

CHAPTER 9

Fault Lines in the Law of Attack

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I. INTRODUCTION

During recent hostilities, global attention has focused sharply, and often critically, on the law of international armed conflict (LOIAC). Debates continue to rage over, *inter alia*, the applicability of LOIAC to counter-terrorist operations, the status of government civilian employees and contractors on the battlefield, the proper characterization and treatment of detainees, the requirements of occupation law, and the relationship between LOIAC and human rights law. At no time in the past half-century has the international law governing warfare drawn as much attention.

The essence of warfare is ‘the attack’, defined in Article 49 of the 1977 Additional Protocol (I) to the 1949 Geneva Conventions (AP1) as ‘acts of violence against the adversary, whether in offence or in defence’.¹ Together with other aspects of LOIAC, the legal norms regarding attacks are increasingly revealing themselves to be less than fully settled. As combat occurs in the glare of television cameras and under intense non-governmental organization (NGO) scrutiny, fault lines—that is, points of contention within the LOIAC community—have appeared in this aspect of the law. Some are real, some merely perceived.

This article seeks to catalogue those fault lines that appear most frequently and forcefully in expert and lay discourse. Where they result from a misinterpretation of the law, it sets forth the accepted understanding of the principle or rule in question. On the other hand, in cases where genuine disagreement exists among experts, the article identifies and evaluates the competing approaches.

The law governing attack is linear. First, the target must qualify as a ‘military objective’, a LOIAC term of art. Second, the ‘means’ (weapon) and

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¹ Protocol Additional (I) to the Geneva Convention of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts (12 Dec 1977) Art 49, 1125 UNTS 3, 16 ILM 1391 (1977) [hereinafter API].

'method' (tactic) employed must be lawful. Third, attacks with lawful methods and means against legitimate military objectives must still comply with the rule of proportionality, which prohibits attacks causing unintended but foreseeable damage to civilian objects (collateral damage) and harm to civilians (incidental injury) that is excessive relative to the concrete and direct military advantage anticipated. Fourth, LOIAC requires attackers to take certain specified precautions. Only attacks meeting each of the four cumulative conditions are lawful. This article surveys ten pervasive fault lines bearing on the first three (the fourth presents less dramatic issues). Although each topic merits fuller treatment than possible within the confines of a single article, the discussion will hopefully contribute to shaping and refining further analysis.

II. MILITARY OBJECTIVES

At the heart of LOIAC lies the principle of distinction. Labelled by the International Court of Justice (ICJ) as one of two 'cardinal' principles in this body of law,² distinction serves as the 'foundation on which the codification of the laws and customs of war rests'.³ Indeed, the principle appeared in codified form as early as the 1863 Lieber Code, a guide for conduct of the Union forces during the American Civil War.⁴ It was subsequently confirmed in the 1899 and 1907 Hague Regulations,⁵ which the Nuremberg Tribunal deemed 'declaratory of the laws and customs of law,' a position reiterated by the International Court of Justice (ICJ) a half century later.⁶ The principle distinction also found expression throughout

² Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, 1996 ICJ Reports, para 78 [hereinafter Nuclear Weapons]. The other principle is 'unnecessary suffering'.

³ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug 1949 (Yves Sandoz, Christophe Swinarki and Bruno Zimmerman (eds) ICRC 1987) para 1863 [hereinafter Commentary].

⁴ War Department, Adjutant General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No 100 (Lieber Code) (24 April 1863) Art 22.

⁵ Convention [No II] with Respect to the Laws and Customs of War on Land, with annex of regulations, Art 22, 29 July 1899, 32 Stat 1803, 1 Bevans 247; Regulations Respecting the Laws and Customs of War on Land, annex to Convention (No IV) Respecting the Laws and Customs of War on Land, 18 Oct 1907, Art 22, 36 Stat 2277, 1 Bevans 631.

⁶ Trial of the Major War Criminals, 14 Nov 1945–1 Oct 1946, Nuremberg, 1947, vol I 254; Nuclear Weapons (n 2) para 77. See also, Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, General List. No 131 (9 July 2005) para 86; Report of the Secretary General on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (3 May 1993), UN Doc S/25704, 32 ILM 1159 (1993). The Security Council approved the report unanimously.

the 1949 Geneva Conventions, in that the four treaties established categories of protected persons.⁷ It undoubtedly constitutes customary international law.⁸

In its contemporary form, distinction has been codified in API, Article 48.

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.

Two derivative rules provide granularity to the general principle. The first is a prohibition of attacks on civilians, Article 51.2.

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 52.1 sets forth the second, a corresponding ban on attacking civilian objects: 'Civilian objects shall not be the object or attack. . . ' It goes on to define civilian objects as 'all objects which are not military objectives.' Pursuant to Article 52.2,

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.⁹

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 Aug 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287.

⁸ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (3 vols) (CUP Cambridge 2005) Rules 1 and 6 [hereinafter CIHLS]. See also Rome Statute of the International Criminal Court (17 July 1998) Art 8.2(b)(i), UN Doc A/CONF. 183/9, 37 ILM 1002 (1998), corrected through 16 Jan 2002.

⁹ Protocols II and III of the Conventional Weapons Convention and the Second Protocol to the Cultural Property Convention, as well as many military manuals and training material (including those of the US), repeat this formula. 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, 1980, 1342 UNTS 137 (1980); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), 1980, as

Thus, there are four alternative ways an object can qualify as a military objective—through nature, location, purpose, or use. ‘Nature’ denotes intrinsic military significance, thereby including objects like ammunition depots, tanks, combat aircraft, headquarters, or military barracks. ‘Location’ refers to areas that have ‘special importance to military operations’. The classic example is a mountain pass that can be blocked to foil the enemy’s advance. When 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’. Finally, ‘use’ means that the enemy is presently utilizing an object militarily.¹⁰ Virtually any object or location may become a lawful military objective through use (or abuse) by a belligerent.

A number of other LOIAC rules either build on or foster the general principle of distinction. For instance, specific API articles ban or restrict attacks against medical establishments, cultural objects, places of worship, objects indispensable to the civilian population, the natural environment, and works and installations containing dangerous forces.¹¹ Moreover, the rule of proportionality and the requirement to take precautions in attack (discussed below) seek to minimize the harmful effects of warfare on the civilian population.

A. Qualification as a military objective

The most frequently cited disagreement regarding the distinction principle surrounds the reach of the term ‘military objective’, a rather curious fact given that all sides, including non-contracting States such as the United States, accept the API textual definition as correct.¹² Significant in this

amended, 1996, Art 2.6, 35 ILM 1206 (1980); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, Art 1.3, 1342 UNTS 171; Second Protocol to the Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict (1996) Art 1(f), 38 ILM 769 (1999); US Navy/Marine Corps/Coast Guard, The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7, para 8.1.1, 1995, reprinted in its annotated version as vol 73 of the US Naval War College International Law Studies (1999). On the topic generally, see Yoram Dinstein ‘Legitimate Military Objectives Under the Current Jus in Bello’ in *Legal and Ethical Lessons of NATO’s Kosovo Campaign* 139 (Andru E Wall (ed) Naval War College 2002) (vol 78 US Naval War College International Law Studies); Horace Robertson ‘The Principle of Military Objective in the Law of Armed Conflict’ in *The Law of Military Operations* 197 (Michael N. Schmitt (ed) Naval War College 1998) (vol 72 US Naval War College International Law Studies).

¹⁰ Commentary (n 3) paras 2020–4.

¹¹ API (n 1) Arts 12, 53, 54, 55, and 56, respectively.

¹² The US position on API is authoritatively set out in Memorandum for Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications 8 May 1986 (on-file with author). See also Michael J Matheson ‘The United States Position on the Relation of

regard is the divide between States (led by the US) that interpret the notion broadly, and those that take a restrictive approach. At the centre of the debate lies the US Navy, Marine Corps and Coast Guard's *Commander's Handbook on the Law of Naval Warfare*. The most recent and authoritative American LOIAC manual, the *Handbook* describes military objectives as objects contributing to the enemy's warfighting or war sustaining capability. It explains that '[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked,' citing Confederate cotton production during the US Civil War as an example.¹³ A contemporary illustration is an oil industry that entirely underpins a nation's economy. The 'war sustaining' verbiage also appears in US joint targeting doctrine and has been included in the definition of military objectives used by the Military Commission at Guantanamo.¹⁴

On the other side are those who point to the phrases 'effective contribution to *military* action' and 'offers a definite *military* advantage.' They argue their plain meaning extends only to objects with a close nexus to the conduct of hostilities. The official ICRC *Commentary* on Article 52.2 supports this interpretation, suggesting that the 'definite military advantage' requirement excludes 'an attack which only offers potential or indeterminate advantages'.¹⁵

Consider oil. Few would contest the legitimacy of striking facilities that produce POL (petroleum, oil, and lubricants) for the military (even if not exclusively for the armed forces). However, attacking oil facilities dedicated solely to export production in order to deprive the military of funding stretches the definition beyond its intended reach. As one commentator has noted, '[f]or an object to qualify as a military objective there must exist a proximate nexus to military action (or "war-fighting").'¹⁶ The present writer endorses this restrictive approach.

Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 American University Journal of International Law and Policy 419

¹³ NWP 1-14M (n 9) para 8.1.1. This assertion is labelled a 'statement of customary international law.' The *Handbook* cites General Counsel, Department of Defense, Letter of September 22, 1972, reprinted in (1973) 67 American Journal of International Law 123, as the basis for this characterization.

¹⁴ US joint doctrine reinforces this approach by providing that '[c]ivilian objects consist of all civilian property and activities other than those used to support or sustain the adversary's warfighting capability.' Joint Chiefs of Staff, Joint Doctrine for Targeting, Joint Publication 3-60, 17 Jan 2002 A-2. The term 'war sustaining' also appears in the Instructions for the US Military Commission at Guantanamo. Department of Defense, Military Commission Instruction No 2, Crimes and Elements for Trials by Military Commission (30 Apr) 2003 para 5D.

¹⁵ *Commentary* (n 3) para 2014.

¹⁶ Yoram Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* (CUP Cambridge 2004) 87-8.

Despite the apparent chasm between the broad and narrow approaches, the practical impact has been negligible. There are two reasons this is so, both logical. First, it takes a long time for attacks on a country's economy to affect battlefield operations; therefore, it makes better sense to expend munitions against the enemy's military. Second, if the conflict is likely to end in occupation, it is counter-productive for an attacker to destroy the economic means of supporting the enemy population. This reality underpinned much of the Operation Iraqi Freedom (OIF) targeting philosophy, during which Coalition forces assiduously avoided harming the Iraqi economic and logistic infrastructure.

The only enduring controversy over target status during recent combat operations involved NATO's strike on Belgrade's Radio Televisija Srbija facility during Operation Allied Force (OAF) in 1999. Litigation ensued in the European Court of Human Rights, but the Court dismissed the case on jurisdictional grounds.¹⁷ Moreover, the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) found insufficient basis to indict (on the grounds of attacking a civilian object).¹⁸ Coalition forces later struck television stations during Operations Enduring Freedom (OEF—Afghanistan) and OIF.¹⁹ Whether media facilities constitute military objectives remains unsettled, but the debate does not evoke the 'war-sustaining' issue in its classic form.²⁰

Finally, one school of thought suggests expansion of the definition of military objectives to meet the realities of contemporary warfare. Advocates argue that:

We need a new paradigm when using force against societies with malevolent propensities. We must hold at risk the very way of life that sustains

¹⁷ *Bankovic & Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (12 December 2001) Eur Ct Hum Rts App No 52207/99.

¹⁸ Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) paras 71–9, reprinted in (2000) 39 ILM 1257. On 2 June 2000, the Prosecutor announced her decision not to proceed to the Security Council. UN Doc S/PV.4150.

¹⁹ Albeit not intentionally in every case.

²⁰ A fact illustrated by inclusion of broadcasting and television stations in an illustrative list of military objectives proffered by APV Rogers, who nevertheless also cites 'dangers in widening the definition of military objectives'. APV Rogers *Law on the Battlefield* (2nd edn MUP Manchester 2004) 81, 84. The ICRC included such facilities in a proposed list of military objectives it offered in 1956. Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, Annex (1956). The list is reprinted in Report to the Prosecutor (n 18) para 39. For a analysis arguing that they are not legitimate military objectives, see Bernard Dougherty and Noelle Quenivet 'Has the Armed Conflict in Iraq Shown once more the Growing Dissension Regarding the Definition of a Legitimate Target? What and Who Can be Lawfully Targeted?' (2004) 3 *Humanitaires Volkerrecht* 188, 190–2.

their depredations, and we must threaten to destroy the world as they know it if they persist. This means the air weapon should be unleashed against entirely new categories of property that current conceptions of LOAC put off-limits.²¹

The advent of effects-based operations may impel others to similar conclusions.²² Many, including the present writer, have criticized such assertions. In fairness, though, it is essential to emphasize that even supporters recognize their position represents mere *lex ferenda*.

B. Lines of communication as military objectives

A recurring debate rages over whether lines of communication constitute military objectives by nature, such that they may be attacked regardless of their current use, future purpose, or location. One influential commentator has included 'arteries of transportation of strategic importance, principally main-line railroads and rail marshalling areas, major motorways (like the interstate roads in the USA, the Autobahn in Germany and the autostradas in Italy), navigable rivers and canals (including the tunnels and bridges of railways and trunk roads)' in a proposed list of objects which '*eo ipso* make an effective contribution to military action.'²³ Given the centrality of logistics in modern warfare, this makes sense. For instance, even though a bridge is presently used exclusively for civilian purposes, dropping it may limit enemy options as the conflict unfolds in often-unpredictable ways. To the extent the bridge's destruction shapes the enemy's military options, the attack makes an effective contribution to the attacker's military situation.

The opposing view holds that lines of communication should be evaluated on a case-by-case basis. Those used militarily, wherever located, qualify as military objectives. Further, those that factor into known future enemy operations meet the purpose criterion. Perhaps most significantly, attacks on lines of communication designed to shape or restrict enemy military activities fall within the location criterion.

²¹ Charles J Dunlap Jr 'The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era' (Summer 2000) *Strategic Review* 14. See also 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' (2001) 51 *Air Force Law Review* 143.

²² Effects-Based Operations focuses not on the object destroyed, but rather on the effects generated through destruction of the object. On Effects-Based Operations and law, see Michael N Schmitt *Aerial Effects-Based Operations and the Law of Armed Conflict*, paper presented at a conference to mark the launch of the UK Manual of the Law of Armed Conflict, Oxford University, July 2004. The papers will appear in a compilation to be edited by Steven Haines and published by OUP.

²³ Dinstein *Conduct* (n 16) 88.

But it is surely possible to posit lines of communication, an attack on which will have absolutely no effect on enemy military activities, present or future. Consider OAF. It would have been excessive for Yugoslav forces to treat every major highway, bridge, combat aircraft-capable civilian airfield, or major waterway in the 19 NATO nations as a legitimate target. In other words, unless an attacker can credibly articulate how an attack on a line of communication will effectively contribute to military actions and offer a definite military advantage in the circumstances ruling at the time, the said line is not legally targetable.

Relevant in this regard are the scope and objectives of the conflict. In the Report to the ICTY Prosecutor, the committee established to review NATO actions noted:

When the definition [of military objective] is applied to dual-use objects which have some civilian uses and some actual or potential military use (communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict.²⁴

This is a perceptive comment. There are certainly cases where entire categories of LOCs become military objectives upon the commencement of hostilities. However, conflicts may be limited in terms of objectives and (or) strategy and tactics. During OAF, it was NATO's avowed intention to avoid introducing ground forces. Moreover, the campaign objectives centred on coercing the Yugoslav leadership, rather than conquest of the country. In light of such strategy and objectives, it would have been indefensible to treat every Yugoslav line of communication as military objectives. This logic applies equally to any potentially dual-use target set.

Despite the debate, the distinction between the two approaches will seldom have any practical import. The 'principle of war' known as 'economy of force' generally deters commanders from executing attacks having little tangible impact on military operations; they prefer to use their forces against those targets likely to measurably influence combat operations.²⁵ This being so, legal characterization of lines of communication will influence operations far less than the realities of warfare.

²⁴ Final Report to the Prosecutor (n 18) para 37.

²⁵ 'Economy of force is the judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations in order to achieve mass elsewhere at the decisive point and time, Joint Chiefs of Staff, Joint Warfare of the United States, Joint Publication 1 (14 November 2000) B-1.

C. Morale of the enemy civilian population as a military objective.

The persistent controversy over targeting the morale of the enemy population confuses the legal concept of military objective with the military notion of strategic, operational, and tactical aims. An attack's effect on civilian morale is irrelevant as a matter of law—a potential target either qualifies as a military objective because it makes an effective contribution to military action (through nature, location, purpose or use) and destruction or neutralization will yield a definite military advantage. . . or it does not. If it so qualifies, it may be attacked, period. The fact that the attacker hopes the strike will weaken civilian morale (even intends for it to) does not detract from the target's status as a military objective. Thus, for example, an attacking force may target military equipment, facilities, and forces based in the capital city in order to undercut the population's confidence in its government, even though the targets do not exert much influence on the course of hostilities. What is not allowed is attacking civilians (who are not directly participating in hostilities, see below) or civilian targets for the purpose of undercutting morale.

The matter of civilian morale was highlighted during OAF when Lieutenant General Michael Short, the Air Component Commander, stated 'I felt that on the first night the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so the next morning the leading citizens of Belgrade would have got up and asked "Why are we doing this?" and asked Milošević the same question.'²⁶ Much controversy ensued, with critics proclaiming that Short had advocated an attack on civilian morale.

Of course he had. Yet, the relevant question was not whether it was permissible to target civilian morale. It was whether the power, bridges, and water qualified as lawful military objectives through nature, location, use, or purpose. Speaking later at a conference on the conflict, Short got it right:

I am not going to think that you are so naive that I do not say to myself and to my planners that this will also make the Serb population unhappy with their senior leadership because they allowed this to happen. But that is a spin off—a peripheral result—of me targeting a valid military objective.²⁷

There is nothing unlawful about seeking to affect civilian morale by striking otherwise lawful military objectives.

²⁶ CR Whitney *The Commander: Air Wars Won't Stay Risk-Free, General Says*, New York Times (18 June 1999) A1.

²⁷ Michael Short 'Operation Allied Force from the Perspective of the NATO Air Commander' in Wall (n 9) 29.

D. Enemy leadership a lawful military objective

Leadership strikes assumed centre stage during Operation Iraqi Freedom. Coalition forces struck 50 'leadership targets' during the air campaign. In fact, the launch of operations was advanced when intelligence reported that Iraqi President Saddam Hussein was at Al-Dura Farm near Baghdad. Seeing a chance to decapitate the Iraqi regime in the first blow of the war, President Bush immediately authorized F-117 aircraft and cruise missile strikes.²⁸

The strategy of attacking an opponent's leadership is alluring. At least in theory, decapitation can paralyze the enemy's nervous system, as loss of command and control cascades down through subordinate echelons. Organizations characterized by highly centralized decision-making structures are especially vulnerable.

Decapitation strategies, traditionally controversial, seem to be acquiring greater legitimacy. Recall that US Air Force Chief of Staff General Michael Dugan was unceremoniously fired in 1990 when he acknowledged Saddam Hussein's death was an Operation Desert Storm air campaign objective.²⁹ But by Operation Allied Force, NATO was willing to publicly announce it was bombing government ministries in order to effect a 'longer term and broader impact on the Serb military machine.'³⁰ Institutional decapitation had come of age. And in 2001 Coalition forces openly targeted Taliban leader Mullah Omar. No significant criticism of this individualized targeting ensued.

Human Rights Watch's comments on the OIF air campaign in its report *Off Target* aptly illustrate the growing acceptability of some sorts of decapitation:

[A]erial strikes targeting the leadership of a party to the conflict. . . are governed by the same rules of IHL that apply to other military actions: The individual attacked must be a military target and the attack must not be indiscriminate, i.e., it must distinguish between civilians and combatants, and it must not cause harm to the civilian population or civilian objects which could be 'excessive in relation to the concrete and direct military advantage anticipated' from the attack.³¹

²⁸ Bob Woodward *Plan of Attack* (Simon & Shuster New York 2004) ch 35.

²⁹ Bruce van Voorst 'Ready, Aim, Fired' *Time* (1 Oct 1990) 55.

³⁰ Lord Robertson, *Kosovo One Year On: Achievement and Challenge*, March 21, 2000, at 13 <<http://www.nato.int/Kosovo/repo2000/index.htm>>. Even when NATO struck Slobodan Milošević's residence there was very little concern expressed. Bradley Graham 'Missiles Hit State TV, Residence of Milošević' *Washington Post* (23 April 1999).

³¹ Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (Dec 2003) 20 <<http://www.hrw.org/reports/2003/usa1203/>>.

Before turning to the relevant law, it is essential to distinguish leadership strikes from assassination. Assassination (as a LOIAC term of art) involves ‘treacherously’ killing or wounding the enemy, as in feigning protected status to kill a specific individual.³² The technique employed, not the targeting of an individual, is determinative. LOIAC expressly prohibits assassination.³³

Whether or not a leader may be attacked depends on his or her status. Recall that Article 51.2 of API prohibits attacks on the civilian population, including individual civilians. Article 51.3 limits this protection by noting ‘[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.’

The first question, then, is who qualifies as a civilian. In Article 50, API I defines civilians as those who are not combatants under Article 4 of the Third Geneva Convention of 1949 and Article 43 of API.³⁴ Combatants include members of the armed forces,³⁵ militia, volunteer corps, or members of an organized resistance commanded by a person responsible for subordinates and who wear a distinctive sign or uniform, carry weapons openly, and are subject to a disciplinary system capable of enforcing LOIAC; and members of a *levée en masse*.³⁶ Personnel of paramilitary or armed law enforcement agencies become combatants whenever their organization has been incorporated into the armed forces, so long as there has been formal notification to the other side.³⁷

Leaders who fall within one of these categories are generally lawful targets. This applies not only to those who are typically *uninvolved* in military operations, such as judge advocates, but also to national leaders who have ‘military status.’³⁸ There is no LOIAC exemption for particular leadership positions, such as head of State.

³² 1907 Hague Regulations (n 5) Art 23(b).

³³ Assassination was forbidden as early as 1863. Lieber Code (n 4) Art 148. On assassination in armed conflict, see Schmitt ‘State Sponsored Assassination in International and Domestic Law’ (1992) 17 *Yale Journal of International Law* 609; W Hays Parks ‘Memorandum of Law: Executive Order 12333 and Assassination’ (1989) *The Army Lawyer* 4.

³⁴ GCIII (n 7) Art 4A(1)&(2); API (n 1) Art 43.1

³⁵ Except medical and religious personnel. API (n 1) Art 43.2.

³⁶ A *levée en masse* consists of ‘inhabitants of a non-occupied territory, who on approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units’ GCIII (n 7) Art 4A(6).

³⁷ API (n 1) Art 43.3.

³⁸ The Rome Statute specifically makes them subject to prosecution, another indication that humanitarian law carves out no special regime for heads of State. Rome Statute, above n 8, Art 27. On targeting heads of States, see also Thomas Wingfield ‘Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine’ (1999) 22 *Maryland Journal of International Law & Trade* 287; Casper Weinberger ‘When Can We Target the Leaders?’ (Spring 2001) *Strategic Review*, at 21; Robert F Turner ‘It’s Not Really ‘Assassination’: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites’ (2003) 37 *University of Richmond Law Review* 787; Nathan A Canestaro ‘American

But surely all national leaders who occupy a position at the top of the military chain of command—whether legislative, constitutional, or de facto—are not targetable members of the armed forces. If this were the case, compliance with the core democratic principle of civilian control of the military would render most national leaders subject to attack. Moreover, some occupy purely ceremonial positions. For example, Queen Elizabeth II is Commander-in-Chief of the British military, and, for purely historical reasons, British officers swear an oath of allegiance to her. But she plays no part in military decision-making.

Some leaders are, however, unquestionably members of the military in both *fact and name*. The evaluation must be conducted on a case-by-case basis. Wearing a uniform, having a military title or rank, and carrying weapons constitute strong combatant status indicators. Of greater weight is the extent and scope of decision-making authority. If the leader makes decisions regarding the conduct of hostilities at the tactical or operational level, he or she is performing combatant functions. For instance, Saddam Hussein clearly qualified as a military officer. He wore a uniform, was armed, and directed combat operations. Such individuals are targetable combatants.

On the other hand, making strategic level decisions such as whether and when to initiate hostilities or engaging in political coalition building does not, standing alone, suffice. As an illustration, although the US Constitution designates the President as the Commander-in-Chief, involvement of individual wartime Presidents in military decision-making has varied widely.³⁹ President Bush approved operational plans for Operations Enduring Freedom and Iraqi Freedom. Such activities arguably render him a valid target. Heads of State who are less involved in day-to-day military decisions may not fall into this category.

More problematic are those who are not members of the armed forces or serving as de jure leader of the nation's military effort, but who are somehow otherwise involved with military matters. For instance, Parliaments often control the military budget, civilian ministries may manage war material production, and intelligence agencies are regularly staffed with civilians. Indeed, individuals may wield great influence over military matters through such unofficial factors as political, party, or family ties.

The issue is direct participation. Pursuant to Article 51.3 of API and customary international law, direct participation results in a loss of immu-

Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo' (2003) 26 Boston College International and Comparative Law Review 1; Louis R Beres 'Assassinating Saddam Hussein: The View From International Law' (2003) 13 Indiana International and Comparative Law Review 847.

³⁹ US Constitution, Art II, s 2, cl 1.

nity from attack.⁴⁰ The official ICRC *Commentary* explains that '[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.'⁴¹ It further describes direct participation as 'acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.'⁴² Any member of the enemy leadership (or anyone else for that matter) who is directly participating in hostilities may be attacked. Thus, at least in international armed conflict, there is no juridical valence to the politically charged term 'targeted killings'. Analysis is simpler. Leaders who either qualify as a combatant or directly participate in hostilities amount to legitimate targets.

Application of the direct participation guidelines in concrete cases is a source of much contention, particularly as civilians increasingly perform functions that were traditionally the province of uniformed personnel. Some experts urge a restrictive interpretation, one that shields the greatest number of such civilians from attack as direct participants. Others take the opposite view, arguing that humanitarian ends are best served by bright-line standards that restrict civilian involvement in conflict. Both positions make sense.

Elsewhere, this writer has suggested that direct participation is best judged through an assessment of the criticality of the acts the civilian performs to the direct application of violence against the enemy forces.⁴³ Gathering, analyzing, and disseminating intelligence offers an excellent illustration of this approach. Strategic-level geopolitical estimates have few immediate effects on current combat operations. By contrast, tactical and operational level intelligence lies at the heart of the battle.⁴⁴ It is often the

⁴⁰ The ICRC's Customary International Humanitarian Law Study cites this principle as customary. CIHLS (n 8) Rule 6.

⁴¹ *Commentary* (n 3) para 1678.

⁴² *ibid* para 1942.

⁴³ Schmitt 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511, 534–5. On the topic, see also *ibid* 'Direct Participation in Hostilities' and 21st Century Armed Conflict' in *Crisis Management and Humanitarian Protection* (Horst Fischer et al (eds) BWV Berlin 2004) 505.

⁴⁴ The Department of Defense's *Dictionary of Military and Associated Terms* offers the following definitions for the levels of war:

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

Operational Level of War: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or

difference between immediate victory and defeat on the battlefield. Arguably, civilians involved in the former would not be directly participating in hostilities, whereas those performing functions related to the latter would fall within the ambit of direct participation. In the end, a case-by-case evaluation is necessary when assessing civilian leadership actions that might amount to direct participation.⁴⁵

E. Meaning of the term 'attack'

As noted, Article 48 of API prohibits directing 'military operations' against other than military objectives. Does this standard prohibit any operation targeting civilians or civilian objects? Clearly not, for it is well accepted that propaganda and other psychological operations directed at the enemy population are lawful methods of warfare.

A careful reading of API, as well as an understanding of the State practice that informs customary international law, reveals that only 'attacks' against the civilian population are forbidden. Most significantly, nearly all of Article 48's derivative prohibitions are expressed in terms of attacks: 'the civilian population as such, as well as individual civilians, shall not be the object of attack'; 'civilian objects shall not be the object of attack'; 'indiscriminate attacks are forbidden'; 'attacks shall be limited strictly to military objectives'; and so on.⁴⁶

Definition of the term is, therefore, essential, for an operation not amounting to an attack will fall beyond the reach of the LOIAC prohibitions. As noted, Article 49.1 of API describes attacks as 'acts of violence

other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives. *Tactical Level of War*: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, as amended through May 9, 2005 <<http://www.dtic.mil/doctrine/jel/doddict/>>.

⁴⁵ The case-by-case approach is adopted in NWP 1-14M (n 9) para 11.3. The International Criminal Tribunal for the Former Yugoslavia came to the same conclusion:

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.

Prosecutor v Tadic Case No IT-94-1-T, (ICTY 1997) para 616. The issue was crimes against persons taking no direct part in hostilities.

⁴⁶ API (n 1) Arts 51.2, 52.1, 51.4, and 52.1.

against the adversary, whether in offence or in defence.’ Other provisions suggest that violence of some sort is a ‘prerequisite’. Article 51.1 sets forth the rule that the ‘civilian population and individual civilians shall enjoy general protection against *dangers* arising from military operations.’ ‘Acts or threats of *violence* the primary purpose of which is to spread terror among the civilian population’ are forbidden in Article 51.2. And even the ICRC *Commentary* on the word ‘operation’ states that the reference is to ‘military operations during which *violence* is used.’⁴⁷

But does violence refer to the means (weapon) used or to the consequences caused? This issue surfaces most overtly in the context of computer network attack and other forms of information warfare. The transmission of malicious computer code is certainly not ‘violent.’ On the other hand, computer network attacks can be deadly and destructive. Imagine the results of shutting down an air traffic control system, a municipal water treatment plant, or a nuclear reactor’s cooling system through computer network attack.

Bearing LOIAC’s humanitarian ends in mind, the term ‘attack’ logically includes all acts that cause violent consequences, ie, death or injury to civilians (including significant human physical or mental suffering⁴⁸) or damage to, or destruction of, tangible civilian objects. Perhaps loss of assets that are directly transferable into tangible property, such as money or stocks, should also be covered by the prohibition. But inconvenience, harassment, or mere diminishment in quality of life would not suffice.

Other API provisions support the portrayal of attacks as acts causing death, injury, damage, or destruction. The rule of proportionality evaluates prospective military advantage in light of ‘loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.’⁴⁹ Attacks causing ‘widespread, long-term, and severe damage’⁵⁰ to the environment are restricted, as are those against dams, dykes, or nuclear electrical generating stations resulting in ‘severe losses among the civilian population.’⁵¹

This interpretation is not universally accepted. Some experts take the view that death, injury, damage, or destruction need not occur for an operation to rise to the level of a prohibited ‘attack.’ They very perceptively point to the fact that the definition of military objective in Article 52.2 refers not only to destruction, but also capture and neutralization. Based on this fact, one commentator has concluded ‘the mere disabling of an object, such as shutting down of the electricity grid, without destroying it should

⁴⁷ Commentary (n 3) para 1875.

⁴⁸ It is reasonable to include human suffering in the meaning based on the fact that API prohibits causing terror, also a mental condition. API (n 1) Art 51.2.

⁴⁹ *ibid*, Arts 51.5(b); 57.2(a)(iii); 57.2(b).

⁵⁰ *ibid*, Arts 35.3 and 55.1.

⁵¹ *ibid*, Art 56.1.

be qualified as an attack as well.⁵² The reference to neutralization, so the argument goes, envisages operations that have no destructive consequences.

The present writer disagrees with this analysis. There is no indication in the ICRC *Commentary* that the reference to neutralization necessarily implies the absence of death, injury, destruction, or damage. More to the point, Article 52.2 merely sets forth those categories of objects that qualify as military objectives. The issue is what can be attacked, not how or with what consequences. Once an object qualifies, it may be attacked in any manner not violating related norms (such as proportionality or precautions in attack). True, the definition is applied in conjunction with the Article 51.1 prohibition on attacking civilian objects, which are defined as objects other than military objectives. But once an object fails to qualify as a military objective, the prohibitions are all framed in terms of ‘attacks’, a term expressly defined. The reference to neutralization in Article 51.2 has nothing to do with the meaning of attack.

III. PROPORTIONALITY

Additional Protocol I, in Articles 51 and 57, first codified the rule of proportionality, which derives from the principle of distinction. Once a target has been determined to be a military objective, the planned attack must still be proportionate. In other words, it is prohibited to mount an attack that ‘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.’⁵³ Today, the rule of proportionality is undoubtedly an element of customary international law, a fact highlighted by Judge Rosalyn Higgins in her Dissenting Opinion in the *Nuclear Weapons* case.⁵⁴

⁵² Knut Dörmann *Applicability of the Additional Protocols to Computer Network Attacks* on-line article at 4 <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/68LG92/\\$File/ApplicabilityofIHLtoCNA.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/68LG92/$File/ApplicabilityofIHLtoCNA.pdf)>.

⁵³ API (n 1) Arts 51.5(b), 57.2(a)(iii), 57.2(b). The Conventional Weapons Convention (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) cites proportionality in relation to the indiscriminate placement of weapons in both the original 1980 Protocol II on the Use of Mines, Booby Traps and Other Devices [Art 3.3(c)] and in the 1996 Amended Protocol II on the same subjects [Art 3.8(c)]. Along the same lines, Art 7(c) of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict forbids attacks that may cause incidental damage to cultural property protected under the Convention that would be ‘excessive in relation to the concrete and direct military advantage anticipated’.

⁵⁴ *Nuclear Weapons* (n 2) at 587 (dissenting on unrelated grounds); CIHLS (n 8) Rule 14. See also inclusion by US in NWP 1-14M (n 9) para 8.1.2.1.

A. Application of the rule of proportionality

While the rule is easily stated, there is no question that proportionality is among the most difficult of LOIAC norms to apply. First, and perhaps foremost, there is the inherent difficulty of valuation. How does one, for instance, compare tanks destroyed to the number of serious civilian injuries or deaths caused by attacks upon them? Dissimilar entities cannot be compared absent a common currency of evaluation. And basic dissimilarity is exacerbated by the fact that differently situated parties will inevitably value specific collateral damage and incidental injury on the one hand, and military advantage on the other, differently. An apt example is the environment. Consensus exists that environmental damage constitutes collateral damage. Yet, the perceived 'value' of the environment will vary widely from country to country, culture to culture, vocation to vocation, and so forth.⁵⁵

Complicating matters is pervasive confusion over how to conduct the proportionality 'test'. Many wrongfully characterize it as balancing, ie, does the concrete and direct military advantage 'outweigh' resulting collateral damage and incidental injury? If so, attack is permitted; if not, it is forbidden. The test is often portrayed as a scale, with the slightest difference tipping the balance.

In fact, the test is one of 'excessiveness.' The rule only bans attacks in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects. The Rome Statute's addition of the adjective 'clearly' to 'excessive' in its articulation of the proportionality rule (as a war crime standard) reflects this interpretation.⁵⁶ Focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time. . . . and nothing more.

A second misconception surrounds the significance of the *actual* collateral damage and incidental injury that ends up being caused by an attack, as well as the military advantage that the attacker actually achieved. The misconception has reached the point that merely causing collateral damage or incidental injury is sometimes viewed as *prima facie* evidence that an attacker engaged in a disproportionate attack, failed to take requisite precautions in attack, or otherwise violated LOIAC. Stated differently, some imply that causing collateral damage and incidental injury creates a rebuttable presumption of a LOIAC violation, in which the attacker bears the burden of persuasion.⁵⁷

⁵⁵ See Schmitt 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22 *Yale Journal of International Law*.

⁵⁶ Rome Statute (n 8) Art 8.2(b)(iv).

⁵⁷ For a discussion of this tendency, see Schmitt 'The Conduct of Hostilities during

In fact, the harm resulting and advantage achieved have little to do with application of the proportionality rule, for compliance is measured not by the results of an attack, but rather by what the attacker reasonably expected before launching it. This is true as to both the collateral damage and incidental injury (note the word 'expected' in the standard) and the ensuing concrete and direct military advantage (note the term 'anticipated').⁵⁸ The rule represents an important acknowledgement of the 'fog of war,' and, more generally, implementation of the premise that the law should balance humanitarian concerns with military necessity and reality. But it also complicates assessment of compliance, for the results of an attack are often tangible and measurable, whereas expectations are not.

A recurring hurdle in application of the proportionality rule surfaces whenever the prohibitory standard is mischaracterized as extensive, rather than excessive, collateral damage and incidental injury. The ICRC *Commentary* illustrates the problem to some extent.

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 ' (Basic rule) ' and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.⁵⁹

There is no basis in the text of either Article 51 or 48, or even in customary international law, for this assertion. On the contrary, such an interpretation, which ignores the degree of military advantage yielded by a given operation, flies in the face of the *Commentary's* own assertion that '[t]he entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements.'⁶⁰ Further, it is inconsistent with the International Court of Justice's refusal to rule out the possibility that use of nuclear weapons might comply with LOAIC when the survival of the State is at stake.⁶¹

Operation Iraqi Freedom: An International Humanitarian Law Assessment' Yearbook of International Humanitarian Law (forthcoming).

⁵⁸ Actual collateral damage and incidental injury, as well as actual military advantage, may assist an ex post facto assessment (eg by a tribunal) to infer what it was that the individual making the proportionality determination anticipated (or should have anticipated).

⁵⁹ *Commentary* (n 3) para 1980.

⁶⁰ *ibid*, para 2206, which discusses proportionality in the context of API, Art 57.

⁶¹ Specifically, the Court opined that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.' *Nuclear Weapons* (n 2) para 105E. The present writer finds the decision flawed in its assessment of the proportionality rule,

Another knotty aspect of proportionality is the scope of the 'concrete and direct military advantage' criterion. The ICRC *Commentary* notes that the phrase 'was intended to show that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.'⁶² Based in part on this statement, many interpret the standard narrowly, arguing that the only advantage that should be considered is that directly bearing on the ongoing battle.

On the other side are those who (correctly in this writer's opinion) urge that while it must be perceptible and meaningful, 'the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.'⁶³ The United Kingdom took precisely this position when it ratified API in 1998. Further support is found in the Rome Statute, which refers to 'overall military advantage' when setting forth the rule of proportionality.⁶⁴

Simple logic dictates that this has to be the case. Consider air attacks intended to convince enemy forces that a ground assault will fall in Sector A. In fact, they constitute a ruse of war intended to draw enemy forces from the intended area of attack, Sector B. The destruction of the enemy forces in Sector A will have little impact on the immediate battle and, standing alone, would excuse only slight collateral damage or incidental injury. But, if the ruse is successful, enormous military advantage will result, advantage that would justify significant collateral damage and incidental injury.

Of course, the advantage considered must be military in nature. Political or economic advantages do not justify collateral damage and incidental injury. In this sense, military advantage in the context of the rule of proportionality tracks use (discussed above) of the phrase vis-à-vis military objectives. There must be a nexus to the conduct of hostilities.

But to what extent must the collateral damage and incidental injury considered in proportionality assessments be direct, ie, caused directly by the kinetic effects of the weapon? For instance, shutting down an electrical grid will deprive military entities reliant thereon of essential power. At the same time, and as strikes on electrical networks during Operations Desert Storm and Allied Force demonstrated, attacks against 'dual-use' entities will often have effects that ripple beyond the target itself, thereby affecting civilians who depend on them.

but even accepting the opinion leads to the conclusion that very extensive collateral damage and incidental injury are justified in some cases. See Schmitt 'The International Court of Justice and the Use of Nuclear Weapons' (Spring 1998) *Naval War College Review* 91.

⁶² *Commentary* (n 3) para 2209.

⁶³ United Kingdom, Statement Made on Ratification of Additional Protocol I (28 Jan 1998) reprinted in *Documents on the Laws of War* (Adam Roberts and Richard Guelff (eds) (3rd edn OUP Oxford 2000) 511.

⁶⁴ Rome Statute (n 8) Art 8.2(b)(iv).

In the aftermath of these two conflicts, controversy arose over the extent to which those who plan and approve attacks are obliged to estimate and consider civilian consequences other than those caused by the weapon's immediate destruction (often styled 'reverberating' effects). However, it now appears well settled that any consequences, even long-term ones, which are foreseeable and likely in light of the information reasonably available to the attacker, must be factored into the proportionality calculation. Stated conversely, those who plan or execute attacks need not take into account every possible consequence, however remote, but must consider foreseeable and likely ones. Case-by-case analysis is required. Occasionally, the extent of the duty to attempt to foresee reverberating effects is questioned. However, the duty is based on 'feasibility', an issue discussed below in the precautions in attack section.

B. 'Force protection' and proportionality calculations.

This issue surfaced most notably during Operation Allied Force, when NATO aircraft were instructed to fly above the threat envelope of Serbian air defences. Human Rights Watch, inter alia, questioned the tactic, suggesting 'if precision would have been greater (and civilian casualties lessened) had NATO pilots flown lower, it could be argued that NATO was 'obligated' to have its pilots fly lower.'⁶⁵ The organization focused particular attention on the Djakovica Road incident, during which Albanian refugees were mistaken for a convoy of Serbian military forces. It concluded that because 'higher altitude seems to have impeded a pilot from adequately identifying a target. . . inadequate precautions were taken to avoid civilian casualties.' By contrast, the review conducted by ICTY found that while operating at lower altitude would have improved the likelihood of avoiding the mistaken attack, 'neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges.'⁶⁶

It is not the purpose here to resolve this case or, more generally, the tactic of attacks from altitude (although it should be noted debates on the subject are often vacuous, evidencing ignorance of such basic aspects of aerial warfare as the fact that guided weapons tend to become more accurate with altitude and distance because they have greater opportunity to guide). Rather, the question is whether it is permissible to take own-forces survival into consideration when deciding if, when, and how attacks may be mounted.

⁶⁵ Human Rights Watch Civilian Deaths in the NATO Air Campaign (Feb 2000) <<http://www.hrw.org/reports/2000/nato/index.htm#TopOfPag>>.

⁶⁶ Report to the Prosecutor (n 18) para 70.

In this regard, many LOIAC experts argue that it is appropriate to consider survival of the combatant (eg aircrew member) and weapon system (eg aircraft) as an element of the military advantage accruing from an attack. It is not so much the life of the pilot that formally factors into the proportionality calculation (since the concern is military vice humanitarian) as it is the ability to conduct future attacks. While the ICRC *Commentary* speaks of ‘ground gained’ or ‘annihilating or weakening the enemy armed forces,’⁶⁷ limiting the term military advantage to such narrow issues would be overly restrictive, particularly in light of the accepted interpretation that overall military advantage is considered in proportionality analysis, not just that resulting immediately and directly from an attack.

Opponents of this approach argue that if it is appropriate to factor force protection into the military advantage calculation, then, to be consistent, one must subtract from advantage when attacking forces are likely to be lost during the mission. By this approach, the greater the casualties suffered in an attack, the less the military advantage. At first glance, this argument is attractive. But consider the result—the more a combatant places him or herself at risk, the fewer incidental injuries and less collateral damage he or she can cause in an operation. The dynamic would generate a disincentive to taking risks to avoid civilian harm, thereby disrupting LOIAC’s balance between humanitarian and military concerns.

A better argument is that force protection constitutes a precautions in attack issue, not one of proportionality. As shall be discussed, one precautionary requirement is that those who plan or decide upon an attack ‘take feasible precautions’ when choosing means or methods of attack in order to minimize civilian harm.⁶⁸ Feasibility is, of course, a matter of reasonableness in light of all the prevailing circumstances. Such circumstances certainly include survival of the attacker and the weapons system involved. Logic dictates that a sliding scale exists along which precautions become less feasible the greater the risk assumed in the operation. Thus, for example, in beyond visual range attacks, the determinative question is usually not how much the attacker’s survival offsets collateral damage and incidental injury (such that the latter were not excessive), as it is whether the attack was ‘reasonable’ under the circumstances.

The present writer finds both approaches valid and applicable. As a practical matter, the first question is whether civilian harm was excessive relative to the concrete and direct military advantage anticipated, excluding survival of the combatant and weapon system. If not, then the question becomes the extent to which the methods (tactics) and means (weapons) of attack reasonably limited harm caused to civilians and their property.

⁶⁷ *Commentary* (n 3) para 2218.

⁶⁸ API (n 1) Art 57.2(a)(ii).

Survival is a valid factor in the assessment. Thus, it is only in cases where collateral damage and incidental injury are excessive (a very subjective standard) that one must further factor in the military advantage that is inherent in combatant and weapon system survival.

C. The effect of human shields on the rule of proportionality

The use of civilians or civilian objects to shield military objectives is known as counter-targeting. Counter-targeting is most often employed when an adversary fields forces against which it is difficult to defend; it is a perverse response to battlefield asymmetry.

The technique was pervasive during the combat phase of OIF. For instance, Iraqi forces, especially the paramilitary Fedayeen, often took cover in locations where civilians were present, including schools and religious and cultural buildings. A common technique was to drive close to civilian vehicles whenever Coalition helicopters appeared. Iraqi forces also forcibly used civilians, including women and children, to physically shield their actions.⁶⁹

API, Article 51.7, expressly prohibits the use of human shields: '[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.'⁷⁰ The prohibition reflects customary law,⁷¹ a fact demonstrated by the wide condemnation of the practice whenever it is employed.⁷² But how do human shields factor into the proportionality equation?

A distinction must be made between voluntary and involuntary shields. With regard to the former, there are two schools of thought. The first holds

⁶⁹ Todd S Purdum 'Night time Ambush in Iraqi City' *New York Times* (5 April 2003) 1; Dexter Filkins 'In the Field Choosing Targets: Iraqi Fighters Or Civilians? Hard Decision for Copters' *New York Times* (31 March 2003) 5. *1 MEF Roots Out Paramilitaries, Destroys Several Ba'ath Party Headquarters*, US Central Command News Release 03-04-13 (1 April 2003).

⁷⁰ This prescription tracks that found in the 1949 Fourth Geneva Convention, Art 28: 'The presence of a protected person may not be used to render certain points or areas immune from military operations.' The prohibition only applies vis-à-vis those who 'find themselves. . . in the hands of a Party, to the conflict or Occupying Party of which they are not nationals'. It would not apply to Iraqi forces using Iraqis as shields. GCIV (n 7) Art 4.

⁷¹ CIHLS (n 8) Rule 97. See also NWP 1-14M (n 9) para 11.2; Rome Statute (n 8) Art 8.2(b)(xxiii).

⁷² The UN General Assembly condemned Iraq's use of human shields during the first Gulf War as a 'most grave and blatant violation of Iraq's obligations under international law'. UNGA Res. 46/134 (17 Dec 1991). In May 1995, Bosnian Serbs seized United Nations Protection Force (UNPROFOR) peacekeepers and used them as human shields against NATO airstrikes. The UN Security Council condemned this action, demanded release, and authorized the creation of a rapid reaction force to handle such situations. UNSC Res 998 (16 June 1995).

that voluntary shields are civilians who must be factored into the proportionality analysis if they are likely to be injured or killed during the attack on the military objective they are shielding.⁷³ The crux of the argument is that such individuals have not engaged in the only activity by which they forfeit their protected status, direct participation in hostilities.

The countervailing argument, and in this writer's opinion the better one, characterizes their actions as direct participation.⁷⁴ By shielding valid targets, they create a 'de facto' defence against attack that may, in an era when civilian casualties become instant global news, be more effective than kinetic defences. Of course, once voluntary shields take on direct participant status, they qualify as military objectives.⁷⁵ And if they can be directly targeted, it would be inconsistent to suggest their wounding or death constitutes incidental injury.

Think of the alternative. If harm to voluntary shields constituted incidental injury, a sufficient number of shields could, pursuant to the rule of proportionality, provide military objectives an absolute defence *as a matter of law*. This is the point missed by those who argue, in an elevation of form over substance, that voluntary shields are not direct participants because they are not employing force to protect the shielded target.

Many taking this position are equally uncomfortable with the notion of voluntary shields as military objectives. The concerns are overstated. Why would an attacker choose to strike the shields rather than the target itself? Of course, there are plausible scenarios, such as attempting to scare away a group of shields by shooting one of them (an arguably humanitarian result), but the economy of force principle of war usually augurs against targeting the shields themselves.

More problematic from a legal perspective are involuntary shields. Three approaches exist. Some suggest that it is inappropriate to factor involuntary

⁷³ See, eg, Human Rights Watch International Humanitarian Law Issues in a Potential War in Iraq (20 Feb 2002) <<http://www.hrw.org/backgrounder/arms/iraq0202003.htm#1>>.

⁷⁴ The distinction is embraced by the United States. See, eg, a Pentagon briefing on the subject.

And then, the other target category that is a challenge for us is where the human shields that we've talked of before might be used. And you really have two types of human shields. You have people who volunteer to go and stand on a bridge or a power plant or a water works facility, and you have people that are placed in those areas not of their own free will. In the case of some of the previous use of human shields in Iraq, Saddam placed hostages, if you will, on sensitive sites in order to show that these were human shields, but, in fact, they were not there of their own free will. Two separate problems to deal with, and it requires that we work very carefully with the intelligence community to determine what that situation might be at a particular location.

Department of Defense, Background Briefing on Targeting, 5 March 2003 <http://www.defenselink.mil/news/Mar2003/t03052003_t305targ.html>.

⁷⁵ Recall API, 51.3. The Rome Statute adopts this standard by making it a war crime to intentionally attack civilians unless they are 'taking direct part in hostilities'. (n 8) Art 8 2(b)(i).

shields into the proportionality calculation at all, for if they are considered, the enemy will profit from what is a clear LOIAC violation. This represents an extreme view that has, fortunately, gained little traction. The sole basis for excluding civilians from a proportionality analysis is direct participation, which includes an element of intent. The duress inherent in being forced to act as a shield excludes the *mens rea* of intent.⁷⁶

More compelling is an argument that harm to involuntary shields factors into the incidental injury calculation, but is somehow discounted in value. As noted by one commentator, ‘the actual test of excessive injury to civilians must be relaxed. . . . [S]hould civilian casualties ensue from an illegal attempt to shield combatants or a military objective, the ultimate responsibility lies with the belligerent State placing innocent civilians at risk.’⁷⁷ His rationale is logical: ‘A belligerent State is not vested by LOIAC with the power to block an otherwise legitimate attack against combatants (or military objectives) by deliberately placing civilians in harm’s way.’⁷⁸ The position is supported by numerous eminent practitioners and scholars.⁷⁹

This writer adopts a third approach, that involuntary human shields are fully included in the incidental injury estimation. Most significantly, Article 51.8 of API provides ‘[a]ny violation of these prohibitions [includes the prohibition on shielding] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . .’

Admittedly, there are situations in which protected objects lose protection due to the enemy’s misconduct. For instance, a hospital housing combatants may be attacked, once a warning to desist has been ignored.⁸⁰ Similarly, the law of reprisal, albeit limited and controversial, permits one side to commit LOIAC violations to pressure the other side, which is itself violating LOIAC, into compliance with the law. But reprisals are only temporarily acceptable LOIAC violations, not a *relaxation* of the rules. Nor has anyone pointed to any specific prescription contemplating relaxation of the proportionality calculation. Regardless of whether Article 51.8 repre-

⁷⁶ *ibid* Art 31.1(d).

⁷⁷ Dinstein *Conduct* (n 16) 131.

⁷⁸ *ibid*. The author cites in support W Hays Parks ‘Air War and the Law of War’ (1990) 32 *Air Force Law Review* 1, 162–3.

⁷⁹ *eg*, APV Rogers has suggested that:

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

Rogers (note 20) 129.

⁸⁰ See, *eg*, API (n 1) Art 13.

sents customary international law or not, the case has not been made for a customary law caveat to the rule of proportionality.

In this writer's estimation, to relax the incidental injury calculation for involuntary shields would be to enter upon a normative slippery slope. What else merits differing treatment under the rule of proportionality? Suggestions that malevolent societies deserve different treatment under LOIAC have already been rejected above as misguided *lex ferenda*. But even if the premise was *lex lata*, the cruel truth is that malevolent actors in the societies referred to are the least likely to find themselves as involuntary shields. On the contrary, recall Saddam Hussein's use of foreigners, including children, as shields prior to the launch of Operation Desert Storm. Consider the use of UNPROFOR peacekeepers as shields in 1995 by the Bosnian Serbs. What if the conflict is being fought to protect a particular ethnic group, such as the Kosovar Albanians during OAF? Is it sensible to suggest that their value should somehow be adjusted downward even though they are already targets of abuse? These examples illustrate the point that equalizing the fighting position of belligerents is not an underlying purpose of LOIAC. Rather, the law seeks to balance humanitarian concerns with military necessity; that dynamic is the essence of the law of proportionality.

Although this debate has animated academic and policy circles, it is unlikely to play itself out in any meaningful way on the battlefield. There is simply no way to operationalize the proposed relaxation. It is already very difficult to apply the 'excessive' standard in practice. To suggest that this elusive term can be further refined when involuntary shields are involved is unrealistic. The judge advocate making such an assertion to a war-fighting commander or trying to explain how to apply it to the crew of an attack aircraft will find him or herself quickly marginalized in the mission planning process.

IV. PRECAUTIONS IN ATTACK

Even if an attack against a valid military objective can be conducted proportionately, it must nevertheless comply with certain precautionary requirements designed to limit collateral damage and incidental injury. Article 57 of API codifies these requirements for contracting States.⁸¹ And, as recognized by the ICTY in the *Tadic* judgment, customary law also

⁸¹ A provision requiring all feasible precautions to be taken to protect civilians can also be found in Art 3.10 of Amended Protocol II to the Conventional Weapons Convention, which in itself repeats a provision contained in Art 3.4 of its original Protocol II. In addition, a similar provision can be found in relation to cultural property in Art 7(b) of the Second Protocol to the Hague Cultural Property Convention.

includes precautionary requirements. The appellate chamber approvingly cited UN General Assembly Resolution 2675's admonishment that 'in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations,' styling the resolution 'declaratory of the principles of customary international law.'⁸²

The precautions in attack norms obligate attackers to take all feasible precautions to minimize harm to civilians and civilian objects. Those who plan, approve, and execute an attack must do everything feasible to verify that targets are neither civilians nor civilian objects, or otherwise subject to special protection; select from among feasible methods or means of warfare so as to minimize danger to civilians and civilian objects; cancel or suspend attack if it becomes apparent that the target is not a military objective or the rule of proportionality would be breached; and, whenever a reasonable choice is available between multiple military objectives for obtaining a similar military advantage, select that expected to minimize the risk to civilians and civilian objects.⁸³

A. Meaning of 'feasible'

Global media passion for images of armed conflict has combined with exaggerated expectations regarding the ability of high-tech weaponry to conduct precision warfare to create the impression that modern warfare may be conducted with little to no collateral damage and incidental injury. Sadly, such capabilities remain beyond the reach of even well-equipped militaries.⁸⁴ Despite this reality, when incidental injury and collateral damage occurs, many critics, as suggested above, seem to apply a rebuttable presumption that the cause was failure to take adequate precautionary measures. A particular tendency, evidenced in the HRW report *Off Target*, is alleging failure without citing feasible precautions the attacker neglected.⁸⁵ This is curious.

⁸² International Criminal Tribunal for Yugoslavia, *Prosecutor v Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Appeals Chamber Case IT-94-1 (2 Oct 1995) paras 111–12, citing UN GA Res 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts (9 Dec 1970). The resolution was adopted with a vote of 109-0, with 18 abstentions/absences.

⁸³ For an assertion these requirements amount to customary law, see CIHLS (n 8) ch 5. For implementation in a Protocol Additional I non-Party's military manual, see NWP 1-14M (n 9) para 8.1.2.1.

⁸⁴ Recall the mistaken bombing by US aircraft of a marked ICRC facility in Afghanistan (on two separate occasions) during Operation Enduring Freedom. For a discussion of the incidents, see Sean D Murphy 'Contemporary Practice of the United States Relating to International Law' (2002) 96 *American Journal of International Law* 237, 247.

⁸⁵ For instance, the organization criticized the decapitation campaign on this basis without setting forth alternatives to the tactics and weaponry employed by the Coalition. See discussion in Dinstein 'Conduct'.

When the target qualifies as a military objective, the attack is proportionate as planned, and the method of execution violates no specific rules regarding indiscriminate attack,⁸⁶ the precautions in attack requirements only apply if there are alternatives available to the attacker.

The nub of the issue, then, is whether feasible precautions were taken.⁸⁷ ‘Feasible precautions’ have been defined as ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.’⁸⁸ In the context of target verification, for example, review of intelligence and target data is required, so long as it is reasonably available at the relevant time. Another factor is availability of systems that perform intelligence, surveillance, and reconnaissance functions. For instance, combat reconnaissance aircraft are in short supply. If attack is delayed until imagery is available, mobile targets may have moved on. Or the intelligence, surveillance, and reconnaissance systems that could provide additional information about the target may be tasked against higher priority assets (higher because of military value or due to greater risk of collateral damage and incidental injury). In the end, feasibility means that those who plan, approve, or execute an attack must take those measures that a reasonable warfighter in same or similar circumstances would take to limit harm to civilians—nothing more.

As in the case of proportionality, a controversial factor vis-à-vis feasibility is force protection. The ICRC *Commentary* rejects consideration of ‘circumstances relevant to the success of military operations as an appropriate consideration. . . .’ It goes on to note that ‘[i]t is not clear how the success of military operations could be jeopardized by this’.⁸⁹ In fact, it is quite clear to anyone with an understanding of combat operations. For example, it would plainly jeopardize the success of a military operation to fly at altitudes within the threat envelope of enemy defenses in order to get a better visual identification of a target. As noted earlier, this writer adopts the position that force protection is an appropriate consideration when assessing feasibility.

⁸⁶ Such as by treating ‘as a single military objective a number of clearly separate and distinct military objectives.’ API, above n 1, Art 51.5(a).

⁸⁷ One author has noted ‘Palpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith’, Yoram Dinstein ‘Collateral Damage and the Principle of Proportionality’ in *New Wars, New Laws?* (David Wippman and Matthew Evangelista (eds) (Transnational Publishers Ardsley NY 2005) 211, citing Michael Bothe ‘Legal Restraints on Targeting: Protection of Civilian Population and the Changing Face of Modern Conflicts’ (2001) 31 *Israel Yearbook on Human Rights* 35, 45.

⁸⁸ Conventional Weapons Convention, Amended Protocol II (n 9) Art 3.10.

⁸⁹ *Commentary* (n 3) para 2198.

A critical issue regarding feasibility is the effect of doubt about a target's status as a military objective. If doubt persists before the attack is launched, must the mission be cancelled or aborted? Some experts say yes, pointing to Article 52.3 of API, which provides that '[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make effective contribution to military action, it shall be presumed not to be so used.' The commentary to Article 57 provides further support by noting that 'in case of doubt, even if there is only slight doubt, [those who plan or decide upon attack] must call for additional information.'⁹⁰ According to this school of thought, verification mechanisms must be exhausted in an attempt to eradicate doubt; if doubt persists, the attack is prohibited.

Article 52.3 was controversial at the time of its inclusion in API and cannot be said to have matured into customary law.⁹¹ In the event, it applies only to 'normally dedicated' objects and, thus, would not apply, for example, to buildings near the frontline, which are typically used for defensive purposes.⁹² Moreover, it would not apply in cases of persistent misuse by the enemy. For example, in the battle for Fallujah, Iraqi forces used 60 of the city's 100 mosques for storage of weapons and/or as fighting positions.⁹³ Obviously, when over half the objects in question are being abused, the category no longer meets the 'normally dedicated' criterion.

More to the point, such assertions reflect insensitivity to the realities of combat, in which the Clausewitzian fog of war often looms thick. The persistence of friendly fire incidents in modern warfare is stark testament to fact that absolute transparency of the battlefield remains a mere aspiration. Simply put, doubt is a familiar feature of conflict; to suggest that operations cannot be mounted in the face of 'slight doubt' is untenable.

In light of the balancing between humanitarian and military concerns in LOIAC, there is but one sensible standard: Having resorted to all reasonable means of verification in light of the prevailing circumstances, would the reasonable war-fighter launch the attack? In assessing the reasonableness of proceeding in the face of doubt, the potential military advantage offered by the attack will certainly play a major role. Just as advantage offsets collateral damage and incidental injury to some degree, so it also acts as an offset to doubt (which risks collateral damage). The greater the military advantage, the more doubt will be justified.

⁹⁰ *ibid*, para 2195

⁹¹ See discussion in *ibid*, paras 2029–38.

⁹² This was the example used by the Rapporteur of the Working Group responsible for drafting the article. *ibid*, para 2032.

⁹³ Marine Expeditionary Force & Multi-National Corps-Iraq, *Telling the Fallujah Story to the World*, Briefing Slides (20 Nov 2004) (on file with author).

This mode of analysing feasibility applies to other aspects of the precautions in attack requirements. The bottom line is that civilian harm must be avoided whenever feasible. For instance, a night attack on a munitions factory (a method of warfare) would be required if it were empty at night and the attacker possessed the means to conduct night operations. Similarly, computer network attack (a means) increasingly offers reasonable alternatives to kinetic attack against networked command, control, and communications assets. Or, when trying to deny electrical power to an enemy military facility, it may be possible to drop carbon filaments on the electric wires (target) serving the installation instead of bombing the electrical generating facility from which they originate.

The assessment of methods and means must be multi-dimensional. Is there additional risk to friendly forces? How much? How many such weapons are in the inventory? How long will resupply take? What are the competing demands for the systems involved? What are future demands likely to be?⁹⁴ In other words, how reasonable is the alternative in the circumstances ruling at the time?⁹⁵

Take commencement of hostilities. While it is true that widespread use of precision-guided munitions will limit collateral damage and incidental injury, there is no requirement to use them solely because they are available.⁹⁶ At the beginning of the conflict, it may be uncertain how long hostilities will last. A reasonable commander will preserve a portion of his or her limited precision-guided munitions inventory for latter operations. Or urban operations may be in the offing, during which precision weaponry will be of great utility in avoiding collateral damage or incidental injury.

Finally, when assessing precautionary requirements, it must be borne in mind that defenders shoulder certain obligations to take precautions against the effects of attack. API, Article 58, provides that they shall 'endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; avoid locating

⁹⁴ Comparable factors arise in Art 3.10 of Amended Protocol II to the Conventional Weapons Convention, which, when considering the protection of civilians from weapons to which the article applies, refers to 'the availability and feasibility of using alternatives'.

⁹⁵ Art 57 of API does not contain an explicit reference to the reasonableness of choices facing the attacker. However, such a condition is implicit in the term 'feasible' (practicable or practically possible), which appears twice in Art 57.2. Additionally, a requirement of 'reasonable precautions' is contained in Art 57.4 in the context of military operations at sea or in the air.

⁹⁶ Some have asserted a duty to use precision munitions in certain environments, such as urban areas, or, more generally to use them whenever available. Both assertions are wrong. See, eg, Stuart W Belt 'Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring Use of Precision Munitions in Urban Areas' (2000) 47 *Naval Law Review* 115, 174; Danielle L Infeld 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?' (1992) 26 *George Washington University Journal of International Law and Economics* 109, 110–11.

military objectives within or near densely populated areas; [and] take other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military objectives.⁹⁷

This provision is primarily hortatory in nature. Nevertheless, attackers are entitled to take into consideration the fact that defenders have precautionary responsibilities. In other words, the attacker need not assume defenders are in breach of their obligations and, resultantly, take other than standard measures to assess the presence of civilian or civilian objects in the target area (at least absent intelligence or information offering indications to the contrary).

B. The relativity of precautionary obligations

De jure, belligerents have identical precautions in attack duties. However, since they are framed in terms of feasibility, the de facto obligations of the parties to a conflict are disparate—they depend on the assets available to the attacker. The high-tech attacker will be better able to verify the target, has a greater number of weapons systems to choose from, be able to execute tactics its opponent is incapable of conducting, and strike a wider array of targets due to advantages in range, stealth, and penetrability. But the fact that the attacker's opponents cannot field comparable systems provides no excuse for the attacker doing less than is feasible. Thus, capability gaps create a form of normative relativity that engenders some resentment on the part of the belligerent bearing the greater burden. This is not healthy for LOIAC.

Complicating matters is an absence of any obligation to acquire and field systems that would permit attackers to better distinguish between military objectives and civilians and civilian objects. States that have fiscal and technological wherewithal arguably have a moral duty to do so, but there is no basis in LOIAC for assertion of a legal duty. Thus, we see the rather strange phenomenon of States that have elected to act responsibly by acquiring discriminate systems bearing greater legal obligations than those that irresponsibly do not.

V. CONCLUSIONS

The law governing attacks during international armed conflict contains multiple fault lines that generate either confusion or reasoned disagreement. This is unfortunate, for the greatest harm to the civilian population during

⁹⁷ See also CIHLS (n 8) ch 6.

hostilities comes as the result of attacks. But at the same time, the restrictions of the law of attack impose the greatest restrictions on the warfighters in their conduct of hostilities. It is a duality that makes this body of law so critical, for the duality touches the very heart of the balance between humanitarian and military concerns that LOIAC seeks.

Fortunately, the practical realities of combat, especially the principle of economy of force, render a number of the fault lines of concern primarily to legal experts. That said, others directly impact the course of battle. . . and the civilians who find themselves in the midst of conflict. Although States, academic institutions, and non-governmental institutions like the ICRC, have undertaken praiseworthy efforts to clarify the law, more are needed. Hopefully, prestigious institutions such as the British Institute of International and Comparative Law will continue to rise to the challenge. It is certainly to be commended for undertaking this publication.