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Legitimate Targets of Attack: Considerations When Targeting in a Coalition
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We need to understand going in the limitations that our coalition partners will place upon themselves and upon us. There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front.¹

Recent major U.S. operations, from Kosovo to Iraq, have been conducted in a coalition, and this trend is likely to continue. During these coalition operations, some targeting decisions require the approval of more than one coalition member.²

Under the law of war (LOW), legitimate targets are limited to military objectives where the attack is not expected to cause excessive collateral damage in relation to the concrete and direct military advantage anticipated.³ This legal requirement, however, is capable of more than one reasonable interpretation. In addition, a range of factors may influence whether objectives are considered acceptable targets, regardless of the permissibility of attacking them under international law. When targeting in a coalition, it is important that judge advocates (JAs) understand U.S. obligations and coalition partner obligations in order to avoid differences that would adversely impact the operation.

Unclassified national policy on legitimate targets of attack is not available for most countries. Accordingly, this article highlights the available interpretations of military objectives and the range of factors that influence national targeting decisions. This article therefore does not provide “the answers,” but instead focuses on providing information to assist JAs in asking the right questions. This article concludes by proposing some ways JAs can ensure coalition partner differences are identified and factored into planning.

Legal Obligations

The starting point for identifying legitimate targets of attack is Protocol I.⁴ Although the United States is not a Party to Protocol I,⁵ it is bound to certain provisions to the extent Protocol I codifies customary international law.⁶ Protocol I, Article 48, provides the following:

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 shall direct their operations only against military objectives.⁷

¹ Lieutenant General Michael Short, USAF, Commander of Allied Air Forces, Southern Europe, Address at the Air Force Association's Air Warfare Symposium (Feb. 25, 2000), quoted in Amnesty International, “Collateral Damage” or Unlawful Killings? *Violations of the Laws of War by NATO During Operation Allied Force* (June 6, 2000), at <http://www.web.amnesty.org/ai.nsf/index/EUR700182000> [hereinafter Amnesty Report].

² See James E. Baker, *When Lawyers Advise Presidents in Wartime, Kosovo and the Law of Armed Conflict*, NAVAL WAR C. REV., Winter 2002, available at <http://www.nwc.navy.mil/press/Review/2002/winter/art1-w02.htm> (outlining the target approval process during the Kosovo conflict); e-mail from MAJ Philip Wold, United States Air Force, former Chief, Operations Law, 9 AF/USCENTAF, to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Operations, Center for Law and Military Operations (12 Apr. 2004) [hereinafter Wold e-mail] (providing comments of MAJ Thomas J Cluff USAF, former judge advocate, Combat Plans Division, Combined Air Operations Center, dealing with United Kingdom and Australian targeting policy in Iraq) (on file with CLAMO).

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Article 52, 57, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁴ *Id.*

⁵ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977: *States Parties* (last visited Nov. 1, 2004) [hereinafter States Parties] (listing Stated Parties to Protocol I).

⁶ See Major Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143 (2001) (quoting Michael J. Matheson, *Session I: 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, 420 (1987)).

⁷ Protocol I, *supra* note 3, art. 48.

Military objective for the purposes of the LOW⁸ is defined in Article 52(2), Protocol I.

[M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁹

Military objectives may be attacked if they meet the following proportionality test set out in Article 57(2)(a)(iii), Protocol I:

[R]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁰

In addition, there are specific requirements that apply to attacks on certain civilian objects that are being used perfidiously by the enemy.¹¹

Interpretation of Legal Obligations

Commentaries

The International Committee of the Red Cross (ICRC) and Michael Bothe, Professor of Public Law at the Johann Wolfgang Goethe University in Frankfurt, provided commentary on the concept of military objectives, which is a useful starting point for understanding the limits of legitimate targets of attack.¹² The ICRC commentary provides:

It should be noted that the definition is limited to objects but it is clear that members of the armed forces are military objectives.

. . . .

A closer look at the various criteria used reveals that the first refers to objects which, by their ‘nature,’ make an effective contribution to military action. This category comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.

The second criterion is concerned with the ‘location’ of objects. Clearly, there are objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action. This may be, for example, a bridge or other construction, or it could also be . . . a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it

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 or

⁸ Note that “military objective” as a LOW term is different from the Department of Defense (DOD) definition of the term. The DOD defines military objective as “**A derived set of military actions to be taken to implement National Command Authorities guidance in support of national objectives. A military objective defines the results to be achieved by the military and assign tasks to commanders.**” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 307 (12 Apr. 2001, as amended through 7 Oct. 2004) [hereinafter DOD DICTIONARY].

⁹ Protocol I, *supra* note 3, art. 52(2). Protocol I applies only to objects situated on land. Protocol I’s definition of military objective, however, is generally believed to be customary international law relating to targets at sea. See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

¹⁰ Protocol I, *supra* note 3, art. 57(2).

¹¹ Attacks on medical facilities require certain warnings. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 19, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. Attacks on dangerous works require the attack to be the only feasible means, Protocol I, *supra* note 3, art. 56(2). The United States, however, does not agree to the provisions of Art. 56. See John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 FLA. J. INT’L L. 481, 509 (2003).

¹² See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 (1987) [hereinafter ICRC COMMENTARY]; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 1949 (1982).

headquarters staff, they become military objectives. It is clear from paragraph 3 that in case of doubt, such places must be presumed to serve civilian purposes.

Other establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military. 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.

Finally, destruction, capture or neutralization must offer a ‘definite military advantage’ in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.¹³

Bothe provides additional commentary on key phrases of Article 52(2), Protocol I:

Military objectives must make an “effective contribution to military action.” This does not require a direct connection with combat operation . . . Thus a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party’s overall war effort.

. . . .

The term military advantage involves a variety of considerations, including the security of the attacking force. Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object.¹⁴

Academic Interpretations

Few, if any, nations have published a detailed unclassified analysis of precisely what objects they consider to be military objectives, and under what circumstances. Within the academic community, however, a variety of interpretations have been proposed. A selection of these and their main critiques are set out below in order to illustrate the range of available interpretations of what constitutes a legitimate military objective.

Restrictive Interpretations

The most restrictive interpretations of legitimate targets derive from a narrow view of what constitutes “an effective contribution to military action” and a “definite military advantage” under Protocol I; requiring the target to be *directly* connected with a *specific* combat operation in order to be legitimate. For example, in relation to targeting bridges, Human Rights Watch stated:

The destruction of bridges that are not central to transportation arteries or have a purely psychological importance does not satisfy the criterion of making an “effective contribution to military action” or offering a “definite military advantage.”¹⁵

Restrictive interpretations would also consider attacks on objects that contribute to the will of the civilian population by generating support for the conflict, such as broadcasting propaganda through civilian radio and television, outside the scope

¹³ ICRC COMMENTARY, *supra* note 12, at 635-36.

¹⁴ BOTHE, *supra* note 12, at 324-25.

¹⁵ William M. Arkin, *Civilian Deaths in the NATO Air Campaign*, HUM. RTS. WATCH, Feb. 2000, available at <http://www.hrw.org/reports/2000/nato/index.htm> [hereinafter HRW Report].

of Article 52(2). After the North Atlantic Treaty Organization's (NATO) attacks on Serbian television and radio in 1999, Human Rights Watch concluded:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, neither purpose offers the concrete and direct military advantage necessary to make them a legitimate military target.¹⁶

In relation to the same incident, Amnesty International stated:

Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation.¹⁷

These interpretations have been criticized as not reflecting customary international law or State practice, which it is argued, allow for attacks that produce a psychological or strategic advantage.¹⁸

Including Psychological Objectives

Major Jeanne Meyer, U.S. Air Force, judge advocate, argues that attacking objects that affect civilian morale is legitimate and within the scope of Article 52(2), Protocol I, provided that civilians are not targeted.¹⁹

[T]he United States should openly assert that it continues to consider bending the will of the enemy to be a legitimate goal when applying the force of air power. Furthermore, during times of armed conflict, the United States should continue to strike targets to achieve that goal, consistent with the basic principles of the law of war. Such actions do not repudiate the value or legitimacy of Article 52(2), but instead exercise a valid interpretation of its language consistent with prior customary international law and state practice.²⁰

She proposes that appropriate military objectives to meet this goal might include bank accounts, financial institutions, shops, entertainment sites, and government buildings.²¹ Marco Sassoli, Professor of International Law at the University of Quebec in Montreal, criticizes this interpretation on the basis that there is no available objective or independent criteria for such attacks that could guarantee a minimum of humanity in armed conflict.²²

Varying Scope

Another interpretation is that the scope of what constitutes a military objective is affected by the size and scope of the conflict. That is, in conflicts where the nation is heavily committed to the war effort, economic activities such as transportation, supply sources, and communications used by civilians may become legitimate targets. In peace enforcement operations or humanitarian intervention, however, the number of legitimate targets would be more restricted.²³

Sassoli believes that the main difficulty with this approach is that there is no definition of these special rules or restrictions and that such an approach abandons the traditional equality of belligerents before the LOW.²⁴ Horace B. Robertson, Professor of Law (Emeritus) at Duke University, believes the wording of Article 52 rejects this interpretation.²⁵

¹⁶ *Id.* (quoting Letter from Human Rights Watch, to Javier Solana, Secretary-General of the Council of the European Union and High Representative for the Common Foreign and Security Policy (May 13, 1999)).

¹⁷ Amnesty Report, *supra* note 1.

¹⁸ *See Meyer, supra* note 6, at 168-71.

¹⁹ *Id.* at 182.

²⁰ *Id.*

²¹ *Id.* at 181.

²² MARCO SASSOLI, LEGITIMATE TARGETS OF ATTACK UNDER INTERNATIONAL HUMANITARIAN LAW, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH 5-6 (2003), at <http://www.ihlresearch.org/ihl/pdfs/Session1.pdf>.

²³ *See id.* at 6 (providing examples in support of this viewpoint).

²⁴ *Id.* at 6.

No Practical Restrictions on Targeting Dual-use Objects

Perhaps the language of Article 52(2) and the proportionality test in Article 57, Protocol I are so subjective as to allow any attack on a dual-use object? Peter Rowe, Professor of Law at University of Lancaster, made the following assessment of the targeting restrictions imposed by Article 52(2), based upon his analysis of NATO's 1999 Kosovo Air campaign:

[T]he reality of the situation is that those objects which military commanders wished to attack, for whatever reasons, were attacked. There is no evidence that the rigors of the limitations imposed on the definition of military objective were applied to attacks against dual purpose objects. In any event, the Protocol is, when it comes to the test, very weak in determining what may or may not be attacked.²⁶

Rowe further explains his belief that this problem occurs because military commanders, in good faith, often overestimate the military advantage to be gained from a particular mission, and underestimate the collateral damage.²⁷ There is some support for this view from Sassoli who acknowledges that:

[i]n practice, it may admittedly be extremely difficult to determine the importance of the military use and of the military advantage in destroying the object, in particular if the military has priority access to all remaining infrastructure.²⁸

The ICRC also acknowledges that the provisions are subject to interpretation, but believes that Article 52, Protocol I does set limits on what constitutes a military objective:

[I]t remains the case that the text adopted by the Diplomatic Conference largely relies on the judgment of soldiers who will have to apply these provisions. It is true that there are clear-cut situations where there is no possibility of doubt, but there are also borderline cases where the responsible authorities could hesitate. In such circumstances the general aim of the Protocol should be borne in mind, i.e., the protection of the civilian population. In any case an essential step forward has been taken in that belligerents can no longer arbitrarily and unilaterally declare as a military objective any civilian object, as happened all too often in the past.²⁹

Interpretation by Courts and Tribunals

Targeting objects that are not military objectives is a war crime³⁰ that may be prosecuted in the International Criminal Court (ICC).³¹ Although the United States is not a party to the ICC, many coalition partners are parties, and, for those countries, ICC interpretations will be relevant to national targeting decisions. It is therefore important for U.S. JAs to be familiar with the way in which the ICC will function. While no prosecutions have yet been brought before the ICC, an indication of the standard to which a State will be held may be gleaned from the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY).³² In 2000, an ICTY committee reviewed allegations of various violations of international law against the NATO air campaign in the Federal Republic of Yugoslavia for consideration by the prosecutor

²⁵ Horace B Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S. A.F. ACAD. J. OF LEGAL STUD. 35, 49-52 (1997-1998).

²⁶ Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT'L REV. OF RED CROSS 147 (2000), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwplList124/B98F42CBD37BB2D3C1256B66005E3504>.

²⁷ *Id.*

²⁸ SASSOLI, *supra* note 22, at 7.

²⁹ ICRC COMMENTARY, *supra* note 12, para. 2037.

³⁰ Protocol I, *supra* note 3, art. 85.

³¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), available at <http://www.un.org/law/icc/statute/contents.htm>.

³² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, annex, art. 8(1) (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute]. According to the ICTY Statute, the Tribunal has jurisdiction over grave breaches of the Geneva Conventions (Article 2) and other violations of the laws and customs of war (Article 3) committed since 1991 in any part of the former Federal Republic of Yugoslavia (Article 1) by any person regardless of that person's nationality. *Id.* arts. 1-3.

for the ICTY.³³ In the course of reviewing the alleged violations, the committee focused on the following aspects of targeting decisions:³⁴

(1) What was the intended objective?

(2) Was the intended objective a military objective? The committee's report (ICTY Report) determined that each target must meet the criteria for military objectives.³⁵ Thus, it was considered insufficient to determine that, for example, all bridges or all refineries are military objectives; rather, each bridge and refinery must be separately assessed. The ICTY Report, however, recognized the differences of opinion in interpreting military objectives.³⁶

The ICTY Report also determined that the media is not a military objective if the effect of the media is merely to foster support for the war effort.³⁷ If, however, the media is part of the military command, control and communications network, is used to incite crimes, or is the nerve system that keeps a "war-monger in power," it may be a military objective.³⁸

(3) What did the attacker (NATO) actually know and what could they have known about potential collateral damage prior to the attack?

(4) Was the proportionality test in Article 57(2)(a)(iii), Protocol I, met on the basis of information available prior to the attack?³⁹

(5) When the target was determined post-attack to have been a civilian object, was any person reckless in taking precautionary measures to the degree that would sustain criminal charges? For example, the ICTY Report found that the aircrew and senior leaders involved in the attack that destroyed the Chinese Embassy should not be assigned any responsibility for receiving and relying upon the wrong target or wrong information.⁴⁰

Legitimate Targets Under U.S. Doctrine

While the United States is not a party to Protocol I, it considers Article 52 to reflect customary international law.⁴¹ In interpreting this obligation, it is clear from doctrine and practice that the United States considers psychological objectives legitimate. Air Force doctrine states "[s]trategic attack builds on the idea that it is possible to directly affect an adversary's sources of strength and will to fight without first having to engage and defeat their military forces."⁴²

The U.S. position in relation to objects that financially support the enemy, such as export industry, is less clear. United States doctrine suggests U.S. interpretation of military objectives is slightly broader than Article 52, Protocol I, in this respect, however, several recent statements assert that this is not the case.

The *Air Force Intelligence Targeting Guide*⁴³ states:

³³ See ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), *reprinted in* 39 I.L.M. 1257 (2000) [hereinafter ICTY Report].

³⁴ See generally *id.*

³⁵ *Id.* at 1272-73.

³⁶ *Id.* at 1266-67.

³⁷ *Id.* at 1270.

³⁸ *Id.* at 1272-73.

³⁹ In relation to the impact of an attack on the environment, as an aspect of collateral damage, the ICTY Report concluded that "in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate." *Id.* at 1263.

⁴⁰ *Id.* at 1281.

⁴¹ See *supra* note 5 and accompanying text; Michael Matheson, former U.S. Dept. of State Deputy Legal Advisor, Comments at the Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law: *A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, *reprinted in* 2 AM. U. J. INT'L L. & POL'Y 428 (1988) [hereinafter Matheson comments]; see also ICTY Report, *supra* note 33, at 1269.

⁴² U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE DOCUMENT I 40 (17 Nov. 2003).

⁴³ U.S. DEP'T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE (1 Feb. 1998).

[M]ilitary objectives *include* those objects that by their nature, location, purpose, or use make an effective contribution to military action, or whose total or partial destruction, capture, or neutralization offers a definite military advantage. The key factor is *whether the object contributes to the enemy's war fighting or war sustaining capability*.⁴⁴

Similarly, the *Navy Commander's Handbook* also refers to “war fighting or war sustaining capability”⁴⁵ rather than Article 52(2)'s language—“contribute to military action.”⁴⁶ The 1997 *Navy Annotated Supplement* further states “**This definition is accepted by the United States as declarative of the customary rule.**”⁴⁷

Duke University Law School Professor of Law (Emeritus) Horace B. Robertson, Jr., contends that using the phrase “war sustaining capability” expands the scope of the term military objective to include an export industry that provides the sole or principal financial resource for an enemy.⁴⁸ This seems accurate, as the *Navy Annotated Supplement* cites the historical example of the targeting of Confederate raw cotton by Union troops during the Civil War, which was deemed lawful because the cotton revenue financed the majority of Confederate arms and ammunition.⁴⁹

According to the authors of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, however, an object that contributes to “war sustaining capability” rather than “war fighting capability” does not fall within the scope of Article 52(2)'s definition of a military objective.⁵⁰ This view seems to be acknowledged in the *Navy Annotated Supplement*, which specifies that the United States does not use the same terminology as Article 52(2).⁵¹ Thus, U.S. doctrine suggests the term military objective is interpreted slightly broader than Article 52(2).

James E. Baker, then Special Assistant to the President and Legal Adviser, however, stated that in 1999 the United States applied “a strict test of military objective, as recognized in customary international law and by those States that have adopted Protocol I of the Geneva Conventions” in Kosovo.⁵²

Unlike military doctrine, Baker suggests that economic targets that financially support a regime, but do not make a product that contributes to the military operations, are not considered permissible targets.⁵³ Further, a recent U.S. Army article on targeting during Operation Iraqi Freedom (OIF) in 2003 stated that the U.S. Army employs the Article 52 definition of a military objective.⁵⁴ This disparity may suggest that the doctrine is not reflective of U.S. practice, or perhaps that the alternate wording in the military manuals is not indicative of as significant a difference as Robertson believes.

Doctrine of Coalition Partners

As may be expected from the range of interpretations suggested by academic commentators, some States may have a view of what constitutes a legitimate target that is different from the view of the United States. The ICTY Committee report described one reason for this:

The answers to these questions are not simple . . . the answers may differ depending on the background and values of the decision maker . . . it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.⁵⁵

⁴⁴ *Id.* para. 1.7.1 (emphasis added).

⁴⁵ U.S. DEP'T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8.1.1 (Oct. 1995).

⁴⁶ Protocol I, *supra* note 3, art. 52(2).

⁴⁷ U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 8, n.9 (1997) [hereinafter NAVY ANNOTATED SUPPLEMENT].

⁴⁸ Robertson, *supra* note 25, at 51.

⁴⁹ NAVY ANNOTATED SUPPLEMENT, *supra* note 47, ch. 8, n.11.

⁵⁰ See Louise Doswald-Beck, *Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L L. 192, 199 (1995).

⁵¹ NAVY ANNOTATED SUPPLEMENT, *supra* note 47, ch. 8.1.1; see Doswald-Beck, *supra* note 50, at 199.

⁵² Baker, *supra* note 2, at 9.

⁵³ *Id.*

⁵⁴ LTC James K. Carberry & M. Scott Holcomb, *Target Selection at CFLCC: A Lawyer's Perspective*, FIELD ARTILLERY, March-June 2004, at 40.

Official national statements concerning the interpretation of ‘legitimate military targets’ are scarce, however, and in most cases limited to the declarations made when ratifying Protocol I.

Common Declarations Concerning Military Objectives

A series of declarations⁵⁶ to Protocol I relating to the definition of military objective indicate a common understanding among several major coalition partners.⁵⁷ These include the following:

a. The military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack: the United Kingdom (U.K.),⁵⁸ Canada,⁵⁹ Germany,⁶⁰ France,⁶¹ and Australia.⁶²

b. A specific area of land may be a military objective if, because of its location or other reasons specified in this Article, its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers definite military advantage: U.K.,⁶³ Canada,⁶⁴ Germany,⁶⁵ France.⁶⁶

c. The first sentence of paragraph 2, Article 52, prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives: U.K.,⁶⁷ Canada,⁶⁸ France,⁶⁹ Australia.⁷⁰

d. Military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time, and such decisions cannot be judged on the basis of information which has subsequently come to light: Canada,⁷¹ Germany,⁷² Australia.⁷³

⁵⁵ ICTY Report, *supra* note 33, para. 50.

⁵⁶ A declaration is a unilateral statement made by a State when ratifying, acceding or succeeding to a treaty, that specifies the legal effect of certain provisions of the treaty in their application to that State.

⁵⁷ Declarations are available online at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1> (last visited Nov. 29, 2004).

⁵⁸ Letter from Christopher Hulse, HM Ambassador of the United Kingdom, to the Swiss Government, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument> (providing a correct copy of the letter dated 28 Jan. 1998) [hereinafter UK Declarations to Protocol I].

⁵⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Canada, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/172ffec04adc80f2c1256402003fb314?OpenDocument> (citing 1125 U.N.T.S. 429 (1979)) [hereinafter Canada Declarations to Protocol I].

⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Germany, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/3f4d8706b6b7ea40c1256402003fb3c7?OpenDocument> (citing 1125 U.N.T.S. 429-30 (1979)) [hereinafter Germany Declarations to Protocol I].

⁶¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, France, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/d8041036b40ebc44c1256a34004897b2?OpenDocument> [hereinafter France Declarations to Protocol I].

⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Australia, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/10312b4e9047086ec1256402003fb253?OpenDocument> (citing 1125 U.N.T.S. 429 (1979)) [hereinafter Australia Declarations to Protocol I].

⁶³ UK Declarations to Protocol I, *supra* note 58.

⁶⁴ Canada Declarations to Protocol I, *supra* note 59.

⁶⁵ Germany Declarations to Protocol I, *supra* note 60.

⁶⁶ France Declarations to Protocol I, *supra* note 61.

⁶⁷ UK Declarations to Protocol I, *supra* note 58.

⁶⁸ Canada Declarations to Protocol I, *supra* note 59.

⁶⁹ France Declarations to Protocol I, *supra* note 61.

⁷⁰ Australia Declarations to Protocol I, *supra* note 62.

⁷¹ Canada Declarations to Protocol I, *supra* note 59.

In addition, some major coalition partners have made unique declarations. The U.K.'s declaration provides the following:

The obligations of Articles 51 through 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.⁷⁴

Germany's declaration states the following: "[t]he Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation."⁷⁵

France provides that "[i]n applying the requirements of Article 51(8) there is no obstacle to employing, in conformity with international law, measures which are considered necessary for protecting the French population from serious, manifest and deliberate violations of the Geneva Conventions and Protocols by the enemy."⁷⁶

Military advantage is further defined in Australia's declaration as involving "a variety of considerations including the security of attacking forces. The term concrete and direct military advantage used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved."⁷⁷

Other Factors Influencing Target Approval

While States may disagree on what constitutes a legitimate target depending on their interpretation of military objective, other factors may also influence target approval. Judge advocates must be aware of these other factors as they may cause differences in nationally approved target lists.

Other Provisions of Protocol I

For parties to Protocol I, other provisions may further restrict permissible targets. Notably, this includes the prohibition on attacks that will cause widespread, long-term and severe damage to the natural environment,⁷⁸ and the prohibition on targeting works or installations containing dangerous forces, such as dams, dykes and nuclear power stations.⁷⁹ As these

⁷² Germany Declarations to Protocol I, *supra* note 60.

⁷³ Australia Declarations to Protocol I, *supra* note 62.

⁷⁴ UK Declarations to Protocol I, *supra* note 58.

⁷⁵ Germany Declarations to Protocol I, *supra* note 60.

⁷⁶ France Declarations to Protocol I, *supra* note 61.

⁷⁷ Australia Declarations to Protocol I, *supra* note 62.

⁷⁸ Protocol I, *supra* note 3, art. 55.

⁷⁹ *Id.* art. 56. An example of the application of the restriction relating to dangerous forces is contained in an Australian commentary:

Failure to display the emblem does not remove the protection afforded the installation. In exceptional circumstances, the protection ceases if the installation is used in 'regular, significant and direct support of military operations.' In any case, such an attack must be the only feasible way to stop the support, and any such attack would have to be approved by the National Command Authority.

provisions are not considered by the United States to be customary international law,⁸⁰ this is a common point of difference between the United States and allies.

Intelligence information

Each coalition partner applies their own intelligence information to a potential target. This assessment forms the factual basis to which the law and policy are applied. Therefore, different intelligence assessments may affect the legitimacy of a target. For example, the function of a particular building or the particular role of an individual in the enemy regime is material to whether a potential target is considered a military objective. Intelligence differences are factors in assessing Time Sensitive Targets (TSTs)⁸¹ as these targets are often identified through intelligence sources that may not be available to coalition partners. Intelligence differences can be reduced through information sharing, but this is often not permissible due to security classifications.

Political Considerations

Some targets may not be politically acceptable to certain coalition partners despite their permissibility under international law:

Popular perceptions of what the law of armed conflict is, or should be, may become self-fulfilling . . . in modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if the people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.⁸²

Domestic and international political considerations may be different for each coalition partner.⁸³ The ways in which political considerations can affect targeting may include: outright prohibitions on certain lawful targets (a no strike list),⁸⁴ requirements for approval for national command authority of some target types before engagement,⁸⁵ requiring a pilot to visually identify a target, requiring use of precision-guided munitions (PGMs),⁸⁶ and the order or rate at which targets are attacked.

Mission Objectives

Target selection is also dependant on the mission objectives. For example, the mission objective was clearly an influence on target choice in Afghanistan:

[D]uring the Afghanistan campaign, U.S. target selection was driven by the consequences of any attack on the reconstruction effort. "Things like transportation infrastructure very often are bona fide legal targets,"

ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI(AF) AAP 1003, para. 8.6 (2d ed. 2004).

⁸⁰ See Matheson comments, *supra* note 41.

⁸¹ A TST is a target requiring immediate response because it poses (or will soon pose) a danger to friendly forces or is a highly lucrative, fleeting target of opportunity. DOD DICTIONARY, *supra* note 8.

⁸² THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT xxiv (W. Michael Reisman & Chris T. Antoniou eds., 1st ed. 1994).

⁸³ See Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 472-79 (2004) (providing examples of U.S. political considerations in application in Kosovo, Afghanistan and Iraq).

⁸⁴ *E.g.*, a significant cultural object that is being used perfidiously.

⁸⁵ The Australian targeting requirements are a good illustration of this point. "Australia received targets on the US-developed strike lists but assessed them according to Australia's own legal obligations. Several target categories were subject to Australian Ministerial approval before they could be engaged." DEPARTMENT OF DEFENCE (AUSTRALIA), THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST 2003 13 (23 Feb. 2004), available at <http://www.defence.gov.au/publications/lessons.pdf>.

⁸⁶ There is a view that States have a legal obligation to use precision guided munitions (PGMs) in order to meet the proportionality test in Art. 57(2)(a)(iii), Protocol I on the basis that: "an operational decision to use gravity-driven weapons when more precise munitions are available can make the attack excessive and unlawful if civilians are killed who would have been spared with the use of more accurate weapons." Hamilton DeSaussure, *Military Objectives*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW (Roy Gutman & David Rieff eds.), available at <http://www.crimesofwar.org/thebook/military-objective.html>; see also Lieutenant Commander Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 137 (2000). This view, however, is not accepted by the United States and is criticized in Danielle L. Infeld, *Precision Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 140-41 (1992) (concluding that the laws of war do not require nations with precision weapons to use them in all circumstances).

explains Brigadier General Charles Dunlap, Air Combat Command's Staff Judge Advocate. "But we look for ways of minimizing that damage because we're always thinking about what's the next step going to be. What are we going to be doing after the conflict is over?"⁸⁷

While mission objectives should be the same across the coalition there may be differences of opinion on how best to ensure target selection meets those objectives.

Problematic Target Types

Given the range of possible interpretations of military objectives and other legal, policy and intelligence considerations, it is unlikely a coalition will agree on all targets. While the problematic targets will differ on each coalition operation, several target types are more prone to differences of opinion.

Bridges and Railways

States may hold different views of targeting bridges and railways, particularly in relation to those not immediately being used as a supply or advancement route for the military. Some questions concerning the legitimacy of these targets may include the following: (1) Are these targets military objectives from day one of the war? (2) From when could these targets be used to replace supply or advancement routes currently in use? (3) Are these objectives only targets if currently being used?⁸⁸

Television and Radio Stations

As discussed above, the legitimacy of targeting television and radio stations is largely dependent on the way in which the stations are being used by the enemy⁸⁹ and on the State's opinion on whether psychological objectives are military objectives within the scope of Article 52(2), Protocol I.⁹⁰ For example, there were reports that France did not agree with the United States that Serbian television was a legitimate target during the 1999 NATO campaign in Kosovo.⁹¹

Power Generation or Distribution Centers

There are two reasons for potential differences of opinion relating to dual use power generation or distribution centers. The first is the difficulty of assessing whether these targets make an effective contribution to military action.⁹²

The second is whether, as a result of the method in which these targets are often attacked, there is a definite military advantage. The method used to temporarily disable power grids in Serbia in 1999 and the problem that such a situation created in applying Article 52(2) was described by Major Jeanne Meyer:

NATO aircraft dropped small dispensers that opened over the power sources, setting free specially treated wire that intertwined and caused instant short circuits in the electrical system. The weapon cut off power to 70 percent of Yugoslavia, yet the effect was only temporary, with most power returning within a day. Although temporary, the attack effectively brought the war home to the Serbian population—without massive, long-term destruction. Such a short duration of disablement, however, was unlikely to severely affect the Serbian military effort. Arguably, a restrictive interpretation of Article 52(2) would not consider the first strikes to be against legitimate military objectives, as it is unlikely that disruption of electricity for such a short period of time truly provided a military advantage to NATO. These strikes would therefore be illegal.⁹³

⁸⁷ Canestaro, *supra* note 83, at 475.

⁸⁸ See SASSOLI, *supra* note 22, at 7-8 (discussion).

⁸⁹ See ICTY Report, *supra* note 33, para. 55 (providing for communications and control, to incite war crimes, as a mouthpiece for the government).

⁹⁰ See HRW Report, *supra* note 15; Meyer, *supra* note 6, at 182; Anthony Dworkin, *Iraqi Television: A Legitimate Target?* (Mar. 27, 2003), at <http://www.crimesofwar.org/special/Iraq/brief-tv.html>.

⁹¹ See Amnesty Report, *supra* note 1.

⁹² SASSOLI, *supra* note 22, at 7 (providing discussion of the problems assessing dual-use objects).

⁹³ Meyer, *supra* note 6, at 178-79 (footnotes omitted).

Symbols of the Enemy Regime

The targeting of symbols of the enemy regime, such as empty royal palaces and statues of Saddam Hussein during OIF,⁹⁴ may lead to disagreement, as their lawfulness as a target depends on the State's view of whether psychological objectives are military objectives within the scope of Article 52(2), Protocol I.

Civilian (non-uniformed) Enemy Regime Officials

Some civilian (non-uniformed) regime officials were targeted by the United States during OIF.⁹⁵ Whether these individuals are considered military objectives, as opposed to civilians, depends on the intelligence information available to a State about the role of that individual in the conflict.

Dangerous Forces—Dams, Dykes and Nuclear Power Stations

As discussed above, parties to Protocol I may only target dangerous forces in certain specified circumstances.⁹⁶ This limitation, however, does not apply to the United States and other States not a party to Protocol I.⁹⁷

Effect of Impermissible Targets

An impermissible target, regardless of the reason, influences a coalition partner's ability to deliver a weapon onto that object, and may also affect the level of permissible support that may be given to U.S. engagement of the target. For example, if the target of an air strike is impermissible, a coalition partner may also be prohibited from refueling strike aircraft, providing airborne early warning and control, approving strike lists or participating in the planning for that particular mission.

Strategies for Coalition Targeting

The targeting process is involved and time-consuming, and JAs have been criticized in the past, somewhat unfairly, for further lengthening the process.⁹⁸ Judge advocates can assist by proactively managing coalition targeting issues as early as possible. The best strategy for managing coalition targeting is situation dependent; for example, there is a difference between operating in a targeting cell versus holding a less formal targeting discussion between two coalition attorneys prior to a ground mission.⁹⁹

One possible approach to coalition targeting issues for a JA is:

⁹⁴ See, e.g., BBC News, *UK Forces "Destroy Saddam Statues"* (29 Mar. 2003), available at <http://news.bbc.co.uk/1/hi/uk/2898003.stm> (stating that the statues were destroyed for psychological reasons).

⁹⁵ See, e.g., U.S. Department of Defense, *Personality Identification Playing Cards*, at <http://www.defenselink.mil/news/Apr2003/pipc10042003.html> (last visited Mar. 16, 2004) (providing a list of persons wanted by the United States, including some non-uniformed regime officials); Nicole Winfield, *U.S. Military Distributes List of 55 Iraqi Leaders to Pursue, Kill or Capture*, SAN FRANCISCO CHRON., Apr. 11, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/04/11/sports0800EDT0566.DTL>.

⁹⁶ Protocol I, *supra* note 3, art. 56(2) (stating that attacks on dangerous works require the attack to be the only feasible means).

⁹⁷ See States Parties, *supra* note 5.

⁹⁸ See, e.g., Canestaro, *supra* note 83, at 478-79.

⁹⁹ An example of the way in which targeting was approached for a ground mission during Operation Enduring Freedom (OEF) was provided by Colonel (COL) Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division. This approach illustrates the need for consultation and the role played by national assessments of intelligence and policy:

[T]he Brits wanted to lay aerial fire on a particular hilltop. Again, they walked me through their intelligence and plan, and I opined no legal objection. At first, I had said no, because we were not sure about what was around that hilltop (concern over collateral damage). But, once we realized the grid location was the same (i.e., we had already done our homework, and realized this was not a new site), we approved the targeting.

E-mail from COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Operations, Center for Law and Military Operations (22 Mar. 2004) (on file with CLAMO).

1. Meet with coalition attorneys as early as possible¹⁰⁰ and develop a good understanding of the issues that affect their targeting decisions: legal position, policy position, target approval level and process.¹⁰¹
2. Identify any divergences from the U.S. position, whether legal or policy, and assess to what extent the differences are real rather than perceived. For example, the legal position may be different, but operation specific policy requirements may result in the final outcome being the same for both coalition partners. Are any differences a result of different intelligence information? If so, can differences or approval time be reduced by sharing intelligence? Is sharing intelligence permissible?
3. Know the roles the coalition partners will undertake: are they providing aircraft or ground forces? Are they providing essential support services for an attack? Do they hold any decision-making positions in the headquarters?
4. Understand the impact of identified differences. How long will it take for the coalition partner to assess a target and provide a GO or a NO GO? If a coalition partner does not agree to a target, does this act as veto on that target for the operation¹⁰² or does it result in that partner being excluded from certain actions during an attack on that target?
5. Adopt a strategy to ensure that the differences are properly factored into the planning and execution of missions. For example, through exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers in potentially awkward positions, or briefing U.S. plans staff in advance of any potential difficulties or sensitivities.¹⁰³

Conclusion

Targeting in a coalition can raise additional issues that need to be addressed as early as possible to avoid any adverse impact on the mission. While not providing the answers, this article discussed the available interpretations of military objectives and the range of factors that influence national targeting decisions. By understanding the legal and policy restraints that impact coalition partners, JAs can ensure that any coalition partner differences are identified and factored into planning where appropriate.

¹⁰⁰ See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 115 (1 Aug. 2004) (reporting that during OEF and OIF several coalition partners had both deployed legal staff and legal “reach back” capabilities).

¹⁰¹ For example, at the Combined Air Operations Center during OIF,

[t]he US JAGs assigned to combat plans and strat[egy] had a round table discussion early on with the UK and AUS JAGs concerning each country's ROE and approval authorities for the various types of targets. We also discussed UK and AUS political sensitivities, which helped us to better understand their ROEs. Of course, this also helped develop good working relationships b[efore] OIF began.

Wold e-mail, *supra* note 2.

¹⁰² This was the case for the NATO Kosovo campaign:

With regard to target selection and assignment, NATO officials at the Brussels meeting explained to Amnesty International that under the system that was in use in Operation Allied Force, NATO members were given a bombing assignment by NATO staff but could refuse it on the grounds, for example, that in their view the target was illegitimate or that the attack would otherwise violate international law and possibly their national law. If a target were refused because the assigned country had deemed it unlawful, NATO officials said that they would not reassign the target to another member.

Amnesty Report, *supra* note 1.

¹⁰³ Major Cluff, former Judge Advocate, United States Air Force, Combat Plans Division, Combined Air Operations Center, described one solution used during OIF “[b]ecause of their small numbers, they were not as involved in combat plans as we were. We were able to use our knowledge of their ROE to spot/resolve/explain coalition unique targeting concerns to US planners.” Wold e-mail, *supra* note 2.