

Deadly Advice: Judge Advocates and Joint Targeting

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*You have got to know your business inside and out and you have got to think like an operator. Your job as a military lawyer is not to prevent me from doing my job, your job as a military lawyer is to make it possible for me to do my job without breaking the law, without blowing up things I should not blow up, without killing people I should not kill*¹

I. Introduction

“Bombs away.” A 500-pound bomb fell towards a house near Baqubah, Iraq, where insurgent leader Abu Musab al-Zarqawi was meeting with his spiritual advisor on June 7, 2006.² Prior to the air strike, as analysts vetted the intelligence and operators planned the mission, military lawyers reviewed the operation³: *Was Zarqawi, the leader of al-Qaeda in Iraq, a valid target? Were the means and method of the attack lawful? Were precautions employed to avoid or minimize collateral damage? Was the strike proportionate since women and children were likely to be in the house with Zarqawi? Were there any violations of Iraqi sovereignty?* Properly advised, the commander made an informed decision and the bomb dropped on its target.⁴

By providing legal advice to commanders, judge advocates “play a critically important role”⁵ during targeting situations. The in-depth integration of military lawyers into targeting decisions stems from the aftermath of the My Lai massacre when the Department of Defense ordered judge advocates to ensure that all U.S. military operations complied with the law of war.⁶ This directive heralded a shift in the duties of judge advocates, evolving from “that of special staff officer providing traditional legal support [military justice,

claims, legal assistance, administrative law] to the current role in which judge advocates are integrated into operations at all levels.”⁷

For example, judge advocates were often called upon to address the legality of attacking problematic targets throughout Operation Desert Storm, such as when Iraqi fighter jets were placed next to the ancient temple of Ur.⁸ In Kosovo, the allied air commander approvingly noted that “every target . . . bombed for seventy-eight days had been reviewed at some level by professional military lawyers and that is the way it has to be.”⁹ During recent operations in Iraq and Afghanistan, military lawyers have provided commanders with a legal analysis for all preplanned targets to ensure compliance with the law of armed conflict (LOAC).¹⁰

To effectively provide advice during the planning and execution of targeting operations, judge advocates must understand the procedural mechanics of the targeting cycle, the substantive laws governing targeting, and their own crucial role in ensuring the law is accurately applied to the process in a way that enhances the commander’s ability to accomplish the mission.¹¹ Indeed, joint doctrine specifically tasks judge advocates:

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¹ Lieutenant General Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, 78 INT’L L. STUD. 19, 26 (2002).

² MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *THE ENDGAME: THE INSIDE STORY OF THE STRUGGLE FOR IRAQ, FROM GEORGE W. BUSH TO BARACK OBAMA 206-08* (2012).

³ See Charles J. Dunlap, Jr., *Come the Revolution: A Legal Perspective on Air Operations in Iraq since 2003*, 86 INT’L L. STUD. 139, 142-45 (2010) (highlighting the integration of judge advocates in air operations centers and their legal review of all preplanned air strikes); see also Mark Benjamin, *Killing “Bubba” from the Skies*, SALON (Feb. 15, 2008), http://www.salon.com/2008/02/15/air_war/.

⁴ GORDON & TRAINOR, *supra* note 2, at 207.

⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 7-45 (18 Mar. 2013) [hereinafter FM 1-04].

⁶ FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI ix* (2001). Current Department of Defense (DoD) policy requires that “all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.” U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5.11.8 (9 May 2006, current as of 22 Feb. 2011) [hereinafter DODD 2311.01E].

⁷ BORCH, *supra* note 6, at vii.

⁸ *Id.* at 167.

⁹ Short, *supra* note 1, at 26.

¹⁰ Lieutenant Colonel James K. Carberry & M. Scott Holcomb, *Target Selection at CFLCC: A Lawyer’s Perspective*, FIELD ARTILLERY 39, 41 (Mar.-June 2004). The law of war, often called the law of armed conflict, “encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” DODD 2311.01E, *supra* note 6, para. 3.1.

¹¹ FM 1-04, *supra* note 5, para. 7-46; see General Hal M. Hornburg, *The Importance of Legal Professionals in the Air Force* (June 27, 2001) (“Who do you think was standing right behind me [in the operations center]? It was my [judge advocate (JAG)]. That person needs to know the law and

Due to the complexity and extent of international law considerations involved in the joint targeting cycle, [judge advocates] must be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations. Early involvement by [judge advocates] will improve the targeting process and can prevent possible violations of international or domestic law.¹²

This article summarizes the phases of the targeting cycle, identifies the principles of the law of targeting, and then addresses the role of the judge advocate in the targeting process. Throughout the discussion, it should be remembered that “it is *always* the commander (not the lawyer) who makes the final decision to strike or not to strike a target”; judge advocates “play a *supporting* role to the commander during the targeting process.”¹³ To support the commander, judge advocates must first understand the targeting cycle.¹⁴

II. Targeting Process

Doctrinally, targeting is the process of “selecting and prioritizing targets and matching the appropriate response to them”¹⁵ to create desired effects that achieve the

commander’s objectives. Targeting is accomplished through the targeting cycle: an iterative, logical methodology for the development, planning, execution, and assessment of attacks against the enemy.¹⁶

In Phase 1 (End State and Commander’s Objectives), the commander sets overall campaign objectives that focus the development of general target sets.¹⁷ Understanding the commander’s objectives is the most important activity of joint targeting because this guidance drives all subsequent phases of the targeting cycle.¹⁸ For instance, during the 2003 invasion of Iraq, the campaign objective was to “rapidly defeat the enemy to deny his use of weapons of mass destruction while preserving critical infrastructure to facilitate the post-conflict rebuilding of Iraq.”¹⁹ Consequently, targeting guidance restricted strikes against Iraqi infrastructure, although such objects may have been lawful targets, because their destruction did not facilitate post-conflict reconstruction.²⁰

After establishing general targeting guidance, specific targets are developed in Phase 2 (Target Development and Prioritization).²¹ Target development seeks to “identify and characterize potential targets that, when successfully engaged, support the achievement of the commander’s objectives.”²² The underlying intelligence is first vetted to make sure the assessment is accurate; the target is then validated to confirm that it meets the targeting guidance and complies with the LOAC and rules of engagement (ROE).²³

rules of engagement, but he or she also needs to understand things bigger than just the law. They’ve got to understand combat.”), reprinted in Colonel Charles J. Dunlap, Jr., *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 A.F. L. REV. 293, 303 (2001).

¹² JOINT CHIEFS OF STAFF, PUB. 3-60, JOINT TARGETING I-1 (31 Jan. 2013) [hereinafter JP 3-60].

¹³ Carberry & Holcomb, *supra* note 10, at 39 (“The [JAG’s] role is to ensure the order is the result of a well informed decision, taking into account the relevant Law of War considerations of necessity, humanity, discrimination and proportionality. In doing so, [the JAG] facilitates the commander’s success.”).

¹⁴ See Dunlap, *supra* note 3, at 146 (noting that judge advocates must be familiar with their client’s business, including “a myriad of technical specifics related to weapons, platforms, strategies and other aspects of the military art”).

¹⁵ JP 3-60, *supra* note 12, at I-1. This article uses the joint targeting process as found in JP 3-60. The Army and Marine Corps use a similar cycle: Decide, Detect, Deliver, and Assess (D3A). The commander and staff first decide what enemy objects to attack. They then determine the best method to detect the target and the most appropriate weapon to be delivered against the target to achieve the desired effects. Finally, they select the most effective means to assess the results of the strike. See U.S. DEP’T OF ARMY, TECHNIQUES PUB. 3-60, TARGETING (May 2015) [hereinafter ATP 3-60]; U.S. MARINE CORPS, WARFIGHTING PUB. 3-43.3, MARINE AIR-GROUND TASK FORCE (MAGTF) FIRES (3 June 2011) [hereinafter MCWP 3-43.3].

¹⁶ JP 3-60, *supra* note 12, at I-10; see *infra* Appendix A; see also U.S. DEP’T OF DEF., DOCTRINE NETWORKED EDUCATION & TRAINING, <http://dtic.mil/doctrine/docnet/courses/operations/target.htm> (last visited Jul. 6, 2016) (providing an online training course on joint targeting).

¹⁷ JP 3-60, *supra* note 12, at II-4. For example, general target sets in Desert Storm included: 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. U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 95 (1992).

¹⁸ THE JUDGE ADVOCATE GEN.’S SCHOOL, U.S. AIR FORCE, AIR FORCE OPERATIONS & THE LAW 279 (2014) [hereinafter AF OPS & LAW].

¹⁹ Carberry & Holcomb, *supra* note 10, at 40.

²⁰ *Id.*; see also MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 239 (2007).

²¹ JP 3-60, *supra* note 12, at II-5; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 859 INT’L REV. RED CROSS 452 (Sept. 2005).

²² JP 3-60, *supra* note 12, at II-5.

²³ *Id.* at II-11. Rules of engagement (ROE) are “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” JOINT CHIEFS OF STAFF, PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 207 (8 Nov. 2010, as amended through 15 Jan. 2016) [hereinafter JP 1-02].

Prioritization is important because the purpose of targeting is to engage those targets that best secure the submission of the enemy as soon as possible.²⁴

In Phase 3 (Capabilities Analysis), after a potential target is identified, vetted, and validated, weaponeers select the most appropriate weapon to use against a particular target under the circumstances.²⁵ They also identify the risk of fratricide and collateral damage.²⁶ The goal is to apply enough force to create the desired first order effects on the target while minimizing second order collateral damage and reducing the expenditure of resources.²⁷

With target development and capabilities analysis complete, the target is presented in Phase 4 (Commander's Decision and Force Assignment) to the commander for decision.²⁸ Upon approval, the target is passed from theoretical planning to actual operations and an appropriate unit is tasked with the mission.²⁹ Engagements are prioritized and scheduled, whether simultaneous or sequential, to achieve the best operational effects.³⁰

A unit receives the tasking orders in Phase 5 (Mission Planning and Force Execution) and conducts detailed planning, such as determining flight routes, followed by execution of the mission.³¹ After the target is attacked, an assessment is conducted in Phase 6 (Assessment) to evaluate the specific actions on the target (measures of performance) and to determine whether the tactical actions generated the desired operational effects (measures of effectiveness).³² The

iterative cycle continues back into Phase 1 as the assessment informs the commander's campaign objectives and shapes future target development.³³ Once comfortable with the targeting process, judge advocates then focus on the law of targeting.³⁴

III. Law of Targeting

The law of targeting is a delicate "balance between the desire of states to retain the capability to effectively conduct military operations and the humanitarian mandate of both shielding those who are uninvolved in a conflict from its tragic consequences and protecting those who are involved, such as members of the armed forces, from unnecessary harm."³⁵ The law preserves this balance through the general principles of military necessity,³⁶ distinction,³⁷ means and

²⁴ MCWP 3-43.3, *supra* note 15, at 1-2 ("[F]iring units don't strike targets just because they can; rather, they attack relevant targets to create specific effects based on how those actions contribute to the larger mission.").

²⁵ JP 3-60, *supra* note 12, at II-13. The most appropriate weapon may be a less than lethal weapon system since "[t]argeting is much more nuanced than merely blowing things up and killing people; it involves influencing people to do things as well as not to do things." GEOFFREY CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 162 (2012).

²⁶ JP 3-60, *supra* note 12, at II-13.

²⁷ *Id.* at II-13 to II-15; GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 532 (2010).

²⁸ JP 3-60, *supra* note 12, at II-16. Targets approved by the commander are placed on the Joint Integrated Prioritized Target List (JIPTL), which is "a prioritized list of targets approved and maintained by the joint force commander." JP 1-02, *supra* note 23, at 126; JP 3-60, *supra* note 12, at I-8, II-12.

²⁹ JP 3-60, *supra* note 12, at II-16.

³⁰ *Id.*

³¹ *Id.* at II-20; SOLIS, *supra* note 27, at 532.

³² JP 3-60, *supra* note 12, at II-31. Measures of performance are "tied to measuring task accomplishment," whereas measures of effectiveness are "tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect." JP 1-02, *supra* note 23, at 149.

³³ JP 3-60, *supra* note 12, at II-31.

³⁴ Comfort with the process will include familiarity with targeting computer systems, such as the Joint Targeting Toolbox (JTT), Theater Battle Management Core System (TBMCS), Joint Automated Deep Operations

Coordination System (JADOCs), Advanced Field Artillery Tactical Data System (AFATDS), and Precision Strike Suite for Special Operations Forces (PSS-SOF), or attendance at a Joint Firepower or Weaponeering Course. See U.S. JOINT FORCES COMMAND, *JOINT FIRES AND TARGETING HANDBOOK* app. C (19 Oct. 2007), http://www.globalsecurity.org/military/library/policy/dod/joint/joint-fires-targeting_hb.pdf.

³⁵ Michael N. Schmitt & Eric W. Widmar, "On Target": *Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SECURITY L. & POL'Y 379 (2014); see also Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010); U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* para. 1.3.4 (June 2015) [hereinafter *LAW OF WAR MANUAL*].

³⁶ "Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war." *LAW OF WAR MANUAL*, *supra* note 35, para. 2.2.

³⁷ *Id.* para. 2.5. "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Although not a party to AP I, the United States considers many of the treaty's targeting provisions as reflective of customary international law. See, e.g., Rem. by Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) [hereinafter Matheson Remarks].

methods,³⁸ precautions,³⁹ proportionality,⁴⁰ and humanity.⁴¹ These principles provide the foundation for a basic law of targeting design in which combatants (1) identify a lawful military objective, as distinguished from civilians, civilian objects, and other protected categories, and (2) employ a lawful, discriminate weapon, (3) using a lawful method, that will result in desired effects on the target, while (4), through reasonable precautions, avoiding or minimizing collateral damage to the uninvolved civilian, at least not excessive, and also (5) respecting state sovereignty.⁴²

From the legal perspective, the first step of targeting is the characterization of the target as a military objective.⁴³ Military objectives include enemy combatants,⁴⁴ members of non-state armed groups,⁴⁵ civilians directly participating in hostilities,⁴⁶ and “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, under circumstances ruling at that time, offers a definite military advantage.”⁴⁷ All persons, places, and objects are protected from attack, such as civilians,⁴⁸ combatants placed *hors de combat*,⁴⁹ medical and religious personnel,⁵⁰ medical facilities,⁵¹ and cultural or historical property.⁵² Only military objectives can be the target of an attack.⁵³

After identifying a valid military objective, the law of targeting next addresses the weapon being employed and the execution of the attack,⁵⁴ because “[t]he right of States engaged in armed conflict to adopt means and methods of warfare is not unlimited.”⁵⁵ For instance, it is forbidden to use inherently indiscriminate weapons⁵⁶ or “to employ arms,

³⁸ “In general, *method of warfare* has referred to how warfare is conducted, while *means of warfare* has referred to weapons or devices used to conduct warfare.” LAW OF WAR MANUAL, *supra* note 35, para. 5.1.1.

³⁹ “Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects.” *Id.* para. 5.11; *see also* AP I, *supra* note 37, art. 57; Geoffrey S. Corn, *Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War*, JUST SECURITY (July 8, 2015), <https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/>.

⁴⁰ “*Proportionality* may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.” LAW OF WAR MANUAL, *supra* note 35, para. 2.4. Specific to targeting, “this rule obliges persons to refrain from attacking where the expected harm incidental to such attacks would be excessive in relation to the military advantage anticipated to be gained.” *Id.* para. 2.4.1.2; *see also* AP I, *supra* note 37, art. 51(5)(b).

⁴¹ “*Humanity* may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.” LAW OF WAR MANUAL, *supra* note 35, para. 2.3.

⁴² *Id.* at 5.5.2; Schmitt & Widmar, *supra* note 35, at 379; *see also infra* Appendix B (providing law of targeting design diagram). “Design is the conception and articulation of a framework for solving a problem. . . . The purpose of design is to achieve a greater understanding of the environment and the nature of the problem in order to identify an appropriate conceptual solution.” U.S. MARINE CORPS, WARFIGHTING PUB. 5-1, MARINE CORPS PLANNING PROCESS 1-3 (24 Aug. 2010).

⁴³ Schmitt & Widmar, *supra* note 35, at 382. “Military objective” is a term of art within the law of targeting, indicating a lawful target. AP I, *supra* note 37, art. 52(2). It should not be confused with an objective in the general operational sense of “a clearly defined, decisive, and attainable goal toward which every operation is directed.” JP 1-02, *supra* note 23, at 171.

⁴⁴ “In general, combatants, whether privileged or unprivileged, may be made the object of attack, provided they have not been placed *hors de combat*.” LAW OF WAR MANUAL, *supra* note 35, para. 5.8.

⁴⁵ “Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.” *Id.* para. 5.8.3.

⁴⁶ “Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.” *Id.* para. 5.9; *see also* AP I, *supra* note 37, art. 51(3).

⁴⁷ LAW OF WAR MANUAL, *supra* note 35, para. 5.7.3; *see also* AP I, *supra* note 37, art. 52(2). For war-sustaining objects, a controversial area, *see* LAW OF WAR MANUAL, *supra* note 35, paras. 5.7.6.2, 5.7.8.5, and 5.17.2.3;

Ryan Goodman, *Targeting “War-Sustaining” Objects in Non-International Armed Conflict*, 110 AM. J. INT’L L. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783736.

⁴⁸ “Civilians may not be made the object of attack, unless they take direct part in hostilities.” LAW OF WAR MANUAL, *supra* note 35, para. 4.8.2; *see also* AP I, *supra* note 37, art. 51(3).

⁴⁹ “Persons, including combatants, placed *hors de combat* may not be made the object of attack.” LAW OF WAR MANUAL, *supra* note 35, para. 5.10; *see also* AP I, *supra* note 37, art. 41(2).

Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape: persons in the power of an adverse party; persons not yet in custody, who have surrendered; persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and persons parachuting from aircraft in distress.

LAW OF WAR MANUAL, *supra* note 35, para. 5.10.

⁵⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 24, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]. “Military medical and religious personnel may not be made the object of attack.” LAW OF WAR MANUAL, *supra* note 35, para. 4.10.1. However, “Military medical and religious personnel who take actions outside their role as military medical and religious personnel forfeit the corresponding protections of their special status and may be treated as combatants or auxiliary medical personal, as appropriate.” *Id.*

⁵¹ GC I, *supra* note 50, art. 19, 21; LAW OF WAR MANUAL, *supra* note 35, para. 5.14.3.1.

⁵² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. “Certain types of property receive additional protection as cultural property. Cultural property, the areas immediately surrounding it, and appliances in use for its protection should be safeguarded and respected.” LAW OF WAR MANUAL, *supra* note 35, para. 5.18.

⁵³ LAW OF WAR MANUAL, *supra* note 35, para. 5.6.1; *see also* AP I, *supra* note 37, art. 48.

⁵⁴ Schmitt & Widmar, *supra* note 35, at 397-404.

⁵⁵ LAW OF WAR MANUAL, *supra* note 35, para. 2.6.2.1; Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2295 [hereinafter Hague IV Reg.].

⁵⁶ LAW OF WAR MANUAL, *supra* note 35, para. 6.7; *see also* AP I, *supra* note 37, art. 51(4)(b).

projectiles, or material calculated to cause unnecessary suffering.”⁵⁷ Furthermore, treaty or customary international law may either specifically prohibit a particular weapon completely or regulate its method of employment, such as with chemical weapons,⁵⁸ mines and booby-traps,⁵⁹ or incendiary weapons.⁶⁰

In regards to the method of attack, it is especially forbidden to kill or wound the enemy in a treacherous or perfidious manner.⁶¹ Furthermore, those that plan, authorize, and execute attacks must take feasible precautions to minimize incidental damage to civilians and civilian objects, taking into account all circumstances at the time, including humanitarian and military considerations.⁶² Specific precautions may consist of adjusting the timing of an attack,⁶³ selecting a certain weapon,⁶⁴ or providing effective advance warnings to potentially affected civilians, unless circumstances do not permit.⁶⁵

Even when employing reasonable means and methods to attack a legitimate target, there may still be incidental injury to civilians and collateral damage to civilian objects.⁶⁶ While

unfortunate and tragic, military necessity justifies incidental damage, subject to the principle of proportionality that prohibits attacks when the anticipated harm to civilians and civilian objects is excessive in relation to the concrete and direct military advantage expected to be gained.⁶⁷ The legal focus is on a military commander making a reasonable decision based on the information readily available; the post-strike “fact that civilians are killed or injured, or civilian property is destroyed, as a result of an attack does not of itself necessarily render that attack unlawful.”⁶⁸

Finally, although not necessarily a *jus in bello* targeting issue, the location of the target can have legal implications in the *jus ad bellum* sense of impacting another state’s sovereignty.⁶⁹ In an international armed conflict between states, “attacks may be conducted against military objectives wherever located, outside neutral territory.”⁷⁰ The territory of a neutral state is inviolable, unless a neutral state fails to fulfill its obligation to prevent its territory from being misused.⁷¹ During a non-international armed conflict between a state and a non-state actor, attacks are permissible when conducted with the consent of the state where the military objective is

⁵⁷ Hague IV Reg., *supra* note 55, art. 23(e); LAW OF WAR MANUAL, *supra* note 35, para. 6.6.

⁵⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317; Law of War Manual, *supra* note 35, para. 6.8.3. For additional guidance on riot control agents, see Law of War Manual, *supra* note 35, para. 6.16. For poison, see Hague IV Reg., *supra* note 55, art. 23(a); Law of War Manual, *supra* note 35, para. 6.8. For asphyxiating gases, see Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65; Law of War Manual, *supra* note 35, para. 6.8.2. For biological weapons, see Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163; Law of War Manual, *supra* note 35, para. 6.9.

⁵⁹ Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as Amended on May 3, 1996, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, May 3, 1996, 2048 U.N.T.S. 93; Law of War Manual, *supra* note 35, para. 6.12. For policy guidance on landmines, see U.S. DEP’T OF STATE, BUREAU OF POL.-MIL. AFF., *Fact Sheet: Changes to U.S. Anti-Personnel Landmine Policy* (Sept. 23, 2014); *see also* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (Ottawa Convention) (United States not a party); *see* Law of War Manual, *supra* note 35, para. 6.13 (providing guidance on cluster munitions).

⁶⁰ Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; LAW OF WAR MANUAL, *supra* note 35, para. 6.14; *see id.* para. 6.14.2.1 (discussing specific guidance on white phosphorous).

⁶¹ Hague IV Reg., *supra* note 55, art. 23(b); LAW OF WAR MANUAL, *supra* note 35, para. 5.22. It is also forbidden to “declare that no quarter will be given” during an attack. Hague IV Reg., *supra* note 55, art. 23(d); LAW OF WAR MANUAL, *supra* note 35, para. 5.5.7.

⁶² LAW OF WAR MANUAL, *supra* note 35, para. 5.11; Matheson Remarks, *supra* note 37. “In the conduct of military operations, constant care shall be

taken to spare the civilian population, civilians and civilian objects.” AP I, *supra* note 37, art. 57(1). While this article specifically addresses precautions taken by the attacker, the party subject to attack also has a duty to take feasible precautions to reduce the risk of harm to civilians and other protected persons and objects. LAW OF WAR MANUAL, *supra* note 35, para. 5.14; AP I, *supra* note 37, art. 58. *See also* W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 150-68 (1990).

⁶³ LAW OF WAR MANUAL, *supra* note 35, para. 5.11.2.

⁶⁴ *Id.* para. 5.11.3.

⁶⁵ *Id.* para. 5.11.1; *see also* AP I, *supra* note 37, art. 57. But note, the United States specifically does not view article 57(3) as reflecting customary international law. LAW OF WAR MANUAL, *supra* note 35, para. 5.11.5.

⁶⁶ LAW OF WAR MANUAL, *supra* note 35, para. 2.4.1.2. “Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of war.” Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) (Lieber Code).

⁶⁷ LAW OF WAR MANUAL, *supra* note 35, para. 5.12; AP I, *supra* note 37, art. 51(5)(b).

⁶⁸ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 475 (2012); *see* INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN paras. 50-51, *reprinted in* 39 INT’L LEGAL MATERIALS 1257, 1272 (2000).

⁶⁹ Schmitt & Widmar, *supra* note 35, at 407-09. *Jus ad bellum* is the law concerning the resort to force; *jus in bello* is the law concerning conduct during war. LAW OF WAR MANUAL, *supra* note 35, para. 1.11.

⁷⁰ LAW OF WAR MANUAL, *supra* note 35, para. 5.5.5. This includes the land, sea, and air territory of a belligerent state and international waters and airspace. Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 5 (2014).

⁷¹ Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 5, Oct. 18, 1907, 36 Stat. 2310; LAW OF WAR MANUAL, *supra* note 35, para. 15.3; Schmitt, *supra* note 70, at 5.

located, when authorized by the United Nations Security Council, or when consistent with *jus ad bellum* self-defense because a state is unable or unwilling to address an imminent threat emanating from its territory.⁷² The penetration of a state's sovereignty is permissible when based on these justifications and exceptions.⁷³

Regardless of where it occurs, as noted above, an attack must always be directed at a valid military objective through lawful means and methods, taking feasible precautions to avoid or minimize incidental harm to civilians. The law of targeting requires a reasonable military commander to exercise good faith judgment in weighing numerous intangible considerations, with imperfect information in dynamic and chaotic situations.⁷⁴ It is not as simple and precise as "using a calculator to solve a mathematical equation."⁷⁵ With an understanding of the law of targeting, in addition to the mechanics of the targeting process, a judge advocate is now ready to provide legal advice to the commander and staff as they employ force to accomplish the mission.⁷⁶

IV. Role of the Judge Advocate in the Targeting Process

The judge advocate plays an essential role in ensuring that the law of targeting is integrated into the targeting process.⁷⁷ During the first two phases of the targeting cycle, the main emphasis is on identifying a valid military objective. In the third phase the concern shifts to the means and methods employed against the target and the feasible precautions taken to minimize collateral damage. The judge advocate then provides legal advice to inform the commander's decision in Phase 4 and monitors the planning and execution of the mission in Phase 5, to include delivering real-time advice as

the operation unfolds. Finally, in Phase 6 the judge advocate helps evaluate the post-strike assessment. The judge advocate is intimately involved in every phase of the targeting cycle, pointing out potential legal pitfalls and assisting the commander and staff with making reasonable targeting decisions.⁷⁸

A. Phase 1 (End State and Commander's Objectives)

During the first phase of the targeting cycle, judge advocates actively participate in the operational planning process, review all plans and orders for legal and policy compliance, and provide the commander and staff with legal estimates as they identify overall campaign objectives.⁷⁹ As members of the joint targeting coordination board (JTCB), judge advocates help translate the campaign objectives into general targeting guidance and target sets.⁸⁰ Judge advocates must ensure all proposed targeting guidance and target sets are consistent with all applicable law and policy.⁸¹

Of note, ROE and other operational directives often restrain targeting to a greater degree than that permitted by the LOAC because they account for political and military purposes in addition to the law.⁸² Judge advocates work with the commander and operations personnel to determine whether the current ROE are sufficient to accomplish the mission or whether supplemental ROE are needed to support the desired concept of targeting.⁸³ Early involvement by judge advocates helps ensure that the targeting guidance, target sets, and ROE are properly nested within the overall campaign objectives, which will set the legal conditions for all subsequent phases of the targeting cycle.⁸⁴

⁷² Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77-91 (2013). See also Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012).

⁷³ Schmitt, *supra* note 72, at 77-91.

⁷⁴ LAW OF WAR MANUAL, *supra* note 35, para. 2.2.3.3 (recognizing the "Rendulic Rule," in that decisions in combat are assessed based on information reasonably available to the commander at the time of the decision, not on information that subsequently comes to light). See also SOLIS, *supra* note 27, at 265, 286-90.

⁷⁵ Frederic L. Borch, *Targeting After Kosovo: Has the Law Changed for Strike Planners?*, LVI-2 NAVAL WAR C. REV. 75 (Spring 2003).

⁷⁶ CTR. FOR LAW & MIL. OPERATIONS (CLAMO), THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DEPLOYED MAGTF JUDGE ADVOCATE HANDBOOK 2-2 to 2-4 (2013) (noting that legal advice should be accurate, timely, relevant, complete, and useable).

⁷⁷ BOOTHBY, *supra* note 68, at 476, 484-85 ("Ready access to legal advisers at all appropriate levels is an important means of ensuring that legal constraints are properly understood and that they are factored into military decision-making, including in particular in relation to targeting decisions."). See Appendix C for matrix of law of war and targeting process integration.

⁷⁸ Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 467-68 (Mar. 2004).

⁷⁹ JOINT CHIEFS OF STAFF, PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS I-12 (17 Aug. 2011); see also Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW. 5, 22 (Sept. 2014).

⁸⁰ JP 1-04, *supra* note 79, at III-18 (noting the presence of a judge advocate on the joint targeting coordination board as essential to ensure proper analysis of whether strikes comply with the law of war).

⁸¹ AF OPS & LAW, *supra* note 18, at 280. For example, guidance to spread terror among the civilian population would obviously be prohibited. LAW OF WAR MANUAL, *supra* note 35, para. 5.3.2; AP I, *supra* note 37, art. 51(2).

⁸² INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 81-82 (2015) [hereinafter OPLAW HANDBOOK]; see also HEADQUARTERS, INT'L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE (6 July 2009), http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (unclassified version).

⁸³ JP 1-04, *supra* note 79, at II-12.

⁸⁴ AF OPS & LAW, *supra* note 18, at 279; JP 3-60, *supra* note 12, at II-4. An air commander in Kosovo advised, "The important thing is that the legal advisor has got to be integrated into the operational team. He can't be an

B. Phase 2 (Target Development and Prioritization)

During the second phase, judge advocates advise staff members within working groups, elements, and cells as they develop specific targets that meet the targeting guidance and fall within a target set.⁸⁵ A potential target is vetted and validated to verify its characterization as a legitimate military objective worth engaging as part of the concept of operations.⁸⁶ It is then prioritized among other potential targets because the intelligence resources necessary to develop targets, and the time to do so, are not unlimited.⁸⁷

1. Target Vetting

Target vetting is an assessment of the accuracy of the intelligence that supports the decision to classify a person or object as a military objective.⁸⁸ Current U.S. policy requires positive identification or “a reasonable certainty that the proposed target is a legitimate military target.”⁸⁹ Rules of engagement will set forth standards for the quantity, quality, timeliness, and duration of the intelligence necessary to establish positive identification.⁹⁰

To advise on target vetting, a judge advocate needs to understand the different sensors that are collecting intelligence, whether human sources, signals intelligence, or real-time video feeds from intelligence, surveillance, and reconnaissance (ISR) assets.⁹¹ Because means and methods of intelligence collection are often classified, the judge advocate must have the appropriate security clearance and be

afterthought. He has to be there when the plan is being made.” Randon H. Draper, *Interview with a JFACC: A Commander’s Perspective on the Legal Advisor’s Role*, THE JAG WARRIOR 21-22 (Autumn 2002).

⁸⁵ JP 1-04, *supra* note 79, at x.

⁸⁶ BOOTHBY, *supra* note 68, at 476.

⁸⁷ See JOINT CHIEFS OF STAFF, PUB. 2-0, JOINT INTELLIGENCE II-6 (22 Oct. 2013) [hereinafter JP 2-0] (noting that intelligence needs often exceed intelligence capabilities, requiring prioritization of collection).

⁸⁸ JP 3-60, *supra* note 12, at II-11.

⁸⁹ See Coalition Forces Land Component Command ROE Card, Iraq (2003), reprinted in OPLAW HANDBOOK, *supra* note 82, at 109; see also John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT’L L. 83 (2016), <http://ssrn.com/abstract=2597065> (arguing to replace positive identification with affirmative target identification as “an honest and reasonable belief, based on such affirmative evidence as is reasonably available at the time, that the object of attack is a lawful military target”).

⁹⁰ See JP 2-0, *supra* note 87, app. A (describing intelligence confidence levels: low, moderate, and high); see also U.S. MARINE CORPS, WARFIGHTING PUB. 2-3, MAGTF INTELLIGENCE PRODUCTION & ANALYSIS 3-12 to 3-13 (27 Sept. 2001) [hereinafter MCWP 2-3] (outlining the intelligence evaluation system with reliability and accuracy evaluation codes).

⁹¹ Rear Admiral Michael F. Lohr & Commander Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT’L L. 465, 471-72 (2003); see also JP 2-0, *supra* note 87, app. B (listing intelligence disciplines).

read on to relevant intelligence programs.⁹² Understanding the reliability of intelligence allows the judge advocate to independently evaluate the characterization of a person or object as a military objective.⁹³

2. Target Validation

Once the intelligence is deemed reliable, target validation determines whether a potential target fits within the commander’s targeting guidance and complies with the LOAC and ROE.⁹⁴ The judge advocate will review the target folder, either hard copy or electronic, and all the underlying intelligence, such as satellite imagery and intelligence summaries, to conduct a legal assessment and ensure that the potential target is a valid military objective.⁹⁵ The judge advocate’s active participation in target validation is essential because some operations personnel, without legal guidance, may be overly cautious and forego attacks that are legally permitted, or overly zealous and launch attacks that are legally questionable.⁹⁶

The primary legal question during vetting and validation is whether there is positive identification of a military objective because without a valid military objective there is nothing to target.⁹⁷ After being vetted and validated, potential targets can be placed on one of three different lists: the joint

⁹² U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 6.1.2.1 (July 2007) (noting that commanders should “ensure their judge advocates have appropriate clearances and access to information to enable them to carry out [their legal] responsibility”).

⁹³ When evaluating intelligence judge advocates should be aware of analytic pitfalls and cognitive biases that can influence the decision-making process. MCWP 2-3, *supra* note 90, at 4-9 to 4-14. See also Ashley S. Deeks, *Cognitive Biases and Proportionality Decisions: A First Look*, http://law.huji.ac.il/upload/6_AshleyDeeks_p.pdf (unpublished draft manuscript; cited with permission); Lieutenant Commander Luke Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT’L SECURITY J. 577 (2016).

⁹⁴ JP 3-60, *supra* note 12, at II-11. Of particular concern will be dual use targets. By having a military purpose, dual use targets are military objectives and subject to direct attack; however, their concurrent civilian function heightens collateral damage considerations. *Id.* at A-5; LAW OF WAR MANUAL, *supra* note 35, para. 5.7.1.4.

⁹⁵ AF OPS & LAW, *supra* note 18, at 280-81.

⁹⁶ *Id.* at 281. But see BING WEST, ONE MILLION STEPS: A MARINE PLATOON AT WAR 29 (2014) (arguing that legal advisors sap energy and optimism from the targeting process, causing hesitation to conduct even legally permissible attacks).

⁹⁷ See Short, *supra* note 1, at 19 (“Every target we intended to strike had passed an extraordinary series of tests, perhaps the most important one being whether it fit with our definition of military objective under the law of armed conflict.”).

target list,⁹⁸ the restricted target list,⁹⁹ or the no-strike list.¹⁰⁰ Although judge advocates must be familiar with these lists, they do not directly manage them; the lists are maintained and updated by intelligence and operations personnel.¹⁰¹

C. Phase 3 (Capabilities Analysis)

Once a valid military objective is identified, weaponeers make a recommendation on how to engage the target and analysts conduct a collateral damage estimation to identify possible collateral concerns.¹⁰² The judge advocate must be readily available to advise on the means, methods, and precautions of attack being considered.

1. Weaponeering

While the weaponeer matches the capabilities of an appropriate weapon with the vulnerabilities of a particular target to achieve the desired effects, the judge advocate reviews the proposed weaponeering solution for potential legal or policy restrictions.¹⁰³ Since all weapons in the U.S. inventory have previously received legal reviews during their acquisition, whether the weapon is inherently indiscriminate or specifically designed to cause unnecessary suffering is not a major concern at this stage.¹⁰⁴ However, the actual method of employment must still be examined for potential legal issues, like the use of a weapon regulated by specific treaty, the use of a weapon beyond its intended purpose, or the use of any otherwise lawful weapon with the specific intent to cause unnecessary suffering.¹⁰⁵ Beyond legal restrictions, the

primary ROE concern is whether the commander has release authority for a particular weapon or whether for operational reasons the use of that weapon is reserved at a higher headquarters.¹⁰⁶

2. Collateral Damage Estimation (CDE)

After deciding on a weaponeering solution that achieves the desired first order effects on the target, CDE examines the incidental second and higher order effects on the uninvolved civilian and civilian objects.¹⁰⁷ A CDE analyst uses the CDE methodology to identify the risk of collateral damage, often through computer modeling that predicts the likely effects of engaging a particular target with a particular munition.¹⁰⁸

The CDE analyst first geospatially locates the positively identified military objective and draws a ring around the target that represents the effects of most conventional weapons in the U.S. inventory (CDE Level 1).¹⁰⁹ If there are no collateral concerns within the effects ring, the target receives a rating of 'low' and a commander with authority to approve that level of collateral risk (CDE Level 1 Low) may authorize the strike after considering risk to the mission, friendly forces, and collateral concerns.¹¹⁰

However, if there are collateral concerns within the effects ring, the target proceeds to the next assessment tier where mitigation techniques are applied to modify the weapons effects with the intent that the collateral concerns will no longer be affected.¹¹¹ Mitigation techniques may

⁹⁸ A joint target list includes targets that have been vetted and validated, with no engagement restrictions; these targets will be nominated for inclusion on the joint force commander approved JIPTL which is prioritized according to the commander's objectives. JP 3-60, *supra* note 12, at II-12.

⁹⁹ A restricted target list contains vetted and validated targets that have operational restrictions on them; restricted targets have engagement prohibitions or limitations due to operational or political considerations, such as do not destroy a bridge, even if it is an otherwise valid military target, because the ground forces need it for their subsequent scheme of maneuver. *Id.* at II-12, II-13.

¹⁰⁰ A no-strike list contains all identified entities functionally characterized as civilian or non-combatant in nature and thus are protected under international law and cannot be the object of attack, unless their protection is lost due to improper use. *Id.* at II-12; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01B, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (11 Dec. 2015) [hereinafter CJCSI 3160.01B] (for official use only (FOUO)).

¹⁰¹ The DoD operates a modernized integrated database (MIDB) as an all-source repository for all target lists, no-strike lists, and data in electronic target folders. JP 3-60, *supra* note 12, at B-3; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3370.01A, TARGET DEVELOPMENT STANDARDS (17 Oct. 2014) (FOUO).

¹⁰² JP 3-60, *supra* note 12, at II-13.

¹⁰³ AF OPS & LAW, *supra* note 18, at 281.

¹⁰⁴ *See* U.S. DEP'T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (2003).

¹⁰⁵ *See* CORNET AL., *supra* note 25, at 191.

¹⁰⁶ U.S. AIR FORCE, DOCTRINE DOCUMENT 1-04, LEGAL SUPPORT TO OPERATIONS 95 (4 Mar. 2012).

¹⁰⁷ JP 3-60, *supra* note 12, at II-14, II-18; CJCSI 3160.01B, *supra* note 100, encl. E (unclassified). The five foundational questions of the collateral damage estimation (CDE) framework are: (1) Can I positively identify the person or object I want to attack as a legitimate military objective? (2) Are there collateral objects within the effects range of the weapon I would like to use? (3) Can I mitigate damage to those collateral concerns by attacking the target with a different weapon or method of engagement, yet still accomplish my mission? (4) If not, how many non-combatants do I think will be injured or killed by my attack? (5) Are the collateral effects of my attack excessive in relation to the expected military advantage to be gained and do I have authority to engage the target with the risk of collateral damage, or do I need to call higher headquarters? *Id.*

¹⁰⁸ CORNET AL., *supra* note 25, at 188; SOLIS, *supra* note 27, at 532. *See also* Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681, 740-53 (2014); Dwight A. Roblyer, *Beyond Precision: Issues of Morality and Decision Making in Minimizing Collateral Casualties* 18 (paper submitted to the Program in Arms Control, Disarmament and International Security, University of Illinois, Urbana-Champaign) (28 Apr. 2003), <http://www.dtic.mil/dtic/tr/fulltext/u2/a424627.pdf>.

¹⁰⁹ CJCSI 3160.01B, *supra* note 100, encl. E, app. A (unclassified).

¹¹⁰ *Id.* Collateral concerns are any people or objects not otherwise considered military objectives found within the weapons effects ring. *Id.*

¹¹¹ *Id.* encl. E, apps. B, C, D (unclassified). There is additional, specialized analysis if the target is a dual-use facility, or if human shields,

include using precision guidance technology, varying the explosive yield and the fusing arrangement (point detonating, proximity/variable time, or delay fuses), altering the angle of attack to minimize the fragmentation pattern, or adjusting the timing of an attack to account for civilian patterns of life.¹¹² Different mitigation techniques are employed at different assessment tiers (CDE Levels 2-4) and if mitigation techniques can completely separate the weapons effects from impacting the target while not likely affecting the collateral concerns, then a commander with corresponding approval authority (CDE Levels 2-4 Low) may authorize the strike on the target.¹¹³

If there are still collateral concerns within the modified effects rings after employing the available mitigation techniques, then a casualty estimate is performed to calculate the anticipated amount of non-combatant injury and death (CDE Level 5).¹¹⁴ The casualty estimate is compared to a non-combatant and civilian casualty cut-off value (NCV) to determine 'low' targets that may be approved by a corresponding commander (CDE Level 5 Low) or 'high' targets that are forwarded for higher, political level review and approval (CDE Level 5 High).¹¹⁵

Collateral damage estimation is a tool that helps commanders employ fires in accordance with the law of war.¹¹⁶ Importantly, CDE is not an exact science and does not guarantee a particular outcome; it merely detects collateral concerns, identifies potential mitigation techniques, and informs the commander's proportionality assessment, weighing collateral risk against military advantage, within the targeting process.¹¹⁷ The judge advocate does not conduct the actual CDE analysis, but still needs to understand the methodology to provide adequate legal advice in regards to the commander's assessment.¹¹⁸

environmental concerns, or chemical, biological, or radiological (CBR) hazards are present within the collateral hazard area. *Id.*

¹¹² BOOTHBY, *supra* note 68, at 478; *see also* AIR LAND SEA APPLICATION CTR., MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR THE JOINT APPLICATION OF FIREPOWER 125-28 (Nov. 2015) (FOUO).

¹¹³ CJCSI 3160.01B, *supra* note 100, enclosure E, apps. B, C, D (unclassified).

¹¹⁴ *Id.* encl. E, app. E (unclassified).

¹¹⁵ *Id.*; JP 3-60, *supra* note 12, at II-16. *See also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3122.06D, SENSITIVE TARGET APPROVAL AND REVIEW PROCESS (12 Nov. 2013) (classified).

¹¹⁶ JOINT TARGETING SCH., JOINT FIRES & TARGETING STUDENT GUIDE II-1, III-65 to III-67 (5 Mar. 2014), http://www.dtic.mil/doctrine/jfs/jts/jts_studentguide.pdf.

¹¹⁷ *Id.*

¹¹⁸ Dunlap, *supra* note 3, at 143 ("JAGs must also learn the applicable collateral damage estimation methodology."); *see* U.S. Army Central & 17th Field Artillery Brigade, Judge Advocates, Operation Inherent Resolve After Action Report 4 (July 2014 to Jan. 2015) [hereinafter USARCENT/17FAB AAR] (on file with CLAMO) (recalling that judge advocates worked closely with the CDE analysts and recommending

D. Phase 4 (Commander's Decision and Force Assignment)

After a vetted and validated target receives a weaponeering solution and a collateral damage estimate, it is presented to the commander for approval at the JTCB.¹¹⁹ The judge advocate attends the targeting board and provides advice to the commander.¹²⁰ However, this should not be the first time that lawyers see the target; by actively participating in the prior phases of the targeting process, including conducting a formal legal review of the entire target package, the judge advocate can identify and address legal issues prior to the target being briefed at the board.¹²¹ This will economize time and effort in developing targets and avoid raising legal objections for the first time during a formal staff meeting late in the process.¹²²

E. Phase 5 (Mission Planning and Force Execution)

When the unit receives a tasking order, a judge advocate should be readily available to provide legal advice during the unit's mission planning and during the real-time execution of the attack.¹²³ Many operational policies that are not legal in nature can have a significant impact on the mission, such as tactical directives, fire and airspace control measures, special instructions, and a concept of operations approval process.¹²⁴ Fratricide prevention is a key consideration during detailed planning and fire support coordinating measures help ensure that friendly forces are clear of the air and ground around the target.¹²⁵ If the attack may cause collateral damage, then the planners will consider ways to provide effective advance warnings to potentially impacted civilians, whether through radio broadcasts, leaflets, or possibly direct phone calls,

attendance at a CDE training course prior to deployment). Collateral damage estimation training courses are taught by the Joint Targeting School in Dam Neck, Virginia, or by mobile training teams. JOINT TARGETING SCH., JOINT ELECTRONIC LIBRARY, <http://www.dtic.mil/doctrine/jfs/jts.htm> (last visited Jul. 6, 2016) (providing contact information, course schedules, and reference materials).

¹¹⁹ JP 3-60, *supra* note 12, at II-16, III-3 to III-6.

¹²⁰ Carberry & Holcomb, *supra* note 10, at 39.

¹²¹ AF OPS & LAW, *supra* note 18, at 281. *See infra* Appendix D for notional targeting checklist.

¹²² Brigadier General Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 480 (Fall 2003) ("It is obviously counterproductive to raise legal issues after the fact, but it is almost as counterproductive to raise legal objections at the last moment. . . . Injecting legal friction late in the game only creates inefficiencies that can be lethal on the battlefield.")

¹²³ AF OPS & LAW, *supra* note 18, at 281-82.

¹²⁴ *Id.* at 274-75.

¹²⁵ JP 3-60, *supra* note 12, at III-1.

unless circumstances do not permit.¹²⁶ Furthermore, when targeting a specific individual, policy may go beyond the law and dictate an assessment of the feasibility of capture.¹²⁷

Coalition operations trigger additional multinational considerations, like national approval authorities and caveats.¹²⁸ Coalition partners will conduct an independent legal assessment of the operation to ensure that it is consistent with their own political concerns and legal perspectives, which may not align with U.S. positions.¹²⁹ Best practice has been the early and proactive engagement with coalition lawyers to identify, understand, and attempt to mitigate targeting differences among the coalition force.¹³⁰ Furthermore, geographic authorities and overflight permissions need to be obtained for the origin of the mission, the ingress and egress routes, and the location of the target.¹³¹ Operations taking place near international borders raise further concerns due to potential spillage of the conflict into neighboring states.¹³²

Combat operations are fluid, the operational environment changes, and even deliberately planned missions are dynamically executed.¹³³ Within execution of the mission, the target is found and sensors fixated to establish and,

especially if the target is moving, to maintain positive identification.¹³⁴ As the moment of the strike approaches, there is a reassessment of the area, including a scan for previously unidentified collateral concerns, to determine if the situation has sufficiently changed so as to merit the suspension or cancellation of an attack.¹³⁵ In identifying the target and any adjacent collateral concerns, an important consideration is any ROE requirement for observation of the target area (pattern of life) prior to and during the strike.¹³⁶ Finally, the target is engaged, followed by an assessment to consider immediate reattack if the initial strike is not effective.¹³⁷

F. Phase 6 (Assessment)

Although judge advocates may play a limited role in routine post-strike assessments, their involvement is crucial when issues arise with possible legal implications.¹³⁸ Judge advocates must monitor the assessment to identify required investigations of possible, suspected, or alleged LOAC

¹²⁶ LAW OF WAR MANUAL, *supra* note 35, para. 5.11.1; Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack Under International Law: Theory and Practice*, 87 INT'L L. STUD. 359 (2011).

¹²⁷ THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013) (stating a policy preference for capture during counterterrorism operations outside areas of active hostilities because of the benefits of gathering meaningful intelligence and disrupting terrorist plots). *But see* LAW OF WAR MANUAL, *supra* note 35, para. 2.2.3.1 (indicating that the law of armed conflict does not require a commander to capture or wound, if possible, rather than attack to kill).

¹²⁸ AF OPS & LAW, *supra* note 18, at 275; N. ATLANTIC TREATY ORG. (NATO), ALLIED JOINT PUB. 3-9, ALLIED JOINT DOCTRINE FOR JOINT TARGETING (May 2008). National approval authorities, commonly referred to as "red card holders," are coalition personnel that can approve missions assigned to their forces. National caveats are restrictions that coalition partners place on the use of their forces due to legal, operational, or political reasons. *See* 1st Infantry Division, Office of the Staff Judge Advocate, Operation Inherent Resolve After Action Report 7 (Oct. 2014 to July 2015) [hereinafter IID AAR] (on file with CLAMO).

¹²⁹ Squadron Leader Catherine Wallis, *Legitimate Targets of Attack: Considerations When Targeting in a Coalition*, ARMY LAW, 44 (Dec. 2004) (also highlighting that restrictions on the sharing of intelligence may impede a state from independently determining that a person or object is a military objective).

¹³⁰ *Id.* at 55-56.

¹³¹ W. Hays Parks, *Lessons from the 1986 Libya Airstrike*, 36-4 NEW ENG. L. REV. 755, 763 (2002) (commenting on legal issues that arose with regard to launching from, and overflight of, foreign nations during Operation El Dorado Canyon).

¹³² W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV. (Jan.-Feb. 1982); W. Hays Parks, *Linebacker and the Law of War*, AIR U. REV. (Jan.-Feb. 1983) (describing an operational buffer zone along the China-North Vietnam border to prevent U.S. aircraft entry into Chinese airspace).

¹³³ JP 3-60, *supra* note 12, at II-20 to II-30. This article focuses on deliberate targeting for attacking planned targets, either scheduled or on-call, that are known to exist in the operational environment and detected in sufficient time to list in an air tasking order; unplanned or unanticipated targets of opportunity that are identified too late, usually within 72 hours of the anticipated engagement, are addressed through dynamic targeting. *Id.* at II-1 to II-3. Dynamic targeting applies the same operational and legal principles identified herein, albeit under time compressed conditions, using the Find, Fix, Track, Target, Engage, and Assess (F2T2EA) cycle that facilitates the quick transition from the vetting and validation of a target, through the weaponeering solution and collateral damage estimation, to the actual attack. AF OPS & LAW, *supra* note 18, at 282-86; ATP 3-60, *supra* note 15, app. A. *See also* AIR LAND SEA APPLICATION CTR., MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR DYNAMIC TARGETING (Sept. 2015) (FOUO).

¹³⁴ It is vital that the aircraft identifies the actual target, known as combat identification, normally through an observer accurately passing the geospatial location of the target to the shooter. JP 3-60, *supra* note 12, at II-21, II-29. *See, e.g.*, Rod Nordlandnov, *U.S. General Says Kunduz Hospital Strike Was 'Avoidable'*, N.Y. TIMES (Nov. 25, 2015), <http://www.nytimes.com/2015/11/26/world/asia/afghanistan-kunduz-hospital-airstrike.html> (reporting how the aircraft misidentified the hospital as the target building).

¹³⁵ JP 3-60, *supra* note 12, at A-5; *see* ERIC BLEHM, THE ONLY THING WORTH DYING FOR 212 (2010) (describing a pilot shift the laser designator of a laser-guided bomb in flight to an abandoned field when it was discovered, after release of the bomb, that the targeted insurgents were surrounding an innocent taxi cab).

¹³⁶ Pattern of life has been used in two contexts: (1) to observe a potential target over time to confirm its characterization as a valid military objective, and (2) to observe civilian activity within an area over time as part of determining potential collateral concerns. McNeal, *supra* note 108, at 734.

¹³⁷ JP 3-60, *supra* note 12, at II-30; *see* IID AAR, *supra* note 128, at 2 (noting legal issues during reengagements, such as whether wounded insurgents were *hors de combat* or merely repositioning to continue fighting).

¹³⁸ AF OPS & LAW, *supra* note 18, at 282.

violations¹³⁹ or friendly fire incidents.¹⁴⁰ In an information environment filled with *lawfare*,¹⁴¹ military lawyers must also be ready to gather evidence to counter enemy propaganda alleging LOAC violations and civilian casualties.¹⁴² A post-strike assessment strategy, whether placing “boots on the ground” or using full motion video from the air, should be developed prior to a strike.¹⁴³ Finally, judge advocates capture legal lessons learned to improve their future performance and pass on their experiences to others.¹⁴⁴

V. Conclusions

A decade after the Zarqawi airstrike, judge advocates remain integrated in the targeting process.¹⁴⁵ Thus, in November 2015, when oil tanker trucks staged in the Syrian desert and prepared to smuggle their cargo to fund the Islamic State, judge advocates analyzed the situation¹⁴⁶: *Were the oil tankers and their cargo, integral links in the Islamic State’s war-sustaining revenue, valid targets? Were the means and method of the attack lawful? Were precautions, such as warnings, employed to avoid or minimize collateral damage? Was the strike proportionate if some drivers remained with their vehicles, or were the drivers directly participating in hostilities and thus excluded from the proportionality calculation? Were there any violations of Syrian sovereignty?* Judge advocates provided the commander with a recommendation, the commander made an informed decision, and the bombs destroyed their targets.¹⁴⁷

¹³⁹ DoDD 2311.01E, *supra* note 6, at para. 4.4; *see, e.g.*, Joseph Goldstein, *Doctors Without Borders Says Clues Point to ‘Illegal’ U.S. Strike on Afghan Hospital*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/world/asia/doctors-without-borders-seeks-explanation-for-kunduz-hospital-attack.html>.

¹⁴⁰ U.S. DEP’T OF ARMY, REG. 638-8, ARMY CASUALTY PROGRAM para. 2-14 (23 June 2015); *see, e.g.*, Azam Ahmed, *‘Friendly Fire’ Strike Kills 5 Special Operations Soldiers in Afghanistan*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/world/asia/friendly-fire-strike-kills-5-special-operations-soldiers-in-afghanistan.html>.

¹⁴¹ Dunlap, *supra* note 122, at 480 (“Lawfare is specifically the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective.”).

¹⁴² *See* JEWISH INST. FOR NAT’L SECURITY AFF., 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT (Mar. 2015); *see also* MICHAEL GOLEMBESKY & JOHN R. BRUNING, LEVEL ZERO HEROES 257-62 (2014) (recalling an Afghan family claiming an American airstrike killed their daughter and demanding compensation, despite medical evidence that she “had been executed at close range by a single 7.62mm gunshot to the side of the head”).

¹⁴³ *See* HEADQUARTERS, INT’L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE (30 Nov. 2011), [http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r.pdf](http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf) (unclassified version) (“Where engagements appear to have breached any aspect of this Directive, whether or not they resulted in civilian casualties, I expect commanders to investigate. We are in a better position tactically, operationally and strategically when we are first with the truth.”).

¹⁴⁴ JP 1-04, *supra* note 79, at III-19 to III-20. Judge advocates are encouraged to contact the Center for Law and Military Operations

Today more than ever, as conflicts continue across the globe under increased legal scrutiny, judge advocates must be “trained, operationally oriented, and readily accessible”¹⁴⁸ to assist commanders and their staffs with navigating the maze of applicable laws, policies, and orders that impact targeting operations.¹⁴⁹

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.¹⁵⁰

To provide effective legal advice that supports the decision-making process and mission accomplishment, judge advocates need a firm grasp of the targeting cycle, a fundamental knowledge of the law and policies governing targeting, and the wisdom to know how to apply the law to the process.¹⁵¹

(CLAMO) via email at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@mail.mil to acquire recent after action reports prior to their deployment and to conduct an after action review upon redeployment. FM 1-04, *supra* note 5, para. 4-50.

¹⁴⁵ *See* USARCENT/17FAB AAR, *supra* note 118, at 4-5; IID AAR, *supra* note 128, at 2-3 (highlighting judge advocate integration in current Operation Inherent Resolve targeting process and strike cells).

¹⁴⁶ *See* Michael R. Gordon, *U.S. Warplanes Strike ISIS Oil Trucks in Syria*, N.Y. TIMES (Nov. 16, 2015), http://www.nytimes.com/2015/11/17/world/middleeast/us-strikes-syria-oil.html?_r=1; Beth Van Schaack, *Targeting Tankers Under the Law of War (Part 1)*, JUST SECURITY (Dec. 2, 2015), <https://www.justsecurity.org/28064/targeting-tankers-law-war-part-1/>; Beth Van Schaack, *Targeting Tankers Under the Law of War (Part 2)*, JUST SECURITY (Dec. 3, 2015), <https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2/>.

¹⁴⁷ *See* Gordon, *supra* note 146.

¹⁴⁸ U.S. AIR FORCE, ANNEX 3-60, TARGETING 96 (10 Jan. 2014).

¹⁴⁹ *See* Carberry & Holcomb, *supra* note 10, at 39; Dunlap, *supra* note 3, at 145 (emphasizing the strategic importance of adherence to the law of war in modern conflicts).

¹⁵⁰ Colonel Tony Montgomery, *Legal Perspectives from the EUCOM Targeting Cell*, 78 INT’L L. STUD. 189-90 (2002), *quoted in* SOLIS, *supra* note 27, at 531.

¹⁵¹ *But see* Arthur Rizer, *Lawyering Wars: Failing Leadership, Risk Aversion, and Lawyer Creep—Should We Expect More Lone Survivors?*, 90 IND. L. J. 935 (2015) (discussing the negative impacts of the contemporary legal environment on U.S. military operations).

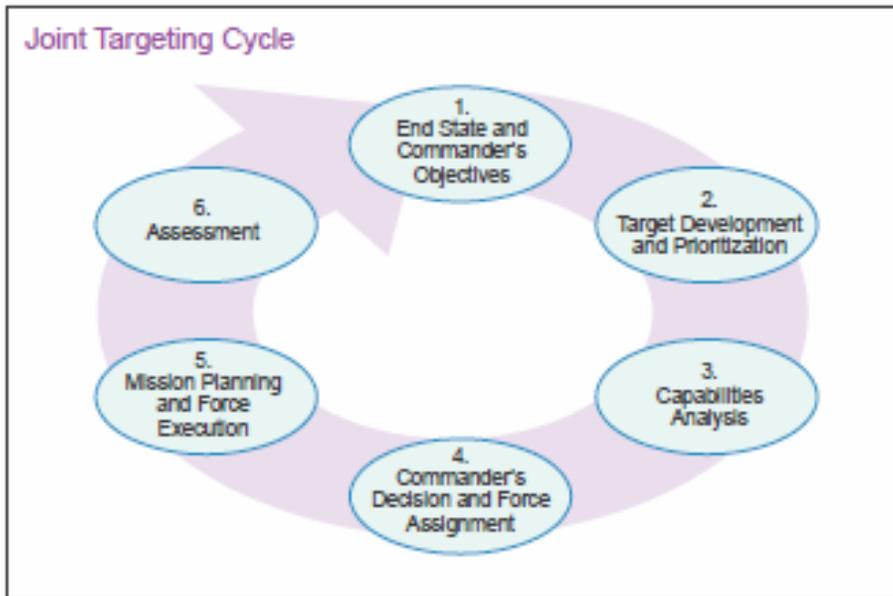


Figure II-2. Joint Targeting Cycle

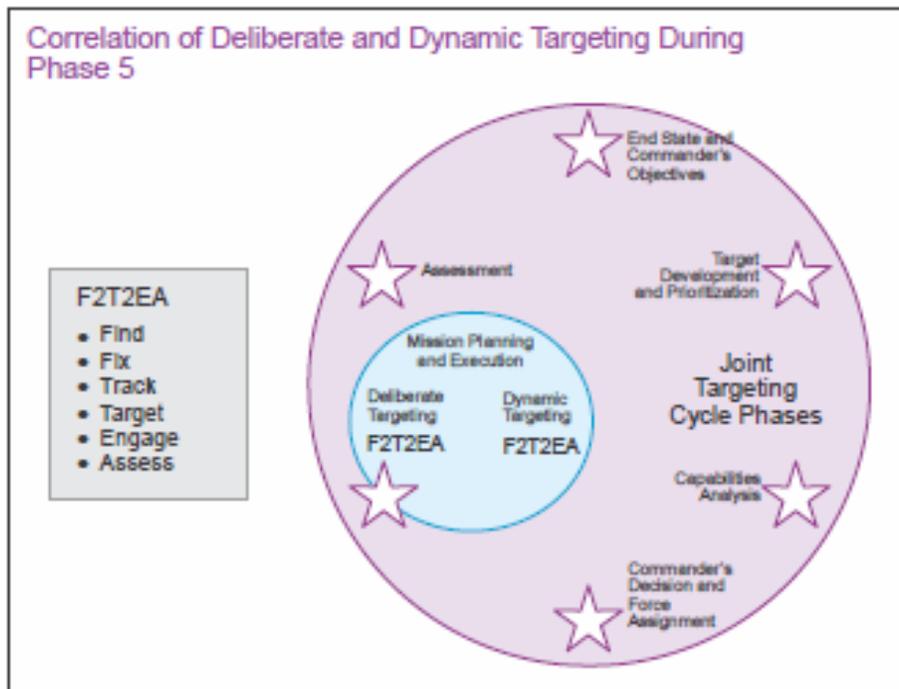
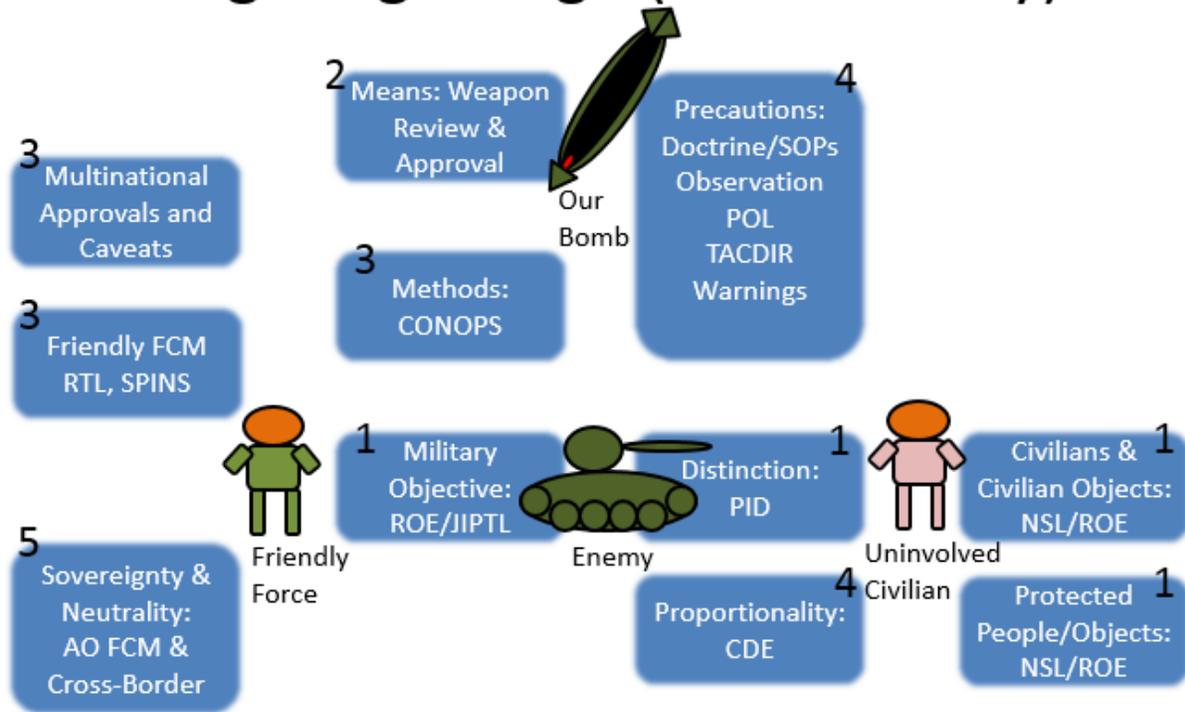


Figure II-9. Correlation of Deliberate and Dynamic Targeting During Phase 5

152

¹⁵² JP 3-60, *supra* note 12, fig.II-2, II-9.

Targeting Design (Law & Policy)



At the most basic level, “in war the main idea is to get the bombs on the targets.”¹⁵³ The law of targeting governs the relationship between our bomb and the enemy target, while also balancing the interests of the uninvolved civilian and our friendly force, by requiring combatants to:

- (1) Gain positive identification of a valid military objective, as distinguished from civilians, civilian objects, and other protected categories.
- (2) Use a lawful weapon, with appropriate release authority.
- (3) Execute a lawful method, consistent with friendly force fire control measures and multinational considerations.
- (4) Employ feasible precautions to avoid or minimize (at least not excessive) incidental collateral damage to civilians, civilian objects, and other protected categories.
- (5) Respect the sovereignty and neutrality of states.

¹⁵³ General Curtis LeMay, Eighth Air Force Commanding General to Eighth Air Force Commanding General (Mar. 31, 1944), *quoted in* STEPHEN L. MCFARLAND, *AMERICA’S PURSUIT OF PRECISION BOMBING: 1910-1945*, at 7 (1995), *reprinted in* Canestaro, *supra* note 78, at 433.

Appendix C. Joint Targeting Cycle and Law of Targeting Integration Matrix

		Joint Targeting Cycle					
		Phase 1: End State & Commander's Objectives	Phase 2: Target Development & Prioritization	Phase 3: Capabilities Analysis	Phase 4: Commander's Decision & Force Assignment	Phase 5: Mission Planning & Force Execution	Phase 6: Assessment
Law of Targeting	Military Necessity - Distinction (1) Target	Attend Coordination Board Campaign Objectives Targeting Guidance Target Sets Military Objectives (LOAC) Rules of Engagement	Participate Working Groups Target Vetting Positive Identification (Quantity, Quality, Timeliness, Duration) (Pattern of Life) Target Validation Military Objective (LOAC) Rules of Engagement Restricted Target List Protected on No Strike List		Complete Legal Review Target Folder Attend Coordination Board Advise Commander	Confirm Not No-Strike List Not Restricted Target Combat Identification Immediate Reattack Criteria Squirters	Monitor Post-Strike Battle Damage Assessment (FMV, BOG) Potential Investigations First with Truth
	Means (2) Weapon			Advise Weaponeer Legal Review No Indiscriminate No Unnecessary Suffering Specific Treaty Regulation Weapons Release Authority		Confirm	
	Precautions - Methods (3) Concept of Operations					Assist Plan and Monitor No Perfidy Warning Observation Fire Control Measures Avoid Friendly Fire Special Instructions Multinational Concerns National Caveats Shift/Abort Criteria CONOP Approval	
	Proportionality (4) Collateral Damage Estimation			Advise CDE Analyst ID Collateral Concerns Collateral Scan (Pattern of Life) Mitigation Techniques CDE Call = Approval Authority Excessive		Confirm Collateral Scan (Pattern of Life)	
	Sovereignty (5) Location of Target	Geographic Considerations <i>Jus ad Bellum</i> Issues	Geographic Considerations <i>Jus ad Bellum</i> Issues			Geographic Considerations <i>Jus ad Bellum</i> Issues Origin, Ingress, Egress Near/Cross Border Guidance	

The columns are the phases of the joint targeting cycle, while the rows are the principles of the law of targeting, indicating the main legal issues at play during each phase of the targeting cycle. A judge advocate starts in the left column, phase 1, developing general target sets (target), before focusing in phase 2 on target vetting and validation (target) and addressing the weaponizing solution (means) and the collateral damage estimation (precautions and proportionality) in phase 3. After conducting a complete legal review in phase 4, the judge advocate assists with detailed mission planning (method and sovereignty), confirms all issues, and monitors the attack in phase 5, ready to assess the situation in phase 6, the right column. It is an iterative process, so the judge advocate continually provides advice across the spectrum of the planning, decision, execution, and assessment of attacks.

DELIBERATE TARGETING						
Military Necessity - Distinction - Proportionality – Humanity						
<i>Military Necessity</i>	(1) Target:	LOAC: Military Objective	Combatant Nature	NSAG Location	DPH Purpose	Use
<i>Distinction</i>		ROE				
<i>Means</i>	(2) Weapon:	Associates				
		TST				
<i>Methods</i>	(3) CONOPS:	NSL/Protected				
		RTL				
<i>Precautions</i>		Dual Use				
		Positive Identification	Quantity	Quality	Timeliness	
<i>Proportionality</i>	(4) CDE:	Pattern of Life	Duration			
<i>Sovereignty</i>	(5) Location:	Legal Review				
		Indiscriminate Weapon				
		Specific Treaty				
		Unnecessary Suffering				
		Weapons Release				
		Perfidy				
		Warning				
		Observation				
		Shift/Abort Criteria				
		Alternative COA				
		Capture				
		HHQ Intent/Guidance (Tactical Directive)				
		FCM/SPINS/SOPs				
		Reattack Criteria				
		Post-Strike BDA				
		Multinational Issues				
		National Caveats				
					NCV =	
		CDE Approval Authority (SAA/TEA/NAA)				
		Collateral Concerns				
		Mitigation Techniques				
		Pattern of Life - Collateral Scan				
		Excessive				
		Geographic AO				
		Origin/Ingress/Egress				
		Near/Cross Border				

Starting at the top, the checklist walks the judge advocate through the law of targeting, first considering the target, before moving on to the weapon, the concept of operation with its associated considerations, the collateral damage estimation, and, finally, the geographic location of the target. The checklist follows the analytical framework of the targeting design.