

Targeting

Michael Bothe

The international legal rules which determine whether certain targets may or may not be lawfully attacked are based on one of the pillars of the international law applicable in armed conflicts, namely the distinction between the civilian population on the one hand and the military effort of the State on the other. The development of this distinction is a historical and cultural achievement of the age of enlightenment. This fact needs to be emphasized when there is a temptation to consider certain consequences of this distinction as too cumbersome for what is supposed to be a necessary military operation.

Distinction

In the centuries before the enlightenment, war was often, and then lawfully so, conducted in a way that made the “civilian” population suffer very drastically.¹ It was in particular the philosopher Jean Jacques Rousseau who, in the second half of the 18th century, developed the idea that war did not constitute a confrontation between peoples, but between States and their rulers (“sovereign’s war”).² This principle limited both the group of persons entitled to perform acts harmful to the enemy (combatants) and the scope of persons and objects which may be the target of such acts (combatants/military objectives).

In the 18th and early 19th century, this distinction corresponded to the reality of the conflicts of those days. It was possible and practicable to keep

1. Fritz Münch, *War, Laws of, History*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1386 *et seq.* (Rudolf Bernhardt ed., 2000).

2. WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 267 (2000).

military activities well apart from the day-to-day life of the citizens, unless such unusual things as a *levée en masse* occurred. It was the technological developments of the late 19th and early 20th century which created the fundamental challenge to this distinction, namely the development of long-range weapons, in particular air warfare. The first rather comprehensive reaction to this challenge was an attempt at international rule making, the so-called Hague Rules of Air Warfare of 1923,³ drafted by a group of experts based on a mandate given by the 1922 Washington Conference on Disarmament. These rules constituted a confirmation of the old distinction and developed its concrete application to the new situation. Rules elaborated by scientific bodies such as the International Law Association were formulated along the same lines.⁴

The great practical challenge to the traditional principle of distinction occurred during the Second World War. There were so many violations of the traditional principle that it was quite appropriate to ask the question whether that rule had survived or whether it had become obsolete.⁵ The biggest challenge to the traditional rule of distinction was the development of nuclear weapons. It is, thus, necessary to critically analyze the attitude which States and other relevant actors adopted after the war in relation to that rule.

State practice immediately following the Second World War was somewhat puzzled and puzzling. The definition of war crimes in the Statute of the International Military Tribunal is based on the assumption that the rule of distinction was applicable (“wanton destruction of cities, towns or villages, or devastation not justified by military necessity”). But neither the judgment of the International Military Tribunal nor the judgments of the American military courts really address the principle of distinction as a limitation on the choice of targets for bombardments.⁶ Furthermore, there was a kind of resounding silence of States in relation to that rule. The Geneva Conventions of 1949, which in many ways clarify and develop the law taking into account the experience of the Second World War, do not address the question, yet most

3. DOCUMENTS ON THE LAWS OF WAR 139 (Adam Roberts and Richard Guelff eds., 3d. ed. 2000).

4. Draft Convention for the Protection of the Civilian Population Against New Engines of War, adopted by the 40th Conference of the International Law Association, Amsterdam 1938. THE LAW OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 223 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

5. For a brief analysis of the practice, see ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 402 *et seq* (1954).

6. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1828 (Yves Sandoz et al. eds., 1987).

writers were loath to accept that the bombing practices of the war had changed the law.⁷

In 1956, the International Committee of the Red Cross (ICRC) made an attempt to have the question of the validity of the principle of distinction clarified by what was meant to become the Delhi Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.⁸ This attempt was based on the assumption that the traditional rule of distinction was still valid, but it failed. It became, so to say, the victim of the development of nuclear weapons or, more precisely, of a dispute concerning their legality. The military establishment of the day, it appears, remained completely outside the legal discourse concerning the legality of those nuclear weapons, of which the resolution of the Institut de Droit International of 1969⁹ concerning the prohibition of weapons of mass destruction is a lively testimony.

That insulation of the legal discourse disappeared when the issue of the reaffirmation and development of international humanitarian law came on the political agenda as a consequence of the debate about the conduct of the Vietnam War and the issue of “human rights in occupied territory.”¹⁰ In 1968, the United Nations General Assembly reaffirmed the traditional principle in its resolution “Respect for Human Rights in Armed Conflicts,” which declared: “That it is prohibited to launch attacks against the civilian population as such; That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population. . . .”¹¹

The negotiations from 1974 to 1977 that led to the Additional Protocol I to the 1949 Geneva Conventions¹² and the reactions of States, including major military powers, after the adoption of the Protocol in 1977 are clearly based on the assumption that the basic content of the rule of distinction is part of customary international law. This is, in particular, reflected in the formulation of the declarations made by the United States and the United Kingdom on the occasion of the signature of the Protocol. In respect of so-called

7. CASTRÉN, *supra* note 5, at 200 *et seq.*

8. THE LAW OF ARMED CONFLICTS, *supra* note 4, at 251.

9. The Distinction between Military Objectives and Non-Military Objects in General and particularly the Problems Associated with Weapons of Mass Destruction, Resolution adopted by the Institut de Droit International at its session at Edinburg on September 9, 1969. *Id.* at 265.

10. Michael Bothe in MICHAEL BOTHE, KARL PARTSCH AND WALDEMAR SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 2 (1982).

11. G.A. Res. 2444, U.N. GAOR, 23rd Sess., Supp. No. 18, at 50, U.N. Doc. A/7128 (1969).

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 422 [hereinafter Protocol I].

Targeting

non-conventional weapons, they deny that the “new rules” of the Protocol apply to those weapons, the clear implication being that the “old,” i.e., customary law rules do apply. It is made clear that the principle of distinction figures among these old rules.¹³

In addition, a legal discourse developed which now included military lawyers dealing with practical implications of this rule. Military lawyers explained and continued to explain that major bombing campaigns like those during the Vietnam¹⁴ and 1991 Persian Gulf¹⁵ wars were indeed conducted on the basis of these rules. Thus, it can safely be concluded that the rule has survived all major challenges; that it is still part and parcel of customary law. This, however, raises the question of the interpretation of the rule in the light of changing circumstances.

The Two-Pronged Test of the Military Objective

As to the selection of targets in general and in air warfare in particular, the basic rule that follows from the distinction between the civilian population and the military effort is the distinction between military objectives and civilian objects. That distinction is to be made on the basis of two interrelated elements, namely the effective contribution the military objective makes to military action and the “definite military advantage” that the total or partial destruction, capture or neutralization of the objective offers. There is no doubt that this is a rule of customary international law and its binding force is, thus, not limited to the parties to Protocol I, which formulates this very principle as follows in Article 52(2): “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.”¹⁶

13. See *inter alios* Waldemar Solf, in BOTHE, PARTSCH AND SOLF, *supra* note 10, at 276, 282.

14. Burrus Carnahan, “Linebacker II” and Protocol I: the Convergence of Law and Professionalism, 31 AMERICAN UNIVERSITY LAW REVIEW 861 (1982).

15. See Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 678, 681 (1994).

16. Protocol I, *supra* note 12, at 450.

The most recent practical confirmation of the customary law character of these principles is the experts report¹⁷ published by the Chief Prosecutor of the Criminal Tribunal for the former Yugoslavia concerning the question whether the NATO bombing campaign against the Federal Republic of Yugoslavia (FRY) involved the commission of crimes which were subject to the jurisdiction of the Tribunal—a report which constitutes an important document if lessons are to be drawn from the Kosovo experience.

The difficulty of the Article 52(2) definition is its general character. There are, of course, clear cases of “pure” military objectives: military barracks, trenches in a battlefield, etcetera. Where objects are used or usable for different, military and non-military purposes (dual-use objects), their qualification as a military objective or civilian object becomes more difficult. What constitutes an “effective contribution” to military action? What is a “definite” military advantage? What is the difference, if any, between an “indefinite” or a “definite” military advantage? This brings us to the crucial problems of targeting. It must be realized that the application of rules formulated in general terms is a problem lawyers often encounter, not only in the law of war, but also in international law in general—even law in general. Legal rules expressed in general clauses need concretization for their practical application. The question, thus, is how to render the general principle of distinction more concrete in order to have secure standards for targeting.

A standard legislative method of rendering a general rule more concrete is the establishment of a list of cases of application, be it exhaustive or illustrative. This approach has been proposed by Professor Dinstein.¹⁸ It presents a few problems of its own. An illustrative list may be useful for certain purposes, but it cannot terminate the discussion because the qualification of items that are not on the list remains open. The exhaustive list is dangerous, because it

17. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), reprinted herein as Appendix A [hereinafter Report to the Prosecutor]. For an analysis, see, *inter alia*, Symposium: *The International Legal Fallout from Kosovo*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 391 (2001), in particular the contributions by William Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, at 489, Paolo Benvenuti, *The ICTY's Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, at 503, and Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, at 531. In addition, see Natalino Ronzitti, *Is the non liquet of the Final Report Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 1017 (2000).

18. See, e.g. Professor Dinstein's paper in this volume.

can exclude clear cases falling under the general rule, which were just forgotten or not foreseen when the list was drafted. Thus, there is often a tendency to add a catchall clause at the end of a list.¹⁹ At that point one is for all practical purposes back to the illustrative list.

Despite these deficiencies of the list method, the ICRC in 1956 attempted to draft such a list of military objectives.²⁰ In relation to the difficult or controversial questions, this list shows all the problems of this method. The list is based on the undisputed fact that there are certain typical military objectives which can indeed be listed, but this is possible only to a limited extent. There are objects that in one context may constitute a military objective, making an effective contribution to military action, while in other circumstances they do not. This is clearly shown in the items on the list that have become quite controversial in the context of the Kosovo campaign, namely lines and means of communication and in particular telecommunication facilities.

As to traffic infrastructure, the formulation of the ICRC list is as follows: “Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.” Thus, a distinction has to be made between those lines and means of communications that are of fundamental military importance and those that are not. Only those lines of communication that are of fundamental military importance are military objectives. This is clearly stated in Article 7, Paragraph 3 of the ICRC Draft Rules to which the list was to be annexed: “However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.”

As a consequence, in every instance the question of the military importance of a bridge or railway line is unavoidable. It is submitted that to ask this very question is the only correct application of the rule of distinction. There is no rule saying that railway lines and bridges are always a military objective. Their military importance has to be ascertained in each particular case. This is

19. See, e.g., Article 61(a) (xv) of Protocol I (“complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization”).

20. The list was drafted by the ICRC “as a model” to be annexed to the “Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Times of Armed Conflict” (see note 8 *supra*) which the ICRC submitted in 1956 for consideration by the Red Cross Conference of 1957. See ICRC COMMENTARY, *supra* note 6, ¶ 2002. These rules became the victim of bitter controversies between governments during that conference (see J. Pokštefl and Michael Bothe, *Bericht über Entwicklungen und Tendenzen des Kriegsrechts seit den Nachkriegskodifikationen*, 35 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 574, 575, 601 (1975).

the crucial problem of dual-use facilities. This problem applies to traffic infrastructure, telecommunication infrastructure and also to energy production and transmission facilities.

In the traditional context of land warfare, the military importance of traffic infrastructure is quite obvious. This traffic infrastructure is needed in order to bring supplies to the front or, as the case may be, to allow a swift retreat of the troops which may then reorganize afterwards. The examples given by Professor Dinstein²¹ in order to prove his thesis are all taken from this context. During the so-called Christmas bombing of Hanoi, it was the use of railway lines for logistical support that was put forward as a justification for choosing certain targets (mainly railroads) in the very center of this city.²² But what was the military importance of the many bridges crossing the Danube River that were destroyed during the Kosovo campaign? There was no front to which supplies could have been moved. It was the declared policy of the NATO States not to create such a front but to renounce to ground operations and to restrict military action to an air campaign. In such a situation, it is very hard to see any military importance of this traffic infrastructure. If there is no such military importance, these means of communication are civilian objects, not military objectives.

With respect to the telecommunication network, the situation may be somewhat different. This network is of military importance even in the context of a conflict where one side uses the strategy of air warfare only, while the other side, by necessity, would have to rely on anti-aircraft defense. This defense certainly depends on telecommunications, but it remains questionable whether each facility using telecommunications equipment that may be found in the country belongs, for that reason, to a network of military significance. Is there a kind of presumption that telecommunication facilities are always, unless the contrary is apparent, related to the military network?

This seems to be the underlying rationale of the Report to the Prosecutor.²³ It brings us to a question of precautionary duties, duties of due diligence in evaluating the military importance of certain objects and more generally the decision-making process to which we will revert below. This was the crucial problem in evaluating the lawfulness of the attack against the television facilities in Belgrade. Could the target selectors just proceed on the basis of the assumption or presumption that the technical equipment of this station was so

21. See Professor Dinstein's paper in the present volume.

22. Carnahan, *supra* note 14, at 864 *et seq.*

23. Report to the Prosecutor, Appendix A, ¶ 72.

Targeting

closely linked to the military network that, although there was an obvious civilian use, its military importance was significant enough that its destruction provided a definite military advantage?

So far, the notion of contribution to the military effort or of military advantage has been discussed in tactical or operational terms. The question then arises whether this notion could also be understood in a broader sense. Can objects that are not related to specific military operations also “contribute to the military effort?” Air attacks have a definite impact on the morale of the entire population and, thus, also on political and military decision-makers. It may well be argued that it was not only the diplomatic efforts by Chernomyrdin and Ahtassari, but also or even mainly the impact of the bombing campaign that finally induced Milosevic to agree to a withdrawal of the Serbian military and police forces from Kosovo. Did the bombing for that reason provide a “definite military advantage”?

As is rightly pointed out by Professor Dinstein and the Report to the Prosecutor,²⁴ this type of “advantage” is political, not military. The morale of the population and of political decision-makers is not a contribution to “military action.” Thus, the advantage of softening the adversary’s will to resist is not a “military” one and, thus, cannot be used as a legitimation for any targeting decision. If it were otherwise, it would be all too easy to legitimize military action which uses bombing just as a psychological weapon—and there are other words for this.

The practical importance of this limitation is considerable and not new. It would indeed be impossible to make any meaningful distinction between civilian objects and military objectives as the psychological effect can be produced by an attack on any target, including entirely civilian living quarters. The morale of the civilian population and of political decision-makers was the main target of the nuclear bombs dropped on Hiroshima and Nagasaki—not a legitimate one. During the bombing of North Vietnamese targets, already mentioned, in addition to the military significance of the traffic infrastructure as channels for military supplies, “forcing a change in the negotiating attitudes of the North Vietnamese leadership” was also recognized as a goal of the bombing campaigns against that country.²⁵ The NATO bombing campaign against the FRY was also designed to induce the Belgrade leadership to accept a settlement of the status of the Kosovo along the lines of NATO terms. Although

24. Professor Dinstein’s paper in the present volume and Report to the Prosecutor, *id.*, ¶ 55 (“civilian objects and civilian morale . . . are not legitimate military objectives”).

25. Carnahan, *supra* note 14, at 867.

the psychological impact of a certain attack may be a legitimate consideration in choosing between targets that are for other reasons of a military character, that impact alone is not sufficient to establish the qualification of a certain target as a military objective.

This legal situation introduces a basic ambiguity, or a fictitious character, into targeting decisions to be made within the framework of an armed conflict conducted for humanitarian purposes. As the goal of such a “war” is not the military defeat of an adversary, but the protection of the human rights of the population, the traditional notion of military advantage loses much of its significance. In the Kosovo campaign target selection was made on the basis of the fiction that military advantages and military victory in the traditional sense were sought, although this was not the case. The only real goal was a change of attitude of the Belgrade government. Thus, the question of what really constitutes a military objective within the framework of a humanitarian intervention has to be asked. It would better correspond to the specific character of that particular type of military operation if only “pure” military objectives, in the sense mentioned already above, were considered to be legitimate targets.

The Environment—A Military Objective?

An additional comment is necessary concerning the environment as a military objective or civilian object. The rules of Protocol I relating to the protection of the environment, i.e., Articles 35(3) and 55, not only limit the permissible collateral damage to the environment caused by attacks against military objectives, but also limit permissible attacks where the environment itself constitutes a military objective, which is quite possible. Military objectives are not just persons or manmade structures: a piece of land can become a military objective if its neutralization offers a definite military advantage. Interdiction fire is an example. This type of military action is not directly targeted at combatants. The military usefulness consists of the fact that by bringing a certain area under constant fire, the enemy is deterred from entering that area. Cutting down, or defoliating, trees in order to deprive the enemy of cover is another example. The consequences of such actions for the environment may be disastrous. In such cases, for the reasons indicated, the rules of Articles 35(3) and 55 protect the environment when it is a military objective.

An attack against the environment, however, is unlawful only where the damage caused or expected is “widespread, long-term and severe.” These

three conditions are cumulative. All three must be met for there to be a violation. Therefore, we are back to the problem of general clauses and their concretization. It is true that many of the delegations present at the conference in Geneva that drafted Protocol I favored a very high threshold.²⁶ It appears that the Kosovo campaign has not really given any new impetus to concretize this threshold, as the actual environmental damage remained below that limit. The threshold is still an open question, but the very fact that the Report to the Prosecutor starts its legal assessment of the bombing campaign by analyzing the question of environmental destruction²⁷ shows that environmental considerations have indeed become an important restraint on military activities, although the legal reasoning of the report in this respect is highly questionable.²⁸

In a first approach, the Report to the Prosecutor uses Articles 35(3) and 55 of Protocol I as the basic yardstick to determine the legality of any damage caused to the environment. It does not give a final answer to the question whether these provisions have become a rule of customary international law. The report simply finds that the damage caused by the NATO air campaign does not meet the triple cumulative threshold established by these provisions of being “widespread, long-term and severe.”

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 committee 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. Once it was established that collateral environmental damage was excessive in relation to a military advantage anticipated, it would also be unlawful even if it was 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 limitation

26. BOTHE, PARTSCH AND SOLF, *supra* note 10, at 346 *et seq.*

27. Report to the Prosecutor, Appendix A, ¶¶ 14–25.

28. Bothe, *supra* note 17, at 532 *et seq.*; Thilo Marauhn, *Environmental damage in times of armed conflict – not “really” a matter of criminal responsibility?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 1029 (2000).

would apply. Unfortunately, the report does not draw this conclusion. Instead, it refers to the formulation of Article 8(2)(b)(iv) of the International Criminal Court (ICC) Statute as “an authoritative indicator of evolving customary international law.”²⁹ 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, second, 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 violence, this is probably as far as one could go in the definition of a war crime. 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 behavior 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, however, is a war crime only if damage fulfils both criteria.

Decision-Making: Ascertaining Relevant Facts

As already pointed out, a targeting decision must involve a certain factual evaluation of the actual or potential use of specific objects as to whether they make or do not make a contribution to military action. Protocol I prescribes that efforts have to be made in order to ascertain the military character of an objective.³⁰ On the other hand, the targeting decision is certainly one which has to be taken in a context of uncertainty. It is unrealistic to require absolute certainty concerning the military importance of a specific object before it can be lawfully attacked, but not requiring absolute certainty is not the same as permitting disregard of the facts.

Whatever the actual standard of due diligence, there is an obligation of due diligence in ascertaining the character of a proposed target. This question arises, in modern decision making, on two different levels, that of target selection at the command level and that of launching the actual attack, which is not the same, as the case of the attack on a bridge which also hit a civilian

29. Report to the Prosecutor, Appendix A, ¶ 21.

30. Article 57(2)(a)(i).

Targeting

train (not a selected target) demonstrates.³¹ A violation of this duty of due diligence is a violation of the law of armed conflict. In such cases as the attack against the Chinese Embassy in Belgrade, there are reasons to believe that indeed the selection of that particular building as a target was due to a violation of this obligation of due diligence and therefore a negligent violation of the law of armed conflict.

Decision-Making: Balancing Processes and Value Judgments

The evaluation of the military advantage to be derived from an attack is not only a matter of the relevant facts, but also a matter of value judgments. What constitutes an advantage is a matter of subjective evaluation. This raises the question of “whose values matter?” In a somewhat different context, namely the value judgment involved in the assessment of proportionality, the Report to the Prosecutor states that this must be the judgment of the “reasonable military commander.”³² This statement, plausible as it may appear at a first glance, is problematic. In a democratic system, the value judgment which matters most is that of the majority of the society at large. The military cannot and may not constitute a value system of its own, separated by waterproof walls from that of civil society. Such separation would be to the disadvantage of both the military and civil society. A dialogue between the two, critical and constructive in both directions, is needed.

This is essential for a number of reasons. There is no denying the fact that public opinion in many countries views the military with a critical eye. This is particularly true for certain organizations of civil society engaged in the promotion of human rights. It is certainly in the interest of both the military and civil society organizations to avoid a situation where such critique is based on a lack of understanding and on misconceptions.³³ Furthermore, the practice observed in recent conflicts indeed recognizes that targeting decisions have political implications. This is why certain decisions are reserved to persons

31. Report to the Prosecutor, Appendix A, ¶¶ 58–62.

32. *Id.*, ¶ 50.

33. A good example for the problem was the case of a German organization for the preservation of the language which chose “collateral damage” as the “bad expression of the year” for 1999. See the Unwort des Jahres website at <http://www.unwortdesjahres.org>. The mistake was on both sides. The organization was unaware of the technical character and meaning of the term, and the NATO spokesmen who had used it did not realize that the term transported a wrong message to the public, namely that damage to the civilian population and civilian objects were something which was unimportant and negligible for those who decided on targets in the Kosovo conflict.

that are very high in the governmental hierarchy. Targeting decisions engage the political responsibility to the electorate, i.e., civil society, of those holding high governmental offices. Therefore, these decisions have to be understandable and acceptable to civil society; hence the need for a dialogue.

The Problem of Errors

The question of values or value judgments leads to the problem of error or mistake in judgment. Such an error may relate to the facts or to the law. In the case of the Chinese Embassy, it was an error of fact. When the decision was made to attack a particular building, the decision-makers thought, or at least this is what we were told, that the building had a military use. The decision-makers did not know that it was the Chinese Embassy, which was obviously not a military objective.

In relation to attacks against railways and bridges, another question arises, namely the error of law. In this case, there was probably no erroneous evaluation of the actual use of those bridges and railway lines as a matter of fact. The essential error, if the view submitted by this paper is correct, consisted in a mistaken view of the law that considered traffic infrastructure as military objectives without asking the question of their military importance in the concrete context. As a matter of principle, an error of law does not exclude responsibility. *Ignorantia iuris* is no excuse or even circumstance excluding the wrongfulness of the behavior.

What are the consequences of these problems of due diligence and error on criminal accountability? The definition of war crimes contained in the statute of the permanent International Criminal Court³⁴ requires intent.³⁵ Violations of the laws of war committed by negligence are not subject to the jurisdiction of that court. The situation is, however, different with respect to the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY). Any violation of the laws and customs of war comes within the jurisdiction of that court according to Article 3 of its statute.³⁶ Thus, the ICTY would have had jurisdiction to prosecute and punish negligent violations of the laws of war which, as indicated, appear to be quite possible in this case. It is in this context that the question of error becomes most relevant. An error concerning the facts

34. U.N. Doc. A/CONF/183/9, July 17, 1998, DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 667.

35. *Id.*, art. 30, at 690.

36. Statute of the International Tribunal, U.N. Doc. S/25704, May 3, 1993. The text of the Statute is reprinted in 32 INTERNATIONAL LEGAL MATERIALS 1192 (1993).

may entail a negligent violation of the respective rule, an error concerning the law, as a rule, does not constitute a valid defense.

The Law of War and Humanitarian Intervention—Some General Reflections

It must be stressed that all these considerations concerning lawful means and methods of combat are independent from the question whether the Kosovo air campaign was or was not a violation of the rules of the United Nations Charter prohibiting the use of force. *Jus ad bellum* and *jus in bello* have to be kept separate. This is the essential basis for a realistic approach to the law of armed conflict that has to treat both parties to a conflict on an equal footing. Questions of the legality or illegality of the use of force in a particular context have to be raised in other contexts, not in that of the application of the *jus in bello*. The equality of the parties in relation to the *jus in bello* is an essential precondition to the effective functioning of this body of law. This is why the Preamble to Protocol I reaffirms this principle in no uncertain terms: “Reaffirming that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances . . ., without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”

The principle of the equality of the parties to a conflict does not exclude the need to consider the entire context of a conflict, its intrinsic character, when determining the concept of military objective. Military advantage, as already pointed out, is a contextual notion. Where the declared purpose of a military action is limited from the outset, where the goal pursued is not just victory, but something else, it is difficult to ignore this limitation when it comes to the question what constitutes an advantage in that particular context. Thus, where the exclusive purpose of a military operation is to safeguard the human rights of a certain population, this very context excludes, it is submitted, a legal construction of the notion of military advantage or contribution to the military effort which disregards the life and health of this very population. In other words, in this context, the notion of military objective has to be construed in a much narrower way than in other types of conflict.

This contextual concept of military advantage is, it is submitted, *lex lata*. It must not be confused with proposals *de lege ferenda* demanding special rules for the conduct of so-called humanitarian interventions. If such rules were to be adopted, they could only mean an additional unilateral restraint imposed on those States or organizations which intervene for the sake of safeguarding the

human rights of a certain population. Such rules could not and should not affect the rights and duties of the other party to the conflict.

More critical review of the notion of military advantage is needed. If the law were to be developed by a specific legal instrument relating to humanitarian intervention, why not impose on the forces maintaining the rule of law and human rights, obligations that are stricter than the usual rules of targeting valid for any belligerent?