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# *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*

Michael Bothe\*

## **Abstract**

*A report to the Prosecutor of the ICTY concludes that there was no sufficient reason to institute proceedings against persons responsible for the NATO bombing campaign against Yugoslavia. The following rules of international humanitarian law were analysed in the report: protection of the environment in times of armed conflict; prohibition on attacking civilian objects; and the limitation of admissible collateral damage according to the proportionality principle. In relation to the protection of the environment, the report is too restrictive as it combines the test provided for by Protocol I Additional to the Geneva Conventions with a proportionality test. In relation to the protection of civilian objects, or the definition of military targets, the report practically sticks to the traditional assumption that traffic and communications infrastructure always constitutes a military objective. It fails, despite some lip service to the contrary, to ask the necessary critical question as to the real contribution of that infrastructure to the military effort of Yugoslavia. The proportionality principle requires a balancing of military advantage and civilian damage. The report's view concerning the value system which has to inspire this balancing process is highly questionable, in particular taking into account the humanitarian purpose of the entire operation.*

The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) had to deal with a number of communications requesting her to institute criminal proceedings against those responsible for the bombing campaign of NATO between March and June 1999. The Prosecutor established an expert commission to evaluate both the law and the facts in this respect. The members of this expert group

\* Professor of Public Law, Johann Wolfgang Goethe University, Frankfurt am Main. This Article has been awarded the Helmuth James von Moltke Prize 2001 of the German Society for Military Law and International Humanitarian Law.

have remained anonymous, thus inviting educated guesses as to who is behind the report of the group, which has indeed been rendered public. The report is an interesting document in that it well reflects current problems concerning the interpretation of the rules relating to the protection of the civilian population, in particular the protection of the environment, the definition of military targets and the practical application of the proportionality principle. The report is more interesting in its general legal discussion than convincing in its conclusions regarding the application of the law to the particular facts.

The report starts the legal assessment with the question of the damage caused to the environment.<sup>1</sup> This fact alone is noteworthy. It reflects a growing concern that environmental devastation caused by war might jeopardize the life and health of future generations. Attempts to develop the treaty law relating to the preservation of the environment in times of armed conflict encountered a strong resistance from certain military powers so that these efforts had to be dropped.<sup>2</sup> Nevertheless, it is safe to say that, despite this resistance, environmental considerations have indeed gained their established place not only in international law generally, but also in international humanitarian law.

In a first approach, the report uses Articles 35(3) and 55 of Protocol I Additional to the Geneva Conventions as the basic yardstick to determine the legality of any damage caused to the environment. It does not give a final answer to the question of whether these provisions have become a rule of customary international law. The report simply finds that the damage caused by the NATO air campaign does not meet the triple cumulative threshold, established by these provisions, of being 'widespread, long-term and severe'. If one takes the factual findings of the Balkan Task Force established by the United Nations Environment Programme, this conclusion is probably unavoidable. What is interesting, however, is that the assessment made by the group does not stop at this point. It also analyses environmental damage in the light of the proportionality principle which is the usual test for the admissibility of collateral damage caused by attacks against military targets. This, as a matter of principle, is a valid point. This line of argument could be used as a means to lower the difficult threshold of Articles 35 and 55 of Protocol I: once it were established that collateral environmental damage was excessive in relation to the military advantage anticipated, it would also be unlawful even if it were not widespread, long-lasting and severe. A systematic interpretation of Protocol I would lead to the conclusion that the environment is protected by the combined effect of the general provision limiting admissible collateral damage and the particular provision on environmental damage. It would mean that, in a concrete case, the stricter provision would apply. Unfortunately, the report does not draw this conclusion. Instead, it refers to the formulation of Article 8(2)(b)(iv) of the ICC Statute as 'an authoritative indicator of

<sup>1</sup> See the Report, [www.un.org/icty/pressreal/nato061300.htm](http://www.un.org/icty/pressreal/nato061300.htm); 39 *ILM* (2000) 1257, at paras 14 *et seq.*

<sup>2</sup> For a short summary of the developments, see Gasser, 'For a Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action', 39 *AJIL* (1995) 637. The UN General Assembly finally did not devote a specific agenda item to that question, but 'buried' the issue in its Resolution 49/50 of 9 December 1994 on the United Nations Decade of International Law.

evolving customary international law'.<sup>3</sup> This provision, which is quite unfortunate from the point of view of environmental protection, creates a different type of cumulative effect of the rules on the protection of the environment and the proportionality principle. Causing environmental damage is only a war crime if it goes, first, beyond the threshold established by the triple cumulative conditions and, secondly, beyond what is permissible according to the proportionality principle. In the light of the reservations which the military establishment shows *vis-à-vis* taking into account environmental concerns as a limitation on military action, this is probably as far as one could go. It should be stressed, however, that this stance can be accepted only for the definition of the war crime, not as far as the interpretation of the primary rules of behaviour relating to the protection of the environment in times of armed conflicts are concerned. The damage caused to the environment is unlawful if it is either excessive or widespread, long-term and severe. Causing the damage is a war crime only if damage fulfils both criteria.

In connection with environmental damages the report also treats the question of depleted uranium projectiles.<sup>4</sup> The same criteria should apply. It is true that the facts reported by UNEP, upon which the report relies, did not provide sufficient evidence of severe or widespread environmental, or more generally civilian, damage. Another aspect of the problem is, however, completely neglected: if this type of ammunition is used for the sake of hardening the ordnance and of increasing penetration power, and if other metals exist which have the same effect, but do not cause radiation, then the damage caused by the radiation of the uranium constitutes a 'superfluous injury' or 'unnecessary suffering', and is, thus, prohibited under both customary and treaty law (Article 35(2) of Protocol I). Whether causing such damage would be a war crime according to Article 3 of the Statute of the Yugoslavia Tribunal is another question. While the prohibition in Protocol I uses the words 'of a nature to cause . . .', the Statute of the Tribunal says 'calculated to cause . . .', which is probably narrower. It is probably difficult to argue that the use of depleted uranium ammunition was 'calculated' to cause unnecessary suffering.

The next interesting point treated by the report is the definition of military objectives.<sup>5</sup> The basic principle is that of distinction. Attacks may only be directed against military objectives. The military objective is defined by the contribution it makes to the military effort of the adversary and by the military advantage to be gained by this destruction. In the terms of Article 52(2) of Protocol I, '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 . . . offers a definite military advantage'. In the application of this principle to the NATO air campaign, the basic problem was the status of certain 'dual-use' installations which may have some military uses, but also

<sup>3</sup> Report, *supra* note 1, at para. 21.

<sup>4</sup> *Ibid.*, at para. 26.

<sup>5</sup> *Ibid.*, at paras 28 *et seq.*

and even mainly civilian ones, such as traffic infrastructure, industrial facilities and media/communication facilities. In these cases, it is necessary to consider very carefully the two-pronged test of the military target contained in Article 52(2) of Protocol I. First, these objects must make an 'effective' contribution to the military effort. The military advantage to be derived from the attack must be 'definite'. These words were carefully chosen and must be taken seriously. It is true that in traditional conflicts, traffic infrastructure and lines of communication are generally considered to be military targets. But as the report rightly points out, tradition is not enough.<sup>6</sup> It must be asked seriously whether, in a given context, these standards are met. Demoralization of the population (and of the decision-makers) are not a definite military advantage, as rightly pointed out by the report.<sup>7</sup> Thus, the contribution to the military effort and to the military advantage have to be linked to the concrete military context. If this statement is correct, serious doubt is shed on the assumption underlying NATO targeting policy that bridges and railway lines generally constitute military targets. They certainly are military targets if they are used for the purposes of military logistics which may have an impact on the outcome of the conflict. This is particularly so where supplies destined for the front must pass over bridges and along railway lines. But in a conflict like that relating to Kosovo, there was no such front. Moving military supplies from one place to another had no significance whatsoever for the conflict where the declared tactic was to use bombing from great altitudes as the only means of causing damage to the enemy. In this military context, it is very difficult to see what contribution those bridges and railway lines made to the military effort and what type of military advantage was to be gained from their destruction, if one does not accept the demoralizing effect of the attacks as such an advantage. The report clearly invites that question, but fails to raise it in express terms. Quite to the contrary, it arrives very often at the conclusion that a certain object was a military objective without really pondering the standards elaborated before. This is a flaw which becomes visible, in particular, where the report deals with the attack on media facilities.<sup>8</sup> It is based on a factual analysis that the TV station in question was also used as part of a military communication infrastructure. No concrete facts which would support this assumption are given.

A third interesting question raised by the report is that of the application of the proportionality principle.<sup>9</sup> Once more, the point of departure of the argument is Protocol I, namely, Article 51(5)(b). An attack is unlawful if it 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. This provision requires a balancing between military advantages and civilian losses. The main question is that of the relative weight given

<sup>6</sup> *Ibid.*, at para. 55.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, at paras 55 and 76.

<sup>9</sup> *Ibid.*, at paras 48 *et seq.*

to the military advantage on the one hand, and to the damage on the civilian side, on the other. The relevant questions are appropriately formulated by the report:<sup>10</sup>

- a. What are the relative values to be assigned to the military advantage gained and the injuries to non-combatants or the damage to civilian objects?
- b. What do you include or exclude in totalling your sums?
- c.. What is the standard of measurement in time or space?
- 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?

The report rightly states that:

the answers may differ depending on the background and values of the decision-maker.

This simple truth underlies the debates between human-rights-oriented NGOs and military circles. The report<sup>11</sup> suggests that the decisive yardstick should be the judgment of the 'reasonable military commander'. But this 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*. What is necessary in this respect is the dialogue between civil society and the military, which then has to be reflected in military decision-making.

It is true that, in the case of the Kosovo conflict, civilian casualties were relatively low. The report calculates about 500 dead civilians during the entire campaign where more than 10,000 strike sorties were flown by NATO aircraft. There were only a few attacks which caused more than 10 fatal casualties. Thus, on the factual side, the conclusions at which the report arrives are relatively safe, if the yardstick is direct loss of civilian lives only. The economic impact of the destruction of bridges, in particular, remains to be evaluated. But probably the issue of proportionality was much more acute in respect of the bombing campaign during the second Gulf War when the lifelines of Baghdad were severely damaged, a fact which accounted for a drastic deterioration of the living conditions of the civilian population.

Both in relation to the question of the definition of the military objective and in relation to the proportionality principle, the report 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.

<sup>10</sup> *Ibid.*, at para. 49.

<sup>11</sup> *Ibid.*, at para. 50.