

4-15-2015

War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure

Geoffrey S. Corn

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>



Part of the [Military, War and Peace Commons](#), and the [National Security Commons](#)

Recommended Citation

Geoffrey S. Corn *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 Pepp. L. Rev. 419 (2014)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol42/iss3/2>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure

Geoffrey S. Corn*

I. INTRODUCTION	419
II. REGULATING THE USE OF COMBAT POWER: A SUBSTANTIVE AND PROCEDURAL MOSAIC	426
III. UNDERSTANDING THE RELATIONSHIP BETWEEN THE LOAC AND THE TARGETING PROCESS	430
A. <i>Understanding the Role of Precautions Analysis in the Sequential Progression of the Targeting Process</i>	435
B. <i>The Precautionary Value of a Comprehensive Understanding of the Relationship Between the LOAC and the Targeting Process</i>	440
IV. PROCESS AS AN ESSENTIAL PRECAUTIONARY MEASURE	444
A. <i>The Role of the Battle Staff/Planners</i>	445
B. <i>Training and Article 82 of Additional Protocol I</i>	449
C. <i>Information as a Precautionary Measure</i>	453
D. <i>Presumptions and Burdens</i>	457
E. <i>Civilian Casualty Benchmarks</i>	460
V. CONCLUSION	464

I. INTRODUCTION

Never in recent memory has the relationship between law and war been so central to strategic legitimacy.¹ This has resulted in both positive

* Presidential Research Professor of Law, South Texas College of Law; Lieutenant Colonel (Retired), U.S. Army Judge Advocate General's Corps. Prior to joining the faculty at South Texas, Professor Corn served in a variety of military assignments, including as the Army's Senior Law of War Advisor, Supervisory Defense Counsel for the Western United States, Chief of International Law for U.S. Army Europe, and as a Tactical Intelligence Officer in Panama. Professor Corn would like to thank his research assistant, Jennifer Whittington, South Texas College of Law Class of 2015.

1. See, e.g., Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*,

evolutions of the law of armed conflict (LOAC) and a remarkable increase in interest, understanding, and analysis of this law.² No state, or even non-state group, is immune from the increasingly informed critique of its planning and execution of military operations and the quite proper demand that its military personnel comply with LOAC obligations.³

Central to the regulation of hostilities are the core LOAC principles of distinction and discrimination.⁴ Distinction mandates restricting deliberate attack to only those persons, places, and things that qualify as lawful military objectives pursuant to conventional and customary international law.⁵ Discrimination imposes an additional obligation to forego engaging in such an attack whenever the incidental and collateral effects will be indiscriminate, and thereby unjustifiably endanger the civilian population.⁶ While Article 51 of Additional Protocol I establishes a three-part definition of indiscriminate for purposes of implementing the discrimination obligation,⁷ an “excessive” impact on civilians and civilian property—the so called proportionality rule—is a definitive standard for compliance with the discrimination obligation and is central to debates on the legality of employing lethal combat power during contemporary armed conflicts.⁸

Symbolic of this focus is the ongoing debate over the use of remotely

FOREIGN AFF., Nov./Dec. 2004, at 18, 18–19, *available at* <http://www.foreignaffairs.com/articles/60262/robert-w-tucker-and-david-c-hendrickson/the-sources-of-american-legitimacy> (explaining that the United States lost credibility for strategic legitimacy when it went to war in Iraq without a legal basis).

2. *See, e.g., id.* (contrasting the increase in legitimacy in the post-World War II era with the loss of legitimacy that has occurred since the administration of President George W. Bush).

3. Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, AM. SOC'Y INT'L LAW (Aug. 24, 2006), <http://www.asil.org/insights/volume/10/issue/21/acts-non-state-armed-groups-and-law-governing-armed-conflict> (stating that the International Court of Justice has set forth rules applying to both state and non-state actors).

4. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257, 272–73 (July 8), *available at* <http://www.icj-cij.org/docket/files/95/7495.pdf> (explaining the theories of distinction and discrimination).

5. *Id.* at 257.

6. *See id.* at 272–73 (stating that atomic warfare and humanitarian law appear to be mutually exclusive because atomic war necessarily endangers many civilian lives).

7. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

8. *See* Letta Tayler, *The Truth About the United States Drone Program*, HUM. RTS. WATCH (Mar. 24, 2014), <http://www.hrw.org/pt/node/124062>.

piloted vehicles (drones) to attack al Qaeda and Taliban operatives.⁹ Critics of these attacks cite the number of resulting civilian casualties.¹⁰ They assert that this incidental injury is disproportionate to whatever military advantage may have been anticipated from the attacks.¹¹ Defenders of the practice respond not only by questioning the validity of the numbers upon which these critiques are based, but also by challenging the “disproportionate” consequence conclusion.¹² They emphasize the ostensible tactical and operational benefit resulting from these attacks, a benefit that renders the loss of civilian life a legally acceptable consequence.¹³

This focus on the LOAC proportionality principle is arguably a reflection of a number of influences.¹⁴ First, proportionality is a rule that, perhaps more than any other LOAC rule, exposes the brutal reality of war.¹⁵ This is because proportionality condones the calculated killing of innocent civilians as an incidental consequence of achieving a military objective, absent a determination that the anticipated civilian suffering is excessive in relation to the anticipated military advantage.¹⁶ Thus, so long as such harm is not assessed as excessive, it is lawfully inflicted.¹⁷ Second, any rule requiring a balance of military and humanitarian interests will almost inevitably generate divergent interpretations, precisely because the law itself is indeterminate of how that balance is properly resolved.¹⁸ Third, such a balance-based rule is naturally appealing to legal experts, as it is instinctual for lawyers to gravitate towards the quite common and comfortable

9. *Id.* (describing the recent use of drones by the United States military).

10. See Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT. SEC. L. & POL’Y 343, 351–52 (2010); see also Tayler, *supra* note 8.

11. See O’Connell, *supra* note 10, at 351–52.

12. See Press Release, President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remark-s-president-national-defense-university>.

13. See *id.*

14. See generally Michael Walzer, *Responsibility and Proportionality in State and Nonstate Wars*, 39 U.S. ARMY WAR C. Q. PARAMETERS 40 (2009), <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/09spring/walzer.pdf> (describing the theory of proportionality and influences, such as the necessity of certain conflicts and the value of human life).

15. See *id.* at 42 (stating that it is sometimes inevitable that civilians will die in war).

16. *Id.* at 44.

17. *Id.*

18. See, e.g., *id.* (portraying how one leader evaluated his own actions and determined that the Lebanon war was not just).

“balancing of interests” process for assessing compliance with any rule.¹⁹ Fourth, the focal point of the balance—whether it is legally permissible to knowingly kill innocent individuals—exposes, in perhaps the most compelling manner, the human and moral consequences of armed conflict and implementation of LOAC rights and obligations.²⁰ Ultimately, the proportionality principle provides legal validation for the infliction of suffering that would be intolerable in any context other than armed conflict, and as such, it is unsurprising that it attracts continuing interest and provides the focal point for continuing controversy.²¹

It is beyond question that compliance with the discrimination obligation writ large, and the proportionality principle more specifically, is a critical measure to mitigate the suffering inherent in armed conflict.²² There is, however, arguably an inverse relationship between the level of attention devoted to proportionality and the actual impact of this principle on mitigating civilian casualties in the context of hostilities.²³ It is a simple truism of both law and military operations that the inherent uncertainty as to when an attack will violate this core LOAC obligation dilutes its utility at any point other than the extreme.²⁴ This truism is even reflected in the statute to the International Criminal Court, which criminalizes a proportionality violation only when the evidence establishes that the defendant would have recognized that launching the alleged unlawful attack would result in “clearly” excessive death, injury, or damage.²⁵ Adding the elemental qualification of “clearly” to the excessive anticipated effect standard highlights the inherent difficulty of assessing when anticipated civilian casualties will, in fact, be excessive and arguably reflects the limited

19. *See id.* at 45 (discussing factors that may be considered when addressing proportionality).

20. *See id.* at 43 (discussing the moral factors that may be considered when addressing proportionality).

21. *See generally id.* (discussing the theory of proportionality as applied to recent conflicts).

22. *Id.* at 45.

23. Janina Dill, *Applying the Principle of Proportionality in Combat Operations*, OXFORD INST. FOR ETHICS, L. AND ARMED CONFLICT 2 (Dec. 2010), http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_%20dec_2010.pdf (stating that the proportionality analysis is ineffective).

24. *Id.* at 3 (explaining that there is uncertainty because there is no absolute standard in the proportionality analysis).

25. *See* Rome Statute of the International Criminal Court art. 8, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute], available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

utility of this principle.²⁶

This uncertainty associated with the balance between military advantage and civilian risk central to implementing the proportionality rule is, in practice, an inherent limitation on the rule's efficacy in all but extreme situations.²⁷ As the recent hostilities between the Israel Defense Forces and Hamas in Gaza so dramatically illustrated, this limitation results in wildly conflicting assessments of legal compliance in the execution of combat operations.²⁸ This should come as no surprise, but instead serve as a reminder that the operational implementation of this very general concept is so intensely fact dependent that it has limited utility in providing a predictable and tactically logical framework for mitigating civilian risk during the execution of combat operations.²⁹

Consideration of proportionality, and the obligation to cancel any proposed attack that would violate this rule, is included within Additional Protocol I's enumeration of precautionary measures.³⁰ However, this is only one such measure, with inherent efficacy limitations.³¹ In contrast, the obligation to take other feasible precautions before launching an attack provides a more predictable and feasible mechanism to achieve this identical humanitarian interest: civilian risk mitigation.³² In most situations involving the decision-making process related to the use of combat power, the risk mitigation measures falling under the umbrella of "feasible precautions" may actually be perceived by operational decision-makers as both more "concrete" than proportionality and more rationally aligned with the overall tactical and operational concept of operations.³³ As a result, although

26. See Dill, *supra* note 23, at 3–4 (explaining that it is anticipated harm, rather than actual harm, that is considered with proportionality).

27. See *id.* (discussing the uncertainty of balancing aims, making it difficult to apply in all but extreme circumstances where the outcome is clear).

28. Dore Gold, *Israel's Doctrine of Proportionality in Gaza*, L.A. TIMES, July 31, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-gold-israel-gaza-proportional-force-20140801-story.html>.

29. See Dill, *supra* note 23, at 5–6 (stating that proportionality is often unhelpful).

30. See Protocol I, *supra* note 7, art. 57.

31. See Int'l Comm. of the Red Cross, *Rule 22. Principle of Precautions Against the Effects of Attacks* (last visited Nov. 17, 2014), available at https://www.icrc.org/customary-ihl/eng/docs/v1_rule22.

32. *Proportionality and Precaution*, DIAKONIA (Nov. 11, 2013), <https://www.diakonia.se/en/IHL/The-Law/International-Humanitarian-Law-1/Issues-addressed-by-IHL/Conduct-of-Hostilities/Proportionality-and-Precautions/> (describing the duty to take measures to protect the civilian population).

33. See *id.* (describing concrete steps, which include separating military personnel from civilians, avoiding locating military actions near densely populated areas, choosing appropriate weapons, and

proportionality seems to dominate the academic and media discourse related to the execution of combat operations, other precautionary measures arguably play a much more significant role in civilian risk mitigation at the operational and tactical level of mission execution.³⁴ In short, while it is certainly true that both precautions and proportionality are intended to produce an identical civilian risk mitigation outcome, precautionary measures hold, from an operational implementation perspective, potentially greater potential for producing this outcome.³⁵

This dichotomy between the significance associated with each of these two distinct sub-components of the overall precautions obligation—the obligation that requires an overall effort to mitigate risk to civilians resulting from combat operations—seems significant for a number of reasons.³⁶ First, implementing the precautions obligation will often involve more objective considerations than application of the proportionality obligation; precautions involve a series of concrete steps in a coherent targeting process that can be applied in a systematic manner.³⁷ In contrast, proportionality, due to its inherent amorphousness, is much more of an ad hoc consideration heavily dependent on subjective decision-maker perspectives.³⁸ Second, good faith compliance with the precautions obligation may actually diminish concerns of inflicting excessive collateral damage or incidental injury by substantially reducing the risk to civilians and their property in a manner that is not perceived as inconsistent with the mission requirements driving the use of combat power.³⁹ In other words, compliance with the precautions obligation may substantially simplify the subsequent proportionality analysis by framing the force employment decision in more defined terms.⁴⁰ Third, compliance with the precautions obligation will often reveal to the

verifying the target).

34. *See id.*

35. *See id.*

36. *See generally* Robert P. Barnidge, Jr., *The Principle of Proportionality Under International Humanitarian Law and Operational Cast Lead*, in *NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 171–89 (William C. Banks ed., 2011), available at http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Legal%20Advocacy/Gaza.pdf (discussing the difficulties of applying the principles of proportionality).

37. *See* Protocol I, *supra* note 7, art. 57.

38. *See* Barnidge, *supra* note 36, at 280.

39. *See id.* at 281.

40. *See, e.g., id.* (considering the definition and interpretation of the proportionality analysis concept “concrete and direct military advantage anticipated”).

commander or others deciding on launching an attack considerations that frame any subsequent proportionality analysis.⁴¹ Finally, a breach of compliance with this obligation is arguably more amenable to objective critique than the highly subjective proportionality rule.⁴²

Hence, the thesis of this Article: that process is inherently precautionary in nature, the overall implementation of precautions is a central component of substantive LOAC compliance, and precautions must also be conceived more expansively than is suggested by the current discourse, which focuses mainly on the precautions rule of Additional Protocol I.⁴³ While this rule is certainly central to the concept of precautionary measures, a key component of this proposal will be considering the *process* of operational and tactical LOAC implementation.⁴⁴ This process involves both training and preparing combatants for implementing their LOAC obligations, as well as the process used for targeting decision-making.⁴⁵ Linked to both of these aspects of the implementation process is the critical connection between the precautions obligation and the role of battle staff advisors, including military legal advisors.⁴⁶ How commanders and these advisors are prepared for the complex challenge of targeting decision-making should, therefore, be included within the scope of the concept of precautionary measures.

Accordingly, a broadly conceived precautions obligation must be a core LOAC principle, standing in stature alongside the core substantive principles of distinction and discrimination (to include the proportionality principle). The scope of the precautions concept must be expansive and pragmatic, including not only choice of methods and means of warfare or issuance of warnings, but also the process utilized to select targets and the implementation of the substantive LOAC principles central to the legality of the target decision-making process.

This Article will thus explain why the precautions obligation should be universally embraced as a core LOAC principle, analogous in significance to those of distinction and discrimination. To support this assertion, this Article will explain the relationship of precautions to both the targeting

41. *See id.*

42. *See id.* at 291 (explaining that proportionality is a “vaguely-phrased principle”).

43. *See* Protocol I, *supra* note 7, art. 57.

44. *See* Barnidge, *supra* note 36, at 291 (noting the importance of having an effective discussion and implementation process).

45. *See id.*

46. *See id.* (noting the importance of the mortality of the military leaders); *infra* Part IV.A.

process and the implementation of those fundamental substantive LOAC principles. Part II will briefly review the core substantive LOAC norms that regulate the use of combat power. Part III will then explain the relationship between the LOAC's regulatory rules and the operational and tactical targeting process. Part IV will then argue that the process of implementing the LOAC's substantive rules is a vital precautionary measure, addressing several aspects of that process and explaining why greater attention must be devoted to this aspect of LOAC compliance and civilian risk mitigation. This Article will ultimately propose that the true scope of the precautions obligation in the targeting process imposes a more comprehensive obligation than the measure included in Article 57, which is linked to this Article's ultimate argument: precautions provide the critical link between the planning and execution of combat operations and compliance with the LOAC's most fundamental targeting regulatory norms, distinction and discrimination.

II. REGULATING THE USE OF COMBAT POWER: A SUBSTANTIVE AND PROCEDURAL MOSAIC

LOAC is a body of law that is principally regulatory in nature.⁴⁷ Although it provides essential content for defining the scope of individual and state responsibility for violations, its principal function is today as it has always been: to balance the necessity of war with a mitigation of human suffering by regulating the conduct and consequences of hostilities.⁴⁸ A key function of the law is to regulate the conduct of hostilities in order to achieve this balance.⁴⁹ As a result, all rules developed for this purpose have an inherent precautionary effect because, through compliance, the risk to the civilian population is mitigated.⁵⁰

The fundamental LOAC principles of distinction and proportionality form the substantive foundation for this regulation.⁵¹ Distinction requires

47. See generally INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2014) [hereinafter INTERNATIONAL HUMANITARIAN LAW], available at <https://www.icrc.org/en/document/what-international-humanitarian-law#.VGvIF74I4V> (discussing the specifics of International Humanitarian Law).

48. See *id.* at 1–2 (explaining that international humanitarian law exists to protect civilians during armed conflict between nations).

49. See *id.*

50. See *id.*

51. For a more extensive explanation of LOAC conduct of hostilities regulation, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 4. See also GEOFFREY S.

belligerents to distinguish between lawful objects of attack, civilians, and civilian property.⁵² By permitting deliberate attack against only those persons, places, and things that qualify as lawful military objectives, this principle is intended to limit the death and destruction resulting from hostilities to that which are necessary to bring about the prompt submission of enemy forces.⁵³ Distinction also reflects the presumption that the deliberate infliction of death or destruction to civilians or civilian property makes no legitimate contribution to bringing about enemy submission, and therefore prohibits deliberate attack on such persons, places, or things unless their character changes in a manner that justifies including them within the definition of military objective.⁵⁴

The principle of distinction is functionally implemented by complying with the LOAC rule of military objective, which establishes conditions that justify subjecting people, places, and things to deliberate attack⁵⁵: “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.”⁵⁶ This determination is made on a case-by-case basis,⁵⁷ but it is clear that the requirement to engage in this attack legality assessment process is a fundamental aspect of protecting civilians and civilian property from the harmful consequences of hostilities.

Proportionality serves an analogous precautionary function by imposing

CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* (Vicki Been et al. eds., 2012); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2d ed. 2010); Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 *BROOK. L. REV.* 437 (2012); Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 *TEX. INT'L L. J.* 337, 357–77 (2012); Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *TEMP. L. REV.* 787 (2008).

52. See ERIC BAHM ET AL., *THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK* 11–12 (William Johnson & David Lee eds., 2014) [hereinafter *OPERATIONAL LAW HANDBOOK*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2014.pdf.

53. See *id.* at 10–11.

54. See *id.* at 12–13.

55. See Protocol I, *supra* note 7, arts. 51–52.

56. *Id.* art. 52.

57. *Cf. id.* arts. 51–52 (implying that determinations must be made on a case-by-case basis because objects are determined to be civilian “by their nature, location, purpose or use”).

a substantive obligation to forego attacks directed against lawful military objectives if and when the anticipated risk to civilians, civilian property, or both is assessed as excessive in relation to the anticipated military advantage that will be produced by the attack.⁵⁸ This is a critically important precautionary measure because it is responsive to the reality that the execution of combat operations will routinely occur in situations involving comingled military objectives and civilian populations.⁵⁹ One need only consider the recent Israeli operations in Gaza⁶⁰ to be reminded of the importance of a rule that recognizes that there will be times when the incidental risk to the civilian population resulting from launching an attack cannot be justified by the military benefit it will produce.

These two fundamental LOAC principles, and the more detailed treaty rules implementing them, provide a logical substantive framework for target legality decision-making. When properly implemented, this framework serves a vital precautionary function of mitigating risk to civilians and civilian property; the law prohibits deliberately (intentionally) attacking civilians or civilian property, and prohibits attacking a lawful military objective with awareness (or when a reasonable commander would be aware) that the unintended harm to civilians will be excessive in relation to the benefit of creating the risk (achieving the military objective).⁶¹

LOAC substantive rules do not, however, function in a vacuum. The process used to allocate combat power for the purpose of engaging targets in order to execute combat missions—the so called targeting process—is central to achieving this regulatory goal, as it is the process through which LOAC substantive obligations are implemented.⁶² Like all other disciplines of law, the process by which these rules are implemented plays a critical role in its efficacy. If anything, this aspect of compliance is elevated with this body of law, as the humanitarian protections provided by the law are so heavily dependent on good faith compliance by those who plan and decide when, where, and how to employ lethal combat power.⁶³ It is therefore both

58. *See id.* art. 51, §§ 4–5.

59. *See infra* Part IV.E.

60. *See, e.g., Gaza Crisis: Toll of Operations in Gaza*, BBC NEWS (Sept. 1, 2014), <http://www.bbc.com/news/world-middle-east-28439404>.

61. *See supra* notes 55–56 and accompanying text.

62. *See infra* Part III.

63. *Cf.* INTERNATIONAL HUMANITARIAN LAW, *supra* note 47, at 2 (discussing whether international humanitarian law is actually complied with).

unfortunate and somewhat perplexing that the law itself provides almost no guidance on the process of implementation. There are several treaty provisions related to the obligation to educate armed forces (and the broader population) on treaty obligations, and these treaty provisions only generally address the need to provide legal advisors for the armed forces.⁶⁴ Nowhere in the law, however, is there even cursory guidance on the method of incorporating legal advice and analysis into the training or operational planning and execution process. It is therefore unsurprising that, in practice, this process is purely ad hoc and varies widely among different armed forces.

Additional Protocol I's inclusion of an obligation to provide legal advisors for the armed forces does, however, indicate the importance of these aspects of compliance process.⁶⁵ Legal advice will only produce a positive effect when integrated into a decision-making process, and even into training. Of course, it would have been (and is to this day) impossible to impose a one-size-fits-all planning and execution process on all armed forces. In fact, the variables in national military organization and culture even necessitated qualifying the legal advisor obligation by acknowledging it was generally a matter of national prerogative to decide at what level of command these advisors need be integrated.⁶⁶ This axiom that no two military structures are identical does not, however, justify the almost total lack of attention to the process element of LOAC implementation and compliance. Instead, like so many other areas of LOAC uncertainty, best practices should be identified and "marketed" to armed forces in order to develop a more uniform commitment to these processes.⁶⁷

64. See, e.g., Protocol I, *supra* note 7, art. 82; INT'L COMM. OF THE RED CROSS, LEGAL ADVISERS IN ARMED FORCES 1-2 (2003), available at http://www.icrc.org/eng/assets/files/other/legall_advisers_ffaa.pdf.

65. Protocol I, *supra* note 7, art. 82.

66. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 950 (Yvez Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY], available at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.

67. See Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Strengthening Legal Protection for Victims of Armed Conflicts—States' Consultations and Way Forward (May 12, 2011), available at <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-2011-05-12.htm> ("Consequently, the ICRC considers that all options must be carefully studied, including the elaboration of soft law instruments, the identification of best practices and the facilitation of expert processes aimed at clarifying existing rules. These are indeed different ways of strengthening international law.").

III. UNDERSTANDING THE RELATIONSHIP BETWEEN THE LOAC AND THE TARGETING PROCESS⁶⁸

Nowhere within the mosaic of LOAC implementation and compliance is the importance of process more significant than in the planning and execution of lethal targeting operations. In this context, there is an inherent correlation between the quality of process and the likelihood of substantive compliance. In operational terms, this targeting process is utilized to synchronize the use of combat capabilities with mission requirements, and in so doing, maximize the operational and tactical effect of lethal combat power.⁶⁹ Ideally, this process is guided by enduring principles of war, such as mass and economy of force.⁷⁰ Because the effects of lethal targeting should be directed towards bringing the enemy into submission, the process of identifying and engaging military objectives should also involve inherent advancement of the LOAC's objective of minimizing harm to civilians and civilian property.⁷¹

Indeed, when properly understood, LOAC conduct of hostilities principles reflect an inherent link to the legitimate military objectives pursued during armed conflict.⁷² By directing the effects of combat capabilities towards the singular objective of bringing enemy forces into submission, a military commander should logically avoid wasting any assets or efforts on anything other than lawful military objectives.⁷³ This focused application of combat power does not, however, happen automatically.⁷⁴ At every level of command—ranging from the team leader in charge of four or five infantrymen to a senior level commander coordinating the effects of

68. This section is adopted, with light edits, from Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L. J. 337 (2012).

69. See JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60, JOINT TARGETING I-5 (2007) [hereinafter JOINT PUBLICATION 3-60], available at https://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf.

70. *Id.* at I-6.

71. See Corn & Corn, *supra* note 51, at 360–61.

72. See *id.* at 339 (observing how military logic is reflected in the LOAC and in the selection, attack, and assessment potential of targets).

73. *Id.* at 359.

74. See generally HEADQUARTERS, U.S. DEP'T OF THE ARMY, PUB. NO. FM 3-60, THE TARGETING PROCESS 1-13 (2010), available at <http://www.globalsecurity.org/military/library/policy/army/fm/3-60/fm3-60.pdf> (“The targeting effort is continuous at all levels of command.”).

tens of thousands of combatants—some targeting process occurs as a predicate to the use of that power.⁷⁵

A target is a person, place, or thing nominated for lethal or non-lethal attack, defined by the U.S. military as “an 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”⁷⁶

All targets must obviously be selected in the sense that a belligerent makes a deliberate choice to initiate an attack to produce some desired tactical, operational, or strategic effect.⁷⁷ Whether a target is selected through a deliberate planning process or identified as an emergent opportunity during what is often characterized as time-sensitive targeting, the desired effect is not the sole consideration that must frame the decision-making process.⁷⁸ By establishing legal limitations on permissible objects of attack and methods and means of attack,⁷⁹ and by implication defining legally permissible targets, the LOAC plays an equally decisive role in the targeting process. Thus, in a very real sense, the end state of all targeting actions—whether the result of complex and detailed planning and deliberation, or immediate action in response to a spontaneous tactical opportunity—is to achieve the desired tactical effect while ensuring compliance with the LOAC.⁸⁰ These two considerations are simply indelible. Demanding compliance with the LOAC in a manner that undermines tactical effectiveness is inconsistent with the core purpose of bringing the enemy into prompt submission;⁸¹ ignoring or violating LOAC to produce a desired tactical effect results in crossing the line from the legitimate application of lethal violence to illegitimate and often times

75. *See id.*; JOINT PUBLICATION 3-60, *supra* note 69, at I-6 (“Targeting links intelligence, plans, and operations across all levels of command.”).

76. JOINT PUBLICATION 3-60, *supra* note 69, at vii.

77. Corn & Corn, *supra* note 51, at 341.

78. *See* JOINT PUBLICATION 3-60, *supra* note 69, at I-10.

79. *See* Protocol I, *supra* note 7, art. 52.

80. JOINT PUBLICATION 3-60, *supra* note 69, at I-8.

81. *Compare id.* (stating that the probability of achieving desired effects while diminishing undesired effects is increased by adherence to four principles: focus on achieving objectives, creation of specific desired effects, interdisciplinary participation, and systematic engagement), *with* Corn & Corn, *supra* note 51, at 360 (explaining that the concept of military necessity only permits inflicting death and destruction to the extent necessary to achieve prompt submission by enemy forces).

immoral infliction of suffering inconsistent with the strategic end state for the use of military force writ large.⁸²

The targeting decision-making process is the mechanism that seeks to produce this synchronized tactical and legal effect: “the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.”⁸³ Conceptually, whether time-sensitive or deliberate, a targeting process should

define 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.⁸⁴

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.”⁸⁵ In warfare, this involves leveraging available assets to generate combat power to achieve a desired effect at a selected time and place.⁸⁶

To assist commanders with maximizing the impact of combat power, U.S. military doctrine organizes all available capabilities into six basic operational functions: (1) command and control, (2) intelligence, (3) fires, (4) movement and maneuver, (5) protection, and (6) sustainment.⁸⁷ Commanders generate and apply combat power through the correct application of each of these six functions.⁸⁸ While mission dynamics impact the relative weight of each function, the fires function is often critical to executing the commander’s overall concept of operations, whether the

82. See Corn & Corn, *supra* note 51, at 360.

83. JOINT PUBLICATION 3-60, *supra* note 69, at I-1.

84. NATO STANDARDIZATION AGENCY, AJP-3(B), ALLIED JOINT DOCTRINE FOR THE CONDUCT OF OPERATIONS 4-18 (2011), available at http://www.cicde.defense.gouv.fr/IMG/pdf/20110316_np_otan_ajp-3b.pdf.

85. Corn & Corn, *supra* note 51, at 350.

86. See *id.* at 341–42.

87. See JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS III-1 (2011) [hereinafter JOINT PUBLICATION 3-0], available at http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf.

88. See *id.*

nature of the operation is offensive or defensive.⁸⁹ This is true regardless of whether direct and indirect fire assets 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.⁹⁰

Fires are defined as “[t]he use of weapon systems to create a specific lethal or nonlethal effects on a target.”⁹¹ 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 weaponized drones), naval surface fires, and command and control of these assets through the targeting process.⁹² Fires include all tasks associated with integrating and synchronizing the effects of these types of weapons with each other and with the effects of the other war-fighting functions.⁹³

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 among others, counter air and missile threats.⁹⁴ 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.⁹⁵

Targeting is a cyclical and iterative process requiring constant flexibility and adaptability in order to respond to the dynamic nature of operations.⁹⁶ At the most basic level, it involves planning, execution, and assessment of the efficacy of each engagement or attack.⁹⁷ The targeting cycle can be

89. JOINT PUBLICATION 3-60, *supra* note 69, at I-8 to -9.

90. *See id.* GL-9.

91. *Id.* at GL-8.

92. *See id.* at G-1 to -2; JOINT PUBLICATION 3-0, *supra* note 87, at III-24.

93. *See* JOINT PUBLICATION 3-0, *supra* note 87, at III-1 (“The joint functions reinforce and complement one another, and integration across the functions is essential to mission accomplishment.”).

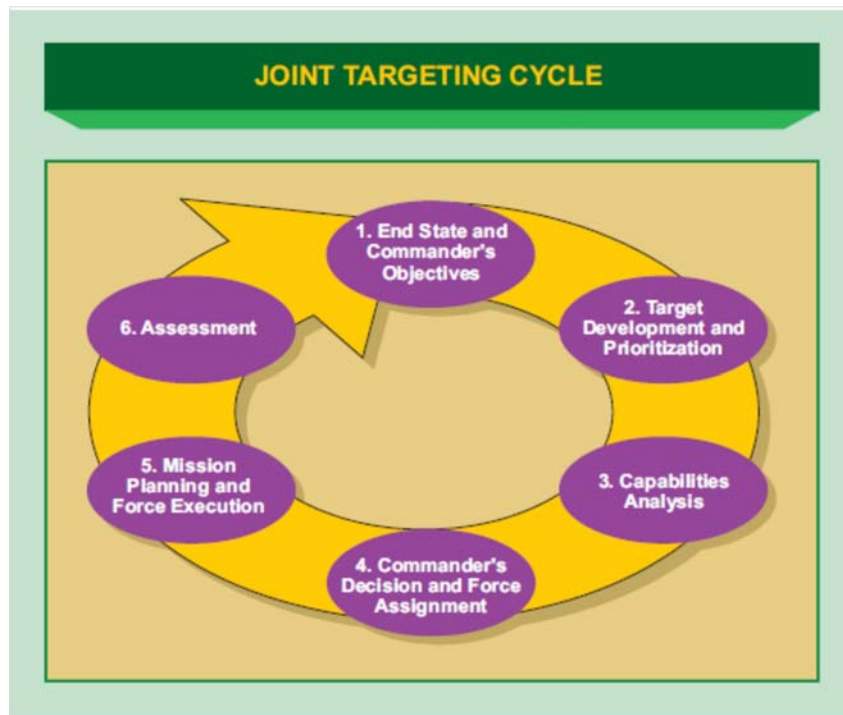
94. *Id.* at III-22.

95. *Id.* at III-23.

96. JOINT PUBLICATION 3-60, *supra* note 69, at I-4.

97. *Id.* at II-1.

further broken down into six phases, represented in the figure below.⁹⁸



“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.”⁹⁹ 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.¹⁰⁰ There are certain points in the process, however, where legal analysis is most critical to the commander’s decision-making.

98. *Id.* at II-3.

99. Corn & Corn, *supra* note 51, at 352.

100. See JOINT PUBLICATION 3-60, *supra* note 69, II-3 to -19 (explaining each phase in the Joint Targeting Cycle).

A. *Understanding the Role of Precautions Analysis in the Sequential Progression of the Targeting Process*

During the deliberate (as opposed to time-sensitive) target development and prioritization phase, legal advisors should ideally review every proposed target to ensure compliance with applicable rules of engagement (ROE), the LOAC, or any other specific restrictions such as No-Strike or Restricted Target lists.¹⁰¹ 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.¹⁰² Accordingly, ROE limitations must be consistent with the LOAC, but they are technically not law. Instead, they are command-imposed constraints based on mission imperatives and policy considerations under which forces may initiate or continue combat engagement.¹⁰³

Once targets are vetted and validated, they are nominated for approval.¹⁰⁴ It is at the next stage that the commander and staff engage in the detailed analysis of available capabilities in relation to the desired effects.¹⁰⁵ This process of “weaponizing” is influenced substantially by the LOAC principle of proportionality.¹⁰⁶ However, prior to considering proportionality, effective targeting process requires that the commander first consider the substantive precautionary measures reflected in Article 57¹⁰⁷: whether civilian risk can be mitigated by adjusting the timing of the attack,

101. *See id.* at II-4, -8, -10.

102. *See* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 329 (1994) [hereinafter JOINT PUBLICATION 1-02], available at http://www.dod.mil/pubs/foi/joint_staff/jointStaff_jointOperations/913.pdf; *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, CJCSI 3121.01B (June 13, 2005), reprinted in OPERATIONAL LAW HANDBOOK, *supra* note 52, at 93 (“The [Standing Rules of Engagement] establish fundamental policies and procedures governing the actions to be taken by US commanders during all military operations and contingencies . . .”).

103. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 52, at 79–108 (providing an “overview of basic ROE concepts”).

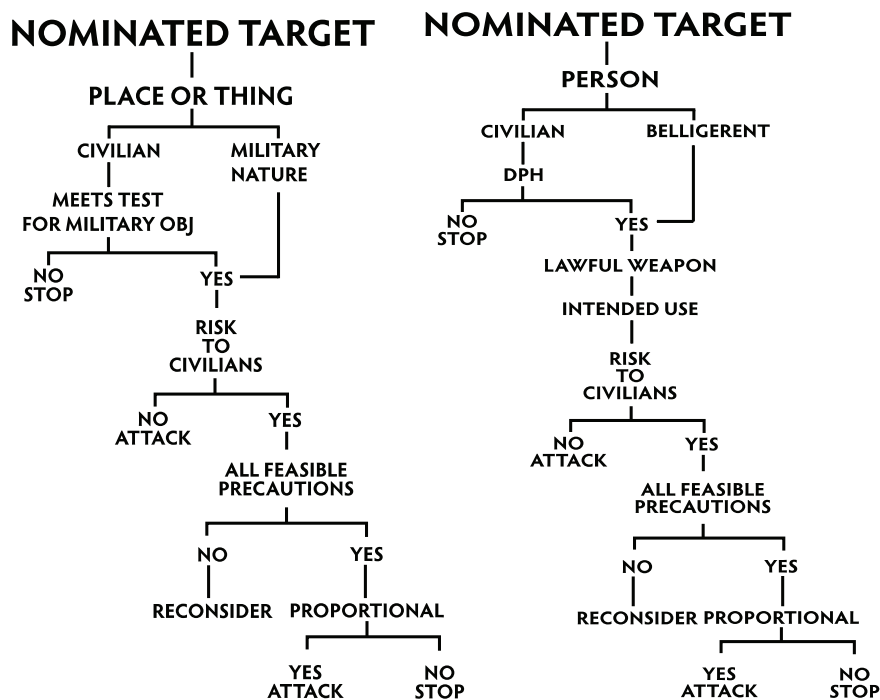
104. JOINT PUBLICATION 3-60, *supra* note 69, at II-9.

105. *Id.* at II-10 to -11.

106. *See, e.g.*, UNITED STATES JOINT FORCES COMMAND, JOINT FIRES AND TARGETING HANDBOOK III-69 to -79 (2007) [hereinafter JOINT FIRES AND TARGETING HANDBOOK], available at http://www.dtic.mil/doctrine/doctrine/jwfc/jntfiretar_hdbk.pdf (discussing weaponizing and the Collateral Damage Estimation process).

107. *See id.* at III-73 to -76.

by issuing a prior warning, or by selecting an alternate means or method for the attack.¹⁰⁸ Preceding proportionality analysis with this initial step mitigates the risk of harm to civilians and civilian property.¹⁰⁹ This aspect of the targeting process not only advances the LOAC's humanitarian objectives, but it is also consistent with operational logic.¹¹⁰ Commanders gain no benefit from wasting effects, and therefore, they logically seek to maximize effects on the intended objects of attack.¹¹¹ The precautionary value of a coherent targeting process is graphically illustrated below¹¹²:



This graphic reveals that when a commander works through a coherent targeting process, the assessment of proportionality should occur only after

108. Protocol I, *supra* note 7, art. 57.
 109. JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-77.
 110. *Id.* at I-2 to -3.
 111. *See id.* at I-3.
 112. *See* CORNET AL., *supra* note 51, at 185-86.

all precautionary measures have been considered and implemented. This “precautions step” in the targeting process may—and often will—provide a more effective protection for civilians by reducing or eliminating civilian risk that would otherwise necessitate a difficult proportionality judgment.¹¹³ It is true that precautionary measures such as selection of alternate methods and means of attack and warnings are limited by considerations related to mission accomplishment.¹¹⁴ There will frequently be situations, however, where the precautions principle will dictate a weaponeering decision.¹¹⁵ Where a commander determines that there are multiple feasible options for achieving a required effect, the LOAC imposes an obligation to select the option that creates the lowest level of risk to civilians and civilian property.¹¹⁶ Furthermore, where a commander determines that issuing a warning prior to attack will not substantially compromise mission accomplishment, the law requires such a warning.¹¹⁷

Requiring a commander to contemplate these measures before assessing the ultimate risk of collateral damage and incidental injury properly elevates civilian protection considerations to a point in the targeting process that does not render this protection dependent on a difficult subjective balance of interests that are impossible to define with any objective precision—the assessment of what amounts to excessive civilian harm.¹¹⁸ Instead, while still involving a feasibility assessment, it turns on much more objective assessments based on the type of information normally available for operational decisions and well within the realm of tactical and operational command instincts. Can a different tactic be used to achieve the same objective? How feasible is that alternate course of action? What will be the impact of revealing my intentions through a prior warning?

As is explained in more detail below, this “least harmful weapon”

113. *See id.*

114. A commander need not always use the means or method that will produce the lowest level of anticipated collateral damage or incidental injury. 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 drone is an available option, the commander might legitimately select an alternate means of attack in order to preserve the drone for a future mission. *See* Protocol I, *supra* note 7, art. 57.

115. *See* JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-74 to -76.

116. Protocol I, *supra* note 7, art. 57.

117. *Id.*; OPERATIONAL LAW HANDBOOK, *supra* note 52, at 23.

118. JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-77.

selection rule is inherently limited by the lack of anything close to international consensus on the meaning of the term “feasible.”¹¹⁹ Indeed, the inherently subjective nature of this assessment subjects this rule to criticism analogous to that applicable to the proportionality rule.¹²⁰ What is relatively clear, however, is that the effectiveness of this substantive precautionary measure is contingent on the quality of the targeting and weaponeering *process* used to set the conditions for the commander’s ultimate selection judgment.¹²¹ It is this process that provides the commander with a comprehensive range of options and facilitates consideration and implementation of civilian risk mitigation consistent with legitimate mission accomplishment requirements.¹²² Interestingly, this same process enhances the efficacy of the substantive proportionality principle by providing the commander with information needed to effectively balance anticipated military advantage against anticipated civilian harm.¹²³

Rules regarding attack timing and prior warnings to the civilian population are also expressly included in Article 57 as substantive precautionary measures.¹²⁴ Like the weapons selection precaution, each of these considerations is also subject to a feasibility qualifier.¹²⁵ Thus, a commander is expected to select the time of an attack that minimizes risk to civilians and civilian property when doing so is feasible, and is likewise required to give advance warning whenever feasible.¹²⁶ Of course, like the weapons selection rule, what is or is not considered feasible is highly subjective, and the efficacy of these precautionary measures also depends in large measure on good faith respect for the rule.

The process related to implementing these precautionary measures is an important component of efficacy. First, the commander must be fully informed as to his tactical options, as well as the anticipated consequences of implementing these precautions.¹²⁷ With respect to the timing of an attack,

119. *See id.* at III-59; Protocol I, *supra* note 7, art. 57.

120. *See supra* notes 10–13 and accompanying text.

121. *See* JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-59, -69 to -70.

122. *Id.*

123. *Id.* at III-77.

124. Protocol I, *supra* note 7, art. 57.

125. *Id.*

126. *Id.* (“[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

127. JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-69 to -70.

this means it is essential that this civilian risk mitigation factor be considered early in the target planning process by all staff officers responsible for preparing operational courses of action to the commander.¹²⁸ Targeting involves a highly synchronized application of combat power, and abating this timing consideration to the end of the planning cycle—the point at which the commander is presented with a course of action for selection—will substantially dilute the likelihood that the commander will consider variance in attack timing to be a feasible option.¹²⁹ This is because it will rarely be the case that an attack will occur in isolation from a broader operational concept.¹³⁰ Thus, varying the timing of one component of the concept may likely disrupt the broader effort.

Therefore, effectuating the timing consideration requires that the battle staff constantly consider civilian risk mitigation as they develop their courses of action.¹³¹ In so doing, it is far more likely that timing considerations will be fully integrated into the range of courses of action presented to the commander for selection.¹³² This same approach should also extend to warnings. The feasibility of issuing warnings prior to an attack—to include when, how, and to whom—should be factored into all courses of action, and not just raised as a consideration after they have been developed.¹³³

Once courses of action are presented to the commander for selection, the overall objective of all precautionary measures—civilian risk mitigation—should also be a criteria considered when selecting a course of action.¹³⁴ If civilian risk mitigation precautions have already been integrated into the course of action development, then the ultimate consideration for the commander will be which course of action best achieves this mitigation effect.¹³⁵ While this cannot be the decisive selection consideration, including it among other selection criteria related to mission accomplishment will ensure that course of action selection fully incorporates these critical

128. *Id.* at III-3.

129. *See id.* at III-36.

130. *See id.* at III-3.

131. Protocol I, *supra* note 7, art. 57 (considering timing as part of the “means and methods of attack”); JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-77.

132. *See* JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-77.

133. Protocol I, *supra* note 7, art. 57.

134. JOINT PUBLICATION 3-60, *supra* note 69, at II-10.

135. *See id.* at G-1.

substantive precautionary measures.¹³⁶

This overview of a deliberate targeting process is not intended to suggest that this is the only methodology that could be effective in implementing LOAC obligations. Instead, it is merely intended to illustrate that the process for target decision-making and operational course of action selection is itself an essential component of implementing the law's substantive obligations. Quite simply, the efficacy of substantive rules is diluted absent an effective implementation process. Accordingly, integration and synchronization of the LOAC substance within the targeting process is essential to ensure mitigation of the harmful effects of combat.¹³⁷ Ultimately, the balance the law is intended to strike between humanitarian protections and the legitimate imperatives of warfare can only be genuinely achieved by emphasizing both substance and process.

Understanding this dual-pronged equation for LOAC compliance is the first step towards developing process "best practices" and assisting armed forces with less developed processes to adopt a more comprehensive approach to LOAC implementation. However, it must also be linked to a more expansive conception of precautionary measures, one that extends beyond the substantive obligations codified in Article 57 and includes within its scope the training and preparation of those responsible for employing deadly combat power during armed conflicts.¹³⁸

B. The Precautionary Value of a Comprehensive Understanding of the Relationship Between the LOAC and the Targeting Process

The efficacy of the operational planning process as a precautionary measure necessitates a comprehensive understanding of the targeting process. This process is designed to maximize the operational and tactical effect of a commander's combat power.¹³⁹ When properly understood and implemented, this process results in an inherent logical symmetry between the commander's operational objectives and the LOAC's humanitarian objectives.¹⁴⁰ In this sense, the more competent the commander and the

136. *See id.*

137. *See id.* at D-1.

138. *See* JOINT FIRES AND TARGETING HANDBOOK, *supra* note 106, at III-74.

139. *See* JOINT PUBLICATION 3-60, *supra* note 69, at I-2.

140. *See* Corn & Corn, *supra* note 51, at 357-77.

planning staff are in tailoring the use of force to achieve only legitimate military objectives, the more likely it is that combat power will be employed in a manner that mitigates the risk to civilians and civilian property, and inflicts incidental injury on such persons and things only when justified by operational and tactical imperatives.¹⁴¹

Thus, commanders and their staffs should be educated not only in the art of battle command, but also in this inherent symmetry.¹⁴² Integrating an understanding of what might best be called LOAC logic into professional military development will inevitably enhance the probability of LOAC compliance across the operational spectrum, especially in the targeting process.¹⁴³ It may also increase respect for the law through the resulting recognition that LOAC compliance rarely compromises the ability to achieve *legitimate* military objectives, and LOAC violations produce almost inevitable negative strategic consequences.¹⁴⁴ This integration should begin early in the military professional development process, no matter how extensive or minimal that process may be. It should also be a constant feature of all battle staff training events through the integration of realistic LOAC challenges in that training.

A key enabler for this integration is the availability of well-qualified legal advisors.¹⁴⁵ Providing such legal advisors to contribute to not only battle command, but also to training and professional development of the command and staff, adds flesh to the bones provided by Article 82 of Additional Protocol I.¹⁴⁶ In an obvious recognition that legal advisors contribute to LOAC compliance, Article 82 established the first treaty-based obligation to provide legal advisors to support military commanders.¹⁴⁷ This treaty obligation, however, is vague in terms of where these legal advisors should be integrated into the battle command process and of the required expertise and function of these legal advisors.¹⁴⁸

The precautionary value of legal advisors is, however, directly linked to their expertise in the LOAC and military operational art, their integration

141. *See id.* at 358.

142. *See id.* at 359–60.

143. *See id.* at 360.

144. *See id.* at 358.

145. *See* ICRC COMMENTARY, *supra* note 66, at 951.

146. *See id.* at 952.

147. *See* Protocol I, *supra* note 7, art. 82.

148. *See* ICRC COMMENTARY, *supra* note 66, at 949.

into operational battle staffs, and their contribution to the training and development of other military personnel, especially commanders and their staffs.¹⁴⁹ Conceptualizing the role of the legal advisor as one related not only to operational execution, but also planning and training, is symmetrical to the military lawyers' operational counterparts.¹⁵⁰ This is also consistent with the International Committee of the Red Cross (ICRC) Commentary to Article 82, which explains that developing effective training for the armed forces is an important function of the military legal advisor.¹⁵¹ The benefits from extensive legal advisor involvement in developing and monitoring LOAC challenges to integrate into the training process are numerous.¹⁵² First, it increases the likelihood that commanders and staff officers will develop an enhanced understanding of the relationship between the LOAC and the targeting process, thereby enabling them to act consistently with the law even when they are unable to rely on legal advice.¹⁵³ Second, it will inevitably enhance the legal advisors' understanding of the battle command process and appreciation of the operational and tactical challenges confronting commanders and their staffs.¹⁵⁴ This will, in turn, render legal advisors more competent in the delivery of advice during times of armed conflict, and enhance the advisors' credibility in the eyes of the warfighters they must advise.¹⁵⁵

Article 82 leaves the expertise, function, and integration of the legal advisor to national judgment.¹⁵⁶ This is not, however, a justification for states to adopt a minimalist approach to this LOAC compliance enabler.¹⁵⁷ Instead, the underlying purpose of Article 82 should compel states to endeavor to provide commanders with legal support and advice commensurate with the operational and tactical challenges they will

149. *See id.* at 952.

150. *See id.*; Corn, *supra* note 51, at 359.

151. *See* ICRC COMMENTARY, *supra* note 66, at 951.

152. *See id.* at 952.

153. *See id.*; Corn, *supra* note 51, at 360.

154. *See* ICRC COMMENTARY, *supra* note 66, at 951 (explaining that a good military advisor must have knowledge of military problems).

155. *See id.* at 952 (noting that effective assistance would include the credibility of the legal advisors).

156. *Id.* at 950 ("The conditions for the use of such personnel and the choice of the methods of training them are left to the discretion of the Parties to the Protocol.").

157. *See id.* at 949.

confront.¹⁵⁸ Commanders called upon to plan and execute contemporary military operations face an increasingly complex legal landscape.¹⁵⁹ It is, therefore, essential that legal expertise keep pace with this operational complexity.¹⁶⁰ The increasingly common integration of military lawyers into operational commands in many armed forces indicates that many states have recognized this imperative.¹⁶¹ These practices should be memorialized and emulated by other states.

One aspect of compliance with Article 82's legal advisor requirement is that military legal advisors be prepared for this demanding challenge through their own educational process.¹⁶² Ideally, this will involve some participation in military legal instruction focused on what the United States calls "operational law"—the integration of international and domestic law and policy considerations into the training, planning, and execution of military operations.¹⁶³ States that have developed such educational opportunities should encourage participation by legal advisors from other states; and nongovernmental programs, such as those at the Institute for International Humanitarian Law at San Remo,¹⁶⁴ should be continually refined to maximize the educational impact for all armed forces.

Combining legal advisors competent in both the LOAC and the relationship between the LOAC and military operations with a deliberate targeting process should be conceived as a precautionary measure.¹⁶⁵ Doing so will enhance the efficacy of substantive LOAC rules intended to mitigate risk to civilians and civilian property.¹⁶⁶

158. Protocol I, *supra* note 7, art. 82.

159. ICRC COMMENTARY, *supra* note 66, at 948.

160. *See id.* at 952–53.

161. *See id.* at 951 & n.13. *See generally* John J. Douglass & Thomas E. Workman, *The Educational Program for the Service Lawyer*, 31 FED. B.J. 7 (1972) (describing the extensive range of legal services available to the United States Armed Forces).

162. *See* ICRC COMMENTARY, *supra* note 66, at 950–51.

163. *See, e.g.*, HEADQUARTERS, U.S. DEP'T OF THE ARMY, PUB. NO. FM 27-100, LEGAL OPERATIONS 5 (1991), available at http://www.loc.gov/r/frd/Military_Law/pdf/legal_operations.pdf ("Operational law is the application of domestic, international, and foreign law to the planning for, training for, deployment of, and employment of United States military forces.")

164. *See* Giorgio Blais, *The International Institute of Humanitarian Law (San Remo) and Its International Military Courses on the Law of Armed Conflict*, INT'L COMMITTEE RED CROSS (Aug. 31, 1997), <http://www.icrc.org/eng/resources/documents/article/other/57jnmr.htm>.

165. *See generally* ICRC COMMENTARY, *supra* note 66.

166. *Id.*

IV. PROCESS AS AN ESSENTIAL PRECAUTIONARY MEASURE

The process utilized to identify, assess, and engage targets in combat is essential for effective mission execution.¹⁶⁷ It is equally essential for implementing the LOAC's balance between the necessity of employing destructive combat power and the humanitarian interest of mitigating the suffering produced by that employment.¹⁶⁸ At the individual soldier or combatant level, the target engagement process involves decision-making based on training and guidance provided by superior commanders.¹⁶⁹ The quality of this training and preparation of individual soldiers will inevitably influence the effectiveness of their adherence to the core LOAC obligations.¹⁷⁰ While it is impossible to guarantee that every soldier will comply with these obligations strictly in all situations—in other words, that there will never be a violation of the rules by individual combatants¹⁷¹—the entire notion of professional armed forces operating under responsible command presupposes a diligent effort to prepare combatants for the turmoil of the battlefield and the challenge of complying with obligations, such as distinction and proportionality, in the heat of battle.¹⁷² These “close fight” situations do not involve the type of complex or deliberate preattack analysis that occurs at higher levels of command, planning more complicated and synchronized engagements.¹⁷³ Nonetheless, several aspects of the process of LOAC compliance, even at this level, indicate why process is, in fact, a critical precautionary measure.¹⁷⁴

167. See, e.g., Corn & Corn, *supra* note 51, at 349–50.

168. *Id.* at 357–60.

169. See Blais, *supra* note 164.

170. See, e.g., Corn & Corn, *supra* note 51, at 376–77.

171. *Id.*

172. *Id.*; Victor Hansen, *What's Good for the Goose Is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 377–78 (2007).

173. See, e.g., HEADQUARTERS, U.S. DEP'T OF THE ARMY, PUB. NO. FM 7-0, TRAINING FOR FULL SPECTRUM OPERATIONS ¶ 1-28 (2008) [hereinafter FM 7-0], available at <http://usacac.army.mil/cac2/Repository/FM70/FM7-0.pdf> (noting “the fluid and disorderly conditions inherent in land operations”).

174. See *id.* (stating that training “conditions Soldiers to operate within the law of war and rules of engagement”).

A. *The Role of the Battle Staff/Planners*

The first step in implementing effective precautions is the process of training.¹⁷⁵ Although training is rarely discussed as a “process” or precautionary measure, in reality it is central to LOAC implementation and compliance.¹⁷⁶ As reflected in the Hague Convention of 1899,¹⁷⁷ and every LOAC treaty since that date that has defined either privileged belligerents or combatants,¹⁷⁸ being part of an organization that is subject to responsible command and complies with the laws and customs of war is an essential element of that lawful combatant status.¹⁷⁹ The organizational commitment and compliance to this law does not occur without inculcating members of the force in both the spirit and the letter of the law.¹⁸⁰ This occurs through the training process.¹⁸¹ Indeed, the training experience that the men and women undergo during this developmental process largely defines their transformation from civilian to soldier.¹⁸²

The extent to which the LOAC is explicitly and implicitly incorporated into training varies among Armed Forces, and even within Armed Forces among different units responsible for different principal wartime functions.¹⁸³ It should come as no surprise that the nature of the training provided to a fighter pilot would be significantly different than that provided to an infantry soldier. But regardless of where the soldier fits within the military organization, training is the fundamental foundation upon which the

175. *See, e.g., id.*

176. *See id.*

177. *See Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/150?OpenDocument> (last visited Nov. 10, 2014) (reproducing text of the Hague Convention of 1899).

178. *See Hansen, supra* note 172, at 351 (discussing Fourth Hague Convention of 1907 and its impact on subsequent international agreements governing the laws of war).

179. *See id.*

180. *See FM 7-0, supra* note 173, ¶ 1-28.

181. *See id.*

182. *See id.*

183. *See, e.g., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE 5100.77*, at 4, 6 (1998) [hereinafter DEP’T OF DEFENSE DIRECTIVE 5100.77], available at <http://biotech.law.lsu.edu/blaw/dd/dd/corres/pdf2/d510077p.pdf> (mandating that heads of “DoD Components” and “Commanders of Combatant Commands” implement “effective [LOAC compliance] programs” within their own organizations).

soldier forms his judgment as to what is and is not permissible conduct during combat.¹⁸⁴

Illustrative of the significance of LOAC training within the mosaic of compliance mechanisms incorporated into a military culture is the United States Department of Defense LOAC training mandate.¹⁸⁵ Adopted in the aftermath of the Vietnam conflict, this departmental-wide policy establishes the requirement that every member of the United States Armed Forces receive LOAC training at least annually, and, more generally, in a manner that is sufficient to enable them to fulfill their assigned functions in compliance with the law.¹⁸⁶ LOAC training, as a precautionary measure to enhance the probability of a legally sound military operation and to reduce the risk of LOAC violations, has risen steadily in significance since the adoption of this policy.¹⁸⁷ Today, LOAC training is incorporated in virtually all classroom and field training events in which U.S. Armed Forces participate.¹⁸⁸

This is a reflection of the recognition that, like any other battlefield task, LOAC implementation necessitates more than mere knowledge of the obligations.¹⁸⁹ Instead, military personnel at every level must be provided the opportunity to test their battlefield judgment and develop a genuine understanding of the relationship between the law and the execution of their

184. See, e.g., FM 7-0, *supra* note 173, ¶ 1-28.

185. See DEP'T OF DEFENSE DIRECTIVE 5100.77, *supra* note 183.

186. See HEADQUARTERS, U.S. DEP'T OF THE ARMY, REGULATION 350-1, ARMY TRAINING AND LEADER DEVELOPMENT app. G-21 (2014), available at http://www.apd.army.mil/pdffiles/r350_1.pdf; DEP'T OF DEFENSE DIRECTIVE 5100.77, *supra* note 183, at 2–3.

187. See generally Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 B.C. L. REV. 1185 (2013), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Training-Army-JA.pdf (describing the JAG training programs that have been created to comply with Department of Defense Directive 2311.01E); Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT'L L. 479, 483–84 (2003), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5200&context=faculty_scholarship (noting that “as the battlefield becomes increasingly flexible,” military commanders face a challenge in “retaining legal and political oversight in this fast-paced environment”); Mark S. Martins, *Deadly Force is Authorized, but Also Trained*, ARMY LAW., Sept.–Oct. 2001, at 1 (explaining the prevalence of LOAC training programs).

188. See David Lloyd Roberts, *Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections*, 82 INT'L L. STUD. 121, 129–31 (2006) (describing the training methodology used by the Armed Forces).

189. See *id.* at 129 (discussing the importance of training soldiers so that LOAC guidelines become second nature).

mission through the crucible of realistic training.¹⁹⁰ This explains why, for nearly two decades, military legal advisors, or judge advocates, have been incorporated as observer advisors in all of the major U.S. military training centers.¹⁹¹ These LOAC experts observe and critique the efficacy of the military legal advisors who participate in training events with their units at these venues.¹⁹² Perhaps more importantly, they ensure that challenging and realistic LOAC issues are incorporated into training scenarios and observe and critique the conduct of the military personnel confronted with these issues.¹⁹³

This process involves the expert input of members of the commander's staff.¹⁹⁴ These experts are responsible for contributing to the effective allocation of the limited resources available to any commander tasked with accomplishing a mission.¹⁹⁵ Indeed, resource management and synchronization are at the very core of the operational planning process,¹⁹⁶ which explains why "battle staffs" become increasingly more robust in direct proportion to the level of command they support, the volume of resources subject to the commander's control, and the complexity of the mission.¹⁹⁷

The composition of such staffs, along with their expertise, will vary from one level of command to another,¹⁹⁸ and from one national armed force

190. *See id.* at 129–31 (discussing options to train and test military personnel at different levels in realistic settings).

191. *See* HEADQUARTERS, U.S. DEP'T. OF THE ARMY, PUB. NO. FM 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY ¶ 1-2 (2013) [hereinafter FM 1-04], available at http://www.globalsecurity.org/military/library/policy/army/fm/1-04/fm1-04_2013.pdf.

192. *See id.* ¶ 4-11 (discussing the roles and responsibilities of military legal personnel in legal operations capacities).

193. *See id.*

194. *See id.* ¶ 2-14.

195. *See* HEADQUARTERS, U.S. DEP'T OF THE ARMY, PUB. NO. FM 101-5, STAFF ORGANIZATION AND OPERATIONS 1-3 (1997) [hereinafter FM 101-5], available at http://www.fs.fed.us/fire/doctrine/genesis_and_evolution/source_materials/FM-101-5_staff_organization_and_operations.pdf (stating that all members of a commander's staff must have sufficient "situational awareness" to enable the proper allocation of resources).

196. *See, e.g.,* Mack Borgen, *The Management and Administration of Military Legal Assistance Offices*, ARMY LAW., Apr. 1975, at 1, 7 ("Because of the constant shortage of [legal] personnel, resources, and facilities[,] thorough planning and effective management and administration take on a new importance.").

197. *See, e.g.,* FM 1-04, *supra* note 191, ¶ 4-4 ("[T]he brigade operational law team has been replaced by the more robust brigade legal section.").

198. *See, e.g., id.* ¶¶ 4-4 to 4-8.

to another.¹⁹⁹ But the core concept of reliance on staff expertise to assist in the process of “battle command” is central to all military operations.²⁰⁰ It is almost inconceivable that a single individual could manage the complexity of planning, executing, and assessing military operations beyond the company level (and even at this level, noncommissioned officers will often play a functional “staff” role) without the assistance of a battle staff.²⁰¹

The inputs made by a battle staff and the process within a military command implemented to maximize the effects of these inputs makes a critical contribution to LOAC compliance.²⁰² In this sense, this staff function and process is itself a precautionary measure.²⁰³ Integrating a legal advisor into the battle staff enhances the significance of the staff function and process as a precautionary measure.²⁰⁴ This improvement occurs because the legal advisor is expected to ensure LOAC considerations are integrated into the operational planning and execution process.²⁰⁵ However, there are two significant reasons why it is a mistake to assume that the precautionary value of a battle staff is contingent on the inclusion of a legal advisor.²⁰⁶ First, integration of such a legal officer at the operational and tactical level of command remains the exception, and not the rule, for most armed forces.²⁰⁷ Second, and perhaps more importantly, LOAC compliance

199. See, e.g., FM 101-5, *supra* note 195 (outlining U.S. Army staff organization and functions); P.K. MALLICK, CTR. FOR LAND WARFARE STUDIES, STAFF SYSTEM IN THE INDIAN ARMY: TIME FOR CHANGE (2011), available at http://www.claws.in/images/publication_pdf/1316148326MP%2031%20For%20Web.pdf (reviewing history of battle staff system in various militaries, and proposing reforms of Indian Army battle staff organization); Jacques Hamel, *The Command and Staff System in the Information Age: Is the Continental Staff System Dead?*, ARMY DOCTRINE & TRAINING BULL., Summer 1998, at 34, available at <http://publications.gc.ca/collections/Collection/D12-9-1-1E.pdf> (discussing Canadian Army battle staff organization and philosophy).

200. See, e.g., Hamel, *supra* note 199, at 34–35; see also FM 1-04, *supra* note 191, ¶ 1-3 (“Judge advocates . . . advise commanders on military justice matters and issues related to the good order and discipline of the force.”).

201. See, e.g., Hamel, *supra* note 199, at 34–35; FM 101-5, *supra* note 195, at 1-3.

202. See, e.g., FM 1-04, *supra* note 191, ¶¶ 7-8.

203. See, e.g., Roberts, *supra* note 188, at 129.

204. See, e.g., FM 1-04, *supra* note 191, ¶¶ 4-1 to 4-9.

205. See, e.g., *id.* ¶ 4-6.

206. See Roberts, *supra* note 188, at 129–31 (discussing importance of training in inculcating adherence to the laws of war).

207. See ADVISORY SERV. ON INT’L HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS, LEGAL ADVISERS IN ARMED FORCES 2 (2003), available at <https://www.icrc.org/en/download/file/1043/legal-advisers-armed-forces.pdf> (noting that signatories to the 1977 Additional Protocols to the 1949 Geneva Conventions should integrate legal advisors into “higher levels of command” or

has never been considered contingent on the presence and advice of a legal officer.²⁰⁸ Instead, it is the commander—and by implication the battle staff that supports the commander—who is ultimately responsible for the integration and implementation of LOAC obligations into every phase of the military operation.²⁰⁹ Accordingly, emphasizing the responsibility of staff personnel and the functions they perform during the planning process as a LOAC precautionary measure is consistent with the LOAC's core normative vision that responsible command is central to LOAC compliance.²¹⁰

B. Training and Article 82 of Additional Protocol I

Additional Protocol I's inclusion of an article imposing an obligation to make legal advisors available to armed forces engaged in armed conflict reflects such a vision.²¹¹ This was a new and important obligation.²¹² However, both the text of Article 82 and the associated ICRC Commentary reflect two important realities related to this new obligation.²¹³ First, the "when and where" of this obligation is vested in the discretion of the State party.²¹⁴ Second, the absence of a legal advisor in no way releases a commander from his primary and constant obligation to ensure respect for and compliance with the LOAC.²¹⁵

Article 82 provides,

The High Contracting Parties at all times, and the Parties to the

"perhaps brigade or regimental level," depending on the advisor's role).

208. See, e.g., Roberts, *supra* note 188, at 129–31.

209. See *id.* at 126 ("Commanders must believe in the law and demonstrate by their interest and emphasis on training in peacetime, and, of course, by their behavior in battle that they respect the law.").

210. See *id.* at 130 (discussing the necessity of training staff officers in upholding international law during operations).

211. See Protocol I, *supra* note 7, art. 82.

212. See, e.g., ICRC COMMENTARY, *supra* note 66, at 950–51 (discussing novelty of adding legal advisors to military staffs).

213. See Protocol I, *supra* note 7, art. 82; ICRC COMMENTARY, *supra* note 66, at 950–51.

214. See, e.g., ICRC COMMENTARY, *supra* note 66, at 949 ("[T]he content of the obligation and the extent of the measures to be taken can certainly vary from one country to another, depending on the importance of the role which these legal advisers are called upon to play.").

215. See Protocol I, *supra* note 7, art. 82; see also ICRC COMMENTARY, *supra* note 66, at 950 ("[T]he weight and obligation of [LOAC] implementation and development rests primarily on the shoulders of those who exercise military command in the field.").

conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.²¹⁶

Note the numerous qualifiers.²¹⁷ First, the obligation is applicable only during times of armed conflict.²¹⁸ This requirement is unfortunate, as the efficacy of legal support to military operations is unquestionably enhanced by integrating that support into training and planning opportunities, events that usually occur during times of peace.²¹⁹ Incorporating legal advisors into the battle staff during these events enhances the overall appreciation of LOAC obligations throughout the command and builds personal relationships between the legal advisor, the commander, and the battle staff that enhance the efficacy of legal support during armed conflict.²²⁰ In short, limiting this obligation only to times of actual armed conflict is fundamentally inconsistent with the mantra, “train like you fight.”²²¹

The second qualifier is one of necessity.²²² When, and at what level of command, is such legal support necessary? The answer to this question is left to the discretion of the parties to a conflict.²²³ Closely related is the discretion to decide “the appropriate level” of command where such advice is necessary.²²⁴ The “watering down” impact of these qualifiers is acknowledged in the ICRC Commentary to Article 82, which notes,

The proposal to create a post of legal adviser to military

216. Protocol I, *supra* note 7, art. 82.

217. *See id.*

218. *Id.*

219. *See, e.g.,* Roberts, *supra* note 188, at 126, 129–31 (emphasizing importance of LOAC training, and arguing that “[i]t is in peacetime that we have time to consider the law; once the balloon goes up it is then too late”).

220. *See, e.g., id.* at 122 (“[E]ncouraging armed forces to integrate the law of armed conflict into their training and operations . . . is based on initial confidence building . . . followed by training courses . . .”); *see also* FM 1-04, *supra* note 191, ¶¶ 4-1 to 4-2 (“JAGC personnel at every level of command are expected to forge and maintain strong working relationships Working relationships are the key to success.”).

221. *See, e.g.,* Roberts, *supra* note 188, at 129–31.

222. *See* Protocol I, *supra* note 7, art. 82.

223. *See id.*; ICRC COMMENTARY, *supra* note 66, at 949.

224. *See* ICRC COMMENTARY, *supra* note 66, at 949.

commanders was made at the beginning of the preliminary discussions preceding the Diplomatic Conference. Following the suggestions presented during the two sessions of the Conference of Government Experts it was introduced in Article 71 of the draft presented by the ICRC to the Diplomatic Conference, in a much stronger form than that of the article under consideration here. During the Conference itself its usefulness was not contested. However, whether it was because of a concern that adequate personnel would not be available, or the possibility that legal advisers attached to the armed forces would be assigned supervisory functions which might affect the hierarchy which is indispensable for the proper functioning of military institutions, or whether it was simply the fear of being bound by unduly strict rules on this point, consensus was finally only achieved on a text which was considerably watered down as compared with the original proposal.²²⁵

The Commentary emphasizes, however, that this provision was nonetheless an important development in the law, as it acknowledged the value of legal advisers in assisting commanders to implement an increasingly complex area of law.²²⁶ Furthermore, while the “when, where, and how” of implementation was left to each country’s discretion, the obligation was clear: to ensure the availability of qualified legal advisors:

Article 82 creates the obligation for the Parties to the Protocol to adopt all appropriate regulations to ensure that legal advisers are available to the armed forces. The fact that the conditions for the use and allocation of these advisers are regulated in particularly flexible terms (“when necessary,” “at the appropriate level”) does not in any way alter the fact that the creation of the post of legal adviser is obligatory.²²⁷

It cannot be seriously questioned that establishing this obligation was indeed an important development in ensuring LOAC compliance.²²⁸

225. *See id.* at 948–49 (emphasis added) (footnotes omitted).

226. *See id.* at 949 (“[T]he obligatory character of the present provision was maintained.”).

227. *Id.*

228. *See id.* at 950–51.

However, as the Commentary indicates, Article 82 could have gone much further.²²⁹ More attention should, therefore, be devoted to identifying best practices for both integrating legal advice into the battle command process²³⁰ and for ensuring that the process itself maximizes LOAC compliance, with or without the presence of a legal advisor.²³¹

Article 82 does not address the role of the battle staff or the battle command process as it relates to LOAC compliance (although it does recognize the value of legal advice in this process).²³² However, the relationship between the function of the battle staff and LOAC compliance is reflected in Article 57 of Additional Protocol I, the article addressing the obligation to take precautionary measures to mitigate the risk to civilians and civilian property.²³³ That article imposes obligations to take feasible precautions on both “those who plan or decide upon an attack.”²³⁴ The terms “plan or decide” suggest a scope of obligation that extends beyond the commander and includes the commander’s battle staff.²³⁵ Interestingly, the ICRC Commentary to Article 57 is silent on the significance of this scope,²³⁶ as is the ICRC’s Customary International Humanitarian Law Study and database.²³⁷

Planning for the use of combat power is, however, a quintessential function of a battle staff.²³⁸ Accordingly, Article 57’s reference to “those

229. *See id.* at 948–49.

230. *See id.* at 951 (“[T]he . . . countries [that] do not (or do not yet) have any . . . facilities [for training military legal advisors] . . . will have to create them.”).

231. *See, e.g.,* Roberts, *supra* note 188, at 122 (proposing steps in LOAC training preliminary to the establishment of legal advisors in a military).

232. *See* Protocol I, *supra* note 7, art. 82 (“[T]he Parties to the conflict in time of armed conflict . . . shall ensure that legal advisers are available . . .”).

233. *See id.* art. 57.

234. *See id.*

235. *See, e.g.,* Roberts, *supra* note 188, at 129–31 (arguing for thorough LOAC training at all levels of command); *see also* FM 1-04, *supra* note 191, ¶¶ 7-8 (“As the commander’s subject matter expert on domestic and international law, the law of war, and the protection of noncombatants, the judge advocate helps the commander draft effective ROE [Rules of Engagement].”).

236. *See* ICRC COMMENTARY, *supra* note 66, at 677–89.

237. *See Customary Law*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> (last visited Nov. 13, 2014) (providing overview of ICRC’s International Humanitarian Law Study); *Customary IHL*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/customary-ihl/eng/docs/home> (last visited Nov. 13, 2014) (providing updated version of the ICRC Study).

238. *See, e.g., supra* notes 194–97 and accompanying text.

who plan” in relation to the obligation to take feasible precautions is an implicit, if not explicit, recognition that the process of operational planning is indelibly linked to ensuring LOAC compliance, most notably in relation to the application of combat power.²³⁹ It is unfortunate that so little attention has been paid to identifying how the staff planning process may contribute to effective implementation, although this may be explained by the difficulty of identifying best practices for a process that varies extensively among armed forces.²⁴⁰ Nonetheless, certain core components of that process can be considered essential to effectively implementing the precautions obligation.

C. *Information as a Precautionary Measure*

Targeting, by its very nature, is intended to produce strategic, operational, or tactical effect.²⁴¹ It is therefore axiomatic that the commander or other individual responsible for target selection and engagement—whether deliberate or time-sensitive—bases the decision on available information.²⁴² In operational terms, this function is the intelligence input into the targeting process.²⁴³ This input can be highly complex and comprehensive, such as that provided to targeting decision-makers planning an attack against a high value target,²⁴⁴ or equally basic and minimal, such as the time-sensitive battlefield decision to engage a target.²⁴⁵

239. See Protocol I, *supra* note 7, art. 57; see also *supra* notes 202–10 and accompanying text (discussing the role of battle staff in helping to ensure LOAC compliance during military operations).

240. See, e.g., sources cited *supra* note 199 (reviewing variation in battle staff organization and philosophy among different militaries).

241. See, e.g., *Chapter IV: Targeting*, FED’N AM. SCIENTISTS, <http://fas.org/irp/doddir/dod/jp3-55/3-55ch4.htm> (last visited Nov. 13, 2014). In classifying military targets,

[a]ctions that influence the overall war effort or political objectives are classified as strategic. . . . Operational targets are those targets deemed critical to the enemy’s capability to conduct successful campaigns. Actions that produce immediate or near-term effects on the battlefield or to current operations are classified as tactical.

Id.

242. See, e.g., *id.* (stating that the identification step “involves recognizing and classifying targets in sufficient detail to allow decisions to be made”).

243. See *id.*

244. See, e.g., JOINT PUBLICATION 3-60, *supra* note 69, at II-19.

245. See, e.g., *id.* at I-5. The term “time sensitive” may belie the true nature of such decisions. Consider a soldier who comes under fire and must immediately return fire, or a junior combat leader

However, regardless of how time-sensitive the decision process is, or where along the spectrum of comprehensiveness the information falls, all combatants bear an obligation to consider all available information prior to making the engagement decision.²⁴⁶ Considering the information reasonably available—to the best of the individual’s ability under the circumstances prevailing at the time—is a key component of reasonable targeting decisions.²⁴⁷ Put another way, a targeting error resulting from the failure to consider information reasonably available is a basis to characterize the error as a LOAC violation.²⁴⁸

This obligation to gather and assess all reasonably available information prior to target engagement is explicitly imposed by Article 57, which first requires “constant care” to spare civilians and civilian objects from the adverse effects of hostilities, and then explicitly requires targeting decision-makers to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives”²⁴⁹

While Article 57 does not explicitly reference consideration of “best available information,” the obligation to “do everything feasible to verify” the nature of a proposed target unquestionably requires such consideration.²⁵⁰ So much is confirmed by the ICRC Commentary, which notes:

who must make a snap judgment to lay suppressing fire on a suspected enemy position to facilitate a movement of other forces, or an attack aviation pilot who identifies a fleeting opportunity to engage an enemy. *See, e.g.,* Roberts, *supra* note 188, at 127 (“[T]here are sometimes severe difficulties and pressures placed upon a soldier in battle that might incline them to disregard the rules they are supposed to obey. . . . This must be controlled by good training, and good clear orders which are enforced by good commanders at all levels.”). In all these situations, the targeting decision may be genuinely split-second in nature. *See id.* Nonetheless, every combatant is required to make that decision based on LOAC targeting principles, which will be facilitated through the training process. *See id.* at 129–31.

246. Paragraph 2(i) of Article 57, Additional Protocol I, states that the Parties shall:

[D]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

See Protocol I, *supra* note 7, art. 57.

247. *See id.*; *see also* ICRC COMMENTARY, *supra* note 66, at 680–81 (discussing importance of gathering all reasonably available information before carrying out a military attack).

248. *See* ICRC COMMENTARY, *supra* note 66, at 680–81.

249. Protocol I, *supra* note 7, art. 57.

250. *See id.*; ICRC COMMENTARY, *supra* note 66, at 680–81.

Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information and if need be give orders for further reconnaissance to those of their subordinates and those responsible for supportive weapons (particularly artillery and airforce) whose business this is, and who are answerable to them.²⁵¹

Considered a customary international law rule, it is only logical that the LOAC impose this “best available information” obligation in relation to implementing the principle of distinction.²⁵² What is perhaps more important is how Article 57 impacts the nature of the information that should be incorporated into the targeting decision process.²⁵³

Intelligence assessments are normally intended to identify enemy capabilities, vulnerabilities, and activities.²⁵⁴ This focus did not traditionally include consideration and analysis of civilian risk.²⁵⁵ However, if, as proposed in this article, the targeting process itself is conceived as a precautionary measure, the scope of intelligence collection and analysis must be understood to include a continuing obligation to assess civilian considerations of the military operation in order to facilitate the commander’s assessment of civilian risk associated with targeting decisions.²⁵⁶ While this expanded focus may, in fact, be more common in relation to contemporary military operations, most notably counterinsurgency operations, compliance with the LOAC obligation to mitigate civilian risk through implementation of substantive obligations, such as distinction, proportionality, and other substantive precautions, necessitates incorporating such an expansion into military intelligence doctrine.²⁵⁷

251. See ICRC COMMENTARY, *supra* note 66, at 680.

252. See *id.* at 680–81.

253. See Protocol I, *supra* note 7, art. 57.

254. HEADQUARTERS, U.S. DEP’T OF THE ARMY, PUB. NO. FM 2-0, INTELLIGENCE ¶¶ 1-69 to 1-72 (2010), available at <http://fas.org/irp/doddir/army/fm2-0.pdf>.

255. See ICRC COMMENTARY, *supra* note 66, at 680–81.

256. See *id.*

257. See, e.g., *id.* at 682 (“What is required of the person launching an offensive is to take the

Article 57 is an important recognition of this requirement.²⁵⁸ However, Article 57 does not address where and how this information should be included in the targeting process—it does not indicate who on the battle staff is responsible for providing this information to the commander or where that information is ideally integrated into the military decision-making process.²⁵⁹ As a practical matter, the failure to address these aspects of the obligation (which in fairness was almost certainly not feasible due to the divergent methodologies used by the numerous state parties involved in negotiating and adopting Article 57) is problematic.²⁶⁰ This failure is problematic because defining the *obligation* to consider information is only as effective as the *process* that is used to ensure the obligation is implemented.²⁶¹

This failure is perhaps the most obvious example of why the targeting process itself must be viewed as a precautionary measure.²⁶² As noted above, in the context of military operations, commanders rely on subordinates to provide essential information.²⁶³ What falls within each subordinate's "information responsibility" is a matter of both doctrine and practice.²⁶⁴ In some armed forces, there is a staff element focused specifically on civilian-related issues,²⁶⁵ and ideally this element would provide civilian risk considerations to the commander. However, this staff element is not a universal aspect of military operations.

necessary identification measures in good time in order to spare the population as far as possible.”).

258. See Protocol I, *supra* note 7, art. 57; ICRC COMMENTARY, *supra* note 66, at 680–82.

259. See Protocol I, *supra* note 7, art. 57; ICRC COMMENTARY, *supra* note 66, at 678–89.

260. See, e.g., ICRC COMMENTARY, *supra* note 66, at 679 (discussing the “differences of opinion” among the state parties, “mainly related to the very heavy burden of responsibility imposed by this article on military commanders”).

261. See *id.* (noting that many state parties considered Article 57’s provisions “fairly broad” and that some “favoured a greater degree of precision . . . , so that anyone violating the provisions would know that he was committing a grave breach”).

262. See *id.* at 680–81.

263. See *id.* at 680 (“Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature.”).

264. See *id.* at 681 (“[T]he high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged.”).

265. See, e.g., HEADQUARTERS, U.S. DEP’T OF THE ARMY, PUB. NO. FM 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS ¶ 2-61 (2014), available at http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm6_0.pdf (discussing the role of Assistant Chief of Staff in logistical operations, including working with the staff judge advocate in identifying restrictions on the use of civilians in sustainment operations).

Implementing Article 57's mandate therefore requires emphasizing an obligation to constantly assess risk to civilians and civilian property as part of the military decision-making process.²⁶⁶ This responsibility should not be left to chance. Instead, doctrinal inclusion of "civilian consideration" into the targeting process at every level of command should be emphasized as a critical enabler for effective battle command.²⁶⁷ At a bare minimum, this responsibility should fall to the intelligence element of a battle staff in the absence of an element specifically responsible for civilian-related issues.²⁶⁸ Ultimately, the precautionary effect of Article 57 will be enhanced as doctrine and practice among all armed forces formalizes integration of civilian considerations into the battle command process.²⁶⁹ This will produce two very positive outcomes.²⁷⁰ First, it will enhance the likelihood that commanders are provided with the best available information to allow them to focus their targeting effects on only lawful military objectives and make credible good faith judgments that attack is justified even after considering the civilian risk, or that the risk requires either adopting an alternate attack option or cancelling the attack altogether.²⁷¹ Second, as subordinates witness the influence of this consideration into the battle command process, it will contribute to the development of a more comprehensive understanding of distinction and proportionality obligations throughout the armed forces.²⁷²

D. Presumptions and Burdens

The nature, locus, and weight of a presumption, along with the burden to rebut a presumption, are both important components in protecting the underlying interest advanced by a substantive rule of law.²⁷³ One need only consider the presumption of innocence and the associated burden of proof

266. See ICRC COMMENTARY, *supra* note 66, at 679–81.

267. See *id.* at 684.

268. See Corn & Corn, *supra* note 51, at 342.

269. See ICRC COMMENTARY, *supra* note 66, at 679–84.

270. See *id.*

271. See *id.* at 682–83.

272. See, e.g., Roberts, *supra* note 188, at 126.

273. See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5126 (2d ed. 2005).

required to rebut this presumption.²⁷⁴ This presumption operates to protect individuals from false conviction by imposing a starting conclusion of innocence and by placing the burden on the state to rebut this presumption with proof beyond a reasonable doubt.²⁷⁵

The protection of civilians in war is advanced by a similar presumption. Article 48 of Additional Protocol I codifies the customary international law rule of distinction, imposing an obligation upon belligerents to distinguish between lawful objects of attack and civilians, and allowing deliberate attack only against lawful targets.²⁷⁶ In order to facilitate implementation of this basic rule, Article 50 of Additional Protocol I defines civilians, employing a negative definition: a civilian is any person who does not qualify as a combatant (as the result of falling within one of several categories of individuals entitled to prisoner of war status upon capture).²⁷⁷ But what of situations where it is unclear whether a potential object of attack is a civilian or a combatant? Article 50 addresses this possibility by imposing a controlling targeting premise: “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”²⁷⁸

The ICRC Commentary associated with this provision indicates that the ICRC initially proposed use of the term “presumption,” but concerns over the meaning of the term led to adoption of “considered” in the actual language of Article 50.²⁷⁹ This wording need not detract from the true nature of the obligation imposed, and in this regard, it is important to note that Article 50 was establishing a rule of operational and tactical regulation, not judicial resolution.²⁸⁰ In this context, utilizing common sense lay terminology to manifest the intent of the rule seems logical.²⁸¹ However, this does not really alter the fact that the *effect* of the rule is basically identical to that of a presumption, because it imposes a starting conclusion and then allocates a burden on a decision-maker to rebut that starting conclusion

274. *Id.*

275. *Id.*

276. *See* Protocol I, *supra* note 7, art. 48.

277. *See id.* art. 50.

278. *See id.*

279. *See* ICRC COMMENTARY, *supra* note 66, at 611.

280. *See id.* at xxvii (noting that Protocol I was intended to apply to the LOAC).

281. *See, e.g., id.* (providing strict definitions for only a handful of terms used in the ICRC COMMENTARY).

before reaching the alternate conclusion.²⁸² According to the Commentary, “[A]rticle 50 of the Protocol concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be [deliberately] attacked.”²⁸³

This aspect of Article 50 certainly imposes an obligation of greater “caution” when considering an attack on an individual who does not clearly fall into the category of combatant.²⁸⁴ In so doing, it should be considered among the range of provisions falling under the umbrella of precautionary measures.²⁸⁵ The protection of the civilian population is enhanced by the imposition of this practical presumption in favor of civilian status and the accordant burden on the attacking force to rebut this presumption before launching an attack.²⁸⁶ This rule should, ideally, lead to a more determined effort to gather additional information when such doubt arises.²⁸⁷ In so doing, it will contribute to more accurate targeting decisions.²⁸⁸ Of equal importance, it will emphasize to members of the armed forces the inherent risk of launching an attack without first fully assessing the situation, whether in a deliberate or time-sensitive targeting context.²⁸⁹ Constant emphasis of the value and importance of maximum situational awareness, when coupled with a good-faith commitment to limit the harmful effects of combat to only legitimate targets, is one of the most significant civilian risk mitigation measures practically available.²⁹⁰

282. *See id.* at 611.

283. *See id.* at 612.

284. *See id.*

285. *See id.* (presuming that, in any doubtful circumstance, individuals are civilians and should not be attacked).

286. *See* Protocol I, *supra* note 7, art. 51 (stating that any attack which has excessive civilian risk in comparison to the military advantage is considered an indiscriminate attack).

287. *See* ICRC COMMENTARY, *supra* note 66, at 620 (stating that when there is doubt as to the civilian risk, more information should be gathered).

288. *See, e.g., id.*

289. *See id.* at 680 (discussing Article 57 of Protocol I and its requirement of precautionary measures when launching attacks).

290. *See id.* at 626.

E. Civilian Casualty Benchmarks

It is clear from the foregoing that effective implementation of the substantive LOAC rules established to protect civilians from the harmful consequences of armed conflict involves significant procedural mechanisms.²⁹¹ Ultimately, however, the combined effect of these substantive and procedural precautionary measures cannot guarantee that civilians will never be exposed to the harmful effects of combat power.²⁹² Instead, the history of modern warfare indicates that even the best efforts to mitigate the risk to civilians are insufficient to completely eliminate such exposure.²⁹³

The LOAC proportionality rule (or principle) is a direct response to this reality.²⁹⁴ This rule prohibits an otherwise lawful attack when the anticipated incidental injury or collateral damage is assessed as excessive in comparison to the concrete and direct anticipated military advantage.²⁹⁵ This substantive rule is obviously a critical component of the mosaic of rules and processes for the protection of civilians and civilian property.²⁹⁶ However, because what qualifies as “excessive” is inevitably dependent on all the facts and circumstances related to an attack,²⁹⁷ it is especially challenging to implement this principle, and perhaps even more challenging to rely on it as a basis for imposing criminal responsibility on an attacking commander.²⁹⁸

291. *See supra* Part IV.D.

292. *See, e.g.,* Corn & Corn, *supra* note 51, at 345 (“[I]t has become almost inevitable that civilians or civilian property will be in close proximity to targets that are identified for attack with indirect fires.”).

293. *See, e.g., supra* Part IV.A–D.

294. *See* Protocol I, *supra* note 7, art. 51 (defining as indiscriminate “an[y] 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”).

295. *See id.*; *see also* RICHARD P. DI MEGLIO ET AL., THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 147 (Andrew Gillman & William Johnson eds., 2012) [hereinafter LAW OF ARMED CONFLICT DESKBOOK], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf (describing the scope of United States adherence to certain of the proportionality provisions set forth in Protocol I).

296. *See* LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 149 (emphasizing the importance of taking precautionary measures for the protection of civilians).

297. *See id.*

298. *See, e.g., id.* at 150 (stating that compliance with Protocol I requires a commander to act “reasonably” in light of all the circumstances).

One response to the inherent uncertainty associated with the proportionality rule has been an interesting blending of substance and process: establishing civilian casualty “benchmarks” for permissible targeting decisions.²⁹⁹ Pursuant to this methodology, higher levels of command establish limits on the maximum number of anticipated civilian casualties a subordinate commander may permissibly risk through a targeting judgment.³⁰⁰ When the anticipated number of civilian casualties is below the benchmark, the subordinate commander is permitted to make the proportionality judgment; when the number exceeds the benchmark, the subordinate commander is prohibited from authorizing the attack and must instead request authorization from a level of superior command empowered to authorize such an attack.³⁰¹ Thus, as the anticipated risk to civilians and civilian property increases, so does the level of command authorized to approve the attack.³⁰²

The proportionality principle does not require limiting the level of command authorized to make a proportionality judgment based on the anticipated number of civilian casualties.³⁰³ Nothing in Article 51 or 57 of Additional Protocol I, nor the associated ICRC Commentary, indicates such a requirement.³⁰⁴ This requirement is, instead, a *procedural* mechanism imposed to enhance the quality, and by implication the credibility and legitimacy, of proportionality judgments.³⁰⁵

This does not mean, and must not be interpreted to mean, that the amount of permissibly incidental injury or collateral damage resulting from an attack increases in relation to the level of command authorizing the attack.³⁰⁶ Of course, whether or not anticipated risk to civilians and civilian property is excessive in relation to the anticipated military advantage is in no

299. See Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 750–53 (2014) (discussing the “Non-Combatant Casualty Cut-Off Value”).

300. See *id.* at 750–51.

301. See *id.* at 751–52.

302. See *id.* at 750–53.

303. See *id.* at 758.

304. See Protocol I, *supra* note 7, arts. 51, 57; ICRC COMMENTARY, *supra* note 66, at 615–28, 678–88; see also McNeal, *supra* note 299, at 750 (“Depending on the theater of operations and the agency conducting the operation, pre-established guidelines will specify *who* the approval authority is, which will vary from theater to theater and agency to agency.” (emphasis added)).

305. See McNeal, *supra* note 299, at 758–59.

306. See *id.* at 750–53.

way influenced by the level of command ordering the attack.³⁰⁷ Nor does this mechanism automatically justify or authorize attacks where the anticipated risk to civilians or civilian property falls below the established benchmark.³⁰⁸ In such situations, it merely empowers commanders at a designated level of command to make the proportionality judgment; a judgment that must always be individually based on all available information.³⁰⁹ In short, this “authorized level of command” method does not result in any per se proportionality outcomes.³¹⁰

Accordingly, this method of enhancing compliance with proportionality in no way alters or modifies the substantive legal obligation to consider, on a case by case basis, whether an otherwise lawful attack will produce excessive civilian casualties, thereby rendering the attack indiscriminate and unlawful.³¹¹ Instead, this “level of authorized command” method of implementing the proportionality rule is a procedural tool to enhance the ultimate substantive proportionality judgment.³¹² This is the result of several factors.³¹³ First, once elevated to a higher level of command,³¹⁴ the commander empowered to make the judgment will be more experienced. Second, because a commander’s battle-staff resources normally increase in size and experience at each progressively higher level of command, the staff’s input into the proportionality analysis will also become more comprehensive. This consideration is especially relevant in relation to the military legal advisor’s input. In some situations, only higher echelon commanders may benefit from the military legal advisor’s support. Additionally, even when legal advisors are assigned to relatively low echelons of command (for example, the U.S. practice of assigning operational law advisors to battalion level command),³¹⁵ the number and

307. See ICRC COMMENTARY, *supra* note 66, at 615–28.

308. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 149 (“Rules of engagement may require elevating the decision to attack if collateral damage is anticipated to exceed thresholds established by higher-level commanders.”).

309. See *id.* at 150.

310. See McNeal, *supra* note 299, at 750–53.

311. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 149.

312. See McNeal, *supra* note 299, at 758–59.

313. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 149.

314. See *id.*

315. See FM 1-04, *supra* note 191, ¶ 4-6.

experience of legal advisors will normally increase symmetrically with each echelon of command.

There is another subtle, but perhaps most important, benefit of elevating certain proportionality judgments to higher echelons of command: an increasingly more expansive operational perspective. Commanders and staffs at all levels of command focus inherently on their operational situation. As a result, commanders' operational focuses will inevitably expand or contract depending on their level of command. Proportionality judgments have profound tactical and strategic consequences.³¹⁶ Where a commander authorizes an attack anticipating it will produce civilian casualties and the attack does in fact do so, those casualties may become a source of condemnation by external observers, become a motivation for resistance by the enemy and civilian population, or become a source of motivation for enemy forces.³¹⁷ Any of these consequences poses significant strategic risk for the overall military effort.³¹⁸ In contrast, where a commander decides to forego an attack because of anticipated risk to the civilian population, the decision may compromise tactical effectiveness, increase the risk to friendly forces, and make mission accomplishment more difficult.³¹⁹

Broadening the decision-making commander's operational perspective should logically enhance the ability to assess these tactical and strategic consequences inherent in proportionality judgments. Thus, as this perspective increases at each higher echelon of command, so too does the acceptable degree of risk associated with a proportionality judgment.³²⁰

Finally, it is a simple axiom of military organizations that the range of combat resources increases with each higher level of command.³²¹ This is a highly significant benefit of reserving proportionality judgments to higher

316. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 147–50.

317. See *id.* at 150–51.

318. See *id.* at 147.

319. See *id.* at 147–50.

320. See McNeal, *supra* note 299, at 739 (discussing risk assessment undertaken by the higher echelon of command when considering a proportionality judgment).

321. See, e.g., Richard J. Dunn, III, *The Impact of a Declining Defense Budget on Combat Readiness*, HERITAGE FOUND. (July 18, 2013), <http://report.heritage.org/bg2828> (“Combat operations of almost any scale are exceptionally complex, requiring integration and synchronization of myriad activities ranging from individual actions to coordinated movements by large, geographically dispersed organizations.”).

levels of command, because as the judgment is progressively elevated, the commander entrusted with the judgment will be able to consider a broader range of alternative targeting options. As a result, a difficult proportionality judgment for a lower level commander may be obviated at a higher level of command because *that* commander may utilize an alternate method or means of attack to avoid the proportionality issue altogether, an option that did not exist for the commander of the subordinate unit.³²² Thus, this procedural tool is related to the “alternate option” precautionary measure by providing an increased range of options whenever the anticipated risk to civilians exceeds a designated benchmark.³²³

All of these consequences of a “civilian casualty authorization” benchmark contribute to the mitigation of civilian risk, and therefore, further the precautions objective.³²⁴ Accordingly, this hybridization of the substantive proportionality rule and the process for its implementation is a logical measure to advance the LOAC’s underlying balance, enhancing the efficacy of proportionality analysis as a precautionary civilian risk mitigation measure.³²⁵ While nothing in this implementation approach alters or modifies the inherent balance between necessity and humanity advanced by the proportionality rule, this implementation approach more effectively aligns assumption of risk with reasoned command judgment in a manner that might not occur where implementation is purely ad hoc in nature.³²⁶

V. CONCLUSION

Mitigating the risk to civilians resulting from armed conflict is a core purpose of the LOAC.³²⁷ To that end, two universally recognized fundamental substantive legal principles evolved over time: distinction and proportionality. In accordance with these two principles, belligerents may only deliberately attack those people, places, and things that qualify as lawful objects of attack, and must at all times distinguish civilians and civilian property from these lawful targets. Furthermore, belligerents must

322. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 295, at 149.

323. See *id.*

324. See McNeal, *supra* note 299, at 750–53.

325. See *id.*

326. See *id.*

327. See Corn & Corn, *supra* note 51, at 348.

forego attack on such targets whenever the collateral or secondary effect on civilians or civilian property is anticipated to be excessive in relation to the anticipated military advantage that will be produced by the attack.

These two fundamental principles, codified in Additional Protocol I,³²⁸ remain the substantive foundation for targeting legality analysis at all tactical and operational levels. Mitigating the risk to civilians does not, however, depend exclusively on these substantive rules. Instead, precautionary measures provide an equally significant, and at times perhaps even more significant, contribution to this core LOAC objective.

The process of implementing the law, to include the chronology of target decision-making and the consideration of targeting options that reduce the risk to civilians, will often prove extremely useful in balancing the legitimate need to use combat power in a manner that brings about the prompt submission of the enemy with the interests of the civilian population. Because of this, much more attention should be devoted to the meaning and role of precautionary measures—in a broad sense, including both substance and process—in the mosaic of LOAC implementation and compliance.

Maximizing the effect of the LOAC requires more than effective substance; it requires an effective process to implement that substance. The precautions obligation is a key source of that procedural component of LOAC efficacy and must be considered alongside the substantive obligations of distinction and proportionality as core LOAC obligations. Furthermore, the scope of this obligation need not be restricted to the requirements of Article 57.³²⁹ Instead, the precautions obligation should be understood to include a broad range of measures related to LOAC implementation and compliance. These measures begin with an understanding that a reasoned process for selecting and engaging targets is itself a vital precautionary measure, as this process will facilitate integration of LOAC considerations into the targeting decision. Accordingly, the process of integrating LOAC substance into targeting decisions is itself a precautionary measure, and more effort must be devoted to enhancing the quality of this process among all armed forces. Precautions must also be understood as including training forces to effectively implement the LOAC in the deliberate and time-sensitive targeting process. This training obligation applies to commanders, members of their battle staffs, and legal advisors. It is simply axiomatic that

328. See Protocol I, *supra* note 7, arts. 51, 57.

329. See Protocol I, *supra* note 7, art. 57; ICRC COMMENTARY, *supra* note 66, at 678–88.

the quality of LOAC integration into the targeting process will increase symmetrically with the understanding of the relationship between the LOAC and military planning and execution process. The advantage of such enhanced understanding will be integration of LOAC considerations into the very inception of the course of action development process, as all staff experts involved in that development will be cognizant of the importance of such integration.

The procedural chronology of targeting decisions also serves a precautionary function, as consideration of “reduced risk alternatives” must occur between the determination of lawful targets and the proportionality assessment. When properly integrated into the targeting chronology, this substantive precautionary obligation may, in fact, obviate the proportionality consideration through selection of a weapon or tactic that averts the risk to the civilian population. Finally, the increasingly common process of restricting proportionality assessment authority based on anticipated civilian casualty benchmarks enhances the effect of precautionary measures by improving the quality of expertise related to such judgments and by providing a broader range of alternate attack options to consider in order to reduce or mitigate the civilian risk.

Precautionary measures, including the targeting process itself, play a vital role in mitigating the risk to civilians and civilian property during armed conflict. As such, the obligation to implement such measures should be considered equally fundamental as that related to substantive principles, such as distinction and proportionality. Treating precautions as a fundamental LOAC principle will increase the likelihood that precautions will be more broadly conceived at every step of the training, planning, and mission execution process, and will not be viewed as a last-minute afterthought once a course of action involving lethal targeting has been largely approved for execution. Furthermore, an expanded conception of precautions—a conception that ranges from training, through the process for LOAC implementation, to the substantive warning and less harmful alternative consideration—will contribute to the improvement of targeting practices among all armed forces, producing a more credible balance between the necessities of armed conflict and the humanitarian interests of risk mitigation.