

# *“On target”: precision and balance in the contemporary law of targeting*

Article

Published Version

Schmitt, M. N. ORCID: <https://orcid.org/0000-0002-7373-9557> and Widmar, E. (2014) “On target”: precision and balance in the contemporary law of targeting. *Journal of National Security Law and Policy*, 7 (3). pp. 379-409. Available at <https://centaur.reading.ac.uk/89853/>

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Published version at: <https://jnslp.com/2014/09/29/on-target-precision-balance-in-the-contemporary-law-of-targeting/>

Publisher: Syracuse University Institute for Security Policy and Law & Georgetown Law

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# “On Target”: Precision and Balance in the Contemporary Law of Targeting

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## INTRODUCTION

The law of targeting lies at the heart of international humanitarian law (IHL). As such it is the fulcrum around which discussion of combat operations revolves. This was the case during the recent war in Iraq,<sup>1</sup> and remains so with respect to the conflicts in Afghanistan<sup>2</sup> and Syria.<sup>3</sup> The precise applicability of the law of targeting has sparked a flurry of recent reports about drone operations by UN Special Rapporteurs and non-governmental organizations<sup>4</sup> and

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1. See, e.g., HUM. RTS. WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (2003), [http://www.hrw.org/sites/default/files/reports/usa1203\\_sumrecs.pdf](http://www.hrw.org/sites/default/files/reports/usa1203_sumrecs.pdf) [hereinafter HRW Iraq Report]; Michael N. Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 Y.B. INT'L HUMANITARIAN L. 73-109 (2003); Dinah PoKempner, Marc Garlasco & Bonnie Docherty, *Off Target on the Iraq Campaign: A Response to Professor Schmitt*, 6 Y.B. INT'L HUMANITARIAN L., 111-25 (2003).

2. See, e.g., HUM. RTS. WATCH, FATALLY FLAWED: CLUSTER BOMBS AND THEIR USE BY THE UNITED STATES IN AFGHANISTAN (2002), <http://www.hrw.org/reports/2002/us-afghanistan/>; Michael N. Schmitt, *Targeting and Int'l Humanitarian Law in Afghanistan*, 85 INT'L L. STUDIES 307 (2009); Michael N. Schmitt, *Targeting Narcotics in Afghanistan: The Limits of International Humanitarian Law*, 12 Y.B. INT'L HUMANITARIAN L. 301 (2009) [hereinafter Schmitt, *Targeting Narcotics*].

3. See, e.g., U.N. Human Rights Council, Rep. of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014).

4. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Third Annual Rep. pursuant to G.A. Res. 66/171 and Human Rights Council Res. 15/15, 19/19 and 22/8*, ¶¶ 24, 55-56, 61-62, 65 (2013) (by Ben Emmerson), transmitted by Note of the Secretary-General, U.N. Doc. A/68/389 (Sept. 18, 2013) [hereinafter Emmerson 2013]; Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 70-71, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson) [hereinafter Emmerson 2014]; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 13, 67-73, 75 (2013) (by Christof Heyns), transmitted by Note of the Secretary-General, U.N. Doc. A/68/382 (Sept. 13, 2013) [hereinafter Heyns 2013]; AMNESTY INT'L, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 58 (2013); HUM. RTS. WATCH, “BETWEEN A DRONE AND AL-QAEDA": THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 88 (2013) [hereinafter HRW Drone Report]. On the reports,

underpins the highly contentious debates over the legality of autonomous weapons systems.<sup>5</sup>

That IHL occupies center stage in contemporary discourse about armed conflict is heartening, for it demonstrates the law's vitality. In assessing this discourse, it is essential to grasp that IHL is a body of law that represents a carefully crafted balance between the desire of states to retain the capability to effectively conduct military operations and the humanitarian mandate of both shielding those who are uninvolved in a conflict from its tragic consequences and protecting those who are involved, such as members of the armed forces, from unnecessary harm.<sup>6</sup> The efficacy of this body of law depends on maintenance of the delicate balance between military necessity and humanitarian concerns. Mischaracterization or misapplication of IHL norms risks imbalance, thereby jeopardizing the innocent and potentially eroding state support for IHL's application. Precision and balance when applying a body of law governing lethal force should not be optional.

Regrettably, while some of the current debate and commentary surrounding, *inter alia*, drone operations, autonomous weapons systems, cyber operations, and the current conflicts in Afghanistan, Syria, Yemen, Somalia, and Ukraine, to name just a few, is highly sophisticated, much of it has been characterized by imprecise, skewed, or wrong assertions regarding the law of targeting. It is therefore a propitious moment to revisit the structure and content of targeting law. After briefly placing the law of targeting in the broader context of IHL, this article examines the five constituent elements of a targeting operation: (1) target; (2) weapon; (3) execution of the attack; (4) collateral damage and incidental injury; and (5) location. The legality of an engagement depends on full compliance with the rules set out for each category.

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see also Michael N. Schmitt, *Narrowing the International Law Divide: The Drone Debate Matures*, 39 YALE J. INT'L L. ONLINE 1 (2014).

5. See, e.g., HUM. RTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2012), [http://www.hrw.org/sites/default/files/reports/arms1112\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf) [hereinafter HRW Killer Robots Report]; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Extrajudicial, Summary or Arbitrary Executions* (2013) (by Christof Heyns), transmitted by Note of the Secretary-General, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013); Michael N. Schmitt & Jeffrey S. Thurnher, "Out of the Loop:" *Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NAT'L SEC. J. 231 (2013); Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT'L SEC. J. 231 (2013) [hereinafter Schmitt, *Autonomous Weapons Systems*]; Kenneth Anderson & Matthew Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can*, HOOVER INSTITUTION (2013), [http://media.hoover.org/sites/default/files/documents/Anderson-Waxman\\_LawAndEthics\\_r2\\_FINAL.pdf](http://media.hoover.org/sites/default/files/documents/Anderson-Waxman_LawAndEthics_r2_FINAL.pdf); Noel E. Sharkey, *The Evitability of Autonomous Robot Warfare*, 94 INT'L REV. OF THE RED CROSS 787 (2012). The NGO community has launched a coordinated campaign to ban the systems. Campaign to Stop Killer Robots, available at <http://www.stopkillerrobots.org/>. In February 2014, the European Parliament proposed a resolution to ban the systems as well. Joint Motion for Resolution on the Use of Drones, Eur. Parl. Doc. RC-B7-0201/2014, ¶ H(2)(d) (Feb. 25, 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN&language=en>.

6. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L LAW 795 (2010).

## I. THE LAW OF TARGETING IN THE NORMATIVE CONTEXT

IHL, also known as the *jus in bello*, must be distinguished from the *jus ad bellum*. Whereas the latter addresses when states may resort to force (e.g., pursuant to a Security Council Resolution or in self-defense), the former governs how hostilities may be conducted during international and non-international armed conflict. By the rule of equal application, IHL applies to all parties in an armed conflict irrespective of the *jus ad bellum*. Thus, even a state that finds itself embroiled in an armed conflict because it has been unlawfully attacked must comply fully with IHL's dictates.

As with international law generally, IHL takes the form of either treaty law for states party or customary law binding on all states.<sup>7</sup> The 1977 Additional Protocol I (AP I) to the Geneva Conventions captures the bulk of contemporary targeting law.<sup>8</sup> Most states are party to the instrument (173 of 193 states) and are therefore bound directly by its terms.<sup>9</sup> Certain key states, most notably the United States and Israel, are not parties.<sup>10</sup> However, they and other non-party states consider nearly all of the treaty's targeting provisions as reflective of customary international law.<sup>11</sup> Accordingly, they accept that they are bound by the norms in their customary guise. Except as indicated, the references to AP I set forth in this article replicate accepted rules of customary law<sup>12</sup> and therefore

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7. Customary law emerges over time through a combination of state practice and *opinio juris* – the belief of states that they are engaging in an action or refraining from one out of legal obligation. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, ¶¶ 27, 34 (June 3). See also Yoram Dinstein, *The Interaction Between Customary International Law and Treaties* 322 RECUEIL DES COURS 243-327 (2006); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175 (2005).

8. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

9. International Committee of the Red Cross Treaties and States Parties to Such Treaties, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (June 8, 1977) available at [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470).

10. Other states not party to Additional Protocol I include Turkey, Andorra, Azerbaijan, Iran, Pakistan, India, Nepal, Myanmar, Thailand, Malaysia, Indonesia, Sri Lanka, Papua New Guinea, Somalia, Eritrea, Bhutan, the Marshall Islands, Kiribati, Tuvalu, South Sudan, and Singapore. *Id.*

11. See, e.g., Rem. by Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in 2 AM. U. J. OF INT'L L. AND POL'Y 419 (1987) (also citing provisions that the U.S. does not consider customary). The authors will use the United Kingdom's *Manual of the Law of Armed Conflict* and the United States' *Commander's Handbook on the Law of Naval Operations* to illustrate guidance provided by states to their military forces by a party and non-party state respectively. U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL]; DEPT. OF THE NAVY, U.S. MARINE CORPS., DEPT. OF HOMELAND SEC. & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007) [hereinafter U.S. COMMANDER'S HANDBOOK].

12. See, e.g., 1 CUSTOMARY INT'L HUMANITARIAN L. (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL Study]; UK MANUAL, *supra* note 11, ¶ 1.33.1; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INT'L L. APPLICABLE TO AIR AND MISSILE WARFARE, [cmt. ac-](http://cmt.ac-)

apply to targeting operations regardless of whether a state is party to AP I.

The condition precedent to IHL's applicability is the existence of an "armed conflict" as a matter of law; absent an armed conflict, international human rights law (which also has limited application during armed conflict, although the scope and extent remain unsettled)<sup>13</sup> and domestic law govern any targeting of individuals or objects. There are two forms of armed conflict – international armed conflict (IAC) between two or more states, such as that between Ukraine and Russia,<sup>14</sup> and non-international armed conflict (NIAC) between a state and an organized armed group (or between multiple organized armed groups), like those in Syria, Afghanistan, and most recently, the Central African Republic.<sup>15</sup> Since the applicable customary law of targeting is very similar in the two forms of conflict, the discussion that follows generally applies to both. It also applies irrespective of the medium of conflict in which the targeting occurs, be it land, sea, air, space, or cyberspace.<sup>16</sup>

## II. THE TARGET

The principle of distinction serves as the keystone in the law governing targeting. Recognized by the International Court of Justice as one of two "cardinal" principles of international humanitarian law,<sup>17</sup> it has been codified in Article 48 of 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.<sup>18</sup>

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companioning r. 1(s), ¶ 4, 30 (2013) [hereinafter AMW MANUAL]; TALLINN MANUAL ON THE INT'L L. APPLICABLE TO CYBER WARFARE 6 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

13. See, e.g., Marko Milanovic, *Norm Conflicts, International Humanitarian Law and Human Rights Law*, in INT'L HUMANITARIAN L. AND INT'L HUM. RTS. L.: THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 95 (Orna Ben-Naftali ed., 2011).

14. Pursuant to Common Article 2 of the 1949 Geneva Conventions, the Conventions apply during armed conflict, including "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." See, e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I].

15. Common Article 3 to the 1949 Geneva Conventions addresses non-international armed conflict. See, e.g., GC I, *supra* note 14, art. 3; S.C. Res. 2149, para. 13, U.N. Doc. S/RES/2149 (Apr. 10, 2014).

16. AP I, *supra* note 8, art. 49(3); AMW MANUAL, *supra* note 12, at xiv; TALLINN MANUAL, *supra* note 12, r. 20.

17. Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) [hereinafter *Nuclear Weapons*]. The other is the prohibition on causing combatants "unnecessary suffering."

18. AP I, *supra* note 8, art. 48. See also CIHL Study, *supra* note 12, r. 1; UK MANUAL, *supra* note 11, ¶¶ 15.8-15.9; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 5.3.2; INT'L AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL L. HANDBOOK 13 (2013) [hereinafter OPLAW HANDBOOK]; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 180



Distinction, from which an array of specific IHL rules derive, operates in all targeting operations. If, how, and when the principle and rules apply depends on whether a person or an object is being targeted. In the vernacular of IHL, targeting is known as “attack,” which is defined as an act of “violence against the adversary, whether in offence or defence.”<sup>19</sup>

**Persons:** IHL affords certain categories of persons and the activities in which they engage special protection from attack. These include medical,<sup>20</sup> religious,<sup>21</sup> civil defense,<sup>22</sup> humanitarian relief personnel,<sup>23</sup> and civilian journalists performing professional functions.<sup>24</sup> However, the *sine qua non* of protection for individuals is, as evident in Article 48 of AP I, distinguishing between combatants and civilians.

Article 51(2) operationalizes the principle of distinction with respect to civilians: “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>25</sup> AP I defines a civilian in the negative as “any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the [1949] Third [Geneva] Convention and in Article 43 of this Protocol.”<sup>26</sup> These provisions have been the subject of significant controversy and confusion since their adoption, in part because Article 4 addresses prisoner of war status, not status for the sake of targeting. However, civilians are best understood as

(Int’l Crim. Trib. for the former Yugoslavia Mar. 3, 2000); Eritrea-Ethiopia Claims Commission, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claim, Partial Award, ¶ 95 (Dec. 19, 2005); *Abella v. Argentina*, Merits, Inter-Amer. Ct. H.R., No. 11.137, OEA/Ser.L/V/II.95, doc. 7 ¶ 177 (1997) [hereinafter *Abella Case*]. For a concise articulation of the principle of distinction, see Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, in 38 *ISR. Y.B. HUM. RTS.* 1 (2008).

19. AP I, *supra* note 8, art. 49(1). Despite the reference to the “adversary,” the notion clearly includes violence against protected persons and places given the various prohibitions contained in treaty and customary law on “attacking” them.

20. GC I, *supra* note 14, arts. 24-26; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 36, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; AP I, *supra* note 8, art. 15; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 9, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; CIHL Study, *supra* note 12, r. 25; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.10.2.1.

21. GC I, *supra* note 14, art. 24; GC II, *supra* note 20, art. 36; AP I, *supra* note 8, art. 15; AP II, *supra* note 20, art. 9; CIHL Study, *supra* note 12, r. 27; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.10.2.1.

22. AP I, *supra* note 8, arts. 62, 67.

23. *Id.*, art. 71(2); CIHL Study, *supra* note 12, r. 31.

24. AP I, *supra* note 8, art. 79; CIHL Study, *supra* note 12, r. 34.

25. AP I, *supra* note 8, art. 51(2). *See also* CIHL Study, *supra* note 12, r. 2; UK MANUAL, *supra* note 11, ¶¶ 5.21-5.21.1; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.3.2; United States Air Force Doctrine, Vol. IV (Operations), Annex 3-60, Targeting 90 (July 28, 2011) [hereinafter AFDD 3-60]. *Prosecutor v. Kupreskić*, Case Number IT-95-16-T, Judgment, ¶ 521 (Int’l Crim. Trib. for the former Yugoslavia Jan. 14, 2000) [hereinafter *Kupreskić Judgment*].

26. AP I, *supra* note 8, art. 50(1); *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶ 47, 49 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003) [hereinafter *Galić Judgment*].

individuals who are not members of the “armed forces” and who therefore enjoy protection from direct attack.<sup>27</sup>

At the risk of slight oversimplification, in the context of targeting, the armed forces consist of two groups: traditional combatants and members of organized armed groups. The term “combatants” refers to three types of individuals. First, members of the regular armed forces are combatants.<sup>28</sup> For example, during the 1991 and 2003 IACs in Iraq, members of the uniformed armed forces of Iraq and of all the Coalition States qualified as combatants on this basis. This category includes members of a paramilitary or armed law enforcement agency that have been incorporated into the armed forces.<sup>29</sup>

Second, members of militias or volunteer corps that “belong to” a party to the conflict also qualify as combatants when they: 1) wear a fixed distinctive sign recognizable at a distance, 2) carry their arms openly, 3) abide by the laws of war, and 4) operate under responsible command.<sup>30</sup> On the modern battlefield, few groups comply with all four criteria. For example, the Fedayeen Saddam, an Iraqi militia that took part in the fighting during the initial stages of the 2003 invasion of Iraq, generally carried their weapons openly and were widely regarded as being under the command structure led by Saddam Hussein’s eldest son Uday. Soon after the conflict began, they shed their uniforms and adopted irregular tactics against Coalition forces. Additionally, members of the group regularly violated IHL by attacking civilians and using them as shields. Once they did so, members of the Fedayeen Saddam no longer qualified as combatants in the legal sense.

Third, the category of combatants includes members of a *levee en masse*. A *levee en masse* consists of “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”<sup>31</sup> The concept originated during the French Revolution and first found expression in the 1907 Regulations annexed to Hague Convention IV.<sup>32</sup> Members of a *levee en masse* enjoy the benefits of combatant status, including combatant immunity and

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27. CIHL Study, *supra* note 12, r. 5.

28. GC I, *supra* note 14, art. 13; Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(1), Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; CIHL Study, *supra* note 12, r. 3.

29. AP I, *supra* note 8, art. 43(3); Prosecutor v. Sesay, Judgment, Case No. SCSL-04-15-T-1234, ¶¶ 87-88, (Mar. 2, 2009), available at <http://rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234.pdf>.

30. GC III, *supra* note 28, art. 4(A)(2); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 274 (Jan. 29, 2007), available at [http://www.legal-tools.org/uploads/tx\\_ltpdb/doc266175\\_04.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc266175_04.pdf).

31. GC III, *supra* note 28, art. 4(A)(6). See also Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations]; CIHL Study, *supra* note 12, r. 5, 106; UK MANUAL, *supra* note 11, ¶¶ 4.2.2, 4.8; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.4.1.1.

32. Hague Regulations, *supra* note 31, art. 2.



prisoner of war status upon capture, but are also subject to attack on the same basis as other combatants.<sup>33</sup>

Combatants may be attacked based solely on their status; the extent of their involvement in the hostilities is irrelevant.<sup>34</sup> There are several exceptions to this rule. In particular, it is unlawful to attack combatants who are wounded, sick, or shipwrecked;<sup>35</sup> have unequivocally surrendered;<sup>36</sup> have been captured;<sup>37</sup> have parachuted from an aircraft in distress;<sup>38</sup> or enjoy protected status (such as medical and religious personnel<sup>39</sup>), or to order that no quarter be afforded the enemy.<sup>40</sup>

Consensus has emerged in the past decade as to another group of individuals who do not qualify as civilians *for the purpose of targeting* – members of “organized armed groups.” To be considered “organized,” a group must be sufficiently structured to engage in military activities as a unit, albeit not to the extent of the regular armed forces.<sup>41</sup> Furthermore, to be considered “armed,” the purpose of the group must be to engage in hostilities.<sup>42</sup> As an example, the Afghan Taliban maintains a tiered organization, loosely based upon tribal traditions, that enables Mullah Mohammad Omar and the Supreme Taliban Shura to exercise centralized decision making and broadly direct decentralized execution through regional, local, and village Taliban cells.<sup>43</sup> The Afghan Taliban’s purpose is to expel anti-Taliban forces through violence and regain its

33. U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.4.1.1; UK MANUAL, *supra* note 11, ¶¶ 4.2.2, 4.8, 8.3.1.

34. *Prosecutor v. Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-A, ¶ 51 (Int’l Crim. Trib. for the former Yugoslavia Dec. 17, 2004).

35. GC I, *supra* note 14, art. 12; GC II, *supra* note 20, art. 12; AP I, *supra* note 8, art. 41; CIHL Study, *supra* note 12, r. 46; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶¶ 8.2.3, 8.2.3.2; UK MANUAL, *supra* note 11, ¶¶ 5.6; AMW MANUAL, *supra* note 12, r. 15(b).

36. AP I, *supra* note 8, art. 41; CIHL Study, *supra* note 12, r. 46; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶¶ 8.2.3, 8.2.3.3; UK MANUAL, *supra* note 11, ¶ 5.6; AMW MANUAL, *supra* note 12, r. 15(b).

37. AP I, *supra* note 8, art. 41; CIHL Study, *supra* note 12, r. 46; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.2.3; UK MANUAL, *supra* note 11, ¶ 5.6; AMW MANUAL, *supra* note 12, r. 132(a).

38. AP I, *supra* note 8, art. 42; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.2.3.1; UK MANUAL, *supra* note 11, ¶ 5.7; AMW MANUAL, *supra* note 12, r. 132(a).

39. GC I, *supra* note 14, arts. 24-25; GCII, *supra* note 20, art. 37; CIHL Study, *supra* note 12, r. 25, 27; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶¶ 8.2.4.1, 8.2.4.2; UK MANUAL, *supra* note 11, ¶ 8.8; AMW MANUAL, *supra* note 12, r. 71.

40. AP I, *supra* note 8, art. 40; CIHL Study, *supra* note 12, r. 46; Hague Regulations, *supra* note 31, art. 23(d); UK MANUAL, *supra* note 11, ¶ 5.5.

41. INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW 32 (2009) [hereinafter Interpretive Guidance], available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. Shahid Afsar, Chris Samples & Thomas Wood, *The Taliban: an Organizational Analysis*, MILITARY REVIEW 58, 64-68 (May-June 2008).

42. Michael N. Schmitt, *Status of Opposition Fighters in a Non-International Armed Conflict*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 120, 131 (Kenneth Watkin & Andrew Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies).

43. *Id.*

pre-war status.<sup>44</sup> Thus, the Taliban qualifies as an organized armed group, and its members are lawful targets at any time based upon their membership in that group.

The lawfulness of targeting specific members of an organized armed group is the subject of on-going debate. According to the International Committee of the Red Cross's (ICRC's) *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, treatment as a member of an organized armed group for targeting purposes depends on whether the individual has a "continuous combat function" within the group.<sup>45</sup> Essentially, this means that the individual performs activities for the group that would amount to direct participation in hostilities (see below) even if he is not a member of an organized armed group.

Unlike individuals who do not belong to such groups but directly participate, members of organized armed groups who have a continuous combat function may be targeted even when they are not so participating. They are treated as analogous to members of the armed forces. For instance, before his death in 2012, Badruddin Haqqani was a top operational commander in the Haqqani network responsible for planning combat operations in Afghanistan as well as providing command and control (C2) of certain operations.<sup>46</sup> Because he used Very High Frequency radios (VHF) for communications, he rarely needed to cross the border into Afghanistan from his headquarters in Pakistan to engage directly in attacks. However, his persistent role as an operational planner and commander established his continuous combat function within the Haqqani network and he was thus targetable at any time, subject to other limitations on

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44. *Id.* at 64-65; see also *The Taliban*, MAPPING MILITARY ORGANIZATIONS, <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367?highlight=the+taliban> (last visited Apr. 16, 2014).

45. Interpretive Guidance, *supra* note 41, at 33-35. The Interpretive Guidance was the result of a major six-year research effort headed by the International Committee of the Red Cross, in which approximately forty eminent international law experts, including government attorneys, military officers, representatives of non-governmental organizations (NGOs), and academics participated with the goal of providing greater clarity regarding the IHL governing the loss of protection from attack when civilians involve themselves in armed conflict. For critique on the controversial aspects of the Interpretive Guidance, see generally Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010) [hereinafter Schmitt, *Deconstructing Direct Participation in Hostilities*]; Bill Boothby, "And for Such Time As": *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. OF INT'L L. & POL. 741 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HAR. NAT'L SEC. J. 5 (2010) [hereinafter Schmitt, *The Interpretive Guidance*]. But see Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831 (2010).

46. U.S. DEP'T OF STATE, Office of the Spokesman, Designation of Haqqani Network Commander Badruddin Haqqani, (May 11, 2011), <http://www.state.gov/r/pa/prs/ps/2011/05/163021.htm>. Badruddin Haqqani was killed in Pakistan by a CIA drone strike on August 24, 2012. Sebastian Abbot, *Badruddin Haqqani Dead: Pakistani Officials Confirm Death Of Key Militant*, HUFFINGTON POST (Aug. 30, 2012), [http://www.huffingtonpost.com/2012/08/30/badruddin-haqqani-dead-pakistan\\_n\\_1842469.html](http://www.huffingtonpost.com/2012/08/30/badruddin-haqqani-dead-pakistan_n_1842469.html).

targeting such as the rule of proportionality and the requirement to take precautions in attack (discussed in section VI). The separate issue of whether it would be lawful to penetrate Pakistan's sovereignty and use force against Badruddin Haqqani is addressed in section VII.

While there is widespread consensus that members of an organized armed group with a continuous combat function are susceptible to direct attack at any time, many experts, including the authors, take a broader approach by which all of the group's members may be targeted irrespective of their function.<sup>47</sup> They argue that limiting attacks to members with a continuous combat function would create disequilibrium in the law because members of the armed forces and other lawful combatants are targetable regardless of the role they play in their unit.<sup>48</sup> Since the law recognizes protections for the regular armed forces that members of organized armed groups do not enjoy, such as the right to prisoner of war status and combatant immunity, it would seem incongruent to afford these combatants *less* protection from attack than similarly situated members of an organized armed group.

Some groups are composed of distinct military, political, or social wings, such as Hamas in the Gaza Strip and Hezbollah in Lebanon. Only members of the military component may be treated as members of an organized armed group for targeting purposes.<sup>49</sup> The permissibility of targeting other members of the group depends on whether they qualify as civilians directly participating in the hostilities. When a group does not have distinct wings, as in the case of the Afghan Taliban, the fact that members of the group may occasionally engage in activities that do not involve hostilities, such as an operational commander who also performs Taliban judicial functions, does not deprive the group of its character as armed or the individual of his or her status as a lawful target.

As noted above, civilians enjoy protection from attack pursuant to the principle of distinction. Those civilians who "directly participate in hostilities" lose this protection "for such time" as they so participate.<sup>50</sup> The ICRC's *Interpretive Guidance*, in an approach that has been widely accepted, suggests that acts of direct participation consist of three cumulative constitutive elements. First, the act in question "must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."<sup>51</sup> Second, there must be a direct causal connection between the

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47. See Watkin, *supra* note 45, at 655-57, 674-82, 690-92; Schmitt, *Deconstructing Direct Participation in Hostilities*, *supra* note 45, at 704; Schmitt, *The Interpretative Guidance*, *supra* note 45, at 21-24; Boothby, *supra* note 45, at 743, 753.

48. *Id.*

49. Interpretative Guidance, *supra* note 41, at 33-35.

50. AP I, *supra* note 8, art. 51(3), at 26; AP II, *supra* note 20, art. 13(3); CIHL Study, *supra* note 12, at 23-24; UK MANUAL, *supra* note 11, at ¶¶ 5.3.2-5.3.3; U.S. COMMANDER'S HANDBOOK, *supra* note 11, at ¶ 8.2.2; *Galić Judgment*, *supra* note 26, at ¶ 48; *Abella Case*, *supra* note 18, ¶ 178.

51. Interpretative Guidance, *supra* note 41, at 47.

act and the harm likely to result, or the act must be an integral part of a coordinated military operation that causes the harm.<sup>52</sup> Lastly, the act must have a belligerent nexus in the sense of being related to the ongoing conflict.<sup>53</sup>

Certain activities clearly satisfy these criteria. There is broad agreement, for instance, that Afghan civilians who personally conduct attacks, such as those who emplace improvised explosive devices for pay but otherwise have no affiliation to the Taliban, are directly participating in the hostilities and are thus subject to attack while they are engaged in that activity.<sup>54</sup> Additionally, civilians who directly support engagements, like those providing early warning for an impending ambush or transporting fighters to and from an attack, are also direct participants.<sup>55</sup> For instance, in Afghanistan's Kunar Province, sympathetic civilians sitting on hillsides surrounding commonly used landing zones occasionally provide early warning – a form of military intelligence – of approaching helicopters to enemy forces using VHF radios.<sup>56</sup> This technique is especially common at night in anticipation of special operations night raids. Even though not members of the Taliban, they are nevertheless targetable for such time as they pass intelligence to enemy forces.

The more difficult cases involve civilians who provide support without being directly involved in engagements or other classic combat-related activities. For instance, the *Interpretive Guidance* asserts that civilians who assemble and store an improvised explosive device, or those who purchase and transport components necessary for such weapons, cannot be considered direct participants because the causal link is not direct enough.<sup>57</sup> Other international experts strongly disagree.<sup>58</sup> Such “close cases” will have to be resolved on an individualized basis.

A notably controversial direct participation issue is the status of human shields.<sup>59</sup> It is one of particular significance in light of the asymmetric tactics adopted by insurgents in Iraq, Afghanistan, Gaza, and elsewhere. Facing overwhelming firepower, insurgents regularly shelter military objectives and activi-

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52. *Id.* at 51.

53. *Id.* at 58.

54. *See, e.g.*, NILS MELZER, TARGETED KILLING IN INT'L LAW 344 (2008).

55. *Interpretive Guidance*, *supra* note 41, at 54, 66.

56. Given the mountainous terrain in Kunar Province, there are a limited number of landing zones, depending upon the size of the operation.

57. *Interpretive Guidance*, *supra* note 41, at 53-54. The *Interpretive Guidance*'s narrow view asserts “the harm in question must be brought about in one causal step.” MELZER, *supra* note 54, at 344-45.

58. *Interpretive Guidance*, *supra* note 41, at 53 n.123; *see, e.g.*, Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77, 104 (2013) [hereinafter Schmitt, *Extraterritorial Lethal Targeting*].

59. On this topic, see generally Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. OF TRANSNAT'L L. 292 (2009) [hereinafter Schmitt, *Human Shields*]; Rewi Lyall, *Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States*, 9 MELB. J. INT'L L. 1 (2008).

ties through the use of involuntary and voluntary shields.<sup>60</sup> The practical issue is not whether the human shields may be directly attacked; doing so would generally serve no military purpose. Instead, it is whether any expected harm to them during an attack on the military objective or activity they are shielding has to be factored into the proportionality and precautions in attack analysis (discussed below). If they are direct participants, such collateral damage can be ignored when performing the assessment; if not, it must be considered by the attacker.

While it sometimes may be tactically difficult to determine whether a human shield is participating voluntarily or involuntarily, legal understanding of the issue has developed along this fault line. Most experts agree that involuntary human shields do not lose their protected civilian status, and therefore any expected harm to them must be taken into account by attackers.<sup>61</sup> However, disagreement surrounds the treatment of voluntary human shields in the targeting decision. The *Interpretive Guidance* contends that they directly participate in hostilities only when creating a “physical obstacle to military operations of a party to the conflict,” as when they “attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.”<sup>62</sup> Some experts, including the authors, counter that all voluntary shields are directly participating in hostilities – thus willingly forfeiting their protected status – and do not count towards the proportionality assessment or factor into the requirement to take precautions.<sup>63</sup> Another view adopts a middle ground approach and argues that while voluntary shields retain their protected status, their voluntary participation “reduces the weight to be accorded to them” in the proportionality assessment.<sup>64</sup> Regardless of the position adopted, it is clear that the more remote a civilian’s actions are from the actual hostilities, the more tenuous the argument that he has lost protected status and is subject to attack.

A further controversy surrounds the “for such time” aspect of the direct participation rule.<sup>65</sup> The *Interpretive Guidance* avers that participation begins

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60. See, e.g., *Philippines: Mistreatment, Hostage-Taking in Zamboanga*, HUM. RTS. WATCH (Sept. 19, 2013), <http://www.hrw.org/news/2013/09/19/philippines-mistreatment-hostage-taking-zamboanga>. The use of human shields is not limited to organized armed groups. States, such as the Syrian government and Iraq, have used human shields. See UN Security-General, *Report of the Secretary-General on children and armed conflict in the Syrian Arab Republic*, ¶ 17, U.N. Doc. S/2014/31 (Jan. 27, 2014); HRW Iraq Report, *supra* note 1, at 5, 67-69.

61. See, e.g., WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 139 (2012); IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* 215 (2009). See also U.S. Chairman, Joint Chiefs of Staff, Joint Publication 3-60, *Joint Targeting*, app. A, ¶ 4(a)(1), (2013) [hereinafter JP 3-60].

62. *Interpretive Guidance*, *supra* note 41, at 56.

63. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, 153-54 (2d ed. 2010); Schmitt, *Human Shields*, *supra* note 59. This appears to be the position of the United States. U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.3.2 (stating voluntary human shields “may be excluded from the proportionality analysis.”); JP 3-60, *supra* note 61, app. A, ¶ 4(a)(1).

64. BOOTHBY, *supra* note 61, at 139. See also UK MANUAL, *supra* note 11, ¶ 5.22.1; A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 169-70 (2012).

65. For an extended discussion on the subject, see Boothby, *supra* note 45.



with “measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution.”<sup>66</sup> For instance, a civilian who implants an IED is directly participating in hostilities while he travels to the location, buries the weapon, and returns home – in other words, throughout the course of the specific operation. At most other times, according to the *Guidance*, he is immune from attack. Many legal experts, including the authors, counter that the concept of “for such time” includes all periods during which a definitive causal link to hostilities exists,<sup>67</sup> such that, for example, the acquisition and storage of improvised explosive device components, as well as the building of such devices for imminent use, would be considered sufficiently direct to allow those involved to be attacked while engaging in the activities.

The status of an individual can sometimes be unclear. To illustrate, consider the earlier example of civilians sitting on a hillside overlooking a commonly used helicopter landing zone. Without additional intelligence indicating they are acting as an early warning system or engaging in other forms of direct participation, IHL requires them to be treated as civilians and protected from attack.<sup>68</sup> Thus, when General John Allen, former commander of International Security Forces-Afghanistan (COMISAF), reissued the COMISAF Tactical Directive and directed all coalition forces to “presume that every Afghan is a civilian until otherwise apparent,”<sup>69</sup> he was simply reiterating a presumption that had long been enconced in international law. Note, however, that the mere existence of some doubt is insufficient to preclude attack. After all, doubt is a persistent and pervasive factor in combat. Rather, the degree of doubt must be at a level that would cause a reasonable attacker in the same or similar circumstances to question the status of the individual, a standard discussed below.

Controversy surrounding the use of so-called “signature strikes” usually revolves around the principle of distinction. Signature strikes are generally directed at persons “who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known.”<sup>70</sup> Those who exhibit certain “signatures,” such as being involved in planning and executing attacks, are clearly targetable as direct participants in hostilities. The

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66. Interpretive Guidance, *supra* note 41, at 65-68.

67. DINSTEIN, *supra* note 63, at 148; Boothby, *supra* note 45, at 749-52.

68. AP I, *supra* note 8, art. 50(1), at 26; INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4789 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC COMMENTARY]; UK MANUAL, *supra* note 11, ¶ 5.3.1; AMW MANUAL, *supra* note 12, r. 12; TALLINN MANUAL, *supra* note 12, r. 33. See also MELZER, *supra* note 54, at 354; Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Judgment, ¶ 946 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007), [http://www.icty.org/x/cases/dragomir\\_milosevic/tjug/en/071212.pdf](http://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf).

69. International Security Assistance Force/United States Forces-Afghanistan, *COMISAF’s Tactical Directive* (Nov. 30, 2011), available at [http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r.pdf](http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf).

70. DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 41 (2012).



more difficult cases involve individuals who exhibit signatures that do not clearly indicate membership in an organized armed group or direct participation in hostilities. For instance, a group of males carrying AK-47s in a known hostile area do not necessarily exhibit a signature sufficient for targeting, especially in countries like Afghanistan and Yemen where the unstable security situation requires prudent people to carry arms in self-defense. However, if the same group of men are observed carrying military-grade weapons, such as rocket-propelled grenades (RPGs), heavy machine guns, and explosives in an area frequently used by militants to ambush coalition or host-nation security forces, such a signature could be sufficient to establish members of the group as valid targets.

IHL's treatment of the status of persons during an NIAC is analogous to that in an IAC. Although the notion of combatancy is technically limited to the latter, IHL does not prohibit the status-based targeting of a state's security forces or dissident armed forces during an NIAC.<sup>71</sup> As to the targeting of members of organized armed groups and civilians directly participating in hostilities,<sup>72</sup> the same rules generally apply – and the same disagreements appear – as in the case of IACs.

**Objects:** Article 52(1) of Additional Protocol I prohibits attacking civilian objects. The provision characterizes civilian objects as those which are not military objectives.<sup>73</sup> Article 52(2) defines the latter as “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.”<sup>74</sup> The United States and other AP I non-parties view the prohibition and attendant definition as reflective of customary international law.<sup>75</sup> If there is a question as to whether an object that is “normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling, or a school,” is being used for military purposes, and thus subject to targeting, a presumption that the object

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71. MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY*, ¶¶ 1.1.2(a), 2.1.1 (2006) [hereinafter *NIAC MANUAL*]. Note that all members of a dissident armed force are always targetable, whereas, by the ICRC interpretation, only members of organized armed groups with a continuous function are targetable at all times. See *Interpretive Guidance*, *supra* note 41, at 32-33.

72. AP II, *supra* note 20, art. 13(3).

73. See also *CIHL Study*, *supra* note 12, r. 9; *UK MANUAL*, *supra* note 11, ¶ 5.24.1; *U.S. COMMANDER'S HANDBOOK*, *supra* note 11, ¶ 8.3.

74. This definition is in accordance with other treaties. See, e.g., Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 2(6), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter *Amended CCW Protocol II*].

75. *U.S. COMMANDER'S HANDBOOK*, *supra* note 11, ¶ 8.2; *2013 OPLAW HANDBOOK*, *supra* note 18, at 22. See also *CIHL Study*, *supra* note 12, r. 8; *AMW MANUAL*, *supra* note 12, cmt. accompanying r. 1(y) ¶ 1; *TALLINN MANUAL*, *supra* note 12, cmt. accompanying r. 38, ¶ 1; *Eritrea-Ethiopia Claims Commission*, *supra* note 18, ¶ 113.

retains its protected civilian status attaches until facts on the ground indicate otherwise.<sup>76</sup>

There are two cumulative criteria that must be satisfied before targeting an object: 1) it must make an “effective contribution” to the adversary’s military action, and 2) attacking the object must offer a “definite military advantage.”<sup>77</sup> The “effective contribution” made by the object to the adversary’s military action need not be critical, or even significant, but it must in fact contribute to the enemy’s military action.<sup>78</sup> At the same time, the military advantage that the attacker accrues from the engagement must be “definite” in the sense that it may not be merely “potential or indeterminate.”<sup>79</sup> The advantage attained may be measured not simply by the immediate tactical gain, but also with respect to the operational advantage accruing to the larger campaign.<sup>80</sup> As a practical matter, attacking most objects that make an effective contribution to the enemy’s military action affords an attacker a definite military advantage.

An object can make an effective contribution through its “nature, location, purpose, or use.”<sup>81</sup> The “nature” of a military objective refers to its “inherent characteristic or attribute which contributes to military action.”<sup>82</sup> Tanks, artillery pieces, warships, submarines, fighter jets, military barracks, and ammunition depots exemplify valid military objectives by nature because they inherently make an effective contribution to military action.<sup>83</sup>

“Location” relates to “selected areas that have special importance to military operations,”<sup>84</sup> regardless of how those areas are currently being used. For example, certain ancillary passes connected to the Khost-Gardez Pass in Afghani-

76. AP I, *supra* note 8, art. 52(3); UK MANUAL, *supra* note 11, ¶ 5.24.3; AMW MANUAL, *supra* note 12, cmt. accompanying r. 22(d), ¶¶ 3-4; *Galić* Judgment, *supra* note 26, ¶ 51.

77. This is the position adopted, for example, in JP 3-60, *supra* note 61, app. A, ¶ 4(b)(1) (asserting that “both [effective contribution to military action and definite military advantage] must apply before an object that is normally a civilian object can be considered a military objective.”).

78. AMW MANUAL, *supra* note 12, cmt. accompanying r. 1(y), ¶ 4. *See also* U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.9.1.

79. ICRC COMMENTARY, *supra* note 68, ¶ 2024; MELZER, *supra* note 54, at 293; JP 3-60, *supra* note 61, Appendix A, ¶ 4(b)(8).

80. UK MANUAL, *supra* note 11, ¶ 5.33.5; UK Additional Protocol Ratification Statement, ¶ (i), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2> (last visited Apr. 16, 2014); AMW MANUAL, *supra* note 12, cmt. accompanying r. 1(w), ¶ 6; TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 38, ¶ 17; AFDD 3-60, *supra* note 25, at 89. *See also* HENDERSON, *supra* note 61, at 199-202 (providing a more detailed discussion of why military advantage may be measured at the operational as opposed to the tactical level, and why measuring military advantage at the strategic level is generally not appropriate).

81. AP I, *supra* note 8, art. 52(2).

82. AMW MANUAL, *supra* note 12, cmt. accompanying r. 22(a), ¶ 1. *See also* ICRC COMMENTARY, *supra* note 68, ¶ 2020; DINSTEIN, *supra* note 63, at 96.

83. ICRC COMMENTARY, *supra* note 68, ¶ 2020; OPLAW HANDBOOK, *supra* note 18, at 23. *See also* DINSTEIN, *supra* note 63, at 96-97.

84. AMW MANUAL, *supra* note 12, cmt. accompanying r. 22(b). *See also* ICRC COMMENTARY, *supra* note 68, ¶ 2021.

stan are well-known smuggling routes for the Haqqani network.<sup>85</sup> Assuming for the sake of analysis that the Haqqani network is a component of the same organized armed group led by the Afghan Taliban in the Afghanistan NIAC, targeting such passes in order to block or degrade their usefulness would be permissible based upon the location.<sup>86</sup>

“Purpose” denotes the intended future use of an object.<sup>87</sup> The criterion acknowledges that it is unnecessary for the attacker to wait until a civilian object is actually being used for military purposes before striking it. An object’s purpose may be deducible using various forms of intelligence, such as observation with intelligence, surveillance, and reconnaissance (ISR) assets (manned or unmanned), human intelligence, or signals intelligence. However, when the intended future use of an object is not perfectly clear, the attacker must act reasonably given the information available at the time of the strike.<sup>88</sup> As an illustration, it is common in the Khost-Gardez Pass for insurgents travelling between Pakistan and Afghanistan to use specific small shelters along well-established mountain trails as safe-houses to store equipment, food, and other items necessary to make the mountain crossing by foot.<sup>89</sup> Provided an attacker has reliable and timely information that such shelters will be used by insurgents in the future for the same purposes, it would be permissible to target them immediately in order to disrupt or degrade insurgent transportation routes.

Lastly, “use” refers to how an object is currently being employed.<sup>90</sup> The criterion applies in the case of civilian objects that are being used for military purposes, but only during the period of use. It is important to note that a civilian object becomes a military objective regardless of the extent of military usage. Damage to distinct civilian components of the target must be considered in the proportionality and precautions in attack analyses and may preclude attack on either or both of those bases, but the object nevertheless qualifies as a military objective once it is converted to military use, however slight.

The category of military objective by use is especially relevant on the contemporary battlefield because non-state actors often use civilian objects,

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85. *Afghan and Coalition Forces Disrupt Haqqani Operations in K-G Pass*, ISAF NEWS (Aug. 15, 2010), <http://www.isaf.nato.int/article/isaf-releases/afghan-and-coalition-forces-disrupt-haqqani-operations-in-k-g-pass.html>.

86. The Haqqani network joined the Taliban in the 1990s and its leader, Jalaludin Haqqani, was a member of the Supreme Taliban Shura. See *Haqqani Network*, MAPPING MILITANT ORGANIZATIONS, <https://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363> (last visited Apr. 16, 2014). The Haqqani network continues to receive orders from Mullah Mohammed Omar, the Taliban leader. Shaan Khan, *The Afghan Taliban Says it Supports Haqqani, Not Pakistan*, CNN (Sept. 29, 2011), <http://www.cnn.com/2011/09/29/world/asia/afghanistan-taliban/>.

87. ICRC COMMENTARY, *supra* note 68, ¶ 2022.

88. AMW MANUAL, *supra* note 12, cmt. accompanying r. 22(c), ¶ 3.

89. Author’s personal experience as the senior legal adviser for a Joint Special Operations Task Force in Afghanistan between 2010-2012.

90. ICRC COMMENTARY, *supra* note 68, ¶ 2022; UK MANUAL, *supra* note 11, ¶ 5.4.4; OPLAW HANDBOOK, *supra* note 18, at 23; AMW MANUAL, *supra* note 12, cmt. accompanying r. 22(d), ¶ 3; TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 38, ¶ 8.

such as residences, religious sites, hospitals, and schools to support military operations. For instance, uninhabited residences in Afghanistan regularly serve as production factories for homemade explosives (HME).<sup>91</sup> It should be cautioned that insurgents frequently change locations to avoid detection by Coalition and Afghan forces. A residence used as an HME production factory remains a valid military objective only for as long as it is so used. Once the materials and activities are moved, the residence regains protected civilian status and may not be targeted.<sup>92</sup>

There is universal agreement that war-fighting and war-supporting objects can qualify as military objectives on one of these four bases. A war-fighting object is one used for combat; such objects are typically military in nature and therefore almost always constitute military objectives. War-supporting objects are those used to directly buttress the war effort, as in the case of a facility used to produce improvised explosive devices. However, controversy surrounds whether so-called “war-sustaining” objects are lawful military objectives, with the United States and few other countries taking the position that they do. The *U.S. Commander’s Handbook on the Law of Naval Operations* defines war-sustaining objects as “economic objects of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability.”<sup>93</sup> Supporters of this approach would, for instance, take the position that it is lawful to target the Afghan poppy crop because of the substantial funding the Afghan Taliban derives from opium production and trade.<sup>94</sup> However, most international legal experts would disagree because of the remoteness of the connection between those activities and military action.<sup>95</sup>

Certain types of military objectives are subject to either specific rules or merit particular care in application of the general rules. In the maritime environment, enemy warships are valid military objectives by nature and may be targeted subject to normal precautions in attack (discussed below).<sup>96</sup> Additionally, en-

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91. ISAF Joint Command-Afghanistan Press Release: Taliban Safe Havens, Explosives Caches Cleared in Arghandab, NATO (Oct. 7, 2010), <http://www.isaf.nato.int/article/isaf-releases/taliban-safe-havens-explosives-caches-cleared-in-arghandab.html>. For an informative article on the bomb-making industry, see Mujib Mashal, *Afghanistan’s IED Complex: Inside the Taliban Bombmaking Industry*, TIME WORLD (Jan. 2, 2013), <http://world.time.com/2013/01/02/afghanistans-ied-complex-inside-the-taliban-bomb-making-industry/>.

92. See, e.g., UK MANUAL, *supra* note 11, ¶ 5.4.4(h) (providing a similar example of a divisional headquarters using a textile factory for operations, thus making the textile factory subject to attack, but only for so long as the headquarters remains present in the factory. If not, the textile factory would regain its protected status and not be subject to attack); JP 3-60, *supra* note 61, Appendix A, ¶ 4(b)(7).

93. U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.2.5. See also AMW MANUAL, *supra* note 12, cmt. accompanying rule 24; AFDD 3-60, *supra* note 25, at 91.

94. See generally Gretchen Peters, How Opium Profits the Taliban (United States Institute of Peace, Peaceworks Series 62, Aug. 2, 2009), available at [www.usip.org/sites/default/files/resources/taliban\\_opium\\_1.pdf](http://www.usip.org/sites/default/files/resources/taliban_opium_1.pdf) (documenting how the Afghan opium trade supports the Taliban war-effort).

95. See generally Schmitt, *Targeting Narcinsurgents*, *supra* note 2. See also HENDERSON, *supra* note 61, at 142-44.

96. See UK MANUAL, *supra* note 11, ¶ 13.44; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.2.5; SAN REMO MANUAL ON INT’L LAW APPLICABLE TO ARMED CONFLICTS AT SEA, Pt. III, § IV, ¶¶ 65-66 (Louise

enemy and neutral merchant vessels may be targeted if they make an effective contribution to the enemy's military effort by their purpose or use and targeting them yields a definite military advantage.<sup>97</sup> Conduct which renders them liable to attack includes being incorporated into an enemy's intelligence system, sailing under convoy of enemy warships, laying mines, minesweeping, cutting undersea cables, attacking friendly merchant ships, and acting as an auxiliary.<sup>98</sup> Additionally, enemy merchant vessels may be attacked if they refuse an order to stop or actively resist visit, search, or capture.<sup>99</sup> Neutral merchant vessels may be targeted, after prior warning, if they intentionally and clearly refuse to stop or actively resist visit, search, or capture, although the attacker must first have a reasonable belief the neutral merchant vessel is carrying contraband or attempting to breach a blockade.<sup>100</sup>

Military objectives in cyberspace can include computers, computer networks, and other tangible components of cyber infrastructure so long as they meet the definition set forth above.<sup>101</sup> Controversy exists over whether data *per se* can qualify as an object given its intangible characteristics.<sup>102</sup> However, it is clear that cyber infrastructure and other cyber related objects can be attacked by destroying, altering, or manipulating data upon which they rely; in such cases, the infrastructure constitutes the object of attack, not the data, and an assessment of whether the target qualifies as a military objective is made based upon the military use or nature of the infrastructure and objects. Additionally, military and civilian users often share computers, computer networks, and cyber infrastructure. As with other dual-use objects, such use for military purposes renders them military objectives.<sup>103</sup> When conducting attacks on dual-use cyber infrastructure, the attacker must take into account the principle of proportionality and the requirement to take precautions in attack (discussed below) – a particular challenge in cyberspace.

In aerial warfare, military aircraft may be targeted based upon their nature,

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Doswald Beck ed., 1995), available at <http://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce?openDocument> [hereinafter SAN REMO MANUAL].

97. See UK MANUAL, *supra* note 11, ¶¶ 13.40, 13.47; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶¶ 7.5.1-7.5.2, 8.6.2.2; SAN REMO MANUAL, *supra* note 96, pt. III, § I, ¶ 40.

98. See UK MANUAL, *supra* note 11, ¶ 13.5(d); SAN REMO MANUAL, *supra* note 96, pt. I, § V, ¶ 13(h) (stating that an auxiliary ship is a "vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a state and used for the time being on government non-commercial service."). See also, U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 2.3.1.

99. See SAN REMO MANUAL, *supra* note 96, pt. III, § IV, ¶ 60(e); U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 8.6.2.2.

100. UK MANUAL, *supra* note 11, ¶ 13.47; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 7.10; SAN REMO MANUAL, *supra* note 96, pt. III, § V, ¶ 67(a).

101. See AP I, *supra* note 8, art. 52(2); ICRC COMMENTARY, *supra* note 68, ¶¶ 2007-2008; TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 38, ¶¶ 3-10.

102. See TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 38, ¶ 5.

103. See *id.*, r. 39, ¶¶ 1-3.



unless being used as a medical aircraft.<sup>104</sup> Non-military aircraft, except civilian airliners, may be downed if they engage in activities that make an effective contribution to military action, such as conducting attacks, being integrated into the enemy's intelligence efforts, or providing troop or matériel transportation.<sup>105</sup> Additionally, non-military aircraft that fail to comply with the orders of military authorities for landing, inspection and possible capture, or that resist interception, also qualify as military objectives.<sup>106</sup>

A civilian airliner that is being used for military purposes such as reconnaissance or transport of troops may only be targeted if: 1) diversion for landing, inspection, and possible capture is not feasible; 2) no other method for exercising military control is available; 3) the actions that render the civilian airliner a military objective are sufficiently grave to justify an attack; 4) all feasible precautions have been taken;<sup>107</sup> 5) the strike will not violate the principle of proportionality;<sup>108</sup> and 6) a warning has been issued whenever circumstances permit.<sup>109</sup> Civilian airliners and aircraft granted safe conduct are subject to special legal requirements.<sup>110</sup> They may be targeted if they violate the terms of agreement permitting that safe conduct or intentionally hamper movements of combatants, subject to the aforementioned six requirements.<sup>111</sup> Given the significant potential for the loss of noncombatant lives when targeting a civilian airliner, it is understandable that special rules attach to such a situation.

Finally, a range of specific objects and facilities enjoy special protection under treaty or customary IHL (or both) and may not be attacked unless they

104. See GC I, *supra* note 14, arts. 19, 35; GC II, *supra* note 20, art. 39; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 22, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]; API, *supra* note 8, arts. 8(f), 8(g), 8(j), 24; SAN REMO MANUAL, *supra* note 96, pt. III, § 3, ¶ 53; AMW MANUAL, *supra* note 12, § A, cmt. accompanying r. 1(u), ¶ 4. See also U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 2.2.6. A medical aircraft is "any aircraft permanently or temporarily assigned – by the competent authorities of a Belligerent Party – exclusively to aerial transportation or treatment of wounded, sick, or shipwrecked persons, and/or the transport of medical personnel and medical equipment or supplies." AMW MANUAL, *supra* note 12, r. 1(u).

105. See UK MANUAL, *supra* note 11, ¶¶ 12.36-12.37; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 8.8; SAN REMO MANUAL, *supra* note 96, pt. III, § IV, ¶ 63; AMW MANUAL, *supra* note 12, § E(II), r. 27(a)-(c).

106. See UK MANUAL, *supra* note 11, ¶¶ 12.36-12.37; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 8.8; SAN REMO MANUAL, *supra* note 96, pt. III, § IV, ¶ 62(e); AMW MANUAL, *supra* note 12, § E(II), r. 27(d)-(e).

107. See API, *supra* note 8, art. 57; CIHL Study, *supra* note 12, r. 15.

108. See API, *supra* note 8, arts. 51(5)(b), 57(2)(a)(iii); CIHL Study, *supra* note 12, r. 14.

109. See API, *supra* note 8, art. 57(2)(a)(iii)(c); CIHL Study, *supra* note 12, r. 20; UK MANUAL, *supra* note 11, ¶ 12.32; SAN REMO MANUAL, *supra* note 96, pt. III, § 3, ¶ 57; AMW MANUAL, *supra* note 12, § J(III), r. 68(a)-(d), 70.

110. See UK MANUAL, *supra* note 11, ¶ 12.7; AMW MANUAL, *supra* note 12, § A, r. 1(i) (defining a "[c]ivilian airliner" as "a civilian aircraft identifiable as such and engaged in carrying civilian passengers in scheduled or non-scheduled service."). Aircraft may be granted safe conduct by agreement between belligerent parties. See also UK MANUAL, *supra* note 11, ¶ 12.28; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 8.6.3; AMW MANUAL, *supra* note 12, § J(II), r. 64.

111. See UK MANUAL, *supra* note 11, ¶ 12.30; SAN REMO MANUAL, *supra* note 96, pt. III, § 3, ¶ 55(c); AMW MANUAL, *supra* note 12, § J(II), r. 65(a)(i).



become military objectives. These include medical facilities and units;<sup>112</sup> areas specially established as civilian protective zones and for the care of the wounded and sick;<sup>113</sup> humanitarian relief facilities, supplies, and transports;<sup>114</sup> peace-keeping equipment and facilities;<sup>115</sup> cultural property;<sup>116</sup> works and installations containing dangerous forces, such as dams, dykes, and nuclear electrical generating stations;<sup>117</sup> the natural environment;<sup>118</sup> and objects indispensable to the survival of the civilian population, such as food and drinking water supplies.<sup>119</sup>

### III. THE WEAPON

Even when a lawful military objective is the intended target, attacks using certain weapons are prohibited, a point confirmed in the Regulations annexed to the 1907 Hague Convention IV: “the right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>120</sup> A number of the prohibitions apply to weapons generally. Article 35(2) of Additional Protocol I prohibits the employment of weapons calculated or of a nature to cause superfluous injury or unnecessary suffering.<sup>121</sup> Projectiles containing fragments that cannot be detected using x-ray would, for instance, qualify on the basis that they complicate medical treatment when the same disabling or lethal effect can be achieved using metal fragments.

A second general prohibition relates to the use of indiscriminate weapons (as

112. See GC I, *supra* note 14, art. 19; AP I, *supra* note 8, arts. 12, 21-24; AP II, *supra* note 20, art. 11; CIHL Study, *supra* note 12, r. 28-29.

113. See GC I, *supra* note 14, arts. 20, 23; GC IV, *supra* note 104, arts. 14-15; AP I, *supra* note 8, art. 60; CIHL Study, *supra* note 12, r. 35-36.

114. See GC IV, *supra* note 104, arts. 55, 59; AP I, *supra* note 8, arts. 69-70; AP II, *supra* note 20, art. 18(2); CIHL Study, *supra* note 12, r. 32.

115. See Convention on the Safety of the United Nations and Associated Personnel art. 7, Dec. 9, 1994, 2051 U.N.T.S. 363; CIHL Study, *supra* note 12, r. 33.

116. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212; AP I, *supra* note 8, art. 53; AP II, *supra* note 20, art. 16; CIHL Study, *supra* note 12, r. 38.

117. See AP I, *supra* note 8, art. 56; CIHL Study, *supra* note 12, r. 42. The U.S. does not consider this article to reflect customary international law. See Matheson, *supra* note 11, at 419, 427.

118. AP I, *supra* note 8, arts. 35(3), 55. The U.S. does not consider these articles to reflect customary international law. See Matheson, *supra* note 11, at 424. There is general agreement, however, that the environment as such constitutes a civilian object subject to the general protection such objects enjoy. In light of the unique nature of the environment as a location of battle, precise application of this protection is unsettled, particularly with regard to the rule of proportionality. CIHL Study, *supra* note 12, r. 43-45.

119. AP I, *supra* note 8, art. 54; AP II, *supra* note 20, art. 12; CIHL Study, *supra* note 12, r. 54.

120. Hague Regulations, *supra* note 31, art. 22.

121. Protocol on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168. See also CIHL Study, *supra* note 12, r. 79; NIAC MANUAL, *supra* note 71, ¶ 2.2.2; AMW MANUAL, *supra* note 12, cmt. accompanying r. 5(b), ¶¶ 1, 3.

distinct from the indiscriminate use of discriminate weapons).<sup>122</sup> Weapons that are incapable of being directed at a specific military objective are inherently indiscriminate and their use is accordingly prohibited.<sup>123</sup> The commonly cited historical example is the German V-2 rocket in World War II. Its aiming mechanism was so inaccurate that any attempt to use it to attack a particular military objective, including large objectives such as military installations, would likely fail; successful attack was essentially the product of luck.

It is extremely rare for weapons to be prohibited as indiscriminate *per se* because their ability to discriminate usually depends not only on technical capabilities, but also on the environment in which they are employed. Consider the Iraqi SCUD missiles used during the 1990-91 Persian Gulf War. While SCUD missiles have been described as “highly inaccurate and prone to breakup in flight,”<sup>124</sup> the weapon could be aimed sufficiently to direct attacks against large military installations, such as the Dhahran Airfield in Saudi Arabia.<sup>125</sup> However, when Iraq employed this otherwise lawful weapon against major cities in Israel and Saudi Arabia, Iraq violated the prohibition on indiscriminate attacks (discussed below) because the weapons were insufficiently accurate to reliably target military objectives within those urban areas.<sup>126</sup>

The advent of fully autonomous weapon systems (AWS) has raised anew the issue of the distinction between indiscriminate weapons and the indiscriminate use of weapons.<sup>127</sup> Despite claims that the systems cannot comply with IHL, their ability to discriminate depends on the capabilities of their on-board sensor suite, the system’s algorithms and processing capability, and the environment in which they are used. There is no question that AWS will employ weapons that are very accurate; the issue is instead whether they will be able to distinguish lawful from unlawful targets when operating on the battlefield, including the ability, in certain situations, to interpret ambiguous human behavior. If not, they are indiscriminate *per se*. Yet, there are environments where there are no unlawful targets present, such as sections of the high seas or remote areas. Additionally, technical advances will dramatically enhance sensor and process-

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122. The International Court of Justice has labeled the prohibition on indiscriminate weapons as one of two “cardinal” principles, the other being the principle of unnecessary suffering. *Nuclear Weapons*, *supra* note 17, ¶ 78; *Kupreskić Judgment*, *supra* note 25, ¶ 524.

123. AP I, *supra* note 8, art. 51(4); CIHL Study, *supra* note 12, r. 12; UK MANUAL, *supra* note 11, ¶ 6.4; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 9.1.2; AMW MANUAL, *supra* note 12, r. 5(a); TALLINN MANUAL, *supra* note 12, r. 43.

124. FRANK N. SCHUBERT & THERESA L. KRAUS, *THE WHIRLWIND WAR: THE UNITED STATES ARMY IN OPERATIONS DESERT SHIELD AND DESERT STORM* 154 (1995). *See also* DEP’T OF DEF., *CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS* 93 (1992).

125. SCHUBERT & KRAUS, *supra* note 124, at 250. The attack on the Dhahran Airfield struck a warehouse that had been converted into military barracks, killing 28 American soldiers and wounding 97 others.

126. *CONDUCT OF THE PERSIAN GULF WAR*, *supra* note 124, at 621-23; SCHUBERT & KRAUS, *supra* note 124, at 246-47.

127. *See generally* Schmitt & Thurnher, *supra* note 5; Schmitt, *Autonomous Weapons Systems*, *supra* note 5.

ing capabilities. Thus, the proper question is not whether they are unlawful *per se*, but rather whether their use in a particular environment and combat context will meet IHL requirements.

Weapons are also unlawfully indiscriminate if their effects cannot be controlled.<sup>128</sup> The paradigmatic examples are biological contagions or persistent airborne chemical agents that can easily spread to civilian populations, even if properly aimed at military objectives.<sup>129</sup> In more modern times, particular types of malware in cyberspace could, by their very design and the target sets for which they are intended, be either unable to discriminate between military and civilian cyber targets or have uncontrollable effects.<sup>130</sup> In most cases, however, such weapons would not be indiscriminate *per se* because they could be introduced into closed military networks.

Specific international treaties have prohibited particular weapons or restricted their use, in many instances because of humanitarian concerns over the use of such weapons. These include poison,<sup>131</sup> explosive bullets,<sup>132</sup> expanding bullets,<sup>133</sup> biological and chemical weapons,<sup>134</sup> anti-personnel land mines,<sup>135</sup> booby-

128. AP I, *supra* note 8, art. 51(4); UK MANUAL, *supra* note 11, ¶ 6.4; AMW MANUAL, *supra* note 12, r. 5(a); TALLINN MANUAL, *supra* note 12, r. 43; AFDD 3-60, *supra* note 25, at 89.

129. The U.S. Commander's Handbook misuses the example of targeting an "entire large city when the object of attack is a small enemy garrison in the city" to illustrate the prohibition on indiscriminate attacks whose effects cannot be controlled. See U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 5.3.2. The example provided by the U.S. Commander's Handbook would more accurately illustrate the prohibition on attacks that are not directed at a specific military objective.

130. U.S. Department of the Army, FM 3-38, Cyber Electromagnetic Activities ¶ 1-14 (February 2014); TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 49, ¶ 3.

131. Hague Regulations, *supra* note 31, art. 23(a); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, *reprinted in* 14 INTERNATIONAL LEGAL MATERIALS 49 (1975) [hereinafter 1925 Protocol on Asphyxiating, Poisonous or Other Gases].

132. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> (prohibiting the use of projectiles weighing below 400 grammes that are either explosive or charged with fulminating or inflammable substances).

133. Hague Declaration (IV, 3) Concerning Expanding Bullets, 1899, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D528A73B322398B5C12563CD002D6716&action=openDocument> (prohibiting the use of "bullets which expand or flatten easily in the human body). Note that the prohibition relates to use during armed conflict. Many states use such rounds for law enforcement purposes because of their significant stopping power. See DINSTEIN, *supra* note 63, at 70.

134. 1925 Protocol on Asphyxiating, Poisonous or Other Gases, *supra* note 131; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

135. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168 [hereinafter CCW Protocol II]; Amended CCW Protocol II, *supra* note 74; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 17, 1997, 2056 U.N.T.S. 211.

traps,<sup>136</sup> incendiary weapons,<sup>137</sup> blinding lasers,<sup>138</sup> cluster munitions,<sup>139</sup> naval mines,<sup>140</sup> and torpedoes.<sup>141</sup> States party to the respective instruments are bound by their prohibitions and restrictions. Moreover, many of the provisions are now viewed as reflective of customary law, and as such, bind even non-parties.<sup>142</sup>

#### IV. EXECUTION OF THE ATTACK

Assuming a target qualifies as a military objective and the weapon used is lawful, an attacker (which in IHL includes those who plan, approve, or execute attacks) must nevertheless, as noted in Article 57 of AP I, take “constant care . . . to spare the civilian population, civilians, and civilian objects.”<sup>143</sup> This general obligation, known as the requirement to take precautions in attack, is operationalized in a number of specific rules.

Before turning to those rules, a cautionary note is in order. IHL only requires the taking of precautions that are feasible.<sup>144</sup> Feasibility is generally understood as referring to steps that are “practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations.”<sup>145</sup> The ICRC *Commentary* to Article 57 sagely points out that what is practicable or practically possible entails “common sense and good faith.”<sup>146</sup> Fundamentally, the “feasible” standard requires attackers to take those measures to avoid civilian harm that a reasonable attacker would take in

136. Amended CCW Protocol II, *supra* note 74. For a detailed explanation of the definition of booby traps and the intricacies of international law concerning them, see UK MANUAL, *supra* note 11, ¶¶ 6.7-6.7.9; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 9.6.

137. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171 [hereinafter CCW Protocol III].

138. Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370 (prohibiting the use and transfer of laser weapons “specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.”).

139. Convention on Cluster Munitions, *opened for signature*, Dec. 3, 2008, 48 INT’L LEGAL MATERIALS 357 (2008).

140. Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines arts. 1(1) & (2), Oct. 18, 1907, 36 Stat. 2332 [hereinafter Hague Convention VIII]; UK MANUAL, *supra* note 11, ¶¶ 13.52-13.64; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶¶ 9.2.2-9.2.3.

141. Hague Convention VIII, *supra* note 140, art. 1(3); *see also* UK MANUAL, *supra* note 11, ¶ 13.51; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 9.4.

142. CIHL Study, *supra* note 12, rs. 72-74, 77-86.

143. AP I, *supra* note 8, art. 57(1); *see also* CIHL Study, *supra* note 12, r. 15; UK MANUAL, *supra* note 11, ¶ 5.32; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.3.1; TALLINN MANUAL, *supra* note 12, r. 52; *Kupreskić* Judgment, *supra* note 25, ¶ 524.

144. AP I, *supra* note 8, arts. 57(2)(a)(i) & (ii). The condition of feasibility is generally understood to apply to all of the precautionary requirements set forth in Article 57.

145. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, UK Reservation; CIHL Study, *supra* note 12, r. 15; CCW Protocol II, *supra* note 135, art. 3(4); CCW Protocol III, *supra* note 137, art. 1(5); and, Amended CCW Protocol II, *supra* note 74, art. 3(10). It also appears in the ICRC COMMENTARY, *supra* note 68, ¶ 2198 and is discussed in MELZER, *supra* note 54, at 365.

146. ICRC COMMENTARY, *supra* note 68, ¶ 2198.

the same or similar circumstances – based upon information “reasonably available [to the attacker] at the relevant time and place.”<sup>147</sup> In making the feasibility assessment, those involved in an attack may take into account military considerations, such as risk to friendly forces, the availability of weapon systems, or other operational demands for surveillance resources, such as unmanned aerial vehicles. The reasonableness of their actions is the touchstone for determining compliance with IHL. The law allows for mistakes in the Clausewitzian “fog of war.” Intelligence may be incomplete or faulty, technology may fail to function properly, and tactical conditions may change after a targeting decision has been made and beyond the point at which an attack may be abandoned. IHL does not require perfection.

In terms of specific precautions in attack requirements, those who plan or approve attacks are obligated to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . [or] subject to special protection . . . .”<sup>148</sup> For instance, the loiter capability and sophisticated sensor suite of unmanned aerial systems has significantly enhanced the capability of states fielding such systems to verify target status. Systems like the Multi-Spectral Targeting System (MTS) found aboard some drones include visible and infrared ranging capabilities that facilitate identification of the nature of a potential target, day or night.<sup>149</sup> As noted, however, the requirement to use them is framed by the feasibility condition. In some cases, sufficient verification by other methodologies may render it operationally unwise to place advanced and sparse systems at risk. In others, higher priorities may make their use ill-advised operationally. For instance, if the capabilities of the MTS or the loiter capability of the Predator or Reaper drones are needed elsewhere on the battlefield, the attacker may resort to a less sophisticated method of target verification, such as a soldier equipped with binoculars or night vision goggles.

The level of legal (as distinct from operational or policy) certainty necessary for target identification is unsettled. Some observers demand near absolute certainty by positing a requirement that an attacker seek additional information even if there is a “slight doubt” as to the status of a target.<sup>150</sup> The reality of combat – particularly in counterinsurgency operations – makes attainment of

147. UK Additional Protocol Ratification Statement, *supra* note 80, ¶ (c); *see also* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, with annexed Protocols, U.S. Understanding ¶ (1)(A), *opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 137; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.3.1; TALLINN MANUAL, *supra* note 12, r. 38; AMW MANUAL, *supra* note 12, cmt. accompanying r. 1(q), ¶ 3.

148. AP I, *supra* note 8, art. 57(2)(a)(i); CIHL Study, *supra* note 12, r. 16.

149. Andrew Mondy & Gregory Roth, *Raytheon’s Multi-Spectral Targeting System*, 2 RAYTHEON’S TECHNOLOGY TODAY 36 (2012), [http://www.raytheon.com/newsroom/technology\\_today/2012\\_i2/pdf/2012\\_i2.pdf](http://www.raytheon.com/newsroom/technology_today/2012_i2/pdf/2012_i2.pdf).

150. *See, e.g.*, ICRC COMMENTARY, *supra* note 68, ¶ 2195. Other states have created disparate levels of ‘doubt’ necessary to prevent an attack. For example, New Zealand requires “substantial doubt,” while Israel requires “significant doubt.” 2 CUSTOMARY INTL. HUMANITARIAN L.: PRAC. 243-44 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). Without a clear articulation from conventional



such a standard impractical. Slight doubt will almost always exist on a counterinsurgency battlefield where the enemy deliberately uses the civilian population to disguise their activities, as is done in Afghanistan and elsewhere.

Consider a situation in which timely and reliable intelligence indicates an al-Qaeda leader is operating out of a remote village in Afghanistan's mountainous Nuristan Province. Human intelligence from a vetted and reliable source reveals the al-Qaeda leader frequently travels between two particular houses and wears a red and white keffiyeh, a distinctive Arab headdress not worn by local Afghans. Signals intelligence confirms the presence of the al-Qaeda leader, and drones overhead identify and track an individual wearing a red and white keffiyeh travelling between the houses reported by the source. While some level of doubt could exist as to whether this is the only red and white keffiyeh in the village, the legal question is whether a reasonable attacker (a standard discussed below), having employed all reasonably available means of verification under the circumstances and in light of all of the intelligence available at the time, would initiate the attack against the keffiyeh-wearing individual. It would seem so in the abstract, although it must be cautioned that every case must be evaluated on its own merits in light of all attendant circumstances.

Attackers are also required to take feasible precautions in the choice of means (weapons) and methods (tactics) of attack in order to minimize "incidental loss of civilian life, injury to civilians and damage to civilian objects."<sup>151</sup> Of course, attackers need only select less harmful means or methods that do not involve sacrificing military advantage and that are feasible. As an example, an attacker does not have to use a less powerful bomb against an insurgent leader in a building in order to avoid civilian casualties if doing so would significantly lower the likelihood of success (assuming all other IHL requirements are met).

Of particular note in this regard are precision weapons. The decision to employ a specific weapon system in a situation is highly contextual; categorical declarations that precision weapons must be used are simply incorrect. For instance, although precision weapons may be available for an operation, they may be more useful at later stages of the campaign and thus need to be preserved, or the employment of a precision weapon may be infeasible because it would require increased risk to ground forces in order to designate a target. Other systems may also avoid or minimize civilian harm without sacrificing military advantage. As an example, carbon filament bombs can be used to interrupt electricity with far less collateral damage than regular bombs, while cyber operations are especially useful in avoiding collateral damage.

Attackers are likewise required to use tactics ("methods" of attack in IHL parlance) that will minimize collateral damage, taking into account the risk to

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IHL, the level of "doubt" permissible will likely remain a decision driven by policymakers based on the operational environment.

151. AP I, *supra* note 8, art. 57(2)(a)(ii); *see also* CIHL Study, *supra* note 12, r. 17; UK MANUAL, *supra* note 11, ¶ 5.32.4; AMW MANUAL, *supra* note 12, r. 32(b); OPLAW HANDBOOK, *supra* note 18, at 26; TALLINN MANUAL, *supra* note 12, r. 54.



friendly forces and other operational factors. To illustrate, an attacker may set the fuse on an aerially-delivered bomb to delay the detonation by several milliseconds so that its effects will be mitigated when it buries itself in the ground or may strike a bridge at night when civilian traffic across it is likely to be light. For the same reason, use of a “tactical call-out” became commonplace in Iraq and Afghanistan.<sup>152</sup> Once a compound was surrounded and secured, soldiers would call out the occupants and ask them to leave the premise. The occupants would then be separated and tactically questioned<sup>153</sup> to identify who else was present in the compound. If a commander was reasonably certain based upon tactical questioning, any available overhead surveillance, and other sources of intelligence that civilians were no longer present in the compound (or were not going to leave and the attack would nevertheless be proportionate), he could launch the attack. It must be emphasized that tactical call-out was possible only because resources were readily available and it was feasible to take such measures. An attacker without such assets who reasonably concluded such actions were not feasible would not be required to engage in the tactic.

Beyond weapons and tactics choice, attackers must consider the full range of targets that, if attacked, would yield the same or similar military advantage. When options are available, the attacker must select the objective that “may be expected to cause the least danger to civilian lives and to civilian objects,”<sup>154</sup> taking into consideration military factors, such as risk to friendly forces and assets available to conduct the attack. To illustrate, take an attack designed to disrupt the production of vehicle-borne improvised explosive devices (VBIED). Two facilities are used – one to structurally prepare the vehicle to carry the explosives and the other to install the explosives. The former is located in a populated area, while the latter is in a remote location, but is heavily defended and significant friendly casualties are anticipated in any attack against it. In this situation, targeting the heavily defended objective would not be required because it would be militarily infeasible, even though its destruction would offer a “similar military advantage” and cause less collateral damage.

Attackers are required to give advance warning if an attack may affect the

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152. See U.S. DEP’T OF THE ARMY, TACTICS IN COUNTERINSURGENCY, FM 3-42.2: U.S. ARMY FIELD MANUAL 3-24.2, ¶¶ 5-48 (2009); Headquarters, International Security Assistance Force/United States Forces-Afghanistan, *COMISAF Night Operations Tactical Directive* (Dec. 1, 2011), available at [http://www.isaf.nato.int/images/docs/20111105%20nuc%20night%20operations%20tactical%20directive%20\(releaseable%20version\)%20r.pdf](http://www.isaf.nato.int/images/docs/20111105%20nuc%20night%20operations%20tactical%20directive%20(releaseable%20version)%20r.pdf) (directing commanders to “initiate entry to the targeted residence by means of . . . an Afghan-led call-out in the appropriate Afghan language.”).

153. The United States defines tactical questioning as “[t]he field-expedient initial questioning for information of immediate tactical value of a captured or detained person at or near the point of capture and before the individual is placed in a detention facility. Tactical questioning is generally performed by members of patrols, but can be done by any appropriately trained DoD personnel. Tactical questioning is limited to direct questioning.” U.S. DEP’T OF DEFENSE, DIRECTIVE 3115.09, DoD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING 32 (2012).

154. AP I, *supra* note 8, art. 57(3); see also UK MANUAL, *supra* note 11, ¶ 13.32; AMW MANUAL, *supra* note 12, r. 33; TALLINN MANUAL, *supra* note 12, r. 56.

civilian population, unless circumstances do not permit.<sup>155</sup> In particular, advance warning that would result in a loss of operational surprise or increase of risk to friendly forces is not required. As an example, in the 2006 airstrike in Iraq against al-Qaeda leader Abu Musab al-Zarqawi, providing a warning to nearby civilians would have alerted him to flee.<sup>156</sup> Sometimes, specific warnings are not feasible, but an attacker may feasibly issue a general warning to the civilian population. The dropping of hundreds of thousands of leaflets warning Iraqi civilians to avoid military sites prior to the initiation of ground combat by Coalition forces in 2003 illustrates this practice,<sup>157</sup> as does the more modern use of Twitter by the Israelis in 2012.<sup>158</sup>

Finally, it should be noted that defenders also shoulder a duty, to “the maximum extent feasible, [to] . . . endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; [and] take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”<sup>159</sup> Failure to comply with this duty does not relieve an attacker of complying with its own obligations under the rule of proportionality and the requirement to take precautions in attack,<sup>160</sup> although the applicability of this rule during operations has sometimes been questioned.<sup>161</sup>

## V. COLLATERAL DAMAGE AND INCIDENTAL INJURY

Even if an attack targets a lawful military objective and the attacker has taken every feasible precaution to minimize the harm to civilians and civilian objects, the attack must comply with the rule of proportionality. Regarded as a tenet of customary international law and codified in Articles 51 and 57 of AP I, the rule prohibits “an 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

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155. AP I, *supra* note 8, art. 57(2)(c); CIHL Study, *supra* note 12, r. 20; UK MANUAL, *supra* note 11, ¶ 5.32.8; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 8.9.2; AMW MANUAL, *supra* note 12, r. 37; TALLINN MANUAL, *supra* note 12, r. 58; JP 3-60, *supra* note 61, Appendix A, ¶ 6(b)(2)(b).

156. John F. Burns, *U.S. Strike Hits Insurgent at Safehouse*, N.Y. TIMES, June 8, 2006.

157. See Pamela Hess, *Propaganda Leaflets Dropped over Iraq*, UNITED PRESS INT’L (Mar. 18, 2003), [http://www.upi.com/Business\\_News/Security-Industry/2003/03/18/Propaganda-leaflets-dropped-over-Iraq/UPI-81231048022702/](http://www.upi.com/Business_News/Security-Industry/2003/03/18/Propaganda-leaflets-dropped-over-Iraq/UPI-81231048022702/).

158. See Olga Khazan, *Israeli Army Drops Warning Leaflets on Gaza*, WASH. POST, Nov. 15, 2012, <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/15/israeli-army-drops-warning-leaflets-on-gaza/> (describing Israeli Defense Force use of its official Twitter account in conjunction with actual leaflet drops to warn civilians to avoid being co-located with Hamas operatives and facilities).

159. AP I, *supra* note 8, art. 58; see also AMW MANUAL, *supra* note 12, r. 42-44.

160. AP I, *supra* note 8, art. 51(7).

161. See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 163-68 (1990).

advantage anticipated.”<sup>162</sup> The harm to civilians is technically labeled “incidental injury,” while that to civilian objects is “collateral damage.” However, common usage generally fails to distinguish between the two and usually uses the latter term, as is done here, to refer to both.

Proportionality does not require a strict mathematical comparison, nor does it, as is often mistakenly believed, call for a balancing test with the scales resting at equilibrium; rather, likely collateral damage only precludes attack when it is “excessive” – that is, “when there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other.”<sup>163</sup> At its core, the rule is an acknowledgement that collateral damage may be unavoidable in order to successfully execute an attack.

Although the issue is not entirely settled,<sup>164</sup> the better view is that collateral damage includes both direct and indirect effects.<sup>165</sup> Direct effects are “the immediate, first order consequences, unaltered by intervening events or mechanisms,” whereas indirect effects are “the delayed and/or displaced second-, third-, and higher-order consequences of action, created through intermediate events or mechanisms.”<sup>166</sup> Therefore, any collateral damage that is foreseeable to an attacker at the time of planning, approving, or executing an attack must be considered during the proportionality calculation.

As indicated by the terms “expected” and “anticipated,” compliance with the rule of proportionality is assessed based upon the information reasonably available to the attacker at the time the attack was planned, approved, or executed. It is not determined by the collateral damage or military advantage that actually resulted; the assessment is *ex ante* rather than *post factum*. Several recent reports regarding the use of unmanned aerial systems, or so-called drones, have been critical of such attacks because, *inter alia*, they have resulted in civilian deaths.<sup>167</sup> However, the existence of civilian casualties, no matter how numerous, does not alone violate the rule of proportionality. A strike must instead be evaluated against expected civilian casualties in light of the military advantages the attacker anticipated attaining through the operation.

It should be cautioned that those with the ability to control an engagement have a continuing duty to comply with this rule.<sup>168</sup> Thus, for example, if a soldier who is ordered to attack a building in which enemy forces have

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162. AP I, *supra* note 8, arts. 51(5)(b), 57(2)(a)(ii), 57(2)(b); *see also* CIHL Study, *supra* note 12, r. 14; UK MANUAL, *supra* note 11, ¶ 2.6; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.3.3; AMW MANUAL, *supra* note 12, r. 14; TALLINN MANUAL, *supra* note 12, r. 51; *Galić* Judgment, *supra* note 26, 58.

163. AMW MANUAL, *supra* note 12, cmt. accompanying r. 14, ¶ 7; MELZER, *supra* note 54, at 360.

164. AMW MANUAL, *supra* note 12, cmt. accompanying r. 14, ¶ 4.

165. TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 51, ¶ 6.

166. JP 3-60, *supra* note 61, Chapter II, ¶ 5e(1)-(2).

167. *See, e.g.*, AMNESTY INT’L, *supra* note 4, at 58; HRW Drone Report, *supra* note 4, at 87-88; Emmerson 2013, *supra* note 4; Emmerson 2014, *supra* note 4; Heyns 2013, *supra* note 4, ¶ 75.

168. AP I, *supra* note 8, art. 57 (2)(b); CIHL Study, *supra* note 12, r. 19.

barricaded themselves becomes aware that, contrary to the intelligence available at the time the order was issued, civilians are unexpectedly present, the soldier must reassess the proportionality of the attack and either alter his means or methods of attack to avoid excessive collateral damage, or cease the attack altogether.

Consider, for instance, the targeting of Taliban leaders in Afghanistan. In many instances, attacks are launched at night while the targeted individual is in a residence, presumably sleeping; family members may also be present. For operational reasons, it is often not feasible to attack at other times or places. When considering whether to proceed, those deciding on the operation must first identify the anticipated military advantage of eliminating the individual based upon his prior actions and function in the organization. They then estimate the expected loss of civilian life or damage to civilian property. In some instances, the leader may not be of sufficient stature to merit any significant loss of civilian life and the operation will be prohibited as a matter of law. In others, the balance may weigh in favor of targeting the leader, even though civilian deaths will result.<sup>169</sup>

IHL also imposes a number of restrictions on specific tactics. The two most significant are based on the broad prohibition on indiscriminate attacks.<sup>170</sup> First, it is unlawful to engage in attacks “which are not directed at a specific military objective” (as distinct from those which are aimed at an unlawful target).<sup>171</sup> In other words, the attacker employs force without heed to whether lawful or unlawful targets will be struck, as in the case of Hamas and Hezbollah’s launching of rockets into Israel,<sup>172</sup> or the recent use of “barrel bombs” in Syria.<sup>173</sup> Second, “[a]ttacks which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian

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169. See Heyns, *supra* note 5, ¶ 71 (acknowledging that compliance with the rule of proportionality “needs to be assessed on a case-by-case basis, depending on the specific context and considering the totality of the circumstances,” including “the value of the target, which determines the level of permissible collateral damage . . .”).

170. See *Galić* Judgment, *supra* note 26, ¶ 57.

171. AP I, *supra* note 8, art. 51(4)(a); CIHL Study, *supra* note 12, r. 11-12; UK MANUAL, *supra* note 11, ¶ 5.23.1; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.3.2; AMW MANUAL, *supra* note 12, r. 13(b); TALLINN MANUAL, *supra* note 12, r. 49. See also *Prosecutor v. Kordić and Čerkez*, Decision on Joint Defence Motion, Case No. IT-95-14/2-A, ¶ 31 (Int’l Crim. Trib. for the former Yugoslavia Mar. 22, 1999); *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, ¶¶ 462-63 (Int’l Crim. Trib. for the former Yugoslavia June 12, 2007); *Prosecutor v. Martić*, IT-95-11-A, ICTY Appeals Judgment, ¶¶ 239-40, 247, 250-52 (Int’l Crim. Trib. for the former Yugoslavia, Oct. 8, 2008).

172. See JEREMY M. SHARP, ET AL., CONG. RESEARCH SERV., RL 33566, LEBANON: THE ISRAEL-HAMAS-HEZBOLLAH CONFLICT, CRS-8 (Aug. 14, 2006).

173. Aryn Baker, *Syria’s Deadly ‘Barrel Bombs’: Assad Regime Uses Devastating, Makeshift Weapon*, TIME (Jan. 13, 2014), <http://world.time.com/2014/01/13/syrias-deadly-barrel-bombs-assad-regime-uses-devastating-makeshift-weapon/>.

objects are prohibited.”<sup>174</sup> An example would be regarding an entire village as a target when it is possible to strike the specific buildings in which insurgents are located.

## VI. LOCATION OF THE TARGET

With respect to the geography of targeting operations, it is important to emphasize the distinction between the body of law that governs the use of force by one state into the territory of another (*jus ad bellum* and the law of neutrality) and the law that controls how targeting must be conducted (*jus in bello*).<sup>175</sup> The legality of penetrating another state’s borders has no bearing on the legality of the actions taken during targeting, and vice versa.

During IACs, targeting may be conducted against valid military objectives within the territory of any of the belligerent states, including their territorial sea and the airspace above it, as well as in international waters and airspace.<sup>176</sup> Belligerent military activities may not take place in the territory, territorial waters, or territorial airspace of a neutral country.<sup>177</sup> However, in order to enjoy the protection afforded neutral states by the IHL law of armed conflict, a neutral state must equally prohibit the use of its territory by any of the belligerents. If a belligerent attempts to use the territory of a neutral state in support of military activities, the neutral state has an obligation to take measures, including the use of force, to prevent or end that use.<sup>178</sup> For instance, when Iranian F-4 fighters attempted to use the airspace above Saudi Arabian territorial waters to attack two ships during the Iran-Iraq War in 1984, Saudi Arabia, which claimed neutrality during the conflict, attacked them in order to defend its territorial sovereignty and comply with its neutral obligations.<sup>179</sup> Should a neutral state be either unable or unwilling to comply with that obligation, the opposing belligerent parties may conduct operations, including attacks, necessary to put an end to

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174. AP I, *supra* note 8, art. 51(5)(a); CIHL Study, *supra* note 12, r. 13; UK MANUAL, *supra* note 11, ¶ 5.23.2; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 5.3.2; AMW MANUAL, *supra* note 12, r. 13(c); TALLINN MANUAL, *supra* note 12, r. 50.

175. For a more detailed discussion of the importance of distinguishing between the two bodies of law, see Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47 (2009).

176. International waters begin at the outer limits of a coastal state’s territorial sea. U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 1.9. International airspace is the airspace located above international waters, including the contiguous and exclusive economic zones. United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397; UK MANUAL, *supra* note 11, ¶ 12.14; AMW MANUAL, *supra* note 12, cmt. accompanying r. 1(b), ¶ 8.

177. Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague Convention V]; Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415.

178. Hague Convention V, *supra* note 177, art. 5; Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at the Hague arts. 42, 47, Dec. 1922-Feb. 1923 (Hague Rules on Air Warfare); UK MANUAL, *supra* note 11, ¶ 1.43; U.S. COMMANDER’S HANDBOOK, *supra* note 11, ¶ 7.3; AMW MANUAL, *supra* note 12, r. 168(a), 170(c).

179. Richard Halloran, *2 Iranian Fighters Reported Downed by Saudi Air Force*, N.Y. TIMES, June 6, 1984.



their opponent's misuse of neutral territory (a principle that should not be confused with the ongoing debate over the *jus ad bellum* concept of unwilling/unable in the self-defense context).<sup>180</sup>

The geographical limits of non-international armed conflict are less clear. The fact that a non-international armed conflict is underway does not permit a state to cross into other states to conduct operations. Instead, the state where the operation is underway must consent to the operations, they must be authorized by the UN Security Council, or the actions must be taken consistent with the *jus ad bellum* right of self-defense.<sup>181</sup> Typically, this latter option requires that the territorial state be unwilling or unable to put an end to the misuse of its territory by the non-state group.<sup>182</sup> The paradigmatic examples are the drone strikes into Pakistan that have not been authorized by that country's government.

The fact that an operation may be mounted in another country during an NIAC does not answer the question of how it may be conducted. Its answer depends on whether IHL or other bodies of law govern the operation. Attacks conducted on the state's territory with a nexus to the conflict are clearly subject to IHL. However, there is an on-going debate about whether IHL applies outside the state involved in an NIAC.<sup>183</sup> One view is that it does not, although that interpretation appears to be losing adherents rapidly. A second position, advocated by the ICRC, is that IHL applies in cross-border areas into which an NIAC's hostilities have spilled over and thus would govern any targeting there.<sup>184</sup> A third view maintains that the reach of IHL is dependent on party

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180. UK MANUAL, *supra* note 11, ¶ 1.43; U.S. COMMANDER'S HANDBOOK, *supra* note 11, ¶ 7.3; AMW MANUAL, *supra* note 12, r. 168(b); TALLINN MANUAL, *supra* note 12, cmt. accompanying r. 94, ¶ 4. The concept of "unwilling/unable" in the neutrality context, "one of long-standing," should not be confused with its *jus ad bellum* counterpart in the law of self-defense. For an excellent academic treatment of the *jus ad bellum* concept, see Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012). For earlier treatment of the issue see Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 540-43 (2003).

181. See generally Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 58.

182. See, e.g., Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013) ("[W]e act . . . when there are no other governments capable of effectively addressing the threat."); OFFICE OF THE PRESS SEC'Y, FACT SHEET: U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) (requiring "[a]n assessment that the relevant governmental authorities in the country where the action is contemplated cannot or will not effectively address the threat to U.S. persons"). See also U.S. DEP'T OF JUSTICE, WHITE PAPER: LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE, DRAFT, 1-2 (2011); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011).

183. Emmerson 2014, *supra* note 4, ¶ 71(d) (identifying the lack of international consensus around this and other questions of law in the counterterrorism context).

184. INT'L COMM. OF THE RED CROSS, INT'L HUMANITARIAN L. AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 9-12 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf/>.



status, not on geography.<sup>185</sup> The distinction is critical, for if IHL does not govern the conduct of targeting, norms contained in domestic law and human rights law will regulate the operation. The latter generally limits attacks to situations in which lethal force is necessary to prevent death or grievous bodily injury; it does not allow status-based targeting.<sup>186</sup>

#### CONCLUSION

International lawyers, policymakers, operators, and others engaged in the contemporary debates over targeting issues would be well served by knowing the specific prescriptive norms resident in targeting law. Such principles and rules should, and must, shape their positions by signaling the boundaries they cannot cross. Unfortunately, some of the dialogue has been ill-informed and sloppily conducted. The cost can be measured in terms of human suffering.

The debate must equally display sensitivity to IHL's underlying logic. As noted at the outset, the law of targeting is designed to balance the military necessity of being able to conduct operations effectively while minimizing harm to civilians, civilian property, other protected persons and objects, and, to some extent, even combatants. Lack of sensitivity to this balancing act will engender interpretations of the law that play out on the battlefield in ways that do not reflect the equilibrium. When that happens, IHL's prescriptive effect is inevitably weakened, as states will no longer see it in their interest to comply with its constituent norms. Therefore, not only must IHL principles and rules be grasped with precision, but they must be applied with strict fidelity to their object, purpose, and underlying foundational balance.

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185. See Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT'L L. STUDIES 1 (2014).

186. See Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 110-16 (1991) (reporting on the basic principles on the use of force by law enforcement officials).

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