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**DEPARTMENT OF DEFENSE**  
**UNITED STATES STRATEGIC COMMAND**

Reply To:  
 USSTRATCOM/J060

24 February 2000

MEMORANDUM FOR J5211

Subject: Targeting Issues Relating to (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- a. J5211 Memorandum, dated 10 February 2000
- b. Joint Staff Review of 1977 Additional Protocol I to the Geneva Convention of 1949

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

2. (U) Military Necessity. The first issue in any legal review of a target is to determine whether the facility or object to be targeted is a legitimate military target. This concept, also referred to as "military necessity," was first addressed in Hague Convention No. IV, *Respecting the Laws and Customs of War on Land* (1907) (hereinafter "Hague Convention"). Article 23 of the Annex to the Hague Convention stated that a belligerent could not "destroy or seize an enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Whether an individual object 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"). As the concept of what constitutes a military objective evolved in customary international law, certain facilities were protected from attack by treaty or convention. For example, the Geneva Conventions prohibit attacks against "hospital zones" provided they are properly marked and are being used for their intended purpose. Similarly, the Hague Convention prohibits attacks against cultural or religious buildings, among others, provided they are not being used for military purposes. In recent years the international community has become increasingly concerned with attacks on targets that could cause "severe" incidental or collateral damage to civilians.

3. (U) Additional Protocol I is an example of a recent attempt to protect civilians from incidental or collateral damage. Although all of its principles are not currently accepted by the United States and others, Additional Protocol I highlights the current debate concerning what is a legitimate military objective, (b)(1) Sec 1.7(e) / (b)(5)-Attorney Work Product USSC The Joint Staff completed a thorough review of Additional Protocol I (hereinafter Joint Staff Review), identifying their concerns. While many of the rules contained within Additional Protocol I are simply a codification of existing customary law, the United States and other nations have objected to

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other rules which they argue did not reflect customary law. As a result of this disagreement, the United States signed, but never ratified, Additional Protocol I. More importantly, particularly for the purpose of this discussion, 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. 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.

4. (U) Article 52 of Additional Protocol I defines what constitutes a "military objective." Article 52 provides that "[a]ttacks shall be limited strictly to military objectives." Article 52 goes on to describe a military objective as:

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.

While accepting this definition as reflecting customary international law, the Joint Staff Review said that if Additional Protocol I were to be ratified, the United States should include an understanding as part of the ratification that ". . . the military advantage anticipated from an attack must be considered as a whole and not only from isolated or particular parts of the attack and that incidental civilian losses are excessive only when tantamount to the total disregard for the safety of the civilian population." This is important when considering proportionality.

5. (S) Additional Protocol I is the first treaty or convention (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product U

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

The United States had several concerns to Article 56 of Additional Protocol I. The primary concern with Article 56 was that the rule was ambiguous and appeared to be contrary to customary international law. Since there was no concrete definition of what is, or would be

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC would be protected under the Protocol. The International Committee of the Red Cross Commentary to Additional Protocol I states that "severe"

is equivalent to "important" or "heavy." As so often in this Chapter, the concept is a matter of common sense and it must be applied in good faith on the basis of objective elements as the proximity of populated areas, the density of the population, the lie of the land, etc.

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

7. (S) Since, based on current international law, there are no *per se* restrictions on targeting (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC the normal rules on targeting apply. First, a Commander must determine if there is a definite military advantage to be gained by attacking the target, in other words, would the destruction or neutralization of the target result in a definite military advantage?

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

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

The only remaining issue is whether the incidental or collateral damage caused by the destruction of these targets clearly outweighs any expected military advantage gained.

8. (U) If the Commander determines that there would be no definite military advantage to be gained by attacking a proposed target, the object would not be considered a legitimate military target. On the other hand, if the Commander determines that the destruction or neutralization of the target would result in a definite military advantage, he must make a further determination regarding proportionality -- is the definite military advantage to be gained clearly outweighed by any incidental or collateral damage?

9. (U) Proportionality The concept of proportionality, which is based primarily on treaty, provides that a belligerent can only use that much force necessary to accomplish the military objective, thereby preventing unnecessary suffering. Article 22 of the Annex to the Hague Convention states that the "right of a belligerent to adopt means of injuring the enemy is not unlimited." Article 23 of the Annex to the Hague Convention stated that the belligerent could not "employ arms, projectiles, or material calculated to cause unnecessary suffering." However, the concept of proportionality recognizes that even the intentional targeting of legitimate military objects could result in collateral or incidental damage to civilians. The question is whether the incidental or collateral damage clearly outweighs the expected military advantage gained. This consideration must necessarily include a consideration of the circumstances surrounding the attack. The Commander has the responsibility to limit incidental or collateral damage.

10. (U) Nuclear Weapons. There are no customary (accepted usage) laws or conventional (treaties) prohibiting the use of nuclear weapons *per se*. In 1995, in response to a request by the United Nations General Assembly, the International Court of Justice (ICJ) issued an advisory opinion on the legality of nuclear weapons. The ICJ, in a written decision, stated that "the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the state would be at stake." The ICJ unanimously concluded that the

threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and of international humanitarian law, as well as the specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

It is noteworthy that the ICJ chose not to address the impact of Additional Protocol I, most likely recognizing that Additional Protocol I did not address nuclear weapons. Therefore, while there are no specific prohibitions on the use of nuclear weapons in international law, their use must comply with the principles of military necessity and proportionality, which are discussed above.

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The United States does not dispute the fact that any use of nuclear weapons must comply with these principles and has long taken the position that various principles of international law of armed conflict would apply to the use of nuclear weapons. In addition, the United States has entered into several treaties concerning the use of nuclear weapons. This includes, among others, the Treaty on the Nonproliferation of Nuclear Weapons and various other treaties establishing nuclear-weapon free zones. However, there are no treaties limiting that use of nuclear weapons that are relevant to the targets you have identified in your memorandum.

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

13. ~~(S)~~ Conclusion. As discussed above, the United States position is that there are no *per se* legal restrictions on attacking (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product. The CINC must make a determination, considering the circumstances surrounding the attack and after all efforts have been made to limit incidental or collateral damage, whether the anticipated incidental or collateral damage clearly outweighs the military advantage to be gained.

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**TARGETING CHEAT SHEET**

**Military attacks will only be directed at Military Objectives** – “objects which by their nature, location, purpose, or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

**Attacking Responsibilities:**

- \* Design and employ lawful weapons and attacks
- \* Ensure personnel are trained and abide by LOW
- \* Use proper target intelligence
- \* Utilize adequate target acquisition
- \* Provide warnings, if possible

**Defending Responsibilities:**

- \* Ensure separation btwn civ and mil obj
- \* Provide civ protection
- \* Remove civ from likely mil target areas

**LOW Principles:**

**Military necessity:** Offer definite military advantage.

**Proportionality:** Direct and concrete military advantage that outweighs civ loss and damage. The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.

**Unnecessary suffering:** Must not inflict unnecessary suffering

**Distinction:** Must target military objectives only. Belligerents must distinguish combatants from civilians, military objects from civilian objects. But can strike dual use.

**\*\*Targeting Board Analysis:\*\***

1. Is the proposed object a lawful target? Does it serve a military purpose (*an object making an effective contribution to military action*)?
2. Is it necessary to destroy the target?
3. What is the appropriate weapon to use? (at weaponeering)
4. Will the attack cause disproportionate collateral damage? (at weaponeering)

**Hostile Act:** An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

**Hostile Intent:** The threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US.

**Economic Targets:** Usually civ and on NST, but: - Permissible to strike if a nexus exists between the civilian object and the adversary's military operations. There is a definitive military advantage to be gained. In order to validate an economic target, at minimum, intelligence must exist to support a nexus between the target and the adversary's military operations. Additionally, a subjective assessment must conclude that the resulting military advantage gained by severing said nexus out-weighs any anticipated collateral consequences.