

A Toolbox for the Application of the Rules of Targeting

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By

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This book is dedicated to my parents

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- 1907 The Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351, Treaty Ser. No. 542
- 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949)
- 1969 Vienna Convention on the Law of Treaties 1969, [1987] 1155 U.N.T.S. 331 (1969)
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), [1979] 1125 U.N.T.S. 3 (1977)
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LIST OF ABBREVIATIONS

API 1977	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
Art.	Article
CCW 1980	United Nations 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 1980
Commander	Military Commander
Commentary to API 1977 “New Rules”	Book “New Rules for Victims of Armed Conflict”
Claims Commission	Eritrea-Ethiopia Claims Commission
HRW	Human Rights Watch
ICTY Committee	The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia
ICRC Commentary to API 1977	International Committee of the Red Cross Commentary to 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
IHL	International Humanitarian Law

ISIS	Islamic State of Iraq and al-Sham
Joint Circular	Joint Circular on Adherence to IHL and Human Rights of the Philippines
NATO	North Atlantic Treaty Organisation
Russian Academy	Russian Combined Armed Services Military Academy
U.N.	United Nations
U.N. Commission of Inquiry	United Nations Human Rights Council Commission of Inquiry
U.N. HRC	United Nations Human Rights Council
U.N. HRC Mission	United Nations Human Rights Council Mission

CHAPTER ONE

INTRODUCTION

In every armed conflict there have been military operations that generated disagreement among lawyers, non-governmental organisations, academics and in some cases tribunals regarding whether the armed forces complied with international humanitarian law in conducting a particular military operation. For instance, Israel said that it took all required precautions during Operation Cast Lead 2009 when it used white phosphorus to screen the movement of its troops,¹ an obscurant which has toxic effects on civilians.² The smoke munitions are an alternative to white phosphorus. The United Nations Mission, which was established to assess the legality of conduct in this armed conflict, found that it was unlawful for Israel to employ white phosphorus in close proximity to a hospital.³

Another area of controversy is the practice the Obama administration introduced in 2010 as part of its effort to target members of the Al Qaeda and Taliban overseas.⁴ Cavallaro, Sonnenberg and Knuckey question whether the practice of the United States of America of choosing targets on the basis of analysing patterns of activity using video footage relayed by unmanned aerial vehicles, known as drones, complies with the duty to take precautions in order to verify that the relevant individuals are in fact

¹ Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects* (Israel: Israel Ministry of Foreign Affairs, July 29, 2009), 148-149 paragraph 417-418.

² Human Rights Watch, *Rain of Fire: White Phosphorus in Gaza* (New York: Human Rights Watch, 2009), 11-12.

³ U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* Doc. A/HRC/12/48 (Geneva: United Nations, September 15, 2009), 146 par. 629.

⁴ David S. Cloud, "C.I.A. Drones Have Broader List of Targets," *Los Angeles Times*, May 5, 2010, <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506> (accessed April 12, 2011).

taking a direct part in hostilities.⁵ On the other hand, Blank argues that tracking and analysing daily activities of suspected militants improves the ability of the armed forces to comply with the law.⁶ Cavallaro, Sonnenberg and Knuckey reach a different conclusion from Blank because they interpret the legal obligations imposed by the rules of targeting differently. Another area of discussion has been what degree of doubt the principle of distinction permits attackers to have.⁷ The principle of distinction requires attackers to distinguish at all times between civilians and civilian objects on the one hand, and combatants and military objectives on the other hand.⁸ The discourse stems from the fact that although the principle of distinction is formulated as an unqualified obligation,⁹ in practice parties to the conflict are unable to achieve complete certainty.

Ultimately, such disagreements are very difficult to resolve. States deliberately formulated the rules of targeting, other than the principle of distinction, in an open-ended fashion in order to ensure that the rules are well-suited to the nature of the battlefield.¹⁰ The commanders need to be

⁵ Sarah Knuckey, James Cavallaro, and Stephen Sonnenberg, *Living under Drones: Death, Injury and Trauma to Civilians from U.S. Drone Practices in Pakistan* (Stanford Law School and New York University School of Law, September 2012), 114.

⁶ Laurie R. Blank, "After 'Top Gun': How Drone Strikes Impact the Law of War," *University of Pennsylvania Journal of International Law* 33, no. 3 (2012): 693-694.

⁷ Afsheen John Radsan and Richard Murphy, "Measure Twice, Shoot Once: Higher Care for C.I.A. Targeted Killing," *University of Illinois Law Review* 2011 (2011): 1224; Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law," *International Review of the Red Cross* 90, no. 872 (2008): 1039; Carla Crandall, "Ready...Fire...Aim! A Case for Applying Due Process Principles Before Engaging in Drone Strikes," *Florida Journal of International Law* 24 (2012): 87-88; Geoffrey S. Corn, "Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness," *SelectedWorks* February (2011): 49, http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=geoffrey_corn.

⁸ Art. 48 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), [1979] 1125 U.N.T.S. 3 (1977) (hereinafter cited as API 1977).

⁹ Art. 48 API 1977.

¹⁰ Laurie R. Blank, "Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law,"

able to respond to the unfolding circumstances on the battlefield in a flexible fashion.¹¹ The battlefield environment is intricate because many variables interact in a complex fashion to shape events that are unfolding on the battlefield. Karl von Clausewitz an influential military theorist,¹² explains that the battlefield is characterised by uncertainty.¹³ The commanders act on the basis of intelligence, which varies in quality.¹⁴ The quality of the equipment the two sides have, the relative training and capability of troops, as well as the quality of munitions interact with each other.¹⁵ The commanders act under varying time pressures, will face terrain that is either advantageous for their plans or a hindrance, and may be operating under difficult weather conditions.¹⁶ Commanders may have fatigued troops and may have different types of materiel at hand, depending on the location of assets that can be called in to offer fire support.¹⁷ Commanders will, therefore, rely on experience and judgment in order to estimate how these variables will interact with each other in a “rapidly changing environment” of combat and what impact they will have on their chances of winning.¹⁸

Yet another source of uncertainty for the commander stems from the fact that a commander takes a risk in making assumptions about the current situation and in making prediction of how events on the ground are likely to unfold in the coming weeks and months.¹⁹ A commander does not know

Emory University School of Law, Public Law & Legal Theory Research Paper Series 12, no. 186 (2011): 3.

¹¹ Alexandra Boivin, “The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare,” *Geneva Academy of International Humanitarian Law and Human Rights Research Paper Series* 2 (2006): 37.

¹² Karl von Clausewitz, *Principles of War* (London: Stephen Austin and Sons Ltd., 1943), 9-11.

¹³ *Ibid.*, 51.

¹⁴ Blank, “Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law,” 12-13.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ United States Department of the Navy, *Naval Doctrine Publication 6 Naval Command and Control* (Washington, DC: Office of the Chief of Naval Operations, Headquarters United States Marine Corps, 1995), 25.

¹⁹ Milan Vego, *Joint Operational Warfare: Theory and Practice*, 2nd ed. (Newport: U.S. Naval War College, 2009), XIV-10.

how the enemy will act and react to the actions of the troops.²⁰ Another difficulty is that commanders operate under conditions of limited resources.²¹ Vego explains that before launching an operation the attacker evaluates whether

“a course of action...can be successfully carried out with the forces and resources available, within the constraints of the physical environment and in the face of extreme enemy opposition.”²²

For this reason, commanders need to have a degree of flexibility in how to ration the limited resources. The environment, in which commanders apply the rules of targeting, illuminates why flexibility is a desirable quality for the targeting rules.²³ Given this context, states formulated the rules of targeting, other than the principle of distinction, in such a way as to require commanders to exercise their judgment when applying the rules.²⁴ They are to make decisions in “good faith.”²⁵

The real difficulty, which scholars universally acknowledge, is that the rules of targeting as such do not specify how commanders are to exercise their judgment. For example, Blank comments that,

“The correct standard in international humanitarian law [targeting rules] is amorphous and subjective in many instances, but it also fairly represents operational realities.”²⁶

Sassòli, Bouvier and Quintin echo this comment, when they observe that the meaning of the obligations imposed by the rules of targeting in

²⁰ Ibid., XIII-48.

²¹ Ibid., IX-48.

²² Ibid.

²³ Blank, “Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law,” 15.

²⁴ *Prosecutor v. Kupreškić et.al.*, Case No. IT-95-16-T T.Ch.II, Judgment, par. 525 (International Criminal Tribunal for the former Yugoslavia January 14, 2000).

²⁵ Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), 681 par. 2198.

²⁶ Blank, “Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law,” 7.

practice remains controversial in many cases.²⁷ Unfortunately, states have not disclosed the criteria that commanders employ to guide their application of the rules to battlefield scenarios. The states tend to keep secret information about what situation existed on the ground, how a commander conducted the military operation and why a commander made a particular decision.²⁸ When speaking in diplomatic forums, states usually make abstract statements relating to the rules of targeting, even when they comment on whether a third state complied with the law on a particular occasion.²⁹

If civilians are to fully benefit from the protection to which they are entitled under international humanitarian law, there must be greater clarity as to the criteria that commanders use in applying the rules of targeting to battlefield scenarios. There is considerable urgency for shedding light on this issue, not least because more civilians die when parties to a conflict do not take sufficient safeguards to spare them from the effects of hostilities. The information about how commanders deliberate will provide non-governmental organisations and practitioners with additional tools for scrutinising how parties to a conflict conducted military operations and for pressuring them to take more measures to protect civilians. Given the fact that new armed conflicts tend to erupt as older ones cease, the provision of guidance for how the rules of targeting apply to particular scenarios remains highly relevant. There is currently very little literature which, through studying state practice, develops a theoretical framework regarding how commanders balance military and humanitarian considerations in applying the rules of targeting. The book addresses this gap in scholarship.

The book analyses the practice of states in order to break down the decision-making of commanders into the constitutive elements. It studies how commanders balance these elements in applying the rules of targeting. The book develops a framework that captures how commanders apply the targeting rules to battlefield scenarios. The practitioners may use this framework in order to analyse whether a commander planned a military operation in compliance with international humanitarian law. The

²⁷ Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law Part I*, vol. 1, 3rd ed. (Geneva: International Committee of the Red Cross, 2011), chap. 9 p. 25.

²⁸ *Ibid.*, chap. 4 p. 5.

²⁹ *Ibid.*

book places an emphasis on identifying interconnections between the rules of targeting and on viewing the rules in terms of a mosaic. Along with clarifying the legal standard, the book engages with topical questions. For instance, Shaw expresses a concern that the Western states consistently prosecute military campaigns in such a way as to transfer risk from the armed forces onto the civilians.³⁰ The book utilises state practice in order to critically engage with his theory and to establish whether Shaw is indeed correct, notably whether Western states are taking insufficient measures to protect civilians. It makes interesting discoveries, such as that the forces, in executing military operations, are under an obligation to assume risk in order to reduce danger to civilians.

While the book examines the state practice of as many different states as can be explored, it tends to focus on the practice of Western states. This is due to the fact that countries such as the United States of America make more information available to the public than, for instance, China. Since the conduct of military operations is tightly linked to national security, this information is frequently classified. Another reason for the uneven coverage is that some states are involved in armed conflicts more frequently than others. For this reason, there is an imbalance of available information about the practice of different states.

The book has the following structure. Since the chapters are interlinked, those readers who wish to consult material on a particular legal rule are advised to read chapter 2 and the relevant excerpts from chapters 3 and 4 in addition to the chapter, which is dedicated to a particular rule. Chapter 2 focuses on considerations that commanders bear in mind in planning military operations. While the discussion is necessarily non-legal, it provides a context against which commanders interpret and apply the targeting rules. In particular, the chapter looks at the building blocks of a military operation of intelligence collection, fires (weapons and materiel), movement and manoeuvre (tactics) and the protection of the force, in order to show the background against which commanders apply the rules of targeting. It explains the characteristics of different types of materiel and the relationship between firepower and manoeuvre. Different approaches to selecting weapons and tactics the armed forces employ, such as combined arms warfare and network centric warfare, are examined. The chapter demonstrates the tensions that commanders face, and the source of

³⁰ Martin Shaw, *The New Western Way of War: Risk-Transfer and Its Crisis in Iraq* (Cambridge: Polity Press, 2005), 71.

these tensions in determining how to overcome the enemy while complying with the law. In doing so, it sheds light on why the targeting rules impose qualified obligations on commanders, despite there being congruence between humanitarian aspirations of the targeting rules and military logic.

Chapter 3 introduces the targeting rules. The targeting rules is an umbrella term for the principle of distinction, the rule of target verification, the principle of the least feasible damage, the principle of proportionality and the warnings requirement. The chapter highlights the legal disagreement that exists regarding how the rules of targeting apply to particular battlefield scenarios. For instance, scholars differ on whether the law requires an attacker to assume risk in order to reduce danger to civilians and whether the principle of proportionality or the principle of the least feasible damage regulates such an obligation. Neither is there clarity on whether the requirement to issue an “effective” advance warning of the attack to civilians requires states to issue specific, as opposed to general, warnings. The chapter engages with these issues in order to provide answers to these contested questions.

The crux of chapter 4 is the question of whether the rules of targeting which confer discretion on commanders themselves provide sufficient guidance to states in how to ensure compliance. Chapter 4 scrutinises how much guidance state practice and scholars provide regarding how commanders balance different considerations in applying the targeting rules. It analyses where the ambiguity lies, and why a degree of uncertainty is inherent in legal rules in general. The discussion draws attention to the fact that states and legislators formulate all legal rules in such a way as to leave room for judges and decision-makers to interpret the rules in light of the facts of the individual case.

The chapter subsequently introduces a hypothesis that commanders in applying the rule of target verification and the principle of the least feasible damage balance the elements of likelihood of harm to civilians, magnitude of civilian harm and military advantage. It demonstrates that the duty to issue an effective advance warning of an attack to civilians “unless circumstances do not permit” may be re-conceptualised. The rule may be seen as prohibiting attacks where a commander anticipates that the harm to civilians which will result if a warning is not given is “excessive” in relation to the military advantage to be gained from not warning the civilians of the attack. The chapter puts forward that theories from the

field of psychology are a promising tool for analysing how commanders apply the warnings requirement. The book leaves the analysis of why it is unclear what degree of certainty the principle of distinction requires to chapter 5. The rationale for this choice is that the challenge of applying the principle of distinction does not stem from the fact that commanders enjoy discretion. Rather, the fact that the battlefield is characterised by uncertainty creates such difficulties. Chapter 5 focuses on the principle of distinction specifically.

Chapters 5 to 8 develop a framework for how commanders apply the rules of targeting. Chapter 5 tackles the current disagreement between scholars, regarding how much doubt the principle of distinction permits attackers to have.³¹ It investigates state practice and deduces what degree of certainty the principle of distinction requires attackers to achieve. In doing so, the chapter engages with current scholarship. The current debate focuses on whether the attackers should attain a degree of certainty that is comparable to that required by the criminal standard of proof of “beyond reasonable doubt” of the jury. Additionally, the chapter scrutinises how elements that determine what degree of certainty an attacker is able to achieve in the circumstances interact. These elements are force protection, the urgency of immediately responding to the enemy’s actions, available resources and harm that will result to civilians if the target is misidentified. The chapter concludes that each of these elements should reinforce the conclusion that the proposed target is a military objective in order for an attack to be lawful.

Chapter 6 turns to the rule of target verification, and analyses state practice in order to test the hypothesis that commanders in applying this rule balance three elements. These elements are the likelihood of civilian harm, the magnitude of civilian harm and the degree of military advantage a commander forgoes in allocating additional intelligence resources to verify the nature of the target. The discussion is used to develop a framework regarding when commanders place greater weight on the humanitarian consideration of the likelihood of harm to civilians, and in what

³¹ Radsan and Murphy, “Measure Twice, Shoot Once: Higher Care for C.I.A. Targeted Killing,” 1224; Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law,” 1039; Crandall, “Ready...Fire...Aim! A Case for Applying Due Process Principles Before Engaging in Drone Strikes,” 87-88; Corn, “Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness,” 49.