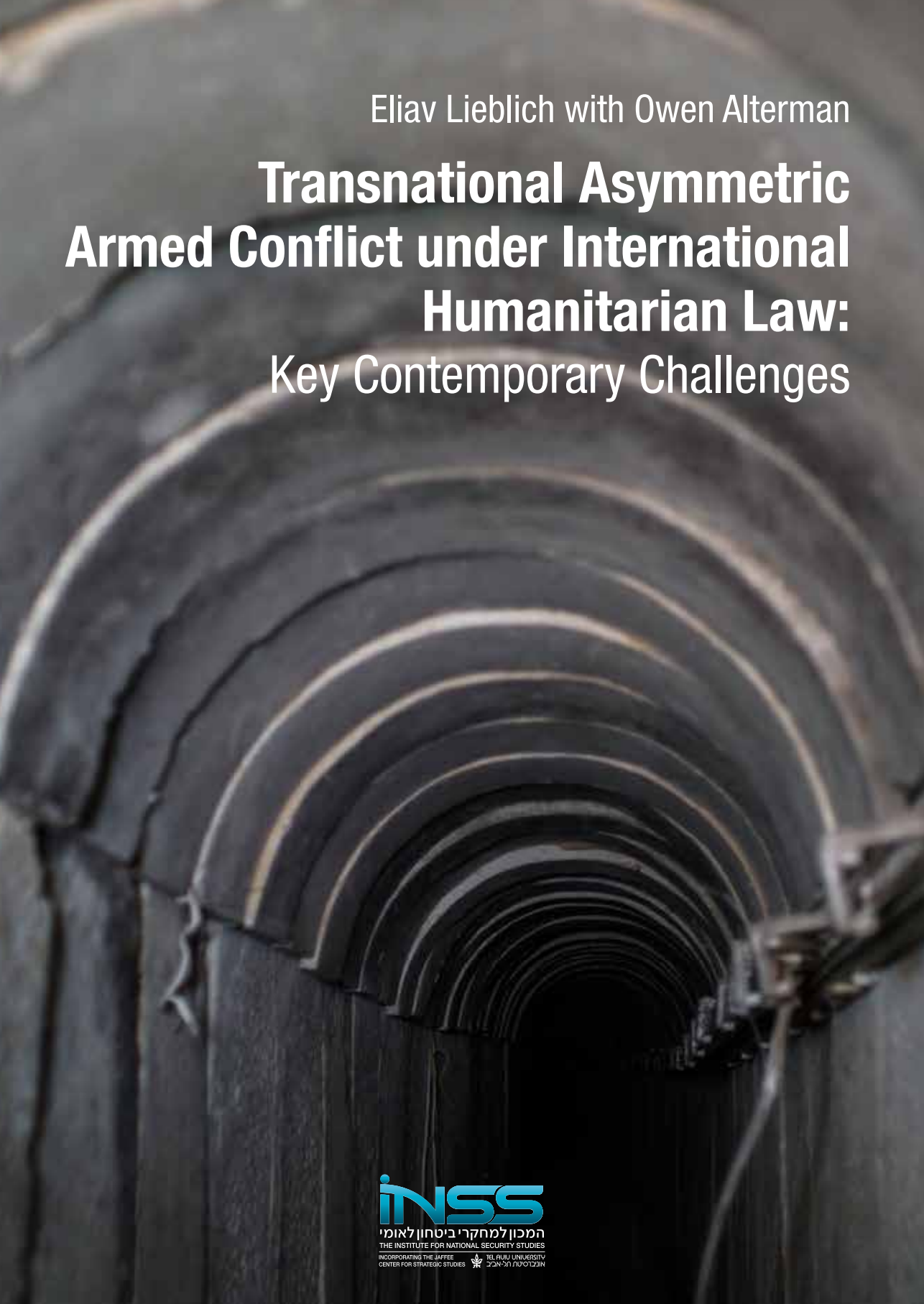

Eliav Lieblich with Owen Alterman

Transnational Asymmetric Armed Conflict under International Humanitarian Law:
Key Contemporary Challenges

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המכון למחקרי ביטחון לאומי
THE INSTITUTE FOR NATIONAL SECURITY STUDIES
INCORPORATING THE JAFFEE CENTER FOR STRATEGIC STUDIES
TEL AVIV UNIVERSITY
אוניברסיטת תל-אביב

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INSS Institute for National Security Studies

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המשפט ההומניטרי הבינלאומי בסכסוכים אסימטריים חוצי־גבולות: אתגרים מרכזיים

אליאב ליבליך
עם אואן אלתרמן

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Key Abbreviations

API	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
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
CCF	Continuous Combat Function
DPH	Direct Participation in Hostilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LOAC	Laws of Armed Conflict
NIAC	Non-International Armed Conflict
TAAC	Transnational Asymmetric Armed Conflict
UN	United Nations

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Foreword

The regulatory potential of the laws of war lay in the types of wars anticipated in Europe during the nineteenth century, and in the common European effort to maintain the then- prevailing balance of power. These were discrete, conventional military conflicts between states' regular armies that operated in sparsely populated areas under similar principles using similar means of warfare. The law was created by mutual agreement and enforced through the promise and threat of reciprocity. This law seems at first sight inadequate to regulate indefinite asymmetric warfare conducted between regular armies and irregular, sub-state militia. Perhaps the most fundamental of all the challenges that asymmetric warfare poses to the application of the law is its exploitation by the militia as a military asset: the legal protection of non-combatants becomes its shelter and a base from which it stages indiscriminate attacks.

But asymmetric warfare is not a new phenomenon, and both experience and law suggest that despite the lack of reciprocity the regular adversary should comply with the law, even though questions as to applicable law and its interpretation do arise. The alternative is even more dangerous to the regular army itself and unjust to the non-combatants.

The rise of transnational asymmetric conflict in recent years, coupled with new technologies of warfare, prompted debates about the need to rethink the laws of war or at least to update them to meet the contemporary conditions of warfare. Whereas some insisted that the breakdown of reciprocity released the regular army of its obligations, others retorted that the asymmetric situation required the regular side to invest more resources and even take additional risks to protect civilians on both sides of the conflict. This debate is still raging, although it seems that the calls for radical change have subsided and it is possible to assess both the fault lines and the emerging consensus.

The aim of the current study is to offer a guide to the main challenges posed by asymmetric warfare to the laws of war and to the response that

contemporary international law offers. The objective is not to provide yet another academic study but a rather practical guide for the perplexed. To do so it was necessary to study the challenges, to realize the goals of the law that addresses them, and to distil the legal responses that should guide the various clients of the law: legal advisors and judges, but first and foremost, military commanders who have come to realize that in contemporary warfare they must also know what the law expects of them.

Given the focus on *asymmetric* warfare, the study focuses on the more problematic aspects of this type of warfare: how to apply the principle of distinction (between combatants and non-combatants, between military and non-military targets), the proportionality requirement, and how to ensure compliance with the law unilaterally (specifically the duty to investigate alleged violations). The aim in each chapter is to present an informed and accessible reflection of the contemporary law in context.

The study was undertaken by Eliav Lieblich (who wrote the introduction, and all chapters except chapter 3) and Owen Alterman (who authored chapter 3), assisted by a dedicated team that included Yael Bar Hillel, LeighAnn McChesney, Magdalena Pacholska and Douglas Pickard. The undersigned observed their work and offered comments. We would like to acknowledge with thanks the comments and suggestions made by Pnina Sharvit Baruch.

And finally, we would like to give special thanks and appreciation to the Philadelphia-based Neubauer Family Fund, which made this study possible through its Program on International Law and National Security and for the support of the Institute for National Security Studies.

Eyal Benvenisti and Yehuda Ben Meir
Heads of the Neubauer Program on International
Law and National Security
December 2014

Introduction

International humanitarian law (IHL) has always struggled to strike the "right" balance between humanitarian considerations and military necessity. Nowhere has this struggle been more strenuous than in the context of transnational asymmetric armed conflicts (TAACs). As defined in detail in Chapter 1, TAACs occur where an armed conflict exists, in which a state deploys its armed forces against a non-state armed group operating from outside its territory; when the actions of the latter are not attributable to the state from which it operates; and the non-state actor employs tactics that bring about the dynamics of asymmetric warfare.

As we shall demonstrate in this study, TAACs place immense pressure on the implementation of basic principles of IHL. This pressure has been felt, for instance, in Israel, as its war against Hizbullah in Lebanon (2006), and to a large extent Operations Cast Lead (2008-2009) and Protective Edge (2014) against Hamas in the Gaza Strip, exhibit the substantive characteristics of TAACs, and have been met with international criticism.[1] Without passing judgment on these critiques—some might be motivated by "political" considerations, while others might be based on genuine concerns—the nature of TAACs seems to be especially conducive to international controversies.

These controversies occur both because of the *tactics* pursued by non-state actors, which significantly strain the basic IHL principle of distinction between civilians and combatants; and because of *reactions* by states to their activities. The dynamics of TAACs merit a study of their own, which should be conducted by military strategists rather than lawyers. However, we can nevertheless outline the basic problem in *fact*, which gives rise to complex problems in *law*. Indeed, non-state actors seldom hold territory in the classical sense, and usually, they do not aspire to forcibly take territory from states. Their goals are generally limited to the continuous harassment

1 Although some do not view the Israel/Gaza conflict as a TAAC. We discuss the status of the Gaza conflict, as perceived by the Israeli Supreme Court, in Chapter 1.

of armed forces, using guerilla tactics or the terrorization of civilians by launching indiscriminate attacks. If they can survive an attack launched by a state, meaning—if they can still engage in some level of guerilla action, or attacks on civilians, a few weeks into the operation—by this mere fact they deny the state its main objective. Due to their often decentralized nature and their use of guerilla tactics, physically preventing all activities by a non-state armed group is virtually impossible, *at least* without acquiring complete effective control over the relevant territory. However, extended military occupation, as is well known, raises a host of problems, and is likely to give rise to further security concerns, resulting in a vicious cycle of occupation, insurgency and counter-insurgency.

This creates a grave dilemma for states: because of the above, they aim to avoid occupying the territory from which the armed group operates, and seek to fulfill their objectives by other tactics. In the court of international public (and legal) opinion, however, they find it difficult to define a "traditional" military advantage that can credibly serve to justify the harm to civilians caused by such tactics. This dilemma relates to the problem—implied above—that the notion of "victory" in TAACs is virtually indefinable. Consequently, the traditional military advantages that form the stepping stones towards a military "victory" are slippery at best when it comes to TAACs. In the absence of a concrete notion of victory, states may be incentivized to search for alternative—and vague—parameters for military success, such as "deterrence."[2] From here, the road to extensive destruction and international controversy is a short one.

Moreover, TAACs give rise to additional and unique challenges, which derive cumulatively from their being *both* asymmetric *and* transnational. The traditional under-regulation of such conflicts can result in a responsibility gap concerning non-state actors, which in turn generates a protection gap in relation to the civilian population. For instance, in traditional, international armed conflicts, each state party is under obligation to take the maximum feasible precautions to protect its "own" civilians from the consequences of

2 In asymmetric conflicts, the "center of gravity" of non-state armed groups is public opinion. Thus, states might choose either a "hearts and minds" strategy towards the civilian population, as prevalent in US counterinsurgency doctrines, or, conversely, deterrence. In Israel's case, thought has gravitated in the direction of deterrence because the "hearts and minds" strategy, considering the nature of the conflict, seems unachievable.

warfare. In TAACs, however, the civilian population located in proximity to the operations of the non-state party is caught in a triple-bind: on the one hand, in practice it does not enjoy the full benefits derived from protection duties incumbent on territorial states; on the other hand, because of the nature of TAACs, as detailed in the previous paragraph, it may suffer extensive harm caused by the reactions of states to non-state actors. In addition—and this is the third prong of its misfortune—non-state actors might be incentivized to capitalize on civilian harm, in order to demonize their adversary in the eyes of local and international public opinion.

While these gaps can be legally addressed by the growing convergence between norms governing *all* conflicts—a process we shall discuss in Chapter 1—this scarcely changes the *de facto* expectation that states involved in TAACs fill the protection gap themselves. Of course, this notion conflicts with the adverse incentive, described above, to achieve victory through deterrence. States also perceive such expectations as unfair or impracticable, which may explain why they generally balk at such responsibilities.

A further complication—not unique to TAACs but relevant also to other potentially asymmetric situations (such as internal-armed conflicts and situations of occupation)—is the intense interaction between IHL and international human rights law (IHRL). The IHL-IHRL interaction nowadays permeates all aspects of armed conflict, but is perhaps most acute in determining whether in a given instance, when facing a non-state actor, a state is justified to act under the paradigm of the conduct of hostilities, or whether it must act according to the more restrictive framework of law enforcement. Simply put, under the first paradigm, as generally understood, targetable persons can be lethally attacked unless they have surrendered or been rendered *hors de combat*, while under the second framework, a person must be arrested and prosecuted, and can be harmed only in defense of self or others. Indeed, our study, as detailed in Chapter 1, presupposes the existence of an armed conflict, which necessarily means that at least *some* state actions, such as targeting, are governed by the hostilities paradigm, as the applying *lex specialis*. However, because of the substantial presence of civilians in the area of hostilities, IHRL norms might be significant by complementing *other* operational aspects relevant to TAACs.

The challenges discussed above spawn some of the most acute dilemmas arising in contemporary TAACs. This study seeks to discuss and analyze some of them. Overall we do not attempt to formulate new general theories

of IHL or to suggest that IHL must be amended to address these difficulties. On the contrary, it is our contention that the existing rules and principles of IHL are indeed well poised to regulate TAACs, and that their unique problems can be addressed through interpretation of existing norms. Furthermore, we do not embark on a quest to facilitate, in legal terms, the capacities of states to confront non-state actors, or to suggest apologetic interpretations of IHL that would presumably allow states to project more power, perhaps at the expense of civilians and civilian infrastructure. Indeed, our point of view is that in addition to the legal obligation to do so, strict adherence to IHL is also the best way to confront such adversaries, not least because in TAACs, the battle for legitimacy is often more decisive than the battle for the attendant military advantage.

Our study thus seeks to highlight key dilemmas that arise in various junctures of IHL, and to discuss the various interpretations given to them by relevant actors. We do not always pass judgment regarding these interpretations; we do, however, comment when they appear to be unreasonable. We aim to reconcile, when possible, between different approaches, taking into account the challenges of TAACS; and to point out, conversely, approaches that are incompatible with each other. At the end of the day, we hope to lay down for policymakers and lawyers a coherent map of the challenges and approaches towards some of the most pressing issues relating to the regulation of TAACs. This map can hopefully serve policymakers in Israel and elsewhere to adapt their policies, as well as—and this is increasingly important—the way they represent them publicly; we also hope that it can assist lawyers, when assessing these policies under international law.

In accordance with our above-mentioned goals, we chose to focus, in this study, only on those areas of IHL where TAACs give rise to acute issues. In general, these areas are those in which the intermingling between civilians and fighters, prevalent in such conflict, is at its most consequential. In Chapter 1, we attempt to define, in detail, the notion of TAACs, and to outline the general legal regimes that regulate such conflicts. We start with a general survey of the sources of IHL—for the benefit, perhaps, of policymakers—and move to analyze the normative complexity of TAACs. In general, we conclude that the difficulties in categorizing TAACs notwithstanding, the ongoing convergence of norms applicable in all conflicts—through the broadening of customary IHL—diminishes the import of this categorization. The chapter then discusses the interaction between IHL and IHRL, and the question of

extraterritorial application of IHRL, mainly as reflected in recent rulings of the European Court of Human Rights.

Chapter 2 discusses the principle of distinction between protected civilians and persons who are targetable during armed conflict—in particular those who belong to an armed non-state party. We juxtapose between the "civilian approach" (viewing such persons as civilians directly participating in hostilities) and the "status approach" (viewing such persons as individuals who have lost their civilian status), as these approaches were adopted, respectively, by the Israeli Supreme Court and the International Committee of the Red Cross. The chapter thereafter proceeds to analyze the various questions that arise when attempting to delineate actions that constitute direct participation in hostilities.

Chapter 3 also discusses the principle of distinction, but this time with regard to *objects*. As with natural persons, IHL requires that parties to a conflict distinguish between objects, in order to avoid harm to the civilian population not participating in hostilities. After a brief introduction of the law, the chapter discusses how distinction relates to so-called "dual-use" objects, targets such as power plants and roads used both by fighters and uninvolved civilians. After discussing dual-use objects, the chapter surveys the debate on so-called "war-sustaining economic objects" and political and psychological objects. It also looks at the question of the degree of certainty an attacking party must have that an object is a military objective. In asymmetric conflicts where intelligence is often uncertain, this is a question that may well arise.

Chapter 4 addresses the complex question of proportionality in asymmetric warfare—meaning, the issue of incidental harm to civilians that can be justified in light of a valid military advantage, and other closely related issues. It begins by dealing with some key distinctions, such as that between *ad bellum* and *in bello* proportionality, and discusses approaches that argue for the convergence of these aspects. The chapter then proceeds to survey some of the more controversial questions that arise when attempting to define "valid military advantage." Among other things, we discuss the question of deterrence as a military advantage and the problem of weighing the protection of troops in relation to civilian harm ("force protection"). Thereafter, the chapter moves to analyze questions closely related to the issue of proportionality, namely, the duty to take feasible precautions in attack. We note the context-intensive nature of the duty, and discuss whether the

determination of "feasibility" is affected by the relative capabilities of the parties. The chapter ends with a discussion of the duty to provide an effective advance warning regarding attacks that can affect the civilian population.

Chapter 5 concludes the study with a brief comment on the issue of the duty to investigate alleged violations of IHL in general, and specifically the duty to undertake a criminal investigation of alleged war crimes. During the writing of this study, the question of the duty to investigate has been addressed thoroughly by a commission established by the government of Israel (the Turkel Commission). We therefore treat this issue in a brief manner only, in order to highlight the general dilemmas and trends that permeate it. Our brief discussion can be read in conjunction with the Turkel Report and its conclusions.

To conclude: As mentioned above, IHL strives to strike the "right" balance between humanitarian and military necessity. However, when we use the term "right," we do not strictly mean it in the ideal ethical sense. We also allude to a balance that is likely to be followed by generally law-abiding armed forces. Indeed, one should be wary of constructing IHL in a manner that would completely discredit it in the eyes of forces operating in the field; in such a case, IHL might be disregarded altogether as utopian idealism, which it was never meant to be. However, the natural tendency of armed forces to place military necessity on the highest plane should not be the bottom line of the discussion. On the contrary, it is our belief that the humanitarian objectives of IHL indeed correlate with notions of military professionalism, honor and even utility. If forced to be stated in a general manner, the "right" balance might be found at the point at which humanitarian considerations, taken to the maximum, are not perceived as rendering military operations impossible altogether; as requiring troops to conduct suicide missions; or be deemed as giving non-state actors manifestly unfair advantages, in light of the under-regulation of TAACs under traditional IHL. Like many aspects of IHL, this balance is relatively easy to phrase in general terms, but is excruciatingly difficult to apply in specific instances. This study, hopefully, can highlight some possible routes to achieve this balance, or at least clarify the interests at stake towards its reconciliation.

Two technical issues before we begin: The chapters below discuss complex issues. Rather than separately summarizing the findings in the chapters themselves, we have compiled the important "bottom lines," as we judge them, in a Detailed Summary at the end of the study. We hope that the

concentration of findings proves helpful in clarifying the big picture and context with regard to our much more detailed discussions in the chapters themselves.

Finally, during the last stages of the editing of this study, Israel embarked on Operation Protective Edge in Gaza. Because of time and space constraints, this study does not discuss whether, and in what sense, Protective Edge raised novel questions with regard to TAACs, or presented new approaches by Israel. Nonetheless, it seems that many of the issues likely to arise in the analysis of Operation Protective Edge are addressed here. We hope that their discussion can benefit from this study as well.

CHAPTER 1

Transnational Asymmetric Armed Conflict: Definition and General Legal Regimes

DEFINITION – TRANSNATIONAL ASYMMETRIC ARMED CONFLICT

This study addresses legal aspects arising from transnational asymmetric armed conflict (TAAC) in international humanitarian law (IHL). It is imperative to note, however, that neither the term "transnational" nor "asymmetric" are legal terms *per se*. Both are terms connoting *factual* situations that might give rise to complex questions of legal interpretation, which we hope to clarify here; but in and of themselves, the terms are not currently recognized as distinct categories of conflicts in positive international law.[1]

While transnational armed conflicts are often also asymmetric, there is no necessary correlation between the terms. Indeed, transnational armed conflicts can theoretically be *symmetric* (for instance, when the non-state actor across the border operates in scope and methods that resemble regular armed forces of a state; or, conversely, when both parties—state and non-state alike—employ guerilla tactics); just as international armed conflicts can be *asymmetric* (for instance, when a regular army faces decentralized armed resistance during occupation).

The term TAAC can be elusive. When we use it in this document, we refer to a situation in which the following factual conditions are cumulatively fulfilled:

a. *the existence of an armed conflict in which a state deploys its regular armed forces against a non-state armed group operating from outside the state's territory*;

1 *See* Noam Lubell, Extraterritorial Use of Force Against Non-State Actors 126 (2010).

b. the actions of the non-state actor are not attributable to the territorial state, if such a state exists;
c. the deployment of the forces is not an intervention in an internal armed conflict, conducted with the territorial state's consent; and
d. the non-state actor, either by choice or on counts of its limited capabilities, employs tactics resulting in a challenge to the traditional IHL concepts of combatant-civilian distinction, or the distinction between military and civilian objects.[2]

In condition (a) of our definition, we presuppose the existence of an armed conflict, at least at some point in time, which is a precondition for the application of IHL in a specific case.[3] As put—albeit not in the context of transnational conflicts—by the Appeals Chamber of the ICTY in the famous *Tadic* case:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[4]

The determination whether an armed conflict exists in a specific instance is crucial, since if this is not the case, state actions are regulated strictly by the international law of human rights (IHRL)—a body of law which severely restricts the use of lethal force,[5] and which might very well apply

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2 *See also* Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 Duke J. Comp. & Int'l L. 339, 341–342 (2010).

3 *See*, *e.g.*, Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan*: *Is the United States Engaged in an Armed Conflict?* 34 Fordham Int'l L. J. 151 (2010).

4 *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 70 (Oct. 2, 1995). We thus exclude instances in which, for example, a state abducts an individual from the territory of another state, such as the famous 1960 Eichmann abduction from Argentina by Israeli agents; or the Turkish abduction of Ocalan from Kenya in 1999. *Compare* Lubell, *supra* note 1, at 2–3, 9. A recent case is the extraterritorial abduction of alleged Hamas operative Dirar Abu-Sisi by Israeli agents operating in the Ukraine. *See 'Abducted' Palestinian Dirar Abu Sisi on Hamas Charges*, BBC News (Apr. 4, 2011), *available at* http://www.bbc.co.uk/news/world-middle-east-12957071.

5 *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶31–33, Hum. Rts. Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston); *see also* Nils Melzer, Int'l Comm. Red Cross,

also to a state's extra-territorial actions.[6] Indeed, some threshold for the existence of armed conflict must be determined, since otherwise states could always derogate from—or even abrogate—their human rights obligations, by arbitrarily declaring that a certain situation amounts to an "armed conflict."

Nonetheless, the application of the *Tadic* standard to specific cases, assuming it can be extended to TAACs, can encounter difficulties. This is especially true in instances where forcible actions are taken against decentralized transnational bodies such as al-Qaeda (the so-called "global war on terror"). The question whether such circumstances amount to "armed conflicts," or should be dealt with exclusively as an issue of law enforcement, has generated much controversy.[7] However, in this study we are only concerned with cases in which it is obvious that the threshold of armed conflict has been crossed, at least at some point.[8] Such cases may be found, for instance, in the fighting between various groups and the US in Afghanistan (but not necessarily elsewhere);[9] the conflict between Israel and Hizbullah in 2006 (assuming Hizbullah's actions were not attributable to Lebanon);[10] the warfare between Turkey and the PKK in northern Iraq;[11] or, perhaps, the conflict between Rwanda and Hutu militias operating in the Democratic Republic of the Congo, during certain stages of the Congolese Conflict, which has taken place intermittently since the mid-1990s.[12]

In condition *(b)* of the definition, we limit the term TAAC only to conflicts against non-state actors where the latter's actions are not attributable to the territorial state. This is since state-attribution necessarily transforms

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Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 24 (2009) [hereinafter *ICRC DPH*].

6 *See infra* sec. IV.2

7 *See, e.g.,* Rosa Ehrenreich Brooks, *War Everywhere*: *Human Rights, National Security and the Law of Armed Conflict in the Age of Terrorism*, 153 U. Pa. L. Rev. 675 (2004); Mary Ellen O'Connell, *When is War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. Int'l & Comp. L. 5 (2005); *Study on Targeted Killings*, *supra* note 5, at ¶¶46–56; Lubell, *supra* note 1, at 112 –121.

8 *Id.* at 130–131.

9 *Id.* at 85, 121.

10 *Id.* at 85, 97.

11 *See Armed Conflict between Army, PKK continues,* Hurriyet (Aug. 20, 2011), *available at* http://www.hurriyetdailynews.com/n.php?n=armed-conflict-between-army-pkk-continues-2011-08-19.

12 *See, e.g.,* Eliav Lieblich, International Law and Civil Wars: Intervention and Consent 24 –30 (2013).

the conflict into an *international* one. Such transformation can take place when the non-state actor is directly sent by the territorial state;[13] when it is controlled by that state, either through effective or overall control;[14] or, perhaps, when the state acquiesces to the actions of the non-state actor, while failing to exercise "due diligence" or "vigilance" to prevent its actions.[15] Furthermore, it is worthwhile to note that in international law, situations of occupation transform the transnational conflict into one generally regulated by the legal framework of international armed conflict, regardless of the identity of the involved parties.[16] Since the threshold for the existence of occupation is increasingly seen as low, at least in some international circles, it is expected that more and more TAACs will shift closer to international ones rather rapidly.[17]

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13 *See* Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 art. 3(g) (Dec. 14, 1974), which reflects customary international law, as held in: Military Aid and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶195 (June 27).

14 There is an ongoing disagreement between international tribunals regarding the question whether the standard for attribution of acts by private individuals or organizations to states should be assessed in light of the "effective" or rather "overall" control standard. *Compare id.* ¶¶115 –11 *with* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chambers Judgment ¶¶17–18 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999) (respectively setting forth the effective control versus the overall control standards) *and* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J., ¶398, ¶¶405–406 (February 26) (preferring the effective control standard). *See also* Rep. of the Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 8, U.N. Doc. A/56/20; GAOR, 53d Sess., Supp. No. 10, (2001). Indeed, the threshold for attribution is not entirely settled in international law. *See* ICRC DPH, *supra* note 5, at 23.

15 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).
Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168, ¶¶276-305 (Dec. 19). For more on the "internationalization" of transnational conflicts see Lubell, *supra* note 1, at 97–99.

16 *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287. [hereinafter *GCIV*].

17 *See, e.g.,* Independent Int'l Fact Finding Mission, *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol. 2, 306, (Sept. 30, 2009). ("the mere fact that some degree of authority is exercised on the civilian population triggers the relevant conventional provisions of the law of occupation

In condition *(c)* we disregard instances in which the operations of the state are permitted through the consent of the territorial state, when the latter itself is involved in a conflict against the targeted actor. Without elaborating on this issue, in such instances the conflict is essentially an intervention by a third party in an *internal* armed conflict.[18] While similar rules of IHL might in fact apply in such situations, we exclude these conflicts from our definition for the sake of conceptual clarity. Finally, condition *(d)* alludes to the challenges, detailed in our introduction and further explored *supra*, that asymmetric conflicts present to the application of the basic pillars of IHL.

GENERAL LEGAL FRAMEWORKS – INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW

The Main Sources of International Law: Treaties and Custom

In order to facilitate the understanding by non-lawyers of the terms used in this document, it is helpful to address briefly some basic concepts of international law. Classically, the sources of international law, meaning, the mechanisms through which the binding norms of international law are identified, are three: treaties, custom and the ambiguous concept of "generally recognized principles of law."[19]

Understanding the two main sources of law—treaties and custom—can allow us to better comprehend the processes that are affecting the way the international community views TAACs; this is especially true in the context of IHL, in which, as we shall see, customary international law is of special importance.

Treaties are international agreements, usually conducted between sovereign states.[20] They can be *ad hoc*, in which case they resemble, to a large extent, private-law contracts that we know from domestic legal systems; they can

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on the treatment of persons. In a further stage, the full application of the law on occupation comes into play, when a stronger degree of control is exercised.")

18 *See* Blanck & Farley, *supra* note 3, at 182–184.

19 Statute of the International Court of Justice, art. 38(1), 24, Oct. 1945, U.N.T.S. XVI.

20 These agreements can be regulated by the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, when they conform to the preconditions set forth in article 1; however, even if the Vienna Convention is not applicable to a certain agreement it can still be controlled by norms of customary international law. *Id.* art. 3.

also be *lawmaking* agreements, when they establish general, forward looking norms.[21] The latter in certain specific cases can be elevated to a quasi-*constitutional* status,[22] when they form a general organizational structure; when they are universal; or when they reflect norms which are considered *jus cogens*—meaning, peremptory, fundamental norms of international law that cannot be derogated from.[23] In any case, since treaties are perceived as representing explicit sovereign consent,[24] their legitimacy and importance as sources of international law is unquestionable.[25]

The second, perhaps more enigmatic, source of international law is *custom*. As framed by Oppenheim, a customary norm of international law is deduced from state-practice when "a *clear* and *continuous* habit of doing certain actions has grown up under the aegis of the *conviction* that these actions are *legally* necessary or legally right" [Emphasis added].[26] Customary international law is nowadays authoritatively defined in article 38(1)(b) of the Statute of the ICJ as an "international custom, as evidence of a general practice *accepted* as law."[27]

Therefore, traditionally, the general practice of states must be accompanied by a subjective expression that the practice represents *legal* norms (*opinio juris*). Traditionally, customary international law's binding power was perceived as rooted in its representation of the *tacit consent* of states.[28] As such, if a state unequivocally and consistently expressed its *dissent* regarding an emerging customary rule, it could claim that it was not bound by the law,

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21 Lassa Oppenheim, 1 International Law, a Treatise ¶18 (2nd ed., 1912).

22 An obvious example for a "constitutional" treaty is the Charter of the United Nations. For a detailed analysis of this issue, *see*, *e.g.*, Bardo, Fassbender. The United Nations Charter as the Constitution of the International Community (2009).

23 *See* Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in The Fundamental Rules of the International Legal Order: *Jus Cogens* and Obligations *Erga Omnes* 21 (Christian Tomuschat & Jean-Marc Thouvenin, eds., 2006); in the specific context of *jus cogens* and treaties see Wladyslaw Czaplinski, *Jus Cogens and the Law of Treaties*, *id.* at 83.

24 *See* Oppenheim, *supra* note 21, at ¶15.

25 Antonio Cassese & Joseph H.H. Weiler, Change and Stability in International Law-Making 165 (1988).

26 Oppenheim, *supra* note 21, at ¶17.

27 ICJ Statute, *supra* note 19, art.38(1)(b) [emphasis added]

28 Oppenheim, *supra* note 21, at ¶16.

as its tacit consent could not be inferred. Such a state would be considered a "persistent objector."[29]

In recent decades, customary law has gained much importance in the work of various international bodies, and specifically in the context of IHL. In fact, it is arguable that the negotiation of treaties became a mean to eventually establish "new" customary law, rather than to reflect and clarify *existing* customary norms.[30] In part, the rise of customary international law as a source of paramount importance coincides with the increasing "constitutional" understanding of international law,[31] in the sense that law is no longer perceived as solely dependent upon state consent. This approach attributes *substantive* importance to customary international law, rather than viewing it merely as an international rule established by tacit consent.[32]

This process has been historically prevalent in the field of IHL, in which "laws of humanity" and the "dictates of public conscience" have had a role in the development of the law, at least on the same footing as that of state-practice.[33] Moreover, it is fortified by the increasing understanding of IHL as a tool designed mainly to protect civilians from harm in armed conflicts, rather than one to protect the interests of sovereign entities.[34] Therefore, it is reasonable to argue that in the realm of IHL, custom enjoys a special status.

In practice, the main importance of distinguishing a norm as reflecting customary international law is straightforward: because of its nature, customary

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29 *See, e.g.,* O.A. Elias & Chin L. Lim, The Paradox of Consensualism in International Law 30–31 (1998).

30 Cassese & Weiler, *supra* note 25, at 165–167.

31 For a discussion of this issue see Jan Klabbers et al, Constitutionalization of International Law (2009).

32 *See, e.g.,* North Sea Continental Shelf (Ger. v. Neth.), 1969 I.C.J 3, 178 (Feb. 20) (the dissenting opinion of Judge Tanaka), *cited in* Elias, *supra* note 29, at 29–30.

33 This formulation, addressing "laws of humanity" and "dictates of the public conscience" originates in the Martens Clause; *see* Hague Convention IV: Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, U.S.T.S. 539; *see also* Antonio Cassese, International Law 160 –162 (2nd ed., 2005). It is incorporated also in the Geneva Conventions of 1949 (common Articles 63/62/142/158 of the respective conventions), and Protocol I for the Protection of Victims of International Armed Conflicts, article 1(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *API*]. *See* Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,* 94 Am. J. Int'l L. 78, 80 –81 (2000); *see also* Nicaragua, *supra* note 13, ¶218.

34 Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).

international law binds virtually *all* states.[35] When such law is manifested in a treaty, for instance, it binds also states that are *non-signatories*. Furthermore, the recognition of a norm as reflecting customary international law bears a special, *domestic* significance in certain legal systems,[36] such as the Israeli one. In such systems, domestic courts will, in general, refrain from applying international treaties that are not legislatively adopted into the domestic legal system, *unless* they reflect customary international law, in which case they are automatically incorporated into domestic law, and thus applicable by domestic courts.[37]

International Humanitarian Law – Basic Premises and Sources

The Tension between IHL and LOAC

Before we briefly survey the basic premises and sources of IHL, it should be noted that the *same* body of norms we call IHL is sometimes addressed, by certain actors, as the Laws of Armed Conflict (LOAC).[38] While this might seem a mere nuance, in actuality the use of the different terms reflects, at times, divergent substantive approaches towards the interpretation of the same set of rules. In essence, the use of the term IHL stresses the humanitarian aspects of the law, namely the protection it affords to civilians, highlighting the argument that the protection of civilians has become the central pillar of the law.[39] The use of the term LOAC, conversely, emphasizes the view that the primary role of the law is to regulate military actions, and that therefore military necessity should be taken especially seriously in its application.[40]

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35 *See, e.g.,* Oscar Schachter, *Entangled Treaty and Custom*, *in* International Law At a Time of Perplexity: Essays in Honour of Shabtai Rosenne 717, 718 (Yoram Dinstein ed., 1989).

36 These systems are pseudo-*dualist*. Regarding the concepts of dualism and monism, see Louis Henkin, International Law: Politics and Values 64 –74 (1995).

37 *See*, *e.g.*, Malcolm Nathan Shaw, International Law 128 –135 (2003) (concerning the incorporation customary international law in Britain); in the Israeli context see, e.g., HCJ 302/72 Abu-Hilu et al. v. Government of Israel et al. 27(2) PD 169, 180 [1973].

38 State of Israel, The Operation in Gaza 27 Dec. 2008-18 Jan. 2009: Factual and Legal Aspects
¶28, fn 2 (2009) ("International Humanitarian Law is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.")

39 *See, e.g.,* Meron, *supra* note 34, at 239.

40 *See* Benvenisti, *supra* note 2, at 348.

Nevertheless, this document will use the term IHL, as it is more frequently used in international forums, including in the deliberations and resolutions of authoritative international bodies such as the UN Security Council[41] or the ICRC.[42] The term can also be found in recent Israeli legislation.[43]

Basic Philosophy

IHL, as a body of law, seeks to mitigate the harm caused by armed conflicts, by sparing those who do not (or no longer) directly participate in hostilities, and by limiting the violence to the amount necessary to achieve the aim of the conflict, which is strictly viewed as weakening the military potential of the enemy.[44] As enumerated by Sassòli et al, according to the ICRC, these basic objectives generate the four fundamental principles of IHL:[45]

a. The principle of necessity (including the prohibition on the attack of those *hors de combat*);
b. The distinction between combatants and non-combatants; between military objectives and civilian objects;
c. The principle of proportionality;
d. The prohibition on inflicting unnecessary suffering (the principle of humanity).

In this document, we will explore the way these principles are affected by the complex characteristics of TAACs.

The Distinction between Jus in Bello and Jus ad Bellum

The distinction between *jus in bello* and *jus ad bellum* is perhaps the most fundamental concept of the application of modern IHL.[46] IHL, as aforementioned, encompasses the international rules and customs that regulate the conduct of warfare (*jus in bello*), as distinct from the rules that

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41 *See*, *e.g.*, U.N. S.C. President, *Statement by the President of the Security Council regarding the protection of civilians in armed conflict,* S/PRST/2009/1 (Jan. 14 2009); S.C. Res. 1973, ¶3, U.N. Doc. S/RES/1973 (Mar. 17, 2011) ("Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law").

42 *See* Marco Sassòli et al, How does Law Protect in War? 1 (3rd ed., 2011).

43 The Imprisonment of Unlawful Combatants Law, 5762-2002, LSI, art. 2 (Isr.).

44 Sassòli, *supra* note 42, Chapter 1, at 1.

45 *Id.*

46 *See* API, *supra* note 33.

regulate the legality of the resort to force (*jus ad bellum*).[47] The essence of this distinction—made for practical and humanitarian reasons—is that the rules of IHL are binding on *all* parties to the conflict, regardless of the legality of their choice to resort to force. In other words, IHL applies *equally* to the party that resorted to force unlawfully and to the one that uses force lawfully.[48] As we shall see in Chapter 4, this distinction is sometimes challenged by commentators, but remains solid nevertheless.

IHL: Treaties and Customary Law

Modern IHL can be traced to the 1863 Lieber Code, an elaborate set of rules set forth by the United States during the American Civil War,[49] and the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[50] The various treaties of IHL were updated throughout the 20th century, and it is now common to classify IHL treaty law as consisting, mainly, of the following legal frameworks:

a. Hague Law: the rules set forth in the various Hague Conventions of 1899 and 1907, which address prohibited means and methods of warfare, as well as other general rules, as notably reflected in the Hague Regulations Concerning the Laws and Customs of War on Land.[51]
b. Geneva Law: the four Geneva Conventions of 1949, which address, respectively, the wounded and sick on land;[52] the wounded, sick and

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47 The law of *jus ad bellum* is a rather modern phenomenon, entrenched in Article 2(4) of the U.N. Charter, which prohibits the threat or use of force. The widely accepted exceptions to the prohibition are self-defense (article 51) and enforcement measures authorized by a "Chapter VII" Security Council Resolution.

48 The practical necessity of the distinction is compelling: since in virtually every conflict both parties claim that its adversary is the "aggressor," if the application of IHL will be contingent upon the legality of the use of force, the result would be that IHL will never be applied. *See* Sassòli, *supra* note 42, at 102 –103; *see also* Michael Walzer, Just and Unjust Wars 21–22 (4th ed., 2006).

49 General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, War Department, Adjutant General's Office, Washington D.C., (Apr. 24, 1863).

50 Sassòli, *supra* note 42, at 122.

51 Hague Convention IV, *supra* note 33.

52 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

shipwrecked at sea;[53] the treatment of prisoners of war;[54] and the status and treatment of protected persons.[55]

c. Additional Protocols: the two additional protocols to the Geneva Conventions, adopted in 1977: Additional Protocol I, which adds, supplements and in fact elaborates on the Geneva Law in instances of *international* armed conflict;[56] and Additional Protocol II, which develops and supplements Common Article 3 of the Geneva Conventions (explained *infra*), and applies only in instances of *internal* armed conflicts ("civil wars").[57]

It is widely accepted that the 1907 Hague Regulations[58] and Geneva Conventions reflect customary international law,[59] and moreover that parts—

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53 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85.

54 Geneva Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

55 Geneva Convention IV, *supra* note 16.

56 *API*, *supra* note 33, art. 1 (3).

57 Protocol II for the Protection of Victims of Non-International Armed Conflicts, art. 1(1), June 8, 1977, 1125 U.N.T.S. 609. [hereinafter *APII*]; *see* Lubell, *supra* note 1, at 110–111.

58 *See.* HCJ 7957/04 Mar'abe v. Prime Minister60 (2) PD 477, ¶14 [2005] (Isr.); *see also* Yoram Dinstein, The International Law of Belligerent Occupation 5 (2009).

59 Meron, *supra* note 33, at 80; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8); It should be noted that the Israeli Supreme Court has been ambiguous on the question of status of the fourth Geneva Convention, and has adopted, over the decades, the position that *some* of the Convention's provisions are customary; and that in any case government actions in the Occupied Territories will be judicially reviewed based on the decision by the government to apply in the territories the "humanitarian" provisions of the Convention, without ruling on the question whether its application is obligatory. *See*, *e.g.*, HCJ 7957/04, *supra* note 58, ¶14; HCJ 7015/02 Ajouri v. IDF Commander in Judea and Samaria 56 (6) PD 352, ¶13 [2002] (Isr.); HCJ 2690/09 Yesh Din v. IDF Commander in the West Bank (Mar. 3, 2020), Nevo Legal Database (by subscription) (Isr.) ¶6; HCJ 3278/02 Hamoked Lehaganat Haprat v. IDF Commander in the West Bank 57 (1) PD 385 [2002] (Isr.). The distinction between "humanitarian" and "non-humanitarian" provisions, along with the perception that not all of the provisions are customary, has allowed the government and Supreme Court to largely "side-step" the issue of judicial review regarding transfer of civilian populations into the occupied territories (the settlements), which widely viewed, in the international community, as prohibited by article 49 of GCIV.

perhaps even the majority—of the provisions of API also reflect such law.[60] Furthermore, an extensive study regarding the customary rules of IHL was conducted by the ICRC. The Customary IHL Study identified 161 customary rules of IHL, most applicable in both international *and* non-international armed conflicts. However, it should be noted, that the ICRC Study's use of the latter term alluded mostly to internal conflicts.[61]

Nonetheless, by identifying that in general the same basic norms regulate both international and internal armed conflict, the Customary IHL Study exemplifies the growing *convergence* between the norms regulating different types of armed conflicts. If this is true regarding international versus internal armed conflicts,[62] there is no reason that this trend will not apply also to the regulation of TAACs.[63]

THE LEGAL FRAMEWORK OF TRANSNATIONAL ARMED CONFLICTS: TOWARDS A CONVERGENCE OF NORMS

The Traditional Realms of IHL: International versus Internal Armed Conflicts

IHL has been traditionally concerned with two types of armed conflicts: international armed conflicts versus conflicts "not of an international character" (or NIAC). International armed conflicts—i.e, direct conflicts between states, or situations in which a state occupies territories of another, are controlled, as aforementioned, by the regulations annexed to the Hague

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60 *See* M. Cherif Bassiouni, 1 International Criminal Law: Sources, Subjects and Contents 285 fn. 128 (3rd ed., 2008); For an elaborate discussion, see Yutaka Arai-Takahashi, The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law 59–64 (2009); regarding the application of API rules as customary international law by the Israeli Supreme Court, *see* HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel 62 (1) PD 507, ¶20 [2006] (Isr.).

61 *See* Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (2005), *available at* http://www.icrc.org/customary-ihl/eng/docs/home.

62 On this convergence see, e.g., Tadic, *supra* note 4, ¶¶100–127.

63 *See* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 20, 41 (2003) (arguing that there is no rationale for a "regulatory gap" between internal armed conflicts and transnational armed conflicts); Lubell, *supra* note 1, at 131–132.

Convention of 1907;[64] the Geneva Conventions of 1949;[65] supplemented (and extended) by Additional Protocol I of 1977.

Conflicts "not of an international character" are specifically addressed in Common Article 3 of the Geneva Conventions, which applies in the following instance:

> In the case of armed conflict not of an international character occurring in the territory of *one* of the High Contracting Parties. [Emphasis added]

Common Article 3 enshrines minimal protections in such conflicts, for the purpose of ensuring the humane treatment of persons taking no active part in hostilities, including those who have laid down their arms. To that end, it prohibits, *inter alia*, forms of violence against such persons; "outrages upon personal dignity"; and minimal due-process requirements.

Common Article 3 was originally understood as regulating cases of internal armed conflicts; meaning, armed conflicts taking place within the territory of a single state in which opposition groups attempt to overthrow the government or secede (or, in common language, "civil wars").[66] Indeed, as clearly reflected in the commentaries to the Geneva Conventions of 1949, Common Article 3 was a compromise struck between those who sought to regulate "civil wars" within IHL, and those who were reluctant to do so as they feared it would serve as an encouragement for insurrectionist movements.[67] Common Article 3 was thus meant to serve as a "convention in miniature" until the detailed regulation of internal armed conflicts could

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64 Hague Convention IV, *supra* note 33.

65 *See* Geneva Conventions, *supra* note 52-55, Common Article 2.

66 Jean S. Pictet, Oscar M. Uhler, ICRC Commentary on the IV Geneva Conventions of 12 August 1949, 36 (1958). ("Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country"); *See, e.g.,* Kenneth Watkin, *21st Century Conflict and International Humanitarian Law*: *Status Quo or Change*? *in* International Law and Armed Conflict: Exploring the Faultlines 265, 267 (Jelena Pejic & Michael N. Schmitt eds., 2007); Lubell, *supra* note 1, at 100–101.

67 Commentary on GCIV, *supra* note 66, at 26–34.

be agreed upon.[68] Notwithstanding this fact, the commentaries stipulated that the Article's scope "must be as wide as possible."[69]

Common Article 3 was "developed and supplemented" by Additional Protocol II of 1977, in which the term "non-international armed conflict" was coined. However, unlike Article 3, the text of Article 1 of Additional Protocol II *explicitly* states that it applies to instances of *internal* armed conflicts.[70]

The Normative Complexity of Transnational Armed Conflicts

The traditional view of IHL as a tool regulating international and internal armed conflicts, presents a challenge when attempting to ascertain the normative frameworks that govern *transnational* armed conflicts. Since such conflicts do not take place between "two or more High Contracting Parties"—the precondition for the application of the Geneva Convention's laws regarding international armed conflict[71]—they do not constitute international armed conflicts, in the strict sense.[72] Conversely, since the conflicts are not *internal*, they do not fall within the traditional understanding of non-international armed conflict,[73] whether these are regulated by Common Article 3 or Additional Protocol II.[74] Indeed, the fact that they are conducted across an international border is sufficient to subject them to the international law of *jus ad bellum*; but it is not certain that it is enough to qualify them as internal armed conflicts for the sake of IHL.

The possible answers to this question are threefold. The first would be that such conflicts exist within a legal void, in which norms of IHL, and specifically Geneva Law and API, do not apply.[75] A second answer would

68 *Id.* at 34.

69 *Id.* at 36.

70 API, *supra* note 33, art. 1 ("This Protocol ... shall apply to all armed conflicts which are not covered by [API]… and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.")

71 Enshrined in common article 2 of the Geneva Conventions, *supra* note 52-55.

72 *See* Blank, *supra* note 3, at 162–163.

73 This was the position of the United States government vis-à-vis the "war" on Al-Qaeda. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–631 (2006).

74 For a detailed discussion on this conundrum see Lubell, *supra* note 1, at 93–103.

75 *See* the U.S. position in Hamdan, *supra* note 73.

be to interpret Common Article 3 as a residual norm, which "captures" any type of conflict "not of an international character," even if it is not a classic "civil war" situation.[76] The third possible position would be to consider transnational conflicts as closer to *international* ones, and thereby subject to Geneva Law and API in their entirety. As we shall briefly exemplify, the view that transnational armed conflicts exist within a complete "legal void" has not been generally accepted.[77] The US Supreme Court, as well as most literature,[78] preferred the second aforementioned option. The Israeli Supreme Court, conversely, chose the third option, which we shall detail shortly. Nonetheless, as we shall see, this distinction is not of extreme importance, in light of the convergence of the norms regulating *all* kinds of conflicts.

The question was addressed by the US Supreme Court in the *Hamdan* case. Hamdan was captured in Afghanistan in 2001, during the armed conflict between the US and Taliban-ruled Afghanistan, and was transported to Guantanamo Bay. President Bush sought to try Hamdan for involvement with al-Qaeda before a military commission, rather than before a court-martial or a civilian court.[79] The question arose, *inter alia*, regarding the legality of the military commission. The US government was of the opinion that this question should not be analyzed according to Geneva Law, which does not apply to detainees captured in the context of the conflict with al-Qaeda, since the latter was neither an international nor an internal armed conflict.[80] The Court, however, rejected this view, ruling that such conflicts fall *at least* within the confines of Common Article 3. It therefore read Common Article 3 as a residual provision, applicable whenever a conflict "does not involve a clash between nations."[81] The Court noted that an "important" purpose of Article 3 was to address *internal* armed conflicts, but emphasized also the commentaries' approach that the scope of application of the Article must be as wide as possible.[82] Thus, the Court held that the military commission in Hamdan's case, and precisely because it was unnecessary, violated the

76 Lubell, *supra* note 1, at 101–104.
77 Benvenisti, *supra* note 2, at 350.
78 *See* Lubell, *supra* note 1, at 101–104, and the sources cited therein.
79 Hamdan, *supra* note 73, at 566 –567.
80 *Id.* at 628–631.
81 *Id.* at 630–631; Blank, *supra* note 3, at 185 –186.
82 Hamdan, *supra* note 73, at 631.

requirement under Common Article 3 that sentences be passed by a "regularly constituted court".[83]

The Supreme Court of Israel, as aforementioned, adopted a different approach. In the context of the conflict between Israel and the Hamas-controlled Gaza Strip, neither Hamas nor the Palestinian Authority constitutes "High Contracting Parties;" the circumstances are further complicated because Gaza is not an integral territory of *any* state. In the *Targeted Killing Case*,[84] the Court affirmed that any conflict taking place in an occupied territory amounts to an international armed conflict;[85] however, it furthermore held that the existence of "belligerent occupation" is *not* a precondition for a conflict to be considered international, as the "law [of international armed conflict] applies in any case of an armed conflict . . . that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation."[86]

The Israeli government holds a slightly different view, maintaining that although "it is not yet settled" which regime applies to such "*sui generis*" conflicts, Israel, as a matter of "policy," applies regarding the Gaza conflict the norms of both international and non-international armed conflict.[87] Importantly, it argued also that the classification of the conflicts—at least with regard to the law of targeting—is largely of "theoretical concern," as both types of conflicts are regulated by many similar norms and principles.[88]

The Turkel Commission, appointed by the Government of Israel to investigate the *Gaza Flotilla* incident of May 2010, has followed the same

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83 *Id.* at 631–633. Note that Justice Stevens was also of the opinion that the military commission violated the substantive requirements of common article 3, that the court provide "all the judicial guarantees which are recognized as indispensible by civilized peoples." *See id*. at 633–635.

84 HCJ 769/02, *supra* note 60, ¶18, ¶21.

85 *See also* common Article 2 of the Geneva Conventions, *supra* note 52-55.

86 *Id.*; *see also* HCJ 201/09 Physicians for Human Rights et al. v. The Prime Minister et al. (Jan. 19, 2009), Nevo Legal Database (by subscription) (Isr.) ¶14.

87 State of Israel, The Operation in Gaza, *supra* note 38, ¶30.

88 *Id*; *see also* HCJ 769/02, *supra* note 60, ¶11. ("according to all of the classifications, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are party to the armed conflict and take an active part in it, whether it is an international or non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations.")

route in general, identifying a "consensus" that the conflict between Israel and Hamas is an *international* armed conflict, although various actors have different reasons for this conclusion;[89] it went on to conclude that regardless of this distinction, the norms of IHL would apply in any case, even if the conflict would have been considered a non-international one.[90]

International bodies have also viewed the Israel-Hamas conflict as an international armed conflict, albeit, as recognized by the Turkel Commission, for reasons differing from those advanced by Israeli institutions. Contrary to the Israeli claim, upheld by the Supreme Court of Israel, according to which the Gaza Strip ceased to be occupied following Israel's 2005 disengagement,[91] various international bodies are of the opinion that Gaza remains occupied, and therefore, and in accordance with common Article 2 of the Geneva Convention, the conflict must be an international one subject to the Fourth Geneva Convention.[92] Other documents, such as the Goldstone Report, accepted the proposition that the Gaza Strip is occupied, adding that, in any case, whatever the distinction of the conflict is, the rules of international and non-international conflicts nowadays converge.[93] The McGowan-Davis report, concluded as a follow-up to the Goldstone Report, also endorsed the position that the conflict is of international character, mentioning that both Israel and the Palestinian sides agree to this presupposition; it reiterated too that the norms regulating both types of conflicts are becoming more similar.[94]

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89 The Public Commission to Examine the Maritime Incident of 31 May 2010 Rep. Part 1,¶41 (Jan. 2011).

90 *Id*. ¶¶43–44.

91 *See* HCJ 9132/07 Al-Bassiouni v. The Prime Minister (Jan. 30, 2008), Nevo Legal Database (by subscription) (Isr.).

92 *See*, *e.g.*, Int'l Fact Finding Mission, *Report of the Int'l Fact Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attack on the Flotilla of Ships Carrying Humanitarian Assistance*, ¶¶63–64, Hum. Rts. Council, U.N. Doc. A/HRC/15/21 (Sep. 27 2010).

93 U.N. Fact Finding Mission, *Report of the United Nations Fact Finding Mission on the Gaza Conflict* , ¶72, ¶¶277–283, Hum. Rts. Council, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009) (The Goldstone Report).

94 Committee of Independent Experts in International Humanitarian and Human Rights Laws, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess any Domestic, Legal or Other Proceedings Undertaken by both the Government of Israel and the Palestinian Side, in light of General Assembly Resolution 64/254, including the Independence, Effectiveness, Genuineness of these Investigations and their*

Indeed, it is well accepted that in contemporary international law, there is "growing customary international law" that applies to all conflicts, whether international or non-international, and includes, *inter alia*, the principles of humanity, proportionality, distinction and necessity.[95] An example of this trend can be found in the opinion of Justice Stephens in the Hamdan case, where he interpreted the requirements set forth in Common Article 3 as containing the provisions of Article 75 of API.[96] This tendency is applicable not only to the Israel-Hamas situation, but also with regard to any potential conflict between Israel and Hizbullah in Lebanon.

The notion of this normative convergence will be the point of departure in this study. However, there are still specific instances in which the different definition of a conflict plays a role. As phrased by the ICTY, albeit in the context of international versus *internal* armed conflicts, the convergence between the norms regulating the different conflicts

> has not taken place in the form of a full and mechanical transplant of those rules [of international armed conflicts] to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[97]

In such cases, we will address the potential discrepancies between the different regimes.[98]

Conformity with International Standards, ¶18, Hum. Rts. Council, U.N. Doc. A/HRC/15/50 (Sep. 21, 2010) (The McGowan-Davis Report).

95 *See* Blank, *supra* note 3, at 161, 186–188 and the sources cited therein; *See also, e.g., Study on Targeted Killings*, *supra* note 5, ¶30; Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict*: *a "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 Isr. L. Rev. 46 (2009); Lubell, *supra* note 1, at 131 –134; *See* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 Int'l L. Stuf. Ser. U.S. Naval War Col. 307, 308 (2009); *compare* Roy S. Schondorf, *Extra-State Armed Conflicts*: *Is there a Need for a New Legal Regime*? 37 N.Y.U. J. Int'l L. & Pol. 1, 75 –78 (2004); *See also* Nicaragua, *supra* note 13, ¶218.

96 Hamdan, *supra* note 73, at 633; *compare* the opinion of Justice Kennedy (concurring in part), *id* at 654.

97 Tadic, *supra* note 4, at ¶126, *cited in* James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 Int'l Rev. Red Cross 313, 323 (2003).

98 A fundamental difference, for instance, is the absence of POW status in non-international (or transnational) armed conflicts, or the application of the "grave

IHL AND INTERNATIONAL HUMAN RIGHTS LAW

General

Once we have established that transnational-asymmetric armed conflicts are ruled by a normative amalgamation of various rules of IHL, the question arises whether the IHL system is the sole legal framework that applies in such cases. In this context, the main question is whether IHL norms apply in conjunction with the law of international human rights (IHRL), chiefly expressed in the ICCPR[99] and ICESCR.[100] When examining the application of these norms in TAACs, three cumulative legal conditions must be met:

(a) that the existence of an armed conflict does not negate the application of IHRL;
(b) that the instruments of IHRL apply *extraterritorially*; and
(c) that the state has crossed the threshold of extraterritorial control required for IHRL jurisdiction to materialize.

While condition (a) would be sufficient to establish the application of IHRL in an *internal* armed conflict, conditions (b) and (c) must be met in order for IHRL to apply to state actions taking place beyond its border, in the context of a *transnational* armed conflict.

IHL and IHRL: Separation, *Lex Specialis,* Complementarity and the Question of Extraterritoriality

Among the diverging views between the LOAC and IHL camps, the most principled difference concerns the relations between IHL and IHRL. In the view of the latter camp, IHL and IHRL are in general mutually exclusive bodies of law, meant to regulate different factual situations. While the rationale of the former is to balance between military necessity and considerations of humanity, the latter, as per this view, is seen primarily as an instrument to protect the individual from the abuse of state power in *peacetime*, where military necessity is irrelevant.[101] However, it is nowadays clear that such

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breaches" regime as entrenched in Geneva Law *See id.* at 319–321; Lubell, *supra* note 1, at 101–102.

99 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 3. [hereinafter *ICCPR*]

100 International Covenant on Economic, Social and Cultural Rights Dec. 16, 1966, 1155 U.N.T.S. 331.

101 *See* Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 Harv. Nat'l Sec. J. 31, 51 (2011); *see also* Noëlle Quénivet, *The History*

an orthodox view of the role of human rights law during armed conflict is losing ground: indeed, in recent years—as noted by most commentators, as repeatedly affirmed in ICJ decisions—IHL and IHRL are gradually coming closer;[102] it is furthermore becoming accepted that there are "mixed" scenarios, in which law enforcement operations occur within the general context of an armed conflict.[103]

In the *Nuclear Weapons* advisory opinion, the ICJ held that the ICCPR indeed applies during armed conflict, but that in the interpretation of its prohibition on the arbitrary deprivation of life, as entrenched in Article 6(1), IHL will apply as the *lex specialis* (a basic principle of law is that *lex specialis*—the specific rule, trumps *lex generalis*—the general rule).[104] The same rationale was further expounded, in situations of *occupation*, in the *Wall* decision and subsequently in the *DRC v. Uganda* ruling.[105] However, the implications and the manner of application of the distinction of IHL as *lex specialis* have been contested;[106] furthermore, the *lex specialis* doctrine does not provide solutions in instances when these normative frameworks do not directly contradict each other. In such cases, it has been suggested that IHL norms be interpreted in light of the rules of IHRL,[107] as a means to create normative harmony between these bodies of law.[108]

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of the Relationship Between International Humanitarian Law and Human Rights Law, *in* International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law 1, 2, 10–11 (Roberta Arnold & Noëlle Quénivet eds. 2008); *see also* Nuclear Weapons Opinion, *supra* note 59, ¶25 (presenting the arguments of certain states according to which IHRL applied only in peacetime).

102 Schmitt, *supra* note 101, at 52; Quénivet, *supra* note 101, at 4–5; for an overview of the historical evolvement of this process see Robert Kolb, *The Main Epochs of Modern International Humanitarian Law Since 1864 and their Related Dominant Legal Constructions*, *in* Searching for a 'Principle of Humanity" in International Humanitarian Law 23, 45–51 (Kjetil Mujezinovi Larsen, et al. eds., 2013).

103 The Public Commission to Examine the Maritime Incident of 31 May 2010 Rep. Part 2, 63 (Feb. 2013).

104 Nuclear Weapons Opinion, *supra* note 59, ¶25; *see also* Schmitt, *supra* note 101, at 53; Quénivet, *supra* note 101, at 8.

105 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory
Opinion, 2004 ICJ 136, ¶ 106 (July 9); Armed Activities on the Territory of the Congo, *supra* note 15, ¶¶ 216–220; *see* Schmitt, *supra* note 101, at 53.

106 *See* Quénivet, *supra* note 101, at 8, 12–13.

107 *See*, *e.g.*, Schmitt, *supra* note 101, at 54.

108 *See* Quénivet, *supra* note 101, at 8.

This approach gave rise to a theory that prefers the understanding of IHL and IHRL as *complementary* bodies of law, rather than bodies interacting with each other in a dichotomic *lex generalis/lex specialis* relationship. This view asserts that IHRL can fill gaps in IHL; that IHRL enforcement mechanisms may enforce IHL norms; and that the two bodies of law may be viewed as advancing the same goals.[109] In any case—whether one subscribes to the *lex specialis* or *complementary* theories—it is well settled, in authoritative statements of international law—that IHRL does not in principle cease to apply in instances of armed conflict, although the nature of this dual-application, in specific instances, is not entirely clear.

In its rulings, at least regarding the application of IHRL in instances of occupation, the ICJ necessarily ruled also on the question of the extraterritorial application of IHRL. Article 2(1) of the ICCPR extends the application of the Convention "to all individuals within its [the member state's] territory and subject to its jurisdiction."[110] The Court, in the *Wall* opinion, held that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory," and that therefore the ICCPR indeed applies in the territories occupied by Israel, in contrast to the latter's interpretation of the Covenant.[111] Based upon the same logic, the Court ruled that Israel is also bound by ICESCR in its activities in the territories.[112]

It should be noted, moreover, that in contrast to the unequivocal rejection by the Israeli government of the principle of extraterritorial application or the application of IHRL during armed conflict,[113] the Supreme Court of Israel adopted a more ambiguous view. For instance, it saw the ICCPR as a possible source of rights of persons detained in the occupied territories

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109 *See* Quénivet, *supra* note 101, at 9–10. A version of this view was endorsed in Part 2 of the Turkel Report. *See supra*, note 103, at 68–69.

110 ICCPR, *supra* note 99, art. 2(1); *see generally* Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011).

111 Wall Opinion, *supra* note 105, ¶¶109 –111.

112 *Id.* ¶112.

113 For the Israeli view of the question of extraterritorial application see Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, 3rd periodic report of Israel, U.N. Doc. CCPR/C/ISR/3 (Nov. 21, 2008); Replies of the Government of Israel to the List of Issues to be taken up in connection with the consideration of the third periodic report of Israel, U.N. Doc. CCPR/C/ISR/Q/3/Add. 1 (Jul. 12, 2010).

during armed conflict;[114] in the *Targeted Killings* case, the Court accepted the notion that IHL is the *lex specialis* in instances of armed conflicts, and, alluding to the "complementarity" theory, when there is a gap in this law, it can be supplemented by IHRL.[115] In another ruling, the Court asserted that the "principles" of the ICCPR would "guide" the decisions of the Supreme Court while addressing human rights issues in the territories.[116]

It therefore can be concluded that according to the vast majority of sources, IHRL indeed applies, in general, in instances of armed conflicts, while the exact nature of its application is a complex question, which merits a case-by-case approach.

The Threshold of Control

While it is thus accepted by most sources that IHRL applies in armed conflicts, and that it also applies extraterritorially, there still remains a complex threshold question: what level of control must a state exercise over territory or persons, during an armed conflict, in order for persons to be considered "subject to its jurisdiction"? On the one hand, one can adopt the point of view that extraterritorial jurisdiction arises only when a state exercises effective control over external territory—meaning, in situations of occupation (the *territorial* test). On the other side of the spectrum, there is the view that in certain situations jurisdiction materializes where a state's actions produce effects over individuals in an external territory (*effects-based* jurisdiction). Between these extremes, a possible approach is that jurisdiction is acquired whenever a state exercises power or control over an *individual*, irrespective of its control over the territory (the *personal control* test).

The ICJ, in the *Wall* opinion, ruled explicitly that the ICCPR applies in situations of occupation, thereby implementing the *territorial* test.[117] It accepted also the interpretation given by the Human Rights Committee (HRC) to the threshold question, in which the Committee found that jurisdiction

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114 HCJ 3278/02, *supra* note 59, ¶24; HCJ 3239/02 Mar'ab v. The Commander of the IDF Forces in Judea and Samaria 57 PD 349, ¶19, ¶27, ¶41, [2003] (Isr.).

115 HCJ 769/02, *supra* note 60, ¶18; *see also* HCJ 7957/04, *supra* note 58, ¶48, ¶57, ¶¶73–74 (accepting in general the legal framework outlined by the ICJ in the Wall decision, but disagrees as to its application).

116 HCJ 3969/06 Al-Haroub v. The Commander of the IDF Forces in the West Bank (Oct. 22, 2009), Nevo Legal Database (by subscription) (Isr.) ¶17.

117 Wall Opinion, *supra* note 105, ¶¶109–112.

exists in cases of extra-territorial detention of individuals.[118] Arguably, thus, the ICJ has viewed positively also the *personal control* test. Indeed, the HRC has been consistent in its view of the Covenant as applying to protect individuals who are "within the *power* or effective control of the forces of a State Party."[119] As power can be interpreted very widely, this approach encompasses virtually any case in which the agent of a state exercises power that directly affects an individual.

The threshold question has been addressed widely in the jurisprudence of the European Court of Human Rights (ECtHR), which provides the most elaborate comparative framework to assess the extraterritorial application of human rights treaties. Although formally binding only with regard to European member states, the ECtHR has been highly influential in the understanding of general IHRL, and can serve as an indication for the development of customary international law in this regard. As we shall see, the ECtHR has, on occasion, adopted each one of the aforementioned approaches regarding the threshold question.

The Territorial Control Threshold: Occupation, Overall Control and Control over Facilities

Article 1 of the European Convention on Human Rights (ECHR) provides that the Contracting Parties shall secure the rights enshrined in the Convention to everyone *within their jurisdiction*.[120] In the famous (and controversial) 2001 Bankovic case, the Grand Chamber of the ECtHR held that an aerial attack by European NATO members was not sufficient to extend the attacking states' jurisdiction over the population in the attacked territory, for the purpose of the application of the ECHR. However, the ECtHR ruled that in principle, jurisdiction can be extended extraterritorially, and specifically, in instances of occupation where the state exercises effective control over the population.[121]

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118 López Burgos v. Uruguay, Human Rights Committee, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (July 29, 1981); Lilian Celiberti de Casariego v. Uruguay, Human Rights Committee, Communication No. 56/1979, U.N. Doc. CCPR/C/OP/1 (July 17, 1979); Wall Opinion, *supra* note 104, at ¶109.

119 Human Rights Comm., General Comment No. 31, Nature of the Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21.Rev.1/Add.13 (2004).

120 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

121 Bankovic et al. v. Belgium et al., App. No. 55721/07 Eur. Ct. H.R. (2001) ¶¶59 –61;

Pre-Bankovic cases in which the Court applied the *territorial* test were *Loizidou v. Turkey* and *Cyprus v. Turkey*, where it ruled that for the sake of the application of the ECHR, Turkey exercised jurisdiction over Northern Cyprus. The Court stressed in these cases that effective control does not have to be detailed, but rather *overall*, and can be exercised through a subordinate local administration such as the Turkish Republic of Northern Cyprus.[122]

It should be noted that the Bankovic case was a significant deviation from previous ECtHR jurisprudence, which at times considered also the *personal control* test as valid for the establishment of jurisdiction.[123] Indeed, subsequent rulings, while not overruling Bankovic, have, in practice, narrowed its application.

In the *Al-Saadoon* case, the ECtHR seems to have adopted the view that territorial control *short* of full occupation or overall control, such as control over certain *facilities*, is sufficient for jurisdiction to materialize. The applicants, two Iraqi Ba'ath Party members, were arrested in 2003 by UK forces, and were later found by British military investigators as connected to the killing of two British soldiers. The UK sought to refer the case to Iraqi authorities. The applicants were detained in British facilities in Iraq until December 31, 2008, after which they were transferred to Iraqi authorities.[124] They sought to challenge the legality of their transfer.[125]

The coalition occupation of Iraq ended, *de jure*, on June 30, 2004, when the occupation forces were transformed into a UN-authorized multi-national force, with the consent of the Iraqi Interim Government.[126] Therefore, the threshold of occupation, at least *de jure*, was not reached for the entire duration of the detention. The Court established jurisdiction based on the fact

¶¶70 –71, 75, 82; for a critique of the Bankovic case see, e.g., Erik Roxstrom et al, *The Nato Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection*, 23 B.U. Int'l L. J. 55 (2005).

122 Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) ¶52; Cyprus v. Turkey, App. No. 25781/94, 35 Eur. Ct. H.R. (2001); *See also*, regarding the concept of "overall control" Ilascu v. Moldova and Russia, App. No. 48787/99, Eur. Ct. H.R. (2004).

123 *See* Roxstrom, *supra* note 121, at 87 –88 (and the sources cited therein).

124 Al-Saadoon and Mufdhi v. U.K. (admissibility), App. No. 61498/08, Eur. Ct. H.R. (2009).¶¶24 –26

125 *Id.* ¶¶69–74.

126 For an overview of the legal status of the coalition forces in Iraq see *id.* ¶¶1–11; *see also* Eliav Lieblich, *Intervention and Consent*: *Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. Int'L L. J. 337, 340 –341 (2011).

that even after June 2004, the *detention facilities* operated by multinational forces, among them those operated by the UK, were subject to their exclusive control.[127] Thus, the Court differentiated between occupation of territory and control over specific facilities, the latter being sufficient to create a jurisdictional-link.

The Personal Control Threshold

The *personal control* threshold for the acquisition of jurisdiction emphasizes the *power* exerted by a state agent on an individual, as sufficient for the creation of a jurisdictional-link required for the application of the ECHR. Indeed, the Bankovic ruling notwithstanding, it seems that the ECtHR has not deserted the personal control threshold. In its 2005 *Öcalan* decision, the Grand Chamber decided that Turkey acquired ECHR jurisdiction over the arrest of PKK Leader Öcalan in a Kenyan airport. Öcalan was captured by Kenyan officials, and handed over to Turkish officials inside a Turkish aircraft. The Court ruled that the jurisdictional link materialized since Öcalan was "physically forced to return to Turkey by Turkish authorities and was *subject to their authority and control following his arrest and return to Turkey*."[128] The Court did not elaborate regarding the relations between this ruling and the seemingly contradicting Bankovic case, and preferred to laconically distinguish between them.[129]

Cause and Effect Jurisdiction

In addition to the territorial and personal control threshold, the jurisprudence of the ECtHR recognizes that in exceptional circumstances, jurisdiction can be extended to acts that produce extra-territorial *effects*.[130] In this context, it is worth mentioning the case of *Andreou v. Turkey*.[131] In August 1996, a group of over one hundred Cypriot and other European motorcyclists arrived

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127 Al-Saadoon, *supra* note 123, at ¶¶84–89.

128 Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2005) ¶93.

129 *See* Roxstrom, *supra* note 121, at 89–91; for other cases that recognized extraterritorial jurisdiction based on control over individuals see Issa et al. v. Turkey, App. No. 31821/96, Eur. Ct. H.R. (2004). (establishing jurisdiction of Turkey regarding activities of Turkish soldiers in Northern Iraq, in situations that did not amount to occupation); Medvedyev v. France, App. No. 3394/03, Eur. Ct. H.R. (2010).

130 *See* Issa*, supra* note 128, at ¶68.

131 Andreou v. Turkey, App. No. 45653/99, Eur. Ct. H.R. (2008).

at the UN buffer zone to protest against the Turkish occupation of Northern Cyprus. In subsequent clashes with counter-demonstrators and Turkish Cypriot forces, a demonstrator was killed. The applicant, Ms. Georgia Andreou, a British national, attended the funeral of the demonstrator, following which a number of people approached the site of the previous demonstrations. The applicant remained outside the UN buffer zone, close to a Greek-Cypriot military position in Greek-Cypriot territory. During the clashes that erupted, which included attempts by some individuals to cross the cease-fire line between Greek and Turkish Cyprus, several people were hit by Turkish bullets, including the applicant.[132] Turkey claimed that the injury took place in an area outside its jurisdiction. The Court rejected this claim:

> In exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction … In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as "within [the] jurisdiction" of Turkey.[133]

Thus, the ECtHR ruled that, in principle, the use of lethal force from a territory of one state into the other can result, in some instances, in acquisition of jurisdiction. Without elaborating on the myriad of questions arising in this context, this ruling can be of significance, for instance, to questions of cross-border demonstrations such as the ones that occurred in recent years at the Syrian-Israeli ceasefire line in the Golan Heights.[134]

Summary of Current ECtHR Law of Threshold of Control – Al-Skeini v. UK

The aforementioned categories for the threshold of extraterritorial control, sufficient to create a "jurisdictional link," were reaffirmed in the 2011 decision

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132 *Id.* ¶¶1–2.

133 *Id.* ¶A(3)(c).

134 *See* Isabel Kershner, *Israeli Soldiers Shoot at Protesters on Syrian Border*, N.Y. Times (Jun. 5, 2011), *available at* http://www.nytimes.com/2011/06/06/world/middleeast/06mideast.html.

by the Grand Chamber in the *Al-Skeini* case.[135] The question posed before the Court concerned the issue of whether six Iraqi civilians who allegedly lost their lives at the hands of UK troops in south-east Iraq during British occupation were "within the jurisdiction" of the UK when those killings took place. The Grand Chamber not only held that the UK exercised jurisdiction in all six cases, but also took the opportunity to clarify the concept of extraterritorial jurisdiction in general.

According to the Court's assessment in *Al-Skeini*, there are two basic thresholds for the materialization of a "jurisdictional link" between a Contracting State and individuals found outside its borders: the "state agent authority and control" and the "effective control over an area" thresholds.[136] The *first* extends to the acts of diplomatic personnel within the territory of another state, the exercise of public powers through consent or invitation of the territorial government of the territory, and also to the actions of a state's agent, as long as they lead to the exercise of control over the person in question. The crucial factor for assessing jurisdiction is whether the state exercises authority and control over the individuals, and not the fact that it is exercised outside of its territory.[137]

Regarding the *second*, the Court reaffirmed the previous relevant case-law by underlying that the control in question may be an effect of lawful or unlawful military action; might be exercised directly, through the Contracting State's own armed forces, or through a subordination of the local administration. The judgment has put forward potential factors, which can be used during an assessment of the threshold of control, and decided that primary reference would be given to the strength of the State's military presence in the area.[138] In essence, therefore, the ECtHR in *Al-Skeini* reaffirmed and consolidated the various thresholds of jurisdictional links analyzed in the previous sections.

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135 Al-Skeini et al. v. U.K., App. No. 55721/07, Eur. Ct. H.R. (2011).

136 *Id*. ¶¶130–132.

137 *Id.* ¶136.

138 *Id.* ¶139. Importantly, the Court clearly stated that the jurisdiction under article 1 of the ECHR can exist outside the territory covered by the Council of Europe Member States and stressed that in no previous cases had such restrictions been applied. *Id,*¶142. The Court cited the *Öcalan, Issa, Al-Saadoon* and *Medvedyev* cases in support of this proposition.

CHAPTER 2

The Principle of Distinction in Transnational Asymmetric Warfare: Targeting of Persons

BASIC NORMATIVE FRAMEWORK

The principle of distinction between civilians and combatants is one of the basic tenets of IHL, and is recognized widely as a rule of customary international law.[1] It is expressed in Articles 48, 50, 51(2) and 52(2) of Additional Protocol I, and applies both to the distinction between the civilian population and combatants and between civilian and military objects. Furthermore, the principle of distinction requires parties to the conflict to distinguish *themselves* from the civilian population, *at least* by carrying arms openly;[2] it also requires parties to take all feasible precautions to protect civilians under their control against effects of attacks (such as construction of shelters).[3] However, protection is not absolute: civilians enjoy protection from attack "unless and for such time as they take a direct part in hostilities."[4] Moreover, as we shall see, some are of the view that under certain circumstances, civilians might even lose their civilian status altogether, and accordingly lose their immunity for as long as they take part in combat.

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1 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶434 (July 8); Int'l Comm. Red Cross, Customary International Humanitarian Law, Rule 1 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (and the sources cited therein), *available at* http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf [hereinafter ICRC Customary Law].

2 Protocol Additional to the Geneva Conventions of 12 August 1949 for the Protection of Victims of International Armed Conflicts (Protocol 1), arts. 37(1), 44(3), 48, 51(7), 58(a), 58(b), 8 June, 1977, 1125 U.N.T.S. 3 [hereinafter API]

3 ICRC Customary Law, *supra* note 1, Rule 22; API, *supra* note 2, art. 58(c).

4 API, *supra* note 2 art. 51(3).

The application of the "direct participation in hostilities" standard is central to the contemporary discussion of targeting, and will be extensively discussed in this chapter. The application of the principle of distinction to civilian *objects* will be addressed in Chapter 3.

In the context of asymmetric conflicts, the principle of distinction is of special importance. In light of the overwhelming technological advantages of modern militaries, non-state armed groups routinely challenge the principle both by their often-ambiguous structure, and through their methods of operation.[5] Indeed, the application of the principle of distinction in the asymmetric theater requires a delicate balance. On the one hand, it is imperative that the principle of distinction is not diluted, since the protection of civilians remains a central pillar of IHL, regardless of any unlawful acts committed by an armed group that fails to distinguish itself from the civilian population. The latter consideration seems to push for a narrow approach towards legal questions arising in the context of targeting. On the other hand, international law, in order to maintain its credibility, cannot be interpreted in a manner that grants non-state armed groups—which take advantage of the legal limitations placed on state-action—significant battlefield advantages.

The question of distinction is especially valid in the context of targeted killings: i.e., the intentional, often "preventative" use of lethal force against a specific individual not in custody of the actor.[6] However, it is by no means limited to the latter question. Problems of distinction are experienced all across the asymmetric battlefield. Indeed, in contemporary TAACs, the line between "targeted killings" in the narrow sense and more traditional military operations that just happen to be conducted by use of the same mechanisms—such as drones—is often blurred. In such conflicts, hostilities are often manifested in a continuous series of targeted operations against militants, such as when an air force operates against ongoing rocket fire. Whether such operations are "targeted killings" *per se* is doubtful. It seems thus that the definition of a targeted killing relies extensively on its temporal

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5 *See* U.S. Army & U.S. Marine Corps, Counterinsurgency, ¶1-87, USA FM 3-24/MCWP 3-33.5 (2006).

6 *See* Nils Melzer, Targeted Killing in International Law 3 –5 (2008); *compare* U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, ¶1, 7 –10, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter – *Study on Targeted Killings*].

aspect: the further the operation is from a specific hostile act conducted by the targeted individual, the more likely it is that the operation will be deemed a targeted killing and raise the dilemmas associated with such actions. These dilemmas also give rise to demands for increased legal scrutiny.

Assuming the existence of an armed conflict, the most challenging question in this context is the identification of the individuals that can lawfully be targeted, and the related question regarding the status of such individuals. In the past few years, there has been a robust debate of this issue, which can be traced from the 2006 Israeli Supreme Court *Targeted Killings* case, through the 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities (ICRC Guidance) and its subsequent critiques. International reports and the increasing use of drone attacks by the US[7] have further invigorated this often polemic debate.

As we shall see, there is disagreement regarding the exact application of the relevant norms. It is beyond the scope and objective of this study to identify, in every case, the correct legal interpretation. However, in instances where gaps of understanding of the law are prevalent, involved states can develop international law through a coherent expression of the legal basis for their actions. This is not merely a matter of public relations; it is an expression of *opinio juris*, which is an integral part of the development of customary international law. Hence, a major conclusion of this chapter is that states should set forth comprehensive legal justifications for their actions, in a transparent and professional manner, thereby contributing to the development and clarification of international law.

THE STATUS OF MEMBERS IN AN ORGANIZATION ENGAGED IN TRANSNATIONAL WARFARE

General

The status of members[8] in a non-state organization involved in TAACs raises a host of perplexing questions. On the one hand, the traditional dichotomy between "combatants" and "civilians" is a well-established principle of IHL, reflected in Article 43 of API, which is widely understood to provide that only

7 *See, e.g.,* Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"*, 13 Y.B. Int'l Hum. L. 311 (2011).

8 The word "member" is used here in a generic sense, in order not to use the word "combatant" which might prejudge the status of such individuals.

members of the armed forces of a *party* are combatants. The term "party" in API generally means a state, as the protocol applies to *international* armed conflicts, thereby excluding non-state actors.[9] However, in practice, TAACs often involve organized armed groups thus stretching thin the concept of "civilian," if not breaking it altogether.

In Common Article 3 of the Geneva Convention, which applies, *inter alia*, to TAACs, there is indeed a reference to "armed forces" not belonging to a state, which can be interpreted to include members in non-state armed groups. However, it is unclear whether the term "armed forces" is used in Common Article 3 in a generic-technical sense, or whether it is meant to establish a different legal status for members of such groups, at least for the sake of loss of protection from attack.[10] State practice has not been clear in this aspect.[11]

In essence, as we shall see, there are two different approaches to the legal standing of such fighters. The first is to view them as civilians, and then to assess whether their actions fall within the ambit of the notion of "direct participation in hostilities" (DPH), as the term appears in Article 51(3) of API, which entails the loss of protection (*the civilian approach*). As we shall see, this was the approach preferred by the Israeli Supreme Court in the *Targeted Killings* case. The second option is to construct Common Article 3 as attributing a *legal* meaning to the term "armed forces," resulting in the recognition of a different status for members of such armed forces (*the status approach*). If the latter route is chosen, there remains a question regarding the relationship between this status and the concept of DPH, and whether this status results in complete equality between a state's armed forces and armed groups, in terms of *targeting*. Much of the debate regarding the ICRC Guidance, as we shall see, revolves around these questions.

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9 *But see* API, *supra* note 2, art. 1(4). This controversial article provides that conflicts subject to the Geneva Conventions and API "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

10 In any case, even if "armed forces" is interpreted as a legal term, it does not grant such fighters POW status if caught.

11 ICRC Customary Law, *supra* note 1, Rule 3, at 13.

Members in Non-State Actors as Civilians Directly Participating in Hostilities – "The Civilian Approach"

The *civilian approach* emphasizes the civilian-combatant dichotomy, interpreting the latter term as strictly referring to a state's armed forces. It does not recognize any other status. The fact that civilians might directly participate in hostilities, the argument goes, does not in itself change the status of these persons from civilians to combatants; nor does it create a novel "third status" of "enemy combatants," "unlawful combatants" or any other. The term "enemy combatants" was used by the US, in its domestic law, to describe specifically persons "part of or supporting" the Taliban, al-Qaeda or "associated" forces, who were to be detained in Guantanamo Bay and tried by military commissions.[12] The term "unlawful combatants" is a generic term sometimes used to describe civilians that participate directly in hostilities (meaning, without a "right" to do so), and thereby can be subject to trial and punishment.[13] In any case, both categories are not deemed to create a separate *status* in international law.

Thus, the *civilian approach* understands the category of "civilian" in IHL as a residual one, applying to any person who does not belong to, or is

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12 *See* Memorandum from Deputy Secretary of Defense Paul Wolfowitz to Navy, Order Establishing Combatant Status Review Tribunal §a (Jul. 7, 2004), *available at* http://www.defense link.mil/news/Jul2004/d20040707review.pdf; Hamdan v. Rumsfeld, 548 U.S. 577, 570 n1 (2006).

13 HCJ 769/02 Public Committee against Torture in Israel v. The Government of Israel 62 (1) PD 507, ¶25 [2006] (Isr.) [hereinafter Targeted Killings Case] *citing Ex Parte* Quirin, 317 U.S. 1, 30 (1942); *see also* Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 29 –30 (2004); *compare* Kenneth Watkin, *21st Century Conflict and International Humanitarian Law: Status Quo or Change?, in* International Law and Armed Conflict: Exploring the Faultlines 265, 286 (Michael N. Schmitt & Jelena Pejic eds., 2007) (arguing for a status of unlawful combatants"). Israeli law defines an "unlawful combatant" as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the State of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law." The Imprisonment of Unlawful Combatants Law, 5762-2002, LSI, art. 2 (Isr.). Some suggest that the term "unlawful belligerents" is more precise. *See* Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law*, 34 Case W. Res. J. Int'l L. 227 (2002).

affiliated with, the armed forces of a *state*.[14] The term is therefore defined negatively as encompassing all persons who are not members of a state's armed forces. This was the understanding of the concept of civilians under IHL, as reflected by the Israeli Supreme Court in the *Targeted Killings* case, where operatives of armed Palestinian groups were deemed civilians, targetable only when directly participating in hostilities.[15] Accordingly, this approach negates the possibility of a "third status" of any kind, such as "unlawful combatants" in customary or treaty-based IHL.[16] In sum, as per the *civilian approach*, individuals engaged in hostilities in the context of a TAAC are civilians, who can be targeted for such time as they take a direct part in hostilities. While the *civilian approach* offers conceptual clarity, it raises many substantive questions. Should it be applicable to all cases of participation in hostilities, even when recurrent, during intense warfare undertaken by highly organized armed groups? Does it not, in effect, denigrate the status of civilians, by including in it persons who are not "civilians" as the term is most regularly understood? Questions of this type are behind the *status approach*, which we will now discuss.

Non-State Fighters as Members in an Organized Armed Group – "The Status Approach"

Continuous Combat Function in an Organized Armed Group as Status

In general, the *status approach* recognizes that loss of protection can occur in two distinct but related situations. The first instance is the "regular" DPH

14 API, *supra* note 2, art. 50(1); *compare* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities"Interpretive Guidance*, 42 N.Y.U. J. Int'l L. & Pol. 641, 670–671 (2010).

15 Targeted Killings Case, supra note 13, ¶26; Another category of non-civilians are participants in *levée en masse*. This issue is beyond the scope of this work. *See* Int'l Comm. Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 25 (Nils Melzer ed., 2009) *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, [hereinafter ICRC DPH].

16 *Id.* ¶¶27–28 (In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants … In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category … It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*).

case, in which civilians directly participate in hostilities in a sporadic manner, and therefore can be targetable only for the duration of their participation. In such cases, no loss of civilian status occurs. The other case refers to situations in which acts are committed within a framework of an *organized armed group*. In this case, the individual is no longer considered a civilian, and is therefore targetable for the duration of his or her membership in the organization. The key question, thus, is how to determine such membership.[17] Of course, the difference between "regular" DPH and loss of civilian status altogether can be blurred, if one adopts a wide interpretation of the temporal requirement applicable to DPH ("for such time as"), as provided for in Article 51(3) of API.

Significantly, a version of the *status approach* has been adopted in the ICRC Guidance. When it comes to international armed conflicts (between states), the Guidance endorsed the position of the Israeli Supreme Court regarding the civilian-combatant dichotomy.[18] However, it also conceded that in the wider context of a given international conflict, it is possible that additional, separate conflicts could exist between a state and a non-state actor not belonging to any party. In such cases, these conflicts would be considered non-international armed conflicts.[19] With regard to all cases of such conflicts—among them transnational ones—the Guidance adopted the *status approach*. It posited that in non-international armed conflicts, a determination can be made as to whether individuals are civilians or members of "organized armed groups," which are the armed forces of the non-state party. [20]

Unlike, as we shall see, the *Targeted Killings* case, the ICRC posited that while it is "tempting" to view members of armed groups as civilians engaged in a continuous form of DPH, such an approach would undermine the conceptual distinction between civilians and combatants. By creating a situation in which a party's entire armed forces would be considered civilians,

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17 Schmitt, for instance, argues that it will usually be impractical to distinguish between these two categories. *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,* 1 Harv. Nat'l. Security J. 5, 22–23 (2010).

18 ICRC DPH, *supra* note 15, at 23–24.

19 *Id.* at 24; for a critique of this issue see Schmitt, *supra* note 17, at 18–19.

20 ICRC DPH, *supra* note 15, at 29 –30.

the ICRC claimed, the meaning of the term "civilians" would be diluted.[21] Instead, the ICRC interpreted the wording and logic of Common Article 3, which refers, as aforementioned, to "members of armed forces" as a *legal* term that confers *status*. Therefore, it concluded that in non-international armed conflicts, organized armed groups essentially constitute the armed forces of the non-state actor, and as such their members are not civilians.[22] Since members of organized armed groups *cease* to be civilians, they lose their protection for as long as they are members of the group. Essentially, therefore, the Guidance argued for a novel status in IHL.[23]

The test for group membership is constructed in the Guidance around the concept of continuous combat function (CCF).[24] The Guidance proposes a functional test for group membership, suggesting that "individuals whose continuous function involves the *preparation*, *execution*, or *command* of acts or operations amounting to *direct participation in hostilities* are assuming a continuous combat function."[25]

The functional approach to membership is justified on the basis of the practical difficulty of establishing formal membership in organized armed groups, because of their wide organizational variety and sometimes informal and ambiguous structures. Therefore, "membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely, the conduct of hostilities on behalf of a non-State party to the conflict."[26] CCF requires "lasting integration" into the organized armed group. When an individual is recruited, trained and equipped to continuously and *directly participate in hostilities*, the individual assumes CCF, even *before* he or she committed their first hostile act.[27] Similarly, methods of disengagement from combat function are also determined on a functional basis, in light of the specific political, cultural and military contexts.[28] In any case, as the Guidance

21 *Id.* at 27–28.
22 *Id.* at 28.
23 *See* Watkin, *Opportunity Lost, supra* note 14, at 643–644.
24 ICRC DPH, *supra* note 15, at 27–36.
25 *Id.* at 34 [emphasis added].
26 *Id.* at 33.
27 *Id.* at 34.
28 *Id.* at 72 –73.

stresses, the presumption of civilian protection applies also in the process of determination of CCF.[29]

The linkage in the Guidance between the concept of DPH and CCF, reflected in the fact that CCF encompasses only acts that would otherwise constitute DPH, is potentially confusing. This is so since DPH is a term usually understood as applying to *civilian* loss of protection, while CCF is meant to establish a different status altogether. For instance, it is not entirely clear what the special significance of CCF would be, if the term were constructed to apply only to acts that would anyway result in loss of protection. As we shall see, the main difference between CCF and DPH concerns the *temporal scope* of loss of protection. While it seems that CCF and DPH cover roughly the same acts,[30] the former results in the loss of civilian status, and therefore the temporal scope of loss of protection is wider. CCF results in loss of protection *as long as the individuals are members of the group*,[31] while loss of protection due to DPH is understood, in the Guidance, to be limited only to a specific act.[32] Indeed, if the temporal scope of loss of protection were similar in both cases, the distinction between CCF and DPH would be utterly meaningless in practice.[33]

It should be noted that the CCF concept draws a clear line between the non-state actor at large (the organization itself), and its armed forces. Thus, for instance, according to the Guidance, CCF encompasses only "the armed or military wings" of the non-state actor, and *excludes* "political and humanitarian wings."[34] This position contradicts, of course, any potential claim that loss of protection would occur on counts of formal membership in *any* branch of a "terrorist" entity.

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29 *Id.* at 76.

30 There is significant ambiguity, though, whether "preparation" or "command" of acts in the context of CCF is similar to these acts in the context of DPH. *See* Watkin, *Opportunity Lost, supra* note 14, at 660 –661.

31 ICRC DPH, *supra* note 15, at 70 –73.

32 *See* Schmitt, *supra* note 17, at 21, 35.

33 *Compare* Watkin, *Opportunity Lost, supra* note 14, at 685.

34 ICRC DPH, *supra* note 15, at 32.

The Inequality Debate: Towards a Sub-Category of Organizations Comparable to Regular Armed Forces?

The CCF concept has been the subject of a robust debate. At large, it has been criticized from two opposing perspectives, correlating, in general, to the IHL and LOAC camps, as these were described in Chapter 1.[35] For instance, the UN Study on Targeted Killings posits that IHL treaty law does not explicitly provide for a CCF category, but limits loss of protection only "for such time" of participation in hostilities, as opposed to "all the time." It furthermore expressed concern that the CCF concept will dilute the protection of civilians, and called for further consideration of the issue.[36]

On the other hand, as aforementioned, CCF encompasses only actions that would otherwise constitute DPH—the basic difference between the two is the temporal scope of the loss of protection. Since, as we shall see, the Guidance has constructed the term DPH rather narrowly, the status of organized armed groups has not—on its face—been equalized with that of a state's armed forces. Thus, for instance, while the latter's support units are targetable, individuals carrying support functions in an organized armed group retain their protection, according to the ICRC. Likewise, CCF does not include purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations, or the collection of intelligence other than of a tactical nature.[37] This, in the eyes of several states, creates an unwarranted differentiation between support and intelligence units of states, and those of organized armed groups, resulting in inequality between the parties. This inequality is criticized as especially problematic in situations where armed groups are no less organized than the armed forces of states.[38] According to this argument, the inequality between the parties

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35 *See supra*, chapter 1, sec. II.2.1. For a brief summary of the nature of the critiques of the Guidance see Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 831, 834 –835 (2010).

36 *Study on Targeted Killings*, *supra* note 6, at ¶¶65–69.

37 ICRC DPH *supra* note 15, at 35.

38 *Id.* at 34–35; Watkin, *Opportunity Lost, supra* note 14, at 644, 647 –648, 672 –678. Melzer responds to this critique by arguing that in practice, many "support" elements of organized armed group will also carry out, in addition, continuous combat function. Thus, claims Melzer, there is no significant inequality between the parties in practice. *See* Melzer, *supra* note 35, at 851–852.

can undermine the credibility of the legal regime, ultimately resulting in reduced compliance, which would only serve to further endanger civilians.[39]

While this inequality is understandable when the non-state actor is a highly decentralized group, it holds much less appeal when highly organized and professional groups are involved, such as Hizbullah, or groups that control territory, like Hamas. Therefore, some have suggested that CCF cannot be based solely on function, but rather on several factors, namely whether the relevant armed groups are comparable to a state's armed forces.[40] These critics stress that *membership* in such an organized armed group should suffice for loss of protection (rather than the actual fulfillment of "combat function"), just as membership alone in a state's armed forces is sufficient for the targeting of troops.[41] Consequently, the argument goes, all "armed forces" should be treated the same, meaning, that support functions can be targetable in the same manner as combat units.[42] The functional approach has also been criticized as impractical, in the sense that it is impossible to distinguish between different individuals affiliated to armed groups solely according to their functions, especially when launching an attack against a group of people.[43]

Therefore, a third approach can be suggested, in which non-state armed groups could be distinguished according to their level of organization. If a group is entirely comparable, in terms of its organization and fixed structure, to regular armed forces, it might be viewed as equally targetable, based on formal membership rather than on *function*. This approach is essentially a subset of the *status approach*, and as such, its legal plausibility is contingent upon the general acceptance that the traditional civilian/combatant dichotomy does not apply as such in the context of TAACs.

In order to minimize the potential of abuse, if one argues for such a category, the threshold should be set so high as to leave no doubt regarding the group's level of organization and structure. It would be imperative

39 *See* Michael N. Schmitt, "*Direct Participation in Hostilities" and 21st Century Armed Conflict, in* Crisis Management and Humanitarian Protection 505, 510 (H. Fischer et al. eds., 2004), *cited in* Watkin, *Opportunity Lost, supra* note 14, at 689; Schmitt, *supra* note 17, at 6–7.

40 Watkin, *Opportunity Lost, supra* note 14, at 690 –691.

41 Schmitt, *supra* note 17, at 23.

42 Watkin, *Opportunity Lost, supra* note 14, at 690 –692; *see also* Schmitt, *supra* note 17, at 22.

43 *Id.* at 22–24.

that a state that views an entity as such would make a clear and reasoned declaration regarding this determination, and would also make available, insofar as possible, the factual basis for its declaration. Furthermore, such a category would still not entail the extension of loss of protection to *all* branches of the non-state actor such as its charity or political branches.

Since the practical difference between membership in an organized armed group and "regular" DPH, as presented in the Guidance, is the temporal scope of loss of protection, the scope of the concept of CCF is necessarily bound by our understanding of DPH. As such, if our interpretation of DPH is narrow, it will also impact the scope of CCF.[44] Therefore, the discussion of the meaning of DPH is relevant if we adopt the *civilian approach*, and also if we favor the *status approach* of the ICRC Guidance. However, should we adopt the third position, according to which organized armed groups are equal to a state's armed forces, the discussion of DPH would only be relevant to civilians who are not members of such groups. We shall therefore move to explore the concept of DPH, mainly as construed in the *Targeted Killings* case and the ICRC Guidance.

CIVILIANS DIRECTLY PARTICIPATING IN HOSTILITIES

Elements of Direct Participation in Hostilities

According to positive IHL, civilians are protected "unless and for such time as they take a direct part in hostilities."[45] However, the exact meaning of "direct participation in hostilities" has not been formally defined in a binding legal instrument.[46] This problem is exacerbated as states have not, in general,

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44 Watkin, *Opportunity Lost, supra* note 14, at 659–660,

45 API, *supra* note 2, art. 51(3). A similar provision is found in Common Article 3, which refers to persons "taking no active part in hostilities." Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3.1, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3.1, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, art. 3.1, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3.1, Aug. 12, 1949, 75 U.N.T.S. 287. This provision was interpreted as identical by the ICTR in Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998); *See* Targeted Killings Case, *supra* note 13 at ¶34.

46 *See* ICRC DPH, *supra* note 15, at 11 –12.

disclosed their detailed interpretations of the notion.[47] Accordingly, there is a strong tendency to interpret the notion on a case-by-case basis.[48] The ambiguity and complexity of the notion has spawned an intense debate. Analysis of the relevant provisions reveals that loss of protection has three sometimes overlapping, mutually-reinforcing elements:

a. *Participation in Hostilities* – the acts committed by the civilian must be *hostile* acts.
b. *Directness* – the participation must be sufficiently close, in the causal sense, to an infliction of actual harm on the enemy. Individuals that contribute to hostile acts in a way that is not direct do not lose their protection.
c. *Temporal Requirement* – the loss of protection extends only "for such time" as the civilian directly participates in hostilities. Beyond this time, the person might be detained but not attacked.

Intertwining with these elements are the interpretive tests outlined in the ICRC Guidance, which have enjoyed relatively broad acceptance in the literature:[49] *threshold of harm, direct causation* and *belligerent nexus.* The following section will attempt to place these concepts within the elements of DPH as they are stipulated in IHL.

Participation in Hostilities – Harm and Belligerent Nexus

General

In the commentary on API, hostile acts are understood "to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[50] It is thus agreed upon that civilians lose their protection against attack when using weapons or other means to harm enemy personnel or equipment.[51] "Other means" can refer to acts that

47 *Study on Targeted Killings*, *supra* note 6, at ¶58.
48 Schmitt, *supra* note 17, at 25–26.
49 *Id.* at 43.
50 ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Commentary on Art. 51(3) ¶1942 at 618 (Yves Sandoz et al. eds., 1987) [hereinafter API Commentary]; *see also* Inter-Am. C.H.R., Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, doc. 9 rev. 1§ 811 (Feb. 26, 1999), *cited in* ICRC Customary Law, *supra* note 1, Rule 6, at 22.
51 *See* API Commentary, at 618.

cause harm, even if not actually involving the use of a weapon.[52] It is the latter category of acts that raises the most complex questions. Therefore, central to the concept of *hostile acts* is the issue of *harm*. In the ICRC Guidance, this requirement was labeled as the "threshold of harm."[53] The threshold does not require the actual materialization of harm, but focuses on the reasonable expectation that the acts could result in harm.[54] For instance, if an individual participates in the launching of rockets across a border, the act constitutes participation in hostilities regardless of whether the attacks actually cause material harm to life or property.

In the context of the threshold of harm, the Guidance offered a further distinction between acts *adversely affecting the military operations or capacity* of a party, and those *inflicting death, injury or destruction on persons or objects protected against direct attack*. The former encompasses any harm of a military nature, *irrespective* of quantitative gravity.[55] As such, it is not only limited to physical injury to military personnel or materiel, but also to a range of other activities.[56] The latter class of harm does not require any adverse effects on military operations, but places the focus on the likelihood of their resulting in death, injury or destruction. Such actions are conducted against civilian population or objects, as distinct from those directed against armed forces.[57]

Not all violent acts are automatically "hostilities." For the purpose of this distinction, the ICRC Guidance suggests the test of "belligerent nexus," meant to separate between harmful actions that amount to DPH, and acts that can indeed cause harm but still do not constitute DPH. Belligerent nexus requires that the act is not only likely to inflict harm (either by adversely affecting military operations or capacity, or by directly inflicting death, injury or destruction), but must also be "specifically designed to do so in support of a party to an armed conflict and to the detriment of another."[58] As per the ICRC, the terms "support of a party to an armed conflict" and the "detriment

52 API Commentary, *supra* note 51, 618 –619; Targeted Killings Case, *supra* note 13, ¶33.
53 ICRC DPH, *supra* note 15, at 47; for a critique, see Schmitt, *supra* note 17, at 27.
54 ICRC DPH, *supra* note 15, at 47.
55 *Id.*
56 *Id.* at 48; *See infra*, table 1, pp. 82-83.
57 Targeted Killings Case, *supra* note 13, ¶33; ICRC DPH, *supra* note 15, at 49.
58 ICRC DPH, *supra* note 15, at 58 –59.

of another" are *cumulative* conditions that have to be fulfilled for the act to be considered DPH.[59] The belligerent nexus is a necessary condition to distinguish between hostile acts, which result in loss of protection, and criminal acts that must be addressed through law enforcement, or other acts that might be violent but are not connected to the armed conflict *stricto sensu*—as long as these do not amount, in themselves, to separate armed conflicts.[60] It does not refer to the subjective intent of the actor, but to the objective purpose of the act.[61]

Actions that might cause harm but lack belligerent nexus could be instances of individual self-defense by civilians against unlawful *in bello* violence by armed forces;[62] violent acts by civilians that take place outside the context of hostilities, even if they constitute, in themselves, grave violations of international law;[63] or demonstrations, *even* if they turn violent, to the extent that their primary purpose is to express dissatisfaction with the policies of an occupying power.[64] Since such actions do not constitute participation in hostilities, and therefore do not result in loss of protection, participating civilians cannot be attacked as military targets. They have to be dealt with by means of law enforcement, according to rules of engagement. Violent acts and violent demonstrations that lack belligerent nexus can be dealt with through lethal force permitted in the context of law enforcement, meaning, to the extent that such force constitutes self-defense or defense of others.[65] This is evident in state practice, as states usually treat demonstrations as "unrest" rather than hostilities, and generally respond to them by non-lethal measures—even when the demonstrations take place in the context of a wider conflict. Accordingly, states do not view deaths of demonstrators as

59 Melzer, *supra* note 35, at 873.
60 ICRC DPH, *supra* note 15, at 59; Melzer, *supra* note 35, at 873.
61 ICRC DPH, *supra* note 15, at 59 –60.
62 *Id.* at 61.
63 *Id.* at 62.
64 *Id.* at 63.
65 *See, e.g.,* Eighth U. N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, arts. 9–10, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (Sept. 7 1990).

a military objective, and may even try to deny responsibility when such deaths occur.[66]

It should be added, however, that perhaps counter-intuitively, law enforcement measures are not always more restrictive than military operations; for instance, law enforcement can allow the utilization of undercover forces to counter violent demonstrations—while in the context of hostilities this could be considered, in the eyes of some, as perfidy.[67]

The Case of Voluntary Human Shields

One of the most difficult questions posed in the context of the "harm threshold" is the issue of *voluntary human shields*. Do civilians that intentionally concentrate around a legitimate military target harm the adversary in a manner that renders them DPH, and thereby lose their protection? Or, rather, do they remain protected, and thus have to be taken into account as "collateral damage" in the attacking party's proportionality assessment? This question is of much significance in TAACs, when an armed non-state actor frequently conducts its activities from within residential areas, where civilians constantly intermingle with military objectives. The Israeli Supreme Court held, rather laconically, that "if they [the putative human shields] do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities."[68] The Court, thus, required two cumulative, *subjective* conditions for the materialization of DPH in the context of human shields – *free will*; and *support* for the non-state actor.

The ICRC Guidance suggests a different approach, the "voluntary" or "involuntary" nature of the human shields being somewhat secondary to

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66 *See, e.g.,* Haaretz Service, *IDF: Death of Bil'In Woman Caused by Poor Medical Care in Ramallah*, Haaretz (Jan. 19, 2011), *available at* http://www.haaretz.com/news/diplomacy-defense/idf-death-of-bil-in-woman-caused-by-poor-medical-care-in-ramallah-1.337998; Anshel Pfeffer & Reuters, *Last Infiltrators Return to Syria after day of Bloody Clashes on Northern Borders*, Haaretz (May 15, 2011), *available at* http://www.haaretz.com/news/diplomacy-defense/last-infiltrators-return-to-syria-after-day-of-bloody-clashes-on-northern-borders-1.361905 (reporting that IDF sources say that demonstrators killed on the Israeli-Lebanese borders were shot by Lebanese, rather than Israeli forces).

67 Melzer, *supra* note 35, at 863 –865.

68 Targeted Killings Case, *supra* note 13, at ¶36. For a general discussion of the problem of human shields from the perspective of states, and for a similar position see Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 Stan. L. & Pol'y Rev. 93 (2011).

its analysis.[69] In line with its general approach, the Guidance suggests a functional approach to the question, distinguishing between human shields whose activities result in a *legal* obstacle to military operations, and those whose actions actually pose a *physical* obstacle. As summarized by Melzer, "the decisive question must be whether the presence of human shields directly affects the enemy's *capability*, and not merely his *willingness*, to attack and destroy the shielded objective."[70] The first, according to the Guidance, may be relevant to ground operations in residential areas, where civilians might give *physical* cover to fighters, for instance, by obscuring the military force's ability to spot and target them. In such case, they fulfill the "threshold of harm" that results in loss of protection. In the second situation, relevant mainly to operations involving powerful weaponry such as artillery or aircraft, human shielding does not affect the operation physically, since it cannot inhibit the *capacity* to carry out the military action. The effect of the human shields in such circumstances, according to the Guidance, is merely reflected in their "shifting" of the proportionality assessment to the detriment of the attacker.

From the fact that the "harm" allegedly inflicted by human shields is only manifested in forcing the attacker to kill them – meaning, by imposing a "proportionality" burden on the attacker—we learn that it is logically impossible to deduce that the human shields are participating in hostilities. Thus, the Guidance concludes, the conduct of the human shields, in such cases, does not cause "direct" harm, and therefore does not result in loss of protection. However, they might be injured or killed through collateral damage, the legality of which will be assessed according to the proportionality requirement.[71]

In the expert meetings in connection with the drafting of the ICRC Guidance, there was considerable controversy regarding this issue.[72] The distinction between human shields as physical obstacles versus human shields as legal obstacles was actually a compromise approach between the views

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69 Melzer, *supra* note 35, at 869; ICRC DPH, *supra* note 15, at 60 ("even civilians forced to directly participate in hostilities … may lose protection against direct attack.")

70 Melzer, *supra* note 35, at 869.

71 ICRC DPH, *supra* note 15, at 57–58.

72 *Id*. at 58 n.141.

of experts who saw human shielding as *per se* not DPH, and those that held an opposite view, some even suggesting that human shields are combatants.[73]

The distinction between "physical" and "legal" obstacles seems a difficult one, and can bring about arbitrary results.[74] In essence, unarmed civilians can almost never, truly, present a significant physical obstacle in front of a military force willing to use force to remove them. This fact renders the distinction suggested in the Guidance applicable only in rare situations, if at all. This is true regarding operations conducted by modern ground forces as much as to aerial attacks. Modern ground forces, in the same way as air forces, are usually capable of deploying powerful weaponry, such as mortar fire, anti-tank missiles and other means that can effectively circumvent any attempt of "physically" human shielding. In both cases, thus, if choosing to refrain from attack, attacking forces do not consider only the physical obstacle created, but chiefly the legal or moral implications of their actions. Thus, in practice, the interpretation suggested by the Guidance is tantamount to arguing that voluntary human shields are *not* DPH, in all but extremely rare cases.

However, there is no need to expressly decide between the competing approaches regarding the question of voluntary human shields. Recall that it is widely accepted that *coerced* human shields are protected from attack.[75] Even if we assume that voluntary human shields indeed lose their protection, it is extremely difficult, in a given situation, to ascertain whether human shielding is actually *voluntary* to begin with. For instance, as we shall see, any attack on civilians DPH requires "solid information," in accordance with the Supreme Court's *Targeted Killings* ruling and key principles of IHL, such as the presumption in favor of civilian status. Due to the inherently complex nature of subjective elements such as "free will" or "support," it is difficult to imagine circumstances in which the attacking party could sufficiently ascertain that the putative human shields, or at least some of

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73 ICRC Summary Report, *Second Expert Meeting on the Notion of Direct Participation in Hostilities*, (Oct. 25-26, 2004); ICRC Summary Report, *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities*, 44–45 (Nov. 27-28, 2006); ICRC Summary Report, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities*, 70 –73 (Feb. 5-6, 2008).

74 Compare, Schmitt, *supra* note 17, at 31 –33.

75 Targeted Killings Case, *supra* note 13, at ¶36; ICRC DPH, *supra* note 15, at 57 n.141.

them, are indeed *voluntary*.[76] Thus, for instance, an attacking party cannot simply assume that if, following warnings, civilians fail to leave their homes, that they are voluntary human shields with regard to nearby militant activity.

Last, it is hard to imagine that attacking a target shielded by a massive number of human shields, even if considered DPH, will ever justify the military advantage acquired, in light of the tremendous political costs inflicted on the attacking party. This is not necessarily a legal consideration, but it should be taken into account by decision makers nevertheless, as the struggle for legitimacy is a key characteristic of modern conflict.

Direct versus Indirect

General

It is extremely unclear what constitutes "direct" participation. It is uncontested that selling goods to an armed party or expressing sympathy for it does not amount to direct participation.[77] But beyond such obvious instances, there are a multitude of hard cases. In general, as rightly noted in the Commentaries on API, a clear distinction must be made between direct participation in hostilities and a general participation in a state's or a group's "war effort," as the latter encompasses, to a certain extent, the entire civilian population.[78] The Israeli Supreme Court, in the *Targeted Killings case*, recognized the lack of clear-cut definition of the directness condition, and held that "there is no escaping going case by case" in this context.[79] In this context, the Court avoided setting forth a general theory of "directness,"[80] and chose instead to suggest a few examples of acts that amount to direct participation.[81] Significantly, in its definition of direct participation, the Court included voluntary human

76 *See* Roy S. Schondorf, *Are 'Targeted Killings' Unlawful? The Israeli Supreme Court's Response: The Targeted Killings Judgment: A Preliminary Assessment,* 5 J. Int'l Crim. Just. 301, 308 (2007); Melzer, *supra* note 35, at 870 –871.

77 ICRC Customary Law, *supra* note 1, Rule 6, at 22; Inter-Am. C.H.R., Third report on human rights in Colombia, *supra* note 50, ¶53, ¶56; Targeted Killings Case, *supra* note 13, ¶34.

78 API Commentary, *supra* note 50, at 619.

79 Targeted Killings Case, *supra* note 13, ¶34.

80 For this critique see Hilly Moodrick Even-Khen, *Case Note: Can We Now Tell What "Direct Participation in Hostilities" Is?* 40 Isr. L. Rev. 213 (2007).

81 *See infra,* table 2, p. 84.

shields.[82] It also extended the definition to encompass those who "sent" the person that committed the hostilities, those who "decided" upon the act, and the person who planned it.[83] However, the Court excluded other examples.[84]

In contrast, the ICRC Guidance has attempted to lay down a *theory* of directness, rather than merely relying on examples. It requires a "direct causation" between the specific act and the likely resulting harm, in distinction from "indirect causation," which is parallel to the difference between actual conduct of hostilities and participation in the general war effort or war-sustaining activities.[85] Direct causation encompasses acts that are "one causal step" from the creation of harm, as opposed to acts that merely build up or maintain the adversary's capacity. Such indirect causation stems from actions such as research, financial services, and—controversially, at least when relating to non-state actors—weapon production (when not carried out as an integral part of a specific military operation.)[86] However, the Guidance also recognizes, as direct participation, situations where the harm caused by the individual occurs only as part of a collective military operation, of which the acts were an integral part. In such cases the harm is caused only in conjunction with other acts, but it is still sufficient to fulfill the directness criterion.[87]

The Guidance's approach to the actions that constitute *direct* hostilities has been criticized as focusing on the "tactical level of war" and therefore as disregarding the reality of how warfare is conducted.[88] For instance, the Guidance exemplifies the direct causation criteria by arguing that the assembly and storage of an improvised explosive device (IED), as opposed to its detonation, is *indirect* participation since it is a causal step away from direct causation.[89] This example was criticized as forcing states into a "reactive posture," by not allowing them to strike at the adversary's capacity

82 *Id.* at ¶¶35–36; regarding the case of the truck driver the ICRC DPH Guidance reached the same conclusion. ICRC DPH, *supra* note 15, at 56
83 Table 2, at ¶ 37, p. 84.
84 *Id.* at ¶35.
85 ICRC DPH, *supra* note 15, at 51.
86 *Id*. at 53, n.123.
87 *Id*. at 54 –55.
88 Watkin, *Opportunity Lost, supra* note 14, at 644.
89 ICRC DPH, *supra* note 15, at 54.

to attack in the future.[90] However, it should be noted that even according to the Guidance, the "one causal step" test is not the only criterion for directness. The concept of "collective operations" allows more flexibility, by asserting that "harm does not have to be directly caused (i.e. in one causal step) by each contributing person individually, but only by the collective operation as a whole."[91] Thus, while the act as a whole must cause harm to the enemy in "one causal step," each individual that plays an "integral part" in the act loses their protection even if their act by itself is further removed from the actual harm.[92]

Military versus Political Wings; Tactical versus Strategic Command; Targeting Individuals under a Self-Defense Paradigm

Some non-state actors formally differentiate, within their organizations, between "political" and "military" wings.[93] Indeed, the US Army, in its Counterinsurgency manual, recognized that common "insurgent" organizations consist of five elements: *leaders, combatants, political cadre, auxiliaries* and *mass base*.[94] As aforementioned, the Israeli Supreme Court has briefly held that "[s]ending others to commit a terrorist act or planning and deciding upon such acts" constitutes DPH.[95] This reasoning potentially covers the political and decision-making echelon of the non-state actor.[96]

The ICRC Guidance has adopted a narrower point of view. Granted, as we shall see, its definition of CCF extends to the "command" of acts that

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90 Watkin, *Opportunity Lost, supra* note 14, at 658, 683–684; *see also* Schmitt, *supra* note 17, at 29 –31; *compare* William J. Fenrick, *ICRC Guidance on Direct Participation in Hostilities*, 12 Y.B Int'l Hum. L. 287 –300 (2009).

91 Melzer, *supra* note 35, at 866.

92 *Id.* at 867.

93 *See, e.g.,* Kevin Siqueira, *Political and Militant Wings within Dissident Movements and Organizations*, 49 J. Conflict Resol. 218 (2005).

94 Counterinsurgency, *supra* note 5, at ¶1-59.

95 Targeted Killings Case, *supra* note 13, at ¶37.

96 A similar approach has been expressed by Harold Koh, Legal Adviser of the U.S. State Department, in his 2010 address to the American Society of International Law: "… the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, *including by targeting persons such as high-level al Qaeda leaders who are planning attacks*." [Emphasis Added]. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, (Mar. 25, 2010) *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

amount to DPH.[97] Moreover, in its understanding of DPH, the Guidance includes "preparatory measures," and suggests that "instruction" towards a specific hostile act amounts to such measures. However, "the preparation of a general campaign of unspecified operations" does not amount to preparatory measures that constitute DPH, in the view of the Guidance.[98] It asserts furthermore that a distinction must be made between a "non-state party" and its "armed forces," as the latter includes only the "military wing" but excludes "political and humanitarian wings."[99]

Thus, the approach of the Guidance, in its insistence that CCF does not cover membership in "political wings," and that DPH does not extend to the preparation of a general campaign, can be understood as resulting in loss of protection that is applicable mainly to command on the *tactical* level. Interestingly, the mere mention of formal distinctions such as "military" and "political" wings in the Guidance seems to reflect a divergence from its otherwise strictly functional approach; we shall therefore assume that the term "political wing," as it appears in the Guidance, means some form of a decision-making body of a non-state actor, whose activities do not amount to CCF as the term is understood there. The treatment of "political wings" in IHL is therefore a sub-question of the wider debate on the scope of CCF, and the directness and temporal elements of DPH. As such, it is subject to the same critiques that have been made concerning the different approaches regarding these issues.

The question of targeting non-state actors' leadership is two-pronged. The first prong concerns the so-called "generals" of the non-state actor's armed forces. As these individuals operate above the tactical level, some theories of distinction—such as the one suggested in the ICRC Guidance, if narrowly read—potentially rule out their targeting. The second prong concerns the "political" leadership of the non-state actor, which is theoretically differentiated from the "generals." Even if one adopts a wide approach towards targeting, which extends also to "strategic" military leadership, it

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97 ICRC DPH, *supra* note 15, at 34. It is unclear whether "command," in the CCF sense, extends to a wider notion of command than the one expressed in the Guidance's definition of DPH.

98 *Id.* at 66.

99 *Id.* at 32; for similar reasoning see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 Eur. J. Int'l L. 171, 200 (2005).

does not necessarily follow that the loss of protection also extends to the "pure" political leadership of the group. Indeed, even if we prefer the view that advocates equality in targeting between armed forces and organized armed groups, this does not automatically result in the contention that the groups' political leadership is targetable.

The extent to which the "military" versus "political" distinctions have bearing over the status or protection of individuals is determined by our view towards membership in organized armed groups: whether it is determined on a "functional" or "formal" basis. A functional approach, as suggested in the ICRC Guidance, will analyze in each case whether the individual fulfills the conditions for loss of protection, according to its understanding of the dynamics of CCF and DPH. Accordingly, this approach will pay no mind to the formal distinction of a person as a member of a "political" or "military" wing.

If, conversely, we choose to adopt the formal approach towards membership, then we encounter the same difficulties that plague the attempts to define formal membership in organized armed groups at large. Indeed, it is unclear how a political leadership in a non-state actor can be defined. In certain cases, a parallel can be drawn between the political leadership of a group and a state's government (meaning, individuals who are primarily engaged in the decision-making process) and between the military wing of a group and a state's armed forces. This might be possible, for instance, when the group is the *de facto* administrator of a territory, or when a group participates in parliamentary politics in the territorial state.[100] In other cases, such distinction is impossible, or extremely difficult.[101] This complexity is especially significant in light of the "inequality debate" above. If we accept that in certain situations an organized armed group is comparable to a state's armed forces for the sake of targeting, it could also follow that its political leadership be comparable to a state's leadership in the same context.

In any case, at least in the context of *international* armed conflicts, the common view is that political leaders can be targeted when they are in the

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100 *See, e.g.,* Counterinsurgency, *supra* note 5, 1-6–1-7, 1-11–1-12, 1-18; what is certain, however, is that the mere participation of a "political wing" in the national politics of the territorial state does not in itself grant any immunity to the group's *military* wing; on the contrary, the effects of such participation can amount, in extreme cases, to the attribution of the military wing's actions to the state.

101 *See* Counterinsurgency, *supra* note 5, at 1-11 (¶1-60).

"military chain of command" of the state's armed forces.[102] For instance, in 2011, NATO officials claimed that Libya's Gaddafi was a legitimate target since "as head of the military, he is part of the control and command structure."[103] If one subscribes to the "equality proposition" between certain armed groups and a state's armed forces, the same logic can apply to the targeting of ostensible political leaders who are an integral part of the chain of command of the armed group.[104]

Another justification that has been advanced for the targeting of leadership of non-state actors—and also field operatives, for that matter—revolves around a wide, even abstract, notion of the concept of self-defense.[105] This approach views each attack on such figures as a separate act of self-defense, conducted, perhaps, *outside* the context of a single armed conflict.[106] This idea has been proposed, mainly, to counter the claim that the US is not entitled to lethally target suspected terrorists, since it is not involved in an ongoing armed conflict—by attempting to define each attack by the US as a "micro" act of self-defense.[107] However, this view does not provide a tangible solution to our problem: it merely sets forth a wide *jus ad bellum* doctrine for targeted killings, for instance, by adopting a flexible understanding of the traditional "imminence" condition for self-defense.[108] Even if (for the sake of argument) we accept this view, its implementation in a specific case raises the exact *jus in bello* quandaries that arise in its absence. In essence,

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102 *See, e.g.*, Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 Temp. Int'l & Comp. L.J. 231, 237 (1991).

103 Fran Townsend, *Nato Official: Gadhafi a Legitimate Target,* CNN (Jun. 10, 2011), *available at* http://articles.cnn.com/2011-06-09/world/libya.gadhafi_1_nato-official-libyan-leader-moammar-gadhafi-libya-mission?_s=PM:WORLD

104 See Kenneth Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, HPCR Policy Brief, 16 (Jan. 2003).

105 Kenneth Anderson, *"Rise of the Drones: Unmanned Systems and the Future of War," Written Testimony Submitted to Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. On Oversight & Gov't Reform,* Subcomm. Hearing, Mar. 23, 2010, 111th Cong., 2nd sess. 2 (2010); *see also* U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force, 2–3. [hereinafter DOJ White Paper], *available at* http://www.fas.org/irp/eprint/doj-lethal.pdf

106 Anderson, *supra* note 105, at 5.

107 On the question of the existence of an armed conflict, see the brief treatment in Chapter 1, Sec. I

108 *See* DOJ White Paper, *supra* note 105, at 7–8 (suggesting a "broader concept of imminence" in this context).

any attempt to set-forth a *jus ad bellum* doctrine necessarily entails also the adoption of *jus in bello* rules of targeting; any other conclusion will result in a complete circumvention of IHL. For instance, although the US Attorney General justified the killing of Osama Bin Laden as a case of "national self-defense" (a *jus ad bellum* claim), he had to further lay down a *jus in bello* argument by claiming that "[i]t's lawful to target an enemy commander in the field."[109] If, however, an attempt would be made to advance such self-defense arguments as a concept completely independent from the law of armed conflict, then such actions would have to conform with the use of the lethal force paradigm of IHRL, which is much stricter.[110]

In sum, the question of distinction between "political" versus "military" wings remains unsettled; however, it seems that recent discourse has very much replaced this distinction with a functional analysis of participation in hostilities. It seems that the latter approach allows us to sidestep the daunting task of differentiating between different "wings" of non-state actors. This notwithstanding, as we saw with regard to the discussion of DPH at large, significant gaps of understanding remain concerning the status and protection of strategic-level leaders of non-state actors.

Temporal Requirement

The Israeli Supreme Court, in the *Targeted Killings* case, adopted the view that the "for such time as" requirement, as entrenched in Article 51(3) of API, includes also the preparation for hostilities.[111] It therefore held that "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way

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109 U.S. Dep't of Justice News, Statement of Attorney General Eric Holder Before the House Judiciary Committee (May, 3, 2011) *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110503.html; *see also* DOJ White Paper, *supra* note 105, at 8 (suggesting, even if not explicitly, an *in bello* standard for targeting based on involvement in a "continuous terrorist campaign").

110 For a detailed analysis of this question, see Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 Wm. Mitchell L. Rev. 1655 (2012). And we do not address here the question of targeting of one's *own* civilians, which is essentially a question of internal law. *See also* DOJ White Paper, *supra* note 105; Barack Obama, Speech at National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

111 Targeted Killings Case, *supra* note 13, at ¶¶33–34.

back from it, is a civilian taking "an active part" in the hostilities."[112] This corresponds with the approach of some states, expressing the view that "hostilities" include also "preparation for combat and return from combat."[113]

Regarding the temporal requirement, the Court offered a distinction, which can be labeled as one between "sporadic" DPH and "continuous" DPH. Sporadic DPH connotes a person that participated in hostilities for one single time, or did so sporadically, and thereafter ceased such participation. Continuous DPH occurs when a person acts in the framework of an organization, in which he or she commits a "chain of hostilities, with short periods of rest between them." The former cannot be attacked after the sporadic action, while the latter can, since they are participating in hostilities "for such time" that encompasses the entire "chain of acts" they are committing; the period between hostilities is merely time for preparation.[114]

The ICRC Guidance rejected the Supreme Court's concept of "continuous DPH."[115] Instead, it offers a dichotomy between "sporadic" DPH, which results in temporal loss of protection, and continuous combat function within an armed organization, which, as aforementioned, amounts to *loss* of civilian status.

As such, the Guidance concedes that DPH extends to *preparatory measures* as well as to *deployment* and *return* from the location of the execution of the *specific* act.[116] In terms of the meaning of *preparatory measures*, those that "are of a specifically military nature and so closely linked to the subsequent execution of a *specific* hostile act that they already constitute an *integral part* of that act" amount to DPH [emphasis added], while acts "aiming to establish the general capacity to carry out unspecified hostile acts do not."[117] The Guidance posits, furthermore, that "instruction" towards a specific hostile act amounts to preparatory DPH measures. Preparatory measures amounting to DPH do not have to occur immediately before the act, nor in geographical proximity to its execution.[118] However, "the preparation of a

112 *Id.* at ¶34.
113 API Commentary, *supra* note 50, at 618; Official Records, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974 –1977) Vol. XV, CDDH/III/224, 330.
114 Targeted Killings Case, *supra* note 13, at ¶39, ¶40.
115 ICRC DPH, *supra* note 15, at 44 –45.
116 *Id.* at 65.
117 *Id.* at 66.
118 *Id.*

general campaign of unspecified operations" does not amount to preparatory measures that constitute DPH.[119]

The Guidance, in this context, was criticized as focusing strictly on the tactical level, while leaving out individuals planning the overall campaign.[120] The Supreme Court of Israel, conversely, held that "sending others to commit a terrorist act or planning and deciding upon such an act" does in fact amount to DPH.[121] The ICRC's definition of "preparatory measures" was further criticized as too narrow. Some have suggested that preparatory measures must encompass all acts that are, in the causal sense, "preparatory to combat"—even if they are not in themselves "military operations" and even if not in preparation for a specific attack.[122] Some have gone further, suggesting that "the period of participation should extend as far before and after a hostile action as a causal connection existed."[123]

Deployment that amounts to DPH, according to the Guidance, begins only "once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation."[124]

Regarding the loss of protection during the *return* from the operations, the Guidance asserts that DPH is extended "as long as the return from the execution of a hostile act remains an integral part of the preceding operation," and ends when the person has physically separated from the operation, for instance by "resuming activities distinct from the operation."[125] This understanding will generally exclude, for instance, targeting of individuals in their homes, and is directly at odds with the "continuous DPH" approach.[126]

The process in which civilians lose and regain protection through engagement in and disengagement from hostile acts has been labeled as the "revolving door" of civilian protection. As such, it was not viewed in the Guidance as a problematic aspect of IHL, but rather as an integral part of it, meant to restrict targeting of civilians only for the time as they represent a

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119 *Id.*
120 Watkin, *Opportunity Lost, supra* note 14, at 660 –661.
121 Targeted Killings Case, *supra* note 13, at ¶37.
122 Bill Boothby, "*And For Such Time As": The Time Dimension to Direct Participation in Hostilities,* 42 N.Y.U. J. Int'l L. & Pol. 741, 749 –750 (2010).
123 Schmitt, *supra* note 17, at 36–37.
124 ICRC DPH, *supra* note 15, at 67.
125 *Id*.
126 Boothby, *supra* note 122, at 751.

military threat.[127] In this context, the Guidance stresses that even if civilians "repeatedly" take part in hostilities, it is virtually impossible to anticipate whether they will do so again.[128] Instead, the Guidance, as we have seen, adopts the view that DPH is limited to each single act and, accordingly, the participation terminates with the end of the specific act.[129] This approach has been countered by the claim that future conduct is possible to predict,[130] and that nevertheless, the individual, having no right to participate in hostilities to begin with, should bear the risk of potential "misunderstandings."[131] Moreover, as the critiques claim, the "revolving door" concept does not indicate at what point repeated participation will amount to CCF and therefore result in loss of civilian status.[132] Indeed, it is difficult to reconcile between the Guidance's view that it is impossible to predict the future conduct of an individual, with its suggestion that membership in an organized armed group be determined on a functional basis—itself requiring some assessment regarding future activity. Furthermore, the Guidance was criticized that in its endorsement of the "revolving door" phenomenon it is granting significant battlefield advantages to insurgents, by allowing them to retain the tactical initiative.[133] An alternative approach is to view DPH as continuing until *extended* non-participation materializes or an affirmative withdrawal can be determined.[134] This approach correlates, to a large extent, to the Israeli Supreme Court's "continuous DPH" doctrine.

However—beyond the important legal question of *status*—the CCF approach and the "continuous DPH" doctrine result in similar practical results: both provide for an extended temporal loss of protection, which goes beyond preparation, execution and return from the specific act. Moreover, as noted by Melzer, "persons directly participating in hostilities on a persistently recurrent basis will almost always be members of an organized armed group," notwithstanding, for instance, "gray" cases such as teenagers that recurrently attack military vehicles with Molotov cocktails.[135] The main difference,

127 ICRC DPH, *supra* note 15, at 70; *compare* Schmitt, *supra* note 17, at 37.
128 ICRC DPH, *supra* note 15, at 71.
129 *See Study on Targeted Killings*, *supra* note 6, at ¶62.
130 Watkin, *Opportunity Lost, supra* note 14, at 644, 688, 692 –693.
131 Schmitt, *supra* note 17, at 38–39.
132 Watkin, *Opportunity Lost, supra* note 14, at 661–662, 686 – 690.
133 Schmitt, *supra* note 17, at 38.
134 *Id*.; Boothby, *supra* note 122, at 759 –760.
135 Melzer, *supra* note 35, at 855.

therefore, between the ICRC Guidance and the *Targeted Killings* case pertains to the *acts* that are considered DPH. Since, as aforementioned, the Supreme Court of Israel did not set forth a comprehensive theory of DPH, and focused, instead, on specific examples, if one seeks to explore their differences, there is no choice but to compare the specific acts enumerated in that judgment to those mentioned in the Guidance, or to apply the Guidance's approach to the acts mentioned in the Court's decision.[136]

LIMITATIONS AND PROCEDURE OF ENGAGEMENT: SOLID INFORMATION, PROPORTIONALITY OF MEANS, INVESTIGATION, DISCLOSURE OF LEGAL BASIS

In the *Targeted Killings* case, the Court sought to mitigate the "gray" zones of the DPH analysis, by circumscribing four guidelines:[137]

a. *Solid information*: the possession of information regarding the identity and activity of the individual, which has been thoroughly verified. This requirement imposes a "heavy" burden of proof on the attacking force.[138] However, in the context of an armed conflict, this information cannot be expected to reflect the standard of proof required in criminal proceedings.[139] This legal interpretation correlates with the requirement that in situations of doubt, a person should be viewed as a civilian rather than a combatant, as enshrined in Article 50(3) of API—a provision that has been understood in the ICRC Guidance as applying also to the determination of whether the elements of DPH exist in a specific instance.[140] In this context, it is quite clear that "signature strikes"—meaning, attacks on individuals

136 *See infra,* table 2, p. 84.

137 For an application of these principles, see *Report of the Special Commission to Assess the Targeted Killing of Salah Shehadeh* 55–65 (Feb. 27, 2011, in Hebrew) (determining, *inter alia*, that Salah Shehadeh, leader of the military wing of Hamas, was continuously DPH, and that therefore he could be targeted at his home). For an English abstract of the report, see http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.

138 Targeted Killings Case, *supra* note 13, at ¶40; *compare* DOJ White Paper, *supra* note 105, at 7–8.

139 ICRC DPH, *supra* note 15, at 76.

140 *Id.* at 74–76. The extension of the presumption in favor of civilian status also the DPH determination has been criticized by Schmitt. *See* Schmitt, "*Direct Participation in Hostilities," supra* note 39; but *see* Melzer, *supra* note 35, at 874 –877.

Table 1: CCF and DPH in the ICRC Guidance

CCF	DPH	Not DPH
CCF includes: Individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. (p.34) An individual recruited, trained and equipped by an armed group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. (p.34) **CCF does NOT include:** Purchasing, smuggling, manufacturing and maintaining weapons and other equipment outside specific military operations or the collection of intelligence other than of a tactical nature. (p.35)	Measures preparatory to the execution of a specific act, the deployment to and the return from the location of its execution. (rule 6) Denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them), and clearing mines placed by the adversary. (p. 48) Electronic interference with military computer networks, whether through computer network attacks (CNA) or computer network exploitation (CNE), and wiretapping the adversary's high command or transmitting tactical targeting information for an attack. (p. 48) Attacks directed against civilians and civilian objects, sniper attacks against civilians and the bombardment or shelling of civilian villages or urban residential areas. (p.49) Recruitment and training of others but only for the execution of a predetermined hostile act. (p.53) A person serving as one of several lookouts during an ambush would certainly be taking a direct part in hostilities. (p.54) Delivery by a civilian truck driver of ammunition to an active firing position at the front line. (p.56)	Building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons (p.50). Providing an adversary with supplies and services [such as electricity, fuel, construction material, finances and financial services] (p.53) Scientific research and design, as well as production and transport of weapons and equipment [unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm]. (p.53) General recruitment and training of personnel. (p.53) The assembly and storing of an improvised explosive device in a workshop, or the purchase or smuggling of its components. (p.54) Transporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone. (p.56) Civilians who voluntarily and deliberately position themselves to create a legal obstacle to military operations of a party to the conflict. (p.57) The use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers. (p.61)

Table 1: CCF and DPH in the ICRC Guidance (cont'd)

CCF	DPH	Not DPH
Recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. (p.38)	Civilians who voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict. (p. 56) Loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities. (p.66) Equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment [if carried out with a view to the execution of a specific hostile act]. (p.66) Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific act or operation amounting to direct participation in hostilities, they extend the beginning and end of the act or operation beyond the phase of its immediate execution. (p.68) An unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force. (p.81) Large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group. (p.81)	The lawful exercise of administrative, judicial or disciplinary authority on behalf of a party to the conflict. (p.62) Perpetration of war crimes or other violations of IHL outside the conduct of hostilities. (p.62) Civil unrest, the primary purpose of which is an expression of dissatisfaction with the territorial or detaining authorities. (p. 63) The preparation of a general campaign of unspecified operations. (p.66) Transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future. (p.66) Purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors. (p.67)

Table 2: DPH in the *Targeted Killings* Case

DPH	Not DPH
Using weapons in an armed conflict, gathering intelligence, or preparing himself for the hostilities. (para. 33) Bearing arms (openly or concealed) on the way to the place where they will be used, at such place, or on the way back from it. (para. 34) Collecting intelligence on the army, whether on issues regarding the hostilities or beyond those issues (para. 35) Transporting 'unlawful combatants' to or from the place where the hostilities are taking place (para. 35) Operating weapons which 'unlawful combatants' use, supervising their operation, or provides service to them. (para. 35) Killing or taking prisoners, destroying military equipment, or gathering information in the area of operations. (para. 35) Transmission of information concerning targets directly intended for the use of a weapon. (para. 35) Driving the ammunition truck to the place from which it will be used for the purposes of hostilities (para. 35) Voluntarily, "out of support for the terrorist organization" human shields (para. 36) Sending others to commit a terrorist act or planning and deciding upon such act as well. (para. 37)	Generally supporting the hostilities against the army. (para. 34) Selling food or medicine to unlawful combatants. (para. 34) Providing general strategic analysis, granting logistical support to 'unlawful combatants', including monetary aid (para. 35) Distributing propaganda supporting 'unlawful combatants'. (para. 35) Employment in the armaments industry (para. 35) Coerced human shields (para. 36)

based on circumstantial information, are clearly in contradiction to this legal paradigm.[141]

The "solid information" requirement encompasses also the duty to take "feasible precautions" before and during the attack, in order to validate whether the person is indeed DPH.[142] The Commentary on API noted that upon ratification of API, France and the UK expressed an understanding that the presumption in favor of protection is subject to the commanders' duty to protect the safety of troops under their command.[143] Essentially, this question is a subsidiary of the general question of "force protection," which will be addressed in a later section of this document. For now, suffice it to say, that while it is reasonable that the commanders' duty to protect their troops has to be considered while assessing whether a civilian is DPH, this duty cannot be an overriding consideration, since such an approach will render meaningless the principle of distinction and the presumption in favor of civilian status.

b. *Preference for arrest and trial (proportionality of means or necessity)*: The Court ruled that even if a civilian is DPH, he or she cannot be attacked if less harmful means can be employed (proportionality of means): arrest, interrogation and trial are primary routes for confronting DPH. The assessment of proportionality of means includes the consideration of the risk to the attacking force. As put by the Court: "at times it [arrest] involves a risk so great to the lives of the soldiers, that it is not required." Furthermore, the Court stressed that in situations of occupation, the possibility of arrest might be "particularly practical."[144]

This approach by the Court correlates with the view suggested in the ICRC Guidance (Section IX), according to which the degree of use of force against individuals should be always constrained by the core IHL principles of necessity and humanity, and that the "restraining" function of the principles of military necessity and humanity increases with the ability of the military to control the circumstances of engagement with the individual. This ability, according to the Guidance, will usually be

141 For an analysis see Kevin Jon Heller, '*One Hell of a Killing Machine': Signature Strikes and International Law*, 11 J. Int'l Crim. Just. 89 (2013).

142 ICRC DPH, *supra* note 15, at 74–75.

143 ICRC Customary Law, *supra* note 1, Rule 6, at 22

144 Targeted Killings Case, *supra* note 13, at ¶40.

low in cases of large-scale confrontations with an organized armed group, but higher in other circumstances.[145]

The notion of proportionality of means in the context of armed conflicts, as suggested in the Guidance, has been subject to severe criticism, prompting several experts participating in the drafting of the ICRC Guidance—mainly military lawyers—to disown the document.[146] In essence, the criticism objects to the contention that there is a legal obligation, *in armed conflict*, to wound rather than kill, and to capture rather than to wound;[147] and that, accordingly, the question should not be whether the individual can be captured but rather if he or she has clearly surrendered.[148] The critics argue, *inter alia*, that the ICRC relied on the Israeli *Targeted Killings* case, while the latter based its proportionality requirement on *domestic*, rather than international law, and therefore should be understood strictly in the Israeli context.[149]

The critique claims, in essence, that once combat operations commence, "soldiers are not constrained by the law of war from applying the full range of lawful weapons against enemy combatants and civilians taking a direct part in hostilities;"[150] and that injecting the proportionality of means principle into the law of armed conflict "imposes a law enforcement paradigm" into the targeting of DPH.[151] However, it seems that some of these criticisms, arguing that the proportionality principle amounts to a requirement of a police-style "use-of-force continuum" in armed conflict,[152]

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145 ICRC DPH, *supra* note 15, chapter IX; *see also* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 Eur. J. Int'l L. (2013) (though criticizing the ICRC's methodology, Goodman argues that a notion similar to proportionality of means, which he labels as *restraints on the use of force* (RUF) can be derived from the scope of the concept of *hors de combat*, and is applicable also to members of states' armed forces).

146 *See, e.g.,* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769, 783 –785 (2010).

147 *Id.* at 785 –787; Schmitt, *supra* note 17, at 41–42.

148 Schmitt, at 42. It should be noted, however, that Schmitt concedes that proportionality of means might exist "in certain situations when occupying forces are acting to maintain order."

149 Parks, *supra* note 146, at 788–793.

150 *Id*. at 780.

151 *Id*. at 797.

152 *Id.* at 785–787.

over-inflate the meaning of the *necessity* based approach suggested in the ICRC Guidance.

The proportionality of means approach was also adopted in the Study on Targeted Killings.[153] The Study emphasized that the requirement set forth in the Guidance does not import the law enforcement paradigm into the context of armed conflict, but merely states the "uncontroversial IHL requirement" that the force used in a military operation be limited to what is necessary to accomplish the military objective.[154] It also endorsed the position that the requirement to use "less-than lethal measures" is augmented when the state has control over the area in which the operation is taking place.[155]

In essence, proportionality of means requires that in instances in which a specific situation—even if within a wider context of an armed conflict—is closer, in its operational characteristics, to policing activity than to a military operation (*inter alia*, in situations of occupation), the requirements of military necessity and humanity spell out that the rules of engagement during the operation should move a step *closer*—but still significantly deviate from—those set forth in law enforcement doctrines. Thus, lethal force, according to the proportionality of means approach, can be used not only in defense of self or others from actual or imminent danger, but also when a "legitimate military purpose," such as the protection of the operating force, requires so.[156] Conversely, in situations in which active hostilities take place, and where other options are impracticable, lethal targeting of civilians DPH is lawful, without any constraints that might restrict operations closer to policing measures.[157] For instance, if a civilian is engaged in preparation, deployment or return from rocket-launching activity in a territory that is not under military occupation in the strict sense, nor effectively controlled by a territorial state that cooperates in an attempt to prevent such actions, it is obvious that arrest is impracticable. In TAACs, the capture or arrest requirement can be practical when the territorial state is willing and able to cooperate

153 *Study on Targeted Killings*, *supra* note 6, at ¶30.
154 *Id.* at ¶76.
155 *Id.* at ¶77.
156 Melzer, *supra* note 35 at 902–904; *compare Study on Targeted Killings*, *supra* note 6, at ¶93, Goodman, *supra* note 145.
157 ICRC DPH, *supra* note 15, at 80 –81; Melzer, *supra* note 35, at 902.

in carrying out these functions. However, by their nature, TAACs will rarely take place within a territory of a state that is actually willing and able to do so.

Whatever its standing under international law, the application of proportionality of means is a corollary of a party's ability to exercise sufficient control over an area—i.e., control sufficient to allow it to capture an individual without exposing its troops to unreasonable threat. It should not be understood beyond this assertion. Furthermore, this principle should not be extended, without alteration, to attacks on a state's military forces,[158] as it is mainly a product of the presumptions entrenched in IHL in favor of *civilians*. However, this by no means implies that the basic principles of necessity and humanity do not apply to combatants—the meaning of which is beyond the scope of this document.

Last, it should be noted that the proportionality of means requirement makes sense mostly if we adopt a wide temporal scope of DPH, as suggested in the *Targeted Killings* case ("continuous DPH"). If we adopt a narrow temporal scope, such as suggested in the ICRC Guidance (in which DPH extends only to "specific acts"), it becomes increasingly difficult to imagine practical situations in which an individual crosses the high threshold of DPH, but can still be stopped by capture rather than by potentially lethal measures.

c. *Independent Investigation*: As ruled by the Court, following an attack on a civilian DPH, a thorough and independent investigation must take place,[159] through an "objective examination committee."[160] We shall briefly discuss issues relating to the duty to investigate in Chapter 5.
d. *Proportionality of collateral damage (proportionality of attack*): this proportionality test deals with the collateral damage inflicted upon innocents *if* the proportionality of means test is satisfied: meaning, the civilian DPH cannot be arrested and is, in principle, liable to attack.[161] This issue will be addressed in chapter 4 *infra*.

158 For such concerns, see Parks, *supra* note 146, at 803–810.
159 Targeted Killings Case, *supra* note 13, at ¶40.
160 *Id.* at ¶54, 59
161 *Id.*

LEGAL UNCERTAINTY AND THE NEED FOR A CLEAR EXPRESSION OF *OPINIO JURIS* THROUGH PUBLIC DISCLOSURE

From our analysis above, the clearest conclusion is that things remain unclear. While the legal framework is well established, its interpretation, and even more its practical implementation, raises acute questions. What is left for stakeholder states to do? First and foremost, states should provide legal justifications for their actions, in accordance with their understanding of the principle of distinction—*including* with regard to the international-legal basis for specific operations. These justifications should point out, with as much specificity as possible, the factual basis upon which the legal analysis is constructed. Indeed, states can mitigate the effects (and exploitation) of the lack of normative clarity by providing a clear and timely legal justification for their actions.[162] The presentation of a legal justification has threefold importance. *First*, it promotes the rule of law and adherence to IHL; *second*, it can serve states' interests by assuring public opinion that they are not acting unlawfully and arbitrarily; *third,* and significantly, asserting a legal justification amounts to a firm expression of *opinio juris*—an action that in itself serves to clarify, promote and reform international law. For the enhancement of the credibility of the legal basis supplied, it should be accompanied by transparent disclosure of information, to the extent possible.

162 On issues of factual and legal disclosure see Eliav Lieblich, *Show Us The Films: Transparency, National Security, and Disclosure of Information Collected by Advanced Weapon Systems under International Law*, 45 Isr. L. Rev. 459 (2012).

CHAPTER 3

The Principle of Distinction in Transnational Asymmetric Warfare: Targeting of Objects

INTRODUCTION

International humanitarian law requires distinction among persons; it also requires distinction among objects. Just as the law requires parties to armed conflicts to distinguish between persons who may be targeted and persons who may not be targeted, so too does the law require distinction between so-called "military objectives" and "civilian objects." The basic reasoning is the same: Civilians not participating in the conflict should not suffer its horrors. Even when non-participating civilians themselves may not be physically harmed when objects are attacked, damage to the objects—such as buildings, roads, or infrastructure—that civilians use has consequences on civilians' lives. In the clear cases—a tank moving toward the front on one hand and a village without arms on the other—the principle is straightforward. The hard cases are much more subject to controversy.

This chapter will briefly set out the legal standard for distinguishing between objects that are "military objectives" and those that are not. It will then take a deeper look at a few selected topics that have prompted the most discussion in relation to asymmetric warfare. These include the questions of "dual use" objects, "war-sustaining" economic objects, and political and psychological objects, as well as the issue of what level of certainty of an object's use or purpose is required before a party may attack it.

THE STANDARD: "EFFECTIVE CONTRIBUTION" AND "DEFINITE MILITARY ADVANTAGE"

The concept of distinction among objects is rooted in customary law that evolved over the past two centuries.[1] It also has been codified in Additional Protocol I, whose Articles 48 and 52 limit targeting to military objectives only.[2] The basic principle of distinction is set out 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."[3] This is recognized as customary law.[4]

By consensus, the definition of "military objective" in API Article 52(2) is also regarded as expressing customary law.[5] According to the Protocol, military objectives are defined as objects "which by their nature, location, purpose or use make an effective contribution to military action" and "whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[6] A "civilian object," in turn, is any object other than a "military objective."[7] This dichotomy—between "military objectives" and "civilian objects"—is the fundamental concept.

As for the definition of "military objective," the provisos of "effective contribution to military action" and "definite military advantage" (part of

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1 Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S. Air Force Acad. J. Legal Stud. 35, 42-46 (1997).

2 API arts. 48, 52.

3 API art. 48.

4 *See, e.g.*, International Humanitarian Law, Rule 7 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC Customary Law Study].

5 Tallinn Manual on the International Law Applicable to Cyber Warfare R. 38 cmt. 1 (Michael N. Schmitt, ed., 2013) [hereinafter Tallinn Manual]; Israel Ministry of Foreign Affairs, "Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality (July 25, 2006) ("The generally accepted definition of "military objective" is that set out in Article 52(2) Additional Protocol I of the Geneva Conventions."); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 Yale H.R. & Dev. L.J. 143, 148 (1999).

6 API art. 52(2).

7 *Id.* art. 52(1); *see also* Tallinn Manual, *supra* note 5, R. 38; Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. Legal Analysis 115, 130 (2010) ("Specifically, the Protocol makes no distinction between 'military objects' and dual-use objects…; instead, it treats all objects as potentially dual-use.").

the definition above) limit the objectives that may be sought. In principle, these two phrases set separate standards that must each be met; in practice, meeting one standard in most cases implies meeting the other.[8] Consistent with other aspects of IHL, a party may not target an object merely because it contributes to civilian morale or because its destruction would achieve a political objective, a topic discussed more in depth in this chapter's section on psychological objects.[9] A related question, to what extent deterrence constitutes a legitimate military advantage, is discussed in Chapter 4. Rather, the "effective contribution" and "definite military advantage" language underline the nexus that must exist with overcoming the adversary's military. (Some view "war-sustaining economic objects" as military objectives, as noted below. For these commentators, the nexus is that which must exist with the wider strategic aims of the party in the armed conflict, not only overcoming the adversary's military).

Examples may help to illustrate the point. Scholars disagree on whether an indirect military contribution—such as a storage depot far from the battlefield or some transportation infrastructure—is sufficient to be considered "effective."[10] A hypothetical future "contribution" does not qualify as "effective"; a civilian airfield incapable of launching military aircraft cannot be targeted because it might one day be transformed for military use. On the other hand, if there is evidence of intent to so transform it in the future, then the airfield might qualify as a military objective.[11] As for the second prong, the adjective "definite" describes the military objective in order to exclude objectives that may be speculative only.[12] A further limitation is the language in API about

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8 *See* Alexandra Bolvin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare* 15-16 (2006), *available at* http://www.geneva-academy.ch/docs/publications/collection-research-projects/CTR_objectif_militaire.pdf. While the report advocates testing the two standards separately, its reasoning makes clear that satisfying one standard nonetheless means, in most cases, satisfying the other standard.

9 Tallinn Manual, *supra* note 5, R. 38 cmt. 23; Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law* 3 (2003). For a more in-depth discussion of the concept of "military advantage," see Chapter 4.

10 *See id.* at 2-3; HPCR Manual on International Law Applicable to Air and Missile Warfare R. 24(1) (2009), *available at* http://ihlresearch.org/amw/HPCR%20Manual.pdf [hereinafter HPCR AMW Manual].

11 HPCR AMW Manual, *supra* note 10, R. 24(3).

12 *See* Tallinn Manual, *supra* note 5, R. 38 cmt. 20; Sassòli, *supra* note 9, at 3. Chapter 5 will introduce the type of military advantage evaluated for purposes of

"the circumstances ruling at the time." For example, "a civilian air traffic control system used for military purposes while a damaged military system is being repaired qualifies as a military objective."[13] Nonetheless, "once the military system is restored and the civilian system is returned to exclusively civilian use, it no longer qualifies as a military objective (absent apparently reliable information that allows the attacker to reasonably conclude that the enemy will use it again in the future for military purposes)."[14]

This concept of distinguishing among objects is, of course, often hard to implement. Discerning whether an object is "military objective" or "civilian object" is often not straightforward. This is particularly true for "dual-use" targets—which often include power plants, bridges, and other infrastructure, but can also include any objects—that meet the criteria for a "military objective" but also have a civilian function.[15] Some claim it is likewise true for "war-sustaining economic objects" (that generate funds used to sustain a war effort) and for political and psychological objects (that, while not directly part of providing arms for the fight, can affect the likelihood of a party's success in armed conflict). Finally, parties to an armed conflict confront the question of certainty: how certain a party must be of an object's military nature in order for its targeting to be permissible.

All of these areas have implications for all states involved in conflicts with non-state actors across their borders. The targeting of objects is often one of the most hotly contested arenas for debating the military strategies of regular armies in asymmetric warfare. Increasingly, non-state actors have the trappings of governments, complete with factories and ports ("war-sustaining economic objects") and broadcasting facilities (political and psychological objects). In no area are the actions of regular armies more contested, though, than on the question of dual-use objects, infrastructure that serves both

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the standard of proportionality. That military advantage is "concrete and direct," as opposed to the "definite" military advantage test for civilian objects. For the most part, the two are viewed as synonymous. Some claim that the "definite" military advantage standard is broader, permitting an advantage to be considered a military advantage even if it requires "other intervening variables, such as the anticipated success of another military operation which is being conducted elsewhere." Bolvin, *supra* note 8, at 43.

13 Tallinn Manual, *supra* note 5, R. 38 cmt. 21.

14 *Id.*

15 It should be emphasized that "dual-use" is not a legal term but a functional one.

military and civilian needs. For that reason, an understanding of the law and how its logic operates is key.

These questions (of dual-use objects; war-sustaining economic objects; political and psychological objects; potential military objectives, and the presumption of an object when in doubt) are addressed in the pages that follow.

DUAL-USE OBJECTS

The legality of targeting dual-use objects is of particular resonance in asymmetric conflicts, in which the strategy of the irregular forces is to blur the distinction between civilian and military function. As Schmitt noted more than a decade ago, the gap between technologically advanced parties and their less equipped adversaries would lead the less powerful side to blur distinctions between civilian objects and military objectives, "driven by the desire to compensate for weakness on the purely military front."[16] At the same time, militaries in more technologically advanced states would increasingly rely on dual-use infrastructure or objects, due both to the advance of technology and for cost efficiencies.[17] For example, militaries increasingly rely on the same mechanisms of information technology—such as the internet—as the civilian sector.[18] States have also identified cost efficiencies in contracting out what had been military work.[19] This "trend towards militarizing civilian activities and civilianizing military ones" complicates distinction.[20]

Whatever the strategic context, in all cases, the target must be a military objective, and, as discussed later in the chapter, the view of the strong majority of sources is that an impact on civilian morale is not a basis for an object to be considered a "military objective." As Schmitt explains succinctly, "Indeed, actually intending to achieve political, economic, or other non-military ends is acceptable, so long as the target qualifies as a legitimate military objective on other grounds."[21] The crucial point is that the criteria for "military objective" must still be met in full (as well as any other applicable

16 *See* Schmitt, *The Principle of Discrimination*, *supra* note 5, at 158-59.
17 *See id.* at 160.
18 *See id.*
19 *See id.*
20 *Id.* at 160-61.
21 Michael N. Schmitt, *Effects-Based Operations and the Law of Aerial Warfare*, 5 Wash. U. Global Stud. L. Rev. 265, 278-79 (2006).

IHL principles, such as proportionality). As noted by Jefferson D. Reynolds in the *Air Force Law Review* (from the United States),

> While the civilian population should never be the subject of direct kinetic attack, the effects on this center of gravity are largely discomfort, morale and resolve to support their leadership in conflict participation. The primary obstacle to this type of campaign is that Article 52(2) arguably prohibits attacking these targets, even though their destruction may reduce the length, cost, damage and casualty rate typically encountered from the destruction of objects providing a distinctly military advantage. Objects providing a military advantage typically translate into the highest center of resistance and the most difficult to engage, especially when they are commingled among the civilian population in concealment warfare.[22]

The attendant legal questions therefore arise frequently. An analysis of the law of targeting dual-use objects begins with API itself. As noted above, Article 52 of the protocol (consistent with customary law) stipulates that an object may qualify as military objective due to its "nature, location, purpose, or use." Dual-use objects are not military objectives by virtue of their "nature"; according to the dominant interpretation,[23] that category includes, primarily, military equipment or bases. Nor do they qualify as military objectives due to "location," as might a strategic mountain pass or high place.[24] The "purpose" category is an important one in the law of

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22 Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F.L. Rev. 1, 86 (2005).

23 *See* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ¶2020 (Yves Sandoz et al. eds., 1987) [hereinafter API Commentary]; *see also, e.g.*, Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 Int'l Rev. Red Cross No. 881, at 11, 28-29 (Mar. 2011) (discussing the ICRC position on the matter).

24 *See* API Commentary, *supra* note 23, ¶ 2021(describing military objectives by "location" as including "a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it").

targeting of objects, as it requires an inquiry into an adversary's future behavior and how it might use the object at a later time.[25]

This "purpose" criterion raises the question of how remote a purpose must be for an object to qualify as a military objective. In theory, any element of civilian infrastructure could be converted to military use, such that all civilian infrastructure could be defined as military objectives by "purpose."[26] For that reason, the ICRC Commentaries require intent on the part of a party to convert the object to military use in order for the "purpose" criterion to be met.[27] Yoram Dinstein has adopted a similar standard, explaining, "Purpose is predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a 'worst case scenario.'"[28] Schmitt offers a more lenient standard, regarding an object as a military objective "if the likelihood of military use is reasonable and not remote in the context of the particular conflict under way." Applying Schmitt's standard, actual intent would not be necessary, only a showing of reasonable likelihood of use.[29]

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25 *See id.* ¶ 2022 ("The criterion of 'purpose' is concerned with the intended future use of an object, while that of 'use' is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives. It is clear from paragraph 3 [of API Article 52] that in case of doubt, such places must be presumed to serve civilian purposes."); Tallinn Manual, supra note 5, R. 38 cmt. 12 ("[An object] acquires the status of a military objective as soon as [a military] purpose becomes clear; an attacker need not await its conversion to a military objective through use if the purpose has already crystallized to a sufficient degree."). As for the degree of certainty in assessing the intention of the adversary to put the object to military purpose, the Tallinn Manual explains, "[T]he law generally requires the attacker to act as a reasonable party would in the same or similar circumstances. In other words, the legal question to be asked is whether a reasonable attacker would determine that the reasonably available information is reliable enough to conclude that the civilian object is going to be converted to military use." *Id.*

26 *See* Sass**ò**li, *supra* note 9, at 7-8 ("If an objective is military simply because it could be converted into something useful for the military, nothing remains as civilian and therefore as protected.").

27 *See* API Commentary, *supra* note 23, ¶ 2022; Sass**ò**li, *supra* note 9, at 8.

28 Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, *in* Legal and Ethical Lessons of NATO's Kosovo Campaign 139, 148 (Andru E. Wall, ed., 2002).

29 Michael N. Schmitt, *Wired Warfare: Computer Network Attack and* Jus In Bello, 84 Int'l Rev. Red Cross 365, 385 (2002) [hereinafter *Wired Warfare*]. *But see*

Objects that are generally civilian objects (e.g., houses, schools, places of worship) are protected from attack according to the ICRC's Customary IHL Study, "unless and for such time as they are military objectives."[30] This language tracks that used for civilian direct participation in hostilities (discussed in Chapter 2), drawing together the rule for persons and the rule for objects. "For example," an Israeli publication from 2006 notes, "if an anti-aircraft battery is positioned on the roof of a school or if a sniper takes up a position on the minaret of a mosque, the protection provided for the facility by the virtue of it being [a] civilian target is no longer valid, and the attacker is permitted to attack it."[31] On the other hand, "Protected places (hospitals, places of worship, etc.) must remain protected as long as military action is not being deployed therefrom."[32]

For dual-use objects, the contention is not necessarily that they will be used for military purposes at a future date but, rather, that they are put to such use at the time of targeting. The claim, then, is often simpler: that the objects, by virtue of their "use" for military purposes—albeit simultaneous to a civilian use—are military objectives that may be targeted. As noted in the ICRC commentaries to API Article 52,

> Other establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military. In such situations the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must [be] expected among the civilian population and the damage which would be caused to civilian objects.[33]

Sass**ò**li, *supra* note 9, at 8 (hinting at his disapproval of Schmitt's standard).

30 ICRC Customary Law Study, *supra* note 4, Rule 10.

31 *Id.* examples of state practice (citing the practice guide; please note that, despite the characterization by the ICRC, the source is not a military manual but a less formal source without the legal weight of a manual). *See also* Dinstein, *supra* note 28, at 144, 149 ("When (and as long as) they are subject to such use, outside their original function, they can be treated as military objectives.")

32 ICRC Customary Law Study, *supra* note 4, Rule 10, examples of state practice (with the same note applying regarding the authority of the practice guide).,

33 *See* API Commentary, *supra* note 23, ¶ 2023.

On the face of it, the text of API permits the targeting of dual-use objects, as the ICRC commentaries confirm. As noted above, the protocol permits the targeting of military objectives; the provision on objects carves out no exceptions. Under the definition of military objectives, any object meeting the "effective contribution" and "definite military advantage" standards qualifies for targeting, regardless of the object's other, civilian functions.[34] If an object has the required military use, then it is a military objective—and Article 52 of API, looked at in isolation, permits its targeting.[35] As the *Tallinn Manual* states, "Any use or future use contributing to military action renders an object a military objective. As a matter of law, status as a civilian object and military objective cannot coexist; an object is either one or the other. This principle confirms that all dual-use objects are military objectives, without qualification."[36]

That is, the definition itself provides no carve-out or exception for objects with a dual use. For example, if a power plant supplies half of its energy to the military and half of its energy to civilians, then it likely would be considered a "military objective"—even though civilians use it extensively. Nonetheless, "state practice suggests that governments are uncomfortable with the notion that the civilian function of a dual-use facility can be ignored."[37] In this sense, the IHL principle of proportionality—applicable generally—has a particular resonance in attacks on dual-use targets, since these often lead to consequences on civilians and/or civilian objects.[38]

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34 *See* Tallinn Manual, *supra* note 5, R. 38 cmt. 8, R. 39 cmt. 1.

35 *See, e.g.*, *id*.

36 *Id.* R. 39 cmt. 1.

37 *See, e.g.*, Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 35 Cornell Int'l L.J. 559, 565-66 (2002) (written by an Oxford professor and Cornell professor).

38 *See* API Commentary, *supra* note 23, ¶ 2023 (noting the need to balance "on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must expected among the civilian population and the damage which would be caused to civilian objects"); Sassòli, *supra* note 9, at 7 ("When a certain object is used for both military and civilian purposes, it may be held that even a secondary military use turns it into a military objective. However, if the effects on the civilian use of the object imply excessive damages to civilians, an attack on such a dual-use object may nevertheless be unlawful under the proportionality rule."); Schmitt, *Wired Warfare*, *supra* note 29, at 385 ("Finally, dual-use objects must be carefully measured against the requirements of discrimination and proportionality,

The problem of dual-use objects can be resolved easily if, by virtue of the nature of the object, targeting of its military aspects can be separated from targeting of its civilian aspects. For example, if a coal factory used for civilian purposes sits beside an oil factory used for military purposes, then only the military-oriented factory may be targeted.[39] These are the easy cases. In other cases, of course, the answers are not so simple. To draw on the example above, if a dual-use airport has only one runway, then targeting that runway affects both an army and civilians.[40] The legal sources and literature on dual-use objects focus on these scenarios, the heart of the problem.

Applying a proportionality analysis, the military advantage of targeting a dual-use object must be weighed against the attendant harm to civilians. Arguably, through the strict language of the proportionality rule, the analysis would not be necessary. As explained in Chapter 4, proportionality, in general, addresses incidental (or "collateral") damage, not damage caused by destruction of the target itself. In the context of dual-use objects, the civilian-oriented harm caused by destruction of a dual-use target is analogized to incidental harm.[41] The direct harm is viewed as that caused to the adversary's military. The harm to civilians, while not incidental, is therefore viewed as akin to incidental harm because that harm, though intrinsic to the targeting of the object, is not part of that which is presumed to be the purpose of the attack.

This theory would require the use of a proportionality analysis, discussed at length in Chapter 4. The essential limitation on targeting of "dual-use" objects is found in the proportionality rule. As the ICRC commentaries to API note, the "time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must [be] expected among the civilian population and the damage which would be caused to civilian objects."[42] As Meron notes, "Attacking dual-use objects is not necessarily unlawful, provided that they meet the definition of military objectives in

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discussed above, because by definition an attack thereon risks collateral damage and incidental injury to civilians or civilian objects.").

39 *See* Shue & Wippman, *supra* note 37, at 563. The analysis seems to assume that the factory used for civilian purposes would not meet the criterion of "purpose" for future military use. *See* discussion *supra*.

40 *See id.* at 564.

41 *See id.* at 565.

42 *See* note API Commentary, *supra* note 23, ¶2023.

Article 52(2) of Protocol I, the principle of proportionality is observed, and collateral damage is minimized."[43] As Sassòli concurs, "When a certain object is used for both military and civilian purposes, it may be held that even a secondary military use turns it into a military objective. However, if the effects on the civilian use of the object imply excessive damages to civilians, an attack on such a dual-use object may nevertheless be unlawful under the proportionality rule."[44] The *Tallinn Manual* likewise focuses heavily on proportionality in its discussion of dual-use objects.[45]

The context of dual-use infrastructure highlights an important issue in applying the proportionality standard. Often, an attack on a dual-use infrastructure target will not result, directly, in mass casualties to civilians; the building or road may be empty. Indirect harm to civilians, on the other hand, can be massive, due to the loss of electricity, water, or other essential services. Many commentators argue that such consequences (sometimes called "reverberating effects"), to the extent they are foreseeable, must be considered in determining the legality of targeting.[46] As one study put it, the damage would be "limited to damage that is foreseeable or likely or that can be reasonably expected,"[47] presumably from the perspective of a reasonable commander before the fact.[48] Another group of experts spoke of a "reasonable expectation of causality."[49] If incidental damage (i.e., casualties) resulting from a strike is reasonably foreseeable, then such damage would be calculated as part of the damage to be weighed in determining whether

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43 Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 276 (2000).

44 Sassòli, *supra* note 9, at 7.

45 *See* Tallinn Manual, *supra* note 5, R. 39 cmts. 2, 4, 6.

46 *See, e.g.*, *id*; *see also* Schmitt, *The Principle of Discrimination*, *supra* note 5, at 168.

47 Bolvin, *supra* note 8, at 51.

48 In the study proposing this standard, some experts questioned whether such assessments often require environmental and/or public health professionals and how realistic it is to expect militaries to staff and consult such experts. *See id.* at 51 n.198. This demonstrates the complexity of reaching the most proper foreseeability standard.

49 *See* University Centre for International Humanitarian Law Geneva, *Expert Meeting "Targeting Military Objectives,"* Report, at 15 (May 12, 2005), *at* http://www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf (summarizing proceedings of experts' meeting sponsored by the Swiss Federal Department of Foreign Affairs) [hereinafter *UCIHL Experts Report*].

an attack meets the proportionality standard. A focus on reverberating effects may be a consequence of the development of precision munitions. As Schmitt has noted,

> If first-tier collateral damage and incidental injury (i.e., damage and injury directly caused by the kinetic force of the attack) become rarer, it is probable that humanitarian attention will increasingly dwell on subsequent-tier, or reverberating, effects. As an illustration, since electrical grids will be attackable with highly surgical strikes, proportionality analysis in future war may well center on derivative consequences, such as unintended but foreseeable denial of power to medical facilities.[50]

The reasoning behind the principle of considering reverberating effects seems hard to reject. Were attacks on power plants to cause harm to water supplies, sewage treatment, and electricity shortages that, in turn, cause the deaths of 70,000-80,000 civilians, then it is not credible to argue that the only damage to be considered is that to the power plant buildings themselves.[51] Both parties would likely accept that the 70,000-80,000 civilian deaths are a relevant fact. Rather, the argument is likely to be on different terrain: whether the military conducting the attack actually could have foreseen the extent of the harm, whether the adversary took reasonable steps to mitigate the harm (on the assumption that a duty to mitigate would exist under international human rights law), and the extent to which the adversary contributed to the harm such that it was not caused by the attack itself. The debate, it seems, would be about how to rein in the principle, rather than whether to reject the principle outright.

Apart from proportionality, some argue for a different limit on targeting some dual-use objects: contending they may be "objects indispensable to the survival of the civilian population."[52] Under Article 54 of API, such objects may not be targeted "for the specific purpose of denying them for

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50 Schmitt, *The Principle of Discrimination*, *supra* note 5, at 168.

51 Bolvin, *supra* note 8, at 51 n.197. The example itself is based on contentions by a former U.S. military intelligence officer about the consequences of U.S. bombing of Iraqi power plants during the Persian Gulf War. We are not familiar with the facts on which that assessment is based and so take no position on the incidents themselves. Rather, we use the set of facts as a hypothetical situation to demonstrate the principle.

52 *See* Shue & Wippman, *supra* note 37, at 572-75.

their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."[53] This principle has been accepted as customary law by the United States and others.[54] In its context, the provision appears in an Article that prohibits starvation as a method of war. The Article also carves out an exception permitting targeting of indispensable objects if used "as sustenance solely for the members of [a party's] armed forces," or "if not as sustenance, then in direct support of military action," unless that targeting would have such severe effects that it would cause starvation or population movements.[55] The focus on starvation or the motive of harming the very survival of civilians would seem to narrow the scope of the Article. The evident purpose seems to be to prohibit parties from starving or causing severe bodily harm to civilians and, especially, from implementing a strategy with those as objectives.

Despite the plain reading of the text, some have attempted to read the provision more broadly in order to create a firm protection against the targeting of some dual-use objects, regardless of the proportionality calculus.[56] That is, such objects could not be targeted for any reason, even if there were a "definite military advantage." Among the category of objects that these commentators might consider "indispensable" would be electricity plants, since these provide power necessary for basic functions, such as water-processing plants and hospitals. This approach is not a universally accepted one and is at odds with the views of some with military experience.[57] Still, this is an area of potential future focus, as the debate over dual-use objects continues.

For the reasons explained above, the question of targeting dual-use objects is largely one of proportionality. The object, by virtue of the "effective contribution" and "distinct military advantage" standard, is a "military objective," but attacking the object often raises questions about whether the effect on civilians meets the standard of proportionality. Chapter 4 discusses in depth the application of the proportionality principle.

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53 API art. 54(2).
54 ICRC Customary Law Study, *supra* note 4, at 189-93.
55 API art. 54(3).
56 Shue & Wippman, *supra* note 37, at 573-75.
57 *See id.* at 575-77.

WAR-SUSTAINING ECONOMIC OBJECTS

For dual-use objects, the question is how to approach objects whose use has two separate applications: the civilian and military spheres. For "war-sustaining economic objects," the question is different: whether the object's singular use makes the "effective contribution to military action" required to qualify as military objective. A war-sustaining economic object is one whose use enables a party to maintain or strengthen its economy and, in doing so, to sustain its war effort. These potential targets include, for example, ships carrying exports, such as British ships carrying Confederate cotton during the American Civil War or Iraqi tankers exporting oil during the Iran-Iraq War.[58] In both these cases, the ships served as a lifeline for the states' economies. Without that channel for exports, the states would have had no access to the goods or services needed to fight their wars. The ships carrying the goods, then, could be viewed as essential to carrying on the fight—and their destruction as an effective way for the adversary to squelch the state's military effort. In transnational asymmetric conflicts, it is easy to imagine potential targets that fit this description, by whose virtue non-state actors obtain the economic resources to keep up their war operations. Such targets could include, for example, cash shipments to the non-state actor or diamonds or other mineral resources the non-state actor plans to sell for war funding.

At the same time, such targets may have a nexus with the civilian economy. Cotton and oil profits flow not only to the military but also to civilians not taking part in the conflict. The use of the objects is also not part of the war effort itself. Because the targets are inviting for the adversary and because the line-drawing question is fraught, IHL instruments have needed to face the question: Is a "war-sustaining" use sufficient to constitute an "effective contribution"?

For most commentators, the answer is no. The reasoning is demonstrated by the discussion at the San Remo Round Table forum in the late 1980s and early 1990s. Initially, some of the San Remo experts proposed that the provision on military objectives include objects providing an "effective

58 Robertson, *supra* note 1, at 51. This contention is behind the traditional law of maritime prize, which allowed belligerents to capture enemy merchant vessels on the high seas. *See* San Remo Manual on International Law Applicable to Armed Conflicts at Sea ¶¶ 138-39 (1994).

contribution to the enemy's war-fighting or war-sustaining capability."[59] The wording, though, was rejected since many argued that the language would allow entire cities to be attacked.[60] The reasoning, apparently, was that "war-sustaining" could be read broadly and that the language itself would not supply any limiting principle. Could not any productive industry be "war-sustaining"? Could not any valuable export cargo qualify? In the end, the conference settled on the more restrictive language earlier adopted in API: "effective contribution" not to "the enemy's war-fighting or war-sustaining capability" but, rather, to "military action."

These concerns seem to have animated later discussions among experts, whose majority view was that the term "military action" excludes war-sustaining contributions only.[61] As Yoram Dinstein put it (referring to the example of targeting shipments of Confederate cotton during the American Civil War,

> The connection between military action and exports, required to finance the war effort, is "too remote." Had raw cotton been acknowledged as a valid military objective, almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort (especially when hostilities are protracted).[62]

Among the group of experts convened to prepare the *Tallinn Manual*, the majority likewise viewed "war sustaining" objects as not constituting military objectives.[63] The British military manual also rejects the "war sustaining" criterion, a decision that Schmitt seems to regard as consequential and as persuasive evidence of an emerging consensus among both militaries and NGOs[64] and also as the direction for the law that best serves the interests of regular forces in asymmetric conflict.[65]

A minority position allows the targeting of war-sustaining economic objects, reading the "military action" phrase in API to include within it war-sustaining economic activity. While this position appears to be a minority one, it nonetheless seems to have a reasonable base of support, at least for

59 *See* Robertson, *supra* note 1, at 50.
60 *Id.*
61 *See* HPCR AMW Manual, *supra* note 10, R. 24, cmt. 2.
62 Dinstein, *supra* note 28, at 146.
63 See Tallinn Manual, *supra* note 5, R. 38 cmt. 16.
64 *See* Schmitt, *Effects-Based Operations*, *supra* note 21, at 288.
65 *See id.* at 292-93.

some limited category of economic objects.[66] This is the view supported by the United States. As noted in the military manual of the US navy, economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked."[67] At least one commentator has argued that the manual's commentary limits the term's reach and that, in practice, the scope is little wider than that in API.[68]

At the very least, there seems to be a consensus that the US position and the majority view do differ in one important respect. The US would support targeting "attacks on exports that may be the sole or principal source of financial resources for a belligerent's continuation of its war effort."[69] This would have included—explicitly, according to the US military manual—targeting of Confederate cotton being exported to Britain,[70] and it might have included the tankers loaded with Iraqi oil. One element of the analysis here may be that the law of naval warfare is less fully developed than that of IHL generally. For that reason, targeting of war-sustaining economic objects at sea might be more permissive than that for similar objects on land. That said, some note that API Article 52(2) is considered to constitute customary law applicable to determining military objectives not only on land and in the air but also at sea.[71] This is consistent with the general pattern of convergence of the rules of land and naval warfare.[72]

Even the US interpretation would come with one crucial caveat. Any such targeting must still abide by rules of proportionality, as outlined in Chapter 4. In practice, this might eliminate much of the potential targeting. It might

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66 *See UCIHL Experts Report*, *supra* note 49, at 3-7 (describing a variety of positions on the "war-sustaining" question).

67 U.S. Department of the Navy, The Commander's Handbook on the Law of Naval Operations § 8.2.5 (Jul. 2007 ed.).

68 Robertson, *supra* note 1, at 50-51.

69 *Id.* at 51.

70 *Id.*

71 *See* Natalito Ronzitti, *Naval Warfare*, Max Planck Encyclopedia of Public International Law para. 8 (2012); J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 Am. J. Int'l L. 64, 69 (2000).

72 *See* Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 Am. J. Int'l L. 192, 194 (1995) (noting that "some of the basic concepts in [Part IV of API] have affected thinking in naval operations, in particular the principle of distinction and the concept of limiting attacks to military objectives"). Doswald-Beck served as a rapporteur at the conference that produced the *San Remo Manual* as well as its editor and coordinator of drafting.

not, though, eliminate all targeting. If proceeds of exports go directly to the military effort (and not to the civilian population), then the targeting seems more likely to pass the proportionality test. The same might be true if the export is illegitimate. From a different war theater, targeting a shipment of poppies whose profits go to the Taliban command would likely be different from targeting a transport of sheep whose products will produce profit for a broader Afghan public.

Overall, the strong weight of opinion (by both states and commentators) is that war-sustaining economic objects do not constitute military objectives and so may not be targeted.

POLITICAL, ECONOMIC, AND PSYCHOLOGICAL OBJECTS

Another category of objects is related, in some sense, to the "war-sustaining" objects discussed above. These include political, economic, and psychological objects that make some contribution to the adversary's war effort. Just as export channels can provide a lifeline for a party to conflict, so, too, can other objects that sustain a war effort. The sustenance that the objects offer might not be only economic in nature. War efforts are also sustained by objects that provide political or even psychological support. The question is whether these objects can qualify as military objectives.

This category includes a wide variety of objects. For example, during the 1991 Gulf War, lawyers from the US Air Force debated the legality of targeting a statue of Saddam Hussein, whose targeting offered a "definite military advantage" only in the psychological impact on the adversary's population and leadership.[73] Broadcasting facilities also fit within this category. They also often serve as inviting targets, and so the question of the legality of targeting them has arisen and received attention. Can a party target the facilities of a television station that broadcasts propaganda designed to rally the population around the war effort? In 1999, NATO bombed the broadcasting facilities of Serbian television, and in the Second Lebanon

73 *See* Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Carr Center for Human Rights Policy, Harvard University, John F. Kennedy School of Government, Program on National Security and Human Rights, Workshop Papers on Humanitarian Challenges in Military Intervention 20 (2001). The ultimate ruling on legality is subject to dispute. Dunlap seems to credit those who argue that lawyers approved the attack, even though the statue was removed from the target list for unrelated reasons. *See id.* at 20 n.53.

War the IAF bombed the broadcasting facilities of Hizbullah's al-Manar and other Lebanese television stations. Both cases have been discussed by international bodies. Their conclusions may indicate the direction in which the law is headed.

In the bombing of Serbian television, NATO justified its action in part because of the station's propaganda function. Part of the justification, to be sure, was the facilities' use as part of the Yugoslav military's command, control, and communications network. This use was alongside the station's civilian use, as a television station broadcasting to the Serbian public. In this respect, NATO argued that the broadcasting facilities were a dual-use object, subject to the analysis presented above.

For the purposes of this section, the more relevant argument was NATO's second one: based on the station's use in transmitting regime propaganda. As a NATO statement explained,

> [We need to] directly strike at the very central nerve system of Milosević's regime. This of course are [sic.] those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned. [….] Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosević's control mechanism.[74]

This argument, then, did not seek to legitimize the targeting based on the connection with military communications but, rather, with the political communications of the regime. NATO even offered to refrain from bombing the station if it would broadcast Western-originated news content for six hours per day.[75] The rationale, then, was directly based on the station's political function. As then-British Prime Minister Tony Blair further explained, the media "is the apparatus that keeps him [Milosević] in power and we are entirely justified as NATO allies in damaging and taking on those targets."[76]

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74 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 74 (not dated), *available at* http://www.icty.org/x/file/Press/nato061300.pdf (last visited July 8, 2012).

75 *See id.*

76 *Id*.

The committee charged with investigating the legality of the targeting rejected NATO's reasoning. "While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support," the committee explained, "it is unlikely that either of these purposes would offer the 'concrete and direct' military advantage necessary to make them a legitimate military objective."[77] Had the Yugoslav government been using the broadcasts to incite hatred, the commission said, the legal conclusion would be different. The committee cited the case of a Rwandan television station found to be inciting genocide and distinguished it from the Yugoslav example: "At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime."[78]

The reasoning of the committee has produced an interesting argument in the scholarly community. At least one leading publication has noted that, in terms of IHL, it is not relevant whether the broadcasts are inciting crimes. The relevant standard is "effective contribution to military action," not relationship to criminality. By this reasoning, a television station inciting genocide cannot be targeted. Instead, those responsible for the broadcasts must, if possible, be arrested and charged.[79] More broadly, at least one commentator has criticized the ruling entirely and suggested that it does not constitute customary law. Even this commentator, while objecting to the ruling, notes that such "restrictive interpretations of Article 52(2) are currently being adopted by the international community."[80]

The issue of targeting broadcast facilities also arose in the Second Lebanon War between Israel and Hizbullah. In the early days of the war, the Israel Air Force attacked the broadcast facilities of al-Manar. Israel argued that al-Manar "was used to relay messages to terrorists as well as incite acts of

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77 *Id.* para. 76. Even though the commission referred to a "concrete and direct" military advantage instead of the "definite" military advantage set out in the relevant article of API, it seems that the reasoning of the commission would apply equally to the API standard.

78 *Id*.

79 *See* James G. Stewart, *Legal Appraisal: The UN Commission of Inquiry on Lebanon*, 7 J. Int'l Crim. Just. 1039 (2007).

80 Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 Air Force L. Rev. 143, 166 (2001).

terrorism."[81] A commission appointed by the UN Human Rights Council evaluating the legality of actions by Israel during the war gave little attention to that contention. Were that contention true, broadcasts might then have been viewed as playing a role in Hizbullah's command, control and communications network. Applying the reasoning from the committee on the Kosovo incident, that function would constitute an "effective contribution" and render the facilities a military objective. In that regard, the Second Lebanon War commission agreed with the Kosovo one on whether propaganda constitutes an 'effective contribution." As the commission explained, "If [a television station] is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target. The Commission was not provided with any evidence of this 'effective contribution to military action.'"[82]

The Second Lebanon War commission and—particularly—the Kosovo committee constitute the most-often cited sources for the law on targeting broadcasting facilities. Nonetheless, there is some evidence of state practice contrary to their positions. For example, a comprehensive report by the US Department of Defense on the 1991 Persian Gulf War mentions that "the Saddam Hussein regime also controlled TV and radio and used them as the principal media for Iraqi propaganda. Thus, these installations also were struck."[83] Further research has yielded no solid evidence of other US statements about the legality of targeting broadcasting facilities. One observer has argued that the United States implicitly considers psychological objects—which, presumably, include broadcasting facilities—to be military objectives, though the evidence she cites may not support so broad a conclusion.[84]

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81 Israel Ministry of Foreign Affairs, "Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality," http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon-+Issues+of+proportionality+July+2006.htm (July 25, 2006).

82 Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, para. 142, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), *at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf.

83 Final Report to Congress: Conduct of the Persian Gulf War 149 (Apr. 1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf [hereinafter Persian Gulf War Report].

84 Catherine Wallis, *Legitimate Targets of Attack: Considerations When Targeting in a Coalition*, Army Law. 24, 49 (Dec. 2004). The author cites U.S. Air Force doctrine that "strategic attack builds on the idea that it is possible to directly affect an adversary's sources of strength and will to fight without first having to engage and defeat their military forces." This principle, though, does not necessarily mean

The issue of targeting broadcasting facilities is particularly important because it may well arise again in future transnational asymmetric conflicts. The increasing sophistication of non-state actors has enabled them to establish facilities to broadcast their perspectives on events to their publics. At the same time, technological barriers continue to erode. The internet has reduced the barriers to entry for broadcasting mechanisms. What, in the past, was the law for broadcasting facilities might, in the future, become the standard for related cyber attacks on internet-based operations or video content uploaded by a non-state actor adversary. Already, the *Tallinn Manual* has adopted the view that a website "merely inspiring patriotic sentiment among the population is not making such [an "effective] contribution [to military action"], and therefore, as a civilian object, is not be [sic.] subject to cyber attack."[85] By the same token, the internet may also have lowered the barriers for the ability of a non-state adversary to strike at states' public diplomacy operations online. In an era when attacks on communications networks required air superiority, the states' interest favored an expansive interpretation of military objective which opened more targets to air force attack without, in practice, exposing those states' own targets to attack.

As the internet changes that balance of power, states might begin to shift their legal approach. Previously, states may have preferred a more permissive approach to targeting broadcasting facilities because states—by virtue of their air power—had greater capacity than non-state actors to attack the buildings needed for broadcasting. As media migrates to the internet, the circumstances might be different. Non-state actors might have nearly as much capacity as states to attack media. This might lead states to change tack and, instead of preferring a more permissive approach to targeting media, opt for a more restrictive rule.

For now, though, the weight of opinion does not regard political or psychological objects as military objectives.

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that psychological objectives are considered military objectives. A military can have a strategy of not "engage[ing]…military forces" but still targeting only the more consensus category of military objectives (i.e., targeting dual-use objects and military installations without "engaging" the adversary's combatants in battle).

85 Tallinn Manual, *supra* note 5, R. 38 cmt. 13. Given the context of the statement, the "is not be" should be read as "may not be."

"IN CASE OF DOUBT": PRESUMPTION OF CIVILIAN OR MILITARY USE

A final question regarding objects is one of presumption: whether, in cases of doubt, an object is presumed to be a military objective or not. For a significant category of objects, API is clear: the presumption is that an object is civilian. "In 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 an effective contribution to military action, it shall be presumed not to be so used."[86] The Commentaries note that the provision was controversial even during the negotiations of the protocol. The ICRC had not included the provision in its draft, and the original version proposed to the diplomatic conference was more restrictive. That version would have carved out an exception under which the "presumption of civilian use for objects would not apply in contact areas when the security of the armed forces made such an exception necessary."[87] For example, were fighting taking place in a residential neighborhood and troops coming under fire, the proposed provision might have allowed a military to presume that apartment buildings are military objectives.

These circumstances, of course, occur frequently in transnational asymmetric conflict, and so the debate over this provision demonstrates the relevance of this issue. Even for more conventional conflicts, the differences matter: As some states' delegations argued, "infantry soldiers could not be expected to place their lives in great risk because of such a presumption and [...] in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works."[88]

The disagreement over the language at the diplomatic conference also demonstrates why the provision is not viewed as constituting customary law. The US Department of Defense took this view in 1992, explaining that API's provision on the presumption is "not a codification of the customary practice of nations."[89] The report went on to argue that the provision

> causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use

86 API art. 52(3).
87 API Commentary, *supra* note 23, ¶ 2031.
88 *Id.* ¶ 2032.
89 Persian Gulf War Report, *supra* note 83, at 703.

> of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.[90]

For its part, according to the ICRC, Israel has taken a more moderate tack, accepting the presumption but limiting it, as it "only applies when the field commander considers that there is a 'significant' doubt and not if there is merely a slight possibility of being mistaken."[91]

Citing US and Israeli state practice, the ICRC notes that the presumption in full does not constitute customary law. Rather, the expectations under customary law are more modest: "[I]n case of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. It cannot automatically be assumed that any object that appears dubious may be subject to lawful attack."[92] The customary standard, then, is a test of "sufficient indications to warrant an attack" and not of mere "doubt." Interestingly, the *Tallinn Manual* sidesteps the question of certainty, noting only that "a determination that [the object is being used to make an effective contribution to military action] may only be made following a careful assessment."[93]

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90 *Id.*

91 *See* ICRC Customary Law, *supra* note 4, R.10 (citing the Report on the Practice of Israel from 1997).

92 *Id. But see* Tallinn Manual, *supra* note 5, R. 40 cmt. 4 (explaining that the majority in the experts group interpreted the ICRC Customary Law Study as "seem[ing] to support the position that Article 52(3), especially in light of its reaffirmation in Article 8(3)(a) of the Amended Mines Protocol, is customary international law).

93 *See id.* R. 40. Note that the rule applies only to the criterion of "use" (i.e., not "nature," "location," or "purpose") and to the element of "effective contribution to military action," not other elements of the determination of whether an object is a military objective. *See id.* R. 40 cmt. 3.

CONCLUSION

As discussed through the course of this chapter, issues of targeting civilian objects arise in an array of contexts in transnational asymmetric conflicts. The basic principle, as outlined in API Articles 48 and 52(2), is a matter of consensus and considered customary law. Still, questions about distinction among objects arise, often in contexts relevant to transnational asymmetric conflict.

For dual-use objects, those that have both civilian and military functions, the object is considered a "military objective" if it meets the relevant criteria—whatever other civilian uses or purposes it may have. That said, in such cases questions of proportionality arise frequently. In applying the proportionality, a question particularly relevant to dual-use infrastructure is whether and in what way the attacking party must consider reverberating effects—those not directly caused by the physical damage to the site—when measuring incidental damage.

Distinction questions likewise arise in the controversies over "war-sustaining economic objects" and political or psychological objects. The US initiative to broaden the definition of "military objective" to include "war-sustaining economic objects" has gained little traction, even among other militaries. The law is also moving toward a narrow definition of "definite military advantage" with regard to political or psychological objects, where the law is best developed regarding the targeting of broadcasting facilities.

Importantly, in all attacks on objects, the attacking party must not only satisfy the principle of distinction but also of proportionality. Especially for dual-use objects, proportionality emphasis is extremely relevant. To that principle of proportionality, we now turn.

CHAPTER 4

Proportionality in Asymmetric Warfare and Closely Related Issues

INTRODUCTION

In all its manifestations, proportionality is a mechanism used for the purpose of balancing between competing *values*; however, in itself, it does not tell us what these values are, nor how to quantify them.[1] In constitutional law, the limitation of rights is frequently analyzed in accordance with their fulfillment of a "proper purpose."[2] In IHL, the "proper purpose" is reflected in the term "concrete and direct military advantage," in light of which justifiable incidental harm to civilians is assessed.[3] Since the latter terms are of open texture, they generate significant dilemmas that are, in turn, amplified in the complex circumstances of asymmetric warfare. The following chapter discusses some of the main problems that arise in such conflicts, in the context of proportionality and related questions.

We start, in Section II, by discussing some key distinctions relating to the principle of proportionality, such as the interaction between *jus ad bellum* and *jus in bello*, and the basic normative framework that regulates proportionality under IHL. In Section III, we address various issues relating to the definition of a "concrete and direct military advantage." We attempt to locate the legitimate military advantage on the spectrum between the specific attack and the *casus belli*, and inquire into the concept of *deterrence* as valid military advantage. We thereafter analyze the controversial question of "force protection," and discuss some of the predominant approaches towards this notion. The section then deals with the concept of the protection

1 *See generally* Aharon Barak, Proportionality Ch. 6 (2012)
2 *Id.* Ch. 9.
3 Discussed *infra*.

of a state's own civilians, weighed against harm to the civilians under the control of the adversary.

Section IV addresses the main questions regarding the duty to take precautions in attack. While this issue is distinct from the concept of proportionality, it intertwines with it and raises closely related questions, and is therefore discussed in this chapter. We analyze the obligation in general, and ask how it plays out when considering the state's relative capabilities. Last, we briefly discuss the issue of the duty to give effective warning regarding an impending attack.

KEY DISTINCTIONS AND BASIC NORMATIVE FRAMEWORK

Jus ad Bellum versus *Jus in Bello* and Other Key Distinctions

The principle of proportionality in IHL—or *jus in bello* proportionality—deals with the permissible collateral damage that can be inflicted upon civilians or civilian objects, due to attacks on a legitimate military objective. It should be emphasized from the outset that damage to civilians directly participating in hostilities, or members of organized armed groups under the continuous combat function paradigm, is not included in the proportionality calculation of damage to civilians, but rather can be part of the assessment of the military advantage.[4]

It is important to offer several clarifying distinctions. Importantly, our analysis in this chapter should be distinguished from the discussion of *jus ad bellum* proportionality—meaning, namely, proportionality in the context of the limitations on a state's exercise of the right to self-defense in light of an armed attack.[5] While the terms are often mixed, it is imperative to maintain their separation, as their analysis is significantly different: *jus ad bellum* proportionality is less concerned with collateral damage caused to

4 HCJ 769/02 Public Committee against Torture in Israel v. The Government of Israel 62 (1) PD 507, ¶45 [2006] (Isr.) [hereinafter Targeted Killings Case].

5 *See* Yoram Dinstein, War, Aggression and Self-Defence 235 –244 (2005); *see also* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 24 Yale J. Int'l L. 47, 52–53 (2009); David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 Eur. J. Int'l L. 234 (2013).

civilians, but rather with the scale or ends of a forcible reaction undertaken in response to an armed attack, even if not causing *any* harm to civilians.[6]

In general, international law holds that these two realms of proportionality must be analyzed independently: meaning, that considerations of *jus ad bellum* must not affect the application or implementation of *jus in bello* norms between the parties—among them norms pertaining to proportionality (we shall label this approach as the *ad bellum/in bello* "dichotomy").[7] Notwithstanding this deeply entrenched dichotomy, there is an ongoing debate, questioning whether there is, nevertheless, room for *jus ad bellum* considerations to inform the application of *jus in bello* in various contexts. We shall label approaches that advance this view as advocating for "conflation."

Before we proceed, it is worthwhile to clarify that although *jus ad bellum* considerations usually refer to the legality or justness of the resort to force, when we speak of them, we allude to a wide—perhaps residual—category of considerations. These include every attempt at drawing normative conclusions under *jus in bello* from a substantive analysis of the conflicting parties, even beyond the aggressor/defender distinction. Thus, *ad bellum* considerations might encompass not only the justness or legality of the belligerents' resort to force—but also their underlying motivations, their relative capabilities (who is the stronger party), and any other characteristic they might have.

Essentially, in all cases, eroding the *ad bellum/in bello* dichotomy can theoretically result in "negative" or "positive" conflation.[8] At large, negative conflation occurs when *ad bellum* considerations are said to lead to the relaxation of IHL limitations imposed on one party, while denying privileges from others. Positive conflation, conversely, implies that *ad bellum* considerations be utilized to impose *harsher* obligations on a party, without diminishing the duties of the other.

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6 *See id.* 238 –240; Sloane, *supra* note 5, at 108–111; *see also* W. Hays-Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 171 (1990).

7 On the principle of equal application, *see* Gabriella Blum, *On a Differential Law of War*, 52 Harv. J. Int'l L. 164, 168 –173 (2011).

8 Sloane categorizes conflations as occurring mainly due to the perception of *aggressor-defender*; from conflation of the proportionality analysis on both levels; and on counts of "supreme emergency." *See* Sloane , *supra* note 5, at 69–70; for a recent discussion of the issue see J.H.H. Weiler & Abby Deshman, *Far Be It From Thee to Slay the Righteous with the Wicked; An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello*, 24 Eur. J. Int'l L. 25 (2013).

Negative conflation can mean, intuitively, that aggressors might have fewer, if any, *in bello* rights than defenders. This may result in the assertion that combatants fighting on behalf of the "unjust" party would not possess the "right" to kill "just" combatants,[9] and consequently would also not be entitled to P.O.W. status.[10] An extreme form of negative conflation advocates the total "drop" of *in bello* limitations in cases of "supreme emergency," in which *ad bellum* threats to national survival become so high that the former can be overridden.[11]

An example of negative conflation can be found, for instance, in the position adopted by the Bush administration in the context of the so-called "war on terror"—according to which traditional restrictions of *jus in bello*—perhaps even the prohibition on torture—can be eased when facing terrorist networks.[12] Another form of a negative conflation can be found in a 2007 ruling by a trial chamber of the Special Court for Sierra Leone, which cited "just cause" of war as a mitigating factor in the sentencing of convicted war criminals.[13] However, the Appeals Chamber overruled this decision as contradictory to "a bedrock principle" of the law of war.[14]

In the specific context of proportionality, negative conflation can be manifested in an assertion that collateral damage can be justified only when caused by the "just side"; and moreover, that the just side should be allowed more leeway in its proportionality calculation.[15] A closely related

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9 *See, e.g.,* Jeff McMahan, *The Ethics of Killing in War,* 114 Ethics 693 (2004).

10 This question is less relevant to transnational conflict, since members of organized armed groups, at large, do not enjoy P.O.W. status to begin with.

11 Sloane, *supra* note 5, at 76 –78. However, such necessity exceptions are usually discussed in the meta-legal level. For an analysis of general necessity exceptions in international law and their limits, *see* Eliav Lieblich, International Law and Civil Wars: Intervention and Consent 254–255 (2013); Report of the International Law Commission to the General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 25, U.N. GAOR, 56th Sess. Supp. No. 10, U.N. Doc. A/56/10 (2001).. An exception perhaps is found in the ICJ's Nuclear Weapons decision. *See* Sloane, *supra* note 5, at 77–78, 90 –92.

12 *See* Sloane, *supra* note 5, at 51 –52, 100 –103.

13 Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Sentencing Judgement (Oct. 9, 2007), *cited in* Sloane, *supra* note 5 at 48.

14 *Id.* at 48–49, citing Fofana & Kondewa, Case No. SCSL-04-14-A, Judgement, ¶¶529-30 (May 28, 2008).

15 Sloane, *supra* note 5, at 70–74; *see also* Judith Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 391 (1993).

approach, such as suggested by two delegations during the drafting of API, posits that the duty to take precautions imposes stricter obligations on the aggressor than on the victim. Phrased as such, it is unclear to what extent this approach condones negative—rather than positive—conflation. In any case, this suggestion does not find support in the wording of API and was thus unequivocally rejected in the Commentary.[16] Yet another position of this order argues for the allocation of responsibility for collateral damage caused by an attack on the unjust party, either on counts of its status as an "aggressor," or because of its use of unjust tactics, such as using civilians as human shields.[17]

Positive conflation can be found, for instance, in the approach adopted in the 2000 Kosovo Report, which asserted that when the *jus ad bellum* rationale for military action is the protection of civilians in the target territory (humanitarian intervention), more onerous constraints are placed on the attacking forces. This approach has significant implications over the question of force protection, as discussed later on.[18] However, the discussion of positive

16 ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 679 (Yves Sandoz et al. eds., 1987) [hereinafter API Commentary]. ("The fact that a Party considers itself to be the victim of aggression does not exempt it from any of the precautions to be taken . . . .")

17 *Compare* Michael Walzer, *Responsibility and Proportionality in State and Nonstate wars,* 39 Parameters: U.S. Army War College Quarterly 40, 46–52 (2009). Note, however, that the discussion of responsibility can be phrased as an intra-*jus in bello* question, which hangs on the question whether the "defender," in the strict sense, adhered to its IHL obligations, and namely the duty to distinguish itself from the civilian population, as entrenched in Protocol Additional to the Geneva Conventions of 12 August 1949 for the Protection of Victims of International Armed Conflicts (Protocol 1), arts. 37(1), 44(3), 48, 51(7), 58(a), 58(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].). *See* Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed conflict 131 (2nd ed., 2010); some claim that in traditional IHL, the responsibility to protect civilians was always in the hands of the defender – as it was in the better position to prevent civilian casualties – and was shifted to a joint responsibility regime in API. *See* Hays-Parks, *supra* note 6, at 153 –154; Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties under International Humanitarian Law*, 11 Chi. J. Int'l L. 425, 431– 437 (2010).

18 The Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned 177–184 (2000); McMahan, however, reaches an opposite conclusion of *negative* conflation in the same situation, since he views the victimized citizens as beneficiaries of the intervention. *See* Jeff

conflation has not been limited to the context of humanitarian intervention, and might be invoked to limit state action in other contexts too.

For instance, Blum suggests that there might be grounds to argue that "stronger" parties—in terms of their relative technological and economical capabilities—should be subjected to more stringent IHL limitations, based on the logic of common but differentiated responsibilities (CBDR) mechanisms found in other fields of international law.[19] Others argue that the stringent dichotomy does not reflect the reality of asymmetric warfare. For instance, Benvenisti claims that the underlying rationales of the dichotomy lose some of their vigor when conflicts involve non-state actors. This is due to the scarcity of pure military targets, the ambiguity of military advantages, and the absence of conditions of reciprocity between the parties. Accordingly, he suggests that *jus in bello* proportionality reflects these considerations, pointing out that they are already prevalent in international *political* reactions to state actions, which might, in due time, transform into positive legal obligations.[20] Nonetheless, when assessing the possible ramifications of conflation, Benvenisti alludes to "positive" effects, arguing that conflation will usually serve to constrain the state rather than to allow it more freedom: indeed, it would compel states to make a convincing *ad-bellum* claim in order to justify *in bello* collateral damage.[21]

Whatever the theoretical outcomes—negative or positive—of conflation may be, some have raised the general argument that dichotomy, in the context of proportionality, is in any case impossible: this is because ostensibly, the determination of the military advantage, to be weighed in relation to incidental harm to civilians, inevitably leads to passing judgment regarding

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McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants,* 38 Phi. & Pub. Aff. 342, 357–365 (2010).

19 Blum, *On a Differential Law of War, supra* note 7, at 16. Note that Blum stops short of wholeheartedly embracing this notion.

20 Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 Yale J, Int'l L. 541, 543–546 (2009) [hereinafter Benvenisti, *Rethinking the Divide*];Eyal Benvenisti, *The Law of Asymmetric Warfare*, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 931 (Mahnoush H. Arsanjani et al. eds., 2010); *see also* Sloane, *supra* note 5, at 54 –55, 66.

21 Benvenisti, *Rethinking the Divide, supra* note 20 at 546.

the legality of the use of force itself.[22] However, as we shall see, this is not entirely the case: IHL responds to this challenge by stressing the tactical nature of the legitimate military advantage, which serves to insulate it—at least in theory—from wider *ad bellum* considerations such as the legality or justness of the resort to force.

The question of dichotomy versus conflation of *jus ad bellum* and *jus in bello* indeed raises a host of difficult dilemmas. However, the consideration of this issue has mainly taken place in the realm of ethics; and even on that level, the proponents of conflation concede that it does not reflect current law, which entrenches dichotomy.[23] Indeed, even the strongest critics of *ad bellum*/*in bello* dichotomy cannot provide a convincing answer to its traditional justification: that dichotomy is needed since conflation will ultimately result in the collapse of IHL—at least as long as there is no credible international mechanism to pass *jus ad bellum* judgments in specific instances. Indeed, as long as each party is convinced that it is the "just" party according to *jus ad bellum*, and in the absence of a body to pass judgment on such claims, conflation will ultimately lead to non-application of IHL by both parties.

However, the latter problem applies mostly to negative conflation. Positive conflation, conversely, although it requires a substantial dose of goodwill from states, might indeed *promote* IHL. Perhaps this is why *in bello* proportionality is not completely detached from wider considerations, such as the capabilities of the parties to the conflict.[24] These can be manifested, for instance, in the interpretation of flexible standards such as the duty to take *feasible* precautions—discussed in Section IV—which can be constructed in

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22 *Compare* Thomas Hurka, *Proportionality in the Morality of War,* 33 Phil. & Pub. Aff. 34, 45 (2005); *cited in* Sloane, *supra* note 5, at 55.

23 For the traditional view see Michael Walzer, Just and Unjust Wars 21 (1977) (labeling the realms of law as "logically independent"); *but see* McMahan, *The Ethics of Killing in War, supra* note 9; Hurka, *supra* note 22, at 35; Benvenisti, *Rethinking the Divide, supra* note 20, at 547 (note, however, that Benvenisti argues that the political reactions that imply conflation can ultimately evolve into positive law); The distinction is entrenched legally in Common Articles 1 and 2 of the Geneva Conventions and more explicitly in the preamble to API, *supra* note 17. However Article 1(4) of API reflects some degree conflation. *See* Sloane, *supra* note 5, at 65. Arguably, Article 47, which addresses the status of mercenaries, also reflects conflation. *See* Eliav Lieblich, *The Status of Mercenaries in International Armed Conflict as a Case of Politicization of International Humanitarian Law*, 3/2009 Bucerius Law Journal 115 (2009).

24 Sloane, *supra* note 5, at 53.

light of the means available to the attacking party.[25] These can be balanced, in turn, against the tactics of the "defending" non-state party.[26]

Be that as it may, states should exercise caution if tempted to advocate for conflation—whether constructing it as part of the *lex lata* or suggesting it as *de lege ferenda*. This is because opening the door to conflation can very well lead to similar claims by the other side. Thus, the mirror image of the negative conflation invoked by the US in the context of the "war against terror" could be that the "weak" party is entitled to utilize tactics that would be otherwise forbidden;[27] or that an occupying power, for instance, would be deprived of the right to justify collateral damage on counts of legitimate military advantages.[28] In practice, an argument of this order was raised in late 2012 by Hamas, in response to allegations by Human Rights Watch that it targeted civilians during 2012's Operation Pillar of Defense: it reportedly claimed, in justification, that "we [Hamas] do not have precise and advanced weaponry that can allow us to only hit military targets."[29] Likewise, positive conflation could lead not only to increased constraints upon states, but also to the positive recognition of the *jus in bello* status of non-state actors, according to the objective of their struggles. For instance, a claim could be made, as provided in the controversial Article 1(4) of API, that IHL affords special status to non-state actors struggling against alien occupation.[30]

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25 *See, e.g.,* API Commentary, *supra* note 16, at 681–682.

26 *See* Estreicher, *supra* note 17, at 435 ("the feasibility inquiry under Article 57(2)(a)(i), or the proportionality inquiry under Article 57(2)(a)(iii), necessarily requires that account be taken of whether defenders have disguised military operations as civilian operations or have deliberately embedded their military assets in close proximity to civilian areas.")

27 This might very well be the rationale behind Article 44(3) of API, which relaxes the requirements for combatant status, by recognizing that "there are situations in armed conflicts where … an armed combatant cannot so distinguish himself." API, *supra* note 17, art 44(3).

28 These claims might stem from the rejection of any "symmetry" between the occupied and the occupier. *See, e.g.,* Amira Hass, *Palestinians Must Say No to Negotiations with Israel*, Haaretz (Nov. 2, 2011), *available at* http://www.haaretz.com/print-edition/opinion/palestinians-must-say-no-to-negotiations-with-israel-1.393255.

29 Elad Benari, *Hamas Responds to HRW: We Didn't Mean to Hurt Civilians*, Israel National New, Dec. 25, 2012, *available at http://www.israelnationalnews.com/News/News.aspx/163534#.UOL3LuRQF9o*

30 As provided by the controversial Article 1(4) of Additional Protocol I; for a comparable argument see Benvenisti, *Rethinking the Divide, supra* note 20, at 547; Sloane, *supra* note 5, at 54.

A few other distinctions should be made: first, *jus in bello* proportionality should not be confused with the possible requirement of *proportionality of means* with regard to the decision to use lethal force against individuals, as discussed at length in chapter 2. Moreover, it is important to emphasize that the principle of proportionality, as discussed in this chapter, applies strictly in situations of armed conflict. Under the law enforcement paradigm—which might be the ruling paradigm during occupation[31]—any form of anticipated incidental harm to uninvolved bystanders is severely limited, if at all permissible.[32] Furthermore, in this chapter we strictly discuss the principle of proportionality, and *not* the consequences of its breaches, whether in international criminal law or in the law on state responsibility.[33]

Basic Normative Framework

The principle of *jus in bello* proportionality, as enshrined in Articles 51(5)(b) and 57 (2)(a)(iii) of API, is widely regarded as a customary norm of international law, applicable in all armed conflicts.[34] Article 51(5)(b) prohibits any attack "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[35] In essence, the IHL principle of proportionality requires "that there be a proper proportionate relationship between the military objective and the civilian damage."[36]

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31 *See,* recently, Int'l Comm. Red Cross, Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory 116–119 (Tristan Ferraro ed., 2012).

32 *Compare* Isayeva v. Russia, App. No. 57947-49/00, Eur. Ct. H.R. ¶ 169, (2005);; *see also, e.g.,* Tony Pfaff, U.S. Army War College, Strategic Studies Institute, Resolving Ethical Challenges in an Era of Persistent Conflict 28 (2011).

33 Regarding proportionality in international criminal law, see the ruling by the ICTY in Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment (Apr. 15, 2011). The Judgment was reversed by the ICTY's Appeals Chamber in November 2012. *See* Judgment Summary, *available at* http://www.icty.org/x/cases/gotovina/acjug/en/121116_summary.pdf

34 Int'l Comm. Red Cross, 1 Customary International Humanitarian Law, Rule 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC Customary Law]; *see also* Targeted Killings Case, *supra* note 4, ¶42.

35 API, *supra* note 17, art. 51(5)(b).

36 Targeted Killings Case, *supra* note 4, ¶44.

It is important to note that the principle of proportionality applies to any "attack." It therefore limits attacks both with regard to the selection of targets, and with regard to the selection of means and methods of attack. It is in this sense that the principle of proportionality intertwines with the duty to take precautions in attack, as entrenched in Article 57 of API, requiring, *inter alia*, that states take all feasible precautions in the choice of means and methods of attack in order to avoid or minimize collateral damage.[37]

Proportionality as a Standard of Reasonableness

The issue of proportionality in IHL, essentially, breaks down to two main questions, which in turn spawn a plethora of difficult sub-questions. The first concerns the meaning of the term "concrete and direct military advantage"; the second, assuming that such advantage exists, is the extent of "incidental harm" to civilians which would be "excessive" in relation to the said military advantage (and we reserve the complex question regarding the nature of harm itself). Our discussion in this chapter will revolve around the attempts to clarify the dilemmas raised with regard to these questions, being aware that the latter is intrinsically woven with the former.

The proportionality test, inevitably, is a value-based test, which requires the balancing between values and interests—namely, between military necessity and the protection of civilians.[38] This is especially true regarding the question of excessive harm, once we are satisfied that the attack indeed promotes a legitimate military advantage. As is the case with any test of balancing, the application of the proportionality standard raises a host of obscurities. The ambiguous nature of the principle has thus generated much debate and controversy during the drafting of API. Mainly, the debate concerned the heavy burden of responsibility the principle imposes on military commanders, which is exacerbated by the imprecise nature of the relevant provisions. This has been deemed especially problematic concerning the fact that violations of the proportionality principle may constitute a grave breach of IHL, as provided for in Article 85(3)(b) of API.[39] Meaning, breaches of the rather

37 API *supra* note 17, art. 57(2)(ii); *see infra*, Sec. IV.
38 Targeted Killings Case, *supra* note 4, ¶45.
39 API Commentary, *supra* note 16, at 679.

vague proportionality principle can prompt the universal criminal jurisdiction of the Contracting Parties to the Geneva Conventions.[40]

Thus, as is widely recognized, while there is a general consensus that the principle of proportionality constitutes a binding norm of customary international law, there is no positive, rule-intensive formula as to its application.[41] Instead, the proportionality test alludes to a standard of reasonableness,[42] which must therefore allow for a "fairly broad margin of judgment."[43] However, this does not mean that there are no obvious cases:[44] while in difficult cases there would be room for argument, the standard of the "reasonable military commander" can serve to identify cases in which incidental harm is clearly disproportionate.[45] It is widely agreed that this standard must be judged according to the information the commander had when ordering the attack, and not in light of information subsequently acquired.[46] Indeed, since the provisions of API refer to "expected" damage to civilians and to "anticipated" military advantage accrued by the attack, the proportionality requirement does not refer to the *actual* outcome of the

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40 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GCIV].

41 ICTY, '*Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia'* ¶48 (Jun. 13, 2000), *available at* http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.

42 *See, e.g.,* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 Int'l L. Stuf. Ser. U.S. Naval War Col. 307, 312 (2009).

43 API Commentary, *supra* note 16, at 684.

44 For an example, *see id*.

45 ICTY, *Final Report to the Prosecutor*, *supra* note 41, ¶50. In this context, it is important to distinguish between *mens rea* requirements regarding the criminal liability of an individual commander – which require, at minimum, recklessness – and the law of state responsibility as reflected in Additional Protocol I – in which the "reasonable commander" test seems closer to a standard of negligence. *Compare* Rebecca J. Barber, *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan* 15 J. Conflict & Security L. 467, 477 –479 (2010); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 Isr. L. Rev. 81, 97 (2006).

46 Timothy L. H. McCormack & Paramdeep B. Mtharu, *Expected Civilian Damage and the Proportionality Equation*, Asia Pacific Centre for Military Law, University of Melbourne Law School 4(2006), *available at* https://disarmament-library.un.org/UNODA/Library.nsf/95c7e7dc864dfc0a85256bc8005085b7/2e8cc7f7dbf63f6485257943005548 15/$FILE/CCW-CONFIII-WP9.pdf.

attack, but to the initial understanding of the commander when authorizing the attack, assessed under the "reasonable" commander standard.[47]

When discussing the "reasonable" military commander, attention must be given to the position or seniority of the specific commander: for instance, it is obvious that a division commander will have more information than a platoon sergeant, and accordingly that the reasonableness standard be more stringent when applied to the former. Moreover, the reasonableness test must be fact-sensitive. The process of targeting is made "in a myriad of contexts," ranging from immediate battlefield decisions made by junior commanders to elaborate planning conducted at high levels. Any standard of reasonability must be constructed to accommodate these widely differing circumstances.[48]

CONCRETE AND DIRECT MILITARY ADVANTAGE

General

The interpretation of the phrase "concrete and direct military advantage" is one of the most difficult issues of the law on proportionality. This is chiefly because one can inflate the term "military advantage" to encompass almost any perceived benefit to the interests of the attacking party. Nonetheless, two things must be clarified from the outset: first, that collateral damage can be tolerable *only* when the attack is conducted against a valid military objective to begin with. Accordingly, considerations of "military advantage" cannot supersede the general prohibition on the deliberate targeting of civilians or civilian objects.[49]

Second, the concept of military advantage—of the type that can lawfully be acquired while causing proportional collateral damage—must be relatively close, causally, geographically and temporally to the immediate results of the attack, and as such cannot extend to general economic or political goals.[50] Indeed, as was already declared in the 1868 St. Petersburg Declaration, "the

47 *See* Dinstein, *supra* note 17, at 132–133.

48 *See* Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: a Fourth Amendment Lesson in Contextual Reasonableness*, 77 Brook. L. Rev. 1, 1–2 (2012); *see also* Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification?* 3 Int. Hum. Leg. Stud. 73, 81–82 (2013).

49 API, *supra* note 17, art. 48.

50 ICRC Customary Law, *supra* note 34, Rule 14, Commentary, at p. 46.

only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[51] In contemporary terms, as phrased in the Commentary on API, "[a] military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces."[52] This point was summarized succinctly by Schmitt:

> As a rule, military advantage is typically viewed as advantage benefiting friendly operations or hindering the enemy's. The notion does not extend to winning hearts and minds, a point illustrated by agreement that destroying enemy civilian morale does not qualify as advantage vis-à-vis the definition of military objective. Rather, military advantage is purely military in nature; there must be some direct contribution to military operations. Political, economic or social advantage does not suffice.[53]

In sum, the principle of proportionality cannot be used to deplete the basic ideas of IHL of their content, by defining military advantages in an indirect, long-term and ambiguous manner, which can serve to justify any collateral damage.[54] If this was so, at the end of the day, proportionality could be assessed in light of the general *casus belli*, leading to dangerous negative conflation between *jus ad bellum* and *jus in bello*. However, this idea of direct military advantage is still not an easily applicable threshold, as we shall see below.

Legitimate Military Advantage: Between the Specific Attack and the *Casus Belli*

Upon ratification of API, Australia, New Zealand, Belgium, Canada, Germany, Italy, Netherlands, Spain and the UK stated that the term "military advantage," in the specific context of Articles 51 and 57 of API, refers to "the advantage anticipated from the attack considered *as a whole* and not only from isolated or particular parts of the attack."[55] The same phrasing is

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51 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29-Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, reprinted in 1 AM. J. INT'L L. 95 (Supp. 1907).

52 API Commentary, *supra* note 16, at 685.

53 Schmitt, *supra* note 42, at 323.

54 API Commentary, *supra* note 16, at 683 –684.

55 Int'l Comm. Red Cross, 2 Customary International Humanitarian Law, Practice, Ch. 4 ¶¶161 –162 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005)

used in the US Naval Handbook.[56] The term "attack as a whole," as used by prominent states, raises an important question: does it connote the advantages reaped from the immediate, tactical attack or rather to expected advantages in light of the operation or campaign as a whole? The distinction is significant since the latter perception of military advantage can potentially encompass strategic and even *political* goals.

The term "attack," as defined in API, refers to "acts of violence against the adversary, whether in offence or in defence."[57] Although the question is not directly addressed in the Commentary on API,[58] it seems that the uses of the term "attack" within the Protocol refer to *specific* actions and their outcomes.[59] It is therefore doubtful whether the term, as used by the aforementioned states, can be understood to encompass the ultimate goals of the entire military campaign. However, the line between a single "attack," an "operation" or a "campaign" is notably blurry, especially if considering—as suggested by the abovementioned states—that an attack is not necessarily a single unitary act. Indeed, there is some practice—by no means conclusive—that advocates measuring the military advantage in light of the objectives of the entire *campaign*. For example, in some instances, the US claimed that the military advantage "generally is measured against an overall campaign;"[60] or that it "may be weighed in overall terms against campaign objectives."[61] Similarly, in a 2007 diplomatic note, the Israeli Ministry of Foreign Affairs stated:

> In practice, [the principle of proportionality] requires that the IDF and the commander in the field assess both the expected military gain, and the potential of collateral injury to Lebanese civilians. With regard to the expected military gain, it should be noted that the relevant advantage is not that of that specific attack but of the *military operation*

[hereinafter ICRC Customary Law, Practice]. [Emphasis Added]; *see also* Hays-Parks, *supra* note 6, at 172.

56 ICRC Customary Law, Practice, *supra* note 55, Ch. 4 ¶174.

57 API, *supra* note 17, art. 49(1).

58 API Commentary, *supra* note 16, at 602–603.

59 *See* David Luban, *Risk Taking and Force Protection*, Georgetown Public Law & Legal Theory Research Paper No. 11-72, at 46 (2011).

60 ICRC Customary Law, Practice, *supra* note 55, Ch. 4 ¶184.

61 *Id.* ¶185, 186; *see also* the Nigerian position, *Id.* ¶172.

> as a whole. As the German Military Manual points out: The term "military advantage" refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack.[62]

The reliance on the German Manual, which specifically refers to "attack as a whole" in support of a claim that the relevant advantage is "of the military *operation* as a whole," is rather imprecise and highlights the ambiguities of this question. The wide interpretation of the concept of attack might receive a boost from Article 8 of the ICC Statute, which criminalizes excessive damage to civilians "in relation to the concrete and direct *overall* military advantage anticipated." However, it is unreasonable that this provision, in itself, can serve to modify customary IHL if the latter is understood otherwise. This is because the ICC Statute deals with individual criminality and does not alter the IHL responsibility of *states*.[63] The confusion is furthermore exacerbated considering that in their statements concerning the definition of military *objectives*, as discussed in Chapter 3, Australia and New Zealand adopted the rather lax threshold of "campaign as a whole" for the understanding of the term "military advantage,"[64] while other states maintained the "attack as a whole" standard.[65]

In any case, stretching the notion of military advantage to encompass objectives far beyond the specific attack—essentially touching upon, at their extreme, the realm of the political goals of the campaign—might prove problematic in several aspects. First, the overall political goals of

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62 Ministry of Foreign Affairs of Israel, *Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hizbullah in the Lebanon War*, Diplomatic Notes No. 1, 13 –14 (2007).

63 Rome Statute of the International Criminal Court, art. 8(2)(b)(iv) July 17, 1998, 2187 U.N.T.S. 93. The ICRC is of the opinion that the word "overall" here is redundant and cannot be understood in any case as altering Customary IHL. *See* ICRC Customary Law, *supra* note 34, Rule 14, Commentary, at p. 46; *see also* Luban, *supra* note 59, at 45–47.

64 ICRC Customary Law, Practice, *supra* note 55, Ch. 2 ¶ 329, 336. Israel too applies the "whole campaign" threshold in the context of the definition of military objectives. *See* State of Israel, The Operation in Gaza 27 Dec. 2008-18 Jan. 2009: Factual and Legal Aspects ¶105 (2009). .

65 *Id.* ¶¶328 –340.

the campaign are sometimes vague, if not undetermined,[66] and in any case cannot be expected to be sufficiently understood by all field commanders. Second, reliance on ambiguous military advantages can constitute (or be looked upon) as a pretext used to justify extensive harm to civilians, pursued for other reasons, as mentioned in Section II.1. Third, extending the military advantage, in its *jus in bello* sense, the *casus belli* of the campaign itself can also result in a merger between *jus in bello* and *jus ad bellum* considerations, with all its consequences, as discussed in Section I.1. Fourth, if one includes long-term military advantage in the proportionality calculation, it would only be logical that international actors would also expect long-term *harm* to civilians to be included on the other end.[67] Fifth, such interpretation of the proportionality principle, because of the high toll it takes on civilians, is highly unlikely to be accepted by international public opinion, which diminishes the perceived legitimacy of the operation, and, thus, in turn—and on the same abstract level—reduces the military advantage sought by the attack.

In its 2009 report on Operation Cast Lead, the Israeli government presented a slightly modified term. Perhaps aware that "attack" cannot always be understood as a unitary act on the one hand, and realizing that the term cannot encompass the strategic objectives of the overall military campaign on the other hand, it posited that "the 'military advantage anticipated' from a particular targeting decision must be considered from the standpoint of the overall objective of the *mission*."[68] Whether this was the intention of the document or not, the "mission objective" threshold is a constructive idea: the term "mission," in most contexts, is wider than "attack" but narrower than "campaign"; it binds military advantage to relatively definable tactical objectives, which constitute workable standards for the reasonable military commander.

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66 Vinograd Commission, *Final Report of the Commission to Investigate the Lebanon Campaign in 2006* 369 – 374 (Jan. 30, 2008) (in Hebrew). For an English summary of the report, *see Vinograd Commission Final Reprt*, Council on Foreign Relations (Jan. 30, 2008) *available at* http://www.cfr.org/israel/winograd-commission-final-report/p15385.

67 *Compare* Barber, *supra* note 45, at 480 –481; McCormack & Paramdeep, *supra* note 45, at 9 –10 (addressing the question mainly in the context of explosive remnants of war such as cluster munitions duds); Prosecutor v. Kupreskic, Case No. IT -95-16-T, Judgment, ¶526 (Jan. 14, 2000).

68 State of Israel, The Operation in Gaza, *supra* note 64, ¶126.

This notion can be easily exemplified. Suppose a unit has been ordered to take a high area, which controls a vital supply line that is under constant enemy attack. However, the only feasible way to reach the plateau is through a densely populated village overlooking a narrow valley. The unit is attacked by an enemy anti-tank squad located in one of the residential buildings over a kilometer away, thereby halting its advance on the narrow road. Should the unit decide to attack the house with tank fire, and certainly cause collateral damage, in light of which military advantage will the damage be assessed? On the one hand, assessing the attack in light of the entire campaign is futile, since its vague nature can serve to legitimize (or delegitimize) any attack. On the other hand, it would be equally unhelpful to assess the attack only on counts of its immediate results—meaning, the effects of the loss of one anti-tank squad on the enemy's military capabilities. However, assessing collateral damage in light of the unit's mission, opening the road for the sake of taking control over the highland, seems to strike a reasonable and realistic balance.

Granted, in the highest command echelons, the mission can intertwine with the general aims of the operation as a whole. However, the high command cannot rely on this fact to circumvent the requirements of the concrete and direct overall military advantage anticipated. It therefore must assess attacks—in cases where authorization by the high command is required—in relation to the concrete missions of subordinate forces.

Deterrence as a Military Advantage and "Incidental Damage" as an Agent of Deterrence

Asymmetric conflicts often pit states against adversaries who draw some measure of support from the civilian population, but on the other hand, might not be deterred by the negative effects of war as most sovereign states would be, since they operate in an accountability vacuum: both in relation to the international community and to their internal "constituencies." Moreover, the perception of victory, in the eyes of non-state actors, differs from that of states as, in general, the former merely aim to survive while still able to inflict harm on the state, thereby placing the latter under extreme political pressure when embarking on military operations.[69]

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69 *See, generally,* Understanding Victory and Defeat in Contemporary War (Isabelle Duyvesteyn & Jan Angstrom eds., 2007). This is by no means a new characteristic

Accordingly, state actors might search for alternative means of leverage, perhaps by rerouting some pressure from the armed groups themselves to the ostensibly supportive civilian population. They therefore might pursue tactics that are meant—even if indirectly—to externalize harm to the civilian population, and thereby intend to use the *consequences* of war—rather than its outcome—to reduce the support pool of the adversary, and to deter further support. The operational prudence of this tactic is at best questionable, since it is destructive in terms of any attempt to turn the hearts and minds of the civilian population in favor of the attacker.[70] In the legal sense—and in the context of proportionality—such an approach gives rise to several questions, within the broader question of the legitimacy of deterrence as a military advantage at large, and "indirect" deterrence through the use of civilian harm specifically.

Thus, the primary question is whether deterrence against future acts can be invoked as a legitimate military advantage that affects, in any sense, *jus in bello* proportionality. Here we must identify two distinct sub-questions:

(a) Can incidental harm to civilians or civilian objects be justified because it, in itself, enhances deterrence?
(b) Can incidental harm caused by the destruction of a military target be lawful even if the attack does not, in itself, result in a substantial military advantage, other than deterrence?
(c) These questions must be distinguished from a third question:
(d) Can deterrence of future aggressive acts be a valid consideration when determining the existence or the scope of the right to self-defense?

Question (c) is not addressed in this study since it deals with issues of *jus ad bellum*. As a matter of fact, most of the debate concerning the legitimacy of deterrence as a valid consideration is conducted on the *ad bellum* rather

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of non-state armed groups. Already in 1862, Francis Lieber noted the view that "guerillas" inflict "intentional destruction for the sake of destruction, because the guerilla chief cannot aim at any strategic advantages or any regular fruits of victory." Francis Lieber, Guerilla Parties Considered with Reference to the Laws and Usages of War, Written at the Request of Major-General Henry W. Halleck 8 (1862).

70 Indeed, it is the exact *opposite* presupposition that guides American counterinsurgency operations. *See* U.S. Army & U.S. Marine Corps, Counterinsurgency, USA FM 3-24/MCWP 3-33.5 (2006).

than *in bello* level,[71] which may account for some of the confused discourse regarding the issue. In any case, without elaborating on this issue, deterrence of a civilian population cannot serve as a valid *jus ad bellum* justification. As recently stated in a *dictum* by the Supreme Court of Israel: "it is clear, that justifications of this kind [revenge or collective deterrence of the civilian population in Gaza against cooperating with terror groups] for military actions are illegitimate."[72]

The answer to question (b) seems to be negative, since, as aforementioned, the concrete and direct military advantage that can be lawfully considered in the proportionality balance must be limited to the tactical operation, rather than aimed at achieving broad and ambiguous goals such as strategic deterrence or, for that matter, the destruction of the morale of the enemy's civilian population.[73] Furthermore, if one seeks to open the door to such strategic and distant considerations, a counter-claim can be made that the collateral damage *itself* inflicts strategic damage to the legitimacy of the attacker, and thus should be offset against the military advantage anticipated.[74]

However, it seems reasonable that valid "tactical deterrence" can indeed exist in certain instances, as long as it can be formulated in a non-ambiguous, specific and concrete way. For instance, an attack against a rocket launching squad in Gaza can serve to deter other squads that operate in the same arena; an attack against a sniper located in an otherwise civilian building can deter sharpshooters in nearby buildings. In these situations, collateral damage that might occur due to a single attack can be assessed also in light of the deterrent factor against *other* squads and snipers—as long as the attacker can point out these *specific* circumstances. However, it should be stressed, collateral damage can never serve as a deterring factor *in itself*.

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71 *See, e.g.* Sloane, *supra* note 5, at 74; Amos Guiora, *Pre-empting Terror Bombings – A Comparative Approach to Anticipatory Self-Defense*, 41 U. Tol. L. Rev. 801, 817 (2010); David A. Sadoff, *Striking a Sensible Balance on the Legality of Defensive First Strikes*, 42 Vand. J. Transnat'l L. 441, 482 –483 (2009). For a recent discussion of deterrence within *ad bellum* proportionality see Kretzmer, *supra* note 5, at 261–270.

72 HCJ 3292/07 Adalah v. Attorney General ¶7 (Dec. 8, 2011), Nevo Legal Database (by subscription) (Isr.).

73 *See* Schmitt, *supra* note 41, at, 323; Benvenisti, *Human Dignity in Combat, supra* note 44, at 101–102.

74 *Compare* Schmitt, *supra* note 41, at 322 –323.

This leads us to question (a) —or questions related to it, which have been the root of major controversy in recent years. It is in this context that the debate regarding the so-called "Dahiya Doctrine" should be placed. The term "Dahiya Doctrine," primarily alludes to several remarks made by Israeli figures, which, as interpreted by critics, condoned the infliction of extensive damage, during asymmetric conflicts—and not only on the non-state actor itself—chiefly for the sake of deterrence.[75] It is worthwhile to note that on the formal level, this Doctrine has never been advanced by Israel as formal policy. Indeed, Israel's official legal documents set forth a relatively conservative perception of the "military advantage" allowable in the context of the proportionality calculus.[76] Be that as it may, the mere existence of such statements in itself represents an unwanted divergence between the language used informally by state officials and the language used by the state's legal apparatus.

It is beyond our study to assess whether or to what extent these ideas were employed in the field. However, since the "Dahiya Doctrine" has been at the center of international debate regarding military operations of recent years, it is worthwhile to address this issue here. A common reference point to the question can be found in the words of Maj. Gen. Gadi Eisenkot of the IDF, in a 2008 interview:

> What happened in the Dahiya Quarter of Beirut in 2006 will happen in every village from which shots are fired on Israel. We will use disproportionate force against it and we will cause immense damage and destruction. From our point of view these are not civilian villages but military bases. This is not

75 *See* Gabi Siboni, *Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War*, INSS Insight No. 74 (Oct. 2, 2008), *available at* http://www.inss.org.il/publications.php?cat=21&incat=&read=2222.

76 State of Israel, The Operation in Gaza, *supra* note 64, ¶126. The fact that Israel maintained this position formally was conceded also by Margalit and Walzer. *See* Avishai Margalit & Michael Walzer, *Israel: Civilians & Combatants*, The New York Review of Books (June 11, 2009), *available at* http://www.nybooks.com/articles/archives/2009/aug/13/israel-civilians-combatants-an-exchange/?pagination=false (maintaining that "the official IDF position is closer to our position than to that of Kasher and Yadlin.')

> a recommendation, this is the plan, and it has already been authorized.[77]

Admittedly, it could be argued that such words, when expressed by officials, are meant as threats to deter non-state actors, rather than as actual introductions of operational doctrines. If this is so, they can be understood as some form of public diplomacy or psychological warfare. But they are nevertheless not to be taken lightly, since states are judged on the legal, moral and political levels, as well as on counts of utterances by officials.

In a similar vein, Maj. Gen. (ret.) Giora Eiland proposed that in any future conflict between Israel and Hizbullah, the actions of the latter would be attributed to the Lebanese state, and that therefore the conflict

> will lead to the elimination of the Lebanese military, the destruction of the national infrastructure, and intense suffering among the population. There will be no recurrence of the situation where Beirut residents (not including the Dahiya quarter) go to the beach and cafes while Haifa residents sit in bomb shelters. Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hizbollah's behavior more than anything else.[78]

A more detailed articulation of these ideas as presented by Col. (ret.) Gabi Siboni, reveals that they are built upon the following premises:

a. A "disproportionate strike against the enemy's weak points as a primary war effort";
b. The use of force will be "disproportionate to the enemy's actions and the threat it poses," in order to inflict damage and punishment that would require a long and expensive reconstruction process;

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77 Alex Fishman & Ariela Ringel-Hoffman, *I have incredible power, I'll have no excuse*, Yedioth Ahronoth (Hebrew), Saturday Supplement (Oct. 3, 2008); *cited in* The Public Committee Against Torture in Israel, *No Second Thoughts*: *The Changes in the Israeli Defense Forces' Combat Doctrine in Light of "Operation Cast Lead,"* Special Report 20 (Nov. 2009), *available at* http://www.stoptorture.org.il/files/no second thoughts_ENG_WEB.pdf.

78 Giora Eiland, *The Third Lebanon War: Target Lebanon,* 11 INSS Strategic Assessment 9, 16 (2006), *available at* http://d26e8pvoto2x3r.cloudfront.net/uploadimages/Import/%28FILE%291226472866.pdf.

c. The strikes will be aimed at "military capabilities" and "power elite" of the non-state actor, *including* "centers of civilian power that support the organization" and state infrastructure, to the extent the state supports the non-state actor.

In sum, as the doctrine suggests –

> Israel again will not be able to limit its response to actions whose severity is seemingly proportionate to an isolated incident. Rather, it will have to respond disproportionately in order to make it abundantly clear that the State of Israel will accept no attempt to disrupt the calm currently prevailing along its borders.[79]

Similar ideas have echoed in the words of Israeli leaders, lauding Israel's "disproportionate" response as a tool to restore the state's deterrence.[80]

The so-called "Dahiya Doctrine" has been the subject of severe criticism expressed in various forums.[81] Commentators have blamed Israel for making "explicit statements that in fact they knowingly and purposely authorized disproportionate use of force, elevating it to the level of military doctrine," which amounted to a clear violation of IHL, specifically in the context of Operation Cast Lead.[82] In essence, statements by Israeli officials were construed by various international actors as condoning the deliberate targeting of civilians and civilian infrastructure in Lebanon and Gaza.

In order to understand and assess these critiques, it is helpful first to analyze the main legal challenges posed by such statements. First, all of the sources mentioned above allude to a wide interpretation of the principle of distinction in relation to civilian objects. Thus, Eisenkot's contention that any village from which rockets are launched *ipso facto* becomes, as a whole, a military objective is in contravention of the principle of distinction as discussed in previous chapters. Of course, there are cases in which significant parts of villages can become valid targets, or cases were a part of a village can be

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79 Siboni, *supra* note 75.

80 George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 Denv. J. Int'l L. & Pol'y 41, 85 –86 (2009).

81 U.N. Hum. Rts. Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶377, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009); *see also No Second Thoughts*, *supra* note 75, at 21; Zeev Sternhell, *Israel: Civilians & Combatants: An Exchange*, The New York Review of Books (June 11, 2009), *available at* http://www.nybooks.com/articles/archives/2009/jun/11/israel-the-rules-of-war-an-exchange/.

82 Bisharat, *supra* note 80, at 85.

destroyed as collateral damage,[83] but this cannot be deduced merely from the fact that a rocket was launched from within the village.

Likewise, Eiland refers to the destruction of "national infrastructure" and of homes, and implies that the civilian population of Beirut will be required to sit in bomb shelters, as a response to the fact that Israeli civilians are forced to do so. National infrastructure can be targeted, as we have seen, only to the extent that it is a valid military objective; moreover, according to API, private homes or civilians cannot be targeted as reprisals to violations committed by the other party, in order to deter it from further violations.[84] Granted, it is unclear whether Eiland refers to the direct targeting of civilian objects, or rather to their incidental-consequential destruction, which can, as a by-product, enhance Israel's deterrence. However, the attacking party cannot treat incidental destruction as a wanted consequence *even* of an otherwise lawful attack, since IHL requires the attacker to proactively take "constant care" to "spare" civilians and civilian objects—meaning, to actively *minimize* incidental damage.[85] Thus, harm to civilians cannot be viewed as an asset, whether directly or indirectly, since at that moment it ceases to be incidental.

Siboni's approach is more nuanced in terms of distinction. It calls for the attack of state infrastructure, if the territorial state is supporting the non-state actor, as a measure of deterrence ("the closer the relationship between Hizbullah and the Lebanese government, the more the elements of the Lebanese state infrastructure should be targeted.") Again, such attacks are only lawful under IHL[86] if the targeted infrastructure can be considered a military objective, and are legal under *jus ad bellum* only if the non-state actor's actions can be attributable to the state. However, the claim that attacks should be aimed at "economic interests and the centers of civilian

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83 *See, e.g.,* Dinstein, *supra* note 17, at 134.

84 API, *supra* note 17, art. 51(6); *see e.g.* Johan D. van der Vyver, *Legal Ramifications of the War in Gaza*, 21 Fla. J. Int'l L. 403, 441–442 (2009). It should be noted that it is yet unclear whether the prohibition on reprisals against civilians has crystallized as customary international law beyond API, although there seems to be a definite trend in that direction. ICRC Customary Law, *supra* note 34, Rule 146, comments.

85 API, *supra* note 17, arts. 57(1), 57(2)(ii)

86 We set aside the question whether these are lawful under *jus ad bellum*, meaning, if the actions by the armed groups can be attributable to the territorial state.

power" that support the organized armed group contravenes the principle of distinction as discussed in earlier chapters.

Setting aside the problematic theories implied in the abovementioned sources, of more interest to our discussion in this chapter is the relation between these positions and the proportionality principle. Indeed, the use of the term "disproportionate" in the sources is extremely vague. Significantly, it is unclear whether the abovementioned commentaries refer to the technical or legal meaning of the term, and if to the latter, whether to *jus ad bellum* or *jus in bello* proportionality. Indeed, Eisenkot warned the Lebanese that the IDF would use "disproportionate" force against any village from which rockets were launched; however, he qualified, as aforementioned, that he did not consider such villages as civilian objects to begin with. Since they are, in his eyes, *military* objectives as a whole—the error of this distinction notwithstanding—the *jus in bello* question of proportionality is less central to the argument.

Likewise, Siboni argues that "with an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses." Furthermore, he posits that "Israel again will not be able to limit its response to actions whose severity is seemingly proportionate to an isolated incident." By focusing on the "disproportionate" *use of force* in relation to the actions which cannot be practically viewed as "isolated incidents," Siboni seems to advocate a disproportionate *jus ad bellum* response—meaning, embarking on an attack against *military* objectives which is wider than the initial attack—and does not necessarily condone the disproportionate damage to civilians (*jus in bello* proportionality). Whether such a position is compatible with *jus ad bellum* proportionality in situations of attrition—itself a major question—will not be addressed here.

In any case, it should be clarified that to the extent that the statements collectively labeled as the "Dahiya Doctrine," in whichever version, call for a disproportionate response in terms of the infliction of civilian collateral damage, such a response could amount to a grave breach of IHL.

In sum, the vagueness of the "Dahiya Doctrine" and the difficulties it raises should lead policymakers and prominent commentators to abandon this terminology, and specifically, to cease the generic use of the term "disproportionate" force. At the very least, Israeli officials must make clear that when they use this term they do not mean disproportionate harm inflicted

on civilians, but rather a *jus ad bellum* response against *military objectives* that happens to be graver in scale than the preceding attack by the non-state actor. This position is not devoid of difficulties itself; however, it at least cannot be interpreted as condoning the intentional targeting of civilians or as having a positive outlook towards incidental harm.

Force Protection: Is the Protection of Troops a Valid Military Advantage, Balanced in Light of Expected Civilian Harm?

One of the most burning issues in the attempt to delineate what constitutes a valid military advantage is the question of "force protection" —meaning, to what extent, if at all, the physical protection of the attacking party's troops can be taken into consideration as a "military advantage" during the proportionality assessment.[87] Viewing the issue of force protection as a largely unresolved question, the Final Report to the Prosecutor of the ICTY phrased the problem as such: "To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?"[88] The issue of force protection is frequently addressed in ethical discussions. In the following section we shall rather briefly discuss some of the relevant ethical arguments, and juxtapose them against the valid legal framework.

Considerations of force protection can come into play before a certain operation, when choosing the method of attack (ground or air; altitude of flights, etc.) or, conversely, when reacting on-the-spot, for instance, while directing close fire in support of units under attack.[89] Unsurprisingly, in situations of the former kind, thorough precautions and verification are possible; in the second scenario, decisions may be taken under the stress of combat.[90] Moreover, in the former cases, the issue of force protection can presumably be looked upon as instrumental for the achievement of a military

87 For a concise description of this dilemma in ethical terms see Luban, *supra* note 59, at 8–10. For a recent in-depth analysis of the questions undertaken here see Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels" Averting Civilian Casualties vs. Safeguarding Soldiers*, 46 Vand. J. Trans. L. 747 (2013).

88 ICTY, *Final Report to the Prosecutor*, *supra* note 41, ¶49.

89 *See* Barber, *supra* note 45, at 467–468.

90 *Compare* Schmitt, *supra* note 41, at 324 –325. Accordingly, civilian casualties in Afghanistan were caused in the latter cases, particularly when airstrikes were called during "troops in contact" situations. *See* Barber, *supra* note 45, at 472.

advantage; in the latter cases, the rescue of the troops might become an end *in itself*.[91] Although these might seem as if they are two distinct situations, in practice, it is not difficult to reconcile the need to rescue troops under fire within the military advantage paradigm: this is because the general conservation of a state's fighting forces is a precondition for any capability to weaken the enemy's armed forces.[92]

The dilemma of force protection has become increasingly relevant in contemporary asymmetric armed conflict, including TAACs, in which modern technology and firepower can theoretically allow powerful states to achieve significant military objectives with very few casualties. In parallel, the debate is a part of the ongoing process in which the protection of civilians has become a key consideration of IHL; and, on the other side of the equation, the lives of combatants—as individuals—have also become a dominant consideration of policy makers and public opinion (and, as some suggest, also of international law).[93]

As a preliminary remark, it is important to note that force protection and humanitarian considerations are not always mutually exclusive. Indeed, it is a reasonable assumption that troops operating in relative safety would be less prone to make hasty decisions, as such are more likely to be made under life-threatening circumstances.[94] Indeed, with the advancement in technology, it is highly plausible that considerations of force protection and civilian protection might begin to *converge*, as targeting technology continues to develop. Should this prediction materialize, force protection will cease to raise significant and practical legal questions, at least with regard to operations conducted by militaries with advanced capabilities.

For instance, it was claimed that during the controversial 1999 NATO aerial campaign in Kosovo, NATO's decision to protect its aircraft by conducting only high-altitude strikes resulted in deficient target verification,

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91 For this distinction see *id.* at 488.

92 API Commentary, *supra* note 16, at 685.

93 *See* Gabriella Blum, *The Dispensable Lives of Soldiers,* 2 J. Legal Analysis 115 (2010); *see also* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 Eur. J. Int'l L. (2013).

94 For a similar argument regarding the use of drones in targeted killing operations, *see* Michael N. Schmitt, *Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, 13 Y.B. Int'l Hum. L. 311, 314, 320 –321 (2010).

which led, in turn, to a higher number of civilian casualties.[95] Some failures by NATO notwithstanding, the claim that force protection of this type is *per se* unlawful has been rejected by the Office of the Prosecutor of the ICTY, and subsequently also by the Independent Commission on Kosovo.[96] Moreover, while it is sometimes implied that ground attacks are less lethal to civilian populations than aerial attacks, this is not necessarily the case when sophisticated air forces are involved. Thus, force protection and humanitarian considerations can indeed sometimes go hand-in-hand.

However, for the purpose of our discussion, we shall address instances in which considerations of force protection in fact lead to the choice of targets, means or methods of warfare that result in greater incidental damage to the civilian population. While the issue is widely discussed in the ethical realm, the black-letter treatment of the question in positive international law is rather thin. Therefore, we shall first present some of the ethical approaches to force protection. Indeed, there is a wide spectrum of opinions regarding this contentious issue. Kasher and Yadlin, for instance,[97] outline an "order of duties," according to which the scope of the state's duty to minimize injury to a person—at least in the context of a struggle against terrorism[98]—is contingent upon the individual's group membership. This duty, presented in a decreasing order of priority, applies differentially to members of the following groups:

a. citizens of the state who are not combatants;
b. other persons uninvolved in "terror," when they are under effective control of the state;
c. the combatants of the state;
d. uninvolved persons who are not under the effective control of the state;
e. persons who are indirectly involved in terror;

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95 *See* The Kosovo Report, *supra* note 18, at 93, 181; *see also* McMahan, *The Just Distribution of Harm, supra* note 18, at, 342 –343.

96 *Id;* ICTY, *Final Report to the Prosecutor*, *supra* note 41, at ¶56; *see also* Dinstein, *supra* note 17, at 141 –142.

97 Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: an Israeli Perspective* 43 J. Mil. Ethics 3 (2005).

98 Kasher & Yadlin's argument discusses the use of force against "terror," but in actually, from a logical point of view, should be applicable to any armed conflict. *See* Avishai Margalit & Michael Walzer, *Israel: Civilians & Combatants*, The New York Review of Books (May 14, 2009), *available at* http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/?pagination=false.

f. persons who are directly involved in terror.[99]

Of interest to us—and the subject of much contention—is the argument that the state's obligation to minimize injury to its own troops supersedes any such obligation that it has towards enemy-civilians not found under its effective control. In this context, Kasher and Yadlin reject as "immoral" the notion according to which the state's duty to minimize injury to soldiers is weaker than its duty towards the enemy's civilians. They claim, conversely, that soldiers are but citizens in uniform,[100] and owing to the obligation a state owes its citizens, the state "ought to have a compelling reason" for jeopardizing their lives.[101]

Furthermore, as they argue, when engaged in combat, in situations where the state has no effective control over the area of hostilities, it should not be required to shoulder the responsibility for the fact that the enemy chooses to intermingle with civilians, and therefore cannot be expected to risk the lives of its troops in order to minimize the harm to the adversaries' citizens.[102] However, once effective control over the person materializes, the duty towards the person supersedes the state's duty towards its own troops. This is because, "it is the responsibility of the state to protect the life of a person under its effective control."[103]

On the other side of the spectrum, one can find those who deny that force protection, as an intrinsic value in itself, can be explicitly pursued at the expense of the adversary's civilians, whether or not the latter are under the state's effective control. Accordingly, Kasher and Yadlin's proposition has been critiqued by Walzer and Margalit because of its potential to erode the distinction between combatants and non-combatants. They consider

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99 Kasher & Yadlin, *supra* note 97, at 14 –15.

100 However, one should proceed with caution when making such claims: the notion of soldiers as "civilians in uniform," which inserts further ambiguity to the question of distinction, might give rise to an inverse claim, according to which civilians are "soldiers without uniforms," as sometimes argued in justification of terrorist attacks against Israeli civilians. This argument is especially dangerous in the Israeli context, where in principle all citizens serve in the army.

101 Kasher & Yadlin, *supra* note 97, at 17; *compare* Gabriella Blum, *supra* note 93, 119–121 (challenging the notion that combatants are always "fair game" in armed conflict, and that there is a case for a legal obligation that narrows the targetability of combatants).

102 Kasher & Yadlin, *supra* note 97, at 18.

103 *Id.* at 17.

the latter as "the only moral relevant distinction" under *jus in bello*—an approach that must result in a nationality-blind proportionality analysis. Furthermore, they argue that in any case, the enemy's civilians should not pay the price of the immoral conduct of armed forces or organized armed groups operating in their proximity.[104]

Indeed, the view that evaluates the scope of the duty to minimize harm to civilians in relation to the effective control of the attacker does not reflect positive international law. This is because IHL does not make an *express* distinction, for the sake of the law of proportionality, between situations in which the attacking state is in effective control over a territory (and is thus an occupying power) and those in which it is not—assuming that hostilities are taking place[105] (excluding, perhaps, the principle of "feasibility" which we shortly discuss). Indeed, even if effective control spawns some enhanced obligations on the state, this does not mean that lack of it absolves it from responsibility. IHL cannot be understood as condoning an unequivocal preference, by the attacking state, of the lives of its own troops over the lives of civilians—whether under the control or not under the control of the attacker—since such an approach, taken to the extreme—and without acknowledging the plethora of possible "gray" areas—can serve to justify any act of force protection, including indiscriminate bombing. While it does not seem that Kasher and Yadlin alluded to such an understanding, as they attribute importance to the proportionality principle,[106] this qualification must be emphasized in all discussions of the issue.

Furthermore, although the attacker (rightly) does not bear the responsibility for the mere fact that armed groups, not under its control, intermingle with citizens—when it comes to the law of proportionality, modern IHL

104 Margalit & Walzer, *supra* note 98; *see also* Benvenisti, *Human Dignity in Combat, supra* note 45, at 86; Luban, *supra* note 59, at 8; *but see* McMahan, *The Just Distribution of Harm, supra* note 18, at 350–359 (criticizing the reasoning of Margalit & Walzer, but also that of Kasher & Yadlin). On the traditional ethical justifications for the targetability of soldiers (noncombatant immunity, honor and convention,) see the critique in Blum, *supra* note 93, at 133–139.

105 For an ethical point of view see McMahan, *The Just Distribution of Harm, supra* note 18, at 348 ("whatever the state's duties to its combatants are, they are *irrelevant* to what it is permissible for those combatants to do.")

106 Kasher & Yadlin, *supra* note 97, at 11–12.

envisions a regime that can best be described as one of *shared* responsibility.[107] Accordingly, while Article 51(7) of API expressly prohibits the use of the civilian population for the sake of shielding objectives from attacks, or to shield, favor or impede military operations, Article 51(8) clarifies that the violation of these prohibitions does not release the attacking party from the obligation to take precautionary measures, including the proportionality requirement as set forth in Article 57. Indeed, this normative situation might place states in the difficult position where the unlawful acts of a defender can affect their proportionality calculations.[108] Nonetheless, this is the law, and as such it reflects basic considerations of humanity.

However, it is exactly in the context of precautionary measures that the extent of a state's effective control over the attacked territory can play some part. This is because effective control can affect the application of the duty to take precautions in the choice of means and methods of attack. Since the duty requires the attacker to take all *feasible* precautions,[109] it is reasonable that in circumstances in which the state controls the territory, the range of measures considered "feasible" would be wider than in other cases. Such a construction can also inform our perception of the necessary weight the attacker should give to considerations of force protection, within their limitations as we discuss later on.

We can exemplify this notion in the following simplified scenario. Assume that a conflict erupts between Israel and Palestinian armed groups. During the conflict, rockets are launched towards Israel both by militants in Gaza and by militants scattered in Areas B and C in the West Bank. Using its intelligence capacities, Israel locates rocket depots in sensitive civilian zones in both areas. Since Gaza is not under the effective control of Israel *stricto sensu*, it is obvious that the "range of feasibility" of precautions available to Israel is significantly narrower than it would have with regard to the rocket depots in the West Bank. Accordingly, various considerations, including force protection, could perhaps justify—according to the circumstances of

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107 *Compare* Luban, *supra* note 59, at 24 –26 (comparing the duty of soldiers to risk themselves in order to spare civilians, with the tort doctrine of placing the liability on the creator of the hazardous situation. However, in cases of asymmetric conflict, it is difficult to argue that the attacker alone creates the hazardous situation, as armed groups frequently intermingle with civilians.)

108 For a related discussion, *see supra* Sec. I.1..

109 API, supra note 17, art. 57(2)(a)(ii).

the case—the use of aerial attack in the former but not in the latter, in which the use of ground forces could be feasible.[110]

However, also in the absence of effective control of the attacked territory, force protection, although it can serve as a legitimate consideration, can never be the supreme overriding one, disregarding all consequences. As we shall see, the attacker cannot consider, as a military advantage recognizable in *international* law, special obligations it may or may not have towards its troops in *domestic* law or politics. It must confine force protection to strict considerations of military necessity. Hence, as detailed below, the most widely accepted position regarding the legality of force-protection seems to be an intermediate approach, which places force-protection within the strict confines of a concrete military advantage.

Australia, Canada and New Zealand, for instance, stated upon the ratification of API that the "security of the attacking forces" is indeed a valid "military advantage."[111] A similar perception is reflected in the British Military Manual.[112] Dinstein, likewise, maintains that minimizing collateral damage does not have be achieved "at all costs to the attacking force," and thus that "force protection is a valid concern that can be factored in any attack" as part of the legitimate military advantage. He alludes to a standard of reasonableness for proper risk allocation between the attacking forces and civilians.[113] Likewise, the Israeli Supreme Court ruled that the "military advantage" weighed in the proportionality test refers also to the protection of combatants, which it deemed as a duty of the state.[114] This duty, as it ruled, must be balanced against the other duties by striking a reasonable balance between the competing values.[115] Similarly, the Government of Israel, in its 2009 report on Operation Cast Lead, saw force protection as a "relevant but not overriding consideration."[116]

When treating force protection as a question of reasonable balancing of interests, it is obvious that a policy of "zero-casualties" is unlawful. Indeed,

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110 This of course is true only under the assumption that the use of ground forces is less harmful to the civilian population.

111 ICRC Customary Law, *supra* note 34, Rule 14, Commentary, at p. 46.

112 Barber, *supra* note 45, at 482.

113 Dinstein, *supra* note 17, at 141.

114 Targeted Killings Case, *supra* note 4, ¶45 [Emphasis Added].

115 *Id.* ¶46.

116 State of Israel, The Operation in Gaza, *supra* note 64, ¶126.

if force protection carried unlimited weight, the proportionality requirement would have been completely stripped of any value.[117] In this context, by requiring that "constant care shall be taken to spare the civilian population," Article 57(1) of API imposes on attackers a positive obligation according to which it is not sufficient "not to intend" to kill civilians, but rather to *intend not* to kill civilians.[118] This rule must require that the attacking state accept some measure of risk to its troops in order to spare the civilian population. On the other hand, if force protection would not at all be a valid consideration, an absurd normative situation would occur, according to which armed forces would be required to conduct suicide missions, *a priori* resulting in military failure.[119] Needless to say, no armed forces would adhere to such rules.

The chief question, then, concerns the balance to be struck between these interests. A common point of departure, in this context, is that force protection can be considered as a valid military advantage only when it is needed to accomplish the mission, and not for other purposes, such as satisfying domestic public opinion.[120] This approach recognizes the legitimacy of force protection, but only as a part of a specific military advantage during a specific mission, and not as a political end.[121] It acknowledges that force protection enhances the domestic-political feasibility of the operation, but maintains a strict separation between such political "necessities" and operational military necessity.[122] To a large extent, this perception of the limitations on force protection correlates with our distinction between concrete military advantage and ambiguous political ends such as "deterrence," as discussed above.

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117 Luban, *supra* note 59, at 7.

118 Margalit & Walzer, *supra* note 98; *see also* Luban, *supra* note 59, at 2; *compare* Benvenisti, *Human Dignity in Combat, supra* note 45.Furthermore, limitations on force-protection can serve another, procedural function. Beyond the substantive obligation to minimize harm to civilians, the attacker's willingness to accept certain casualties can serve as an indication that it seeks to observe the principle of proportionality; The Kosovo Report, *supra* note 18, at 181.

119 *See* Luban, *supra* note 59 at 44 ("Obviously, force protection has military salience, and Additional Protocol I was not a suicide pact").

120 *Compare* Barber, *supra* note 45, at 482.

121 *Id.* at 481–482.

122 *See, e.g.,* Luban, *supra* note 59, at 39 –47.

This statement, in itself, does not alleviate the inherent difficulty in identifying the levels of risks required *within* this equation.[123] According to Walzer, the limits of the risk are fixed "roughly at the point where any further risk-taking would *certainly doom* the military venture or make it so costly that it could not be repeated."[124] A recent paper published by the US Army War College posited, conversely, that "[i]f the risk to the mission and one's forces becomes so great as to *jeopardize* operational integrity, it is not clear that Soldiers are required to take those risks [in favor of civilians]."[125] Indeed, there seems to be a significant gap between these suggested thresholds. Be it as it may, the question is one that militaries engaged in asymmetric warfare must discuss and consider; the aforementioned thresholds exemplify some of the reasonable approaches towards its resolve.

"Civilian Protectionism" in the Context of Military Advantage and Excessive Harm

The issue of force protection intertwines with another, controversial question: generally phrased, it asks whether a state is entitled to risk the lives of the enemy's civilians, during armed conflict, more than it would have risked the lives of its *own* civilians in a similar situation (the question of citizenship-based preference).[126] The question whether a state is justified in "preferring" its own civilians, in this context, gives rise to complex dilemmas, reaching down to the core of the debate between nationalism, statism and cosmopolitanism as describing the proper citizen-state relations;[127] and with regard to the existence or nature of "associative obligations" between individuals and groups.[128] These are fundamental political and ethical questions of the international

123 *See id.* at 28.

124 Walzer, *supra* note 23, at 157, *cited in* Barber, *supra* note 45, at 482. (emphasis added)

125 Pfaff, *supra* note 32, at 8 (emphasis added).

126 For the sake of our discussion, "citizen" means each person under the effective control of the state, regardless of official status.

127 *See generally* Robert J. Delahunty, *Nationalism, Statism and Cosmopolitanism*, University of St. Thomas School of Law, Legal Studies Research Paper No. 12-08 (2012), *available at* http://www.law.northwestern.edu/colloquium/international/documents/Delahunty.pdf

128 *See, e.g.,* Diane Jeske, *Special Relationships and the Problem of Political Obligations*, *in* Readings in Political Philosophy: Theory and Applications 195, 197 (Diane Jeske & Richard Fumerton eds., 2011).

system, the resolve of which is far beyond the scope of this work. We shall attempt only to present the generally representative approaches concerning this highly contentious dilemma.

For the sake of simplicity—and by no means implying any prejudgment—we shall label approaches that recognize that states are indeed entitled to exercise more care towards their own civilians, as approaches endorsing the idea of "civilian protectionism." Conversely, views opposing such a distinction can be labeled as condoning the "equality proposition."[129] Another, intermediate, position can be identified: conceding that states are permitted to take *greater* risks for the protection of their own civilians ("acts of heroism,") but emphasizes nevertheless that this does not entail the conclusion that states can *lower* the threshold of protection of the enemy's civilians below a mandatory standard. We shall call this approach the "soft equality" proposition.

In the context of the principle of proportionality, the question can be raised in two related contexts. The first aspect is mostly relevant when confronting adversaries that intentionally target civilians. It inquires whether, or to what extent, the protection of a state's own civilians justifies, as a valid military objective, incidental harm to the enemy's civilians. Essentially, this question asks whether a harm "ratio" which is bigger than 1:1 (between lives of one's own civilians likely to be saved by the attack, in relation to "enemy" civilians) is acceptable when assessing the proportionality of an attack.

Another aspect of the question relates to force protection: it involves a hypothetical exercise, in which we ask whether we would have chosen the same means and method of attack—if chosen in order to protect our soldiers—if the target was located in the vicinity of "our" civilians.[130] If the answer is "no," the argument goes, we must also not prefer the lives of

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129 A third, rather unique position, allocates risks to civilians according to the determination whether they are the "beneficiaries" of the military action, in which case they might incur greater risk, and perhaps also according to the "justness" or "unjustness" of the war. *See* McMahan, *The Just Distribution of Harm, supra* note 18, at 357 –365. However, we shall set this position aside, since it is manifestly based on a merger between *jus ad bellum* and *jus in bello*, which is foreign to positive IHL.

130 *See, e.g.,* Iddo Porat, *Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?* University of San Diego School of Law, Public Law and Legal Theory Research Paper Series (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445509 ("One way of answering these questions [of force-protection] is to posit that soldiers

"our" soldiers over "enemy" civilians, since there is no morally valid way to distinguish between different groups of civilians, at least in the context of targeting.[131] Thus, the question of force protection can be rephrased as asking whether states are *entitled* to increase or decrease the risk to their troops, and thereby to respectively affect the scope of collateral damage, in accordance with the nationality of the civilians in risk of incidental harm.[132]

To a certain extent, the issue of citizenship-preference is at the core of Kasher and Yadlin's distinction between civilians under the effective control of the state and those that are not, and their general preference for force protection over the safety of the latter.[133] Likewise, and conversely, the argument *against* civilian-protectionism has been invoked, for instance, to challenge claims that rely on the presumption that soldiers are "citizens in uniform," in order to give supremacy to force-protection:[134] if our "own" civilians cannot be preferred over "enemy' civilians, than the fact that our soldiers are also our citizens does not carry any weight.

The latter argument was presented by Margalit and Walzer, in response to Kasher and Yadlin. They offer a hypothetical scenario, in which Hizbullah succeeds in capturing a kibbutz in northern Israel and uses, as human shields, Israeli civilians found there. The essence of their argument is that in such a scenario, IDF troops would have to assume the same risk when retaking the kibbutz, regardless of the nationalities of the civilians held by Hizbullah. According to Margalit and Walzer, since ethics and the laws of war make no nationality distinction when assessing collateral damage,[135] this "equality of risk" would remain intact even if the civilians held in the kibbutz were Lebanese. Kasher and Yadlin responded to this hypothetical scenario as a "straw man," and asserted furthermore that

> Margalit and Walzer abolish the Double Effect doctrine [allowing proportional collateral damage] by demanding that a state treat any noncombatants as if they are its citizens. Accordingly, since

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should be willing to risk their lives in order not to harm enemy civilians to the same degree they would in order not to harm their own civilians.")

131 Margalit & Walzer, *supra* note 98.

132 *See, e.g.,* Luban, *supra* note 59, at 10.

133 *See, e.g.,* Margalit & Walzer, *supra* note 98; Luban, *supra* note 59, at 8; Kasher & Yadlin, *supra* note 97, at 17

134 *See, e.g.,* Luban, *supra* note 59, at 37 –39.

135 *See, e.g.,* Margalit & Walzer, *supra* note 98.

> collateral damage is not morally acceptable in solving domestic problems, it is never morally acceptable. This is a dangerous guideline, since it practically encourages and enhances terrorism. It is also a wrong guideline, because states have special duties to defend the life, liberty, health, and well-being of their citizens, and everyone else under their effective control.[136]

Kasher and Yadlin's reply is two-pronged: it claims (a) that the requirement of treating the enemy's civilians as one's own, in the context of proportionality considerations, means that collateral damage is never acceptable, since it is always unacceptable when dealing with one's own citizens ("solving domestic problems"); and (b) that a state has a special obligation to protect its citizens and others under its effective control. Regarding prong (a), it should be emphasized that even the equality proposition advanced by Margalit and Walzer does not exclude *a priori* the possibility of collateral damage inflicted against one's own civilians during *armed conflict*. Their argument is merely that such collateral damage cannot be treated differently than that inflicted on non-citizens, whether under effective control of the state or not.

Claim (b) is based on the special obligation a state has to its own citizens.[137] While it is indeed true that states may, in principle, give preference to their own citizens in many circumstances, this does not necessary imply that in instances of armed conflict, the preference of one's own citizens has any bearing on *jus in bello*. Thus, while a state's commitment to its own citizens can affect its decision to resort to force to protect them—after all, prohibiting the preference of the interests of one's own citizen-body from harm when deciding whether to react in forcible self-defense is tantamount to pacifism[138]—it does not trickle down to considerations of IHL, which must apply impartially. Indeed, the latter conclusion is an integral part of

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136 Avishai Margalit & Michael Walzer, *'Israel & the Rules of War': An Exchange, Asa Kasher & Amos Yadlin: A reply,* The New York Review of Books (Jun. 11, 2009), *available at* http://www.nybooks.com/articles/archives/2009/jun/11/israel-the-rules-of-war-an-exchange/./

137 *Compare,,e.g.,* Luban, *supra* note 59, at 29 –35 *with* Iddo Porat, *supra* note 128, *Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?*" University of San Diego School of Law, Public Law and Legal

Theory Working Paper, Aug. 7, 2009, available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445509 (visited Sept. 9, 2014), p. 13.

138 *Compare* McMahan, *The Just Distribution of Harm, supra* note 18, at 376.

the isolation of *jus in bello* from *jus ad bellum*, as discussed above.[139] In the same vein, the duty of the state to protect its combatants as *citizens* must take place too on the *jus ad bellum* level, when deciding on the scope of the use of force, or when training and equipping soldiers. However, once entering an armed conflict, thus also endangering the lives of the enemy's civilians, the state must subject such considerations to the principles of *jus in bello*.

Luban, perhaps, offers a way out of this impasse, by introducing a position that we shall call the "soft equality proposition."[140] He points out that the valid question is not whether soldiers (and we assume also states) are *permitted* to take more risks when at stake is a risk to "their own" civilians, but rather whether the *minimal acceptable standard* of obligation to spare civilians changes according to the nationality of the affected population.[141] To the latter question he answers negatively, but maintains that "taking heroic risks out of loyalty to your own people," which would not have been taken for the sake of minimizing collateral damage to the *enemy's* civilians, is not necessarily unacceptable.[142] Indeed, Luban's position seems to strike a reasonable balance between positive international humanitarian law, ethical considerations and the stark political realities of asymmetric warfare.

PRECAUTIONS IN ATTACK

General: A Context-Intensive Standard

The duty to take precautions has been discussed several times in previous Sections. As such, the question is intertwined with the other dilemmas of asymmetric warfare—ranging from the *ad bellum/in bello* distinction to the problem of force-protection. In this section, however, we shall address the duty to take precautions in its narrow sense. Specifically, we shall address the duty to take all feasible precautions in the selection of means and methods of attack in light of the principle of proportionality, and the duty to give effective warning of attacks.

The duty to take precautionary measures is set forth in Articles 57 and 58 of API, and is widely recognized as reflecting customary international

139 For a comparable argument see Luban, *supra* note 59, at 30–35.

140 Luban argues also that Margalit & Walzer too alluded to this position, however it is not so clear-cut from the analysis of their text. *See* Luban, *supra* note 69, at 11–12.

141 *Id.* at 11.

142 *Id.* at 12, 35.

law.[143] Article 57(1) lays down the basic norm, imposing a positive duty to take "constant care" to spare civilians and civilian objects.[144] It is obvious, then, as aforementioned, that the attacker must not only "not intend" to harm civilians, but rather must *intend not* to harm them; and that this requirement applies to all operational stages and levels,[145] spawning an obligation to control the lawfulness of an attack at all times.[146] While Article 57(1) sets out the general standard of conduct during hostilities, the subsequent Articles break it down to specific obligations. However, as with regard to other rules of IHL, the duty to take precautions is set forth in the form of context-intensive standards rather than in rigid rules. Above all, the notion of "feasibility" informs any attempt to delineate the limits of the obligation.

Thus, Article 57(2) enshrines the duty to take all feasible precautions in two contexts: that of *distinction*, meaning, in the process of target verification (57(2)(a)(i))—which we shall not deal with directly in this chapter, but to which one can draw reasonable parallels from our conclusions here—and that of *proportionality*, as discussed extensively in this chapter. In the latter context, the obligation entrenches several duties, the main of which being to:

a. Take all feasible precautions in the choice of means and methods of attack, to avoid or minimize collateral damage;[147]
b. Refrain, cancel or suspend an attack that would be disproportional, *notwithstanding* the feasible precautions taken;[148]
c. Give effective warning of attacks that may affect civilians, unless "circumstances do not permit."[149]

Before venturing into detailed discussion of the obligation, it should be noted that the duty to take "constant care," as embodied in the precautionary obligations, applies to "those who plan or decide upon an attack."[150] As with regard to the proportionality principle in general, this phrase refers both to the planning stage (the "standing operating procedure"), when decisions

143 ICRC Customary Law, *supra* note 34, Rule 15.
144 *See* Jean-Francois Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 Int'l Rev. Red Cross 796 (2008).
145 Quéguiner, *supra* note 142, at 797, 803; API Commentary, *supra* note 16, at. 686, ¶2220.
146 *See* State of Israel, The Operation in Gaza, *supra* note 64, ¶ 252.
147 API, *supra* note 17, art. 57(2)(a)(ii).
148 *Id.* art. 57(2)(a)(iii)
149 *Id.* art.57(2)(c).
150 *Id.* art.57(2)(a).

are likely to be undertaken by senior officers and under less duress (but not only), as well as to the execution stage, when decisions to attack can be taken on the spot by junior commanders under the duress of combat. Since the standard of precautions revolves around the notion of feasibility, it is obvious that in the former cases the obligation—whatever its substance—would be more onerous than in the latter.[151] For instance, in the planning stage, senior officers have the authority to allocate "smart" weaponry such as drones—which, in general, can minimize collateral damage—to certain units; thus, other things being equal, at this stage, the allocation of drones can be considered a "feasible" act of precaution. However, a company under fire cannot be expected to halt all action until it is allocated such weaponry. The same logic applies also to the acquisition of high-quality intelligence that can greatly reduce incidental harm. This, too, will more likely be available to senior officers in the planning stage rather than to units during combat. These considerations intertwine, of course, with the core question of the content of the "feasibility" standard, which we shall now consider.

Feasibility and Relative Capabilities

The open-textured nature of "feasibility" was discussed at length in the process of drafting Article 57.[152] The term "feasible precautions" was defined in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[153] Thus, "feasibility" alludes to the practicability of the measures, in light of the specific circumstances. Regarding the military considerations that can serve to limit feasibility, it is reasonable to conclude that like the question of military advantage in the context of proportionality, these considerations must be concrete and direct, and not extend to general and ambiguous advantages that could serve to severely limit all notion of feasibility.[154]

Some aspects of the "feasibility" test are less controversial than others. A clear example could be the requirement that if possible, the attack be

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151 *Compare* API Commentary, *supra* note 16, at 681.

152 API Commentary, *supra* note 16, at 681–682.

153 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) art. 3(4), Oct.10, 1980, 1342 U.N.T.S. 168.

154 *Compare* API Commentary, *supra* note 16, at 681–682.

conducted at a timing that will minimize civilian casualties. This requirement is fulfilled, for instance, when attacking a weapons factory at night.[155] Another simple precaution could be to choose an angle of attack which minimizes damage in case bombs miss their targets.[156] However, the complex family of problems regarding the "practicability" standard concerns the question whether it circumscribes a unitary, objective standard, or rather one that applies differentially to militaries of different capacities. Namely, these dilemmas ask whether the standard imposes a heavier burden on states that possess advanced precision weaponry;[157] or on liberal democracies because of their self-proclaimed values. A more radical claim—which might have ethical merits, but certainly does not reflect international law—would be that rich states are under obligation to *acquire* or *develop* such weapons.[158] Questions of this order generate extreme tension between the principles of "equal application" of IHL, the separation between *ad bellum* and *in bello* considerations, and the context-intensive nature of the obligation to take precautions in attack.[159] The question whether it is just or prudent to require a higher standard of precautions from rich or powerful states raises complex problems of global distributive justice and fairness.[160] Furthermore, it spawns a debate concerning the proper incentive system that should be promoted by IHL. For instance, if the mere possession of smart weaponry would impose stricter obligations on states (both in terms of methods of attack and in terms of transparency, for instance, by imposing duties of disclosure),[161] does it not, theoretically, create an adverse incentive—albeit not a powerful one in

155 API Commentary, *supra* note 16, at 682; Quéguiner, *supra* note 144, at 800; State of Israel, The Operation in Gaza, *supra* note 64, ¶258.

156 Quéguiner, *supra* note 144, at 801.

157 *See* Michael N. Schmitt, *Precision Attack and International Humanitarian Law* 87 Int'l Rev. Red Cross 446, 460 (2005).

158 *See* Quéguiner, *supra* note 144, at 802 –803; Schmitt, *Precision Attack and International Humanitarian Law, supra* note 157, at 460; API Commentary, *supra* note 16, at 682.

159 *See* Quéguiner, *supra* note 144, at 802; Dinstein, *supra* note 17, at 126.

160 On these and related questions *see generally* Blum, *On a Differential Law of War*, *supra* note 7x.

161 *See* Eliav Lieblich, *Show us the Films: Transparency, National Security, and Disclosure of Information Collected by Advanced Weapon Systems under International Law,* 45 Isr. L. Rev. 459 (2012).

practice[162]—not to develop such weapons, considering that they otherwise minimize collateral damage because of their precision?

Be it as it may, states cannot ignore the fact that third party monitoring, the media, and resulting international public opinion indeed expect a higher threshold of precautions from states possessing advanced capabilities.[163] In addition, the context-intensive nature of the obligation itself suggests that the general capabilities of the party may be taken into account in the feasibility assessment.[164] For instance, in a simplified case where a commander is in possession both of precision weaponry such as drones and of artillery, and the target is located in a densely populated area, the obligation to take feasible precaution might require the deployment of the drone rather than artillery projectiles. This conclusion must be drawn while taking into account the specific context of the operation, such as the length of the conflict, which can affect the expectations that the attacker deploy or conserve precision munitions.[165] However, this by no means implies that a state in possession of precision weaponry must only make use of the latter and that any deployment of "traditional" weapons would automatically result in a failure to take precautions.[166] The increased precautionary obligations imposed on advanced militaries must thus be subjected to a reasonable, commonsensical balance which takes note of their capabilities, but also does not result in absurd

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162 This is due to the operational advantages reaped by deployments of such weapons, and also because of public opinion and diplomatic pressure that are surely no less relevant than legal considerations.

163 *See* Blum, *On a Differential Law of War, supra* note 7, at 174–175 (and the sources cited therein).

164 *See* Quéguiner, *supra* note 144, at 801–802; Schmitt, *Precision Attack and International Humanitarian Law, supra* note 157, at 460–461.

165 As suggested by Schmitt, because of the fact the precision weapons are more scarce, "the commander will limit laser-guided munitions to attacks in which they would significantly decrease collateral damage or incidental injury, especially if uncertain as to the length of the conflict." Schmitt, *Precision Attack and International Humanitarian Law*, *supra* note 157, at 461.

166 *See* Quéguiner, *supra* note 144, at 801–802 (and the sources cited therein); *but see* Stuart W. Belt, *Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 Naval L. Rev. 174 (2000).

results that are highly unlikely to be followed, and perhaps give rise to various disincentives.[167]

The need for a "reasonable balance" notwithstanding, there must remain an objective core of precautionary obligations which would remain unalterable, regardless of the parties' relative capacities. In the absence of such a core, armed groups, on counts of lack of capabilities and high-tech weapons, might claim for a threshold of feasibility so low that it would practically result in the eradication of the principle of distinction altogether.[168] A possible "core" can be found in the definition of indiscriminate attacks, as found in Article 50(4) of API. Thus, the prohibition on indiscriminate attacks should be understood as trumping any claim according to which low capabilities prevent the taking of precautions in attack. This interpretation is also implied in the qualifying clause of Article 57(5), which clarifies that the duty to take precautions cannot be construed as authorizing attacks against civilians.

In sum, it seems that the notion of "feasibility," in all its manifestation, is a function of the attacker's capabilities; the nature of the conflict (for instance, its length); the seniority of the decision maker and the temporal dimension of the exercise of discretion (whether in the planning or execution stage). Be it as it may, all of these considerations cannot be relied upon to erode the principle of distinction on counts of low capabilities.

Effective Warning

Article 57(2)(c) of API requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." This rule has been found by the ICRC to reflect customary IHL, in both IACs and NIACs.[169] In essence, many of the dilemmas arising in the discussion of precautionary measures in general are relevant also to the issue of effective warning, and will not be repeated in this section.[170]

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167 As noted in the Commentary on API, the interpretation of the feasibility standard is "a matter of common sense and good faith." API Commentary, *supra* note 16, at 682; Schmitt, *Precision Attack and International Humanitarian Law*, *supra* note 157, at 461.

168 *See* the statement of Hamas, *supra* note 29.

169 ICRC Customary Law, *supra* note 34, Rule 20; *see also* Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice,* 87 Int'l L. Stud 359, 361–362 (2011).

170 We refer mainly to the question of the effect of differential capabilities over the circumstantial test in the context of effective warning. This discussion applies

Moreover, the duty to give effective warning is intrinsically interwoven with the principle of proportionality: the fewer civilians present in the area of the attack, the easier it is for the attacking party to act proportionally. It follows that it is not only the legal duty, but also the interest of the state to warn civilians effectively.[171] In any case, we shall here only highlight some basic issues that are relevant to the narrow question of effective warning.

First, a few general points: the Commentary on API has been clear that the circumstantial derogation provided for in Article 57(2)(c) relates to situations in which "the element of surprise in the attack is a condition of its success," but it is possible to envision other exceptions.[172] The Commentary also acknowledges that the method of warning depends on the operational circumstances: for instance, warning delivered by flying low over an objective, prior to attacking it, is only possible to the extent that the attacker is not threatened by air defense systems.[173] Moreover, the Commentary clarifies that while "ruses of war" in the context of warnings are not generally prohibited, they are unacceptable if they aim to deceive the civilian population.[174] Last, it is also not contested that advanced warnings cannot be used as a means to spread terror among the civilian population.[175]

Assuming situations where the element of surprise, or other key operational considerations, does not preclude the *a priori* possibility of a warning, the key remaining question relates to the issue of the warning's "effectiveness." The US, for instance, stated that an effective warning can be "general" in character.[176] Support for this position is implied also in the Commentary on

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mutatis mutandis also in relation to the latter. For arguments of this order see A/HRC/12/48, *supra* note 81, ¶¶510–511.

171 Sharvit Baruch & Neuman, *supra* note 169, at 373 ("This connection between giving a warning and fulfilling the proportionality standard leads to warnings being, on the one hand, a valuable measure in reducing harm to civilians and, on the other hand, a useful tool in the hands of commanders for gaining more freedom of action … this only reflects one of the realities of such situations, namely, that they are not necessarily zero-sum games.")

172 API Commentary, *supra* note 16, at 686. For other possible exceptions, including with regard to force-protection and the need to respond speedily see Sharvit Baruch & Neuman, *supra* note 169, at 388–390.

173 *Id.* at 686–687.

174 *Id.* at 687.

175 API, *supra* note 17, at 375; Sharvit Baruch & Neuman, *supra* note 169, at 375–376.

176 ICRC Customary Law, *supra* note 34, Rule 20, Interpretation, at pp. 64–65..

API.[177] All in all, it seems acceptable that effectiveness is a matter of "common sense," in light of the prevailing circumstances.[178] However, this does not mean that general parameters for effectiveness cannot be contemplated. Some of these parameters were discussed in the debate following Israeli practice in Operation Cast Lead (and are likely to be discussed also in the context of Protective Edge).

In Operation Cast Lead, Israel warned the civilian population in Gaza, both generally and at times in a specific manner, by making use of phone calls, leaflets and radio broadcasts. In addition, Israel adopted a practice of so-called "roof-knocking," in which light weapons or light explosives were aimed at roofs of buildings before striking them, in cases, according to the state, where it was suspected that civilians still remained in them after previous warning.[179] The effectiveness of Israel's warnings was criticized in light of three parameters: clarity of the message; credibility of the threat and the possibility of the recipients to escape the threat should they adhere to the warning (*inter alia*, that there exists in actuality a recognized safe place to go to).[180] Additional supplementing factors relevant to such assessments could be the temporal aspect of the warning (when the warning is given); to whom the warning is addressed (authorities, the general population or, perhaps, specific persons, as long as the recipients are those endangered); and the method of its dissemination.[181] It seems that the combination of these parameters can serve as general guidelines for commanders issuing warnings in specific instances, in accordance with operational constraints.

In this context, significant disagreement has surfaced concerning the practice of "roof-knocking:" some considered it an ineffective form of warning—and perhaps amounting to an attack in itself—and moreover required the making of "another phone call" rather than using "roof-knocking."

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177 API Commentary, *supra* note 16, at 687. For a survey of the approach of several military manuals to the issue and a survey of practice (including a detailed summary of Israeli practice) see Sharvit Baruch & Neuman, *supra* note 169, at 363–372.

178 *Id.* at 377.

179 *See* A/HRC/12/48, *supra* note 81, ¶¶500–501; State of Israel, The Operation in Gaza, *supra* note 63, ¶264.

180 A/HRC/12/48, *supra* note 81, ¶513.

181 For a detailed analysis, in particular in response to allegations concerning Israeli practice, see Sharvit Baruch & Neuman, *supra* note 169, at 378 –388. The authors are of the opinion that some of the measures of warning employed by Israel were actually more extensive than required by law. *Id.* at 383–384.

[182] The Israeli government stressed, conversely, that the method was used only after previous effective warnings of other types were given and were not adhered to.[183] The issue of "roof-knocking," as stand-alone warning, is essentially a sub-question of the legitimacy of "warning shots" as methods of effective warning—a contentions question that we shall not resolve here.[184] The key issue here is factual: namely, whether such practice causes further confusion, and whether it is safe or might endanger civilians itself. In any case, it is clear that alone, without other measures, it cannot be considered as effective warning.

Be that as it may, it is important to stress that the requirement of effective warning should be completely separated from the issue of distinction. Failure to adhere to advance warning does not amount to the negation of the protected status of civilians;[185] accordingly, civilians remaining in the vicinity of the target must be taken into account in the proportionality assessment of the attacker.

CONCLUSION

As with regard to the question of distinction, the issue of proportionality—at least in the context of its application—leaves many dilemmas unresolved. This is a corollary of proportionality's nature as a flexible standard rather than a rigid rule, which requires a balancing of competing values, themselves not universally agreed upon, in a highly context-intensive normative and operational environment. Above all, this situation connotes the importance of proper targeting procedures, as well as the need to adopt an institutional discourse sensitive to the intricacies of proportionality. Indeed, since the proper relation between military advantage and incidental harm is virtually indefinable in a general, forward-looking manner, actions might be assessed in light of the decision-making *process* that led to them, the latter serving as a prime indication for the action's substantive lawfulness; or on counts of other external circumstantial indications, such as remarks by officials.[186]

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182 A/HRC/12/48, *supra* note 81, ¶¶532 –535.

183 The Operation in Gaza, *supra* note 64, ¶264.

184 Sharvit Baruch & Neuman, *supra* note 169, at 387–388.

185 *See, e.g.,* ICRC Customary Law, *supra* note 34, Rule 20, Interpretation, at pp. 64–65.

186 For an example of treating procedure and statements as indications for lawfulness, *see, e.g.,* the ruling in Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment

This fact should be kept in mind by officials (as well as ex-officials), when engaging in discourse on proportionality.

Summary (Apr. 15, 2011). *available at http://www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf*. The Judgment was reversed by the ICTY Appeals Chamber in November 2012. *See* Judgment Summary, *available at* http://www.icty.org/x/cases/gotovina/acjug/en/121116_summary.pdf

CHAPTER 5

A Few Comments on the Duty to Investigate Alleged Violations of International Law during Armed Conflict

GENERAL: A NON-EXHAUSTIVE DISCUSSION

As with regard to other aspects of IHL, asymmetric conflicts place significant strain on the duty to investigate (and to prosecute, where applicable) alleged violations of international law committed during armed conflict. The constant intermingling between fighters and civilians, prevalent in such conflicts, raises the risk of incidental harm to civilians or civilian objects, which often spawns allegations of wrongdoing. Furthermore, the blurry legal line between protected civilians and those who lose protection—as discussed at length in Chapter 2—gives rise to persistent concerns with regard to the legality of targeting. This problem is of course also relevant to the problem of dual-use objects as discussed in Chapter 3.

In addition, since the paradigms of hostilities and law enforcement are often enmeshed in asymmetric conflicts, it is often unclear whether to analyze the duty to investigate through the prism of IHL, IHLR, or both. Indeed, this dilemma has effect on all issues relating to the duty to investigate. In particular, this normative entanglement raises questions with regard to the factual circumstances that might qualify as violations; with how the investigation must be conducted; and whether such investigation must be of a "criminal" or "disciplinary" nature.[1]

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1 When we say "criminal investigation," we refer to a formal process, which may lead to indictment. We exclude fact-finding panels that might prompt a criminal investigation, such as Israel's inquiry into the killing of Salah Shehadeh; *see, e.g., Report of the Special Commission to Assess the Targeted Killing of Salah Shehadeh* (Feb. 2011, in Hebrew). For an English abstract of the report, see http://www.

A further contributory factor to the importance of the issue of investigations in the contemporary international setting, relates to the principle of *complementarity* enshrined in the ICC Statute, and the emerging principle of *subsidiarity* in the context of universal jurisdiction. According to these principles, states that fail to genuinely investigate alleged violations might expose their political and military echelons to international prosecution in the ICC or national courts, respectively.[2]

These questions have been addressed widely, in recent years, by international panels,[3] courts,[4] scholars,[5] and NGOs.[6] In addition, a major report on the issue—and in particular with regard to institutional aspects of the duty to investigate—by a commission appointed by the Government of Israel (the Turkel Commission) was released during the advanced writing stage of this study.[7] Because of the detailed principled treatment of the issue elsewhere, and particularly in the Turkel Report, this chapter will only, and very briefly, highlight several of the main dilemmas in this context, mainly to better inform stakeholders of the ongoing debate. Our discussion should thus be

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mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011/. Such panels are equivalent to preliminary assessments by an investigating authority, undertaken in order to determine whether the facts of the matter give rise to a duty to investigate. We shall briefly discuss preliminary assessments *infra.*

2 Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 93; *see also* The Public Commission to Examine the Maritime Incident of 31 May 2010 Rep. Part 2, 85–89 (Feb. 2013) [hereinafter *Turkel Report*].

3 U.N. Hum. Rts, Council, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess any Domestic, Legal or Other Proceedings Undertaken by Both the Government of Israel and the Palestinian side, in the Light of General Assembly resolution 64/254, Including the Independence, Effectiveness, Genuineness of These Investigations and Their Conformity with International Standards*, U.N. Doc A/HRC/15/5 [Hereinafter *Tomuschat Report*].

4 Al-Skeini et al. v. U.K., App. No. 55721/07, Eur. Ct. H.R. (2011); HCJ 9594/03 B'Tselem v. Judge Advocate General [2011] (Isr.).

5 *See*, in particular, the in-depth analysis in Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 Y'BOOK OF I.H.L. 37 (2012); Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31 (2011).

6 Yesh Din, *Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers Against Palestinians* (August 2011).

7 Turkel Report, *supra* note 2.

read in conjunction with the Turkel Report, and can perhaps contribute to its implementation.

In general it should be emphasized, as a point of departure, that notwithstanding some disagreements among different actors regarding the scope and nature of the duty to investigate, and the methods for its implementation, none dispute the fact that there is indeed a duty to investigate allegations of war crimes—and that this obligation must be discharged in good faith, in an effective, independent and impartial manner. One should not lose sight of this simple fact when discussing the often over-legalized arguments of the issue.

THE DUTY TO INVESTIGATE IN TRANSNATIONAL ARMED CONFLICTS

The most oft-cited source of the duty to investigate violations is found in the "Grave Breaches Regime" common to the four Geneva Conventions.[8] The Grave Breaches Regime obliges states to enact penal legislation against those committing or ordering actions that constitute grave breaches, as those are defined in the Conventions. Significantly, the regime imposes upon states the positive duty to search for suspects and to bring them—regardless of their nationality—before their own courts, or to extradite them.[9] In essence, then, the Grave Breaches Regime imposes on states a *mandatory* duty to exercise universal jurisdiction over the enumerated crimes.

However, the Conventions are not silent with regard to other violations of IHL (those that are not labeled as "grave breaches"). Regarding the latter, the Convention provides that states "shall take measures necessary" for their "suppression." Arguably, such "necessary" measures must require, in some instances, penal responses—although the violations may not amount to grave breaches in the strict legal sense.[10] In other cases, disciplinary actions might be sufficient.

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8 Articles 49, 59, 135, 146 of the four Geneva Conventions respectively (as complemented by Articles 4, 85, 86 of Additional Protocol I); Turkel Report, *supra* note 2, at 73–76.

9 *Id.*

10 For a similar (and detailed) argument see Cohen & Shany, *supra* note 5, at 41–44. Cohen & Shany derive such obligations *inter alia* from the doctrine of command responsibility and the principle of precaution. *Id.* at 45–47.

The provisions establishing the Grave Breaches Regime, including the duty to suppress "other" violations, are commonly understood as applying only to *international* armed conflicts. This differentiation remains accepted, notwithstanding the general convergence between norms applying to all types of armed conflict. To the extent that we see TAACs as governed by Common Article 3 to the Geneva Convention, rather than by the entire corpus of the law on international armed conflict,[11] this would mean that the Grave Breaches Regime does not apply in transnational armed conflicts.

The latter fact notwithstanding, this by no means suggests that the duty to investigate violations does not arise in "Common Article 3 conflicts." First, Common Article 1 requires states to "respect and to ensure respect for the present Convention in all circumstances."[12] This obligation might very well apply also to violations of Common Article 3. Since there is a substantial correlation between the violations enumerated as grave breaches and the behaviors prohibited in Common Article 3, the reading of Common Article 1 in conjunction with Common Article 3 must result in the conclusion that *at least* violations of Common Article 3 require the opening of criminal investigations. This conclusion is fortified by the fact that many violations of IHL in the course of NIACs—*inter alia* violations of Common Article 3—give rise to criminal liability in international courts and tribunals.[13]

Moreover, since the duty to ensure respect for IHL in *all* conflicts, including through investigation and prosecution, is widely recognized as customary international law,[14] a logical conclusion is that a respective duty arises to investigate violations of customary IHL regulating NIACs. When such an alleged violation, for instance, parallels the criminal offense set forth in the ICC Statute, states might be obliged to undertake criminal investigation.[15]

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11 We discuss this issue in Chapter 1.

12 On Common Article 1 as a source for obligations to investigate see Cohen & Shany, *supra* note 5, at 44–45.

13 Rome Statute, *supra* note 2, Arts. 8(2)(c) –(d).

14 Int'l Comm. Red Cross, Customary International Humanitarian Law, Rul es 139, 158 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (and the sources cited therein), *available at* http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf [hereinafter ICRC Customary Law].

15 Rome Statute, *supra* note 2, art. 8(2)(b)(iv) ("Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete

In sum, and as recognized in the Turkel Report, the growing convergence of norms regulating all types of conflicts calls for a unified approach towards the duty to investigate.[16]

CONDUCT THAT MERITS A CRIMINAL INVESTIGATION

The term "investigation" encompasses a variety of actions—not all relating to criminal proceedings. It can refer also to preliminary examinations, disciplinary actions, operational debriefings or fact-finding mechanisms. Indeed, it is certainly true that the duty to suppress violations and to ensure respect of IHL does not always require a *criminal* investigation. Some violations of IHL give rise to causes of action that are closer to violations of administrative rather than penal rules.[17] Such violations still have to be suppressed and, accordingly, some examination to establish the facts is logically required, but it is doubtful that criminal proceedings are mandatory.[18]

Likewise, a violation of IHL can at times give rise to criminal responsibility (as opposed to *state* responsibility), but *only* when it crosses a certain threshold. For instance, and without exhausting this issue, while any disproportional attack, in contravention of Articles 51(5)(b) and 57(2)(a)(iii) of API is a violation of IHL, it seems—in light of the ICC Statute—that in order for individual criminal liability to be incurred, such an attack must be conducted intentionally "in the knowledge" that it will cause "clearly excessive" incidental harm to civilians.[19] However, this by no means implies that the duty to suppress the non-criminal aspect of the proportionality principle is quashed; furthermore, and as we shall see, it is quite possible that the only credible way in which it is possible to rule out criminal *mens rea*, in the case of a disproportional attack, is through some preliminary investigation.

To summarize this point, in certain cases, disciplinary measures or independent fact-finding mechanisms will suffice to satisfy the obligation

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and direct overall military advantage anticipated"). The ICRC Study has reached a similar conclusion upon the analysis of practice. See ICRC Study, Rule 156 (presenting a list of war crimes).

16 *See* Turkel Report, *supra* note 2, at 78–82.

17 For instance, if an occupying power modifies the laws in force in the occupied territory when it is not absolutely needed, in violation of Article 43 of the Regulations Annexed to the Hague Convention (IV) of 1907.

18 *See, e.g.,* Turkel Report, *supra* note 2, at 74–75.

19 Rome Statute, *supra* note 2, art. 2(b)(iv)

to ensure respect for IHL, and to suppress violations.[20] In the words of the Turkel Report, states have a duty to *examine* allegations, even if these do not amount to war crimes.[21] While states that seek enhanced enforcement can choose to criminalize other behaviors as well, the *duty* to embark on a criminal investigation arises, at minimum, in relation to *war crimes* allegedly committed by their nationals or on their territories.[22] War crimes, in short, are "serious violations" of IHL (even if not necessarily "grave breaches" in the sense of the Geneva Conventions); these are conducts that either endanger civilians or objects, or breach "important values." These are discussed, for instance, in the ICRC Customary Law Study, and are also enumerated in the ICC Statute.[23] Our discussion henceforth is centered on such cases.

Indeed—and considering the drawing closer of IHL and IHRL, as aforementioned in Chapter 1—violations of IHRL can also give rise to an independent duty to initialize criminal investigations during armed conflict.[24] Most of these violations, committed in the course of an armed conflict, correlate with war crimes and thus do not require separate treatment. However, as noted by Cohen and Shany, it is reasonable that some conducts that do not amount to war crimes might still give rise to an independent, IHRL-based duty to embark on a criminal investigation.[25] It is beyond our purpose in this brief analysis to attempt to determine these exact conducts; nonetheless, investigating authorities must give due regard to these developments.

CIVILIAN HARM AND THE DUTY TO INVESTIGATE

Notwithstanding the convergence of IHL and IHRL with regard to conduct that merits criminal investigation, some types of conduct—or consequences—are analyzed differently under the two fields of law. Indeed, both spheres prohibit intentional harm to uninvolved civilians. IHRL does so through the entrenchment of the right to life, while IHL affords this protection through

20 *See Cohen &* Shany, *supra* note 5, at 45.

21 Turkel Report, *supra* note 2, at 82.

22 Or in other cases, if a state enacts universal jurisdiction legislation. *See* ICRC Customary Law, *supra* note 14, Rule 158.

23 *Id.* Rule 156, 158; Rome Statute, *supra* note 2, art. 8; *See also* Turkel Report, *supra* note 2, at 76, 97–99.

24 Human Rights Comm., General Comment No. 31, Nature of the Legal Obligation Imposed on States Parties to the Covenant, ¶8, U.N. Doc. CCPR/C/21.Rev.1/Add.13 (2004); Turkel Report, *supra* note 2, at 82 –84.

25 Cohen & Shany, *supra* note 5, at 50.

the principle of distinction. However, a key difference between them arises, for instance, in the context of *incidental* harm. The question whether such harm, in itself, requires a criminal investigation can be viewed as relating to the threshold, or "trigger" of the duty to initiate a criminal investigation.[26] However, it seems more precise to view this question from the standpoint of substantive law. The immediate question, in this context, is whether a certain operation was (or should have been) conducted as an act of law enforcement or lawfully undertaken as an act of hostility during an active armed conflict. This approach is reflected in the Turkel Report, as it recommends that upon being notified of a civilian death, the relevant incident should be immediately classified by investigating authorities as either relating to "actual combat" or as a law enforcement operation.[27]

This classification has important consequences: as also conceded in the Turkel Report, under the law enforcement paradigm, material harm to civilians always merits a criminal investigation, since it is in general never a legitimate outcome of law enforcement—save in narrow circumstances of defense of self or others, and after the use of force continuum has been exhausted.[28] Under the hostilities paradigm, however, incidental harm to civilians is not *per se* unlawful, and even if it is unlawful (in terms of state responsibility), it generally gives rise to criminal liability only in aggravating circumstances.[29] Thus, for instance, it is arguable whether incidental harm to civilians during active hostilities merits *criminal* investigation (as opposed

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26 *See, e.g.,* Cohen & Shany, *supra* note 5, at 51–55. The accepted trigger for the initialization of a criminal investigation is the materialization of a "reasonable" basis that the elements of a certain violation have materialized. This standard can be deduced, for instance, from the triggering mechanism included in Article 15(3) of the Rome Statute, *supra* note 2. As we shall see, any establishment of a reasonable basis requires a preliminary examination. It seems that such a preliminary investigation must be undertaken whenever information is received by investigating authorities (as provided in Article 15(2) of the Rome Statute, *supra* note 2, "The Prosecutor *shall* analyse the seriousness of the information received." [emphasis added]), unless the information is manifestly non-credible. It seems that here, too, the standard is one of good faith and reasonableness.

27 Turkel Report, *supra* note 2, at 377.

28 *See, e.g.,* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7 1990, arts. 9–10; Turkel Report, *supra* note 2, at 103 –104.

29 *See, e.g.,* Rome Statute, *supra* note 2, art. 8(2)(b)(iv).

to other forms of suppression) only where there is a credible accusation or a reasonable suspicion that it satisfies these aggravating circumstances.[30]

Indeed, because of the complexity of the proportionality standard, as discussed at length in Chapter 4, the mere determination of whether such a reasonable suspicion materializes requires *in itself* a factual examination, and necessitates a normative assessment of the circumstances of the attack, such as the existence of a valid military advantage. Since these cannot be conducted offhand, it seems that—save for in "obvious" cases—material incidental harm to civilians, even when occurring during armed conflict, requires at least a preliminary examination conducted in accordance with the universal principles of investigations, as discussed below. This logic is behind the Turkel Report's recommendation that allegations of such violations would require a *fact-finding assessment*.[31]

These situations are especially common in asymmetric warfare, in which the fundamental question of whether an act could at all be undertaken as an act of hostilities is not obvious in itself. The same concerns arise also with regard to alleged violations of the principle of distinction during such conflicts. These concerns were, perhaps, at the core of the requirements set forth in the *Targeted Killings* case, according to which targeted killings must be followed by an independent (non-criminal) investigation.[32] In instances of occupation, where active hostilities cease, it seems well accepted that harm to civilians should be analyzed, by default, through the prism of law enforcement, although the situation is regulated at large by the law of belligerent occupation.[33]

These dynamics can be exemplified by a recent ruling by the Israeli Supreme Court (*The Investigations Case*).[34] In the *Investigations Case,* prominent Israeli NGOs challenged the investigations' policy of the IDF Military Advocate General (MAG) which, when deciding whether to open an investigation regarding civilian deaths, prioritized reliance on operational debriefings

30 Turkel Report, *supra* note 2, at 100.

31 It should be stressed, however, that when the allegations are made regarding "absolute" prohibitions of international law, such as willful attacks against civilians, such a preliminary examination is unnecessary and investigation should be immediately started (assuming the information is credible). *See id.*, at 100–103.

32 *See* Chapter 2, Section IV.

33 Turkel Report, *supra* note 2, at 107 –110.

34 HCJ 9594/03, *supra* note 4.

rather than on investigations by the military police criminal investigations unit (MPCI). In essence, in cases of death, a preliminary examination would be undertaken by the MAG, based on operational debriefings, along with other supplementary materials. An MPCI investigation would follow only where the material gave rise to suspicions of criminal conduct.[35]

This policy was formulated during the height of the Second Intifada, in deviation from the previous policy where MPCI investigations were initiated whenever a civilian death occurred in Gaza or the West Bank. In justification of the "new" policy, the MAG initially argued that the circumstances of the Second Intifada amounted to an armed conflict, in which not every case of civilian death raises suspicions of criminal conduct.[36] However, during the proceedings, this position was altered. The MAG now argued that the circumstances had changed since the Second Intifada: in Gaza, an armed conflict existed against Hamas, while in the West Bank there was a significant reduction in "hostilities." Thus, from that point on, each civilian death in the West Bank would trigger an MPCI investigation. However, in instances of outright hostilities, the MAG would still rely on conducting a preliminary examination prior to commencing investigations.[37]

The Court ruled that the new policy introduced by the MAG in the West Bank reflected the changing circumstances on the ground.[38] Regarding Gaza, it held that in the absence of Israeli effective control over the territory, and considering the ongoing armed conflict between Israel and Hamas, the predominant paradigm concerning operations in that area is that of hostilities. Since during hostilities, some incidental harm to civilians can be lawful, the scope of the duty to investigate is affected.[39] In sum, the ruling in the *Investigations* case exemplifies the interplay between occupation, effective control and hostilities and the duty to investigate civilian deaths.

35 *Id.* ¶2.
36 *Id.* ¶5.
37 *Id.* ¶7.
38 *Id.* ¶¶9–11.
39 *Id.* ¶13.

STANDARDS OF INVESTIGATION

The Trickling Down of Human Rights Standards and Several Concerns

While customary IHL prescribes, in general, the types of violations that merit a criminal investigation, it scarcely addresses the issue of *how* investigations must be undertaken. In this context the concurrent application of IHL and IHRL enriches the law during armed conflict. IHRL jurisprudence on the standards of investigation is extensive. In general, it is beyond doubt that investigations of violations must be independent, impartial, thorough, prompt and effective.[40] The Turkel Report concluded that a fifth requirement— that of transparency, which stems from IHRL also has some bearing during armed conflict, in light of the prevailing circumstances in specific instances.[41] Indeed, there are no rational grounds to object—at least in systems respecting the Rule of Law—to these universal principles, even in times of armed conflict.[42] The question is rather one of balance: namely, how states can maximize the adherence to these universal principles during armed conflict, considering military expediencies. Like all cases of balancing, resort to case-by-case analyses cannot be avoided.[43]

It is worthwhile to highlight two relevant points in this context: first, the nature of asymmetric conflict is usually such that it does not place the same strain on state institutions as full-blown international armed conflicts. That fact, along with the increased *de facto* expectations on states to protect the civilian population, can give rise to demands that states involved in TAACs conduct investigations in a manner closer to what is required in "pure" IHRL situations.

Second, it is widely accepted that the use of military justice systems can satisfy a state's duty to investigate, as long as such systems conform to the principles outlined above.[44] However, since they are not entirely external

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40 *See* Turkel Report, *supra* note 2, at 114 –146; *see also* Tomuschat Report, *supra* note 3, ¶¶21 –25.

41 Turkel Report, *supra* note 2, at 114, 144 –145.

42 *See* Tomuschat Report, *supra* note 3, ¶¶31–32; *see also* G.A. Res. 60/147 The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

43 For examples and discussion see Tomuschat Report, *supra* note 3, ¶¶32 –33.

44 *See id.* ¶34.

(in the institutional sense)—and in particular in Israel, where the MAG has a dual role of a legal adviser and chief prosecutor—it is fair to expect that military systems would be held under higher scrutiny. This issue was widely discussed in the Turkel Report.[45] Thus, at least in the court of public opinion, military justice systems bear a significant burden of proof. Because of this fact, one may doubt the wisdom of decisions not to cooperate with international bodies appointed to assess investigatory policies.[46]

Preliminary Examinations During Armed Conflict: The Question of Operational Debriefings

The preliminary examination stage (the "fact-finding assessment," as per the Turkel Report) —meaning, the stage in which the investigating authority assesses whether there are reasonable grounds to initiate a criminal investigation—is as important as the investigation itself. However, the discretion exercised in this stage is, in practice, on the seam between loose "administrative" discretion and the more structured approach of criminal proceedings. This ambiguous nature of the preliminary examination stage accounts for its special liability to allegations of abuse. Therefore, if investigations must be conducted according to the universal principles mentioned above, it must follow that preliminary examinations—although they are "looser" in nature—must also adhere to the core of such standards.[47]

It is in this context that the reliance on operational debriefings when deciding whether to commence an investigation raises significant challenges.[48] Indeed, while the Court in the *Investigations Case* permitted reliance on such debriefings in preliminary examinations during hostilities, it also noted their "disadvantages": namely, they raise concerns regarding their impartiality, and their main purpose is operational rather than investigative.[49]

These shortcomings are clear. Operational debriefings are usually internal and therefore can hardly be considered independent and impartial in the legal sense. They are not conducted by professional criminal investigators, since they are chiefly undertaken for the purpose of drawing operational conclusions. In this sense, it is highly questionable whether they can be a

45 *Compare* Turkel Report, *supra* note 2, at 389–396.
46 *See* Tomuschat Report, *supra* note 3, ¶¶44–50.
47 *See* Turkel Report, *supra* note 2, at 147–148.
48 *See id.* 340 –341.
49 HCJ 9594/03, *supra* note 4, ¶12.

predominant source of information in the context of a criminal investigation.[50] It seems, therefore, that a preliminary examination based on operational debriefings is incompatible with the universal principles of investigations under international law. This logic guided the Turkel Commission in its recommendation that operational debriefings should not play a role in the decision on whether to open an investigation.[51]

All in all, our points above—and many others beyond the scope of this study— have been thoroughly treated in the Turkel Report. In this brief chapter, we only sought to provide some insight regarding the key issues relating to the duty to investigate. It should be emphasized, in this context, that notwithstanding any nuances that might be found in the analyses, we have not attempted to challenge the Report. On the contrary, we believe that it is a constructive way forward.

50 Alleged Investigations, *supra* note 6, at 35 –36.

51 It should be noted that the Report did not recommend prohibiting the MAG from reading operational debriefings. *See* Turkel Report, *supra* note 2, 382 –383, 425–426.

Concluding Remarks

During the late stages of the editing of this work, the Crimean Crisis erupted. It is impossible to tell, as of now, whether the crisis will be resolved in the coming months, quietly forgotten, or herald a prelude to a new era—reminiscent of the Cold War—in which strong-arm politics will dominate all international discourse.

What is striking, however, is that the only common ground for discussion between the parties—whether Ukrainian, Russian or any of their respective allies—is international law. Neither party phrases its positions strictly in terms of interests, ideology or power. Instead, they turn to *legal* arguments in order to base their opposing positions. Indeed, these arguments might not always be convincing. It is also highly likely that many of them are not advanced in good faith. However, these dynamics are quite telling with regard to the enduring power of legal discourse in the contemporary international system. In this sense, these dynamics go hand in hand with some of the key notions that underlined our work. Chiefly, we have emphasized that the language of law is gaining more and more ground within the quest for legitimacy, which concerns every conflicting party. In Ukraine as in the Middle East, the language of power and interest is simply inadequate, if one seeks to convince international public opinion.

However, it is important to note that law during conflict is not only an agent of legitimacy. The law is first and foremost an instrument meant to achieve substantive values. These values, as is commonly noted, represent a balance between humanitarian considerations and military necessity. In this context, it cannot be ignored that this balance is increasingly affected by human rights' norms. Indeed, the recent jurisprudence of the European Court of Human Rights regarding the application of human rights law extra-territorially and during armed conflict, is in essence a statement regarding the equal moral worth of all, including, of course, civilians found on the

"other side." It particularly rings true in asymmetric conflicts, where adverse incentives affecting all involved parties often place civilians in grave danger.

Be that as it may, this understanding of the nature of law during conflict does not imply that states cannot defend themselves. On the contrary, we believe that the findings outlined in this work not only take into consideration the equal moral worth of all, but they also promote better, more professional military planning.

We hope that our work clarifies some of the dilemmas addressed, and provides a useful basis for further consideration.

Detailed Summary

CHAPTER 1 – THE LEGAL FRAMEWORK

1. This chapter introduces the reader to basic concepts in international humanitarian law that will help the reader follow the discussion in later chapters.
2. States should explicitly acknowledge that there is a growing merger of applicable international humanitarian law (IHL) to *all* armed conflicts (without distinction between different categories of armed conflicts); and reflect such recognition in the planning, execution, investigation and public representation of military operations.
3. States should recognize that international human rights law (IHRL) is increasingly perceived as also applying extraterritorially and during armed conflict, and that the *lex specialis* approach to the application of IHRL does not mean that IHRL ceases *completely* to be considered during hostilities. States should engage in discussion regarding the nature of this application.

CHAPTER 2 – DISTINCTION AMONG PERSONS

1. This chapter discusses the question of how a party must distinguish between persons who may and may not be targeted.
2. States should disclose the legal justification for their actions, in accordance with their understanding of the principle of distinction between combatants and those noncombatants not directly participating in hostilities. Indeed, states can mitigate the effects (and exploitation) of the lack of clarity on this issue by providing a clear and timely explanation of the legal basis for their actions. This serves a threefold objective:
   a. Promoting the rule of law and adherence to IHL;

b. Furthering the interests of states by assuring public opinion that they are not acting unlawfully and arbitrarily;
c. Asserting a legal justification amounts to a firm expression of *opinio juris*, which serve to clarify, promote and reform international law.

3. Regarding the issue of the status of non-state fighters and the concept of continuous combat function (CCF), states should work according to the following understanding of the prevailing legal situation:
   a. There is some acceptance that on the question of membership in organized armed groups, the "status approach" prevails over the "civilian approach." In essence, there are two different approaches to the legal standing of those fighting on behalf of non-state actors. The first is to view these fighters as civilians (the *civilian approach*), and then to assess whether their actions fall within the ambit of the notion of "direct participation in hostilities" (DPH), as the term appears in Article 51(3) of API. If the actions do qualify as DPH, then "for such time as" the fighter takes a direct part in hostilities, the fighter may be targeted; this was the approach preferred by the Israeli Supreme Court in the *Targeted Killings* case. The second option is to construe Common Article 3 of the Geneva Conventions as attributing a legal meaning to the term "armed forces"—which the Article can be read as inferring reference not only to "armed forces" of states but also to "armed forces" of non-state actors—resulting in the recognition of a different status for members of such armed forces (the *status approach*).
   b. There is considerable agreement that membership in an organized group, however determined, results in a wide temporal loss of protection, beyond the usual temporal scope of loss of protection due to direct participation in hostilities;
   c. There is strong disagreement regarding the nature of the concept of CCF as suggested by the ICRC;
   d. A possible bridge between the CCF concept and its alternative could be the realization that different armed groups differ according to their level of organization: if the level of organization is comparable to the state's armed forces, they might be equally targetable; however, any such determination with regard to specific groups must be made in a way that allows for scrutiny;

4. Regarding the issue of the scope of the notion of DPH (that applies both to civilians occasionally taking part in fighting and fighters who are more continuously part of an organized armed group), states should work according to the following understanding of the prevailing legal situation:
   a. There is considerable agreement that DPH requires a *threshold of harm, direct causation* and *belligerent nexus*. However, the application of these standards is contested.
   b. The question of voluntary human shields remains controversial among those that argue that such action crosses the threshold of harm to constitute DPH, and those that find this proposition impossible.
   c. Regarding the requirement of direct causation, there is wide agreement that "general participation" in a war effort does not amount to DPH; conversely, there remains significant disagreement between those that endorse the "one causal step" approach to DPH (endorsed by the ICRC) and those that argue for a wider standard, which goes beyond the "tactical level" of warfare.
   d. Concerning the temporal requirement, it remains disputed whether DPH, in instances that do not amount to membership in an organized armed group (the CCF criterion), encompasses only the preparation, deployment and return from the specific act (the "revolving door" concept), or rather to an entire "chain of acts," as suggested in the Israeli Supreme Court case on *Targeted Killings* ("continuous DPH").

5. Regarding the issue of targeting of leadership, states should work according to the following understanding of the prevailing legal situation:
   a. Replace the distinction between military and political wings, and adopt the functional approach of DPH or CCF towards dual military-political targets.

6. Regarding the issue of preference of arrest over killing of civilian DPH, states should work according to the following understanding of the prevailing legal situation:
   a. The approach of the Israeli Supreme Court and the ICRC Guidance has been heavily criticized by military legal advisors;
   b. However, regarding the proponents of the preference of arrest, there is an agreement that it does not inject a pure "law enforcement"

approach into IHL, but rather serves as a reflection of the core principles of necessity and humanity.

c. Among the proponents of the idea, there is general agreement that non-lethal actions are more feasible in instances in which the state exercises control, such as in situations of occupation.

CHAPTER 3 – DISTINCTION AMONG OBJECTS

1. This chapter discusses the question of how a party must distinguish among objects (i.e., buildings, roads, infrastructure, etc.).

2. The governing law is found in Article 52 of API. According to that provision, military objectives are any 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." A "civilian object," in turn, is any object other than a "military objective." The provision is widely viewed as accurately stating customary law.

3. In many cases, military objectives are easily distinguished from civilian objects. Often, though, distinction raises difficult questions, especially in asymmetric conflicts. Moreover, in addition to the rules on distinction, the rules of proportionality still apply to objects. These rules are discussed in Chapter 5.

4. One category of objects that often raises legal questions is that of so-called "dual-use" objects, those (such as roads or power plants) that have both a civilian and military use. The legality of targeting dual-use objects is of particular resonance in asymmetric conflicts, in which dual-use objects are often inviting targets for a regular army.

5. Article 52 of API classifies dual-use objects as military objectives and permits their targeting, as long as the object meets the criteria for a "military objective" as set out in paragraph 2 above. That said, for potential attacks on dual-use objects, questions of proportionality often arise. The civilian-oriented harm caused by destruction of a dual-use target is analogized to incidental harm. The direct harm is viewed as that caused to the adversary's military. The extent of harm to civilians is thus weighed against the military advantage to be conveyed by the attack. Apart from proportionality, some argue for a different limit

on targeting some dual-use objects: contending they may be "objects indispensable to the survival of the civilian population." This theory can be problematic, but some commentators still hold to it.

6. For dual-use objects, the question is how to approach objects whose use has two separate applications: the civilian and military spheres. For "war-sustaining economic objects," the question is different: whether the object's singular use makes the "effective contribution to military action" required to qualify as military objective. A war-sustaining economic object is one whose use enables a party to maintain or strengthen its economy and, in doing so, to sustain its war effort.

7. Most have concluded that an object may not be targeted simply because it is a "war-sustaining economic object." A minority position allows the targeting of war-sustaining economic objects. While this position appears to be a minority one, it nonetheless seems to have a reasonable base of support, at least for some limited category of economic objects. This is the view supported by the United States. Still, two caveats apply. First, the US position may rely on the law of maritime warfare that is less developed than that of IHL in general. Second, targeting of war-sustaining economic objects would still need to abide—as with targeting of any object—with the rules of proportionality.

8. Yet another category of objects that raises distinction questions is that of political, economic, and psychological objects. Here, a prime example is a broadcasting facility. The leading statement of the law—from a commission investigating the 1999 NATO campaign in Kosovo—holds that a broadcasting facility may not be targeted solely because it engages in propaganda on behalf of a party to the armed conflict. On the other hand, a broadcasting facility may be targeted if it is part of the party's command, control, and communications network (i.e., conveying information to its fighters). Thus, after attacking the broadcasting facilities of Hizbullah's al-Manar in the Second Lebanon War, Israel not only noted that the facility was used to "incite acts of terrorism" but also that it was used to relay messages to the adversary's fighters.

9. Finally, an important question is the level of certainty that a party must have in determining whether an object is a military objective. Often, especially in asymmetric conflicts, intelligence information about a

potential target is not certain, and requiring certainty would seem to prejudice the law unduly against an attacking party. On the other hand, were the law to permit targeting based only on a scintilla of evidence, the rule would seem to violate humanitarian norms.

10. Some strains of IHL hold that in cases of doubt about an object usually used for civilian purposes (such as a place of worship, house, or school), the object should be presumed not to be a military objective. Israel, for example, has accepted this reading of the law—but only "when the field commander considers there is a 'significant' doubt and not if there is merely a slight possibility of being mistaken." Rather than "doubt," the leading statement of customary law, from an ICRC manual, permits targeting of an object should there be "sufficient indications to warrant an attack."

CHAPTER 4 – PROPORTIONALITY

1. This chapter discusses issues relating to the principle of proportionality, meaning, the assessment of the incidental harm to civilians or civilian objects that could be justified in light of a concrete and direct military advantage.

2. General:
   a. Public statements on all levels should reflect that states must adhere to IHL—including to proportionality requirements—regardless of the justness of their cause, and that, conversely, non-state actors must adhere to law notwithstanding their perception of the conflict.
   b. It should be pragmatically acknowledged that in practice, powerful or democratic states are constrained by heavier expectations, although these are not enumerated as such in black-letter law.
   c. It must be understood that any claims for amendment of positive IHL, including by merger of *jus ad bellum* and *jus in bello*, can be mirrored by similar claims advanced by the parties.
   d. In all discussions of proportionality, it must be emphasized that proportionality is a value-based test, and is therefore heavily contextual.
   e. It should be recognized that the "reasonable" military commander standard imposes a higher degree of responsibility on senior command, as opposed to junior commanders.

3. With regard to the question of "concrete and direct military advantage":
   a. The widely accepted point of departure is that the military advantage—of the type that can lawfully be acquired while causing proportional collateral damage—must be relatively close to the results of the attack, and cannot extend to further economic or political goals.
   b. When considering the assessment of military advantage, a reasonable "middle" position is that collateral damage should be assessed in light of the unit's mission, rather than only in light of the immediate advantage or the campaign objectives at large.
   c. Commanders should refrain from referring to incidental harm or any other harm to civilian objects as a legitimate agent of deterrence.
   d. The only form of deterrence that might be justified, under *jus in bello*, as a direct military advantage, is "tactical deterrence" against enemy units.
   e. The discourse on the "Dahiya Doctrine" is understood by international actors as condoning violations of IHL, and might expose officials to criminal liability. Armed forces must emphasize (and act accordingly) that all references to "disproportionate responses" do not mean the targeting of civilians or civilian objects but is rather a claim in the realm of *jus ad bellum*; even in this context, the term "disproportionate" should be avoided.

4. Regarding the question of "force protection" and preference of one's own citizenry over the adversary's:
   a. Force protection and humanitarian considerations are not always mutually exclusive. Troops operating in relative safety would be less prone to make hasty decisions, as these are more likely to be made under life-threatening circumstances. This contention is most likely to gain more force with the advancement in technology.
   b. A stringent "order of duties" that prefers lives of soldiers over lives of civilians not under the control of the state is incompatible with IHL. Armed forces should explicitly disassociate themselves from such approaches.
   c. Lack of effective control over the civilian population in the targeted area can only affect the feasibility of precautionary measures.
   d. Force protection can be a legitimate military advantage, but must be subjected to a reasonable balancing of interests, the nature of

which must be discussed and considered by armed forces. Beyond the basic commitment to troop safety, force protection can be considered as a valid military advantage *only* when it is needed to accomplish the mission, and not for the purpose of satisfying domestic public opinion.

e. The law of targeting is generally insulated from the question of preference of one's own civilians over those of the adversary; a workable rule in this context can be that states are permitted to take more risks to spare "their own" civilians, but this fact alone does not change the *minimal acceptable standard* of obligation to spare enemy civilians.

5. Regarding the duty to take precautions in attack:
   a. The obligation to take *feasible* precautions is context-intensive; the main question is whether this standard circumscribes a unitary, objective test, or rather one that it applies differentially to armed forces of different capacities. Be it as it may, in reality, liberal-democracies and advanced militaries engaged in asymmetric conflicts are expected by third parties to "do more" by way of precautions.
   b. In addition, the context-intensive nature of the obligation itself suggests that the general capabilities of the party may be taken into account in the feasibility assessment. This must thus be subjected to a reasonable, commonsensical balance which takes note of a state's capabilities, but also does not result in absurd results that are highly unlikely to be followed.
   c. Notwithstanding the need for a "reasonable balance," there must remain a core of "objective" precautionary obligations that is unalterable, regardless of the party's relative capacities.

6. Regarding the duty to provide effective warning:
   a. Effective warning must be given unless the element of surprise is a condition for the attack's success, or when otherwise operationally impossible.
   b. Giving an effective warning is in the interest of the attacking party since it facilitates conducting proportional attacks—both in the legal realm and in the context of international legitimacy.
   c. An "effective" warning should be assessed on several criteria, in light of the operational circumstances: (a) the clarity of the

message; (b) credibility; (c) the possibility to escape the threat if acting in accordance with the warning; (d) the temporal aspect of the warning; (e) to whom the warning is addressed; and (f) the method of dissemination.

d. Where effective warning must be given, "roof-knocking" cannot serve as an effective warning in itself, but can only be used as a "last line" warning after a *previous* effective warning was given, and only if proven to be unharmful in itself.

e. The requirement of effective warning should be completely separated from the issue of distinction. Failure to adhere to advance warning does not amount to negation of the protected status of civilians.

CHAPTER 5 – A FEW COMMENTS ON THE DUTY TO INVESTIGATE VIOLATIONS OCCURRING DURING TRANSNATIONAL ASYMMETRIC ARMED CONFLICT

1. The over-legalization of the duty to investigate should not result in losing sight of the fact that there is an overwhelming consensus that there is a duty to investigate allegations of war crimes, and that this obligation must be discharged in good faith, in an effective, independent, prompt and impartial manner ("universal principles of investigations").

2. The duty to investigate (criminally) extends beyond the Grave Breaches Regime, set forth in the four Geneva Conventions, to serious violations of IHL ("war crimes"). This duty applies equally in international and non-international armed conflicts.

3. While states that seek enhanced enforcement can choose to criminalize other behaviors as well, the *duty* to embark on a criminal investigation arises, at minimum, in relation to *war crimes* allegedly committed by their nationals or on their territories.

4. Even violations that do not require a *criminal* investigation must be suppressed. Suppression too requires a credible investigation (or "examination") to establish the relevant facts.

5. Violations of international human rights law can also give rise to an independent duty to conduct criminal investigations during armed conflict. However, many times these violations correlate with acts that also constitute war crimes.

6. The question whether harm to civilians must be criminally investigated requires an initial determination whether the operation was (or should have been) conducted as an act of law enforcement, or whether it was lawfully undertaken as an act of hostility during an armed conflict.
7. Material incidental harm to civilians, even when occurring during armed conflict, requires at least a preliminary examination conducted in accordance with the universal principles of investigations, in order to assess potential criminality.
8. In occupation, where active hostilities cease, the main prism through which to conduct investigations is the law-enforcement paradigm.
9. While it is accepted that the use of military justice systems can indeed satisfy the state's duty to investigate, it is fair to expect that such systems would be under higher scrutiny with regard to issues of independence and impartiality.
10. At least in the court of public opinion, military justice systems bear a significant burden of proof. It is worth reconsidering decisions to refrain from cooperating with international bodies appointed to assess investigatory policies.
11. The preliminary examination stage ("fact-finding assessment") — meaning, the stage in which the investigating authority assesses whether there are reasonable grounds to initiate a criminal investigation, is as important as the investigation itself. This stage is especially prone to allegations of abuse.
12. Preliminary examinations must follow the core of the universal principles of investigations.
13. Operational debriefings should not serve as substantial sources of information during a preliminary examination.
14. The recommendations of Part 2 of the Turkel Report should be adopted and implemented.

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