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UNITED STATES STRATEGIC COMMAND

Reply To:  
USSTRATCOM/J060  
MEMORANDUM FOR J512

This document dates  
back to the late 1990s.  
*Note inserted by the  
Command FOIA  
Manager 19 June 2019.*

Subject: Proposed Targeting Strategies for Nuclear Posture Review (NPR) (U)

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

3. (U) The Department of Defense (DoD) has established an unambiguous policy that US forces will comply with the law of war during all military operations. Department of Defense Directive ("DoDD") 5100.77, *DoD Law of War Program*, dated 9 December 1998, establishes procedures to ensure United States forces comply with our obligations under the law of war. DoDD 5100.77, paragraph 3.1, defines the law of war as:

[t]hat part of international law that regulates the conduct of armed hostilities. . . .  
The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

DoDD 5100.77, paragraph 5.3, makes it clear that the Heads of DOD Components will ensure that all members of their components will "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." In order to ensure compliance, DoDD 5100.77, paragraph 5.8.6, requires that "all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisors to ensure their consistency with this Directive and the law of war." Chairman, Joint Chiefs of Staff Instruction (CJCSI) 5810.01A, *Implementation of the DoD Law of War Program*, dated 27 August 1999,

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states that "all operational plans (including preplanned and (b)(1) Sec 1.4(a) USSC targets) are to reviewed by the Command legal advisor . . . to ensure compliance with domestic and international law, this instruction, and the DOD Law of War Program." There are no exceptions for nuclear weapons in either the DoD Directive or the CJCSI.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

What constituted a legitimate "military objective" was historically based on customary international law until it was defined in the 1977 Additional Protocol I to the 1949 Geneva Convention (hereinafter "Additional Protocol I").

5. (U) Additional Protocol I is an example of a recent attempt to protect civilians from incidental or collateral damage. While many of the rules contained within Additional Protocol I are simply a codification of existing international customary law, the United States and other nations have objected to other rules which they argued went beyond international customary law. As a result of their disagreement with certain provisions, the United States signed, but never ratified, Additional Protocol I. During the interagency review of Additional Protocol I the Joint Staff completed a thorough review (hereinafter "Joint Staff Review"), identifying not only areas of concern, but also those rules which they believed represented international customary law. Since the United States has not ratified Additional Protocol I, we are bound only to the extent that a provision represents current customary international law.

6. (S) (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, offers a definite military advantage.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

7. (U) What constitutes a "military objective" is important when reviewing any attack against civilian populations. International customary law requires that an attacker distinguish between combatants and noncombatants, and further requires that an attacker never make civilians the object of attack. Article 51(2) provides that "[t]he civilian population, as well as individual

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civilians, shall not be made the object of attack." Article 51(5) provides that indiscriminate attacks are prohibited. It defines indiscriminate attacks as "(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat which cannot be limited as required by this Protocol."

8. ~~(S)~~ It is important, particularly for the purpose of this discussion, that the United States and others involved in the negotiation of Additional Protocol I had an understanding prior to the Protocol negotiations that the rules would not apply to nuclear weapons. (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC The United States submission referred to U.S. Army Field Manual 27-10, Change No. 1, The Law of Land Warfare, (1976) (paragraph 25), which states: "[h]owever, it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

9. ~~(S)~~ Our only other concern is that any review of the proposed (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

10. (U) We look forward to working with you on these issues. Our POC is (b)(6) USSC

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Colonel, USAF  
Staff Judge Advocate

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