



LOAC and Targeting



Colonel

(b)(6) USSC

Staff Judge Advocate

14 May 2018

This briefing is classified: UNCLASSIFIED

This slide is classified: UNCLASSIFIED



Commanders Vision and Intent, February 2018

- **The Command's priorities remain:**
 - Above all else, we will provide **Strategic Deterrence**
 - If deterrence fails, we are prepared to deliver a **Decisive Response**
 - We will do this with a resilient, equipped, and trained **Combat-Ready Force**



LOAC and Deterrence

“Deterrence should be based on capability (having the means to influence behavior), credibility (maintaining a level of believability that the proposed actions may actually be employed), and communication (transmitting the intended message to the desired audience) to ensure greater effectiveness (effectiveness of deterrence must be viewed from the perspective of the agent/actor that is to be deterred).” JP 3-0, Joint Operations (2017)

“Another little-understood aspect of the importance of LOAC to STRATCOM is the role it plays in deterrence. Among other things, compliance with LOAC helps to ensure that military personnel would obey an order given to execute a nuclear option. Absent confidence in the lawfulness of such orders, we would invite dissension at a crucial time.” US Strategic Command SJA in 1995



2013 Report on Nuclear Employment Strategy of the United States

“[A]ll plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”



2018 Nuclear Posture Review

“If deterrence fails, the initiation and conduct of nuclear operations would adhere to the law of armed conflict and the Uniform Code of Military Justice. The United States will strive to end any conflict and restore deterrence at the lowest level of damage possible for the United States, allies, and partners, and minimize civilian damage to the extent possible consistent with achieving objectives.”



Principles of Joint Operations from JP 3-0

- **Objective**
 - **Offensive**
 - **Mass**
 - **Maneuver**
 - **Economy of Force**
 - **Unity of Command**
 - **Security**
 - **Surprise**
 - **Simplicity**
-
- **Restraint**
 - **Perseverance**
 - **Legitimacy**



Principles of Joint Operations from JP 3-0

- **Objective** - The purpose of specifying the objective is to direct every military operation toward a clearly defined, decisive, and achievable goal. The purpose of military operations is to achieve specific objectives that support attainment of the overall strategic objectives identified to resolve the conflict. This frequently involves the destruction of the enemies' capabilities and their will to fight.
- **Economy of Force** - The purpose of economy of force is to expend minimum essential combat power on secondary efforts in order to allocate the maximum possible combat power on primary efforts.
- **Restraint** - The purpose of restraint is to prevent the unnecessary use of force. A single act could cause significant military and political consequences; therefore, judicious use of force is necessary.
- **Legitimacy** - The purpose of legitimacy is to maintain legal and moral authority in the conduct of operations. Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.



General Principles of LOAC

- **Military Necessity.** This principle limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definite military advantage. While military necessity gives commanders great latitude in conducting military operations, it does not authorize all military action and destruction. For instance, under no circumstance would military necessity authorize actions specifically prohibited by LOAC, such as the murder of prisoners of war or the deliberate targeting of innocent civilians.
- **Unnecessary Suffering.** This principle forbids the employment of arms, projectiles, or material calculated to cause unnecessary suffering. This construct also extends to unnecessary destruction of property. Combatants may not use arms that are calculated to cause unnecessary suffering, and may not use otherwise lawful weapons in a manner or with the intent to cause unnecessary suffering.
- **Proportionality.** The principle of proportionality requires that commanders weigh the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations with the advantages expected to be gained. The principle of proportionality is weighed by a commander in determining whether, in engaging in an operation, the commander's actions may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated by those actions. The military advantage anticipated is intended to refer to the advantage anticipated from those actions considered as a whole, and not only from isolated or particular parts thereof. Generally, "military advantage" is not restricted to tactical gains, but is linked to the full context of a strategy.
- **Distinction (Discrimination).** LOAC requires that military forces are directed only against lawful military objectives. To that end, the principle of distinction (discrimination) requires both attacker and defender to distinguish between combatants and noncombatants, as well as between military objectives and protected property, locations, or objects. Defenders are obligated to use their best efforts to segregate noncombatants and to refrain from placing military personnel or materiel in or near civilian objects or locations. Attackers are required to only use those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations.



LOAC Targeting

- **The United States has accepted the following definition of distinction as reflective of customary international law, and it forms the basis of a LOAC targeting analysis:**
 - Under the principle of distinction, combatants may make enemy combatants and other military objectives the object of attack, but persons, objects, and locations that are not military objectives may not be made the object of attack.
- **Is the proposed target a military objective?**



LOAC Targeting – Military Objectives

- **Two types of objects are categorically recognized as military objectives:**
 - Military equipment and bases
 - Objects containing military objectives
- **If the object is not in one of these categories, we must determine:**
 - Whether by its nature, location, purpose or use, the object makes an effective contribution to the enemy's action, and
 - Whether attacking, capturing, or neutralizing the object offers our forces a definite military advantage
- **Both must be met before the object is a military objective**
- **The reason for one may be the reason for the other, but they are not necessarily related. Definite military advantage has a broader meaning and forms the basis for conducting a proportionality analysis if needed**



LOAC Targeting – Military Objectives

- **By its nature, location, purpose or use, does the object makes an effective contribution to the enemy's action?**
 - Nature, location, purpose or use
 - The contribution need not be direct, need not be proximate and it need not provide immediate operational or tactical gains
 - However, the contribution must be real and not speculative and be supported by available intelligence or other information
- **Will attacking, capturing, or neutralizing the object offer our forces a definite military advantage?**
 - “Military advantage” refers to the advantage gained when considered as a whole, not from isolated or individual parts
 - It is not restricted to tactical or operational gains
 - The military advantage to be gained must not be indeterminate or speculative and be supported by available intelligence or other information
 - Diminishing the morale of civilians or their support for the war does not provide a military advantage
- **Power generating stations, oil refining and distribution facilities, and objects associated with POL products, including production, transportation, storage and distribution facilities are often going to be found to meet the criteria, but this is not categorical.**



LOAC Targeting - Proportionality

- **In accordance with the principle of proportionality, combatants must not exercise the right to engage in attacks against military objectives in an unreasonable or excessive way.**
- **In particular, the following rules apply:**
 - Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack; and
 - Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.
- **The principle of proportionality does not impose obligations intended to reduce the risk of harm to purely military objectives**



Proportionality and feasible precautions

- **Feasible precautions in planning and conducting attacks may include, but are not limited to, the following:**
 - assessing the risks to civilians
 - identifying zones in which military objectives are more likely to be present or civilians are more likely to be absent
 - providing effective advance warning before an attack that may affect the civilian population
 - adjusting the timing of an attack
 - cancelling or suspending attacks based on new information raising concerns of expected civilian casualties
 - weaponeering (e.g., selecting appropriate weapons, aim points)



Proportionality and excessive incidental harm

- **The expected loss of civilian life and injury to civilians should be given greater consideration than the expected damage to civilian objects**
- **The expected damage to civilian objects (such as schools, hospitals, and religious facilities) should be given greater consideration when such damage is expected to involve the risk of harming civilians present inside such objects**
- **Expected damage to cultural property should be afforded greater consideration than expected damage to ordinary property**
- **Mere inconveniences or temporary disruptions to civilian life need not be considered in applying this rule**
- **The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack.**
- **Remote harms that could result from the attack do not need to be considered in applying this prohibition.**



Proportionality and excessive incidental harm

- **Determining whether the expected incidental harm is excessive does not necessarily lend itself to quantitative analysis, as the comparison is often between unlike quantities and values.**
- **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.**
 - On the one hand, striking an ammunition depot or a terrorist training camp would not be prohibited because a farmer is plowing a field in the area
 - On the other hand, an extraordinary military advantage would be necessary to justify an operation posing risks of collateral death or injury to thousands of civilians.
- **In less clear-cut cases, the legal question of whether the expected incidental harm is excessive may be a “highly open-ended” inquiry, and the answer may be “subjective and imprecise.” For this reason, States have chosen to apply a “clearly excessive” standard for determining whether a criminal violation has occurred.**



Compliance with LOAC and Illegal Orders

- **Each member of the armed forces has a duty to comply with the law of war in good faith**
- **Not every individual is responsible for implementing every obligation held by that party. Certain persons have the authority to make necessary decisions and judgments.**
- **Members of the armed forces must refuse to comply with clearly illegal orders to commit law of war violations.**
- **Orders should not be construed to authorize implicitly violations of law of war.**
- **The requirement to refuse to comply with orders to commit law of war violations applies to orders to perform conduct that is clearly illegal or orders that the subordinate knows, in fact, are illegal.**
- **The duty not to comply with orders that are clearly illegal would be limited in its application when the subordinate is not competent to evaluate whether the rule has been violated**
- **Subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued.**
 - **For example, if a commander issues an order to attack a town, one should assume that the order directs attacks on military objectives located in that area.**
- **Subordinates ordinarily do not have an obligation to second-guess the judgments of their superiors in relation to the principle of proportionality. As with other aspects of the law of war, subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued.**



My Role as the Senior Legal Counsel

- **On behalf of the commander and in accordance with DoD policy, I:**
 - Provide advice about law of war compliance during planning and execution of exercises and operation
 - Ensure that all plans, policies, directives, and rules of engagement, and those of subordinate commands and components, are reviewed to ensure their consistency with the law of war and DoD policy on the law of war
 - Supervise the administration of those aspects of the command's Law of War program dealing with possible, suspected, or alleged enemy violations of the law of war



Slide # 18

UNCLASSIFIED



Back-up Slides



Slide # 19

UNCLASSIFIED



Justice Jackson's concurring opinion in the Steel Seizure case

- **"A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring opinion).**
 - Justice Rehnquist in *Dames & Moore v. Regan* quoted Justice Jackson and added: "Our decision today will not dramatically alter this situation...."



2018 Nuclear Posture Review

The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks.

Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.

The United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.

Given the potential of significant non-nuclear strategic attacks, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of non-nuclear strategic attack technologies and U.S. capabilities to counter that threat.