

REVIEW ESSAY

Military Objectives in International Humanitarian Law

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Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, London/New York, Routledge, 2014, 294 pp., ISBN 9781138818408, \$155.00 (hb).

This doctoral thesis, now published as a monograph, provides a thorough analysis of one of the most crucial concepts of the modern law of armed conflicts (LOAC), namely military objectives. The concept is crucial because the targeting of such objectives is directly linked to the principle of distinction, which in turn is a cardinal tenet of LOAC. It requires that the belligerents must always make the distinction between civilian objects and persons on the one hand, and military objectives (persons and objects) on the other, and attack only the latter to the exclusion of the former (Article 48 of the Additional Protocol I of 1977 (API)). Thus, the concept of military objectives is cast amidst the protection of civilians during the conduct of hostilities (whereas Geneva Convention IV of 1949 concerns their protection outside the context of combat action). It stands to reason that this protection is an essential part of the modern law of armed conflicts. Moreover, it is only superficially surprising that API was the first treaty to generally define military objectives. In the nineteenth century, the civilian hardly appeared in the LOAC. It was at that time simply taken for granted that civilians were outside the reach of military action; they would not participate in it and concomitantly would be spared from attacks. The social environment of the past was such that military action and civilian presence were reasonably distinct: the battlefield was the pitch for military action, other areas were bluntly aloof from such action. The twentieth century completely changed these parameters. Air power allowed a belligerent to wreak heavy havoc into all the lands of the adverse party. Industrialization and modernization of the army made civilian objectives relevant from a military standpoint, in particular industrial plants. Finally, the difference between civilians and military personnel was blurred, since civilians participated in a variety of forms to military operations (guerilla warfare is but one of the most emblematic forms of such participation). All these factors, among others, explain

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that the majority of victims in modern armed conflicts are civilians, not rarely up to a proportion of 90 per cent.¹ The question of military objectives remains also highly relevant when viewed from another perspective. It is a concept often applied in modern military campaigns, where air power is of the essence. However, it gives rise to uncertainties at least on two accounts. First, the definition is open-ended and contextual; it must be operationalized in single cases and this gives rise to legal uncertainty. Indeed, Article 52, § 2, AP I, the cardinal provision in this regard, provides only for criteria which have to be applied by the belligerent to single sets of facts in order to determine if an object is a military objective. Second, there are marked differences of interpretation between the US and the continental European conceptions of military objectives, especially in certain areas of targeting such as 'economic targets' (i.e. targets chosen for their economic value to the war-sustaining effort). Notwithstanding the relevance of the concept of military objectives, there is hardly a wealth of monographic treatment of the subject matter. Indeed, no monograph in the English language was directly and exclusively devoted to that notion before the present publication. This new monograph is thus more than welcome.

The book's enquiry is precisely tailored to a narrow subject matter, i.e. military objectives such as defined in Article 52, § 2, of AP I. It therefore excludes: (i) the attack on military personnel (as opposed to objects); (ii) issues of proper preparation of attacks and notably the necessary measures of precaution in determining and attacking military objectives (Article 57 AP I); (iii) issues of proportionality and collateral civilian damages when attacking a military objective (Article 51, § 5, letter b, AP I). This choice allows it to disentangle quite different legal problems and to confine the analysis within narrow bounds. One of the advantages of this course is a legal discourse which remains on the track of its subject matter and which also leads to a reasonably short monograph. Concision is something which in the current world has to be particularly lauded.²

The book is divided into two parts: the first is devoted to the legal concept of military objectives, i.e. an analysis of Article 52, § 2, AP I in order to explain all the definitional elements of the concept; the second reaches beyond the sphere of law and ventures into the role of military doctrine and interoperability issues (i.e. the influence of coalition warfare on the selection of targets).

Part I begins by presenting the concept of military objectives in its historical dimension (p. 16ff): This historical inquiry reveals three particular aspects in the evolution of the law, which are worth noticing: (i) the fact that the relevant legal instruments use a negative definition of civilian objects as being all those which are *not* military objectives, all with the aim of avoiding gaps in protection and of increasing the protection for civilians (for if something does not fit the military objective

1 See A. Roberts, 'Lives and Statistics: Are 90% of War Victims Civilians?', (2010) 52(3) *Survival* 115, at 115–36.

2 The reader interested in a fully-fledged discussion of the three issues excluded from the present compass could consult, for an Anglo-Saxon treatment of the matter, the book by I. Henderson, *The Contemporary Law of Targeting* (2009).

criteria, it becomes automatically a civilian object protected against attack);³ (ii) the fact that a similar definition of military objectives in the Additional Protocol II (AP II), for non-international armed conflicts, was deleted from that draft; (iii) and the fact that combatants are also military objectives, even if beyond Article 52, § 2, with the important legal result that the constraints of this provision do not apply in this context (notably that such persons can always be attacked, even if there is not an immediate military advantage to be gained).

The discussion then passes over to the ‘nature, location, use or purpose’ criteria by which Article 52, § 2, AP I qualifies the requirement of an effective contribution to military action (p. 45ff). The author stresses that the nature criterion is distinct from the other three: it is the only requirement that relates to an intrinsic and thus non-changeable quality of an object, i.e. its intrinsic military character. Contrariwise, the other three criteria are context-related and change over time. ‘Location’ is mainly about strategic importance of certain places (e.g. a fortress or hill) or about the relation of a certain place to certain other objects (e.g. a civilian building obstructing a line of fire). Application here depends on the concrete location of military action and on the operational goals. ‘Use’ is about the current effective function of an object, whose nature is not inherently military. Such use can be continuous, sporadic, or singular. The author stresses that virtually every object can become a military objective through military use. For certain objects of civilian destination, however, there is a legal presumption of civilian use, as e.g. schools (Article 52, § 3, AP I). This presumption can be rebutted by proper evidence to the contrary, i.e. of military use. ‘Purpose’ is essentially about intended future use. The author identifies the main point there being in the tension between gauging the future intentions of a belligerent and the requirement to take account only of effective contributions to military action. The author is of the opinion that only specific evidence and/or some imminence as to such a purpose can help it out of the quagmire, not open-ended criteria on what a reasonable fighter would or worse might do.

Then comes the discussion of the criterion of ‘effective contribution to military action’ (p. 83ff). This relates to the input by which the object adds to one’s military action. The author argues that ‘effective’ in this respect means a real and discernible, not a hypothetical or possible contribution. The contribution must not necessarily relate to the adverse party but can also concern one’s own actions, e.g. the capture of a piece of land to improve the action of the own forces. In the view of the author, military action connotes the idea of military operations by the military personnel. It excludes vaguer notions of ‘war effort’, which would increase the reach of targetable objects largely into the realm of civilians. The author considers that the extent to which the contribution must be ‘direct’ remains a difficult matter. In her view, this is to be resolved under the banner of the ‘effectiveness’ criterion, i.e. that the contribution must be discernible. In other words, some indirect contributions can be

3 It may be noticed here, beyond what is written in the monograph, that this state of affairs produces the remarkable result that a military item, which cannot be attacked at any given moment for lack of sufficient military advantage, is from the point of vantage of the law, for the time span it cannot be attacked, a ‘civilian’ object – this being a fantastic example of the relativity of legal terms.

taken into account if only they are discernible, tangible, and not speculative. Finally, the author considers that the most problematic cases are the 'economic targets', i.e. objects which contribute to the 'war-sustaining capability' through their economic value. While noting that the US consider these objects to be legitimate targets, she expresses doubts whether the law under AP I and customary international positions would lead to the same conclusion.

The book continues with an inquiry into the issue of 'definite military advantage' (p. 111ff). The author deals first with the relationship between the two elements of contribution and advantage. She concludes that these elements are cumulative: both must be satisfied; an object cannot be attacked simply because the attack yields a military advantage.⁴ The military advantage results in benefits that help attain one's own military goals. This advantage has to be of military nature, i.e. there must exist a clear belligerent nexus or other connection to ongoing or planned military operations. Such advantages are namely the gaining of ground and the weakening of enemy armed forces or their ability to fight; political or economic advantages do not suffice. The author considers that attacks must sometimes be considered as a whole in order to analyse the advantage; isolated parts of one single operation may not show the proper advantage while the perspective of the entirety of the operation will disclose the advantage obtained. Finally, the author notes that advantage must be 'definite' in the sense that it must be clearly defined and not vague or general, or too distant in time and thus speculative. Problematic in her view are advantages which are extremely low or advantages that are mainly economic but do also have some marginal military import.

The book then tackles the question of how the military advantage can be achieved (p. 129ff). Article 52, § 2, AP I considers destruction, capture, or neutralization. By 'destruction', the object is rendered permanently non-useable. By 'capture' an object is seized and the control/possession over it is maintained. Therefore, any use by the adverse party is avoided and the object can now even benefit to the captor. 'Neutralization' is based on acts disabling objects so that they are incapable of functioning as intended, e.g. laying mines, disrupting electricity infrastructure by blackout bombs, etc. The author suggests as a crucial criterion in this respect that the advantage must appear 'in the circumstances ruling at the time' (of the planning and later of the attack). This makes the targeting process a dynamic one, which also corresponds to military practice. Everything becomes time and situation-specific: an object may be a military objective here and now, and not any more so some hours later, and then shift again back to being targetable. The author argues that such context-specific approach applies both to the military contribution and to the military advantage. Even military objects by nature could fail to offer a proper military advantage in context, e.g. if there are some military airplanes which cannot anymore be accessed by the adverse forces because of their location. The contextual setting of the whole process makes information and intelligence crucial. In the

4 The author notes that the Spanish text of AP I departs from the conjunctive 'and' by using the disjunctive 'or', but attributes this to a mistake in translation. There remains, however, the doubt as to the implementation of the law by Spanish-speaking countries when their internal codes and manuals use 'or' instead of 'and'.

view of the author, the information to be sought for is roughly that which could reasonably be obtained by a commander considering his or her real possibilities.

In the last section of part I, the author addresses several problematic cases (p. 147ff). First, she deals with state and political leadership infrastructure, e.g. the Ministry of Defence, which includes persons exercising military impulsion, control, and supervision functions. The author argues that, on this account, these persons can be targeted. But what about the buildings? What about villas of the rulers when these persons are not present there? Second, the book deals with the question of civilian morale and whether or not this can be affected through attack on symbolic objects in the hope to induce the people to make pressure on their leaders to terminate the war. The author concludes that civilian morale cannot be a target in itself under the law as it stands. Conversely, an object can be attacked as a military objective if it fits the conditions of such objectives, while concomitantly taking due account of the fact that it will also affect civilian morale. The author notes that the extent to which such attacks will not rather exacerbate resistance is controversial. Third, the author addresses the position of radio and TV broadcasting facilities. Here, she identifies as the main issue the question whether such stations can be attacked in order to curb adverse propaganda. In her view, this is hard to square with Article 52, § 2, AP I and customary law requirements. Neither the contribution nor the advantage can be said to be military. Finally, the author discusses objects that are involved in the commission of international crimes. But also here, the author concludes that the contribution and the advantage will hardly be military in nature. However, she also notices that such an attack was flown again in the Libyan War (2011) against the Libyan State Television accused of incitement to violence against civilians.

Part II of the book starts with the impact of military doctrine on the implementation of the law (p. 169ff, 173ff). The author in this part aims to discover how the military targeting process (placed outside the law) is made to fit with legal requirements and how the two levels, doctrine and law, come together and interact. This long section describes mainly military processes and may not be summarized further here. Thereafter, the author addresses legal interoperability in coalition warfare and how different participating states co-ordinated their targeting processes in a single military campaign (p. 215ff). The examples of the Gulf War (1990–1991), of Kosovo (1999), Afghanistan (2001–2002) and Iraq (2003) are discussed. This part of the inquiry reveals that in the first conflict, where many states were not bound by API, some divergences occurred on the use of strategic bombing, i.e. the destruction of the leadership and state apparatuses. In Kosovo, there were greater clashes of opinion, e.g. between France and the US, on the same issue of strategic bombing (especially on radio/TV stations). Afghanistan had little industry and infrastructure; thus the bombing was concentrated on classical military objectives. There was now a greater effort to avoid collateral damages. Disagreement on targeting seems to have diminished. Iraq saw again a great amount of strategic bombing, without apparent opposition. Australia, however, refused to attack a series of targets for lack of proper intelligence information. The author draws two main conclusions from this inquiry: (i) subsequent practice of participating states seems to tend towards allowing a broader targeting, including radio/TV stations and political leadership

infrastructure; (ii) interoperability issues are solved either through a veto system (in a consensus-based alliance), with the effect that an object rejected is in principle not attacked at all, or through a red card system (in coalitions of the willing), where an object may be rejected by some but attacked by others.

The book concludes (pp. 251ff) that, on the matter of targeting, there are mainly two problematic areas: (i) the disagreement of principle on economic targets (criterion of the 'war-sustaining capabilities' against the criterion of contribution to military action); (ii) a tendency to disagreement on some objects, such as radio/TV stations, even if that opposition is now decreasing (there is thus some overall shift favourable to strategic targeting). Furthermore, the author sees further problems in: (i) the absence of sufficient information-sharing in coalition warfare; (ii) the uncertainties as to the degree of information required by different states in the targeting process. In the end, the main conclusion of the book is that legal and non-legal factors are extremely linked in the targeting process: non-legal factors first dominate, but then the targets selected are vetted as against legal standards.

All in all, the discussion of the law in this monograph is of good quality. The interpretation of Article 52, § 2, AP I is solid and avoids the slippery slopes of some US lawyers, which tend to give excessively large interpretations to some terms (due probably to their absence of experience of reciprocity in targeting and being targeted). The content and aim of the discussion are essentially practical and not academic. Only the historical part could be identified as a small and retrenched part of academic nature. Legal and extra-legal factors are considered and aptly put together; both are highly relevant to the targeting issue. This increases the usefulness of the analysis for military lawyers. Overall, this is thus a very welcome and apt contribution to an extremely important legal and military subject matter.

If some venial weaknesses of the monograph (in the view of the present author) may be mentioned in passing, these would be the following. First, there are some parts of the book which indulge in excessive length and slightly lose focus: this is the case, notably, in the discussion of economic targets (p. 92ff) and in the chapter on military doctrine (p. 173ff). Second, instead of limiting herself to expressing doubts, the author could sometimes have taken a firmer stand to say that something is incompatible with the law (see p. 147ff); but this may just be British understatement. Third, when determining the impact of subsequent practice on the interpretation of the law on military objectives, it would perhaps have been helpful to emphasize that the relevant practice cannot be only that of states participating in military operations. Third, states are also relevant, i.e. all other parties to AP I or even all states in the case of universal customary international law. The fact that strategic bombing has been conducted by a coalition of 'willing states' does not necessarily mean that such standards are sufficiently accepted by all relevant states for AP I or customary international law so as to be able to generalize acceptance of such practices. But admittedly, the latter does not seem to be the claim of Dr. Jachec-Neale. Finally, it stands to be regretted that in the US, UK, and other English-speaking Universities, it is current practice to take only account of English-written literature. This fact tends to give a partial perspective on any subject matter. There is in most cases a wealth of materials in other languages, which open entirely different mental

and cultural perspectives on a subject matter. This is especially true in the realm of international law. In our context, it is true that on targeting the most relevant literature is written in English. But there are some seminal studies in other idioms, such as e.g. the classical article on strategic bombing by H. Meyrowitz.⁵

After these general comments, some specific aspects on the law of military objectives may be singled out.

First, we may notice that the law on targeting has constantly oscillated historically between the poles of 'strategic bombing' and 'military advantage bombing'. The first is open-ended and subjective: it holds that all objectives sustaining to some extent the *war-effort* should be open to attack. This approach tends to give the belligerent an almost unfettered discretion in his targeting process. The law has however constantly reacted against this essentially military view which leads to the slippery path of total warfare. Its effect is even magnified by the practice of reciprocity: liberties taken by one party will inflate liberties taken by the other party, often liberties with some 'added extent'. The whole process leads more often than not to a spiralling down. Moreover, in the modern world there are few objects which have no link whatsoever with the war effort. The whole society is entangled in that effort; almost all social means are geared towards it. Thus, every financial asset has some utility for the war effort, if only through the taxing process which enriches the state and sustains its war capabilities. In practice, we have witnessed many conflicts in which the tendency towards 'strategic bombing' has manifested itself and progressively swept away legal limitations: e.g. in the First and Second World Wars, Korean War (1950), Vietnam, etc. It is understandable that the natural inclination of a belligerent will always be to attack all objects which it thinks could have some value to the other party for the war effort. The same is true for other areas of the law of armed conflict, e.g. the inherent tendency to inflate the lists of items considered to be contraband during the First World War. The second approach is tighter and objectivized: it holds that all objectives making a *military contribution* and whose destruction yields some *military advantage* are in principle open to attack. The vague notion of war effort disappears in favour of the legally dominated notion of immediate usefulness to military action. If the whole society contributes to the war effort, only one branch of the state, the military, performs properly military action (in addition to levy *en masse* and resistance movement participants, and civilians participating directly in hostilities). This approach leads to a considerable limitation on the targetable objects. It is based on the legal tenet of limited warfare: only what is strictly necessary to overcome the military resistance of the enemy may be attacked and destroyed. This essentially legal approach is in constant tension with the temptation to reach further, to destroy more, to quicken the end of the war. At the end of the day, the legal approach will be effective only if the professional military commanders are convinced that it does not sacrifice a vital interest and that it is, all well considered, more advantageous to their state. In this context, there are still important efforts to be made, even if in the last years, professionalization and progressive legalization of the processes

5 H. Meyrowitz, 'Le bombardement stratégique d'après le Protocole additionnel I aux Conventions de Genève', (1981) 41 *ZaöRV* 1.

of targeting point in a welcome direction. Thus, the Libyan operation of 2011 was dominated by such careful legal analysis of the targeting process as never before.⁶ Summing up, the law on military objectives is constantly torn by opposing forces: war-effort and military-contribution approaches, with their respective spheres of action. Historically, the general movement goes from the first towards the second. But this movement is not linear. It evolves along a broken line with many fallbacks and uncertainties. Today, it gives rise to difficult discussions on the issue of targeting of broadcasting stations, economic targets, or political leadership infrastructure. The question is rendered more difficult by the straddling of some of these objects between the poles of the two definitions. At the end of the day, the decision has to be taken by considering the role and function of an object in a given set of realities.

Second, the law on the definition of military objectives is but one part of a larger legal framework. The present monograph limited itself to the definition of the military objective, excluding analysis on the related issues of precautions (Article 57 AP I) and proportionality (Article 51 AP I)⁷. In reality, the processes are intertwined. The question as to whether an object can be attacked depends as much on its quality as a military objective as it does on proportionality issues. Article 51, § 5, letter, of AP I, which has to be considered as expressive of customary international law on this issue, strikes a peculiar balance, which is here favourable to the military branch (whereas the definition of the military objective is tighter and thus more favourable to the humanitarian limb). An attack on a military objective is unlawful only if the collateral loss in civilian lives or objects is 'in excess' of the military advantage. The issue is thus one of disproportion rather than of proportion. This allows a much greater subjective assessment. The choice is understandable: a belligerent may attack only military objectives; but these he must be able to always attack, in principle, lest he be prohibited to attack anything. The natural tendency of journalists to present every loss of civilian life or objects as a violation of IHL is thus legally wrong. All depends on the circumstances and on the concrete targeting process: what was the advantage pursued? What was its importance for the attacking belligerent? What collateral losses could be expected (and not what losses actually occurred)? etc. The point here is to show that the restrictive definition of military objectives is to some extent counterbalanced by other legal notions, which lean more towards the interests of the military branch than towards the expectations cherished by NGOs, civilian society, and humanitarian communities. However, it may at least be added that when proposals were made to define proportionality in IHL somewhat more precisely, the reaction of states has been overwhelmingly negative. There is here the feeling of a danger to lose the benefit of the mentioned equilibrium and to be entangled in a constantly tighter legal web. There is certainly also the feeling that a tighter definition could lead more easily to criminal investigation for war crimes at the ICC or elsewhere. From this point of view, the ICC is not always a faithful ally of IHL. Sometimes, it amplifies resistance of the military personnel to legal reforms (or

6 See G. Bartolini, 'L'operazione "Unified Protector" e la condotta delle ostilità in Libia', (2012) 95 *Rivista di diritto internazionale* 1012.

7 For more details, see, e.g., R. Kolb, *Advanced Introduction to International Humanitarian Law* (2014), 165ff, 172ff.

e.g. to fact-finding) in the fear to be cast on a road to 'The Hague'. Summing up, it can be said that the law on military objectives is not only practically linked to the law on precautions and proportionality, since the process of targeting brings together all these parameters, but that it is also linked strategically to these other notions. The triad taken as a whole ensures a hopefully viable equilibrium between restriction and leeway so as to fit realistically to the necessities of warfare. Consideration of one aspect requires – at least from this point of view – taking account of the others.

Third, the contention of the author of this monograph that Article 52, § 2, AP I applies only to objects and not to persons is manifestly right. Combatants, she adds, may be targeted at every moment, not only when there is a military advantage in doing so. This is true. It may however be added that this '24-hours targeting' principle applies only to combatants and not to persons in general. Thus, when civilians are directly participating in hostilities, the ICRC has proposed a distinction. On the one hand there are civilians constantly engaged in an armed group (continuous combat function) and on the other hand there are civilians participating only sporadically in the armed conflict.⁸ The former are assimilated to combatants: they can be targeted on the basis of the '24-hours' principle. The latter are subjected to the principle of the revolving door: they can be targeted only during the phase of their active participation. From the point of view of the law, this means that the balancing-up process of the military advantage is performed once and for all in the rule itself (as interpreted by the ICRC). It is not the military commander who will decide case by case if there is a military advantage in attacking the person (the military contribution, on its part, exists, since the person at stake sporadically, but recurrently, participates to military action). The attack is rather generally prohibited outside the phase of active participation. This leads to a restriction of the targeting power and to a rolling back of the context-related approach in this particular situation. This tighter approach to targeting is due to the civilian quality of the person. The point made here also allows to recall that under IHL a civilian is not necessarily an 'innocent' (*non nocens*) or 'peaceful' person. He or she could participate to the fighting (even if legally not allowed to do so) without losing civilian status; the loss is limited to the immunity against attack, either generally or only for a specific time-window. Summing up, this example shows that there are special rules on targeting in the body of IHL. Article 52, § 2, of AP I and related customary international law contain the general rule on the matter. But there are some *leges speciales*, as on the civilian participating directly in hostilities.

Fourth, and last, the dual definition of Article 52, § 2, of AP I leads to a specific legal use of terms. It may be far aloof from the ordinary meaning of words outside this specialized context. The matter is an example in the relativity of legal terms. Thus, an object is a military objective if it fulfils the criteria discussed, namely the contribution and the advantage, which have to be military, precise, in the circumstances ruling at the time, etc. If an object fulfils these criteria, it is a military objective. If it does not, it is a civilian object. As with persons, IHL knows of no other general category: either

⁸ See the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL', (2008) 90 *International Review of the Red Cross* 991.

an object is a military objective or it is a civilian object (Article 52 AP I). *Tertium non datur*. The result is that when a military object (e.g. a military aircraft) cannot be attacked for lack of military advantage, it becomes from the point of view of the law a civilian object. This could be the case, for example, of the Iraqi fighter Jet to which the Iraqi forces had lost any access (p. 137). An intrinsically military object can legally be a civilian object. Notice that this qualification can shift from one moment to the other, e.g. if the Iraqi forces gain access to that aircraft or are susceptible to gain access over it again in the proximate future. Context-relatedness remains the controlling aspect in the process. Notice also that what has been said applies only to the military contribution/advantage test under the definition of military objectives, not to proportionality issues. If a certain object may not be targeted at a certain moment because of a prospect of excessive collateral damage, that object remains nonetheless throughout a military objective. The faculty of a belligerent to attack that object is limited on account of proportionality; but the object does not lose or change its status. There are thus military objectives which may not legally be attacked for a certain timespan. Summing up, from the legal point of view, the status of an object is purely relative: it may straddle the military and the civilian objects. But it can do so only on account of shifts in the definitional elements of a military objective, not on account of precautionary or proportionality issues.