

**NECESSITY AND
PROPORTIONALITY IN THE
OPERATION ENDURING
FREEDOM VII CAMPAIGN**

BY

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USAWC STRATEGY RESEARCH PROJECT

**NECESSITY AND PROPORTIONALITY IN THE OPERATION ENDURING FREEDOM
VII CAMPAIGN**

by

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ABSTRACT

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The effects of collateral damage during counterinsurgency operations are significant, both locally and strategically. This paper uses targeting process and case studies from Operation Enduring Freedom VII and the principles of military necessity, discrimination and proportionality to examine the doctrine set forth in FM 3-24.

NECESSITY AND PROPORTIONALITY IN THE OPERATION ENDURING FREEDOM VII CAMPAIGN

. . . using force precisely and discriminately strengthens the rule of law that needs to be established . . . the key for counterinsurgents is knowing when more force is needed – and when it might be counterproductive.¹

—FM 3-24 Counterinsurgency

I. Introduction

The recent publication of the Army's Field Manual 3-24, *Counterinsurgency* (FM 3-24) seeks to reduce the complexity of executing counterinsurgent operations and the effect using force has on those operations. Although the manual astutely provides commanders and staffs with insights and offers principles as the one above for consideration in the uncertain environment of countering an insurgency, the use of force still remains a complicated paradox without a scientific checklist for employment. The use of force during counterinsurgency operations in particular remains very much a commander's art fraught with challenges and difficulties.

This paper will recount experiences of the Commander, Combined Joint Task Force 76 and staff in applying the principles of proportionality and discrimination as described in FM 3-24 during operations in Afghanistan in Operation Enduring Freedom VII from February 2006 to February 2007. The paper will explore the methods used to balance proportionality of actions and the means used to discriminate in the use of force during counterinsurgent operations. It will examine some of the special challenges faced by staffs working in a counterinsurgent environment, and it will offer guidance to those who may find themselves in such a position. The essay will be divided into five main sections. The first section highlights the difficulty of these operations by describing a typical example from field experience. The second section will explain the

background and history of the CJTF-76 mission during OEF VII and review the applicable LOAC principles commanders and staffs must consider as force is applied. The third section will explore the targeting process employed by the CJTF-76 staff and command group. The fourth section will explore time sensitive targeting in the context of FM 3-24. Finally, the fifth section will provide scenarios from OEF VII as illustrations of the time sensitive targeting process during a counterinsurgency.

II. Strategic and Operational Dilemmas in Counterinsurgency: An Example.

Intelligence, surveillance, and reconnaissance (ISR) assets track a high value target into a multiple building compound on the outskirts of a local Afghan village. The target is a high level leader of an active Taliban network with numerous subordinate cells, coordinating the flow of logistics and finances for the Taliban. He is also credited with leading and coordinating numerous operations against coalition forces operating in the province. In fact, active intelligence gathering indicated the target coordinated an ambush on coalition forces less than 10 kilometers from the compound just two days before. Coalition forces suffered two killed in action and five wounded during the engagement. Intelligence analysts monitoring the ISR through full motion video (FMV) determine there are at least twenty-five military-age males moving in and out of the compound. Analysts also indicate women and children may be in the compound. There is reason to believe the compound has been used as a command and control node by the target in the past. ISR indicates the target is likely in the largest building in the compound. Joint fires, including B2 bombers, are in position to strike the compound on the joint task force (JTF) commander's order.

As the JTF commander reviews these facts, his mind turns back to several incidents in the past 90 days. The President of Afghanistan has recently publicly criticized coalition forces for excessive civilian casualties in several operations in this province as well as across Afghanistan. The Taliban information campaign has relentlessly attacked coalition forces after every air strike, claiming multiple non-combatant casualties, regardless of the truth. Local village elders in the province have raised the issue of civilian deaths during shuras with coalition forces. On the other hand, the elders complain of the Taliban practice of commandeering villages and compounds, using civilians as shields. The removal of this prominent leader would leave a void in the regional Taliban leadership and deliver a significant blow to the enemy.

The JTF commander weighs his options and considers the “what if” possibilities. What are the long term strategic consequences of the strike? What if the intelligence is wrong? What if this is not the Taliban leader who has been a priority target for five months? What if it is? What if this is the wrong compound? What if the strike kills a number of women and children but not the high value target (HVT)? What if the HVT and his Taliban bodyguards are killed but the Taliban information operations response scores a quick victory with false claims? How do we get in front of that? How do we approach the local elders if women and children are killed? If we should strike, what is the desired effect? What is the appropriate level of force? Should the entire compound be destroyed or just the largest building? What effect does a strike have on the overall counterinsurgency campaign? Does the strike help to achieve the overall objective of separating the Afghan people from the Taliban?

The JTF commander's deliberation over whether or not to engage a time sensitive target through the use of joint fires is complex and difficult, not only because of the multiple sources of information competing for time and a decision, but also because of the balancing test that must be conducted. The fact that there is no textbook solution certainly compounds both the complexity and difficulty of the commander's decision. It also raises the issue of whether the use of force in this situation should be viewed as a single strike engagement alone or, instead, as part of a larger, long term campaign.

Modern military commanders have received general, broadly principled war fighting regulation and guidance such as provided in the 1977 Protocol I to the Geneva Conventions, "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."² While discrimination between combatants and civilians during military operations and achieving military objectives is difficult even in the most traditional force on force conventional warfare, the complexity of counterinsurgency increases the difficulty of discrimination in myriad ways.

III. Background and History

The international community has recognized that in modern warfare, civilians have borne a terrible burden. This has led to the establishment of laws generically referred to as the "law of armed conflict" (LOAC) which recognizes the immunity of civilians and mandates parties to an armed conflict to adhere to the rules seeking to regulate warfare.³ The United States historically has affirmed this recognition. In the

midst of the bitter and deadly United States Civil War the United States Army published the “Lieber Code,” recognizing the rights of civilians and noncombatants to be protected from the horrors of warfare.⁴ Further, the United States has ratified historically significant international agreements which provide civilians protection from adversaries on the battlefield. Commanders now promulgate rules of engagement for Soldiers to follow in the prosecution of armed conflict, in large part to ensure adherence to the law of armed conflict. While recognition of civilian protections in warfare and the overall United States’ adherence to the law of armed conflict in the conduct of operations in traditional armed nation-state warfare is generally strong, the prosecution of operations against insurgencies and irregular warfare in American history is less deserving of praise. For example, during operations against Filipino rebels during the Philippine Insurrection of 1899-1912 United States Soldiers targeted civilians as a means to counter insurgent activities.⁵

Recently, FM 3-24 has reemphasized and indeed prioritized the importance of protecting civilians during irregular and insurgent warfare. More significantly, the manual states “the law of armed conflict principles of proportionality and discrimination require combatants *not only* to minimize the harm to non combatants but also to make positive commitments to preserve noncombatant lives by limiting the damage they do and *assume additional risk to minimize potential harm*” [to noncombatants].⁶

FM 3-24 defines and describes the law of armed conflict principles proportionality and discrimination in terms of their important effects on counterinsurgency operations. First, “proportionality requires that 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.”⁷ The manual requires Soldiers “take *all feasible* precautions when choosing means and methods of attack *to avoid* and minimize loss of civilian life. . . .”⁸ Second, the manual describes the principle of discrimination in terms of when and how to use force.⁹ While recognizing the difficulty in operating in the gray zone of counterinsurgency operations, the manual requires Commanders and Soldiers to apply a two-step analysis to satisfy the principle of discrimination before using force: (1) “decide between targets” (is the individual an insurgent (combatant) or noncombatant?), and (2) “determine an acceptable risk to noncombatants and bystanders.”¹⁰ Doctrine is one thing; its application on the battlefield in the face of the insurgent enemy is another. Carrying out this analysis is, inevitably, complex and demanding.

Since the invasion of Afghanistan in 2001 and the fall of the Taliban government, the United States has conducted Operation Enduring Freedom (OEF), a continuous operation to counter a resurgence of the Taliban supported by the Al Qaeda (AQ) terrorist network and other insurgent groups. The newly transformed 10th Mountain Division (Light Infantry) headquarters deployed to Afghanistan in January 2006 to assume the role as the Combined Joint Task Force 76 (CJTF 76) for Operation Enduring Freedom VII.¹¹ Operation Enduring Freedom VII was significant in that 2006 marked the year the North Atlantic Treaty Organization assumed operational control of the entire country of Afghanistan as the International Security Assistance Force (ISAF).¹²

The situation in Afghanistan represented the classic insurgency as described in FM 3-24: “an organized, protracted politico - military struggle designed to weaken the

control and legitimacy of an established government . . . while increasing insurgent control.”¹³ The five years since the fall of the Taliban had seen an ebb and flow of insurgent activity conducted by the Taliban, AQ and associated groups against the Government of Afghanistan (GoA) and Coalition Forces deployed in support of the GoA. The Taliban made strides in insurgent activities during 2005 which the Commanding General, 10th Mountain Division (LI) determined had to be countered decisively during OEF VII.¹⁴ Despite the lack of a strategic campaign plan for the Afghanistan theater of operations, the Division staff developed a comprehensive operational campaign plan to be executed during the year-long deployment as the joint task force headquarters.¹⁵ The plan centered on four named operations to improve security in Afghanistan, support the GoA at the national, provincial, and local levels, and improve the country’s infrastructure.¹⁶

The named operations were Operations Mountain Lion, Thrust, Fury, and Eagle.¹⁷ They were designed and executed to extend the lines of operations of security, governance, and reconstruction into remote areas of eastern and southern Afghanistan to counter gains previously made by Taliban insurgents. The strategy employed by the CJTF to prosecute counterinsurgency actions during each named operation was to clear, hold, build, and engage.¹⁸ The Commanding General and senior leadership of the CJTF identified the people of Afghanistan and the GoA as the centers of gravity during execution of the campaign plan.¹⁹ The methodology employed by the CJTF highlighted the critical necessity of separating the people from the insurgents during counterinsurgency operations. Consequently, operations affecting the Afghan civilian

populace would carry significant consequences during the execution of the campaign plan.

Application of force during counterinsurgency operations carries with it the almost certain risk of unintended harm and damage to civilians and civilian property.

Operations conducted during OEF VII were no different in this respect. Since the ongoing support and trust of the Afghan people was crucial to the success of the CJTF mission, the CJTF Commanding General and staff focused efforts during operations on minimizing harm and damage to civilians and civilian property.²⁰

LOAC Principles

The Hague Conventions of 1899 and 1907 and the subsequent four 1949 Geneva Conventions along with the two Geneva 1977 Additional Protocols generally comprise the body of international law which seeks to regulate armed conflict between warring parties.²¹ The four conventions are applicable to international armed conflict between states. Common article 3 is widely accepted to apply to internal armed conflicts.²² The Supreme Court has ruled that the conflict between the United States and Al Qaeda is not international armed conflict.²³ However, Additional Protocol II of the Geneva Conventions speaks to internal armed conflict between a state and non-state actors within its borders and although the United States has signed but not ratified either of the Additional Protocols, it treats the provisions as customary international law which gives them equivalent status in the international community.²⁴ Accordingly, customary international law mandates that the use of force by American forces in armed conflict in Afghanistan against either Taliban insurgents or Al Qaeda terrorists be balanced with the most important *jus in bello* principles of military necessity and

discrimination. Thus, an overview of the principles and their definitions will be helpful to understand their application during CJTF-76 operations.

Military necessity and military objective. Protocol I defines “military objectives” as “those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”²⁵ The International Committee of the Red Cross (ICRC) offers this alternative and more restrictive definition in its *Handbook on the Law of War for Armed Forces*: “The military necessity required justifies *only* those measures *indispensable* for the fulfillment of the mission.”²⁶ Well-known international law commentators provide a broader definition grounded in the historical roots of the concept. Geoffrey Best states, “the object may be anything or anywhere *provided that*, at the time it is dealt with (and the attacker is reminded that he may have other choices than ‘total destruction’), it is contribut[ing] effectively to the other side’s ‘military action’ and that dealing with it offers a ‘definite military advantage.’”²⁷ Further, at least one commentator recognizes that the use of force against one individual combatant constitutes a specific military objective.²⁸ Regardless of the position one takes on the spectrum between the two definitions of military objective, this principle of the law of armed conflict takes primacy as commanders and their staffs plan and execute military operations. Other LOAC principles, however, including those articulated in the ICRC Handbook, may not be discarded as a commander decides an objective will provide his force with a military advantage. The commander must ensure operations discriminate (or distinguish) between combatants and non-combatants.

Discrimination. Civilians are protected from direct attacks in times of armed conflict and therefore, must be distinguished from combatants.²⁹ The attempt to prevent indiscriminate warfare is fundamental and underpins the entire body of laws which comprise the LOAC. Combatants have long been defined as those individuals engaged in hostilities who: a) are commanded by one who is responsible for subordinates; b) have a fixed distinctive emblem recognizable at a distance; c) carry their arms openly; and d) conduct their operations in accordance with the laws of war.³⁰ Conversely, the LOAC mandates combatants to distinguish themselves from the civilian population when engaged in military operations and attacks.³¹ Additional Protocol I defines a civilian as one who does not generally fit the category of those individuals outlined above who engage in hostilities and are prohibited from being the object of attack.³² An important caveat to this general rule outlined in AP I provides commanders the ability to consider attacking military objectives even though civilians are present.³³ The precise words of this caveat are critical to commanders conducting counterinsurgency operations: “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations.”³⁴ This caveat is a crucial component of use of LOAC principles during counterinsurgency operations. More often than not, insurgents blend into the civilian population and use noncombatants and their property as shields for the insurgency operations. For example, an insurgent network leader, through the use of coercive tactics, may locate several command and control facilities inside civilian houses in a particular operational region. In the case of Afghanistan,

walled civilian compounds which contain several structures offer insurgent leaders tremendous concealment to conduct operations while using the civilian inhabitants as cover. These facilities become “dual-use,” meaning they are simultaneously used for military purposes and civilian purposes.

Proportionality or Avoiding Excessive Incidental Civilian Loss

Although a long-standing principle in the LOAC, proportionality was not codified until the creation of AP I in 1977.³⁵ AP I anticipates civilian casualties during the execution of military operations. Outlining prohibited indiscriminate attacks, the protocol does not use the term “proportionality”, substituting, however, the term “excessive” throughout Article 50. Specifically, it states, “. . . an attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁶ Commentary on AP I by some scholars and by the ICRC seems to constrain the determination of excessive incidental loss to a single attack.³⁷ Several international law experts, however, argue the relationship between the resulting incidental civilian loss and the military advantage anticipated should be examined in the larger context of the military operation, not the single attack.³⁸

AP I Article 57, incorporating the wording from Article 50, provides important direction for commanders and staffs while considering the LOAC principle of proportionality as they plan and execute military operations. In part, Article 57 provides:

Article 57 – Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
 - a. Those who plan or decide upon an attack shall:
 - i. 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 within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - ii. Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - iii. Refrain from deciding to launch any 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;³⁹

At least one non-governmental organization recognizes a sliding scale of acceptability of civilian losses during military operations. In its 2007 report on the conduct of hostilities in Afghanistan, the Human Rights Watch states, “. . . . By contrast, if an attack is directed at a high value military target, it is conceivable that a higher number of civilian casualties might be legally justifiable under the laws of war.”⁴⁰

IV. Time Sensitive Targeting Process in Afghanistan

A formal targeting cell on the 10 MD staff and accompanying process did not exist prior to deployment to Afghanistan. The presence of Taliban and Al Qaeda leadership on the battlefield, however, demanded the creation of a targeting cell and time sensitive targeting (TST) procedures which provided the CJTF-76 commander with relevant and timely information to decide to order an aerial strike against an enemy leadership target. The CJTF 76 command and staff used the doctrinal methodology of

Joint Publication 3-60 of “decide, detect, deliver, and assess” to target individuals with lethal means (FM 3-24 describes it as “personality targeting”) in order to eliminate them from the insurgent network.⁴¹

Decide. Taliban and Al Qaeda leaders were designated as targets by the Joint Targeting Working Group (JTWG) which was comprised of the CJ3, CJ2, Staff Judge Advocate (SJA), subordinate targeting officers, Combined Joint Special Operations Task Force representative, and other governmental agencies representatives. Combatant status, target value, current operational requirements, and guidance from the Commanding General were factors considered in determining whether a nominated target was placed on the Joint Effects Target List (JETL). The JTWG met weekly to refine and focus targets and to vet the additional targets. The end state of the JTWG was to place enemy network leaders on a prioritized target list and important facts, background, and history of known activities of the target were consolidated into a target folder for retrieval in the event of acquisition. The J2 then vetted the CJTF-76 target list with the CENTCOM J2 targeting section to ensure consolidation of targets on the CENTCOM target list. Targets were categorized according to importance and consolidated on an Operation Enduring Freedom target list. Figure 1 depicts the JTWG and process.⁴²



Joint Targeting Working Group Weekly (F2F)



Participants: J2T, CJSOTF, Subordinate Targeting Officers, CJ3 rep, SJA, ISE, OGA, CFC-A, CSG, CJ2X, JISE Fusion

Agenda:

Target Vetting	J2T
Enemy Situation	JISE Fusion rep
High Value Target Review	J2T
CJTF-76 Cdr's Guidance on Targeting Priority	J2T
Actionable High Payoff Targets	J2T
Assets Available	J3 Rep
Asset/HPT synchronization	All

Endstate: Finalize vetting of nominated targets; resolve targeting issues; disseminate guidance/focus for HVTs and priority targets.

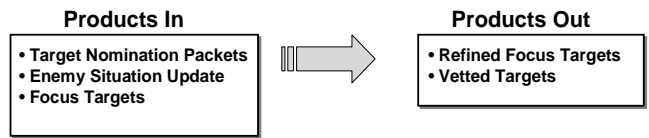


Figure 1

Detect. Members of the staff comprising the joint targeting cell included the J2, Chief of Joint Fires, SJA, J2 Targeting officer, Chief, Current Operations, and the Air Liaison Officer. The charter of the targeting cell was to positively identify the target, conduct the collateral damage estimate, maintain continuous observation of the target, and advise the Commanding General regarding his decision to strike the target. The joint targeting cell was an on-call entity, convening upon intelligence, surveillance, and reconnaissance (ISR) acquisition of a JETL target.⁴³

Deliver. As the ISR asset acquired a potential target, elements in the JISE began continuous analysis of full motion video to determine the identity and “targetability” of the individual or group. This process became known as establishing the “pattern of life.” Pattern of life was a fact-gathering process designed to ultimately provide the Commanding General or, in his absence, the Deputy Commanding General – Operations (DCG-O) with as much information as possible to balance the military

necessity in conducting the strike with proportionality of potential harm to civilians. Although not dispositive, a pattern of life analysis reasonably demonstrating the presence of noncombatants in and around a potential target would disincline the CG or DCG-O to approve the air strike due to the substantial risk of negative impacts on counterinsurgent operations. Balancing military necessity in the context of the operations as a whole against proportionality of air strikes which potentially could result in civilian casualties proved critical to understanding the near and long term operational and strategic consequences.

As the ISR assets provided JISE analysts FMV to continually observe the target and surrounding environment, the J2 targeting officer began a collateral damage estimate (CDE). The CDE analyzed the target location, surrounding structures if located in a congested area, potential for civilian casualties, and mitigation options based on available weapon platforms and types of ordnance. The CDE product resulted in a sliding scale of parameters for the Commanding General to consider based on the potential for noncombatant casualties if the target were engaged with varying types of ordnance.

The targeting cell then reviewed the target in context of the CDE and the availability of weapon platforms pursuant to the air tasking order. The pattern of life in and around the potential strike area played a critical role in the targeting cell's final analysis, shaping the target briefing to the DCG-O. A member of the targeting cell routinely provided a "pre-brief" and process updates to the DCG-O as ISR assets initially detected and monitored a target.⁴⁴ The DCG-O reviewed the targeting cell's analysis and decided if the targeting process had fully developed enough facts to

approach the Commanding General for a decision to engage the target. The DCG-O critically and thoroughly reviewed each member's analysis of the target. The DCG-O's main concern during this meeting was whether the JISE had continuous, unbroken observations of the target area and had developed a pattern of life in and around the target. He then asked each member of the cell for a recommendation on whether to strike the target.

The targeting cell then briefed the Commanding General in the Joint Operations Center to provide him detailed facts which ultimately served as the basis for his decision to order the target engaged. The Commanding General reviewed the targeting cell's process and fact gathering. He meticulously asked each member to brief the particular aspects of their responsibility of the targeting process. The Chief, Joint Fires, reviewed the ATO and available weapon platforms. The J2 targeting officer briefed the CDE on the potential target area. The J2 reviewed the targeting folder of the potential target and recent actions and patterns involving the individual. The Chief, Current Operations, reviewed the continuous pattern of life in and around the target area. The Staff Judge Advocate then advised the Commanding General on the LOAC considerations of discrimination and proportionality regarding the potential target and strike. Finally, the DCG-O provided his considerations and recommendation. Based on staff input and recommendations, the Commanding General then decided whether the military necessity of eliminating the target outweighed the damage to potential noncombatants in the strike area. If so, he ordered the target to be engaged.

Assess. The terrain in Afghanistan is forbidding. Moreover, almost every TST engagement occurred at night and many without United States forces in the vicinity.

CJTF-76 forces rarely conducted sensitive site exploitations after a TST strike for these reasons. Subsequently, timely assessments of the strike were complicated and challenging. Assessments were incorporated in the weekly JISE-FUOPS briefing to the Commanding General.⁴⁵

Vignettes of TST opportunity strikes conducted during OEF VII are helpful to amplify the TST targeting process and how the Commanding General and staff incorporated the balancing test according to the LOAC to determine whether to order air strikes.

V. FM 3-24 and TST targeting

FM 3-24 provides a number of paradoxes for JTF Commanders to consider as counterinsurgency operations are conducted. Three that stand out in the context of the TST process and the Commander's decision making process are: (1) sometimes, the more force is used, the less effective it is; (2) the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted; and (3) sometimes doing nothing is the best reaction.⁴⁶ While considering these paradoxes, the commander is urged, nonetheless, to use the appropriate level of force while conducting operations.⁴⁷ Additionally, Appendix E of the manual offers general insights for commanders to consider when employing air strikes against the enemy during counterinsurgency operations.⁴⁸

ICRC guidance and commentary by legal scholars also provide helpful considerations and analyses for JTF commanders contemplating the use of force in a civilian populated area commonly used by insurgents. The ICRC's "Handbook on the Law of War for Armed Forces," is a tremendous resource which is thoroughly cross-

referenced to the major body of international law of armed conflict and should be at the disposal of all JTF Commanders and staffs. Although not specifically tailored to counterinsurgent operations, the Handbook offers a compilation of LOAC principles compartmentalized in applicable means and methods of warfare. Of particular and noteworthy interest to JTF Commanders conducting counterinsurgent operations and legal advisors, the ICRC handbook lists and defines principles extant in the conduct of operations. For example, it states “an action is proportionate when it does not cause civilian casualties and damage which is excessive in relation to the value of the expected result of the **whole** military operation.”⁴⁹

Geoffery Best, an international law commentator, provides a three-part analysis that can assist JTF Commanders and staffs prior to launching an attack.⁵⁰ The following must be weighed against each other: 1) the concrete advantage and direct military advantages anticipated from a possible action; 2) the incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which might accompany it; and 3) what precautions are feasible. Although formed in terms of a single strike or action, this analysis incorporates the paradoxes and considerations of FM 3-24 into a three part test.

While these observations and offerings are helpful to commanders and their staffs in understanding broad principles, they do not provide templates which can always be employed reliably by the JTF commander deciding on the means and methods to employ air strikes against insurgent targets while meeting the underlining objectives concerning the appropriate use of force espoused in the manual. One of the reasons a template is not offered may indeed be the recognition in the international

academic and military communities that weighing the LOAC principles on the battlefield, particularly a counterinsurgent battlefield, is both difficult and subjective. No objective standard exists in international law for the term “excessive” as defined in the ICRC Handbook. In fact, “excessive” is weighed against “military advantage”⁵¹ which by its own nature is inherently subjective in the mind of a commander. JTF Commanders, along with the staff, find themselves grappling daily with the LOAC principles of necessity and proportionality. In light of the subjective nature of these principles, the following examples and recommendations based on CJTF-76 experiences in OEF VII are offered for future JTF commanders and staffs.

Scenario A. Civilian compound with roving guards. During Operation Mountain Thrust in July 2006, ISR assets potentially acquired a Taliban leader in Helmand Province as he moved with several individuals into a walled compound containing four varying sized structures. The compound appeared to be a typical and normal civilian compound for an Afghan family. Analysts in the JISE began to monitor the target environment using FMV to determine the pattern of life. After determining the individual was an insurgent leader who had previously been vetted by the JTWG and listed on the CJTF-76 JPEL, the J2 Targeting Officer began to develop the CDE on the structure within the compound of buildings the target was last seen entering. Shortly after the suspected target entered the compound, several men with apparent AK-47 weapons emerged and took positions along the perimeter and also on the rooftop of the largest structure. One individual began to rove the length of the perimeter as if he were performing guard duties.⁵² The pattern of life inside the compound indicated the presence of several males without weapons and no women and children visible.

The targeting cell huddled in the JISE, reviewing the target folder and the facts gathered by through ISR assets surveiling the target. Of particular importance during the review was the fact that the target was a prominent Taliban network leader in Helmand Province, responsible for directing and controlling recent attacks against coalition forces operating in Regional Command South. The targeting cell then briefed the DCG-O on the status of weaponry platforms currently available, the Taliban network leader's history, the CDE for potential damage to the surrounding area, and the continuous pattern of life in and around the compound. The DCG-O received recommendations from each member and concurred in briefing the Commanding General with the recommendation the target should be engaged.

The Commanding General reviewed the facts and status of the target received from the target cell. The CG concurred with the recommendations of the targeting cell and DCG and directed the compound destroyed which was completed by the delivery of four 2,000 lbs JDAMs.

Several factors entered the Commanding General's decision to engage the target and what effect to seek. First, the individual target's status as an influential Taliban leader in Helmand Province clearly designated him as an important director of insurgent operations in southern Afghanistan. Second, intelligence indicated coalition forces had been directly engaged by forces commanded and controlled by the targeted individual as recently as four days prior to the strike, thus reinforcing his status as an enemy combatant leader. Third, eliminating the Taliban leader from the battlefield would have a significant degrading effect on the enemy's command and control. Operation Mountain Thrust, having the objective of establishing security in southern Afghanistan

and extending the reach of the Afghanistan government, was underway, with coalition forces engaging the Taliban and Al Qaeda daily. Fourth, the presence of armed individuals in the compound and others in overwatch positions made it evident that the civilian compound had been converted to a dual use structure in which, more likely than not, served as a headquarters to plan future operations against coalition forces in the area. Finally, although it is well known that multiple generations of an Afghan family live together in walled structures comprised of varying structures, the continuous pattern of life established by FMV did not indicate the presence of any women or children. As discussed above, the presence of civilians or noncombatants does not prohibit a target from attack. Any final decision would assess and balance the factors listed above.

Scenario B. Afghan Cemetery. During the early stages of Mountain Thrust in June 2006, coalition forces engaged Taliban in the Panjway District of Helmand Province, killing several Taliban insurgents and suffering losses. Later in the evening, ISR assets acquired a large formation of Taliban in the vicinity of the engagement area of hours earlier. See Figure 2.⁵³

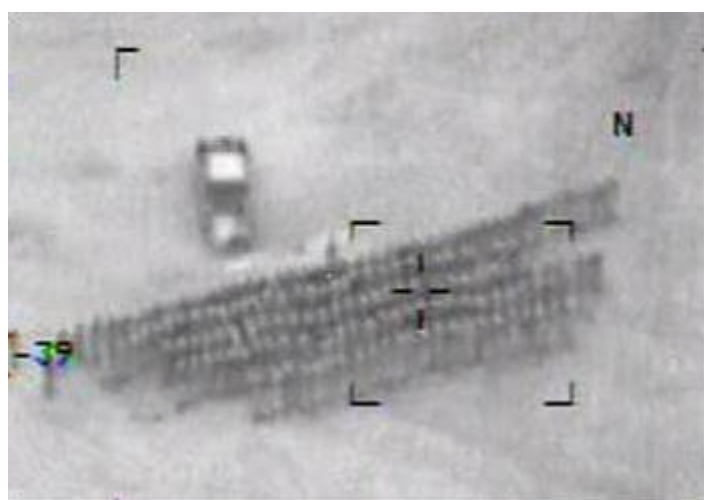


Figure 2

Members of the CJTF-76 targeting cell were called together quickly. After a few minutes of monitoring FMV, JISE analysts indicated the Taliban fighters had broken ranks and appeared to be digging in an area adjacent to a village. The J2 Targeting Officer hastily began to develop a CDE for a potential strike on the area. The Chief, Joint Fires ALO indicated there were sufficient weapon platforms available to engage and destroy the Taliban fighters. Analysts monitored the target area to establish a pattern of life while the joint fires were positioned for the Commanding General to give the order to engage. As the monitoring continued, an analyst noticed the individuals unloading large items from a truck and placing them in the ground. The JISE analyst detected poles or sticks inserted on mounds or rocks and dirt, indicating an Afghan cemetery.

Further monitoring of the area revealed individuals clothed in burkhas, the traditional dress for women in areas of Afghanistan, intermingled with the previously identified Taliban. The reasonably certain determination of the presence of women and the location of a cemetery presented complicating factors for the targeting cell to consider in determining whether the Taliban should be engaged. Although cemeteries are not explicitly protected places defined in the Hague or Geneva Conventions, some rules of engagement specifically provide protection to culturally sensitive locations such as cemeteries.

The targeting cell briefed the Commanding General on the potential for a strike against the Taliban in the cemetery. After each member provided the CG with the pertinent information, the CG quickly directed the discussion to a LOAC balancing test, reviewing the relative military advantages potentially to be gained by striking a large

force of Taliban insurgents with the disadvantage of the risk for death and serious bodily injury likely to be inflicted on civilians, specifically women assisting in the burial of fellow Afghans (as is the custom). Another factor raised by the CG that weighed against any military advantage was the cemetery location itself. The Taliban could readily exploit the insensitive nature of the coalition forces if an air strike destroyed a village's cemetery (along with village women). In making his decision, the CG carefully balanced the principles of military necessity and proportionality.

VI. Recommendations.

Each modular Army division and corps is robustly structured to assume the role as a joint task force headquarters and sufficiently manned with expertise to analyze complex issues and provide recommendations to the Commanding General and Command Group. Thus, the Division chief of staff should form a standing targeting cell *prior to deployment exercises* for a headquarters facing a deployment to conduct counterinsurgent operations. The cell should be comprised of the Chief, Fires, G2, Staff Judge Advocate, G2 targeting officer, G3 Chief, Current operations, and the Air Liaison Officer. The targeting cell should establish a Targeting Working Group and the process to nominate, designate, and establish targets and target lists. The Chief of Staff and Deputy Commanding-General should approve the staff target process.

Once the targeting process is created, the targeting cell should refine the target list process and time sensitive targeting procedures in a series of division command post exercises before the mission rehearsal exercise conducted by Joint Forces Command (JFCOM) observers and trainers. JFCOM should develop TST scenarios, using FMV, which exercise the targeting cell and command group's tactics, techniques,

and procedures. Embedded in the scenarios should be a series of scripted events which test the subjective principles of military necessity (military advantage to be gained) and proportionality (in light of potential for civilian casualties).

The role of the Staff Judge Advocate in the targeting process is to provide the Commanding General (or in his absence, the Deputy Commanding General-Operations) full and complete advice and counsel concerning the principles of necessity and proportionality as well as a recommendation whether to direct engagement of a target. The Commanding General and Staff judge advocate must have a relationship based on trust and confidence for targeting advice concerning the LOAC principles to be effective. Moreover, if the Staff Judge Advocate enjoys a bond of trust with the Commanding General, he or she may have the opportunity to provide advice outside the technical, legal sense of the principles and enter the arena of providing advice on matters involving the true subjective nature of target engagement and assist the Commanding General to grapple with the primary balancing test in the larger strategic context.

As outlined in the FM 3-24 principles and paradoxes and the ICRC Handbook, a commander fighting an insurgency must take a long view rather than parsing individual battles and targets. Appendix E of FM 3- 24 highlights the inherent difficulties and paradoxes of targeting during counterinsurgency operations. Although the appendix does not prescribe a scientific blueprint for targeting, it does provide considerations worth reviewing for those directing operations. Specifically, the appendix reminds commanders that accurate, actionable intelligence combined with timely and precisely delivered ordnance which achieves the desired effect while mitigating adverse effects can be of “enormous value in COIN operations.”⁵⁴ Precision ordnance is not a foolproof

safeguard against unintended collateral damage and civilian casualties.⁵⁵ The JTF Commander and staff must, however, keep the long view in the forefront during the TST process. Accordingly, before directing a TST be engaged from the air, the JTF Commander conducting counterinsurgency operations should conduct a two part-test: 1) what is the concrete military advantage to be gained from engaging the target?; and 2) is the military advantage to be gained worth the potential civilian casualties and the associated negative impact to the military operation *as a whole*? A thorough staff analysis and articulable decision making from the JTF commander which answers the two-part test will satisfy the LOAC principles of necessity and proportionality and provide the desired operational effect.

Endnotes

¹ U.S. Department of the Army, Counterinsurgency, Field Manual 24-3 (Washington, D.C.: U.S. Department of the Army, 15 December 2006), 1-27.

² Article 48, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter Additional Protocol I).). Although the United States has not ratified the Protocol, it has stated the provisions contained in the Protocol will be treated as customary international law. See Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions" *American University Journal of International Law and Policy* 2 (1987): 419,431.

³ The term "law of armed conflict" is often interchanged with the "law of war." Further, the International Committee of the Red Cross and the International Court of Justice prefers the term "International Humanitarian Law" to the "law of armed conflict." See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 13. The law of armed conflict is the body of international law generally derived from the 1899 and 1907 Hague and 1925 and 1949 Geneva Conventions as well as the two 1977 Protocols Additional to the 1949 Geneva Conventions.

⁴ See generally *The 1863 Laws of War* (Mechanicsburg,PA: Stackpole Books, 2005). General Orders Number 100, Instructions for the Government of Armies of the United States in the Field were commonly referred to as the Lieber Code after the author, Professor Francis Lieber of Columbia University.

⁵ For example, during operations against Filipino rebels during the Philippine Insurrection of 1899-1912 United States Soldiers specifically targeted civilians as a method to counter an

insurgent group. See Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002), 120,121.

⁶ FM 3-24, 7-6. [emphasis added].

⁷ Ibid.

⁸ Ibid.

⁹ Ibid., 7-7

¹⁰ Ibid.

¹¹ Initial Impressions Report, 10th Mountain Division: Observations of a Modular Force Division Operating as a Combined Joint Task Force (CJTF) in Operation Enduring Freedom (OEF), (Fort Leavenworth, KS; Center for Army Lessons Learned, February 2007). 7. 10th Mountain Division (Light Infantry) was the first modular Army Division headquarters to deploy as a joint task force headquarters.

¹² For a chronological history of NATO-ISAF expansion in Afghanistan pursuant to United Nations Security Resolution 1510 see "Expansion of NATO's Presence in Afghanistan," available from <http://www.nato.int/isaf/topics/expansion/index.html>; Internet; accessed 12 March 2008.

¹³ FM 3-24, 4-1.

¹⁴ Report, 8-9.

¹⁵ Ibid., 5.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.,10.

¹⁹ Ibid.,11.

²⁰ The use of force during operations involving "troops in contact," as it is known in the joint operations center, and escalation of force criteria are outside the scope of this paper.

²¹ See Leon Friedman, ed., *The Law of War: A Documentary History*, Vol. I (New York, Random House, 1972) and Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 2d ed. (Oxford, Oxford University Press, 1989).

²² See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795 (2006)

²³ Ibid.

²⁴ See Astrid J.M. Delissen and Gerard J. Tanja, eds., *Humanitarian Law of Armed Conflict Challenges Ahead* (London, Martinus Nijhoff Publishers, 1991) 142. Further, if not explicitly,

then certainly implicitly, the US Army has operated under the rules of the Protocol I and Protocol II without ratification by the US Senate. See U.S. Department of the Army, *Protocols to the Geneva Conventions of 12 August 1949*, Army Pamphlet 27-1-1 (Washington, D.C.; September 1979).

²⁵ Additional Protocol I, Art. 52 (2).

²⁶ Frederic De Mulinen, *Handbook on the Law of War for Armed Forces* (Geneva: International Committee of the Red Cross, 1987), 82-83. [emphasis added]. Hereinafter, ICRC Handbook.

²⁷ Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994) 272. Best substantiates his position on the definition by using the definition of military objective in the 1923 Hague Draft Rules. Best also cites other commentators' broader position on the meaning of the military objective definition as discussed in Protocol I.

²⁸ Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 403.

²⁹ Additional Protocol I, Art. 48.

³⁰ Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 2d ed. (Oxford: Oxford University Press, 1989) 48, citing the 1907 Hague Convention IV Article I.

³¹ Additional Protocol I, Art. 44.

³² Additional Protocol I, Art. 50 and Art. 51.

³³ Additional Protocol I, Art. 51(7). "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations."

³⁴ *Ibid.*

³⁵ Best, 323. Best asserts the impetus for the codification of proportionality resulted from the post WWII war-crimes trials as tribunal judges attempted to weigh the evidence of the lack of precautionary care in attacks and negligent or indiscriminate attacks resulting in careless or willful civilian deaths.

³⁶ Additional Protocol I, Art. 51(5)(b).

³⁷ Fleck, 178.

³⁸ *Ibid.*, 179.

³⁹ Additional Protocol I, Art. 57.

⁴⁰ “The Human Cost: The Consequences of Insurgent Attacks in Afghanistan,” April 2007, p.87; available from <http://www.hrw.org/reports/2007/afghanistan0407/>; Internet; accessed 26 January 2008.

⁴¹ FM 3-24, 5-30.

⁴² 10th Mountain Division, “10th Mountain Division (Light Infantry) After Action Report,” June 2007, 47.

⁴³ The target did not have to be formally included on the JETL for consideration and on occasion, the joint targeting cell processed non-JETL targets.

⁴⁴ Once alerted of a potential TST, the DCG-O conducted his own monitoring of the target environment using FMV available in his office within in the Joint Operations Center.

⁴⁵ After Action Report, 50.

⁴⁶ FM 23-4, 1-27.

⁴⁷ Ibid., 1-25.

⁴⁸ Ibid., E-1.

⁴⁹ ICRC Handbook, 92. [Emphasis added].

⁵⁰ Best, 326.

⁵¹ ICRC Handbook, 92.

⁵² The only structures in Afghanistan displaying outward signs of a military headquarters were those of the Afghanistan National Army and the United States and Coalition Forces. Any headquarter-type or command and control facilities used by the Taliban or Al Qaeda were non-descript, dual-use structures within walled compounds. More times than not, the insurgent leaders used Afghan civilians who lived in the compounds as cover for their operations.

⁵³ Kerry Sanders and Jim Miklaszewski, “U.S. Passes Up Chance to Strike Taliban,” NBC News, 13 September 2006; available from <http://www.msnbc.msn.com/id/14823099/>; Internet; accessed 26 January 2008.

⁵⁴ FM 3-24, E-1.

⁵⁵ Ibid.