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Targeting, the Law of War, and the Uniform Code of Military Justice

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Targeting, the Law of War, and the Uniform Code of Military Justice

*Michael W. Meier & James T. Hill**

ABSTRACT

Allegations of civilian deaths or injury or damage to civilian property caused during combat operations require an investigation to determine the facts, make recommendations regarding lessons learned in order to prevent future occurrences, and recommend whether individual soldiers should be held accountable. Using the factual circumstances of the airstrike on the Médecins Sans Frontières hospital, this Article articulates how, in the context of targeting, a violation of the Law of War is made punishable under the Uniform Code of Military Justice as explained by the recent Targeting Supplement promulgated by The Judge Advocate General of the Army.

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I. INTRODUCTION

In ground operations, one of the most difficult tasks for soldiers under the Law of Armed Conflict is targeting. In making a targeting decision, parties to an armed conflict must conduct an attack in accordance with the principles of distinction and proportionality, which impose a duty to assess available information to determine whether a particular attack would be lawful.¹ This is especially true when conducting an attack in a populated area with civilians and civilian objects in close proximity to the fighting, which often leads to unintended civilian casualties and damage to civilian objects. On the night of October 2, 2015, that is exactly what happened in Kunduz, Afghanistan, when an AC-130 gunship mistook a hospital operated by Médecins Sans Frontières (MSF), also known as Doctors Without Borders, for a Taliban compound. During a thirty minute period, the AC-130 gunship fired more than two hundred rounds at the hospital, resulting in the tragic death of over thirty civilians and injuring an additional thirty-seven others.²

Almost immediately after the attack, MSF, through its General Director, Christopher Stokes, in addition to calling for an international investigation, stated in pertinent part:

Not a single member of our staff reported any fighting inside the MSF hospital compound prior to the US airstrike on Saturday morning. The hospital was full of MSF staff, patients and their caretakers. It is 12 MSF staff members and ten patients, including three children, who were killed in the attack. We reiterate that the main hospital building, where medical personnel were caring for patients, was repeatedly and very precisely hit during each aerial raid, while the rest of the compound was left mostly untouched. We condemn this attack, which constitutes a grave violation of International Humanitarian Law.³

1. U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 5.4.2 (Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

2. U.S. FORCES-AFGHANISTAN, INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MÉDECINS SANS FRONTIÈRES/DOCTORS WITHOUT BORDERS TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015 [hereinafter KUNDUZ INVESTIGATION REPORT].

3. *Statement on Kunduz Hospital Bombing*, MÉDECINS SANS FRONTIÈRES USA (Oct. 4, 2015), <http://www.doctorswithoutborders.org/article/statement-kunduz-hospital-bombing> [<https://perma.cc/C69P-Y5YE>] (archived Feb. 4, 2018) [hereinafter MSF Press Release].

MSF's outrage over the airstrike on the hospital is certainly understandable. The airstrike was a horrible tragedy, but did it amount to a "grave violation" as MSF alleged?

A Department of Defense investigation⁴ disagreed, asserting "this tragic incident was caused by a combination of human errors, compounded by the process and equipment failures" and the fact "that the aircrew [was] 'unaware' . . . they were firing on a hospital."⁵ Yet, the investigation did not cite to any authority that distinguished "human errors" from a violation of the Law of War, nor did it adequately address Mr. Stokes's assertion that the incident constituted a "grave violation of International Humanitarian Law."⁶

When there is an allegation of civilian deaths or injury, or damage to civilian property, caused during combat operations, commanders must review or investigate those incidents. Such an investigation requires the reviewing commanders to consider relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations, and to take measures to mitigate the likelihood of future civilian casualties.⁷

When an Army Commander appoints such an investigation, it must be conducted pursuant to Army Regulation (AR) 15-6,⁸ and the investigating officer must determine the facts and make recommendations regarding lessons learned in order to alleviate future similar occurrences, as well as determine whether individual soldiers should be held accountable.⁹ In the case of the MSF incident, an officer conducted an AR 15-6 investigation, and an Army Judge Advocate completed a legal review and determined the Kunduz investigation was in compliance with AR 15-6.¹⁰

Although the investigation may have been conducted in compliance with AR 15-6, The Judge Advocate General (TJAG) of the Army believed US Army investigative procedures should be improved to address international law issues. In particular, TJAG was concerned that "legitimacy"—a principle of warfare for US joint operations¹¹—

4. KUNDUZ INVESTIGATION REPORT, *supra* note 2.

5. Barbara Starr & Ryan Browne, *Pentagon: U.S. bombing of Afghanistan Hospital not a 'War Crime'*, CNN (Apr. 29, 2016), <http://www.cnn.com/2016/04/29/politics/u-s-airstrike-hospital-afghanistan-investigation/index.html> [<https://perma.cc/KRW2-XD3W>] (archived Feb. 4, 2018).

6. MSF Press Release, *supra* note 3.

7. Exec. Order No. 13732, 81 Fed. Reg. 44485 (July 7, 2016).

8. See generally U.S. DEPT OF ARMY REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (Apr. 1, 2016) [hereinafter AR 15-6].

9. *Id.* at § II.

10. KUNDUZ INVESTIGATION REPORT, *supra* note 2, at 7–9.

11. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at I-2 fig. I-1 (2011) (asserting that "legitimacy" is a principle of war for joint operations, the other

could be undermined if targeting investigations did not clearly delineate between human error and international criminal violations, including “grave breaches” of the Law of War.¹² Yet the Uniform Code of Military Justice (UCMJ), the criminal code that applies to all US service members, does not specifically address these matters.¹³ Further, the 1949 Geneva Conventions, which define “grave breaches” of the Law of War, do not clearly articulate how a violation of Law of War targeting requirements can amount to such a breach.¹⁴

On May 30, 2017, TJAG promulgated the *Targeting and the Law of War: Administrative Investigations and Criminal Law Supplement (Targeting Supplement)*,¹⁵ which articulates the link between targeting law, the UCMJ, and the pertinent 1949 Geneva Conventions.¹⁶ The *Targeting Supplement* explains the analytical framework for assessing compliance with the Law of War and is intended, in the context of targeting, to assist Judge Advocates in recognizing pertinent lines of investigative effort required to thoroughly and impartially investigate suspected violations of both the Law of War and the UCMJ.¹⁷

TJAG references legitimacy as an underlying purpose of the publication, stating, “[f]rom the perspective of our partners, allies, and non-governmental organizations, the Law of War is the lens through which they view U.S. adherence to the rule of law in the context of targeting.”¹⁸ Further, the *Targeting Supplement* also notes that legitimacy has a domestic component, stating that “from a domestic audience’s perspective . . . adherence to the rule of law may be best understood” by that audience “through the application of common law concepts that underpin the UCMJ’s punitive articles.”¹⁹

are objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, simplicity, restraint and perseverance).

12. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (describing “grave” breaches of the Geneva Conventions); Geneva Convention for the Amelioration of the Condition of Wounded Sick and Ship-wrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (defining “grave breaches”).

13. See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2016) [hereinafter UCMJ].

14. See GC I, *supra* note 13.

15. U.S. DEPT OF ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL, TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT (May 20, 2017) [hereinafter TARGETING SUPPLEMENT].

16. *Id.*

17. *Id.* at 1.

18. *Id.* at i.

19. *Id.*

Using the airstrike on the MSF hospital as the backdrop, this Article articulates how, in the context of targeting, a violation of the Law of War is made punishable under the UCMJ as explained by the *Targeting Supplement*. Part II discusses the factual circumstances surrounding the “human error” that led to the MSF incident. Part III addresses how the Law of War distinguishes between such error and international criminal violations of the Law of War. Part IV addresses the Law of War duties the *Targeting Supplement* applies to targeting and the required *mens rea* to establish a Law of War violation in the context of those duties. Part V explains how the *Targeting Supplement* distinguishes between violations of the Law of War and violations of US domestic law and explains how a violation of the latter can result in a violation of the former. Finally, Part VI explains how the *Targeting Supplement* establishes the link between Law of War violations, the common law-like crimes contained in the UCMJ’s punitive articles, and the “grave breaches”²⁰ of the 1949 Geneva Conventions.

II. AIRSTRIKE ON THE MSF HOSPITAL

On September 28, 2015, after months of fighting, Taliban fighters unexpectedly seized the northern Afghan provincial capital of Kunduz, a city of approximately three hundred thousand residents.²¹ This sudden seizure of Kunduz gave the Taliban a political and military victory that had eluded them since 2001 and presented the Afghan government with a demoralizing setback for the control of Afghanistan. There were approximately five hundred Taliban fighters in the city, while seven thousand government troops retreated to the airport.²²

On September 30, 2015, Afghan forces, with support from US Special Forces, began to try and regain control of Kunduz.²³ Between September 30 and October 2, Afghan and US forces established a small base at an Afghan police compound and repelled several Taliban attacks.²⁴ During the evening of October 2, 2015, Afghan forces decided to attack an insurgent-controlled target in the city.²⁵ As part of their planning, the Afghans requested air support from the Special Forces

20. See GC I, *supra* note 13.

21. Joseph Goldstein & Mujib Mashal, *Taliban Fighters Capture Kunduz City as Afghan Forces Retreat*, N.Y. TIMES (Sept. 28, 2015), <https://www.nytimes.com/2015/09/29/world/asia/taliban-fighters-enter-city-of-kunduz-in-northern-afghanistan.html> [<https://perma.cc/RH96-KP2X>] (archived Feb. 4, 2018).

22. *Id.*

23. U.S. CENT. COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS (Apr. 28, 2016) [hereinafter U.S. CENTRAL COMMAND SUMMARY].

24. *Id.* at 2.

25. *Id.*

elements supporting their efforts.²⁶ An AC-130 gunship was directed to provide the requested support and arrived near Kunduz in the early morning on October 3, 2015.²⁷

The aircrew attempted to locate the Taliban-controlled target site from the grid coordinates provided by the Afghan forces that the US Special Forces commander on the ground was relaying through the Joint Terminal Attack Controller (JTAC).²⁸ The aircrew was still unable to locate the target as the grid coordinates directed them to an open field, so the aircrew attempted to visually identify the target structure based on a description relayed from the Afghan forces through the JTAC.²⁹

The aircrew identified a structure that they believed to be the intended Taliban-controlled target, but that structure was actually the MSF Trauma Center.³⁰ Before they engaged the target, one aircrew member, the TV Sensor Operator, identified the correct structure as also fitting the intended target. However, after several attempts to clarify which structure was the intended target, the aircrew was again redirected to the MSF hospital, as it generally matched the physical description of the intended Taliban-controlled target, even though it was approximately four hundred meters away.³¹

At approximately 2:08 a.m., the aircrew began firing on the MSF hospital under the mistaken belief that it was the Taliban-controlled compound.³² Around 2:19 a.m., MSF personnel contacted US government personnel, notifying them that the MSF hospital was receiving fire.³³ Because of the fighting around Kunduz, it was not initially clear who was engaging the MSF hospital.³⁴ There were a series of communications across multiple echelons of command, and the US Special Forces commander on the ground realized that the AC-130 was engaging the MSF hospital and not the intended Taliban-controlled target.³⁵ The airstrike was halted at approximately 2:38 a.m., but it resulted in at least thirty deaths and thirty-seven

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 2–3.
32. *Id.* at 3.
33. *Id.*
34. *Id.*
35. *Id.*

injuries.³⁶ Since the investigation was completed, MSF has increased the number of reported casualties to forty-two.³⁷

US Army General John Campbell, then the Commander of US Forces-Afghanistan (USFOR-A), directed an investigation to determine the cause of this incident. He appointed Army Major General William Hickman as the investigating officer, who was assisted by Air Force Brigadier General (BG) Robert Armfield and Army BG Sean Jenkins.³⁸ All three were brought in from outside Afghanistan in order to provide an objective perspective. The investigative team included over a dozen subject matter experts from several specialty fields.³⁹

The team visited the MSF Trauma Center site and several other locations in the city of Kunduz, and they interviewed more than sixty-five witnesses including personnel at the Trauma Center, members of US and Afghan ground forces, members of the aircrew, and representatives at every echelon of command in Afghanistan. The team had full access to classified information, and the investigation included more than three thousand pages of documentary evidence, much of it classified.

The intended target was an insurgent-controlled site, which was approximately four hundred meters away from the MSF hospital. The investigation found that the AC-130 gunship aircrew, in support of a US Special Forces element and Afghan ground forces, misidentified and struck the MSF hospital. It further determined that neither the aircrew nor the members of the ground forces were aware the aircrew was firing on the hospital during the airstrike.⁴⁰

The investigation determined the airstrike was caused by a combination of human errors that were compounded by process and equipment failures.⁴¹ Further, fatigue and high operational tempo by those engaged in the airstrike contributed to the incident. These factors contributed to the "fog of war," which is the uncertainty often encountered during combat operations. The investigation found that this combination of factors caused both the Ground Force Commander and the air crew to believe mistakenly that the air crew was firing on the Taliban-controlled target as opposed to the MSF hospital.⁴²

36. *Id.* at 2; see *Kunduz: Updated Death Toll – 42 People Killed in Kunduz Hospital*, MÉDECINS SANS FRONTIÈRES (Dec. 12, 2015), <http://www.msf.org/en/article/kunduz-updated-death-toll-%E2%80%93-42-people-killed-us-airstrikes-kunduz-hospital> [<https://perma.cc/UU66-79GV>] (archived Feb. 13, 2018) [hereinafter *Updated Death Toll*].

37. U.S. CENTRAL COMMAND SUMMARY, *supra* note 23, at 2; see *Updated Death Toll*, *supra* note 36.

38. KUNDUZ INVESTIGATION REPORT, *supra* note 2, at 22.

39. U.S. CENTRAL COMMAND SUMMARY, *supra* note 23, at 1.

40. *Id.*

41. *Id.*

42. *Id.* at 2.

The investigation concluded that certain personnel failed to comply with the Rules of Engagement (ROE) and the Laws of War. The investigation, however, did not conclude that these failures amounted to a war crime. As a result of the investigation, sixteen US service members received administrative punishment. However, it determined that criminal proceedings were not appropriate in light of the fact that the errors were unintentional and that there were other mitigating factors, such as equipment failures, that affected the mission.⁴³ General Campbell approved the investigation on November 21, 2015.⁴⁴

III. ERRORS IN JUDGMENT AND THE LAW OF WAR

Had the service members involved in the incident been criminally prosecuted for a Law of War violation, it is unlikely that the prosecution would have been successful in light of the service members' unintentional human error. The Nuremberg Tribunal case of *United States v. Rendulic* illustrates this point.⁴⁵ In *Rendulic*, the Nuremberg Tribunal confronted one of the greatest operational errors in international criminal tribunal history. Operating under the mistaken belief that Russian forces were in pursuit, German General Lothar Rendulic implemented a devastating "scorched earth" campaign in the Norwegian province of Finnmark.⁴⁶ General Rendulic's forces leveled entire villages across Finnmark, blasted highways, wrecked communication lines, and destroyed port installations.⁴⁷ The tribunal noted the devastation was "as complete as an efficient army could do" and that, even years after the operation, the devastation throughout Finnmark was still "discernible to the eye."⁴⁸ Nonetheless, the tribunal concluded that General Rendulic "may have erred in the exercise of his judgement but he was guilty of no criminal act."⁴⁹

The operative principle that guided the tribunal's conclusion is embodied in the phrase "erred in the exercise of his judgement."⁵⁰ A more complete version of the principle was articulated by the Nuremberg Tribunal in the *High Command Case*, which stated an accused "[c]annot be held criminally responsible for a mere error in judgment as to disputable legal questions."⁵¹ The U.S. Supreme Court

43. See *id.* at 3–4.

44. *Id.* at 1.

45. See U.S. GOV'T PRINTING OFFICE, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1288 (1950) [hereinafter 11 TRIALS OF WAR].

46. *Id.* at 1295–96.

47. *Id.* at 1296.

48. *Id.*

49. *Id.* at 1297 (emphasis added).

50. *Id.*

51. *Id.* at 511 (emphasis added); see also *Ashcroft v. Al-Kidd*, 131 U.S. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgements about

adhered to the same principle in an early qualified immunity case, *Wilkes v. Dinsman*, which stated a military official is protected from liability for “mere errors of judgment in the discharge of his duties.”⁵² The US *Manual for Courts-Martial* also enshrines this principle in Article 99 (misbehavior before the enemy) and Article 110 (improper hazarding of a vessel), specifying that a “mere error in judgment” is not punishable under those articles.⁵³

Errors in judgment arise in the context of legal duties that leave room for judgment—*Rendulic*’s analysis illustrates the point. In General Rendulic’s case, the legal duty at issue was imposed by Article 23(g) of the Laws and Customs of War on Land (Hague IV), which prohibits the destruction or seizure of “the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”⁵⁴ As the language of Article 23(g) is imprecise, the tribunal articulated the following standard that would guide their analysis in assessing guilt or innocence: “*If the facts were such as would justify the action by the exercise of judgment*, after giving consideration to all the factors and existing possibilities, even though the conclusion reached *may have been faulty*, it cannot be said to be criminal.”⁵⁵ Put another way, an “error in judgment” can occur in the context of discretionary duties, that is, mandatory legal obligations that leave discretion for the “exercise of judgement.”⁵⁶ Discretionary duties are in contrast to ministerial duties, which the Supreme Court in *Mississippi v. Johnson* defined as those duties for “which nothing is left to discretion . . . a simple definite duty, imposed by law, and arising under conditions admitted or proved to exist.”⁵⁷

open legal questions. When properly applied, it protects “all but the plainly incompetent or those who knowingly violate the law.”).

52. *Wilkes v. Dinsman*, 48 U.S. 89, 123 (1849).

53. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(c), pt. IV, ¶¶ 23c(3)(b), 34c(3) (2016) [hereinafter 2016 MCM].

54. Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention No. IV, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9 [hereinafter HR IV].

55. 11 TRIALS OF WAR, *supra* note 46, at 1296–97.

56. See BLACK’S LAW DICTIONARY 467 (6th ed. 1990) (defining “discretionary act” as those governed by “hard and fast rule”).

57. *Mississippi v. Johnson*, 71 U.S. 475, 498 (1867).

As the *Rendulic* decision illustrates, to prove an accused was derelict in performing a discretionary act, the government has a very high hurdle to overcome—it must be shown that the accused could not “justify the action by the exercise of judgment”⁵⁸ The *Manual for Courts-Martial* articulates the standard of care similarly at Article 110, stating that “a mere error in judgement [is one] that a reasonable person might have committed under the same circumstances”⁵⁹ In the qualified immunity case of *Scheuer v. Rhodes*, the Supreme Court articulated the standard as requiring there be some “reasonable grounds” to justify the exercise of judgment.⁶⁰ In a recent case, *Mullenix v. Luna*, the Supreme Court articulated the standard of care in the negative, stating an exercise of discretion will not be lawful if “every reasonable official would have understood that what he is doing violates” the law.⁶¹

The *Targeting Supplement* refers to the standards referenced in the previous paragraph as “abuse of discretion” standards—that for an unintentional error to be criminal, an accused must abuse his discretion for liability to follow.⁶²

IV. TARGETING, THE LAW OF WAR, AND MENS REA

A. Targeting Duties

In the modern context, the *Targeting Supplement* explains that the legal duties implicated in targeting incidents, such as the MSF incident, are discretionary, requiring application of the standard of care articulated above.⁶³ In the context of targeting, for example, the Law of War imposes the following six overarching targeting duties that may leave room for judgement in execution:

Table 1

| | Targeting duties |
|-----------------------|--|
| Target Identification | - Attack lawful targets only. ⁶⁴ |
| Specialized Warning | - Do not attack objects subject to special protection (e.g., medical units, enemy hospitals, medical transports) unless the enemy has misused them. ⁶⁵ - Provide “due warning” before attacking an object subject to special protection ⁶⁶ unless acting in self-defense. ⁶⁷ |

58. 11 TRIALS OF WAR, *supra* note 46, at 1297.

| | |
|------------------------------|---|
| Generalized Warnings | - Provide advance warning before conducting an attack where protected persons may be harmed unless the circumstances do not permit. ⁶⁸ - When warning is required, provide “effective advance warning.” ⁶⁹ |
| Feasible Precautions | - Take feasible measures to minimize incidental harm. ⁷⁰ |
| Principle of Proportionality | - Conduct proportionate attacks—the expected incidental harm must not be excessive in relation to the direct and concrete military advantage anticipated. ⁷¹ |
| Command Responsibility | - Take “necessary and reasonable measures” to prevent subordinates from unlawfully harming |

59. 2016 MCM, *supra* note 54, pt. IV, ¶ 34c(3).

60. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (“It is the existence of *reasonable grounds* for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.”) (emphasis added).

61. *Mullenix v. Luna*, 136 U.S. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 U.S. 2088, 2093 (2012)).

62. TARGETING SUPPLEMENT, *supra* note 15, at 2–3.

63. *Id.* at 4–5.

64. DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 5.63 (listing criteria for determining if an object is a military objective); *id.* ¶ 5.8.3 (listing criteria for determining if an individual is a member of an armed group); *id.* ¶ 5.8.3.1 (listing criteria for determining if an individual is directly / actively participation hostilities); *id.* ¶ 4.3 (listing criteria for determining if an individual is a lawful combatant or unprivileged belligerent); *see also id.* ¶ 5.5.2 (stating which persons and property are protected from attack).

65. *See id.* ¶ 7.10.3.3 – ¶ 7.10.3.6 (explaining the factors that bear upon whether an object has lost its special protection).

66. *Id.* ¶ 7.10.3.2, ¶ 7.11.1 (explaining that “due warning” is required before attacking an object subject to special protection); *id.* ¶ 5.11.5.2 (explaining what type of advanced warning may be “effective”).

67. *Id.* ¶ 7.10.3.2 (stating the requirement to provide warning “does not prohibit the exercise of the right of self-defense”).

68. *Id.* ¶ 5.11.5 (stating advance warning must be given if “circumstances permit”); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

69. *Id.* ¶ 5.11.1 – ¶ 5.11.1.1 (explaining that “effective warning” must be given unless “circumstances do not permit”); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

70. *Id.* ¶ 5.2.3 (articulating the general rule that feasible precautions must be taken); *id.* ¶ 5.11.3 (explaining that adjusting the timing of an attack is a form of precaution); *id.* ¶ 5.11.6 (explaining that selecting the weaponing for an attack is a form of precaution); *id.* ¶ 5.2.3.2. (listing factors that bear on what precautions are feasible).

71. *Id.* ¶ 5.12 (explaining relevant factual considerations to be assessed in determine whether an attack would be proportionate).

| | |
|--|---|
| | persons and property protected by the Law of War. ⁷² |
|--|---|

B. Information Assessment Duties

In addition to the targeting duties referenced in Table 1 above, the *Targeting Supplement* also specifies that for each targeting duty the Law of War imposes a corresponding "information assessment duty."⁷³ Like the targeting duties listed above at Table 1, the *Targeting Supplement* explains that the information assessment duties, too, are discretionary in nature, and they are as follows:

Table 2

| | Information Assessment Duties |
|-----------------------|---|
| Target Identification | - Take reasonable steps to identify a person or object as a legal target. |
| Specialized Warning | - Exercise due regard in determining whether an object subject to special protection lost its protected status under the Law of War. - Take reasonable steps to determine what means of communicating the warning would be adequate. |
| Generalized Warnings | - Take reasonable steps to determine whether the circumstances permit providing an advanced warning. - Take reasonable steps to determine what means of communicating the warning would be adequate. |
| Feasible Precautions | - Take reasonable steps to determine what precautionary measures are feasible. |

72. *Id.* ¶ 18.23.3; see also U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, CHANGE NO. 1 1976, 178-79 (July 1956) [hereinafter FM 27-10] ("The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.") (emphasis added).

73. TARGETING SUPPLEMENT, *supra* note 15, at 2-3.

| | |
|------------------------------|--|
| Principle of Proportionality | - Take reasonable steps to determine whether the incidental harm would be excessive in relation to the direct and concrete military advantage anticipated. |
| Command Responsibility | - Take reasonable steps to monitor subordinate compliance with the Law of War. ⁷⁴ |

C. *Mens Rea*

Thus, given the discretionary nature of the duties articulated in Table 1 and Table 2, the following excerpt bearing on *mens rea* from the qualified immunity case of *Ashcroft v. Al-Kidd* applies equally in the context of combatant immunity regarding targeting decisions: “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgements about open legal questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”⁷⁵ As such, prosecutions for law violations in the context of targeting will be extremely rare occurrences because absent specific intent, a prosecutor must establish plain incompetence or an abuse of discretion. Mere harm to persons or property protected by the Law of War is not enough.

Therefore the *Targeting Supplement* contains both a subjective standard and an objective standard in order to assess whether an accused violated a duty listed in Table 1 and Table 2 in causing such harm. Regarding the subjective standard, if the individual specifically intended to violate any of the duties listed in Table 1 and Table 2, the *Targeting Supplement* explains that would be a violation of the Law of War.⁷⁶ Regarding the objective standard, if the accused commits an unintentional error amounting to plain incompetence or an abuse of discretion, liability would hinge upon whether that individual was also culpably negligent when viewed from “the conditions as they appeared to the defendant at the time.”⁷⁷

D. *Competent Authority Required*

It is important to note that not all service members engaged in targeting decisions are subject to the Law of War targeting obligations. The *Targeting Supplement* explains that a determination of whether a

74. DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 18.23.3 n.338 (citing FM 27-10, *supra* note 72, at 178–79).

75. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012).

76. TARGETING SUPPLEMENT, *supra* note 15, at 6.

77. *Id.* at 4–5; 11 TRIALS OF WAR, *supra* note 46, at 1297.

service member is bound by a particular targeting duty depends “upon whether he or she has the authority to exercise the discretion implied by the targeting duty in question.”⁷⁸ For example, command responsibility will not attach unless that soldier exercises command discretion.⁷⁹ Accordingly, he or she generally must be a commander. Similarly, the duty to conduct proportionate attacks will “normally” occur if that soldier “has authority over military operations.”⁸⁰ This is important because “[l]ower level personnel may not be privy to the strategic or operational significance of a specific attack, and thus may not be competent to evaluate the expected military advantage of the attack against the expected harm to civilians and civilian objects.”⁸¹ With respect to feasible precautions, the duty generally attaches if the soldier has the “authority to direct and manage resources (e.g., allocating weapon systems and intelligence assets) or judgments about the acceptable degree of risk (e.g., to the lives of friendly forces and to mission accomplishment).”⁸²

V. THE RELATIONSHIP BETWEEN DOMESTIC LAW AND THE LAW OF WAR

The *Targeting Supplement* also addresses the relationship between violations of duties grounded in domestic law and violations of duties grounded in the Law of War. In particular it states in pertinent part:

[R]ules of engagement, standing operating procedures, and other sources of duty may impose greater restrictions than the requirements of the Law of War. Depending on the circumstances, a failure to comply with such standards could be a violation of the UCMJ, and yet not be a violation of the Law of War.⁸³

Yet, a violation of a domestic legal obligation in some circumstances may also result in a Law of War violation, even if the obligation itself is not imposed by the Law of War. A Nuremberg Tribunal, in the so-called *Hostage Case*, determined that if a commander was derelict in his duty to review reports sent to his headquarters “for his special benefit,” even if the reports are not mandated by the Law of War, that dereliction may prevent him from asserting his resulting ignorance as a defense to an alleged Law of War violation.⁸⁴ Underpinning the tribunal’s reasoning was that a basic

78. TARGETING SUPPLEMENT, *supra* note 15, at 3.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 3–4.

84. 11 TRIALS OF WAR, *supra* note 46, at 1271 (“Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of

function of any commander is to read reports that his or her subordinates provide him—failing to do so is a violation of his or her domestic legal military responsibilities, a dereliction that cannot be used to support a defense of ignorance.⁸⁵

The reasoning applied in the *Hostage Case* can also be applied outside the command responsibility context. For example, in combat, a standard operating procedure might require the warfighter to check a “no-strike list” before authorizing an airstrike on a suspected target.⁸⁶ If the warfighter was derelict in his or her duty to check the no-strike list and struck a protected object on the list, that dereliction may prevent the warfighter from asserting his or her resulting ignorance of the target’s actual protected status under the Law of War as a defense to an alleged Law of War violation.⁸⁷

Turning to the MSF airstrike, there was a no-strike list, and the AR 15-6 investigation determined that the hospital was placed on that list.⁸⁸ However, the no-strike list was not uploaded to the AC-130’s computer system, so the flight crew was unaware of the protected status of the hospital.⁸⁹ The investigation failed to address whether a member of the flight crew, or a commander, had a legal duty under the UCMJ to manually check the no-strike list.⁹⁰ As such, the investigation did not address whether US domestic law imposed a duty upon any member of the flight crew or a commander to check the list, a dereliction that may have resulted in a Law of War violation.

such reports . . . constitutes a *dereliction of duty* which he cannot use in his own behalf.”) (emphasis added).

85. *See id.*

86. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60, at II-12 (Jan. 13, 2013) (“No-strike entities are protected from the effects of military operations under international law and/or the ROE. Attacking these may violate the laws of war (e.g., cultural and religious sites, embassies belonging to noncombatant countries, hospitals, schools) or interfere with friendly relations with other nations, indigenous populations, or governments. [No Strike Lists (NSLs)] are not target lists, since the entities on the NSLs are not targets. NSLs are continuously updated with the latest information from the operational environment.”).

87. U.S. GOV’T PRINTING OFFICE, 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1055 (1950) (“Mummenthey’s assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.”); U.S. GOV’T PRINTING OFFICE, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1088 (1950) (“It was his duty as the head to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was . . . forbidden by the rules of warfare . . .”); U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK ¶ 5-11-2 n.1 (Sept. 10, 2014) [hereinafter JBB] (“The (ignorance) (mistake) cannot be based on a . . . failure to discover the true facts.”).

88. U.S. CENTRAL COMMAND SUMMARY, *supra* note 23, at 3; KUNDUZ INVESTIGATION REPORT, *supra* note 2, at 80.

89 KUNDUZ INVESTIGATION REPORT, *supra* note 2, at 80.

90. *Id.* at 80–81.

The *Targeting Supplement* specifically addresses the application of the ignorance-of-fact defense to the Law of War to such an occurrence in the future.⁹¹ In particular, it makes clear that an intentional dereliction or a culpably negligent dereliction of duty may result in the denial of the ignorance-of-fact defense in the context of alleged violations of the Law of War.⁹²

VI. THE LAW OF WAR AND THE UCMJ

A. Public Authority Justification and the Law of War

The public authority justification is the key to understanding how a Law of War violation may result in a violation of crimes contained in the UCMJ, such as assault, murder, or manslaughter.⁹³ The UCMJ's public authority justification is referenced in the *Targeting Supplement*, which states that "[a] death, injury, or other act caused or done in the performance of duty and in compliance with the Law of War is justified and not unlawful with respect to that body of Law."⁹⁴

How the public authority justification is applied in the context of the Law of War is explained by a 2010 Department of Justice Office of Legal Counsel (OLC) memorandum.⁹⁵ This memorandum addressed whether Department of Defense (DoD) officials could be subject to prosecution for conducting a contemplated drone strike against a US citizen who was an enemy combatant located in Yemen.⁹⁶ 18 U.S.C. § 1119(b) criminalizes the killing of a US national while within the jurisdiction of another country.⁹⁷ Despite this prohibition, the OLC ultimately concluded that "the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification."⁹⁸

In reaching its conclusion, the OLC noted there is a dearth of precedent addressing the contours of the public authority

91. TARGETING SUPPLEMENT, *supra* note 15, at 7.

92. *Id.*

93. See 2016 MCM, *supra* note 53, at II-116 ("A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful."); *Id.* at Discussion ("killing an enemy combatant in battle is justified"); *cf.* Model Penal Code § 3.03(2)(b) (1985) (proposing that criminal statutes recognize justification for a killing pursuant to a "public duty" that "occurs in the lawful conduct of war"); see also *United States v. Payne*, 40 C.M.R. 516, 519 (A.C.M.R. 1969) (stating that a legal duty may be imposed by "the law of war, written and customary").

94. TARGETING SUPPLEMENT, *supra* note 15, at 3–4.

95. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Att'y Gen., *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* 12 (July 16, 2010) [hereinafter OLC Memo].

96. *Id.* at 21.

97. *Id.* at 12.

98. *Id.* at 17.

justification.⁹⁹ The OLC also noted there is no federal statute that explicitly establishes a public authority justification defense.¹⁰⁰ Nonetheless, it determined that § 1119(b) contemplated a public authority justification because its legislative history contemplated that only “unlawful” killings could be prosecuted¹⁰¹—the same terminology used in the UCMJ’s punitive articles.¹⁰²

The OLC then went on to cite the Laws of War as a specific subset of the public authority justification.¹⁰³ In particular, the memorandum stated: “[w]e conclude that the [public authority] justification would be available because the operation would constitute the lawful conduct of war—a well-established variant of the public authority justification.”¹⁰⁴ It is also noteworthy that the OLC relied upon DoD interpretations of the Law of War and US treaty obligations as informing the contours of the public authority immunity for the DoD personnel at issue.¹⁰⁵

The *Targeting Supplement* therefore should be understood as taking the same approach to applying the Law of War under the UCMJ that the OLC took to applying the Law of War under federal statute. That is, it relies upon DoD interpretations of the Law of War and US treaty obligations as informing the contours of the combatant immunity in the context of targeting. When service members are “plainly incompetent or . . . knowingly violate the law,”¹⁰⁶ they lose their protection from prosecution for the common law-like crimes contained in the UCMJ’s punitive articles. As the *Targeting*

99. *Id.* at 15.

100. *See id.* at 17.

101. *See id.* at 12–14.

102. *See, e.g.*, UCMJ, *supra* note 13, art. 118 (premeditated murder).

103. *See* OLC Memo, *supra* note 95, at 20.

104. *Id.*

105. *See id.* (“Although DoD would specifically target al-Aulaqi, and would do so without advance warning, such characteristics of the contemplated operation would not violate the laws of war and, in particular, would not cause the operation to violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant.”); *see, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301–02 (“[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army”); *cf.* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts “inviting the confidence of [the] adversary . . . with intent to betray that confidence,” including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status). Those prohibitions do not categorically preclude the use of stealth or surprise in conducting an attack against individual soldiers or officers. *See* U.S. ARMY FIELD MANUAL 27-10, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not “preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where, and we are not aware of any other law-of-war grounds precluding the use of such tactics.”).

106. TARGETING SUPPLEMENT, *supra* note 15, at 4 n.26.

Supplement explains, for those who violate Law of War targeting obligations, those crimes could include: attempts, conspiracy, murder, involuntary manslaughter, assault, and so forth.¹⁰⁷

B. Grave Breaches of the Law of War

While every violation of the Law of War may be punishable under the UCMJ, not every violation will amount to a grave breach of the Law of War. However, it would be inaccurate to say, as was asserted by US Central Command (CENTCOM) in the aftermath of the MSF incident, that the “[t]he label ‘war crimes’” applies only to “*intentional acts—intentionally targeting civilians or intentionally targeting protected objects.*”¹⁰⁸ Rather, for the United States, even “grave breaches” of the Law of War—those defined in the 1949 Geneva Conventions¹⁰⁹—can result from culpable negligence.¹¹⁰ In particular, the *Targeting Supplement* makes this clear in articulating the following grave breaches defined in the 1949 Geneva Conventions as being potentially implicated in the targeting context:

- “[W]ilful killing” of protected persons;
- “[W]ilfully . . . causing serious injury to body or health” to protected persons;
- “Willful harm to protected property provided damage thereto is “extensive”; and
- “Culpably negligent harm to protected property . . . provided the harm was the product of the ‘wanton’ form of culpable negligence, and the damage caused was ‘extensive.’”¹¹¹

Although CENTCOM’s assertion on this matter was inaccurate, the CENTCOM report was partially correct in the context of the conflict in Afghanistan. To understand this point, it is first necessary to understand that conflict in Afghanistan is generally recognized as a Common Article 3 conflict, also known as a non-international armed conflict (NIAC).¹¹² Because Common Article 3 does not define any

107. See *id.* at 7–8.

108. U.S. CENTRAL COMMAND SUMMARY, *supra* note 23, at 2.

109. See GC, *supra* note 12; GC II, *supra* note 12; GC III, *supra* note 12; GC IV, *supra* note 12.

110. See TARGETING SUPPLEMENT, *supra* note 15, at 10.

111. *Id.* at 9–10.

112. See White House, Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations 15 (Dec. 2016) (“As a matter of international law, the United States initiated counterterrorism combat operations in Afghanistan in U.S. national self-defense. On October 7, 2001, the United States notified the U.N. Security Council consistent with Article 51 of the U.N. Charter that the United States was taking action in the exercise of its right of self-defense in response to the September 11th attacks. Seventy-two U.S. military operations

grave breaches in an NIAC, a plain reading of this article would lead one to conclude that none of the grave breaches listed in the previous paragraph apply to the MSF incident, willful or otherwise.¹¹³ However, the United States has taken the position that the offenses listed in Common Article 3 can amount to a grave breach in an NIAC to the extent those offenses are also referenced in the grave breach provisions of the 1949 Geneva Conventions.¹¹⁴ As such, in the context of targeting, the grave breaches related to willfully harming protected persons meet this criteria.¹¹⁵ By contrast, the grave breach provision related to intentional or culpably negligent harm to protected property cannot apply in an NIAC, because this provision has no analog in Common Article 3.¹¹⁶

Therefore, the CENTCOM statement is accurate as it applies to Afghanistan to the extent it states that “[t]he label ‘war crimes’ applies only to ‘*intentional acts—intentionally targeting civilians . . .*’”¹¹⁷ Further, as there was no evidence of intentional harm to protected persons in the MSF incident, no “grave breach” of the Law of War occurred in that circumstance.¹¹⁸ Nonetheless, the CENTCOM statement indicated there was a lack of understanding that unintentional acts could amount to a grave breach, and this resulted in justifiable criticism that called into question the validity of various findings.¹¹⁹ Therefore, the *Targeting Supplement* specifically addresses how targeting law violations may amount to grave breaches in NIAC or otherwise to provide clarity to judge advocates in the future.¹²⁰

and support for Afghan military forces in the ongoing armed conflict in Afghanistan are now undertaken consistent with the Bilateral Security Agreement between the United States and Afghanistan and with the consent of the Government of Afghanistan.”)

113. See, e.g., GC I, *supra* note 12, art. 3 (this article is common to all four Geneva Conventions).

114. See DOD LAW OF WAR MANUAL, *supra* note 2, ¶ 18.9.3.2 (“Since Common Article 3 of the 1949 Convention protects persons against some of the acts described as grave breaches, the United States took the position that the obligations created by the grave breaches provisions of the 1949 Geneva Conventions could also apply to violations of Common Article 3.”).

115. Compare GC IV, *supra* note 12, art. 147 (classifying as a grave breach “willful killing” and “willfully . . . causing serious injury to body or health . . .”), with *id.* art. 3 (prohibiting in pertinent part “violence to life and person, in particular murder of all kinds . . .”).

116. Compare GC IV, *supra* note 12, art. 147 (classifying as a grave breach “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly.”), with *id.* art. 3 (not articulating the causing of harm to property as a violation of CA3.).

117. U.S. CENTRAL COMMAND SUMMARY, *supra* note 23, at 2.

118. See *id.*; TARGETING SUPPLEMENT, *supra* note 15, at 10.

119. See U.S. CENTRAL COMMAND SUMMARY, *supra* note 23.

120. See TARGETING SUPPLEMENT, *supra* note 15, at 10.

VII. CONCLUSION

The American people and US partners and allies expect and will continue to demand that US armed forces adhere to the law applicable to the battlefield. When credible allegations of violations of the Law of War are received, the allegations must be fairly and impartially investigated. Adherence to the law must be clearly demonstrated in investigative reports and processes in order to safeguard the legitimacy of US operations. The MSF incident was a wake-up call for the DoD; one that brought to light serious gaps in understanding about the interrelation between the Law of War, the UCMJ, and the 1949 Geneva Conventions. The *Targeting Supplement* addresses those gaps, integrates lessons learned, and solidifies the foundation upon which the United States can continue to influence and develop the Law of War.