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## The Protection of Civilian Objects : Current State of the Law and Issues de lege ferenda

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MARCO SASSÒLI AND LINDSEY CAMERON

## The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*

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### 1. Introduction

The protection of civilian objects is a crucial part of the system of international humanitarian law (IHL) governing the conduct of hostilities in armed conflicts. First, civilian objects are needed by civilians, sometimes even for their mere survival. Second, attacks against civilian objects also put civilians into danger. While it is unlawful to deliberately attack civilians, incidental civilian deaths resulting from attacks are not necessarily unlawful. Therefore, it is also important to define which objects may not be attacked, because even incidental civilian losses in connection with attacks on such unlawful targets are not admissible. All this is even truer for aerial attacks

since, unlike attacks in land warfare, aerial attacks are rarely directed exclusively at individuals.<sup>1</sup>

Attacks directed at civilian objects are prohibited not only by positive law – Article 52 of Additional Protocol I to the Geneva Conventions (hereafter: Protocol I) – but also by the very idea of humanitarian law that only violence that is militarily necessary can be admissible.<sup>2</sup> However, civilian objects cannot be positively defined. Article 52 rather defines them as “all objects which are not military objectives” and then defines the latter, which (together with combatants) are the only lawful targets of attacks. Defining what is permissible is unusual for IHL, but, as we will show, it is unavoidable in this case and has the advantage of underlining the point that the overwhelming majority of things may not be attacked. The general protection of civilian objects is therefore simply the reverse side of the fundamental prescription to attack only military objectives, a concept which will be our first and most difficult concern in this paper. However, even an attack directed against a military objective is unlawful if it must be expected to lead to excessive incidental damage to civilian objects. Furthermore, even during lawful attacks precautionary measures to spare civilian objects must be taken. These additional rules will also be dealt with in this paper, although they concern civilian objects and civilians equally.

Beyond this general regime protecting all civilian objects, some categories of civilian objects, such as cultural objects, objects indispensable to the survival of the civilian population, the natural environment and works and installations containing dangerous forces benefit from special protection.<sup>3</sup> This special protection consists mainly of rules facilitating the identification of such objects, of prohibitions of various extents to attack such objects even when they turn into military objectives, and, in part, of prohibitions to use such objects for purposes related to the military effort. In this contribution, we will not deal with these regimes of special protection. Nor will we deal with the protection of civilian objects at sea, where civilian

<sup>1</sup> The most conspicuous recent exception is the use of aerial attacks against individual “leadership targets” in Iraq and Israel. However, since these attacks are carried out against persons and not civilian objects, they fall outside the scope of the present study.

<sup>2</sup> Note however that at the Diplomatic Conference, which adopted *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, in 1125 UNTS, 3 - 434, France objected to the prohibition of attacks on civilian objects arguing that in many situations of self-defence it was impossible to distinguish civilian objects from military objectives (See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974-1977)* (Berne, 1978) vol. VI, 169 and 186 [Official Records]). Some military analysts criticize that Protocol I offers civilians and civilian objects the same level of protection (W. H. Parks, *Air War and the Law of War*, in (1990) 32 *The Air Force Law Review*, 146-149).

<sup>3</sup> See Protocol I, *supra* note 2, Articles 53-56.

objects are perforce means of transport, animals, or are situated on means of transport. The protection of civilian objects against aerial attacks is therefore equivalent to that of civilian passenger and cargo ships, an issue dealt with by specific rules of the law of sea warfare, which have recently been restated in the San Remo Manual of Sea Warfare.<sup>4</sup>

In the past five years, there have been three conflicts involving significant aerial bombardment, all of which have led to dramatic footage on the news. It is therefore not surprising that debate over the definition of military objectives and civilian objects under IHL and the regime designed to protect the latter has resurfaced. Under what conditions was the destruction of apparently civilian objects such as schools, mosques and residential houses lawful? Do the supposed purposes and the reasons given for an attack matter? The NATO bombardment of the Federal Republic of Yugoslavia tested (and pushed) the limits of aerial warfare since it was designed to accomplish NATO's goals without an accompanying ground invasion. There was concern that air war planners would run out of targets before achieving the war's objectives.<sup>5</sup> In Iraq, the belligerents declared their respect for the laws of war, yet we witnessed and continue to witness many civilian deaths and the destruction of many seemingly civilian objects by air attacks. Was IHL violated, or is it inadequate to protect civilian objects in contemporary armed conflicts?

The answer first and foremost depends upon an accurate assessment of the facts.<sup>6</sup> Were the victims of cluster bomb attacks we saw on our TV screens actually civilians? If so, were they hurt or killed while working in military facilities or at home? If at home, was this home situated near important military facilities? Were the Iraqi authorities even deliberately placing military facilities on the roofs or in the courtyards of civilian houses? How important were those facilities for the Iraqi military effort and how important was their destruction for the concrete US war plan? How many civilians and civilian objects were incidentally affected by a given attack directed at an undisputed military objective? Was the destruction of civilian objects a mistake? What measures did US forces take to avoid such mistakes? What measures did they take to minimize unintended destruction of civilian objects while attacking a military facility? Could they have taken additional precautionary measures? Had they alternatives permitting them to obtain a similar military advantage, while attacking another objective, using another weapon or doing it at another time? What did those who decided

<sup>4</sup> See International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, L. Doswald-Beck (ed.), Cambridge, 1995.

<sup>5</sup> See *infra* note 108.

<sup>6</sup> A good overview of media reports on IHL issues in Iraq may be found on the Website of the International Humanitarian Law Research Initiative, Monitoring IHL in Iraq, at: <http://www.ihlresearch.org/iraq>.

upon the attack know about their target and the civilians surrounding it? Could they have known more?

The authors of this contribution cannot provide the true answers to those questions. They can only deal with the law. As always in law, the most controversial issues are those that test the boundaries of categories. At present, one of the most controversial issues with respect to defining civilian and military objects are media and broadcasting facilities. Not far behind are power generating stations, roads, railways, and bridges. Frequently, however, more damage to civilian objects (and civilian casualties) occurs as a result of failure to respect the principles of proportionality and precaution, and not as a result of failure to respect the prohibition to attack civilian objects or of a broad definition of military objectives.

## 2. Historical background

The obligation to distinguish military from civilian objects is an uncontroversial, longstanding principle of IHL which now finds itself codified as Article 48 of Protocol I.<sup>7</sup> Only military objectives and combatants may be directly attacked.

The history of the prohibition of attacks on civilian objects as it relates to air warfare is well known. In 1899 there was agreement, albeit tentative, to prohibit the use of hot air balloons “or other new methods of a similar nature” to launch projectiles in war.<sup>8</sup> The 1907 Hague Regulations prohibited attacks on undefended towns or villages and exhorted armed forces to avoid in sieges and bombardments of defended towns bombing

<sup>7</sup> It is considered that although earlier instruments regulating war did not expressly distinguish between civilians and combatants, this principle was implicit in the understanding that only military defeat was a legitimate objective. Moreover, the system comprising the Hague Rules of 1899 and 1907 through to the Additional Protocols of 1977 was “founded on this rule of customary law”, according to Y. Sandoz/C. Swinarski/B. Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, Dordrecht, 1987, para. 1863-1866 [hereinafter *Commentary*]. See also Protocol I, *supra* note 2, 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”. The International Tribunal for the Former Yugoslavia (ICTY) affirms the customary nature of this principle in *Prosecutor v. Blaškić* (2004) Case No. IT-95-14, (ICTY Appeal Chamber) and *Prosecutor v. Galić* (2003) Case No. IT-98-29, (ICTY, Trial Chamber).

<sup>8</sup> *Declaration (IV, 1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature*, The Hague, 29 July 1899, reproduced in D. Schindler/J. Toman, *The Laws of Armed Conflicts*, 4<sup>th</sup> ed., Leiden/Boston, 2004, at 310.

religious, cultural, medical and scientific institutions “provided they are not being used at the time for military purposes”<sup>9</sup> – which means that not all civilian objects were protected.<sup>10</sup> At that time the general prohibition against aerial attacks was also renewed, but only until the end of the Third Peace Conference, which never took place.<sup>11</sup> The principle that only military objectives may be attacked appeared first in regulations regarding naval bombardment.<sup>12</sup> In the early 1920s, there was an attempt by the Commission of Jurists of The Hague<sup>13</sup> to define military targets that could legitimately be subject to aerial bombardment. Although this draft never saw the light of day as a convention, it echoes the principle first codified in St. Petersburg in 1868 that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”<sup>14</sup> and clearly foreshadows the eventual Article 52 of Protocol I, adopted more than 50 years later. In 1923, the Commissioners adopted the following rule:

Article 24

1. An air bombardment is legitimate only when directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent;
2. Such bombardment is legitimate only when directed exclusively against the following objectives: military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military

<sup>9</sup> Articles 25 and 27 of the [Hague] *Regulations concerning the Laws and Customs of War on Land, annex to Convention (IV) respecting the Laws and Customs of War on Land*, The Hague, 18 October 1907, reproduced in Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York, 1918, 100-132, and in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 74.

<sup>10</sup> Such old practices have not survived (see UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, at para. 15.16.3 [UK Manual]).

<sup>11</sup> See *Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons*, The Hague, 18 October 1907, reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 309. It did therefore not avert the use of aircraft to launch projectiles during the First World War.

<sup>12</sup> *Convention (IX) Concerning Bombardment by Naval Forces in Time of War*, The Hague, 18 October 1907, Article 2 (reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 1079: “Military works, military or naval establishments, depots of arms or war ‘matériel’, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”).

<sup>13</sup> This was a group created by the Washington Conference on Disarmament in 1922.

<sup>14</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St. Petersburg, 29 November/11 December 1868, G. F. de Martens, *Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international*, Gottingue, 1ère Série 1843-1875, Vol. XVIII, 474-475; reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 91 [St. Petersburg Declaration].

supplies, lines of communication or transport which are used for military purposes;

3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

[...] <sup>15</sup>

Article 24 differs from the treaty provisions governing air warfare that later entered into force due to its relative specificity. In 1938, the League of Nations Assembly passed a resolution prohibiting the bombing of civilians and civilian objects.<sup>16</sup> In 1956, the ICRC proposed “Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War”, which sought to restrict aerial attacks only to objects which, “in view of their essential characteristics” were “generally acknowledged to be of military importance.” A list of such objectives was set out in an annex to the Draft Rules.<sup>17</sup> Then, finally, between 1974 and 1977, a diplomatic conference resulted in the adoption of the Additional Protocols I and II to the Geneva Conventions. No specific regime exists for air warfare. However, the definition of military objectives and rules for targeting and attacks are set out in the section of Protocol I dealing with “General Protection Against Effects of Hostilities”; this section applies to aerial attacks aimed at objectives on land.<sup>18</sup> The treaty regime is rounded out by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, its two Protocols and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, with its different and in some cases revised Protocols.

<sup>15</sup> *General Report of the Commission of Jurists at The Hague: Part I, Rules for the Control of Radio in Time of War; Part II, Rules of Aerial Warfare*, The Hague, December 1922 – February 1923, in (1923) 17 *AJIL* “Official Documents”, Supp., at 242 [*Hague Rules on Air Warfare*]. Reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 315.

<sup>16</sup> See *Protection of Civilians Against Bombing From the Air in Case of War*, Resolution of the League of Nations Assembly, 30 September 1938, reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 329.

<sup>17</sup> The Annex included, in addition to armed forces and military objects such as barracks, fortifications, Ministries, arms and vehicle stores, etc., “(6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance; (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance; (8) industries of fundamental importance for the conduct of the war.” See *Commentary*, *supra* note 7, para. 2002 and accompanying notes.

<sup>18</sup> Protocol I, *supra* note 2, Article 49(3).

This brief overview illustrates that lawmakers have moved from attempts at a total prohibition against launching projectiles from the air to attempts to restrain it using lists and the principles of distinction, proportionality and precaution. Early attempts at imposing restraints attempted to outline civilian objects which may not be attacked and listed some military objectives. Following the Second World War, the principle of distinction, based on a definition of military objectives and coupled with the correlative principles of proportionality and precaution, has become the preferred method of “alleviating as much as possible the calamities of war”<sup>19</sup> in this respect.

### 3. Preliminary issues

#### 3.1. Applicability of the same rules to the protection of civilian objects on land from aerial and land attacks

Article 49(3) of Protocol I clarifies that the provisions of that treaty on the protection of the civilian population and civilian objects against the effects of hostilities “apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.” While other aspects of this provision have given rise to controversies<sup>20</sup> it is uncontroversial that the said part of Protocol I applies to aerial and missile bombardments directed at targets on land.

As important air Powers are not party to Protocol I, the question arises whether under customary law the same rules apply to all attacks on targets on land, including those directed from the air, even though the latter case was traditionally discussed under the heading of the law of air warfare. The answer must be affirmative for several reasons. First, modern technology makes attacks on a given target by the air force, missiles or artillery interchangeable. Second, most discussions on the law of the conduct of hostilities in recent years, by States, NGOs, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and

<sup>19</sup> *St Petersburg Declaration*, *supra* note 14.

<sup>20</sup> See for the dispute on whether and to what extent the provisions of Protocol I apply to naval warfare, H. Meyrowitz, *Le protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime*, in (1985) 89 *RGDIP*, 245 at 254, and E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare*, Berlin, 1984, at 57.



authors referred mainly to aerial attacks, but no one claimed that the law applicable to land attacks would be different.<sup>21</sup> The US Department of Defense Report on the Conduct of the 1991 Gulf War discusses targeting mainly in relation to cases which actually consisted of aerial bombardments, but makes no distinction between those attacks coming from the air or by missiles or artillery. As for the standards it applies, it refers exclusively to the law of land warfare, including Article 23(g) of the Hague Regulations, and applies or criticizes (indifferently for air and land warfare) certain provisions of Protocol I.<sup>22</sup> A US Air Force military manual reproduced nearly all rules of Protocol I without changing one word.<sup>23</sup> At the diplomatic conference which adopted Article 49(3), there were considerable controversies about that provision, in particular as to whether the rules of the Protocol should only apply to attacks against objectives “on land,” but no State questioned the idea that at least those attacks should be covered.<sup>24</sup>

### 3.2. Rules applicable to air-to-air warfare

In the air, civilian objects are perforce means of transport, animals, or are situated on means of transport. The protection of civilian objects from air-to-

<sup>21</sup> Human Rights Watch, *Civilian Deaths in the NATO Campaign* (2000); Amnesty International, “Collateral Damage” or Unlawful Killings? *Violations of the Laws of War by NATO During Operation Allied Force* (2000); *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 1999, in (2000) 39 *ILM*, 1257; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003); Amnesty International, *Iraq: Civilians Under Fire* (2003) and, e.g., H. Meyrowitz, *Le bombardement stratégique d’après le Protocole I aux Conventions de Genève*, in (1981) 41 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1; W. A. Solf, *Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I*, in (1986) 1 *American University Journal of International Law and Policy*, 107; Y. Dinstein, *Legitimate Military Objectives Under The Current Jus In Bello*, in A. E. Wall, (ed.), *Legal and Ethical Lessons of NATO’s Kosovo Campaign*, Vol. 78 US Naval War College’s International Law Studies, Newport, 2002, at 139; F. Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, London, 1993, at 94; B. M. Carnahan, *Linebacker II and Protocol I: The Convergence of Law and Professionalism*, in (1982) 32 *American University Law Review*, 861; Parks, *Air War and the Law of War*, *supra* note 2.

<sup>22</sup> US Department of Defense Report to Congress on the Conduct of The Persian Gulf War, in (1992) 31 *ILM*, 612-644.

<sup>23</sup> See *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet AFP 110-31, of 19 November 1976, 5-7.

<sup>24</sup> See *Official Records*, *supra* note 2, vol. XIV, 13-25, 85, and in particular, *ibidem*, vol. XV, 255, a working group reporting to the competent committee of the conference that it was unanimously of the view that the rules should at least cover military operations from the air against persons and objects on land.

air attacks therefore boils down to the protection of civilian aircraft. In air-to-air warfare, it is uncontroversial, as formulated by Oppenheim/Lauterpacht, that the same “humanitarian principles of unchallenged applicability [apply as in land warfare, including] the fundamental prohibition of direct attack upon non-combatants [and therefore, we would add, also the principle of distinction and the prohibition of indiscriminate attacks]. Whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of air warfare”.<sup>25</sup>

Instances of express agreement in treaties do not exist, since the Hague Rules of 1923, which contain many provisions on air-to-air warfare, were never accepted as a treaty.<sup>26</sup> There are however currently efforts by experts to restate the law applicable to air and missile warfare.<sup>27</sup>

Any modification of the fundamental principles, as formulated more precisely by the rules for attacks on targets on land, must therefore be “proved by reference to the peculiar conditions of air warfare.” In this respect, the Hague Rules and the provisions of the San Remo Manual (concerning aircraft in sea warfare) may assist in identifying in what respect the details must be adapted to the physical realities of the air environment. One of the realities of that environment, mentioned by Oppenheim/Lauterpacht, is that “the danger of surprise on the part of apparently inoffensive civil aircraft will probably impose upon the latter special restraints as the price of immunity”.<sup>28</sup>

The Hague Rules defined circumstances in which aircraft lose their protection very broadly, due to the more rudimentary means of verification and communication existing at the time. They stated in particular that enemy

<sup>25</sup> L. Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, 7<sup>th</sup> ed., H. Lauterpacht (ed.), London, 1952, at 520. The US Air Force Pamphlet stipulates that “[t]he law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land and sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources” (*Air Force Pamphlet 110-31*, *supra* note 23, para. 1-3(c), 1-7). The Canadian Manual mentions that its chapter 7 “Law relating to the conduct of hostilities in the air” must be read in conjunction with chapters 4 “Targeting” and 5 “Restrictions on the use of weapons”, (see Office of the Judge Advocate General, National Defense, *Law of Armed Conflict at the Operational and Tactical Levels*, Doc. B-GJ-005-104/FP-021, para. 701, at 7-1. See [http://www.forces.gc.ca/jag/training/publications/law\\_of\\_armed\\_conflict/loac\\_2004\\_e.pdf](http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf)).

<sup>26</sup> See the *Hague Rules on Air Warfare*, *supra* note 15.

<sup>27</sup> In the framework of the International Humanitarian Law Research Initiative, the Harvard Program on Humanitarian Policy and Conflict Research launched in 2004 a new academic research project to restate the rules of IHL applicable to air and missile warfare (see [http://www.hsph.harvard.edu/hpcr/ihl\\_research.htm](http://www.hsph.harvard.edu/hpcr/ihl_research.htm)).

<sup>28</sup> Oppenheim/Lauterpacht, *International Law*, Vol. II, *supra* note 25, at 530.

civilian aircraft “are exposed to being fired at” when flying within the jurisdiction of the enemy; in the immediate vicinity of such jurisdiction and outside that of their own country; in the immediate vicinity of the military land and sea operations of the enemy; or even within the jurisdiction of their State, but there only if they do not land at the nearest suitable point when an enemy military aircraft is approaching.<sup>29</sup> The conditions for neutral civilian aircraft were also formulated very broadly in the Hague Rules.<sup>30</sup> From the wording of the rules, it is not clear whether the terms “are exposed to being fired at” refer to a factual risk of aircraft engaged in such behaviour or to a loss of immunity in law. Here too, “the fundamental prohibition of direct attack upon non-combatants” which was “unchallenged” even at that time, leads us to the understanding that the terms could only refer to the factual risk such aircraft take, but not to a license to deliberately attack civilian aircraft identified as such and known not to be engaged in hostile activities. Today, the circumstances that make enemy and neutral civil aircraft lose protection are listed in the most detailed manner, confirmed by several military manuals, in several rules of the San Remo Manual.<sup>31</sup>

### 3.3. Rules applicable to non-international armed conflicts

Most contemporary armed conflicts are not of an international character. Aerial bombardments on civilian objects are no less frequent in non-

<sup>29</sup> See Articles 33 and 34 of the *Hague Rules on Air Warfare*, *supra* note 15.

<sup>30</sup> *Ibid.*, Articles 30, 35, 50 and 51.

<sup>31</sup> See *San Remo Manual*, *supra* note 4, Rules 53-58 for medical aircraft, civilian airliners and aircraft granted safe conduct, Rules 62 and 63 for civil aircraft, and Rule 70 for neutral civil aircraft. In our view the US Navy Commander’s Handbook simply summarizes those circumstances when it stipulates that enemy civilian aircraft may be attacked and destroyed by military aircraft only when persistently refusing to comply with directions from the intercepting aircraft, when sailing under convoy of enemy military aircraft, when armed, when incorporated into or assisting in any way the enemy’s military intelligence system, when acting in any capacity as a military auxiliary to an enemy’s armed forces, and when otherwise integrated into the enemy’s war-fighting or war-sustaining effort. Neutral civilian aircraft may be treated by a belligerent as *enemy military aircraft* when engaged in taking a direct part in the hostilities on the side of the enemy, or acting in any capacity as military auxiliary to the enemy’s armed forces and as enemy civilian aircraft “when engaged in operating directly under enemy control, orders, charter, employment, or direction, or resisting an attempt to establish identity, including visit and search” (*The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M (Formerly NWP 9) FMFM 1-10 COMDTPUB P5800.7, Naval Warfare Publication, Department of the Navy, Office of the Chief of Naval Operation, paras 7.5.1, 7.5.2 and 8.4, <http://www.cpf.navy.mil/pages/legal/NWP%201-14/NWP1-14%20COVER.htm>. The Canadian Manual, *supra* note 25, para. 714, at 7-6, is even more summary when it stipulates that civilian aircraft engaged in support of military activities, such as ferrying troops, may be attacked.

international than in international armed conflicts. The treaty law applicable to non-international armed conflicts (Article 3 common to the Geneva Conventions and Protocol II) does not contain rules on the general protection of civilian objects.<sup>32</sup> Certainly, attacks on civilians are prohibited and the civilian population enjoys general protection against the dangers arising from military operations.<sup>33</sup> It is difficult to imagine how those rules can be respected without limiting attacks to military objectives. The principle of distinction, which clearly applies in non-international armed conflicts, must therefore be understood in such conflicts as not only implying an obligation to distinguish civilians from combatants, but also civilian objects from military objectives. It would be absurd to claim that in a non-international armed conflict, an attack upon a weapons factory and upon a school are equivalent under IHL simply because in both cases civilians are killed.

As for customary international law, in its first decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) gave very detailed explanations to show that the rules applicable to the conduct of hostilities in non-international armed conflicts have evolved over the last century to become largely equivalent to those existing for international armed conflicts.<sup>34</sup> In its practice, the ICTY applies IHL on the conduct of hostilities in both categories of conflicts without distinction.<sup>35</sup> The deletion by majority vote and by consensus, respectively, of the two draft provisions protecting civilian objects by the diplomatic conference which adopted Protocol II<sup>36</sup> may indicate that States (at least in 1977) were not yet convinced of those alleged customary rules and that the latter therefore lacked (at least at that time) the necessary *opinio juris* (not to mention that the actual practice in non-international armed conflicts corresponds even more rarely to those alleged rules than in international armed conflicts). However, those drastic decisions to delete the two pertinent provisions of Protocol II were not specifically directed at civilian objects, but were rather only an aspect of the general preoccupation of the Third World majority of the negotiating States to preserve what they saw as their national sovereignty, avoiding a detailed development of the conventional

<sup>32</sup> See *Commentary*, *supra* note 7, para. 4759, 4794, and 4817.

<sup>33</sup> See *Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, in 1125 UNTS, 609, Article 13(1) and (2).

<sup>34</sup> *Prosecutor v. Tadić, Jurisdiction Appeal*, (1995) Case No. IT-96-I (ICTY, Appeals Chamber), paras. 100-118.

<sup>35</sup> See, e.g., *Prosecutor v. Martić, Rule 61 Decision* (1996) Case No. IT-95-11-I, (ICTY, Trial Chamber I) para. 8-14, and *Prosecutor v. Kupreškić et al., Judgment* (2000) Case No. IT-95-16, (ICTY Trial Chamber II), para. 525-536.

<sup>36</sup> See *Official Records*, *supra* note 2, vol. VII, 134-135.

norms applicable to non-international armed conflicts.<sup>37</sup> It is interesting to note that the Rome Statute of the International Criminal Court, which has criminalized many violations of IHL of non-international armed conflicts by provisions similar to those covering international armed conflicts, lacks a provision criminalizing attacks against civilian objects<sup>38</sup> but covers “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”.<sup>39</sup> While many issues concerning the protection of civilian objects described in this paper must be dealt with in an analogous way in non-international armed conflicts, it would go beyond its scope to determine the exact extent and possible limits to that analogy as far as the legal obligations are concerned. The ICRC study on customary international humanitarian law, comprising a list of rules found to be customary law based upon a very detailed examination of practice, both in international and non-international armed conflicts, will certainly be very useful in this respect.<sup>40</sup> One of its main aims is indeed to clarify the principles and laws governing non-international armed conflicts that are not codified in Protocol II.

In practice, an air force is trained based on the law of international armed conflicts. The few military manuals that deal separately with non-international armed conflicts explicitly prohibit attacks against civilian property.<sup>41</sup> We cannot imagine that the process of selecting targets, weapons and attack modalities could be different according to the legal qualification of the conflict in which it takes place. We are also unable to imagine how in air warfare (even more than for land warfare) a belligerent could respect its obligation to respect the civilian population without determining the objects it may or may not target and then applying the principles of proportionality and precaution.

<sup>37</sup> See *Commentary*, *supra* note 7, para. 4410-4418, and D. Momtaz, *Le droit international humanitaire applicable aux conflits armés non internationaux*, in (2001) 292 *RCADI*, at 95.

<sup>38</sup> For international armed conflicts see Article 8(2)(b)(iii) of the *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF 183/9.

<sup>39</sup> *Ibid.*, Article 8(2)(e)(xii).

<sup>40</sup> J. M. Henckaerts/L. Doswald-Beck, *Customary International Humanitarian Law*, (ICRC, Cambridge, 2005); see already J. M. Henckaerts, *Study on Customary rules of international humanitarian law: Purpose, coverage and methodology*, in (1999) 81 *IRRC*, 660.

<sup>41</sup> See e.g. *UK Manual*, *supra* note 10, para. 15.16, and S. Oeter, *Means and Methods of Combat*, in D. Fleck (ed.), *The Humanitarian Law in Armed Conflicts*, New York, 1995, 105 at 153.

## 4. Distinguishing military objectives from civilian objects

### 4.1. Defining civilian objects and military objectives

The principle of distinction is of limited value without a definition of at least one of the categories between which the attacker must distinguish. From the point of view of the philosophy of IHL, it would have been more satisfactory to define civilian objects.<sup>42</sup> However, since it is not due to the intrinsic character of an object, but rather to its use by the enemy or potential use for the attacker that an object becomes a military objective, military objectives had to be defined. Indeed, every object other than those benefiting from special protection<sup>43</sup> may become the legitimate object of an attack.

Although we have seen that in the past there have been attempts to formulate a list of legitimate military objectives, the current approach favours a flexible definition as opposed to a list. Despite the challenges of interpretation this approach engenders,<sup>44</sup> this method is preferable because it adapts the legal obligations to the actual situation, it allows the attack of an object or installation only when militarily necessary in a given military operation, and it permits the law to remain current despite changes in technological and military capabilities. Such flexibility should avoid automatism in both directions, *i.e.*, there should be no assumption that certain objects may always be attacked or that others may never be attacked.

According to Article 52(2) of Protocol I, military objectives “are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

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<sup>42</sup> The *Commentary*, *supra* note 7, at paras. 2015-2016, notes that the ICRC grappled with this problem considerably before taking the decision to define objects that could be attacked, rather than objects that could not.

<sup>43</sup> Those specially protected objects (see *supra* note 3) may not be used by those who control them for military action and should therefore never become military objectives. However, if they are used for military purposes, even they can, under restricted circumstances, become military objectives. See *e.g.*, Article 56(2) of Protocol I, *supra* note 2, and Article 19 of Convention IV, *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, in 75 *UNTS*, 287.

<sup>44</sup> See, for arguments in favour of establishing a list, even if such list were merely illustrative or non-exhaustive, Dinstein, *Legitimate Military Objectives*, *supra* note 21, 141-142. Against the establishment of such a list in the same debate, see W. H. von Heinegg, *Commentary*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, 203 at 204. See also H. Reinhold, *Target Lists: A 1923 Idea with Applications for the Future*, in (2002) 10 *Tulsa J. Comparative & International Law*, 1, who argues that NATO should adopt the target list from the 1923 Hague Rules on Air Warfare as a policy tool to develop specific target lists prior to any action.

Unpacking this definition, we observe that an object must cumulatively fulfil two criteria to be a military objective. First, the object must contribute *effectively* to the military action of the enemy. Its ability to do so turns on its “nature, location, purpose or use”, which makes clear that not only objects of a military nature are military objectives. Second, the object’s capture, destruction, or neutralization must offer a *definite* military advantage for the attacking side. Both elements must be satisfied cumulatively. This definition squares with principles of military economy and general logic. By characterizing the object’s necessary contribution as *effective* and the military advantage resulting from the attack as *definite*, drafters sought to avoid too broad an interpretation of what constitutes a legitimate military objective, excluding *indirect* contributions and *possible* advantages. Without this restriction, the limitation to “military” objectives would be too easily undermined. According to declarations of understanding by countries ratifying the Protocol, the military advantage anticipated from the attack is intended to refer to the military advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.<sup>45</sup> An attack as a whole must, however, be a finite event, not to be confused with the entire war.<sup>46</sup> Note that several States hold that a specific area of land may be a military objective if it satisfies the cumulative criteria set out above.<sup>47</sup>

In addition, these criteria must be fulfilled “in the circumstances ruling at the time.” This proviso is crucial. Without this limitation to the actual situation at hand, the principle of distinction would be meaningless, as every object could, *in abstracto* and under possible future developments, become a military objective. It would suffice that enemy troops could in future occupy a building to transform it into a military objective.

Only a material, tangible thing can be a target.<sup>48</sup> Thus, intangible objectives, such as victory, public will, or morale cannot be the legitimate objects of attack. Taken literally, the separate requirement that the attack must offer a definite military advantage means that even an attack on an objective of a military nature would not be lawful if its main purpose is to

<sup>45</sup> *Official Records*, *supra* note 2, vol. VI, 164 (UK), 179 (Canada), 188 (Germany), 195 (The Netherlands), 231 (Italy), 241 (US), and upon ratification Belgium, Italy, The Netherlands, the UK, New Zealand, Spain, and France. See for the text of declarations under the name of the respective States in the ICRC IHL database, <http://www.icrc.org/ihl.nsf/WebPAYS?OpenView>.

<sup>46</sup> Hampson, *Means and Methods of Warfare*, *supra* note 21, at 94, and Dinstein, *Legitimate and Military Objectives*, *supra* note 21, at 145.

<sup>47</sup> *Official Records*, *supra* note 2, vol. VI, 169 (UK), 179 (Canada), 188 (Germany) 195 (The Netherlands), and 204 (US).

<sup>48</sup> See *Commentary*, *supra* note 7, para. 2007-2008.

affect the morale of the civilian population and not to reduce the military strength of the enemy.<sup>49</sup>

On its face, the negative definition of civilian objects in Protocol I means that the two concepts of military objectives and civilian objects are complementary and mutually exclusive. Everything falls under one of the two categories and nothing falls simultaneously under both terms. Contrary to the distinction between civilians and combatants, what belongs to the two categories is however neither fixed nor irreversible. In addition, one may express some doubts whether an object of a military nature, *e.g.* a tank, truly falls, as the wording of Article 52(1) suggests, under the category of civilian objects if, in a given situation, there is no military advantage in destroying it. In any case, it is not lawful to attack such an object.

#### 4.2. Customary character of the definition provided in Article 52 of Protocol I

Since some States frequently involved in armed conflicts, *e.g.* the US, Israel, Iran and Iraq, are not among the 162 States Parties to Protocol I, it may be appropriate to consider whether the definition of military objectives provided in Article 52(2) of that Protocol reflects customary international law. Without going into a detailed study,<sup>50</sup> let us outline the following points. While actual State behaviour in some conflicts, including World War II, may appear to favour next to no distinction between civil and military objects, in fact, *opinio juris* and some practice support the argument that the method of distinguishing between military and civilian objects set out in Article 52(2) reflects customary law. During the highly destructive bombing campaigns of the Second World War, belligerents claimed that they attacked exclusively military objectives. They defined military objectives using the same criteria as above; the result of their attacks belied the principle of distinction as it is understood today mainly due to indiscriminate (carpet) bombing techniques. During the Vietnam War, the US and North Vietnam largely agreed on what is a legitimate military target according to criteria that would satisfy the definition in Protocol I, indicating that the *opinio juris* of the parties supported the definition of military objectives. They simply disagreed over what was the actual target of US aerial bombardments. Even during the “Christmas bombing” of Hanoi in 1972, the declared objectives would fit

<sup>49</sup> As was the case in Kosovo, according to J. M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, in (2001) 51 *The Air Force Law Review*, 143 at 176.

<sup>50</sup> See M. Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Basel, Frankfurt am Main, 1990, 359-376.



under the definition of military objectives under Protocol I.<sup>51</sup> Moreover, the wording of Article 52(2) appears in military manuals around the world, including in the US, despite its not having ratified the Protocols<sup>52</sup> and is repeated in other conventional instruments.<sup>53</sup> US officials have on several occasions expressed their opinion that this definition corresponds to customary international law.<sup>54</sup> Moreover, during its 1982 invasion of Lebanon, Israel insisted that “operations were carried out only on the basis of the concrete and direct military advantage anticipated”.<sup>55</sup> Neither side in the Iran-Iraq war disputed the definition of a military objective; rather, only what was actually attacked was a matter of controversy.<sup>56</sup>

<sup>51</sup> Carnahan, *Linebacker II and Protocol I*, *supra* note 21, 864-865.

<sup>52</sup> *US Army Manual FM 27-10, Change 1* of 15 July 1976, Article 40 c; *Air Force Pamphlet 110-31*, *supra* note 23, 5-8 and 5-9. See however for a more recent manual and instructions, which consider a contribution to the “war-sustaining effort” as sufficient to make an object a military objective, *infra* note 100.

<sup>53</sup> Repeated word for word in Protocols II and III of the 1980 UN *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, Geneva, 10 October 1980, in 1342 UNTS, 137; *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices* (Protocol II), in 1342 UNTS, 163, Article 2(4), and *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III) Article 1(3), in 1342 UNTS, 171; *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 26 March 1999, UNESCO Doc. HC/1999/7, Article 1(f), reproduced in Schindler/Toman, *The Laws of Armed Conflicts*, *supra* note 8, at 1039.

<sup>54</sup> See for the US position the *US Air Force Intelligence Targeting Guide*, *Air Force Pamphlet 14-210 Intelligence* at paras. A4.2.2 and A4.2.2.3 (1 February 1998), <http://www.fas.org/irp/doddir/uasf/afpam14-210/part17.htm>, and *Reconnaissance, Surveillance, and Target Acq Sppt for Joint Op*, JP 3-55 at para. 3a (14 April 1993), <http://www.fas.org/irp/doddir/dod/jp3-55ch4.htm>; H. B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in M. Schmitt (ed.), *The Law of Military Operations – Liber Amicorum Professor Jack Grunawalt*, Vol. 72, US Naval War College’s International Law Studies, 1998, 204-207; M. J. Matheson [at the time Deputy Legal Adviser of the US State Department], *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the Geneva Conventions*, in (1987) 2 *American Univ. Journal of Int. Law and Policy*, at 436 [The Sixth Annual Conference]; Critical Parks, *Air War and the Law of War*, *supra* note 2, 147-156; Meyer, *Tearing Down the Façade*, *supra* note 49, 164-182.

<sup>55</sup> Israel, Ministry of Foreign Affairs, *Briefing: The Israeli Operation in Lebanon, Legal Aspects*, (Jerusalem: Information Division, 18 July 1982).

<sup>56</sup> See *Mission to Inspect Civilian Areas in Iran and Iraq which have been subject to Military Attack, Report by the Secretary General*, UN Doc. S/15834, partly reproduced in M. Sassòli/A. Bouvier, *How does Law Protect in War?*, Geneva, ICRC, 1999, at 989.

### 4.3. The presumptive civilian character of certain objects

Paragraph three of Article 52 indicates that the intrinsic nature of an object is not totally irrelevant when assessing whether it is a legitimate military objective:

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.

This provision imposes a higher standard of verification based on the intrinsically civilian nature of an object.<sup>57</sup> The presumption was meant by the drafters as a partial replacement of a definition of civilian objects, but already at the diplomatic conference it met some objections and even those favouring the presumption admitted that it did not reflect customary law but constituted a progressive development.<sup>58</sup> Indeed, apart from the general difficulty of considering presumptions as customary (because the possible supporting practice in form of actual behaviour according to the rule may always be seen as concerning a situation in which there was no doubt), this presumption simply does not enjoy sufficient State support to be customary.<sup>59</sup> Resistance is particularly motivated by the fear that a defender may be tempted to conceal its military forces in civilian installations – which does not violate IHL.<sup>60</sup>

A conclusion that the presumption does not correspond to customary law should however not be misunderstood. First, it only covers cases of doubt. Where nothing indicates that an object contributes to military action, it may clearly not be attacked. When confronted with a place of worship, a house or a school, only very strong clues that they effectively contribute to military action may raise doubts about their civilian character. In this sense, such objects benefit from a factual presumption that they are civilian. Second, in cases of genuine doubt, there is clearly no opposite presumption that the object is a military objective. The decision-maker must, rather, as always

<sup>57</sup> See discussion *infra*, 4.5.2., regarding dual use objects and exclusion of infrastructure and transportation from the provision.

<sup>58</sup> See *Official Records*, *supra* note 2, vol. XV, 277 and 332; vol. XIV, 220.

<sup>59</sup> See in particular US objections to this presumption, G. Roberts, *The New Rules for Waging War: The Case against Ratification of Additional Protocol I*, in (1985) 26 *Virginia Journal of International Law*, 109 at 150-151; B. M. Carnahan, *Additional Protocol I, A Military View*, in (1986) 19 *Akron Law Review*, 543-545, but the conclusion that it does not correspond to customary law is shared by F. Kalshoven, in (1980) *ASIL Proceedings*, at 203; E. Rauch, *Attack Restraints, Target Limitations and Prohibitions or Restrictions of Use of Certain Conventional Weapons*, in (1979) 18 *Revue de droit pénal militaire et droit de la guerre*, 51 at 54.

<sup>60</sup> Parks, *Air War and the Law of War*, *supra* note 2, 136-137.

when he or she lacks information, do everything feasible to obtain such information. This is not only codified in Article 57(2)(a)(i) of Protocol I, but corresponds to general international law, as it necessarily flows as a kind of procedural obligation from the customary obligation to distinguish civilian objects from military objectives.<sup>61</sup> He who launches an attack without knowing what he is attacking and without verifying the nature of the target, despite his own doubts and the fact that he could verify the target, launches a deliberately indiscriminate attack.

#### 4.4. Rationale behind limitation to military objectives

The rule that only military objectives may be attacked is based on the principle that, while the aim of a conflict is to prevail politically, acts of violence for that purpose may only aim to overcome the military forces of the enemy.<sup>62</sup> Anchored in the principle of military necessity,<sup>63</sup> as a restraint to warfare, it curbs “total war.” Indeed, acts of violence against persons or objects of political, economic, or psychological importance may sometimes be more efficient to overcome the enemy, but are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralized, even the politically, psychologically, or economically strongest enemy can no longer resist.<sup>64</sup>

#### 4.5. Challenges to the restriction of air attacks on military objectives as currently defined - Should the scope of civilian objects be narrowed?

Some recent theories and practice challenge the current definition of civilian objects. Attacks on public will and propaganda (*i.e.* broadcasting stations) constitute purported attempts to broaden what can be considered a military advantage, while theories advocating aggressive targeting of objects that

<sup>61</sup> W. G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Convention*, in (1984) 24 *The Air Force Law Review*, 189 at 235. In this sense we can agree with A. Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, in (1984) 3 *UCLA Pacific Basin Law Journal*, 55 at 89, when he writes that Article 52(3) “specifies a concept that could be inferred from the general principles on the matter. In this respect the provision should also be held to enunciate customary law”.

<sup>62</sup> As stated in the *St Petersburg Declaration*. See *supra* note 14.

<sup>63</sup> See G. Venturini, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano, 1988, in particular 145-150.

<sup>64</sup> This reasoning is qualified as “oversimplistic” by M. Schmitt, *Targeting and Humanitarian Law: Current Issues*, in (2004) *IYHR*, 59 at 68.

serve both a military and civilian purpose attempt to loosen the requirement that an object make a present and direct contribution to military action in order for it to become a target. The latter challenge relates to some theories on “dual-use” objects and “effects-based” targeting. Each of these challenges will be explored below.

#### 4.5.1. Media and broadcasting stations

Despite confusing practice in recent conflicts, broadcasting stations are not legitimate military objectives based on their role as propaganda centres for the enemy regime. Their destruction fails to satisfy the “definite military advantage” test of Article 52(2). The unpredictability of an entire population’s actions in regard to its government in a time of national crisis makes it impossible to conclude that destroying the media will provide a definite advantage to the attacking side, and in any event such advantage would not be *military*.

During the war in Iraq, the Baghdad TV station was targeted several times.<sup>65</sup> In Kabul, air forces seriously damaged the Afghanistan offices of Qatari Al Jazeera television. In Serbia, NATO admittedly and deliberately bombed Radio Television Serbia (RTS), causing 16 civilian deaths and leaving 16 others wounded. This action, which was sometimes defended by NATO officials with generic statements listing the media as legitimate objectives of attacks,<sup>66</sup> was one of the most controversial of the NATO bombing campaign. In its *Final Report to the Prosecutor*, an ICTY Commission stated “whether the media constitutes a legitimate target group is a debatable issue [...]. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target”.<sup>67</sup> However, in its analysis, the Commission suggested that the impact on Milošević’s

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<sup>65</sup> P. E. Tyler, *Heavy Iraqi Losses Seen in Big Battle in Central Region*, in *The New York Times*, March 26, 2003, <http://www.nytimes.com/2003/03/26/international/worldspecial/26MILL.html> (date of access: 26 March 2003).

<sup>66</sup> US Secretary of Defense W. S. Cohen and Chairman of the Joint Chiefs of Staff Gen. H. H. Shelton, *Joint Statement on the Kosovo After Action Review*, (14 October 1999), online: [http://www.defenselink.mil/news/Oct1999/b10141999\\_bt478-99.html](http://www.defenselink.mil/news/Oct1999/b10141999_bt478-99.html); General W. Clark, *Effectiveness and determination*, (2 June 1999), <http://www.nato.int/kosovo/articles/a990602a.htm>; The Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, UK, H.L., *Parliamentary Debates*, Vol. 600, at col. 38 and 41, (26 April 1999), <http://www.publications.parliament.uk/pa/ld/ldvol600.htm>; J.A. Burger, *International humanitarian law and the Kosovo crisis: Lessons learned or to be learned*, in (2000) 82 *IRRC* 129 at 131-132; *ICTY Final Report*, *supra* note 21, at para. 74; Amnesty International, “*Collateral Damage*”, *supra* note 21, 38-44.

<sup>67</sup> *ICTY Final Report*, *supra* note 21, para. 47.

propaganda machinery was “an incidental (albeit complementary)” aim such that the illegitimacy of this aim did not render the bombing itself illegal.<sup>68</sup>

We will first confine our discussion to the legitimacy of classifying broadcasting stations as military objectives because they are instruments of propaganda. Targeting media or broadcasting stations in order to prevent the regime under attack from communicating with its civilian citizens, defending its reasons for fighting and disseminating propaganda is tantamount to attacking the public will to maintain the conflict. As an intangible sentiment, the public will is not susceptible to definition as a legitimate military objective. While the stations themselves are tangible, the object aimed at, propaganda, or public support for the war, is intangible. The Commentary to Germany’s military manual astutely concludes, “[i]f the intention directly to influence the enemy population’s determination to fight were recognized as a legitimate objective for military force, then no limit to warfare would remain”.<sup>69</sup>

While attacks on broadcasting centres to eliminate propaganda in order to affect the public will may appear limited, they nonetheless represent an attempt to re-introduce the doctrine of total war through the back door. In addition, to hinder a regime from inciting citizens to support the war, even for those justifying the targeting of the media, is implicitly only legitimate if that regime fights an unjust war. The argument therefore conflates *ius ad bellum* and *ius in bello*. According to the basic distinction and absolute separation between *ius ad bellum* (the laws on the legality of the use of force) and *ius in bello* (the laws on how force may be used), the rules applying to those fighting for a just cause and to their enemies must be the same.<sup>70</sup> From a practical perspective, this distinction is vital to preserve respect for IHL. It will always be controversial between belligerents which of them has violated *ius ad bellum*. The victims of the conflict on both sides need the same protection. They are not necessarily responsible for the violation of *ius ad bellum* by ‘their’ party.

However, this does not mean that broadcasting stations cannot be legitimately attacked for other reasons. It is uncontroversial that if a broadcasting station is actually used to transmit military communications it is, under the limitations discussed hereafter for dual-use objects, a military

<sup>68</sup> *Id.*, at para. 76 and 79.

<sup>69</sup> Oeter, *Means and Methods of Combat*, *supra* note 41, at para. 442.

<sup>70</sup> See Protocol I, *supra* note 2, preambular para. 5; the US Military Tribunal at Nuremberg in the case of *Wilhelm List et al.*, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VIII, 34 (see for this case and other references Sassòli/Bouvier, *How does Law Protect in War?*, *supra* note 56, 83-87, and at 665, 681-682); C. Greenwood, *The Relationship between jus ad bellum and jus in bello*, in (1983) 9 *Rev. of Int’l Studies*, 221; R. Kolb, *Origin of the twin terms of jus ad bellum/jus in bello*, in (1997) 320 *IRRC*, 553; H. Meyrowitz, *Le principe de l’égalité des belligerents devant le droit de la guerre*, Paris, 1970.

objective. The question is whether the simple possibility that it may be so used is sufficient, or, in the wording of Protocol I, whether broadcasting stations are military objectives because of their “nature” or “purpose.” Some argue, on the contrary, that there is a presumption that they are civilian objects such as those listed in paragraph 3 of Article 52.<sup>71</sup> Others argue that there are no standing or permanent military objectives,<sup>72</sup> a position which is compatible with the wording of Article 52(2), but counter-intuitive for objects of a military nature, such as tanks. Others argue that broadcasting facilities are always a military objective because “enemy means of communication have always been and always will be considered legal military objectives”.<sup>73</sup> In their report recommending that the Prosecutor of the ICTY not investigate further the NATO bombing of RTS, the ICTY Commissioners concluded that RTS was a legitimate military objective without making it clear whether this conclusion was based on the alleged actual use by the FRY or upon the potential use.<sup>74</sup> A number of writers have found fault with this conclusion.<sup>75</sup> It may be difficult to argue that attacking radio and other broadcasting stations was necessary to disrupt military communications, as there was evidence that there were hundreds of other small stations in Serbia that could maintain radio contact even without RTS.<sup>76</sup> In Iraq, the Coalition forces tracked and targeted military leaders by their satellite telephone conversations,<sup>77</sup> suggesting that in the era of satellite communications, for many military leaders, radio technology is of limited military value. In Iraq, the US defended its attacks on the Baghdad television station by arguing that Saddam Hussein may use it to communicate with pro-Iraq elements outside the country and give them directions on how to participate in the war via television. They had no evidence, however, that he was doing so.<sup>78</sup>

Article 8(1)(b) of the 1954 Hague Convention for the Protection of Cultural Property<sup>79</sup> mentions that cultural property placed under special protection must be situated at an adequate distance “from any important

<sup>71</sup> As A. Balguy-Gallois argues in *Protection des journalistes et des médias en période de conflit armé*, in (2004) 86 *IRRC*, 37 at 44-45.

<sup>72</sup> M. Bothe, *Targeting*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 173.

<sup>73</sup> W. H. von Heinegg, *Commentary*, in Wall, *ibidem*, 203 at 205.

<sup>74</sup> *ICTY Final Report*, *supra* note 21, at para. 75.

<sup>75</sup> See E. David, *Respect for the Principle of Distinction in the Kosovo War*, in (2000) *YIHL*, 81 and M. Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, in (2001) 12 *EJIL*, 531 [hereinafter “*Protection of Civilian Population*”].

<sup>76</sup> David, *Principles of Distinction*, *supra* note 75, at 90.

<sup>77</sup> Human Rights Watch, *Off Target*, *supra* note 21, 27-40.

<sup>78</sup> *Id.*, at 49.

<sup>79</sup> *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 14 May 1954, in 249 *UNTS*, 240.

military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, [...].” Some authors mention this rule as evidence that all broadcasting stations are military objectives.<sup>80</sup> However, the purpose of the article is to ensure that specially protected cultural immovable property must be placed away from any location that *could* become a military objective, since it would be impossible to remove it in the midst of an actual conflict. In the past, some proposed lists of legitimate military targets included radio and broadcasting facilities, which may prompt some to conclude that such facilities are *a priori* military objectives. The ICRC included radio and broadcasting stations in an annex to its 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.<sup>81</sup> We should point out that the ICRC intended for its proposed list of military objectives to be revised every ten years. While radio communications have been crucial to military operations in the past, their usefulness may be fading.<sup>82</sup> It is entirely possible that the ICRC would now be advocating for the removal of broadcasting/radio communication stations from the list of military objectives on the basis of their lapsed/lapsing ability to meet the test of military necessity. While no object may be permanently removed from the realm of what, under certain circumstances, can become a military objective, at the very least, the assessment regarding broadcasting stations must be made on a case- by-case basis and in no circumstances may they be assumed to be *a priori* military objectives.

In sum, while the media, as symbols of propaganda, are always off limits (unless, perhaps, they are advocating commission of war crimes),<sup>83</sup>

<sup>80</sup> W. J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, in (2001) 12 *EJIL*, 489 at 496; Dinstein, *Legitimate Military Objections*, *supra* note 21, 156-157.

<sup>81</sup> N. Ronzitti, *Is the non liquet of the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?*, in (2000) 82 *IRRC*, 1017 at 1024. See also *Commentary*, *supra* note 7, at para. 2002.

<sup>82</sup> W. Arkin, *Baghdad: Urban Sanctuary in Desert Storm?* in (1997 Spring) *Airpower Journal* argues that even during the first Gulf War, destruction of telecommunication and radio facilities had no impact on Saddam Hussein’s ability to conduct and command the war due to his alternative method of communicating with his subordinates, which included surprise visits to field operations, face-to-face meetings, and notes delivered by messenger. [Http://www.airpower.maxwell.af.mil/airchronicles/apj/spr97/arkin.pdf](http://www.airpower.maxwell.af.mil/airchronicles/apj/spr97/arkin.pdf) (Date consulted: 20 August 2004).

<sup>83</sup> Many argue that if radio is being used to incite commission of war crimes, it may become a legitimate target for that reason alone (see *ICTY Final Report*, *supra* note 21, at para. 76; Fenrick, *Targeting and Proportionality*, *supra* note 80, at 496). The International Military Tribunal at Nuremberg considered whether Hans Fritzsche was inciting war crimes on his radio programmes; however, this does not necessarily imply that such use would legitimize the targeting of radio stations. Indeed, one may ask why the use of an instrument inciting violations of *ius in bello* should be treated more harshly than use of the same instrument to

broadcasting stations, as hardware that is capable of making an effective contribution to military action, may be the objectives of attack, if they are actually used for military communications.

#### 4.5.2. Dual-use objects

“Dual-use object” is not a legal term. It has arisen out of an apparent need to describe the class of objects that do not appear to fit neatly within Article 52(3), *i.e.* “normally dedicated” to civilian purposes, such that the presumption that they are civilian cannot be readily applied. It is interesting to note that in the first Draft Protocol drawn up by the ICRC in 1970-71, the phrase “installations and means of transport,” which would have caught many “dual-use” objects, was included in the original provision prescribing the protection of civilian objects.<sup>84</sup> This provision, however, did not include the presumption in Article 52(3). At the Diplomatic Conference, the Dutch delegation objected that “installations and means of transport [...] could subsequently contribute to part of the military effort and therefore be attacked”.<sup>85</sup> It suggested deleting any list of examples of civilian objects, an idea that found support by many delegations. A working group then drafted a new provision, which no longer mentioned “installations and means of transport”, but retained the other examples mentioned in Article 52(3).<sup>86</sup> This provision was later adopted by the Conference, with some changes irrelevant for our discussion.

When a certain object is used for both military and civilian purposes, it may be argued that even a secondary military use renders it a military objective. However, if the effects on the civilian use of the object imply

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incite violations of *ius ad bellum*. If advocacy of violations of *ius ad bellum* by the media transformed the media into legitimate targets, many American broadcasting stations would, in the eyes of many international lawyers and the public be legitimate targets of attack for supporting and encouraging the war against Iraq (which Kofi Annan has recently pronounced to have been illegal). In its judgement, the IMT noted Fritzsche’s use of the media “to arouse popular sentiment in support of Hitler and the German war effort” and determined that such use was not against the laws of war. International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, in (1947) 41 *AJIL*, 326 at 328. We might also note that despite the use of the radio by Hutu *génocidaires* to incite the public to commit war crimes, the Pentagon investigated only the possibility (and cost) of jamming the national radio station. See R. Dallaire, *Shake Hands with the Devil*, Canada, 2003, at 375.

<sup>84</sup> *Commentary*, *supra* note 7, at para. 2004.

<sup>85</sup> *Official Records*, *supra* note 2, vol. XIV, 109.

<sup>86</sup> *Ibidem*, vol. XV, 331.



excessive damage to civilians, an attack on such a dual-use object may nevertheless be unlawful under the proportionality rule.<sup>87</sup>

A slightly different issue arises when an object or installation is not actually used for military purposes, but may be so used at any time. This is the case in particular for means and installations of transport, including bridges. If an objective is military simply because it could be converted into something useful for the military,<sup>88</sup> nothing remains as civilian and therefore as protected.<sup>89</sup> For some authors, it is sufficient that the likelihood of military use is reasonable and not remote.<sup>90</sup> According to the text of Protocol I, the object must however “make” (in the present tense) an effective contribution to military action. Admittedly, as the purpose can turn an objective into a military one, an intended future use may be sufficient,<sup>91</sup> but not a possible future use. On the face of it, a decision of an ICTY Trial Chamber seems to be more restrictive. In *Prosecutor v. Galić*, the Trial Chamber opined “that such an [civilian] object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object *is being used* to make an effective contribution to military action” (emphasis added).<sup>92</sup> If no combat occurs or is likely to occur in the area where a given bridge leads, the requirement of a military advantage resulting from its destruction “in the circumstances ruling at the time” would anyway not be fulfilled.<sup>93</sup>

NATO mentioned bridges generically as military objectives during the Kosovo air campaign.<sup>94</sup> Some propose that in a campaign in which military planners do not intend to conquer territory nor consecrate vast military resources, a more expansive interpretation of targets may be appropriate.<sup>95</sup> Some authors include, at the very least, bridges that could replace those situated on the supply lines among the military objectives, while others are of the opinion that bridges may only be attacked if supplies destined for the

<sup>87</sup> See on the difficulties to make the proportionality calculus in this case and for an interesting proposal H. Shue/D. Wippman, *Limiting attacks on Dual Use Facilities performing Indispensable Civilian Functions*, in (2002) 35 *Cornell ILJ*, 559 at 569-579.

<sup>88</sup> As Dinstein, *Legitimate Military Objections*, *supra* note 21, at 155 seems to suggest.

<sup>89</sup> P. Rowe, *Kosovo 1999: The air campaign – Have the provisions of Additional Protocol I withstood the test?*, in (2000) 82 *IRRC*, 147 at 152.

<sup>90</sup> M. N. Schmitt, *Wired warfare: Computer network attack and jus in bello*, in (2002) 84 *IRRC*, 365 at 385.

<sup>91</sup> *Commentary*, *supra* note 7, at para. 2022.

<sup>92</sup> *Prosecutor v. Galić*, *supra* note 7, at para. 51.

<sup>93</sup> Shue/Wippman, *Limiting attacks*, *supra* note 87, at 561. Critical about this consequence of Article 52(2) is Meyer, *Tearing Down the Façade*, *supra* note 49, 169-170.

<sup>94</sup> See General Wesley Clark, *Effectiveness and determination*, *supra* note 66.

<sup>95</sup> Schmitt, *Targeting and Humanitarian Law*, *supra* note 64, at 68-69.

front must pass over them.<sup>96</sup> The problem becomes even more delicate when a party limits itself to aerial bombardments. What constitutes, in such a situation, “the front”, and what is the definite military advantage in hindering the movement of enemy ground troops?<sup>97</sup>

Might it not be appropriate, in a situation of exclusively aerial warfare, to sharpen the divide between objects that are military by their nature and dual-use objects? On a simple reading of Article 52, a commander must inquire as to the effective contribution of a purported dual use object according to “the circumstances ruling at the time.” The fact that no ground invasion is planned comprises part of those circumstances. This consideration may significantly limit which objects are military objectives.

Another possibility is to allow attacks on objects of a military nature even before they have an impact on military operations, while objects that are military because of their location or use could only be attacked at the moment they actually contribute effectively to military action.<sup>98</sup> In our view, in the latter categories, each objective must be assessed individually and selected as a target because of its actual, not potential, contribution. Descriptions of the labour intensive procedure of target selection and review in the First Gulf War and the NATO campaign in FRY indicate that this is entirely feasible and not an unreasonable requirement.<sup>99</sup>

#### **4.5.3. Civilian objects with an impact on the enemy’s war sustaining capability: legitimate targets under theories of “effects-based” targeting?**

Beyond dual-use objects, a recent US military manual and recent Military Commission instructions substitute “war-fighting or war-sustaining capability” for military action and include targets that “indirectly but effectively support and sustain the enemy’s war-fighting capability”.<sup>100</sup> There are two categories of objects that some military analysts hope to

<sup>96</sup> Bothe, *Protection of Civilian Population*, *supra* note 75, at 534; P. Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, in (2001) 12 *EJIL*, 503 at 508.

<sup>97</sup> Bothe, *Protection of Civilian Population*, *supra* note 75, at 534.

<sup>98</sup> Robertson, *The Principle of Military Objective*, *supra* note 54, at 209.

<sup>99</sup> T. Montgomery, *Legal Perspective from the EUCOM Targeting Cell*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 190; M. W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, in (2003) 97 *AJIL*, 481 at 487-502.

<sup>100</sup> A.R. Thomas/J. C. Duncan (eds), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, Vol. 73, Naval War College’s International Law Studies, 1999, at para. 8.1.1; Department of Defense, *Military Commission Instruction No. 2*, 30 April 2003, Section 5 (D), US Department of Defense, DefenseLINK, <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf> (date of access: 23 August 2003); Sceptical Dinstein, *Legitimate Military Objectives*, *supra* note 21, 145-146.

justify targeting by pointing to the effect of their destruction on the enemy's ability – or willingness, which is an even larger standard – to sustain the war.<sup>101</sup> In more mainstream discussions, aggressive targeting of dual-use objects such as roads and bridges is the subject of debate and the effect on the enemy's will to continue the war is at least implicitly the main desired aim. Some go further and advocate acquiring a non-military advantage over the enemy as a more effective means of defeating the enemy's will.<sup>102</sup> Indeed, as discussed above, one of the most frequent but contentious claims in contemporary conflicts is that influencing the public will through target selection should be a legitimate aim and strategy, especially when the aim of a conflict is the capitulation of a (dictatorial or tyrannical) government. In one rather extreme manifestation of this theory, a military analyst advocates targeting civilian private property in order to influence the public will. General J.C. Dunlap writes

The protection of civilians and their property in war is an accepted norm of international law – even where the putatively “non-combatant” populace openly supports the immoral use of force by its military. NATO's Kosovo operation suggests, however, that the imposition of hardship on the sentient, adult “non-combatant” population through property loss can erode a society's appetite for malevolence. While civilians should not be targeted, *a new paradigm for non-combatancy that allows the destruction of certain property currently protected by international law but not absolutely indispensable to civilian survival may well help shorten the conflict* and effect necessary societal change.<sup>103</sup> [Emphasis added]

This position totally ignores accepted practice of distinguishing between civilian objects and military objectives; it is not rooted in the principle that the aim of war is to overcome the enemy's military forces. It also conflates *ius ad bellum* and *ius in bello*, because it presupposes that those aiming at shortening the war fight for an aim legitimate under the UN Charter. Indeed, the wish to shorten the conflict is only legitimate for the side successfully fighting in self-defence or with UN Security Council authorization. Under international law, conversely, an aggressor may be repelled through a long war. What is more, this deviation from the principle of *military necessity* is based on a false or at least unproven premise – that attacking civilian objects

<sup>101</sup> See already the detailed arguments by Parks, *Air War and the Law of War*, *supra* note 2, 137-145.

<sup>102</sup> Meyer, *Tearing Down the Façade*, *supra* note 49, 143-182; J. Baker, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, in (2002) 55 *Naval War College Review*, 11 at 22.

<sup>103</sup> C.P. Dunlap, *The End of Innocence: Rethinking Non-combatancy in the Post-Kosovo Era*, in (2000) *Strategic Review*, 4 at 9, cited in W. J. Fenrick, *The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside*, in (2000) *YIHL*, 53 at 56, and Schmitt, *Targeting and Humanitarian Law*, *supra* note 64, 71-72.

will shorten conflicts by influencing public will. History shows, rather, that attacks that made life more difficult for civilians during the Second World War and the NATO bombing of FRY had the effect of crystallizing support for Hitler and Milošević.<sup>104</sup>

Suggestions that the direct contribution to military action should be abandoned as the decisive criterion for deciding which objects may be attacked may be connected to the widely used theory of “effects based targeting”, which holds that the desired aim of a conflict will result from the effects of attacking specific links, nodes or objects.<sup>105</sup> In our view, this theory does not necessarily imply that this desired aim may go beyond the weakening of the military forces of the enemy or that the physical effects must go beyond the military.<sup>106</sup>

It is true that if the enemy is seen as a system, attacks upon certain targets, which politically, financially or psychologically sustain an enemy regime, may have a greater impact upon the system than attacks that affect military operations.<sup>107</sup> In many countries the centre of gravity is not in the armed forces. To aim at an impact on persons other than the armed forces may appear particularly indicated if those attacking are not prepared to occupy the enemy territory or if there is no fighting on land. In such a situation, aerial bombardment may run out of military targets while the enemy government is not yet ready to give in.<sup>108</sup> It may also be argued that the limitation to military objects obliges belligerents to give hypocritical justifications for their attacks.<sup>109</sup> When they interrupt the power supply to show the civilian population that it will live in the dark as long as it does not get rid of a regime, they have to claim that the power stations also produce power for the military. When they attack a radio station because it maintains the morale of the population, they have to claim that the station also serves

<sup>104</sup> C. Webster/N. Frankland, *The Strategic Air Offensive against Germany 1939-1945*, vol. 2, London, 1961, 244-268.

<sup>105</sup> Schmitt, *Targetting and Humanitarian Law*, *supra* note 64, 60-65; Montgomery, *Legal Perspective*, *supra* note 99, at 190.

<sup>106</sup> This is emphasized by Schmitt, *Targetting and Humanitarian Law*, *supra* note 64, at 63, who, however, sheds doubt on this conclusion when he qualifies our idea that every enemy can be overcome by sufficiently weakening its military forces as “oversimplistic” (*id.*, at 68). Baker, *When Lawyers Advise*, *supra* note 102, at 22 admits that an effects-based concept of military objectives “sends the law hurtling down the slippery slope toward collateral calamity.”

<sup>107</sup> J. Warden, *The Enemy as a System*, in (1995) *Airpower Journal*, 40; Meyer, *Tearing Down the Façade*, *supra* note 49, at 181.

<sup>108</sup> Baker, *When Lawyers Advise*, *supra* note 102, at 11; A. Roberts, *The Law of War After Kosovo*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 416.

<sup>109</sup> See Meyer, *Tearing Down the Façade*, *supra* note 49, in particular 170-171 and 178. See also Lord Robertson, *Kosovo One Year on: Achievement and Challenge*, (21 March 2000), <http://www.nato.int/kosovo/repo2000/index.htm>.

as a military communications relay station. When they attack factories belonging to a decision-maker to show him that he too will be personally affected if he does not give in, they have to claim that cigarette factories support the military effort.

However, in our view, the decisive factor is that no one has come forward with criteria other than the direct contribution to military action which could guarantee a minimum of humanity in an armed conflict and yet be assessed objectively – without too many speculations about causalities and future impacts on the enemy – and applied independently of the causes attributed to the parties and the nature of the regimes involved. We can therefore not subscribe to the view that “without doubt, limiting the targets set to enemy military forces can [...] sometimes be less humanitarian than embracing a broader interpretation of military objectives”.<sup>110</sup>

If it is accepted that military action is the only practicable criterion, the frequently-discussed issue as to which government ministries are military objectives also finds an answer. What matters is not how important a ministry is for the enemy regime, but how directly its work affects military action. Those who hold otherwise should logically argue that where religious feelings of the population are important for the readiness of a country to continue an armed conflict, religious institutions and shrines are legitimate targets of attacks.

#### 4.6. The prohibition of indiscriminate attacks

Article 51, paragraphs (4) and (5) of Protocol I, which prohibits indiscriminate attacks, goes hand-in-hand with the principle of distinction.<sup>111</sup> In Iraq, many of the accusations of indiscriminate attacks were based on the use by coalition aircraft of cluster bombs against a legitimate target situated in an otherwise residential area.<sup>112</sup> These attacks may violate the prohibition against indiscriminate attacks; however, doubts about their legality arise principally out of a failure to take appropriate precautions. Should the use of cluster bombs in densely populated or even mixed population areas be prohibited, as a measure to protect civilians and civilian objects against indiscriminate attacks, since these area weapons are inherently indiscriminate in their effects when military objectives are collocated with

<sup>110</sup> Schmitt, *Targeting and Humanitarian Law*, *supra* note 64, at 69.

<sup>111</sup> See also *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ, *Reports 1996*, at para. 78: “they must consequently never use weapons that are incapable of distinguishing between civilian and military targets”.

<sup>112</sup> Human Rights Watch, *Off Target*, *supra* note 21, and Amnesty International, “*Collateral Damage*”, *supra* note 21.

civilian objects, regardless of how accurate the weapons are in striking their intended military target?

More generally, if one analyzes the definition of indiscriminate attacks in Protocol I in detail, one comes to the conclusion that such attacks either do not comply with the requirement that they be directed at a military objective, as discussed above, because they are not directed at such an objective, employ means and methods which cannot be directed at a specific military objective or treat several military objectives in midst of the civilian population as one single military objective. Or they are directed at a military objective, but have disproportionate incidental effects upon the civilian population and civilian objects. This proportionality rule will be discussed hereafter.

## 5. Proportionality

The proportionality principle is a rule of customary law, derived from a general principle of law,<sup>113</sup> and codified in Article 51(5)(b) of Protocol I.<sup>114</sup> The rule prohibits attacks, even if directed at a military objective, if they “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.” This principle is the inescapable link between the principles of military necessity and humanity, where they lead to contradictory results.<sup>115</sup> Despite the qualifications of the military advantage in Article 51(5)(b), it remains very difficult and subject to inevitably subjective value judgements to compare military advantage with civilian losses or damage to civilian objects, especially when the probability of gaining the advantage or affecting civilians is lower than 100% and different for each.<sup>116</sup> It might be possible to identify, with military experts, indicators and criteria to evaluate

<sup>113</sup> M. Huber, *Quelques considérations sur une révision éventuelle des Conventions de la Haye relatives à la guerre*, in (1955) 37 *IRRC*, 417 at 423.

<sup>114</sup> See for detailed criticism of the proportionality principle as defined in Protocol I, including the taking into account of damage to civilian objects, Parks, *Air War and the Law of War*, *supra* note 2, 168-176.

<sup>115</sup> M. S. McDougal/F. P. Feliciano, *Law and Minimum World Public Order, The Legal Regulation of International Coercion*, New Haven, 1961, 524-530; Solf, *Protection of Civilians*, *supra* note 21, at 128; M. Bothe/K. J. Partsch/W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, 1982, at 309.

<sup>116</sup> See, on those dilemmas in the recent war in Iraq, D. Eviatar, *Civilian Toll: A Moral and Legal Bog*, in *The New York Times*, (22 March 2003), <http://www.nytimes.com/2003/03/22/arts/22CIV.html>, and on the proportionality calculus, Shue/Wippman, *Limiting attacks*, *supra* note 87, 564-569.

proportionality and to make the subjective judgement implied slightly more objective. Even when identified, the application of such indicators and the respect of such criteria would be largely based upon the good faith of the military, which will naturally tend to overstate the importance of the military advantage part of the equation. It is probably unrealistic to expect transparency that would allow third parties to monitor that choice during the conflict. On the other hand, some *ex post* monitoring would be possible and some preventive effect achieved, if belligerents undertook to keep records of their evaluations and to make them public after a certain period of time after the end of a given conflict. Such record-keeping would also facilitate prosecution and defence in possible war crimes trials. In addition, subsequent disclosure would allow belligerents to counter false accusations and avoid creating the impression among the public that IHL is not respected in war, an impression which seriously undermines the readiness to respect it.

In the meantime, while hoping for such new and specific mechanisms of implementation for the proportionality rule, we may begin to draw some clues from various sources in order to establish an emerging framework giving at least the standard itself a more precise meaning.

As for the standard of care expected when evaluating the proportionality of an attack – which is an aspect of the precautionary measures to be taken – the jurisprudence of the ICTY may be of help. The question of what is prescribed by IHL and the question what behaviour leads to individual criminal responsibility are obviously two questions which must be strictly separated. Logically, however, any behaviour which leads to individual criminal responsibility must first be contrary to the standard of care required by IHL from belligerent parties. Therefore, the ICTY Trial Chamber in *Galić* provides a useful minimum standard when it sets out the framework to assess whether the proportionality evaluation of the perpetrator of an attack was within legal bounds. The Tribunal held, “In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack”.<sup>117</sup> This test imposes a slightly higher standard than a simple “reasonable person” test. It may even be fair to say that the law may accept the view of a reasonable military commander, since the “reasonably well-informed person” must be “in the circumstances of the actual perpetrator”, although the Tribunal stops short of this specific standard. The subjective bias this may generate with respect to the benefits of the attack would be offset by the higher standard that could be imposed in terms of what the reasonable commander or well-informed person would foresee due to the effects of the attack. Whatever one

<sup>117</sup> *Prosecutor v. Galić*, *supra* note 7, at para. 58 (footnotes omitted).

may think of this standard from a criminal law point of view, it is certainly a useful minimum starting point for setting out more precisely how proportionality must be evaluated.

The ICTY Trial Chamber in *Galić* also reiterated that the rule of proportionality does not refer to actual damage caused or military advantage achieved by an attack, but “expected” damage and “anticipated” advantage.<sup>118</sup> It also considered that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of the attack.<sup>119</sup>

With respect to the duty to consider the long term impact of the destruction of a target, and especially a dual-use target, the *British Manual of the Law of Armed Conflict* states that commanders “must bear in mind foreseeable effects of attack”.<sup>120</sup> Reverberating effects must be included into the proportionality calculus,<sup>121</sup> e.g. that water purification installations can no longer function when dual-use power plants that produce the electrical power are hit. In such cases it is however particularly difficult to calculate long-term effects on the civilian population. Targeting electrical facilities in the 1991 Gulf War led to the deaths of between 40,000 and 110,000 civilians due to lack of access to water.<sup>122</sup> Should this consequence have been taken into account? Military planners of that campaign defend their actions, stating that water treatment facilities were never directly targeted and that planners never foresaw that cutting electricity would have this impact.<sup>123</sup> Applying our reasonable military commander standard above, while the average “reasonable person” on the street might not be expected to foresee that destroying electricity facilities would cut off the civilian fresh water supply, the reasonable military commander, who is aware of the interconnectedness of infrastructure, would be expected to foresee this consequence. The *British Manual* provides the example of bombing petrol reserves, and indicates that commanding officers must consider the possibility of burning liquid fuel flowing into nearby residential areas. This scenario has fairly immediate foreseeable consequences. It is perhaps noteworthy that the *Manual* does not refer to the much-debated example of destroying electricity supply and thereby impeding access to fresh water. *Galić* provides no further insight

<sup>118</sup> *Ibid.*

<sup>119</sup> *Id.* at para. 60.

<sup>120</sup> *UK Manual*, *supra* note 10, at para. 5.33.4.

<sup>121</sup> See US, Joint Staff, Joint Doctrine for Targeting, Joint Publication 3-60, Jan. 17, 2002, at I-6, and M. Schmitt, *The Principle of Discrimination in 21<sup>st</sup> Century Warfare*, in (1999) 2 *Yale Hum. Rights and Development L.J.*, 143 at 168. *Contra* Lt. Col. K. A. Rizer, *Bombing Dual Use Targets: Legal, Ethical and Doctrinal Perspectives*, in (2001) *Airpower Journal*, <http://www.airpower.maxwell.af.mil/airchronicles/cc/Rizer.html>.

<sup>122</sup> Lewis, *The Law of Aerial Bombardment*, *supra* note 99, at 506.

<sup>123</sup> Lewis, *ibidem*, quoting General Horner, who led the command of air war in Desert Storm.



with respect to how far into the future a foreseeability analysis should extend since that case dealt with indiscriminate sniping and shelling attacks, whose effects were immediate, in Sarajevo.

The ICTY has sent mixed signals as to how and whether the cumulative impact of attacks on civilian objects should be weighed. In *Kupreškić*, the court held that “in the case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity”.<sup>124</sup> However, the Commission reporting to the Prosecutor on the NATO bombing watered down these remarks in its own report, stating that the above statement “can be regarded as a progressive statement of the applicable law [...]. Its practical import [...] is somewhat ambiguous and its application is far from clear. It is the committee’s view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign”.<sup>125</sup> (Emphasis in original). From a criminal procedure point of view it is astonishing to see a prosecutor decline to open a formal investigation because she disagrees with the standard decided by her own court, which she considers to be unfair for the accused because it constitutes a progressive development and is therefore contrary to the principle “*nullum crimen sine lege*”. Due to the latter principle, the Prosecutor may even have been correct. For our purpose, which is to find a more precise meaning for the proportionality principle, the standard developed by the ICTY in the *Kupreškić* case is in any event interesting.

Dual-use objects generate debate among scholars and military planners when it comes to evaluating the proportionality of the attack. Some query whether a higher standard should apply when evaluating the proportionality of a planned attack against a dual-use object.<sup>126</sup> For example, when targeting a bridge that enemy forces may use for transport but that is also important for civilian transportation, perhaps an attack should become unlawful if the expected damage caused to civilians outweighs the anticipated military advantage by a smaller margin than usual. Debate becomes even more

<sup>124</sup> *Prosecutor v. Kupreškić*, *supra* note 35, at para. 526. This issue was not challenged on appeal.

<sup>125</sup> *ICTY Final Report*, *supra* note 21, at para. 52.

<sup>126</sup> Shue, *Commentary*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 207.

heated regarding objects such as the electrical power grid.<sup>127</sup> Furthermore, some argue that at the very least, a more demanding standard of the proportionality of an attack against a purported military objective should be met when the military action is for humanitarian ends.<sup>128</sup>

For a number of reasons, we cannot support the application of a differential proportionality assessment in either of these situations. First of all, a higher standard is unnecessary. As Sandoz notes, “the attack on a dual-use object can be considered as the attack of a military objective with collateral damages”.<sup>129</sup> When completing the proportionality assessment (or collateral damage estimate) of a target, military lawyers may consider anticipated damage in a tier system or in a more global manner.<sup>130</sup> Thus, the expected collateral damage from an attack on a target that is military by nature will take into account potential damage to the surrounding area and foreseeable consequences,<sup>131</sup> which must be offset by the advantage anticipated from the object’s destruction. The expected collateral damage from an attack on a dual-use object, on the other hand (whose use has been identified as military and is therefore legally subject to attack), must include the damage expected due to the destruction of the object itself, in addition to whatever other collateral damage may be expected in the surrounding area or that is foreseeable, including through reverberating effects. Thus, the collateral damage the anticipated advantage will have to offset with a dual-use object is never zero and may, in many cases, automatically be high.

A different proportionality standard should not be applied in cases of humanitarian intervention because this would allow *ius ad bellum* considerations to affect *ius in bello*. Rather, a faithful application of Articles 52(2) and 51(5) enables us to achieve the appropriate and desired goal of restricting harm to civilians and civilian objects in that context. For example, in a conflict planned strictly as an air war to last only two weeks, it would not be legal to target factories on the ground that they can be converted into

<sup>127</sup> See Lewis, *The Law of Aerial Bombardment*, *supra* note 99, 495-496 and 504-507.

<sup>128</sup> O. Bring, *International Humanitarian Law after Kosovo: Is Lex Lata Sufficient?*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 271.

<sup>129</sup> Y. Sandoz, *Commentary*, in Wall, *Legal and Ethical Lessons*, *supra* note 21, at 273 and 276.

<sup>130</sup> Montgomery, *Legal Perspective*, *supra* note 99, at 194, describes the “Tier System” used in Operation Allied Force in order to have a standardized methodology for assessing collateral damage. Tier 1 was a 1500 foot circle around the target. If collateral damage were anticipated within that circle, analysts went to Tier 2, which applied fragmentation data of specific munitions within a smaller circle. The analysis continued up to Tier 4, which involved computer modelling of anticipated effects of attacks. Lewis, *The Law of Aerial Bombardment*, *supra* note 99, 490-491, notes that in the first Gulf War, Judge Advocate Generals responsible for reviewing targets applied different proportionality assessments depending on the target, allowing different factors to be weighed.

<sup>131</sup> *UK Military Manual*, *supra* note 10, at para. 5.33.4.

weapons technology factories. If, however, the war drags on, the possibility and, perhaps, probability of conversion of civilian factories to military ends increases. With the help of intelligence evidence indicating that conversion is taking place (and not just because the war has dragged on for so long that the planes have run out of targets), these may later become legitimate military objectives.

## 6. Precautions

### 6.1. By the attacker

The rules governing the precautions to be taken when planning and executing attacks are more operational and precise than those describing the proportionality principle. The term “attacker” covers all those who commit acts of violence, whether offensively or defensively,<sup>132</sup> and, because of the separation between *ius ad bellum* and *ius in bello*, whether in self-defence or as aggressors.<sup>133</sup> If an attack is directed at a military objective and is not expected to cause excessive civilian losses, it is lawful. However, a belligerent must take precautionary measures set out in detail in Article 57 of Protocol I to spare civilians and civilian objects.<sup>134</sup> An attack must be cancelled if it becomes apparent that it would be of the type that is prohibited. Circumstances permitting, an advance warning must be given for those attacks which may affect the civilian population – but not for those which may only affect civilian objects.<sup>135</sup> In determining the objective of an attack among several objectives carrying a similar military advantage, the one causing the least danger and damage to the civilian population or civilian objects must be chosen, when a choice is possible. In addition, those who plan or decide upon an attack must verify that the targets that they attack are lawful and choose means (*i.e.* weapons) and methods (*e.g.* timing and tactics) to avoid unnecessary and minimize inevitable civilian losses or damage to civilian objects.

<sup>132</sup> Article 49(1) of Protocol I, *supra* note 2.

<sup>133</sup> See *supra* note 70.

<sup>134</sup> See for a discussion of the customary character of the different provisions of Article 57, Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht*, *supra* note 50, 453-489. On some measures taken by the US in its recent war in Iraq and their inherent limits, see, *How Precise is our Bombing*, Editorial, in *The New York Times* (31 March 2003). For a detailed description of the precautions taken during the first Gulf War, see Lewis, *The Law of Aerial Bombardment*, *supra* note 99, at 487 and 500-501.

<sup>135</sup> See Article 57(2)(c) of Protocol I, *supra* note 2, and already Article 26 of the Hague Regulations, *supra* note 9. Article 19 of Geneva Convention IV, *supra* note 43, foresees such a warning obligation even to protect some objects, *i.e.* hospitals.

The meaning of these obligations in practice remains in many cases controversial. The answers IHL can provide turn mainly on the issue of which precautions are “feasible”. This discussion often begins with a consideration of what risks attacking forces must take, and what injuries they should be ready to incur, in order to be able to distinguish between civilian and military objects (and civilians and combatants).<sup>136</sup> In our view, the facts should first be accurately assessed. Is a pilot flying at a higher altitude less anxious about anti-aircraft fire and therefore more able to comply with IHL through modern computerized means? When precision-guided weapons are used, are they more accurate when they fly for a longer period from the delivering platform to the target, because they can stabilize their trajectory? If the answer to both questions is affirmative, the advantage of thus attacking from high altitude has to be balanced with the real possibility for a low-flying pilot at high speed to verify the military nature of the target. If a positive balance in favour of low altitude attacks subsists, we agree with the approach of A.P.V. Rogers. He writes:

If the target is sufficiently important, higher commanders may be prepared to accept a greater degree of risk to the aircraft crew to ensure that the target is properly identified and accurately attacked. No-risk warfare is unheard of. Risks may be taken, for example, to rescue pilots who have been shot down or in deploying forces on reconnaissance or target identification missions in enemy-held territory. However, if the target is assessed as not being worth that risk and a minimum operational altitude is set for their protection, the aircrew involved in the operation will have to make their own assessment [...]. If their assessment is that (a) the risk to them of getting close enough to the target to identify it properly is too high, (b) that there is a real danger of incidental death, injury or damage to civilians or civilian objects because of lack of verification of the target, and (c) they or friendly forces are not in immediate danger if the attack is not carried out, there is no need for them to put themselves at risk to verify the target. Quite simply, the attack should not be carried out.<sup>137</sup>

A second important question is whether the obligation to take all feasible precautions entails an obligation to acquire new weapons and information technology and an obligation for a party having such technology to use it. From the first Gulf War to the recent war in Iraq, observers have noted a

<sup>136</sup> See for the controversy on NATO's preclusion of low-flying operations during the Kosovo Air Campaign, to avoid casualties among its pilots, Human Rights Watch, *Case Studies of Civilian Deaths*, in *Civilian Deaths*, *supra* note 21; Amnesty International, “*Collateral Damage*”, *supra* note 21, at 19; ICTY *Final Report*, *supra* note 21, at para. 70. See also W. J. Fenrick, *Attacking The Enemy Civilian as a Punishable Offense*, in (1997) 7 *Duke Journal of Comparative and International Law*, at 546, <http://www.law.duke.edu/journals/djcil/articles/djcil7p539.htm>.

<sup>137</sup> A. P. V. Rogers, *Zero-casualty warfare*, in (2000) 837 *IRRC*, 165 at 179. See also Amnesty International, “*Collateral Damage*”, *supra* note 21, at 19.

significant increase in use by the US of precision-guided weapons. These have been credited with reducing civilian casualties.<sup>138</sup> Some authors and NGOs consider that there is a duty to use precision-guided munitions in urban areas<sup>139</sup> or that countries with arsenals of “smart bombs” are compelled to use them everywhere.<sup>140</sup> Others object that this would introduce an inadmissible discriminatory bias against more developed belligerent States equipped with modern technology.<sup>141</sup>

In our view, no country has an IHL obligation to acquire modern technology. If it does so, it has many military advantages, including that of being able to lawfully attack some targets which a less developed country with less precise weapons would not be allowed to attack under the proportionality principle. The (slight) disadvantage is that when it chooses weapons to be used for a given lawful attack, it has the choice of using smart weapons which additionally reduce incidental losses and damage. The UK Manual correctly states that “[t]he employment of ‘dumb’ bombs has not been rendered unlawful by the advent of precision guided or ‘smart’ bombs, but developing technology does bring with it a change in the standards affecting the choice of munitions when taking the precautions”.<sup>142</sup> Financial considerations should not be included into the feasibility evaluation, while a belligerent may take into account that it has only a limited number of smart weapons and must therefore save them for militarily particularly important or (for the civilian population) particularly risky targets. If this could not be taken into account, a State possessing some smart weapons would be, unlike the one having none, obliged to acquire more of them, which would indeed constitute discrimination against such States.

In practice, it is very hard to assess objectively whether the prescribed precautionary measures were taken preceding a given attack leading to civilian casualties. Numerous “friendly fire” incidents in Afghanistan and

<sup>138</sup> Human Rights Watch, *Off Target*, *supra* note 21, at 54.

<sup>139</sup> See “Smart” Bombs, “Dumb” Bombs, and Inaccurate Attacks on Targets in Civilian Population Centers, in Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War*, New York, 1991, <http://hrw.org/reports/1991/gulfwar/CHAP2.htm#USPublicStatements> and S. W. Belt, *Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, in (2000) 47 *Naval Law Review*, 115 at 174.

<sup>140</sup> See D. L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, in (1992-93) 26 *George Wash. J. of Int’l and Comp. Law*, 109 at 110-111 (who is herself critical towards this position).

<sup>141</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004, at 126; J. F. Murphy, *Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO’s Kosovo Campaign*, in (2001) 31 *IYHR*, 51 at 63; Schmidt, *The Protection of Victims of International Armed Conflicts*, *supra* note 61, at 231.

<sup>142</sup> UK Manual, *supra* note 10, at para. 12.51.

Iraq and the repeated bombing of duly notified and marked Red Cross compounds far away from possible military objectives in Kabul are evidence that even when a belligerent can be presumed to do everything possible to avoid errors, mistakes happen.<sup>143</sup> On the other hand, every TV viewer was stricken during the recent war in Iraq by the question how so many apparent mistakes could occur and whether serious inquiries will be conducted into such incidents even if they do not affect “friendly forces” but “enemy civilians”. Under the law, both categories should benefit from the same attention.

The planning and decision-making process of a commander is by definition secret and we will never know what he knew or what alternatives he had. In this respect, too, it may be appropriate to ask belligerents to keep records, although it may be even more difficult to ask for those records to subsequently be made public. It may, however, be possible for military experts from different countries to compare practical examples of best practices and exchange them with IHL experts.

## 6.2. By the defender

The issue on which there is probably the greatest controversy about the applicable legal standards concerns the extent to which the protection of the civilian population and civilian objects from indiscriminate attacks is a shared responsibility between the belligerent launching attacks against military objectives and the belligerent subject to those attacks. While the US has always claimed that both sides have an equal responsibility,<sup>144</sup> the text, legislative history, and context of Protocol I indicate that the main responsibility is conferred upon the “attacker” as understood in *ius in bello*.<sup>145</sup>

The main prohibition addressed to the defender is the prohibition in Article 51(7) of Protocol I to use civilians to shield military objectives and operations. However, this prohibition does not apply to the use of civilian objects for that purpose. A defender who so uses them simply turns them

<sup>143</sup> See for an impressive list of mistakes due to the “human factor” Parks, *Air War and the Law of War*, *supra* note 2, 198-201.

<sup>144</sup> See for the Vietnam War Letter by J. F. Buzhardt, General Counsel of the Department of Defense to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, reproduced in (1973) 67 *AJIL*, 122 at 123; *US Air Force Pamphlet 110-34*, 25 July 1980, *Commander’s Handbook on the Law of Armed Conflict* at 3-1; *US Naval Handbook NWP 9*, at 11-1; forcefully Parks, *Air War and the Law of War*, *supra* note 2, 149-168 with further references; lately K. Anderson, *Who Owns the Rules of War?*, in *The New York Times Magazine*, (13 April 2003), <http://www.nytimes.com/2003/04/13/magazine/13RULES.html>.

<sup>145</sup> See text accompanying *supra* notes 132-133.

into military objectives. Nonetheless, civilian objects are covered by the additional obligations foreseen in Article 58 of Protocol I, which provides that a defending party must take basic precautionary measures to protect civilians and civilian objects against the effects of attacks against military objectives, such as removing the civilian population and civilian objects from the vicinity of military objectives and avoiding locating military objectives within or near densely populated areas. The wording of the provision, however, clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only “to the maximum extent possible”, and the defender has only to “endeavour to remove” the civilian population and “avoid” locating military objectives nearby.

Even with those qualifications, several delegations at the 1974-1977 Diplomatic Conference emphasized that the provision, in particular the obligation in respect to the location of military objectives, may not prevent a State from organizing its national defence as it considers necessary.<sup>146</sup> Other delegations enumerated the many factors to be taken into account when evaluating whether a given measure prescribed by Article 58 is at all “possible”.<sup>147</sup> Participants report that in the competent working group of the conference “many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas. This was deemed by representatives of densely populated countries to restrict their right to self-defence, and by others to impose too heavy an economic burden to disperse their industrial, communications and transportation facilities from existing locations in densely populated areas”.<sup>148</sup> When becoming a party to Protocol I, Belgium, Italy, the Netherlands, and Algeria declared that the term “feasible” must be understood taking the available means or military considerations into account. Switzerland and Austria even made formal reservations subjecting Article 58 to the “exigencies dictated by the defence of the national territory”.<sup>149</sup>

The only non-US opinion arguing that a defender has a customary law obligation not to locate military objectives in densely populated areas comes interestingly enough from Iraq. The latter denounced Iran for concentrating troops, contrary to good faith, in towns which Iraq had promised the UN Secretary-General not to attack. It qualified such concentrations as violations of IHL and specifically referred to Article 58(b) of Protocol I as a reaffirmation of the existing law – neither Iran nor Iraq being parties to

<sup>146</sup> *Official Records*, *supra* note 2, vol. VI, 213/214 (France, Switzerland, Austria), 232 (Italy), 234/235 (South Korea), 239 (Cameroun).

<sup>147</sup> *Ibidem*, vol. VI, 214 (UK, The Netherlands), 224 (Canada), 226 (Germany), 241 (US).

<sup>148</sup> Bothe/Partsch/Solf, *New Rules for Victims of Armed Conflicts*, *supra* note 115, at 372.

<sup>149</sup> See for the text of declarations and reservations under the name of the respective States in the ICRC IHL database, <http://www.icrc.org/ihl.nsf/WebPAYS?OpenView>.

Protocol I.<sup>150</sup> The UN Secretary-General responded that he was “deeply concerned that allegations were made that civilian population centres are being used for concentration of military forces. If this were indeed the case, such actions would constitute a violation of [...] basic standards of warfare that the international community expects to be observed”.<sup>151</sup> In our view this answer reduces the customary rule alleged by Iraq to the prohibition against using the civilian population as a shield, as codified in Article 51(7) of Protocol I. During its 1982 invasion of Lebanon, Israel similarly accused the PLO of abusing the civilian population to protect military objectives and not simply of leaving military objectives in the midst of concentrations of civilians.<sup>152</sup>

It is not astonishing that the US, not having experienced attacks on its mainland for nearly two centuries,<sup>153</sup> and having a relatively thinly populated territory, favours a rule putting the burden of the protection of the civilian population at least as much upon the belligerent controlling that population. But other States have not accepted such a rule. Customary law and treaties clearly do not impose, for the purpose of protecting civilian objects, obligations on the defender comparable to those of a belligerent launching an attack.

## 7. Conclusion

The protection of civilian objects is a Siamese twin to the protection of the civilian population. Both depend mainly on the respect of the rule that only military objectives may be attacked and on a workable definition of the concept of military objectives. The US in particular has had considerable opportunity in the past five years to experiment with aerial warfare and its

<sup>150</sup> Letter dated June 28, 1984 from the Deputy Permanent Representative of Iraq to the UN, addressed to the Secretary-General, UN Doc. S/16649, partly reproduced in Sassòli/Bouvier, *How does Law Protect in War?*, *supra* note 56, 1000-1001.

<sup>151</sup> Message dated June 29, 1984 from the Secretary-General addressed to the President of the Islamic Republic of Iran and to the President of the Republic of Iraq, UN Doc. S/16663, partly reproduced in Sassòli/Bouvier, *How does Law Protect in War?*, *supra* note 56, at 1002.

<sup>152</sup> *Briefing*, *supra* note 55.

<sup>153</sup> The obvious exceptions are the attacks of 11 September 2001 against the World Trade Center and the Pentagon. The US considered them as acts of war. The World Trade Center was according to the definition of Protocol I clearly not a military objective. The Pentagon was, but to attack it using a civilian airplane was obviously contrary to the prohibition to attack civilians and the prohibition of perfidy. One may however wonder whether those US military experts who mention that targeting financial institutions may, in the long run, be more destructive than targeting military objectives (*supra* note 107) are prepared to move Wall Street in case of war (including the “war against terror”?) out of Manhattan, in conformity with the alleged obligation of defenders under the principle of distinction.



precision-guided missiles. While the principle of distinguishing civilians from combatants and military objectives from civilian objects as well as the need to limit civilian casualties and damage to civilian objects seem to have been recognized, if not always respected, there appears to be a simultaneous attempt to broaden the definition of what constitutes a military objective. We agree that the concept of “military objective” as defined in Protocol I is not as precise and practicable as one would wish in the interest of the civilian population. Efforts to find more precise, agreed interpretations of the terms and to devise specific measures of implementation to ensure the respect of the principles of proportionality and precaution are important, but in view of the considerable controversies they will likely not succeed in the near future. However, beyond such possible refinements, no one has suggested an alternative definition of military objectives which would be first, practicable, second, as objectively assessable as that of contribution to the military effort, and third, would grant a minimum of protection to the civilian population, their property and the goods and installations they need. In addition, even if a new concept that is more adapted to contemporary warfare could be found, it is almost inconceivable that such a definition would be accepted by States.<sup>154</sup>

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<sup>154</sup> For a post-modern process not aiming at new treaty rules, but at action-oriented research, informal discussions with governments and possibly “new interpretations”, see Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (IHL) and its follow-up, Harvard Program on Humanitarian Policy and Conflict Research, [http://www.hsph.harvard.edu/hpcr/ihl\\_research\\_meeting.htm](http://www.hsph.harvard.edu/hpcr/ihl_research_meeting.htm).