

11 A FIVE-STEP LEGAL ASSESSMENT IN THE JOINT TARGETING PROCESS – AN OVERVIEW

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11.1 INTRODUCTION

The targeting process has become an integral element of the conduct of modern warfare, especially in multinational coalition operations.¹ Sophisticated targeting processes have been in place and applied during several military campaigns such as the NATO intervention in Kosovo,² the 2003 US operations in Iraq,³ the NATO-led and US operations in Afghanistan,⁴ and also during the NATO operations in Libya.⁵ In very brief terms, at the risk of oversimplification, the joint targeting process covers the military commander's decision-making process during which 'targets' are identified and validated, and the means and methods of the planned attack against them are determined.⁶ Undoubtedly, the operational legal advisor is an inevitable participant within this process as the primary legal advisor to the commander; each targeting process contains a specific legal assessment in order to ensure compliance with the applicable norms of the law of armed conflict.⁷

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1 M.N. Schmitt & E.W. Widmar, 'On Target': Precision and Balance in the Contemporary Law of Targeting, *Journal Of National Security Law & Policy*, Vol. 7, 2014, pp. 379-380.

2 T. Montgomery, Legal Perspective from the EUCOM Targeting Cell, in A. E. Wall (Ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, US Naval War College International Law Studies, Vol. 78, 2002, pp. 189-197.

3 J. M. Fyfe, The Evolution of Time Sensitive Targeting: Operation Iraqi Freedom Results and Lessons, *College of Aerospace Doctrine, Research and Education, Air University US Air Force, Research Papers 2005-02*, (www.dtic.mil/dtic/tr/fulltext/u2/a476994.pdf); M.N. Schmitt, The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment, *Yearbook of International Humanitarian Law 2003*, Vol. 6, T.M.C. Asser Press, 2006, pp. 73-109;

4 M. N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, in M.N. Schmitt (Ed.), *The War in Afghanistan: A Legal Analysis*, US Naval War College International Law Studies, Vol. 85, 2009, pp. 189-197.

5 C. De Cock, Operation Unified Protector and the Protection of Civilians in Lybia, in M.N. Schmitt & L. Arimatsu (Eds.), *Yearbook of International Humanitarian Law 2011*, Vol. 14, T.M.C. Asser Press, 2012, pp. 213-236.

6 For potential definitions see I. Henderson, *The Contemporary Law of Targeting*, Martinus Nijhoff Publishers, 2009, p. xix; W. H. Boothby, *The Law of Targeting*, Oxford University Press, 2012, p. 4.

7 Art. 82 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 requires that 'legal advisers are available

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The present study, after a short overview of the operational targeting process, aims to present a five-step legal assessment model comprising of the primary legal questions to be answered during the targeting process. With regard to the methodology of this study, I will provide an overview and summary of existing and emerging notions, principles and interpretations of the law of armed conflict for each step of the assessment, and highlight the most widely debated cases – all these synthesized in a practice-oriented approach. Whereas an in-depth analysis of each legal issue falls beyond the scope of this overview, this study will also reference the potential differences within the legal assessment with respect to international or non-international armed conflicts.

11.2 A BRIEF OVERVIEW OF THE TARGETING PROCESS FROM THE PERSPECTIVE OF THE LEGAL ADVISOR

‘Targeting’ is an operational term of art, used primarily in the context of planning and execution of military operations.⁸ In its broadest – technical – meaning, targeting is the process to create ‘effects’ that lead or directly contribute to the accomplishment of mission objectives set out by the military commander.⁹ Hence, the careful selection and engagement of individual targets (e.g., a supply route) is closely linked to certain operational effects¹⁰ to be achieved (e.g., disruption of enemy lines of communication), and the accumulation of those effects is to create an end-state that meets the planned operational objectives (e.g., the inability of the adversary to maintain its fighting capabilities).¹¹

As for the classification of such effects, targeting doctrines usually refer to lethal and non-lethal targeting.¹² The first refers to the use of kinetic force against the adversary; the latter is generally used in non-kinetic operations, such as information operations, key

[...] to advise military commanders [...] on the application of the Conventions and this Protocol’, setting out a clear requirement to appoint qualified legal advisors to military commanders, ensuring the compliance of military decisions with the applicable law of armed conflict.

8 The most referenced targeting doctrine, taken as a reference in this study as well, is that of the United States of America: *Joint Publication 3-60 of the United States Joint Chiefs of Staff on Joint Targeting*, 31 January 2013 (hereinafter: JP 3-60) (http://cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf). Several states have their own targeting doctrines describing the role and process of joint targeting; also, NATO has its own targeting doctrine issued in *Allied Joint Publication (AJP)-3.9 Joint Targeting* (2008).

9 JP 3-60, p. vii.

10 Id., pp. 1-6-1-7.

11 Id., p. II-33; M. N. Schmitt, *Effects-based Operations and the Law of Aerial Warfare*, *Washington University Global Studies Law Review*, Vol. 5, No. 2, 2006, p. 274. (http://openscholarship.wustl.edu/law_globalstudies/vol5/iss2/2).

12 JP 3-60, p. 1-6.

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leader engagements, or as certain methods of psychological operations.¹³ The present study focuses on the first, i.e., on the legal aspects of lethal targeting.¹⁴

Operational targeting is executed in a so-called ‘join targeting cycle’ which is a six-phase process consisting of (1) identifying the desired end state and the commander’s objectives, (2) target development and prioritization, (3) capability analysis and weaponeering, (4) commander’s decision and force assignment, (5) mission planning and force execution, and (6) assessment.¹⁵

The order of these phases and the individual tasks to be performed in each of them is strictly regulated by doctrine and is adhered to by operational ‘targeteers’.¹⁶ In very simple terms, during the joint targeting cycle, phase 1 focuses on understanding the commander’s objectives, be it, in a hypothetical example, the disruption of the adversary’s ability to sustain its war-fighting capability in theatre, to which the effects are attached, e.g., that the adversary becomes unable to supply its forces.¹⁷ In phase 2, targets are selected, analysed and validated to create such effects, for example lines of communication, enemy supply units and their equipment.¹⁸ Having set up an approved, legally validated target, in phase 3 the appropriate engagement means and methods (including ‘weaponeering’) are chosen and analysed in order to find the most feasible and effective solution to reach the desired ‘operational effect’, e.g., aerial bombardments of enemy supply equipment with air-to-surface precision guided munition.¹⁹ This is followed, in phase 4, by the assignment of tasks for execution to a certain command or unit, be it e.g., a fighter-bomber aircraft squadron.²⁰ In phase 5 this unit prepares for the engagement, conducts further pre-strike analysis and prosecutes the target on order.²¹ Finally, in phase 6, the assessment of the effects and effectiveness of the attack is conducted, forming the basis of further decisions on the conduct of the operation.²²

13 On non-kinetic targeting see P. Ducheine, *Non-Kinetic Capabilities: Complementing the Kinetic Prevalence to Targeting*, *ACIL Research Paper* 2014-26 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474091).

14 Hence, further reference to targeting in this paper shall be understood as ‘lethal targeting’.

15 JP 3-60, p. II-3. For a description of NATO’s targeting process see M. Roorda, *NATO’s Targeting Process: Ensuring Human Control Over and Lawful Use of ‘Autonomous’ Weapons*, *ACIL Research Paper* 2015-06, pp. 3-11 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593697). For an overview of targeting doctrine and practice see A. Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, Routledge, 2015, pp. 202-205.

16 JP 3-60, p. GL-9.

17 *Id.*, p. II-4.

18 *Id.*, pp. II-5 – II-13.

19 *Id.*, pp. II-13 – II-16.

20 *Id.*, pp. II-19 – II-20.

21 *Id.*, pp. II-21.

22 See JP 3-60, p. II-31.

As seen in the description above, the targeting process focuses on 'effects'. This military concept of 'effects-based operations' (EBO)²³ and effects-based targeting has been analysed and also criticized by several legal experts due to its ambiguous relationship and potential non-compliance with the key principles of the law of armed conflict.²⁴ To highlight the most crucial elements, at the risk of running ahead in my analysis, it is to be ensured that the 'operational effects' to which targets are selected do not overstretch the legal concept of 'military advantage' within the notion of the 'military objective' or during the proportionality analysis, thereby breaking the inherent limitations within the laws on attack.²⁵ On the other hand, it is also argued that an effects-based targeting, especially when applied through precision attacks, may well limit or reduce the conflict's collateral effects on the civilian population.²⁶

In order to ensure that this effects-based targeting process complies with the law of armed conflict, the validation stage within phase 2 ('target development') of the joint targeting cycle includes a detailed legal assessment of the proposed target.²⁷ This is one of the most important stages when the prepared target is being revised and evaluated by the legal advisor.²⁸ Beyond that, the legal advisor is also to provide a reasoned legal advice in relation to the compliance with the principles of discrimination, humanity, proportionality and on meeting the requirement of precautionary measures. Hence, the legal advisor's presence is to be maintained during all phases of the joint targeting cycle.²⁹

From a legal perspective then, it is the legal advisor's role to assess the applicable norms of the international law of armed conflict on 'attack'³⁰ in the light of the facts, calculations and operational assumptions presented to him or her.

In the following chapters, this author will provide an overview of a five-step legal assessment model to ensure that the planning and execution of the attack, i.e., the decision

23 On the military concept of 'effects-based operations' see: J. N. Mattis, USJFCOM Commander's Guidance for Effects-based Operations, *Parameters*, Autumn 2008, pp. 18-25. (<http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/08autumn/mattis.pdf>).

24 See e.g., Boothby, 2012, pp. 489-511; Henderson, 2009, pp. 126-128; Schmitt, Effects-based Operations, 2006, pp. 274-291; J. Dill, The 21st-Century Belligerent's Trilemma, *European Journal of International Law*, Vol. 26, No. 1, 2015, pp. 93-94.

25 Thereby, this author agrees with the assessment by Henderson, 2009, p. 128.

26 M.N. Schmitt, Precision Attack and International Humanitarian Law, *International Review of the Red Cross*, Vol 87, No. 859, September 2005, p. 453.

27 JP 3-60, p. II-11.

28 Ibid. See also reflected in: G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, 2010, p. 531.

29 Schmitt, 2005, p. 450-454.

30 The literature on this issue varies between the 'law of targeting' and the 'law on attack'. This author prefers the latter term, due its closer link to the terminology applied in the relevant international conventions. See Boothby, 2012; M. N. Schmitt, Fault Lines in the Law of Attack, in S. Breau and A. Jachec-Neale (Eds.), *Testing the Boundaries of International Humanitarian Law*, British Institute of International and Comparative Law, 2006, p. 277.

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resulting from the targeting process complies with the requirements of the law of armed conflict.

11.3 A FIVE-STEP LEGAL APPROACH DURING THE TARGETING PROCESS

The core issues surrounding the lawfulness of attacking a target have been identified and analysed by several scholars in many different ways. Schmitt and Widmar outlined five essential elements through which the legal assessment may be conducted, namely ‘(1) target; (2) weapon; (3) execution of the attack; (4) collateral damage and incidental injury; and (5) location.’³¹ Ian Henderson has set up an ‘IHL 6-step targeting process’³² focusing on (1) ‘location of the target’, (2) its ‘lawfulness as a military objective’, (3) taking ‘all feasible precautions’, (4) ‘assessing collateral damage’, (5) ‘taking care in the tactical situation to ensure hitting the desired aim point’, and (6) ‘cancelling or suspending the attack if the assessments under steps 2 or 4’ are no longer valid.³³ In another approach, the legal assessment for targeting is grouped around three key principles of law, namely ‘distinction’, ‘proportionality’ and the requirement of ‘taking precautionary measures’ (this latter broken down into further elements).³⁴

As it can be seen, the legal assessment within the targeting process revolves around identical or similar concepts and principles, however, often viewed from different angles and with divergent amplifications. This author offers another approach, aimed at mirroring the logic and concept of the joint targeting cycle set out above, consisting of five major questions, namely:

1. The location of the planned attack and the adversary – how does the geography of the operational theatre and the legal nature of the adversary affect the applicable legal framework?
2. The target –
 - a. is the targeted object a legitimate ‘military objective’?
 - b. can the targeted person(s) be attacked lawfully?
3. Proportionality – is the expected incidental loss of civilian life or harm to civilian objects or a combination thereof excessive in relation to the concrete and direct military advantage anticipated?

31 Schmitt & Widmar, 2014, p. 380.

32 Henderson, 2009, p. 234.

33 Henderson, 2009, p. 237.

34 L. R. Blank, Extending Positive Identification from Persons to Places: Terrorism, Armed Conflict and the Identification of Military Objectives. *Utah Law Review*, 2013, p. 1232.

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4. Precautions in attack – have feasible precautions been taken during the planning and execution phases in order to ensure that the targets are lawful military objectives and to minimize collateral damage, as well as to refrain from disproportionate attacks?
5. Legal assessment in relation to the weaponizing solution – are there any further legal restrictions with regard to the chosen means and methods of target prosecution?

It will be demonstrated in the chapters below that the assessment model outlined above corresponds the requirements of the targeting doctrines and encompasses the core legal problems and principles under the law of attack.³⁵

11.3.1 Step 1 – The Location of the Attack and the Adversary

The location and legal nature of the target has a direct effect on the determination of the applicable legal regime during the targeting process. In a complex joint operations area,³⁶ international and non-international armed conflicts may co-exist; regular armed forces, non-state armed groups either under the control of another state or acting independently may appear in theatre simultaneously, blurring the operational, and also the legal picture.³⁷ With special regard to targeting, it has been argued by authors and also been confirmed by jurisprudence that the laws on attack, including the definition of military objectives, the principle of proportionality as well as the requirement to take precautionary measures are identical in their essential characteristics both in international and non-international armed conflicts.³⁸ On the other hand, some authors note that the operational reality, the nature of the actors and the interplay of other international legal regimes in non-international armed conflicts may not necessarily support this direct flow of terms and provisions

³⁵ It is submitted here that the law of targeting is to be found among the international humanitarian legal norms concerning the conduct of hostilities, and more precisely, within the laws on attack.

³⁶ For a definition of the joint operations area see JP 3-0, US Joint Operations Doctrine, 11 August 2011, p. IV-13 (www.dtic.mil/doctrine/new_pubs/jp3_0.pdf).

³⁷ See e.g., J. G. Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict, *International Review of the Red Cross*, Vol. 85, 2003, pp. 315-316.

³⁸ See Rules 7-20 in J.-M. Henckaerts & L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1, ICRC, Cambridge, 2005, pp. 25-67; M. N. Schmitt et al., *The Manual of the Law on Non-international Armed Conflict With Commentary*, International Institute of Humanitarian Law, Sanremo, 2006; Y. Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge, 2014, p. 211; International Criminal Tribunal for The former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T, 2 October 1995; *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Decision On Joint Defence Interlocutory Appeal Of Trial Chamber Decision On Rule 98bis Motions For Acquittal, Case No. IT-01-47, ICTY App. Ch, 11 March 2005; *Prosecutor v. Stanislav Galic*, Judgement and Opinion, Case No. IT-98-29, ICTY Tr. Ch. I, 5 December 2003.

from the realm of international armed conflicts.³⁹ Due to different approaches regarding the scope and content of the applicable law in non-international armed conflicts, it is important to first have a clear understanding of the overall legal framework for the targeting process. Here, some of the controversies will be highlighted.

While an armed conflict between two or more states' armed forces, by virtue of common Article 2 of the 1949 Geneva Conventions constitutes an international armed conflict, the involvement of organized armed groups in the hostilities logically begs for further differentiation. It is argued here that an armed conflict – reaching a certain threshold of intensity – between a state's regular armed forces and non-state organized armed groups, is to be classified as a non-international armed conflict.⁴⁰ This, however, may transform into an international armed conflict, if the organized armed group conducts its operations 'on behalf' of another state.⁴¹ What exactly the correct test for proving this acting 'on behalf' is, is subject to ongoing discussions among scholars. One view supports the so-called 'Tadic-test',⁴² referring to the 'overall control' exercised by another state over the organized armed group.⁴³ The other view prefers the approach based upon the terms 'belonging to' in Article 4A(2) of the 3rd Geneva Convention Relative to the Treatment of Prisoners of War of 1949, arguing for applying coherent notions within the law of armed conflict.⁴⁴ A significant difference, also relevant from a targeting perspective, between the two is that the latter test provides for a lower threshold in terms of the required nexus between the organized armed group and the state in order to 'internationalize' the conflict.⁴⁵ It is submitted here that eventually, it is the belligerent state's own legal approach that determines the application of one or the other test.

39 L. Hill-Cawthorne, *Developing the Law of Non-International Armed Conflict: A View of the Harmonization Project*, EJIL:Talk! (www.ejiltalk.org/developing-the-law-of-non-international-armed-conflict-a-view-of-the-harmonization-project/); S. Sivakumaran, Re-envisioning the International Law of Internal Armed Conflict, *European Journal of International Law*, Vol. 22, No. 1, 2012, pp. 219-264. This author notes that there are clear indications on the willingness of states to apply the laws of attack applicable in non-international armed conflicts as much as possible in non-international armed conflicts.

40 See e.g., Schmitt et al., 2006, p. 2; *Prosecutor v. Tadic*, above, Para. 70; Rome Statute of the International Criminal Court, Art. 8(2)f).

41 Also discussed in A Cassese, The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, *European Journal of International Law*, Vol. 18, No. 4, 2007, p. 649-668; K. Okimoto, The Relationship Between a State and an Organised Armed Group and its Impact on the Classification of Armed, *Amsterdam Law Forum*, Vol 5, No. 3, 2013, p. 37.

42 Stemming from *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, ICTY App. Ch, 15 July 1999, Para. 120.

43 See M.N. Schmitt, Charting the Legal Geography of Non-International Armed Conflict, *Military Law And The Law Of War Review*, Vol. 52, No. 1, 2013, p. 96; G. S. Corn, Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide between the Tadić Aspiration and Conflict Realities, *US Naval War College International Law Studies*, Vol. 91, 2015, p. 284.

44 K. Del Mar, The Requirement of 'Belonging' under International Humanitarian Law, *European Journal of International Law*, Vol. 21, 2010, No. 1, pp. 105-124. M. Milanovic, What Exactly Internationalizes an Internal Armed Conflict, *EJIL: Talk*, www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/.

45 Del Mar, 2010, p. 113.

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As for geographical aspects, the targeting of organized armed groups in cross-border operations, i.e., when the target is outside of the ‘hot battlefield’⁴⁶ may lead to controversies regarding the applicable legal framework. We will assume, for the sake of this example, that there is an ongoing non-international armed conflict between governmental forces and a non-state organized armed group, and this conflict spills over state boundaries; the organized armed group escapes into, hides in the neighbouring country, or maintains camps, operational sites across the border.⁴⁷ Still, there is no assumption or proof with regard to any nexus between the organized armed group and the neighbouring state, which could clearly turn the conflict into an international armed one. One view is that the applicable legal framework for targeting this group is the law applicable to non-international armed conflict, despite the cross-border element.⁴⁸ An opposing view is that unless the territorial state gives its consent to the operations, this becomes an international armed conflict.⁴⁹ This author is of the view that unless actual hostilities (‘resort to armed force’) take place between the intervening forces and the territorial state’s forces, the applicable legal regime remains that of non-international armed conflicts. On the other hand, if there is an ongoing international armed conflict between two states, additional hostilities (in the context of the ongoing conflict) between one state’s forces and organized armed groups from the other state would not create an additional non-international conflict; here, the author argues that the organized armed groups are to be treated as ‘belonging to’ the other belligerent party, as highlighted above. Therefore, ‘battlefield geography’⁵⁰ and the legal status of the adversary forces are indeed interrelated factors with regard to conflict classification.

Having then determined the legal framework to be applied, attention is to be turned on the substantive rules of the ‘law of attack’.

11.3.2 Step 2 – The Target

From an operational standpoint, a target can be any object, subject or other entity, including an area upon which an effect is to be created. From a law of armed conflict per-

46 J. C. Daskal, *The Geography Of The Battlefield: A Framework for Detention and Targeting Outside the ‘Hot’ Conflict Zone*, *University Of Pennsylvania Law Review*, Vol. 161, No. 5, 2013, p. 1166.

47 See also in M. N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, *Columbia Journal of Transnational Law*, Vol. 52, 2013, pp. 85-87.

48 Schmitt, 2013, p. 103.

49 See D. Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in E. Wilmhurst (Ed.), *International Law and the Classification Of Conflicts*, Oxford University Press, 2012, pp. 73-75.

50 See Daskal, 2013, p. 1166.

spective, a target can essentially be an object or a person ('human'), pending further conditions.⁵¹

11.3.2.1 Step 2 (a) – Objects as Targets

In accordance with the basic principle of distinction, only 'military objectives' may be attacked.⁵² Hence, any object selected during the target nomination stage must comply with this legal requirement. The definition of a 'military objective' is to be found in Article 52(2) of Additional Protocol I of 1977, providing that

[...] 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.

In accordance with the generally applied interpretation of this definition, any object selected as a potential target must meet two cumulative conditions, namely (1) to effectively contribute to military action by its nature, location, purpose or use, and (2) its total or partial destruction, capture or neutralization shall, in the circumstances ruling at the time, offer a definite military advantage.⁵³ This dual, cumulative requirement will now be disassembled into its constitutive elements.

1 *Effective Contribution to Military Action*

The analysis of the notion of military objectives usually starts with the interpretation of the notions of 'nature', 'location', 'purpose' or 'use'. From the perspective of the targeting process, these elements shall be interpreted in light of the specific meaning of 'military action' in the given armed conflict to which they 'effectively' contribute. It is argued that an effective contribution to military action encompasses a nexus, be it direct or indirect, to the 'war-fighting' or 'combat operations' of the adversary.⁵⁴ It is also noted that this term should not be interpreted too narrowly, in a strictly tactical context.⁵⁵ These two

51 See M.N. Schmitt, Targeting in Operational Law, in T.D. Gill & D. Fleck, *The Handbook of the Law of Military Operations*, Oxford University Press, 2010, pp. 247-252; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 85.

52 Dinstein, 2004, p. 82.

53 See e.g., Boothby, 2012, p. 100; Y. Sandoz, C. Swinarski & B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, 1987, p. 635; H. B. Robertson, The Principle of the Military Objective in the Law of Armed Conflict, *United States Air Force Academy Journal of Legal Studies*, Vol. 8, 1997, pp. 48-49; A. Boivin, The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare, *University Centre for International Humanitarian Law Research Paper Series No. 2/2006*, Geneva, 2006, p. 15.

54 Dinstein, 2004, p. 87; Henderson, 2009, p. 64.

55 Schmitt & Widmar, 2014, pp. 392-394.

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limitations provide us some reference, especially in light of the ‘operational effects’ to be achieved. This means that the effective contribution must provide a nexus to the *military*, and not to the overall political, or economic efforts of the adversary.⁵⁶ With regard to the scope of such military actions, the other end of the scale is that such actions are not to be limited to the micro-level of the combat, that is, the adversary’s military actions are to be examined within the whole spectrum of operations, including the kinetic and non-kinetic actions.

The other crucial element is the ‘effective contribution’, namely the nexus that binds the objects to the military actions.⁵⁷ The attribute ‘effective’ seems to be less helpful in practice. On one hand, it is argued that ‘effective’ is to be interpreted as ‘not insignificant’,⁵⁸ ‘factual’,⁵⁹ or having a ‘proximate nexus’.⁶⁰ On the other hand, it is also argued that an effective contribution to the enemy’s military action has a direct relevance regarding the extent of the military advantage to be gained; hence, the two criteria are essentially the two sides of the same coin.⁶¹ However, from the targeting perspective, it is still to be ensured that (1) the object’s contribution is linked to *military* actions, and (2) the nexus between the object and the military action is manifest, logically deducible and not too remote.⁶²

In the context of a non-international armed conflict, military actions of non-state actors opposing governmental forces should be viewed as inclusive all those operations and activities which have a factual and logical nexus to acts of violence against governmental forces within the context of the ongoing armed conflict.

2 *By Nature ...*

It is argued that a military objective by nature has an inherent military character which qualifies the object in question as an *eo ipso* military object.⁶³ It means that its fundamental character, its purpose renders it for a primarily and essentially military use.⁶⁴ Examples in international armed conflicts include military equipment and armament, e.g., fighter aircraft, warships, military command and control posts, military airbases and ports, barracks, etc.

56 See e.g., A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 2nd edition, 2004, p. 59; *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, 2013, p. 121 (Hereinafter: HPCR Manual).

57 See Dill, 2015, p. 85.

58 Schmitt, *Targeting in Operational Law*, 2010, p. 253.

59 Schmitt & Widmar, 2014, p. 392.

60 Dinstein, 2004, p. 87.

61 Dinstein, 2004, p. 85; Boivin, 2006, pp. 15-16.

62 See Henderson, 2009, p. 55.

63 Dinstein, 2004, p. 88.

64 Henderson, 2009, p. 55.

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In non-international armed conflicts, facilities, for example training camps or bases established by non-state armed groups to train and accommodate their fighting personnel may arguably be treated as military objectives by nature, due to their inherent purpose.⁶⁵

From an operational perspective, the practical importance of an object being a military objective by nature is that it remains targetable throughout the conflict, even if it is not being used in actual combat.⁶⁶ Nevertheless, it shall not be forgotten that even if the targeted object has an intrinsic military character, its effective contribution to the adversary's military action is to be proven, and shall not be treated as given.⁶⁷ If the targeted object, although military by nature, has no discernible or only too remote nexus to the ongoing operation of the adversary, its qualification as a valid target within the given operation may become questionable.⁶⁸

3 *By Location ...*

A military objective by location refers to objects whose geographical position has a specific importance in connection with the operations.⁶⁹ It is then the location of the object which is to be judged during the targeting process. Usual examples refer to special mountain passes or bridges as single routes to the theatre of operations.⁷⁰ Beyond that, commentators note that purely civilian objects that are located in an area with a definite operational importance, as a hill may hence become a valid military target.⁷¹ Targeting an object by its location usually offers a military advantage by denying access to certain areas or to channel the movement of the adversary. In the author's view the above criteria are equally valid and applicable in non-international armed conflicts, with due regard to the manoeuvring abilities of different non-state organized armed groups.⁷²

4 *By Purpose ...*

According to the *ICRC Commentary to Additional Protocol I*,⁷³ this term refers to an 'intended future use'⁷⁴ of the object. From a targeting perspective, this particular classification is forward looking; the subject of the analysis is the intention of the adversary to use the given objective in connection with its military operations. The importance of this ele-

65 Blank, 2013, p. 1249.

66 HPCR Manual, 2013, p. 116. (Commentary on Rule 22. a).

67 Henderson, 2009, p. 55; Boothby, 2012, p. 100.

68 Henderson, 2009, p. 56.

69 Sandoz et al., 1987, p. 636.

70 Rogers, 2004, p. 69; HPCR Manual, 2013, p. 117.

71 Dinstein, 2004, p. 92; Henderson, 2009, p. 57.

72 M. John-Hopkins, Regulating the conduct of urban warfare: lessons from contemporary asymmetric armed conflicts, *International Review of the Red Cross*, No. 878, pp. 469-493.

73 Y. Sandoz, C. Swinarski & B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987.

74 Id., p. 636, Para. 2022.

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ment lies within the operational need to prosecute the target, under certain conditions, before its use by the adversary, in order to gain military advantage.⁷⁵

In this case, as noted, reasonable and reliable information is needed on the intentions and plans of the adversary.⁷⁶ From the legal perspective, the information should satisfy the criteria of rationality and a definite degree of reliability.⁷⁷

In asymmetrical wars the means of warfare are often unconventional. Several objects or materials can be transformed into weapons or other equipment directly supporting combat operations.⁷⁸ In this author's position, if there is reliable information that such items are being prepared to be transformed or even are undergoing transformation into combat equipment or weapons, targeting them could arguably be based upon their 'purpose'.

5 By Use ...

Under the current practice of the law of armed conflict, a civilian object may become a military objective through its use for military purposes.⁷⁹ Hence, civilian objects lose their general protection from attack if and until such time as they are used in connection with military actions.⁸⁰ This particular classification has two essential characteristics. First, the use of the objective shall be factual and not assumed. Secondly, this classification has a temporal limitation; an object can only be targeted as long as it is used in such a way.⁸¹

A practical issue for the targeting process is the degree of the use, namely whether the object or facility is used totally or partially for military purposes. One view is that an object becomes military objective by its use 'regardless of the extent of military usage.'⁸² However, this author hesitates supporting this view, due to its peril of oversimplifying the potentials in targeting an object. A more prudent approach would be to analyse each object on a case-by-case basis whether there is a material possibility to limit the attack to those parts of the object that are being used for military purposes.⁸³ This requirement, in this author's view, does not only stem from the principles of proportionality and precaution in attacks, but is also deducible from the principle of distinction.

75 HPCR Manual, 2013, p. 117.

76 Id.; *Report of the Expert Meeting "Targeting Military Objectives" Organized by the University Centre for International Humanitarian Law Geneva*, University Centre for International Humanitarian Law, 2005, p. 7. (www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf).

77 M.N. Schmitt, *Essays on the Law and War at the Fault Lines*, T.M.C. Asser Press, 2012, p. 200.

78 Examples may be steel pipes to be turned into rockets or their launchers, fertilizers to be turned into explosives or insecticides to home-made chemical weapons.

79 Dinstein, 2004, p. 91.

80 Henderson, 2009, p. 58.

81 Id.

82 Schmitt & Widmar, 2014, p. 393.

83 By an example: in a building with separate wings, only that part that is actually used for military purposes should be made subject of an attack.

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Within the targeting process, those nominated target objects that, beside their military usage, continue maintaining a civilian function, such as ports or railway hubs, are generally characterized as ‘dual-use’ objects.⁸⁴ This classification is acknowledged as an operational term of art, with the primary aim to highlight the military (and also political) sensitivity of a potential target. From a target classification perspective, if their use for military purposes is confirmed, such objects are valid military objectives;⁸⁵ however, the temporal requirement is still to be met here. If there is reliable information on regularly recurring (instead of parallel) military use, the category of ‘purpose’ may be taken into account.⁸⁶ A continuous ‘dual-use’ character plays a significant role in other phases of the targeting process, namely when the proportionality test is conducted, and also when potential limitations on prosecution are determined as part of the precautionary measures.

6 *Military Advantage*

In order for an object to be classified as a military objective, under Article 52(2) of Additional Protocol I, it is to be demonstrated that its ‘total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’ The elements of this condition are (1) the military nature of the advantage, (2) its definite character, and (3) that it is reasonably anticipated during the targeting process.⁸⁷

Regarding the first element, commentaries to the law applicable to international armed conflicts note that the advantage shall be of military value and cannot be purely political.⁸⁸ This means from a targeting perspective that the strike against the selected target must have a certain positive effect on own military operations or a negative effect on those of the adversary, within the military domain. The proper interpretation of the notion of ‘military advantage’ during the targeting process is therefore closely linked to the core of the targeting process, namely the ‘operational effect’. As noted by an author, effects-based targeting views the adversary as a ‘system of systems’⁸⁹ and aims at destroying its centre of gravity with selected attacks. However, discrepancies may arise if the planned operational effect is linked to political, social or even psychological centres of gravity.⁹⁰ A notable example is if the planned operational effect is the disruption of the political support for the adversary’s leader by its population.⁹¹ Whilst it is absolutely reasonable to account for

84 JP 3-60, p. A-3.

85 HPCR Manual, 2013, p. 119.

86 See the view of Jachec-Neale, 2015, pp. 69-70.

87 See e.g., Boothby,

88 Dinstein, 2004, p. 86; Solis, 2010, p. 522; Rogers, 2004, p. 71.

89 Schmitt, *Effects-based Operations*, 2006, p. 274.

90 See M. Sassoli, *Legitimate Targets Of Attacks Under International Humanitarian Law – Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law*, Cambridge, January 27-29, 2003, Program on Humanitarian Policy and Conflict Research at Harvard University, p. 4. (www.hpcrresearch.org/sites/default/files/publications/Session1.pdf).

91 See e.g., Sassoli, 2003, p. 4; Schmitt, 2012, p. 183.

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the disruption of the support by the civilian population in terms of strategic or even operational objectives, there is no room for such considerations when assessing the military advantage anticipated from a planned attack.⁹² Hence, it is to be ensured that the planned, or in legal terms, anticipated military advantage is related to the adversary's *military* actions or capabilities. Here, it is important to recall an often used interpretive guidance,⁹³ stemming from the United Kingdom's (and other states') statement upon ratification to Additional Protocol I, providing that military advantage is to be assessed through 'the attack considered as a whole and not only from isolated or particular parts of the attack.'⁹⁴ In this respect, this author offers the view that an 'attack as whole' may be best viewed from the operational level of a campaign, with a view to the effects of interconnected tactical level fires and manoeuvres.

From a practical perspective, the above frames the assessment of military advantage: it should not restrict itself to the potential tactical gains but shall be deducible from a clearly identifiable (planned) operation instead of the campaign as a whole.

The second element requires the military advantage to be 'definite', meaning 'concrete' and 'perceptible'.⁹⁵ However, it does not mean that it shall be significant or decisive.⁹⁶ With regard to the third element, it is to be noted briefly here that in the targeting process, the assessment on the anticipated military advantage is heavily reliant on the available information and on the phasing of effects. For the commander to make his reasoned, operational judgement, his or her task is to assess duly and prudently all the information at hand when the nominated object is being approved as a target.

11.3.2.2 Step 2 (b) – Humans as Targets

The targeting of persons under the law of armed conflict revolves around the principle of the protection of civilians and their distinction from other persons either having a belligerent⁹⁷ status or from those who directly participate in the hostilities.⁹⁸ Under the provisions of the law of international armed conflict, the following categories of persons are deemed

92 See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Para. 55. (www.icty.org/x/file/Press/nato061300.pdf); W. J. Fenrick, Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, *European Journal of International Law*, Vol. 12, No. 3, 2001, p. 498.

93 See e.g., HPCR Manual, pp. 35-36; Boivin, 2006, p. 22.

94 See the statement of the United Kingdom upon ratification of Additional Protocol I of 1977, reprinted in A. Rogers & R. Guelff, *Documents on the Laws of War*, Oxford University Press, 3rd Edition, 2000, p. 511.

95 M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, 1982, p. 326.

96 Schmitt, Targeting in Operational Law, 2010, p. 253.

97 Reference to this notion varies between 'combatants' and 'belligerents'. The author prefers the latter due to its more comprehensive meaning.

98 Arts. 43 and 50(1) of Additional Protocol I of 1977. See Solis, 2010, pp. 188-189. N. Melzer, *Interpretive Guidance On The Notion Of Direct Participation In Hostilities Under International Humanitarian Law*, ICRC, 2009, pp. 20-21.

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targetable *per se*, based upon their status:⁹⁹ members of the regular armed forces (including militias forming part thereof) of a state,¹⁰⁰ except for certain protected members such as medical personnel or chaplains, and those *hors de combat*,¹⁰¹ members of other militias or volunteer groups, if they meet certain structural conditions,¹⁰² members of regular armed forces who profess allegiance to an authority not recognized by the belligerent state,¹⁰³ members of a *levee en masse*.¹⁰⁴ Also, those civilians who directly participate in the hostilities, are targetable 'for such time as they take a direct part in the hostilities.'¹⁰⁵

With regard to targeting members of the adversary's armed forces and related militias, there is usually less ambivalence during the targeting process; however, positive identification and status assessment are unavoidable elements, especially, if the adversary's forces fail to properly distinguish themselves from the overall civilian population. Some controversy surrounds the targeting of certain political-military leaders who may not be formal members of the armed forces but have authority and control over their activities.¹⁰⁶ Here, the guiding principle is arguably the nexus to and the degree of the involvement into the planning and execution of military operations, or participation in the military decision-making process.¹⁰⁷

Beyond that, both theoretical and practical difficulties arise in relation to targeting members of non-state organized armed groups and with regard to the exact meaning of 'direct participation in the hostilities' by civilians.¹⁰⁸ In summary, as also accepted by the

99 See G. Corn & C. Jenks, Two Sides Of The Combatant Coin: Untangling Direct Participation in Hostilities From Belligerent Status in Non-International Armed Conflicts, *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2011, pp. 341-342; G. S. Corn et al., Belligerent Targeting and the Invalidity of a Least Harmful Means Rule, *US Naval War College International Law Studies*, Vol. 89, 2013, pp. 548-550; Schmitt, Targeting In Operational Law, 2010, pp. 248-249.

100 Arts. 43(2) and 50(1) of Additional Protocol I of 1977, Art. 4 A.(1) of Geneva Convention III of 1949.

101 Arts. 41 and 43(2) of Additional Protocol I of 1977.

102 Art. 50(1) of Additional Protocol I of 1977, Art. 4 A.(2) of Geneva Convention III of 1949.

103 Art. 50(1) of Additional Protocol I of 1977, Art. 4 A.(3) of Geneva Convention III of 1949.

104 Art. 50(1) of Additional Protocol I of 1977, Art. 4 A.(6) of Geneva Convention III of 1949.

105 Art. 50(3) of Additional Protocol I of 1977; B. Boothby, 'And For Such Time As': The Time Dimension To Direct Participation In Hostilities, *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 741-768. F. J. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, *US Naval War College International Law Studies*, Vol. 87, 2011, pp. 187-216.

106 See Boothby, 2012, p. 530; Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom*, 2006, pp. 82-83.

107 *Id.*, p. 83; Henderson, 2009, pp. 111-113.

108 For different views see e.g., M. N. Schmitt, Deconstructing Direct Participation In Hostilities: The Constitutive Elements, *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 697-739; E. Christensen, The Dilemma Of Direct Participation In Hostilities, *Journal of Transnational Law & Policy*, Spring, 2010, pp. 281-309; Melzer, 2009; K. Watkin, Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance, *New York University Journal of International Law and Politics* Vol. 42, 2010, pp. 641-657. Boothby, 2010, pp. 741-768.

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ICRC Interpretive Guidance,¹⁰⁹ members of non-state organized armed groups can be targeted.¹¹⁰ However, with regard to the membership criteria, and especially the requirement of a ‘continuous combat function’, opinions are at variance.¹¹¹ The ICRC position is that individuals who ‘continuously assume a function involving direct participation in hostilities’¹¹² are considered as members of an organized armed group, and hence become targetable as long as this function applies. The opposing view argues that all individuals who are members of an organized armed group, irrespective of their actual function within that group, are targetable based upon this status of them.¹¹³ From another viewpoint, even if certain elements of the concept of the continuous combat function can be accepted, focus should be moved from the nature of the conducts to the nature of the individual’s nexus to the group, also taking into account the diversity among organized armed group and their potentials to develop wings or organs with an essentially political function.¹¹⁴ This author is of the view that the ICRC position in this regard, nevertheless accepted as stemming from a practical approach, has the very practical peril of blurring the distinction between status-based and conduct-based targeting.¹¹⁵ As summarized by Corn and Jenks,

[s]tatus based targeting authority is [...] triggered by the determination that a proposed object of attack is a member of an opposition belligerent force. In contrast, conduct based targeting is based on the determination that an individual presumed inoffensive is engaged in conduct hostile to the friendly force.¹¹⁶

Although the continuous combat function appears to support the status-based targeting of persons, its core element is still based upon a certain conduct, focusing on its temporal and material scope.¹¹⁷ Hence, beyond the confirmation of a person’s mere membership within or affiliation to a non-state organized armed group, the application of the ‘continuous combat function’ element further requires confirmation regarding that person’s role and activities within the group and the actual threat this conduct poses to own forces.¹¹⁸

109 *Above* n. 98.

110 Melzer, 2009, pp. 27-28.

111 See e.g., studies above at footnote 108, N. Melzer, *Keeping The Balance Between Military Necessity And Humanity: A Response To Four Critiques Of The ICRC’s Interpretive Guidance On The Notion Of Direct Participation In Hostilities*, *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 831-916; Dinstein, 2015, pp. 59-61.

112 Melzer, 2009, p. 34.

113 See Schmitt & Widmar, 2014, p. 387; Watkin, 2010, p. 655.

114 Cf., the argument by Melzer, 2010, pp. 848-850. With regard to the problem of complex armed groups consisting of separate political and military wings, see S. Sivakumaran, *The Law of Non-international Armed Conflict*, Oxford University Press, 2012, pp. 359-362.

115 Corn & Jenks, 2011, pp. 343-344. Corn et al., 2013, pp. 548-550.

116 *Ibid.*, p. 341. Footnotes omitted.

117 Corn & Jenks, 2011, p. 343.

118 See Melzer, 2009, Section B, pp. 41-68.

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This, while putting a significant burden on the state party in many conflict environments, goes clearly beyond of what is actually required if the targeted person is a member of the regular armed forces of the adversary under status-based targeting.¹¹⁹ Therefore, continuous combat function should rather be used as a supporting methodology in assessing the status of the targeted person, while relying primarily on the nature and internal characteristics of the armed group as a whole and the nexus of the person to that group.¹²⁰

In summary, the targeting of persons is arguably focusing either on their status of combatants or develops a specific threat assessment in relation to the conducts (amounting to direct participation) of the targeted person.¹²¹ With regard to non-state organized armed groups, current legal discussions indicate that overlaps between the two approaches may become unavoidable, with an emerging requirement to shift the balance towards the protection of civilians in potential borderline cases.

Having analysed the above constituent elements, the legal advisor shall come to a clear conclusion whether or not the nominated target constitutes a lawful ‘military objective’ or a lawful ‘human target’¹²² under the law of armed conflict. This judgement is decisive in order to arrive at the next step of the assessment.

11.3.3 Step 3 – Proportionality

With regard to black letter law, the principle of proportionality is reflected in three distinct provisions within Additional Protocol I of 1977, namely in Article 51(5) para. b), stating that attacks violating the principle of distinction are treated as indiscriminate, and in Article 57(2) para. a) (iii) and Article 57(3), within the context of precautionary measures. In brief terms, the principle of proportionality puts an obligation on the belligerents to avoid or cancel an attack if it ‘may be expected to cause incidental loss to 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.’¹²³

The operational difficulty with regard to this principle lies within the *prima facie* comparison and weighing of two different concepts, namely the anticipated military advantage against the expected ‘harm’¹²⁴ to civilians. *In extremis*, e.g., balancing the military value of a destroyed enemy battle tank against the life of five or more people would lead

119 Schmitt & Widmar, 2014, p. 387.

120 Cf., K. Watkin, 2010, pp. 691-692.

121 Corn & Jenks, 2011, pp. 336-337.

122 An expression used by Henderson, 2009, p. 79.

123 See Additional Protocol I of 1977, Art. 51(5)b).

124 For the sake of simplicity, the term ‘harm’ will be used to summarize the ‘loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof’ as expressed by the law.

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to inherently incorrect conclusions and misconceptions.¹²⁵ The various subjective elements in the text cited above, such as ‘expected’, ‘excessive’ or ‘concrete and direct’ turn this judgement rather to an operational art than to a purely legal analysis. Nevertheless, a few elements deserve some clarification here.

First, the expected ‘harm’ is arguable measured through the *foreseeable* primary and collateral effects of the attack. These include the primary effects of the attack itself (e.g., the physical destruction of a bridge) and also those secondary or residual effects that follow from the attack and are ‘reasonably foreseeable’¹²⁶ based upon available information, and deducted from own and from the adversary’s system analysis. However, it is argued here that this requirement shall not include mere generic assumptions or purely theoretical probabilities.¹²⁷ For example, it is reasonably expected that the destruction of the adversary’s ammunition depot will cause collateral effects not only in the close vicinity of the facility, but, due to secondary explosions, in the wider area as well. As noted above, this expectation and calculation is essentially information-based.

Secondly, the attribute of ‘military advantage’ is different in the proportionality principle from that in the definition of the military objective; it becomes ‘concrete and direct’ from ‘definite’. While the core of the military advantage remains the same, the angle of the assessment changes here.¹²⁸ This author argues that the anticipated military advantage within the proportionality principle, whilst should not be limited to actual tactical level gains,¹²⁹ requires a more proximate nexus and a more direct deduction from the actual attack than required by the ‘definite’ attribute.¹³⁰

Another factor that makes this process rather complicated is the lack of universal yardsticks or standards guiding the commander’s decision-making. It has been argued elsewhere that the standard reference point should be the mind-set of the ‘reasonable military commander’, albeit less helpful in practice.¹³¹ Eventually, the commander needs to come to a reasonable conclusion, based upon the outcomes of the planning, that the military advantage to be gained by the attack will not be significantly outweighed by the

125 See also H. Olesolo, *Unlawful Attacks in Combat Situations*, Martinus Nijhoff Publishers, 2008, p. 158.

126 See Schmitt & Widmar, 2014, p. 405.

127 See Schmitt, *Fault Lines*, 2006, p. 296.

128 See Bothe et al., 1982, p. 407.

129 See the discussion between Y. Shany, A. Cohen and M.N. Schmitt on proportionality in relation to the Israeli targeting practices, available on JustSecurity.org, <https://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/> and <https://www.justsecurity.org/22948/response-cohen-shany/>.

130 See also Henderson, 2009, p. 200.

131 R. McLaughlin, *The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications*, *Yearbook of International Humanitarian Law*, Vol. 13, 2010, p. 232; E. Cannizzaro, *Proportionality in the Law of Armed Conflict*, in E. Clapham & P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, p. 339.

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expected collateral ‘harm’.¹³² This assessment is forward looking; it is based upon calculations, information and also military art.

Phase 3 of the joint targeting cycle contains a ‘collateral damage estimation’¹³³ to assist the commander’s decision making process with regard to the principle of proportionality.¹³⁴ This highly technical methodology not only provides for calculations and assessments on the anticipated collateral effects but also offers certain mitigation measures.¹³⁵ A recent scholarly analysis of the US practice of this methodology noted its practical efficacy in avoiding or significantly limiting collateral damage to civilians.¹³⁶

Even though the target qualifies as a military objective and the planned means and methods of engagement indicate a compliance with the principle of proportionality, further precautions are still to be taken.

11.3.4 Step 4 – Precautions in Attack

The obligation to take precautionary measures in attacks has been codified in Article 57 of Additional Protocol I of 1977, and has been accepted as reflecting customary international humanitarian law.¹³⁷ The obligation itself has several layers and elements, consisting of obligations (1) to take all feasible precautionary measures to ensure that the targeted objective is a valid military objective under the law or armed conflict,¹³⁸ and (2) to take all feasible precautionary measures to avoid or minimize collateral damage to civilians or to civilian objectives. The latter element can be further divided into the following requirements: (1) to select, if feasible, means and methods with a view to minimize collateral damage to civilians or civilian objectives,¹³⁹ (2) to refrain from disproportionate attacks,¹⁴⁰ (3) if there is a reasonable choice, to select the objective with similar military advantage which is ‘expected to minimise damage to civilians or civilian objectives’,¹⁴¹ and (4), whenever possible to give ‘effective advance warning’.¹⁴² The above requirements appear primarily during the target planning procedure; however, precautionary measures are also to be

132 See e.g., M. Newton & L. May, *Proportionality in International Law*, Oxford University Press, 2014, p. 164.

133 JP 3-60, pp. II-14. and II-16.

134 For a brief description of the methodology see J. D. Wright, ‘Excessive’ Ambiguity: Analysing And Refining The Proportionality Standard, *International Review of The Red Cross*, Vol. 94, No. 886, 2012, p. 832.

135 JP 3-60, p. III-1.

136 G. McNeal, The US Practice of Collateral Damage Estimation and Mitigation, *Pepperdine Working Paper* (2011), (<http://works.bepress.com/gregorymcneal/22/>).

137 HPCR Manual, 2013, p. 25; see also Rule 15 of the ICRC Customary International Humanitarian Law Study, in Henckaerts & L. Doswald-Beck (Eds.), Vol. 1, 2005, pp. 51-55.

138 Additional Protocol I of 1977, Art. 57(2) Para. a) (i).

139 Id., Art. 57(2) Para. a) (ii).

140 Id., Art. 57(2) Paras. a) (iii) and b).

141 Id., Art. 57(3).

142 Id., Art. 57(2) Para. c).

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applied before and during target prosecution, as dictated by Article 57(2) para. 2) b) of Additional Protocol I. Hence, if, due to newly available information, or to any change in the circumstances, it would become apparent that (1) the targeted object is not a valid military objective, or (2) the attack would cause excessive loss of civilian life or damage to civilian objects or a combination thereof, the attack shall be cancelled or suspended.

As discernible from the conditions set out above, the obligation to adopt precautionary measures revolves around the highly subjective notion of ‘feasibility’. What is feasible, is, according to the general interpretation of this notion, to be judged taking into account all relevant circumstances, be it humanitarian or military in nature, including, among others, the available information, the accuracy and foreseeable effects of the available weapon systems, the geographical environment, and also the location of the target and of own forces or civilians.¹⁴³ As with the principle of proportionality, the precautionary measures are eventually subject to the commander’s assessment, in light of all the factors influencing the conduct of the operations. Here again, the standard requirement falls back on reasonableness, ‘common sense and good faith.’¹⁴⁴

With regard to the first element of the principle set out above, the verification of the object to be targeted is done through a ‘positive identification’ (PID)¹⁴⁵ process. Law requires this to be maintained during the whole target planning and execution phase, in order to ensure compliance with the principle of distinction.

Regarding the feasible choice of means and methods in order to minimize collateral damage, the following examples will be given.¹⁴⁶ The advancement and more extensive use of precision-guided weapons or munitions arguably reduce the risk to cause unintended collateral damage to civilians and comply with the principle of discrimination at the highest possible level.¹⁴⁷ However, as experience from recent operations demonstrates, the availability of such weapons, primarily due to financial and technical reasons, is limited.¹⁴⁸ Proposals have been put forward that the employment of precision guided weapons in certain operational environments is indeed a legal obligation, stemming from the precautionary principle; however, this cannot be deducted from the current legal norms and would lead too far against the principle of military necessity.¹⁴⁹ Even if such weapons are

143 See reflected in Henckaerts et al. (Eds), 2005, Commentary to Rule 15, p. 54; HPCR Manual, 2013, Commentary to Rule 1(q), pp. 26-28.

144 Sandoz et al., 1987, Para. 2198, p. 682.

145 See JP 3-60, p. II-21.

146 See similar examples mentioned by the NIAC Manual, p. 28.

147 Schmitt, 2005, p. 453.

148 See e.g., R. Romão, Targeting and Adaptation in Combat: Examining the Libya Case, *Baltic Security and Defence Review*, Vol. 15, No. 1, 2013, pp. 13-14 (www.baltdefcol.org/files/files/BSDR/BSDR_15_1.pdf).

149 See e.g., J. F. Quéguiner, Precautions Under The Law Governing The Conduct Of Hostilities, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 801-802; C. B. Puckett, Comment: In This Era Of ‘Smart Weapons’, Is A State Under An International Legal Obligation To Use Precision-Guided Technology In Armed Conflict?, *Emory International Law Review*, Vol. 18, 2004, p. 645; HPCR Manual, 2013, p. 83.

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available, their employment is subject to other factors, such as operational decisions on the timing of certain effects, the economy of force in a lasting conflict or even the protection of own forces – all these count in the ‘feasibility’ assessment.¹⁵⁰

With regard to risk to own forces as an element of consideration, the protection of own forces is an essentially acceptable factor that needs to be taken into account when assessing the feasibility of precautionary measures. However, it shall not lead to overly limiting the activities in order to positively identify and validate military objectives or efforts to minimize collateral damage to civilians.¹⁵¹ On the other hand, accepting greater risk on the price of providing the highest possible level of precautionary measures may arguably lead to the loss or significant reduction of the military advantage to be gained by the attack, which leads back to the balance within the proportionality assessment.

As seen, satisfying the legal requirement of taking feasible precautionary measures is linked to both phases 4 and 5 of the joint targeting cycle, up to the moment of releasing the missile or ordnance. In this regard, this obligation extends from the operational level decision-making down to the tactical level mission execution.

11.3.5 Step 5 – Special Legal Considerations in Relation to the Weaponneering Solution

Beyond the limitations stemming directly from the principle of distinction (e.g., avoiding indiscriminate attacks or the use of indiscriminate weapons) and from the obligation to take feasible precautionary measures (e.g., to use smaller ordnance, special timing or special impact angle to minimize collateral effects, or to give advance warnings) there are further potential international legal constraints and restraints with regard to the selection and employment of weapons.

Such limitations may equally stem from the prohibition of causing ‘unnecessary suffering or superfluous injury’, as codified in Article 35(2) of Additional Protocol I of 1977. This prohibition applies equally to certain weapons *per se* and to the employment of certain weapons.¹⁵² The use of several weapons has been outlawed by virtue of the 1980 Geneva Convention on Certain Conventional Weapons and its Protocols.¹⁵³ It is the task of both the operational legal advisor and the weaponneering expert to observe and ensure compliance with the limitations above.

150 See also Quéguiner, 2006, pp. 809-811; HPCR Manual, 2013, pp. 83-84.

151 See also, HPCR Manual, 2013, p. 28.

152 See N. Sitaropoulos, Weapons and Superfluous Injury or Unnecessary Suffering in International Humanitarian Law: Human Pain in Time of War and the Limits of Law, *Revue Hellénique de Droit International*, Vol. 54, 2001, pp. 71-108; Solis, 2010, pp. 269-272.

153 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, Geneva, 10 October 1980.

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Especially in coalition operations, when the target prosecution is to be executed by different military units from several participating states, their individual international legal obligations under the various conventions may arguably cause difficulties with respect to selecting the appropriate weaponeering solution.¹⁵⁴ This may not only include obvious cases such as whether or not missiles with cluster munitions are to be applied but also to issues relating to the divergent interpretations when a weapon is deemed to be incendiary or causing superfluous injuries.

Hence, it may then be argued that such additional limitations on the options for weaponeering have a definite impact on the operational commander's assessment in relation to both proportionality and precautionary principles, by restraining the practically available means and methods at a given time and space. Eventually, this becomes a closed cycle of assessments and re-assessments of objects, weapons, methods and legal implications, in search for the optimal solution to be submitted to the commander for approval.

11.4 CONCLUSIONS

Every armed conflict has an impact on civilians; a fact that military commanders cannot escape from. Collateral damage, incidental loss of civilian life – regrettably – accompanies the conduct of military operations. During the last decade, several critiques have been expressed in connection with major military campaigns, demanding a higher level care for civilians.¹⁵⁵

It has been argued throughout this study that the targeting process embedded in various military doctrines aims to ensure that the conduct of attacks complies with the law of armed conflict. The single phases of the joint targeting cycle are designed to be capable of incorporating the relevant legal principles of the law of attack. However, compliance with the law is never assumed as given, notwithstanding the sophisticated methods to assess a targeted object's military character or to mitigate collateral effects. It is the legal advisor to the commander whose active participation and legal control during the targeting process is needed to close the 'cycle' in its very concept – in order to live up to its essential goal.

The law of targeting has often been characterized by experts as being 'at the very heart of the law of war.'¹⁵⁶ The various concepts, notions and definitions, although often interpreted differently, all lead us back to the key principles of the law of armed conflict, namely

154 Jachec-Neale, 2015, pp. 244-246.

155 See e.g., Human Rights Watch, *Targeting Saada – Unlawful Coalition Airstrikes on Saada City in Yemen*, Report of 30 June 2015, www.hrw.org/report/2015/06/30/targeting-saada/unlawful-coalition-airstrikes-saada-city-yemen; Office of the High Commissioner for Human Rights, *Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014*, www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.

156 Boothby, 2012, p. vii; See also Schmitt & Widmar, 2014, p. 379.

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distinction, proportionality, military necessity and humanity – all accumulated in this single area of the law of armed conflict.

This author shares the view that maintaining the proper balance between the principles of military necessity and humanity may arguably be a key approach behind a prudent targeting decision.¹⁵⁷ It is then their correct interpretation within each definition and principle that makes the legal analysis an essential part of the targeting process.

157 Cf., M. N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, *Virginia Journal Of International Law*, Vol. 50, No. 4, 2010, pp. 795-839.