

## 14 Targeting

### 14.0. Introduction

In common Article 2 international armed conflicts, lawful and unlawful combatants may be targeted. In common Article 3 non-international armed conflicts, individuals who may be targeted are, in general terms, any positively identified armed individual resisting antigovernment forces – insurgents, insurrectionists, rebels, and revolutionaries.

In this chapter we examine what *objects* may be lawfully targeted in a common Article 2 armed conflict. The law of armed conflict/international humanitarian law (LOAC/IHL) pertaining to the targeting of objects differs from that pertaining to targeting combatants – human beings. When “targeting” is described throughout this chapter, it is the targeting of objects – not combatants – that is being described. That is not to suggest that human beings cannot be military objectives, cannot be targets. They can be, just as military pack animals and working dogs in certain circumstances can be valid targets.

The targeting of objects involves all of LOAC’s four core principles, distinction, military necessity, unnecessary suffering, and proportionality – particularly distinction. Distinction, the cardinal principle of LOAC/IHL, is at the heart of lawful targeting. Proportionality is always a primary consideration for an attacking force and its targeting planning. Proportionality may dictate the timing of an attack to minimize damage collateral to that inflicted on the military personnel on the target; proportionality may dictate that a lawful military object not be targeted at all. A lack of military necessity should scratch a legitimate target from an air tasking order or fire support plan. Unnecessary suffering may decide that certain weapons should not be employed against enemy combatants; white phosphorus or napalm, for example. Command responsibility also is a possible targeting issue, as is its counterpoint, obedience to orders; the lawfulness of a commander’s targeting decisions, and their execution by subordinates, may raise issues of LOAC/IHL lawfulness.

Targeting issues have become ever more important, particularly in urban settings, like Iraqi cities, and in more austere situations, Afghan villages.

### 14.1. Defining a Lawful Objective

“Targeting” is the process of selecting enemy objects to be attacked, assigning priorities to the selected objects, and matching appropriate weapons to those objects to assure their destruction.

Through the nineteenth and early twentieth centuries, states generally agreed that only military objects should be targeted, but there was no definition of what a “military

objective” was. “[D]uring the Second World War . . . each belligerent determined what should be understood by such objectives as it pleased . . . [T]heir ideas often differed, depending on whether the territory concerned was their own, or was enemy territory, or territory of an ally occupied by enemy forces.”<sup>1</sup> Not until 1977 Additional Protocol I was an authoritative definition codified in a binding multinational document.

Article 52.2: “**Attacks shall be limited strictly to military objectives. Insofar 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 . . . offers a definite military advantage.**” This definition requires that an object meet two criteria to be a lawful military target or objective: First, it must make an effective contribution to military action, and, second, its total or partial destruction, capture, or neutralization must offer a definite military advantage.

Complementing Article 52.2., Article 48 reads: “. . . **the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . .**” The requirements of Articles 52.2 and 48 are customary law.<sup>2</sup> (Note that the terms “objects” and “objectives” are distinct, with different meanings. As will be discussed, using one when the other is meant will generate confusion.)

Protocol I, Article 57.2 (a) goes on to require that those planning an attack “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . .”

Although Article 52.2 is customary law, its rather vague definition can lend itself to different interpretations. There are targets that are clearly military objects, but Article 52.2. does little to clarify the term in cases where it is not obvious. “What constitutes an ‘effective contribution’ to military action? What is a ‘definite’ military advantage? What is the difference, if any, between an ‘indefinite’ and a ‘definite’ military advantage?”<sup>3</sup> No Protocol article, no law or rule can resolve all definitional questions, but those surrounding Article 57.2 have proven vexing.

An exception to Article 52’s abstraction is the definition of an “attack.” An attack is an act of violence, whether offensive or defensive, against the enemy.<sup>4</sup> A massive air bombardment or a sniper firing a single round may both be an attack. Beyond that, a closer examination of remaining definitional terms is needed.

## 14.2. Interpreting “Military Objective”

The term “military objective” first appeared in relation to the law of war in the 1923 Hague Rules of Aerial Warfare, Article 24.1: “An air bombardment is legitimate only

<sup>1</sup> Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds., *Commentary on the Additional Protocols* (Geneva: ICRC/Martinus Nijhoff, 1987), 631.

<sup>2</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), Rules 7 and 8, at 25 and 29, respectively. Also see: Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report, § 365.

<sup>3</sup> Michael Bothe, “Targeting,” in Andru E. Wall, ed., *International Law Studies*, vol. 78, *Legal and Ethical Lessons of NATO’s Kosovo Campaign* (Newport, RI: Naval War College, 2002), 173, 177.

<sup>4</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereafter, 1977 Additional Protocol I), Art. 49.1.

when directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent.” Several major powers objected to aspects of the 1923 Rules and they were never adopted,<sup>5</sup> but the 1923 Hague definition remains a good broad description of a military objective.

A military objective must have certain characteristics. The destruction of the target or objective must offer “a concrete and perceptible military advantage rather than a hypothetical and speculative one.”<sup>6</sup> It would be impermissible for a targeting team to muse, “If we take out the electrical grid it might cut power to the air defense system,” and act on that musing; the military nature of the power grid is speculative, lacking the objective military advantage required of a lawful military objective. Additionally, the required military advantage may not be purely political, for example, to force a change in the enemy’s negotiating stance.

... [T]he notion of “military advantage” is not singularly helpful. Surely, military advantage is not restricted to tactical gains. The spectrum is necessarily wide... The key problem is that the outlook of the attacking party is unlikely to match that of the party under attack in evaluating the long-term military benefits of any action contemplated. Moreover... assessment of the military advantage can be made in light of “an attack as a whole,” as distinct from “isolated or specific parts of the attack.” The attacking party may thus argue, e.g., that an air raid of no perceptible military advantage in itself is justified by having misled the enemy to shift its strategic gaze to the wrong sector of the front.<sup>7</sup>

Hays Parks agrees. He cites the 1942 morale-boosting Doolittle raid (launched from a U.S. aircraft carrier against targets on the Japanese mainland) and the 1971 heavy bombing of targets in the Hanoi–Haiphong area of North Vietnam, which are widely believed to have forced the North Vietnamese to negotiate a conclusion to the U.S.–North Vietnamese conflict, and the 1986 bombing of Libyan targets in response to Libyan-supported terrorist attacks that demonstrated U.S. resolve. “In each of the preceding cases,” Parks writes, “the United States would have been hard pressed to state that there was a ‘definite military advantage’ resulting from the operations described, or that the gain was not ‘potential’ or ‘indeterminate’; the result sought in each was speculative, as are most actions in war, and more psychological than military, although each had military effects.”<sup>8</sup>

Merely denying the use of an object (e.g., a highway or railway bridge) to the enemy may constitute a military advantage. In World War II, the military significance to the American army of the Rhine River’s Remagen Bridge was great: In 1945, its intact capture opened the way into Germany for tanks, towed artillery, and other wheeled and tracked weapons. Had the German army succeeded in destroying the bridge and denying its

<sup>5</sup> Although the 1923 Rules were never adopted, “at the time of their conclusion they were regarded as an authoritative attempt to clarify and formulate rules of air warfare, and largely corresponded to customary rules...” Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3d ed. (Oxford: Oxford University Press, 2000), 139. The term is subsequently used in 1949 Geneva Convention I, Art. 19, and Convention IV, Art. 18.

<sup>6</sup> Waldemar Solf, “Article 52,” in Michael Bothe, Karl Partsch, and Waldemar Solf, eds., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Hague: Martinus Nijhoff, 1982), 326.

<sup>7</sup> Yoram Dinstein, “Legitimate Military Objectives Under The Current *Jus In Bello*,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 144–5. Footnotes omitted.

<sup>8</sup> W. Hays Parks, “Air War and the Law of War,” 32–1 *Air Force L. Rev.* (1990), 1, 143.

use to the Allies, the tactical disadvantage would have been great. General Dwight Eisenhower called the capture of that single bridge “one of those bright opportunities of war which . . . produce incalculable effect on future operations.”<sup>9</sup> Another example is the Arnhem bridge over the Lower Rhine. In September 1944 it was key to British Field Marshal Bernard Montgomery’s plan to end the war in three months.<sup>10</sup> After furious fighting, it proved “a bridge too far,” however. German forces denied the bridge to Allied forces, and the war went on for another fourteen months. The Remagen and Arnhem bridges were of great military advantage to one side or the other.

The breadth of the term “military advantage” is not without limits, however. One cannot target at will, suggesting that the effect of destruction of this or that object bears on the war as a whole. Each attack must provide a concrete and perceptible military advantage. Furthermore, not every military *object* is necessarily a military *objective* to be targeted. “I would suggest that the *USS Constitution* in Boston Harbor is a military object, but not necessarily a military objective. Similarly, a civilian house, which may not be being used by the military in any way but may be interrupting a tank advance, can by its location be a military objective [that can be destroyed].”<sup>11</sup> (Although, if military necessity dictates that a civilian house be seized or destroyed to clear a field of fire or block an enemy avenue of approach, for example, the house ceases to be a civilian object and may be considered a military object.<sup>12</sup>)

The presence of civilians at or near a military objective does not automatically make that objective immune from attack. “This is the case, for example, of civilians working in a munitions factory . . . [S]uch persons share the risk of attacks on that military objective but are not themselves combatants . . . Such attacks are still subject to the principle of proportionality.”<sup>13</sup>

Economic targets, including multiple economic targets, are legitimate military objectives as long as they effectively support military operations, and if attacking them provides a definite military advantage.<sup>14</sup> Economic targets would be traditional targets such as oil production facilities – pipelines, pumping stations, refineries, and cracking plants – as well as natural gas facilities and steel plants. These resources are of great economic value and are also vital to sustain the conflict. Without them the state’s capability to carry on the conflict would wither, if not die. Once again, there are limits on what may be considered a legitimate economic target:

If a country relies almost entirely on, say, the export of coffee beans or bananas for its income and even if this income is used to great extent to support its war effort . . . it would not be legitimate to attack banana or coffee bean plantations or warehouses. The reason for this is that such plants would not make an *effective* contribution to *military* action nor would their destruction offer a *definite* military advantage. The definition of

<sup>9</sup> Gen. Dwight D. Eisenhower, *Crusade in Europe* (New York: Doubleday, 1948), 378.

<sup>10</sup> Cornelius Ryan, *A Bridge Too Far* (New York: Simon & Schuster, 1974), 90.

<sup>11</sup> Col. Charles Garraway, “Discussion: Reasonable Military Commanders and Reasonable Civilians,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 215. To the same effect: Parks, “Air War and the Law of War,” supra, note 8, at 146–7.

<sup>12</sup> Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook*, 2008 (Charlottesville: Judge Advocate General’s Legal Center and School, 2008), 20.

<sup>13</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, supra, note 2, at 31–2.

<sup>14</sup> *Id.*, at 32.

military objectives thus excludes the general industrial and agricultural potential of the enemy.<sup>15</sup>

A frequently cited example of an economic target is the Confederate cotton crop during the American Civil War. The south's cotton crop was a war-sustaining product, providing the Confederacy with almost its total means to prosecute the war – to import arms, provision its army, and finance the conflict. In 1870, a U.S. court reportedly recognized that the cotton crop constituted a war-sustaining character, making an effective contribution to military action and legitimizing its targeting.<sup>16</sup> Even though the United States takes an expansive view of what constitutes a lawful military objective, that court's conclusion is contrary to today's LOAC/IHL. “[O]bjects such as raw cotton or, to take a more contemporary example, oil, only under exceptional preconditions and circumstances are subject to military measures, i.e., only if they are used for military purposes.”<sup>17</sup> Of course, oil usually *is* used for military purposes. Professor Yoram Dinstein writes:

[T]he raw cotton illustration (which may be substituted today by the instance of a country relying almost entirely on the export of coffee beans or bananas) displays the danger of introducing the slippery-slope concept of “war-sustaining capability.” The connection between military action and exports, required to finance the war effort, is “too remote.” Had raw cotton been acknowledged as a valid military objective, almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort . . .<sup>18</sup>

Nor is enemy morale a valid targeting objective.<sup>19</sup> “Air attacks have a definite impact on the morale of the entire population and, thus, on political and military decision-makers. . . . [But] 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 [it] cannot be used as a legitimation for any targeting decision.”<sup>20</sup> Weakening enemy morale was one purported goal of World War II “area bombing,” although Parks suggests that “this may well have been an afterthought to explain away the inherent inaccuracy of [World War II] bombing.”<sup>21</sup> In any event, today area bombing is considered indiscriminate targeting and a LOAC/IHL violation.<sup>22</sup> The psychological effect of

<sup>15</sup> Maj.Gen. A.V.P. Rogers, *Law on the Battlefield*, 2d ed. (Manchester: Juris Publishing, 2004), 70–1. Emphasis in original.

<sup>16</sup> *Id.*, at 59, citing U.S. Dept. of the Air Force, *Commander's Handbook on the Law of Armed Conflict* (AFP 110–34) 1980, p. 2–1. The case has not been located, however.

<sup>17</sup> Wolff H. von Heinegg, “Commentary,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 204.

<sup>18</sup> Dinstein, “Legitimate Military Objectives Under The Current Jus In Bello,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 146. Footnotes omitted.

<sup>19</sup> Brig.Gen. Charles Dunlap, a U.S. Air Force judge advocate, disagrees. In a controversial article he writes, “We need a new paradigm when using force against societies with malevolent propensities. We must hold at risk the very way of life that sustains their depredations, and we must threaten to destroy the world as they know it if they persist. This means the air weapon should be unleashed against entirely new categories of property . . .” Brig.Gen. Charles J. Dunlap, “The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era,” *Strategic Rev.* 14 (Summer 2000).

<sup>20</sup> Bothe, “Targeting,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 180. Also, Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 116.

<sup>21</sup> Parks, “Air War and the Law of War,” supra, note 8, at 55.

<sup>22</sup> 1977 Additional Protocol I, Art. 51.4: “Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective. . . .” Art. 51.5 (b): “An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

destroying a particular military object or objective may be a legitimate targeting consideration, if the object is an otherwise lawful target. Like morale, however, psychological effect alone is not a valid military objective.

Other prohibited targets include cultural property (Chapter 15); objects indispensable to the survival of the civilian population (Additional Protocol I, Article 54); undefended places (1907 Hague Regulation IV, Article 25); and, not surprisingly, medical units and establishments (Geneva Convention I, Article 19). Paratroopers may be targeted, parachutists may not be<sup>23</sup> (1977 Additional Protocol I, Article 42).

Military objectives are not addressed in 1977 Additional Protocol II, in reference to non-international armed conflicts. A definition of military objects is included, however, in Amended Protocols II and III of the 1980 *Convention on Prohibitions on the Use of Certain Conventional Weapons*, both of those Protocols being applicable in non-international conflicts (Chapter 16).

### 14.3. Targets by Virtue of Nature, Location, Purpose, or Use

Military targets are commonly defined in terms of the two criteria of Article 52.2. First, military targets are objects which by their nature, location, purpose, or use make an effective contribution to military action. Second, military targets are objects the destruction of which offers a concrete and perceptible military advantage. Those four criteria – nature, location, purpose, and use – are by no means the sole considerations involved in targeting decisions, but they are key considerations. If a targeting cell correctly determines that a proposed target meets the two criteria of Article 52.2, it is a lawful target and military objective.

Notice the intertwining of nature, location, purpose, and use. Often, a military object will be included in more than one of those descriptive categories.

#### 14.3.1. *Military Objects Are Limited to Objects Which, by Their Nature . . .*

The intended target's "nature" refers to the type of object it is. Does the proposed target make an effective contribution to enemy military action? The military nature of some targets is clear: defense – or weapons-related industrial plants, major highways, military laboratories, navigable rivers, shipping, ports, power plants that serve the military, rail lines, equipment marshalling yards, and command centers such as the Pentagon. On a

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

<sup>23</sup> In World War II there was no international prohibition on targeting pilots or crew escaping from their damaged aircraft, although it was considered contrary to fair play, and unchivalrous conduct. A variation of the rule was apparently offered by the British high command. Fighter Command's Air Marshal Hugh Dowding said, "Germans descending [by parachute] over England were prospective prisoners and should be immune [from attack], while British pilots descending over England were still potential combatants. German pilots were perfectly entitled to fire on our descending airmen." One wonders how British pilots viewed their commander's statement. Quoted in Parks, "Air War and the Law of War," *supra*, note 8, at 109. Paradoxically, it was considered permissible to strafe aircrew as they emerged from a crash-landed aircraft. Some former German pilots also charge that the American 8th, 9th, and 15th Air Forces, based in England and Italy – but not British units – had unwritten policies of shooting German pilots in their parachutes. See Klaus Schmider, "The Last of the First: Veterans of the *Jagdwaaffe* Tell Their Story," 73–1 *J. of Military History* (Jan. 2009), 231, 238–9. Although there is no evidence known to substantiate such an allegation, a mere belief that such a policy existed encouraged retaliatory acts.

tactical level, enemy ships and boats, military barracks, fortifications, armored vehicles, artillery, aircraft, and tactical positions, all meet the “nature” criteria for military objects. The military *nature* of other objects becomes apparent only when the intended *use* of the object becomes clear. For example, a glassworks facility that produces eyeglass lenses and binocular lenses for hunters is not an inherently military object. If, upon the outbreak of armed conflict, the facility switches to the manufacture of optical sights for tactical rifles, the facility’s *nature* has changed, and its new *use* makes it a military object and lawful target.

#### 14.3.2. *Military Objectives Are Limited to Objects Which, by Their Location . . .*

“Location” includes areas that are militarily important because they must be captured or denied the enemy. When flying into or out of civilian airports, one sometimes observes military aircraft parked in a remote portion of the airfield – tactical helicopters, gray-painted transport aircraft, or jet fighters. That civilian airport is home to a military Reserve or Air National Guard unit. Were there an international armed conflict in progress, civilian passenger aircraft landing or departing from that airport would be “located” at a military objective. If the civilian aircraft were strafed and destroyed by an attacking enemy as collateral damage to a lawful attack on the military portion of the airfield, the civilian passengers would perish with the satisfaction of knowing that they had not been unlawfully targeted.

“The notion underlying the reference to location is that a specific land area can be regarded as a military objective.”<sup>24</sup> If there is an inherently civilian object within a clearly military objective, for instance a marked infirmary within an ammunition depot, or an elementary school on a naval base, the ammunition depot and naval base retain their character as military objectives. Logic and experience dictate that the damage or destruction of the civilian object placed close to or within a military objective must be accepted.

#### 14.3.3. *Military Objectives Are Limited to Objects Which, by Their Purpose . . .*

“Purpose” means the intended future use, or possible use. “The criterion of purpose is concerned with the intended future use of an object, while that of use is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops . . . they become military objectives. . . .”<sup>25</sup>

The purpose of a recently launched cruise ship is to serve as a civilian luxury liner, but it may become a military object, quickly transformed into a troop transport, as was often done in World War II and the Korean conflict. As late as the 1982 U.K.–Argentine Falklands conflict, the P&O Cruise Line’s 45,000-ton *Canberra* was requisitioned by the British Ministry of Defense, hastily converted to troop use, and used to transport 2,000 combatants to the Falklands.<sup>26</sup> *Purpose* may be superseded by later *use*.

<sup>24</sup> Dinstein, “Legitimate Military Objectives Under The Current Jus In Bello,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 150.

<sup>25</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 636.

<sup>26</sup> Max Hastings and Simon Jenkins, *The Battle for the Falklands* (New York: Norton, 1983), 88.

During the U.S. invasion of Iraq, was Saddam Hussein's lavish 360-foot, 7,359-ton presidential yacht, *al Mansur* (*The Victor*) a military object? In March 2003, after reports that military communications were emanating from the yacht, a U.S. Navy S-3B Viking aircraft from the aircraft carrier *USS Constellation* (CV-64) fired a missile into the ship, setting it afire. Days later, after additional strikes, the *al Mansur* finally settled on her side in Basra's Shatt al Arab waterway, to become a long-time navigation hazard. "It seems a safe conclusion, albeit with incomplete information, that targeting the yacht intended either (or perhaps both) to create a powerful symbol of the [Saddam] regime's demise . . . or to prevent her use as a regime sanctuary or headquarters. On the other hand, three factors suggest the *al Mansur* was simply a maritime target of opportunity."<sup>27</sup> The three factors were the unlikelihood that the yacht was designated a priority target, the novel use of a missile-firing S-3B in an over-land strike, and the practice at the time of expending unused munitions on targets of opportunity rather than returning to the aircraft carrier with armed weapons.

Was the possible *use* of the *al Mansur* as a command and control vessel, with its Republican Guard crew, sufficient to overcome the yacht's *purpose* and render it a military objective? Did its destruction offer a definite military advantage? A U.S. Navy intelligence analyst who was involved in the targeting writes, "[C]onsidering the cost, labor, risk . . . and the arguably minimal effect achieved, perhaps it does not serve as a case of how to use naval air power."<sup>28</sup>

#### 14.3.4. *Military Objectives Are Limited to Objects Which, by Their Use . . .*

Like purpose, "use" does not depend on the object's original or intended utilization. A location inhabited by civilians, if defended by military personnel – a defended place – is a lawful target by virtue of its use.<sup>29</sup> The environment illustrates how use may influence targeting decisions. In the U.S.–Vietnam conflict, bamboo was widely used in making sharpened punji stakes that were embedded in camouflaged holes to impale the feet of passing U.S. soldiers. Bamboo groves did not therefore become military objects and lawful targets because of the use to which they were often put. Their destruction would neither make an effective contribution to military action nor offer a definite military advantage. In any event, the natural environment is protected with debatable effectiveness by the 1976 Environmental Modification Convention,<sup>30</sup> and by 1977 Additional Protocol I, Articles 35.3 and 55.1: "Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage. . . ." <sup>31</sup> Environmental attacks are

<sup>27</sup> Cmdr. John Patch, "Taking Out Saddam's Floating Pleasure Palace," U.S. Naval Institute's *Proceedings* (Sept. 2008), 33.

<sup>28</sup> *Id.*, at 36.

<sup>29</sup> 1907 Hague Resolution IV, Art. 25; 1977 Additional Protocol I, Art. 59 (2); International Criminal Court Statute, Art. 8 (2)(b)(v).

<sup>30</sup> U.N. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1976), Art. 1.1: "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects. . . ."

<sup>31</sup> Protocol I, Art. 35.3 similarly reads, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Still, "belligerents can continue to wage 'conventional warfare' (including artillery bombardment with its attendant disturbance of the ecosystem) without fear of violating the principle of protection of the natural environment. Such fear they need to harbour solely when they have recourse to rather less conventional modes of warfare, such as the use of herbicides or other methods or means specifically designed



prohibited only when the damage is anticipated to be all three – widespread, long term, and severe. Proportionality is a consideration when the environment may be collaterally damaged. The International Court of Justice warns, “. . . States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”<sup>32</sup>

“Taking care” and “environmental considerations,” however, are not the same as excluding all targeting that may effect the environment. “These provisions do not automatically prevent certain types of military objectives such as nuclear submarines or super tankers from being legitimate targets nor do they automatically prevent the use of certain means of warfare such as herbicides and chemical agents. The effects of attacking these targets or using these means *must be considered*.”<sup>33</sup> Despite noble intentions, Articles 35 and 55 are not customary law. A thousand-year-old grove of redwood trees, or a supertanker the sinking of which would cause untold environmental damage, could be targeted if *used* for enemy military purposes, as long as military necessity and proportionality considerations were satisfied.

Schools, hospitals, and mosques, among other civilian objects, are protected and may not be targeted.<sup>34</sup> During the common Article 2 phase of Operation Iraqi Freedom, in March 2003, units of the U.S. Army’s 82nd Airborne Division were advancing toward the city of As Samawah against heavy enemy resistance. “The paratroopers quickly learned that the Iraqis in As Samawah were using schools, mosques, and hospitals as headquarters and logistics sites.”<sup>35</sup> The objects being used in violation of LOAC lost their protected status and became lawful military objectives.<sup>36</sup>

**SIDEBAR.** Can a civilian passenger airliner be a military object and a lawful target?<sup>37</sup> At 0846, on September 11, 2001, al Qaeda hijackers flew American Airlines Flight 11 into the North Tower of New York City’s World Trade Center. At 0903, other hijackers flew United Airlines Flight 175 into the South Tower. President George W. Bush was visiting an elementary school in Sarasota, Florida. In Washington, D.C., Secret Service agents hustled Vice President Richard Cheney into a shelter deep under the East Wing of the White House. American Airlines Flight 77 and United Airlines Flight 93 were known to still be speeding in the direction of

to damage the environment; even then, the protection afforded to the environment remains restricted to really serious forms of large-scale damage, meeting the requirements of being ‘widespread, long-term and severe.’” Frits Kalshoven, *Reflections on the Law of War* (Leiden: Martinus Nijhoff, 2007), 232–3.

<sup>32</sup> International Court of Justice (ICJ), *The Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion), (1996), para. 30. Footnotes omitted.

<sup>33</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 5.29.3, at 76. Emphasis supplied.

<sup>34</sup> 1907 Hague Regulation IV, Art. 27; 1949 Geneva Convention IV, Art. 18; and 1977 Additional Protocol I, Art. 52.3.

<sup>35</sup> COL Gregory Fontenot, LTC E.J. Degen and LTC David Tohn, *On Point: The United States Army in Operation Iraqi Freedom* (Fort Leavenworth, KS: Combat Studies Institute Press, 2004), 214.

<sup>36</sup> Loss of protected status is addressed in 1907 Hague Regulation IV, Art. 27; 1949 Geneva Convention IV, Art. 19; 1977 Additional Protocol I, Arts. 13.1, 52.3; and Additional Protocol II, Art. 11.2. Also, Dinstein, “Legitimate Military Objectives Under The Current Jus In Bello,” in Wall, *Legal and Ethical Lessons*, supra, note 3, at 150: “If . . . the minaret of a mosque is used as a sniper’s nest, the presumption [of Art. 52(3) protection] is rebutted and the enemy is entitled to treat it as a military objective.”

<sup>37</sup> The targeting of civilian aircraft, generally, is addressed in the 1929 Hague Rules of Air Warfare, Arts. 33 and 34.

Washington, D.C. Sometime between 1010 and 1015, a military aide asked the vice president a question regarding Flight 77, with sixty-four passengers and crew aboard, and closing on Washington, D.C. “The jetliner was presumed hostile, but packed with innocents. Should the Air Force shoot it down? Cheney paused . . . Then he answered: Yes.”<sup>38</sup>

Although there are questions surrounding the vice president’s order – what LOAC/IHL applied at the moment of his order and did he have authority to issue the order since the vice president is not in the military chain of command – the status of the target was apparent: The civilian aircraft had become a military object and lawful target by virtue of its use. Had Air Force interceptors shot down Flight 77, the sixty-four innocent passengers aboard would have been (one hesitates to use the words, with their horrific implications) collateral damage.

#### 14.4. Dangerous Forces

In international armed conflict, three types of targets, referred to as “dangerous forces,” are exempt from attack despite being military objectives. “Works or installations containing dangerous forces, namely dams, dykes and nuclear generating stations, shall not be made the object of attack, even when these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population . . .”<sup>39</sup> Additional Protocol II, Article 15, applies the same prohibition to non-international armed conflicts. The term “severe losses” must be judged in good faith on the basis of objective elements, such as the existence of heavily populated civilian areas that might be affected by the release of dangerous forces.<sup>40</sup>

The exemption of dangerous forces was not always the case. In World War II, on the night of May 16–17, 1943, sixteen British Lancaster heavy bombers, flying in darkness at an altitude of only sixty feet, each armed with a single 9,250-pound bomb especially designed for the mission, attacked and breached the Möhne and Eder dams, deep in western Germany. Eight of the sixteen bombers were shot down, but millions of gallons of water from the breached dams cascaded down the Ruhr valley. “Buildings standing on the floor of the valley were destroyed up to a distance of 65km from the dam; so were bridges 50km away . . . Destruction in the valley was undoubtedly severe, with water and electricity supplies seriously effected.”<sup>41</sup> Vital German military industries were deprived, at least temporarily, of the power needed to function. “A week later the waters reached Holland and Belgium more than 100 miles away, sweeping away countless bridges and embankments en route.”<sup>42</sup> German civilians also paid a heavy price. “The village of Günne had been virtually washed away, [and] most of the town of Neheim-Hüsten.”<sup>43</sup>

<sup>38</sup> Barton Gellman, *Angler* (New York: Penguin Press, 2008), 119.

<sup>39</sup> 1977 Additional Protocol I, Art. 56.1. The Article concludes, “Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.”

<sup>40</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 1463.

<sup>41</sup> John Sweetman, *The Dambusters Raid* (London: Arms and Armour, 1990), 153.

<sup>42</sup> Alan Cooper, *The Dambusters Squadron* (London: Arms and Armour, 1993), 29.

<sup>43</sup> *Id.*, at 101.

Indeed, 1,300 noncombatants, including allied prisoners of war were killed in the raid.<sup>44</sup> Air Marshal Harris reported, “staggering destruction had been inflicted throughout the Ruhr . . .”<sup>45</sup> The leader of the bombing raid, Wing Commander Guy Gibson, was awarded the Victoria Cross, England’s highest award for combat valor. Books and movies heralded “the Dambusters raid.” Could the acts for which the Victoria Cross was awarded in 1943 earn a court-martial today?

Professor L.C. Green writes of today’s dangerous forces targeting exemption. “It is nearly inconceivable that massive risks to the civilian population could ever be outweighed by military considerations so as to justify an attack on such installations *used purely for civilian purposes*. The attack is accordingly strictly prohibited and cannot be justified by any claim of military necessity, except under the exception of paragraph 2 of Article 56 [Additional Protocol I].”<sup>46</sup> (Emphasis supplied.) Professor Dinstein, in contrast, considers the exemption “extraordinary.” He writes: “The exemption attaches to them not only where they are civilian objects, but even when they glaringly constitute military objectives . . .”<sup>47</sup> Still, the exception Professor Green mentioned is significant:

The special protection against attack . . . shall cease:

- (a) for a dam or dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
- (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
- (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of such support.

A disapproving Frits Kalshoven writes:

Evidently, the “special protection” afforded under [Article 56] paragraph I . . . does not amount to unconditional immunity from attack. Rather, the protection remains dependent on whether the attack “*may cause*” the release of dangerous forces and consequent *severe* losses among the civilian population . . . [T]he test seems to be whether, in light of all the information available at the time, these effects could objectively have been foreseen.<sup>48</sup>

One may reasonably argue that, if exceptions may be made on the grounds of military necessity, subjective and elastic as that concept is, that leaves military commanders considerable discretion to employ the exception rather than observe the rule. Another issue is that defensive weapons, such as anti-air or anti-missile weapons, may be installed to defend installations containing dangerous forces. “This gives rise to quite complicated considerations for military commanders. They have to be able to distinguish defensive

<sup>44</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 667.

<sup>45</sup> Henry Probert, *Bomber Harris: His Life and Times* (London: Greenhill Books, 2001), 254.

<sup>46</sup> Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Manchester University Press, 2000), 158.

<sup>47</sup> Dinstein, *The Conduct of Hostilities*, supra, note 20, at 173.

<sup>48</sup> Kalshoven, *Reflections on the Law of War*, supra, note 31, at 235. Emphasis in original.

weapons from other military objectives and they have to be able to distinguish offensive from defensive uses of those weapons.”<sup>49</sup> The International Committee of the Red Cross (ICRC) responds, “it should be stressed . . . that in such cases where the highest human interests are at stake, the decision to deprive them of protection can only be taken at a high military level.”<sup>50</sup> To a lieutenant, however, a colonel is a “high military level.”

The ICRC study of customary international law indicates that the exemption of dams, dykes, and nuclear generating stations is customary law.<sup>51</sup> The study’s supporting text is tentative and somewhat unconvincing, however. Dinstein’s disagreement that it is customary law seems well-founded.<sup>52</sup> What remains clear is that, despite Article 56, there remains considerable room for attacks on installations containing dangerous forces, particularly if they have even slight military use.

#### 14.5. Making Targeting Decisions

Military forces employ strict protocols in making targeting decisions. Those protocols improve and mature, change to meet conflict circumstances, and seldom remain static for long. The target selection process, for military objects to be attacked by air forces, at least, can be described in general terms.

In aviation usage, targets can be “planned” or “immediate.” “Planned targets are those known to exist in the operational area and are attacked in accordance with an air tasking order (ATO), mission-type order, or fire support plan . . . Immediate targets are not identified (or selected for attack) soon enough to be included in the normal targeting process . . . [A]s a general matter, planned targets are more conducive to precision attack than unplanned.”<sup>53</sup> In Operation Desert Storm (1991), “the ATO did not respond as rapidly when air operations progressed and emphasis shifted to more mobile targets.”<sup>54</sup> In other words, an ATO is not suited to targets of opportunity. Here, we examine the targeting of planned targets, rather than targets of opportunity.

Professor Michael Schmitt, a former U.S. Air Force targeting officer, has described the targeting process as a six-phased exercise. His description is not immutable, and other targeting experts may offer varying descriptions. Phases may overlap to greater or lesser degrees – the targeting process is not always a distinct series of isolated decisions and actions. Also, Schmitt’s depiction may differ from major U.S. command to major

<sup>49</sup> UK Ministry of Defence, *Manual of the Law of Armed Conflict*, supra, note 33, at para. 5.30.10, at 79. Indeed, Kalshoven writes, “Article 56 . . . undoubtedly contains one of the most peculiar and complex sets of rules in the Protocol.” Kalshoven, *Reflections on the Law of War*, supra, note 31, at 234. Professor Kalshoven, a retired Dutch Naval officer turned scholar, ascribes at least part of the hidden complexity of Art. 56 to its author: “[T]he quoted words were written by a lawyer who has never in his life been a member of the armed forces: [American] Mr. George Aldrich, Rapporteur of Committee III [which was responsible for the Article].” Id., at 236.

<sup>50</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 670.

<sup>51</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, supra, note 2, Rule 42, at 139.

<sup>52</sup> Dinstein, *The Conduct of Hostilities*, supra, note 20, at 173: “This is an innovative stricture, which cannot be viewed as part of customary international law (unless excessive collateral damage to civilians is anticipated). It is definitely inconsistent with previous practice . . .”

<sup>53</sup> Michael N. Schmitt, “Precision Attack and International Humanitarian Law,” 859 *Int’l Rev. of the Red Cross* (Sept. 2005), 445, 450–1.

<sup>54</sup> Dept. of Defense, *Conduct of the Persian Gulf War* (Washington: GPO, 1992), 103.

U.S. command, but it does provide a useful outline of the targeting process, a process throughout which judge advocates are involved:

The legal advisor's role/responsibility . . . is to offer well-reasoned advice . . . This requires knowing the law, awareness of other restrictions, understanding of the military and political objectives, familiarity with the methods of achieving those objectives and, finally, the ability to synthesize and make a recommendation on a target or set of targets . . . Legal advisors provide recommendations on whether the proposed use of force abides by the law of war and do this by offering advice on both restraint and the right to use force . . . However, the final decision will always be the commander's. Legal advisors do not . . . approve or disapprove targets.<sup>55</sup>

In Schmitt's six-phase targeting model, first, the force commander sets campaign objectives, which sets the targeting process in motion. Schmitt writes, "During this phase, the enemy's military, political and economic systems . . . are studied. The value of potential targets is analyzed to determine the relative need to strike them, and international humanitarian law and rules of engagement factors are considered."<sup>56</sup> In Operation Desert Storm, for instance, twelve strategic "target sets" were formulated to assist in achieving the coalition's five military objectives. "The method for producing the daily attack plan involved synthesizing many inputs – battle damage assessment (BDA) from previous attacks, CINCCENT [commander-in-chief, Central Command] guidance, weather, target set priorities, new targets, intelligence, and the air campaign objectives. The target sets were interrelated and were not targeted individually."<sup>57</sup> The vast majority of targets are approved in-theater – the location in which the conflict occurs. Targets that are sensitive due to their location or nature, such as electric power grids, infrastructure objects, and targets in built-up areas, may require approval by the Pentagon's Joint Staff and the Joint Chiefs of Staff. Occasionally, Secretary of Defense approval is sought. Given the lengthy Operation Desert Storm build-up period before the Iraqis were attacked and ejected from Kuwait, planners had the unusual luxury of detailed and well-considered target planning.

To help strike planners, CENTCOM [Central Command] target intelligence analysts, in close coordination with the national intelligence agencies and the State Department, produced a joint no-fire target list. This list was a compilation of historical, archaeological, economic, religious and politically sensitive installations in Iraq and Kuwait that could not be targeted. Additionally, target intelligence analysts were tasked to look in a six-mile area around each master attack list target for schools, hospitals, and mosques to identify targets where extreme care was required in planning . . . When targeting officers calculated the probability of collateral damage was too high, the target was not attacked. . . .<sup>58</sup>

<sup>55</sup> Col. Tony Montgomery, "Legal Perspective from the EUCOM Targeting Cell," in Wall, *Legal and Ethical Lessons*, supra, note 3, at 189–90.

<sup>56</sup> Dept. of Defense, *Conduct of the Persian Gulf War*, supra, note 54, at 452.

<sup>57</sup> Id., at 95. The twelve target sets were: Leadership Command Facilities; Electricity Production Facilities; Telecommunications and Command, Control, and Communications Nodes; Strategic Integrated Air Defense System; Air Forces and Airfields; Nuclear, Biological and Chemical Weapons Research, Production, and Storage Facilities; Scud Missiles, Launchers, and Production and Storage Facilities; Naval Forces and Port Facilities; Oil Refining and Distribution Facilities; Railroads and Bridges; Iraqi Army Units Including Republican Guard Forces; and Military Storage and Production Sites.

<sup>58</sup> Id., at 100.

Planners are not often able to devote such time and effort to targeting decisions. There were still many friendly fire incidents involving both aircraft and ground combatants. Any targeting plan, no matter how meticulously formulated, is subject to the vagaries of combat. Weather, visibility, smoke, and enemy defenses all degrade the accuracy sought by planners and which is mandated by Protocol I's Articles 48 through 60.

In Schmitt's second phase, target development, the enemy's military, political, and economic systems are studied. Their relative values and their interrelationships help to decide targeting priorities.

In the third phase, weaponeering, force application is decided. This decision involves consideration of the best-suited weapons available, the degree of damage desired, and issues of potential collateral damage. "[D]uring Operation Iraqi Freedom, US forces engaged in computer modeling to 'determine the weapon, fuse, attack, angle, and time of day that will ensure maximum effect on the target with minimum civilian casualties.' When the model estimate exceeded 30 civilian casualties, Secretary of Defense approval was required for the mission."<sup>59</sup> "The intense concern over the issue of collateral damage . . . meant that only a certain type of munitions could be used or the target could only be attacked at certain times of day. Thus, something as simple as a change in munitions could raise the level of collateral damage above what had been approved and, thus, remove a target from the 'approved for strike' category."<sup>60</sup>

The fourth targeting phase is the force application phase: What aerial weapons system is best suited to achieve the best result for the particular target? What available aircraft is the best delivery platform for the selected weapon? Is an F-117 stealth ground attack aircraft more likely to penetrate enemy defenses? Will the F-117's limited bomb capacity be sufficient to achieve the desired degree of target damage? Do its stealth characteristics offer a better chance of evading enemy defenses, or is a flight of B-52 heavy bombers with its immense weapons capacity better suited to the mission?

Fifth, in the execution planning and force execution phase the actual mission is designed; how the target will be identified and tactics decided – target approach and egress routes, altitudes, air-to-air refueling points, radio frequencies – tactical issues vital to pilots and controllers.

In the final phase, combat assessment, the execution and effectiveness of the completed mission is evaluated to determine if another attack is required or if the mission was successful.<sup>61</sup> Finally, "[j]ust as each level of command has its own operators and intelligence officers, so too do they have their own legal advisor. The legal advisors were in constant contact discussing both the broad impact of changes in guidance, as well as specific issues on individual targets."<sup>62</sup>

Collateral damage is a primary targeting concern. For example, Operation Allied Force, March to June 1999, was NATO's bombing attack on Serbian civilian and military infrastructure to force a Serbian retreat from Kosovo. For targets that were not approved in-theater because of their sensitivity, the operation's American elements employed a complex analysis of collateral damage. Proposed targets involving the potential of

<sup>59</sup> *Id.*, at 458. Footnote omitted.

<sup>60</sup> Montgomery, "Legal Perspective from the EUCOM Targeting Cell," in Wall, *Legal and Ethical Lessons*, supra, note 53, at 195.

<sup>61</sup> Schmitt, "Precision Attack and International Humanitarian Law," supra, note 53, at 453.

<sup>62</sup> Montgomery, "Legal Perspective from the EUCOM Targeting Cell," in Wall, *Legal and Ethical Lessons*, supra, note 3, at 196.

significant civilian casualties were forwarded to the Pentagon. The Joint Staff's intelligence division made an independent assessment of the target. Using slides, the intelligence division briefed the Joint Chiefs of Staff, and, if considered necessary, the Secretary of Defense. Rarely, the President was briefed. "The contents of the slides showed the objective . . . Was it command and control, was it integrated air defense, was it industrial-military, and what was the collateral damage estimate? . . . The slide would also have a casualty estimate which would include sometimes both the combatants and the noncombatants."<sup>63</sup> Attempting to quantify military necessity and proportionality, the Joint Staff created a matrix rating the military significance of the target and rating collateral damage as high, medium, or low. The matrix also included consideration of outliers, "the potential for a bomb or missile to miss its target . . . This assessment [of outliers] was particularly important where . . . there was a heavily built-up area with large urban structures around the target. There was a greater risk of outliers in those situations."<sup>64</sup> Judge advocates then conducted a legal assessment of the target to ensure that, by its nature, location, purpose, or use, the targeted object made an effective contribution to the military action and that its damage or destruction offered a definite military advantage. Finally, the target was approved or disapproved by the Joint Chiefs, the Secretary of Defense, or the President. NATO allies have systems that are similarly stringent in their efforts to minimize collateral damage.

The targeting processes described are already more than a decade old. Today, more detailed targeting models are in place for aviation-delivered ordnance, using more sophisticated computer-based graphics, modeling, and algorithms.

Targeting decisions are not limited to aerial munitions, of course. Ground artillery units are integral to all large ground units. Artillery in support of infantry forces relies on trained spotters, or the infantrymen themselves, to locate and identify suitable targets. Shared map references, continuous radio contact, and Fire Direction Center personnel place ordnance on the target.

Differing missions may call for differing targeting methods. The targeting decision process varies, depending on the tactical goal and the particular mission. What all decision processes share are the requirements of distinction, military necessity, and proportionality.

Despite best efforts, combat zone targeting will always result in collateral damage and injury or death from friendly fire. "Protocol I prescribes that efforts have to be made in order to ascertain the military character of an objective. On the other hand, the targeting decision is certainly one which has to be taken in a context of uncertainty."<sup>65</sup> Advances in tactics and technology continue to reduce the number of such incidents. Precision-guided munitions (PGMs) – global position satellite (GPS) – and laser-guided munitions – result in impressive reductions in civilian injuries and deaths, as well as fewer damaged or destroyed civilian objects. During 1991's Operation Desert Storm, 8.8% of U.S. aerial attacks employed PGMs. Operation Allied Force, the 1999 NATO air strikes on President Milosevic's military and security structure in Kosovo, saw a rise to roughly 33% of aerial attacks that employed PGMs. In 2001's Operation Enduring Freedom, in Afghanistan, 65%, and in Operation Iraqi Freedom, in 2003, 68% of U.S. air strikes involved PGMs.

<sup>63</sup> Harvey Dalton, "Commentary," in Wall, *Legal and Ethical Lessons*, supra, note 3, at 200.

<sup>64</sup> Id.

<sup>65</sup> Bothe, "Targeting," in Wall, *Legal and Ethical Lessons*, supra, note 3, at 183.

Given the greater accuracy of PGMs, one may ask why their use is not mandatory. The reason is that PGMs remain sufficiently expensive that they are beyond the economic reach and technological capabilities of most states.<sup>66</sup> A delegate to 1977 Additional Protocol I said of Article 48, which mandates that combatants distinguish between civilian and military targets, “this article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally at a particular moment, this article does not require a party to do something which is not within its means or its capacity.”<sup>67</sup>

#### 14.6. Dual-Use Targets

Like the term “unlawful combatant,” the term “dual-use target” does not appear in the Geneva Conventions or Additional Protocols. The term “has arisen out of an apparent need to describe the class of objects that do not appear to fit neatly within Article 52(3), i.e. ‘normally dedicated’ to civilian purposes, such that the presumption that they are civilian cannot be readily applied.”<sup>68</sup> A dual-use target is one with both military and civilian functions, such as an airfield from which both civilian and military aircraft fly. Examples also include electric power grids, oil-refining facilities, and radio and television broadcasting sites. Even highways, bridges, ports, and railways can be considered dual-use. They all serve needs of both the civilian community and the armed forces. In industrialized, urbanized states in which such potential military objects are intermingled, “it is difficult to neutralize the military effectiveness of those targets without simultaneously harming the civilian population.”<sup>69</sup> Yes, the destruction of the enemy capitol city’s electrical power grid will degrade or eliminate the country’s military radar system and communications link, but it will also cut off power to the city’s hospitals, domestic water supply system, and central sewage plant. Is a dam that produces hydroelectric power for armament plants and also acts as a reservoir for drinking water a military object, or is it a civilian facility with the potential to flood the countryside? Is a television broadcasting facility a civilian object providing civil defense information to civilians, or, because it may be used to broadcast instructions to military forces and disseminate propaganda, is it a lawful target? Proportionality and military necessity, the yin and yang of military operations, become difficult assessments.<sup>70</sup>

In Gulf War I (1990), the Al Furdos bunker in central Baghdad was an important command and control center, military communications hub, and secret police headquarters. Clearly a military object, it was bombed by U.S. aircraft late at night, when the fewest military personnel would be inside. (See Chapter 7, section 7.1.1.) Unknown to the

<sup>66</sup> John F. Murphy, “Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO’s Kosovo Campaign,” 31 *Israel Yearbook on Human Rights* (2001), 51, 63.

<sup>67</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 599.

<sup>68</sup> Marco Sassòli and Lindsey Cameron, “The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*,” in, Natalino Ronzitti and Gabriella Venturini, eds., *The Law of Air Warfare* (Utrecht, the Netherlands: Eleven International Publishing, 2006), 35, 57.

<sup>69</sup> Rogers, *Law on the Battlefield*, supra, note 15, at 71.

<sup>70</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 636: “In such situations the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must be expected among the civilian population and the damage which would be caused to civilian objects.”



United States, at night the bunker also sheltered families of military personnel assigned to the bunker, and 204 individuals, most of them civilians, were killed in the attack. Had the dual-use of the bunker been known, would the bombing have been lawful or not? Viewed solely as a military object, targeting the bunker was obviously lawful. Given the information available at the time to U.S. targeting personnel, and in light of the satellite reconnaissance and human intelligence that appeared to support that information, targeting the bunker was reasonable. Nevertheless, after the Al Furdos incident, American planners effectively put central Baghdad targets off limits to bombing. Would the result have been different had CNN not televised the bodies of women and children being removed from the ruined bunker? Would it have made a difference if 20 noncombatants had been killed, rather than 200?

Dual-use targeting decisions are sometimes easier. Electric power grids have been mentioned. Major-General A.V.P. Rogers, former Director of Legal Services of the British Army, writes of Gulf War I:

The modern military machine relies very heavily on electrical power, especially for command, control, communications and air defence systems. Take away that power and the enemy is severely handicapped and may be rendered blind and leaderless and vulnerable to air attack. The suggestion by [writers in disagreement] that repeated attacks are not necessary where a war is going to be short is unrealistic . . . and the allies were fully entitled to take no risks in that respect. In these circumstances, power sources become military objectives. . . . The writer would reject the allegation that repeated bombing of previously disabled electrical facilities served no military purpose. The purpose obviously is to prevent repair and keep the facility out of action.<sup>71</sup>

NATO bombers dropped munitions that deployed tinfoil-like streamers to drape over power lines and short them out, requiring days to repair. The power grid remained largely intact, however, without requiring total rebuilding. General Rogers stresses the importance of proportionality in all cases. Professor Dinstein, in agreement, writes, “From a legal viewpoint, a ‘dual use’ of Iraq’s electric grid did not alter its singular and unequivocal status as a military objective.”<sup>72</sup> Just as there were factors other than LOAC/IHL that made the Al Furdos bunker exempt from further bombing, there could be factors exempting an electric power grid from attack. Every case is distinctive.

During Operation Allied Force, the 1999 NATO bombing of Serbian targets, including some in the Yugoslav capitol, the Serbian state television and radio station, RTS, in Belgrade, was bombed. This attack, which resulted in the deaths of ten to seventeen non-combatants (a firm number was never established), along with other air attacks, caused numerous formal complaints from non-governmental organizations to be lodged with the International Criminal Tribunal for the Former Yugoslavia’s (ICTY’s) Chief Prosecutor. In accordance with Article 18 of the ICTY Statute, she established a committee of experts to assess all of the complaints and charges, including the bombing of the radio and television station. In its final report, the committee said:

NATO stressed the dual-use to which such communications systems were put, describing civilian television as “heavily dependent on the military command and control system and military traffic is also routed through the civilian system.” . . . NATO claimed that

<sup>71</sup> Rogers, *Law on the Battlefield*, supra, note 15, at 75–6.

<sup>72</sup> Yoram Dinstein, “Discussion: Reasonable Military Commanders and Reasonable Civilians,” in, Wall, *Legal and Ethical Lessons*, supra, note 3, at 219.

the RTS facilities were being used “as radio relay stations and transmitters to support the activities of the FRY [Federal Republic of Yugoslavia] military and special police forces, and therefore they represent legitimate military targets. . . . More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which it [RTS] was employed. . . .”<sup>73</sup>

With the proviso that an attack based solely on RTS’s role in Serbian propaganda dissemination would be questionable, the committee of experts recommended there be no formal investigation. (See Cases and Materials, this chapter.) Targeting radio and television facilities remains controversial, nevertheless. The U.S. position is that, generally, such dual-use facilities are military objectives. That position is supported by the 1954 Hague Cultural Property Convention that refers to broadcasting stations as military objectives. Some European-based commentators, disagree.<sup>74</sup> “[M]any in the humanitarian law community,” as well, “believe the attack was unlawful under the circumstances.”<sup>75</sup>

A reasonable guideline: “Attacks on a media station may be permissible . . . subject to the rule of proportionality, if it helps the enemy in its military operations, for example, if it is integrated into the military communications system . . . but not if it merely broadcasts news.”<sup>76</sup> A similar guideline may be applied to other dual-use objects.

#### 14.7. Indiscriminate Attacks

“Attacks against civilian objects are banned not only when they are direct and deliberate, but also when they are indiscriminate.”<sup>77</sup> The basic rule of Protocol I, Article 48, requiring that only military objectives be targeted, is complemented by the rule that attackers must also observe distinction – must discriminate – in their attacks. The prohibition on indiscriminate attacks, first raised in the 1923 Hague Rules of Air Warfare, Article 24(3), are repeated in 1977 Additional Protocol I, Article 51(4):

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Parts (a) and (b) of Article 51(4) restate the core concept of distinction, and part (c) restates the proportionality concept in saying that any attack that violates proportionality

<sup>73</sup> *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 13, 2000), paras. 72–4. Available at: <http://www.un.org/icty/pressreal/nato061300.htm>.

<sup>74</sup> Not all European experts disagree: “[C]oncentrating on the broadcasting station . . . we must admit that under the laws of war, enemy means of communication have always been and always will be considered legitimate military objectives.” Wolff H. von Heinegg, “Commentary,” in, Wall, *Legal and Ethical Lessons*, supra, note 3, at 205.

<sup>75</sup> Michael N. Schmitt, “Targeting and Humanitarian Law: Current Issues,” 33 *Israel Yearbook on Human Rights* (2003), 59, 69.

<sup>76</sup> Rogers, *Law on the Battlefield*, supra, note 15, at 83.

<sup>77</sup> Dinstein, *The Conduct of Hostilities*, supra, note 20, at 116.

is an indiscriminate attack and, if a civilian population or civilian objects are knowingly affected in an international armed conflict, such an attack constitutes a grave breach.<sup>78</sup> Additional Protocol II does not contain a similar prohibition, but in international armed conflicts, “the area bombing attacks of World War II would now be illegal. This does not mean, however, that merely because a built-up area exists the larger area is no longer a military objective . . .”<sup>79</sup> This despite Additional Protocol I, Article 51(5)(a) prohibiting bombing “by any methods or means which treats as a single objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.”

The ICRC *Commentary* discreetly notes, “This provision [Article 51.4] . . . confirms the unlawful character of certain regrettable practices during the Second World War . . . Far too often the purpose of attacks was to destroy all life in a particular area or to raze a town to the ground without . . . substantial military advantages.”<sup>80</sup> The comment refers to indiscriminate “area bombing,” practiced by the Japanese in 1932 in prewar Shanghai, by the Germans at Guernica, Spain, in 1937, as well as Weiluń, Poland (1939), Rotterdam, the Netherlands, and Elverum, Norway (1940), then London and Coventry, later in the war.<sup>81</sup> “[T]he German bombardments of . . . English coast towns ignored the spirit of the [1907 Hague] Convention, for those raids had no military purpose whatever, unless it is a legitimate military purpose to attempt to frighten and terrorise the civil population of the enemy . . .”<sup>82</sup> The Allies in turn attacked Berlin, Hamburg, Dresden, and other German cities, and U.S. bombers attacked sixty-eight Japanese cities,<sup>83</sup> leveling at least seven,<sup>84</sup> including Tokyo, which, on the night of March 9–10, 1945, was fire bombed, leaving between ninety and one hundred thousand dead.<sup>85</sup> Area bombing was not and is not a lawful aspect of modern warfare. The rule against indiscriminate attacks has become customary law.<sup>86</sup>

In an indiscriminate attack, whether by aerial bombing, artillery, or missile, the attacker does not seek to harm civilians; he simply is not concerned whether they are injured. World War II Nazi “buzz bombs” and V-1 and V-2 rockets aimed at London – no specific target, just London – and Iraqi SCUD missiles fired at Israel and Saudi Arabia during Gulf War I are examples of indiscriminate attacks and indiscriminate targeting. Those weapons are by their nature indiscriminate. “If the military objective consists of scattered enemy tank formations in an unpopulated desert, it would be permissible to use weapons having a wider area of effect than would be possible if the target were a single communications site in the middle of a heavily populated area. Military objectives

<sup>78</sup> 1977 Additional Protocol I, Art. 85 (3)(b).

<sup>79</sup> Green, *The Contemporary Law of Armed Conflict*, supra, note 46, at 160.

<sup>80</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 619.

<sup>81</sup> Thilo Marauhn and Stefan Kirchner, “Target Area Bombing,” in, Ronzitti and Venturini, *The Law of Air Warfare*, supra, note 68, at 87, 88–9.

<sup>82</sup> L. Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht, ed. (London: Longman, 1952), para. 213, at 513–14.

<sup>83</sup> Stephen L. McFarland, *America’s Pursuit of Precision Bombing, 1910–1945* (Washington: Smithsonian Institution Press, 1995), 204.

<sup>84</sup> Kenneth P. Werrell, *Blankets of Fire* (Washington: Smithsonian Institution Press, 1996), photos p. 2.

<sup>85</sup> Conrad C. Crane, *Bombs, Cities, and Civilians* (Lawrence: University of Kansas Press, 1993), 132. Parks, “Air War and the Law of War,” supra, note 8, at 154, fn. 459, places the number killed at 83,793.

<sup>86</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, supra, note 2, Rule 11, at 37.

dispersed about populated areas have to be attacked separately.”<sup>87</sup> As one writer caustically puts it, “[t]he line must . . . be drawn somewhere, and on the plainly illegal other side of it henceforth lie the kind of attacks which sacrifice any number of civilians for even small and dubious military advantages, and which . . . are likely to signify the restlessness of materially well-endowed belligerents given to believing that (to use the too familiar phrase) ‘anything is permissible which saves the life of one of our men.’”<sup>88</sup>

“Basically, the commander will have to ask himself three questions before he proceeds with the attack: 1, Is the target a military objective? 2, Is the attack indiscriminate? 3, Is the rule of proportionality likely to be offended?”<sup>89</sup> “Applying the law of armed conflict is not like using a calculator to solve a mathematical equation.”<sup>90</sup> Charges of indiscriminate targeting will turn on the attacker’s state of mind, given the circumstances and the facts known to the commander, after a conscientious gathering of such facts as were available to him at the time. Like attacks on dangerous forces, attacks on civilian areas are not flatly prohibited, but they must meet the requirements of military necessity and proportionality.

#### 14.8. Targeted Killing

Targeted killing has become a common tactic in the fight against terrorists.<sup>91</sup> In the mountains of Waziristan, in Pakistan, a Hellfire missile fired from an orbiting Predator drone kills a high-ranking al Qaeda figure. In Gaza, a Hamas bomb-maker answers a call on his cell phone and the phone explodes as he places it to his ear. In essential respects, targeted killing is a targeting issue.

There is no generally accepted definition of “targeted killing,” but a reasonable definition is: **the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict.**<sup>92</sup>

A lawful combatant squeezes the trigger on his rifle, the weapon fires and, two hundred meters away, a uniformed enemy soldier falls dead. Although the shooter “targeted” the enemy he killed, that is not what is meant by the term “targeted killing.” On the battlefield, the killing of combatants – uniformed members of the army of one of the parties to the conflict – by opposing combatants is lawful and unremarkable. If rebellious citizens

<sup>87</sup> UK Ministry of Defence, *Manual of the Law of Armed Conflict*, supra, note 33, at para. 5.23.3, at 69.

<sup>88</sup> Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994), 281.

<sup>89</sup> Rogers, *Law on the Battlefield*, supra, note 15, at 27.

<sup>90</sup> Col. Frederic L. Borch, “Targeting After Kosovo: Has the Law Changed for Strike Planners?” vol. LVI-2 *Naval War College Rev.* (Spring 2003), 64.

<sup>91</sup> Predator UAVs first deployed to the Balkans in 1995. Since then their offensive capabilities have increased. Today, they carry a daytime television nose camera, a forward-looking infrared camera for low-light and night operations, and a laser designator. Cruising at 85 miles per hour at 25,000 feet, a Predator can loiter for forty hours. The first armed Predator mission in Afghanistan was flown on October 7, 2001. The Predator’s successor, Reaper, is more advanced, more effective, and more heavily armed.

<sup>92</sup> There are other definitions. An ICRC legal advisor defines targeted killing as, “The use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.” Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 5. Another is, “Premeditated killing of an individual by a government or its agents,” in, William C. Banks and Peter Raven-Hansen, “Targeted Killing and Assassination: The U.S. Legal Framework,” 37 *U. Richmond L. Rev.* (2002–2003), 667, 671.

shoot and kill their state's political leader as he watches a parade of the nation's military forces, that is not targeted killing. It is assassination and the domestic crime of murder.

**SIDEBAR.** During a common Article 2 international armed conflict, a national leader such as Saddam Hussein, who often wore a military uniform and went about armed with military sidearms, and who personally directed the disposition of his state's armed forces, was a combatant and a lawful target of opposing lawful combatants.

Is the President of the United States a lawful target? He does not wear a military uniform, and does not carry personal arms. On the other hand, he is denominated by the Constitution as the "commander in chief" of the nation's armed forces. He is the individual who, by federal law, is advised by the Chairman of the Joint Chiefs of Staff. He has the authority to assign military missions and direct the disposition of American armed forces.

In time of international armed conflict, the U.S. president is a lawful target of combatants of the opposing state (which excludes groupings of unlawful combatants, such as al Qaeda terrorists).

Usually considered customary law, 1977 Additional Protocol I, Article 51.3 appears to prohibit targeted killing in international armed conflicts: "Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities.*" (Emphasis supplied.) The phrase, "unless and for such time as they take a direct part in hostilities" is the subject of debate addressed by the 2009 ICRC report on direct participation in hostilities.<sup>93</sup> The plain wording of the phrase indicates that terrorists and terrorist accomplices, weapon-makers, and communications experts, cannot lawfully be targeted unless, at the precise time of targeting, they are directly engaged in hostilities. Those who argue against such a constricting limitation urge that terrorists should be lawful targets whenever and wherever they can be positively identified and their locations can be positively confirmed.

The United States first admitted engaging in targeted killing in 2002.<sup>94</sup> On November 3, 2002, over the desert near Sana, Yemen, a CIA-controlled Predator unmanned aerial vehicle (UAV) tracked a SUV-style automobile containing six men. One of the six, Qaed Salim Sinan al-Harethi, was believed to be a senior al Qaeda lieutenant who played a major role in the 2000 bombing of the American destroyer, *USS Cole*. He "was on a list of 'high-value' targets whose elimination, by capture or death, had been called for by President Bush."<sup>95</sup> The United States and Yemen had tracked al-Harethi's movements for months. Now, away from any inhabited area, and with the permission of the government

<sup>93</sup> The report of the second meeting of ICRC-sponsored experts on targeted killing is available at: [http://www.icrc.org/Web/eng/siteengO.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteengO.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf).

<sup>94</sup> It can be argued that the U.S.–Vietnam War's Phoenix Program constituted targeted killing, or Operation Eldorado Canyon, the 1986 bombing of Libyan leader Muammar Qadhafi, or the attacks on Osama Bin Laden in 1998, when he was linked to the bombing of U.S. embassies in Dar es Salaam and Nairobi. Those attacks may also be argued to be assassinations and attempted assassinations, mounted with political rather than tactical motives.

<sup>95</sup> Seymour M. Hersh, "Manhunt," *The New Yorker*, Dec. 23 & 30, 2002, 66.

of Yemen, the Predator fired a Hellfire missile at the vehicle. Its occupants, including al-Harethi, were killed.<sup>96</sup>

The justification for targeted killing rests in the assertion of national self-defense. “It is the prime duty of a democratic state to effectively defend its citizens against any danger posed to their lives and well-being by acts or activities of terror. . . .”<sup>97</sup> In the United States, the preamble of the Constitution includes the words, “. . . in order to . . . provide for the common defense . . .” Arguing against a state’s assertion of self-defense as justification for targeted killing is that “this type of practice is incompatible with international law, which categorically prohibits extra-judicial executions . . .”<sup>98</sup> Human rights organizations hold that “suspected terrorists should be detained and put on trial before they can lawfully be punished for their actions. . . . To kill under these circumstances is simply execution – but carried out without any trial or proof of guilt.”<sup>99</sup> Such objections, and others, led to the ICRC’s 2009 guidance on the notion of direct participation in hostilities.<sup>100</sup> (See Chapter 6, section 6.4.)

Some of these objections presumed the employment of a law enforcement model in combating terrorists. “The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of law-enforcement authorities in the victim state, so that an arrest can be affected.”<sup>101</sup>

Israel has openly engaged in targeted killing since September 2000 and the second *intifadah*.<sup>102</sup> Even before then, in 1996, a Hamas bomb-maker known as “The Engineer,” Yehiya Ayash, was killed when he answered an Israeli-booby-trapped cell phone.<sup>103</sup> In 2000, helicopter-fired missiles killed a Palestinian Fatah leader and Yasser Arafat deputy.<sup>104</sup> In 2001, Israeli helicopters fired missiles into the West Bank offices of Hamas, killing eight.<sup>105</sup> Later, in 2002, in Gaza, Salah Shehade, the civilian founder and leader of Hamas’s military wing and an individual said by the Israelis to be responsible for hundreds of noncombatant deaths, was targeted. In predawn hours an Israeli F-16 fighter jet dropped a one-ton bomb on the three-story apartment building where Shehade was sleeping. He was killed, along with fourteen others asleep in the building, including nine children. One hundred seventy were reportedly wounded.<sup>106</sup> Another casualty was proportionality.

<sup>96</sup> “No holds barred,” *The Economist*, Nov. 9, 2002, 49.

<sup>97</sup> Asa Kasher and Amos Yadlin, “Assassination and Preventive Killing,” XXV no. 1, *SAIS Rev. of Int’l Affairs* (Winter–Spring 2005), 41, 45.

<sup>98</sup> Vincent Joël Proulx, “If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists,” 56 *Hastings L. J.* (2004–2005), 801, 873.

<sup>99</sup> Anthony Dworkin, “The Killing of Sheikh Yassin: Murder or Lawful Act of War?”, Crimes of War Project (30 March 2004), available at: [www.crimesofwar.org/onnews/news-yassin.html](http://www.crimesofwar.org/onnews/news-yassin.html).

<sup>100</sup> ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” 872 *Int’l Rev. of the Red Cross* (Dec. 2008), 991–1047.

<sup>101</sup> David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, 16–2 *European J. of Int’l L.* (2005), 171, 179.

<sup>102</sup> O. Ben-Naftali and K.R. Michaeli, “We Must Not Make A Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings,” 36 *Cornell Int’l L. J.* (2003), 233, 239.

<sup>103</sup> Keith B. Richburg and Lee Hockstader, “Israelis Kill Arab Militia Official,” *Washington Post*, Nov. 10, 2000, A1.

<sup>104</sup> Deborah Sontag, “Israelis Track Down and Kill a Fatah Commander,” *NY Times*, Nov. 10, 2000, A1.

<sup>105</sup> Clyde Haberman, “Israeli Raid Kills 8 at Hamas Office; 2 Are Young Boys,” *NY Times*, Aug. 1, 2001, A1.

<sup>106</sup> Sharon Weill, “The Targeted Killing of Salah Shehadeh,” 7–3 *J. of Int’l Crim. Justice* (July 2009), 617. In 2005, an Israel Defence Force judge advocate involved in planning the Shehade operation was asked

Among Israel's targeted killings was that of the wheelchair-bound Sheik Ahmed Yassin, the cofounder of Hamas and its spiritual leader. He was reputedly involved in authorizing many terrorist actions against Jews. In March 2004, he was killed by helicopter-fired Hellfire missiles, along with two bodyguards and eight bystanders. Another fifteen were wounded. "[T]he Bush administration felt constrained . . . to say it was 'deeply troubled' by Israel's action, though later it vetoed a U.N. Security Council resolution condemning the action."<sup>107</sup> These Israeli actions were not taken in a vacuum, of course. Israeli noncombatants have been victims of countless terrorist attacks over a period of many years.

Once an anathema to America,<sup>108</sup> after 9/11 targeted killing became tolerated,<sup>109</sup> then embraced. Under a series of classified presidential findings, President Bush reportedly broadened the number of named terrorists who could be killed if their capture is impractical.<sup>110</sup> In early 2006 it was reported that since 9/11 the United States has successfully carried out at least nineteen targeted killings via Predator-fired missiles. There have been countless more since then. In June 2006 the targeted killing of Abu Musab al-Zarqawi, leader of al Qaeda in Iraq, was celebrated as an American strategic and political victory. The roster continues to lengthen, and reports of attacks by armed UAVs in Afghanistan and the border regions of Pakistan have become routine, as have complaints of proportionality violations. The successful targeted killings of so many senior Taliban and al Qaeda by CIA-operated UAVs operating from Pakistani bases indicate that there will be no turning back for the United States. Indeed, the Obama administration expanded the use of targeted killing in Afghanistan and Pakistan.<sup>111</sup>

Even considering the predictable collateral damage, the effectiveness of UAVs mated with Hellfire missiles, combined with their relatively low cost and zero exposure of friendly personnel, assures their continued use. The trend in state practice toward the legitimization of targeted killing, whether or not in compliance with Article 51.3, is apparent. "Today, targeted killing is in the process of escaping the shadowy realm of half-legality and non-accountability, and [is] gradually gaining legitimacy as a method of counter-terrorism and 'surgical' warfare. Several Governments have expressly or implicitly acknowledged that they have resorted to targeted killings in their respective efforts to curb insurgent or terrorist activities."<sup>112</sup> Those governments include the U.S., Israel, Russia, Pakistan, the United Kingdom, Germany, and Switzerland.

what he was thinking, to allow a one-ton bomb to be employed in such a manner. His response, "We f - d up."

<sup>107</sup> Craig R. Whitney, "War on Terror Alters U.S. Qualms about Assassination," *Int'l Herald Tribune*, March 29, 2004, 2.

<sup>108</sup> "Self-licensed to kill," *The Economist*, Aug. 4, 2001, 12: "Israel justifies these extra-judicial killings as self-defense. . . . But the usual context of such a discussion would be that the two sides involved were at war . . ."; and, "Assassination Ill Befits Israel," *NY Times*, Oct. 7, 1997, A24: "[T]rying to assassinate Palestinian leaders in revenge is not the answer."

<sup>109</sup> In 1989, Abraham D. Sofaer, then U.S. State Department Legal Advisor, equivocated, "While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State's ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender's unlawful activities from occurring." Abraham D. Sofaer, "Terrorism, the Law, and the National Defense," 126 *Military L. Rev.* (1989), 89, 121.

<sup>110</sup> James Risen and David Johnston, "Bush Has Widened Authority of C.I.A. to Kill Terrorists," *NY Times*, Dec. 15, 2002, A1.

<sup>111</sup> Mark Mazzetti and David E. Sanger, "Obama Expands Missile Strikes Inside Pakistan," *NY Times*, Feb. 21, 2009, A1.

<sup>112</sup> Melzer, *Targeted Killing in International Law*, supra, note 92, at 9–10.

### 14.8.1. *Characteristics of Targeted Killing*

There is no announced U.S. policy directive regarding targeted killing. Assassination is addressed in Executive Order 12333, which does not prohibit killing absolutely, but only without presidential approval. Assassination and targeted killing are very different acts, however. Given that there is no official protocol, only ICRC guidance, one looks to LOAC/IHL principles for targeted killing guidelines, even in the face of Article 51.3's seeming prohibition.

Recall the five characteristics or requirements of the definition of targeted killing. First, an international or non-international armed conflict must be in progress. Without an ongoing armed conflict, the targeted killing of an individual, whether or not a terrorist with a continuous combat function, would be homicide and a domestic crime. It is armed conflict that raises the combatant's privilege to kill an enemy. In a common Article 3 non-international conflict, the basis of the targeted killing must rest upon domestic law provisions, if any, rather than LOAC/IHL because, in a non-international conflict, LOAC/IHL, other than common Article 3, is inapplicable.

Second, the victim must be a specific individual. He must be targeted by reason of his activities in relation to the armed conflict in progress. Were the targeted individual a combatant, uniformed and openly armed, he would be an opposing combatant's lawful target with no discussion necessary. Identification of the targeted individual should be positive, which requires military intelligence of a high caliber, a quality not always available in armed conflict. It is clear that noncombatants may not be targeted.<sup>113</sup> Civilians who take up arms and directly participate in hostilities, and those with a continuous combat function, may be.

A civilian is any person *not* belonging to one of the categories referred to Geneva Convention III as eligible for POW status upon capture.<sup>114</sup> As Additional Protocol I points out, in an international armed conflict, "Civilians shall enjoy the protection afforded by this Section [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities."<sup>115</sup> A civilian who injects himself directly into ongoing hostilities violates the basic concept of distinction and becomes a combatant, forfeits civilian immunity, and is a lawful target. "For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities. . . . [A] person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to the other."<sup>116</sup>

Third, the individual who has engaged directly in hostilities must be beyond a reasonable possibility of arrest – not an LOAC/IHL principle, but an important human rights concern. The United States has no extraterritorial arrest authority except in a few statutory instances, and rarely would an allied state be in a position to make an arrest. If capture is a reasonable option, that option must be exercised.

<sup>113</sup> 1907 Hague Regulation IV, Art. 25, and 1977 Additional Protocol I, Arts. 3 (1)(a) and (d). Also, "it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." UK, Ministry of Defense, *The Law of War on Land: Part III of the Manual of Military Law* (London: HMSO, 1958), para. 13. All nations' military manuals are in agreement.

<sup>114</sup> 1977 Additional Protocol I, Art. 50.1.

<sup>115</sup> *Id.*, Art. 51.3.

<sup>116</sup> Dinstein, *The Conduct of Hostilities*, *supra*, note 20, at 27–8.



Fourth, only a senior military commander representing the targeting state may authorize a targeted killing. Of course, the authorizing individual may also be the President, or a senior domestic government official to whom the President has delegated targeting authority, such as the Secretary of Defense, or the Director of the CIA. “As commander in chief, the President has the constitutional authority to command the use of deadly force by troops in war, whether it has been declared by Congress or thrust upon us by enemy attack or invasion.”<sup>117</sup> That “authority to command” implies authority to delegate.

Once beyond targets authorized by the president, what level of military commander may authorize a targeted killing on behalf of the state? Press reports indicate that, in Israel, such decisions must be approved by “senior cabinet members,”<sup>118</sup> which apparently translates to the Prime Minister him- or herself. In the United States, the decision to carry out a targeted killing, if not made by the President, should be made only by senior military officers, at least major generals – two-star generals – or above, commanding at least a division-size force in the combat zone.

Distinction having been previously satisfied through positive identification of the target, the military commander’s initial consideration is military necessity. Is the planned action indispensable for securing the submission of the enemy? The death of no one person will end terrorism, but would the killing of this particular individual constitute a substantial injury to the terrorist cause, or seriously disrupt terrorist plans? The concept of “continuous combat function” eases the military necessity requirement by making anyone with that designation targetable as an enemy combatant.

Collateral damage (i.e., proportionality) must be high among the authorizing commander’s considerations. Prospective collateral damage assessments, like those of military necessity, are a difficult issue, allowing for lenient judgments and moral assessments. In 2002, the Israeli Chief of Military Intelligence, haunted by civilian deaths in killings he oversaw, asked a mathematician to write a mathematical formula to determine the number of acceptable civilian casualties per dead terrorist. Unsurprisingly, the effort was unsuccessful.<sup>119</sup> Each proposed targeted killing raises its own unique moral dilemmas.

#### 14.8.2. *Direct Participation in Hostilities*

The final characteristic of the definition of a targeted killing is that the targeted individual must be directly participating in the hostilities, either as a continuous combat function or as a spontaneous, unorganized act. Dinstein writes, “attack[s] (which may cause death, injury and suffering) are banned only on condition that the persons concerned do not abuse their exempt status. When persons belonging to one of the categories selected for special protection – for instance, women and children – take an active part in hostilities, no immunity from an ordinary attack can be invoked.”<sup>120</sup>

As Additional Protocol I specifies, civilians are not lawful targets “unless and for such time as they take a direct part in hostilities.”<sup>121</sup> The lawfulness of targeted killing, then,

<sup>117</sup> Banks and Raven-Hansen, “Targeted Killing and Assassination,” *supra*, note 92, at 677, citing *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

<sup>118</sup> Laura Blumenfeld, “In Israel, a Divisive Struggle Over Targeted Killing,” *Washington Post*, Aug. 25, 2006, A1.

<sup>119</sup> *Id.*

<sup>120</sup> Dinstein, *The Conduct of Hostilities*, *supra*, note 20, at 150.

<sup>121</sup> 1977 Additional Protocol I, Art. 51.3.

turns on interpretation of “direct participation in hostilities.” For Israel, such activities include “[p]ersons recruiting certain other persons to carry out acts or activities of terror,” and, “Developing and operating funding channels that are crucial to acts or activities of terror,” among others.<sup>122</sup> These are broad definitions of “direct participation” with which the ICRC’s interpretive guidance does not agree. The Director of the Center for Democratic Studies at the University of Haifa, holds that “Israel has the right and duty to kill these terrorists. . . . Furthermore, it is justified to kill chiefs of terrorist operations who plan and orchestrate murderous attacks.”<sup>123</sup> Professor Robert K. Goldman offers a United States–centric viewpoint: “The basic premise is that the U.S. regards itself as at war with al Qaeda. That being the case, it regards members of al Qaeda as combatants engaged in war against the U.S.”<sup>124</sup>

Is mere membership in al Qaeda sufficient to make one a target, wherever he may be found? Given traditional LOAC/IHL predicates for targeting individuals and ICRC interpretive guidance, absent an individual’s continuous combat function, the answer is no. Is there a common Article 3 armed conflict in progress? If so, and if the al Qaeda member is directly participating in the common Article 3 armed conflict, either as one with a continuous combat function or as a spontaneous, unorganized act, he may be targeted. (Although “direct participation” is a construct raised in Additional Protocol I relating to international conflicts, it remains instructive in non-international contexts by analogy.)<sup>125</sup> This presumes, in a common Article 3 situation, that the individual cannot be captured.

Mere membership in a terrorist organization, without more, is *not* sufficient to render one the lawful target of an opposing military armed force. There is, however, a countervailing position that would broaden the understanding of what the term “direct participation” means; a position that could make mere membership in a terrorist organization a basis for military targeting. That position is not customary law and not a majority position, but state practice in current antiterrorism armed conflicts continues to edge toward this countervailing position without notable objection.

#### 14.8.3. *Does Targeted Killing Broaden the Meaning of “Direct Participation”?*

In determining the meaning of Article 51.3 “direct participation,” it is widely agreed that the civilian driver delivering ammunition to combatants and the civilian gathering military intelligence in enemy-controlled territory are both actively participating in hostilities, but when does their participation (and permissible targeting under Article 51.3) end? May the driver be targeted after he has returned to his starting point and walked away from the truck? May he be targeted when he is being toasted in the mess, late that evening? The next day? May the intelligence gatherer be killed before she actually embarks on her mission?

<sup>122</sup> Kasher and Yadlin, “Assassination and Preventive Killing,” *supra*, note 97, at 41–57, 48–49. Prof. Kasher is an advisor to the Israeli Defense Force College of National Defense. Maj.Gen. Yadlin is the former commander of that College.

<sup>123</sup> “Targeting Assassination,” *Washington Post*, April 25, 2004, B4. (Author unidentified.)

<sup>124</sup> Esther Schrader and Henry Weinstein, “U.S. Enters A Legal Gray Zone,” *Los Angeles Times*, Nov. 5, 2002, A1.

<sup>125</sup> “[T]he application of IHL to noninternational conflicts, and the conflict with Al Qaeda in particular, is often an exercise in analogical or deductive reasoning. One reason to examine the rules that apply in international conflict is their use as an analogy.” Ryan Goodman, “Editorial Comment: The Detention of Civilians in Armed Conflict,” 103–1 *AJIL* (Jan. 2009), 48, 50.

Is a civilian POW-camp guard directly participating in hostilities? A civil defense worker who directs military traffic through his town? Is a civilian, seated in the Pentagon, controlling an armed Predator UAV over Iraq, directly participating in hostilities?\*

The United States authorizes the arming of civilian defense contractors in combat zones, and they “may be authorized to provide security services . . .”<sup>126</sup> Are they directly participating?

These Article 51.3 conundrums do not describe the probable targeted killing candidate, however. A more apropos question is: When is Pakistan’s al Qaeda coordinator a civilian, and when is he directly participating in hostilities? Only when he is actually engaged in a fire-fight with U.S. or Pakistani forces? Only when he is actively directing terrorist activities? By virtue of his leadership position, is he *always* a legitimate target – when asleep, when playing with his children? In 2002, was the al Qaeda lieutenant, al-Harethi, who planned the bombing of the *USS Cole*, a lawful target while he was on the move in Yemen, fighting no one, formulating no terrorist plan?

Civilians are protected unless and *for such time* as they take a direct part in hostilities. One may argue, however, that by virtue of their positions, civilians who lead terrorist groups seldom, if ever, literally pick up arms. Also, in essence, they never lay down their arms. That is the position of the ICRC’s interpretive guidance.<sup>127</sup> General Kenneth Watkin, Judge Advocate General of Canadian armed forces, rightly says, “It is not just the fighters with weapons in their hands that pose a threat.”<sup>128</sup>

“[I]t is well settled that providing some important logistical support to armed forces, even in a zone of active military operations, falls below the threshold for direct participation.”<sup>129</sup> What about terrorist recruiters<sup>130</sup> or those who finance terrorism?<sup>131</sup> Can they be considered to directly participate in hostilities? Do their activities constitute “a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place”?<sup>132</sup>

Even before the ICRC’s interpretive guidance, not everyone agreed that terrorists could be targeted only when actually engaged in combatant activities:

If we accept this narrow interpretation, terrorists enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act. Is this theory, which has been termed the revolving door theory, tenable? . . . Another argument is that a “combatant-like” approach based on membership in the military wing of a group involved in hostilities, rather than on individual actions, should be adopted in deciding whether persons may be targeted. If we adopt the restricted theory, according to which international terrorists

\* In April 2007, the U.S. Department of Defense and the Air Force reportedly decided that UAV pilots could qualify for award of the Distinguished Flying Cross. *Washington Post*, May 6, 2007, D7. The traditional DFC award criteria: “Heroism or extraordinary achievement while participating in aerial flight.”

<sup>126</sup> Dept. of Defense Instruction 3020.41 (Oct. 3, 2005), “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” para. 6.3.5.

<sup>127</sup> ICRC, “Interpretive Guidance,” *supra*, note 100, at 1043.

<sup>128</sup> Brig.Gen. Kenneth Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” in David Wippman and Matthew Evangelista, eds., *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsey, NY: Transnational, 2005), 137, 147.

<sup>129</sup> Goodman, “Detention of Civilians in Armed Conflict,” *supra*, note 125, at 52.

<sup>130</sup> For an argument that recruiters are targetable, see Armando Spataro, “Why Do People Become Terrorists?” 6–3 *J. of Int’l. Crim. Justice* (July 2008), 507, 520–21.

<sup>131</sup> Melzer, *Targeted Killing in International Law*, *supra*, note 92, at 320: “Also excluded are “financial contributors, informants, collaborators and other service providers without fighting function [who] may support or belong to an opposition movement or an insurgency as a whole . . .”

<sup>132</sup> Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols*, *supra*, note 1, at 516.

are civilians who may only be targeted while taking a direct part in hostilities, the right of self-defence under Article 51 of the UN Charter . . . may become meaningless.<sup>133</sup>

Was Yehiya Ayash, the civilian who constructed diabolically effective bombs but led no combatants, who gave neither orders nor instructions, who acted only as a fabricator of tools of insurgency, a lawful target only when he was actually constructing a bomb? Two hundred years ago, Vattel wrote, “Assassins and incendiaries by profession, are not only guilty in respect of the particular victims of their violences, but likewise of the state to which they are declared enemies. All nations have a right to join in punishing, suppressing, and even exterminating these savages.”<sup>134</sup>

A combatant general, for example, Dwight Eisenhower, during World War II, was, by virtue of his position of command and authority, a lawful target whenever and wherever he could be found by opposing Axis combatants. Whether in London or in Kansas, in civilian clothes or uniform, Eisenhower was always on duty and was always an Allied commander who could have been lawfully killed by any enemy combatant. Should terrorist leaders, and terrorists with critical war-making skills, be free from the same threat by consciously avoiding lawful combatancy? Logic and the ICRC’s interpretive guidance indicate that they, like the uniformed combatants *they* target, be considered lawful targets whenever and wherever they are found. Professor George Fletcher points out:

This phrase “direct part” conjures up a picture of someone picking up a gun and aiming it at the enemy. But . . . Ordinary principles of self-defence apply against people pointing guns, whether they are civilians or not. Targeted assassinations are usually aimed at the organizers of terrorist attacks – not those who are aiming weapons . . . The targets are the key figures behind the scenes who organize the suicide bombings, the hijacking and other terrorist activities. Are they “taking direct part in hostilities”? I think the phrase lends itself to this construction.<sup>135</sup>

In a world where the enemy has missiles too, targeted killing by American forces makes American leaders and weapons specialists without uniforms the legitimate targets of enemy combatants. “[T]he United States and countries that follow its [targeted killing] example must be prepared to accept the exploitation of the new policy by adversaries who will not abide by the standards of proof or evidential certainty adhered to by Western democracies.”<sup>136</sup>

Defining direct participation and continuous combat function remains the thorniest issue in targeted killing. A *de facto* expansion of Article 51.3’s meaning is underway, often illustrated when a terrorist not involved in a firefight is killed by a drone-fired missile.

<sup>133</sup> Kretzmer, “Targeted Killing of Suspected Terrorists,” *supra*, note 101, at 193.

<sup>134</sup> Vattel, *The Law of Nations, or, Principles of the Law of Nature* (Northampton, MA: Thomas M. Pomroy for S. & E. Butler, 1805), 327. Spelling rendered contemporary.

<sup>135</sup> George P. Fletcher, “The Indefinable Concept of Terrorism,” 4 *J. of Int’l Criminal Justice* (Nov. 2006), 894, 898. ICRC writings support the position that an individual may take an active part in hostilities without touching a weapon. See Sandoz, *Protocols Commentary*, *supra*, note 1, at 618–19: “. . . [H]ostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.”

<sup>136</sup> Kristen Eichensehr, “On the Offensive: Assassination Policy Under International Law,” 25(3) *Harvard Int’l Rev.* (Fall 2003), available at: <http://harvardir.org/articles/1149>.

### 14.9. Summary

Military objectives – targets – are restricted to objects which by their nature, location, purpose, or use make an effective contribution to military action and the destruction or neutralization of which offers a definite military advantage. How difficult it is to apply that Additional Protocol I rule in armed conflict. Professor Peter Rowe writes of targeting restrictions in NATO's 1999 Kosovo bombing campaign, "the Protocol is, when it comes to the test, very weak in determining what may or may not be attacked."<sup>137</sup> Commanders, he says, in good faith overestimate the military advantage to be gained from a planned mission while underestimating collateral damage. That is why, out of the public eye, targeting decisions have become the complex multifaceted, multilayered process required by modern armed forces. Today, distinction is more than an abstract principle, it is a defining feature of targeting.

Like much of LOAC/IHL, the application of targeting rules depends on the good faith of the states that have accepted and ratified its precepts. Prohibitions on targeting dangerous forces, dual-use objects, and indiscriminate targets each have undefined "workarounds" potentially subject to abuse. We necessarily accept that "the text [of Article 52] adopted by the Diplomatic Conference largely relies on the judgment of soldiers who will have to apply these provisions."<sup>138</sup>

Targeted killing, a frequent tactic of choice in fighting terrorists, raises complex targeting issues. What constitutes "direct participation in hostilities" and "continuous combat function"? How broadly may, or should, the terms be interpreted?

Despite its difficult issues, targeting is still largely about distinction and proportionality. Extensive and painstaking efforts are made by most armed forces to meet their requirements.

## CASES AND MATERIALS

### "THE EINSATZGRUPPEN CASE"

#### THE UNITED STATES V. OTTO OHLENDORF, ET AL.<sup>139</sup>

**Introduction.** *One of the twelve Subsequent Proceedings held in Nuremberg during and after the Nuremberg International Military Tribunal, was The Einsatzgruppen case, in which Otto Ohlendorf, head of the Interior Division of the Sicherheitsdienst (SD Security Service), a sister organization of the SS, was tried by a U.S. military commission for his role in the murder of*

<sup>137</sup> Peter Rowe, "Kosovo 1999: The Air Campaign – Have the Provisions of Additional Protocol I Withstood the Test?" 837 *Int'l Rev. of the Red Cross* (2000), 147.

<sup>138</sup> Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 1, at 638.

<sup>139</sup> *U.S. v. Ohlendorf* ("The Einsatzgruppen Case"), *Trials of War Criminals before the Nuremberg Military Tribunals*, vol. IV (Washington: GPO, 1950), 1, 466.

*Jews during the war. A portion of the trial is instructive as historical comment on targeting. Evidence at Ohlendorf's trial indicated that, under his leadership, at least 90,000 people, and doubtless many more, mostly Jews, were executed.<sup>140</sup> Twenty-three coaccused were tried with Ohlendorf. This extract from the judgment casts light on the thinking of American judges regarding area bombing, which in World War II had not yet been specifically prohibited as indiscriminate attacks.*

Then it was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of noncombatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well.

... Germany, under its Nazi rulers started an aggressive war. The bombing of Berlin, Dresden, Hamburg, Cologne, and other German cities followed the bombing of London, Coventry, Rotterdam, Warsaw, and other Allied cities; the bombing of German cities succeeded, in point of time, the acts discussed here. But even if it were assumed for the purpose of illustration that the Allies bombed German cities without Germans having bombed Allied cities, there still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.

A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.

It was argued in behalf of the defendants that there was no normal distinction between shooting civilians with rifles and killing them by means of atomic bombs. There is no doubt that the invention of the atomic bomb, when used, was not aimed at noncombatants. Like any other aerial bomb employed during the war, it was dropped to overcome military resistance.

Thus, as grave a military action as an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to affect the surrender of the bombed nation. The people of that nation, through their representatives, may surrender and, with the surrender, the bombing ceases, the killing is ended.

**Conclusion.** *Ohlendorf, who practiced law before the war, raised the defense of obedience of orders. Like accused in several other Subsequent Proceedings, he argued that his acts and those of his subordinates were no worse than those of Americans who had dropped the atomic bombs on Japan. The Chief Prosecutor, Brigadier General Telford Taylor, responded in his closing argument:*

*The common denominator of all these expressions [in defense] is the same. It is the doctrine that total war means total lawlessness. The doctrine is logically indefensible and is based*

<sup>140</sup> Id., at 511.

*upon wanton indifference to facts and the order in which certain events took place. As to the atom bomb . . . the laws of war have never attempted to prohibit such developments . . . The atomic bomb, therefore, is neither more nor less legal than ordinary bombs; under the laws of war, the question is not as to the character or explosive capacity of the bomb, but how it is used.*<sup>141</sup>

*Ohlendorf was convicted of having committed crimes against humanity, war crimes, and being a member of a criminal organization, and was hanged.*

*The military commission, made up of three American civilian jurists and an alternate (a North Carolina superior court judge, a Navy Reserve rear admiral, and Pennsylvania common pleas court judge, and a lawyer from Alabama) seem to have had a view of proportionality without shades of gray. Would you agree with the commission's judgment regarding the atom bomb? How persuasive is General Taylor's argument?*

**FINAL REPORT TO THE PROSECUTOR  
BY THE COMMITTEE ESTABLISHED  
TO REVIEW THE NATO BOMBING CAMPAIGN  
AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA**<sup>142</sup>

**Introduction.** *When may a dual-use target be considered a military objective? The 2000 report of a committee of experts assembled by the ICTY provides guidelines and limits. Is it feasible to apply the same or similar guidelines to other dual-use targets, such as electrical grids, oil-refining facilities or railway bridges? Would you recommend other parameters?*

### **I. Background and Mandate**

1. The North Atlantic Treaty Organization (NATO) conducted a bombing campaign against the Federal Republic of Yugoslavia (FRY) from 24 March 1999 to 9 June 1999. During and since that period, the [ICTY] Prosecutor has received numerous requests that she investigate allegations that senior political and military figures from NATO countries committed serious violations of international humanitarian law during the campaign, and that she prepare indictments pursuant to . . . the [ICTY] Statute.
2. On 14 May 99 the then Prosecutor established a committee to assess the allegations . . . and advise . . . whether or not there is a sufficient basis to proceed with an investigation into some or all the allegations . . . related to the NATO bombing.

### **II. Review Criteria**

28. In brief, in combat military commanders are required: a) to direct their operations against military objectives, and b) when directing their operations against military objectives, to ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated. Attacks which are not directed against military objectives (particularly attacks directed against the civilian

<sup>141</sup> *Id.*, at 380–1.

<sup>142</sup> (June 13, 2000). Footnotes and references omitted. Available at: <http://www.un.org/icty/pressreal/nato061300.htm>.

population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offense of unlawful attack under . . . the ICTY Statute. The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives,
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

#### IV. Assessment

##### B. Specific Incidents

##### iii) The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade on 23/4/99

71. On 23 April 1999, at 0220, NATO intentionally bombed the central studio of the RTS (state-owned) broadcasting corporation . . . in the center of Belgrade. . . . While there is some doubt over exact casualty figures, between 10 and 17 people are estimated to have been killed.

72. The bombing of the TV studio was part of a planned attack aimed at disrupting and degrading the C<sub>3</sub> (Command, Control and Communications) network. In co-coordinated attacks, on the same night, radio relay buildings and towers were hit along with electrical power transformer stations. At a press conference . . . NATO officials justified this attack in terms of the dual military and civilian use to which the FRY communication system was routinely put, describing this as a:

“very hardened command and control communications system [which . . . ] uses commercial telephone, [ . . . ] military cable, [ . . . ] fibre optic cable, [ . . . ] high frequency radio communication, [ . . . ] microwave communication and everything can be interconnected. There are literally dozens, more than 100 radio relay sites around the country, and [ . . . ] everything is wired in through dual use. Most of the commercial system serves the military and the military system can be put to use for the commercial system [ . . . ].”

Accordingly, NATO stressed the dual-use to which such communications systems were put, describing civilian television as “heavily dependant on the military command and control system and military traffic is also routed through the civilian system” . . .

73. . . . NATO claimed that the RTS facilities were being used “as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represent legitimate military targets.”

74. . . . More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which [RTS] was employed:

“[We need to] directly strike at the very central nerve system of Milosovic’s regime. This of course are those assets which are used to plan and direct and to create the



political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned. [...] Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosovic's control mechanism."

....

75. NATO intentionally bombed the radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate objective and; if it was, were the civilian casualties disproportionate to the military advantage gained by the attack? . . . The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as military objectives . . . As indicated in paras. 72 and 73 above, the attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosevic in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

76. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required by the Additional Protocols. The ICRC Commentary on the Additional Protocols interprets the expression "definite military advantage anticipated" to exclude "an attack which only offers potential or indeterminant advantages" and interprets the expression "concrete and direct" as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary . . . para. 2209). While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and direct" military advantage necessary to make them a legitimate military objective. NATO believed that Yugoslav broadcast facilities were "used entirely to incite hatred and propaganda" and alleged that the Yugoslav government had put all private TV and radio stations in Serbia under military control . . . However, it was not claimed that they were being used to incite violence akin to *Radio Milles Collines* during the Rwandan genocide, which might have justified their destruction . . . At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime . . . 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 . . . 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. . . .

77. Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate. . . .

78. . . . 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.

79. On the basis of the above analysis . . . the committee recommends that the OTP [Office of the ICTY Prosecutor] not commence an investigation related to the bombing of the Serbian TV and radio station.

**Conclusion.** *Unless the sole motive for targeting a television broadcasting station is to stop transmission of enemy propaganda, the committee finds it to be a military object. Will that caveat ever be a bar to targeting a broadcasting station?*

## PROSECUTOR V. KORDIĆ AND ČERKEZ

It-95-14/2-T (26 February 2001), footnotes omitted.

**Introduction.** *During the conflict in the former Yugoslavia, Dario Kordić was a Bosnian local politician who allied himself with Croatian military forces. Mario Čerkez was a Croatian brigade commander. Because of the military and political relationship of the two throughout the period that the charged offenses occurred, 1992–1993, both were charged with committing various crimes in connection with the conflict, including crimes against humanity, inhumane treatment, ethnic cleansing, and the wanton destruction of property not justified by military necessity.*

*In this extract from the Judgment, the Trial Chamber discusses what constitutes the unlawful destruction of property. It does not refer to targeting or mention Additional Protocol I. Under Geneva Convention IV (and the ICTY Statute), the extent of the unlawful destruction is nevertheless found to constitute the grave breach of extensive destruction of property not justified by military necessity, sounding in unlawful targeting.*

328. In short, prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects . . .

335. Article 147 of Geneva Convention IV sets out the crime of extensive destruction as a grave breach. The ICRC Commentary thereto states, in relation to the crime of extensive destruction

Furthermore, the Occupying Power may not destroy in occupied territory real or personal property except where such destruction is rendered absolutely necessary by military operations. On the other hand, the destruction of property on enemy territory is not covered by the provision. In other words, if an air force bombs factories in an enemy country, such destruction is not covered either by Article 53 or by Article 147. On the other hand, if the enemy Power occupies the territory where the factories are situated, it may not destroy them unless military operations make it absolutely necessary.

336. Several provisions of the Geneva Conventions identify particular types of property accorded general protection thereunder. For example, Article 18 of Geneva Convention IV

provides that “civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict. While property thus protected is presumptively immune from attack, the Conventions identify certain highly exceptional circumstances where the protection afforded to such property will cease.

337. Article 53 of Geneva Convention IV sets forth a general prohibition on the destruction of property in occupied territory:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the state, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

While the protective scope of this provision encompasses all real and personal property, other than property accorded general protection under the Geneva Conventions, it only applies in occupied territories. . . .

340. In *Blaškić*, the only case to date before the International Tribunal to have provided a definition of this crime [extensive destruction of property], the Trial Chamber found that

[a]n Occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of “extensive” is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterize an offense under this count.

341. In view of the foregoing, the Trial Chamber finds that the crime of extensive destruction of property as a grave breach comprises the following elements, either:

- (i) Where the property destroyed is of a type accorded general protection under the Geneva Convention of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or
- (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and
- (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

*Conclusion.* Convicted of committing a variety of crimes under the ICTY Statute, including multiple counts of wanton destruction of private property not justified by military necessity, Kordić was sentenced to twenty-five years’ confinement, affirmed on appeal.<sup>143</sup> Čerkez, the military commander, was similarly convicted and sentenced to fifteen years’ confinement. On appeal, his sentence was reduced to six years.<sup>144</sup>

<sup>143</sup> *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A (Dec. 17, 2004), para. 1067.

<sup>144</sup> *Id.*, at para. 1092.

## WIRED FOR WAR

*Excerpted from an Amaud deBorchgrave book review of Peter W. Singer's book, Wired for War: the Robotics Revolution and Conflict in the 21st Century (Penguin Press, 2009).*

**Introduction.** *This review, bearing on targeted killing, illustrates how quickly warfare is changing. Is LOAC keeping pace? Issues of distinction and proportionality are raised by the pilots' decisions and actions – issues that infantrymen will have to deal with, should errors be made.*

From their cockpit at Creech Air Force Base in Nevada, the pilot and co-pilot are flying a pilotless Predator on a bombing mission over Afghanistan, 8,000 miles away. Ordnance aboard includes four Hellfire missiles and two 500-pound bombs. A forward air controller in another unmanned drone spots the target and the Predator bomber takes off under local control from Kandahar in Afghanistan. Minutes later, control of the bomber is handed over to satellite control in the cockpit at Creech.

Two hours later, the crew sees on the cockpit screen two suburban vehicles stop in front of the targeted mud-baked house. Half a dozen men hurry into the dwelling that intelligence has spotted as a Taliban command post. The ultra-sensitive cameras in the aircraft's nose showed a door latch and a chicken inside. Seconds later, the bombardier in Nevada squeezed the trigger and a 500-pound bomb flattened the Taliban dwelling with a direct hit.

Watching the action on identical screens are CIA operators at Langley, Va., who can call in last-minute course corrections.

Their-eight-hour mission over, pilot and co-pilot, both experienced combat pilots, climb into their vehicles and drive home. Thirty minutes later, they are playing with their children. War by remote control is here . . . There are already some 5,000 unmanned drones of one kind or another in Iraq and Afghanistan and a shortage of experienced pilots. Those unfit to fly conventional fighter bombers, either over age or for medical reasons, can extend their flying careers in unmanned bombers. But drones now in combat will soon look like Model T Fords.

Science fiction is already reality on the battlefield, not just how wars are fought, but also the geopolitics of war. At the end of Gulf War I, Air Force Chief of Staff Merrill "Tony" McPeak forecast that by 2010 the fighter pilot will have been taken out of the cockpit. The Air Force isn't there yet, though the next phase in robotic flying will be fighter aircraft, now on the drawing board at a fraction of the cost of today's state-of-the-art fighters and bombers.

The cost of Lockheed Martin's 5th generation stealth fighter aircraft is now just under \$140 million per copy for 187 F-22 Raptors, whose development costs are in the \$70 billion range. The most expensive U.S. Air Force aircraft is the B-2 bomber. Twenty Northrop Grumman B-2s were deployed at a cost of \$2.2 billion per aircraft (one crashed in Guam last year).

The British designed Taranis drone is expected to fly in 2010 and its designers forecast even fighter pilots may get excited . . .

The U.S. military invaded Iraq with a handful of drones in the air and zero unmanned systems on the ground. Today, there are some 12,000 with a lethal armory of missiles, rockets and grenades.

Deadly mistakes are, of course, unavoidable, such as the man who was a dead ringer for Osama bin Laden, though an innocent civilian. He lost his life to digitized warfare . . .

But potential enemies like Hezbollah in Lebanon have already picked up or stolen the rudiments of pilotless machines. They used them for reconnaissance over Israeli lines in the 2006 war . . .

Today, a general can already see at the very same moment what a war fighter sees through the bull's eye of his rifle sights – and take over the decision to shoot or not . . .

Moving humans off the battlefield . . . will make wars easier to start, but more complex to fight.

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