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EXTENDING POSITIVE IDENTIFICATION FROM PERSONS TO PLACES: TERRORISM, ARMED CONFLICT, AND THE IDENTIFICATION OF MILITARY OBJECTIVES

Laurie R. Blank*

In January 2013, French forces combating rebel forces in Mali attacked “Islamic targets” in northern Mali and French fighter planes “hit rebel targets in the northern cities of Gao and Kidal.”¹ Turkish forces frequently attack “rebel positions,” fighting the Kurdistan Workers Party (PKK) in Iraq’s Kurdistan region,² and the Sri Lankan Army targeted “terrorist stronghold[s]” during the conflict with the Tamil Tigers.³ The Israel Defense Forces contend with “rocket villages” in Hezbollah-dominated areas in southern Lebanon and with the complexities of a periodically intensifying conflict with a terrorist entity governing the Gaza Strip.⁴ In Afghanistan, U.S. and multinational forces seek not only to target Taliban and al-Qaeda operatives, but also to disable and destroy the infrastructure that enables them to continue launching and threatening attacks against the Afghan government and multinational forces.⁵

Conflicts between States and non-state actors are certainly not a new phenomenon, but over the past decade or more, the legal issues they highlight have dominated the academic and policy discourse. With regard to targeting, these debates have focused almost entirely on who can be targeted—attacked—in the course of an armed conflict with a non-state entity, in accordance with the law of armed conflict. To be sure, identifying individuals who are legitimate targets in

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¹ George Thomas, *French Military Pounds Islamic Targets in Mali*, CBN NEWS (Jan. 18, 2013), <http://www.cbn.com/cbnnews/world/2013/January/French-Military-Pounds-Islamist-Targets-in-Mali>.

² *Turkey Defends Incursions in Iraq*, BBC NEWS (Dec. 19, 2007, 12:23 AM), <http://news.bbc.co.uk/2/hi/europe/7151074.stm>.

³ *Sri Lankan Military Targets LTTE in North*, UPI.COM (Oct. 13, 2008, 2:00 PM), http://www.upi.com/Emerging_Threats/2008/10/13/Sri-Lankan-military-targets-LTTE-in-north/UPI-47791223920808.

⁴ *Israeli Map Shows Nearly 1,000 Hezbollah Sites*, AL ARABIYA NEWS (Mar. 31, 2011, 2:48 PM), <http://www.alarabiya.net/articles/2011/03/31/143666.html>.

⁵ See George Friedman, *Strategic Divergence: The War Against the Taliban and the War Against Al Qaeda*, STRATFOR GLOBAL INTELLIGENCE (Jan. 26, 2009, 1:01 PM), http://www.stratfor.com/weekly/20090126_strategic_divergence_war_against_taliban_and_war_against_al_qaeda; Henry Kissinger, *A Strategy for Afghanistan*, WASH. POST (Feb. 26, 2009), http://articles.washingtonpost.com/2009-02-26/opinions/36927848_1_afghan-pakistan-afghan-population-military-strategy; *NATO Pursues New Strategy for Afghan Insurgency*, VOICE OF AM. (Feb. 10, 2010, 7:00 PM), <http://www.voanews.com/content/nato-pursues-new-strategy-for-counter-afghan-insurgency-84179592/165352.html>.

non-international armed conflict is challenging, made particularly so by the common practice of non-state actors purposely mingling with the civilian population.⁶ The erosion of the distinction between fighter and civilian during armed conflict, most notably in conflicts with organized armed groups, terrorist groups, and other non-state entities, is a primary cause for the continued and increased danger for civilians during wartime, and also lies at the heart of many challenging implementation issues for state armed forces.⁷ The current debate over the United States' program of targeted strikes by armed drones centers on precisely this question, for example: Who can be targeted in the course of a conflict with a transnational non-state entity, and how should such persons be identified?⁸

These issues and questions continue to be of great importance. However, military operations in armed conflict are not limited simply to actions taken against individuals and groups or units of persons fighting. All manner of objects—buildings, equipment, roadways, bridges, communications networks, airfields, strategic locations, and more—are also vital components of military operations and can be legitimate targets of attack during conflict. Unlike in the area of categorization of persons, where the difference between international armed conflict and non-international armed conflict is significant in providing for combatant status and prisoner of war protections in the former category of conflict only, the law makes no distinction between the two types of conflict in addressing the types of objects that can be attacked or must be protected.⁹ Nonetheless, the nature of conflicts with non-state actors—which encompasses more than one type of non-international armed conflict—introduces a number of issues specific to targeting of objects in such conflicts.

This Article addresses the identification of military objectives in a variety of non-international armed conflict contexts, including conflicts with terrorist groups operating transnationally and conflicts with non-state actors located outside the State's borders. In particular, the nature of non-international armed conflict can

⁶ Ann Scott Tyson, *In Afghanistan, A Test of Tactics*, WASH. POST, Aug. 13, 2009, at A6, available at http://articles.washingtonpost.com/2009-08-13/world/36785580_1_helm-and-river-anibal-paz-taliban-fighters.

⁷ See, e.g., Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765 (2012) (discussing how the failure of fighters to distinguish themselves from innocent civilians undermines the law's protection of innocent civilians).

⁸ See U.S. DEP'T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE* (2013), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBCNEWS.COM (Feb. 4, 2013, 8:57 PM), http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite.

⁹ I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 29–32 (2005) (noting that the definition of military objectives is applicable as customary international law in both international and non-international armed conflicts).

alter how the basic definition and analysis of the term “military objective” is applied. For example, the same types of objects that would automatically be considered military in nature in an international armed conflict—a conflict between two States—would not necessarily suggest the same military connotation in a non-international armed conflict. Another comprehensive analytical challenge lies in the fact that nearly every object in a non-international armed conflict will fall into the category of dual-use objects; very few will be objectively and solely military and, unfortunately, all too often very few objects will retain a solely civilian use.

Operationally, state armed forces fighting against a non-state actor, whether an insurgent group inside its borders, a non-state entity in a neighboring State, or a transnational terrorist group, need to make the same determinations about lawful targets as in any other conflict, international or non-international. In this sense, the fact that those state forces are combating a non-state actor does not change either the definition of military objective or the practical, operational task of identifying lawful objectives and applying targeting doctrine and the law of armed conflict to that process to ensure lawful military operations in all circumstances. However, the challenges of conflicts with non-state actors introduce a range of questions regarding how the definitional components of military objective should be understood and applied. With regard to two of the core purposes of the law of armed conflict, exploring and understanding the import of these questions and how they play out in practice is essential. First, protection of civilians: distinguishing between military and civilian objects is perhaps the fundamental aspect of how the law of armed conflict regulates the conduct of hostilities so as to minimize civilian suffering and harm during war.¹⁰ Second, enabling effective military operations: the law of armed conflict is not designed to prevent war, nor was it envisioned as a set of constraints that would make it impractical to engage in combat, thereby leaving States with no effective options to fulfill their core mission of protecting national security and their own citizens from danger.¹¹ Rather, the law is inherently practical; it is meant to facilitate the lawful and effective fulfillment of military operations. To the extent that the application of the definition of military objectives in non-international armed conflicts introduces complications and conceptual challenges that blur the lines between civilian and military, and exacerbate existing difficulties, it is important to tease out and better understand those conceptual challenges.

Part I of this Article sets forth the framework for targeting within the law of armed conflict, including the key principles of the law that govern targeting, both the choice of target and the means and methods used to apply combat force to that target. In addition, Part I highlights the basic challenges of positive identification

¹⁰ CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 630 (Yves Sandoz et al., 1987).

¹¹ See LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 10–11 (2013).

that are particularly relevant in, although not limited to, non-international armed conflict. Part II analyzes the definition of military objective, including the historical background to the concept of military objective and how the existing definition has developed and applies in current conflicts. Finally, Part III analyzes in depth how conflicts with non-state actors pose difficulties for the application of the definition of military objective to potential targets, in effect extending the ongoing conversation regarding positive identification of persons to the identification of objects as well. In particular, Part III addresses the question of which objects are inherently military in nature in such conflicts, whether dual-use extends to nearly all objects because of the nature of how non-state armed groups function within the civilian population, and how use and purpose may need to be reconceptualized in light of how non-state armed groups operate. Throughout, the analysis also identifies areas for further analysis and potential future concerns with regard to interpretation and application of the law of armed conflict.

I. FOUNDATIONS: TARGETING AND THE LAW OF ARMED CONFLICT

The law of armed conflict (LOAC), otherwise known as international humanitarian law (IHL) or the law of war, governs the conduct of both States and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.¹² LOAC applies during all situations of armed conflict, with the full panoply of the Geneva Conventions and customary law applicable in international armed conflict and a more limited body of treaty-based and customary law applicable during non-international armed conflict. The 1949 Geneva Conventions endeavor to address all instances of armed conflict¹³ and set

¹² See *War and International Humanitarian Law*, INT'L COMM. RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 10, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

¹³ OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF

forth two primary categories of armed conflict that trigger the application of LOAC: international armed conflict and non-international armed conflict. Common Article 2 of the Geneva Conventions of August 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹⁴ Common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁵

Just as the existence of an armed conflict triggers the application of LOAC to govern the status of persons and the rights and obligations of parties to the conflict, the nature of the conflict—whether international or non-international—determines the extent of the applicable law. International armed conflicts are subject to the full panoply of the Geneva Conventions and the customary laws of war.¹⁶ Non-international armed conflicts are subject to the more limited legal regime of Common Article 3 and the steadily growing customary international law applicable in non-international armed conflict, including the principles of military necessity, humanity, distinction, and proportionality.¹⁷ Over the past several decades, the law

WAR 26 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded and sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to *all* cases of armed conflict, including internal ones.”).

¹⁴ Geneva Convention III, *supra* note 12, art. 2; Geneva Convention IV, *supra* note 12, art. 2.

¹⁵ Geneva Convention III, *supra* note 12, art. 3; Geneva Convention IV, *supra* note 12, art. 3.

¹⁶ See *supra* text accompanying note 14; Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1, 15 (Michael W. Lewis ed., 2009).

¹⁷ Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–27 (Int’l Crim. Trib. for the Former Yugoslavia Oct 2, 1995) (highlighting the development and applicability of necessity, distinction, humanity, and proportionality to internal armed conflict); LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 133–34 (2002); Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *TEMP. L. REV.* 788, 827 (2008); Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 *EUR. J. INT’L L.* 265, 275–78 (1996); see *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 6 rev. ¶¶ 176–77 (1997); Ian G. Corey, *The Fine Line Between Policy and Custom: Prosecutor v. Tadic and the Customary International Law of Internal Armed Conflict*, 166 *MIL. L. REV.* 145, 152–53 (2000); Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183

applicable in international armed conflict and that applicable in non-international armed conflict has continued to merge, until in many aspects of the law, the legal obligations and principles are nearly identical.¹⁸ One area where sharp distinctions remain is the status of persons: unlike international armed conflict, where LOAC recognizes the particular status of combatant, in non-international armed conflict, LOAC does not create status categories at all.¹⁹ However, for the purposes of this Article, which focuses on targeting and, in particular, the identification of military objectives, the law applicable in both international and non-international armed conflicts is based on the same central principles and obligations.

A. Key Principles of Targeting

The lawfulness of targeting individuals and objects during armed conflict is determined by the principles of distinction, proportionality, and precautions. As a foundation for the discussion to follow, this section offers a brief background on these key components of the law of targeting.

One of the most fundamental issues during conflict is identifying who or what can be targeted. The principle of distinction, one of the “cardinal principles” of the LOAC,²⁰ requires that any party to a conflict distinguish between those who are fighting and those who are not and to direct attacks solely at the former. Similarly, parties must distinguish between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I thus sets forth the basic rule: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”²¹

Distinction lies at the core of the LOAC’s seminal goal of protecting innocent civilians and persons who are *hors de combat*. The obligation to distinguish is part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held in the *Tadić* case.²² The purpose of distinction—to protect

MIL. L. REV. 65, 66 (2005); William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 907, 915–17 (2003).

¹⁸ *Tadić*, Case No. IT-94-1-T, ¶¶ 96–127; EVE LA HAYE, WAR CRIMES IN INTERNAL CONFLICTS 380 (2010) (discussing the overlap between the laws of war applicable in internal and international armed conflict).

¹⁹ Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT’L LAW STUD. 119, 119–20 (2012).

²⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).

²¹ Additional Protocol I, *supra* note 12, art. 48. Article 48 is considered customary international law. See 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 3–8.

²² *Tadić*, Case No. IT-94-1-T, ¶ 111 (“Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General

civilians—is emphasized in Article 51 of Additional Protocol I, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”²³ Furthermore, Article 85 of Additional Protocol I declares that nearly all violations of distinction constitute grave breaches of the Protocol,²⁴ and the Rome Statute similarly criminalizes attacks on civilians and indiscriminate attacks.²⁵

Distinction thus requires identification of lawful targets as a prerequisite to the use of force in armed conflict. A lawful attack must be directed at a legitimate target: either a combatant, a member of an organized armed group, a civilian directly participating in hostilities, or a military objective. In international armed conflicts—those occurring between States—all members of the State’s regular armed forces are combatants and can be identified by the uniform they wear, among other characteristics. Other persons falling within the category of combatant include members of volunteer militia who meet four requirements: operating under responsible command, wearing a distinctive emblem, carrying arms openly, and abiding by the law of armed conflict.²⁶ Members of the regular armed forces of a government not recognized by the opposing party and civilians participating in a *levée en masse* also qualify as combatants in international armed conflict.²⁷ Combatants can be attacked at all times and enjoy no immunity from attack, except when they are *hors de combat* due to sickness, wounds, or capture. In non-international armed conflicts, including State versus non-state actor conflicts, there is no combatant status, but individuals who are members of an organized armed group are legitimate targets of attack at all times.²⁸ The principle

Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . . [i]n the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.” (first alteration in original) (quoting G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Dec. 9, 1970) (internal quotation marks omitted)); *see also Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 79 (stating that distinction is one of the “intransgressible principles of international customary law”); *Abella*, Report No. 55/97 at ¶¶ 177–78 (“[C]ustomary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives.”); 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 3–8 (discussing the distinction between civilians and combatants).

²³ Additional Protocol I, *supra* note 12, art. 51(2).

²⁴ *Id.* art. 85(3).

²⁵ *See* Rome Statute of the International Criminal Court art. 8, para. 2(b)(i)–(ii), (iv)–(vi), (e)(i)–(ii), (iv), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

²⁶ Geneva Convention III, *supra* note 12, art. 4(A)(2).

²⁷ *Id.* art. 4(A)(3), (6).

²⁸ *See* JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 70–76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an

of distinction and concomitant obligations apply with equal force to attacks on objects rather than persons; indeed, the obligation to target only military objectives lies at the heart of this Article's analysis of how the identification of military objectives is affected by the nature of conflict with non-state actors.

The second key principle, the principle of proportionality, requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.²⁹ This principle balances military necessity and humanity, and is based on the confluence of two key ideas. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy.³⁰ Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated "[t]he incidence of some civilian casualties . . . as a consequence of military action,"³¹ although "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."³² That is, the law requires that military commanders and decision makers assess the advantage to be gained from an attack in light of the likely civilian casualties.³³

Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."³⁴ This language demonstrates that Additional Protocol I contemplates

enemy force . . . is presumed hostile and therefore presumptively subject to attack" in international armed conflict and (2) "[s]ubjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of [S]tates engaged in non-international armed conflicts"); INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 27–29 (2009) (stating that organized armed groups are targetable based on status in non-international armed conflict).

²⁹ Additional Protocol I, *supra* note 12, art. 51(5)(b).

³⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art 22, Oct. 18, 1907.

³¹ Judith Gardam, *Necessity and Proportionality in Jus Ad Bellum and Jus In Bello*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 275, 283–84 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

³² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 587 (July 8) (dissenting opinion of Judge Higgins).

³³ The term "collateral damage" is often used in the media and by the public to refer to the incidental (meaning not deliberate) civilian casualties from an attack on a military target.

³⁴ Additional Protocol I, *supra* note 12, art. 51(5)(b).

incidental civilian casualties, and appears again in Articles 57(2)(a)(iii)³⁵ and 57(2)(b),³⁶ which refer specifically to precautions in attack. Proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well accepted as an element of customary international law applicable in all armed conflicts.³⁷

Lastly, LOAC mandates that all parties take certain precautionary measures to protect civilians. In many ways, the identification of military objectives and the proportionality considerations are, of course, precautions. But the obligations of the parties to a conflict to take precautionary measures go beyond that. Beginning at the broadest level, Article 57(1) of Additional Protocol I states, “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”³⁸ This provision is a direct outgrowth of and supplement to the Basic Rule in Article 48, which mandates that all parties distinguish between combatants and civilians and between military objects and civilian objects.³⁹ The practical provisions forming the major portion of Article 57 discuss precautions to be taken specifically when launching an attack. Precautions are, understandably, a critical component of the law’s efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful.

First, parties must do everything feasible to ensure that targets are military objectives.⁴⁰ Doing so helps to protect civilians by limiting attacks to military targets, thus directly implementing the principle of distinction. Second, they must choose the means and methods of attack with the aim of minimizing incidental

³⁵ *Id.* art. 57(2)(a)(iii) (“With respect to attacks, the following precautions shall be taken: [t]hose who plan or decide upon an attack shall . . . [r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

³⁶ *Id.* art. 57(2)(b) (“An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.”).

³⁷ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 587 (dissenting opinion of Judge Higgins); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 120 (2004); 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 46; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006).

³⁸ Additional Protocol I, *supra* note 12, art. 57(1).

³⁹ *Id.* art. 48.

⁴⁰ *Id.* art. 57(2)(a)(i).

civilian losses and damage.⁴¹ For example, during the 1991 Persian Gulf War, “pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that missed their targets—because they were dropped either too early or too late—would hopefully fall in the river and not on civilian housing.”⁴² Another common method of taking precautions is to launch attacks on particular targets at night when the civilian population is not on the streets or at work, thus minimizing potential losses.⁴³ In addition, when choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects.⁴⁴ Each of these steps requires an attacking party to take affirmative action to preserve civilian immunity and minimize civilian casualties and damage—in effect, to take “constant care.”⁴⁵ Proportionality considerations are also a major component of the precautions framework. Parties are required to refrain from any attacks that would be disproportionate and to cancel any attacks where it becomes evident that the civilian losses would be excessive in light of the military advantage.⁴⁶ Finally, Article 57(2)(c) of Additional Protocol I requires attacking parties to issue an effective advance warning of “attacks which may affect the civilian population, unless circumstances do not permit.”⁴⁷

These key principles of LOAC form the essential guideposts for targeting in armed conflict, whether against persons or objects. With regard to the targeting of objects, only objects that meet the definition of military objective constitute legitimate targets of attack, as required by the principle of distinction; once such determination is made, the obligations introduced by the principles of proportionality and precautions must be fulfilled as well. The obligation to target only military objectives is one way of implementing the age-old principle that the means and methods of warfare are not unlimited.⁴⁸ Part II below sets forth the

⁴¹ *Id.* art. 57(2)(a)(ii).

⁴² Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. RED CROSS, 793, 801 (2006). This angle of attack “also means that damage would tend to be in the middle of the bridge and thus easier to repair.” *Id.* at 801 n.27.

⁴³ *See id.* at 800 (noting that U.S. forces in Iraq conducted offensive operations at night in an effort to minimize civilian casualties).

⁴⁴ Additional Protocol I, *supra* note 12, art. 57(3).

⁴⁵ *Id.* art. 57(1).

⁴⁶ *Id.* art. 57(2)(a)(iii), (b).

⁴⁷ *Id.* art. 57(2)(c).

⁴⁸ The modern version of this principle appears in Article 35 of Additional Protocol I; earlier formulations appear in the writings of Vitoria, Grotius and Vattel, as well as in early codifications of the laws of war. *See generally* The Laws of War on Land art. 4, Sept. 9, 1880, *reprinted in* THE LAWS OF ARMED CONFLICTS 29 (Dietrich Schindler & Jiri Toman eds., 4th rev. & completed ed. 2004); Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297; 3 HUGO GROTIUS, THE LAW OF WAR AND PEACE (George Grafton Wilson ed., Francis W. Kelsey trans., Oceana Publ’ns 1964) (1646); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS

definition of military objective and the parameters for implementing the decision during military operations.

B. Challenges of Positive Identification in Non-International Armed Conflicts

Thousands of pages have been written over the past decade and more about the complexities of contemporary conflicts, where the lack of boundaries between conflict areas and civilian areas—between those actively participating in hostilities and those who are not—pose particular challenges for distinction. Without going into great detail or addressing the complexities of this issue, this sub-section simply offers a brief glimpse at how these complex conflicts, where the lines between innocent civilian and fighter are barely distinguishable, impact the obligation of distinction and the need to ensure positive identification of targets. These situations demand ever-greater efforts—through intelligence-gathering and surveillance—to determine who is whom, and what is what, in the zone of combat operations. In addition, modern warfare is increasingly characterized by asymmetry in the military capabilities of the parties, which adds to these difficulties. As such asymmetry grows, the “disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack.”⁴⁹

When hostile persons (members of armed groups or civilians directly participating in hostilities, for example) fail to wear uniforms or carry their arms openly, differentiating between legitimate targets and innocent civilians is extraordinarily difficult and fraught with danger for both the soldier and the innocent civilian. Insurgents take advantage of this dilemma every day to gain an edge over the superior military capabilities and resources of state forces. During Operation Iraqi Freedom, for example, Iraqi insurgents commonly wore civilian clothing when approaching American and British forces in order to get closer without seeming to present a threat.⁵⁰ Perhaps most nefariously, insurgent groups that employ suicide bombing as a tactic have now turned to the use of women and children, for they have proven more likely to evade measures designed to identify

AND SOVEREIGNS (Neill H. Alford, Jr. ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758); FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 16 (Wash., Gov’t Printing Office 1898) [hereinafter THE LIEBER CODE], reprinted in THE LAWS OF ARMED CONFLICTS, *supra*, at 3; FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES (Ernest Nys ed., John Pawley Bate trans., Ocean Publ’ns 1964) (1557).

⁴⁹ Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS: CHANGES AND CHALLENGES 169, 178 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005); see also *id.* at 170 (recognizing a “widening divide between States that possess [sic] high-tech military capabilities and those that do not”).

⁵⁰ *Id.*; see also *Official: Afghan Militants Fled Dressed as Women*, CNN.COM (July 6, 2009, 4:30 PM), <http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.stan.doff/index.html>.

suicide bombers.⁵¹ In Sri Lanka, the Tamil Tigers purposely blended in with the civilian population, sought shelter in the safe zones established to provide fire-free areas for civilian protection, and used civilians as human shields in the face of extensive government shelling.⁵² There is, unfortunately, no end to the examples available of fighters using the cover of the civilian population (as a shield, as a disguise, or in other ways) to gain an advantage over the other side.

These challenges are not limited to the identification of enemy persons, however, but extend to the identification of buildings and other objects that are part of or contribute to enemy operations. Thus, in conflicts between Israel and Hamas, for example, Hamas has used hospitals, schools, mosques, residential houses, and other civilian objects extensively for the storage of weapons, firing of rockets, and other military purposes.⁵³ In fact, Hamas does not have a “war ministry” or many other identifiable military locations—because it deliberately commingles military and civilian buildings and objects. Conflicts in Afghanistan, Iraq, and Lebanon, among others, also involved similar use of protected objects by insurgents and other fighters.⁵⁴ Human rights organizations regularly condemned the Iraqi

⁵¹ See, e.g., Dan Abrams, *Turning a Blind Eye to Child Suicide Bombers*, NBCNEWS.COM (March 26, 2004, 11:37:21 AM), <http://www.nbcnews.com/id/4601244#>. UWHSZaLYc9U (discussing several incidences of child suicide bombings); *Child Bombers-in-Training Arrested in Iraq*, UPI.COM (April 21, 2009, 11:14 AM), http://www.upi.com/Top_News/2009/04/21/Child-bombers-in-training-arrested-in-Iraq/UPI-487612403-26883 (discussing the arrest in Iraq of four children being trained to engage in suicide bombings); Cassandra Clifford, *The Battle for Child Suicide Bombers*, FOREIGN POL’Y BLOGS NETWORK (Aug. 4, 2009), <http://foreignpolicyblogs.com/2009/08/04/the-battle-for-child-suicide-bombers> (explaining that children are used as suicide bombers because “they are easy to manipulate and influence, [and] children are still seen as the least likely suspect and thus less likely to be arrested, making them more effective than their adult counterparts”); Nic Robertson, *Pakistan: Taliban Buying Children for Suicide Attacks*, CNN.COM (July 7, 2009, 5:36 AM), <http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html> (explaining that “young suicide bombers may be able to reach targets unnoticed”).

⁵² *Sri Lanka: UN Says Army Shelling Killed Civilians*, BBC (Apr. 26, 2011), <http://www.bbc.co.uk/news/world-south-asia-13190576>.

⁵³ See ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT’L STUDIES, THE “GAZA WAR”: A STRATEGIC ANALYSIS 43–47, 49, 51–52, 54–55 (2009), available at http://csis.org/files/media/csis/pubs/090202_gaza_war.pdf (describing how Hamas uses mosques, houses and cemeteries for military operations and to store weapons).

⁵⁴ See U.S. Permanent Representative to the United Nations, Letter dated Mar. 5, 1991 from the Permanent Representative addressed to the President of the Security Council, U.N. Doc. S/22341 (Mar. 8, 1991) (explaining that the Iraqis “moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets” and “Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures”); DEP’T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 82 (1992) [hereinafter GULF WAR FINAL REPORT], available at <http://www.ndu.edu/library/epubs/cpgw.pdf> (describing the way in

practice of using hospitals and mosques for military purposes during Operation Iraqi Freedom, as one example. Emphasizing that such use was illegal under LOAC, Human Rights Watch's report *Off Target* explains that the "protection ceases [when] medical establishments are used to commit 'acts harmful to the enemy.' By using hospitals as military headquarters, Iraqi forces turned them into military objectives."⁵⁵ During recent armed strife in Thailand, both sides regularly used schools as headquarters or barracks for soldiers or militants and also located military objectives in schools.⁵⁶

All of these examples highlight the need for a thorough and nuanced understanding of the definition of military objective, the obligations LOAC places on parties to identify military objectives before launching attacks, and how these definitions and obligations play out in conflicts with non-state actors. Before addressing the particular questions and issues that arise with regard to the identification of military objectives in non-international armed conflict, the following section sets forth the definition of military objective and the key issues inherent in the application of the definition during military operations.

II. DEFINITION OF MILITARY OBJECTIVE

The principle of distinction obligates parties to a conflict not only to differentiate between civilians and combatants, but also between civilian objects and military objects as well.⁵⁷ Separating civilian and military objects forms a critical component of the protection of the civilian population during armed conflict. The earliest mention of the term "military objective" appears in the 1923 Hague Rules of Air Warfare, a set of rules drafted by a Commission of Jurists established by the Washington Conference of 1922 on the Limitation of Armaments. Article 24(1) of the 1923 Hague Rules states, "Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the

which the Iraqis dispersed aircraft into civilian areas to prevent the destruction of the Iraqi air force); Dexter Filkins, *In Taking Falluja Mosque, Victory by the Inch*, N.Y. TIMES, Apr. 27, 2004, at A1; Carlotta Gall, *Americans Face Rising Threat from Taliban*, INT'L HERALD TRIB. (N.Y.C.), July 15, 2008, at 4; Jeremy Rabkin, *The Fantasy World of International Law: The Criticism of Israel Has Been Disproportionate*, WKLY. STANDARD, Aug. 21, 2006, at 27.

⁵⁵ HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 72–73 (2003) (quoting Geneva Convention IV, *supra* note 12, art. 18) (criticizing the use of hospitals as headquarters by the Iraqi military).

⁵⁶ HUMAN RIGHTS WATCH, SCHOOLS AND ARMED CONFLICT 5 (2011), available at <http://www.hrw.org/sites/default/files/reports/crd0711webwcover.pdf>. One mother in Thailand explained, for example, after removing her children from a school occupied by paramilitary forces for two years, "when they moved into the school, I feared there would be an attack on the school, so that is the reason I withdrew my children. . . . [I]f there was an attack on the grounds, the children would be hit as well." *Id.*

⁵⁷ Additional Protocol I, *supra* note 12, art. 52(1).

belligerent.”⁵⁸ The second paragraph of that article offers examples of military objectives: “military forces; military works; military establishments or depots; manufacturing plants constituting important and well-known centres for the production of arms, ammunition, or characterized military supplies; lines of communication or of transport which are used for military purposes.”⁵⁹ Although the 1923 Hague Rules were never adopted as a binding legal instrument, they remain important “as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.”⁶⁰

Other early categorizations of military objectives included steel works, motor and engineering works, docks and dockside warehouses, waterworks, gasworks, refining and oil storage depots, and oil wells, for example.⁶¹ Finally, one comprehensive survey looking back at the understanding of the notion of military objective at the end of World War II presents the following list of items considered to be military targets:

military equipment, units, and bases; economic targets; power sources (coal, oil, electric, hydroelectric); industry (war supporting manufacturing, export and/or import); transportation (equipment, lines of communication, and petroleum, oil, and other lubricants necessary for transportation); command and control; geographic; personnel; military; and civilians taking part in the hostilities, including civilians working in industries directly related to the war effort.⁶²

Although the 1949 Geneva Conventions reference the term “military objective,” the drafters of the conventions did not include any definition in the treaties.

At the time of the drafting of the Additional Protocols in 1977, the drafters recognized the need for a comprehensive definition “if the essential distinction between combatants and civilians and between civilian objects and military objectives was to be maintained.”⁶³ Article 52 of Additional Protocol I thus contains the definition of military objective, which is considered to be customary international law.⁶⁴ First, Article 52(1) declares that “[c]ivilian objects shall not be the object of attack or of reprisals” and defines civilian objects as “all objects

⁵⁸ Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare art. 24(1), drafted Dec. 1922–Feb. 1923, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 315.

⁵⁹ *Id.* art. 24(2).

⁶⁰ 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 519 (H. Lauterpacht ed., 7th ed. 1948), quoted in THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 315.

⁶¹ A.P.V. ROGERS, LAW ON THE BATTLEFIELD 30 (1996) (citing J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 624 (1954)).

⁶² W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 55 (1990).

⁶³ CLAUDE PILLOUD ET AL., *supra* note 10, at 631.

⁶⁴ THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64–65 (1989).

which are not military objectives.”⁶⁵ Like the definition of civilian in Article 50 of Additional Protocol I,⁶⁶ the definition of civilian object is a negative one, dependent on the definition of military objective, which appears in Article 52(2):

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.⁶⁷

The definition includes four criteria for determining whether a particular object qualifies as a military objective by making an effective contribution to military action—nature, location, use, or purpose.

Nature refers to “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.”⁶⁸ Thus, military bases, units, equipment and forces, for example, can be attacked at any time. These are objects that are inherently military, that is, they have “intrinsic military significance”⁶⁹ and by their nature make an effective contribution to military action. Targeting such objects fits directly within the concept of military necessity as understood in the Lieber Code and subsequent LOAC treaties and commentary—the authority to take all measures not forbidden by the law that are indispensable for securing the complete submission of the enemy⁷⁰—because they enable the opposing forces to wage war. Two extensive lists of objects that are inherently military by nature offer useful guidance for understanding the concept of “nature” in the definition of military objective. The first, drawn up by the International Committee of the Red Cross (ICRC) in 1956 as an annex to the Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War, includes:

(2) Positions, installations or constructions occupied by the [armed] forces . . . as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).

(3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.

⁶⁵ Additional Protocol I, *supra* note 12, art. 52(1).

⁶⁶ *Id.* art. 50(1) (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”).

⁶⁷ Additional Protocol I, *supra* note 12, art. 52(2).

⁶⁸ PILLOU ET AL., *supra* note 10, at 636.

⁶⁹ Schmitt, *supra* note 37, at 280.

⁷⁰ THE LIEBER CODE, *supra* note 48, art. 14.

- (4) Stores of arms or military sup[p]lies, such as munition dumps, stores of equipment or fuel, vehicles parks.
- (5) Airfields, rocket launching ramps and naval base installations.
- (6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
- (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
- (8) Industries of fundamental importance for the conduct of the war:
 - (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
 - (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment of the armed forces;
 - (c) factories or plant[s] constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;
 - (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)–(c);
 - (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
- (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.⁷¹

The second commonly relied-upon list is the following one drawn up by Major General A.P.V. Rogers, a former Director of British Army Legal Services, using the Additional Protocol I definition and his own review of state practice:

military personnel and persons who take part in the fighting without being members of the armed forces; military facilities, military equipment, including military vehicles, weapons, munitions and stores of fuel, military works, including defensive works and fortifications, military depots and establishments, including War and Supply Ministries; works producing or developing military supplies and other supplies of military value, including metallurgical, engineering and chemical industries supporting the war effort; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads as well as tunnels and canals; oil and other

⁷¹ PILLOU ET AL., *supra* note 10, at 632–33 n.3.

power installations; communications installations, including broadcasting and television stations and telephone and telegraph stations used for military communications.⁷²

The lists excerpted above include a fairly comprehensive collection of objects that fall within the category of “nature”—that is, they have an intrinsically military character. For most of these objects, their use at a given moment is not necessarily relevant—barring use for a distinct civilian purpose, such as using empty military barracks to house civilian refugees—because they automatically contribute to the enemy’s ability to wage war and therefore their destruction, neutralization, or capture offers a definite military advantage.

Location is an important factor because certain objects, such as bridges, make a direct contribution to military action regardless of whether they have a military function. Another example could be a particular site that is critical for military operations because it must be seized, or because it is important to prevent the enemy from seizing it, or to force the enemy to retreat from it. It is generally accepted that a certain area of land can be a military objective by virtue of its location, although in most cases, “there must be a distinctive feature turning a piece of land into a military objective (e.g., an important mountain pass; a trail in the jungle or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbour).”⁷³

The categories of “use” and “purpose” refer respectively to an object’s present or intended function and will often involve objects that do not appear to be military upon first impression, thus requiring further examination in given situations. An example of use that would cause an object to be classified as a military objective would be school buses, or private taxis,⁷⁴ used to transport troops to the front during conflict. Purpose, in contrast, depends on the enemy’s intended future use of an object and must inherently be based on intelligence gathering and analysis regarding the enemy’s intentions. Thus, “[w]hen reliable intelligence or other information indicates that the enemy intends to use an object militarily in the future, the object qualifies as a military objective through ‘purpose.’”⁷⁵ The Eritrea-Ethiopia Claims Commission relied on this criterion for the definition of military objective in holding that the Hirgigo Power Station in Eritrea was a lawful military objective, liable to attack by Ethiopian forces. The power station was under construction and, once completed, would have provided power to the nearby

⁷² ROGERS, *supra* note 61, at 37. Another useful list appears in DINSTEIN, *supra* note 37, at 88.

⁷³ DINSTEIN, *supra* note 37, at 92.

⁷⁴ During World War I, the “Taxis of the Marne” were commandeered to bring French reserve units to the front line; once they were used in that manner, they became legitimate military objectives even though when they served their normal purpose—private taxis—they were civilian objects. *See id.* at 90 (citing GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 112 (1968)).

⁷⁵ Schmitt, *supra* note 37, at 280.

port and naval base. As the Commission explained, “a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use.”⁷⁶

These four criteria are used to determine whether the object in question makes an effective contribution to military action—by its nature, location, use, or purpose. The definition of military objective contains a second requirement as well, that the destruction, capture or neutralization of the object offers a definite military advantage. Here, the benefit from the attack—the military advantage—cannot be simply hypothetical or speculative. As the Commentary to Additional Protocol I explains, “[I]t is not legitimate to launch an attack which only offers potential or indeterminate advantages.”⁷⁷ The concept of definite military advantage can thus often be hard to quantify: at one level, the destruction or neutralization of any object that makes an effective contribution to military action would seem to offer a definite military advantage. Indeed, as some commentators have explained,

In practice, . . . one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy.⁷⁸

However, any assessment of military advantage must be made in light of the circumstances prevailing at the time, such that a civilian object would not offer a definite military advantage at one moment but then could indeed qualify as such if being used as a command post, to store weapons or to launch attacks.

Military advantage also is not limited solely to the tactical gains from the particular attack or parts of an attack, but extends to the attack as a whole and to the security of the attacking force.⁷⁹ As an example, the attacking party may see a definite military advantage in an attack that causes the defending party to focus its strategic and tactical energies on one sector, leaving another sector unprotected. Alternatively, a “classic example involves an attack constituting a ruse intended to cause the enemy to believe an operation is to take place at other than its intended

⁷⁶ Western Front, Aerial Bombardment and Related Claims (Eri. v. Eth.), 26 R.I.A.A. 291, 334–35 (Eri.-Eth. Claims Comm’n 2005).

⁷⁷ See PILLOUD ET AL., *supra* note 10, at 636.

⁷⁸ 1 MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? 252 n.196 (3d ed., 2011).

⁷⁹ See, e.g., U.K. MINISTRY OF DEFENCE, JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 5.4.4(j) (2004) (“The military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The advantage need not be immediate.”).

location.”⁸⁰ The immediate military advantage of destroying the physical target of the attack may be small, but the actual military advantage—to the extent the enemy is fooled regarding the actual location of the operation—“can prove significant.”⁸¹ The Allied bombing of bridges and railroad tracks in the Pas de Calais region of France before the invasion at Normandy offered just such an advantage: “[t]he Germans were convinced that the invasion would occur in the Pas de Calais, thereby diverting the Germans from Normandy.”⁸²

Although Additional Protocol I applies, as a matter of treaty law, only to international armed conflicts, these rules for determining when objects constitute military objectives apply in both international and non-international armed conflict as a matter of customary law as well.⁸³ Furthermore, several treaties applicable in non-international armed conflict incorporate this definition of military objective, including Amended Protocol II to the Convention on Certain Conventional Weapons⁸⁴ and the Second Protocol to the Hague Convention for the Protection of Cultural Property.⁸⁵ As the following section discusses, the nature of non-international armed conflicts, and of the non-state entities that fight in such conflicts, raises a range of interesting and challenging questions about how the definition of military objective applies, and should apply, in such situations.

III. IDENTIFYING MILITARY OBJECTIVES IN CONFLICTS WITH NON-STATE ACTORS: THE CHALLENGES OF POSITIVE IDENTIFICATION

Several components of the definition of military objective and aspects of the identification of objects in accordance with that definition play out differently in conflicts with non-state actors than in the classic international armed conflict. Non-international armed conflicts can take a variety of forms, some of which present

⁸⁰ Michael N. Schmitt, *Targeting in Operational Law*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 245, 254 (Terry D. Gill & Dieter Fleck eds., 2010).

⁸¹ *Id.*

⁸² Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of The Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 173 (2001).

⁸³ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 29.

⁸⁴ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects art. 2, para. 6, May 3, 1996, 2048 U.N.T.S. 93.

⁸⁵ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 1(f), *opened for signature* May 17, 1999, 2253 U.N.T.S. 172. Protocol III to the Convention on Certain Conventional Weapons, made applicable in non-international armed conflicts pursuant to an amendment of Article 1 of the Convention adopted by consensus in 2001, also includes this definition of military objective. *See* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1, para. 3, *opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 171.

additional complications for either the determination of military objectives or the operational decision-making process regarding the lawfulness of attacking such objectives. It is important to note, at the outset, that some of these challenges arise directly within LOAC and relate to how the definition of military objectives is or should be applied; others stem from *jus ad bellum* or other legal paradigms relevant to the use of force against a non-state actor, or lie within the operational realm.

To that end, consider the different forms a conflict with a non-state actor can take: a purely internal conflict between a government and an organized armed group; a conflict between two or more organized armed groups within a single State; a conflict between the government and an organized armed group that spills over into one or more neighboring States; a cross-border conflict in which government forces combat an organized armed group operating from the territory of a neighboring State; a conflict in which multi-national forces fight alongside, or in support of, the host government in its conflict with one or more organized armed groups;⁸⁶ or a conflict between government forces and an organized armed group operating transnationally with hostilities occurring in and across the territory of several States.⁸⁷ Debates surrounding the characterization of conflict with transnational terrorist groups as armed conflicts triggering LOAC are outside the scope of this Article; for the purposes of the instant analysis, it is simply important to note that non-international armed conflicts include a variety of conflict scenarios not limited to fighting within the confines of a single State.⁸⁸ The difference

⁸⁶ See Int'l Comm. of the Red Cross [ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, at 9–11, ICRC Doc. 311C/11/5.1.2, (Oct. 2011).

⁸⁷ See, e.g., Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 299–300 (2007) (calling for the recognition of a hybrid category of “transnational armed conflict” triggering the application of the foundational principles of laws of war); Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46, 78–79 (2009) (arguing that counter-terror military operations should be regulated by fundamental principles of the LOAC).

⁸⁸ Although debate continues regarding the characterization of the United States' struggle with al-Qaeda and other terrorist groups as an armed conflict, there is a general consensus that the United States is engaged in a non-international armed conflict with al-Qaeda. Much of the debate surrounds the parameters of that conflict—whether it includes all instances in which U.S. forces engage with al-Qaeda and associated forces wherever that occurs, or whether the existence of an armed conflict between the two parties must be determined on an individual basis in each geographical location affected. All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note); Hamdan v. Rumsfeld, 548 U.S. 557, 628 (2006); Military Order of November 13, 2001, § 1(a), 3 C.F.R. 918 (2002) (stating that the September 11th attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); Procedures for Trials by Military Commissions

between a conflict occurring solely within the territory of the State fighting against the organized armed group and a conflict in which a State is fighting an organized armed group in the neighboring State, or perhaps operating in a number of locations around the world, can present significant interpretive and operational differences in the application and implementation of the definition of military objectives and the obligations of distinction the definition mandates.

A. “Nature”

As the Commentary explains, “nature” refers to all objects directly used by the armed forces. A look at the lists proffered—some of which are reproduced or excerpted above—as examples of objects that are military by nature evinces a broad understanding of what it means to be military by nature. Not only are military depots, tanks, aircraft and other military equipment included in this category, but also roadways, industries producing components of war materiel, and communications networks, for example. In an international armed conflict, this broad conception of “nature” flows naturally from the principle of military necessity and is based on the State’s control over these networks, resources and industries. Non-international armed conflict—in particular the identification of targets on the non-state actor side of the equation—introduce additional considerations, however. When there is no state actor, does the notion of “nature” change? And, if so, in what ways does it change?

1. *The Nature of the Non-State Actor*

The type of non-international armed conflict and the role of the non-state actor can have a significant impact on how “nature” should be interpreted. At one extreme, many non-state armed groups do not control any significant territory or any infrastructure. In such situations, it is reasonable to conclude that only the group’s military equipment and installations, to the extent they have bases or other

of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. §§ 9.1, 9.3 (2012); *see also* U.S. DEP’T OF STATE, REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNHCR SPECIAL RAPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA 4 (Mar. 10, 2006), *available at* <http://www.asil.org/pdfs/ilib0603212.pdf> (“[T]he United States is engaged in a continuing armed conflict against Al Qaida, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.”); Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[T]he United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces . . .”). The U.S. characterization of the conflict does not depend on geographical or territorial lines. In contrast, for example, “the ICRC does not share the view that a conflict of global dimensions is or has been taking place,” and instead favors a case-by-case analysis of the various situations in question. *See* ICRC, *supra* note 86, at 10–11.

headquarters, could fit within the category of “nature” in defining objects as military objectives. For example, during the conflict in the Philippines between the government and multiple insurgent groups, the government forces attacked the “Bangsamoro Islamic Armed Forces (BIAF)’s 113th Base Command.”⁸⁹ Similarly, Turkish warplanes have attacked PKK ammunition depots in Iraqi Kurdistan.⁹⁰

However, other objects listed in the 1956 ICRC list or other compilations of objects of a military “nature” no longer seem to fit in that category—industries, roadways, communications networks, war ministries, and the like—because they are not within the non-state actor’s authority in any way. For example, television and broadcast stations, which appear on both the ICRC list and the list drawn up by Major General Rogers, are often identified as legitimate military objectives in conflicts between States.⁹¹ Thus, when NATO bombed the Serbian Radio and TV Station (RTS) during Operation Allied Force in 1999, the broadcasting station was a lawful military objective as “part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosević in power.”⁹² Similarly, in July 2011, NATO forces implementing the U.N. Security Council Resolution authorizing the use of force to protect civilians in Libya bombed the state television satellite transmitters in Tripoli because it was “an integral component of the regime apparatus designed to systematically oppress and threaten civilians.”⁹³ These broadcast stations were

⁸⁹ *MILF Claims AFP Attacked Its Forces in Zambo Sibugay*, GMA NEWS ONLINE (Oct. 22, 2011, 2:14 PM), <http://www.gmanetwork.com/news/story/236222/news/nation/milf-claims-afp-attacked-its-forces-in-zambo-sibugay>.

⁹⁰ *Turkish Military Jets Strike Kurdish PKK Targets in Iraqi Kurdistan*, KURD NET (Dec. 27, 2012), <http://www.ekurd.net/mismas/articles/misc2012/12/turkey4379.htm>.

⁹¹ See DINSTEIN, *supra* note 37, at 98 (“[I]t is noteworthy that the Hague Cultural Property Convention of 1954 refers to any ‘broadcasting station’ as a military objective (in the same breath as an aerodrome and a port.)” (quoting Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 8(1)(a), *opened for signature* May 14, 1954, S. EXEC. REP. 110-26, 249 U.N.T.S. 240).

⁹² INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGO., FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA para. 75 (2000) [hereinafter NATO BOMBING REPORT], *reprinted in* 39 I.L.M. 1257 (2000); *see also* W.J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 496 (2001) (“RTS would be a military objective if it was integrated into the military command, control or communications system.”). There was extensive criticism of the decision to target the RTS broadcast station, from both human rights organizations and from other States, including coalition partners within NATO. *See* Amnesty Int’l, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings?: Violations of the Laws of War by NATO During Operation Allied Force*, AI Index EUR 70/18/2000 (June 5, 2000); HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 30 (2000).

⁹³ Press Release, N. Atl. Treaty Org., NATO Strikes Libyan State TV Satellite Facility (July 30, 2011) [hereinafter NATO Press Release], *available at* http://www.nato.int/cps/en/SID-82983FF0-6E3BF21C/natolive/news_76776.htm.

military objectives regardless of whether the State was actually using them as communications networks at the time of the attack because they were part of the communications network the State used in advance of its military effort (although in both cases, the State was using them directly in furtherance of its own objectives). In contrast, in the case of the non-state armed group, a broadcast station could certainly be a lawful military objective, but would likely only meet that definition as a result of the group's use of the station.

Where a non-state armed group controls or administers territory, this conclusion regarding where a broadcast station—or other communications network equipment—fits in the definition of military objective might be entirely different. Imagine that the rebel forces in Libya set up their own broadcast network for a variety of purposes. At that point, the analysis would likely be the same as that for the State as in the examples from Libya and the Federal Republic of Yugoslavia above. In the context of a conflict between a State and a non-state actor operating in the territory of the neighboring State, however, the notion of “nature” would be similarly more limited in most situations. Lebanese television stations, for example, would not be military by nature in a conflict between Israel and Hezbollah in southern Lebanon. Such stations could well constitute military objectives nonetheless if Hezbollah were using them as part of a communications or command and control network, but under the criterion of “use,” not “nature.” In contrast, Hezbollah's own television station was a target of Israeli attack during the 2006 Israel-Hezbollah conflict because, according to Israeli analysis, Hezbollah's al-Manar broadcast station served as a central communications and recruitment tool for Hezbollah.⁹⁴ The distinctions between these various classifications of the same type of object highlight how the various components of the definition of military objectives can differ in conflicts with non-state actors.

As a result, the concept of “nature” as a definitional component of military objective must be understood differently in conflicts with non-state actors. It will also vary across the different types of conflicts with non-state actors. It is important to emphasize, however, that this varying conception of “nature” does not necessarily mean that fewer objects will constitute lawful military objectives in such conflicts. Rather, the operational consequences will be insignificant in most cases because most of these “nature” objects will also fall within the “use” or “purpose” categories; the difference lies in the legal analysis of determining why objects satisfy the definition of military objective.

⁹⁴ See HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 75 (2007), available at <http://www.hrw.org/sites/default/files/reports/lebanon0907.pdf>; *Summary of IDF Operations Against Hizbullah in Lebanon*, ISR. MINISTRY FOREIGN AFF. (July 13, 2006), <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+from+Lebanon+Hizbullah/IDF+operations+against+Hizbullah+in+Lebanon+13-Jul-2006.htm>; *Hezbollah's Al-Manar Television Station Legitimate Target of Israeli Response*, FOUND. FOR DEF. DEMOCRACIES (July 13, 2006), <http://www.defenddemocracy.org/media-hit/hezbollahs-al-manar-television-station-legitimate-target-of-israeli-respons>.

2. *The Special Case of Terrorist Groups Governing Territory*

The type of non-state armed group—domestic rebel group, transnational terrorist organization, cross-border insurgency—involved in the conflict does not necessarily impact the military objective analysis. However, in cases of terrorist entities, the different perceptions of the group’s purposes and activities can be an important factor. For example, the nature of Hamas as a terrorist organization governing a non-state entity and engaging in terrorism and insurgent warfare introduces challenging questions with regard to the specifics of the definition of military objectives. The perception of how and if such organizations have non-military or non-terrorist activities and infrastructure bears directly on the analysis of which objects constitute military objectives in the case of armed conflict. During Operation Cast Lead, the conflict between Israel and Hamas and other Palestinian groups from December 2008 to January 2009, for example, this issue proved consequential in the legal analysis of Israeli targeting decisions.⁹⁵ The Israel Defense Forces targeted a broad swath of government buildings and civilian political infrastructure in Gaza, including civilian ministries, the al-Saraya prison and the Palestinian Legislative Council building.⁹⁶ In response to criticism of these strikes, the Israel Defense Forces explained,

While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.⁹⁷

In essence, therefore, Hamas’s terrorist activities turned all Hamas infrastructure into terrorist—or enemy military—infrastructure. The Goldstone Report, in contrast, found that such buildings could not be military objectives because they were not “war ministries,” the only types of ministries on the two lists of military objectives referenced above.⁹⁸

Although the Israeli position that all Hamas buildings were part of the terrorist infrastructure and therefore legitimate targets is a clear broadening of the

⁹⁵ STATE OF ISR., *THE OPERATION IN GAZA 27 DECEMBER 2008–18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS* 86–89 (2009).

⁹⁶ See U.N. Human Rights Council, *Human Rights In Palestine and Other Occupied Arab Territories*, Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, 12th Sess., paras. 32, 364–77, U.N. Doc. A/HRC/12/48 (2009) [hereinafter *Goldstone Report*] (describing attacks on Palestinian Legislative Council building and Gaza al-Sarayah prison); STATE OF ISR., *supra* note 95, at 89 (discussing attacks on “civilian ministries”).

⁹⁷ STATE OF ISR., *supra* note 95, at 89.

⁹⁸ *Goldstone Report*, *supra* note 96, paras. 385–87.

category of military objectives and legitimate targets, the opposing viewpoint is equally notable in its narrow interpretation of the definition of military objectives. Hamas has no “war ministry,” but rather multiple armed entities engaged in operations against Israel, making this distinction too elementary. The Interior Ministry, for example, oversees “Hamas-controlled government forces in Gaza.”⁹⁹ According to Article 52(2) and the ICRC’s list of military objectives, it meets the standard of a military objective because it makes an effective contribution to military action and its neutralization or destruction would offer a direct military advantage for Israel by eliminating or curtailing the ability of those forces to engage in combat. Moreover, the ICRC list specifically mentions “other organs for the direction and administration of military objectives” as legitimate military objectives.¹⁰⁰ Given the nature of Hamas’s infrastructure, a number of its buildings would so qualify.¹⁰¹

These examples from Operation Cast Lead demonstrate the challenges in assessing the relationship between a so-called political wing and military wing of a terrorist organization and the impact of that relationship on the definition of military objectives as applied to components of the organization’s infrastructure. Neither the broad approach nor the narrow interpretation is satisfying in light of the factual realities; such approaches seem too simplistic for the complexities of the situation. At a minimum, however, unease with the all-or-nothing dichotomy presented in the legal analyses of targeting in Operation Cast Lead highlights the need for a more nuanced understanding of the criterion of “nature” in the definition of military objectives and its interpretation in different types of conflicts with non-state actors. Beyond that, the concept of “nature” begins to give way to the concepts of “use” or “purpose” in these situations: because defining the parameters of “nature” becomes difficult due to the qualities and characteristics of the non-state actor and its overall role and activities, “nature” becomes a narrower category and less prominent in the military objective analysis.

B. Use . . . or Dual Use?

In all conflicts, the line between military and civilian objects can be hard to draw and is often blurry at best. Many buildings—schools, residential buildings, post offices, hotels, and the like—are civilian in nature but might be used extensively for military purposes. As the Commentary to the Additional Protocols explains, “a school or a hotel is a civilian object, but if . . . used to accommodate

⁹⁹ Nidal al-Mughrabi, *Israel Flattens Hamas Ministry in Gaza Strip*, REUTERS (Jan. 18, 2008, 8:40 AM), <http://www.reuters.com/article/2008/01/19/us-palestinians-israel-idUSL1730626720080119>; see also DINSTEIN, *supra* note 37, at 98 (noting that while a “sweeping allusion” to all government buildings as legitimate targets “is wrong,” nonetheless “[g]overnment offices can be considered legitimate targets for attack only when used in pursuance or support of military functions”).

¹⁰⁰ NATO BOMBING REPORT, *supra* note 92, para. 39.

¹⁰¹ See MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* 97 (2006).

troops or headquarters staff, [it will] become [a] military objective[.]”¹⁰² Examples of civilian objects that make an effective contribution to military action could include “civilian buses or trucks which are being transported to the front to move soldiers from point A to point B, [or] a factory which is producing ball bearings for the military.”¹⁰³ In such situations, the analysis under Article 52(2) of Additional Protocol I centers on whether the use of the object in question makes an effective contribution to military action—the first part of the definition of military objective—and whether its destruction, capture, or neutralization offers a definite military advantage. During the Croatian operation to retake the Krajina region in the summer of 1995, the ICTY thus found that the post office in Knin (the capital of the self-proclaimed Republic of Serbian Krajina) and a screws and bolts factory believed to be a logistics supply facility and ammunition components factory were lawful military objectives. First, the post office was thought to be used as a communications center for the Serb forces in the Krajina (SVK) and the government of the Republic of Serbian Krajina—fulfilling the “use” criterion of the definition of military objective.¹⁰⁴ Second, because there was “evidence [indicating] that the SVK planned to produce weapons-related products at the . . . factory,” the factory was a lawful military objective within the “purpose” criterion of Article 52(2).¹⁰⁵

The term “dual-use” takes the blurring of civilian and military objects yet another step and refers to objects that simultaneously have a civilian and military use. In nearly all conflicts, “the military uses civilian infrastructure, telecommunications and logistics also for military purposes. In industrialized countries power-generating stations are crucial for civilian access to clean water, but they also provide power to war industries—and in an integrated power grid all stations provide power to both.”¹⁰⁶ The term is thus most often applied to infrastructure, such as electricity-generating plants or oil refineries, that serves both functions at the same time. In other words, the dual-use description is applicable “not when a facility sometimes serves civilian purposes and sometimes serves military purposes, [as in the examples above,] but rather when it

¹⁰² PILLOUD ET AL., *supra* note 10, at 636; *see, e.g.*, HUMAN RIGHTS WATCH, *supra* note 56, at 5 (describing how paramilitary forces in Thailand occupied schools for two years during the conflict there).

¹⁰³ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 20 (Brian Bill & Jeremy Marsh eds., 2010).

¹⁰⁴ Prosecutor v. Ante Gotovina, Case No. IT-06-90-T, Judgement, ¶ 1899 (Int’l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011), *available at* http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf

¹⁰⁵ *Id.* ¶ 1902.

¹⁰⁶ MARCO SASSÒLI, LEGITIMATE TARGETS OF ATTACKS UNDER INTERNATIONAL HUMANITARIAN LAW 7 (2003), *available at* <http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf>.

continuously serves both civilian purposes and military purposes.”¹⁰⁷ As one of the authoritative commentaries on Additional Protocol I explains, civilian transportation hubs and other civilian objects contributing to military operations can constitute military objectives:

The objects classified as military objectives under this definition include much more than strictly military objects such as military vehicles, weapons, munitions, stores of fuel and fortifications. Provided the objects meet the two-pronged test, *under the circumstances ruling at the time* (not at some hypothetical future time), military objectives include activities providing administrative and logistical support to military operations such as transportation and communications systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict.¹⁰⁸

A first question in conflicts with non-state actors is whether nearly everything is essentially dual-use, because of the intermingling of the non-state group with the civilian population and—in many cases—its lack of territorial control or governing authority. As noted in Part II.A above, the concept of “nature” narrows considerably when analyzing the types of military objectives in such conflicts because, in many cases, non-state armed groups have very little in the way of buildings, property, or other objects that are inherently military in nature as described in the 1956 ICRC list or other lists of military objectives.¹⁰⁹ In addition, because most non-state armed groups operate in and among the civilian population, few objects that qualify as military objectives due to “use” or “purpose” will be solely military in that use or purpose—whether “rocket villages” in southern Lebanon that are also home to hundreds of civilians, or schools used by paramilitaries in Thailand while classes are still ongoing, or hospitals storing rockets in Gaza while patients are being treated on floors just above. When every target becomes a dual-use target, the targeting process becomes more complex,

¹⁰⁷ Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 35 CORNELL INT’L L.J. 559, 562 (2002); see also SASSÒLI, *supra* note 106, at 7; Meyer, *supra* note 82, at 178.

¹⁰⁸ MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 323–24 (1982); see also Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 INT’L REV. RED CROSS 907, 918–19 (2008) (“With many objects, including communications systems, transport systems, manufacturing plants and so on, the question of how to classify them is of great importance As a general rule, it can be said that as soon as the object is actually (not potentially) used for military purposes, or where its secondary use is military, it is a military objective and may, in principle, be attacked.”).

¹⁰⁹ See *supra* Part II.A.

both operationally and legally, specifically with regard to the application of the principle of proportionality.

Applicable at all times and in all conflicts, proportionality is an essential component of the protections LOAC provides for civilians, the civilian population and civilian property in all conflicts, international or non-international.¹¹⁰ The principle of proportionality mandates that commanders must refrain from any attack in which the expected civilian casualties will be excessive in light of the anticipated military advantage.¹¹¹ However, proportionality only applies to attacks where the commander expects some civilian damage; if there are no civilians or civilian property at risk from the attack, the proportionality analysis is not relevant.¹¹² Even in the case of erstwhile civilian objects used for military purposes, therefore becoming military objectives by dint of their “use,” if the object is thus solely military and poses no risk of civilian damage or injury (without a doubt an unusual proposition in non-international armed conflicts), proportionality would not arise as a limiting factor on targeting decisions.¹¹³ Dual-use changes the calculus. Every dual-use target poses extensive proportionality challenges inherent in the process of determining the lawfulness of an attack on such a target. Even more, “the more interconnected and interdependent societies become, the greater the reverberating effects of many attacks, and the more difficult it will be to assess them in advance of an attack.”¹¹⁴

The second, and perhaps more perplexing, challenge of dual-use targets in conflicts with non-state actors is how the notion of dual-use should be thought of in the first place. As described above, dual-use generally refers to objects used for

¹¹⁰ The principle of proportionality is accepted as customary international law in all types of armed conflicts. *See, e.g.*, Rome Statute of the International Criminal Court, *supra* note 25 and accompanying text.

¹¹¹ *See* Additional Protocol I, *supra* note 12, art. 51(5)(b).

¹¹² Attacks on military objectives where no civilians are present do not trigger proportionality obligations. Eric Talbot Jensen, *Unexpected Consequences From Knock-On Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT’L L. REV. 1145, 1171 (2003). For example, during the Falklands War, the British Navy sunk the Argentine warship *General Belgrano*, killing 368 Argentine seamen. Although a large number of lives were lost, the attack did not pose proportionality concerns because it was a military vessel, there were no civilians on board and no risk of damage to civilian life or property. *See* GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 280 (2010).

¹¹³ In reality, such a situation is of course highly unlikely in conflicts with non-state actors where the extensive intermingling (whether incidental or purposeful) of military and civilian objects and personnel puts civilians at risk at almost all times and in almost all situations. However, as a legal matter, this remains nonetheless true.

¹¹⁴ Michael N. Schmitt, Remarks Before the Carnegie Council for Ethics and International Affairs: Ethics and Military Force: The Jus in Bello (Jan. 7, 2002), *available at* <http://www.carnegiecouncil.org/studio/multimedia/20020107/index.html> (emphasizing the need to take into account not only first order effects, but also second-, third-, and fourth-order effects when analyzing proportionality obligations, especially in conflicts taking place within the civilian population).

both civilian and military purposes; the general understanding is usually that such objects are civilian in nature and become military objectives because they are also used for military purposes at the same time. Surely this approach holds true for railroads, interstates, communications networks, broadcast stations, electrical grids, and other similar objects—they are primarily civilian in nature in the “regular course of business” but are used extensively and with great effectiveness by the military during conflict. Analyzing the idea of dual-use objects in conflicts with non-state actors may upend this traditional understanding of dual-use, however. Rather than starting with the civilian nature of the object and “militarizing” it through military use, what seems equally to happen in the activities of non-state armed groups operating in civilian areas is that an object may well be military in nature and then “civilianized” by the activities and use of the civilian population. Imagine, for example, a restaurant that the non-state armed group uses as its primary headquarters; civilians also use the restaurant regularly as a local eatery. Is this restaurant a civilian object that is being used for military purposes? Or is the restaurant equivalent to a military base that happens to house civilian families or have a daycare center?¹¹⁵ The difference may seem slight, but is consequential: if the former, then the restaurant is only a military objective if and once it is being used for military purposes;¹¹⁶ if the latter, then the building is a military objective, full-stop, and can be targeted at any time within the parameters of the principles of proportionality and precautions.¹¹⁷

This reversal of the concept of dual-use not only changes the analysis of what objects constitute military objectives, but also contributes to the narrowing of the criterion of “nature” as a component of the definition of military objective. If objects that are “civilianized” as in the example above, are considered dual-use objects, then they would likely not fall within the category of “nature” at all, since “nature” refers to objects that are intrinsically military. As such, very few objects in a conflict with a non-state armed group commingled with the civilian population would ever satisfy the criterion of “nature,” even those objects that might have

¹¹⁵ Note that even though it is a military objective by nature, any commander attacking such a military base or installation would still need to assess the civilian death or injury that would result from the attack in accordance with the principle of proportionality if he or she expected the attack to cause damage to civilians or civilian property.

¹¹⁶ This notion of use is significantly broader than the notion of “for such time as” used in the formulation of direct participation in hostilities in Article 51(3) of Additional Protocol I. See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT’L L. 281, 305 (2005) (“An approach that relies on actual use appears to suggest an ‘unless and for such time’ test for targeting objects that is more appropriately considered for targeting persons.” (quoting Additional Protocol I, *supra* note 12, art. 51 para. 3)); BOTHE ET AL., *supra* note 108, at 324 (stating that civilian objects need not have a direct connection to hostilities in order to be considered military objectives under Article 52). However, the notion of “use” is still not as broad as that of “nature.”

¹¹⁷ The same proportionality considerations raised in ICRC, *supra* note 86, at 19, thus, of course, apply.

seemed to on first impression—because as soon as civilians start using the building or other object for their own purposes, it becomes a dual-use object and therefore only targetable on the basis of its use or purpose rather than its nature. Since “use” and “purpose” are inherently more fact-driven and case-specific analyses than “nature,” this reconfiguration of dual-use contributes substantially to the increasing complexity of the targeting decision-making process in conflicts with non-state armed groups.

C. *Extraterritorial Non-International Armed Conflicts*

Two types of extraterritorial non-international armed conflicts have grabbed the attention of the international community and added extensively to the discourse about the law applicable to conflicts with non-state actors in recent years: conflicts between a State and a non-state actor located on the territory of a neighboring State, such as the 2006 conflict between Israel and Hezbollah, and conflicts between a State and a transnational terrorist organization, such as the U.S. conflict with al-Qaeda and associated terrorist entities. With regard to the instant discussion, the key factor in such conflicts is the fact that the non-state actor targets are located in the territory of a sovereign State, one most likely not part of the conflict. It is important to note that this cross-border aspect does not change the definition of military objective or the overall legal analysis thereof. Targetability, in whatever type of conflict, depends only on LOAC and the principles and obligations set forth in the treaty and customary law. Rather, the cross-border component of these conflicts introduces considerations from other legal paradigms, such as *jus ad bellum*, and additional operational considerations as well.

1. *Sovereignty and the Use of Force in Another State’s Territory*

LOAC does not address the decision to use force; that is, to go to war. Irrespective of the lawfulness or unlawfulness of the decision to resort to force, LOAC regulates the conduct of hostilities and mandates protections for those not engaged in hostilities. In contrast, *jus ad bellum* governs the lawfulness of the resort to force—when a State may use force within the constraints of the United Nations Charter framework and established legal principles.¹¹⁸ Article 2(4) of the U.N. Charter prohibits the use of force by one State against another: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any [S]tate, or in any other manner inconsistent with the Purposes of the United Nations.”¹¹⁹

International law provides three justifications that effectively rebut this presumption against the use of force: 1) the consent of the territorial State; 2) the authorization of the United Nations under Chapter VII of the United Nations Charter; or 3) individual or collective self-defense in response to an armed

¹¹⁸ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 5 (4th ed. 2005).

¹¹⁹ U.N. Charter, art. 2, para. 4.

attack.¹²⁰ The use of force in self-defense must comply with the principles of necessity, proportionality and immediacy.¹²¹ These three exceptions balance two key international law principles: respect for state sovereignty and the collective interests of the international community, including the right to use force in self-defense. Thus, a State's right to protect its sovereignty and territorial integrity is a fundamental aspect of international law and the international system. At the same time, however, States have an inherent right to protect their legally recognized individual and collective interests and their nationals from attack. A thorough analysis of *jus ad bellum* and how it applies to the use of force against a non-state armed group across State borders is beyond the scope of this Article.¹²² Nonetheless, understanding the relevance of *jus ad bellum* in such conflicts is important as a component of the overall targeting process.

Consider the example of targeting the transportation or communications infrastructure in the neighboring State to prevent the non-state armed group from using it to coordinate and conduct operations and launch attacks. Israel engaged in just such attacks during the 2006 conflict with Hezbollah in southern Lebanon, targeting the main Beirut-Damascus road and other roads "used to transport terrorists and weapons to the terror organizations operating from Lebanese territory against civilians in Israel."¹²³ The Israel Defense Forces also attacked runways and fuel tanks at the international airport in Beirut, based on the airport's role as a major hub for the transfer of weapons and supplies to Hezbollah.¹²⁴ Within the realm of LOAC, at first blush, the fact that the targets are across a State border seems to make little difference in the analysis to determine whether the roads and airport—or other similar targets in other conflicts—constitute military objectives. Indeed, based on Israel's explanation for the targeting decisions quoted above, the roads and airport made an effective contribution to military action and their destruction offered a definite military advantage.¹²⁵

On a practical level, however, one significant difference stands out: the roads and the airport are the sovereign territory of Lebanon, which was not a party to the conflict. In an international armed conflict, when targeting the road networks or

¹²⁰ Article 51 of the U.N. Charter recognizes a State's inherent right to individual and collective self-defense when the subject of an armed attack. Article 42 of the U.N. Charter then allows for military force to be used when authorized by the Security Council. For a further discussion on the use of force, see Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 32–35 (2013).

¹²¹ Gardham, *supra* note 31, at 277–79.

¹²² For an analysis of *jus ad bellum* applicable to targeted strikes against non-state actors, see Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012); see also Michael N. Schmitt, "Change Direction" 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 153–55 (2008) (discussing the principle of *jus ad bellum* applicable to the Israel-Hezbollah conflict in 2006).

¹²³ *Summary of IDF Operations Against Hizbullah in Lebanon*, *supra* note 94.

¹²⁴ *Id.*

¹²⁵ *Id.*

airports or other infrastructure, the attacking force is targeting the infrastructure of the enemy party. In an internal conflict, the State would be targeting what is essentially its own infrastructure in an attempt to deny the non-state armed group access to communications or transportation networks and hubs. Sovereignty does not play a role in either of those situations. In the cross-border conflict with a non-state armed group, sovereignty and territorial considerations are an inherent component of any decision-making process, at two levels.

First, although roads and airfields and other infrastructure would likely fall within the “nature” criterion of the definition of military objective in an international armed conflict, as suggested by the 1956 ICRC list and other compilations of military objectives, in the instant example of a cross-border conflict with a non-state armed group, they would not—precisely for the territorial and sovereignty reasons noted above. Instead, the analysis would center on “use” or “purpose” and, in most cases, just as in the conflict between Israel and Hezbollah, the intended targets would fall within either of those criteria and constitute lawful military objectives. This difference lies solely at the legal analytical level and not at the operational level, naturally, but highlights that the analysis would be significantly more fact-specific and situation-dependent because of the need to identify actual use or purpose. Second, sovereignty and territorial considerations are particularly relevant at the operational and strategic level, as one component of the vast range of considerations that inform such decisions.¹²⁶ The risk or likelihood of drawing the territorial State into the existing conflict with the non-state armed group would, at least in many situations, be an important strategic consideration in the decision-making process regarding infrastructure and like targets in the territorial State, even though they fall squarely within the definition of military objective. More closely related to *jus ad bellum* considerations, the attacking State would likely also want to assess the implications with regard to international legitimacy and the reaction of the international community, another important strategic aspect in today’s conflicts.

2. *Communicative Targeting*

LOAC flatly prohibits direct targeting of civilians and civilian objects.¹²⁷ Targeting aimed solely at civilian morale—in other words, targeting objects that do not qualify as military objectives but are symbolic or notional targets—is also

¹²⁶ In U.S. military doctrine, targeting rests on the components represented in the acronym METT-TC: Mission, Enemy, Terrain and weather, Troops and support available, Time available, and Civilian considerations. U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-0, C1, OPERATIONS 1–9, (2008) (amended Feb. 22, 2011); *see also* Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT’L L.J. 337, 366–67 (2012) (“METT-TC is used in U.S. practice to indicate the relevance of these variables in all operational decision making . . .”).

¹²⁷ Additional Protocol I, *supra* note 12, art. 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”).

forbidden.¹²⁸ However, the fact that the destruction of a lawful military objective will have the secondary consequence of undermining civilian morale or support for the enemy's war effort does not make an otherwise lawful target no longer lawful. The essential analysis is whether the target meets the standard set forth in Article 52(2) of Additional Protocol I.¹²⁹ In Operation Allied Force, the NATO campaign to stop Serbian ethnic cleansing in Kosovo, and in U.S. operations in Iraq, communicative targeting played an important role: one of the central goals of the operations was to force the other side to stop its conduct.¹³⁰ In an international armed conflict, this form of communicative targeting, sometimes also called compellence campaigns or coercive campaigns, can be quite effective at reducing the enemy's will to fight and bringing the enemy leadership to the negotiating table.¹³¹

The operational considerations for communicative targeting can differ dramatically in conflicts with non-state armed groups, in contrast. Legally, the analysis remains the same: if the target is a legitimate military objective, the fact that its destruction also offers the benefit of undermining civilian morale does not change the lawfulness of the target.¹³² The practical issues in most conflicts with non-state armed groups, however, are those dominant in counterinsurgency

¹²⁸ UNIV. CENTRE FOR INT'L HUMANITARIAN LAW, EXPERT MEETING: "TARGETING MILITARY OBJECTIVES" 9–11 (2005), available at http://www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf (recounting a discussion among experts on "whether notional targets fell within the traditional interpretation of Art.52 [of the Additional Protocol I], whether there was still a link between the object of attack and the military action in a narrow or wide sense, or whether a new practice was developing").

¹²⁹ *Id.* at 10 ("[I]t is still lawful to target a military objective that meets the standard of Art. 52.2 [of Additional Protocol I] with the aim of affecting civilian morale.").

¹³⁰ Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 30 (2008) ("Operation Allied Force serves as a classic example of a 'coercive' campaign, for the intent was never to defeat President Slobodan Milosevic's army. Rather, it was to compel a return to the bargaining table and end systematic and widespread mistreatment of the Kosovar Albanian population." (citing Press Release, N. Atl. Treaty Org., M-NAC-1 (99) 51, *The Situation in and Around Kosovo: Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 12 April 1999* (Apr. 12, 1999); Press Release, N. Atl. Treaty Org., S-1 (99) 62, *Statement on Kosovo: Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C. on 23rd and 24th April 1999* (Apr. 23, 1999) (listing NATO's demands as including a cessation of military action, as well as ending violence and repression of the Kosovar Albanians; withdrawal from Kosovo of military, police, and paramilitary forces; an international military presence in Kosovo; safe return of refugees and displaced persons and unhindered access to them by humanitarian aid organizations; and the establishment of a political framework agreement on the basis of the Rambouillet Accords)).

¹³¹ See, e.g., DANIEL BYMAN, MATTHEW C. WAXMAN & ERIC LARSON, *AIR POWER AS A COERCIVE INSTRUMENT* (1999); ROBERT A. PAPE, *BOMBING TO WIN: AIRPOWER AND COERCION IN WAR 15–19* (1996); Paul C. Strickland, *USAF Aerospace Power Doctrine: Decisive or Coercive*, *AEROSPACE POWER J.*, Fall 2000, at 13.

¹³² Fenrick, *supra* note 92, at 495.

operations—the need to win the “hearts and minds” of the population.¹³³ Such demands may well produce entirely opposite or at least different considerations with regard to the effects of targeting certain military objectives. Cross-border conflicts or conflicts with transnational terrorist organizations, in which targeting may take place in more than one State, increase these practical considerations exponentially. The civilian population in the territorial State in such conflicts may play one of many roles: supportive of the non-state armed group, indifferent to the conflict, opposed to the armed group but unable to challenge its presence or operations, or opposed to the armed group and eager to challenge its presence and operations with the requisite support, as just some examples. The impact of communicative targeting in each of these different scenarios can be dramatically different and have divergent consequences for the success of the overall operation. These concerns are taken into account at the operational decision-making level, as part of the METT-TC analysis noted above,¹³⁴ and do not affect the legal analysis of whether certain targets constitute military objectives. Nonetheless, highlighting the differences inherent in conflicts with non-state armed groups, and between different types of conflicts with non-state armed groups, is a useful component of understanding the entirety of the targeting process in conflicts with non-state actors.

IV. CONCLUSION

The challenges of identifying targets—whether persons or objects—in conflicts with non-state actors are not likely to disappear or diminish anytime in the near future. In fact, the success that non-state armed groups have had at commingling with the civilian population and making identification of targets more difficult will only increase those challenges in the future.¹³⁵ And yet, the extensive discourse on the identification and classification of persons in conflicts with non-state actors—whether internal counterinsurgencies or transnational conflicts with terrorist groups—has not been matched by corresponding debate and discussion of the challenges inherent in the identification of objects as legitimate targets of attack in those same conflicts. Protecting civilians and minimizing the harm to civilians and the civilian population during conflict is not only achieved by avoiding attacks on civilian persons, however, but also by maximizing the ability to distinguish between military and civilian objects. Understanding the complexities of that latter determination in the extraordinarily complicated environment of non-international armed conflict can thus help enhance effective

¹³³ See DAVID GALULA, *PACIFICATION IN ALGERIA, 1956–58*, at 246 (1963); U.S. DEP’T OF THE ARMY, *THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL: U.S. ARMY FIELD MANUAL NO. 3-23; MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5*, at app. A-26 (2007).

¹³⁴ See U.S. DEP’T OF THE ARMY, *supra* note 126; NATO Press Release, *supra* note 93.

¹³⁵ See, e.g., Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 *CASE WEST. RES. J. INT’L L.* 279 (2010).

interpretation and application of the definition of military objective and the concomitant obligations under LOAC.

This Article highlights several such complexities and raises questions for further analysis and consideration. First, the criterion of “nature” is significantly narrower as applied to potential targets on the non-state actor side of the conflict, and in some cases, could disappear almost entirely as nearly every object can only be classified on the basis of its use rather than its inherent military nature. Although this shift in the application of the various criteria in the definition of military objective does not—in most cases—impact the operational implementation of the definition, because most objects that would be military objectives would simply fit within a different criterion, it is highly relevant to the overall understanding of the definition of military objective. No less, it is important to explore where the narrowing of the concept of “nature” can change how the definition of military objective is operationalized, such as in cross-border conflicts or other scenarios complicated by additional considerations. Second, examples from current and past non-international armed conflicts raise the question of whether all objects are dual-use. In international armed conflict, although there are many dual-use targets, a large number of objects fall squarely within the category of military by nature and do not introduce the additional complexities of dual-use targets. Dual-use in conflicts with non-state actors may well be yet more complicated, however, because of the potential reversal of our traditional understanding of what dual-use means. Whereas dual-use has generally been thought of as civilian objects that are also used for military purposes at the same time—that is, civilian objects that are “militarized”—a look at how non-state armed groups operate and enmesh themselves within the civilian population suggests that dual-use in such conflicts actually involves “civilianizing” what seem to be initially military buildings or objects. This reversal can have significant consequences for not only the analysis of dual-use targets itself, but also for our understanding of the criterion of “nature” in such conflicts. Finally, the territorial and sovereignty issues that arise in cross-border and transnational conflicts add comprehensive operational and strategic considerations to the targeting decision-making process.

Identification of military objectives is essential to both effective and lawful military operations. It is important therefore to broaden the debate about the identification and classification of persons as legitimate targets of attack—positive identification, as it is known operationally—to include a more sophisticated and comprehensive analysis of how different types of non-international armed conflicts, and the activities of the non-state armed groups fighting in such conflicts, impact how we apply and understand the definition of military objective.