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### The Law of Operational Targeting: Viewing the LOAC through an Operational Lens

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# The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens

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## INTRODUCTION

Air and missile warfare is and will almost certainly continue to be a ubiquitous aspect of contemporary armed conflicts. Yet, the law related to the regulation of this aspect of warfare has failed to develop at the same pace as the methods and means of employing such combat assets. The Manual on International Law Applicable to Air and Missile Warfare (AMW Manual)<sup>1</sup> is therefore without question an important development in the law of armed conflict. Although not hard law, it reflects the consensus of some of the most respected *jus in bello* scholars in the world on how existing law of armed conflict (LOAC) rules and norms apply to this type of warfare.

Understanding how air and missile warfare is planned, executed, and regulated requires more than just an understanding of relevant LOAC provisions. In U.S. practice (and that of many other countries), air and missile warfare is one piece of a broader operational mosaic of law and military doctrine related to the joint targeting process. According to U.S. doctrine, joint targeting involves:

**creating specific effects to achieve the joint force commander's (JFC's) objectives or the subordinate component commander's supporting**

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1. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE foreword (May 15, 2009), available at <http://ihresearch.org/amw/HPCR%20Manual.pdf> [hereinafter AMW MANUAL].

**objectives.** Targeting proceeds from the definition of the problem to an assessment of the results achieved by the executed courses of action. The process allows for the testing of multiple solution paths, a thorough understanding of the problem, and the refinement of proposed solutions. **The joint targeting process is flexible and adaptable to a wide range of circumstances.**<sup>2</sup>

Air and missile warfare is embedded within this broader targeting process. Accordingly, a genuine understanding of the law of air and missile warfare necessitates understanding how the LOAC influences and is integrated within this targeting process.

How operational commanders select, attack, and assess potential targets and how the LOAC reflects the logic of military doctrine related to this process is therefore the objective of this Article. To achieve this objective, the authors focus on a recent decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Gotovina*. Although the military operation at the center of this case involved only limited use of air and missile warfare, the ICTY's extensive focus on the use of artillery and rocket attacks provides a useful and highly relevant illustration of why understanding the interrelationship between law and military doctrine is essential for the logical and credible development of the law. The authors therefore seek to "exploit" this case as an opportunity to expose the reader to this interrelationship, an interrelationship equally essential to the effective evolution of the law of air and missile warfare.

## I. BACKGROUND

On May 21, 2001, the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia filed an indictment against Ante Gotovina, a former lieutenant general of the Croatian Army, alleging a series of war crimes related to the execution of "Operation Storm"<sup>3</sup> in 1995.<sup>4</sup> On its face, the indictment is not particularly remarkable. As amended, it charged General Gotovina and two other former Croatian generals with both individual and "joint criminal enterprise"<sup>5</sup> (JCE)

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2. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING v (2002) (emphasis in original) [hereinafter JP 3-60 (2002)]; see also JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING vii-ix (2007) [hereinafter JP 3-60 (2007)] (discussing the "Fundamentals of Targeting").

3. Operation Storm is the code name given to a large-scale military operation carried out by Croatian Armed Forces, in conjunction with the Army of the Republic of Bosnia and Herzegovina, to gain control of parts of Croatia that had been claimed by separatist ethnic Serbs since early 1991. For a description of Operation Storm, see Mark Danner, *Operation Storm*, N.Y. REV. OF BOOKS, Oct. 22, 1998, available at <http://www.markdanner.com/articles/show/50>.

4. *Prosecutor v. Gotovina*, ICTY Case No. IT-01-45-I, Indictment (May 21, 2001), <http://www.icty.org/x/cases/gotovina/ind/en/got-ii010608e.htm>. The Prosecutor subsequently amended the original indictment to name two additional Croatian former generals—Mladen Markac and Ivan Cermak. *Prosecutor v. Gotovina*, ICTY Case No. IT-06-90, Amended Joinder Indictment (May 17, 2007), <http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf>.

5. Joint criminal enterprise is a theory of criminal liability first recognized by the Appeals Chamber of the ICTY in *Prosecutor v. Milutinovic*, ICTY Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, para. 18 (May 21, 2003). Like conspiracy, JCE liability is a crime commission, characterized by the existence of a common criminal plan

responsibility for, inter alia, the wanton destruction of cities, towns, or villages.<sup>6</sup> The Prosecutor's central theory of criminal liability was an allegation that General Gotovina's employment of indirect fires (such as artillery, rockets, and mortars)<sup>7</sup> against population centers such as the city of Knin violated the LOAC.<sup>8</sup> While such an allegation is not itself remarkable, the complex nature of the targeting situations that existed during the attack on Knin and the reliance on these targeting decisions as the focal point for criminal responsibility make this case profoundly significant in the development of targeting law. Indeed, no other decision by the ICTY has addressed such a complex targeting situation. For this reason, the attack on Knin and the subsequent trial and conviction of General Gotovina offer a unique insight into the law of targeting and its application in contemporary armed conflicts.

The ICTY convicted General Gotovina on April 15, 2011, sentencing him to twenty-four years confinement.<sup>9</sup> This Article is not, however, focused on critiquing that judgment.<sup>10</sup> Instead, the issues raised in the trial of General Gotovina, particularly with respect to the prosecution's novel theory that the mere use of indirect fires against population centers violates the LOAC, provide an excellent lens through which to examine the LOAC principles that regulate the application of combat power and the processes by which military commanders synchronize doctrine, law, and policy to employ force for mission accomplishment. The view through this lens provides an important insight into a legal framework that is central to the application of combat power in any context, including the use of unmanned aerial vehicles armed with precision-guided missiles. In short, the complexities of the legal issues related to the use of such weapons, like any weapons, must start with a solid foundation of understanding the core principles of targeting, which are illustrated by considering the complex case of the attack on Knin. The same LOAC principles related to this attack are woven into the AMW Manual, and by viewing them through the lens of an actual operation the authors hope to provide the reader with an enhanced understanding of how the law is applied in actual operational practice.

In the execution of military operations, commanders and their staffs conduct detailed planning sessions in order to identify both the military end state that is to be

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or purpose pursued by a plurality of persons. However, unlike conspiracy, JCE liability requires actual commission by at least some of the members of the plurality of the underlying crimes agreed to; all individuals who contribute to the carrying out of crimes in execution of a common purpose may be subjected to criminal liability. Although not specifically recognized in the ICTY Statute, the Appeals Chamber held that it is fairly encompassed within article 7(1) of the Statute. *Id.* para. 28.

6. Prosecutor v. Gotovina, Amended Joinder Indictment, *supra* note 4, para. 51.

7. Indirect fire is "[f]ire delivered on a target that is not itself used as a point of aim for the weapons or the director." *Indirect Fire Definition*, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 169 (Nov. 8, 2010, as amended through Aug. 15, 2011) [hereinafter JP 1-02].

8. See Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Prosecution's Public Redacted Final Trial Brief, para. 524–66 (Aug. 2, 2010), <http://www.icty.org/x/cases/gotovina/custom5/en/100802.pdf> (describing the "shelling" of Knin); Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Gotovina Defence Final Trial Brief, para. 180 (July 27, 2010), <http://www.icty.org/x/cases/gotovina/custom5/en/100727.pdf> (describing the prosecution's theory of criminal liability).

9. Prosecutor v. Gotovina, ICTY Case No. IT-06-90, Judgement Volume II of II, para. 2620 (Apr. 15, 2011), [http://www.icty.org/x/cases/gotovina/tjug/en/110415\\_judgement\\_vol2.pdf](http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf).

10. The coauthors acknowledge Professor Geoffrey Corn's role as an expert witness for the defense in the Gotovina trial. Professor Corn is also currently assisting with the filing of an amicus brief challenging the trial court's findings.

achieved and a construct for how to reach that end state. The commander is the focal point of decision making throughout this process and during mission execution. Every application of combat power, whether at the tactical, operational, or strategic level,<sup>11</sup> is designed to achieve the specific effects that support the commander's identified end state and objectives. These are the basic premises that drive the target selection and execution process within a process characterized as operational art. According to U.S. Army Field Manual 3-0:

Commanders use operational art to envision how to establish conditions that define the desired end state. Actions and interactions across the levels of war influence these conditions. These conditions are fundamentally dynamic and linked together by the human dimension, the most unpredictable and uncertain element of conflict. The operational environment is complex, adaptive, and interactive. Through operational art, commanders apply a comprehensive understanding of it to determine

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11. According to U.S. Army Field Manual 3-0, Operations:

7-9. The *strategic level of war* is the level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, and develops and uses national resources to achieve these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve those objectives; and provide military forces and other capabilities in accordance with strategic plans (JP 3-0).

...

7-12. The operational level links employing tactical forces to achieving the strategic end state. At the operational level, commanders conduct campaigns and major operations to establish conditions that define that end state. A *campaign* is a series of related major operations aimed at achieving strategic and operational objectives within a given time and space (JP 5-0). A *major operation* is a series of tactical actions (battles, engagements, strikes) conducted by combat forces of a single or several Services, coordinated in time and place, to achieve strategic or operational objectives in an operational area. These actions are conducted simultaneously or sequentially in accordance with a common plan and are controlled by a single commander. For noncombat operations, a reference to the relative size and scope of a military operation (JP 3-0). Major operations are not solely the purview of combat forces. They are typically conducted with the other instruments of national power. Major operations often bring together the capabilities of other agencies, nations, and organizations.

...

7-16. *Tactics* uses and orders the arrangement of forces in relation to each other. Through tactics, commanders use combat power to accomplish missions. The tactical-level commander uses combat power in battles, engagements, and small-unit and crew actions. **A battle consists of a set of related engagements that lasts longer and involves larger forces than an engagement.** Battles can affect the course of a campaign or major operation. An *engagement* is a tactical conflict, usually between opposing lower echelons maneuver forces (JP 1-02). Engagements are typically conducted at brigade level and below. They are usually short, executed in terms of minutes, hours, or days.

7-17. Operational-level headquarters determine objectives and provide resources for tactical operations. For any tactical-level operation, the surest measure of success is its contribution to achieving end state conditions. Commanders avoid battles and engagements that do not contribute to achieving the operational end state conditions.

U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (2008) (amended Feb. 22, 2011) (emphasis in original) [hereinafter FM 3-0].

the most effective and efficient methods to influence conditions in various locations across multiple echelons.<sup>12</sup>

Targeting is the term used within the military to describe the process of applying combat power to achieve desired objectives within the overall operational plan by destroying, disabling, degrading, or harassing enemy capabilities.<sup>13</sup> It involves a cycle of identifying individuals and objects for potential attack, selecting which of those objects will be attacked, selecting the means (weapons) and methods (tactics) to conduct the attack, executing the attack, and assessing the effects of the attack.<sup>14</sup> All experts on the commander's staff (the "battle staff") participate in this targeting process, whether deliberate or time-sensitive. At the most basic level, operational experts identify the effects necessary to achieve the commander's purpose, intelligence experts identify enemy capabilities and vulnerabilities, weapon systems experts identify the available assets capable of achieving the desired effects, and the commander chooses the capability that he or she determines is best suited to accomplish the mission. This process can be extremely complex and time consuming at very high levels of command, or very brief and ad hoc at low levels of command. Even an infantry fireteam—a group of four to eight soldiers—engages in this process. The team leader identifies the objectives and employs the team's combat power in a manner best designed to achieve those objectives. However, the process becomes more complex in proportion to the level of command and the range of combat capabilities available to the commander.

The commander's discretion in selecting targets for attack is not, however, unfettered. In addition to being constrained by the mission and policy imperatives dictated by his or her superiors, it is an axiom of military operations that the commander may only direct attacks against lawful military objectives. What is or is not lawful is defined by the LOAC, which provides the test for not only assessing what people, places, and things may be attacked, but also for determining the legality of the means and methods used for the attack. Therefore, a legal analysis is a fundamental component of the target selection and engagement process. Stated simply, the LOAC imposes on commanders (or any other operational decision-maker) an obligation to ensure that persons, things, or places selected for deliberate attack qualify as lawful military objectives, and that the means used to attack those targets comply with limitations established by the LOAC.<sup>15</sup> What qualifies as a lawful military objective is determined by applying the controlling LOAC provisions and definitions. Such definitions are found not only in binding LOAC treaties, but also customary international law. In fact, in the context of contemporary armed conflicts between states and non-state groups (such as terrorist organizations), it is

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12. *Id.* para. 7-18.

13. See JP 1-02, *supra* note 7, at 354 (defining targeting as "[t]he process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities").

14. *Id.*

15. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (defining military objectives and limiting attacks strictly to military objectives); Prosecutor v. Tadic, ICTY Case No. IT-94-1, Opinion and Judgment, para. 607 (May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (explaining that the rule of "military objective" applies to all armed conflicts as a matter of customary international law).

this latter source of authority that establishes obligations applicable to all belligerents, irrespective of the formal applicability of treaty obligations.

Because of the incredible complexity and pressure of combat, ensuring compliance with the LOAC has proven to be one of the most challenging aspects of conducting military operations. This complexity is invariably exacerbated in direct relation to the unconventional nature of the opponent. However, the strategic imperative of compliance with LOAC obligations is, if anything, increased in the context of operations against such opponents, a reality emphasized by U.S. Army doctrine:

Military leaders cannot dissociate objective from the related joint principles of restraint and legitimacy, particularly in stability operations. The amount of force used to obtain the objective must be prudent and appropriate to strategic aims. Means used to accomplish the military objective must not undermine the local population's willing acceptance of a lawfully constituted government. Without restraint or legitimacy, support for military action deteriorates, and the objective becomes unobtainable.<sup>16</sup>

This doctrine is a direct reflection of the many lessons learned by military commanders charged with achieving strategic objectives in the counter-insurgency environment. As recent history demonstrates, the legitimacy of military operations rests squarely, if not at times entirely, on the perception of adherence to the rule of law, especially the LOAC.<sup>17</sup>

Thus, in many militaries around the world, military lawyers have assumed an increasingly central role in the operational planning and target selection processes. These lawyers are trained in the LOAC and embedded within the targeting process to advise commanders on whether target selection and engagement will comport with LOAC obligations.<sup>18</sup> However, it would be a major error to assume that lawyers will always be involved in this process, and an even greater error to assume that lawyers "own" this process. After all, even when the participants to a conflict are forces with a commitment to providing widespread legal advice, the reality is quite different in multiple ways. This is a reminder that while it is certainly beneficial that commanders have access to such advice, it is only advice, and it is the commander who is ultimately responsible for making the "shoot/don't shoot" judgment.

Lawyers never have been, and never should be, viewed as a substitute for this decision-making obligation, even when highly skilled in both the LOAC and operational art. The law, in short, must evolve and be articulated in a manner that

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16. FM 3-0, *supra* note 11, para. A-3.

17. See, e.g., Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 15-16 (Winter, 1994) ("Soldiers who spray fire when they should not do so sabotage any operation in which the United States seeks to bolster the legitimacy of a government or faction."); Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 143 (1994) ("Enforcing humane methods of combat establishes that a country is waging a justly fought war, thus providing the best evidence to rebut propaganda claims of law-of-war violations.").

18. INT'L & OPERATIONAL LAW DEPT., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 130, 571 (2010) [hereinafter OPERATIONAL LAW HANDBOOK]; see also Additional Protocol 1, *supra* note 15, art. 82 ("The High Contracting Parties at all times . . . shall ensure that legal advisors are available, when necessary . . .").



facilitates its understanding by lay commanders, for it is their judgment that the law must inform. While the AMW Manual is an important contribution to this evolution, the regulation of air and missile warfare operations must be driven by a synchronized assessment of both legal norms and operational realities. Allowing the law to develop without consideration of operational reality will undermine its ultimate efficacy because the constituents who must embrace the law will view it as inconsistent with their operational instincts.

Why is this so in an era of increasing legal primacy in LOAC development? First, there will always be levels of command without immediate access to legal advisors. The bulk of combat occurs at the tactical, small-unit level, where military lawyers are rarely—if ever—available. Second, while an ideal targeting decision would be the product of a deliberate planning process, armed conflict is actually laden with dynamic and emergent targeting decisions that are made without the benefit of prior planning and analysis. Belligerents make these decisions in situations offering extremely limited time to contemplate the action, much less seek the advice of a military lawyer. Indeed, U.S. Marine Corps doctrine indicates that:

Marines must determine if a situation warrants applying deadly force. Sometimes Marines must decide in a matter of seconds because their lives or the lives of others depend on their actions. To make the right decision, Marines must understand both the lethal and nonlethal close combat techniques needed to handle the situation responsibly without escalating the violence unnecessarily.<sup>19</sup>

In reality, even seconds will often be a luxury for the war fighter.

Even an infantry private deciding to engage an enemy belligerent is implementing LOAC principles in a real-time targeting process. And all soldiers learn as soon as they enter a combat environment what the Federal Bureau of Investigation emphasizes when training its agents on the use of deadly force: action nearly always beats reaction.<sup>20</sup> Hesitation during the assessment phase of the immediate engagement decision cycle can mean the difference between life or death and mission success or failure. Even during deliberate planning, the compressed time lines of combat often do not afford the luxury of time that is needed to thoroughly analyze the legal nuances of each contemplated action. As such, commanders and their staffs (including military legal advisors), as well as the soldiers, sailors, airmen, and marines that execute military missions, depend on simplified systems that make the integration of law into operational planning and execution routine. These systems—all of which must effectuate the synchronization of law and operations (sometimes referred to as “operationalizing” the law<sup>21</sup>)—transform the complex rules and principles of the LOAC into digestible, understandable, trainable, and easily applicable concepts.

Of course, “operationalizing” the law necessitates an understanding of the relationship between the law and the principles of military operations that the law

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19. DEP'T OF THE NAVY, UNITED STATES MARINE CORPS, MCRP 3-02B, CLOSE COMBAT foreword (1999).

20. Anthony J. Pinizzotto et al., *Law Enforcement Perspective on the Use of Force: Hands-on, Experimental Training for Prosecuting Attorneys*, FBI LAW ENFORCEMENT BULL. 16, 18 (Apr. 2009), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/april09leb.pdf>.

21. See *infra* notes 54–56 and accompanying text.

regulates. With respect to targeting specifically, it requires an appreciation of the targeting process, the capabilities of the assets to be employed, and the anticipated effects of employment. It also requires an appreciation of how LOAC targeting principles impact all of these considerations. This is rarely more significant than when analyzing the legality of employing indirect fires during combat operations. Indirect fires—which include weapons such as cannon and rocket artillery, mortars, naval gunfire, and missiles—display two characteristics that make its employment particularly challenging from a LOAC perspective: enhanced destructive power and non-line-of-sight engagement.

In many ways, indirect fire support—the use of indirect fires to directly support land, maritime, amphibious, and special operations forces to engage enemy forces, combat formations, and facilities<sup>22</sup>—is the quintessential example of how the LOAC influences the employment of combat power. This is especially the case because it has become almost inevitable that civilians or civilian property will be in close proximity to targets that are identified for attack with indirect fires. This reality—combined with the enhanced destructive effects of most indirect fire weapons, the limits on information available to commanders who use such fires, and the risk that such fires will produce effects that extend beyond the intended object of attack—indicates that integrating LOAC targeting principles into the planning and execution of fire support missions is essential to the legitimate use of such fires.

The purpose of this Article is therefore to illustrate this synchronization process through the example of Operation Storm. As background, Part II will describe Operation Storm, focusing specifically on the Croat use of indirect fires in and around the city of Knin.<sup>23</sup> The Article then turns in Part III to a broader discussion of the role that LOAC targeting principles play in this process of synchronization, starting with an explanation of the target planning and execution process itself.<sup>24</sup> From there, the Article considers a series of questions in order to explore the relationship between the LOAC and the logic of military operations. It then explains the relationship between the LOAC, rules of engagement, and the targeting processes. Next, it specifically addresses the application of these principles to the use of indirect fires in areas of civilian population, including a discussion of the risks of conducting ground maneuvers in such populated areas and how this risk impacts a commander's choice to employ indirect fires. The Article concludes with several general considerations related to the obligations and expectations of commanders engaged in the target decision-making process.

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22. JP 1-02, *supra* note 7, at 133.

23. While this Article does not address the specific target set and engagement missions approved by General Gotovina, using the questions solicited by his defense will hopefully offer readers a more complete understanding of LOAC targeting principles in action.

24. These tenets are based on an opinion originally written by Professor Corn in his capacity as an expert witness for the defense in *Prosecutor v. Gotovina*. Central to the prosecution's theory of criminal responsibility in this case was the allegation that General Gotovina employed indirect fire assets—to include rocket artillery—against the city of Knin in the Serb-controlled area of Croatia (the Krajina) in order to terrorize the civilian population. In response to this allegation, General Gotovina's defense sought to establish why the use of these assets during Operation Storm—the offensive commanded by General Gotovina to liberate the Krajina from the control of dissident Croatian Serb forces—was legitimate within the parameters of the LOAC.

## II. OPERATION STORM AND THE USE OF INDIRECT FIRES

By the mid-summer of 1995, armed hostilities triggered by the fragmentation of the former Socialist Federal Republic of Yugoslavia (SFRY) were raging in Bosnia and Croatia.<sup>25</sup> In Croatia, this violence began in 1991 when the Croat-Serb majority in and around Knin established the Serbian Autonomous Oblast (SAO) of Krajina.<sup>26</sup> The SAO declared itself independent of Croatia on March 16, 1991.<sup>27</sup> In 1992, following Croatia's declaration of independence from the SFRY, the SAO united with other self-declared SAOs to form the Republic of Serbian Krajina.<sup>28</sup>

As the conflict widened into Bosnia and Herzegovina, Croatia and the breakaway Krajina Serbs remained in a state of armed conflict. In 1995, responding to failed negotiations between the warring parties, and building on recent battlefield successes, Croatia's President Franjo Tudjman met with his top military and political leaders to begin planning a decisive operation against the Krajina Serb forces.<sup>29</sup> The name chosen for the offensive was Operation Storm.<sup>30</sup>

On August 4, 1995, Croatian military forces launched Operation Storm—the largest ground offensive in Europe since World War II—with the objective of retaking the Krajina region.<sup>31</sup> The four-day offensive opened with 150,000 Croatian forces attacking along a 300-kilometer front.<sup>32</sup> Not surprisingly, long-range artillery fires were integrated into all phases of the operation.<sup>33</sup> In many instances, Croatian forces employed these indirect fires against predetermined enemy objectives located in the city of Knin and other population centers, a fact which figured prominently in *Prosecutor v. Gotovina*.<sup>34</sup>

In terms of achieving the objective of reestablishing Croatian control over the Krajina, Operation Storm was a complete success. The Serb forces were quickly defeated in depth and the operation reversed the military balance of power in the region.<sup>35</sup> This shift in power eventually led to the resumption of peace talks and the

25. JUDITH ARMATTA, TWILIGHT OF IMPUNITY 124, 468 (2010) (time line of events surrounding the hostilities in the former SFRY).

26. Chuck Sudetic, *Serbian Enclave Reluctant to Allow Visit by Outsiders*, N.Y. TIMES, July 31, 1991, at A4.

27. David Binder, *Serbian Official Declares Part of Croatia Separate*, N.Y. TIMES, Mar. 18, 1991, at A3.

28. ARMATTA, *supra* note 25, at 484–85.

29. *See Croatian Serbs Won't Even Look at Plan for Limited Autonomy*, N.Y. TIMES, Jan. 31, 1995, at A3 (“A proposal described as the last best effort to avoid a much wider Balkan war was spurned late today by leaders of the Serbian nationalists who control a third of Croatia.”); *Croatian President Franjo Tudjman Says Force Was the Only Option to Shift the Balance of Power in the Balkans Away from the Serbs*, CNN WORLD (Aug. 29, 1995), [http://articles.cnn.com/1995-08-29/world/Bosnia\\_updates\\_august95\\_8-19\\_tudjman\\_1\\_operation-storm-krajina-serbs-forces](http://articles.cnn.com/1995-08-29/world/Bosnia_updates_august95_8-19_tudjman_1_operation-storm-krajina-serbs-forces) (stating that the Croatian Army's “successful military offensive” allowed Croatia to reclaim lands held by Krajina Serbs for four years).

30. Danner, *supra* note 3.

31. *Id.*; Anes Alic, *Serb NGOs Sue US Private Security Outfit for ‘Genocide’ in Croatia*, ISA INTEL (Sept. 21, 2011), <http://www.isaintel.com/2011/09/21>.

32. Alic, *supra* note 31.

33. *Croatia—Operation Storm 1995*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/intell/ops/croatia.htm> (last visited Feb. 22, 2012) (describing the attack as including “integrated air, artillery, and infantry movements”).

34. *Prosecutor v. Gotovina*, ICTY Case No. IT-06-90, Judgment Volume I of II, paras. 1163–281 (Apr. 15, 2011), [http://www.icty.org/x/cases/gotovina/tjug/en/110415\\_judgement\\_vol1.pdf](http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf).

35. *See* Danner, *supra* note 3 (“[L]ess than three months after Tudjman launched his ‘Operation

Dayton Accords a few months later.<sup>36</sup> However, another immediate consequence of the offensive was the near complete displacement of the Krajina-Serb population—some 150,000 people or more.<sup>37</sup> The question of whether this mass exodus was the result of deliberate ethnic cleansing or an unintended consequence of legitimate military operations was at the heart of the Prosecutor’s case and General Gotovina’s conviction.<sup>38</sup>

At the macro level, *Prosecutor v. Gotovina* rests on the allegation of a “joint criminal enterprise [JCE]; the common purpose being the permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means . . . .”<sup>39</sup> As set forth in the prosecution’s Public Redacted Final Trial Brief, its theory of JCE liability was premised in large part on a number of alleged LOAC violations—a “[f]orcible [d]isplacement through the [c]ommission of [c]rimes,”<sup>40</sup> to include the unlawful use of artillery against Knin and other population centers.<sup>41</sup>

According to the prosecution, the defendants furthered their JCE through the use of artillery to either directly or indiscriminately target civilians and civilian property, thus violating the LOAC principles regulating the employment of combat power.<sup>42</sup> The defense countered that the defendants’ employment of indirect fires during Operation Storm was based on accepted military doctrine and that such indirect fires were directed only at lawful military objectives.<sup>43</sup> Accordingly, the defense position was that the prosecution could not prove beyond a reasonable doubt that General Gotovina violated relevant LOAC principles; indeed, the defense asserted that the prosecution’s own facts established General Gotovina’s compliance with those principles, particularly when considered within the broader context of the

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Storm’—the Serbs had lost enough territory to bring their holdings from 70 percent to not more than half . . .”).

36. JAMES GOW, TRIUMPH OF THE LACK OF WILL: INTERNATIONAL DIPLOMACY AND THE YUGOSLAV WAR 276–77 (1997).

37. ROBERTA COHEN & FRANCIS MADING DENG, THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED 185 (1998) (describing the incident as leading to the “mass migration of nearly 150,000 civilian[s] and 50,000 soldiers from the Krajina region”).

38. See *Prosecutor v. Gotovina*, Judgement Volume II of II, *supra* note 9, paras. 2600–01 (describing the manner in which the attack had been planned as deliberate).

39. *Prosecutor v. Gotovina*, Amended Joinder Indictment, *supra* note 4, para. 12.

40. *Prosecutor v. Gotovina*, Prosecution’s Public Redacted Final Trial Brief, *supra* note 8, para. I(C)(1); see also *id.* para. I(A)(1) (“The Accused and other Joint Criminal Enterprise (‘JCE’) members shared the common criminal purpose of the JCE to permanently remove the Serb population from the Krajina region by force or threat of force, including through the commission of the following crimes charged in Counts 1–5 of the Indictment: persecution (through deportation and forcible transfer, wanton destruction, plunder, shelling of civilians, unlawful attacks on civilians and civilian objects, the imposition of restrictive and discriminatory measures including the imposition of discriminatory laws and discriminatory expropriation of property, and unlawful detentions); deportation and forcible transfer; plunder; and wanton destruction.” (footnote omitted)).

41. *Id.* paras. 615–31. According to the prosecution, the “shelling” of Knin and other areas was the manifestation of an agreement between then President Franjo Tudjman and senior Croat leaders, including Gotovina and the other defendants, at a meeting on the island of Brijuni on July 31, 1995. *Id.* para. 127.

42. *Id.* para. 491.

43. *Prosecutor v. Gotovina*, Gotovina Defence Final Trial Brief, *supra* note 8, paras. 180–88.

overall offensive.<sup>44</sup> At trial, the defense sought to establish that General Gotovina employed indirect fires only against targets that qualified as lawful objects of attack in accordance with the LOAC principle of distinction.<sup>45</sup> These attacks on Serb forces were designed to (and in fact did) disrupt enemy command, control, and communication capabilities, as well as its logistical support, while also degrading the enemy's willingness to fight.<sup>46</sup>

The applicability of fundamental LOAC targeting principles—distinction, proportionality, and precautions in the attack—was never disputed between the parties. Nor do the authors take issue with their applicability to Operation Storm. The principle of distinction prohibits deliberate attacks on civilians or civilian objects.<sup>47</sup> Indiscriminate attacks—attacks on a lawful object that are anticipated to produce collateral damage or incidental injury that is excessive in relation to the legitimate anticipated value of the attacks—are also prohibited by the LOAC.<sup>48</sup> Precautions in the attack require that commanders utilize feasible measures for the purpose of mitigating the risk to the civilian population (such as issuing warnings or timing the attack to minimize civilian exposure).<sup>49</sup> However, the assessment of whether the use of indirect fires during a particular military operation violates these LOAC principles must always turn on an assessment of the specific facts available to the commander at the time he orders the attack, not on a retrospective view considering facts and circumstances that were not available to the commander. This analytical perspective is central to the credibility of any post-attack criminal or administrative review of a commander's judgments and is at the core of the controversy over the execution of Operation Storm.

Perspective, however, was not the only area of dispute between the prosecution and defense. As indicated by the opposing trial briefs in the *Gotovina* case, the issue of the lawful employment of indirect fires during Operation Storm is subject to a number of disputed material facts.<sup>50</sup> However, irrespective of the relative merits of each position, there is a clear dispute as to the correct interpretation of the controlling LOAC principles. The prosecution strongly implied a per se prohibition on the use of indirect fires in population centers. The defense countered this position by arguing that no such prohibition exists and that targeting military objectives in a populated area must be analyzed no differently than any other targeting decision—by applying LOAC principles within the context of the operational situation.<sup>51</sup> The Trial Chamber appears to have rejected the per se prohibition theory.<sup>52</sup> Nonetheless, the Chamber's judgment of conviction in many ways endorsed a near strict liability standard of care for the employment of indirect fires in populated areas, condemning

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44. *Id.* paras. 180–319.

45. *Id.* para. 258 (listing specific military objectives that were identified during the targeting process and the justification for their selection).

46. *Id.*

47. See Additional Protocol I, *supra* note 15, arts. 51–52 (stating that civilians and civilian objects “shall not be the object of attack”).

48. *Id.* arts. 51(2), (4), (5).

49. *Id.* art. 57(2).

50. See *supra* notes 42–46 and accompanying text.

51. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, paras. 260–88.

52. See Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 1893–913 (finding liability through rigorous factual analysis of artillery attack).

General Gotovina based on a very small percentage of artillery effects that could not (at least according to the Chamber) be attributed to lawful objects of attack.<sup>53</sup>

How the LOAC influenced the planning, execution, and criminal critique of Operation Storm offers a particularly relevant opportunity to understand the relationship of law and targeting doctrine. This Article will hopefully provide greater insight into this relationship, the importance of which transcends Operation Storm and applies to any effort to genuinely understand how the LOAC impacts the employment of deadly combat power.

### III. OPERATIONALIZING THE LAW: INTEGRATING AND APPLYING THE LOAC IN TARGETING

Although a relatively novel term, “operationalize” is generally defined as: to make operational; put into operation.<sup>54</sup> As noted above, in the context of military operations, putting the LOAC “into operation” involves transforming the myriad complex rules and principles of the LOAC into understandable and actionable orders and guidance for commanders and soldiers<sup>55</sup> at every echelon. It is to this process of LOAC integration and application that the Article now turns, starting with a brief description of the targeting process itself.<sup>56</sup>

#### A. *The Targeting Process*

In common parlance, a target is “something or someone fired at or marked for attack.”<sup>57</sup> In military terms, the United States defines target as:

[A]n entity or object considered for possible engagement or action. It may be an area, complex, installation, force, equipment, capability, function, individual, group, system, entity, or behavior identified for possible action . . . .<sup>58</sup>

Targets relate to objectives at all levels of war. Whether a target is selected through a deliberate planning process or identified as an emergent opportunity, it should be selected and engaged in support of the commander’s objectives, guidance, and intent.

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53. See *id.* para. 1909 (“The Trial Chamber considers that the number of civilian objects or areas in Knin deliberately fired at . . . may appear limited in view of the total of at least 900 projectiles fired at the town on 4 and 5 August 1995.”).

54. *Operationalize Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/operationalize?q=operationalize> (last visited Feb. 22, 2012).

55. We use the term “soldier” throughout this Article to refer to a member of the armed forces. We are fully cognizant of the fact that “soldier” normally indicates a member of the Army, and not a member of the Navy (Sailor), Air Force (Airman), or Marine Corps (Marine). However, we use this term for purposes of simplicity and not in an effort to diminish the differences between each branch of the armed forces.

56. Although the description that follows is based primarily on U.S. doctrine, the basic structure is shared by most militaries. See generally NATO STANDARDIZATION AGENCY, ALLIED JOINT PUBLICATION 3.9: ALLIED JOINT DOCTRINE FOR TARGETING (2008) (describing NATO targeting doctrine).

57. *Target Definition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1206 (10th ed. 1993).

58. JP 3-60 (2007), *supra* note 2, at I-1.

Of course, it is axiomatic that only those targets determined to be valid military objectives, as defined in the LOAC, are to be made the subject of attack.<sup>59</sup>

Targeting is “the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.”<sup>60</sup> The targeting process

defines what targets are to be engaged, by which assets, using which method and in which priority order. It also specifies targets that are restricted or may not be engaged at all. Above all, the process aims to ensure all involved are entirely clear about their targeting and coordination responsibilities and constraints, in time and space.<sup>61</sup>

Before turning to the governing LOAC principles that are applicable to this process, it is necessary to first describe the process itself, focusing on those steps in the process where the injection of proper legal analysis is most critical.

Although doctrine and terminology may differ among militaries, certain core concepts are common to all. Whether at the strategic, operational, or tactical level of warfare, the ultimate objective of any military commander is to employ his or her available capabilities in a synchronized manner to successfully achieve a defined end state as efficiently and effectively as possible. In warfare, this involves leveraging available assets to generate combat power to achieve a desired effect at the selected time and place. By virtue of their extended range and amplified destructive power, indirect fires have long been considered and utilized as a critical component of combat power.

To assist commanders with integrating, synchronizing, and directing operations, doctrine organizes all available capabilities into six basic operational functions: command and control, intelligence, fires, movement and maneuver, protection, and sustainment.<sup>62</sup> Commanders generate and apply combat power through the correct application of each of these six functions. While the relative weight of each function may vary according to each mission, the fires function is often critical to executing the commander’s overall concept of operations, whether the nature of the operation is offensive or defensive. This is true regardless of whether indirect fires are employed to enhance the overall effect of the other functions (such as maneuver and movement) or to create and preserve conditions for the success of the operation itself.

Fires are defined as “[t]he use of weapon systems to create specific lethal or nonlethal effects on a target.”<sup>63</sup> As a war-fighting function, fires consist of the related tasks and systems that provide the coordinated use of surface-to-surface indirect fires, air-to-surface fires (which would include drone operations), naval surface fires, and command and control of these assets through the targeting process.<sup>64</sup> Fires

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59. Additional Protocol I, *supra* note 15, art. 52.

60. JP 3-60 (2007), *supra* note 2, at I-1.

61. NATO STANDARDIZATION AGENCY, ALLIED JOINT PUBLICATION 3(B): ALLIED JOINT DOCTRINE FOR THE CONDUCT OF OPERATIONS para. 0448 (2011).

62. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: JOINT OPERATIONS III-1 (2011) [hereinafter JP 3-0].

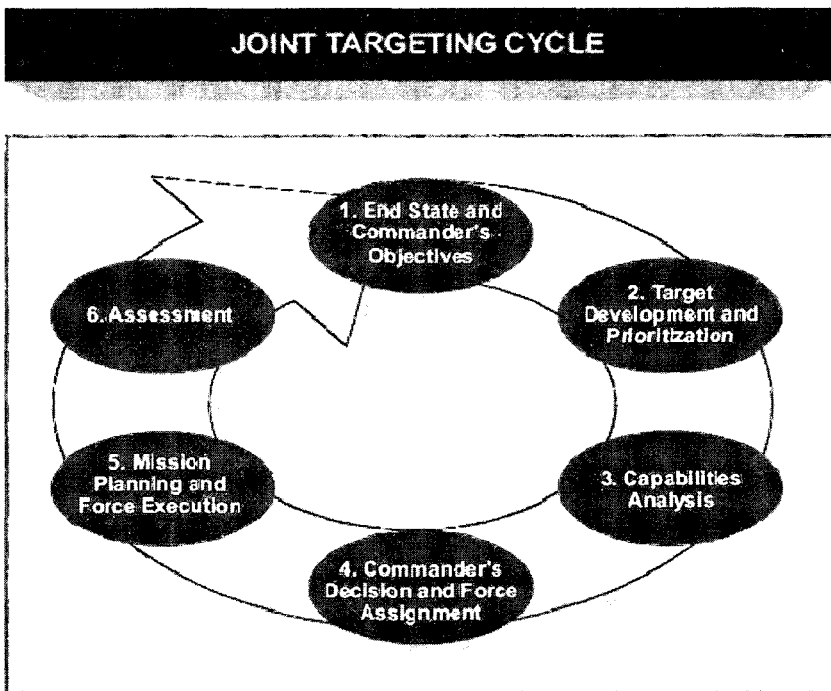
63. JP 1-02, *supra* note 7, at 133.

64. U.S. DEP’T OF ARMY, FIELD MANUAL 3-60: THE TARGETING PROCESS 1-1 to -2 (2010) [hereinafter FM 3-60].

include all tasks associated with integrating and synchronizing the effects of these types of fires with each other and with the effects of the other war fighting functions.<sup>65</sup>

As part of the commander's integrated plan, fires can be employed for a variety of purposes. Among the more common purposes, fires are employed to: provide fire support to assist air, land, maritime, and special operations forces to move, maneuver, and control territory, populations, airspace, and key waters; interdict enemy capabilities to divert, disrupt, delay, or destroy the enemy's military potential before it can be used effectively against friendly forces; attack strategic objectives and centers of gravity; and counter air and missile threats, to name a few. Commanders ensure the effective integration and synchronization of fires into their plans through the use of standard target selection and execution processes that seek to link intelligence, plans, and operations across all levels of command.

Targeting is a cyclical and iterative process requiring constant flexibility and adaptability in order to respond to the dynamic nature of operations. At the most basic level, it involves planning, execution, and assessment of the efficacy of each engagement or attack. The targeting cycle can be further broken down into six phases, represented in the figure below.<sup>66</sup>



65. See JP 3-0, *supra* note 62, at III-1 (“The joint functions reinforce and complement one another, and integration across the functions is essential to mission accomplishment.”).

66. JP 3-60 (2007), *supra* note 2, at II-3.



The intersection of mission imperatives, policy considerations, and the law is constantly at play during all six phases of the targeting cycle. Commanders, planners, and, when available, legal advisors must be cognizant of these factors at all times. The legal analysis begins with the identification of the commander's end state and objectives and carries through the entire process to the assessment and related recommendations for reengagement.<sup>67</sup> There are certain points in the process, however, where legal analysis is most critical to the commander's decision making.

During the deliberate (as opposed to time-sensitive) target development and prioritization phase, legal advisors normally review every proposed target. This target vetting or validation process is intended to ensure compliance with applicable rules of engagement (ROE), the LOAC, or any other specific restrictions such as No-Strike or Restricted Target lists.<sup>68</sup> As discussed more fully below, the LOAC sets the legal limits for defining and engaging lawful targets, while ROE serve as an additional source of authority defining guidelines for permissible combat actions.<sup>69</sup> Accordingly, ROE limitations must be consistent with the LOAC, but they are technically not law. Instead, they are constraints based on mission imperatives and policy considerations, under which forces may initiate or continue combat engagement.<sup>70</sup>

Once targets are vetted and validated, they are nominated for approval.<sup>71</sup> It is at the next stage that the commander and staff engage in the detailed analysis of available capabilities in relation to desired effects.<sup>72</sup> This process of "weaponizing" is heavily impacted by the LOAC principle of proportionality.<sup>73</sup> The commander and planners seek to mitigate the risk of collateral damage by selecting weapons and tactics that will, to the greatest feasible extent, produce the desired effect while limiting such collateral damage.<sup>74</sup> This selection process is thoroughly consistent with the LOAC, and, of equal importance, it is also consistent with operational logic. Commanders gain no benefit from wasting effects, and they therefore logically seek to maximize effects on the intended objects of attack.<sup>75</sup>

However, it is important to note that this does not mean commanders will always select the weapon that produces the minimum collateral damage. The mitigation of such damage, while an important consideration in the weaponizing process, is not the exclusive consideration. Factors such as weapon availability, resupply rates, potential future requirements, and risk to friendly forces all play into

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67. *Id.* at II-3 to -19.

68. *Id.* at II-4, II-8, III-10.

69. JP 1-02, *supra* note 7, at 309; *see also* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005) ("The [Standing Rules of Engagement] establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during all military operations and contingencies . . ."), *reprinted in* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 87.

70. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 18, at 73-81 (providing an "overview of basic ROE concepts").

71. JP 3-60 (2007), *supra* note 2, at II-9.

72. *Id.* at II-10-11.

73. *See, e.g.*, UNITED STATES JOINT FORCES COMMAND, JOINT FIRES AND TARGETING HANDBOOK III-69 to -79 (2007) [hereinafter JOINT FIRES AND TARGETING HANDBOOK] (discussing weaponizing and the Collateral Damage Estimation process).

74. JP 3-60 (2007), *supra* note 2, at II-10 to -11.

75. JOINT FIRES AND TARGETING HANDBOOK, *supra* note 73, at I-3.

this process.<sup>76</sup> Thus, it is not uncommon for commanders to forego a means or method of attack that might create the least amount of collateral damage risk in favor of an alternative that creates greater risk. But such a decision will be driven by the prioritization of one of these other considerations. For example, while use of a drone attack might offer the most precise method of target engagement and therefore create the lowest level of collateral damage risk, that option might not be feasible in certain situations, such as those involving robust enemy air defense systems or limited supply of drone assets. In such situations, even if the commander could use the drone, he might select an alternate means of attack in order to “husband” the drone resource.

However, there does come a point where the LOAC dictates the weaponeering decision. The LOAC principle of proportionality prohibits the selection of any means or method of attack anticipated to produce collateral damage or incidental injury that is excessive in relation to the concrete and direct military advantage anticipated.<sup>77</sup> Accordingly, even if a proposed attack option will achieve the desired effect against a presumptively lawful military objective, it may not be utilized if the commander believes it will produce such an excessive effect. This is reflected in U.S. Joint Targeting doctrine, which indicates that “[c]ollateral damage estimation (CDE) is a critical component of the . . . targeting process.”<sup>78</sup>

It should be apparent from the foregoing discussion that the effective integration and synchronization of the LOAC into and throughout the targeting process requires far more than a basic familiarity with the applicable treaty and customary norms. The LOAC is an elaborate set of rules developed from a desire among civilized nations to prevent unnecessary suffering and destruction in warfare. At the same time, the LOAC recognizes that under certain circumstances states have the need and the right to wage war. The law therefore seeks to strike a balance between humanitarian protections and the legitimate imperatives of warfare. Understanding this balance and the complex interaction among law, policy, and military doctrine is critical to the effective integration of legal advice into the targeting process. Before discussing the LOAC provisions relevant to the targeting process, a brief description of the concept of rules of engagement and their relationship to the LOAC is warranted.

### *B. The Relationship Between the LOAC and Rules of Engagement*

It is axiomatic that thorough understanding of the military end state and the commander’s intent, objectives, desired effects, and required tasks drives the entire targeting process. However, if the end state and objectives are tainted in any way with an improper or illegal purpose, or if they are premised on a misinterpretation of the legal authorities at the foundation of the overall operation, then the engagement of every target is at risk of legal infirmity. Accordingly, it is at this critical stage that

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76. *Id.* at III-72 to -73.

77. JP 3-60 (2007), *supra* note 2, at E-1; *see also* Additional Protocol I, *supra* note 15, art. 57(2)(a)(iii) (requiring parties to a conflict to “refrain 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”).

78. JP 3-60 (2007), *supra* note 2, at II-10.

legal considerations inform the development of combat force initiation procedures as well as employment restraints or constraints. In U.S. practice (and the practice of many other states), these procedures and constraints normally take the form of rules of engagement.<sup>79</sup> Whether during the ROE development process or during the planning and execution of operations within an established ROE framework, legal advisors play a crucial role in ensuring the legality, and hence the legitimacy, of the application of combat power.

The ROE and the LOAC are two distinct sources of operational regulation. While ROE will often incorporate LOAC obligations and authorities, they are not synonymous. As defined in U.S. military doctrine, ROE are “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”<sup>80</sup> In other words, ROE are intended to give operational and tactical military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare is replete with examples of what have essentially been ROE. The Battle of Bunker Hill provides what is perhaps a quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive “[d]on’t one of you shoot until you see the whites of their eyes” in order to accomplish a tactical objective.<sup>81</sup> Given his limited resources against a much larger and better-equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was in effect a rule of engagement is remembered to this day for one primary reason—it enabled the American rebels to maximize enemy casualties.

Another modern example of tactical controls on the use of force is the Battle of Naco in the fall of 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States.<sup>82</sup> In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure U.S. neutrality was strictly maintained.<sup>83</sup> As part of the cavalry mission, “[t]he men were under orders not to return fire,”<sup>84</sup> despite the fact that the U.S. forces were routinely fired upon and “[t]he provocation to return the fire was very great.”<sup>85</sup> Because of the soldiers’ tactical restraint and correct application of their orders—what today would be characterized as rules of engagement—the strategic objective of maintaining U.S. neutrality was accomplished without provoking a conflict between the Mexican factions and the United States. The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.<sup>86</sup>

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79. JP 1-02, *supra* note 7, at 309. In the context of joint operations planning, rule of engagement is a requirement placed on the command by a higher command that dictates (restraint) or prohibits (constraint) an action, thus restricting freedom of action.

80. *Id.*

81. JOHN BARTLETT, FAMILIAR QUOTATIONS 353 (13th ed. 1955).

82. James P. Finley, *Buffalo Soldiers at Huachuca: The Battle of Naco*, 1 HUACHUCA ILLUSTRATED, 1993, available at <http://net.lib.byu.edu/estu/wwil/comment/huachuca/HI1-10.htm>.

83. *Id.*

84. *Id.*

85. *Id.* (quoting Colonel William C. Brown).

86. *Id.* (A military chronicler noted that the Chief of Staff’s Annual Report stated: “These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire of

Despite these and numerous other historical examples of soldiers applying ROE, the actual term “rules of engagement” was not used in the United States until 1958 by the military’s Joint Chiefs of Staff (JCS).<sup>87</sup> As the Cold War began to heat up and the United States had military forces spread across the globe, military leaders were anxious to control the application of force and to ensure that any force used complied with national strategic policies.<sup>88</sup> With U.S. and Soviet bloc forces looking at each other across fences and walls in Europe and over small areas of air and water in the skies and oceans, it was important to prevent a local commander’s overreaction to a situation that might begin as a minor insult or probe from resulting in the outbreak of a conflict that could quickly escalate into World War III. Accordingly, in 1981 the JCS produced a document titled the JCS Peacetime ROE for Seaborne Forces, which was subsequently expanded in 1986 into the JCS Peacetime ROE for all U.S. Forces.<sup>89</sup> Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations other than war.<sup>90</sup> In 1994, they promulgated the Chairman of the Joint Chiefs of Staff Standing ROE that was subsequently updated in 2000 and again in 2005.<sup>91</sup> As discussed below in detail, it is this 2005 edition that governs the actions of U.S. military members today.

ROE have become a key issue in modern warfare<sup>92</sup> and a key component of mission planning for U.S. and many other armed forces.<sup>93</sup> In preparation for military operations, the President and/or Secretary of Defense personally review and approve the ROE, ensuring they meet the military and political objectives.<sup>94</sup> Ideally, ROE represent the confluence of three important factors: operational requirements, national policy, and the law of armed conflict.<sup>95</sup> This is illustrated by the diagram below.<sup>96</sup>

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retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test.”).

87. TREVOR FINDLAY, *THE USE OF FORCE IN UN PEACE OPERATIONS* 14 n.26 (2002).

88. See generally Robert K. Fricke, *Dereliction of Duty*, 160 MIL. L. REV. 248 (1990) (book review).

89. Martins, *supra* note 17, at 42.

90. International Law Note, “*Land Forces’ Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*,” 27-50-253 ARMY LAW. 48, 49 (Dec. 1993).

91. See OPERATIONAL LAW HANDBOOK, *supra* note 18, at 74 (noting the effective date of June 13, 2005, and how the Joint Chiefs of Staff replaced the 2000 and 1994 orders).

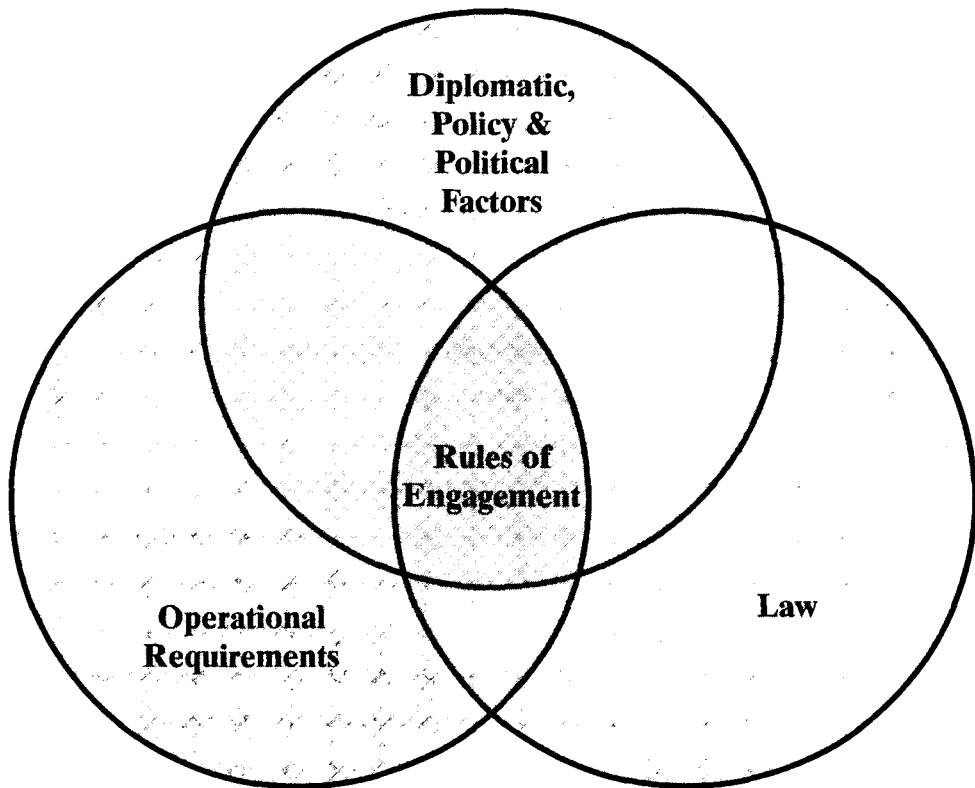
92. See, e.g., Sean McCormack, Spokesman, U.S. Dep’t of State, Daily Press Briefing (Oct. 3, 2007), <http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm> (discussing ROE in relation to the Blackwater private security defense contractor).

93. See OPERATIONAL LAW HANDBOOK, *supra* note 18, at 83 (discussing ROE’s importance in mission accomplishment); CTR. FOR LAW AND MILITARY OPERATIONS, *RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-1 to -32* (2000) (discussing ROE development).

94. See Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (discussing how the “national command authority [reviews ROE] in accordance with exacting politico-legal imperatives”).

95. Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. REV. 245, 247 (1997).

96. Martins, *supra* note 17, at 26.



It is particularly important to note that while ROE are not coterminous with the law of armed conflict, they must be completely consistent with this law. In other words, while there are provisions of the LOAC that do not affect a mission's ROE, all ROE must comply with the LOAC. This is illustrated by the diagram above, which reflects the common situation where the authority provided by the ROE is more limited than would be consistent with the law of armed conflict. For example, in order to provide greater protection against collateral injury to civilians, the ROE may require that the engagement of a clearly defined military objective in a populated area be authorized only when the target is under direct observation. This is a fundamental principle and key to the proper formation and application of ROE. In fact, the preeminent U.S. ROE order explicitly directs U.S. forces that they "will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all other operations."<sup>97</sup> Note that this directive applies to "armed conflict," not international armed conflict.

To illustrate this interaction between ROE and the LOAC, consider an ROE provision that allows a soldier to kill an enemy. While this provision is completely appropriate, it does not give the soldier the authority to kill an enemy who is surrendering because such conduct would violate the LOAC.<sup>98</sup> Similarly, if the ROE allow a pilot to destroy a bridge with a bomb, that does not relieve the pilot of the

97. OPERATIONAL LAW HANDBOOK, *supra* note 18, at A-1.

98. AMW MANUAL, *supra* note 1, r. 15(b); *see also* Turley, *supra* note 17, at 145 (describing the humanitarian and strategic motivations underlying the protection of surrendering soldiers).

responsibility to do a proportionality analysis and be certain that any incidental civilian deaths or damage to civilian property is not “excessive in relation to the concrete and direct military advantage” to be gained by the destruction of the bridge.<sup>99</sup> ROE will often contain provisions that remind soldiers that they can only engage the enemy or other individuals who engage in defined conduct endangering soldiers or others.<sup>100</sup> In this way, ROE ensures compliance with the laws of war by reinforcing the requirement to abide by the LOAC.

Recognizing this interrelationship is therefore essential to understanding why violation of a constraint imposed by a specific ROE, or even customarily imposed by ROE, does not *ipso facto* establish violation of the LOAC. To assess that question, it is necessary to determine whether the ROE constraint was coterminous with the LOAC or more restrictive than the scope of permissible authority established by the LOAC. In contemporary military operations, it is common for ROE to be more restrictive than the LOAC in order to satisfy policy considerations related to the application of combat power. This is particularly true with regard to the employment of indirect fires.<sup>101</sup>

#### IV. UNDERSTANDING THE SYMMETRY BETWEEN THE LOAC AND OPERATIONAL ART

As noted in the foregoing discussion, LOAC regulation and operational art are inextricably intertwined. Even the most thorough understanding of one of these disciplines is insufficient to appreciate genuinely how the law influences the planning and execution of military operations. Instead, such an appreciation is derived from an understanding of the relationship between these two disciplines or, perhaps more importantly, the symmetry between LOAC regulation and operational considerations.

During the trial of General Gotovina, both the prosecution and defense sought to provide evidence on this interrelationship. Experts on the impact of LOAC regulation on the targeting process testified for both the prosecution and defense, offering their assessments of how the LOAC impacted General Gotovina’s obligations within the context of the operational situation he confronted.<sup>102</sup> Both experts agreed that for General Gotovina, like any other operational commander, compliance with LOAC obligations was central to the legitimate use of fires, and ultimately to mission success.<sup>103</sup> However, there was substantial disagreement on how the operational situation impacted application of LOAC targeting principles.<sup>104</sup>

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99. Additional Protocol I, *supra* note 15, art. 57.2(b).

100. See, e.g., CTR. FOR LAW AND MILITARY OPERATION, *supra* note 93, at B-15-25 (providing an example ROE card).

101. For example, a typical rule of engagement might restrict the use of indirect fires in populated areas when direct observation of the target is not available, such as from a Forward Observer. While no such rule exists in the LOAC, requiring direct observation provides an added degree of confidence that the target is in fact a legitimate military objective, that any collateral effects will be within legal and acceptable standards, and that the rounds will impact the intended target.

102. Prosecutor v. Gotovina, Judgement Volume I of II, *supra* note 34, paras. 1163–75 (summarizing expert testimony).

103. *Id.*

104. *Id.*

In order to facilitate a general understanding of this aspect of the case, the Gotovina defense proffered a series of questions focused on how an operational situation influences implementation of these LOAC targeting principles.<sup>105</sup> The answers to these questions (provided by coauthor Geoffrey Corn in his capacity as a defense expert) were discussed at length during the presentation of evidence in the trial and heavily relied on by the Gotovina defense in its summation.<sup>106</sup> Because they offer valuable insight into the targeting process writ large, they are reproduced below in edited form in an effort to explore how the LOAC applies to the selection and execution of targets, so as to simultaneously advance the commander's operational objectives while fulfilling the LOAC's humanitarian objective of minimizing civilian suffering produced by the use of fires in populated areas.

*A. Eight Questions on the LOAC and Military Operations*

1. Explain the symmetry between the law of armed conflict and the operational art.

The LOAC—the body of customary and positive international law that regulates both the authority to engage in armed conflict and the manner in which parties conduct armed hostilities—arises from a desire among civilized nations to prevent unnecessary suffering and confine the destruction of combat to the participating armed belligerents, while at the same time not impeding the parties' ability to effectively wage war. At its heart, the LOAC evolved from codes of conduct imposed on belligerents by their commanders and has always reflected the core logic of military operations.<sup>107</sup> While it is clear that the law serves important humanitarian objectives, it is equally true that the law does so while facilitating the ability of belligerents to accomplish their strategic, operational, and tactical objectives. As a result, the contemporary LOAC reflects a carefully evolved balance between these two interests, a balance informed by the realities of armed conflict.

This balance is manifest in numerous provisions of the customary and conventional LOAC. Examples include the principle of military necessity,<sup>108</sup> military objective,<sup>109</sup> proportionality,<sup>110</sup> and the authority to preventively detain enemy belligerents.<sup>111</sup> Even humanitarian obligations serve an underlying military utilitarian purpose. These protections are derived from the reasoned judgment of the

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105. Transcript of Prosecutor v. Gotovina at 21156–90, ICTY Case No. IT-06-90-T (Sept. 7, 2009), <http://www.icty.org/x/cases/gotovina/trans/en/090907ED.htm>.

106. *Id.*

107. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 26–37 (3d ed. 2008) (describing “the history and sources of the law of armed conflict”).

108. See OPERATIONAL LAW HANDBOOK, *supra* note 18, at 10 (“The principle of military necessity authorizes that use of force required to accomplish the mission.”).

109. See Additional Protocol I, *supra* note 15, art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

110. See *supra* note 77 and accompanying text.

111. See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

profession-of-arms that unnecessary violence, destruction, and suffering will not only waste limited and valuable resources, but will also ultimately undermine the strategic purpose of armed conflict: restoration of peace.

The fact that the law serves the interests of not only civilians and non-combatants but also of belligerents is often overlooked in contemporary scholarship and commentary. However, this purpose is clearly central to the law. The following extract from one of the most important precursors to the twentieth-century evolution of the conventional laws of war—the *Oxford Manual of the Laws of War on Land*—emphasizes this aspect of the law:

By [codifying the rules of war derived from State practice], [it is] a service to military men themselves . . . . A positive set of rules . . . serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts—which battle always awakens, as much as it awakens courage and manly virtues—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.<sup>112</sup>

The compelling logic reflected in this extract finds contemporary manifestation in the policy mandates that the United States' and other nations' armed forces have implemented to extend application of these principles to all military operations.<sup>113</sup> These mandates indicate that the application of combat power must always be subject to a logical and effective regulatory framework. That framework is provided by the LOAC.

The LOAC is replete with examples of the symmetry between regulation and operational logic. A quintessential example is the prohibition against the infliction of superfluous or unnecessary suffering.<sup>114</sup> This prohibition is a foundational principle of the law, tracing its roots back to the St. Petersburg Declaration of 1868.<sup>115</sup> By prohibiting the calculated infliction of superfluous suffering or injury, the principle advances not only a humanitarian purpose, but also the military logic reflected in the concept of economy of force. There is no military value in wasting resources for the purpose of exacerbating the suffering of an opponent already rendered combat ineffective; the principle of law is consistent with this logic.

112. OXFORD MANUAL OF THE LAWS OF WAR ON LAND preface (1880), available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

113. It is the policy of the United States that all “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” U.S. DEP’T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (2006).

114. Int’l Committee of the Red Cross, Customary International Humanitarian Law, Mar. 2005, rule 70, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule70](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70) [hereinafter Rule 70] (“The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.”); OXFORD MANUAL OF THE LAWS OF WAR ON LAND, *supra* note 112, art. 9(a) (“It is forbidden [t]o employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering, or to aggravate wounds . . .”).

115. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (stating as its object the barring of the “employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”).



Another example is the law of military objective. While there may be definitional uncertainty on the fringes of the rule when it is operationally applied, the underlying premise is militarily sound: the application of combat power should be limited only to those persons, places, or things that contribute to the achievement of operational objectives. This rule is consistent with the logic that a resource-conscious commander should instinctively avoid wasting resources on targets of no operational or tactical significance.

This general symmetry is unsurprising considering that the contemporary LOAC has been historically informed by the reasoned judgments of battlefield veterans and not in a vacuum. This symmetry is also a critical component in enhancing compliance with the law. Because armed forces will be primarily responsible for effective implementation of the law, implementation will invariably be facilitated where the dictates of the law comport with the logic of the profession-of-arms.

2. What is the relationship between targets and “effects,” and between targets and the LOAC definition of military objective?

In general terms, targets are those persons, places, or things made the object of attack by a military force.<sup>116</sup> Targets can include virtually any person, object, or place in the battle space. While pursuant to the LOAC many persons, places, or things are presumed not to be targetable,<sup>117</sup> virtually no presumption of immunity is conclusive. Even civilians can become lawful objects of attack by virtue of their direct participation in hostilities.<sup>118</sup> Likewise, the LOAC permits the targeting of presumptively immune places, such as hospitals, when the enemy is using those places for hostile (unlawful) purposes.<sup>119</sup>

The principle of distinction, which requires belligerents to distinguish between lawful objects of attack and civilians and civilian property, is a basic principle of the LOAC.<sup>120</sup> This principle is derived from the concept of military necessity, which permits the infliction of death and destruction only to the extent necessary to bring about the prompt submission of enemy forces.<sup>121</sup> Because the law presumes that the deliberate infliction of death or destruction to civilians or civilian property does not contribute to this objective, belligerents are obligated to refrain from making civilians or civilian property the object of attack.

The LOAC defines those targets that may be lawfully attacked through the rule of military objective and the prohibition on indiscriminate attacks.<sup>122</sup> Commanders

116. For a full definition and discussion of targets and the targeting process, see *supra* Part III.A.

117. See, e.g., Additional Protocol I, *supra* note 15, arts. 50(1), 51(1) (stating that the civilian population “shall enjoy general protection against dangers arising from military operations” and that “[i]n case of doubt whether a person is a civilian, that person shall be considered a civilian”).

118. *Id.* art. 51(3).

119. *Id.* art. 52(2)–(3).

120. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11–12.

121. *Id.* at 10–11.

122. Additional Protocol I, *supra* note 15, arts. 51(4), 52(2). See generally OPERATIONAL LAW HANDBOOK, *supra* note 18, at 10–12, 19–20 (discussing the law of war limitations on military objectives and military necessity); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 131–43 (2011) [hereinafter LAW OF WAR DESKBOOK] (explaining and analyzing Additional Protocol I articles 51 and 52).

are obligated to select only lawful targets and to engage those targets in a manner that comports with the prohibition against indiscriminate attacks. This does not, however, mean that the knowing infliction of harm on civilians or civilian property renders an attack on a target unlawful. Instead, it is the rule of military objective that provides the *prima facie* standard for determining when a target is lawful. The knowing but unavoidable harm to civilians or civilian property is considered as a second level of analysis in order to determine whether the attack will be indiscriminate and therefore unlawful.<sup>123</sup> This assessment process occurs within the targeting process.<sup>124</sup>

In order to facilitate compliance with this basic principle of distinction, the 1977 Additional Protocol I to the Geneva Conventions of 1949 (Additional Protocol I) explicitly defines what qualifies as a military objective (those people, places, and things that may be made the lawful objects of attack).<sup>125</sup> The first component of this definition is derived from Article 51, which provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>126</sup> Because individuals entitled to status as prisoners of war upon capture are excluded from the definition of “civilian” (with the exception of civilians who accompany the armed forces in the field), these “combatants” are by implication always lawful objects of attack.<sup>127</sup> In contrast, Additional Protocol I does not provide a comprehensive definition of places and/or things that qualify as lawful objects of attack. This was responsive to the inevitable variables of any military action, which make it impossible to establish an exhaustive list of places and things that so qualify.<sup>128</sup> Instead, Additional Protocol I provides a framework for assessing each proposed target to determine if it so qualifies. That rule is Article 52, which provides “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>129</sup>

Accordingly, determining whether places or things qualify as lawful objects of attack requires a case-by-case analysis based on the mission, enemy, troops available, terrain, time, and presence of civilians. A central component of this analysis is the complementary rule established in Article 51, which provides that “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede

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123. See OPERATIONAL LAW HANDBOOK, *supra* note 18, at 12 (discussing the principle of proportionality); LAW OF WAR DESKBOOK, *supra* note 122, at 140–41 (“The question is whether such death, injury, and destruction are excessive in relation to the military advantage; not whether any death, injury or destruction will occur.”).

124. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 12.

125. Additional Protocol I, *supra* note 15, arts. 51–52.

126. *Id.* art. 51(2).

127. See GPW, *supra* note 111, art. 4 (defining prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC] (defining persons protected by the convention).

128. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 52 (1987) [hereinafter Additional Protocol I Commentary].

129. Additional Protocol I, *supra* note 15, art. 52.

military operations.”<sup>130</sup> Pursuant to this rule, the presence of civilians in or around what qualifies as a military objective does not “immunize” the thing or area from attack. Instead, the operational decision-maker is obligated to conduct a secondary analysis of the legality of the attack based on the prohibition against engaging in indiscriminate attacks. This requires assessment of whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated (commonly referred to as proportionality analysis and discussed in greater detail below).

Perhaps the three most important aspects of the military objective “test” are contained in the prong of the rule limiting attacks to objects “whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>131</sup> First, it is clear that the law recognizes that the desired effect of an attack need not be total destruction. This is consistent with principles of military operations. Commanders employ combat power to achieve desired effects, and these effects often do not require total destruction or capture of an enemy capability. For example, a doctrinal mission employing indirect fire assets serves the purpose of not only target destruction, but also disruption, harassment, and degradation. Another example would involve the use of a minefield to deny access or egress to an enemy. If the use of the mines never results in the destruction of an enemy asset, the effect may be achieved nonetheless by depriving the enemy of a certain area.

Second, operational judgments must be made (and ultimately critiqued) based on the situation prevailing at the time of the decision. The purpose of this qualification is to prevent the “slippery slope” that would exist if commanders could speculate on the potential future value of proposed targets. This does not, of course, mean that anticipated value is not permissible. However, a commander must have some basis in fact to support the conclusion that a possible future use of a place or thing renders it as a present military objective.

Third, the advantage gained by targeting a place or thing must be “definite.” Again, the purpose of this qualifier is to prevent unfounded speculation or conjecture of the value that targeting a place or thing would produce.<sup>132</sup> However, no commander can know with absolute certainty the value to be gained from attacking a target. What the “definite” qualifier is intended to prevent is general speculation on some attenuated value of target engagement.<sup>133</sup> So long as the commander acts with a good-faith belief that the target engagement will produce a tangible operational or tactical advantage for his force, the qualifier is satisfied.

The second and third components of the military objective test are further examples of the symmetry between the LOAC and military logic. No commander should waste resources on targets with purely speculative value. Accordingly, sound operational judgments should be consistent with these aspects of the military objective test.

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130. *Id.* art. 51(7).

131. *Id.* art. 52(2).

132. See Additional Protocol I Commentary, *supra* note 128, art. 52, para. 2024 (“[I]t is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information . . .”).

133. *Id.*

3. What is the relationship between the LOAC principle of distinction, the definition of military objective, and the effect of an opponent locating military objectives among or in proximity to civilians or civilian objects?

It is clear that military objectives may be lawfully targeted and that civilians may not. The principle of distinction establishes this axiom. This principle, which is at the core of the regulation of methods and means of warfare, requires that belligerents must at all times distinguish between the lawful objects of attack and all other persons, places, and things that do not qualify as such.<sup>134</sup> As discussed above, the rule of military objective implements this principle.

Compliance with the principle of distinction becomes most difficult when lawful military objectives are comingled with civilians or civilian property. While the LOAC imposes an obligation on belligerents to take “constant care . . . to spare the civilian population, civilians and civilian objects,”<sup>135</sup> it is clear from both historical practice and the structure of Additional Protocol I that such comingling is virtually inevitable. Extending the obligation to mitigate risk to civilians by a prohibition against attacks on military objectives whenever civilians or civilian objects are in close proximity to these objectives would be unworkable for a number of reasons. First, the rule would invite violation due to the reality that belligerents have historically refused to consider military objectives immune from attack due to the proximity of civilians or civilian property. Second, belligerents would be provided an incentive to exacerbate the risk to civilians or civilian objects by deliberately comingling them with military objectives in an effort to immunize those objectives.

In response to the reality of a comingled battle space, the drafters of Additional Protocol I adopted a compromise approach. Belligerents bear a constant obligation to mitigate the risk of harm to civilians and civilian property.<sup>136</sup> However, Article 51 explicitly provides that the presence of civilians or civilian objects in the proximity of military objectives does not immunize those objectives from attack.<sup>137</sup> Of course, this does not permit the deliberate targeting of civilians or civilian objects, but it does permit attacks on lawful military objectives with knowledge that the attacks will likely cause harm to civilians or civilian property. Thus, the commander does not violate the LOAC when he orders an attack with knowledge that civilians will likely become casualties of the attack, so long as he does not act with the purpose (conscious objective) to cause such casualties.

An equally critical aspect of this balance is that the obligation to “take constant care” to spare civilians and civilian objects from the harmful effects of hostilities requires belligerents to make *prima facie* good-faith efforts *not* to comingle military objectives with civilians or civilian property.<sup>138</sup> This obligation is obviously an “endeavor” obligation, and is therefore not absolute. However, a belligerent who deliberately locates military objectives in proximity to civilians or civilian objects

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134. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11.

135. Additional Protocol I, *supra* note 15, art. 57(1).

136. *Id.*

137. *Id.* art. 51(7).

138. *Id.* art. 57.

shares responsibility for the harm caused to civilians resulting from an attack on those military objectives.<sup>139</sup>

The final aspect of this equation is the relationship between comingled civilians and the proportionality rule. All belligerents are prohibited from attempting to immunize a military objective by deliberately locating the objective in the vicinity of civilians or civilian property. However, even deliberate comingling (in violation of the law) does not release the attacking commander from the obligation to consider whether the harm to the civilians or civilian property would violate the proportionality prong of the prohibition against indiscriminate attacks.<sup>140</sup> As a result, when improper, comingling of civilians with military objectives provides a potential residual immunizing effect. This is because it will result in a prohibition against attacking the military objective if the harm to civilians is expected to be excessive in relation to the concrete and direct military advantage anticipated. However, excluding such situations from the scope of the proportionality rule would be both unworkable (due to an attacking commander's inability to determine whether the comingling was deliberate, reckless, negligent, or innocent) and would subject civilians to the manipulation of commanders acting in bad faith.

In summary, when a commander identifies a lawful military objective that is comingled with civilians or civilian property, the commander is permitted to attack that objective even with knowledge that the attack will cause collateral damage or incidental injury to civilians or civilian property. The only limitation on this permission is that the commander must refrain from the attack if he determines that the collateral damage or incidental injury will be excessive in relation to the concrete and direct advantage anticipated from the attack.

4. How does the LOAC principle of proportionality seek to protect civilians from the effects of attacks during the execution of combat operations?

As noted above, the presence of civilians and civilian property in areas of armed hostilities has produced an ever-increasing risk that the effects of combat operations will extend beyond lawful military objectives and impact these civilians and their property. Because of this reality, it is universally recognized that the principle of military objective is insufficient to provide adequate protection for civilians from the harmful effects of hostilities. During the twentieth century, hundreds of thousands of civilians became victims of war not as the result of a decision to deliberately target them, but as the result of the collateral effects of attacks on lawful military objectives.<sup>141</sup>

Responding to this reality, the drafters of Additional Protocol I provided the first express prohibition against launching indiscriminate attacks. Article 51 provides a three-part definition of indiscriminate attacks: those that employ methods or means of warfare that cannot be controlled; those that treat a number of military objectives in an area of civilian population as one general objective; and those in which the collateral damage or incidental injury will be *excessive* in relation to the

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139. *Id.* arts. 57(7), 58; Additional Protocol I Commentary, *supra* note 128, art. 58, paras. 2240, 2244.

140. Additional Protocol I, *supra* note 15, arts. 51(5)(b), 51(8).

141. *See* Additional Protocol I Commentary, *supra* note 128, art. 51, para. 1968 (describing World War II carpet bombing).

concrete and direct military advantage anticipated from attacking a lawful military objective.<sup>142</sup>

This last prong of the indiscriminate attack definition is routinely referred to as the “proportionality” rule, or the “principle of proportionality.” It is universally accepted as a customary norm of the *jus in bello*, applicable to all armed conflicts. However, the term “proportionality” is somewhat misleading, for an attack does not become indiscriminate when the collateral damage or incidental injury is slightly greater than the military advantage anticipated (what is suggested by the term “disproportionate”) but only when those effects are *excessive*.<sup>143</sup>

Understanding of this rule is facilitated by analogy to the common law concept of malice in relation to the crime of murder. The crime of murder is contingent on proof that a defendant killed with malice.<sup>144</sup> Malice was originally understood as a willful or deliberate act.<sup>145</sup> However, the common law evolved to define malice as either express or implied.<sup>146</sup> Express malice is established when a defendant acts deliberately (with the conscious objective to kill) or with knowledge of substantial certainty that his act will cause a death.<sup>147</sup> Implied malice, however, is established when the defendant acts without intent to kill but creates a risk to human life that is so unjustified that it manifests a wanton disregard for the value of human life.<sup>148</sup> This wanton disregard is sufficient to impute malice to the defendant.<sup>149</sup>

While this equation is not totally apposite to targeting decisions, there is a useful analogy. Violation of the principle of military objective is analogous to acting with express malice, for the commander is deliberately (intentionally) causing harm to civilians or civilian property. A commander is not prohibited from attacking a lawful military objective with knowledge of substantial certainty that the attack will cause civilian casualties so long as there is no conscious objective to do so, so in this regard the analogy fails. However, just as the common law allows for the imputation of malice to a defendant who acts with no intent to kill when the defendant’s actions manifest a wanton disregard for others as the result of the risk created, the proportionality rule imputes an improper purpose to an otherwise lawful attack based not on the commander’s intent, but instead on the commander’s disregard for the consequences of the risk created by the attack. When a commander launches such an attack with awareness that the unintended harm to civilians will be excessive in relation to the benefit of creating the risk (achieving the military objective), the law essentially imputes to the commander the intent to engage in an indiscriminate attack.

Because this rule is primarily regulatory and not punitive, it necessarily requires commanders to balance anticipated effects of an attack. The two critical components of this balance are the anticipated military advantage to be gained by attacking a lawful target, and the anticipated collateral damage and incidental injury to civilians

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142. Additional Protocol I, *supra* note 15, art. 51(4)–(5).

143. *Id.* art. 51(5)(b).

144. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 543 (4th ed. 2006).

145. *Id.* at 547.

146. *Id.* at 544.

147. *Id.* at 548–49. See generally *id.* at 130 (discussing the meaning of intent in criminal law).

148. *Id.* at 552–54.

149. *Id.* at 554.

and civilian property. There are no established numerical equations or ratios for applying this rule, which is by its very nature METT-TC dependent on a case-by-case basis. METT-TC refers to considerations of Mission, Enemy, Terrain and weather, Troops and support available, Time available, and Civil considerations.<sup>150</sup> Any critique of application of this rule must be based on this reality and must therefore be made through the subjective perspective of the commander at the time the targeting decision was made. All facts and circumstances available to the commander, including the pressures of time and the proverbial “fog of war,” must be considered when rendering an objective assessment of the validity of a targeting decision.

Ultimately, like virtually all other regulatory provisions of the LOAC, these rules are intended to reinforce the obligation of commanders to make decisions in good faith. No commander should endanger civilians when the military advantage gained by doing so is so insignificant as to render the harm to civilians excessive. Doing so is both an act of bad faith and operationally illogical (for it presupposes a conclusion that the advantage anticipated by the attack is negligible). What a violation of this rule reveals, and accordingly requires, is the conclusion that although a commander did not act with the purpose to harm civilians, his disregard for the effects of his attack in relation to the advantage he anticipates justifies an imputation of invalidity in his decision-making process. Thus, while commanders need not always be correct in their judgments, they must always act reasonably under all the circumstances.

5. Does the LOAC impose a per se prohibition against indirect fires in populated areas?

There are very few per se LOAC prohibitions related to the use of weapons and weapon systems during armed conflict. Some of these have taken the form of treaties that establish an outright prohibition against the use of certain weapons, such as the prohibition against the use of chemical, biological, and bacteriological weapons.<sup>151</sup> Other prohibitions impose contextual limitations on the use of weapons or methods of warfare, such as the prohibition of bombarding undefended population areas or the use of booby traps in certain contexts.<sup>152</sup>

There is no per se prohibition against the use of artillery to attack lawful military objectives in populated areas. Instead, the legality of the use of this means of warfare, like the use of almost all means of warfare, is determined by application of the broad principles that regulate targeting (those discussed previously). Accordingly, the legality of use of artillery in such areas is dependent on consideration of a variety of factors related to the operational necessity for the use, the availability of alternate methods and means of warfare to achieve the military purpose, the enemy situation, and the risk to civilians. METT-TC is used in U.S. practice to indicate the relevance of these variables in all operational decision

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150. FM 3-0, *supra* note 11, para. 6-52.

151. Chemical Weapons Convention art. 1, Jan. 13, 1993, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. 1, 1975, 1015 U.N.T.S. 163.

152. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) arts. 3-4, 1996, 1342 U.N.T.S. 168.

making, and is a key component in assessing the propriety of use of artillery in populated areas.<sup>153</sup>

Consideration of the METT-TC factors provides the contextual background for operational decisions. While “law” is not an explicit element of this analysis, the requirement to consider the civilian population and the enemy situation implicitly invokes the LOAC in assessing the propriety of targeting decisions. An example of the multiple factors a commander must assess in deciding whether to use artillery to achieve an operational effect can be found in the U.S. Army Field Manual 6-20:

Any variable that could affect the mission is a factor. Before the estimate is started, all relevant information must be collected from all available sources. Once this information has been assembled and the factors that could affect the plan have been identified, they should be listed and arranged in priority.

Examples of the factors that may be considered are as follows:

- The task organization of subordinate forces and their missions.
- The availability of field artillery resources, including cannons, multiple launch rocket systems (MLRSs), missiles, ammunition (conventional, nuclear, and chemical), and target acquisition assets.
- The availability of other fire support resources, including mortars, NGF [naval gunfire], tactical air support, and Army aviation support. Also included are EW [electronic warfare] and other intelligence-controlled surveillance assets.
- In the attack, the enemy dispositions (including frontage and depth), the degree of protection afforded the enemy, objectives for subordinate forces or units, the number of phases, and the likely frontage and depth of the assault. These will affect the allocation of fire support resources to subordinate units.
- In the defense, the mission of the security force, the frontage and depth of the MBA [main battle area], the contingencies for counterattack, and considerations for deep and rear [operations].
- The mobility of the supporting artillery and its speed of movement to contact and withdrawal.
- In light forces, the force antiarmor plan.
- Courses open to the enemy artillery commander, especially his most probable course of action. These are derived from the intelligence estimate and knowledge of enemy artillery doctrine. Consideration of this factor results in—
  - The probable enemy artillery plan.
  - Enemy artillery vulnerabilities.
  - Enemy nuclear and chemical capability and posture.

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153. See FM 3-0, *supra* note 11, para. 1-45 (explaining how leaders use METT-TC to analyze each mission they receive).



- Any information requirements on enemy that have significant influence on the tasking of weapons-locating sensors.
- The allocation of resources, weapons, and munitions for counter fire.
- Measures to reduce the vulnerability of our force.
- The recommended counter fire priorities for each phase of the battle (by the designation of critical friendly zones and enemy weapon systems).
- The enemy EW situation.
- The identification of high-payoff targets (derived from target value analysis [TVA] and IPB [intelligence preparation of the battlefield]).
- The commander's information requirements (derived from the intelligence estimate).
- The availability and condition of roads, trails, and likely position areas. This leads to the coordination of movement and position areas with the operations staff.
- Ammunition consumption factors (type and quantity), pre-positioning requirements, and priority of combat service support.
- The effects of survey and met requirements on the ability to guarantee timely and accurate fire support (to include weapon and target acquisition assets).
- The reliability and range of communications.
- The time required for positioning and technical preparation to engage targets.
- The time to be ready to support the operation.<sup>154</sup>

Use of artillery in populated areas should be dictated by assessment of these factors, and even when the acronym is not explicitly used by a commander (for example, in an army that does not tend to follow U.S. or NATO doctrine), these considerations should inevitably be part of the targeting analysis. The commander first must determine how the mission should be tactically executed, which will drive selection of targets and dictate the effects that must be achieved for each target. The commander then must assess the enemy situation to guide analysis of which component of his power will be most effective in achieving the desired effects. The commander will then assess the assets available that are capable of achieving the effects, the effectiveness of each asset for this purpose, other demands on each asset, etc. This is often called "weaponeering" and involves the process of selecting the

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154. U.S. DEP'T OF ARMY, FIELD MANUAL 6-20, FIRE SUPPORT IN THE AIRLAND BATTLE 3-10 to -12 (1988) [hereinafter FM 6-20].

best asset for each proposed target.<sup>155</sup> The commander must then consider the element of time, for time might make some assets that are potentially effective in an attack non-responsive to the operational need.

Finally, the commander must assess the impact of the targeting decision on the civilian population and civilian property. First, the commander must ensure the desired effect can be achieved without violating the prohibition against indiscriminate attacks. If the commander determines that artillery can be employed in a manner that is not indiscriminate, then, so long as the object of attack is lawful, the commander must then consider whether the potential harm to civilians creates an unacceptable policy risk even if lawful. It is not uncommon in contemporary operations for commanders to refrain from launching lawful attacks based on policy-driven concerns (it simply might not be worth the cost of having to defend the legality of the attack in the public realm, or a commander may not want to alienate the civilian population by causing casualties that, while lawful, would still be perceived as unjustified). However, this consideration is directly linked to the first element of the analysis—the mission—because the mission will dictate the degree of risk of public condemnation of civilian alienation a commander is willing to assume.

While the contemporary practice of U.S. and NATO forces is to place ROE controls on the use of artillery in populated areas, it is simply improper to characterize these controls as indications of per se prohibitions against such use. Indeed, if this were the case, no ROE constraint would be necessary, for the restraint would be redundant with existing legal prohibition. Furthermore, almost all such ROE controls permit the use of artillery fires under certain circumstances or when authorized by a certain level of command, which is only permissible because (and when) such use is consistent with existing legal standards. For example, a prohibition against the use of unobserved indirect fires in populated areas will often provide an exception for “forces in contact” or permit such fires when authorized by “division command or higher.”<sup>156</sup> The variety of control measures is not relevant. What is relevant is that by providing exceptions to these policy-based constraints, ROE indicate that such fires are not prohibited per se by the LOAC, but are instead dictated by METT-TC considerations.

If a commander decides to employ artillery against military objectives in civilian-populated areas, the commander must act consistently with the obligation to endeavor to minimize the risk to civilians. This will often involve considering the use of artillery observers or “spotters” to better control the effects of the attack. This is referred to as “observed” indirect fires, which obviously mitigates the risk of collateral damage or incidental injury to civilians.<sup>157</sup> Unobserved indirect fires use intelligence indicating the location of proposed targets and indirect fire direction calculations to maximize the probability of achieving the desired effect.<sup>158</sup> Observed

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155. JP 1-02, *supra* note 7, at 387.

156. See CTR. FOR LAW AND MILITARY OPERATIONS, *supra* note 93, at B-15-18 (providing a sample ROE with language regarding exceptions for the use of unobserved indirect fires in populated areas).

157. FM 6-20, *supra* note 154, at 2-8.

158. *Id.* at 2-8 to -9 (There are two categories of fires: observed and unobserved. Adjusting and correcting artillery fires by direct observation increases the effectiveness of artillery. Fires may be delivered on unobserved targets when the relative location of such targets with respect to the unit firing can be determined.). See FM 6-40 for a detailed description of firing methods. U.S. DEP'T OF ARMY, FIELD MANUAL 6-40, TACTICS, TECHNIQUES, AND PROCEDURES FOR FIELD ARTILLERY MANUAL

fires are therefore also operationally preferable because they enhance the effectiveness of the artillery attack.

However, it is not always possible to use observed indirect fires. Observation requires getting personnel into a position where they can have “eyes on” the target. Because one of the key advantages of artillery is the capability to engage in long range targeting, commanders might not be willing or even able to place friendly spotters in close proximity to long range targets, especially those in areas under significant enemy control. Ultimately, commanders will have to engage in a cost-benefit analysis to decide whether placing artillery spotters in a position enabling observed fires is the best operational decision.

A per se prohibition on unobserved fires would be wholly unworkable for two reasons. First, it would encourage belligerents to put their most important targets in populated areas, thereby increasing the danger to the civilian population. Second, it would require attacking commanders to either ignore such targets (giving an enemy a reward for comingling them), or resorting to ground assaults to attack such targets. Because ground assaults in populated areas are considered the most complex and dangerous type of ground operations, this will place commanders in an untenable position of having to assume maximum risk to friendly forces whenever an enemy chose to abuse the law by comingling important targets in civilian-populated areas.

Accordingly, there is no prohibition against using artillery, either observed or unobserved, against lawful military objectives in civilian-populated areas. The legality of such use must be assessed on a case-by-case basis that focuses on METT-TC.

6. Does a commander have an obligation to select a method or means of warfare that poses the least risk to the civilian population? If so, what is the impact of risk to his own forces when in the selection process?

Additional Protocol I's effort to mitigate the risk to civilians in areas of hostilities includes a rule that imposes on commanders planning an attack the obligation to place a high priority on this mitigation when selecting how they will conduct attacks.<sup>159</sup> This rule, contained in Article 57, applies whenever a commander has the option to select from more than one military objective or more than one method or means of attack to achieve a tactical objective.<sup>160</sup> When this is the case, the law requires a commander to select the objective or the method or means of warfare that poses the least risk to the civilian population.<sup>161</sup> However, this rule includes an important and pragmatic qualifier: the alternate options must be equally effective for achieving the commander's purpose.<sup>162</sup> In essence, the rule is that “when all options are equal in anticipated effect, select the option that creates the least risk to the civilian population.”

It is critical, however, to understand what the concept of “equality” means in assessing multiple options. It is not merely an effects-based analysis. Instead, a commander may legitimately consider both resource availability and risk to friendly

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CANNON GUNNERY (1996).

159. Additional Protocol I, *supra* note 15, art. 57.

160. *Id.*

161. *Id.*

162. *Id.*

forces when assessing equality.<sup>163</sup> For example, a commander is not automatically obligated to use precision guided munitions (PGM) in lieu of a “dumb” round when attacking an area in which civilians are located. While the PGM will almost certainly be the option that reduces the risk to the civilian population, the commander is entitled to consider the supply of PGMs compared to dumb munitions, other military objectives that might require the use of the limited number of PGMs, and resupply rates. If the commander determines that it is operationally necessary to “husband” the PGMs, then the option to use PGMs is not “equal” to the option to use the dumb rounds.

One area of controversy in application of this rule is the effect of risk to friendly forces when conducting equality analysis. Most experts seem to agree that a commander is entitled (some would argue obligated) to consider the comparative risk to friendly forces as a component of this analysis.<sup>164</sup> Accordingly, the commander is not obligated to select the method or means of warfare that poses the least risk of harmful effects to civilians when that choice increases the risk to his own forces. For example, a commander might have a need to destroy or disable an enemy command post located in a populated area. When assessing the possible options to achieve this objective, the commander may have a choice between indirect artillery fires or a special operations assault on the objective. Because the special operations assault will reduce the risk to civilians as the result of the more precise engagement probability, from an effects standpoint it would appear to be the option the commander is obligated to adopt. However, because use of that option will pose a substantially greater risk of casualties to his forces, that option is not equal to the use of indirect fires within the meaning of the rule.

Of course, commanders may always choose to assume greater risk in the interest of minimizing harm to civilians as a matter of policy because the benefit is perceived as outweighing the risk to friendly forces (which is often a motivating factor in the imposition of constraints within rules of engagement that are more restrictive than required by the LOAC). However, such choices are not legally mandated.

- a. Should commanders seek to avoid ground combat operations in civilian population centers?

It is a maxim of operational art that urban warfare<sup>165</sup> should be avoided whenever feasible. This is because engaging an enemy in built-up or urban terrain is considered among the most difficult combat situations a commander may encounter. Such operations cede to the defender the natural advantage provided by the use of the urban terrain for cover, concealment, and overall tactical advantage. The built-up environment degrades the effectiveness of fires and maneuver. It also creates an

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163. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 140–43 (2d ed. 2010).

164. *Id.* at 141–43.

165. FIBUA (fighting in built-up areas) is the current doctrinal term for conducting ground combat operations in built-up or urban areas. This type of operation is also often referred to as MOUT (military operations in urban terrain). U.S. DEP'T OF ARMY, *FIELD MANUAL 3-21.10, THE INFANTRY RIFLE COMPANY Glossary-2* (2006) (defining FIBUA); FM 6-20, *supra* note 154, *Glossary-7* (defining MOUT).

extremely high risk to civilians in area of hostilities that adds an undesired element of uncertainty into the target engagement process.

History is replete with examples from which this maxim is derived. From Stalingrad to Hue to Fallujah, urban areas have historically been considered the most undesired terrain on which to engage an enemy with ground combat power.<sup>166</sup> Because of this, military doctrine indicates that whenever feasible, commanders should seek to isolate and bypass enemy defensive positions in built-up areas.<sup>167</sup>

Unfortunately, there is an inverse relationship between built-up areas and defensive operations. Because of the difficulty of dislodging forces from such areas, a defending commander obtains a force multiplication benefit from emplacing positions in them.

Bypassing built-up areas is not always feasible and, when absolutely necessary, assault into such areas may have to occur. However, if alternatives to ground assault are viable, a commander would be derelict in not considering and ultimately employing them. For example, a commander may choose to use indirect fire assets to disrupt enemy forces in a built-up area during bypass operations, or to fix them in the area so that they cannot endanger friendly forces during the bypass.

The danger associated with ground assaults into built-up areas would also be an important METT-TC consideration in deciding how to address the presence of enemy forces in such an area.

- b. Does the LOAC prohibit the use of certain weapons against targets in areas of civilian population?

Other than weapon systems that are the subject of express treaty prohibitions (such as chemical weapons, bacteriological weapons, air-delivered incendiary weapons, etc.), all weapons are potentially lawfully used in populated areas, and all weapons are potentially unlawful for such use. Whether use of a weapon in such an area is lawful is contingent on two primary rules. First, the weapons must be used against a lawful military objective; using even the most precise engagement capability against a non-military objective is unlawful. Second, the weapon itself, or its employment, must not be indiscriminate.

The prohibition against indiscriminate attacks codified in Article 51 of Additional Protocol I includes both weapon types (means) and weapon employment (methods).<sup>168</sup> Use of a weapon that cannot be controlled once fired is treated as indiscriminate because the weapon is not subject to sufficient control to comply with the distinction obligation. Weapons that fall into this category would include gas or chemical weapons or long-range missiles that can be directed against a populated area but not against any target contained therein (such as the Iraqi SCUD missile attacks against Israel and Saudi Arabia in the 1991 Persian Gulf War). Most modern weapons however, including most tube and rocket artillery, are subject to enough fire direction control as to not be considered to fall within this category.

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166. See FM 3-0, *supra* note 11, para. 1-18 (recognizing that adversaries will seek urban environments to offset U.S. advantages).

167. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-06, JOINT URBAN OPERATIONS I-10 (2009).

168. Additional Protocol I, *supra* note 15, art. 51.

Any weapon can also be employed in a manner that is inherently indiscriminate. This is reflected in the two additional definitions of indiscriminate attack in Article 51. The first involves treating a number of distinct military objectives in a populated area as one large objective for purposes of targeting.<sup>169</sup> When a commander employs a weapon system to attack a “lumped together” series of distinct targets (such as carpet bombing a city in order to destroy dispersed military objectives within the city), that employment is indiscriminate and is prohibited. The second is the proportionality rule discussed above. When a commander employs even a precise weapon system against a lawful military objective with the anticipation that the collateral damage and incidental injury to civilians or civilian property will be excessive in relation to the concrete and direct military advantage the commander expects to gain from the attack, the attack is treated as indiscriminate and therefore unlawful.<sup>170</sup>

Because there is no per se prohibition against tube or rocket artillery, direct or indirect artillery fires, observed or unobserved indirect artillery fires, or conventional (non-chemical or bacteriological) artillery or rocket munitions, use of these capabilities in populated areas is subject to a case-by-case legality assessment based on the foregoing rules.

- c. Does the LOAC contain a per se prohibition against using rocket systems to engage military objectives within urban areas during offensive military operations?

Consistent with the foregoing discussion, the LOAC imposes no per se prohibition against using rocket artillery (indirect fire systems that employ rockets, such as the U.S. Multiple Launch Rocket System (MLRS) or the Soviet-era 122 Multiple Barrel Rocket Launcher used by Croatian forces against Knin) to engage lawful military objectives in a civilian-populated area. As with almost all other weapon systems, the legality of such use would be contingent on METT-TC analysis in relation to the LOAC prohibition against engaging in indiscriminate attacks.

Once a commander determines that a military objective within a populated area needs to be attacked, the commander must then determine the effects that must be achieved. This “effects-based analysis” should drive the choice between available assets to engage the objective. If the commander determines that long-range strike capability is the best or only viable option, then artillery will become a prime candidate for target engagement.

Artillery assets are generally divided between cannon and rocket. Cannon artillery uses single-round munitions (such as howitzer or mortar rounds). Rocket artillery fires rocket-propelled munitions, often in salvos of multiple rockets (although it should be noted that tube artillery can be delivered in salvos from multiple individual artillery assets). According to U.S. Army Field Manual 6-20, *Fire Support in the Airland Battle*:

*Indirect Fire.* The projectile, rocket, missile, and bomb are the weapons of indirect-fire systems. Indirect fire can cause casualties to troops, inhibit

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169. *Id.* art. 51(5)(a).

170. *Id.* art. 51(5)(b).

mobility, suppress or neutralize weapon systems, damage equipment and installations, and demoralize the enemy. Most casualties to troops in an indirect-fire attack are caused by the initial rounds. Best results are achieved by a short engagement at a high rate from as many weapons as possible.

*Effects of Fire.* A commander will decide what effect fire support must have on a particular target. There are three types of fire: destruction, neutralization, and suppression.<sup>171</sup>

Rocket artillery is generally preferred for area targets. However, it is also an ideal asset for use in disruption missions. For example, rocket artillery is often a preferred means to disrupt enemy air defense assets or command and control capabilities. Furthermore, the value of rocket artillery in relation to cannon artillery will often turn on multiple factors in addition to the desired effect, to include the vulnerability of enemy assets to both types of attack, degree of certainty as to location of enemy assets, the collateral effects of both types of attack, and other operational demands on these assets.<sup>172</sup>

Any commander considering use of rocket artillery in a civilian-populated area would be required to assess the impact of anticipated collateral damage and incidental injury. However, it is impermissibly overbroad to assert that use of this asset would always be the most indiscriminate option of attack in comparison to cannon artillery. Factors such as the location of the civilian population (indoors or outdoors), the timing of the attack, the protection afforded to civilians by hardened structures, and the potential comparative impact of cannon versus rocket rounds would all be relevant in making this determination. It is certainly conceivable that based on all these (and other METT-TC) considerations a commander could make a good-faith determination that rocket artillery is better suited to achieve a desired effect within the framework of the LOAC than cannon artillery.

7. What importance does evidence of good faith play in attempting to impute improper motives to a commander when critiquing a given decision-making process?

The LOAC rests ultimately on a foundation of good faith. Virtually any LOAC rule can be circumvented by a commander who is not committed to good-faith compliance with the law. When assessing criminal responsibility for LOAC violations, it should be axiomatic that an overall record of good-faith application is probative circumstantial evidence in relation to determining whether the decision under judicial scrutiny violates the law.

Transforming the obligations related to the application of combat power to criminal sanction is a complex process. The law regulating such application provides operational leaders (the term “commander” denotes such leaders, although the proscriptions of the law could also reach decision-makers in a non-command position) a framework to guide their decision-making process. Reliance on these

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171. FM 6-20, *supra* note 154, at 2-8.

172. JOHN J. MCGRATH, FIRE FOR EFFECT: FIELD ARTILLERY AND CLOSE AIR SUPPORT IN THE U.S. ARMY 133-35 (2010), available at [http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/mcgrath\\_fire.pdf](http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/mcgrath_fire.pdf) (describing the modernization of U.S. artillery and the improved capabilities of the MLRS).

rules as the source of criminal sanction requires a retrospective critique of this decision-making process. This involves the classic “subjective/objective” test: an objective standard of assessment is applied by analyzing decisions through the subjective perspective of the defendant. This is essential to ensure that commanders are not held liable based on a retrospective assessment of facts and circumstances. It is also an established principle of war crimes liability, often referred to as the “Rendulic Rule” in reference to the war crimes prosecution of a German commander for engaging in a “scorched earth” campaign in Norway during a tactical retreat at the end of World War II.<sup>173</sup>

Lothar Rendulic was ultimately acquitted by the Nuremberg war crimes tribunal of the charge of wanton devastation for his “scorched earth” campaign.<sup>174</sup> This precedent stands for the proposition that when subjecting a commander’s judgment to criminal critique it is necessary to consider the situation through the perspective of that commander at the time the judgment was made.<sup>175</sup>

Assessing criminal responsibility for operational decisions also invariably involves assessing the state of mind of the defendant. Because direct evidence of state of mind is rarely available, it becomes essential to rely on circumstantial evidence to infer a defendant’s state of mind related to a given decision. For decisions to employ combat power, this evidence often takes the form of effects from such employment. These effects are relied on to infer the defendant acted with a criminal state of mind. However, because operational effects can often support the alternate inference that a commander acted in good faith even if the assessment of potential consequences was erroneous, prior decisions by the commander should also be considered in the assessment process. In this regard, while not dispositive, a pattern of good-faith decision making by a commander could undermine the inference that an illicit effect was the result of a criminal state of mind.

This evidence is particularly useful in determining if a targeting decision violates the proportionality rule. That rule, which is a component of the prohibition against indiscriminate attack, prohibits any attack in which the anticipated incidental injury or collateral damage is excessive in relation to the concrete and direct military advantage anticipated. Using this rule as a basis for criminal responsibility requires the finder of fact to critique a command judgment based on effects of an attack and assessment of information available to the commander at the time of the attack. As will be discussed in more detail below, the essence of this inquiry is determining whether bad faith can be imputed to the commander as the result of what is in essence a reckless judgment producing harm to civilians and civilian property. In this regard, the criminal application of the proportionality rule almost inevitably will require the finder of fact to rely on actual effects of an attack as circumstantial evidence from which to infer the defendant’s state of mind at the time of the decision. Accordingly, evidence of improper motive for creation of the risk should

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173. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 11 (“The circumstances justifying destruction of objects are those of military necessity, based upon information reasonably available to the commander at the time of his decision.”).

174. *Id.*

175. United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, at 1230, 1297 (1948) (“The conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.”).



be highly probative in the imputation analysis, and therefore evidence of overall good-faith application of the law becomes probative to this motive analysis.

8. Does the LOAC permit a commander to assume subordinates will implement orders lawfully?

The responsibility of military commanders for the LOAC violations of subordinates is a complex and ever-evolving area of the law. The concept of “command responsibility” is a doctrine of criminal liability that emerged in the aftermath of World War II and continues to play a central role in contemporary war crimes prosecutions.<sup>176</sup>

Pursuant to this doctrine, as a general proposition a commander can be held criminally responsible for the LOAC violations of subordinates.<sup>177</sup> However, this liability is not “strict,” but requires that the commander acted with some culpable state of mind.<sup>178</sup> Much of the debate related to application of this doctrine has focused on what level of proof is necessary to satisfy this mens rea element, particularly when liability is based not on what the commander knew, but what he “should have known.”<sup>179</sup>

However, as the doctrine has evolved, some aspects have emerged that provide a degree of protection for military commanders. The most important of these is the principle that commanders are generally justified in relying on a presumption that subordinates will execute lawful orders in a lawful manner. This is an important qualifier to the scope of command liability, for it recognizes that it is impossible for commanders to monitor every action of every subordinate. Of course, such reliance would be invalid if the commander was on notice of some reason why subordinates would be inclined to disregard the law.<sup>180</sup> However, as the U.S. military tribunal noted in the High Command case after World War II:

Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . . There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.<sup>181</sup>

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176. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 35; GREEN, *supra* note 107, at 309–10; GARY D. SOLIS, THE LAW OF ARMED CONFLICT 382–91 (2010) (summarizing the development of command responsibility and the criminal liability it entails).

177. OPERATIONAL LAW HANDBOOK, *supra* note 18, at 35.

178. *Id.*

179. *Id.*

180. *Id.* at 36.

181. 12 THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR

Accordingly, when a commander gives orders to subordinate units, it is neither necessary nor required that the orders explicitly direct subordinates to execute their missions in accordance with the LOAC. Such a direction is an implicit component of all orders. When a commander issues an order, therefore, he may justifiably presume that the subordinate leaders who receive the order will resolve any uncertainty as to the legality of the method of execution in favor of lawful conduct.

### *B. Use of Indirect Fires in Operation Storm*

Operation Storm and General Gotovina's trial highlight the significance of developing an operationally sound understanding of how the LOAC regulates the application of combat power. As part of his offensive to capture the Krajina Serb capital of Knin, General Gotovina ordered the employment of cannon (howitzer) and rocket artillery against numerous targets in Knin.<sup>182</sup> These targets had been pre-selected based on intelligence analysis and ranged from barracks to headquarters buildings to the residence of the President of the Krajina.<sup>183</sup> General Gotovina obviously knew civilians and civilian property were at risk as a result of his use of fires against these targets. Nonetheless, he ordered execution of the attack plan as part of the broader mission to penetrate Serb defensive positions surrounding the city, exploit these penetrations, defeat Serb resistance, and force Serb forces to abandon their hold on the Krajina.

Unsurprisingly, the prosecution's position on why General Gotovina ordered the use of fires against targets in Knin was substantially different from that of the defense. For the prosecution, use of indirect fires in a city populated with Serbs provided critical evidence of General Gotovina's illicit intent to ethnically cleanse the region of the Serb civilian population;<sup>184</sup> for the defense, the use was a legitimate employment of combat power carefully conceived to set the conditions for success of the main effort: penetration and exploitation of improved defensive positions.<sup>185</sup>

Why is this a significant example of the complexity created by the intersection of LOAC regulation and operational art? Because like virtually any use of fires in a densely populated area—an almost inevitable aspect of future armed conflicts—the effects of Croat attacks provided evidence that *both* the prosecution and defense argued proved their respective cases. For the prosecution, the fact that the fires produced damage to civilian property and that Serb civilians fled the city demonstrated an illicit purpose.<sup>186</sup> For the defense, the fact that the fires produced exactly the type of command and control paralysis General Gotovina had intended, coupled with the fact that the vast majority of damage was inflicted on or in close proximity to lawful military objectives, undermined any reasonable allegation that

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CRIMINALS 76 (1949).

182. Prosecutor v. Gotovina, Judgement Volume I of II, *supra* note 34, paras. 1183–86.

183. *Id.* para. 1403.

184. See Prosecutor v. Gotovina, Prosecution's Public Redacted Final Trial Brief, *supra* note 8, para. 123 ("Gotovina planned, ordered and implemented . . . a shelling attack against the Krajina Serb population designed to drive out Krajina Serbs.").

185. Prosecutor v. Gotovina, Gotovina Defence Final Trial Brief, *supra* note 8, para. 9.

186. Prosecutor v. Gotovina, Prosecution's Public Redacted Final Trial Brief, *supra* note 8, paras. 9–14.

General Gotovina's intent was to terrorize the civilian population.<sup>187</sup> In fact, the defense asserted that, even though it had no burden to do so, it had proved by overwhelming evidence General Gotovina's good-faith compliance with the LOAC.<sup>188</sup>

Ultimately, the Trial Chamber's judgment adopted almost all of the defense's arguments. It found that there were numerous lawful enemy objectives located within the Knin;<sup>189</sup> it rejected the prosecution's theory that the LOAC imposes a *per se* prohibition against the use of indirect fires in populated areas—even unobserved indirect fires;<sup>190</sup> it rejected the prosecution's theory that the use of rocket artillery in a populated area is automatically indiscriminate;<sup>191</sup> it found that approximately 1,000 out of 1,057 artillery round impacted either a lawful military objective or an area within a reasonable range of a lawful military objective.<sup>192</sup> However, based on the approximate 57 impacts that it did not attribute to lawful objects of attack and its conclusion that attacking President Milan Martić's residence with knowledge that civilians *might* be harmed by the attack violated the LOAC proportionality principle, the Trial Chamber found that General Gotovina's overall intent was to place the entire city under artillery attack, and therefore the attack violated the LOAC.<sup>193</sup>

The finding of an illegal attack on Knin is a major aspect of General Gotovina's currently pending appeal.<sup>194</sup> The ultimate resolution of this appeal will have a potentially profound impact on the law of targeting precisely because the case involved the type of factual and operational situation so common in modern warfare (as opposed to an extreme case of blatant deliberate targeting of civilian populations). Both NATO's air campaign against Libya and the U.S. practice of using armed drones to attack terrorist targets of opportunity in the border regions of Pakistan involve many of the same complex legal and operational issues reflected in the *Gotovina* judgment.

Several aspects of the attack on Knin illustrate why it is so important to consider operational art and the situation confronted by a commander to understand how the LOAC influences decision-making. First, is it legitimate to use fires against targets in populated areas with full knowledge that destroying the target is virtually impossible? In Operation Storm, this was the situation with various targets attacked with indirect fires—many of which were hardened structures in Knin.<sup>195</sup> In the abstract, risking civilian injuries without the ability to destroy a target may seem inherently invalid, a position asserted by the Prosecutor. However, unless the intended effect is considered, and that effect is viewed in the context of the overall operation, such a conclusion would be flawed. In Operation Storm, General Gotovina never sought to destroy these buildings.<sup>196</sup> Instead, he used his limited indirect fire capability to disrupt enemy command, control, and communications by

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187. Prosecutor v. Gotovina, *Gotovina Defence Final Trial Brief*, *supra* note 8, paras. 181–82.

188. *Id.* paras. 183–88.

189. Prosecutor v. Gotovina, *Judgement Volume II of II*, *supra* note 9, para. 1899.

190. *Id.* para. 1898.

191. *Id.* para. 1900.

192. *Id.* paras. 1898–906.

193. *Id.* paras. 1890–913.

194. Prosecutor v. Gotovina, ICTY Case No. IT-06-90-A, Notice of Appeal of Ante Gotovina, paras. C–H (May 16, 2011), <http://www.icty.org/x/cases/gotovina/custom6/en/110516.pdf>.

195. Prosecutor v. Gotovina, *Judgement Volume II of II*, *supra* note 9, paras. 1890–913.

196. Prosecutor v. Gotovina, *Gotovina Defence Final Trial Brief*, *supra* note 8, para. 262.

targeting the buildings at critical times of the attack that he had launched on the outskirts of the city.<sup>197</sup> Because it was never operationally necessary to destroy those targets, indirect fires provided an ideal means of achieving this effect; an effect that was absolutely critical to isolate forces in fixed defensive positions in order to facilitate exploitation of any penetrations of those defenses.<sup>198</sup> Thus, when considered in this light, the reasonableness of the fires seems fundamentally different, a conclusion that was not lost on the Trial Chamber.

A more complex illustration was the use of fires to attack the apartment building where Milan Martić, the President of the Krajina Serbs, resided. How could such an attack be legitimate? Martić was the civilian leader of the Krajina Serb military forces and as such was a lawful object of attack.<sup>199</sup> As with his attacks on other buildings in Knin, General Gotovina almost certainly did not expect to destroy the apartment with intermittent shelling. Nor was it likely he expected to kill Martić, although such an effect was possible. Instead, by using fires to harass Martić, General Gotovina could have intended to “fix” him in the apartment location and thereby isolate the military headquarters in Knin from its political leadership.<sup>200</sup> When considered in a broader operational context, such an effect seems particularly significant. This is because the Krajina Serbs relied on Serbia proper for almost all their support, and Martić would have been the conduit between the Krajina and President Slobodan Milošević of Serbia.<sup>201</sup> Disrupting his ability to assess the operational situation and communicate with Milošević would therefore mitigate the risk of Serbian intervention to reinforce their Krajina allies.

Ultimately, the Trial Chamber accepted the defense position that the apartment qualified as a lawful object of attack because General Gotovina expected Martić to be located there.<sup>202</sup> However, the Chamber then concluded that because General Gotovina knew civilians resided in that area, the attack was inherently indiscriminate.<sup>203</sup> This aspect of the judgment is a focal point of the pending appeal,<sup>204</sup> and for good reason. Because the Trial Chamber failed to articulate its view of the military value General Gotovina anticipated when he chose to attack the building and failed to consider how disrupting Martić’s ability to influence the battle would impact overall operational execution, the judgment is difficult to understand. Such considerations are essential to any proportionality judgment, whether made by a commander prior to an attack or a tribunal after the attack. If this aspect of the judgment is rejected on appeal, it will almost certainly be the result of this failure to lay an operationally based foundation.

## CONCLUSION

Targeting is a complex operational process that involves life and death decisions. The LOAC plays a critical role in regulating that process. Whether a

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197. *Id.* para. 269.

198. *Id.* para. 286.

199. Prosecutor v. Gotovina, Judgement Volume II of II, *supra* note 9, paras. 1907–11.

200. *Id.* para. 1910.

201. *Id.* para. 1693.

202. *Id.* para. 1910.

203. *Id.* paras. 1910–11.

204. Prosecutor v. Gotovina, Notice of Appeal of Ante Gotovina, *supra* note 194, paras. 1.2 to 1.2.3.

private with a rifle or a Predator drone firing a Hellfire missile, the legal framework is the same. However, how that framework applies in any given situation will inevitably be influenced by the nature of the military operation. It should therefore be apparent that an understanding of operational art and the many variables that influence a commander's targeting judgments is required to truly understand how the LOAC regulates the application of combat power.

The recent case of *Prosecutor v. Gotovina* provides a unique insight into the significance of the relationship between operational art and legal regulation. The complexity of the targeting environment General Gotovina confronted during Operation Storm is indicative of the complexities that will almost certainly permeate future military operations. Building off of this case, this Article seeks to illustrate why an understanding of that relationship is critical to a genuine understanding of how the LOAC regulates combat operations, and aspects of operational art central to this understanding. While the case against General Gotovina is yet to be finally resolved, students of this law should pay close attention, for the issues *Gotovina* raises are and will remain central to the legal regulation of all armed conflicts.