Part II

The Law Concerning Attacking a Target Lawfully
Determining the proper relation between means and ends in situations of great complexity and uncertainty is never easy. Decision makers are faced with their own inadequacies and lack of knowledge, together with the pressures inherent in conflict. They cannot forget the risks and costs of restraint, yet they must also be mindful of the legal imperative to avoid unnecessary and disproportionate force.¹

Part I dealt with the law concerning lawful target selection. But, this is not the end of the matter. As well as a general obligation to target only military objectives, articles 57(2) and 57(3) API provide for certain precautions that must be taken when planning or executing the attack itself. In other words, not only must the target of an attack be lawful but lawful targets must be attacked lawfully. In this chapter, article 57 API in discussed in some detail; however, due to size of the topic, the law relating to the rule of proportionality (which is just one aspect of the precautions to be taken when conducting an attack) is dealt with in its own chapter (chapter 8).

Before turning to the actual requirements of article 57 API, a significant preliminary issue that is covered in this chapter, and which is not clearly addressed in API, is the level at which the precautions set out in article 57 API must be applied? For instance, Switzerland made a reservation stating that the “provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion or group level and above.”² I argue that this is an overly restrictive view and a misunderstanding of what is required by article 57 API. I argue that the obligations in article 57 API apply to all personnel who have the authority and practical possibility to affect the course of an attack. To support my conclusion, I set out a method for compliance in chapter 9 along with references to how article 57 API has been complied with at the individual pilot level by Australian military aircrew.

One of the precautions to be taken when conducting an attack is to do everything feasible to verify that the target is a military objective subject to lawful attack.³ I review the law and arrive at a conclusion as to what amounts to everything feasible and what level of certainty is implied by verify. When planning an attack,

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² Reservation 1 by Switzerland, Roberts and Guelff, above n 14 (chapter 1), 509. Switzerland, as well as Austria, made similar statements during the 1974–77 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts—CDDH/VI, above n 77 (chapter 2), 212.
³ API, above n 2 (chapter 1), art 57(2)(a)(i).