

**Replies and Comments:**

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**Focus**

**Article 3B of MCI No. 2**

“No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.”

**Article 5D of MCI No. 2**

“”Military objectives” are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the times of the attack.”

**Article 52(2) of API**

„In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.“

**A US version of what constitutes a “military objective”?**

A shift in the interpretation of a military objective by the US is evidenced in the recent Military Commission Instructions. A series of eight military commission instructions provide guidance to the military commissions established by the Military Order (13 November 2001) and by Military Commission Order No. 1 (21 March 2002) was issued on 30 April 2003 by the US Department of Defense. The second set of instructions relates to the crimes to be tried by these commissions.

The Military Commission Instruction (MCI) No. 2 contains the definition of a “military objective” in article 5D which, although it draws on the definition spelled out in article 52(2) of Additional Protocol I, deviates from that definition in a number of ways. Read in conjunction with article 3B of MCI No. 2, which states that other relevant provisions should not be given too much attention when applying or interpreting the MCI even if the language is very similar, it is clear that the language is designed to supplant the definition in API. This means that the military commissions, when examining whether a combatant/fighter targeted a military objective, can only make use of article 5D MCI No. 2 and should not refer to article 52(2). As article 40(c) of the US Army Field Manual had adopted the wording of article 52(2) of API in its entirety, the major differences between these two definitions now become very important.

According to article 5D MCI No. 2, military targets include objectives that effectively contribute to helping the opposing force continue to fight (“war-sustaining capability”). This new language allows a wider range of objectives to be targeted and includes virtually all of the infrastructure and services of a State. For example, a power-plant that provides electricity to, among others, a company producing ammunition may be viewed as a military objective since it sustains the war capability of the State. The definition illustrates the new US military strategy to think in terms of “systems” and to target any object that may be part of a 3C (control, command, communication) system, i.e., a system that keeps a war-monger in power and thus prolongs the war effort. Recent examples are to be found in the attacks of TV stations in Belgrade and in Baghdad as TV channels were considered as able to sustain the war effort by diffusing propaganda in favour of the government in place. There is no doubt that this was not the original idea of the drafters of the Additional Protocol I.

A key difference between MCI No.2 and Article 52(2) API is the omission of the word “definite” in front of the expression “military advantage”. The ICRC Commentary on article 52(2) of API clearly explains that “it is not legitimate to launch an attack which only offers potential or indeterminate advantages”. By failing to qualify the “military advantage”, the US government signifies that it may target objectives that may have a “potential” military advantage. The Commentary points out that “there must be a definite military advantage for *every* military objective that is attacked”. The requirement of definite military objective militates against the “system” approach adopted by the United States that may be more indirect..

Looking at the practice of the US in the last few years, it was already possible to see this shift in the interpretation of what constitutes a military objective. The Military Commission Instruction No. 2 simply formally acknowledges the change.

**Responsibility**

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