

# *Naval War College situation: conflict in Gregoria and Tanaka: the law of targeting*

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Naval War College Situations

Conflict in Gregoria and Tanaka:  
The Law of Targeting

*Project Director: Michael N. Schmitt*

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# Naval War College Situations

## Conflict in Gregoria and Tanaka: The Law of Targeting

*Project Director: Michael N. Schmitt\**

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\* Professor Emeritus and Charles H. Stockton Distinguished Scholar, U.S. Naval War College; Professor of Law, University of Reading; G. Norman Lieber Distinguished Scholar, U.S. Military Academy at West Point. Workshop participants, some of whom collaborated in the drafting of the scenario, situations, and analysis, included Laurie Blank, John Cherry, Kevin Coble, Peter Combe, Matthew Grant, Jon Griffiths, Eric Jensen, Guy Kiernan, James Kraska, Duco Le Clercq, Peter Marguiles, Daphne Richemond-Barak, Michael Rizzotti, Eran Shamir-Borer, and John Tramazzo. The analysis reflects the project director's sense of the group's general approach to the issues the situations posed. Individual participants, including the project director, did not necessarily agree with every approach or conclusion. The thoughts and opinions expressed do not necessarily reflect those of any government, armed force, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

This article addresses complex law of armed conflict (LOAC) issues posed by eight “situations” examined during a tabletop workshop conducted by the U.S. Naval War College’s Stockton Center for International Law. The use of “situations” as a technique for legal analysis stretches back to 1901 with the publication of *International Law Situations with Solutions and Notes* in *International Law Studies*, which was founded in 1894 to educate practitioners and inform scholars on the application of international law to military operations. This article revives the practice of legally deconstructing complex hypothetical military situations.

The scenario involves an armed conflict between two fictional States, Tanaka and Gregoria, and separate hostilities between Tanaka and an organized armed group (OAG), the Gregorian People’s Front (GPF). Because LOAC analysis always starts with classifying the conflict to ascertain which rules apply, discussion begins there. Emphasis is placed on how to classify concurrent international and non-international armed conflicts (so-called “horizontal” armed conflicts). Next, a brief recitation of the law applicable to targeting—including the rules addressing military objectives, distinction, precautions in attack, and proportionality—provides a framework for analyzing the situations. Finally, eight situations are set forth, with corresponding legal analysis and conclusions.

The participants in this project were carefully selected. They included judge advocates from the United States and uniformed legal advisors from Israel, the Netherlands, and the United Kingdom. All had extensive experience providing legal advice on targeting, and individual members of the group had served at every level of command involved in targeting decision-making. The participants also included academics who were experts in the law of armed conflict and had written on various complex conduct of hostilities issues. The scenario and accompanying eight situations were drafted to reflect situations some participants had faced in international or non-international armed conflict.

It must be emphasized that the analysis and positions set forth below do not necessarily represent the legal position of any State and that everyone participated in their private, not official, capacity. Moreover, one or more participants sometimes disagreed with the broader consensus. Therefore, all that can be said of the following discussion is that it allows readers to glimpse

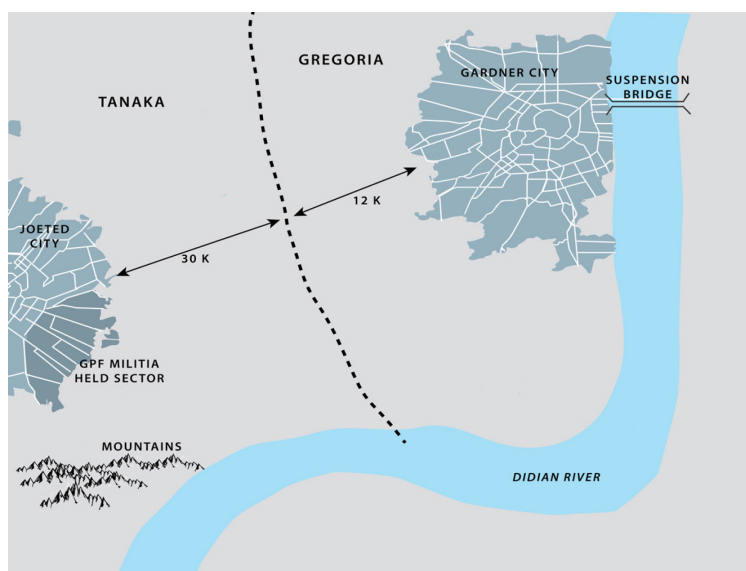
how scholars and experienced practitioners, working together, might address the situations raised in the scenario.

## II. SCENARIO

Tanaka and Gregoria are neighboring countries with a long-running dispute over the border region near Joeted, a city thirty kilometers inside Tanaka. In recent months, the two States have engaged in sporadic fighting. Additionally, militia groups drawn from the minority Gregorian diaspora in Tanaka have united under a single command, the Gregorian People's Front (GPF), and engaged in intense fighting with Tanakan forces. Much of it involves urban operations in Joeted, the eastern sector of which is under GPF control. Villages in a mountainous region of Tanaka lying southwest of Joeted serve as GPF logistics hubs and bases of operations.

Gregoria is sympathetic to the GPF and provides some financial and operational support. Occasionally, it coordinates operations against Tanakan forces, but generally, GPF forces act under the GPF chain of command.

Both States are party to the four 1949 Geneva Conventions. Gregoria is a party to the 1977 Additional Protocols (I for international armed conflict, II for non-international) to those instruments, while Tanaka is not.



### III. THE APPLICABLE LAW: CLASSIFICATION

The preliminary questions in all LOAC analyses are 1) whether an armed conflict exists and, if so, 2) whether it is international or non-international in character. International armed conflicts are defined in Common Article 2 to the Geneva Conventions as “declared war or . . . any other conflict . . . between two or more . . . High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>1</sup> An international armed conflict can also exist when a State exercises “overall control” of an organized armed group. The International Criminal Tribunal for the former Yugoslavia (ICTY) has portrayed overall control as “going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations,”<sup>2</sup> while the International Criminal Court has explained that overall control occurs when the State plays “a role in organising, co-ordinating or planning the military actions of the military group.”<sup>3</sup> The State does not need to direct individual operations of an organized armed group to have overall control, but it must exercise a degree of de facto decision-making authority over it. In such cases, the conflict is said to have been “internationalized.”

By contrast, Common Article 3 describes a non-international armed conflict as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>4</sup> Non-international armed conflicts can take place between a State and an OAG or between two or more OAGs.<sup>5</sup>

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1. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

2. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 145 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999).

3. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 211 (Jan. 29, 2007).

4. Geneva Conventions I–IV, *supra* note 1, art. 3.

5. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the former Yugoslavia May 7, 1997). *See also* Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l

While “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war,”<sup>6</sup> the same is not true for non-international armed conflict. A non-international armed conflict involves “protracted armed violence.”<sup>7</sup> Additionally, the OAG(s) concerned must be sufficiently organized<sup>8</sup> and the fighting intense enough<sup>9</sup> to distinguish the armed conflict from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”<sup>10</sup>

Additional Protocol II sets an even higher threshold for applicability. It applies only to conflicts between a treaty party’s armed forces and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol.”<sup>11</sup> The requirement of control over territory and the limitation to conflicts between OAGs and States differentiate Additional Protocol II non-international conflicts from those falling within Common Article 3’s reach.

By these standards, the eight situations that follow arise in the context of an international armed conflict between Gregoria and Tanaka and a parallel

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Crim. Trib. for the former Yugoslavia Oct. 2, 1995); OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL §§ 1.5.1, 3.3.1, 17.1.2, 17.1.3 (updated ed. July 2023) [hereinafter U.S. DOD MANUAL].

6. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952). Furthermore, in an international armed conflict “it makes no difference how long the conflict lasts, or how much slaughter takes place.” *Id.*

7. Tadić, IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70. *See also* INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW 4–5 (Mar. 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

8. Tadić, IT-94-1-T, Opinion and Judgment, ¶ 562; Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 94–129 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2005).

9. Tadić, IT-94-1-T, Opinion and Judgment, ¶ 562; Haradinaj, IT-04-84-T, Judgment, ¶¶ 40–49; Limaj, IT-03-66-T, Judgment, ¶¶ 135–67.

10. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. *See also* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 43–46 (2d ed. 2014).

11. Additional Protocol II, *supra* note 10, art. 1(1).



non-international armed conflict between Tanaka and the GPF. The support Gregoria provides the GPF does not rise to the level of “overall” control that would internationalize the conflict between Tanaka and the GPF.

Consequently, the customary law applicable to international armed conflict and, as State parties, the rules contained in the four Geneva Conventions (and any other LOAC treaties to which both States are party) bind Tanaka and Gregoria.<sup>12</sup> Although Gregoria is a party to Additional Protocol I,<sup>13</sup> Tanaka is not and has not agreed to be bound by its terms.<sup>14</sup> Therefore, that instrument does not apply except as it reflects customary law.

The GPF is well organized and is fighting with Tanaka’s armed forces with sufficient intensity to trigger a non-international armed conflict. This being so, the rules related to non-international armed conflict found in customary law and Common Article 3 apply.<sup>15</sup> In that Tanaka is not a party to Additional Protocol II, that instrument is inapplicable except as its rules reflect customary law.

#### IV. THE APPLICABLE LAW: CONDUCT OF HOSTILITIES

Before analyzing the eight situations, it is helpful to set forth the legal framework for targeting during armed conflict.<sup>16</sup> Accordingly, this section outlines

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12. See, e.g., 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xvi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CUSTOMARY LAW STUDY].

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

14. *Id.* art. 96(2).

15. Geneva Conventions I–IV, *supra* note 1, art. 3. See generally ICRC CUSTOMARY LAW STUDY, *supra* note 12.

16. The footnotes that follow include cites to Additional Protocol I, the U.S. *DoD Manual*, and the *ICRC Customary Law Study*. Additional Protocol I is cited as it is the instrument containing the bulk of the treaty law rules regarding the conduct of hostilities. Although States like Israel and the United States are not party to the instrument, many of its conduct of hostilities provisions reflect customary international law in both international and non-international armed conflict. The U.S. *DoD Manual* is cited to provide examples of positions taken by a non-party State. Finally, *ICRC Customary Law Study* rules are referenced to illustrate the positions of the ICRC, the most-influential non-State actor in law of armed conflict matters. It must be cautioned that some States and commentators object to particular rules or aspects thereof. See John B. Bellinger & William J. Haynes, *A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007).

the fundamental rules on targeting, including qualification as a military objective or targetable individual, required precautions in attack, and the rule of proportionality.<sup>17</sup>

These and other targeting rules operationalize the principle of distinction, which applies in both international and non-international armed conflict. It requires parties to an armed conflict to always distinguish between civilians and combatants (or other targetable persons, like direct participants in hostilities) and between civilian objects and military objectives. Only combatants and military objectives may be made the object of attack.<sup>18</sup>

In cases of doubt as to an individual's status or whether an object normally used for civilian purposes is being used for military ends, Additional Protocol I requires an attacker to presume civilian status,<sup>19</sup> a requirement that some States believe reflects customary law.<sup>20</sup> Absolute certainty is not required and, in practice, will often not be attainable, although it is safe to say that there is no fixed threshold. Instead, certainty is a context-dependent concept that varies from case to case, depending on the attendant circumstances.<sup>21</sup>

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17. Geneva Conventions I–IV have been ratified by 196 States, Additional Protocol I by 174, and Additional Protocol II by 169. Notably, the United States has not ratified either protocol, although it considers many of their provisions to reflect customary law. On U.S. LOAC positions, *see* U.S. DOD MANUAL, *supra* note 5; HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE (Aug. 2019) [hereinafter FM 6-27]; U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Mar. 2022) [hereinafter NWP 1-14M].

18. Additional Protocol I, *supra* note 13, arts. 48, 52; ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 1, 7; U.S. DOD MANUAL, *supra* note 5, §§ 5.4.2, 5.5; FM 6-27, *supra* note 17, ¶ 2-22.

19. Additional Protocol I, *supra* note 13, arts. 50(1), 52(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 7.

20. *See, e.g.*, U.S. DOD MANUAL, *supra* note 5, § 5.4.3.2.

21. *See* Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARVARD NATIONAL SECURITY JOURNAL 148 (2019). *See also* IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I (2009); A.P.V. Rogers, *Zero-casualty Warfare*, INTERNATIONAL REVIEW OF THE RED CROSS 165, 175 (Mar. 2000); INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 35 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE]. Certain States that are party to Additional Protocol I take the position that this rule does not override the commander's duty to protect the safety of troops under his command or to preserve the military situation.

To illustrate, the United States takes the position that under customary law,

commanders and other decision-makers must presume that persons or objects are protected from being made the object of attack unless the information available at the time indicates that the persons or objects are military objectives. This presumption is the starting point for the commander or other decision-maker's good faith exercise of military judgment based on information available at the time. For example, if there is no information indicating that a person is a combatant or a non-combatant member of the armed forces, then commanders or other decision-makers must presume that the person is a civilian.<sup>22</sup>

#### *A. Distinction with Respect to Objects*

Additional Protocol I, Article 52(2), codifies the cumulative two-pronged test for determining whether a prospective target is a military objective.

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>23</sup>

While Additional Protocol II does not repeat the test, State practice establishes it as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>24</sup>

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*See* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.3.4 (2004).

22. U.S. DoD MANUAL, *supra* note 5, § 5.4.3.2.

23. Additional Protocol I, *supra* note 13, art. 52(2). *See also* Int'l Law Ass'n Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INTERNATIONAL LAW STUDIES 321, 327 (2017) [hereinafter ILA Study Group].

24. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DoD MANUAL, *supra* note 5, § 5.6; FM 6-27, *supra* note 17, ¶ 2-29; COMMENTARY TO THE HUMANITARIAN POLICY AND CONFLICT RESEARCH MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE r. 1(y) (Yoram Dinstein ed., 2013) [hereinafter COMMENTARY TO THE AMW MANUAL]; MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.4 (2006), <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf> [hereinafter NIAC MANUAL].

The first prong requires that an object effectively contribute to military action by its nature, location, purpose, or use. Its wording is important, for it does not require a direct, or even significant, link to ongoing combat operations. Rather, it is enough that the object makes (or will make) an “actual and discernible” contribution to military activity.<sup>25</sup>

Objects satisfy the requirement by “nature” when they are military in character, as in the case of military equipment, weapons storage facilities, and command and control or military communications facilities.<sup>26</sup> Those that are not military by nature qualify as military objectives if they are presently being used (“use”) for military purposes or are reasonably expected to be so used (“purpose”). An example is a civilian structure used to store weapons or serve as a command center, now or in the future.<sup>27</sup> “Locations,” as in the case of terrain, the flooding of which will impede enemy maneuver, may also fulfill the first prong if it is presently contributing, or reasonably expected to contribute, to enemy military action.

The second prong dictates that the object’s destruction, capture, or neutralization must offer a definite military advantage. Two points merit explanation. First, the word “definite” requires that the prospective advantage be perceptible and not merely speculative.<sup>28</sup> Second, in making their decision, commanders or others in a position to determine whether an object is a military objective must judge military advantage based on the circumstances at the time and the information reasonably available.<sup>29</sup>

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25. COMMENTARY TO THE AMW MANUAL, *supra* note 24, at 110. *See also* NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENT ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1948, ¶ 2.4.3 (Michael Bothe ed., 2d ed. 2013) [hereinafter NEW RULES FOR VICTIMS].

26. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1. *See also* FM 6-27, *supra* note 17, ¶¶ 2-29, 2-40 to -44; ICRC CUSTOMARY LAW STUDY, *supra* note 12, r.8.

27. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1. *See also* FM 6-27, *supra* note 17, ¶¶ 2-29, 2-40 to -44; ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8.

28. U.S. DOD MANUAL, *supra* note 5, § 5.6.7.3; FM 6-27, *supra* note 17, ¶ 2-50; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1948, ¶ 2024 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY]; NEW RULES FOR VICTIMS, *supra* note 25, ¶ 2.4.6.

29. U.S. DOD MANUAL, *supra* note 5, § 5.6.7.2; FM 6-27, *supra* note 17, ¶ 2-49; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INT’L ARMED CONFLICT 124 (4th ed. 2022) [hereinafter THE CONDUCT OF HOSTILITIES].

### B. *Distinction with Respect to Persons*

The term “combatant,” which applies only in international armed conflict, refers to regular armed forces, except military non-combatants such as medical personnel and chaplains.<sup>30</sup> Combatants have certain privileges, including immunity from prosecution for their participation in hostilities and prisoner-of-war status in the event of capture.<sup>31</sup> They must distinguish themselves from the civilian population, often accomplished by wearing uniforms or other distinctive emblems.<sup>32</sup> Individuals qualifying as combatants are subject to attack based on their status as such.<sup>33</sup>

Combatant status does not exist in non-international armed conflict.<sup>34</sup> As a result, the term “fighter” is sometimes used to describe individuals who may be attacked without violating LOAC.<sup>35</sup> It encompasses both regular armed forces fighting on behalf of the State and members of dissident armed forces or OAGs fighting against the State or another OAG.<sup>36</sup> As such, fighters may be attacked based on their status.<sup>37</sup>

Unlike regular forces, distinguishing OAG members from the civilian population can be challenging because they frequently do not wear uniforms

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30. Additional Protocol I, *supra* note 13, art. 43(2); U.S. DOD MANUAL, *supra* note 5, § 5.6.2; FM 6-27, *supra* note 17, ¶ 2-30; ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 3.

31. Additional Protocol I, *supra* note 13, art. 44; U.S. DOD MANUAL, *supra* note 5, §§ 4.4.3, 4.4.3.1–2; FM 6-27, *supra* note 17, ¶ 1-52; ICRC COMMENTARY, *supra* note 28, ¶ 1687.

32. Additional Protocol I, *supra* note 13, art. 44(3), (7); U.S. DOD MANUAL, *supra* note 5, §§ 5.4.8, 5.4.8.2, 5.14.5. *See also* ICRC COMMENTARY, *supra* note 28, ¶ 1723. *See generally* Geneva Convention III, *supra* note 1, art. 4(A)(2)(b); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 1.

33. Additional Protocol I, *supra* note 13, arts. 43, 48; ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 1; ICRC COMMENTARY, *supra* note 28, ¶ 2017; U.S. DOD MANUAL, *supra* note 5, § 5.7; FM 6-27, *supra* note 17, ¶ 2-33.

34. *See generally* Additional Protocol II, *supra* note 10. *But see* Ian Henderson & Bryan Cavanagh, *Military Members Claiming Self-Defence During Armed Conflict: Often Misguided and Unhelpful*, in ACCOUNTABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: ESSAYS IN HONOUR OF TIM MCCORMACK 73, 81–82 (Jadranka Petrovic ed., 2016) (discussing the possibility of combatant privilege for government forces involved in a non-international armed conflict).

35. NIAC MANUAL, *supra* note 24, ¶ 1.1.2.

36. *Id.*; ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 27. *See also* Stephen Pomper, *Toward a Limited Consensus on the Loss of Combatant Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INTERNATIONAL LAW STUDIES 181, 187–89 (2012).

37. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 1; U.S. DOD MANUAL, *supra* note 5, §§ 5.7.2, 5.7.3.

or carry arms openly. As noted, when OAG membership cannot be established, individuals are generally presumed to be civilians,<sup>38</sup> although the discussion above regarding the contextual nature of the rule of doubt must be borne in mind.

Civilians lose their protection from attack if, and “for such time as they take a direct part in hostilities.”<sup>39</sup> Varying interpretations of direct participation exist.<sup>40</sup> For example, the United States has adopted a contextual approach that excludes general support (e.g., buying war bonds) but includes acts integral to combat operations and those that effectively and substantially contribute to an adversary’s ability to conduct or maintain operations.<sup>41</sup> The United States broadly interprets the temporal aspect of “for such time as” and rejects the idea of a “revolving door” of protection for those individuals who engage in a pattern of on-again, off-again direct participation, instead requiring them to cease participation permanently.<sup>42</sup>

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38. The United States takes the position that all members of an organized armed group may be targeted in armed conflict. However, the United States presumes a person is a civilian if there is no information to indicate that the person is a combatant. U.S. DOD MANUAL, *supra* note 5, §§ 5.4.3.2, 5.7.3.1. *See also* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 641, 690–91 (2010); Eran Shamir-Borer, *Fight, Forge, and Fund: Three Select Issues on Targeting of Persons*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 959, 963 (2018). Like the United States, Israel also takes the position that all members of an organized armed group may be targeted in an armed conflict. *See* STATE OF ISRAEL, THE 2014 GAZA CONFLICT 7 JULY–26 AUGUST 2014: FACTUAL AND LEGAL ASPECTS 155–56 (May 2015), <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>. Unlike the United States, the ICRC takes the position that members of an organized armed group are civilians unless they have a “continuous combat function.” ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 32–36.

39. Additional Protocol I, *supra* note 13, art. 51(3); Additional Protocol II, *supra* note 10, art. 13(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 6. *See also* U.S. DOD MANUAL, *supra* note 5, § 5.8.3; FM 6-27, *supra* note 17, ¶ 2-11; ICRC COMMENTARY, *supra* note 28, ¶¶ 1942, 1944.

40. *Compare* ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 46–64, *with* U.S. DOD MANUAL, *supra* note 5, § 5.8.3, *and* FM 6-27, *supra* note 17, ¶ 2-11.

41. U.S. DOD MANUAL, *supra* note 5, § 5.8.3. *See generally* Ryan T. Krebsbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 125 (2018).

42. Additional Protocol I, *supra* note 13, art. 51(3); Additional Protocol II, *supra* note 10, art. 13(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 6; U.S. DOD MANUAL, *supra* note 5, § 5.8.4; FM 6-27, *supra* note 17, ¶ 2-18.

Though there is considerable overlap, the ICRC's approach to direct participation differs in some respects from that of the United States.<sup>43</sup> The organization requires three constitutive elements to be satisfied: threshold of harm, direct causation, and belligerent nexus.<sup>44</sup> First, an individual's "act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm)."<sup>45</sup> Second, "there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation)."<sup>46</sup> Finally, the "act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."<sup>47</sup>

The ICRC narrowly interprets both the temporal aspect of participation and direct causation. As to the former, its approach allows for a "revolving door" of protection, interpreting "for such times as" to only include "measures preparatory to the execution of [a specific act of direct participation in hostilities], as well as the deployment to and the return from the location of its execution."<sup>48</sup> As to the latter, the ICRC's interpretation of the term "direct" is restrictive, excluding such activities as making improvised explosive devices and acting as voluntary human shields.<sup>49</sup>

### C. Precautions in Attack

When conducting military operations, Additional Protocol I, Article 57(1), requires that "constant care shall be taken to spare the civilian population,

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43. The ICRC's approach to direct participation in hostilities primarily differs from the United States in three ways: the "continuous combat function" requirement for membership in an OAG, a more limited temporal interpretation of "for such time as," and a narrower view of the constitutive element of "direct causation." See ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 46–64; U.S. DOD MANUAL, *supra* note 5, §§ 5.8.3–5.8.4.

44. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 46.

45. *Id.* at 47–50.

46. *Id.* at 51–58.

47. *Id.* at 58–64.

48. *Id.* at 65–68.

49. *Id.* at 54, 56–57.

civilians and civilian objects” during military operations.<sup>50</sup> There are various interpretations of the obligation, with no definitive agreement on its precise content. Moreover, non-parties to Additional Protocol I, including the United States, do not seem to describe their legal obligation in terms of “constant care” as such—which makes it difficult to see the “constant care” terminology as a customary rule in this field. Generally speaking, the customary rule, if any, has been viewed as requiring consideration of the danger posed to the civilian population during military operations.<sup>51</sup> Some interpret Article 57(1) along the same lines.<sup>52</sup>

With respect to “attacks” (an act “of violence against the adversary, whether in offense or in defense”),<sup>53</sup> the obligation to take precautions in attack includes requirements to:

- “Do everything feasible to verify that the objectives to be attacked” are military objectives and not civilians, civilian objects, or subject to special protection;<sup>54</sup>
- “Take all feasible precautions in the choice of means [i.e., weapons] and methods [i.e., tactics] of attack” to avoid or minimize the harm to civilians and damage to civilian objects;<sup>55</sup>
- Refrain from conducting attacks that are expected to cause harm to civilians or damage to civilian objects that is excessive in relation to the direct

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50. Additional Protocol I, *supra* note 13, art. 57(1). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 15; U.S. DOD MANUAL, *supra* note 5, § 5.2.3.5; FM 6-27, *supra* note 17, ¶ 5-30.

51. *See, e.g.,* Roy Schöndorf, *Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations*, 97 INTERNATIONAL LAW STUDIES 395, 401 (2021).

52. *See, e.g.,* Michael Schmitt, *Wired Warfare 3.0: Protecting the Civilian Population During Cyber Operations*, 101 INTERNATIONAL REVIEW OF THE RED CROSS 333, 354 (2019); Eric Talbot Jensen, *Cyber Attacks: Proportionality and Precautions in Attack*, 89 INTERNATIONAL LAW STUDIES 198, 202 (2013).

53. Additional Protocol I, *supra* note 13, art. 49.

54. *Id.* art. 57(2)(a)(i). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 16; U.S. DOD MANUAL, *supra* note 5, § 5.11; FM 6-27, *supra* note 17, ¶¶ 1-44, 2-82.

55. Additional Protocol I, *supra* note 13, art. 57(2)(a)(ii). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 17; FM 6-27, *supra* note 17, ¶¶ 2-88 to -89; THE CONDUCT OF HOSTILITIES, *supra* note 29, at 188–89. The United States, which is not a party to Additional Protocol I, does not view the qualifier “all” as being customary international law. Therefore, the United States’ view is simply that parties to a conflict are required to take “feasible precautions” to reduce the risk of harm to civilians. U.S. DOD MANUAL, *supra* note 5, §§ 5.2.3, 5.2.3.1, 5.2.3.2.



military advantage anticipated (commonly understood as the rule of proportionality);<sup>56</sup>

- Suspend or cancel an attack “if it becomes apparent that the objective is not a military [objective] or is subject to special protection” or the harm or damage to be caused is excessive in relation to the “direct military advantage anticipated”;<sup>57</sup>
- Give effective advance warnings of attacks “which may affect the civilian population, unless circumstances do not permit”;<sup>58</sup>
- Attack the military objective that exposes civilians and civilian objects to the least amount of danger if two military objectives offer the same or very similar military advantage (that is, it delivers the effect sought by the attacker);<sup>59</sup> and
- “Take all reasonable precautions” in attack during military operations at sea or in the air.<sup>60</sup>

These requirements are subject to a condition of feasibility, which includes military factors such as threat to the attacker. Feasible precautions are those that are “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>61</sup> “Practical” and “practicable” denote “common sense and good faith.”<sup>62</sup> Commanders’ decisions must reflect the information available “at

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56. Additional Protocol I, *supra* note 13, art. 57(2)(a)(iii); ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 14, 18; U.S. DOD MANUAL, *supra* note 5, § 5.10; FM 6-27, *supra* note 17, ¶ 2-76.

57. Additional Protocol I, *supra* note 13, art. 57(2)(b). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 19; U.S. DOD MANUAL, *supra* note 5, § 5.12; FM 6-27, *supra* note 17, ¶ 2-76.

58. Additional Protocol I, *supra* note 13, art. 57(2)(c). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 20; U.S. DOD MANUAL, *supra* note 5, § 5.11.5; FM 6-27, *supra* note 17, ¶ 2-83 to -86.

59. Additional Protocol I, *supra* note 13, art. 57(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 21; U.S. DOD MANUAL, *supra* note 5, § 5.11.7.

60. Additional Protocol I, *supra* note 13, art. 57(4). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 15–21; NWP 1-14M, *supra* note 17, ¶ 8.3.1.

61. U.S. DOD MANUAL, *supra* note 5, § 5.2.3.2. *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 15; ICRC COMMENTARY, *supra* note 28, ¶ 2198; Michael N. Schmitt & Eric W. Widmar, “On Target”: Precision and Balance in the Contemporary Law of Targeting, 7 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 379, 400–4 (2014).

62. ICRC COMMENTARY, *supra* note 28, ¶ 2198. *See also* Schmitt & Widmar, *supra* note 61, at 400.

the time in which attacks are decided upon or executed,” which is “a clear rejection of hindsight analysis.”<sup>63</sup>

#### *D. Proportionality*

Once the customary two-pronged test for military objectives is satisfied and an attacker has complied with its obligation to take feasible precautions, the lawfulness of the attack hinges upon the rule of proportionality. This customary rule is codified in Additional Protocol I, Articles 51 and 57, for parties to that instrument. It prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>64</sup>

The rule of proportionality is not a balancing test nor a scale resting at equilibrium, but rather a systematic approach to ensure harm to civilian objects or persons is not *excessive* in relation to the *concrete and direct* military advantage anticipated from the attack.<sup>65</sup> “Excessive” is best understood as prohibiting attacks where a “significant imbalance [exists] between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other.”<sup>66</sup> Moreover, a “concrete” and “direct” military advantage is clearly identifiable, not speculative or hypothetical.<sup>67</sup>

When considering the harm anticipated from an attack and whether it is “excessive,” the direct effects of the attack must be considered. Universal consensus is lacking regarding indirect or so-called “reverberating” effects,

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63. COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 1(q), ¶ 4. *See also* U.S. DOD MANUAL, *supra* note 5, § 5.2.3.3; FM 6-27, *supra* note 17, ¶ 1-27; THE CONDUCT OF HOSTILITIES, *supra* note 29, at 190–91.

64. Additional Protocol I, *supra* note 13, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b). *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 14; U.S. DOD MANUAL, *supra* note 5, § 5.10; FM 6-27, *supra* note 17, ¶ 2-71 to -76.

65. Schmitt & Widmar, *supra* note 61, at 404–5 (emphasis added).

66. COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 14, ¶ 7. *See also* Additional Protocol I, *supra* note 13, art. 51(5)(b); ICRC COMMENTARY, *supra* note 28, ¶ 1979; U.S. DOD MANUAL, *supra* note 5, § 5.12.3; Schmitt & Widmar, *supra* note 61, at 405.

67. COMMENTARY TO THE AMW Manual, *supra* note 24, cmt. to r. 14, ¶ 9. *See also* U.S. DOD MANUAL, *supra* note 5, §§ 5.6.7.3, 5.12.2; FM 6-27, *supra* note 17, ¶ 2-50.

although the more remote the effects, the less likely they will be seen as necessary to include in the proportionality calculation.<sup>68</sup> The same is true with respect to foreseeability.

## V. SITUATIONS

### *Situation 1: Aerial Platforms and Their Basing*

Joeted International Airport is the primary transit hub for Tanaka. It has one military-controlled terminal dedicated solely for use by the Tanakan forces. Using unmanned aerial systems, the GPF recently attacked the airport and a civilian airliner docked at a terminal there. It alleges that Tanakan forces were using the civilian airliner to transport military personnel and equipment. Tanakan intelligence indicates that the GPF stores its unmanned aerial systems in eastern Joeted, in a school gymnasium, multiple residential garages, and an ambulance bay attached to a hospital.

#### 1. Joeted International Airport

Whether Joeted International Airport may be the subject of a lawful attack is contingent upon satisfying the two-prong test for military objectives.<sup>69</sup> Those aspects of the airport that were attacked must make an effective contribution to military action, and their partial or total destruction, in the circumstances ruling at the time, has to offer a definite military advantage.<sup>70</sup> If

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68. For instance, the U.S. *DoD Manual* explains,

Remote harms that could result from the attack do not need to be considered in applying this prohibition. The exclusion of remote harms is based on the difficulty in accurately predicting the myriad of remote harms from the attack (including the possibility of unrelated or intervening actions that might prevent or exacerbate such harms) as well as the primary responsibility of the party controlling the civilian population to take measures to ensure that population's protection.

U.S. DOD MANUAL, *supra* note 5, § 5.12.1.3. *See also* COMMENTARY TO THE AMW Manual, *supra* note 24, cmt. to r. 14, ¶ 4.

69. Additional Protocol I, *supra* note 13, art. 52(2). *See also* Section IV(A), *supra*.

70. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6; FM 6-27, *supra* note 17, ¶ 2-29.

these criteria are met, the attack must comply with the requirement to take precautions in attack and the rule of proportionality.<sup>71</sup>

The dedicated terminal is a military objective by nature, for its sole purpose is to support the armed forces. Any other parts of the airport used by Tanaka's armed forces—roads leading to the airport, runways used by aircraft transporting troops, etc.—satisfy the first prong by their use (present function).<sup>72</sup> As to the second prong, the destruction of these facilities offers a definite military advantage, as it would largely eliminate Tanaka's ability to move its forces into and out of Joeted by air.

The military use of the various airport facilities need not be continuous. For instance, if buildings were regularly used by the Tanakan military but periodically not so used, they would remain military objectives by use. Changing the situation for the sake of illustration, if Tanakan forces had not been using the airport at all, but GPF intelligence indicated a high likelihood that it would do so in the future, facilities supporting those activities would qualify as military objectives, only this time due to their purpose.<sup>73</sup>

It is important to consider whether the entire Joeted International Airport or only the dedicated terminal and other aspects of the airport used by Tanakan forces may be made the object of attack. Depending on the extent of the airport's use for military purposes, the airport could be considered a single military objective. In such a case, the entire airport would be targetable, except for parts not used for military purposes that are "clearly separated and distinct" (for example, a terminal used solely for civilian purposes in a separate building).<sup>74</sup> Whether part of the airport can be regarded as clearly separated and distinct "should be defined by its 'material/physical' element, namely one building/a single structure for immovable objects."<sup>75</sup> In any case,

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71. See Sections IV(C)–(D), *infra*, for discussion of both precautions in attack and the rule of proportionality.

72. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; FM 6-27, *supra* note 17, ¶ 2-43; ICRC COMMENTARY, *supra* note 28, ¶ 2023.

73. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; FM 6-27, *supra* note 17, ¶ 2-44; ICRC COMMENTARY, *supra* note 28, ¶ 2022. Because many objects can offer a *potential* military advantage, available information and understanding the intent of enemy forces, rather than mere speculation as to what enemy forces may do, is critical to a finding that an object qualifies as a military objective by purpose. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 22(c), ¶ 3; ILA Study Group, *supra* note 23, at 332–33.

74. Additional Protocol I, *supra* note 13, art. 51(5)(a).

75. ILA Study Group, *supra* note 23, at 333. See also *id.* at 336; U.S. DOD MANUAL, *supra* note 5, § 5.6.1.2; FM 6-27, *supra* note 17, ¶ 2-36.

the attack would be subject to the requirement to take precautions in attack and the rule of proportionality.

Most participants were of the view that the attacking force's capabilities do not affect the military objective assessment.<sup>76</sup> Thus, if a terminal used by the military forms part of a single building containing other civilian terminals and the GPF knows the terminal's exact location and can strike only it, the entire building would still qualify as a single military objective. A minority view is that an attacker who can feasibly strike only that aspect of a structure being used for military purposes must treat the remainder as civilian, an important distinction when applying the requirement to take precautions in attack and the rule of proportionality.<sup>77</sup>

## 2. The Airliner

A military aircraft is a military objective by nature. However, Tanakan forces are using a civil airliner to transport their personnel to and from Joeted International Airport. Therefore, it must be determined whether the airliner's use or purpose effectively contributes to military action and whether its "total or partial destruction, capture, or neutralization . . . offers a definite military advantage."<sup>78</sup>

A civilian airliner transporting military personnel on duty or military materiel is a military objective by use, even though it may also be transporting civilians or civilian cargo.<sup>79</sup> This assessment is not as straightforward when

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76. ILA Study Group, *supra* note 23, at 334–35. While some scholars believe that when attacking forces possess the knowledge and capabilities (e.g., precision weapons, low-blast munitions) to distinguish and therefore direct an attack against the *part* of the building used for military purposes, only that *part* of the building becomes a military objective by use, this approach appears to impose a higher threshold for those armed forces with advanced capabilities. However, the majority view among scholars is that where military forces use part of a building for military purposes, the *whole* building becomes a military objective by use and is targetable. *Id.*

77. See, e.g., Michael Schmitt, *Legal Protection of the Media in Armed Conflict: Gaza*, ARTICLES OF WAR (May 18, 2021), <https://lieber.westpoint.edu/legal-protection-media-armed-conflict-gaza/>.

78. Additional Protocol I, *supra* note 13, art. 52(2). Note the presumption of civilian status in the aerial environment discussed in COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 59, ¶ 4, which also applies in non-international armed conflict.

79. COMMENTARY TO THE AMW MANUAL, *supra* note 24, r. 63(c). See also NWP 1-14M, *supra* note 17, ¶ 8.6.3.2; SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA ¶ 41 (Louise Doswald Beck ed., 1995).

the civilian airliner has completed its journey and is at an airport. Here, judgment is required to determine whether the criteria for status as a military objective remain satisfied. Assuming Tanaka's military will continue to use the aircraft when available, it is appropriate to conclude that a temporary refueling stop or other interruption does not terminate the aircraft's period of employment for military ends and, therefore, that it remains a military objective by use.

It would be difficult to reach the same conclusion if the armed forces infrequently used the airliner; for example, if they used it only when military transport aircraft were unavailable. However, in such circumstances the airliner would still be a military objective by purpose, provided it is possible to establish that the Tanakan military intends to use it in the future. The aircraft may be attacked, subject to taking feasible precautions and the proportionality rule.<sup>80</sup>

### 3. Storage Locations for Unmanned Aerial Systems

As weapon systems employed by the GPF, unmanned aerial systems are military objectives by nature. To the extent they are stored in gymnasiums, garages, and ambulance bays, those civilian structures are military objectives by use. This is because the storage of the systems effectively contributes to the GPF's military action, and the destruction of the buildings will deprive the GPF of their use, thereby offering a definite military advantage. On this basis, four considerations arise.

First, to the extent that an attack within a populated area treats discrete military objectives as a single military objective, it is potentially indiscriminate.<sup>81</sup> However, if it is not possible to identify and individually target the storage locations, the *area* in which the group of objectives is located may be targeted.<sup>82</sup> The rule of proportionality would constrain such an attack; the expected damage to civilian structures and the likely harm to civilians would

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80. COMMENTARY TO THE AMW MANUAL, *supra* note 24, rr. 58, 63, 68. Given the inherent dangers of attacking civilian airliners, the AMW MANUAL details special precautions to be taken prior to attack. *See also* Schmitt & Widmar, *supra* note 61, at 396.

81. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 13; NIAC MANUAL, *supra* note 24, ¶ 2.1.1.3. *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 11, 12; ICRC COMMENTARY, *supra* note 28, ¶ 1968.

82. COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 13(c); ILA Study Group, *supra* note 23, at 331.

need to be assessed and weighed against the concrete and direct military advantage anticipated. Tanakan forces would also need to take feasible precautions before targeting the military objectives, a requirement that is especially significant in an urban environment.

A second consideration follows from the partial use of the buildings as unmanned aerial system storage bays. Much like Joeted International Airport, once part of a building is a military objective, the prevailing view is that the entire building is targetable, subject to taking feasible precautions and compliance with the proportionality rule.<sup>83</sup> As noted, a minority of the participants would qualify this conclusion slightly based on the attacker's capabilities.

Third, medical units, in this case the hospital of which the ambulance bay forms part, are the subject of special protection from attack unless used beyond their humanitarian function for acts harmful to the enemy.<sup>84</sup> Here, the actions of the GPF make the ambulance bay a military objective by use in the same way as a garage in a residential property. However, unlike the residential garage, before attacking the ambulance bay, the Tanakan military first must warn the GPF or the relevant medical institution to desist from its use.<sup>85</sup>

Finally, by deliberately locating military objectives within a populated area to impede efforts to identify them, it is arguable that the GPF has violated a customary law obligation to avoid locating military objectives within or near densely populated areas to the extent feasible.<sup>86</sup> Still, even if the GPF's practice of collocating military objectives and civilian objects represents a failure of their LOAC obligation to take "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations,"<sup>87</sup> this

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83. Legal considerations regarding the targeting of a single terminal in Joeted International Airport are discussed in Section V(A)(1), *supra*.

84. Geneva Convention I, *supra* note 1, art. 21; Geneva Convention IV, *supra* note 1, art. 19; Additional Protocol I, *supra* note 13, arts. 12–13; U.S. DOD MANUAL, *supra* note 5, § 7.17.1; FM 6-27, *supra* note 17, ¶ 5-41. *See also* NIAC MANUAL, *supra* note 24, ¶ 4.2.1.

85. Geneva Convention I, *supra* note 1, art. 21; Geneva Convention IV, *supra* note 1, art. 19; Additional Protocol I, *supra* note 13, art. 13; U.S. DOD MANUAL, *supra* note 5, § 7.17.2; FM 6-27, *supra* note 17, ¶ 5-42.

86. Additional Protocol I, *supra* note 13, art. 58(b); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 23; U.S. DOD MANUAL, *supra* note 5, § 5.14.1.

87. Additional Protocol I, *supra* note 13, art. 58(c). *See also* U.S. DOD MANUAL, *supra* note 5, § 5.14; FM 6-27, *supra* note 17, ¶ 2-9.

does not relieve Tanaka's military of its own precautions in attack obligation.<sup>88</sup>

*Situation 2: Information Operations and Cyber Infrastructure*

The GPF uses a local television station to routinely inform civilians about its political goals. It also uses the broadcasts to incite the civilian population to interfere with Tanakan forces in eastern Joeted. The TV station further forms part of the emergency notification system.

Tanakan intelligence indicates that Gregorian cyber and information operations units support the dissemination of the GPF's social media messaging, which also encourages civilian interference with Tanakan military operations. These units are based in Gregoria at the Gregorian Western Regional Command in Gardner City. Gregorian forces specializing in cyber and information operations staff the Gregorian Western Regional Command, which primarily uses information networks dedicated to military purposes. Those systems connect to the larger civilian internet architecture within Gardner City.

Using social media platforms, the GPF has exploited a series of lethal Tanakan strikes in eastern Joeted by inflating the number of incidental civilian casualties and falsely alleging that Tanakan forces intentionally targeted civilians.

1. Television Station

The TV station serves military and civilian functions.<sup>89</sup> This "dual-use" does not preclude its classification as a military objective.<sup>90</sup> To the extent GPF messaging encourages civilians to interfere with Tanakan military operations directly, the broadcasts effectively contribute to military action. Indeed, the messaging is inciting civilians to take a direct part in hostilities. The second

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88. See Additional Protocol I, *supra* note 13, art. 57(2)(a)(ii); ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 15–21; U.S. DOD MANUAL, *supra* note 5, § 5.11.

89. U.S. DOD MANUAL, *supra* note 5, § 5.6.8.2.

90. U.S. DOD MANUAL, *supra* note 5, § 5.6.1.2; FM 6-27, *supra* note 17, ¶ 2-36. See also Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in *THE GULF WAR 1990–91 IN INTERNATIONAL AND ENGLISH LAW* 63, 73 (Peter Rowe ed., 1993) ("If an object is a military objective, it may be attacked (subject to the requirements of the principle of proportionality . . .), while if it is a civilian object, it may not be attacked. There is no intermediate category of 'dual use' objects: either something is a military objective or it is not.").



prong of the military objective test is also satisfied in that the TV station's destruction will impede interference with Tanakan operations.<sup>91</sup> Thus, it qualifies as a military objective by use and may be attacked subject to the obligation to take precautions and the proportionality rule.<sup>92</sup>

It merits note that messaging inspiring only patriotic support for the GPF does not rise to the level of making an effective contribution to military action. Additionally, the disruption of propaganda activity to undermine popular support is unlikely to offer a definite military advantage, given its indeterminate nature.<sup>93</sup>

This issue arose in a 1999 North Atlantic Treaty Organization (NATO) attack that destroyed a radio-TV station in the Federal Republic of Yugoslavia.<sup>94</sup> NATO argued the station's broadcasts created a political environment of intolerance, where brutalities were not only accepted but also condoned. Yet, NATO justified the legality of its strike based on disrupting military communications from the station, which qualified it as a military objective.

Because the TV station forms part of the emergency notification system and disabling it would risk physical harm to the civilian population, Tanakan forces must consider the impact on the civilian population when performing the requisite precautions in attack and proportionality assessments.<sup>95</sup> A relevant consideration in doing so is whether alternative means of notifying civilians of emergencies exist. However, they need not consider an attack's impact on the media functions of the station, for the collateral damage included in the assessments only includes property damage, injury, or death. This view accords with the language of Additional Protocol I and how States address their legal obligations during attacks on dual-use objects.<sup>96</sup>

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91. See Additional Protocol I, *supra* note 13, art. 52(2); U.S. DOD MANUAL, *supra* note 5, § 5.6.7.3; FM 6-27, *supra* note 17, ¶ 2-47; THE CONDUCT OF HOSTILITIES, *supra* note 29, at 121–122.

92. Additional Protocol I, *supra* note 13, arts. 51(5)(b), 57(2)(b), 57(2)(a)(ii); U.S. DOD MANUAL, *supra* note 5, §§ 5.2.3.5, 5.10; ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 14–22.

93. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 76, ICTY.ORG, <http://icty.org/x/file/Press/nato061300.pdf> (last visited Dec. 29, 2023) [hereinafter ICTY REPORT TO PROSECUTOR]; W.J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 489, 496–97 (2001).

94. ICTY REPORT TO PROSECUTOR, *supra* note 93, ¶¶ 71–74.

95. ILA Study Group, *supra* note 23, at 335–37.

96. See, e.g., EMANUELA-CHIARA GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT ¶¶ 126–31 (Dec. 2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10->

## 2. Cyber Infrastructure

Cyber infrastructure includes “communications, storage, and computing devices upon which information systems are built and operate.”<sup>97</sup> Gregorian *military* cyber infrastructure is targetable as a military objective by nature. Since it is connected to civilian cyber infrastructure, which enables dissemination of GPF messaging inciting direct participation, the latter is also a military objective, albeit by use, not nature.

Note that the GPF’s information operations include disinformation regarding collateral damage. Where objects do no more than enable such propaganda, the legal basis for their destruction is debatable.<sup>98</sup> For example, it is not clear that disruption of such GPF social media messaging would offer a definite military advantage, even if it causally led to the Tanakan government adopting more restrictive rules of engagement for its forces.<sup>99</sup> Rather, the term “military advantage” is generally considered to exclude exclusively political or psychological advantages.<sup>100</sup> Therefore, to characterize the civilian cyber infrastructure as a military objective, Tanaka must rely on its use to incite direct participation in the hostilities by civilians.

In that the civilian cyber infrastructure is a military objective, damage caused to it is not treated as collateral damage subject to the requirement to take precautions in attack or consideration in a proportionality analysis. However, if damaging it might reasonably be expected to cause injury or death of civilians or damage to civilian objects—for example, because medical equipment in a hospital connected to the same network would stop operating properly and endanger the lives of patients—the obligation to choose the military objective that causes the least collateral civilian damage without sacrificing anticipated military advantage would be triggered.<sup>101</sup> To illustrate,

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proportionality-conduct-hostilities-incident-harm-gillard-final.pdf; Aurel Sari, *Israeli Attacks on Gaza’s Tower Blocks*, ARTICLES OF WAR (May 17, 2021), <https://lieber.westpoint.edu/israeli-attacks-gazas-tower-blocks/>; DANISH MINISTRY OF DEFENSE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 195, 708 (2016) (treating the mitigation of harm to civilian elements of a military objective solely as a policy directive).

97. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 564 (Michael N. Schmitt gen. ed., 2017).

98. ICTY REPORT TO PROSECUTOR, *supra* note 93, ¶ 76.

99. *See generally id.* ¶ 47; Fenrick, *supra* note 93, at 496–97.

100. TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 100, ¶ 21.

101. Additional Protocol I, *supra* note 13, art. 57(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 21; U.S. DOD MANUAL, *supra* note 5, § 5.11.7.

Tanakan forces would have to designate the Gregorian military cyber infrastructure as the object of attack, so long as an attack on it is feasible, if it would offer the same military advantage as striking the dual-use infrastructure, and would likely result in less collateral damage. Tanakan forces also must select the weapon and tactic that will minimize civilian harm when doing so does not diminish the chances of achieving the desired effects of the attack.

However, it must be emphasized that the harm that has to be minimized is loss of civilian life, injury to civilians, and damage to civilian objects. Inconvenience and interference with services need only be considered if accompanied by these types of harm.

The pervasive nature of the internet in civilian life can make it difficult to foresee and accurately judge the collateral effects of an attack against dual-use cyber infrastructure. In this regard, the United States contends that while immediate or direct harm foreseeably resulting from an attack qualifies as collateral damage, an attacker need not consider “remote” harms.<sup>102</sup> The ICRC and others are of the view that incidental damage also includes an attack’s foreseeable reverberating, or indirect, effects.<sup>103</sup>

A final observation regarding the civilian internet infrastructure, including the social media servers, is useful. Status as a military objective is irrelevant if the desired effect on an object can be achieved by an operation that does not qualify as an “attack.”<sup>104</sup> Such a cyber operation may be launched against civilian cyber infrastructure because the LOAC prohibition is on *attacking* civilian objects.

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102. U.S. DOD MANUAL, *supra* note 5, § 5.12.1.3 (“The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack. Remote harms that could result from the attack do not need to be considered in applying this prohibition.”).

103. INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 52 (2015), <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>. See also Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 107, 112–13 (2016) (“In the view of the [ICRC] and others, incidental damage also includes the foreseeable reverberating effects of an attack, otherwise known as ‘knock-on’ or ‘indirect’ effects. According to this position, commanders are not only obliged to take into account the direct incidental damage that may be expected from an attack, but must also consider the foreseeable reverberating effects of the attack.”).

104. Additional Protocol I, *supra* note 13, art. 49(1); U.S. DOD MANUAL, *supra* note 5, §§ 5.6, 16.5.1–16.5.2; TALLINN MANUAL 2.0, *supra* note 97, r. 92, at 415; NIAC MANUAL, *supra* note 24, ¶ 1.1.6; ICRC COMMENTARY, *supra* note 28, ¶ 4783.

A cyber attack is a cyber operation reasonably expected to result in violent consequences, that is, to cause injury, death, or physical damage or destruction.<sup>105</sup> There is no consensus on the threshold at which a cyber operation will constitute an “attack” if it does not have those consequences.<sup>106</sup> Some States are of the view that only operations having physical consequences qualify.<sup>107</sup> Others hold that permanent loss of functionality, or cases where components must be replaced to restore functionality, may also amount to an attack. Still others would adopt a lower threshold.<sup>108</sup>

Despite the uncertainty as to the appropriate threshold, some cyber operations are clearly not attacks. For instance, hacking GPF’s social media accounts to alter the content of the messaging would not be an attack; thus, doing so would be permissible irrespective of the military objective issue.<sup>109</sup>

### *Situation 3: Organized Armed Groups and Funding Sources*

The GPF seized control of the New Gregorian Oil and Gas refineries. Before that occurred, New Gregorian Oil and Gas engaged in oil extraction and gas production in Gregorian territory. The GPF now uses New Gregorian Oil and Gas’s production facilities to sell oil to buyers on the black market. Approximately 70 percent of the proceeds fund GPF military operations, with the remaining 30 percent used for civilian purposes.

While the GPF initially funded its operations by transferring money directly to fighters in the field through Gregorian banks, the international com-

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105. TALLINN MANUAL 2.0, *supra* note 97, r. 92, at 415. *See also* Roy Schöndorf, *Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations*, 97 INTERNATIONAL LAW STUDIES 395, 400 (2021) (“Only when a cyber operation is expected to cause physical damage, will it satisfy this element of an attack under LOAC. In the same vein, the mere loss or impairment of functionality to infrastructure would be insufficient in this regard, and no other specific rule to the contrary has evolved in the cyber domain.”).

106. Additional Protocol I, *supra* note 13, art. 49(1). *See also* Schmitt, *Wired Warfare* 3.0, *supra* note 52, at 338.

107. Schöndorf, *supra* note 105, at 400–1.

108. TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 92, ¶¶ 10–11. *See also* Michael N. Schmitt, *Peacetime Cyber Responses and Wartime Cyber Operations Under International Law: An Analytical Vade Mecum*, 8 HARVARD NATIONAL SECURITY JOURNAL 242, 243–50 (2017); U.S. DOD MANUAL, *supra* note 5, § 16.5.2 (stating that “briefly disrupting, disabling, or interfering with communications” is not considered an “attack”).

109. *See generally* U.S. DOD MANUAL, *supra* note 5, § 16.5.2; TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 92, ¶ 14, at 418.

munity imposed sanctions that included blacklisting individuals and businesses associated with the GPF. This forced the GPF to develop new ways to fund its operations.

Joseph Lawrence, a Gregorian economist sympathetic to the GPF cause, approached the GPF and offered to help establish “an alternative economy.” Based on his detailed planning and advice, the GPF established a sophisticated financial system that generates funds and allows for their easy use in support of ongoing military operations, as well as the group’s civilian activities. Lawrence has not formally joined the group.

James Johnson operates an exchange house in Joeted. He also sometimes participates in an exchange network for the GPF that replaces the ordinary banking system. This involves the GPF paying an exchange broker in Gardner City, who then contacts Johnson and directs him to provide members of the GPF with equivalent funds. With Johnson’s help, the GPF funds operations in Joeted. Johnson is aware of the purpose of the funds.

#### 1. New Gregorian Oil Gas

Recall that a military objective “by use” refers to an object’s current or present function, while “purpose” refers to its intended future use.<sup>110</sup> Importantly, once an object qualifies as a military objective by use, it remains so only for the period it is in use. When the use ceases, the object reverts to its protected civilian status.<sup>111</sup>

If the refineries’ products were used directly by GPF fighting units, they and the equipment used to produce and refine them would amount to military objectives by use. They similarly would qualify as military objectives if their proceeds were directly sent to those units, as was the case in the past, or specifically set aside to support GPF’s military activities. Whether this would qualify them as military objectives by the use or purpose criteria would depend on how and when the proceeds were expended.

The situation at hand is more challenging because the proceeds are now transferred into the GPF’s central treasury, which was devised and managed by Joseph Lawrence. Only then are they budgeted for civilian or military activities.

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110. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; ICRC COMMENTARY, *supra* note 28, ¶¶ 2022–23.

111. FM 6-27, *supra* note 17, ¶ 2-49. *See also* U.S. DOD MANUAL, *supra* note 5, § 5.6.7.2; Schmitt & Widmar, *supra* note 61, at 393–94.

By the U.S. position, the refineries qualify as military objectives because they are so-called “war-sustaining” objects.<sup>112</sup> The United States asserts that “military action has a broad meaning . . . understood to mean the general prosecution of the war,”<sup>113</sup> and, therefore, “the object’s effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient.”<sup>114</sup> While the terms “war-fighting” and “war-sustaining” do not appear in treaty law dealing with military objectives, the United States considers both to qualify as “military action” for the purpose of the military objective definition.<sup>115</sup>

U.S. practice in operations against ISIS reflects this approach. The United States and coalition partners targeted currency and war-sustaining objectives controlled by ISIS to deny the group the funds that sustained its operations. Targets included ISIS-controlled “oil infrastructure, tanker trucks, wells, and refineries.”<sup>116</sup> The attacks significantly reduced ISIS’s oil production and the revenues used to support operations.<sup>117</sup> By the same approach, the GPF-controlled refineries and associated equipment qualify as military objectives subject to attack.

Some States and scholars do not share the U.S. view on war-sustaining targets.<sup>118</sup> Indeed, the ICRC notes that objects offering a purely economic or

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112. U.S. DOD MANUAL, *supra* note 5, §§ 5.6.6.2, 5.6.8.5, 5.17.2.3; FM 6-27, *supra* note 17, ¶ 2-46; NWP 1-14M, *supra* note 17, ¶ 5.3.1. *But see* COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 24, ¶¶ 2–4; ILA Study Group, *supra* note 23, at 340–41.

113. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.2. *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 105–7 (3d ed. 2012).

114. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.2. *See also* Memorandum from John W. Vessey, Jr., Chairman of the Joint Chiefs of Staff, to the Secretary of Defense, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, app. 51 (May 3, 1985), <https://nsarchive.gwu.edu/sites/default/files/documents/s1cj17-k0bgt/13.pdf>. *See generally* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, ¶ 2.4.2 (1982).

115. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.2; Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INTERNATIONAL LAW STUDIES 235, 242 (2016); W. Hays Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 65, 100 (W.H. von Heinegg & Volker Epping eds., 2007).

116. Barack H. Obama, President of the United States, Remarks by the President on Progress Against ISIL (Feb. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/remarks-president-progress-against-isil>.

117. *Id.*

118. Compare U.S. DOD MANUAL, *supra* note 5, §§ 5.6.8.5, 5.17.2.3, with Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 INTERNATIONAL LAW STUDIES

financial contribution to the enemy, such as objects used to generate revenues for the enemy war effort, do not satisfy the definition of a military objective because the connection to the fighting is too remote to make an effective contribution to military action or offer a definite military advantage.<sup>119</sup> That would be the case here for advocates of the position, as the proceeds are no longer immediately used for military purposes.

## 2. Architect of the “Shadow” Economy

Joseph Lawrence’s actions enabled the GPF, an organized armed group, to continue military operations and maintain the overall war effort in circumvention of the sanctions. While not formally a member of the GPF, his role in its operations renders him a *functional* member who performs tasks like those of a comptroller, a “combat service support” role in the regular armed forces. For this reason, the fact he has not “officially” joined GPF is immaterial; he is targetable based on his functional membership in the organized armed group.<sup>120</sup>

It should be cautioned that the ICRC has suggested that only members of an organized armed group having a “continuous combat function” may be targeted based on their group membership.<sup>121</sup> By this approach, Lawrence would not be targetable unless he otherwise directly participated in the hostilities, for example, by joining the fighting.

## 3. Money Exchange Network

By contrast, James Johnson does not qualify as a member of the GPF even though his actions help the group evade sanctions and continue its military

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139, 145–46 (2001), and COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 24, ¶ 2. See also Ryan Goodman, *The Obama Administration and Targeting “War-Sustaining” Objects in Noninternational Armed Conflict*, 110 AMERICAN JOURNAL OF INTERNATIONAL LAW 663, 666–67 (2016); TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 100, ¶¶ 18–19, at 441.

119. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 51–58.

120. U.S. DOD MANUAL, *supra* note 5, §§ 5.7.3.1, 5.7.3.2. See also THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20 (2016); Eran Shamir-Borer, *Fight, Forge, and Fund: Three Select Issues on Targeting of Persons*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 959, 963–66 (2018).

121. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 33–36.

operations. Nor is he employed by, or serving as a contractor of, the GPF. Rather, Johnson moves money for a variety of people, including civilians.<sup>122</sup>

Accordingly, Johnson is not targetable unless he takes a “direct part in hostilities” (DPH).<sup>123</sup> In this regard, cases where money changers are deliberately involved in transferring funds closely connected to military activities, as in the case of transferring funds to specific military units, are different than those where money changers provide general assistance equivalent to civilian bankers.

By the U.S. position on DPH, and applying a contextual analysis, Johnson might qualify as a direct participant. Such a characterization would be informed by the frequency with which he transfers funds to the GPF, his geographic proximity to its operations, and the temporal immediacy of willingly moving funds to support GPF military operations.

Once determined to be a civilian directly participating in hostilities, the question becomes when that person is targetable, as the rule is that direct participants lose their civilian protection only “for such time” as they participate. By the U.S. approach to that matter, Johnson would be targetable until he permanently, or for an extended period, ceases his regular participation.<sup>124</sup>

The ICRC and some LOAC experts take a more restrictive view of direct participation in which the causal connection between Johnson’s activities and GPF operations against Tanaka would be too attenuated for the activities to amount to direct participation. Additionally, even if he qualified as a direct participant, Johnson would only be targetable while preparing to engage, and engaging, in activities in support of the group’s military operations.

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122. Johnson’s activities mirror a “hawala” network, an alternative or parallel remittance system that exists and operates outside or parallel to traditional banking or financial channels. *See* PATRICK M. JOST & HARJOT SINGH SANDU, THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING 5, <https://amnet.co.il/joomla/attachments/FinCEN-Hawala-rpt.pdf> (last visited Dec. 29, 2023).

123. Additional Protocol I, *supra* note 13, art. 51(3); Additional Protocol II, *supra* note 10, art. 13(3); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 6; U.S. DOD MANUAL, *supra* note 5, § 5.8; FM 6-27, *supra* note 17, ¶ 2-11; ICRC COMMENTARY, *supra* note 28, ¶¶ 1942, 1944.

124. U.S. DOD MANUAL, *supra* note 5, § 5.8.4.2. *See also* Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, 62(1) PD 507, ¶¶ 39–40 (2006) (Isr.), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 373 (2007).



*Situation 4: Urban Ground Maneuver and Human Shields*

Tanakan forces control the west side of Gardner City in Gregoria. Intelligence indicates that Gregorian forces are assembling east of the Didian River and preparing to cross a suspension bridge to retake the city. The bridge is the only access route Gregorian forces have for entering the west side of Gardner City. To counter Gregoria's offensive, Tanakan forces plan to maneuver to the suspension bridge to seize it and, if necessary, destroy the bridge to counter the Gregorian attack. Due to operational concerns, the Tanakan forces must utilize a specific route of maneuver that passes a cluster of eight buildings. Reliable intelligence indicates that Gregorian forces have set up ambush sites in three but has not identified which ones.

Approximately fifty Gregorian civilians are on the suspension bridge, blocking all four lanes. They are not violent but will surely refuse to move because they are intent on preventing Tanakan operations against the bridge. There is no indication they are operating under the direction of Gregorian forces, and they appear to be obstructing the bridge of their own accord. Leveraging their presence, Gregorian forces have advanced and are now preparing to assault Tanakan forces across the bridge.

1. Cluster of Buildings Along an Avenue of Approach

Three of the eight clustered buildings are military objectives by use because they house Gregorian ambush sites,<sup>125</sup> but since intelligence does not specify which buildings contain the ambush sites, the question is whether the cluster of buildings is a single military objective by location. "Location" in the context of qualification as a military objective "relates to 'selected areas that have special importance to military operations,' regardless of how those areas are currently being used."<sup>126</sup> For example, "a house or other structure that would ordinarily be a civilian object may be located such that it provides cover to enemy forces or would provide a vantage point from which attacks could be launched or directed."<sup>127</sup> In such a case, it is a military objective by location.

Given that the maneuver corridor is indispensable for the Tanakan forces and reliable intelligence indicates that three of the eight buildings will

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125. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; FM 6-27, *supra* note 17, ¶ 2-43.

126. Schmitt & Widmar, *supra* note 61, at 392 (quoting COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 22(b)). See also U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; FM 6-27, *supra* note 17, ¶ 2-42; ICRC COMMENTARY, *supra* note 28, ¶ 2021.

127. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1.

be used to ambush them, destroying the buildings in anticipation of that attack will offer a definite military advantage. Absent intelligence as to which building will be so used, the buildings as a group are a military objective by location.

## 2. Civilians Blocking a Bridge

The suspension bridge is also a military objective by location. It qualifies as such because it is militarily indispensable to denying the only access route Gregorian forces have for entering west Gardner City and attacking Tanakan forces. The bridge will effectively contribute to Gregorian military action, and denying its use offers the definite military advantage of stopping, or at the least delaying, Gregorian attacks.<sup>128</sup> As a valid military objective, Tanakan forces may attack it, subject to taking feasible precautions and applying the rule of proportionality.

Characterization of the civilians on the bridge requires consideration of the LOAC rules on human shielding. The term “human shield” denotes “civilians or other protected persons, whose presence or movement is aimed or used to render military targets immune.”<sup>129</sup> A customary norm of international law, the use of human shields is prohibited in both international and non-international armed conflicts.<sup>130</sup>

Civilians can become human shields in three ways.<sup>131</sup> The first is when a military force compels civilians to be present to deter the enemy’s operations against them or other military objectives (this would not include, for example, taking a civilian for questioning).<sup>132</sup> The second involves combatants or

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128. See Additional Protocol I, *supra* note 13, art. 52(2); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6; FM 6-27, *supra* note 17, ¶ 2-29.

129. Vera Rusinova, *Human Shields*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (last updated May 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2111>. See also Geneva Convention III, *supra* note 1, art. 23; Geneva Convention IV, *supra* note 1, art. 28; Additional Protocol I, *supra* note 13, art. 51(7) (while Article 51(7) addresses the use of human shields by State parties, it does not specifically address civilians who voluntarily become human shields).

130. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 97; Additional Protocol I, *supra* note 13, art. 57; U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶¶ 2-20, 2-21. See also Michael Schmitt, *What Is and Is Not Human Shielding*, ARTICLES OF WAR (Nov. 3, 2023), <https://lieber.westpoint.edu/what-is-and-is-not-human-shielding/>.

131. THE CONDUCT OF HOSTILITIES, *supra* note 29, at 208–9. See also U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶¶ 2-20, 2-21, 2-78.

132. THE CONDUCT OF HOSTILITIES, *supra* note 29, at 208; U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶¶ 2-20, 2-21, 2-78.

other fighters intermingling with civilians and placing military objectives such as tanks or artillery in their proximity with the same intention.<sup>133</sup> In the third, civilians voluntarily serve as “human shields” to deter enemy operations.<sup>134</sup>

In this situation, the civilians at the bridge fall into the third category, for they are purposefully acting to prevent a Tanakan attack. Because access to the bridge and the maneuver route are militarily critical,<sup>135</sup> the question is whether the voluntary human shields qualify as direct participants in the hostilities. If they are directly participating, harm to them need not be factored into the proportionality analysis, and no precautions need be taken to minimize it; they have lost LOAC protections otherwise enjoyed during attacks. Some States and experts, including most of the participants in this project, are of the view that all voluntary human shields are direct participants.

Others, including the ICRC, suggest that whether an act of voluntary shielding qualifies as direct participation depends on the attendant facts. But both sides agree that if human shields are not directly participating as a matter of law, then they are entitled to the protections of the proportionality rule and the requirement to take precautions in attack (although some suggest it is appropriate to consider the fact of the enemy’s use of human shields in the proportionality assessment).

Since they are intentionally physically blocking Tanakan access to the bridge, there is no question that in this case they have satisfied the three elements of direct participation identified by the ICRC—requisite threshold of harm, direct causation, and belligerent nexus.<sup>136</sup> Indeed, the ICRC uses this scenario to illustrate direct participation by voluntary human shields.<sup>137</sup> These voluntary human shields likewise satisfy the United States’ contextual approach to qualification as direct participants.<sup>138</sup> Importantly, and though

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133. THE CONDUCT OF HOSTILITIES, *supra* note 29, at 208; U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶¶ 2-20, 2-21, 2-78.

134. THE CONDUCT OF HOSTILITIES, *supra* note 29, at 209; U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶¶ 2-20, 2-21, 2-78.

135. Schmitt & Widmar, *supra* note 61, at 392 (quoting COMMENTARY TO THE AMW MANUAL, *supra* note 24, cmt. to r. 22(b)). *See also* U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; FM 6-27, *supra* note 17, ¶ 2-42; ICRC COMMENTARY, *supra* note 28, ¶ 2021.

136. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 46–64.

137. *Id.* at 56.

138. U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4; FM 6-27, *supra* note 17, ¶ 2-20.

sometimes difficult to discern, the voluntary shield's intent (*mens rea*) drives the assessment.<sup>139</sup>

As direct participants, the voluntary human shields are subject to attack. However, Tanakan forces are less concerned with harming them than clearing the bridge. Therefore, from a practical perspective, qualification as a direct participant is more significant with respect to the proportionality assessment that must be conducted before attacking the bridge, for, as direct participants, they need not be considered as potential collateral damage.<sup>140</sup> Of course, any nearby civilians who are not directly participating must be factored into that assessment.

*Situation 5: Militia Food Distribution Network*

PNG, a local food distribution company in Joeted, has agreed to supply the GPF with food and water (provisions) to sustain it during military operations. PNG also serves as the main food distribution company for most restaurants and food markets in the area. It conducts most of its business operations from 0400 to 1500 but employs a small civilian crew to load trucks from 2200 to 0400 at its warehouse. At varying times, a four-person GPF team assists the civilian warehouse employees in loading PNG trucks with

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139. U.S. DOD MANUAL, *supra* note 5, § 5.12.3.4. It is important to stress that voluntary human shields “only occur[], as a matter of law, consequent to the shield’s intent to frustrate enemy operations. . . . The mere presence of villagers does not render them voluntary shields.” Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292, 316 (2008).

140. The ICRC’s *Interpretive Guidance* takes a bifurcated approach to voluntary human shields and whether they should be considered direct participants in hostilities subject to attack. When considering the element of “direct causation,” the ICRC is of the view that while some activities of voluntary shields qualify as DPH (e.g., physically shielding a military objective from attack), others do not and therefore must be factored into the proportionality assessment of the attacker (e.g., presence at a military objective in the hopes that the enemy will refrain from attacking). ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 56–57. *See also* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 833, 869–72 (2010). *But see* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 697, 732–35 (2010) (criticizing the ICRC’s position on the constitutive element of direct causation as it relates to voluntary human shields and arguing the ICRC’s bifurcation lacks a basis in instruments of hard and soft law).

provisions for GPF. After that, PNG civilians drive the trucks to GPF logistics hubs in eastern Joeted, where GPF members unload the provisions.

#### 1. Provisions

Some of the provisions in the warehouse will be used to help sustain GPF members and, therefore, support their military operations. Recall that a military objective “by purpose” refers to the objective’s intended or possible use in the future. Before being purchased by the GPF, the provisions are military objectives by purpose.<sup>141</sup> Once purchased, they become military objectives by use, as their present function is to sustain GPF members.<sup>142</sup>

Prior to targeting the provisions in the food distribution center, it must be determined whether they are indispensable to the civilian population’s survival. The prohibition on starvation as a method of warfare is a customary law rule reflected in Article 54, Additional Protocol I:

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse party:

(a) As sustenance solely for the members of its armed forces; or

(b) If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.<sup>143</sup>

There is no indication that Tanaka is targeting the provisions to deny sustenance to the civilian population. Additionally, no evidence suggests that PNG foodstuffs are indispensable to the population’s survival in eastern

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141. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; ICRC COMMENTARY, *supra* note 28, ¶¶ 2022–23.

142. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1.

143. Additional Protocol I, *supra* note 13, art. 54. *See also* ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 53; U.S. DOD MANUAL, *supra* note 5, § 5.20.

Joeted. Tanakan forces may attack provisions intended for the GPF, subject to the requirement to take precautions to minimize harm (death, injury, or illness) to civilians and civilian objects (damage or destruction) and the rule of proportionality.<sup>144</sup>

## 2. Warehouse

PNG's warehouse serves the civilian population and the GPF. Considering it is used to store provisions for the GPF, the warehouse effectively contributes to military action and qualifies as a military objective by use. Destroying it will impair the GPF's ability to carry out its military operations, resulting in a definite military advantage. Consequently, the warehouse may be made the object of attack subject to the precautions in attack requirement and the proportionality rule, particularly with respect to the civilian workers and civilian provisions in the warehouse.

## 3. Trucks

When a civilian truck—in this case, a food delivery truck—is transporting provisions intended for use by military forces, that truck is making an effective contribution to military action, and its destruction offers a definite military advantage.<sup>145</sup> In this scenario, the trucks transporting provisions for the GPF are military objectives by use, even though they may also carry civilian provisions.

This calculation is more complicated when the civilian trucks are empty or are only transporting civilian provisions. If the trucks will be used to transport provisions to the GPF in the future, they remain military objectives due to their military purpose, even if they have completed their current delivery. However, trucks that will only transport civilian provisions in the future have regained protected civilian status.<sup>146</sup>

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144. U.S. DOD MANUAL, *supra* note 5, §§ 5.20, 17.9.2. *See also* Additional Protocol I, *supra* note 13, art. 54(3).

145. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; ICRC COMMENTARY, *supra* note 28, ¶¶ 2022–23.

146. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 8; U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1.

#### 4. Warehouse Personnel and Truck Drivers

Considering the U.S. position on membership in an organized group, which rejects the so-called “continuous combat function” criterion,<sup>147</sup> GPF members assigned to work in the PNG warehouse to stock trucks are targetable. The lawfulness of targeting the remaining warehouse personnel and the truck drivers hinges on whether they qualify as civilians directly participating in hostilities.

Individuals working in the PNG warehouse who are not members of GPF and those driving PNG trucks are performing regular job requirements irrespective of the entity for which they are loading and delivering the provisions. Considering the ICRC’s three DPH constitutive elements, their actions fail to meet the requirement for direct causation.<sup>148</sup> The requisite causal nexus is lacking between the acts of the truck driver and warehouse personnel and the harm to the enemy or support for one’s own military operations.<sup>149</sup> Applying the United States’ contextual approach, they also fail to qualify as direct participants; their actions are too remote from military activities.<sup>150</sup>

However, a different conclusion might be reached if these individuals’ geographic and temporal proximity to the GPF’s military operations change. For example, if truck drivers transport the provisions to locations where the GPF is immediately consuming them (as distinct from merely storing them for future use), it could be argued that they are directly participating. The determination would be heavily fact-dependent.<sup>151</sup>

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147. The DoD *Law of War Manual* does not explicitly address the “continuous combat function” criterion; rather, it focuses on membership in the organized armed group itself, noting that “the organization’s hostile intent may be imputed to an individual through his or her association with the organization,” and that “[m]oreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.” See U.S. DOD MANUAL, *supra* note 5, § 5.7.1.

148. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 51–58.

149. *Id.* at 52–55.

150. U.S. DOD MANUAL, *supra* note 5, § 5.8.3. The manual notes that “working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State” does not qualify as direct participation in hostilities. *Id.* ¶ 5.8.3.2. See generally Krebsbach, *supra* note 41.

151. Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, *supra* note 124, ¶ 40 (noting that it is “necessary to obtain well-founded and verifiable information about civilians allegedly taking part in hostilities before attacking them”).

In any case, a direct attack against the warehouse, the provisions stored in it, or targetable individuals must take the probable death of civilian warehouse personnel, drivers, and other protected civilians who are not directly participating into account in any proportionality assessment and when determining whether precautions to avoid killing or injuring them are feasible.<sup>152</sup>

*Situation 6: Displaced Command and Control Nodes*

Gregorian forces are considering targeting three Tanakan Ministry of Social Services buildings in Joeted. Available intelligence indicates:

- Tanakan military forces have been taking over civilian government offices in Joeted and using them as command and control nodes;
- Tanakan newspapers report that Ministry of Social Services buildings in Joeted are now closed until further notice;
- A Tanakan soldier is posted outside Ministry of Social Services buildings 1 and 2;
- A human asset sent by Gregorian forces to investigate Ministry of Social Services buildings 1 and 2 reported he was turned away from each building by a Tanakan soldier; and
- The same human asset proceeded to Ministry of Social Services building 3 to investigate and was promptly arrested by Tanakan police.

Additionally, Colonel Knight, a Tanakan brigade commander, relocated from her recently destroyed headquarters building to alternative locations within Joeted. She often operates from her apartment, which houses an encrypted landline used to communicate orders to subordinates. Her apartment is in a four-story residential building, though its precise location within the building is unknown. Colonel Knight also regularly operates from a nearby civilian cafe and uses a personal laptop to communicate orders and monitor current operations.

Finally, General Bryce is the commander of the military wing of GPF. His identity and location are unknown due to his effective evasion of Tanakan intelligence efforts. A reliable tip provided to Tanakan forces indicates a 30 percent chance that he will spend the night in a specific garage in

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152. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 56 & n.137.



the center of Joeted. He is considered a high-value target by the Tanakan forces.

#### 1. Ministry Buildings in Joeted

Determining whether the Tanakan military is using the three Ministry of Social Services buildings requires an assessment of the available intelligence concerning each structure. Such determinations are fact-dependent.

Based on the facts presented, a reasonable commander could conclude that Tanakan forces operate from each Ministry of Social Services building. Though less certainty exists regarding building 3, the human asset's arrest and Tanaka's seeming military use of the other two buildings provide a basis for reasonably concluding it is also used for military purposes.

Thus, characterizing the three buildings as military objectives by use is reasonable. Tanakan command and control centers effectively contribute to military action, especially in controlling Tanakan forces and the logistics necessary to sustain their overall campaign. Furthermore, the destruction of each Ministry of Social Services building offers a definite military advantage, as eliminating Tanakan command and control centers degrades their ability to synchronize efforts.<sup>153</sup> The three buildings may be attacked subject to taking precautions in attack and applying the rule of proportionality.

It must be emphasized that identification as a military objective is judged based on information available to those making the determination when it is made. If it turns out to have been wrong, the question is whether the determination was nevertheless reasonable. The same applies concerning precautions and proportionality determinations. They are judged based on the facts as understood at the time of decision rather than on those that became clear after the fact.

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153. Some nations consider headquarters, command and control facilities, and command and control equipment to be military objectives as a matter of law, which obviates the need to apply the second prong of the customary two-prong test reflected in AP I, art. 52(2). *See, e.g.*, U.S. DOD MANUAL, *supra* note 5, § 5.6.4. *See also id.* at 219 n.209 (citing United Kingdom, Australian, and Canadian military doctrine that similarly define the term "military objective." For example, both the United Kingdom and Austria define the term "military objective" to include "combatant members of the enemy armed forces and their military weapons, vehicles, equipment, and installations." UNITED KINGDOM MINISTRY OF DEFENSE, JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 5.4.1 (2004); AUSTRALIAN DEPARTMENT OF DEFENCE, ADDP 06.4, LAW OF ARMED CONFLICT, ¶ 5.27 (2006)).

## 2. Alternate Command and Control Locations

Colonel Knight's encrypted landline and laptop are military objectives by use, as their present function is monitoring operations and facilitating command of her forces.<sup>154</sup> They effectively contribute to Tanakan military action, and their destruction offers a definite military advantage because it will hinder Tanakan command and control.

The apartment building is also a military objective by use because its present function is to shelter Colonel Knight and serve as her command and control center.<sup>155</sup> The question is whether the entire four-story apartment building or only Colonel Knight's apartment may be the object of attack. Gregorian intelligence did not specify which apartment Colonel Knight uses.

The prevailing view is that the entire building is targetable as a military objective, one "defined by its 'material/physical' element, namely one building/a single structure for immovable objects."<sup>156</sup> By this approach, the entire building is targetable as a military objective, even if Gregorian forces have the capability to strike only her apartment. Possible harm to other parts of the building would not factor into the proportionality and precautions assessments.<sup>157</sup>

A minority approach would treat only the apartment as a military objective, if known and the attacker can strike it surgically. Damage to the remaining portions of the building would qualify as civilian harm in the proportionality assessment, and the precautions requirement would compel Gregorian forces to use their precision capability, if feasible, to avoid that harm to the extent possible.

Colonel Knight also monitors operations and commands her subordinates from the cafe, making it a military objective by use while she is doing so. The cafe may become a military objective by purpose should Colonel Knight intend to use it as a command and control node in the future. In either case, her use of the cafe effectively contributes to military action, and its destruction offers a definite military advantage. Because civilians frequent

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154. The term "encrypted" as used here denotes two-factor authentication rather than a secure network and communications equipment specifically designed for and used by the military. The latter would likely make the encrypted landline a military objective by nature.

155. ICRC COMMENTARY, *supra* note 28, ¶ 2265; U.S. DOD MANUAL, *supra* note 5, § 5.6.4.2.

156. ILA Study Group, *supra* note 23, at 333, 336; U.S. DOD MANUAL, *supra* note 5, § 5.6.1.2; FM 6-27, *supra* note 17, ¶ 2-36. *See also* GILLARD, *supra* note 96, ¶¶ 125–28.

157. ILA Study Group, *supra* note 23, at 334–35.

the cafe, Gregorian attackers must factor any civilians likely to be injured or killed into the precautions and proportionality analyses.

### 3. Bed-Down Location for General Bryce

General Bryce is targetable as the commander of GPF's military wing. Although there is a 70 percent chance that General Bryce will not bed down in the garage for the evening, the 30 percent likelihood that he will do so and the fact that he is a very high-value target arguably make it reasonable to conclude the garage is a military objective by use subject to attack. Certainty is often elusive in combat. Many factors bear on the reasonableness of mounting an attack in the face of uncertainty, including the anticipated military advantage to be gained. In this case, the advantage is especially significant.<sup>158</sup> Of course, the requirement to take precautions in attack and the rule of proportionality will apply to the attack.

#### *Situation 7: Tunnel Operations*

To avoid detection by Tanakan air assets, the GPF dug cross-border tunnels to transport supplies and weapons and emplaced pipes to smuggle gasoline from Gregoria into Tanaka. The GPF also uses the tunnels to facilitate attacks on Tanakan forces. However, the tunnels and pipes are also used to supply civilian materiel.

In one case, the GPF approached a woman living in a single-family home on the outskirts of Joeted to request permission to construct an underground tunnel from her house to a military location four blocks away. She agreed. Tanakan soldiers will use the tunnel to move within Joeted without exposing themselves to enemy forces.

### 1. Cross-Border Tunnels and Gasoline Pipes

Considering the U.S. approach to membership in organized armed groups, which a majority of the participants endorsed, members of the GPF traversing the tunnels to conduct attacks, smuggle gasoline, or maintain them may be targeted.<sup>159</sup> By contrast, according to the ICRC's position, only members who serve a continuous combat function may be the object of attack based

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158. See Schmitt & Schauss, *supra* note 21, at 153–66.

159. U.S. DOD MANUAL, *supra* note 5, §§ 5.7.3.1, 5.7.3.2.

on their GPF membership. Those having this view would likely find only individuals traversing the tunnels to commit attacks or deliver weapons in direct support of an operation targetable. Individuals smuggling supplies for general purposes and those merely maintaining the tunnels would not be performing a combat function. They would, therefore, be treated, according to this view, as civilians who could not be made the object of attack “unless and for such time as they take direct part in hostilities.”<sup>160</sup>

The cross-border tunnels and the pipes are targetable as military objectives by use since their present function includes the movement of fighters and supplies for use in operations.<sup>161</sup> The fact that they also facilitate the transportation of civilian supplies does not detract from their qualification as military objectives in their entirety. Moreover, the mere loss of civilian use would not amount to collateral damage that Tanaka must consider in its proportionality and precautions determinations. As is evident from the text of the rules, only loss of life, injury, and damage qualify as collateral damage.<sup>162</sup>

## 2. Tunnel from the Home

The woman’s home that provides access to the tunnel and the tunnel itself are also military objectives by use. Whether the woman who lives in the home is targetable is a more complex question.<sup>163</sup> Although a civilian, allowing her home to be used benefits GPF forces. The question is whether the woman’s consent to constructing and maintaining a tunnel from her home amounts to a deliberate decision to join the hostilities, thus making her a direct participant in the hostilities. As the intelligence provided does not establish this, the better view is that she should be considered a civilian protected from attack. If Tanakan forces attack the tunnel, they should consider the expected harm to her in the proportionality analysis and take feasible precautions to minimize the possibility of harming her.

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160. ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 32–36.

161. U.S. DOD MANUAL, *supra* note 5, § 5.6.6.1; ICRC COMMENTARY, *supra* note 28, ¶ 2022; Schmitt & Widmar, *supra* note 61, at 392–93.

162. Additional Protocol I, *supra* note 13, art. 57(2)(a)(ii) (requiring attackers to take feasible precautions to avoid or minimize “incidental loss of civilian life, injury to civilians and damage to civilian objects”). *See also* Additional Protocol I, *supra* note 13, art. 57(2)(a)(iii), (2)(b), (4).

163. *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 21, at 46–64; U.S. DOD MANUAL, *supra* note 5, § 5.8.3; FM 6-27, *supra* note 17, ¶¶ 2-11 to -19. *See generally* Krebsbach, *supra* note 41.

*Situation 8: Precautions in Attack and Proportionality*

After fierce urban fighting, the Tanakan military pushed GPF forces to the outskirts of Joeted and is attacking them with, amongst other weapons systems, missiles. In response, the GPF launched a counterattack, “Operation Episteme.”

A press release describing the operation indicates that the GPF has installed “jammers” in its remaining military positions in Joeted. The jamming system purportedly interferes with incoming missile guidance, redirecting them away from the intended target. It cannot guide the missiles once jammed, nor is it able to jam the guidance system of all incoming missiles.

Tanakan intelligence initially assessed the jamming capability to be false propaganda. However, its first three missiles were jammed and redirected, striking a nearby fish market and two homes. Dozens of civilians were killed or injured. Thereafter, Tanakan intelligence reevaluated the capability as credible.

In the wake of Operation Episteme, Tanakan forces have warned civilians residing in militia-held areas outside Joeted of impending attacks. The civilians do not believe these warnings, mainly because they have received previous warnings that were not followed by actual attacks. To convince them to leave, the Tanakan Air Force proposes dropping several low-blast bombs in nearby agricultural fields. No civilians are expected to be harmed. The Tanakan military believes the explosions will persuade the civilians in the area to evacuate.

Additionally, the GPF established an improvised explosive device (IED) production facility in the basement of a three-story structure adjacent to Joeted’s largest hospital. The structure is a recently closed textile warehouse. It is separated from the hospital by an alley only five meters wide. The GPF chose this location because the building and the hospital are connected to the city’s water and sewage system and other man-made tunnels. GPF uses the tunnels to move undetected around the city and to smuggle the IEDs out of Joeted for operations against Tanaka.

1. Militia Jamming Capabilities

Although there is limited intelligence regarding GPF’s positions in Joeted, all such positions are targetable as military objectives. Tanakan forces must

take feasible precautions and conduct a proportionality analysis before launching an attack against them.<sup>164</sup>

Following the successful jamming of the first three Tanakan missiles, which resulted in them impacting off-target and striking civilians and civilian objects, Tanakan forces must consider the GPF's demonstrated ability to jam missiles in future missile attacks. In particular, it complicates assessments regarding subsequent military advantage and expected collateral damage. Yet it must be cautioned that the rule of proportionality only prohibits strikes where an attacker should have determined before an attack that the resulting collateral damage would be "excessive." Accordingly, Tanaka may continue the strikes so long as it monitors the effectiveness of the jamming carefully and considers the information it gathers when assessing future strikes' proportionality.<sup>165</sup>

While the GPF may engage in defensive action against incoming Tanakan missiles, it must also consider the potential risks to the civilian population posed by the diverted missiles and take feasible precautions to minimize collateral damage.<sup>166</sup> Of course, using the jammers in the hope of causing debris to land in populated civilian areas—for example, to accuse Tanaka of conducting indiscriminate attacks (so-called "lawfare")—would breach precautionary obligations towards the local civilian population. That obligation requires a defender to take "feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks."<sup>167</sup>

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164. Additional Protocol I, *supra* note 13, art. 57(2)(a)(ii)–(iii); ICRC CUSTOMARY LAW STUDY, *supra* note 12, rr. 14–20; U.S. DOD MANUAL, *supra* note 5, §§ 5.2.3, 5.10, 5.11, 5.11.6; FM 6-27, *supra* note 17, ¶¶ 2-68 to -89. *See generally* Additional Protocol II, *supra* note 10, art. 13.

165. U.S. DOD MANUAL, *supra* note 5, § 5.12.1.4. When conducting a proportionality assessment, "a commander directing an air operation would not need to consider civilians injured or killed by counter-attacks from enemy air defense measures, such as spent surface-to-air measures or antiaircraft projectiles." *Id.*

166. *Id.* (noting "the risk to the civilian population from the legitimate deception activities of the *defending force*, such as jamming, smoke, or chaff, would not need to be considered by the *attacking force*, although the *defending force* should consider such risks as part of its obligations to take feasible precautions in defense" (emphasis added)). *See also* Additional Protocol I, *supra* note 13, art. 57(1), (2)(a)(ii); FM 6-27, *supra* note 17, ¶ 2-75.

167. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 22. *See also* Additional Protocol I, *supra* note 13, art. 57(1), (2)(a)(ii); U.S. DOD MANUAL, *supra* note 5, § 5.11; FM 6-27, *supra* note 17, ¶¶ 2-82 to -89.

## 2. Dropping Munitions on Land for Effect

A preliminary issue is whether Tanakan forces may drop munitions as a precautionary measure to minimize civilian casualties. It should be noted that prior warnings were received but unheeded, thereby exhausting the legal duty to warn the civilian populations. Dropping munitions on agricultural fields to signal the impending danger and give civilians a final opportunity to seek safety before an attack is not required by law. Warnings must be effective, but effectiveness denotes the civilian population receiving them, not whether the warnings are heeded.

With regard to this warning tactic, it must be determined whether there is any legal barrier to dropping the munitions on the agricultural field. In particular, does the practice qualify as an attack? And if so, is the field a civilian object protected from attack?<sup>168</sup>

If dropping the munitions does not qualify as an attack as a matter of law, targeting law does not apply. Article 49(1) of Additional Protocol I defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.” Although not formally binding on States that are not party to the instrument, the definition is still helpful. Indeed, it is general enough to accord with the practice of the United States and other non-party States.

While many actions in warfare result in damage or destruction, it is generally understood that “attacks” require an underlying military purpose of harming the adversary (“adversary” must be interpreted to include civilians and civilian objects).<sup>169</sup> They are to be distinguished from other destructive actions that do not meet this condition, such as damage caused to a road by the movement of a tank or the breaching of walls by troops moving in urban

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168. In the aftermath of the Israeli Defense Forces (IDF) firing low-explosive projectiles at targets’ roofs to signal impending danger (commonly referred to as roof-knocking) during Operation Protective Edge in Gaza in 2014, questions over the lawfulness of this tactic as a precautionary measure arose. Subsequently, the United States used the same tactic in Iraq in 2016 during Operation Inherent Resolve. In both operations, the precautionary roof-knock was used on a military objective to warn civilians to vacate the area before striking it. The instant situation differs from these two examples in that the agricultural field is not a military objective. *See* ILA Study Group, *supra* note 23, at 384–88, 385 n.189.

169. *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 A2, Submission of Observations to the Appeals Chamber Pursuant to Rule 103, ¶¶ 14–15 (Sept. 18, 2020), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020\\_05312.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05312.PDF) (discussing the “against the adversary” motive element, which is required for an act to be considered an “attack”). *See also* Additional Protocol I, *supra* note 13, art. 49(1).

terrain to avoid exposure to enemy fire.<sup>170</sup> Since the military purpose behind dropping the munitions is not to harm the adversary but to avoid civilian casualties during follow-up operations, it would not be considered an “attack.”

Another aspect to consider is the damage in question. For an act to qualify as an “attack,” it must be “reasonably expected to cause injury or death to persons or damage or destruction.”<sup>171</sup> It is widely acknowledged that the damage in question must exceed a de minimis threshold.<sup>172</sup> Depending on the circumstances, dropping munitions on an agricultural field would not necessarily cross that threshold, a further reason that dropping the munitions does not amount to an “attack.”

Thus, the principle of distinction would not prohibit dropping the munitions even if the field was considered a civilian object. The applicable rule in this situation would be that requiring “constant care” under Article 57(1)

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170. According to Geoffrey Corn, two elements differentiate “attacks” from other destructive actions. “First, an ‘attack’ must involve an act reasonably expected to produce physical injury or damage to a person(s) or object(s).” *Prosecutor v. Ntaganda*, Submission of Observations to the Appeals Chamber Pursuant to Rule 103, *supra* note 169, ¶ 13. “Second, the motivation for executing the act must be to cause harm to the adversary or other persons or objects in the conduct of hostilities.” *Id.* ¶ 14. *See also* *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 A2, Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶¶ 3, 17 (Sept. 18, 2020), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020\\_05316.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05316.PDF); *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-2666-Anx1, Separate Opinion of Judge Morrison and Judge Hofmański on the Prosecutor’s Appeal, ¶ 29 & 9 n.26 (Mar. 30, 2021), [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021\\_03024.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_03024.PDF) (citing two amicus curiae briefs, Submission of Observations to the Appeals Chamber Pursuant to Rule 103, *supra* note 169, and Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, *supra*, while defining “attacks”).

171. TALLINN MANUAL 2.0, *supra* note 97, r 92. *See also* Additional Protocol I, *supra* note 13, art. 49(1); THE CONDUCT OF HOSTILITIES, *supra* note 29, at 3–4; COMMENTARY TO THE AMW MANUAL, *supra* note 24, r. 1(e); U.S. DOD MANUAL, *supra* note 5, §§ 16.5.1, 16.5.2.

172. TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 92, ¶ 4; INT’L COMM. OF THE RED CROSS, GUIDELINES ON THE PROTECTION OF THE NATURAL ENVIRONMENT IN ARMED CONFLICT, ¶ 105 (Sept. 25, 2020), [https://www.icrc.org/en/download/file/141079/guidelines\\_on\\_the\\_protection\\_of\\_the\\_natural\\_environment\\_in\\_armed\\_conflict\\_advance-copy.pdf](https://www.icrc.org/en/download/file/141079/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf). *See also* Noam Neuman, *Challenges in the Interpretation and Application of the Principle of Distinction During Ground Operations in Urban Areas*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 807, 820–21 (2018); U.S. DOD MANUAL, *supra* note 5, § 16.5.2.



of Additional Protocol I or a possible customary rule counterpart.<sup>173</sup> It requires consideration of the consequences of military operations on civilians and civilian objects.<sup>174</sup>

But assume solely for the sake of discussion that dropping the munitions is an “attack” (it is not). The analysis would next require determining whether the agricultural field enjoys protection as a “civilian object” under LOAC. While there is an approach that sees the environment as having an intrinsic value that merits characterization as damage, most participants were of the view that customary law requires an attacker to consider only that damage to the natural environment expected to prejudice the health or survival of the civilian population.

Further assume solely for discussion purposes that the field crosses this threshold (it probably does not). If it is reasonable to conclude the civilians will leave, the commander may take the view that the attack effectively contributes to the broader plan of securing the militia-held area and, therefore, that the proposed strike offers a military advantage. Under this assumption, the field could be a military objective by location.

But in such a case, State practice and practical humanitarian considerations justify the action even if the field was not considered a military objective. After all, Tanakan forces are not targeting the field to destroy the crops and deny the field’s use to the local population but rather to avoid civilian casualties in follow-on operations.

By analogy, pilots and operators use the practice of “shift cold” or “post-launch abort” to guide munitions away from a target when unanticipated collateral damage concerns arise during an airstrike.<sup>175</sup> The munition is typically redirected to a civilian area, but one with less collateral damage risk.<sup>176</sup> The operator or pilot is not redirecting the munition to attack the civilian area but rather to comply with the obligation to cancel an attack if the attack is expected to cause collateral damage excessive to the anticipated military

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173. Additional Protocol I, *supra* note 13, art. 57(1); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 15. *See also* U.S. DOD MANUAL, *supra* note 5, § 5.2.3.5; Schmitt & Schauss, *supra* note 21, at 177–80.

174. *See* ICRC COMMENTARY, *supra* note 28, ¶ 2191. *See generally* ICRC CUSTOMARY LAW STUDY, *supra* note 12, cmt. to r. 15; U.S. DOD MANUAL, *supra* note 5, §§ 5.2, 5.2.3.5; Schmitt & Schauss, *supra* note 21, at 177–80.

175. Michael N. Schmitt & Matthew King, *The “Shift Cold” Military Tactic and International Humanitarian Law*, JUST SECURITY (Feb. 20, 2018), <https://www.justsecurity.org/52198/shift-cold-tactic-international-humanitarian-law/>.

176. Schmitt & King, *supra* note 175; Chairman, Joint Chiefs of Staff, Joint Publication 3-09.3, Close Air Support, at III-39 to -40 (2019).

advantage.<sup>177</sup> While Tanaka is not *redirecting* its strike to the agricultural field, its goal is to warn civilians in the area and reduce collateral damage in follow-on attacks, thereby meeting LOAC's humanitarian intent and satisfying Tanaka's obligation to take precautions in attack.

### 3. IED Production Facility Adjacent to Civilian Hospital

The three-story building housing the GPF's IED production facility and the tunnels qualify as military objectives by use; the building's present function is the assembly of IEDs, while the tunnels provide undetected movement by GPF members for the distribution of IEDs. Tanaka must consider the hospital (which is distinct from the building), other surrounding civilian structures, and civilians who might be harmed in its proportionality and precautions assessments.

An interesting issue is how to characterize any military patients (*hors de combat*) being treated in the adjacent hospital. While they may not be the object of direct attack,<sup>178</sup> there are different views on whether they must be considered in the proportionality analysis. The United States does not consider enemy military wounded, sick, or shipwrecked in the proportionality analysis, but it does require "feasible precautions . . . be taken to reduce the risk of harm to the wounded."<sup>179</sup> By contrast, the ICRC takes the position that "the presence of wounded and sick members of the armed forces in the vicinity of a military objective is to be taken into consideration when carrying out a proportionality assessment prior to an attack."<sup>180</sup>

Finally, the situation raises the question of how to consider the effects of the attack on the water and sewage systems lying below the building and hospital. First, its tunnels are military objectives because they are being used or will be used by the GPF. However, any damage to them risks indirectly affecting the civilian population's health.

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177. ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 19.

178. Additional Protocol I, *supra* note 13, art. 41; ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 47. *See also* Additional Protocol I, *supra* note 13, arts. 51(4), 85(3)(e).

179. U.S. DOD MANUAL, *supra* note 5, §§ 7.3.3.1, 17.14.1.2.

180. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 1355–57 (2016); Geoff Corn & Andrew Culliver, *Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk*, 45 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 445, 454 (2017).

In this regard, it is universally accepted that direct effects must be considered in the proportionality analysis.<sup>181</sup> And there is broad agreement that “[m]ere inconveniences or temporary disruptions to civilian life need not be considered when applying this rule.”<sup>182</sup>

However, no consensus exists regarding so-called indirect or reverberating effects like the impact on civilian health. Indirect or reverberating effects are “the effects that are not directly or immediately caused by attack, but are nonetheless a consequence of it.”<sup>183</sup> Generally speaking, the United States does not consider “remote” harms that could result from an attack, basing this exclusion on the difficulty in accurately predicting such harm.<sup>184</sup> In other words, it does not exclude indirect effects from consideration in the proportionality and precautions assessments but does factor causal attenuation into its determinations. By contrast, others, including the ICRC, support a broader approach, which considers it an obligation to account for reasonably foreseeable indirect effects.<sup>185</sup> Neither approach rules out the consideration of indirect harm altogether, although they approach the matter from different perspectives.

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181. Additional Protocol I, *supra* note 13, arts. 51(5)(b), 57(2)(a)(iii); ICRC CUSTOMARY LAW STUDY, *supra* note 12, r. 14; U.S. DOD MANUAL, *supra* note 5, § 5.10; FM 6-27, *supra* note 17, ¶¶ 2-71 to -76. The Chairman of the Joint Chiefs of Staff’s doctrinal publication on targeting defines “direct effects” as “the immediate and easily recognizable, first-order consequences of a military action (weapons employment results), unaltered by intervening events or mechanisms.” “Indirect effects” are defined as “the delayed and/or displaced second-, third-, and higher-order consequences of action, created through intermediate events or mechanisms.” Chairman, Joint Chiefs of Staff, Joint Publication 3-60, Joint Targeting, ¶ 5e(1)–(2), at II-35 (2018).

182. U.S. DOD MANUAL, *supra* note 5, § 5.12.1.2. *See also* TALLINN MANUAL 2.0, *supra* note 97, cmt. to r. 113, ¶ 5; COMMENTARY TO THE AMW Manual, *supra* note 24, cmt. to r. 14, ¶ 2.

183. REPORT OF THE ICRC MEETING OF EXPERTS ON EXPLOSIVE WEAPONS IN POPULATED AREAS: HUMANITARIAN, LEGAL, TECHNICAL AND MILITARY ASPECTS, ¶ 2.3, at 21 (June 15, 2015), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4244.pdf>. *See also* U.S. DOD MANUAL, *supra* note 5, § 5.12.1.3; FM 6-27, *supra* note 17, ¶ 2-70.

184. U.S. DOD MANUAL, *supra* note 5, § 5.12.1.3; FM 6-27, *supra* note 17, ¶ 2-70.

185. ILA Study Group, *supra* note 23, at 352–55; REPORT OF THE ICRC MEETING OF EXPERTS ON EXPLOSIVE WEAPONS IN POPULATED AREAS, *supra* note 183, ¶ 2.3, at 21–22. *See generally* Ian Henderson & Kate Reece, *Proportionality Under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 835 (2018).