

Targeting of Persons: The Contemporary Challenges

Charles J. Dunlap, Jr.*

TABLE OF CONTENTS

I.	INTRODUCTION	887
II.	HUMAN SHIELDS	889
III.	THE ROLE OF THE MEDIA	892
IV.	OPTIONS?	897
V.	CONCLUDING OBSERVATIONS	898

I. INTRODUCTION

The targeting of persons engages the most fundamental of all the norms in the law of war: the principle of distinction. Indeed, scholar Gary Solis calls it the “most significant battlefield concept a combatant must observe.”¹ The rule itself is simple and direct: in its study of customary international humanitarian law, the International Committee of the Red Cross (ICRC) explains, “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”² Unlike some provisions of the law of war, the principle of distinction applies to both international armed conflicts, that is, traditional conflicts between nation-states, as well as non-international armed conflicts (NIACs) involving nonstate actors who are part of armed groups.³

* Major General, USAF (Ret.), Executive Director, Center on Law, Ethics and National Security, Duke Law School. This essay is a version of remarks made by the author at the Israeli Defense Forces (IDF) conference on the Law of Armed Conflict in April of 2017, but is expanded and updated with new material.

1. GARY D. SOLIS, *INTERNATIONAL LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 269 (2d ed. 2016).

2. Int’l Comm. of the Red Cross, *Rule 1. The Principle of Distinction between Civilians and Combatants*, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Feb. 21, 2018) [<https://perma.cc/B49V-YKTG>] (archived Feb. 5, 2018).

3. The law applicable to non-international armed conflicts is essentially premised on “Common Article 3” of the Geneva Conventions of 1949. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287. The ICRC explains non-international armed conflicts as follows:

The *Manual on Non-International Armed Conflicts*, for example, insists that a “distinction must always be made in the conduct of military operations between fighters and civilians.”⁴

In the twenty-first century, the challenge for Israel, the United States, and other rule-of-law nations relates to the latter type of conflict, that is, the targeting of persons in NAICs. Very often, the nonstate beings confronted by nation-states in NIACs do not wear uniforms and embed themselves among civilians for the explicit purpose of blurring the distinction between targetable belligerents and protected civilians. That blurring can operate to deter attacks by cautious and conscientious militaries. Moreover, if attacks are conducted, the nonstate actors often use the occurrence of *any* incidental civilian casualties to claim a violation of the law of war and in that way undermine the legitimacy of the nation-state’s military operations. As Professor William Eckhart observes:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our ‘center of gravity.’⁵

Exploiting respect for the rule of law is increasingly the primary way adversaries facing opponents like the United States, Israel, and other nations equipped with advanced weaponry will seek to offset that technological advantage. Indeed, many of these adversaries are quite willing to orchestrate civilian casualty events.

For example, during the 2017 offensive against the Islamic State of Iraq and the Levant (ISIL), ISIL fighters drew an attack on a

Common Article 3 [of the General Conventions] applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "in the territory of one of the High Contracting Parties" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.

Int’l Comm. of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 3 (Mar. 2008).

4. MICHAEL N. SCHMITT ET AL., *INT’L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 10* (2006).

5. William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 *CHI. J. INT’L L.* 431, 441 (2003).

building in Mosul, Iraq.⁶ Unbeknownst to coalition forces, ISIL had hidden explosives in the building, and the coalition strike triggered them, killing over one hundred civilians, with initial reports blaming the coalition for their deaths.⁷ The ultimate purpose of such adversary strategies is to undermine public support, both domestically and internationally, and in that way derail the military effort.

Make no mistake about it: democracies need public support to wage war. As two Yale scholars wrote in 1994: “In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.”⁸ This writer has called the strategy of attempting to erode public support through weaponized allegations of illegality “lawfare.”⁹ The purpose of this brief essay is to discuss several specific contemporary issues of targeting of persons in the context of current operations and to propose some ways for countering adversary efforts.

II. HUMAN SHIELDS

As already indicated, adversaries today are not just opportunistically exploiting situations where civilians are incidentally killed in an attack; they are actively seeking to cause civilian casualties or, equally as nefariously effective, to create the fear of causing them in the leadership of law-abiding militaries and the societies they represent. The end result is the same: an attack is either limited or forgone altogether. One of the means adversaries employ to create the desired effect is the extensive use of human shielding.

Human shielding, the International Committee of the Red Cross (ICRC) tells us, is the “intentional co-location of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives.”¹⁰ While human shielding is not new to warfare, the extent to which the tactic has today been regularized and systematically employed is unparalleled in the

6. Bill Chappell, *Pentagon Blames 105 Civilian Deaths From Mosul Strike On 'Secondary Explosion'*, NPR (May 25, 2017, 7:43 AM), <https://www.npr.org/sections/thetwo-way/2017/05/25/528925544/report-on-u-s-airstrike-that-killed-civilians-in-mosul-to-be-released-thursday> [https://perma.cc/CL88-QA4R] (archived Feb. 5, 2018).

7. *Id.*

8. W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR*, at xxiv (1994).

9. *See generally* Major General Charles J. Dunlap, Jr., *Lawfare 101: A Primer*, 97 MIL. REV. 8, 9 (2017).

10. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 340 (Cambridge Univ. Press 2005).

modern era. For example, during the fight for Mosul in 2017, the ISIL's use of human shielding was so "rampant" as to be considered "unprecedented"—even in a conflict where almost no atrocity has been left unused.¹¹

Conventional law of war thinking universally condemns the use of human shields but still insists that attackers must consider the human shields as "civilians" in the targeting calculation. That calculation is found textually in various law of war treaties but is also considered customary international law. The ICRC defines the rule as: "Launching an 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, is prohibited."¹² The problem is that in contemporary conflicts the rule too often incentivizes unscrupulous fighters. Specifically, if such fighters surround themselves with enough civilians, they can legally "shield" themselves by manufacturing a targeting calculation where the expected incidental loss of civilian life would be unlawfully "excessive." This is because many authorities deem the resulting civilian deaths to still be the responsibility of the attacker, even when the defender acts illegally by employing human shields. Put another way, the defender creates a real benefit for himself by violating the law of war proscription against the use of human shields.

The international community—to include the legal community—has proven to be impotent against nonstate actors who flaunt the law of war in their use of human shielding. Indeed, Israel has found Hamas doctrinal and training manuals "attest to Hamas's intentional efforts to draw the IDF into combat in densely populated areas and to actively use the civilian population in order to obstruct the IDF's military operations."¹³ That an adversary would be bold enough to actually train to violate the law is a testament to how serious the situation has become.

The United States attempted to address this situation by announcing in its 2015 *Law of War Manual* that harm to human

11. Hollie McKay & Steven Nabil, *How ISIS uses human shields in fighting coalition forces*, FOX NEWS (July 11, 2017), <http://www.foxnews.com/world/2017/07/11/how-isis-uses-human-shields-in-fighting-coalition-forces.html> [https://perma.cc/K2YP-7ZYX] (archived Feb. 5, 2018).

12. Int'l Comm. of the Red Cross, *Rule 14. Proportionality in Attack*, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (last visited Feb. 21, 2018) [https://perma.cc/Y762-26WA] (archived Feb. 21, 2018).

13. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 152 (May 2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> [https://perma.cc/322F-PNJ3] (archived Mar. 20, 2018).

shields does “not prohibit attacks under the proportionality rule.”¹⁴ However, a subsequent revision eliminated that provision and instead attempted to distinguish between voluntary and involuntary human shields by saying that “the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.”¹⁵ As this writer has said elsewhere:

This statement seems to be half-right. Whether or not a civilian—human shield or otherwise—needs to be considered in the proportionality analysis in determining whether or not their loss is anticipated to be “excessive” in a particular situation does not turn on their voluntary/involuntary mental state, but rather whether or not their actions constitute “taking part” in hostilities. If by their behavior they take a direct part in hostilities, they lose their protection from attack, and need not be considered in the proportionality analysis. It is hard to think of what action could be more directly participating in hostilities than attempting to shield a bona fide military objective from an otherwise legitimate attack.¹⁶

What about the involuntary human shields? As one scholar has observed, it is difficult to conceptually differentiate between involuntary human shields who are, it is argued by most law of war specialists, fully protected, and involuntary conscripts who are typically targetable at any time.¹⁷ As a practical matter, it is unclear how combatants in the midst of the chaos of modern conflict are supposed to determine the mental state of actors whose behavior would constitute taking a direct part in hostilities.

Regardless, the use of human shields has been unwittingly encouraged by the public statements of officials from rule-of-law countries. For example, in 2008 a NATO spokesman announced that “[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there.”¹⁸ Similarly, the Obama administration publically announced that certain military operations would not take place absent a “near

14. See Major General Charles J. Dunlap, Jr., *No Good Options Against ISIS Barbarism? Human Shields in 21st Century Conflicts*, 110 AM. J. INT'L L. UNBOUND 311, 312 (2016) [hereinafter *ISIS Barbarism*].

15. U.S. DEP'T OF DEF., LAW OF WAR MANUAL §§ 5.12.3–5.12.4 (2016) [hereinafter DOD MANUAL].

16. *ISIS Barbarism*, *supra* note 14, at 313.

17. *Id.* (citing Michael Gross, *The Ethics of Using Human Shields in War*, ETHICS & INT'L AFFAIRS (Oct. 6, 2014), <https://www.ethicsandinternationalaffairs.org/2014/the-paradox-of-using-human-shields-in-war/> [https://perma.cc/4S4C-9YCK] (archived Feb. 5, 2018)).

18. Pamela Constable, *NATO Hopes to Undercut Taliban With 'Surge' of Projects*, WASH. POST (Sept. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452.html> [https://perma.cc/26Q3-6ZPU] (archived Feb. 5, 2018) (quoting NATO spokesman Brigadier General Richard Blanchette).

certainty” that no civilians would be put at risk—a standard no interpretation of international law would mandate.¹⁹

It appears that these public pronouncements were intended to garner support from the indigenous population as well as the citizenry of the troop-contributing countries. For example, the Obama administration contended that the “sustainability and legitimacy of these operations are best served through the clear and public articulation of the legal and policy frameworks under which such operations are conducted.”²⁰

However, there is utterly no data to suggest that the effort succeeded or even made any difference in public opinion about the justice or, for that matter, injustice of the cause. What *is* rather obvious is that it provided the unprincipled adversary with a road map to an operational benefit: if you want to protect yourself from air attack, keep at least one civilian close by. This perverse inducement which puts civilians at risk is completely at odds with the fundamental purpose of the law of war to protect civilians.²¹

In addition, it can create difficulties in operations where, for example, the terrain—such as the urban environment often faced by Israelis—along with enemy tactics that place civilians deliberately at risk virtually assures civilian casualties will occur.²² Unfortunately, the public can become conditioned to a mindset that mistakenly concludes if any civilian casualties occur, something must have went wrong, if not deliberate war crime.

III. THE ROLE OF THE MEDIA

One of the most vexing aspects of an adversary’s use of lawfare *vis-à-vis* the targeting of persons is the all too frequently misleading or outright inaccurate coverage by the media of civilian casualty incidents. Examples abound, even in the media considered the most

19. Office of the Press Sec’y, *FACT SHEET: Presidential Memorandum—“Legal and Policy Transparency Concerning United States’ Use of Military Force and Related National Security Operations” and Accompanying Report on Transparency in Legal and Policy Frameworks*, THE WHITE HOUSE (Dec. 5, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/fact-sheet-presidential-memorandum-legal-and-policy-transparency> [https://perma.cc/Y78X-HP4L] (archived Feb. 5, 2018).

20. *Id.*

21. Major General Charles J. Dunlap, Jr., *Lawfare amid Warfare*, WASH. TIMES (Aug. 3, 2007), <https://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/> [https://perma.cc/B5XP-85Q4] (archived Feb. 5, 2018).

22. Major General Charles J. Dunlap, Jr., *Sadly, we have to expect more civilian casualties if ISIS is to be defeated*, DUKE UNIV. LAWFIRE (Mar. 26, 2017), <https://sites.duke.edu/lawfire/2017/03/26/sadly-we-have-to-expect-more-civilian-casualties-if-isis-is-to-be-defeated/> [https://perma.cc/BTG4-XKSF] (archived Mar. 20, 2018).

sophisticated. The *New York Times* recently discussed the law and did so erroneously. Specifically, they summarized the law of targeting in this way: “International law governing war or self-defense allows countries to knowingly kill some civilians as an incidental consequence of attacking a legitimate military target, so long as the bystander deaths are deemed necessary and proportionate.”²³

This writer contends:

In other words the rule is not, as the *Times* would have it, that the law “allows countries to knowingly kill some civilians.” “Some” is obviously not a synonym for “excessive,” and I would argue that in this context, it suggests it always must be a small number, an interpretation which would indicate that the law is much less realistic than it really is.²⁴

Professor Wolff Heintschel von Heinegg explains further:

International humanitarian law lacks a definition of the term ‘excessive’. There is, however, general agreement that ‘excessive’ is not synonymous with ‘extensive’ and that assessing excessiveness ‘is not a matter of counting civilian casualties and comparing them to the number of enemy combatants that have been put out of action’. It has been rightly held that ‘even extensive civilian casualties need not be excessive in light of the concrete and direct military advantage anticipated’.²⁵

In short, the *Times*’ summary of the law is plainly misleading, and—if accepted by the public—could create serious misunderstandings of the law of war as it applies to targeting decisions.

Another common distortion is the frequent reference in the press about “innocent” civilians being victimized in an otherwise legitimate attack on nonstate fighters in a NIAC.²⁶ Actually, it would be extraordinarily unusual if any media source would have enough information to determine if particular civilians were legally or morally “innocent.” In many instances civilians proximate to a bona fide target

23. Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> [https://perma.cc/26NT-5MF7] (archived Feb. 5, 2018).

24. Major General Charles J. Dunlap, Jr., *How the New York Times misconstrues the law on civilian casualties*, DUKE UNIV. LAWFIRE (Oct. 13, 2017), <https://sites.duke.edu/lawfire/2017/10/13/how-the-new-york-times-misconstrues-the-law-on-civilian-casualties/> [https://perma.cc/G66P-D54G] (archived Feb. 5, 2018).

25. Wolff Heintschel von Heinegg, *Proportionality and Collateral Damage*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2166> (last updated Oct. 2015) [https://perma.cc/AN6D-HJ9Y] (archived Feb. 5, 2018).

26. See, e.g., Major General Charles J. Dunlap, Jr., *Civilian Casualties, Drones, Airstrikes and the Perils of Policy*, WAR ON THE ROCKS (May 11, 2015), <https://warontherocks.com/2015/05/civilian-casualties-drones-airstrikes-and-the-perils-of-policy/> [https://perma.cc/AZ27-V74L] (archived Feb. 5, 2018) (discussing how civilians included in the death tolls are sometimes supporting the terrorist group).

may be legally and morally culpable for serious crimes. In the United States, for example, the provision of material support to certain terrorists is a serious felony.²⁷

None of this is to suggest that civilians, even criminal civilians, are—or should be—necessarily targetable persons under the law of war or that the law of war targeting calculation should be altered. Rather, it is to point out that precision in the reporting matters and that when the adjective of “innocent” is indiscriminately used it may create an undeserved level of emotionalism in the public’s perception about how the conflict is being fought.

Exactly why journalists report the way they do is beyond the scope of this Article, but a recent study by Harvard’s Shorenstein Center about media coverage of President Trump has insights beyond that context:

Although journalists are accused of having a liberal bias, their real bias is a preference for the negative. News reporting turned sour during the Vietnam and Watergate era and has stayed that way. Journalists’ incentives, everything from getting their stories on the air to acquiring a reputation as a hard-hitting reporter, encourage journalists to focus on what’s wrong . . . rather than what’s right.²⁸

Similarly, *New York Times* opinion columnist Ross Douhet sought to explain why “nobody seemed to notice” the recent defeat of ISIL in Iraq and Syria.²⁹ With remarkable candor he admitted that: “this is also a press failure, a case where the media is not adequately reporting an important success because it does not fit into the narrative of Trumpian disaster in which our journalistic entities are all invested.” Irrespective of what one may think of President Trump, the fact is that politics invades reportage, especially concerning issues associated with targeting in armed conflict.

All of this may explain to a degree a particularly egregious story about civilian casualties published by the *New York Times Magazine*.³⁰ Entitled *The Uncounted*, writers Azmat Khan and Anand Gopal claim to have visited 150 of what they said were sites of US and coalition air attacks. From those visits they say they concluded “the air war has

27. 18 U.S.C. § 2339A (2012); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 2 (2010) (upholding the statute outlawing providing material support to a foreign terrorist organization).

28. THOMAS E. PATTERSON, HARV. UNIV. SHORENSTEIN CTR. ON MEDIA, POL., AND PUB. POL’Y, NEWS COVERAGE OF DONALD TRUMP’S FIRST 100 DAYS 8 (2017).

29. Ross Douhet, *A War Trump Won*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/opinion/sunday/war-trump-islamic-state.html> [<https://perma.cc/NFS2-6KE6>] (archived Feb. 5, 2018).

30. Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html?_r=3 [<https://perma.cc/A2G2-RWR9>] (archived Feb. 5, 2018).

been significantly less precise than the coalition claims.”³¹ Additionally, they said:

[T]hat one in five of the coalition strikes [they] identified resulted in civilian death, a rate more than 31 times that acknowledged by the coalition. It is at such a distance from official claims that, in terms of civilian deaths, this may be the least transparent war in recent American history.³²

The problem? The authors, who were not *New York Times* reporters but rather held positions in a nongovernmental organization, had no discernable expertise in casualty or bomb damage assessments. More importantly, U.S. Central Command said in its “Monthly Civilian Casualty Report” (November 30, 2017) that the Coalition had “conducted a total of 28,198 strikes that included 56,976 separate engagements between August 2014 and October 2017.”³³ Consequently, this writer contended:

Yes, that’s right, from a sample size of just 150, Khan and Gopal extrapolated to an entire air war that thus far has involved almost 57,000 separate engagements. Even if you believe their claims, at best they examined only .003% of the engagements. Again, even if you believe their data, was it really fair to suggest from their tiny sample that the *entire* “air war” was “significantly less precise” as they claimed? That the campaign lacked transparency? Isn’t it vastly more likely that their data set was so minuscule that they could not legitimately opine about the whole “air war” as they did?³⁴

Yet despite the many questions about the legitimacy of the article, shortly after its publication, Marc Garlosco, a self-described UN war crimes investigator proclaimed as a “shocking truth” that “U.S. airstrikes there are killing far more civilians than the U.S. acknowledges” and that “we know the system is broken.”³⁵ What is actually a “shocking truth” is that a UN war crimes investigator would accept to blithely allegations that are so suspect.

31. *Id.*

32. *Id.*

33. Press Release, U.S. Cent. Command, Combined Joint Task Force—Operation Inherent Resolve Monthly Civilian Casualty Report (Nov. 30, 2017), <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1383637/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/> [https://perma.cc/6X5U-63R6] (archived Feb. 5, 2018).

34. Major General Charles J. Dunlap, Jr., *The (Un)accountable? Why critics need to be scrutinized as much as the military*, DUKE UNIV. LAWFIRE (Dec. 11, 2017), <https://sites.duke.edu/lawfire/2017/12/11/the-unaccountable-why-critics-need-to-be-scrutinized-as-much-as-the-military/> [https://perma.cc/P6E5-97U6] (archived Feb. 5, 2018).

35. Mark Garlosco, *How to Fix the US Military’s Broken Targeting System*, JUST SECURITY (Dec. 12, 2017), <https://www.justsecurity.org/49133/fix-militarys-broken-targeting-system/> [https://perma.cc/C2X2-KYUM] (archived Mar. 20, 2018).

Since at least March 2017, President Trump has given field commanders more discretion to conduct combat operations.³⁶ This does not, however, seem to have triggered increased risk to civilians. For example, the Bureau of Investigative Journalism reports with respect to drone (and manned) strikes conducted in 2017 and 2018 (as of January 19, 2018):³⁷

Nation	Strikes	Max People Killed	Max Civilians Killed
Pakistan	3	5	22
Somalia*	3	35	240
Yemen*	10	127	184
Afghanistan*	149	2,613	1,472

*Includes manned air strikes

Given that the adversary in these countries often burrows into civilian areas and makes widespread use of human shields, these figures are remarkable in the relative paucity of civilian losses. In Iraq, restrictive rules of engagement (ROE) were also revised in 2017.³⁸ It seems that doing so led to greater military effectiveness. *Fox News* reported in December:

ISIS has been routed from Iraq and Syria with an ease and speed that's surprised even the men and women who carried out the mission. Experts say it's a prime example of a campaign promise kept. President Trump scrapped his predecessor's rules of engagement, which critics say hamstrung the military, and let battlefield decisions be made by the generals in the theater, and not bureaucrats in Washington.³⁹

Importantly, however, the ROE adjustments did not change the targeting rules in a way that would jeopardize civilians. *Fox News* reported that “[Marine Brig. Gen.] Sofge said criticism that loosening rules of engagement put civilians at risk is ‘absolutely not true.’”⁴⁰ “We

36. Max Greenwood, *Trump gives commanders new powers to launch military strikes: report*, THE HILL (Mar. 3, 2017, 4:19 PM), <http://thehill.com/policy/defense/322259-trump-granted-commanders-expanded-authority-to-order-military-action-report> [https://perma.cc/M7UD-GAYJ] (archived Feb. 5, 2018).

37. *Drone Warfare*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/projects/drone-war> (last visited Feb. 21, 2018) [https://perma.cc/PS88-KDLH] (archived Feb. 5, 2018).

38. Douglas Ernst, *Pentagon ditches onerous rules of engagement, gives Mosul troops quicker firepower access*, WASH. TIMES (Feb. 24, 2017), <https://www.washingtontimes.com/news/2017/feb/24/pentagon-ditches-onerous-rules-of-engagement-in-ir/> [https://perma.cc/5WQJ-D42M] (archived Feb. 5, 2018).

39. Hollie McKay, *Trump, Mattis turn military loose on ISIS, leaving terror caliphate in tatters*, FOX NEWS (Dec. 10, 2017), <http://www.foxnews.com/world/2017/12/08/trump-mattis-turn-military-loose-on-isis-leaving-terror-caliphate-in-tatters.html> [https://perma.cc/RH4Z-428S] (archived Feb. 5, 2018).

40. *Id.*

used precision strikes, and completely in accordance with international standards,” he said.⁴¹ “We didn’t lower that standard, not one little bit. But we were able to exercise that precision capability without distraction and I think the results speak for themselves.”⁴²

Plainly, combat success may require more flexibility in the targeting process, but that does not mean that the law of war has been abrogated. While consequentialism and *kreigrason* must not infect the thinking of honorable combatants, the rapid defeat of the most heartless and brutal of opponents is itself an action protective of civilians.

IV. OPTIONS?

How should rule-of-law nations deal with the continuing challenges with respect to the targeting of persons? Of course, the starting point needs to be assuring that the actual law is properly set forth to the public and applied correctly to a given situation. In part, this means educating those in the media and elsewhere who really want to be factual. In other cases, it means systematically and consistently countering misstatements of the law and misapplications of it. At the same time, nations must readily accept responsibility where the facts warrant it.

Technology may also provide some help. For example, micro-drones equipped with facial recognition software may be able to conduct attacks against lawful individual targets with extreme accuracy and minimal possibility of unintended civilian casualties.⁴³

In addition, Western nations are taking a more liberal view of finding military objectives that not only affect the enemy’s fielded force in a real way but also put few civilians at risk. For example, the United States and coalition partners battling ISIL in Iraq and Syria attacked ISIL oil operations, which were a key source of financial support. These attacks on “war sustaining” targets—which garnered little in the way of objections by nation-states—constitute something of a reversal of what many law of war academicians outside of the United States and Israel considered permissible under international law.⁴⁴

41. *Id.*

42. *Id.*

43. Major General Charles J. Dunlap, Jr., *The Hyper-Personalization of War: Cyber, Big Data, and the Changing Face of Conflict*, 15 GEO. J. INT’L AFF. 108, 111 (2014); see also David Martin, *New Generation of Drones Set to Revolutionize Warfare*, CBS NEWS 60 MINUTES (Aug. 20, 2017), <https://www.cbsnews.com/news/60-minutes-autonomous-drones-set-to-revolutionize-military-technology-2/> [<https://perma.cc/4HUX-ZYA5>] (archived Feb. 5, 2018).

44. See generally Major General Charles J. Dunlap, Jr., *Understanding War-Sustaining Targeting: A Rejoinder to Iulia Padeanu*, YALE J. INT’L L. (Apr. 6, 2017), <http://www.yjil.yale.edu/understanding-war-sustaining-targeting-a-rejoinder-to-iulia->

Perhaps the most productive approach might be to attempt to change the narrative about civilian casualties in the targeting process. Although not often discussed, the reality is that from a military—and moral—perspective, it cannot be overlooked that an attack that does not take place out of a fear of civilian casualties does not mean that fewer civilians are at risk in a particular situation. In circumstances such as an occupation by ISIL forces, civilians are constantly at risk.⁴⁵ It could be that more civilians might die when an enemy is not attacked than would have died as a result of incidental casualties had an otherwise lawful attack taken place.

When, for example, a ruthless enemy like ISIL is spared when an attack is forgone because of a policy that is more limiting than what the law of war requires with respect to incidental civilian casualties, that enemy lives to inflict atrocities on the truly helpless. This writer calls the phenomena the “moral hazard of inaction.”⁴⁶ The *DoD Law of War Manual* acknowledges this to a degree in its discussion of “expected military advantage.” It says:

The evaluation of expected incidental harm in relation to expected military advantage intrinsically involves both professional military judgments as well as moral and ethical judgments evaluating the risks to human life (e.g., civilians at risk from the attack, *friendly forces or civilians at risk if the attack is not taken*).⁴⁷

In other words, rather than a reactive approach to charges of civilians casualties that tries to argue that they are few under the circumstances, more emphasis should be put on the lives likely saved when the target of the attack is the person or group responsible for the vast majority of civilians losses overall in the conflict.

V. CONCLUDING OBSERVATIONS

Rule-of-law nations in the twenty-first century face something of a paradox with respect to targeting. As Michael Schmitt and John Merriam explained in a 2015 article, the Israeli Defense Force (IDF) goes to great lengths to comply with the law of war, and to do so under

padeanu/ [https://perma.cc/LM6L-J5XT] (archived Feb. 5, 2018) (discussing reactions to the attack on ISIS' oil operations and noting that these oil operations are crucial to ISIS).

45. See, e.g., Nick Cumming-Bruce, *ISIS Has Killed Hundreds of Civilians in Mosul*, *U.N. Says*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/world/middleeast/iraq-mosul-isis.html> [https://perma.cc/ZXX5-LFB9] (archived Feb. 5, 2018).

46. Major General Charles J. Dunlap, Jr., *The Moral Hazard of Inaction in War*, WAR ON THE ROCKS (Aug. 19, 2016), <https://warontherocks.com/2016/08/the-moral-hazard-of-inaction-in-war/> [https://perma.cc/AV2X-QJAV] (archived Feb. 5, 2018).

47. DOD MANUAL., *supra* note 15, § 5.12.3.

unique circumstances influenced by its history and culture.⁴⁸ Schmitt and Merriam say: “IDF operations are clearly well-regulated and subject to the rule of law. The IDF has extremely robust systems of examination and investigation of operational incidents, and there is significant civilian oversight, both by the Attorney General and the Supreme Court.”⁴⁹

However, Schmitt and Merriam also concluded that the ability of Israeli judge advocates to throw a “red card” (which essentially bars a particular attack)—as well as the “concentration of investigative and prosecutorial authority” in military lawyers—helps ensure scrupulous adherence to the law of war. The authors find, however, that:

“[T]he system sacrifices the intangible, but very real, relationship between Commanders and their judge advocates that results from being a member of the Commander’s team. This relationship is, in the personal experience of the Authors, a key factor in securing the Commander’s recognition that the law can serve as an enabler of broader operational and strategic objectives, rather than an obstacle to mission accomplishment.”⁵⁰

Yet they also conclude that the IDF system “is arguably better suited to the unique operational and strategic context” because the “IDF fights enemies who intentionally employ lawfare as a tactic and strategy” and therefore “has to be extremely cautious when conducting a strike that might be exploited.”⁵¹

Of course, a robust role for military lawyers—not to mention a strict adherence to the law of war—is certainly commendable. That said, to the extent Israeli policies exceed what the law of war actually requires, it is hard to see the tangible strategic benefits one might hope would result. For example, there does not seem to be any objective evidence that the vigorous process that Israel employs to protect civilians in the targeting process employs has changed any significant number of minds—at least on the international level—as to the propriety of the IDF’s use of force in a given circumstance.

Accordingly, it is worth pondering whether the complex procedures and additional restrictions not required by the international law of war that Israel, the United States, and other rule-of-law nations utilize are really effective as counter-lawfare techniques. To be sure, the law of war must be followed in all particulars. There are, and always will be, tactical and even strategic

48. Michael N. Schmitt & Major John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 53 (2015) [hereinafter *The Tyranny of Context*]; see also, Major John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Appraisal*, 64 NAVAL WAR C. REV. 15, 30 (2015) (arguing that a review of Israel’s positions on targeting law shows that Israel is “generally reasonable and consistent with mainstream contemporary state practice”).

49. *The Tyranny of Context*, supra note 48, at 135.

50. *Id.*

51. *Id.* at 136.

considerations that could prudentially dictate in certain situations restrictions, even significant restrictions, beyond those required by the law.

However, when restrictions are imposed and openly discussed in the hopes that such transparency will aid or even enhance the public support—and effectively counter enemy allegations of illegalities in the targeting persons—further consideration is warranted, particularly where there is a dearth of evidence that the “hopes” will be achieved by restrictive policies. What is more, these additional procedures may crystallize in the public’s mind as *required* norms—a circumstance that could be problematic in a future conflict where the stakes are truly existential.

It may be that in fighting the most ruthless of enemies—ISIL, the Taliban, Hezbollah, and other terrorists—faithful adherence to the law of war in the targeting process is essential, but proliferating additional procedures and reviews that unnecessarily impede or excessively complicate the use of force may not benefit the civilians those processes aim to protect.