Chapter V
Practical Issues on the Application of the Notion of Military Objective

V.1 Preliminary Remarks

In order to decide on the lawfulness of a given attack, a number of issues relating to the preparation and execution of military operations must be taken into consideration.

Firstly, projectiles do not hit targets with the degree of precision that one could have expected.\footnote{For instance, every bomb and missile delivered from the air has a circular error probable (CEP). The CEP is a circle within which 50\% of the bombs directed at a given point will eventually impact; thus, it is expected that the other 50\% will impact outside such circle. During WW II, most of the bombs fell miles away from their targets. Since then, and particularly since the development of projectiles guided by remote control, the precision of the bombardiers has exponentially increased. Nevertheless, not even the use of this type of guided bombs and missiles can guarantee that the target will be hit. Different factors such as mechanical errors, human mistakes, defensive measures of the party under attack or the weather have a great influence in the trajectory of a bomb or a missile. Moreover, as shown by the conflict in former SFRY, most modern-day bombs are still not guided by remote control. Indeed, in that armed conflict, technological evolution in this field scarcely played a role and the vast majority of the operations involved the use of artillery – namely cannons, howitzers and mortars – in support of land operations. Needless to say that all artillery weapons have margins of error previously identified by the party using them, including a reach probable error and a direction probable error. There are also tables that show through an ellipse around the targeted impact point the probable error of every weapon from any given distance.} If even professional snipers using rifles with telescopic sight have a small margin of error, such margin of error is far higher when persons with a lower level of training use less sophisticated weapons.

Secondly, whenever possible, armed forces must try to avoid combat in urban areas because: (i) it usually brings about a higher toll of casualties among their own troops; (ii) it eliminates any technological advantage that they could have over the enemy and (iii) it increases the risk of causing serious incidental civilian damage.\footnote{For instance, 116,000 Japanese soldiers, 1,000 US soldiers and some 100,000 Filipino civilians lost their lives in the campaign that led US forces to take over Manila in 1945. Most civilian casualties took place during cross-fire between the US and Japanese soldiers.}

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Thirdly, although in some cases military doctrine may be tempted to put aside those legal duties with which armed forces must comply during the conduct of hostilities, this does not mean that such obligations no longer exist. On the contrary, these obligations are always binding on the armed forces because military doctrine is only comprised of a set of military practices which indicate the way in which the armed forces are expected to conduct themselves in combat situations.

These and other practical issues relating to the application of the notion of military objective and the proportionality rule are the subject of the following chapters. In addressing these issues, special attention will be placed on the ICTY’s case law because the ICTY is the only international judicial body which has undertaken the difficult task of applying these principles after WW II.

V.2 Persons who Are Military Objectives

The notion of military objective is the cornerstone of the principle of distinction and the rules which elaborate on this principle. According to art. 48 AP I, “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”. Many other provisions of the Additional Protocols, such as arts. 51(2) and 52(2) AP I and art. 13(2) AP II, elaborate on the obligation to only attack military objectives and the prohibition on launching attacks against civilians or civilian objects. Serious breaches of this prohibition are criminalized in paragraphs (2)(b)(i) and (ii) and (2)(e)(i) of art. 8 RS.

However, the RS, the EC, the ICTY’s case law and the Additional Protocols do not contain a definition of the notions of civilian population, civilians or civilian objects. Indeed, they refer to such notions by stating that they include those persons and objects that do not fall within the category of military objectives. Therefore, the only way to determine the group of persons and objects that can be subject to the crimes of directing attacks against civilians or civilian objects is to analyze the content of the notion of military objective and to interpret it a contrario.

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390 For instance, although military doctrine recommends the use of mortars for combat operations in urban areas because the usual high trajectory followed by mortar shells allows them to go over the buildings, this does not mean that they can be used without taking into account the incidental civilian damage that they might cause. Military personnel are always bound to apply the proportionality rule and to cancel or suspend those operations which are expected to cause excessive incidental civilian damage.

391 The military doctrine of some armies puts the stress on mobility whilst in other armies the emphasis is put on the use of artillery to solve the problem.