that is what the Inquiry does.\textsuperscript{221}

Whatever the reasons for its proposal, the Inquiry’s “reasonable military commander standard” would restrict liability for disproportionate use of force to instances in which most or almost all commanders would agree—and thus not reach cases in which there was disagreement.\textsuperscript{222} This might constitute a

\begin{footnotesize}
\begin{enumerate}
\item Cf. Rome Statute, \textit{supra} note 120, arts. 28, 30 at 1017-18.
\item But see, \textit{e.g.}, Benvenuti, \textit{supra} note 8, at 517 (“An objective approach [to evaluating proportionality] must be used: the reference by the Committee . . . to the concept of the ‘reasonable military commander’ can be accepted.”). The Inquiry’s reasonableness prong relies on the \textit{Rendulic case}; General Rendulic was acquitted of wanton destruction because he believed—mistakenly but reasonably—that his scorched-earth policy was militarily necessary. \textit{United States v. List (Case 7)}, \textit{XI Trials of War Criminals Before the Nuremberg Military Tribunals} 757, 1297 (1948).
\item The reasonable commander standard is formally an objective test, but given the Inquiry’s reliance on NATO’s sources and its sympathetic perspective, see discussion \textit{infra} Part V.B, it functions as a subjective test, making NATO, not some average “reasonable commander,” the functional arbiter of legality. Cf. Benvenuti, \textit{supra} note 8, at 518 (noting that the Committee bases its view of an attack’s legitimacy on the perception of NATO commanders).
\item If the absence of a clear standard was the concern, it should have obtained in other, earlier cases too.
\item The Inquiry is clearly not proposing just a fictive “reasonable commander,” but rather some standard based, at least notionally, on the subjective experiences of real commanders, since it notes how real commanders have different perspectives on combat than human rights lawyers. \textit{See Inquiry, \textit{supra} note 3, ¶ 50.}
\end{enumerate}
\end{footnotesize}
viable standard, though it clearly limits a civilian Tribunal's ability to assess liability, especially if one credits commanders' good intentions and reasonableness as the Inquiry does. It is a cautious standard—but not a consensus one, nor one restrained, as it so recently was, by the difficulty of application. That can be acceptable in theory, yet if a cautious approach, or any other approach, is applied only selectively based on which actor is being investigated—well, that is novel indeed.

D. Selective Consistency II: The Progressive Prosecutor's Other Voice

Of course, if consensual caution were the Prosecution's norm, the novel "reasonable commander" standard might just be an anomaly. Yet there is another, more progressive incarnation of the Prosecution's voice against which we may assess the Inquiry: Evidence from indictments shows that in fact the Prosecution is not conservative in approaching novel issues of liability, and many observers see the Tribunal as not merely reflecting settled law but rather progressively creating and advancing it.223

One of the most significant examples of the Tribunal's progressiveness has been its approach to sexual crimes. The Tribunal has created significant new law governing sexual crimes where little existed before,224 and in its rape trials the Prosecution's approach to jurisdictional concerns that seem to constrain it in the Inquiry is entirely more assertive. A "strong trend"—and perhaps a sense of the rightness of the cause—appears to have been more than sufficient grounds for advancing the law, rather than a reason not to proceed.

223. This is not only true of outsiders: "Another of our biggest cases, the 'media' case, started last month. That is the prosecution in which evidence is being led about the alleged central role played by the media in the Rwandan genocide. The case is recognised as breaking new legal ground, and is attracting a great deal of interest." OTP Address, supra note 103.

224. The 1996 trial of Bosnian Serbs for mass rape committed at Foca was the first international criminal proceeding solely for that crime. ARYEH NEIER, WAR CRIMES, BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 175 (1998). "International criminal law has made greater progress on women's issues since 1993 than during any other time in recorded history." Askin, supra note 143, at 47. See generally Caroline Kennedy-Pipe & Penny Stanley, Rape in War: Lessons of the Balkan Conflicts in the 1990s, in THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS 67 (Ken Booth ed., 2001).
Prior to the Tribunal, rape was considered a crime against humanity but was not clearly understood as a war crime or a grave breach of the Geneva Conventions. Consider what then-Professor Meron had to say on liability for rape:

It is time for a change. Indeed under the weight of the events in former Yugoslavia, the hesitation to recognize that rape can be a war crime or a grave breach has already begun to dissipate. The International Committee of the Red Cross (ICRC) and various states aided this development by adopting a broad construction of existing law.225

By calling for "a change"—a prospective development—and noting that opposition had "begun to dissipate"—rather than already "dissipated"—Meron acknowledges that, while matters were moving in a direction he favored, a new consensus had not yet formed.226 (It is interesting to note that this passage was published in 1993, the year the Tribunal was estab-

225. Meron, supra note 176, at 207.
226. Commentators analyzing the Tribunal's Statute could not readily or consistently ignore the evident lack of consensus on rape as anything other than a crime against humanity:

To make it absolutely clear that rape would be subject to prosecution before the international tribunal for ex-Yugoslavia, the Security Council of the United Nations said so explicitly in the tribunal's charter. Paragraph 48 states: "Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful [sic] killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds . . . ." Paragraph 49 provides that "the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population . . . rape . . . ."

Neier, supra note 224, at 182 (first ellipsis in final sentence original to Neier). With Paragraphs 48 and 49, the Security Council explicitly made rape a crime against humanity. It may be argued, however, that the Security Council had no such clear intent regarding rape as a war crime or grave breach. Normal statutory interpretation raises the inference that, having explicitly referred to rape in one place, the Security Council's failure to include it elsewhere is intentional. The later Rwanda Statute, for example, explicitly includes rape and enforced prostitution as violations of Common Article 3 and Additional Protocol II. Askin, supra note 143, at 49; Navanethem Pillay, Sexual Violence in Times of Conflict: The Jurisprudence of the International Criminal Tribunal for Rwanda, in Civilians in War 165, 166-68 (Simon Chesterman ed., 2001).
lished.\textsuperscript{227} In discussions of law, use of phrases such as "broad construction" (or "emergence," "evolution," or "clarification")\textsuperscript{228} signals attempts to locate the progressive vanguard of consensus—which is to say, to make a new consensus. They are used by authors who know their position is progressive in that it is not universally agreed upon (i.e., that it is \textit{not} yet a consensus).\textsuperscript{229} This seems obvious as a matter of language: A

Even when clearly looking to maximize the scope of liability, such analyses were largely compelled to adopt language that conceded the project's prospective (i.e. progressive) element. Meron, for example, notes:

The approval by the Security Council (Res. 827) \ldots of the tribunal's charter recognizing rape as a punishable offense under international humanitarian law validates this important normative development and, it is hoped, may expedite the recognition of rape, in some circumstances, as torture or inhuman treatment in the international law of human rights as well.

\textit{Meron, supra} note 176, at 209. The normative development represented by the Statute's mention of rape as a crime against humanity is not at issue: The Prosecution need not hesitate on a matter plainly within the text of the Statute. Meron calls rape a "punishable offense," however, which diverts attention from the fact that the Statute criminalizes rape under one head of jurisdiction, but not others. Text cannot get him to such a conclusion, but claims of consensus can.


\textsuperscript{228} See, e.g., \textit{Meron, supra} note 176, at 263 ("The clarification of customary law [about violations of international humanitarian law in internal conflicts] is the most important normative contribution of the [Tadic] decision.") (emphasis added).

\textsuperscript{229} For additional examples, see Kelly D. Askin, \textit{Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status}, \textit{93 Am. J. Int'l. L.} 97, 123 (1999) ("creative and varied indictments"); \textit{id.} at 122 (calling charges brought by the Prosecution "significant progress for the heretofore inadequate international law on gender-based crimes"); \textit{Meron, supra} note 176, at 202, 204 ("rapid adjustment" of the law); \textit{id.} at 296 ("The Hague Tribunal has issued several important decisions that clarify and give a judicial imprimatur to some rules of international humanitarian law"); Schrag, \textit{supra} note 227, at 34-35 (the "Prosecutor at the Tribunal made creative use of the Statute"). \textit{Compare Meron, supra} note 176, at 221 (asserting a lack of consensus on the requirement of a nexus between crimes against humanity and war), \textit{with} Diane F. Orentlicher, \textit{Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime}, \textit{100 Yale L.J.} 2537, 2589-90 (1991) ("while post-Nuremberg developments have tended to free crimes against humanity from a wartime context, the trend has been inconclusive").
proponent of a view would not resort to such qualifying phrases if he knew with confidence that his view already held the full force of consensus.\textsuperscript{230}

Yet despite the evident absence of consensus on broader liability for rape, the Prosecution pursued just such charges, first in the \textit{Foca} case.\textsuperscript{231} Indeed, this first attempt at applying the 'existing consensus' was quite consciously understood as an effort to \textit{establish} a consensus:

The first indictments solely for rape—in June 1996, cover[ed] the rape camp at Foca . . . . According to the indictments, the defendants . . . had committed war crimes. The defendants were not charged with other offenses, which was important: Indictments specifying rape and only rape seemed to resolve once and for all the question of whether the crime is covered by the provisions of the Geneva Conventions enumerating grave breaches.\textsuperscript{232}

The determination to charge rape alone as a demonstration case is both within a prosecutor's discretion and a hallmark of progressiveness. This was all the more so at a time when it was still necessary to "resolve once and for all the question of whether the crime is covered." Rather than finding or following an existing consensus, \textit{Foca} created a new one.

Observers approved the Tribunal's (and Prosecution's) actions\textsuperscript{233} and in so doing confirmed the progressive, consensus-making nature of the decisions:

\begin{itemize}
\item \textsuperscript{230} This is particularly relevant when the usage refers to the immediate past. One might observe that a norm, now well-settled, evolved with great rapidity at some point in the past. The case is different if that rapid development is presently underway or, in the phrasing of a progressive advocate, has just been completed.
\item \textsuperscript{231} Prosecutor \textit{v.} Dragoljub Kunarac and Radomir Kovac, IT-96-23-PT, Third Am. Indictment (Dec. 1, 1999), \textit{available at} http://www.un.org/icty/ind-e.htm. More than half the Prosecution's indictments include sexual crimes. Askin, \textit{supra} note 143, at 49.
\item \textsuperscript{232} \textit{Neier, supra} note 224, at 182-83.
\item \textsuperscript{233} "Many delegations [to the ICC process] recalled the position taken by the Prosecutor of the ICTY to overcome the fact that sexual crimes are not self-standing crimes under the ICTY Statute by charging the crime of rape as a grave breach of the Geneva Conventions..." \textit{The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence} 185 (Roy S. Lee ed., 2001) [hereinafter Lee] (citing Patricia Viseur Sellers \& Kaoru Okuizima, \textit{Intentional Prosecution of Sexual Assaults}, 7 TRANS-
It is significant that the Office of the Prosecutor (OTP) has moved beyond the explicit language of these provisions[234] to find other bases on which to prosecute sex crimes. The OTP has charged and the judges have accepted by confirming the indictments, various forms of sexual violence as grave breaches, violations of the laws or customs of war, genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II.235

The record on rape shows the Prosecution proceeded in the absence of a consensus, and in so doing made one that materially affects the work and prospects of future courts.236 It is not an attack on the rightness of that project to note, as an
historical matter, that no consensus existed until very recently—until after the Prosecution claimed one. That was progressive in a way the Inquiry is not, which is all this discussion intends to show.

This merely historical observation matters because the Tribunal publicly has undertaken to prosecute only matters on which there is consensus—and determining consensus properly is supposed to be a neutral, technical, historical question. In reality, of course, human beings have an interest in outcomes and are prepared, out of ideological or moral conviction, to apply looser or stricter standards to measuring consensus—that is to say, progressive or conservative standards. To call this simply a matter of statutory construction somehow unrelated to consensus is to deny the considerable (indeed, consensus) weight of legal scholarship about the law-making nature of interpretation. The Prosecution’s progressive interpretations in other cases were either right or wrong, but they were progressive and therefore not in the mode the Prosecution claims, nor the mode it mostly uses, in the Inquiry. This is a problem of consistency: in process, in outcome, in attitude, and, perhaps, in intention.

Realist voices will say doctrinaire reliance on consensus creates a sophomorically rigid view of law that naively supposes prosecutors adopt consistent approaches out of formal obligation and do not have their own agenda. Clearly, that is not the way the world works; the question, though, is why the Inquiry insists that it is. We are sophisticated enough to know that prosecutors pursue progressive strategies, advancing the law in ways they think just when they can, refraining when they must. Clearly the Prosecution is sophisticated enough to pursue such strategies in other cases, yet a reader of the Inquiry could well suppose that such things cannot happen. Perhaps this was simply a case in which the Prosecution felt it could not act, or in which it did not consider the attempt just or serious enough to be worth the effort.

Voice—Information—Argument—Style—Structure—
Consequence—Silence

opment of the law which has been instrumental in protecting vic-
tims of sexual violence . . . .
V. TRACES OF THE REDATOR’S HAND: THE EVIDENCE OF, AND FROM, STYLE

As I returned to this fire-ravaged area night after night to ascertain whether I’d left behind any traces that might betray me, questions of style increasingly arose in my head. What was venerated as style was nothing more than an imperfection or flaw that revealed the guilty hand.

—Orhan Pamuk, My Name is Red

A discussion of style is perhaps the most problematic approach to employ in considering the qualities of the Inquiry. While everyone appreciates the role of rhetoric and emotion in law, when called to account for law’s effects, most observers understandably retreat to the more objectively assessable areas of evidence, precedent, and logical argument.

Yet a persuasive if impressionistic case can be made that the style and tone adopted in the Inquiry supplement its sense that liability not only does not, but shall not lie. The Inquiry employs a number of stylistic devices that materially advance the message that none of NATO’s actions verged upon the serious issues that are the Tribunal’s proper business: The Inquiry sets NATO’s actions in an ameliorative context through tu quoque arguments, it focuses on NATO actors’ subjective views in a way that unnecessarily relativizes its legal arguments and factual descriptions, and it exhibits a strikingly different level of emotional distance—seen in expressions of regret and frustration—than in other Prosecutorial pronouncements.

It is perhaps unsurprising that style comports with outcome, yet the Inquiry’s stylistic choices affect its evaluations. As noted earlier, for example, extensive quotation of NATO sources distorts not only information but also viewpoint. Quotation quotes a style too, and indeed we are concerned with something deeper than the borrowing of words: the absorption of a voice.

239. Cf. Koskenniemi, supra note 142, at 358 (“any style of legal argument may work as a mechanism of blindness”).
A. Misdirection: Prosecutorial Tu Quoque Arguments

Context can illuminate how a seemingly innocuous act is in fact culpable, or how a seemingly culpable act is not. In the Inquiry, context chiefly serves to limit the scope of liability. Classically, *tu quoque* arguments, which claim mitigation because others have engaged in analogous behavior, have been rejected by courts, though defendants still resort to them.\(^\text{240}\)

So it is curious to hear the Prosecution, which has argued against such mitigation in other cases, adopting the tactic: The Inquiry explicitly raises the issue of Serb forces' or their leadership’s contributory involvement in the deaths of civilians in two attacks—mention that, in both cases, deflects attention from the question of NATO’s contribution to those deaths.

**RTS:** In discussing whether or not NATO gave sufficient warning prior to its attack on RTS, the Inquiry first notes that NATO acknowledged not giving warning,\(^\text{241}\) which, the Inquiry notes, might have increased civilian casualties.\(^\text{242}\) It then determines that there was effective notice because Western journalists *were* forewarned\(^\text{243}\) and draws the conclusion that “some Yugoslav officials may have expected that the building was about to be struck” and therefore may have been partially responsible for the deaths.\(^\text{244}\) The Inquiry thus not only sug-

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241. Inquiry, *supra* note 3, ¶ 77 (noting that NATO officials in Brussels allegedly told Amnesty International that they did not give a specific warning, as it would have endangered the pilots).

242. *Id.*

243. *Id.* Although it acknowledges that this would not necessarily absolve NATO of its duty to warn, in another example of discursive closure, the Inquiry does not pursue the logical thrust of this, or the opportunity to elaborate on the obligations warring parties have to warn civilians; instead it simply considers that “[e]vidence on this point is somewhat contradictory.” *Id.*

244. *Id.*:

[I]t 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 . . . .” Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians . . . it may nevertheless imply that the Yugoslav au-
suggests that NATO’s notification of Western journalists sufficed, but also interprets this as suggesting that Yugoslav officials might be contributorily liable. That the source for this accusation is the British Prime Minister, who himself authorized the attack, is at least as infelicitous as the argument is agile in developing NATO’s own best defense for bombing a civilian television station: Though the missiles were NATO’s, the fault was someone else’s.

The Inquiry’s mention of Yugoslav complicity in the deaths at RTS is not, properly speaking, *tu quoque*, since it is presented *passim* as evidence that Yugoslav officials had notice of the attack; still, it inevitably suggests that real fault lies with the victim. That prejudicial taint could easily have been avoided. It would have been possible to write the sentence pointing out the factual link to Yugoslav officials’ knowledge without saying, as the Inquiry does, that those officials “may be partially responsible for the civilian casualties.”245 A neutral formulation is clearly possible, because the issue is Yugoslav officials’ knowledge, not their complicity. Blair’s accusation, bolstered by the Inquiry’s own text, hardly serves to support a claim of effective notification and introduces prejudicial issues by raising the question of why it is included and why a Committee committed to truth, to fairness, and to the appearance of fairness would not see it as a problem, instead of its best evidence.247

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245. For example, one could write: “Various observers have suggested that Yugoslav officials nonetheless knew of the attack, through the agency of the foreign reporters, and this may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.”

246. In fact, the “evidence” of Yugoslav officials’ knowledge upon which the Inquiry relies is a bare assertion by Blair that they knew, and the fact that they did not remove the personnel—non-action that would also be perfectly consistent with not knowing, a conclusion that would weaken somewhat the Inquiry’s reasoning about the sufficiency of NATO’s chosen medium for giving notice.

247. See Benvenuti, *supra* note 8, at 523 (“The responsibility of Yugoslav officials for not following the extremely surreptitious NATO warning is consistent only with the upturned realities of *Alice in Wonderland*.”). Cf. RFE/RL Newsline, *Del Ponte: Milosevic Knew of Attack on Serbian Television*, (Jan. 24, 2001), available at http://www.rferl.org/newline/2001/01/240101/asp:
Koriša: Discussing NATO’s attack on the village of Koriša, the Inquiry again raises the possibility that Serb forces were contributorily liable for civilian deaths. After discussing the known facts and NATO’s position, the Inquiry notes, “There is some information indicating that displaced Kosovar civilians were forcibly concentrated within a military camp in the village of Koriša as human shields, and that Yugoslav military forces may thus be at least partially responsible for the deaths there.”

The argument is not merely noted in passing: In the following paragraph, it is reprised as quite literally the last statement before the Committee concludes that no crime has been committed. Combatants’ obligations are not necessarily reduced by an enemy’s willful attempt to place civilians in harm’s way, as the Committee evidently knew, yet the Inquiry freely departs from this consensus view to place the focus

Del Ponte’s spokeswoman . . . said in Belgrade . . . that Milosevic knew that NATO had targeted the building of Radio Television Serbia for bombing on 23 April 1999 . . . . Del Ponte provided information to that effect from NATO to [a lawyer] who represents the families of 13 of the 16 people killed in the bombing . . . . The families maintain that Milosevic knew that the building was slated for attack but kept it open and did not warn the staff of the danger. The families also want to charge NATO for the deaths, but Del Ponte told [their lawyer] that she does not have sufficient information to link the bombing to any one individual.

248. Inquiry, supra note 3, ¶ 88.
249. Id. ¶ 89:

The available information concerning this incident is in conflict . . . . It appears that a relatively large number of civilians were killed. It also appears these civilians were either returning refugees or persons gathered as human shields by FRY authorities or both. 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 OTP should not undertake an investigation concerning the bombing at Koriša.

250. Id. ¶ 51 (noting that although it is often difficult to avoid civilian casualties because of mixed-use settlement patterns, “[c]ivilians present within or near military objectives must, however, be taken into account in the proportionality equation even if a party to the conflict has failed to exercise its obligation to remove them”). The Inquiry analyzes Koriša in terms of mistake, not proportionality, but the general point is the same: Liability for civilian deaths is measured by the existing circumstances and is not necessarily lessened by the other side’s failure to remove civilians from legitimate
of censure on Yugoslav forces, thereby reducing the liability confronting NATO.

*Implicit instances:* There are other instances that, while not using the overt language of *tu quoque*, act to transfer responsibility to the victims of NATO attacks. For example, the Inquiry describes the attack at Grdelica by quoting U.S. Deputy Secretary of Defense John Hamre: "[O]ne of our electro-optically guided bombs homed in on a railroad bridge just when a passenger train raced to the aim point. We never wanted to destroy that train or kill its occupants. We did want to destroy the bridge and we regret this incident." Hamre's phrasing is hardly neutral: He says that the bomb was aimed at the bridge "just when a passenger train raced to the aim point." The causal relationship between bomb, train, and explosion that Hamre develops is consistent with his version of liability: It suggests the train as the active element, racing to a given point where explosion inevitably awaits, rather than two elements being in motion—and one rather faster than the other, as anyone who has seen a missile fired or ridden a train in Yugoslavia will know. While it is understandable that Hamre colors his description in a way that shifts responsibility to others, it is harder to understand why the Committee accepts such a shading and thinks him an appropriate source for its truth.

A further example is the Inquiry's use of "war-monger" to describe the Serb leadership: "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." War-mongering—a crime against the *jus ad bellum*, if anything—is presumably a bad thing, and for that very reason it is curious to see it invoked. It sounds like taking sides to suggest that one of two military opponents is a war-monger, implying that the other may be justified in taking up arms—not normally relevant in a conventional *jus in bello* analysis—and even that the object of attacks may be contributorily

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252. Id. ¶ 55. The usage here is general, but elsewhere the Inquiry uses similar wording to describe the Serb leadership: "[NATO's] primary goal [was] disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power." Id. ¶ 76 (emphasis added).
liable for all harm that ensues. It is all the more curious when the Inquiry has explicitly disavowed jurisdiction over the *jus ad bellum.*253

The formal argument the Inquiry advances could be made just as cogently without loading on contributory liability, crimes against peace, or justifications for intervention: One could assert that "if the media is linked integrally to the survival in power of parties committed to continuing military efforts, and thus perpetuates armed resistance, it may fall within the definition of a legitimate military objective," or any number of alternative formulations. But the Inquiry said what it said—that has come down to us, in words like law. More than the implications for legal argument, however, it is the tone created by such words that defines, or reveals, the voice of the Inquiry. A prosecutor seriously considering investigation would not employ a phrase dismissing the victims of a potential accused, or allow it to escape his editorial review. Only a prosecutor fundamentally unprepared to consider seriously that a "war-monger" might also be a "victim," which would be the logical conclusion of investigating NATO, would lack incentive to guard against such words.

*Tu quoque* and contributory liability (though formally illegitimate) frequently appear in legal discourse because they speak to the moral values underpinning resort to law’s justice. They make claims about who is the good side, or about there not being one good side, with the inevitable suggestion either that those who are morally right should be judged by different standards254 or that no one party is guilty, as all are equally good or bad. They therefore constitute either a deeply moral argument or an amoral, relativizing one. Either case is prob-

253. *Id.* ¶ 4 (noting the International Court of Justice’s jurisdiction over crimes against peace). *See also id.* ¶¶ 30-34.

254. *See id.* ¶ 32 (discussing arguments before the International Military Tribunal at Nuremberg and in the 1950s linking *jus in bello* analysis to the right to resort to force, though noting further that "The [Nuremberg] courts were unreceptive to these arguments . . . [and the debate in the 1950s] died out as the participants realized that a crude reciprocity was essential if the law was to have any positive impact. An argument that the 'bad' side had to comply with the law while the 'good' side could violate it at will would be most unlikely to reduce human suffering in conflict."). The Inquiry thus formally rejects a differential approach but is evidently conversant with its arguments.
lematic for those who value process and consistency, and as a practical matter _tu quoque_ and contributory liability always argue to limit the liability of the main actor. It is therefore particularly troubling when, as in the Inquiry, they are pursued by the Prosecution.

B. **Sympathy: Who is in View, Whose Voice is Heard**

The Inquiry considers the _mens rea_, or mental state, of NATO actors, and necessarily so: In the Djakovica case, for example, where pilots’ impressions of the battlefield below were of the essence, an assay of their views in context would be essential to any finding of recklessness or intent. Normally, in prosecutorial practice, such an exercise is tempered by objective (or at least conventional) estimates of what defendants should have known. However, the Inquiry goes well beyond this normal exercise in perspective, relativizing its discussion of law and fact in a way that dramatically alters the Prosecution’s ability even to contemplate liability. Adoption of NATO’s subjective view not only concedes ground on issues of liability; by converting a potential suspect into the _subject_, it creates an atmosphere of sympathy.

We have seen how the Inquiry relies on NATO’s own descriptions, with a concomitant bias in its conclusions; how the Inquiry considers NATO statements “generally reliable;” and how its “reasonable commander” standard makes liability a function of NATO’s view. Building on this, the Inquiry asserts the good intentions of NATO and approves NATO’s belief that it targeted only legitimate objectives, declaring that “[a]s a general statement, in the particular incidents reviewed by the committee... NATO was attempting to attack objects it perceived to be legitimate military objectives.”\(^{255}\) A suspect’s self-evaluation is relevant, but he cannot simply demonstrate belief in his own propriety to claim excuse. Presumably, most war criminals think their actions legitimate, and the challenge for prosecutors is to show that they should have known better. A prosecutor certainly has no strategic interest in emphasizing a suspect’s subjective view. What, then, is the purpose of this “general statement”?

\(^{255}\) _Id._, ¶ 55.
There are two parts to the Inquiry's concession: NATO's belief in the legitimacy of its targets and the Prosecution's focus on targets intended rather than objects struck. If accepted at face value, their joint effect is to presuppose that civilian deaths are collateral: Whenever NATO hits what it was aiming at, that object is deemed a legitimate target (relying on NATO's own belief in its legitimacy), and inquiry is at an end. When NATO hits an illegitimate target, because NATO's good intent is conceded, the assumption is that a mistake was made. This prejudicial framing device is also employed for the specific incidents, relying for its power on the consistent location of NATO actors in the subjective lens of the Inquiry. In the Djakovica convoy incident, for example, considerable attention is paid to NATO pilots' perceptions of Serb forces' actions in the period leading up to the destruction of the convoy:

A reconstruction of what is known about the attack reveals that in the hours immediately prior to the attack, at around 1030, NATO forces claimed to have seen a progression of burning villages . . . . They formed the view that MUP and VJ forces were thus methodically working from the north to the south through villages, setting them ablaze and forcing all the Kosovar Albanians out . . . .

The pilots' subjective belief about what had been happening in the valley was critical to the Inquiry's view that no liability lay for destroying the convoy, because it is acknowledged that the pilots could not actually identify the targets when they launched the strike: they were relying on what they assumed to be happening—as reported, apparently, by NATO. As an act in war, that reliance may be reasonable, but in judging that act, the Inquiry's reliance on a relativized combatant's-eye-view makes a "should have known better" standard almost beside the point because, in effect, the "reasonable combatant" is the pilot himself. However reasonable this may make the limit on

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256. Id. ¶ 65. Here is an example of a text that bears on the facts, and is probative of legal conclusions, that is not attributed to NATO yet is almost certainly derived from its sources without corroboration or critical review.

257. It is ironic to consider the precision of the impressions that the Inquiry reports the pilots formed, considering how imprecise their view of the actual battlefield was, again according to the Inquiry, when the time came. See id.
liability appear, it is a function of extremely defensive, discretionary postures about what the marginal legal interpretation should be. One may question, then, the prominence the Inquiry affords to NATO’s subjective views (especially since no indictment gives similar weight to an accused’s subjective evaluations) and the decision to make such a generalization. Why is the Prosecution assuming anything about NATO’s intentions? What is gained, and more importantly, what is lost?

A focus on the suspect’s view makes him the subject of sympathy, an effect a prosecutor normally wishes to avoid. One cannot resist noting the irony in the Inquiry’s declaration that “the aircrews [who attacked the Djakovica convoy] could have benefited from lower altitude scrutiny of the target at any early stage;[;]” surely it was the 75 civilians on the ground who could have benefited. Of course, this is more than irony: Focusing on the “benefit” to the crews confirms the sense of unfortunate error, directing our attention and our sympathy to their difficult task, not to the plight of those unable to dodge missiles that, whether launched reasonably, recklessly, or with cool deliberation, hit the ground just as hard and killed just the same. At one level, this focus on the pilots’ perspective is wholly proper: It is necessary to consider the potential suspects’ view (and not only the victims’), since it is against them that liability would lie. Yet we know that prosecutors do not normally make a special point of this, but rather focus insistently on victims’ suffering; it may not be the best law, but it is the most common practice. Here, inquiry has taken place off-stage, and the conclusion about these deaths, as in Greek tragedy, is simply reported, while our eyes stay with the actors.

How else might one phrase this, if one were writing as a prosecutor? “Lower altitude scrutiny of the target at an early stage might have prevented the loss of civilian life”; “The aircrews might have been able properly to identify the targets had they flown at a lower altitude”; “The deaths of 75 civilians

258. Id. ¶ 70.

259. Cf. Tania Voon, Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict, 16 Am. U. Int’l. L.R. 1083, 1112 (2001) (“[T]he primary beneficiaries of NATO’s precision weapons technology were the aircrews, who were able to direct attacks from higher altitudes at lower risk to themselves, rather than the civilians.”).
were caused by the NATO pilots’ bombing from an altitude too high to allow proper identification”; or even “Senior NATO commanders’ instructions to pilots to bomb from high altitude were a direct cause of these 75 innocent civilians’ deaths.” Surely these formulations are at least as accurate as the Inquiry’s. They also imply a greater responsibility, in part because they do not place the suspects’ subjective impressions in the most favorable light. But surely our conclusions about those matters should be substantive; surely they should not hang on mere choice of phrasing between equally meaningful alternatives, or on who is in the narrative focus—that is to say, on matters of style?

C. Regret: Accusation, Restraint, and Expressions of Frustration

Perhaps the most striking manifestation of this identity of style and view is the absence of emotive distance between NATO and the Prosecution. In failing to express frustration or regret about the difficulties of developing a case, the Inquiry foregoes a cost-free opportunity to develop the law: The Inquiry almost never hints at what it would take to make a case in similar circumstances; instead, it states its belief that on these facts there is nothing worth investigating. This is a very different matter and a different way of saying it.

Expressions of regret are counterfactual; they allow prosecutors to suggest standards for other cases without affecting the one at hand. For example, in the following (rare) instance, by expressing regret the Inquiry identifies a data point affecting proportionality analysis: “Assuming the station was a legitimate objective, the civilian casualties [between ten and seventeen] were unfortunately high but do not appear to be clearly disproportionate.”261 This posture—besides confirming that NATO is not liable—identifies a point of permissibility: For an analogous target, seventeen deaths would not be excessive. Yet the Inquiry’s few limits serve to identify isolated, decontextualized points of permissibility and not, as would have

260. Inquiry, supra note 3, ¶ 71.
261. Id. ¶ 77 (emphasis added).
been possible, points beyond which a violation would be found.\(^{262}\)

The Prosecution does express regret. Regret is rare in indictments (since by definition the Prosecution believes it can make the case), but in terminating other investigations the Prosecution has made clear it believed liability would have lain had circumstances been different. For example, the Deputy Prosecutor issued a statement regretting that Croatia's former President Franjo Tudjman would not be brought to justice, suggesting that there was a moral case against him that could not be brought only on the compelling procedural grounds that he was dead.\(^{263}\) The Prosecution has similarly asserted its belief that there was substantive guilt when responding to losses in court.\(^ {264}\) The Prosecution has also recommended...

\(^{262}\) Any decision to acquit or not to indict implies a point of permissibility for analogous facts, but it is possible to craft decisions to suggest where liability would lie.


Graham Blewitt, a prosecutor for the UN war crimes tribunal at The Hague, said on 9 November that the late President Tudjman would have been indicted by the court if he were still alive . . . . Blewitt declined to comment on the charges that would have been brought against Tudjman, but he said evidence of his role in the Balkan wars will come out as more prosecutions are conducted.


The Prosecutor is deeply alarmed at the decision of the Chambers of this Tribunal to release two of the accused . . . in . . . the Bosanski Samac case . . . . The Prosecutor has at all times strenuously opposed the application by these two accused for their provisional release . . . . When the Trial Chamber ordered the provisional release of the two accused . . . the Prosecutor immediately lodged a notice of appeal . . . . The Prosecutor will monitor closely the activities of the two accused, who will be returned to Republika Srpska, in Bosnia and Herzegovina.

When informing the Court that it wished to withdraw a count in the Furundžija case, the Prosecution noted:

1. . . . [T]he Prosecutor does not concede the arguments set forth by the Defence.
2. The confirming Judge determined that the Prosecutor met her prima facie burden as concerns crimes recognised by Article 2 of the Tribunal Statute. The Prosecutor has, however, reconsidered the
amendments to the Statute, showing that even when matters fall outside its jurisdiction, it is prepared to press to place them on the international agenda.\textsuperscript{265}

appropriateness of proceeding on the establishment of international armed conflict. The Prosecutor considers that it is in the interests of justice, of a fair and expeditious trial and, [sic] the judicial economy of the Trial Chamber, for the Prosecutor not to pursue Count 12 of the Indictment.

Prosecutor v. Furundžija, IT-95-17/1-PT, Prosecutor’s Response to Defence Motions to Dismiss Count 12 of the Indictment for Failure Adequately to Plead International Armed Conflict and to Dismiss Counts 12, 13, 14 for Defects in the Form of the Indictment, 1-2 (Mar. 6, 1998). See also Press Release, International Criminal Tribunal for the Former Yugoslavia, Prosecution Files Motion to Withdraw Article 2 Charges, at http://www.un.org/icty/pressreal/p300-e.htm:

The Prosecutor announced its intention to withdraw the charges under Article 2 of the Tribunal’s Statute (“Grave breaches of the Geneva Conventions of 1949”) . . . .

Pursuant to the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, rendered on 2 October 1995 by the Appeals Chamber in the Tadić case, grave breaches of the Geneva Conventions of 1949 can be committed only in the course of an international armed conflict. Charges under Article 2 of the Statute therefore require proof of the international character of the conflict, which involves complicated questions of fact and law.

The Prosecutor still maintains that the conflict was international in character. However, she takes the view that the withdrawal of those charges should “significantly expedite the trial proceedings,” let it be understood that the charges maintained cover all the alleged criminal conduct of the accused.

It is interesting to compare the Prosecution’s willingness here to insist on the correctness of its view, even in light of requirements for “proof . . . involving complicated questions of fact and law,” id., with the Inquiry’s vocal reticence to pursue proportionality. Cf. Inquiry, supra note 3, ¶¶ 48-50.

\textsuperscript{265} OTP Address, supra note 103 (calling for amendment of the Statute to remove the “armed conflict” requirement to allow prosecutions of crimes against Serbs and Gypsies after NATO’s occupation of Kosovo). In this connection the Prosecutor noted:

[The] ICTY’s forced inaction on what has been happening in Kosovo since June 1999[ ] undermines the Tribunal’s historical credibility. We must ensure that the Tribunal’s unique chance to bring justice to the populations of the former Yugoslavia does not pass into history as having been flawed and biased in favour of one ethnic group against another. Besides, if we obtain this morally justified and necessary extension of our mandate, the Tribunal might become a deterrent factor against the ongoing ethnic-cleansing campaign in Kosovo.
In NATO's case then, it must be that the Committee genuinely felt there was no substantive guilt, since it expresses no regret or frustration about procedural or evidentiary obstacles. Perhaps there is no rhetorical distance between what it believes and what it can prove, because that is the substantive conclusion to which the Prosecution came: NATO did nothing wrong—or nothing seriously wrong—and the text reflects that. This is a perfectly plausible position. A prosecutor is supposed to be skeptical and critical, not contrary or vicious; if he believes there is no liability, he should say so. To criticize the Prosecution's lack of regret, then, may require descent into the thicket of substantive argument that is beyond the scope of this Article. It did not believe anything seriously criminal had occurred, and its language reflected that.

Still, in deciding what the law does not reach, it undeniably foregoes saying what the law should reach. At the verges of rhetoric—perhaps as a mere matter of style—an easy, uncomplicated declaration that some facts do not give rise to liability hardly comports with the prosecution's purported function, whether that be to produce evidence of guilt or a balanced assessment. In the Inquiry, the same Prosecution that kept its investigation into Operation Storm open for six years before producing an indictment that met its (and the Chamber's) requirements does not sound vicious or contrary, nor even critical or skeptical. It sounds as if it has nothing to regret: not the paucity of information, nor NATO's obfuscation, nor the double-edged ambiguities of law. Yet the tone is not relaxed; one might almost think it determined.

Voice—Information—Argument—Style—Structure—
Consequence—Silence

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Id. The Prosecutor further stated, "It is regrettable that the Tribunal's statute... makes only a minimum of provision for compensation and restitution[.]", and requested its amendment. Id.

266. Operation Storm (Oluja) was the 1995 Croatian offensive that retook areas of western Croatia occupied by Serbs, most of whom fled into Bosnia, giving rise to accusations that Croatia had engaged in ethnic cleansing. See S.C. Res. 1019, U.N. SCOR, 50th Sess., 3591st mtg., U.N. Doc. S/RES/1019 (1995).

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VI. A “SITUATION QUITE UNFORESEEN”: STRUCTURE, PUBLICITY, AND THE PURPOSE OF SERIOUSNESS

The image of the Inquiry that we have seen—biased information, defeatist argument, distorting stylistics—is troubling. But what does it mean? Rather than being accidental or haphazard, these problematic elements reveal a pattern grounded in the public nature of the document they constitute—a structure with evident purpose: The Inquiry is a window onto the intentions of the institution that, quite unexpectedly, felt a need to create it and then reveal it to the world.

A. Interpretation Reprised: Seriousness and the Real Consistency in the Inquiry

We began with an approximation: The Prosecution is inconsistent, because while it is conservatively consensual in the Inquiry, it is progressive in other cases. We must now revise that approximation, for it would be wrong to say that the Inquiry always relies on consensus. We have seen the Inquiry adopt entirely novel theories, departing from consensus to advance its reasonable commander standard, redefine proportionality, or employ *tu quoque* arguments; these represent marginal and progressive interpretations of the law. Is there then any consistency in the Inquiry's approach?

The one interpretation that renders the Inquiry's arguments consistent is a tendency to reduce NATO's potential liability. On this reading, the Inquiry's frequent reliance on consensus simply reflects the fact that most of the time, expansive interpretations would increase liability, but when *consensus* might entail a risk of liability, the Inquiry adopts restrictive (progressive) interpretations. The Inquiry's real consistency, then, is not that it is consensual, but that it is cautious. This does not mean NATO should have been found liable, but it is instructive to consider the reasoning the Prosecution consistently adopted in choosing its interpretations and, beneath this consistency, its intention. The question is not if the Prosecution thought NATO's acts were serious, but how seriously the Prosecution thought about it.

The Inquiry asserts that, even if proven, the crime base alleged against NATO would not constitute grounds for indictment for anything but war crimes or grave breaches: "If one accepts the figures . . . of approximately 495 civilians killed
and 820 civilians wounded . . ., there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity."267 This view—an argument about law and numbers—is completely at odds with the Prosecution’s representations in other cases. To be sure, far more heinous crimes occurred in Bosnia and Croatia, where individuals committed acts, such as some of the sexual depravities, at a level of unmediated intimacy and, as at Srebrenica, with a sweep that is grotesquely epic.268 Yet many crimes charged could not reasonably be termed more serious than those alleged against

267. Inquiry, supra note 3, ¶ 90.

268. See, e.g., Prosecutor v. Anto Furundžija, IT-95-17/1-PT, First Am. Indictment ¶ 25 (June 2, 1998) ("While being questioned by FURUNŽIJA, [REDACTED] rubbed his knife against Witness A’s inner thigh and lower stomach and threatened to put his knife inside Witness A’s vagina should she not tell the truth"); Prosecutor v. Ratko Mladic, IT-95-5/18-I, Am. Indictment ¶ 25 (Oct. 11, 2002):

25. As Commander of the Main Staff of the VRS, General Ratko MLADIC, acting individually and in concert with other members of the joint criminal enterprise, participated in the joint criminal enterprise from no later than 12 May 1992 until at least 22 December 1996 in the following ways:

a. Planning, preparing, facilitating, or executing a campaign of persecutions, which included acts of genocide, within BiH, by establishing control of [various] municipalities . . . attacking and destroying non-Serb towns and villages, as well as looting, destroying, and/or appropriating residential, commercial and religious properties in the municipalities; killing and terrorising the non-Serb inhabitants, and submitting them to cruel and inhumane treatment and conditions, including physical, psychological and sexual abuse, often in detention facilities; using non-Serbs for forced labour, including at front lines, and as human shields; imposing restrictive and discriminatory measures on the non-Serb population; and separating, deporting, and permanently removing non-Serbs who did not subjugate themselves to Serb authorities;

d. Planning, preparing, facilitating, or further executing the campaign of persecutions, which included acts of genocide, after the capture of Srebrenica in July 1995, by forcibly transferring the Bosnian Muslim women and children from the Srebrenica enclave to Kladanj; capturing, detaining, summarily executing, and burying thousands of Bosnian Muslim men and boys from Srebrenica, all of whom were either separated from the group of Bosnian Muslim refugees in Potocari or captured from the column of Bosnian Muslim men escaping the Srebrenica enclave; and exercising command and control over an organised and comprehensive operation designed to conceal the execution campaign by exhuming bodies
The Prosecution has indicted individuals for harming one individual, and the Tribunal’s jurisprudence and the Prosecution’s indictments make clear that a single act against a single victim can constitute a crime against humanity. The Prosecution has also charged genocide for lower numbers of deaths, and it is clear that genocide could be charged for a single killing, or even no killings at all.

From the initial mass graves and reburying them, en masse, in isolated secondary locations. . . .


I have re-evaluated all outstanding indictments vis-à-vis the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused in . . . the Omarska and Keraterm indictments . . . .


270. See, e.g., Prosecutor v. Furundžija, IT-95-17/1, First Am. Indictment (June 2, 1998) (complicity in one rape).

271. See, e.g., Prosecutor v. Mrksic, Radic, & Šljivancanin, IT-95-13-R61, Review of Indictment Pursuant to Rule 61 ¶ 30 (April 3, 1996) (“Crimes against humanity are to be distinguished from war crimes against individuals, and, particularly, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity.”); Prosecutor v. Tadić, IT-94-1-T, Judgment of Trial Chamber II ¶ 649 (May 7, 1997) (“[A] single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual need not commit numerous offences to be held liable.”).


273. See Annex to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (S/25704) (Stat. I.C.T.Y.), Art. 4(2) (“Genocide means any of the following acts:[ . . . (b) causing serious bodily or mental harm . . . ; (d) imposing measures intended to prevent births . . . ; (e) forcibly transferring children . . . .”); Art. 4(3) (“The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commitment ge-
It is another question whether or not an indictment would ultimately make sense—there are other elements to genocide and crimes against humanity,274 which perhaps the Prosecution believed lacking275—but the Inquiry does not seriously consider the question, dismissing it as a matter of law in contravention of its own prior arguments. Lack of seriousness reveals itself in language: It could have written that "while genocide can be charged for a single killing, the other elements cannot be made out," but instead it frames its dismissal in terms of the number killed. To focus on numbers implies not that other elements were absent, but rather that the harm, like the matter, was not sufficiently serious.276

Perhaps this is a hopelessly substantive dispute, but it seems hard to separate from a procedural and institutional core: Does the Tribunal demonstrate any willingness or ability seriously to contemplate such questions, regardless of its ultimate findings or the obvious correctness of one particular outcome? No one could reasonably suggest that the Inquiry attempts to highlight the seriousness of questions before it through its substantive outcome (it finds no liability for any-

274. Crimes against humanity also require a systematic or widespread attack against a civilian population; genocide requires intent to destroy a national or religious group in whole or part by specified acts, including killing. ICTY Statute, supra note 234, art. 4, 5. See also M. Cherif Bassiouni, Crimes Against Humanity, in Crimes of War, supra note 150, at 107, 107-08; Dinstein, supra note 143, at 374-93 (surveying contemporary jurisprudence on crimes against humanity); Diane F. Orentlicher, Genocide, in Crimes of War, supra note 150, at 153, 154-55; Guglielmo Verdirame, The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, 49 Int’l. & Comp. L.Q. 578, 584 (2000) (discussing genocide and noting the ICJ’s prima facie finding in the Legality of the Use of Force case that NATO did not appear to have the requisite intent).

275. Certainly observers have made that argument. See, e.g., Ronzitti, supra note 14, at 1019, 1026-27 (noting that the F.R.Y.’s genocide charge against NATO “lacks any serious foundation” but also noting the mathematical problem with the Inquiry’s dismissal of the genocide allegation and suggesting that questions about NATO’s mens rea were dispositive in dismissing the allegation).

276. The Inquiry also does not suggest that it is foregoing investigation because of resource limitations—a relative measure of seriousness consistent with believing that crimes occurred, but were simply less pressing than others needing investigation. Instead, it tends to argue for the absolute absence of serious crime. Thanks to Richard Goldstone for raising this observation.
thing NATO did) so there are only dicta and tone to advance the argument. As we have seen, the record is one of omission, bias, and selectivity. Thus, to say that the Prosecution concluded in all seriousness that the allegations were not serious is not sufficient, because it does not explain the manner in which the Inquiry—a document, after all, significant parts of which are cribbed verbatim from a law review article written by the Inquiry’s principal author two years before the war—reached its conclusions. If the Inquiry did not take its task seriously—and a sober reading tends inexorably towards that conclusion—that is a serious matter indeed.

B. Purpose and Publicity: The Inquiry’s Existence as a Novel Category

Having examined problematic aspects of the Inquiry, and before turning to its consequences, we should consider the document itself as a whole—returning, in a sense, to questions posed at the beginning: Why does this document look different? Why does it exist?

The Inquiry looks, and is, very different from other works of the Prosecution. Three sections—thirteen of its ninety-one paragraphs—address the Committee’s mandate, review criteria, and work program. In no other investigative document is so much room given to justifying the Prosecution’s deliberative procedures. Why does the Prosecution expend such effort explaining this? But this curious view into the Prosecution’s inner workings only begs a further question: Why does the Inquiry exist as a public document at all? The Inquiry is a novel category, the only such document the Prosecution has ever released, and as noted earlier, there would have been no indictment even if it had not been published. So why publish it?

The Prosecution gave this justification for publicizing its internal deliberative processes:

277. William J. Fenrick, Attacking the Enemy Civilian as a Punishable Offense, 7 Duke J. Comp. & Int’l L. 539 (1997) (detailing the various principles of warfare). The Inquiry does not cite the article. See Laursen, supra note 14, at 776 (noting that “[c]onsidering the importance of the [Inquiry], one might also expect that resources are on hand to research and write a new report, thus avoiding the ‘cut and paste’ method,” but also that it is “hard to find anything fundamentally wrong with such an approach”).
It is not the Prosecutor's normal policy to make public the details about investigations or allegations received but not investigated. Standard practice is to comment only about indictments that have been made public. Even then, any comment by the Prosecutor outside the courtroom must be extremely limited. The Prosecutor considers that individuals against whom allegations are made should, under normal circumstances, be entitled to the presumption of innocence. The good reputation of innocent persons would undoubtedly be damaged by public disclosure that they are being investigated for serious crimes. For this reason, in the absence of any indictment, which would provide an opportunity for such persons to defend their name, it is not proper to divulge details of who may be under investigation by the Prosecutor. The NATO air campaign, however, does not raise such considerations and there has already been much public debate about the allegations. The Prosecutor considers that in this situation, quite unforeseen when the Tribunal came into existence, she should take the unusual step of making her reasoning public.278

This is a curious conclusion to draw from the premise that harm to reputation can result from report of investigation, since in this case the Prosecutor is not investigating, a fact that could have been established without publishing an Inquiry.279 Why else, then, might it have been necessary to take the "unusual step," not only of announcing that there would be no in-


The Prosecutor does not comment on the existence or progress of any investigation, and this has been the policy of the Office from its inception. In the same way the Prosecutor does not announce or confirm that particular persons are the subject of an investigation, in fact we go out of our way to insure that persons are not named until publicly indicted. But see supra note 38 (regarding the Prosecutor's announcement that "NATO is not under investigation").
vestigation, but “of making [the Prosecutor’s] reasoning public”? The reason, clearly, is the reasoning itself: to show how a considered, impartial decision about NATO’s non-liability was reached. The logical assumption must be that it is in the very act of publication, of publicity, that its value lies; it is the public nature of the document that matters.

One view would say the Prosecution released the Inquiry to forestall criticism from groups that had urged it to investigate by demonstrating its procedural equality. Or perhaps the Prosecution intended to assert its right to do more on the merits and thus demonstrate that international law governs the powerful as well. We shall consider this possibility further in the next section, noting here again that any such intention was given effect—if at all—only through dicta or tone, but not through the substantive assessment, because that assessment completely vindicated NATO and, indeed, vindicated it publicly. Without the Inquiry, no one would have known that the Prosecution was not investigating.

What, then, did the Prosecution intend with this unprecedented step? Its own text is ambiguous: Whether the “unforeseen situation” was the bombing campaign itself, or the spectacle of the world’s foremost military alliance coming under scrutiny before the Tribunal whose creation its members had advocated, is not clear. Regardless, the phrasing only highlights the sense that this post hoc Tribunal was designed for other purposes and was finding it difficult—conceptually and institutionally—to re-orient itself to investigate its principal supporters. Even more than the timidity of its probing, the very fact that the Inquiry exists is a powerful proof that the

280. See, e.g., Inquiry, supra note 3, ¶ 5 (“The committee has applied the same criteria to NATO activities that the Office of the Prosecutor has applied to the activities of other actors in the territory of the former Yugoslavia . . . [including] allegations of crimes committed by Serb forces in Kosovo.”).

281. Recall that the Inquiry creates a novel and public category intervening between no action and investigation. Its very structure and existence, therefore, serve to forestall investigation, or at least publicly to signal its termination.

282. Cf. Ronzitti, supra note 14, at 1018 (“When the [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.”).
Prosecution viewed this as a dangerous, potentially explosive subject.

But perhaps it was not so troubled after all—that depends on what it thought its goals and audience were. As we have seen, the goal the Inquiry seemingly set for itself in advance was, in certain respects, overachieved: Reasons for NATO's non-liability were found in abundance. The effect of publicizing that exuberant, abundant reasoning was to provide an even more forceful exoneration of NATO than a bare announcement, or even silence, would have done. What the effect of that has been—and will be—we shall now consider.

Voice—Information—Argument—Style—Structure—Consequence—Silence

VII. A NEW VOICE: THE EFFECT OF THE INQUIRY ON INTERNATIONAL CRIMINAL LAW

The impression one receives from the Inquiry is of a Committee convinced, from before the outset, that NATO committed no crimes worth investigating. As an outcome, that is unobjectionable, but as a process, it is deeply troubling: Even assuming the facts most favorable to the Committee's view, it should not follow that the form of the Inquiry bespeaks the inevitability of a done deal. But even if one concedes the faults in the Prosecution's method, what is the practical effect of the Inquiry in international criminal law? The flaws in the Inquiry matter for several reasons: They create a limiting precedent for the Tribunal and the new ICC in responding to new modes of warfare, and they send a dangerously licit message about the attitude of international justice to power itself.

A. Untaken Opportunities: Regulating Aerial Combat and the Recourse to War

... Leopold II never saw a drop of blood spilled in anger. He never set foot in the Congo. There is something very modern about that, too, as there is about the bomber pilot in the stratosphere, above the clouds, who never hears screams or sees shattered homes or torn flesh.

—Adam Hochschild, King Leopold's Ghost

Most narrowly, the Inquiry matters because no other court will address NATO’s actions; if the Tribunal’s approach is flawed, there will be no remedy. Even someone convinced that NATO did nothing wrong can see that the Inquiry does not seriously consider the matter; even he could concede, on the evidence of the text, that this was a deeply flawed (and aborted) process. This is a harm in itself—to the Tribunal’s reputation, to public confidence—although frankly it is a small harm already past, if you agree with the outcome.

But foreclosing more serious investigation incurs a broader cost beyond this one investigation and this one Tribunal. The Prosecution’s preference for campaign-level focus is a potentially legitimate outcome of interpretative discretion, but real substantive and institutional consequences flow from this choice—a choice effectively forced upon the Tribunal by the Prosecution’s apparent determination not to consider alternatives. Two effects are of note.

First, a discretionary preference for campaign-level analysis makes it more difficult to ask productive questions about individual incidents, assuming one wanted to, and arguably this will have a disproportionate distracting effect on consideration of aerial incidents, with their high level of coordination, their over-the-horizon impersonality, and the “collateral” nature of the incidental harm they cause. It is perhaps easier to conceive of a single egregious bombing incident as part of a campaign than a single on-the-ground atrocity, and in turn, thinking at a campaign level may change how we evaluate intentionality: a focus not on Dresden, but the whole Second World War. This will tend to reduce the potential liability for NATO and similarly situated actors in the future, because aerial bombardment is the preferred tool of military intervention, with expansive claims being made for its efficacy and accuracy and every indication that it will occupy an increasingly prominent place in military strategy.

284. A Milošević-era district court in Yugoslavia tried leading figures of NATO and its member states in absentia, found them guilty, and handed down 20-year prison sentences for violations of the laws and customs of war and grave breaches of the Geneva Conventions. See Benvenuti, supra note 8, at 527.

285. But see Barry & Thomas, supra note 101, at 22 (“The risk is that policymakers and politicians will become even more wedded to myths like ‘surgical strikes.’ The lesson of Kosovo is that civilian bombing works, though it raises
The NATO campaign was unlike any other operation under the Tribunal's jurisdiction: The previous conflicts were ground wars negotiated on a village-to-village level; the mode of death was direct and, for all its dehumanization, often intensely personal and unmediated. Even the conflict between Serbs and Albanians in Kosovo followed this pattern. NATO's intervention was an entirely different war, an example of the paradigmatic "Revolution in Military Affairs" that will become ever more common. The debate on air warfare and moral qualms and may not suffice to oust tyrants like Milosevic. Against military targets, high-altitude bombing is overrated. Any commander in chief who does not face up to those hard realities will be fooling himself.

Mark Bowden, The Kabulki Dance, ATLANTIC MONTHLY, Nov. 2002, at 66, 81, 84 (noting that perhaps half of all bombs dropped in Kosovo exploded where targeted, compared to 75 percent in Afghanistan, as well as pilots' acknowledged inability to identify properly targets from 25,000 feet). See generally A.P.V. Rogers, Zero-Casualty Warfare, 82 INT'L. REV. RED CROSS 165, 170-3 (March 2000); Matthew C. Waxman, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 55-67 (2000) (both discussing the characteristics, uses, and constraints of stand-off weapons).


[NATO's war] objectives set a difficult task for international humanitarian law to control. This was largely because the conflict did not fit within those types of armed conflicts envisaged by the drafters of Additional Protocol I or by those States which had become High Contracting Parties to it. There were no ground forces engaged in combat against each other, but only attacks from the sea, and more particularly from the air, against targets on land.... The conflict was, therefore, quite unlike any other. Denied the persuasive value of precedent in a situation where their attacks were largely unopposed by enemy forces, NATO military commanders and politicians were forced to think through the consequences of each military action.

287. On the Revolution in Military Affairs (RMA), see Andrew Latham, Warfare Transformed: A Braudelian Perspective on the "Revolution in Military Affairs," 8 EUR. J. INT'L. REL. 231, 251 (2002) ("[S]ince the Gulf War, it has become fashionable to argue that the United States is in the midst of a profound 'Revolution in Military Affairs,'... a term that is used both to describe and explain the momentous changes in the nature of warfare that appear to be taking place in the current era."); id. at 237 (noting the existence of "a new paradigm based on 'non-linear' combat operations, 'information warfare' and 'precision destruction'"); id. at 239-40 (citing Michael Klare, ROGUE STATES AND NUCLEAR OUTLAWS: AMERICA'S SEARCH FOR A NEW FOREIGN POLICY 95 (1995) ("[The new warfare] bears as little relation to the attrition-oriented battles of World War I and II as those did to the infantry-

Latham, summarizing conventional thinking, suggests the developing RMA will be dominated by long-range smart munitions able to strike with precision over great distances; stealthy and unpiloted weapons platforms with stand-off capability . . . and advanced battle management and communications systems able to integrate, process and distribute information so that commanders can apply dominant forces in just the right place and at just the right time . . . . Such operations are the antithesis of traditional tactics, involving instead high-tempo attacks conducted simultaneously against key tactical, operational and strategic targets throughout the length, depth and breadth of the battlespace. This new doctrine . . . calls for near-simultaneous, fast-paced, hard-hitting offensive operations (airmobile assaults, long-range air and missile attacks, surprise maneuvers, etc.) against the enemy’s key tactical, operational and strategic “centers of gravity.”

Latham, supra, at 239; see also Lewis H. Lapham, The Road to Babylon: Searching for Targets in Iraq, HARPER’S MAG., October 2002, at 37-38 (quoting Lieutenant General Thomas McInerney (ret.), former Assistant Vice Chief of Staff of the U.S. Air Force, testifying before the U.S. Senate Foreign Relations Committee on July 31 or August 1, 2002, describing proposed operations in Iraq “using what I will call blitz warfare to simplify the discussion. Blitz warfare is an intensive 24-hour, seven days a week precision air-centric campaign supported by fast moving ground forces composed of a mixture of heavy, light, airborne, amphibious, special, covert operations working with opposition forces that all use effects-based base operations for their target set and correlate their timing of forces for a devastating violent impact.”). “Effects-based” operations refer to application of overwhelming force, a variant of the Powell Doctrine developed around the 1990-91 Gulf War. See Armstrong, supra, at 78, 81.

One of the prominent features of the new approach is a focus on war-making capacity, rather than only on military forces proper. The new “approach emphasized attack not upon the enemy’s combat power, but upon its willingness to fight and upon its operational cohesion.” Colin McInnes, Spectator Sport Warfare, CONTEMP. SECURITY POL’y 157 (1999), cited in Latham, supra, at 237.

On Kosovo in the new war paradigm, see generally Michael Ignatieff, Virtual War: Kosovo and Beyond (2000); Stephen Biddle, The New Way of
the propriety of targeting civilian infrastructure inevitably would have been altered by whatever the Tribunal said about its legality.\textsuperscript{288} The Inquiry was a first test, and to judge from it, the Tribunal chose to consider only the one, more ancient kind of killing. It has remained silent—perhaps worse than silent—about the new.

Second, the Inquiry's campaign-level focus covertly encourages importation of extra-jurisdictional concerns about which party is the aggressor—that is to say, the \textit{jus ad bellum}. As we have seen, consistent with prior practice\textsuperscript{289} and mainstream views, the Inquiry refuses \textit{jus ad bellum} jurisdiction.\textsuperscript{290} Yet its logic inevitably encourages analysis of a campaign's overall purposes and assessment of each side's rectitude.\textsuperscript{291} We have seen how the Inquiry's reliance on NATO's sources and viewpoints comports conveniently with NATO's description of itself as an humanitarian intervenor fighting a just war justly.\textsuperscript{292} At the outset the Committee seems to have asked,

\textit{War? Debating the Kosovo Model}, FOR. AFF., May/June 2002, at 138 ("[Kosovo] helped crystallize a fundamentally new 'American way of war,'" citing \textsc{War over Kosovo} (Andrew Bacevich & Eliot Cohen, eds., 2001)). On Kosovo as an example of how the new strategy aims to affect civilian morale, see \textsc{Defence Select Committee, Fourteenth Report, 2000}, HC 347-I, at \textsc{¶} 99, cited in supra note 8, at 508 (addressing efforts to "influence perceptions" of "target audiences," one of which was "the Serbian people as a whole," by strategic bombing); Biddle, \textit{supra}, at 140 (noting recent studies that emphasized the practical success of the strategic infrastructure bombing and the "largely fruitless counter-military strikes favored by NATO Supreme Commander Wesley Clark.").


289. See Inquiry, \textit{supra} note 3, \textsc{¶} 34.

290. \textit{Id.} ("As a matter of practice . . . we in the OTP have deliberately refrained from assessing \textit{jus ad bellum} issues in our work and focused exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of \textit{jus in bello}"). \textit{See also} Ratner & Abrams, \textit{supra} note 140, at 124-28.

291. It is perhaps not coincidental that although the Inquiry formally eschews \textit{jus ad bellum} arguments, it actually spends considerable time discussing them. See Inquiry, \textit{supra} note 3, \textsc{¶} 30-34.

292. \textit{Cf.} Barkawi, \textit{supra} note 288, at 310 ("[T]he notion of 'humanitarian war' offers an irresistible and exciting morality tale in which Western militar-
“Who is the right side?” Of course, the right side cannot be convicted, nor investigated. That is a possible question—indeed, there is debate about whether or not it should be asked—but it is not clear it makes sense to ask NATO. It is, moreover, a very different rule from what the Prosecution purports to apply and one that goes to the heart of the adjudicative enterprise. It hardly seems a trivial difference to say that international law should excuse an intervenor’s actions by virtue of his virtue. To call that merely a change in the substantive rules would be like saying that reintroducing trial by ordeal (or by combat) would be a merely preferential change in procedure, rather than a different vision of justice.

Both in relation to the question of the definition of the military objective and in relation to the proportionality principle, the [Inquiry] fails to raise yet another fundamental question. Do traditional considerations of military necessity and military advantage have a legitimate place in a conflict the declared purpose of which is a humanitarian one, namely, to promote the cause of human rights? The thought would deserve further consideration that in such a conflict, more severe restraints would be imposed on the choice of military targets and of the balancing test applied for the purposes of the proportionality principle than in a “normal” armed conflict.

In any event, these would be the matters to sort out, and the Inquiry does not engage in the attempt.

Cf. Barkawi, supra note 288, at 310 (noting the effects on discourse of identifying one side with humanitarian interests).
It seems incumbent upon us, as moral observers of the existing legal consensus, to acknowledge that neither identity nor intimacy determine the criminal actus reus. NATO, in the course of a self-described humanitarian intervention, killed hundreds of civilians by bombing. If its acts were otherwise criminal, they were no less serious for having been committed by a friend of the court, with sincere intentions, from a distance. Evil does not arise solely from the aesthetic immediacy of an act; most observers do not make a moral distinction between being beheaded with a machete or carbonized by a fuel-air bomb. Evil arises from willful dehumanization, whether through denial in the face of a pleading victim or through a bureaucratic determination, a thousand nautical miles away, that a cruise missile causes nothing but collateral damage.

The primitive fears and prejudices which make us suppose that wielding a knife is somehow more evil than launching a missile (if all the other elements of murder are made out) should not necessarily guide us. The seriousness of law's purpose requires no less than that it be able to consider, in theory and practice, the potential criminal seriousness of high-tech, over-the-horizon killing. This is, indeed, one of the most obvious progressive contributions the Inquiry does not make: to assert, clearly and authoritatively, that seriousness is a matter of consequence, not of style, and that liability is not limited by the identity of the warrior or his access to technology. The Inquiry could have taken the opportunity to confirm the obvious proposition that distance killing can be criminal and serious, that armies' obligations extend beyond the horizon. It could have taken that opportunity even without charging NATO. It did not.

This is why the Inquiry's approach—not its take on the rules of aerial warfare or even its campaign-level focus as such, but its deferential, ask-nothing approach—is troubling: Given the way the Inquiry's reliance on NATO's categories and perceptions comports so closely, not only with NATO's interests, but with its view of the conflict and itself, has it not in effect already embraced this changed vision of war, in advance of any

consensus on the question and while publicly denying it is doing so? What does this approach say about this or any court's ability to conduct a serious debate of this sort? or the propriety of its trying? It is important to ask if the Tribunal, or any court, is a forum capable of answering—or even asking—the right questions about war, power, and law in a changing world.

This is all the more problematic precisely because changes in military technology will alter powerful states' moral calculus about the costs of war, and it is powerful states that increasingly dominate the new kind of war. If the Inquiry is

296. Cf. Philip Allott, Kosovo and the Responsibility of Power, 13 Leiden J. Int'l. L. 83 (2000) (suggesting that the Kosovo conflict represented a change in the world order that an international court—in his discussion the I.C.J.—is constitutionally ill-equipped to accommodate or assert responsibility for).

297. Cf. Biddle, supra note 287, at 139-40 (arguing that high-flying, over-the-horizon wars are less costly to the technologically superior side, with the result that there is less political resistance to such campaigns and consequently less likelihood of domestic restraint on military behavior); Reisman, supra note 163, at 287-88 (noting the asymmetry of power in interventions: "Consider operations like those conducted recently in Kosovo and Serbia . . . . Here again, there is asymmetry between belligerents and, as a result of the nature of the internal policing dynamic or enforcing dynamic of the law of war—the implication of reciprocity or retaliation—there will be strong pressures on external participants to reduce their casualties by externalizing the risks of conflict onto the civilian population of the adversary, in ways likely to violate the laws of war."); Rowe, supra note 286, at 161 (noting that given "the relative ease with which a State can convince itself not only that a selected target is a military objective, but also that mistakes in targeting are rare when compared with the number of bombing raids or that the enemy's actions are much worse, it seems not unreasonable for the law to take into account the development of these smart weapons."); Gardner Botsford, It Used to Be Just the Soldiers Who Died, N.Y. Times, Mar. 19, 2003, at A29 (noting that changes in air warfare have tended to change the ratio of military to civilian casualties and that "warfare has become much safer for the American foot soldier"); Michael R. Gordon, U.S. Air Raids in '02 Prepared for War in Iraq, N.Y. Times, July 20, 2003, at A1 (reporting on U.S. military internal briefings discussing operational and planning elements of the air campaign against Iraq in 2002-03, noting that "Air war commanders were required to obtain the approval of Defense Secretary Donald L. Rumsfeld if any planned airstrike was thought likely to result in deaths of more than 30 civilians. More than 50 such strikes were proposed, and all of them were approved."). On how the precedents of one war affect the prospects for the next, see Anne-Marie Slaughter, Good Reasons for Going Around the U.N., N.Y. Times, Mar. 18, 2003, at A33.

298. See, e.g., Bowden, supra note 285, at 69 (discussing the high-tech dominance of U.S. forces in the 2001-02 Afghanistan conflict).
ultimately seen as confirming the principle that even powerful political actors are subject to judicial oversight, then it will have served a useful purpose. No charges were brought against NATO, but they could have been. If it is seen instead as having hesitated to pursue an investigation because of the subject’s identity, then it will have reinforced the suspicion of many that international criminal law is still immature victors’ justice, suited only for defeated dictators of tinpot countries. This may be the most reasonable conclusion to draw from the Inquiry, which, given its mode of argument, does little to defeat the impression.

No state today openly contests the Tribunal’s right to bring charges even against the powerful.299 States will, however, oppose prosecution of their own forces or leaders with all legitimate means at their disposal.300 They will oppose such outcomes all the more forcefully, encouraging any effective immunity, if courts signal an unwillingness to assert their prerogatives. In its public rhetoric—quite apart from its outcome—the Inquiry does little to challenge that determination; it rather reinforces and rewards it. Although issuing the Inquiry could be seen as asserting the Prosecution’s prerogative, it serves another purpose: It gives public notice that inquiry is at an end.301 There will be no investigation. Although the Prosecution has the right to revisit the matter, the Inquiry publicly declares that it has no intention of doing so (and, indeed, suggests obliquely that investigation might actually exceed its

299. Arbour noted that NATO states “said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts.” Press Release, ICTY, Office of the Prosecutor, May 13, 1999, CC/PIU/401-E, cited in Boelaert-Suominen, supra note 3, at 248.

300. See Colum Lynch, European Countries Cut Deal to Protect Afghan Peacekeepers, WASH. POST, June 20, 2002, at A15 (noting that Britain, negotiating on behalf of 19 other countries, “obtained written assurances that their troops serving as peacekeepers in Afghanistan would be immune from arrest or surrender to the court[,]” and that the accord was reached “‘in a great rush’ and with no public debate”); see also Ignatieff, supra note 287, at 128, 199-200 (noting American military opposition to jurisdiction and that “in practice, [U.S. military officers] say, we’d never give them jurisdiction”).

301. See supra note 281 and accompanying text.
legitimate discretion). Given NATO's near-monopoly on probative information, this amounts to a practical grant of immunity. NATO thus gains public vindication of the campaign's lawful conduct and public reassurance that it will not be subjected to investigation or requests for potentially compromising internal materials. All of this is at the cost of tolerating a weakly phrased reminder of theoretical jurisdiction that no NATO state had ever openly contested. In that context, the novel, public Inquiry does little to advance the development of international criminal law, and may set it back considerably.

B. The Risk of Caution: Against Incrementalism

What of the alternative—an investigation of NATO? It seems unquestionable that investigation would have asserted the Tribunal's right to proceed against powerful states, and could have advanced debate on substantive rules for air war, in a way the Inquiry has not. Of course, a baseless investigation could have ended up harming the enterprise of international law by reducing the essential elements of support and seriousness, upon which a justice system relies for its legitimacy. We may suppose, however, that NATO would consider the charges baseless regardless of the merits. It is entirely plausible that NATO might undermine the Tribunal rather than acquiesce in trials of its leadership, and it is almost certain that NATO

302. See Inquiry, supra note 3, ¶ 5 (noting that "any investigation failing to meet [the Prosecution's test for jurisdiction] could be said to be arbitrary and capricious, and to fall outside the Prosecutor's mandate"). Cf. Press Release, International Criminal Tribunal for the Former Yugoslavia, President McDonald Reports the Continued Non-Cooperation by the Federal Republic of Yugoslavia to the Security Council (Mar. 19, 1999), JIL/PIU/386-E, at http://www.un.org/icty/pressreal/p386-e.htm (reporting the Prosecution's assertion, in a letter to the President of the ICTY, that "[T]he standard of review [for a Prosecution decision to investigate] is an arbitrary and capricious standard . . . . [F]or 'a reviewer' to conclude that the decision was arbitrary and capricious, he/she would have to 'find no reasonable person could have decided to initiate an investigation'").

303. Full investigation was not the only alternative; another, differently constructed Inquiry, or none at all, was possible and would not have required greater resources. It is useful, however, to consider the starkest alternative in terms of its likely effects. See Part VIII, infra.

would decline further cooperation. In either event, the damage to the institutions of international law would be real, and the Prosecution could not help being aware of this.

It is a separate matter whether such concerns legitimately should enter the Prosecution's deliberations about whom to investigate (and, as in the Inquiry, whom not to), or what the effect on the Tribunal's moral stature would be if it were dissolved for having asserted jurisdiction over the powerful. Perhaps the Prosecution was wise to act conservatively, because any assertion of principle that harmed the Tribunal's material and political position—or persuaded states that the ICC should not be supported—would be too high a price to pay.

Rwanda to remove Del Ponte as Prosecutor for the Rwanda Tribunal because of attempts to investigate Rwandan civilian and military officials).

305. Cf. Press Release, NATO, Statement by the Secretary General of NATO, Lord Robertson, in Response to the Report Given by the Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Carla Del Ponte, to the U.N. Security Council (June 2, 2000), available at http://www.nato.int/docu/pr/2000/p00-057e.htm:

The statement by Chief Prosecutor Del Ponte that the ICTY is not opening an inquiry into NATO's actions comes as no surprise. NATO's civilian leaders and military authorities took extraordinary precautions throughout the entire air campaign to ensure that NATO consistently acted in accordance with international law . . . . NATO is as committed as the ICTY itself to bringing war criminals to justice. The ICTY's decision should help ensure that the world's attention is focused exactly where it belongs—on bringing the real war criminals of the Balkan wars to face justice in The Hague."


In a perfect world, it would be ideal to have respected international courts that could enforce justice against citizens of any country, strong or weak. But at a time when impunity is still all too typical, as shown by the recent collapse of U.N. efforts to set up a war crimes tribunal for Cambodia, waiting for perfect international courts might well mean no justice at all. Milosevic does not want a fairer brand of justice; he wants no justice.

It's true that a tribunal that prosecuted only Serbs would be unfair, just as it was unfair that Nuremberg tried Germans for some crimes that had also been committed by the Soviets. But the Hague tribunal, sensitive to such accusations, also investigates Croats, Bosnian Muslims and Kosovar Albanians. If more of the defendants are Serbs, that is because Milosevic drove his people into war after war: Slovenia, Croatia, Bosnia and Kosovo. The tribunal even looked into Serb allegations that NATO was guilty of war crimes in its bombing of Yugoslavia, and decided there was no case there.
A more searching inquiry would have confirmed states' worst fears about the dangers of an independent prosecution. If a rough estimate suggested no serious crimes occurred, why cause irreparable damage to a more important enterprise whose moment might not come again for another fifty years?

This incrementalist argument has great pragmatic force, but it is a calculation and may be wrong. First, it must be questioned in light of states' existing attitudes toward the ICC: It is difficult to imagine the United States' posture toward an international trial of its citizens being any more resistant than it already is (although the future always confounds imagina-

Note the linking of themes: the vision of strong and independent courts, the imperfection of existing ones, the need to compromise, and the risk in demanding too much—implicitly, that a new court might not be established.

307. See Neil A. Lewis, U.S. to Renounce Its Role in Pact for World Tribunal, N.Y. TIMES, May 5, 2002, at A18 (noting comments by John R. Bolton, Under-Secretary of State for Arms Control, referring to the ICC as a "product of fuzzy-minded romanticism" and "not just naive, but dangerous"). Cf. Editorial, On the Backs of Bosnians, WASH. POST, July 2, 2002, at A14 ("[There is] a risk that the [ICC] may at some point be turned for political reasons against American service members, in which case it will constrain the Kosovo-style humanitarian interventions that human rights groups rightly advocate.").

tion), and this in the wake of a most pragmatic demonstration of the law's caution—that is, the Inquiry itself. A more searching inquiry might have made things worse, but it is hard to see what would have made them better, if the real Inquiry couldn't.

In any event, advocates of incrementalism must face the interim consequences of their approach, even if they are confident of its ultimate vindication. The short- and middle-term damage seems clear: If the Prosecution indeed took the risks to future courts or its budget into account in contemplating NATO's actions, then necessarily it gave conventional understandings of justice and process a lesser place. This may be for the greater good, but it also is a sacrifice, and at some point sacrifices must come to an end; costs are only "worth it" if, over time, they contribute to the prospects for a more authoritative international criminal jurisprudence. Of course, over time, differential treatment based on differences in power is antithetical to serious and legitimate judicial authority. Any court that appears to take a lighter approach with the powerful necessarily opens itself to charges of clientelism and complicity, undermining the appeals to neutrality, procedural fairness, and equal justice that underpin legitimacy and credibility—especially if these practices become entrenched as

Rev. 681 (1997) (discussing states' resistance to application of international criminal law to their nationals).

309. Consider this view:

Most Americans would be amazed to learn that the ICTY, created at U.S. behest in 1993 to deal with Balkan war criminals, had asserted a right to investigate U.S. . . . leaders for allegedly criminal conduct—and for the indefinite future, since no statute of limitations applies. Though the ICTY prosecutor chose not to pursue the charge—on the ambiguous ground of an inability to collect evidence—some national prosecutor may wish later to take up the matter as a valid subject for universal jurisdiction.


310. There are short- and middle-term benefits as well: The Inquiry left NATO member states free, and probably more inclined, to continue cooperating with the Tribunal on cases against their wartime enemies in the F.R.Y., which has been the object of concerted pressure from the U.S. to increase its cooperation with the Tribunal.


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precedent and institutional worldview. Pragmatism, like com-
plicity, can become habit.

There is also reason to believe that an overly incremental
approach is less certain of success. There are risks to asserting
oneself; the examples of courts crushed by dictatorships are
too numerous to mention, and all courts must consider their
circumstances. But my critique is limited, an antidote to a
kind of timorously encomiastic thinking that hesitates to de-
mand anything of the Tribunals lest it weaken them. No
court, unsure in its powers and position, has ever achieved se-
curity and prominence solely by playing safe. Courts gain au-
thority in part because they assert themselves. The U.S. Su-
preme Court owes its prominence to a particular legal culture,
to fortune, but also to important decisions, such as Marbury v.
Madison,\(^3\)\(^1\)\(^2\) that over time helped establish its claim to be an
independent, not a subservient, actor.\(^3\)\(^1\)\(^3\) Concern about the
risks of boldness is curious, considering that the Tribunal
often has been encouraged to adopt an expansive agenda\(^3\)\(^1\)\(^4\) and to indict the presidents of the F.R.Y. and Croatia; some-
times political realism masks political preference. Ultimately
this is a question of timing and priorities: Perhaps advocates
of caution are still right, but for how long and to what end? If
the Inquiry is evidence of that strategy’s prospects, the answer
may not satisfy caution’s boldest hopes.

The truth is, while societies sometimes grant courts inde-
pendence and sometimes refuse, they are never generous in
giving it to courts afraid to ask. Subservience and patience to-
day are not rewarded with independence and responsibility in
some golden future. Subservience is rewarded with more op-
portunities to serve, and patience with more time to wait, be-

312. 5 U.S. (1 Cranch) 137 (1803).

313. Cf. Lewis, supra note 307 (quoting Professor Harold Hongju Koh, a
former Assistant Secretary of State in the Clinton administration, comparing
the creation of the ICC to the Marbury v. Madison decision for its role in
defining the relationship among the governing branches, and saying “This is
an international Marbury versus Madison moment[.]”). Marbury is an espe-
cially valuable proof that a court’s admitted political weakness need not dic-
tate adoption of weak positions; indeed, the Court’s weakness was the very
vehicle it used to make an expansive institutional claim to power.

314. See, e.g., discussion on sexual crimes supra Part IV.D.
cause both are seen as weakness. Whether one thinks that law is a special endeavor or just politics, a court's authority will only extend as far as it asserts itself and as other actors cede it ground. Even in mature legal communities this truth is never far from the surface, and in the inchoate culture of international criminal law, this truth is practically an everything.

C. International Criminal Law in an Original Position

Begin then, by clearing your mind of the prejudices it harbours. Shake off the hidebound notions which can only lead to error, and put yourself in the position of a brand-new man on the point of hearing what you yourself admit to be a brand-new language.

—Epistle to Diognetus

Young, untested, still largely without form: International criminal law can become many things, and must become certain things if it is to be worth the endeavor—a legitimate alternative to domestic fora. As it takes on more attributes of domestic systems, especially in creating criminal courts, seemingly narrower issues of practice will become more prominent. Broader issues will continue to matter, but the luxury of grand reflection that international law's fundamental marginality long afforded will no longer be available as it grapples with the quotidian realities of devising procedures, conducting trials, and becoming, perhaps, a normal body of law.

Yet in its current, immature phase, international criminal law is still more concerned with particular outcomes than with the integrity of its processes. There is a temptation to prove

317. "Though the United States has been at the forefront of the charge for international justice, it has never been willing to place itself at the mercy of a system it did not trust. And it has never been willing to trust a system it did not control." Samantha Power, The United States and Genocide Law: A History of Ambivalence, in The United States and the International Criminal Court 165, 172 (Sarah B. Sewall & Carl Kaysen eds., 2000) [hereinafter Sewall & Kaysen]; cf. Sir Robert Jennings, Kosovo and International Lawyers, 1 INT’L L. F. 166, 166 (1999) (discussing institutional and structural limits on
courts' worthiness and strength by bringing in convictions, because the reality of human beings in the dock reinforces the reality of international law\(^\text{318}\) (and because it would be a tremendous embarrassment not to secure conviction of people "so obviously guilty"). This is especially true when each case constitutes a discernible share of international justice's tiny docket; failure in these early days is hugely damaging. The felt sense today is that it would be outrageous to imagine—and unacceptable to tolerate—a Miloševic or Karadžić "walking on a technicality."\(^\text{319}\) Most people want justice—by which they mean a just outcome; when a court is created, as the Tribunal was, as a post hoc, ad hoc response to crimes already occurring, this logic is all the more compelling and all the more in accord with states' interests. Yet to say "any system that would release a major war criminal must be flawed" is a conclusory determination, the antithesis of that commitment to procedural justice that is true respect for law.\(^\text{320}\) For we ought to be perfectly content to see—prefer to see—any accused set free if there is not sufficient evidence or if procedural protections have been neglected, rather than insist on his conviction because of our conviction that he is "obviously guilty."\(^\text{321}\)

\(^\text{318}\) Cf. Sadat & Carden, supra note 308, at 385 ("[T]he Court will put real people in real jails.").

\(^\text{319}\) Cf. Danner, Navigating, supra note 308, at 1641 ("The necessity for the [ICC] can be captured in a single word: impunity."). Obviously, the Chamber has found defendants not guilty on some charges; I am speaking of tendency and tone.

\(^\text{320}\) Cf. W. Michael Reisman, Kosovo's Antimonies, 93 Am. J. Int'l. L. 860, 860 (1999) ("The insistence on the integrity of procedures is not arid formalism. Lawyers know that however noble the impulse, action in the common interest that is taken without formal authority may have incalculable costs."); Bass, supra note 306, at A33 ("In the real world, it is victory that makes justice possible, but it is the fairness of the process that makes it justice.").


Of course, if good faith trials are sought, that is another matter. I am not troubled as some seem to be over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches

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So international legal justice will have to develop processes less guided by outcome. An opportunity to change that balance seems to present itself, for the new ICC, however limited its competence, exercises authority in advance of the crises that will generate its docket. No one yet knows which matters will come before it, nor what the political constellations will be when they do; no one can say in advance what outcomes he will want. We are, by imperfect analogy, in Rawls' original position at this new Court's constitution, in which procedures should matter more than outcomes. Freed of ad hoc restraints, the new Court will have to shift—to create—the balance between outcomes and procedures.

That is the challenge. If the prospect of creating a Court properly accountable to political actors and yet insulated from the tyranny of outcomes is too daunting, we must recognize that the alternative is to reduce our expectations of what international justice can accomplish: Rawls' theory, after all, is an aspiration, not a prediction. These alternatives are mirrored in the ongoing struggle over the Court's role, for it would be a mistake to think that all procedural and political questions were settled in its Statute and Rules: They will be that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts . . . . You must put no man on trial before anything that is called a court . . . if you are not willing to see him freed if not proven guilty . . . ."


323. JOHN RAWLS, A THEORY OF JUSTICE 17 (1972).

324. See Brown, supra note 308, at 884 ("If the experience of the ICTY is any indication, the ICC will be too timid rather than too bold."); see also Developments in the Law, supra note 138, at 1981-82; Giulio M. Gallarotti & Arik Y. Preis, Politics, International Justice, and the United States: Toward a Permanent International Criminal Court, 4 UCLA J. INT'L. L. & FOREIGN AFF. 1, 18-30 (1999) (discussing the likely effects of structural and political weakness in the ICC's statute). But see Reisman, supra note 163, at 288-89 (concluding that the ICC's jurisdiction may discourage states from participating in interventions). This is plausible, but equally so is the possibility that the ICC will adjust its own jurisprudence and working assumptions to reduce the dissonance and reassure intervenors; the Inquiry suggests that the latter possibility is a real one.

325. See Miskowiak, supra note 308, at 76-77 (identifying states with "restrictive" and "progressive" attitudes to ICC jurisdiction).
contested in the Court's early cases.\footnote{326}{ Cf. Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 Am. J. Int'l L. 510, 510-11 (2003) [hereinafter Danner, Legitimacy]} What would not be acceptable would be to graft the forms of ambitious independence onto structures of complicity. The new Court must be both bold and cautious: bold in asserting the privileges of independence,\footnote{327}{ On judicial independence as privilege, see EUROPEAN UNION ACCESSION MONITORING PROGRAM, MONITORING THE EU ACCESSION PROCESS: JUDICIAL CAPACITY 14-17 (2002), at http://www.eumap.org/reports/2002/content/70.} cautious in developing the law. To be the opposite—cautious in independence, and bold in law—is a most dangerous thing.

D. Courts of the Conqueror: The Inquiry's Legacy to the ICC

Of course, we are not truly at the beginning. We have the experience and precedent of the ad hoc Tribunals,\footnote{328}{ The notion that, despite differences in their statutes, the Tribunals' structure and experience have had a decisive influence on the ICC is universal. See, e.g., Lee, supra note 233, at 186 (noting that the Tribunals' case law "greatly influenced the elaboration of the elements of crimes"); Meron, supra note 176, at 197; Morten Bergsmo et al., The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 121, 124 (Louise Arbour et al. eds., 2000) [hereinafter Arbour et al.] (noting that "it is obvious that the experience of . . . the ICTY and ICTR[ ] is highly relevant to the ICC."); The Board of Editors, The Rome Statute: A Tentative Assessment, [hereinafter Cassese et al.] in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1901, 1901-02 (Antonio Cassese et al. eds., 2002) (noting that the ICC was a "direct beneficiary" of the regulatory framework evolved at the Tribunals, which "paved the way, in an immediate sense, for the ICC[.]") and referring generally to the Tribunals' effect on the ICC); Sean D. Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93} which
will provide decisive guidance in the new Court's early years as it defines its own institutional identity;\(^\text{329}\) their successes and failings will define and delimit the possibilities open to the new Court, both in law and in its institutional relationships.\(^\text{330}\) Its scope for action will be strengthened to the degree the Tribunals vindicate their own claims; conversely, it will be weakened if the Tribunals do the opposite. And what have they done? These courts have inevitably been colored by their post hoc, ad hoc formation: In creating a judicial solution, states necessarily had decided that matters in the particular case warranted it and therefore preferred—expected—concomitant outcomes.\(^\text{331}\) They have not been disappointed.


329. See Meron, supra note 176, at 189 (“To be credible, an ad hoc tribunal for the former Yugoslavia must respect impeccable legality and fairness. For better or worse, the precedent of such a tribunal will be invoked in future situations.”); Developments in the Law, supra note 138, at 1954 (“As important as they are in their own right, the ICTY and the ICTR are perhaps most intriguing for what they herald. Their efforts to establish individual accountability revived widespread interest in a permanent international criminal court.”); id. at 1974 n.102 (citing Richard Goldstone, The United Nations' War Crimes Tribunals: An Assessment, 12 CONN. J. INT'L L. 227, 227-8 (1997) as “declaring that the ICTY is primarily useful in serving as precedent for the ICC”); see also Abram Chayes & Anne-Marie Slaughter, The ICC and the Future of the Global Legal System, in Sewall & Kaysen, supra note 317, at 237, 243.

330. Support for the ICC has been bolstered by observation of fair proceedings at the Tribunals. See, e.g., Richard J. Goldstone & Gary Jonathan Bass, Lessons from the International Criminal Tribunals, in Sewall & Kaysen, supra note 317, at 51, 52, 55-56. Evidence of bias logically would reduce support or create demand for higher standards.

331. See, e.g., Developments in the Law, supra note 138, at 2022 (“[I]t was clear from the outset that the international community already suspected that genocide had occurred in Rwanda and the former Yugoslavia. As such, the chambers were under significant pressure both to find that genocide had occurred and to hand down genocide convictions.”). The Chamber did not sustain the genocide charge in Jelisic. It did, however, allow the trial to proceed and issued rulings easing and expanding the definition of genocide, and in any event, the Prosecutor unquestionably pursued the charge. Prosecutor v. Jelisic, IT-95-10, Trial Chamber I J. ¶¶ 99-108 (Dec. 14, 1999). Cf. Press Release, International Criminal Tribunal for the Former Yugoslavia,
The Inquiry was the last great instance in which the Tribunal confronted the limits of law in the face of power.\textsuperscript{332} The circumstances of the Yugoslav wars inevitably meant that powerful states created a Tribunal whose targets were from small, prostrate nations; until the NATO bombing, it never had real occasion to address the acts of the mighty. The Tribunal had been frustrated by the warring parties' recalcitrance,\textsuperscript{333} and lukewarm support\textsuperscript{334} threatened to consign it to the rolls of past failures as late as 1998.\textsuperscript{335} Since then, support from powerful states and (enforced) cooperation by the former warring parties has increased.\textsuperscript{336} When, by the Kosovo crisis, Yugoslavia still resisted investigation, it was an isolated pariah whose opposition could not prevent indictment of its leadership.


Irrationally selective prosecutions undermine the perception of justice as fair and even-handed, and therefore serve as the basis for defiance and contempt. The \textit{ad hoc} nature of the existing Tribunals is indeed a severe fault line in the aspirations of a universally applicable system of criminal accountability \ldots. The broader the reach of the International Criminal Court, the better it will overcome these shortcomings of \textit{ad hoc} justice.

\textsuperscript{332} Cf. Christopher Greenwood, \textit{International Law and the NATO Intervention in Kosovo}, 49 INT'L. & COMP. L.Q. 926, 933 (2000) ("The NATO operation in Kosovo raised fundamental questions about the nature of modern international law and the values which it is designed to protect."); Press Release, International Criminal Tribunal for the Former Yugoslavia, Kosovo: Statement by the President of the ICTY, Gabrielle Kirk McDonald (Mar. 31, 1999), CC/PIU/392-E, at http://www.un.org/icty/pressreal/p392e.htm (calling the response to the Kosovo war "a test of our nascent order of international criminal justice").

\textsuperscript{333} See Arbour & Bergsmo, \textit{supra} note 308, at 13 ("[T]erritorial States have been able to impede ICTY investigations and prosecutions simply by cynically disregarding their obligations under international law.").

\textsuperscript{334} On initial western reticence, see Ignatieff, \textit{supra} note 287, at 122-23, 126-27.

\textsuperscript{335} See Bass, \textit{supra} note 306, at A33 ("The Hague has long had an uneasy relationship with NATO, whose Balkan agenda is more about stability than about prosecuting war criminals.").

\textsuperscript{336} See Akhavan, \textit{supra} note 17, at 8; Goldstone & Bass, \textit{supra} note 322, at 52. Russia, despite having participated in the Tribunal's creation, generally has been hostile. \textit{See}, \emph{e.g.}, OTP Address, \textit{supra} note 103 (responding to Russian criticism of the Tribunal as anti-Serb and a threat to the unity of accepted international law). At the same time, the Prosecutor frequently notes the Tribunal's statutory reliance on the Security Council. \textit{Id}.
Thus it was a much stronger Tribunal that confronted the bombing, though one whose new strength rested on the still-contingent willingness of states, especially NATO members, to pressure the former warring parties, capture indictees, and fund its operations. Indeed, the stakes were far higher, for though the warring parties had frustrated investigations, they

337. See, e.g., Ignatieff, supra note 287, at 199 ("Practically, of course, Arbour is dependent on NATO governments for everything from the helicopters that fly her to the sites in Kosovo to the secret intelligence she needed in order to indict Milosevic."); Meron, supra note 176, at 279 ("In contrast to Nuremberg . . . the tribunal has had to depend on the readiness of the Security Council and the international community to exert pressure for full compliance on reluctant parties. When that pressure has been in short supply, the tribunal has encountered setback after setback."); cf. Laursen, supra note 14, at 774. On support by NATO (whose members include the world’s sole superpower, three permanent members of the Security Council, which created the Tribunal, the Tribunal’s host, and its principal funders and suppliers of technical support and intelligence), see Clark, supra note 287, at 371, and in particular on the transfer of western intelligence, see Ignatieff, supra note 287, at 121-22; Press Release, International Criminal Tribunal for the Former Yugoslavia, Kosovo/ICTY: Statement by the Prosecutor (Apr. 21, 1999), CC/PIU/398-E [hereinafter ICTY Press Release, April 1999]:

We . . . need the sophisticated kind of assistance that only states can provide . . . . We have been steadily building our co-operation with a number of countries, and their decisions to increase our access to sensitive information takes us another important step forward. It should also send a signal to leaders and commanders on the ground who are implicated in the commission of war crimes that they will be brought to justice.

See also Meron, supra note 176, at 284 (noting that the United States “has given the tribunal more political, budgetary, and logistical support than any other nation”); Fred Abrahams, The Tribunal, A Village Destroyed, at http://www.hrcberkeley.org/ avillagedestroyed/thetribunal.html (last visited Sept. 26, 2003) (noting that the Tribunal’s first public reference to the events in Kosovo occurred on March 10, 1998, following the first Serbian offensive in Drenica, and noting the United States’ grant, three days later, of $1,075,000 U.S. to support the Tribunal’s investigations in Kosovo). Exhumations in Bosnia and Kosovo have been conducted almost entirely by state-sponsored teams. NATO intelligence has been used in a number of cases. See, e.g., ICTY Press Release, April 1999, supra (noting use of British and German intelligence). Cf. Marc Weller, The Kosovo Indictment of the International Criminal Tribunal for Yugoslavia, in The Kosovo Tragedy: The Human Rights Dimensions, supra note 224, at 207 (noting the Tribunal’s reliance on external sources). The Tribunal’s appropriations and appointments are dependent on the United Nations, which itself is not famously independent. See Scott T. Johnson, On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia, 10 INT’L LEGAL PERSP. 111, 116 (1998) (asserting that the U.N.’s power to appoint and fund “send a
never posed the sort of existential threat to the Tribunal's legitimacy or operations that a different finding in the Inquiry would have engendered.\textsuperscript{338} Even so, these risks may not have affected the deliberations of the Prosecution and may not have had to.

It should not have to be said and yet bears repeating: I do not argue that the Prosecution made any decision under political pressure.\textsuperscript{339} What I do argue is this: The Tribunal operates in a political and institutional atmosphere that encourages caution, conciliation, and co-optation, creating incentives for the Prosecution to reach the kinds of conclusions it does in the Inquiry, in the way it does—conclusions marked with that stately, certain, but compromised moral vision possessed by what Marshall called "courts of the conqueror."\textsuperscript{340} Rather than reassuring us of the Prosecution's probity, the text of the Inquiry is a product and a proof of that environment. Although it puts no one in the dock, the Inquiry reads like a document drafted within a worldview that favors justice over law, one that views process as a potential obstacle to outcomes consistent with its convictions—a court, in short, in which law has become, in the worst sense of the word, politics. Nuremberg often has been criticized as victor's justice, but in the Inquiry the place of power looks much more subtle and postmodern: Today, the victors have outsourced their justice to a Tribunal that, in a strange form of self-censorship, believes in its own independence even as it produces a text in

\begin{quotation}

\textsuperscript{338} Many states would oppose such an exercise of prosecutorial power: the nineteen NATO members, but also states with peacekeepers under the territorial jurisdiction of the Tribunal, as well as states that would fear the precedent of an aggressive and independent prosecutor for the ICC. \textit{Cf.} Akhavan, \textit{supra} note 17, at 19 ("[T]he air campaign has also put the independence and impartiality of the ICTY to the test . . . .").

\textsuperscript{339} Former Prosecutor Louise Arbour explicitly has denied having been put under any pressure from NATO or the U.N. and, along with former U.S. Ambassador for War Crimes David Scheffer, has denied that the timing of the Milosevic indictment was linked to U.S.-supplied intelligence. \textit{See} Ignatieff, \textit{supra} note 287, at 119-20, 123.

\textsuperscript{340} "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the origin of the claim which has been successfully asserted." Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).
\end{quotation}
NATO's voice. A stronger court, such as the Tribunal had become, should have been able to confront the risks of co-optation more forthrightly, establishing a precedent for its, and its successor's, place among the tribunes and powers of the nations.

It is widely accepted that prosecutors, like courts, must somehow be both independent and accountable. Whatever those vague terms mean, they limit direct interference in core decisional processes. Yet commentators have noted "the tribunals' particular susceptibility to [political] pressure[,]"\(^{342}\) such as the Rwanda Tribunal's rescinding an order to release Jean-Bosco Barayagwiza after hearing "new facts"—a threat by Rwanda to cease cooperation.\(^{343}\) All prosecutors and all courts are accountable to someone; all courts and prosecutors are political in that sense.\(^{344}\) The risk is that, without institutionalized political accountability, influence will be subterranean, uncontrolled, and contested as pure power. The unavoidable, necessary intrusion of politics into the judicial process must be visible, institutionalized, and grounded legislatively. An unmediated political process that lacks institutional restraints or visibility inevitably will produce a court constitutionally incapable of critically considering the actions of the politically powerful or of asking fundamental questions about the law—not because it has been crushed, but because it has been seduced. The problem we confront is not blatant and slavish subordination but a more subtle, structural co-optation at the margins. The margins, of course, are where law is made.

So this is what we expect for the new Court, as a legacy from the Tribunal. Though the Rome Statute differs significantly from that of the Tribunal, the provisions on prosecutorial independence,\(^{345}\) and especially its discretion-

\(^{341}\) See, e.g., Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court, in Arbour et al., supra note 328, at 667-69 (especially Preamble (¶ 3) and Points 1, 3, 4, 7, & 9).

\(^{342}\) Developments in the Law, supra note 138, at 2022.

\(^{343}\) Id. at 2023.

\(^{344}\) Indeed, it could be dangerous and undesirable if a prosecution truly eschewed all "political" considerations, however narrowly defined, in making its decisions. (Thanks to John Packer of the OSCE Office of the High Commissioner on National and Ethnic Minorities for this point.)

\(^{345}\) Although the Rome Statute's independence provisions (Art. 42) are more detailed than those in the ICTY Statute (Art. 16), no one suggests that
ary, ad hoc funding, are similar enough to raise analogous expectations, and thus to make the Inquiry an object lesson. It is ironic that almost all of the concern over the ICC Prosecutor has centered on the risk that he might act irresponsibly, and not on the risk, so evident in the Inquiry, that he might find

the ICTY Prosecutor is not, or should not be, effectively as independent of political influence as the ICC Prosecutor is supposed to be. It follows that—variation notwithstanding—the ICTY’s experience may offer guidance about what independence could mean in practice. Compare Rome Statute, supra note 120, at 1024, with ICTY Statute, supra note 234, Art. 16. See, e.g., Danner, Legitimacy, supra note 326, at 510 (noting the ICC Prosecutor’s greater independence from the Security Council); Id. at 511 (calling the Prosecutor of the ad hoc Tribunals “the closest analogue to the ICC Prosecutor”). Most importantly, the Inquiry suggests that the area in which the Statutes do differ the most—the ability of the Prosecutor to initiate investigations proprio motu—is actually less important than his discretion to refrain from investigating; in that, the Statutes are effectively identical. But see Richard J. Goldstone & Nicole Fritz, “In the Interests of Justice” and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, 13 Leiden J. Int’l L. 655, 657 (2000) [hereinafter Goldstone & Fritz] (calling the ICC Prosecutor’s propio motu powers “a fundamental departure” from the ICTY). See also Danner, Navigating, supra note 308, at 1647 (“The [ICC] prosecutor is also subject to a variety of important checks exerted by states . . . . Most importantly, the ICC prosecutor is dependent entirely on state cooperation in the investigation of his cases . . . .”); Valerie Oosterveld et al., The Cooperation of States with the International Criminal Court, 25 Fordham Int’l L.J. 767, 768 (2002) (describing the ICC’s institutional weakness and its need for states’ support). Brown, supra note 308, at 884-5, notes that Arbour observed that there is more reason to fear that the international prosecutor will be impotent than there is to fear that she will be overreaching. The ICC prosecutor, like Justice Arbour, will depend upon the United States and the Security Council for essential political support and enforcement and will have no reason to pursue frivolous prosecutions against the citizens of any state.

That is accurate; the issue, however, is not the effect of dependency on frivolous prosecutions, but on serious ones.

346. The financing provisions of the Rome Statute, though differing from those for the Tribunal (direct funding by States Parties’ assessed contributions, Art. 115a), do not suggest a radical departure (allowing voluntary contributions, for example, Art. 116, and U.N. contributions, Art. 115b) on those matters where experience or reason might suggest the greatest opportunities for influence and cooptation. See Rome Statute, supra note 120, at 1066. Indeed, in certain ways, a permanent court may be more susceptible to financial pressures. See Tullio Treves, Some Practical Remarks on the Early Functioning of the International Criminal Court, in The Rome Statute of the International Criminal Court: A Challenge to Impunity 271, 280 (Mario Politi & Guiseppe Nesi eds., 2002).
irresponsible reasons not to act. Without the institutional anchoring that public accountability affords, the pious insistence on prosecutorial independence at the ad hoc Tribunals has simply obscured the processes of influence, to the benefit of the powerful. Indeed, one of the best tactical arguments for U.S. involvement in the ICC is the Tribunals’ record of pro-

347. See, e.g., Cassese et al., supra note 328, at 1907-08 ("The necessary safeguards have been built in against the 'loose cannon' (or 'politically minded') Prosecutor: the provisions ensuring his independence, his non-re-electable term, the provisions for his removal, the complementarity provisions, the Pre-Trial Chamber 'filter,' and the possibility of the Security Council requesting deferral of the investigations or prosecutions he has initiated."); Silvia Fernandez de Gurumendi, The Role of the Prosecutor, in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 175, 181-82 (Roy S. Lee ed., 1999); Goldstone & Fritz, supra note 345, at 657-58, 661 (outlining limits on the Prosecutor's ability to act); Kissinger, supra note 309, at 94 (asserting that "prosecutorial discretion without accountability is precisely one of the flaws of the [ICC]" and, making a comparison to special prosecutors in the U.S., that "such a procedure is likely to develop its own momentum ... and can turn into an instrument of political warfare"). These comments demonstrate a singular focus on restraining the Prosecutor's independence; there is little in them about ensuring he will act. Cf. Arbour & Bergsmo, supra note 308, at 18 (noting that "States can paralyse the ICC not only by holding back acceptance of its jurisdiction and by pursuing domestic investigation and prosecution ... but also by not co-operating with the ... Prosecutor in the preparation of cases;" that ICC Statute Art. 99(1) is "likely to create insurmountable difficulties for case preparation in cases where there has not been a change in regime after the alleged atrocities[;]" and that it is implausible that the ICC would find a state unwilling to prosecute and yet receive assistance from that state).

In one extremely narrow circumstance the Statute does provide that the Pre-Trial Chamber may require the Prosecutor to proceed with an investigation he has declared he will not pursue “if [his decision] is based solely on paragraph 1 (c) or 2 (c)” as not being in the interests of justice. See Rome Statute, art. 53(3)(b), supra note 120, at 1029. See also Rules of Procedure and Evidence for the International Criminal Court, ICC-ASP/1/3 (1998), R. 110, available at http://www.icc-cpi.int/library/basiceducuments/rules(e).pdf (noting that in such a case the Prosecutor “shall proceed with the investigation or prosecution”). However, the Prosecutor need merely have any other reason to render this power ineffective; can simply not declare to the Chamber that investigation is not warranted; or can decide later, on the basis of any information, to halt investigation. It is very difficult to imagine this formalistic procedure forcing the Prosecutor to investigate if he has other incentives not to. See Guiliano Turone, Powers and Duties of the Prosecutor, in 2 The Rome Statute of the International Criminal Court: A Commentary, supra note 328, at 1137, 1156-58 (including a note that a "judicial order to investigate" exists in Italy).
ducing outcomes acceptable to it.\textsuperscript{348} The U.S. may be quite wrong to worry so much about a dangerously independent prosecutor at the ICC and the rest of the world, for surprising reasons, wrong to worry so little.

It does not matter, then, whether or not there was real complicity, of which this Article presents no evidence. What matters is what appears: an analysis and a style that could only result from a convergence of views functionally equivalent to complicity. The ancient English axiom that justice must not only be done, but be seen to be done, is not a cynical posture, but the subtlest wisdom. Both are necessary because justice is a social good and must be perceived publicly. Yet even sincere effort is no guarantee against that conflation of (self-) image with substance that is the highest art of modernity. The very public Inquiry exhibits just such a concern, asserting its correctness, its neutrality—in short, its professionalism—while moving inexorably, and with the sloppiness of the singularly determined, toward its result, which is (or appears to be) complete exoneration and the removal of all taint. It does not matter if taint is there; it matters that the Inquiry seems determined that it shall not be.

The Inquiry failed to find a language showing it had not succumbed to the risks of complicity. That failure is not one of creativity alone—it is a failing of seriousness and of purpose. The Inquiry failed because its authors did not believe NATO was liable in fact, could be liable in law, or should be liable at all, because they shared NATO’s view of the conflict and of air war’s impersonality, and because they believed NATO was right to go to war—and evidently believed all that before inquiring. That belief, of course, should have told them nothing about NATO’s liability, nor what to write. The Inquiry could have done much more, rhetorically, to advance international law \textit{and} to solidify its prosecutorial prerogative without touching NATO. That it did not suggests it was cautious in the extreme. It is that sense of caution—and what it says about how justice is understood by those who will practice it in the

\textsuperscript{348} Cf. David Chandler, \textit{From Kosovo to Kabul: Human Rights and International Intervention} 148 (2002) ("In the absence of any collective body which can enforce its rulings, it is clear that the ICC will be as reliant on the United States and other Western powers as the earlier UN tribunals.")
new Court—that should disturb even those who completely agree with the Inquiry's outcome. The Inquiry represents the failure of an institution, and a new one—"the last great international institution of the Twentieth Century"—may well pay the price: in the failure to move beyond ad hoc justice; in the foregone opportunity to expand the role of international humanitarian law, especially in regulating aerial warfare; in the quiet conflation of *jus ad bellum* and *jus in bello*, with its implicit devaluation of the judicial role; in the discursive ground lost to the militant confidence of the great powers; and in the reinforced sense that justice is only serious when it pursues the weak and the reviled.

There are different visions for what a court should be: Some, like me, believe that though a court inevitably is political in some sense, it also has a unique role in restraining the exercise of power. Others see a court as more explicitly political, an actor like any other, or even one more tool in the toolkit we employ against the enemies of the just society, just like an army. Yet even those more sanguine about the value of harnessing law to one nation's political agenda will at least want to know the prospects of such a project; even they will have to admit that, if this description of how a prosecution decides is right, they too will have to locate their hopes for justice, and for restraint on the abuse of power, in the powerful themselves and not in a court.

The decision not to investigate surely confirmed the opinion among Serbs that the Tribunal is incapable of independent judgment, but then opinion among Serbs hardened against the Tribunal long ago. Indeed, throughout the former Yugoslavia, public opinion has long considered the Tribu-

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350. *Cf.* Reisman, *supra* note 163, at 284, 287-89 (suggesting that the ICC will prove ineffective in the face of certain kinds of conflicts).
nal fundamentally illegitimate,\textsuperscript{352} and the chance to persuade the peoples of the region that it is a legitimate or necessary contribution to justice probably already was lost irrevocably. The larger issue is not the Balkans, but the world community's attitude toward justice and the new Court. It would be a great loss if the world were to adopt, in however veiled a fashion, an analogous view: that a court is useful when it pursues one's enemies but dangerous and illegitimate when it threatens one's own. The compliant, results-driven style of the Inquiry gives no cause to believe that the Tribunal—or the world—has embraced a view of justice any more mature than that held by the partisans of those presently in the dock in The Hague.

Voice—Information—Argument—Style—Structure—Consequence—Silence

VIII. Concluding Silence

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.

—Robert H. Jackson, opening statement before the Nuremberg Tribunal\textsuperscript{353}

Here is yet a postscript.

—Malvolio, in Twelfth Night\textsuperscript{354}

An equally legitimate approach to the Inquiry's subject—and to the dearth of probative information—would have been silence. There was no obligation to publish an inquiry; no other pre-indictment inquiry has been issued, even when con-

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  \item 352. Akhavan, supra note 17, at 22 ("In August 2000 . . . a survey reported that . . . [o]ver 60 percent of those polled [Croatian citizens] believed that the ICTY was 'unfair,' in contrast to 15 percent who believed it was fair . . . . The pollsters concluded that there is 'an express anti-Hague atmosphere in the country.'"); Casey, supra note 308, at 871 (noting Croat and Serb beliefs that the ICTY is biased); Tim Judah, Serbia backs Milosevic in Trial by TV, Observer, Mar. 3, 2002, at 23 (noting widespread belief in Serbia that the Tribunal is a "kangaroo court").
  \item 353. Taylor, supra note 321, at 167.
\end{itemize}
siderable controversy surrounded the Tribunal's inaction.\(^{355}\)

Of course, one cannot be insensitive to the costs of an ill-considered or ill-explained silence. Refusal to investigate NATO would have met with criticism from rights groups and observers in the former Yugoslavia, who would have seen it as proof that the Tribunal was a tool of western policy.\(^{356}\) It might have been at least as harmful to the appearance of justice if the Prosecution had simply said nothing, if it had issued a terse note declaring NATO not liable, or if it had loudly asserted its formal right to investigate but never pursued the matter. In this sense, the Prosecution was damned if it did and damned if it didn't.\(^{357}\)

Still, these were not its only alternatives. The Prosecution could have issued an inquiry treating the matter candidly and assertively, regardless of its conclusions, and pointedly refusing to draw conclusions without sufficient information. The Prosecution could have pressed publicly for the information it needed, and criticized NATO if none was forthcoming. It

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355. Consider the Prosecution's response to leaked documents about its investigation of Croatia's 1995 Operation Storm:

In a confidential document belonging to [the] Office of the Prosecutor, leaked to The New York Times in March 1999, [Croatian generals were] mentioned as potential indictees. However, the prosecutor's office said the leaked document was out of date and "merely represents expressions of opinion, arguments and hypotheses from various staff members . . . and not in any way the concluded decisions of the prosecutor."


356. *Cf.* Konstantin Obradovic, *International Humanitarian Law and the Kosovo Crisis,* 82 INT'L REV. RED CROSS 699, 730 (2000) ("If the Chief Prosecutor of the ICTY . . . does not take into serious consideration the charges brought against NATO and does not initiate proceedings, or does not convincingly explain why that was not done, the Tribunal's already weakened credibility will be finally eroded.")

could have drawn clear distinctions between investigation and accusation, between pursuit of a process and pursuit of NATO. By refusing to publish conclusive findings, then, the Prosecution could have retained a real option to voice its concerns and seek the truth. Even in demonstrating impartiality, it could have done things differently, with different effects on the future possibilities available to other tribunals. Silence has a voice, and silence can bear the marks of courage, too.

In the event, of course, NATO was not investigated. Deciding if that was an intentionally or only unconsciously complicit decision would require access to facts available only to the most knowledgeable insider; surely the motives of those involved were complicated anyway. But a reader of the public record, who cannot know such things, can see this much: The Inquiry is not a courageous or even a convincing document. Whatever the correctness of its conclusions, it was not right in reaching them. It could have reached the same outcome—or a different one—in a way showing that commitment to law, not timidity before power, determined the result. As it is, one can hardly say. Correct, but not right, and lacking the courage to be convincing: That is no way to create a new law for a new court, which will require boldness, determination, and words to match. Law afraid of confronting power, even to its own detriment, is a dangerously pacifying soothsayer and not worth having.

One is tempted to conclude with measured proposals for reform: greater transparency; coherent standards for prosecutorial discretion in inquiry, investigation, and indictment;\textsuperscript{358} regularization of states' ad hoc financial contributions; even a more serious debate about rules of air warfare or linkages between \textit{jus ad bellum} and \textit{jus in bello}. All of these are welcome, to be sure, but while the technical issue identified here concerns the prosecution's discretion not to act, the problem revealed in the Inquiry is a more general and more rooted one: It is about a court's fundamental orientation toward power. It is not about getting facts or law wrong; it is about a way of arguing and of conceiving the work of a court: the deliberations it considers proper, the compromises it thinks possible, the standards it insists upon, and the influ-

\textsuperscript{358} Cf. Danner, \textit{Legitimacy, supra} note 326, at 541-50 (setting forth suggested prosecutorial guidelines).
The Kosovo air war—that “situation quite unforeseen”—fell upon the Tribunal like a rocket from the skies, threatening to overturn what it worked for and the order in which it worked. The Prosecution—perhaps afraid, perhaps not seeing it for what it was—left it alone. But it is sometimes better to make a bomb explode, especially at the time and place of one’s choosing when one can brace for the shock. Left where it fell, dormant, an unexploded bomb breeds an easy cowardice, an uncomfortable amnesia, and a silence that says there is no problem, while all the time one must step around, speak carefully, and never, ever touch. Because we all fear what unexploded bombs sometimes, some day, do—and is that not the real danger?