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Targeting and Humanitarian Law: Current Issues

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In the 21st century, the art and science of targeting, particularly in the aerial environment, has become extraordinarily complex. So too has compliance with humanitarian law. Battlefields of centuries past were linear in character, with opposing forces facing each other across a FEBA (forward edge of the battle area). This positioning, together with the limited range and mobility of weapons systems, rendered civilian populations relatively immune to the direct effects of warfare. Civilians were either distant from the battlefield or fled as hostilities drew near.

The advent of long-range strike capability led to a revolution in military-legal affairs.² Civilian populations and objects were not only placed at greater risk due to their proximity to lucrative, and now viable, military and infrastructure targets, but civilians and civilian objects became objectives themselves in various strategic bombing doctrines.³ Humanitarian law reacted by affirming their immunity from direct attack, most notably with the 1977 codification of the distinction principle in Protocol Additional I to the Geneva Conventions.⁴

Today, technological advances in range, precision, and stealth, as well as the transparency resulting from advanced C4ISR technologies,⁵ have again transformed the nature of warfare. Entire countries now comprise the battlespace. And the technological “haves” can strike the assets of their ill-equipped adversaries with near total

impunity. For instance, during Operation Iraqi Freedom, coalition forces lost only one fixed wing aircraft to enemy fire.⁶ Such asymmetry has momentous consequences, not only for combat operations, but also for the application of humanitarian law.

This article explores several of the more pressing legal issues involving targeting during 21st-century armed conflict—targeting doctrine, targeting an opponent’s leadership, targeting terrorists, the use of human and civilian object shields, treating military installations as a unitary target, and computer network attack. Each is especially relevant given the likely use of “lawfare” by opponents of the United States and its coalition partners, most recently demonstrated during Operation Iraqi Freedom.⁷ Humanitarian law has become a permanent fixture on the modern battlefield. Those who ignore this reality do so at their own risk.

Targeting Doctrine, Compellance Campaigns, and Military Objectives

Effects-based operations (EBO) have replaced attrition targeting in US doctrine. In attrition warfare, extensive pre-planned target lists are developed and targets are then destroyed serially, while engaging targets of opportunity as located. Reduced to basics, the enemy is defeated by progressively weakening its military forces. In contrast, effects-based operations represent “the maturation of . . . technologies merged with the theory of targeting for systematic effect rather than absolute destruction.”⁸ The confluence of three factors makes EBO possible: advanced technologies; effects-based planning; and parallel warfare, a new concept of operations.⁹

Technological advances enable effects-based operations by generating new options for attack. For example, the use of low-observable (stealth) technologies in the F-117 Nighthawk or B-2 Spirit aircraft permits smaller attack packages because stealth aircraft need no escorts.¹⁰ This frees systems that would otherwise be tasked for escort duties to conduct attacks themselves. It also heightens the likelihood of mission success by making attacks less detectable than would be the case with penetration by a large package.

Advances in precision also facilitate effects-based operations. The Joint Direct Attack Munition (JDAM) constitutes the great leap forward in this regard. JDAMs are guidance tail kits that use an inertial navigation system and global positioning system satellite (GPS) linkage to achieve a CEP (circular error probable—radius of a circle within which ½ of the bombs will strike) of approximately 20 feet when attached to free-fall 1,000 and 2,000-pound bombs.¹¹ A 500-pound variant entering the inventory will improve accuracy and allow aircraft to carry more weapons per sortie. Nearly all attack aircraft can carry the JDAM, and each weapon is

independently targetable. Thus, even single-seat fighters such as the F-16 can now strike multiple targets during a single sortie. JDAM's bargain price tag of approximately \$21,000 per tail kit makes it an affordable option against the vast majority of targets. Combined, these characteristics dramatically increase the number of targets that can be struck in a very short period with a high degree of accuracy.¹² The net result is the capability to conduct "shock and awe" campaigns, i.e., campaigns that stun opponents into confusion and dismay.

Advances in information technology also enable effects-based operations. Information systems now make it possible to "rapidly collect, share, access, and manipulate information," while sometimes linking the sensor directly to delivery system.¹³ By doing so more quickly and comprehensively than an opponent (and by using information technology to blind the enemy), friendly forces can operate inside his OODA (observe, orient, decide, act) loop.¹⁴ Paralysis eventually results.

The second element of EBO is effects-based planning. This method of planning seeks to achieve specific effects with the least risk, in the shortest time possible, and with minimal expenditure of resources by considering both direct and indirect effects. Direct effects are "immediate, first order consequences,"¹⁵ i.e., the damage directly caused by the weapon. Classic attrition warfare emphasizes direct effects. However, effects-based planning also factors in indirect effects—"the delayed and/or displaced second- and third-order consequences of military action."¹⁶ A typical example is loss of support for a regime that appears inept or impotent in the face of repeated enemy attacks.¹⁷

Both direct and indirect effects have three fundamental characteristics. The first is the cumulative nature of individual effects. This occurs when the overall impact of various attacks is greater than the sum of the individual attacks themselves; the attacks operate synergistically. Loss of support for the regime in the example cited above exemplifies this phenomenon.

Cascading effects are "indirect effects [that] ripple through an adversary target system, often influencing other target systems as well."¹⁸ Typically, they occur when striking targets at a higher level of conflict. For instance, damaging a national level command and control net will influence lower levels of the conflict as the ability to receive intelligence and direction from above, and to coordinate operations with other units, diminishes. Targeting leadership represents perhaps the pinnacle of a cascading effects focused mission.

Collateral effects are the unintended consequences of an attack.¹⁹ To the extent that foreseeable collateral effects affect civilians or civilian objects, the humanitarian law principle of proportionality requires balancing them against the military advantage that accrues from attacking the target.²⁰ Further, although it is sometimes

questioned whether reverberating effects must be assessed during proportionality calculations, US doctrine affirmatively requires planners to consider them.²¹

Effects-based planners deconstruct target systems to identify that element thereof the neutralization or destruction of which best achieves the desired effect. Sensitivity to the typology of effects expands the universe of possible attacks likely to yield that result. Moreover, targeting only components of the target system generating the desired effect means tasking fewer sorties, thereby increasing the availability of weapons systems for missions against other targets. EBO also creates opportunities to avoid causing collateral damage and incidental injury. In the words of one Pentagon briefer, “The best way to mitigate collateral damage is only strike the stuff you need to strike—or affect the stuff you need to affect.”²²

As to the objects or individuals against which EBO is most effective, one must understand that the effect sought determines the precise target; categories of targets cannot be assessed in the abstract. That said, because Colonel John Warden’s strategic rings concept continues to resonate in airpower circles, political leadership, economic systems, supporting infrastructure, population, and military forces remain attractive targets to planners.²³ Focusing on these key target sets does not imply that civilians or civilian objects should be attacked directly, although, as will be discussed later, some commentators are suggesting exactly that. Instead, EBO creatively identifies targets likely to affect, but not necessarily harm, these strategic centers of gravity.

In addition to a fresh planning approach, EBO leverages a new concept of operations, Parallel Warfare and Simultaneous Attack.²⁴ Traditionally, warfare was serial and sequential. In an oversimplified example, because planners usually deemed it essential to establish air superiority before conducting a concentrated bombing campaign against other targets, the enemy air defense system typically dominated air tasking orders in the early days of a conflict. Within that target set, the attack plan tended to be sequential—early warning radars, then interceptor operations centers, followed by airfields and surface-to-air missiles. To a measurable degree, this approach dominated planning during Operation Desert Storm in 1991.

Serial and sequential attack evolved into parallel and sequential attack, in which elements of a single target system are struck simultaneously, but systems are hit sequentially. For instance, Operation Allied Force, the 1999 NATO conflict against Yugoslavia, was planned as a phased air campaign: Phase 0—deploy; Phase 1—air superiority over Kosovo; Phase 2—military targets in Kosovo; Phase 3—high value military and security forces in the Federal Republic of Yugoslavia; and Phase 4—redeploy. Once operations began, however, the seemingly bright lines faded. With air superiority attacks underway, political pressure mounted to stop the ongoing slaughter of the Kosovar Albanians. When the weight of attack shifted to military

targets in Kosovo in response to such pressure, calls for attacking regime targets grew louder in the belief that Milosevic held the key to ending the conflict on acceptable terms.

Inevitably, a new concept of operations emerged, one that leverages the technological superiority of US forces and fits neatly with effects-based planning approaches—parallel and simultaneous attack. Illustrated by Operation Iraqi Freedom, this concept calls for simultaneous attack on every element of a target system, as well as on all systems, from the initiation of hostilities. The beauty of the concept is that it encourages treating the enemy as a single system, thereby taking advantage of cascading and cumulative effects occurring across what were formerly treated as separate systems. This frees up weapons systems for other attacks, which in turn increase the intensity and speed of the campaign.

The dilemma with EBO from the humanitarian law point of view is that it coincides with an era in which technological advances and dramatic asymmetries in military capabilities make possible coercive strategies that seek to compel (a compellance strategy) an opponent to engage in, or desist from, a particular course of conduct.²⁵ The archetypal example was Operation Allied Force, which was designed to compel President Milosevic to return to the bargaining table and end systematic mistreatment of the Kosovar Albanian population.

If one is trying to conquer an enemy absolutely, destroying its military through attrition warfare, albeit less efficient and effective than EBO, makes some sense; given the objective, the military is a logical center of gravity. But if the objective is compellance, force must be applied surgically, striking at centers of gravity likely to alter the opponent's cost-benefit analysis, without imposing costs so great as to render him either intransigent or irrational.²⁶ Because the objectives underlying the use of force determine centers of gravity, they may shift from the enemy's armed forces to non-military targets dear to the civilian population or leadership.²⁷ Indeed, as Allied Force demonstrated, striking military targets may actually embolden the civilian population.²⁸

Since effects-based targeting involves precisely this sort of search for effects tied to both military and political objectives, it subtly suggests an expansive view of the appropriate targets and target sets in a conflict. For instance, dual-use facilities become particularly appealing targets because the attacker not only benefits from destruction or neutralization of the target's military value, but also from cumulative effects on the civilian population.

Lieutenant General Michael Short, Air Component Commander for Operation Allied Force, made it clear that this is how commanders tasked with compellance missions think. In a controversial interview, General Short was reported as saying "I felt that on the first night the power should have gone off, and major bridges around

Belgrade should have gone into the Danube, and the water should be cut off so the next morning the leading citizens of Belgrade would have got up and asked ‘Why are we doing this?’ and asked Milosevic the same question.”²⁹ A crescendo of criticism followed, for he seemed to be suggesting that in a compellance campaign it was appropriate to attack civilian targets because this would hasten victory.

General Short backtracked somewhat at a 2001 US Naval War College conference on the Kosovo campaign. After stating that the center of gravity was “Milosevic and the men and women around him who depend upon him and who he, in turn, depends upon,” he stated,

I do not think that you are so naïve that I do not say to myself and to my planners that this will also make the Serb population unhappy with their senior leadership because they allowed this to happen. But that is a spin off—a peripheral result—of me targeting a valid military objective.³⁰

The problem is that Article 57 of Protocol Additional I, which the United States accepts as reflective of customary international law, provides that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”³¹ Thus, collateral damage and incidental injury are only lawful when they are unavoidable consequences of an otherwise proportionate attack selected as the most “humanitarian” option from among equally militarily advantageous alternatives.

In fact, we are seeing these sorts of fissures in the guise of both interpretive disagreement and revisionist claims of the inadequacy of the humanitarian law definition of “military objectives.” Article 52 defines military objectives 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.”³² Protocols II and III of the Conventional Weapons Convention³³ and the Second Protocol to the Cultural Property Convention,³⁴ as well as many military manuals and training material (including those of the US),³⁵ repeat this formula.

While even the United States accepts this as the correct articulation of the legal concept of “military objective,” explanations of the standard differ. Most notably, the United States takes an expansive stance. For instance, the authoritative US Navy’s *The Commanders Handbook on the Law of Naval Warfare* includes “war sustaining” activities within the scope of the phrase.³⁶ Similarly, US joint doctrine provides that “[c]ivilian objects consist of all civilian property and activities other than those used to support or sustain the adversary’s warfighting capability.”³⁷

This interpretation has generated some negative reaction, particularly within the non-governmental organization (NGO) community and academia. For instance, one respected academic has opined that

Acts of violence against persons or objects of political, economic or psychological importance may sometimes be more efficient to overcome the enemy, but are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralized, even the politically, psychologically or economically strongest enemy can no longer resist.³⁸

Such assertions are overly simplistic. First, they assume that both sides of a conflict are willing to commit the resources necessary to conquer the enemy. Operation Allied Force demonstrates that this is not always the case. It may well be that one side is seeking limited objectives and therefore only prepared to employ (or risk) forces necessary to achieve those specific objectives. In the campaign against the Federal Republic of Yugoslavia, NATO explicitly ruled out the use of ground forces, thereby effectively pre-announcing its unwillingness to commit all the resources at its disposal to fully neutralize the Yugoslavian military. Instead, NATO's strategy was to successively impose costs on Milosevic until his cost-benefit calculations shifted enough to force him into compliance with its demands.³⁹ Indeed, given 21st-century attitudes towards the use of force, and despite the conquest of both Afghanistan and Iraq by the United States and its partners, most States initiating a conflict are likely to seek limited objectives not involving conquest, and therefore will be unwilling to risk the forces that would be required to fully "neutralize" its opponent. Any attempt to convince States to narrowly interpret "military objective" because "every enemy" can be overcome by sufficiently weakening its military forces (albeit probably true), fails to take cognizance of the realities of modern conflict.

The explanation offered above also rather optimistically assumes that neutralization of enemy forces is sufficient to achieve one's objectives. However, United States and coalition forces have suffered more casualties in Iraq since President Bush declared hostilities at an end than during the preceding period in which they "neutralized" the Iraqi military as an organized armed force. Clearly, victory requires much more than simply defeating one's opponents on the field of battle.

Humanitarian concerns may actually auger against an overly restrictive definition of military objective. Consider, again, Operation Allied Force. Had NATO limited its attack to Yugoslavia's military forces, Milosevic might never have yielded, for he could have simply sheltered his forces while waiting for NATO resolve to dissolve. In the process, identifying and destroying military forces would have become more difficult as attacks reduced the number of unambiguous and

vulnerable targets. The likelihood of collateral damage and incidental injury would resultantly have increased. Many analysts feared exactly this would happen once the decision not to mount a ground campaign became public—that Milosevic would wait out NATO while his centers of gravity remained intact and the Yugoslav population suffered (and his support grew). Without doubt, limiting the target sets to enemy military forces can paradoxically sometimes be less humanitarian than embracing a broader interpretation of military objectives.

Although few States explicitly accept the overt US extension to “war sustaining” targets, the definition of military objectives is nevertheless generally applied contextually. The Report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the NATO bombing campaign provides, for instance, that

When the definition is applied to dual-use objects which have some civilian uses and some actual or potential military use (communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict.⁴⁰

That there is a gray area regarding the meaning of military objectives was perhaps best illustrated in the controversy generated by the NATO attack on the Belgrade’s Radio Televisija Srbije (RTS) facility. The ensuing litigation in the European Court of Human Rights focused on whether the facility was a civilian object.⁴¹ Although the Court eventually dismissed the case on jurisdictional grounds, and despite the fact that the ICTY prosecutor found that there was insufficient basis to indict,⁴² many in the humanitarian law community believe the attack was unlawful under the circumstances. This despite a prominent military law expert’s inclusion of “broadcast and television stations” in an illustrative list of military objectives in his award-winning book,⁴³ something the ICRC had done decades earlier in a proposed list of military objectives it offered in 1956.⁴⁴

Application of the concept of military objective clearly expands or contracts based on the scope and goals of the conflict. Interestingly, when one compares the academic commentary on the subject to application of the principle, the practical differences narrow. For instance, a premier legal thinker in the field has stated that the US approach “goes too far.” But, a review of air campaigns conducted by the United States, the country that coined the term “war-sustaining,” reveals that strikes in which the military nature of the target is questionable are extraordinarily rare. Instead, criticism of US attacks tends to center on their proportionality or compliance with the requisite duty of care.⁴⁵ That said, EBO has the capacity to put

greater substance into the debate. After all, if one, in a Clausewitzian manner, focuses on effects during a conflict intended to coerce and compel an opponent rather than conquer him, the war sustaining verbiage looks very attractive.

Interestingly, it is arguably not interpretive disagreement that presents the greatest threat to humanitarian law, but rather revisionism on the part of those who argue that the principle itself needs to be adjusted. Most significant in this regard are the fascinating writings of Brigadier General Charles Dunlap, a US Air Force judge advocate who serves as senior legal adviser for the Air Force's Air Combat Command. In a very thoughtful—and very provocative—2000 *Strategic Review* article, he argues that

We need a new paradigm when using force against societies with malevolent propensities. We must hold at risk the very way of life that sustains their depredations, and we must threaten to destroy the world as they know it if they persist. This means the air weapon should be unleashed against entirely new categories of property that current conceptions of LOAC put off-limits.⁴⁶

General Dunlap limits this deviation from current principles of humanitarian law to conflicts with “societies whose moral compass is wildly askew.” Moreover, he does not advocate targeting either noncombatants or objects that are “genuinely indispensable to the survival of the noncombatant,” although “almost everything else would be fair game.”⁴⁷ As an example, he suggests “reducing the middle and upper classes to a subsistence level through the destruction of all but essential goods” might pressure the very groups best positioned to effect the desired change.⁴⁸ In General Dunlap's view, doing so is just because the population bears some culpability for supporting the government, or at least failing to fulfill a duty to oppose it.⁴⁹ To an extent, he is a 21st-century adherent to the views of Giulio Douhet, the Italian air war theorist who, in his 1921 classic *Command of the Air*, suggested that the civilian population and its morale were important centers of gravity.⁵⁰

Although not addressing it directly, the Dunlap proposal takes EBO to the extreme. Indeed, General Dunlap suggests that the purpose behind the use of force is not punishment, but rather “eviscerating the disposition of the adversary to conduct objectionable activities.”⁵¹ His views resonate with many. For instance, another thoughtful active duty officer, in a 2001 *Air Force Law Review* article, has suggested that it might be more humane to attack civilian property if doing so would demoralize the population and contribute to conflict termination, than to protect property at the expense of prolonging hostilities.⁵² What General Dunlap and his supporters are calling for appears to be nothing less than a fundamental rejection of a major

element of the principle of distinction, a principle that the International Court of Justice labeled “intransgressible” in its *Nuclear Weapons Advisory Opinion*.⁵³

Effects-based operations, focused as they are on effects vice targets, enliven the debate over the distinction principle’s effectiveness in infusing humanitarian ends into armed conflict. But suggesting civilian objects can be legitimate targets of attack risks the spiral of violence against innocents that humanitarian law, such as that prohibiting certain reprisals, seeks to prevent. Moreover, suggesting that attacking civilian objects is appropriate when there is a moral imbalance between belligerents would effectively mean malevolent leaders could deprive innocents among their population of humanitarian law’s protection against the ill-effects of war. Although an “ends justify the means” philosophy may be appealing in the short term, it will ultimately prove a very slippery slope.

The appropriate balance lies between the extremes. As General Short correctly noted above, there is nothing wrong with striking legitimate military objectives in a manner intended to affect the enemy’s will to continue the fight or the civilian population’s support for the government. For instance, in order to demonstrate that they controlled the air during the Korean conflict, US forces dropped leaflets pre-announcing strikes on legitimate military targets.⁵⁴ US air forces successfully employed this tactic again during Operation Desert Storm, when warnings of impending B-52 strikes led to mass surrender by Iraqi forces. There is nothing inherently immoral or illegal about targeting the will of the people or their leader. That said, humanitarian law does, and should, dictate how that may be accomplished.

Moreover, one must be careful what one wishes for. Opponents of advanced militaries have far more to gain from a relaxation of the distinction standard than those capable of fielding state-of-the-art forces. The disadvantaged side in an asymmetrical fight has every incentive to strike at civilians and civilian objects because it cannot hope to prevail on the field of battle. Thus, its sole chance of victory (or chance of fending off defeat) lies in striking a center of gravity other than the military. This being so, a restrictive reading of military objective actually benefits the advantaged side by allowing it to leverage its superior military capabilities. It is only when mixing *ad bellum* and *in bello* principles by labeling one belligerent malevolent (as suggested by General Dunlap), that it makes any sense for the militarily advantaged side to adopt a less restrictive standard; so long as its cause is just, it need not fear attacks against its civilians or civilian objects. This is naïve. The difficulty of objectively determining that a belligerent is in the wrong (consider the case of Iraq) means that in practice any shift in the law will apply equally to both sides.

Relaxing the principle of distinction would also deprive the advantaged side of the opportunity to use what General Dunlap has labeled “lawfare.”⁵⁵ To the extent the enemy begins targeting civilians and civilian objects, it can be publicly branded criminal, thereby potentially undercutting both domestic and international support. Thus, lawfare can impose costs on an adversary’s attempt to compensate for military weakness by shifting the center of gravity he is attacking. What proponents of relaxing humanitarian law norms seem to have missed is that the question, from a purely practical point of view, is not whether relaxation of a norm benefits your side; rather, it is the relative costs and benefits of doing so vis-à-vis likely opponents. Therefore, adopting an effects-based operations doctrine should not necessarily lead to support for any relaxation of the principle of distinction, because doing so might well enhance the opponent’s ability to achieve enhanced effects with his own operations.

Targeting Leadership

Always an appealing target set, EBO doctrine and the growing emergence of compellence as a campaign objective have heightened the desire to strike directly at enemy leadership. During Operation Allied Force, for instance, government ministries were included as strategic targets, ostensibly because of the “longer term and broader impact on the Serb military machine.”⁵⁶ Of late, killing the enemy leader himself has become an open objective of military operations; failure to do so is sometimes even deemed operational failure—consider the survival of Osama bin Laden. During Operation Iraqi Freedom, the media was actually reporting attempts to kill Saddam Hussein in nearly real time.⁵⁷ Contrast this with the removal of the US Air Force Chief of Staff in 1990 for suggesting Saddam’s death was an aim of the Operation Desert Storm air campaign.⁵⁸

Targeting leadership is often mislabeled “assassination.” In fact, the lineage of the humanitarian law prohibition on assassination (e.g., Article 148 of the 1863 Lieber Code) demonstrates that the term is best interpreted as the “treacherous killing of one’s enemy,”⁵⁹ for example by perfidiously feigning protected status.⁶⁰ It is not the target’s status that determines whether a wartime assassination has been conducted, but rather the method by which he or she is attacked.

Recall that humanitarian law requires distinguishing between combatants (and illegal noncombatants) and civilians in conducting attacks. With regard to targeting enemy leadership, therefore, the determinative issue is the status of the individual in question; those who are combatants or wrongfully taking a direct part in hostilities, i.e., illegal combatants, may legally be attacked.

Article 51 of Protocol Additional I sets forth the relevant principle:

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Art. 51.2. The civilian population as such, as well as individual civilians, shall not be the object of attack

Art. 51.3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

Violations are grave breaches under Article 85 of the Protocol, and, therefore, States party to the Protocol are obligated to search for individuals alleged to have targeted civilians (or ordered them to be targeted) and either try them for the offense or turn them over to another State party willing to do so.⁶¹ An analogous ban for non-international armed conflict appears in Protocol Additional II,⁶² while the Statute of the International Criminal Court contains prohibitions along these lines for both international and non-international armed conflict.⁶³

Since “civilians” enjoy immunity from attack, it is necessary to define the term. Under Article 50 of Protocol Additional I, a protected civilian is someone who does not fall into the categories enumerated in Article 4 of the Third Geneva Convention of 1949 and Article 43 of Protocol Additional I.⁶⁴ Excluded as civilians are members of the armed forces; militia, volunteer corps, or members of an organized resistance commanded by a person responsible for subordinates, who wear a distinctive sign or uniform, carry weapons openly, and are subject to a disciplinary system capable of enforcing the law of armed conflict; and members of a *levee en masse*. Article 44 reduces the requirement to carry arms openly and wear distinctive emblems or clothing, but not in situations likely to have much bearing on whether a member of the enemy leadership can be targeted.⁶⁵ Combatant organizations can include paramilitary or armed law enforcement agencies when incorporated into the armed forces if other parties to the conflict have been formally notified of the integration.⁶⁶

There is little doubt that any member (except chaplains and medical personnel) of such organizations can be targeted, although not directly applying force themselves. For instance, a public affairs officer in the military is a legitimate target despite the fact that he or she does not perform typically military functions.⁶⁷ Even heads of State or government who are active members of the armed forces may be targeted; humanitarian law provides them no specially protected status.⁶⁸

Senior leaders who are not members of the armed forces, but lie in the chain of command, are more difficult to categorize. Their legitimacy as a target must be assessed contextually and holistically. For instance, wearing military uniforms, carrying weapons, or using military rank suggest combatant status, but are not dispositive. The Queen of England wears a uniform and carries a ceremonial dagger during the “trooping of the colours,” but is hardly a combatant by virtue of doing so.

A more telling indication is the proposed target's role in the command of the armed forces. Civilians often fill *de jure* positions relative to the armed forces. As an example, by Article II of the US Constitution, the President is the "Commander-in-Chief."⁶⁹ Similarly, the Queen of England is the British Commander-in-Chief pursuant to the unwritten constitution of the United Kingdom, and each of the royals serves as a regimental "Colonel-in-Chief." In fact, British officers swear an oath of allegiance to the Queen, not the State, and it is the Queen who issues their commission.

It would be incongruous to suggest that all such individuals are legitimate targets. Obviously, if a post is purely ceremonial, or otherwise solely *de jure* in nature, i.e., if it involves no military decision-making, then the incumbent is a civilian who enjoys protected status. State practice would also suggest that decision-making at the strategic level of war does not render the participant a combatant (legal or illegal), because such decisions are in essence political. As an example, attempting to build an international coalition would not alone suffice. However, if an individual occupying a *de jure* position makes decisions affecting the operational or tactical level of war, he or she is sufficiently involved in military operations to become legitimately targetable.⁷⁰

At times, individuals without a *de jure* position in the chain of command also exercise influence over military operations. For example, Congress must approve all military funding in the United States. This makes Senators and Congressmen, particularly those on committees dealing with the military, enormously influential *vis-à-vis* defense policy. Or consider individuals tied to a dictator who exercise great influence over particular aspects of a conflict, such as certain members of Saddam Hussein's family or other highly placed members of his tribe from Tikrit.

In such cases, the critical issue is whether they are taking a direct part in hostilities as envisaged by Article 51.3 of Protocol Additional I (see text above). As to the meaning of the term "direct part," the Commentary to the Protocol states that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."⁷¹ If a leader makes combat decisions at the tactical level such as target selection, then he or she would certainly be directly participating. Arguably, the same is true for those who act in a like manner at the operational level. Essentially, leaders who decide how and where to use military force are directly participating in hostilities.

As an aside, note the Article 51.3 "unless and for such time" qualifier. Some have suggested that this allows direct participants who are not formally part of the armed forces to opt in and out of "direct participant" status, and, as a result, susceptibility to attack. This position runs counter to the underlying purposes of humanitarian law because it would encourage a lack of respect for the principle of distinction on the part of the victims of those moving back and forth through

the revolving door. A much more logical and practical standard provides that once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal.⁷² Since the individual who directly participated did not enjoy any privilege to engage in hostilities in the first place, it is reasonable that he or she assumes the risk that the other side is unaware of such withdrawal.

Obviously, gray area situations exist in which the sufficiency of the causal relationship to the conduct of hostilities is unclear. Indeed, the issue of the scope of direct participation is the subject of an ongoing international project sponsored by the International Committee of the Red Cross. In uncertain cases, it is prudent to interpret the concept narrowly, since striking directly at an opponent's leadership can be highly destabilizing. This is especially so where the proposed target is not in the chain of command, for the absence of a position in an armed force or its civilian control structure creates a rebuttable presumption that he or she enjoys protected status as a civilian.

As should be apparent, applying the humanitarian law bearing on leadership targeting can prove difficult in practice. With the exception of situations in which the leaders are members of the armed forces, decapitation operations inevitably risk condemnation on legal, or even moral, grounds. Consider the Israeli targeted killing strategy.⁷³ Although the operations are clearly legal in many cases,⁷⁴ they are widely condemned as violations of international law.⁷⁵

Non-legal reasons also militate against mounting decapitation strikes. They may strengthen enemy resolve or morale, particularly if the target becomes a martyr in the eyes of the enemy population. Leadership attacks also risk retaliation against one's own leadership or other high value targets like the civilian population. When the target has ties to terrorist groups, this possibility is especially acute. Targeting leadership may further be perceived as escalation, an upping of the stakes which increases the level of violence and complicates conflict termination. Indeed, an individual aware of being targeted may become intransigent, even irrational, thereby rendering his military operations less predictable.

Of course, there is always the chance that targeted individuals may be replaced by less acceptable alternatives. And if they had civil responsibilities, their death may limit the ability of the State to recover from conflict, thereby presenting the victorious occupying forces with greater occupation challenges. The simple fact is that quite aside from normative barriers, targeting an enemy leader may be insensible from a practical point of view.

Targeting Terrorists

In the aftermath of the tragic attacks of September 11, the use of force against terrorists has been fervently debated, particularly as the preferred response paradigm shifted from law enforcement to military action. Unfortunately, the analysis has tended to be overcomplicated.

During armed conflict, whether international or non-international in nature, the issue of terrorism is irrelevant *vis-à-vis* targeting. All combatants and individuals taking direct part in hostilities are targetable regardless of their motive or the object or persons they attack.

The quandary surfaces in cases of terrorism occurring outside armed conflict. As a matter of law, the issue is one of self-defense. Article 51 of the UN Charter sets forth the codified law on the subject. It provides, in relevant part, that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”⁷⁶ The question is whether non-State actors such as terrorists can commit an “armed attack” that allows the victim State to respond with military force as if it had been attacked by another State.

It is incontrovertible that since 9/11 the international community has accepted just such an interpretation of the law of self-defense. Virtually no State voiced any opposition to the US and coalition attacks on al-Qaeda forces in Afghanistan that began October 7, 2001. Indeed, two pre-October 7th Security Council resolutions specifically cited the right to self-defense with reference to the 9/11 attacks,⁷⁷ NATO and other international organizations invoked the collective defense provisions of their constitutive treaties,⁷⁸ and many States either contributed forces to the effort or provided other forms of support.⁷⁹ Following commencement of hostilities in Afghanistan, international support for the coalition operations remained strong and widespread.⁸⁰ Clearly, international law is now interpreted as permitting military operations in self or collective defense against terrorist acts committed by non-State actors. However, when may those defensive operations occur?

Self-defense is obviously permissible in response to an ongoing attack; that much is clear from Article 51 on its face. When armed action follows an attack, its legality becomes murkier. Some have suggested that since the attack is over, the appropriate responses are law enforcement (*vis-à-vis* the terrorists) or diplomacy and sanctions (*vis-à-vis* State support). Negative reaction to past responses to terrorist attacks, such as the near universal criticism of Operation El Dorado Canyon that followed the 1986 bombing of the La Belle discothèque in Berlin,⁸¹ demonstrates that States have tended to be uneasy with counter-terrorist actions that smack of

retaliation or retribution. Yet, denying the possibility of post-attack military action would surrender the initiative to non-State terrorist actor's intent on continuing their campaign of violence against the target State and its citizens.

A much more effective and appropriate way to analyze terrorism and military responses thereto is to ask whether an attack was part of a continuing campaign conducted by the terrorist group against the responding State. If so, the individual actions constituting it are no more separate and distinct than tactical engagements in a military campaign. For instance, al-Qaeda has been attacking US targets for over a decade in a regular and very violent campaign. In the face of such campaigns, defensive actions may continue until it is reasonable to conclude the terrorist campaign has ended.

By this approach, the defending State may conduct strikes against those who would carry out subsequent attacks, not in retaliation or retribution and not in anticipation of future acts of terrorism, but rather because the terrorist campaign is underway. As with all defensive actions, the two requirements of self-defense apply. First, defensive action has to be necessary, i.e., non-forceful measures (such as law enforcement, diplomacy, economic sanctions, etc.) would not suffice to deter further attacks making up the terrorist campaign. Second, the use of force must be proportional.⁸² Proportionality does not refer to the relationship between the force against which one is defending and that used in self-defense. Rather, proportional force is that amount of force necessary to effectively defend against the attack, and no more. Assessed on a case-by-case basis, it may either exceed or fall short of that used by the attacker.

Characterizing individual terrorist attacks as a part of a single integrated campaign clarifies the legality of responses thereto. For instance, when a CIA-controlled Predator attacked a car carrying Qaed Senyan al-Harhi, al-Qaeda's senior operative in Yemen, in 2002, there was much discussion about targeted killings, the nature of the conflict, and so forth. Yet, al-Harhi had been tied to the October 2000 attack on the *USS Cole* and was still active in a terrorist group against which law enforcement had proven ineffective and which had vowed to carry out more terrorist strikes against the United States in the aftermath of their highly successful attacks of September 11.⁸³ Additionally, the CIA conducted the operation with the cooperation of the Yemeni intelligence service.⁸⁴ The only debatable issue from a self-defense perspective was whether al-Harhi could have been arrested instead of killed. Although ultimately a question of fact, it appears reasonable for US officials to have concluded that there was a possibility he would elude capture, thereby necessitating the lethal attack.

An analogous analysis applies to Israel Defense Force operations targeting specific Palestinians. To the extent the targets are clearly involved in an ongoing campaign of terrorism, and in the absence of other reliable means of neutralizing them, they may be attacked in self-defense when there is a "specific and imminent" threat.⁸⁵ Thus, in

such cases, the operations are legal quite aside from the separate issues of whether an armed conflict is underway and, if so, its character under humanitarian law.

A third possibility is mounting counter-terrorist strikes before the initial terrorist attack has taken place. The seminal legal issue here is neither necessity nor proportionality, but rather imminency, for the weight of authority in international law requires that an attack be imminent before acting in self-defense. In the immortal words of Secretary of State Daniel Webster in correspondence with Lord Ashburton following the 1837 *Caroline* incident, the need for defensive actions must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁸⁶ Webster’s verbiage has matured over time into a requirement that the defending party wait until the last possible moment before acting *anticipatorily*.⁸⁷

Professor Yoram Dinstein has rejected the term “anticipatory” in favor of “interceptive” on the basis that Article 51 requires an armed attack, not the possibility thereof. He propounds a standard that requires the attacker to have “committed itself to an armed attack in an ostensibly irrevocable way.” As Professor Dinstein explains, “[t]he crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon.”⁸⁸ By this approach, no shot need be fired prior to the defensive action, but the attack operation must have been launched.

Professor Dinstein’s analysis is an insightful balancing of the practical need to deliver a defensive blow before the opponent strikes (lest it be too late to mount an effective defense) with the apparent clarity of the Article 51 requirement that an armed attack have occurred. The one difficulty with his approach is the requirement of irrevocability, a criterion that may be too difficult to judge except *ex post facto*. A more workable tack may be to appraise the attacker’s commitment to follow through, the nature of the acts already performed, and the extent to which the defensive action occurs during the last viable window of opportunity to mount an effective defense.

If a State initiates defensive action before being attacked, the evidence of the pending attack (or follow-on attacks in case of a terrorist campaign), the need to militarily defend oneself, and the perpetrator’s identity, must be very credible. This was the unambiguous lesson of the widespread criticism of the US strikes into Sudan in 1998 following terrorist bombings of its embassies in Dar-es-Salaam and Nairobi. Compare the muted criticism of related strikes against terrorist camps in Afghanistan. Since the two operations were conducted simultaneously and in response to the same terrorist attacks, the logical explanation for the dramatically different international reactions was a pervasive belief that in the case of the attacks into Khartoum, the United States got it wrong by striking a pharmaceutical plant with no ties to terrorism.

Evidentiary issues again surfaced in the aftermath of US and allied operations in Iraq in 2003. Failure to locate convincing evidence of any Iraqi weapons of mass destruction programs or Iraqi ties to al-Qaeda generated significant criticism of the decision to attack.⁸⁹ As in the Sudanese case, concern that the attack was based on insufficient and faulty intelligence was pervasive.

Given that terrorists intentionally seek to mask their activities, evidence in terrorism cases will seldom be unassailable; therefore, to demand perfect evidence of future attacks and their source would be to render victims defenseless. A better threshold is one that requires evidence on which counterterrorist operations are justified to be “clear and compelling.” The United States proffered this standard in its notification to the Security Council that it was acting in self-defense when attacking al-Qaeda and Taliban assets in Afghanistan. It articulated the same criterion when briefing the North Atlantic Council on the complicity of the two groups in the 9/11 attacks.⁹⁰ Both the Security Council and North Atlantic Council appear to have accepted the standard as sufficiently high, for neither criticized the ensuing military operations. A mere preponderance standard would certainly be too low to justify resort to military force, the most significant act in international relations, whereas a beyond a reasonable doubt standard would clearly be too high in the shadowy world of terrorism.

Finally, the issue of who can legally conduct counterterrorism operations involving armed force has drawn some attention. Specifically, must operations be mounted by combatants or can others, such as members of intelligence agencies or law enforcement personnel, conduct them?

If the operations are conducted during an international armed conflict, and the terrorists are taking part in the conflict, then combat operations may be conducted only by combatants. Article 43 of Protocol Additional I codifies this point of customary international law.⁹¹ As noted earlier, combatants are members of the armed forces and paramilitary or armed law enforcement agencies incorporated into the armed forces.⁹²

No such limitation applies in a non-international armed conflict. On the contrary, intelligence and law enforcement agencies are regularly involved in attempting to maintain law and order during an internal conflict. The latter are often the lead agencies in such conflicts, as was the case, for example, during the disturbances in Macedonia in 2001.

In cases of violence between a State and transnational terrorists unrelated to an ongoing armed conflict, humanitarian law, with the exception of general principles pervading all uses of force (such as discrimination, proportionality, unnecessary suffering), does not apply. The applicability of the humanitarian law to *international* armed conflict depends on the participation of at least one State on each side,⁹³ while

that applicable to *non-international* armed conflicts requires a situation resembling classic civil war. With respect to the latter, Common Article 3 to the Geneva Conventions envisions a “Party in revolt against the *de jure* Government [that] possess an organized force, an authority responsible for its acts, acting within a determinate territory.”⁹⁴ Protocol Additional II requires a conflict “which takes place in the Territory of a high contracting Party between its armed forces and dissident armed forces [that] . . . exercise control over part of its territory.”⁹⁵ In any case, and as noted above, the humanitarian law of non-international armed conflict imposes no limitation on the participation of other than members of the armed forces.

Therefore, except in an international armed conflict, intelligence or law enforcement agents may conduct counter-terrorist strikes such as occurred in Yemen. Thus, President Bush’s authorization to the Central Intelligence Agency to target specific al-Qaeda members outside the confines of armed conflict did not violate humanitarian law,⁹⁶ nor did the creation of a CIA Special Operations Group of several hundred officers to conduct this type of missions.⁹⁷

Finally, where may operations in other than an armed conflict be conducted? Obviously, they may take place on the territory of the State conducting them or, as in the case of the strike in Yemen, on the territory of any State that has consented. The more difficult question is when may counterterrorist operations be mounted without the consent of the State of situs.

States enjoy the right of territorial integrity under international law, a customary right enshrined within Article 2(4) of the Charter.⁹⁸ At the same time, international law recognizes a right of self-defense, itself enshrined within Article 51 of the Charter. When legal rights appear to conflict, an effort must be made to best balance them in the context in which they are to be applied.

In this situation, recall that States have a duty to “use due diligence to prevent the commission within its dominions of criminal acts against another nation or people.”⁹⁹ This duty plainly includes keeping one’s territory free from use for terrorist ends.¹⁰⁰ In light of this obligation, the only sensible balancing of the territorial integrity and self-defense rights is one that allows the State exercising self-defense to conduct counterterrorist operations in the State where the terrorists are located *if* that State is either unwilling or incapable of policing its own territory. A demand for compliance should precede the action and the State should be permitted an opportunity to comply with its duty to ensure its territory is not being used to the detriment of others.¹⁰¹ If it does not, any subsequent nonconsensual counterterrorist operations into the country should be strictly limited to the purpose of eradicating the terrorist activity (purpose and proportionality), and the intruding force must withdraw immediately upon

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accomplishment of its mission since the necessity for these specific defensive operations evaporates at that point.¹⁰²

Human Shields and Shielding with Civilian Objects

The US Defense Intelligence Agency has framed this issue as “the placement of any category of non-combatant personnel, or of civilian equipment, vehicles, or material at or near a recognized or suspected military or government facility immediately before or during hostilities.”¹⁰³ It would also include placing military objects or personnel near protected individuals, objects, or locations. In technical terms, such activity falls into the category of “counter-targeting,” i.e., “preventing or degrading detection, characterization, destruction, and post-strike assessment.”¹⁰⁴ The goals of using human or civilian object shields include complicating an opponent’s military planning, reducing the effectiveness of its strikes, preserving key military forces and facilities such as command and control assets, and/or generating a strategic incident by creating the impression that the attacker is careless, incompetent, or, most significantly in the CNN age, lawless.¹⁰⁵

Sadly, there have been many instances of the use of human or civilian object shields in recent history. All have been uniformly condemned. For instance, Iraq’s use of human shields during the first Gulf War was labeled by the UN General Assembly as a “most grave and blatant violation of Iraq’s obligations under international law.”¹⁰⁶ A dozen years later, Human Rights Watch, in *Off Target*, its report on the conduct of the second Gulf War, condemned Iraqi use of civilians both to protect Iraqi forces during hostilities and to advance on US and British forces.¹⁰⁷ Similarly, the use of human shields was widespread during the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia. Even UN peacekeepers have been used as human shields, most infamously with the seizure of United Nations Protection Force (UNPROFOR) personnel by the Bosnia Serbs in 1995.¹⁰⁸

As a matter of law, the use of shields presents two issues: Can shields be targeted directly (discrimination) and, if not, how do they factor into the proportionality calculation? In considering these questions, it is useful to note that US targeting doctrine closely tracks the principles set forth in Protocol Additional I. For instance, Joint Publication 3-60 (discussed above) adopts the proportionality formula contained in Articles 51.5(b) and 57.2 verbatim.¹⁰⁹ With regard to discrimination, the Joint Publication requires US forces to “engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking a direct part in hostilities) and combatant forces, directing the application of

force solely against the latter. Similarly, military force may be directed only against military objects or objectives, and not against civilian objects.”¹¹⁰

Without question, using human or civilian object shields violates humanitarian law. Article 28 of the Fourth Geneva Convention provides that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.”¹¹¹ The analogous Protocol Additional I provision is even more explicit.

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.¹¹²

The International Criminal Court Statute includes these prohibitions as war crimes in Article 8.¹¹³

Uncertain, though, are the effects of such misconduct on an opponent’s military operations. To address this issue, it is necessary to distinguish between involuntary shields and those who volunteer to serve in this role. Beginning with the former, Article 51 of Protocol Additional I explicitly provides that “[a]ny violation of these prohibitions [which includes the prohibition on shielding] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . .”¹¹⁴ Therefore, an attacker continues to be bound both by the prohibition on directly attacking civilians and the proportionality principle. Taking these requirements together, the attacker must consider the deaths and injuries shields might suffer when determining whether the military advantage accruing from attack on the military objective they are shielding outweighs likely collateral damage and incidental injury.

Few have suggested that an attacker should be released from the obligation not to directly target human shields. However, there is far less satisfaction with pure application of the principle of proportionality, for some are concerned that a malevolent opponent might turn the use of human shields into a significant military advantage. Specifically, by using shields, an opponent could so alter the extent of likely civilian death and injury resulting from a strike, that the military objective is rendered immune from attack. Thus, the 1976 US Air Force law of armed conflict manual states that “[a] party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise

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lawful attacks upon valid military objectives in their territory.”¹¹⁵ And no less a distinguished scholar and practitioner than A.P.V. Rogers has suggested that

. . . a tribunal considering whether a grave breach has been committed [a disproportionate attack] would be able to take into account when considering the rule of proportionality the extent to which the defenders had flouted their obligation to separate military objectives from civilian objects and to take precautions to protect the civilian population. . . . The proportionality approach taken by the tribunals should help to redress the balance which would otherwise be tilted in favour of the unscrupulous.¹¹⁶

Despite such calls, the prevailing practice appears to be unqualified fidelity to the principle of proportionality; this is the position taken in US doctrine. In addressing use by the enemy of human shields, Joint Publication 3-60 states that: “Joint force responsibilities during such situations are driven by the principle of proportionality. . . . When an adversary employs illegal means to shield legitimate targets, the decision to attack should be reviewed by higher authority in light of military considerations, international law, and precedent.”¹¹⁷ The US Air Force, in its own doctrine, acknowledges the shields dilemma, but likewise retains the protection civilians enjoy under humanitarian law. Air Force Pamphlet 14-210 points out that

[a] state’s failure to segregate and separate its own military activities and to avoid placing military objectives in or near a populated area may greatly weaken protection of its civilian population. Such protection is also compromised when civilians take a direct part in hostilities or are used unlawfully in an attempt to shield attacks against military objectives.¹¹⁸

Note that protection is “weakened,” not canceled; in other words, 14-210 recognizes that such practices have a *de facto* effect of weakening protection of civilians and civilian objects because their proximity to military objectives increases their likelihood of being incidentally injured or collaterally damaged—but there is no *de jure* relaxation of the proportionality standard.

Perhaps the best guidance on the subject is that set forth in the Air Force’s *Operations and the Law* text:

[S]tandards of conduct should apply equally to the attacker and defender. In other words, that the responsibility to minimize collateral injury to the civilian population not directly involved in the war effort remains one shared by the attacker and the defender; and that the nation that uses its civilian population to shield its own military forces violates the law of war at the peril of the civilians behind whom it hides. . . . At the same time, however, targeteers and judge advocates should consider the necessity of

hitting the particular target, the expected results versus expected collateral damage, and ways to minimize civilian casualties, if possible.”¹¹⁹

An approach which refuses to release one side from its full obligations under humanitarian law when the other violates it is consistent with the underlying purpose of that body of law—protection of those who are not engaged in the conflict from its effects. While humanitarian law takes account of the practicalities of warfare (the principle of proportionality being perhaps the best example), it is not intended nor designed to ensure a “fair fight.” Suggestions that the wrongful behavior of one side justify a revision of the other’s obligations under humanitarian law in order to redress the balance between the two appear under girded by concerns over the inequity of the malevolent side achieving *de facto* immunity for its military objectives. Yet, even the highly controversial law of reprisals is justified solely on the basis that reprisals (otherwise unlawful acts) can compel the other side back into compliance with its humanitarian law obligations; it has never been justified on the basis that it is unfair for one side to be limited by humanitarian law when the other ignores it.¹²⁰

The issue becomes more contentious when human shields volunteer. As with the use of involuntary shields, there has been a marked increase in the readiness of civilians to willingly shield military objectives. Recent examples include Iraqis flocking to various locations when coalition forces threatened force to enforce the UN weapons inspection regimes in 1997;¹²¹ Serb civilians standing on bridges during Operation Allied Force in 1999; and international volunteer shields traveling to Iraq in anticipation of Operation Iraqi Freedom.¹²²

Although there is no explicit distinction between voluntary and involuntary shields in targeting doctrine, some States, including the United States, assert a difference. In their view, voluntary shields of military objectives lose their protected status as civilians.¹²³ Human Rights Watch, *inter alia*, takes the opposite position. In a February 2002 Briefing Paper, it opined that

[L]ike workers in munitions factories, civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted, although a military objective protected by human shields remains open to attack, subject to the attacking party’s obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive.¹²⁴

The more defensible view is that adopted by the United States. Human Rights Watch wrongly equates voluntary human shields with munitions workers, which they

correctly characterize as only indirectly contributing to the war-making capabilities of a State. The contribution of human shields is, by contrast, very direct—they are attempting to deter an actual attack on a valid military objective. In a sense, they are no less involved in defending a potential target than air defenses.

As discussed earlier, civilians may lose their protected status by, in the terminology of Protocol Additional I, taking “a direct part in hostilities.” When they do, immunity from attack vanishes for such time as that participation continues.¹²⁵ The Statute of the International Criminal Court adopts this standard by making it a war crime to intentionally attack civilians unless they are “taking direct part in hostilities.”¹²⁶

There is much uncertainty regarding the meaning of direct participation. The Commentary to Protocol Additional I states that the term “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.”¹²⁷ Elsewhere, the Commentary describes direct participation as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”¹²⁸ Seemingly, these comments support the Human Rights Watch position that shields must pose an immediate risk to the enemy before they can be directly attacked.

Such a narrow position does not fit well into the architecture of humanitarian law. Recall the definition of military objective. Military objectives are “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.”¹²⁹ By acting to render a military objective immune from attack (or contributing to the enemy’s hesitancy to attack it), voluntary human shields contribute to the survival of an object that *by definition* contributes to military action; thus, they themselves contribute to that action in a very direct way. Indeed, by immunizing the military objective against attack as a matter of law, in many cases shields would more effectively defend it than would traditional defenses such as anti-aircraft artillery or surface-to-air missiles, which have proven highly ineffective against air forces equipped with state of the art weaponry.

When viewed in the context of humanitarian law generally, the most reasonable characterization of voluntary shields is that they are directly participating in hostilities and, resultantly, lose their protected civilian status.¹³⁰ Consequently, voluntary human shields can be legitimate targets. Further, because they no longer enjoy protected status, death or injury to voluntary shields should not be considered in any proportionality analysis. Practically speaking, though, their military contribution only emerges at the point that they are shielding the military objective; thus, they enjoy no military significance distinct from the objective itself. This being so,

there is no military necessity for attacking them when they are not engaged in shielding. Further, even when they are shielding a target, there is no military rationale for attacking them directly instead of, or in addition to, the actual military objective. Therefore, the only practical impact of their willingness to serve as shields is that they need not be included in proportionality calculations.

An exception to this analysis involves children. For instance, Palestinian militants have used child shields to protect themselves because they know the Israel Defense Forces have been ordered not to use live ammunition against children.¹³¹ As a matter of law, children should be deemed incapable of forming the intent necessary to “directly participate” in hostilities, particularly in light of humanitarian law’s increasing recognition of their unique predicament in armed conflict.¹³² Even beyond the legal aspects of the phenomenon, as a practical matter it would usually be impossible to determine whether a child present at a prospective target is there of his or her own volition.

Finally, there is the issue of using civilian objects to shield military objectives. What is often forgotten in the debates is that civilian objects can become military objectives when their use makes an effective contribution to military action and their total or partial destruction or neutralization offers a definite military advantage in the circumstances.¹³³ When one side intentionally places military objectives near civilian objects or places civilian objects close to military objectives in order to shield them (a wrongful act as discussed above), those objects may take on a status analogous to “military objective.” Their use contributes directly to defense of the target and if their role as shields could be neutralized, a military advantage would accrue to the attacker. That said, and like voluntary shields, because their sole use is as a military shield, there is no need to attack them directly unless they physically impede attack on the intended target. Of course, they are vulnerable to damage during attack on the target, but, having taken on the character of a military objective through use, such damage should not be included within the proportionality calculation.

Note that the case of intentionally using civilian objects as shields differs from that of the civilian object unintentionally located near a military objective. To suggest otherwise would create an exception that would swallow the rule of proportionality. Obviously, objects near the intended target incur the heaviest collateral damage. Therefore, if mere proximity to a target transforms a civilian object into a military objective, there would be no need for the rule because there would be few civilian objects to protect.

Area Targets

An emerging issue in targeting involves attacking military installations on which civilian facilities exist. In the past, this issue rarely presented itself. First, civilian facilities seldom existed at military bases. However, with the demise of conscription, the average age of military personnel has increased, and a greater percentage is married. Thus, military installations increasingly contain facilities meeting the needs of military families. Further, in the era of all-volunteer forces, quality of life has become an important factor in recruiting and retaining military personnel. Today, for instance, the typical US base offers family housing, schools, child care centers, youth sports fields, stores, post offices, pools, and even the inevitable American fast food restaurant.

Second, weapons systems of the past did not have the range to strike at military bases far from the front. Today, by contrast, some systems have global capabilities. Globalization itself, with increasingly borderless travel, has made it possible to conduct special operations thousands of miles from the front. Simply put, in the 21st century most military installations lie “within range” of enemy action.

The question is whether an entire area or installation can be treated as a single unitary whole during an attack. To some extent, this defense was mounted in the trial of Major-General Stanislav Galic, former commander of the Sarajevo Romanija Corps, before the ICTY. The case involved allegations that troops under his command conducted a sniping and shelling campaign against the civilian population of Sarajevo intended to spread terror. The defense argued that the presence of some 40,000 Bosnian Muslim troops spread throughout the city rendered the entire area a target and the fact that only 3,000 civilians died out of an original population of approximately 300,000 meant the attacks were not disproportionate. After carefully reviewing the facts, the Trial Chamber determined that the attacks on the civilians were intentional and sentenced the general to 10 years imprisonment.¹³⁴ While not ruling out the possibility of treating an entire area or installation as a unitary whole, the Chamber’s meticulous focus on the facts of individual deaths demonstrates that, in its view, questions of discrimination are resolved on a case-by-case basis.¹³⁵

This approach comports well with Article 51’s characterization of “an attack by bombardment . . . which treats 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 and civilian objects” as indiscriminate.¹³⁶ By parallel logic, the presence of a clearly distinct civilian area, such as a shopping complex or housing area, on a military installation precludes treating the entire installation as targetable.

Further, Article 57 requires belligerents to employ reasonable steps to verify that the target is military in nature and to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹³⁷ Therefore, whether an attack is discriminate enough depends both on the extent to which the attacker used information assets to confirm the nature of the target and selected weapons and tactics designed to avoid causing harm to civilians and civilian objects. Again, these requirements auger against treating military installations as a single entity for targeting purposes.

At any rate, military planners are now able to more accurately refine the choice of targets and aimpoints. Intelligence, surveillance, and reconnaissance (ISR) system improvements have made it far easier to distinguish between military and civilian objects, whereas advances in precision have made striking the intended target with great surety more practicable.¹³⁸ In fact, since installations are fixed, most missions against them will be preplanned. This allows a highly complex and in-depth planning process that considers such factors as maximum effective range of weaponry and their circular error probable, likely collateral damage, and aim point, fusing, and azimuth of attack alternatives. Perhaps most importantly, it is poor airmanship (or soldiering) to treat areas in which discrimination is possible as a single target because doing so, in an age of precision, would be wasteful; it violates the principle of economy of force.

That said, in those cases where it is impossible to verify that individual facilities on an installation are military objectives (e.g., does the warehouse contain munitions or school supplies?), a presumption that they are military attachés. This is because the Protocol Additional I, Article 52, presumption that a prospective target is not making an effective contribution to military action, and therefore not targetable, applies only to objects “normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling, or a school.”¹³⁹ The presence of a facility on an active military installation, combined with the fact that it does not, after reasonable steps have been taken to ascertain its status, appear to be normally dedicated to civilian purposes, makes striking it consistent with the principle of distinction. For instance, hangar facilities often line runways. In most cases, they are used for traditional military purposes such as aircraft maintenance. However, if one is the community gymnasium, as is the case at an actual US military facility, an attacker should be permitted to strike it after exhausting reasonable measures under the circumstances to determine its nature. The attack may, *ex post facto*, be shown to have been a mistake, but that mistake will have been reasonable.

Computer Network Attack

Targeting one's enemy through computer networks is a relatively new method of warfare that raises a number of complex legal issues.¹⁴⁰ Many derive from the *jus ad bellum* and have been addressed elsewhere.¹⁴¹ With regard to the *jus in bello*, and specifically the law of targeting, three merit mention.¹⁴²

The first centers on the requirement of precautions in attack. As noted above, humanitarian law imposes a duty on the attacker to select methods and means of warfare "with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."¹⁴³ This is a significant obligation because it means that even if a target is a lawful military objective that can be attacked with a particular weapon without causing disproportionate collateral damage or incidental injury, a different weapon must be employed if it could achieve a comparable military advantage with less. Of course, the requirement is subject to a rule of reason that would take into account such factors as the inventory of available weapons, particularly in light of the anticipated length of the conflict, and any increased risk to those executing the mission.

This obligation may increasingly drive armed forces possessing CNA capabilities to employ them in lieu of kinetic weapons. The precision of computer network attack (in which particular systems can be isolated and attacked), the generally low risk to the attacker, and the fact that attacks do not expend "ordnance" that might be needed later in the conflict, all lend themselves to selecting CNA in place of more traditional weaponry. For instance, typical goals in air campaigns include destroying air defense networks, blinding intelligence capabilities, and disrupting command and control. Doing so might involve hundreds of sorties by aircraft dropping or launching explosive munitions with significant risk of collateral damage and incidental injury. However, all such target systems now rely heavily on computers of some sort, thereby making them vulnerable to computer network attack.

A related humanitarian law requirement is that "[w]hen a choice is available between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and civilian objects."¹⁴⁴ Again, the fact that many prospective targets rely on computer systems in some fashion opens up opportunities to avoid striking targets in ways that might cause harm to civilians and civilian objects. As an example, one might wish to destroy an enemy air force by bombing air bases. However, in an age of computer network attack, it may be less collaterally destructive to feed the enemy false information that causes enemy aircraft to unknowingly travel into aerial ambushes. Alternatively, consider the bombing of the media station in Belgrade during Operation Allied Force that resulted in the

Bankovic litigation before the European Court of Human Rights.¹⁴⁵ Using CNA, it might have been possible to target that aspect of the electrical grid providing the station electricity, thereby simply taking it off the air during offending programming. In an increasingly networked age, the possibilities of computer network attack grow exponentially.

The second issue posed by computer network attack is that of the targets against which it may legally be directed. The requirement that parties to a conflict “direct operation only against military objectives”¹⁴⁶ would seem to imply that CNA launched against civilians or civilian objects would be unlawful. A careful reading of Protocol Additional I, most of which is characterized by even non-Party States as reflective of customary law, reveals that it is “attack” on civilians which is forbidden, not operations directed against them writ large. Thus, the “civilian population . . . shall not be the object of attack”;¹⁴⁷ “civilian objects shall not be the object of attack”;¹⁴⁸ “indiscriminate attacks are forbidden”;¹⁴⁹ “attacks shall be limited strictly to military objectives”;¹⁵⁰ and so forth.

In Article 49, the Protocol defines “attacks” as “acts of violence against the adversary, whether in offense or defense.”¹⁵¹ The Commentary on Article 48 echoes the centrality of violence by describing the term “operations” as “military operations during which violence is applied.”¹⁵² Utilizing this definition, the prohibition is actually on attacking other than military objectives through the application of violence, that is, force which injures, kills, damages, or destroys.

This interpretation does not imply that all CNA is lawful merely because kinetic force is absent. Instead, the term “attack” can best be understood as prescriptive shorthand for a particular set of consequences, specifically the type of consequences violence would cause—injury to humans and damage to objects.¹⁵³ The prohibition would also reasonably extend to intentionally creating severe mental anguish, particularly in light of humanitarian law’s prohibition on terrorizing the civilian population.¹⁵⁴ However, conducting computer network attacks that merely inconveniences the civilian population, harasses them, or causes a decline in their quality of life is permissible. This interpretation does not represent a relaxation of humanitarian law in any way; indeed, the law already countenances such results through, for example, non-violent psychological operations directed at the civilian population.

Finally, there needs to be greater sensitivity to who can conduct computer network attacks. Obviously, military personnel who possess the privilege to apply kinetic force during an armed conflict may do so. However, many countries rely on either civilian defense employees or contractors for their computer network attack capabilities. Any civilian who launches a CNA “attack,” as that term has just been described, is directly participating in hostilities and thus an unprivileged belligerent. So too are those who conduct computer network attacks that do not damage

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or injure, but nevertheless affect the enemy's immediate war-fighting capabilities. Typical examples would include directing a computer network attack against enemy command and control facilities, air defense networks, and combat communications nets. Simply put, to the extent that a computer network attack neutralizes or diminishes the capabilities of a military objective, the individual launching it is directly participating in hostilities.

Concluding Thoughts

In *A Man for All Seasons*, Sir Thomas More and William Roper engage in the following now familiar exchange on the law.

Roper: So now you'd give the Devil benefit of law.

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that.

More: Oh? And when the law was down—and the Devil turned round on you—where would you hide? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹⁵⁵

To some degree, each of the targeting issues addressed in this article illustrate similar contradictions. Targeting doctrine that seeks particular effects subtly incentivizes attacking protected persons or objects when facing a malevolent opponent or when doing so might operate to lessen likely collateral damage and incidental injury. Similarly, many argue that it is acceptable to strike at a wicked leader, even if he or she does not meet the requirements for combatant status or direct participation. Others suggest that humanitarian law should be relaxed in meeting the new phenomenon of catastrophic transnational terrorism. Similar concerns underlie suggestions that involuntary shields should be treated differently from civilians or that military installations or other areas where the enemy has positioned military and civilian objects in close proximity may be treated as a unitary whole when targeting. Finally, computer network attack opens entirely new targeting options, some which enhance the protections of humanitarian law, others that challenge them.

What is remarkable throughout the discussions of these complex issues, however, is the extent to which humanitarian law resolves them. In the vast majority of cases, application of the law, interpreted with sensitivity to both the context in which it is to be applied and its underlying purposes, meets the concerns of the

William Ropers who assert its insufficiency in meeting the challenges of 21st-century conflict. The law hardly needs to be “cut down”; on the contrary, it still effectively shelters non-participants from the effects of hostilities, while adequately meeting the practical concerns of the warfighters. Most importantly, Sir Thomas More’s words remain prescient, for in these troubling times we must preserve the law . . . for our own sake.

Notes

1. Professor Schmitt is Professor of International Law, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany. The views expressed herein are those of the author in his personal capacity and do not necessarily represent those of any United States or German government agency.
2. For an introduction to the concept of revolutions in military affairs, see Jeffrey McKittrick, et. al., *The Revolution in Military Affairs* (Sept. 1995), www.airpower.Maxwell.af.mil/airchronicles/battle/chp3.html.
3. Most notably, Giulio Douhet, an Italian air power strategist who argued that “war is won by crushing the resistance of the enemy; and this can be done more easily, faster, and more economically, and with less bloodshed by directly attacking that resistance at its weakest point.” For Douhet, that point was the population itself. GIULIO DOUHET, *THE COMMAND OF THE AIR* 196 (Dino Ferrari trans., 1942).
4. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 48–52, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol Additional I].
5. Command, control, communications, computers, intelligence, surveillance, and reconnaissance.
6. Between March 19 and April 18, 2003, during which 41,404 sorties were flown (excluding special operations and Army helicopter flights). The Iraqis also downed 6 helicopters. US Central Command Air Forces (CENTAF), Assessment and Analysis Division, Operation Iraqi Freedom—By the Numbers (Apr. 30, 2003), www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.
7. Lawfare refers to the effort to undercut an opponent’s support by making it appear to violate international humanitarian or human rights law (or publicize actual violations). That support may be either domestic or international. For a discussion of lawfare, see Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, paper presented at Humanitarian Challenges in Military Intervention Workshop, Carr Center, Harvard University (Nov. 29–30, 2001), <http://www.ksg.harvard.edu/cchrp/UseofForcePapers.shtml>.
8. Gary L. Crowder, Department of Defense Effects-Based Operations Briefing (Mar. 19, 2003), http://www.defenselink.mil/transcripts/2003/t03202003_t0319effects.html.
9. Chairman of the Joint Chiefs of Staff, Joint Publication 3-60, Joint Doctrine for Targeting, at I-4 (2002) [hereinafter Joint Pub 3-60].
10. Escorts perform such missions as defense suppression of ground air defense systems or defense of the attacking aircraft against enemy fighters.
11. A description of these and other weapons and weapon systems can be found on the Air Force Link website, <http://www.af.mil/factsheets/>.

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12. Thus, while roughly 9% of air munitions used during Operation Desert Storm were precision-guided, by Operation Iraqi Freedom that figure had grown to nearly 70%.
13. Joint Pub 3-60, *supra* note 9, at I-5.
14. The term was coined by Colonel John Boyd, United States Air Force. Operating within an opponent's OODA loop is a decision-making concept in which one party, maintaining constant situational awareness, assesses a situation and acts on it more rapidly than his opponent. When this happens, the opponent is forced into a reactive mode, thereby allowing the first party to maintain the initiative. As the process proceeds, the opponent eventually begins to react to actions that no longer bear on the immediate situation. The resulting confusion results in paralysis.
15. Joint Pub 3-60, *supra* note 9, at I-6.
16. *Id.*
17. Joint Publication 3-60 offers the following example: "For example, the plane destroyed as a direct effect of an attack on an airfield, combined with similar attacks on all the assets of an adversary's air defense system, over time may ultimately degrade the legitimacy of the regime by portraying them as incapable of protecting the populace." *Id.*
18. *Id.*
19. In humanitarian law, the proper term for unintended injury or death of civilians is "incidental injury." Technically, the term "collateral damage" refers only to unintended damage or destruction of civilian objects. However, many lay publications, such as Joint Publication 3-60, group the two under the general category of "collateral damage."
20. Protocol Additional I, *supra* note 4, arts. 51.5(b), 57.2(a)(iii), & 57.2(b).
21. Joint Pub 3-60, *supra* note 9, at I-7.
22. Crowder, *supra* note 8.
23. John A. Warden, *The Enemy as a System*, AIRPOWER JOURNAL 40 (Spring 1995). For a commentary on Warden's theory, see DAVID R. METS, THE AIR CAMPAIGN: JOHN WARDEN AND THE CLASSICAL AIRPOWER THEORISTS (1998).
24. Department of Defense Effects-Based Operations Briefing, Briefing Slides (Mar. 19, 2003), www.defenselink.mil/news/Mar2003/g030318-D-9085.html.
25. Interestingly, both Operation Enduring Freedom and Operation Iraqi Freedom were classic campaigns of conquest, rather than compellence. Nevertheless, compellence campaigns are likely to remain a prominent feature in the 21st-century strategic landscape.
26. United States Air Force, Air Force Basic Doctrine (AFDD 1) (Sept. 1997), at 79. Centers of gravity are "those characteristics, capabilities, or localities from which a military force derives its freedom of action, physical strength, or will to fight." Department of Defense, Dictionary of Military and Associated Terms, Joint Publication 1-02 (as amended through June 5, 2003), available at www.dtic.mil/doctrine/jel/doddict [hereinafter Joint Pub 1-02].
27. A dynamic entirely consistent with Clausewitz's assertion that war is "a true political instrument, a continuation of political intercourse, carried on with other means." CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard and Peter Paret trans., 1989).
28. Out of a sense of latent patriotism.
29. Craig R. Whitney, *The Commander; Air Wars Won't Stay Risk-Free, General Says*, NEW YORK TIMES, June 18, 1999, at A1.
30. Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 29 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies).
31. Protocol Additional I, *supra* note 4, art. 57.3. Although not a Party to the Protocol I, the United States considers many its provisions to be declaratory of customary international law. For a non-official, but generally considered authoritative, delineation of those viewed as

declaratory, see 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*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987). See also International & Operational Law Division, Office of the Judge Advocate General, Department of the Air Force, Operations Law Deployment Deskbook, tab 12 (no date), and comments by the then State Department Legal Advisor Abraham D. Sofaer in *Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 784 (1988).

32. Protocol Additional I, *supra* note 4, art. 52.2.

33. 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, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 515 (1980); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Oct. 10, 1980, as Amended, May 3, 1996, art. 2.6, *reprinted in id.* at 536; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1.3, *reprinted in id.* at 533.

34. Second Protocol to the Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1996, art. 1f, 38 INTERNATIONAL LEGAL MATERIALS 769 (1999).

35. See, e.g., Judge Advocate General's School, Operational Law Handbook 10 (2003); US Navy/Marine Corps/Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7 ¶ 8.1.1(1995), *reprinted in* its annotated version as volume 73 of the US Naval War College's International Law Studies series.

36. *Id.* ¶ 8.1.1. This assertion is labeled a "statement of customary international law." The Handbook cites General Counsel, Department of Defense, Letter of Sept. 22, 1972, *reprinted in* 67 AMERICAN JOURNAL OF INTERNATIONAL LAW 123 (1973), as the basis for this characterization.

37. Joint Pub 3-60, *supra* note 9, at A-2.

38. Marco Sassoli, *Legitimate Target of Attacks Under International Humanitarian Law*, International Humanitarian Law Research Initiative Brief 3 (Jan. 2003), *available at* www.ihlresearch.org/portal/ihli/Session1.pdf.

39. NATO's demands were set forth in a Statement of the Extraordinary Meeting of the North Atlantic Council on April 12, 1999, and reaffirmed by the Heads of State and Government at Washington on April 23. They included a cessation of military action, as well as ending violence and repression of the Kosovar Albanians; withdrawal from Kosovo of military, police, and paramilitary forces; an international military presence in Kosovo; safe return of refugees and displaced persons and unhindered access to them by humanitarian aid organizations; and the establishment of a political framework agreement on the basis of the Rambouillet Accords. Press Release M-NAC-1(99)51 (Apr. 12, 1999), *available at* www.nato.int/docu/pr/1999/p99-051e.htm; Press Release S-1(99)62 (Apr. 23, 1999), *available at* www.nato.int/docu/pr/1999/p99-062e.htm

40. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257, ¶ 37 (2000), *available at* www.un.org/icty/pressreal/nato061300.htm [hereinafter Report to the Prosecutor].

41. *Bankovic & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, European Court of Human Rights Application no. 52207/99.

42. The attack was addressed in the Report to the Prosecutor, *supra* note 40, at ¶¶ 71–79. The Prosecutor announced her decision not to proceed to the Security Council on June 2, 2000. UN Doc. S/PV.4150 (2000).

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43. A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* 37 (1996). A second edition of this excellent book was published in 2004.

44. Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, Annex (1956). The list, which is not included with the ICRC on-line text (www.icrc.org/ihl/nsf), is reprinted in paragraph 39 of Report to the Prosecutor, *supra* note 40. The Report to the Prosecutor failed to take a firm position on the attack (and on attacks against media facilities generally).

The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

Id. ¶55.

45. See *supra* note 38. Coalition forces dropped over 29,000 guided and unguided munitions during Operation Iraqi Freedom. Operation Iraqi Freedom—By the Numbers, *supra* note 6. Yet, the Human Rights Watch report on the operation found only the destruction of media facilities and electrical power distribution facilities “questionable.” Instead, it criticized an “unsound targeting methodology . . . compounded by the lack of an effective assessment both prior to the attacks of the risk to civilians . . . and following the attacks of their success and utility” as the primary culprits in causing civilian casualties. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (Dec. 2003), available at www.hrw.org/reports/2003/usa1203/ [hereinafter *Off Target*]. The Human Rights Watch, Amnesty International, and ICTY Prosecutor’s Office reports on the 1999 air campaign in Yugoslavia are consistent, with over 28,000 combat sorties and only a handful of targets questioned as legitimate military objectives. See, respectively, Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (Feb. 2000), available at www.hrw.org/reports/2000/nato/; Amnesty International, “Collateral Damage” or Unlawful Killings?: Violations of the Laws of War by NATO during Operation Allied Force (June 6, 2000), available at www.amnesty.org/library/index/ENGEUR700182000; Report to the Prosecutor, *supra* note 40.

46. Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REVIEW 14 (Summer 2000). He further suggests that current technology allows the United States to apply “tremendous destructive power . . . discreetly and efficiently against a wide range of objects that opportunistic, materialistic societies like Yugoslavia value.” *Id.*

47. *Id.*

48. *Id.* He continues,

[a]dditional targets under this proposal could include selected cultural, educational, and historical sites whose existence provides support—to include psychological sustenance—to the malignant ideology that stimulates the behaviors the use of force is intended to support.. Furthermore, resorts, along with other entertainment, sports, and recreational facilities could be slated for destruction. Of course, government offices and buildings of every kind would be subject to eradication, even if they do not directly support military activities (except those

whose destruction would seriously impede the delivery of services indispensable for noncombatant survival). Finally, to the extent it is feasible to do so, the personal property of the sentient, adult population ought to be held at risk so long as it is not, again, indispensable to human survival. Milosevic's bank accounts would be high on the target list under the revised model.

Id.

49. *Id.*

This proposal openly acknowledges an intent to inflict hardship upon the sentient, adult (albeit putatively noncombatant) populace who must be held responsible for the deeds of their military forces. It includes even those who may oppose their government's policies. Given the tremendous scale of atrocities that are infecting the world, not to mention the globalization of WMD technology, ethical norms should place an affirmative duty on a nation's citizenry to actively frustrate their government's actions when they become patently inhumane.

Id.

50. DOUHET, *supra* note 3.

51. Dunlap, *supra* note 46, at 15. Arguably he contorts the principles of necessity and proportionality to support this effects-based objective: "The scope and severity of the attacks must bear a reasonable relationship to the egregiousness of the conduct sought to be prevented, and the level of force necessary to purge the enemy society of its perverse beliefs." The classic articulation of military necessity is drawn from the case of *United States v. List*: "The destruction of property to be lawful must be imperatively demanded by the necessities of war There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces." *United States v. List*, 11 *Trials of the Major War Criminals before the Nuremberg Tribunals* 1253 (1950).

52. Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 *AIR FORCE LAW REVIEW* 143 (2001).

53. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 78, 79 (July 8). He partially rejects the principle of distinction by treating civilian objects as a military objective and the principle of necessity is transformed by measuring it against need to reeducate the enemy population. Doing so ignores the preambular language of the 1868 St. Petersburg Declaration, a foundation of modern humanitarian law: "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, Dec. 11, 1868, 18 *Martens* 474-5, *reprinted in* *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 4, at 54. It also flies in the face of Article 22 of the 1863 Lieber Code, the manual for Union forces during the American Civil War, and also a foundational document of humanitarian law:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.

War Department, Adjutant General's Office, *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, art. 22 (Apr. 24, 1863), *reprinted in* *THE LAWS OF ARMED CONFLICTS* 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

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Numerous contemporary instruments contain the principle, most notably the Protocol Additional I requirement that Parties “shall direct their operations only against military objectives.” Protocol Additional I, *supra* note 4, art. 48. Of course, this principle assumes a legal fiction, albeit a defensible one, because if the civilian population opposes the war effort, there is little doubt that the State’s ability to wage war will be seriously degraded.

54. ROBERT F. FUTRELL, *THE UNITED STATES AIR FORCE IN KOREA 1950–1953*, at 516 (1983).

55. *See supra* note 7.

56. Lord Robertson, *Kosovo One Year On: Achievement and Challenge* 13 (Mar. 21, 2000), www.nato.int/Kosovo/repo2000/index.htm.

57. Indeed, the first attack sortie of Operation Iraqi Freedom was an attempt to kill Saddam Hussein. Mark Kinkaid, *The First Shot*, AIRMAN MAGAZINE, July 23, 2003, *available at* www.af.mil/news/airman/0703/air.html.

58. Bruce van Voorst, *Ready, Aim, Fired*, TIME, Oct. 1, 1990, at 55. Also recall the controversy surrounding Operation Phoenix, the CIA’s program to neutralize the Vietcong civilian infrastructure (resulting in nearly 20,000 deaths). Michael Ratner, *The Bob Kerry Case, Crimes of War Expert Analysis* (July 2001), www.crimesofwar.org/expert/rather.html. The *High Command Case* of 1948 was based in part on Hitler’s order to kill Soviet Commissars (political leaders). The judgment labeled the order “notorious” and the case yielded multiple convictions. *United States v. Von Leeb (High Command Case)*, 11 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 1 (1950).

59. Lieber Code, *supra* note 53, art. 148. For a fuller explanation of this analysis, see Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 *YALE JOURNAL OF INTERNATIONAL LAW* 609 (1992). *See also* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *THE ARMY LAWYER* 4 (1989).

60. The British Manual of 1958 is illustrative: “assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans . . . and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war.” War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, art. 115 (1958), *reprinted in* 10 *DIGEST OF INTERNATIONAL LAW* (1968).

61. Protocol Additional I, *supra* note 4, art. 85.3(a).

62. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4.2, 1125 *U.N.T.S.* 609, *reprinted in* *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 4, at 483 [hereinafter Protocol Additional II].

63. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998), arts. 8.2(b)(i) & (e)(i) *reprinted in* *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 4, at 671 [hereinafter ICC Statute].

64. Protocol Additional I, *supra* note 4, art. 50.1.

65. The exception applies in “situations in armed conflict where owing to the nature of hostilities an armed combatant cannot so distinguish himself.” In such cases, he need only distinguish himself during each military engagement and while engaged in “a military deployment preceding the launching of an attack” during such time as he is visible to the adversary. *Id.*, art. 44.3.

66. *Id.*, art. 43.3.

67. The Commentary to Article 43 of Protocol Additional I makes it clear that only religious and medical personnel enjoy a special status in the armed forces:

In fact, in the army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they

actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1677, at 515 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987) [hereinafter PROTOCOLS COMMENTARY].

68. The Rome Statute specifically makes them subject to prosecution, another indication that humanitarian law carves out no special regime for heads of State. ICC Statute, *supra* note 63, art. 27. On targeting heads of States, see also Thomas Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MARYLAND JOURNAL OF INTERNATIONAL LAW 287 (1999); Robert F. Turner, *It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 UNIVERSITY OF RICHMOND LAW REVIEW 787 (2003); Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 1 (2003); Louis Beres, *Assassinating Saddam Hussein: The View from International Law*, 13 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 847 (2003).

69. US Constitution, art. II, sect. 2, cl. 1. Casper Weinberger has suggested that a head of State or government who serves as commander of the armed forces is a combatant. As a matter of law, he overreaches. Casper Weinberger, *When Can We Target the Leaders?*, STRATEGIC REVIEW 21 (Spring 2001). See also Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE JOURNAL OF LAW AND PUBLIC POLICY 306 (1992).

70. The Department of Defense Dictionary of Military and Associated Terms offers the following definitions for the levels of war:

Strategic Level of War: The level of war at which a nation, often as a member of a group of nations, determines, national or multinational (alliance or coalition) security objectives and guidance, and develops and uses national resources to accomplish these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve these objectives; and provide military forces and other capabilities in accordance with strategic plans.

Operational Level of War: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives.

Tactical Level of War: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

Joint Pub 1-02, *supra* note 26.

71. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1678, at 515. In the context of non-international armed conflict, the Commentary to Protocol Additional II provides: "Direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences." *Id.* ¶ 4787, at 1453.

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72. For a full discussion of the issue of direct participation in hostilities, see Michael N. Schmitt, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in *FESTSCHRIFT FÜR DIETER FLECK* 505 (Horst Fischer et al. eds., 2004), available at www.michaelschmitt.org/Publications.html. Israel takes the position that Protocol Additional I, Article 51(3), which provides that civilians taking part in the hostilities can only be targeted “for such times as they take a direct part in hostilities,” should be broadly construed such that those who participate remain targetable throughout the entire period of their involvement in the conflict. Yuval Shany, *Israeli Counter-Terrorism Measures: Are They “Kosher” under International Law*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 96, 104 (Michael N. Schmitt & Gian Luca Beruto eds., 2003).

73. Although Israel has acknowledged killing over 30 Palestinians pursuant to the policy, non-governmental organizations estimate that nearly three times that number have been targeted. Techniques include using snipers, bombs, and airstrikes. Most of the strikes have occurred in Palestinian controlled territory and have been mounted against mid- or high-level militants involved in attacks against Israeli targets. *Id.* at 103. On the policy of targeted killings, see also Orna Ben-Naftali and Keren R. Michaeli, “*We Must not Make a Scarecrow of the Law*”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 *CORNELL INTERNATIONAL LAW JOURNAL* 233 (2003).

74. The Israel Defense Forces Judge Advocate General has set four conditions for conducting such strikes:

- 1) well-supported information showing the terrorist will plan or carry out a terror attack in the near future; 2) after appeals to the Palestinian Authority calling for the terrorist’s arrest have been ignored; 3) attempts to arrest the suspect by use of IDF troops have failed; 4) the assassination is not to be carried out in retribution for events of the past. Instead, it can only be done to prevent attacks in the future which are liable to toll multiple casualties.

HA’ARETZ, Feb. 4, 2002.

75. See, e.g., Amnesty International, *Israel, and the Occupied Territories: State Assassinations and Other Unlawful Killings* (Feb. 21, 2001), at www.amnesty.org/library/index/ENGMDE150052001.

76. UN CHARTER, art. 51.

77. S.C. Res. 1368, UN SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368 (2001); S.C. Res. 1373, UN SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001).

78. NATO—North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; North Atlantic Treaty Organization (NATO), Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001), www.nato.int/docu/pr/2001/p01-124e.htm.

OAS—Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001).

ANZUS—Security Treaty between Australia, New Zealand, United States, Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; (by Australia), Prime Minister John Howard, Government Invokes ANZUS Treaty—Press Conference (Sept. 14, 2001), available at australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml.

79. Russia, China, and India agreed to share intelligence with the United States, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights and 46 multilateral

declarations of support were obtained. White House, Fact Sheet: Operation Enduring Freedom Overview, Oct. 1, 2001, www.state.gov/s/ct/rls/fs/2001/5194.htm.

80. In addition to United Kingdom participation in the initial strikes, Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan provided airspace and facilities. China, Egypt, Russia, and the European Union publicly backed the operations, while even the Organization for the Islamic Conference limited itself to urging the United States to restrict its campaign to Afghanistan. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41, 49 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 237, 248 (2002).

81. With the exception of the United Kingdom and Israel, many of the closest US allies criticized the airstrikes against government and terrorist targets in Libya. The General Assembly passed a condemnatory resolution following the attack. GA Res. 41/38, UN GAOR, 41st Sess., 78th plen. mtg. at 34, UN Doc A/RES/41/38 (1986). See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 33–34 (1999) for a detailed description of international reaction. See also Stuart G. Baker, *Comparing the 1993 US Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99 (1994).

82. Proportionality and necessity have specifically been cited as customary international law by the International Court of Justice. Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. ¶ 194 (June 27); Case Concerning Oil Platforms (Iran v. US), Judgment (Merits) ¶¶ 43 & 74 (Nov. 6, 2003), www.icj-cij.org.

83. Profile: Ali Qaed Senyan al-Harhi, BBC News World Report, Nov. 5, 2002, [at news.bbc.co.uk/2/hi/middle_east/2404443.stm](http://at.news.bbc.co.uk/2/hi/middle_east/2404443.stm).

84. Anthony Dworkin, The Yemen Strike, Nov. 14, 2002, at www.crimesofwar/onnews/news-yemen.html.

85. Ministry of Foreign Affairs, Israel: Targeting Terrorists—Background (Aug. 1, 2001), at www.mfa.gov.il/mfa/go.asp?MFAH0k9d0.

86. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1, at 1129, 1138. The incident involved the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion. British forces crossed into the United States (after asking the United States, without result, to put an end to rebel activities on its territory), captured the *Caroline*, set it ablaze, and sent it over Niagara Falls. Two US citizens perished. An exchange of diplomatic notes ensued in which Secretary of State Daniel Webster articulated the standard. Lord Ashburton, his British counterpart, accepted this formula as the basis of their exchange. Letter from Lord Ashburton to Daniel Webster, US Secretary of State (July 28, 1842), in 30 BRITISH AND FOREIGN STATE PAPERS 1841–1842, available at www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm.

87. In addition to acceptance of the standard by the International Court of Justice (see *supra* note 82), the Nuremberg Tribunal cited the case approvingly when rejecting the argument that Germany had attacked Poland in 1939 and Norway in 1940 in (anticipatory) self-defense. International Military Tribunal (Nuremberg), Judgment, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 205 (1947).

88. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 172 (3d ed. 2001).

89. On January 8, 2004, Secretary of State Powell, referring to “evidence of a connection between Saddam Hussein and al-Qaida and . . . a likelihood that he would transfer weapons to al-Qaida,”

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stated that he has “not seen smoking-gun, concrete evidence about the connection, but I think the possibility of such connections did exist and it was prudent to consider them at the time that we did.” Colin L. Powell, Secretary Powell’s Press Conference (Jan. 8, 2004), www.state.gov/secretary/rm/28008.htm.

90. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), UN Doc. S/2001/946, www.un.int/usa/s-2001-946.htm; Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), www.nato.int/docu/speech/2001/s011002a.htm.

91. “Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” Protocol Additional I, *supra* note 4, art. 43.2.

92. Law enforcement incorporation must be notified to the other side for combatant status to attach. *Id.* art. 43.3.

93. Common Article 2 to the four Geneva conventions provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.” (Emphasis added). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 197; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 222; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 244; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 301. Article 1.2 of Protocol Additional I states that it applies to “situation referred to in Article 2 common.” It then controversially expands coverage to armed conflicts in which “people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Protocol Additional I, *supra* note 4, arts. 1.3 & 1.4.

94. COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK OF THE ARMED FORCES IN THE FIELD 49 (J. Pictet ed., 1952).

95. Protocol Additional II, *supra* note 62, art 1.1.

96. James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda*, NEW YORK TIMES, Dec. 15, 2002, at 1.

97. See report of the group’s activities in Douglas Waller, *The CIA’s Secret Army*, TIME, Feb. 3, 2003, www.time.com/covers/1101030203/.

98. UN CHARTER, art. 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This prohibition extends not only to seizure of territory, but also to non-consensual penetration. Albrecht Randelzhofer, *Article 2*, *in* I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 123 (Bruno Simma ed., 2d ed. 2002). See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations:

Every State has a duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or

use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., annex, UN Doc. A/Res/2625 (1970), *reprinted in* 65 AMERICAN JOURNAL OF INTERNATIONAL LAW 243 (1971) and *in* KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY, 1946–1996, at 3 (Dietrich Rauschnig, Katja Wiesbrock & Martin Lailach eds., 1997) [hereinafter *Declaration on Friendly Relations*]. The resolution was adopted by acclamation.

99. Noted by John Basset Moore in his dissent in the *Lotus* case. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Sept. 7) (Moore, J., dissenting).

100. See, e.g., *Declaration on Friendly Relations*, *supra* note 98; *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 49/60, UN GAOR 6th Comm., 49th Sess., 84th plen. mtg., UN Doc. A/49/743 (1994); *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, UN GAOR 6th Comm., 51st Sess., 88th plen. mtg., UN Doc. A/51/631 (1996); S.C. Res. 1363, UN SCOR, 56th Sess., 4352d mtg., UN Doc. S/RES/1363 (2001); S.C. Res. 1267, UN SCOR, 54th Sess., 4051st mtg., UN Doc. S/RES/1267 (1999).

101. In the case of Afghanistan, the United Nations had demanded that the Taliban put an end to terrorist activities on territory it controlled both before and after September 11. See, e.g., S.C. Res. 1267, *supra* note 100; S.C. Res. 1363, *supra* note 100; S.C. Res. 1378, UN SCOR, 56th Sess., 4415th mtg., UN Doc. S/RES/1378 (2001); S.C. Res. 1390, UN SCOR, 57th Sess., 4452d mtg., UN Doc. S/RES/1390 (2002). After 9/11, President Bush made the demand explicit. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1347 (Sept. 20, 2001). The United States also made back-channel demands through Pakistan.

102. Perhaps the most significant case of a State crossing into another to deal with attacks is the *Caroline* case itself, since the correspondence between Webster and Ashburton is universally cited as the source of the requirements of self-defense.

103. Defense Intelligence Agency, Saddam's Use of Human Shields and Deceptive Sanctuaries: Special Briefing for the Pentagon Press Corps (Feb. 26, 2003), www.defenselink.mil/news/Feb2003/g030226-D-9085M.html. On this subject, see also Central Intelligence Agency, Putting Noncombatants at Risk: Saddam's Use of Human Shields, January 2003, www.cia.gov/cia/reports/iraq_human_shields/; Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War by a Democratic State against Terrorism*, 16 EMORY INTERNATIONAL LAW REVIEW 445 (2002).

104. Defense Intelligence Briefing, *supra* note 103.

105. For a version of these points, see *id.*

106. G.A. Res. 46/134, UN GAOR, 46th Sess., ¶ 2(c), UN Doc. A/RES/46/134 (1991).

107. Off Target, *supra* note 45.

108. In May 1995, Bosnian Serbs seized UNPROFOR peacekeepers and used them as human shields against NATO airstrikes. In response, the United Nations condemned the action, demanded release, and authorized the creation of a rapid reaction force to handle such situations. S.C. Res. 998, UN SCOR, 3543d mtg., UN Doc. S/RES/998 (1995).

109. Joint Pub 3-60, *supra* note 9, app. A.

110. *Id.*

111. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 93, art. 28.

112. Protocol Additional I, *supra* note 4, art 51.7.

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113. ICC Statute, *supra* note 63, art 8.2(b)(xxiii): “Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.”
114. Protocol Additional I, *supra* note 4, art. 51.8.
115. Department of the Air Force, International Law—The Conduct of Armed Conflict and Air Operations (AFP 110-31), at ¶ 5-4b (Nov. 19, 1976).
116. ROGERS, *supra* note 43, at 79. *See also* W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 163 (1992).
117. Joint Pub 3-60, *supra* note 9, at A-2–A-3.
118. Department of the Air Force, USAF Intelligence Targeting Guide, at A4.2.1.2 (Feb. 1, 1998).
119. Department of the Air Force, Judge Advocate General’s Department, Air Force Operations and the Law 293 (2002).
120. A belligerent reprisal is an unlawful, but proportionate, act taken to compel one’s adversary to desist in its own unlawful course of conduct. On reprisals, see FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971). Protocol Additional I went far beyond prior humanitarian law in prohibiting reprisals, a fact that led to US opposition to the treaty. *See* Protocol Additional I, *supra* note 4, arts. 51.6 (civilians and civilian population), 52.1 (civilian objects), 53 (cultural objects and places of worship), 54.4 (objects indispensable to the survival of the civilian population), 55.2 (the natural environment), and 56.4 (dams, dykes and nuclear electrical generating stations).
121. CNN Interactive, *Iraqis Volunteering as Human Shields* (Nov. 14, 1997), at www.cnn.com/WORLD/9711/14/iraq.al.sahhaf.presser. They used force for that purpose during Operation Desert Fox in December 1998.
122. Although most came to shield civilian objects, the Iraqi government urged them to shield military objectives.
123. Department of Defense, Background Briefing on Targeting (Mar. 5, 2003), at www.defenselink.mil/news/Mar2003/t03052003_t305targ.html.
- And then, the other target category that is a challenge for us is where the human shields that we’ve talked of before might be used. And you really have two types of human shields. You have people who volunteer to go and stand on a bridge or a power plant or a water works facility, and you have people that are placed in those areas not of their own free will. In the case of some of the previous use of human shields in Iraq, Saddam placed hostages, if you will, on sensitive sites in order to show that these were human shields, but, in fact, they were not there of their own free will. Two separate problems to deal with that, and it requires that we work very carefully with the intelligence community to determine what that situation might be at a particular location.
124. Human Rights Watch, *International Humanitarian Law Issues in a Potential War in Iraq* (Feb. 20, 2002), <http://www.hrw.org/backgrounder/arms/iraq0202003.htm#1>.
125. Protocol Additional I, *supra* note 4, art. 51(3).
126. ICC Statute, *supra* note 63, art. 8. The notion of direct participation also appears in the humanitarian law pertaining to non-international armed conflict. Common Article 3 to the four 1949 Geneva Conventions specifically applies to “persons taking no active part in hostilities.” Geneva Conventions, *supra* note 93, art. 3(1). The very limited nature of the article’s protections were augmented in 1977 by Protocol Additional II to the Geneva Conventions, which provides far more extensive protection to civilians “unless and for such time as they take a direct part in hostilities.” Protocol Additional II, *supra* note 62, art 13.3. Although Common Article 3 and Protocol II employ different terminology (“active” and “direct” respectively), the International Criminal Tribunal for Rwanda reasonably opined in the *Akayesu* judgment that the terms are so similar they should be treated synonymously. ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case ICTR-96-4-T, Judgment, 2 Sept. 1998, ¶ 629.

127. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1679, at 516.

128. *Id.* ¶ 1942, at 618.

129. Protocol Additional I, *supra* note 4, art. 52.2.

130. This is arguably consistent with US doctrine. Joint Publication 3-60 provides,

The protection offered civilians carries a strict obligation on the part of civilians not to participate directly in armed combat, become combatants, or engage in acts of war. Civilians engaging in fighting or otherwise participating in combat operations, singularly or as a group, become unlawful combatants and lose their protected civilian status.

Joint Pub 3-60, *supra* note 9, at A-2.

131. Justus R. Weiner, *Co-existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOKLYN JOURNAL OF INTERNATIONAL LAW 591, 679 n.407 (2000).

132. For instance with the entry into force on February 12, 2002 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, 54 UN GAOR Supp. No. 49, UN Doc. A/54/49 (2000).

133. Protocol I, *supra* note 4, art. 52.2.

134. Prosecutor v. Stanislav Galic, Judgement, Dec. 5, 2003, Case No. IT-98-29-T, www.un.org/icty/galic/trialc/judgement/index.htm.

135. The Report to the Prosecutor on the NATO bombing campaign usefully addresses the *actus reus* and *mens rea* of the offense of unlawful attack under Article 3 of the ICTY Statute:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack under Article 3 of the ICTY Statute. The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives,
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

Report to the Prosecutor, *supra* note 40, ¶ 28.

136. Protocol Additional I, *supra* note 4, art. 51.5(a).

137. *Id.*, art. 57.2. The Report to the Prosecutor on the NATO bombing campaign expanded on this obligation:

The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in

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a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.

Report to the Prosecutor, *supra* note 40, ¶ 29.

138. Indeed, the International Criminal Tribunal for the Former Yugoslavia addressed the failure to use discriminate weapons where civilians were collocated with the military in the *Blaskic* case. The case involved shelling of the village of Ahmici and several others in Lasva River Valley with “baby-bombs,” home made mortars that are difficult to aim accurately. The Trial Chamber found this to be a deliberate attack on civilians with “blind weapons.” Prosecutor v. Blaskic, Judgment, March 3, 2000, Case No. IT-95-14.

139. Protocol Additional I, *supra* note 4, art. 52.3.

140. Information warfare consists of “information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries.” Computer network attacks (CNA), a form of information warfare, are “operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.” Joint Pub 1-02, *supra* note 26. The essence of CNA is that, regardless of the context in which it occurs, a data stream is relied on to execute the attack. Methods include, *inter alia*, gaining access to a computer system so as to acquire control over it, transmitting viruses to destroy or alter data, using logic bombs that sit idle in a system until triggered on the occasion of a particular occurrence or at a set time, inserting worms that reproduce themselves upon entry to a system thereby overloading the network, and employing sniffers to monitor and/or seize data.

141. On CNA and the *jus ad bellum*, see Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885 (1999).

142. On CNA and the *jus in bello*, see Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*,” 84 (No. 846) INTERNATIONAL REVIEW OF THE RED CROSS 365 (June 2002). On the subject generally, see COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian T. O’Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

143. Protocol Additional I, *supra* note 4, art. 57.2 (a)(ii).

144. *Id.*, art. 57.3.

145. See Bankovic, *supra* note 41.

146. Protocol Additional I, *supra* note 4, art. 48.

147. *Id.*, art. 51.2.

148. *Id.*, art. 52.1.

149. *Id.*, art. 51.4.

150. *Id.*, art. 52.2.

151. *Id.*, art. 49.

152. PROTOCOLS COMMENTARY, *supra* note 67, ¶ 1875, at 600.

153. See Schmitt, *Wired Warfare: Computer Network Attack and International Law*, *supra* note 142, at 375–78.

154. See discussion at *id.* at 377.

155. Robert Bolt, *A Man for All Seasons*, act. I, scene 6 (1954).