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ARTICLES

Targeting, Command Judgment, and a Proposed Quantum of Information Component

A FOURTH AMENDMENT LESSON IN CONTEXTUAL REASONABLENESS

Geoffrey S. Corn[†]

> *How does the Court know that these orders have a reasonable basis in necessity? . . . And thus it will always be when courts try to look into the reasonableness of a military order. In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved.*[1]

INTRODUCTION

No decision by a military commander engaged in hostilities has more profound consequences than the decision to launch an attack. The decision to attack almost always sets in motion the use of deadly combat power and routinely produces loss of life or grievous bodily injury, often to individuals and property not the intended object of attack (i.e., "collateral damage"). This targeting process[2] is made in a myriad of contexts, sometimes involving split-second decisions by soldiers

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[1] Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

[2] For an overview of the military targeting process and its relationship to the law of armed conflict, see Geoffrey S. Corn & Lieutenant Colonel Gary P.M. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, TEX. INT'L L.J. (forthcoming), *available at* http://ssrn.com/abstract=1913962.

at the proverbial "tip of the spear,"[3] sometimes involving complex and deliberate processes at high levels of command, and sometimes involving summarized processes at those same levels of command to address time-sensitive targeting requirements. In all these contexts, the law of armed conflict (LOAC) provides the test for ensuring target legality. Pursuant to the LOAC, the decision to attack must be based on the judgment that the object of attack—a person, place, or thing—qualifies as a lawful military objective. This test is intended to ensure that the harmful consequences of military hostilities are confined as much as possible to the lawful objects of violence. In so doing, the test provides the primary (although not exclusive) barrier against unjustifiably injuring other persons, places, and things that are protected from being deliberately attacked.[4] Deliberately attacking individuals or objects that do not qualify as lawful military targets violates the LOAC. Accordingly, the meaning of this rule has also been central to war-crimes prosecutions related to unlawful targeting and has been a significant aspect in the development of the Rome Statute for the International Criminal Court.[5]

This LOAC equation is universally accepted as the controlling standard for assessing target legality. Despite the customary law status of this equation, there is far from perfect clarity as to what is or is not a lawful military objective, and the test's application to the range of potential targets in contemporary armed conflicts is extremely complex. It is therefore unsurprising that this test, along with the LOAC

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[3] One U.S. Marine Corps commander characterized this process as a three-second decision cycle—the front line combatant has one second to observe, one second to assess, and one second to decide. *See Civilians Safer, Are Marines Worse Off?*, LEATHERNECK: MARINE CORPS COMMUNITY FOR MARINE VETERANS (Oct. 10, 2009, 9:47 AM), http://www.leatherneck.com/forums/showthread.php?t=90021 ("Battalion Commander Lt. Col. Christian Cabaniss describes the new mission of restraint. 'Killing a thousand Taliban is great but if I kill two civilians in the process, it's a loss . . . . I told the Marines before we deployed it's about a three-second decision, especially with his personal weapon. The first second is "Can I." The next two are: "Should I? What is going to be the effect of my action? Will it move the Afghan closer to the government or further away?" . . . . Decisive is winning the consent of the people. Winning is really the government of Afghanistan filling the vacuum with delivery of governance.'").

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, 57, June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 [hereinafter Protocol Additional to the Geneva Conventions].

[5] Prosecutor v. Galić, Case No. IT-98-29-A, Judgment and Opinion, ¶ 190 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 694-706 (Dieter Fleck ed., 2d ed. 2008).

principles it is derived from, has been a significant subject of judicial decisions, scholarship, and analysis by legal departments of many armed forces.[6] The rule establishes its own analytical methodology for assessing the legality of potential targets—a methodology that produces inherent uncertainties. Nevertheless, despite its complexity, in practical terms the LOAC target legality framework is based on two simple countervailing presumptions: targeting the enemy is allowed, but targeting civilians is not.

The LOAC presumes that members of the enemy armed forces (including members of armed organized opposition groups in the context of noninternational armed conflicts), their equipment, military facilities, and installations are lawful objects of attack[7] until rendered *hors de combat*.[8] Rebutting this presumption requires surrender or some other event that renders the person, place, or thing effectively out of combat (such as wounds, sickness, or incapacitation of the equipment).[9] In contrast, all other persons, places, or things are considered civilian and are accordingly presumed protected from being deliberately attacked.[10] This presumption, however, is also rebuttable. For persons, the presumption is rebutted by their

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[6] *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶¶ 47, 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89-92 (2d ed. 2010); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 520-27 (2010); Maj. Michael L. Smidt, *Yamashita, Medina, & Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 54-57 (2004). Most of these analytical efforts have focused on defining the constituent elements of the military objective test: clarifying the substantive meaning to terms like "definite military advantage," "effective contribution," "prevailing conditions at the time," and the cumulative effect of all of these qualifiers for making the military objective determination. *See, e.g.*, Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶¶ 51, 316 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

[7] DINSTEIN, *supra* note 6, at 89 (interpreting Article 48 of Additional Protocol I).

[8] Article 41.2 of Protocol I provides:

> A person is hors de combat if:
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> (a) he is in the power of an adverse Party;
>
> (b) he clearly expresses an intention to surrender; or
>
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
>
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

Protocol Additional to the Geneva Conventions, *supra* note 4.

[9] *Id.* art. 41.

[10] *Id.* art. 51.

direct participation in hostilities.[11] For places and things, the presumption is rebutted when those places and things "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."[12]

Complexity arises, however, when belligerents consider attacking persons, places, and things that do not fall into these clearly defined categories. In the contemporary battlespace there is an almost endless potential variety of persons, places, and things not readily definable as "military" or "civilian," which are sometimes referred to as "dual-use targets."[13] While attacking such dual-use targets is not presumptively legal, Article 52 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 (AP I) does provide an equation for determining when such an attack is allowed.[14] Pursuant to that rule, virtually anything can qualify as a lawful object of attack when its "nature, location, purpose or use" contributes to the enemy's war effort, and its "total or partial destruction, capture or neutralization" (under the circumstances) "offers a definite military advantage."[15]

These countervailing presumptions and the complexity arising out of their confluence reflect a balance between the two foundational principles of the LOAC: military necessity and humanity. Military necessity justifies inflicting death and destruction on the enemy;[16] humanity prohibits inflicting any suffering that is not necessary to bring about the prompt submission of enemy forces.[17] This delicate balance has in turn

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[11] *Id.* art. 51.3 ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.").

[12] *Id.* art. 52.2.

[13] Definition of "Battlespace Awareness," DOD DICTIONARY OF MILITARY TERMS, http://www.dtic.mil/doctrine/dod_dictionary (search "battlespace awareness") (last visited Sept. 8, 2011).

[14] *See* Protocol Additional to the Geneva Conventions, *supra* note 4.

[15] *Id.* art. 52.2 ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

[16] General Orders No. 100: Instructions for the Government of Armies of the United States in the Field ¶ 15 (Apr. 24, 1863), *available at* http://www.civilwarhome.com/liebercode.htm.

[17] Geoffrey Corn, *Principle of Humanity*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Feb. 2010), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1810&recno=1&author=Corn%20%20Geoffrey%20S; SOLIS, *supra* note 6, at 258.

manifested the principle of distinction[18]—a universally applicable[19] principle characterized by the International Court of Justice as "cardinal" and designated as the "Basic Rule" in AP I.[20] The principle of distinction requires belligerents to constantly distinguish between lawful objects of attack and all other persons, places, and things.[21] While the principle of distinction is a manifestation of the balance between military necessity and humanity, it is also an expression of perhaps an even more central tenet of the LOAC: the assumption that the only legitimate object of war is to weaken enemy forces.[22] Accordingly, the legal regulation of targeting is based on a conclusive presumption that the deliberate infliction of death or destruction to civilians or civilian property will never contribute to this objective, thereby obligating belligerents to limit their destructive efforts to military objectives only.[23] The framework for determining what is and is not a lawful target of attack is known as the military objective test.

This article proposes a quantum of information framework to facilitate the effective implementation of the military objective test. In support of this proposal, the article will provide a comparative analysis of United States constitutional Fourth Amendment jurisprudence, focused specifically on the relationship between several distinct quantum of proof standards for assessing reasonableness and the interests they were developed to balance. The basis for this proposed analogy is that reasonableness is the common touchstone for both the combat targeting process and the constitutionality of police intrusion. The Fourth Amendment quantum framework is deliberately responsive to the myriad of

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[18] DINSTEIN, *supra* note 6, at 62.

[19] *Id.* at 8 (stating that "no circumstance would justify any deviation from the principle" of distinction).

[20] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8), *available at* http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Advisory_Opinion.htm; Protocol Additional to the Geneva Conventions, *supra* note 4, art. 48.

[21] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 48.

[22] This tenet of the law was articulated in one of the first multi-lateral treaties developed to regulate hostilities, the St. Petersburg Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, *available at* http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument ("Considering: . . . That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy . . . .").

[23] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78-79 (July 8), *available at* http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Advisory_Opinion.htm (describing the principle of distinction as an "intransgressible principle[] of international customary law").

operational variables police confront when making time-sensitive decisions, and accordingly has been made central to determining compliance with the Constitution's reasonableness requirement. The scope of lawful authority exercised by police is clearly different from that exercised by military commanders in the context of armed conflict. However, as will be explained, the Supreme Court's specific emphasis on developing a contextual reasonableness framework to respond to the challenges confronted by police in the execution of their duties parallels the analogous contextual variables confronted by commanders in battle. Because of this parallel, the LOAC should adopt the shifting quantum of information framework from Fourth Amendment jurisprudence and apply it to determining the requisite amount of information a commander must have to legitimately hold the reasonable belief that a person, place, or thing qualifies as a lawful military objective.

The value derived from analogy to Fourth Amendment jurisprudence is that it provides an illustration of how and why the quantum associated with reasonableness must be situation-dependent. This contextual reasonableness equation is based on the premise that a logical symmetry should exist between the nature of the intrusion on a protected interest and the quantum of information necessary to render the intrusion reasonable: the greater the degree of intrusion, the more information is required to render the action reasonable.[24] Implicit within this premise is the accordant assumption that as the nature of the intrusion becomes more significant, the law becomes less tolerant of error. Thus, while it is an axiom of search and seizure law that "reasonable does not always mean right," it becomes more difficult to conclude that an error in

[24] *Cf.* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered "no." *See* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); Payton v. New York, 445 U.S. 573, 586 (1980); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.").

judgment is reasonable as the degree of intrusion increases.[25] Accordingly, the requisite quantum of information is lower for minimal intrusions but escalates proportionally with the degree of intrusion and the accordant consequence of erroneous government decisions.

A note of caution is in order. Nothing in this article is intended to suggest that domestic criminal law principles should define the law of battlefield targeting. Indeed, challenging the intrusion of human rights–based law enforcement principles into the realm of target decision making confuses operational clarity. This blurring of the line between human rights principles and the law of armed conflict targeting produces a dangerous erosion of targeting authority, the thesis of an article recently published by the author.[26] Nor is this article intended to suggest that the analogy to Fourth Amendment principles is a perfect solution for addressing the quantum of information lacunae in the law of military targeting, or that the application of these principles will eliminate all subjectivity in the target decision-making process. No legal test can achieve that goal; and no matter what framework is employed to assess target legality, its efficacy will almost invariably depend on the subjective good faith of the decision maker. Instead, this article simply asserts that the many analogies between Fourth Amendment principles of reasonableness and the reasonableness component of the target-legality assessment warrant careful consideration of the methodologies employed in the domestic sphere to add clarity to the decision maker's judgment.

In spite of the differences between the law of peace and the law of war, the need for a workable definition of reasonableness is as, if not more, important to military commanders as to police officers. The Fourth Amendment contextual reasonableness equation this article posits provides a potential foundation for the development of a framework to facilitate compliance with the reasonableness component of the target decision-making process. Both an assessment of reasonableness in the Fourth Amendment context, as well as a

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[25] *Rodriguez*, 497 U.S. at 185-86 ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.").

[26] *See generally* Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52 (2010).

similar information/reasonableness equation, will not only balance the needs of the military commander with individual rights, but will also accommodate the legitimate interests of "tip of the spear" operatives and of those responsible for assessing their decisions.

Following this introduction, Part I of this article addresses the relationship between the LOAC and the military targeting process. Part II discusses the concept of reasonableness as it relates to that process and to U.S. criminal search and seizure law. Part III outlines the contextual reasonableness equation, which is based on the proportional relationship between the nature of the intrusion on a protected interest and the quantum of information required to render that intrusion reasonable. Parts IV and V propose a framework for application to the military targeting process, and then the article concludes.

I. TARGET DECISION MAKING

In the simplest terms, targets are those persons, places, or things deliberately subjected to attack by a military force.[27] Targeting refers to the process of identifying lawful objects of attack, determining the desired effect to be achieved by attack, selecting the means and method of producing this effect, striking the target, and assessing the effect.[28] The target selection and engagement process begins with the military mission. Operational planners determine how best to leverage the capabilities of the military unit to achieve the effects deemed necessary to accomplish the mission (effects which generally include destruction, neutralization, denial, harassment, and disruption).[29] From a military operational perspective, the targeting process is central to achieving tactical and operational success because it maximizes the effectiveness of friendly capabilities in bringing about submission of an enemy.[30] According to U.S. joint-targeting doctrine, "The purpose of the joint targeting process is to provide the commander with a methodology linking objectives with effects throughout the battlespace. The targeting process

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[27] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING I-4 (Jan. 17, 2002), *available at* http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf.

[28] *Id.* at I-3.

[29] *Id.* at II.

[30] *Id.* at I-3.

provides a logical progression as an aid to decision making and ensures consistency with the commander's objectives."[31] This decision-making process is not limited to a mature planning context since every soldier who aims and fires a rifle on the battlefield is in fact engaging in the process (although, by virtue of the situation, the extent of such analysis will normally be substantially abbreviated).

Because not everything in the battlespace may be subject to attack, one of the most important aspects of the targeting process is determining who and what qualifies as a lawful object of attack. Indeed, the obligation to distinguish between lawful objects of attack (lawful targets) and all other persons, places, and things protected from being deliberately attacked is perhaps the most important principle of the LOAC—the principle of distinction.[32] The legal standard for making this determination during armed conflict is central to conflict regulation and is universally regarded as a customary element of the law applicable to both international (interstate) and noninternational armed conflicts.[33]

Along with the principle of distinction, another foundational element of the LOAC conflict regulation framework is the principle of military necessity. The principle of military necessity justifies the deliberate infliction of destructive combat power only when doing so is necessary to bring about the prompt submission of an enemy. This principle by implication prohibits the application of combat power that is not expected to contribute to this effect, for absent such an expectation the use could never be considered necessary.[34] This principle is directly related to the protection of the civilian population from the sufferings associated with armed conflict and is central to the derivative principle of distinction. The principle of distinction is implemented by compliance with the LOAC rules of military objective[35] and proportionality.[36] The

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[31] *Id.* at I-2(a).

[32] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 48; DINSTEIN, *supra* note 6, at 89 (interpreting Article 48 of Additional Protocol I).

[33] *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100-27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://icty.org/x/cases/tadic/acdec/en/51002.htm; DINSTEIN, *supra* note 6, at 129; Smidt, *supra* note 6, at 156-59; *see also* UK MINISTRY OF DEFENCE, *supra* note 6.

[34] U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3 (1956).

[35] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2 ("Attacks shall be limited strictly to military objectives. In so far as objects are

rule of military objective ensures that commanders select only lawful targets for deliberate attack;[37] the rule of proportionality ensures that these targets are not engaged in an indiscriminate manner.[38] These rules were developed to ensure that the deliberate objects of attack are limited to only lawful military objects, and that anticipated and unavoidable incidental consequences of attacking lawful objectives are not so excessive as to nullify the legitimacy of the deliberate attack.

These rules do not imply, however, that the knowing infliction of harm on civilians or civilian property necessarily renders an attack unlawful. Instead, the rule of military objective provides the prima facie standard for determining the legality of attacking a target. The knowing, but unavoidable, harm to civilians or civilian property is considered as part of a second level of analysis to determine whether an attack is indiscriminate.[39] When such harm is anticipated to be excessive in relation to the military advantage produced by targeting the deliberate object of attack, the attack is treated as indiscriminate and therefore unlawful. This assessment process occurs, either formally or informally, within the targeting process.[40]

The rule of military objective, articulated in Article 52 of AP I,[41] is considered the single most important treaty expression of the legal framework for target decision making (although it has not been adopted by a number of states, including the United States and Israel[42]). In order to facilitate compliance with this basic principle of distinction, AP I established an express definition of lawful military objectives,

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concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage.").

[36] *Id.* art. 51.5(b) (defining indiscriminate attacks); *id.* art. 57.2(b) ("[A]n attack shall be cancelled or suspended if it becomes apparent . . . that the attack may be expected to cause incidental loss of human life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

[37] *Id.* art. 52.2.

[38] *Id.* (defining military objectives). *See* DINSTEIN, *supra* note 6, at 128-30 (discussing proportionality).

[39] *See supra* note 36 and accompanying text.

[40] MAJ. R. CRAIG BURTON, 86TH LAW OF WAR COURSE: MEANS & METHOD OF WARFARE D-3 (International Operational Law TJAGLCS Law of War Course, 2006).

[41] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.

[42] *See International Humanitarian Law—State Parties/Signatories to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, INT'L COMMITTEE RED CROSS, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Sept. 8, 2011).

codified in Article 51 of the treaty.[43] The first Article 51 definition provides that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[44] AP I, however, excludes captives entitled to prisoner of war status from the definition of civilian[45] (with the exception of civilians who accompany the armed forces in the field to provide support[46]). Accordingly, these "combatants" are by implication lawful objects of attack.[47] Places and things, however, must be analyzed pursuant to a different equation. In recognition of the inevitable variables of the operational environment, AP I does not provide an exhaustive list of military objectives. Instead, it provides a test for assessing whether each proposed target qualifies for attack or whether it must be treated as a civilian place or object protected from attack. This test is codified in Article 52, which provides: "[M]ilitary 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."[48] Accordingly, determining target legality requires a case-by-case assessment based on a combination of factors related to the military situation (defined by U.S. military doctrine as METT-T-C: the mission, enemy, troops available, terrain, time, and presence of civilians).[49] A central component

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[43] Passed in 1977, API is a supplementary treaty to the 1949 Geneva Conventions which broadens the scope of protection for victims of international armed conflicts. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE, 1977 TO THE GENEVA CONVENTION OF 12 AUGUST, 1949, at 31 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]. More specifically, Article 51 is given the distinction as "one of the most important articles in the Protocol" by the drafters of the Commentary to API. *Id.* at 615. This article codifies the rule of customary international law that requires armed forces to refrain, as much as possible, from endangering or harming innocent civilians in the midst of an armed conflict. *Id.* Article 51 also provides standards by which to apply this rule. *Id.*

[44] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 51.2.

[45] *Id.* art. 50.1 (excluding from the definition of civilians "persons referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention"); Geneva Convention Relative to the Treatment of Prisoners of War art. 4A(1)-(3), (6), Aug. 12, 1949, 6 U.S.T. 3316, 3320-22, 75 U.N.T.S. 135 (defining "prisoners of war"); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 611.

[46] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 45, art. 4A(4).

[47] DINSTEIN, *supra* note 6, at 146; Protocol Additional to the Geneva Conventions, *supra* note 4, art. 50; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 610-12.

[48] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2.

[49] UNITED STATES DEP'T OF THE ARMY, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 145-46 (2007).

of this analysis is the complimentary rule established by Article 51 of AP I: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."[50]

In accordance with this rule, a determination that civilians are located in the vicinity of a place or thing that otherwise qualifies as a lawful military objective does not render the objective immune from attack. Instead, the attacking commander is obligated to analyze the legality of the attack pursuant to the complimentary prohibition against indiscriminate attacks and assess whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated. This comparison is commonly referred to as the proportionality analysis.[51]

The predicate lawful military objective assessment, however, remains the cornerstone of lawful targeting. Three of the most significant components of the military objective test are derived from the prong of Article 52 requiring that the target's "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[52]

First, the law clearly recognizes that the desired effect of an attack need not be total destruction.[53] This is consistent with military doctrine, and specifically principles of military operations.[54] Commanders employ combat power to achieve desired effects; effects that often do not require total destruction or capture of an enemy capability.[55] For example, in addition to target destruction, the doctrinal mission of indirect fire assets (such as artillery) also includes disruption, harassment, and degradation. Another example is the use of a minefield to deny access or egress to an enemy. If the use of the mines never results in the destruction of an enemy asset, the effect may nonetheless be achieved by depriving the enemy of a certain area.

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[50] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 51.7.

[51] DINSTEIN, *supra* note 6, at 130-33. The proportionality analysis is discussed in greater detail in Part IV.C, *infra*.

[52] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2.

[53] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 631-32.

[54] *See* Corn & Corn, *supra* note 2.

[55] *See generally* JOINT CHIEFS OF STAFF, *supra* note 27.

Second, operational judgments must be made (and ultimately critiqued) based on the situation prevailing at the time of the decision.[56] The purpose of this qualification is to prevent the "slippery slope" that would result if commanders could justify attacks based purely on speculation that the place or thing might be used in the future in a manner that would render it a military objective. This does not, of course, mean that considering anticipated value is impermissible. Rather, a commander must have some basis in fact to support the conclusion that a potential future use of a place or thing renders it a military objective.

Third, the advantage gained by targeting a place or thing must be "definite."[57] Again, the purpose of this qualifier is to prevent unfounded speculation or conjecture on the value gained by targeting a place or thing. However, no commander can know with absolute certainty the value to be gained from attacking a target until the attack is actually executed (and even then assessment of effects is often incomplete). What the "definite" qualifier is intended to prevent is general speculation on some attenuated value of target engagement.[58] So long as the commander acts with a good-faith basis that the target engagement will produce a tangible operational or tactical advantage for his force, the qualifier is satisfied.[59]

These three components of the military objective test reveal that a commander making a legality determination must inevitably rely on information available at the time of the decision, ideally in the form of intelligence, but often in the form of unrefined battlefield information.[60] The quantity and

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[56] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 636; *see also* SOLIS, *supra* note 6, at 286-90 (citing The Hostage Case and concluding that "[a]s the opinion makes clear . . . the standard of guilt or innocence is the facts as they appeared to the accused at the time, given the circumstances at the time").

[57] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 636.

[58] *Id.* at 684.

[59] *Id.* at 682.

[60] Battlefield information is not intelligence because it is information that has not been subjected to analysis. Intelligence is the product of such analysis:

> *Intelligence* is the product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations. The term is also applied to the activity that results in the product and to the organizations engaged in such activity (JP 2-0). The Army generates intelligence through the intelligence warfighting function.

DEP'T OF THE ARMY, INTELLIGENCE (FM-2-0) 1-8 (2010), *available at* http://www.fas.org/irp/doddir/army/fm2-0.pdf.

quality of this information is highly dependent on multiple variables, ranging from the time available to assess a potential target to the sophistication of the intelligence, surveillance, and reconnaissance capabilities supporting the decision.[61] Even in the most time-sensitive decision-making situations, however, the law of military objective requires some factual information to support a reasonable judgment of target legality, thereby rejecting speculation based on nothing more than operational instinct. Simply put, attacking based solely on a hunch is never allowed.

II. REASONABLENESS IN TARGETING

It is axiomatic that a commander must exercise reasonable judgment when deciding the legality of a potential target. As such, it is also indubitable that any post hoc critique of a targeting decision will involve an assessment of reasonableness. In the context of a criminal prosecution for unlawful targeting, this assessment would be determinative of whether a commander engaged in a reckless attack (the culpability standard adopted by the International Criminal Tribunal for the Former Yugoslavia[62]), and would be the first step in determining whether the commander engaged in a willful attack on a protected person or place (the culpability standard reflected in AP I and for the crime of attacking civilians according to the International Criminal Court[63]). The ubiquity of the "reasonableness" requirement is hardly surprising, considering that the law routinely requires government agents to exercise their judgment reasonably (particularly when that discretion implicates life or liberty). While the criminal culpability standard used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) may appear to make reasonableness more central to an assessment of guilt,[64] the important point here is

[61] *Id.* at 1-21.

[62] Prosecutor v. Galić, Case No. IT-98-29-T, Separate & Partially Dissenting Opinion of Judge Nieto-Navia, ¶ 103 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), http://icty.org/x/cases/galic/tjug/en/gal-so031205e.pdf ("Despite my aforementioned disagreements with certain of the Majority's factual findings, I share in the conclusion that the Prosecution has established beyond a reasonable doubt that, in a number of instances, the SRK either deliberately or recklessly fired at civilians in Sarajevo during the Indictment Period."). It should be noted that the use of a recklessness standard by the ICTY is of questionable validity. *See infra* note 87 and accompanying text.

[63] Rome Statute of the International Criminal Court art. 8(2)(e), July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [hereinafter Rome Statute].

[64] Incidentally, this is why it also appears inconsistent with established standards of criminal responsibility for targeting decisions.

that assessing the reasonableness of a targeting judgment is the inherent first step in determining whether the commander's decision was legal.

A. The Reasonableness Requirement

There are two ways this reasonableness component of compliance relates to the rule of military objective. First, criminal compliance relates to determining lawful objects of attack by deciding on the appropriate perspective for critiquing the reasonableness of battlefield judgments. Here, the critique of objective reasonableness must be made through the subjective perception of the decision maker at the time the decision was made, not retrospectively. Second, the compliance relates to the military objective test in assessing the probative value of information available to the commander[65] at the time of the decision (resulting in a principle analogous to the doctrine of willful blindness: when a decision maker had information available but chose to ignore that information, the knowledge that would have been gained will effectively be imputed to the decision maker for purposes of assessing reasonableness).[66]

International law does not clearly define the amount of information required for a targeting judgment to be considered reasonable. Nothing in Article 50 or its associated International Committee of the Red Cross (ICRC) Commentary indicates the quantum of information necessary to render "reasonable" a judgment of target legality. Instead, the Commentary merely emphasizes the importance of satisfying the elements of the military objective test.[67] Because AP I focuses primarily on operational regulation (and only secondarily on criminal responsibility), this omission might be understandable. But the failure to address the requisite

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[65] I will use the term "commander" throughout this article to denote the operational decision maker responsible for authorizing an attack, and therefore responsible for making the judgment of target legality. However, the rule of military objective is also applicable to other operational decision makers who might not be in a formal position of command. For example, staff operations officers and front line soldiers routinely determine what qualifies as a lawful object of attack. Use of the term "commander" is not intended to suggest the rule is limited only to individuals with lawful command authority.

[66] *See* MELVYN ZARR ET AL., PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 2.14 (1997), *available at* http://www.rid.uscourts.gov/menu/judges/jurycharges/PJI.pdf; Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 184 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006), http://icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

[67] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 635-36.

quantum is unjustifiable since the rule has slowly transformed into a basis for criminal responsibility both at the ad hoc international war crimes tribunals[68] and in the Rome Statute for the International Criminal Court.[69] This may be attributable to the fact that the criminal liability standards related to unlawful attack require a higher standard of mental culpability than mere unreasonableness.

Several war crimes for attacking civilians require proof that the perpetrator intended civilians to be the object of attack. For instance, as noted above, both AP I and the offenses established for the International Criminal Court prohibit the intentional attack on protected persons or property. For the war crime of attacking "civilian objects" established for the International Criminal Court, Article 8 requires that a perpetrator intentionally attacked civilians during what the perpetrator knew was an armed conflict.[70]

Proof of intent requires more than a determination that the attack was unreasonable, since a perpetrator's unreasonable decision to attack does not necessarily mean he intended to attack civilians. On the other hand, the decision to intentionally attack civilians is always unreasonable. Therefore, a more attenuated culpability standard—separate from the existing "intentional" standard—is necessary to provide a clear and genuine method for assessing post hoc whether the decision to attack meets the "unreasonableness" required for criminal culpability.

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[68] *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), http://icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf (stating that "an object shall not be attacked when it is not reasonable to believe . . ." but failing to address the meaning of reasonableness).

[69] Rome Statute, *supra* note 63.

[70] *See id.* art. 8(2)(b)(ii). Article 8 provides the following:

> War crime of attacking civilian objects
>
> Elements
>
> 1. The perpetrator directed an attack.
>
> 2. The object of the attack was civilian objects, that is, objects which are not military objectives.
>
> 3. The perpetrator intended such civilian objects to be the object of the attack.
>
> 4. The conduct took place in the context of and was associated with an international armed conflict.
>
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Id.

Having such a method for assessing culpability would facilitate the ability of a commander to articulate the basis for the judgment subject to critique. Furthermore, commanders may confront situations where the attack itself is not the basis for an allegation of criminality, but instead provides evidence supporting a broader allegation of improper conduct.[71] For example, the propriety of an attack may be related to a broader allegation of genocide or crimes against humanity based on individual or joint criminal enterprise. In such a case, the LOAC arguably may not require proof that an attack against protected civilians or civilian property was intentional, because the probative value of the evidence of the improper attack would not be that the attack itself was a criminal violation, but that it demonstrated a broader illicit purpose to commit a chapeau offense.[72] In such a situation, establishing that targeting decisions were unreasonable would contribute to proving the broader allegation by creating an inference that the overall purpose of the military operation was illicit. Assessing the reasonableness of such decisions without a quantum of information framework arguably invites arbitrary and subjective determinations. If this is true, then it is fundamentally inconsistent with the assessment of reasonableness, which requires an objective critique. What is necessary, then, is a methodology for assessing the objective reasonableness of a decision through the subjective perspective of the commander at the time of the decision. A quantum of information framework will contribute to the legitimacy of this process.

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[71] *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-01-45-I, Indictment, ¶¶ 13-15 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2001), http://www.icty.org/x/cases/gotovina/ind/en/got-ii010608e.htm. The prosecutor subsequently amended the original indictment to name two additional former Croatian generals—Mladen Markac and Ivan Cermak. Prosecutor v. Gotovia, Case No. IT-06-90-PT, Amended Joinder Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2007), http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf.

[72] This is exactly how the prosecution relied on what it alleged was unreasonable target decision making in the trial of General Gotovina. The attacks on Knin were never alleged as crimes themselves. Instead, the prosecution asserted that the attacks manifested Gotovina's intent to ethnically cleanse the Krajina of ethnic Serbs, thereby proving his complicity in a joint criminal enterprise. *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution's Public Redacted Final Trial Brief, ¶ I(A)(1) (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100802.pdf; Prosecutor v. Gotovina, Case No. IT-06-90-T, Gotovina Defence Final Trial Brief, ¶¶ 1-7 (Int'l Crim. Trib. for the Former Yugoslavia July 27, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100727.pdf.

B. What Does Reasonableness *Mean?*

Reasonableness is unquestionably the focal point of compliance with the military objective rule and, by implication, the principle of distinction.[73] What, however, does *reasonable* mean in practical terms? There are two potential answers to this question. The first, which seems consistent with current practice, does not in fact define reasonableness, but merely emphasizes that each ad hoc targeting decision must be the result of a reasonable judgment. Commanders make ad hoc assessments of target legality based on instinctual assessments of the amount of information necessary to satisfy the elements of the military objective test (at times guided by the advice of a military legal staff officer, who, like the supported commander, is left with his own subjective determination of what amount of information renders the decision reasonable).[74] An alternative approach is more pragmatic and would link the definition of reasonableness to a quantum of information component.

The current ill-defined approach is certainly flexible, but it creates a number of deficiencies. First is the absence of a uniform standard for assessing the quantum and quality of information to support a targeting decision. This lack of uniformity necessarily requires tolerance of potentially disparate judgments. Second, the lack of a uniform quantum standard subtly dilutes the influence of staff officers (and especially the legal advisor) in the target decision-making process. Without a defined quantum requirement, the staff officer must ultimately concede that determining whether the military objective test is satisfied is within the pure subjective discretion of the commander. This effect is related to the third deficiency: the lack of a consistent framework for post hoc critique of the reasonableness of the commander's decision.

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[73] BURTON, *supra* note 40, at D-4.

[74] THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW § 467 (Dieter Fleck ed., 2008) ("However, all military actions involve an extremely high degree of factual uncertainty, which necessarily means that the decision of the responsible commander can only be judged on the basis of information available to him at the time of the decision, and not on the basis of hindsight."); SOLIS, *supra* note 6, at 255 (relaying the story of an Israeli soldier who said, "Maybe I'll tell you a story. A car came towards us, in the middle of the [Lebanese] war, without a white flag. Five minutes before another car had come, and there were four Palestinians with RPGs . . . in it—killed three of my friends. So this new Peugeot comes towards us, and we shoot. And there was a family there—three children. And I cried, but I couldn't take the chance."). For a general overview of the targeting process, see JOINT CHIEFS OF STAFF, *supra* note 27, at v.

The lack of a defined quantum standard is most palpably detrimental to any effort to subject the target decision to post hoc review. Whether for purposes of administrative investigation, process review and refinement, or criminal sanction, assessing whether a commander acted reasonably without a defined quantum of information framework renders the assessment inherently arbitrary.[75] This detrimental effect has two possible manifestations. One is that the finder of fact will be disabled in performing the objective reasonableness assessment because of an inability to effectively critique the reasonableness of the decision based on the subjective perspective of the commander at the time the decision was made. This, however, is unlikely for the simple reason that the mandate of an investigation or adjudication is to reach a conclusion.

The alternate and more likely manifestation is that the reviewing official or entity will simply apply her own subjective determination of what quantum of information renders a judgment reasonable. This substitution of subjective judgment is particularly troubling, for it contributes to disparate outcomes and subjects the commander under scrutiny to a post hoc judgment based not on a standard of reasonableness analogous to that used at the time of the decision, but on the subjective instincts of the reviewing official or entity. In short, without linking reasonableness to a defined quantum of information, the law invites subjective and inherently arbitrary determinations of whether a commander acted in compliance with his obligations.

This latter effect was exposed during the recent trial of General Ante Gotovina. In 2008, General Gotovina was convicted by the International Tribunal for the Former Yugoslavia (Tribunal) for, among other things, unlawful attacks on civilian population centers as part of a joint criminal enterprise to ethnically cleanse Croatia of ethnic Serbs.[76] Central to the prosecution's theory that Gotovina engaged in ethnic cleansing of Croatian Serbs from Krajina was the allegation that he used indirect fires against the city of Knin, the capital of the Croatian Serb break-away region of Krajina.[77] According to the prosecution, General Gotovina's use of

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[75] *See* Corn & Corn, *supra* note 2, at 41.

[76] Adam LeBor, *Croat General Ante Gotovina Stands Trial for War Crimes*, TIMES (London) (Mar. 11, 2008), http://www.timesonline.co.uk/tol/news/world/europe/article3522828.ece.

[77] *Id.*

artillery and rocket fire against targets in Knin was intended to terrorize the civilian population.[78] By demonstrating the inherent unreasonableness of his target selections, the prosecution hoped that proof of this indirect fire would support a circumstantial inference that the overall objective of the operation he commanded (Operation Storm) was to force Serbs from the territory. Accordingly, it was not necessary for the prosecutor to establish intent to attack protected persons and places. Instead, by demonstrating the inherent unreasonableness of his selection of methods and means of attack against targets within the city, the prosecutor would achieve the purpose of corroborating the broader illicit motive.[79]

In response, the defense offered evidence in the form of expert opinions that focused on the propriety of designating and subsequently attacking certain buildings and areas within Knin. Through this evidence, the defense argued that, based on the facts available at the time Gotovina approved the attacks, each nominated target qualified as a lawful military objective and the methods and means used to attack these objectives were appropriate. The defense also challenged the probative value of a report offered by the prosecution's expert who reached the exact opposite conclusion. The defense theory was clear: it was reasonable for Gotovina to conclude that all of the nominated targets located within the city of Knin were either being utilized by Croatian Serb forces for military purposes (such as use as headquarters or barracks) or were valuable for other military purposes (such as to facilitate movement of reinforcements or supplies).[80] The prosecutor challenged much of this opinion, particularly in relation to buildings and places that were not purely military in nature (such as a rail yard, or an apartment building housing the civilian leader of the Croatian Serb forces).[81] The Tribunal was therefore provided

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[78] *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90, Prosecution's Public Redacted Final Trial Brief, ¶ 492 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100802.pdf.

[79] *Id.* ¶¶ 538-49.

[80] Prosecutor v. Gotovina, Case No. IT-06-90, Gotovina Defence Final Trial Brief, ¶¶ 233-59 (Int'l Crim. Trib. for the Former Yugoslavia July 27, 2010), http://www.icty.org/x/cases/gotovina/custom5/en/100727.pdf.

[81] *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Transcript, ¶¶ 7647-54 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2008), http://www.icty.org/x/cases/gotovina/trans/en/080901IT.htm (interviewing Mr. Berikoff, a soldier, on the military target at Knin); Prosecutor v. Gotovina, Case No. IT-06-90-T, Transcript, ¶¶ 8251-53 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 9, 2008), http://www.icty.org/x/cases/gotovina/trans/en/080909ED.htm (interviewing Mr. Liborius, who detailed his analysis of the damage caused to civilian property).

with conflicting expert opinions on the reasonableness of General Gotovina's judgments, punctuated by periodic interventions by the presiding judge who emphasized his view that reasonableness would depend on all the variables presented to General Gotovina at the time of his decisions. In its judgment, the Tribunal adopted most of the defense theory, although it ultimately concluded that evidence of artillery effects beyond the range of identified targets (combined with an unjustified use of artillery against the residence of the Croatian Serb President) proved the prosecution's allegation.[82] Currently pending appeal, this ruling may not be the final chapter in the case of General Gotovina.[83] What is relevant here, however, is how the trial process revealed the consequence of an ill-defined concept of reasonableness.

Although a substantial amount of time was devoted to the presentation of evidence related to the attack on Knin, and literally hundreds of pages of the trial judgment address this issue, there was no discussion of the amount of information required to render Gotovina's targeting judgments reasonable. As a result, four distinct conclusions were invited: the conclusions reached by General Gotovina when he approved targets, the defense conclusion based on review of the evidence available to him at that time, the prosecutor's conclusion that the evidence did not justify Gotovina's legality conclusions, and the inchoate conclusion of the Tribunal. The absence of a clear quantum to define reasonableness therefore leads to an inherent arbitrariness in this assessment.

For a charge of unlawful attack on civilians or civilian property, the current state of the law does arguably require a prosecutor to prove beyond a reasonable doubt that an attack on a target was intentional,[84] although several decisions by the ICTY seem to have adopted a lower culpability standard.[85] However, requiring a prosecutor to meet this standard and prove that a target subjected to attack was *not* a lawful military objective does not eliminate the disabling effect of an

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[82] Prosecutor v. Gotovina, Case No. IT-06-90, Judgement Vol. II of II, ¶ 2620 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf.

[83] *Case Information Sheet: "Operation Storm" (IT-06-90) Gotovina & Markac*, COMMC'NS SERV. OF THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf (last visited Sept. 17, 2011).

[84] *See infra* note 87 and accompanying text.

[85] *About the ICTY: Criminal Proceedings*, INT'L CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, http://www.icty.org/sid/146 (last visited Sept. 8, 2011); *see also supra* note 62 and accompanying text.

undefined reasonableness quantum. Proof beyond a reasonable doubt requires the prosecutor to exclude every fair and rational hypothesis except that of guilt.[86] In more specific terms, it requires the prosecutor to prove that there was no fair and rational justification for concluding a target qualified as a lawful military objective. So long as the commander can point to *some* information relied on for the target legality judgment, the court will have to assess the reasonableness of the judgment. As such, the post hoc assessment of whether the attack was intentionally directed against a protected person or place renders the critique inherently subjective. Therefore, without a quantum standard, there is no meaningful criterion upon which to meet this heightened burden in any but the most extreme cases, and the resulting assessment will be arbitrary.

Reasonableness should not be based solely on an assessment of whether a commander considered information in support of his decision, but instead on the quality of the information that supported the decision. While this is almost certainly consistent with the application of the military objective test in current practice, it highlights the importance of defining the quantum component of reasonableness. Furthermore, the universally high standard for criminal responsibility for attacking civilians or civilian property[87] should not be relied upon as a justification to avoid a more functional assessment of reasonableness in the decision-making process. Obviously, any commander who willfully (or,

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[86] *See, e.g.*, United States v. Gay, 16 M.J. 475, 477 (C.M.A. 1983).

[87] Several decisions of the International Criminal Tribunal for the Former Yugoslavia have addressed the culpability requirements to sustain a charge of unlawful attack on non-combatants. These cases have appropriately focused on the question of whether the commander knew the object of attack was a civilian or civilian property. *See, e.g.*, Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgement, ¶¶ 54-64, 121-29, 161-66 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf; Prosecutor v. Boškoski, Case No. IT-04-82-A, Judgement, ¶¶ 61-68, 84-86, 93-95, 100-02 (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010), http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf. Thus, culpability for violation of the principle of distinction attaches only when the prosecution can prove beyond a reasonable doubt that the commander launched the attack "intentionally in the knowledge . . . that civilians or civilian property were being targeted . . . ." Prosecutor v. Bla[ki], Case No. IT-95-14-T, Judgement, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf. This has been further defined as including a reckless judgment. Prosecutor v. Martic, Case No. IT-95-11-T, Judgement, ¶¶ 90, 96 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), http://www.icty.org/x/cases/martic/tjug/en/070612.pdf; Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006), http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

according to the ICTY, recklessly)[88] attacks a target he knows is civilian in nature has violated the principle of distinction and the law of military objective. However, at the operational execution level, the principle of distinction along with the rule of military objective requires more of a commander—a good-faith determination that the object of attack qualifies as a military objective. It is this determination that should be the focal point of improving the decision-making process by identifying a rational quantum of information framework. Shifting the focus of compliance with the military objective test to the criminal consequence of noncompliance coupled with the high burden of proof required to establish that liability undermines the efficacy of the law to achieve its intended goal: facilitating good-faith and factually-sound attack decisions.

All this indicates that both the operational decision-making process and the post hoc critique of those decisions will be enhanced by linking the concept of target decision-making reasonableness with a quantum of information framework. There has, however, been a notable omission from the evolution of the targeting reasonableness test that raises a question: what is the requisite quantum of information that may legitimately result in a reasonable belief that a person, place, or thing qualifies as a lawful military objective? Such a framework would serve two purposes. First, the framework would facilitate good-faith operational decisions by providing commanders greater clarity on the standard against which to assess the sufficiency of available information relied on to make targeting judgments. Second, it would provide a consistent standard against which targeting decisions would subsequently be critiqued. The contemporary absence of a quantum framework contributes to the potential transformation of what is supposed to be a prospective assessment into a retrospective critique, focused not on the information available to the commander at the time of the decision, but on the actual facts discovered after the decision.[89]

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[88] *See supra* note 85 and accompanying text.

[89] SOLIS, *supra* note 6, at 286-90 (citing The Hostage Case and concluding that "[a]s the opinion makes clear, . . . the standard of guilt or innocence is the facts as they appeared to the accused at the time, given the circumstances at the time").

III. CONTEXTUAL REASONABLENESS: THE U.S. CRIMINAL PROCEDURE MODEL

An analysis of reasonableness in criminal investigations illustrates the value of developing a quantum of information framework linked to the reasonableness requirement of target decision making. In both police search and seizure and military targeting contexts, operational decisions must be reasonable, and so they are often subjected to post hoc administrative and/or criminal investigations to assess their reasonableness.

The Fourth Amendment of the U.S. Constitution imposes reasonableness as the "touchstone" for assessing the legality of all searches and seizures.[90] Unlike in the LOAC, the Fourth Amendment reasonableness standard links the ultimate assessment of reasonableness with a defined quantum of information component. One quantum in constitutional jurisprudence is "probable cause," which requires facts and circumstances that create a fair probability of truth.[91] Another quantum is "reasonable suspicion," which requires a "particularized and objective basis" for a belief "supported by specific and articulable facts."[92] This metric "allows [police] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them."[93] The appropriate quantum component is fundamental to assessing the reasonableness—and therefore the constitutionality—of a government action. So instead of employing a static quantum of information, constitutional jurisprudence imposes a shifting scale contingent upon the extent of the government intrusion at issue. When the government action results in a limited intrusion into a protected interest, the Supreme Court has held that a reduced quantum of information is appropriate for assessing reasonableness.[94] But the Court never allows objective reasonableness to be established by reliance on the

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[90] Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

[91] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009). According to *Safford*, "the best that can be said generally about the required knowledge component of probable cause . . . is that it raise a 'fair probability' . . . or a 'substantial chance.'" *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

[92] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2088 n.3 (2011) (Ginsburg, J., concurring) (quoting BLACK'S LAW DICTIONARY 1585 (9th ed. 2009)); *see also* United States v. Arvizu, 534 U.S. 266, 273-74 (2002); Illinois v. Wardlow, 528 U.S. 119, 123-25 (2000).

[93] *Arvizu*, 534 U.S. at 273.

[94] *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

pure instincts of the police officer; rather, some articulable fact is required to justify inferences based on those instincts.[95]

This quantum of information sliding scale developed in Fourth Amendment law provides a useful template for understanding the relationship between reasonableness and the amount of information relied upon by the government actor. This relationship between the operational context and the quantum of information necessary to justify government action offers a potentially beneficial analogy that may contribute to the targeting process. At a minimum, it offers an opportunity to begin to consider whether a similar approach might be effective for filling the lacunae in LOAC targeting analysis—a context that is also defined by the practical realities of fast-paced operational decision making.

This part will begin by showing why an analogy between the law of war and the law of Fourth Amendment search and seizure is apt, and how the established quantum of information standards (probable cause, reasonable suspicion, etc.) make sense for assessing targeting decisions.

A. Applying Fourth Amendment Jurisprudence to Military Targeting: Borrowing the Quantum of Information for Reasonableness Assessments

The post hoc review of targeting decisions requires a framework that adjusts according to the severity of the threatened intrusion at issue. This is because *reasonable* is an arbitrary term lacking a quantum component. Without defining the requisite quantum of information to support a reasonable determination of lawful military objective, the reasonableness of that judgment cannot legitimately be assessed. Further, providing greater clarity on the requisite quantum element will contribute to the assessment of targeting judgments from the perspective of the commander at the time the judgment is made. It will preserve the objective nature of such an assessment without inviting a wholesale substitution of post hoc judgment for that of the commander at the time the decision was made.

Providing a defined analytical framework for decision making facilitates a critique of the decision by focusing the assessment on the application of facts to the analytical

[95] *See Wardlow*, 528 U.S. at 124.

framework. Indeed, this is one of the principal benefits of the military objective test: it provides a general framework that not only focuses analysis on facts and circumstances during the decision-making process, but also provides a benchmark for any subsequent critique of those decisions.

Finally, enhancing the ability of the commander to articulate precisely why she considered a judgment reasonable will invariably mitigate the subjectivity of post hoc critique and facilitate both the decision-making and critique processes. Providing a framework similar in both concept and flexibility to the Fourth Amendment will likewise focus the decision-making analysis and subsequent critique and provide for greater clarity and less arbitrariness for the assessment of reasonableness in targeting.

Like combatants, police officers constantly exercise operational judgment in fast-moving tactical situations. While these judgments do not routinely involve the application of deadly physical force,[96] the investigation of and response to crime in a myriad of operational situations present challenges analogous to ensuring the reasonableness of military action. Like that of their battlefield counterparts, police exercise of operational discretion is often regulated by a legal requirement of reasonableness—a requirement derived from the Fourth Amendment, which prohibits unreasonable search and seizure.[97] Accordingly, like targeting decisions, reasonableness is the focal point of post hoc critiques of the legality of searches and seizures by law enforcement officers and is therefore central to the legitimacy of police action. In fact, the Supreme Court has consistently emphasized that "reasonableness is the touchstone of the Fourth Amendment."[98]

The reasonableness touchstone[99] is not the only analogy between law enforcement officers and military commanders. There are a number of additional interesting similarities between U.S. search and seizure law and the law of targeting:

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[96] *See, e.g.*, *Study Examines Police Use of Deadly Force*, CBSNEWS.COM (Apr. 27, 2010), http://www.cbsnews.com/stories/2007/10/11/national/main3359288.shtml?source=RSSattr=U.S._3359288 ("[W]e have 2,000 deaths out of almost 40 million arrests over three years, so that tells you by their nature they are very unusual cases . . . .").

[97] *Terry*, 392 U.S. at 19, 21-22.

[98] *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006); United States v. Knights, 534 U.S. 112, 118 (2001).

[99] *See, e.g.*, *Knights*, 534 U.S. at 118; Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 165-77 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf.

the imposition of a legal regulatory framework on nonlawyers engaged in operational decision making,[100] the application of judicially defined framework parameters (what qualifies as a military objective and what qualifies as a search or seizure),[101] and the subsequent scrutiny of the operational judgment by the judiciary or relevant agency.[102]

There is, however, one significant difference in application of the reasonableness touchstone in these two distinct contexts. Unlike the law of military objective, a central component of assessing reasonableness in relation to U.S. search and seizure law is a defined quantum of proof: the quantum component of reasonableness is not static but is adjusted contextually.[103] United States search and seizure law has evolved to recognize a continuum of justifications matched to the degree of intrusion and operational context of the government action.[104] Thus, in order to assess reasonableness, one must first determine the point along this continuum where the intrusion falls.

Under the Fourth Amendment framework, the legitimacy of any government deprivation of liberty turns on satisfying an established quantum requirement. For example, a *Terry* stop will require mere reasonable suspicion, whereas punitive incarceration will require proof beyond a reasonable doubt.[105] All criminal law quantum requirements reflect two critical principles of regulating government action in the criminal law context. First, the quantum of proof required to render government action justified cannot be unitary, for each

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[100] *See, e.g.*, Katz v. United States, 389 U.S. 347, 359 (1967); Protocol Additional to the Geneva Conventions, *supra* note 4, art. 48-56.

[101] *See, e.g.*, *Katz*, 389 U.S. at 353; DINSTEIN, *supra* note 6, at 89-120.

[102] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 32 (2001) (citing *Katz*, 389 U.S. 347); Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 165-77 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

[103] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[104] *See, e.g.*, Peter E. Moran, Case Note, *Fourth Amendment—Unreasonable Searches & Seizures—Unprovoked Flight Upon Noticing Police Officers While Present in a High-Crime Area Are Relevant Factors Which Create a Reasonable Suspicion to Justify a* Terry *Stop and Thus Does Not Violate the Fourth Amendment's Prohibition of Unreasonable Searches and Seizures*—Illinois v. Wardlow*, 120 S. Ct. 673 (2000)*, 11 SETON HALL CONST. L.J. 859, 859-76 (2001) (discussing *Terry* and the recognition of the level of government intrusion).

[105] *Terry*, 392 U.S. at 9 ("We have recently held that 'the Fourth Amendment protects people, not places,' and wherever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" (citations omitted)).

step in that process involves a different balance of interests.[106] Second, a definition of the requisite quantum of information is essential to facilitate a post hoc critique of the reasonableness of government action. Probable cause and reasonable suspicion both involve acting on suspicion, and yet the basis for satisfying the reasonableness requirement is calibrated to both the situation and the extent of the intrusion. Suspicion, the common element of both probable cause and reasonable suspicion, refers to "[t]he apprehension of something without proof or upon slight evidence."[107] However, to rise to the level of probability, the suspicion must be based on facts that establish a "likelihood of a proposition or hypothesis being true."[108] Accordingly, probable cause requires a quantum of information establishing the suspected fact to a degree indicating the substantial likelihood of that fact being true.[109]

Furthermore, this increased quantum requirement renders instinct and intuition less significant in relation to the legitimacy of the judgment. Like government efforts to detect and punish crime, targeting involves the exercise of judgment with profound consequences for the object of military action. It is practically axiomatic that like the domestic criminal context, these decisions must be reasonable.[110] Moreover, because both the LOAC and human rights law prohibit arbitrary deprivations of life or property (even during armed conflict), reasonable deprivations of these fundamental interests in this context must require more than mere speculation or hunch.[111]

Despite the similarities between criminal investigation and military targeting, the law of targeting lacks a quantum of information framework for assisting in the determination of

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[106] *See id.* at 20 ("[W]e deal here with the entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.").

[107] BLACK'S LAW DICTIONARY 1447 (6th ed. 1990).

[108] *Id.* at 1201.

[109] *See* Illinois v. Gates, 462 U.S. 213, 232 (1983); Brinegar v. United States, 338 U.S. 160, 175 (1949) (defining the meaning of probable cause and the quantum of information required to establish probable cause in relation to Fourth Amendment compliance); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) ("[T]he best that can be said generally about the required knowledge component of probable cause . . . is that it raise a 'fair probability' . . . or a 'substantial chance.'" (citations omitted)).

[110] Brigham City v. Stuart, 547 U.S. 398, 403 (2006); United States v. Knights, 534 U.S. 112, 118 (2001).

[111] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4& case=95; Corn, *supra* note 26, at 93.

reasonableness (or the subsequent critique of these determinations). Explicating the several ways in which U.S. search and seizure law is analogous to the law of targeting shows why this lack of a quantum component in targeting law is extremely problematic.

The first way in which these two spheres are similar is that, like U.S. search and seizure law, the LOAC is intended to provide individuals operating in a complex and fast-moving environment with a meaningful and logical standard to guide their decisions. Indeed, the pressure on battlefield decision makers is almost invariably more intense and the situations in which these decisions are made more confused than those which confront police officers on the street. This complexity is only exacerbated by the reality that the human stakes involved in battlefield targeting are normally more significant than those involved in law enforcement operations. While it is true that law enforcement officers must in certain circumstances make judgments that jeopardize life, this is normally an exceptional situation because use of deadly force is considered a measure of last resort.[112] In contrast, use of deadly force is an authorized measure of first resort in armed conflict.[113] Accordingly, placing life in jeopardy is the inevitable consequence of routine targeting judgments. Furthermore, even when law enforcement officers employ deadly force, the nature of that force rarely implicates risk to innocent bystanders to a degree normally associated with the use of combat power. In contrast, armed conflict targeting decisions routinely unleash combat power that creates a substantial risk of collateral damage and incidental injury to individuals who were not the deliberate objects of attack.

Second, in both contexts, the law that regulates the government actor is intended to balance two critical but competing interests: achievement of the government objective and protection of the innocent from deprivations of life or liberty. The third, and perhaps most important, way these two fields are analogous is that the LOAC exists not only to guide the decisions of battlefield operatives, but also to provide a standard by which those decisions may be properly critiqued. Whether for the purpose of achieving procedural improvement, administrative discipline, or criminal sanction, the law of

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[112] *See* Corn, *supra* note 26, at 76, 93.
[113] *Id.*

targeting, like search and seizure law, must provide a meaningful standard to assess the reasonableness of battlefield judgments for those who engage in these post hoc critiques. That, in turn, requires a more definite framework related to the contextual exercise of judgment.

B. *Probable Cause: The First Example of a Workable Standard to Meet the Realities of Pragmatic Decision Making*

Probable cause is a quantum of proof, which generally amounts to sufficient evidence to establish a fair probability.[114] In the search and seizure context, probable cause satisfies the substantive component of the reasonableness "touchstone" of Fourth Amendment compliance.[115] Prior to the endorsement of reasonable suspicion as a valid standard of cause, probable cause was the lowest level of justification along the justification continuum.[116] The central feature of probable cause is that it is intended to be a practical, not overly technical standard. As the Supreme Court noted, "[I]n dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[117] Probable cause, therefore, refers to a level of cause that certainly exceeds mere suspicion but is able to respond appropriately to the workable realities of the street.

The workability and fluidity of probable cause is reflected in the Supreme Court's definition. According to the Supreme Court, "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[118]

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[114] *Gates*, 462 U.S. at 238*; see also* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009). According to *Safford*, "the best that can be said generally about the required knowledge component of probable cause . . . is that it raises a 'fair probability' . . . or a 'substantial chance.'" *Id.*

[115] *Knights*, 534 U.S. 112. The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

[116] It should be noted, however, that mere suspicion suffices to justify starting an investigation. *See infra* note 140.

[117] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[118] *Id.* at 175-76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

These illustrations of probable cause demonstrate that there is no exact conceptualization of the standard.[119] In fact, "[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual context—not readily, or even usefully, reduced to a neat set of legal rules."[120] When determining if probable cause exists, the courts look to the totality of the circumstances from the standpoint of an "objectively reasonable police officer."[121] Unlike other standards under the law—e.g., proof beyond a reasonable doubt—probable cause is a not a rigid concept. Instead, it is intended to be responsive to the realities of police investigatory practices, providing the officer flexibility in the use of his judgment but still ensuring ample protection for citizens against unreasonable government action.[122]

One example of the application of the probable cause standard is *Maryland v. Pringle*.[123] In this case, the defendant was riding in the passenger seat of a car when the police pulled the driver over for speeding.[124] When the driver opened the glove compartment to get his registration the officer noticed a large amount of rolled-up cash.[125] Upon the officer's request the driver consented to a search of the vehicle which revealed $763 in cash in the glove compartment and five baggies of cocaine in the armrest in the backseat of the car.[126] Neither the driver, the defendant, nor the other passenger in the car would tell the officer who the drugs and money belonged to, so the officer arrested all three men.[127] At the police station, Pringle confessed that the drugs and money belonged to him.[128] At trial

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[119] Maryland v. Pringle, 540 U.S. 366, 371 (2003).

[120] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[121] *Pringle*, 540 U.S. at 371.

[122] *Gates*, 462 U.S. at 238-39 ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.").

[123] *Pringle*, 540 U.S. at 368.

[124] *Id.* at 367.

[125] *Id.* at 368.

[126] *Id.* at 367-68.

[127] *Id.* at 368.

[128] *Id.* at 369.

the defense attempted to suppress the confession on the ground that it was the fruit of an illegal arrest.[129]

The Supreme Court concluded that Pringle's arrest was in fact based on probable cause.[130] Using the totality of the circumstances test outlined above, the Court found that the officer had probable cause to arrest all three individuals, including Pringle.[131] The Court stated:

> There was $763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money. We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[132]

The Court's analysis reveals the application of the probable cause standard. The Court—through the eyes of a reasonable officer on the scene—looks at the circumstances and determines if the officer could have had a reasonable belief that the defendant committed the crime. Perhaps even more important for the thesis presented herein, the focus on a fair probability in *Pringle* meant that alternate probabilities did not render the conclusion unreasonable. In short, the suspected fact in probable cause may be one among several probabilities, and need not be the exclusive probability.

Another case that describes the process courts go through to determine if probable cause existed is *Illinois v. Gates*.[133] Based on a tip from an anonymous informant, the

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[129] *Id.* The trial court denied the defense's motion and the jury convicted Pringle of possession with intent to distribute cocaine. *Id.* The court of appeals reversed the trial court's ruling stating that "absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, 'the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car . . . is insufficient to establish probable cause for an arrest . . . .'" *Id.* The Supreme Court granted certiorari and overruled the state court. *Id.*

[130] *Id.*

[131] *Id.* at 372.

[132] *Id.* at 371-72.

[133] 462 U.S. 213 (1983). In *Gates*, the Bloomingdale Police Department received an anonymous letter by mail purporting to detail the illegal drug activity of Mr. and Mrs. Gates. *Id.* at 225. The letter informed the police of the Gates' address, where they bought the drugs, and how they picked up the drugs. It concluded by stating, "At the time [Mr. Gates] drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement." *Id.* The police department investigated each of the details of the letter regarding the address and

police obtained a warrant to search the Gateses' trunk and home for marijuana and found "approximately 350 pounds of marihuana. A search of the Gateses' home revealed marihuana, weapons, and other contraband."[134] The question before the Court was whether the anonymous letter along with the affidavit provided enough information to conclude that there was probable cause to issue the search warrant.[135]

The U.S. Supreme Court agreed with the decision of "the Illinois Supreme Court that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report. [The Court did] not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . ."[136] Instead the Court applied a "totality-of-the-circumstances approach."[137] This approach rejects any hard and fast rule and allows courts to balance probable cause with all the facts in front of them. In this case, the Court considered all of the facts and concluded:

> Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities. . . . It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . [concluding]" that probable cause to search the Gateses' home and car existed.[138]

This decision provides an important manifestation of the Court's emphasis that probable cause is a practical standard intended to be applied by nonlawyers—not a

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the travel activities of the defendants and found them to be true; they then signed an affidavit and presented it, along with the letter, to a judge who granted them a warrant to search the Gateses' residence and automobile. *Id.* at 226.

[134] *Id.* at 227.

[135] *Id.*

[136] *Id.* at 230.

[137] *Id.*

[138] *Id.* at 245-46.

technical legal standard. Probability is the key, and in determining probability, all facts and circumstances must be considered. The emphasis on a workable, nontechnical standard responsive to the realities of operational application and compliance resonates with anyone familiar with the targeting process. Indeed, one hallmark of contemporary legal support in military operations is the emphasis on the ultimate role of the commander as the decision maker. Military lawyers may routinely facilitate this decision-making process, but legal judgment is not intended to become a substitute for command judgment. Probable cause, therefore, offers potential utility for the targeting process precisely because it has evolved as a practical and context-driven standard.

C. Reasonable Suspicion: A Further Manifestation of the Importance of Context

Just as context was the critical feature in formulating the probable cause quantum, the particular context of a government action is, to an even greater degree, fundamental to the reasonable suspicion standard.[139] This very low quantum[140] of information is custom-fitted to the intricate realities of law enforcement and is meant to protect citizens and police officers at the expense of only a minimal government intrusion into constitutionally protected privacy.[141] When the intrusion into constitutionally protected privacy is minimal, the Supreme Court has held mere reasonable suspicion is sufficient to allow an otherwise unconstitutional search.[142] By responding to the particular context of the situation, Fourth Amendment law provides a useful rubric for assessing targeting decisions that vary markedly based on context.

The Supreme Court added a quantum lower than probable cause based on the recognition that not all police intrusions into privacy interests were made for the purpose of

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[139] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (explaining that the probable cause and reasonable suspicion standards are "'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed." (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996))).

[140] *See* Ronaldo V. Del Carmen, Terry v. Ohio, *in* CRIMINAL PROCEDURE AND THE SUPREME COURT 57, 66 (Ronaldo V. Del Carmen & Craig Hemmens eds., 2010). Reasonable suspicion is the minimum quantum of information required for a police officer to stop and frisk a suspect. *Id.* The lower standard of mere suspicion is sufficient to justify starting an investigation. *Id.* at 63.

[141] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[142] *Id.*

arrest or evidentiary search. Instead, in the 1968 case *Terry v. Ohio*,[143] the Court recognized that in many situations the police act on suspicion that an individual poses a danger of violence to them or surrounding individuals, or that the individual may be preparing to engage in criminal conduct.

Terry involved the investigatory actions of a plain clothes officer in downtown Cleveland, Officer McFadden. McFadden, a detective with thirty-five years of experience, noticed three individuals "pacing, peering, and conferring" outside of a store window.[144] Believing that the individuals may have been planning to rob the store, Officer McFadden watched them, and when they left, he followed. He approached the individuals to question them. But, fearing one might have a gun, he "spun [Terry] around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol."[145] The officer then had Terry remove his coat and took the pistol from him. Terry was charged with and convicted of carrying a concealed weapon.[146] On appeal, Terry challenged the admissibility of the pistol and claimed that because McFadden lacked probable cause that he was armed, the evidence seized was the product of an illegal search.[147]

The Court was forced to decide whether the search and seizure was reasonable under the Fourth Amendment, a decision complicated by the fact that the government conceded McFadden did not act based on probable cause.[148] The Court determined that, when weighed in the balance of officer safety and Forth Amendment protection, a search like the one conducted by Officer McFadden is reasonable. The Court held,

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal

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[143] *Id.*

[144] *Id.* at 6.

[145] *Id.* at 7.

[146] *Id.* at 4.

[147] *Id.* at 12. The Supreme Court granted certiorari to answer the question of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." *Id.* at 15. The Court first rejected the government argument that only a full-blown arrest or evidentiary search implicates the reasonableness requirement of the Fourth Amendment. For the Court, there was no question that Officer McFadden conducted a seizure and search of Terry; any other conclusion would be "sheer torture of the English language." *Id.* at 16.

[148] *Id.* at 15-16.

> activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[149]

Terry's holding is very narrow.[150] This exception to the probable cause requirement applies only when the officer has a reasonable suspicion the suspect is armed. In order for a police officer's conclusion to be considered reasonable it must be based "not [on] inchoate and unparticularized suspicion or 'hunch,' but [on] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[151] The officer must have some "specific and articulable facts" that lead to his conclusion that the suspect is armed.[152] When an officer forms reasonable suspicion that "crime is afoot" and that a suspect is armed, it is reasonable for the officer to conduct a limited search of the suspect's outer clothing (commonly characterized as a brief investigatory seizure)[153] to confirm or deny the suspicion.[154] The brevity of such seizures distinguishes the degree of intrusion from an arrest, and therefore justifies a reduced quantum of certainty to justify the action.[155]

D. *The Continuum of Cause*

The discussion above demonstrates that in the U.S. criminal investigation context, the amount of certainty a government agent must possess before depriving a person of liberty is contingent on the liberty interest at stake. The highest quantum of proof—proof beyond a reasonable doubt—is required before an individual can be convicted of a crime and deprived of his life or freedom through incarceration or

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[149] *Id.* at 30.

[150] *See, e.g.*, Dunway v. New York, 442 U.S. 200, 216 (1979) (holding that the reasonable suspicion quantum endorsed in *Terry* could not be relied upon to justify a deprivation of liberty that exceeded the limited purpose of confirming or denying suspicion, and therefore could not justify the arrest of the Petitioner).

[151] *Terry*, 392 U.S. at 27.

[152] *Id.* at 21.

[153] *See id.* at 29.

[154] *See id.* at 30.

[155] *See id.*

execution.[156] Probable cause, on the other hand, is a much lower standard and requires only a reasonable belief to justify the search or seizure of property or a person.[157] Although less common in the criminal procedure context, there are two additional quanta relevant to the analysis here—a preponderance of the evidence and clear and convincing evidence. Both of these quanta fall between proof beyond a reasonable doubt and reasonable suspicion on the quanta continuum. The following chart illustrates this continuum:

Standard	Definition
Proof Beyond a Reasonable Doubt	Information that excludes every fair and rational hypothesis except that of guilt[158]
Clear and Convincing Evidence	Information that establishes a degree of certainty greater than "more likely than not,"[159] but not as high as "beyond a reasonable doubt"
Preponderance of the Evidence	Information that establishes a fact is more likely than not to be true[160]
Probable Cause	Information that establishes a fair probability, although not necessarily a probability more likely than all other fair probabilities[161]
Reasonable Suspicion	An objective fact that, when considered through the lens of experience-based intuition, renders a mere suspicion reasonable[162]
Instinctual Suspicion	A judgment based on hunch or instinct with no supporting objective fact[163]

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[156] *In re* Winship, 397 U.S. 358, 363-64 (1970).
[157] Maryland v. Pringle, 540 U.S. 366, 371 (2003).
[158] *See* United States v. Gay, 16 M.J. 475, 477 (C.M.A. 1983).
[159] *See* BLACK'S LAW DICTIONARY 556 (6th ed. 1990).
[160] *See* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).
[161] *See supra* note 91 and accompanying text.
[162] *See supra* note 151 and accompanying text.
[163] *See supra* notes 107, 185 and accompanying text.

Preponderance of the evidence falls fourth on the continuum under clear and convincing and above probable cause. It is defined in federal jury instructions for civil law suits as evidence sufficient

> to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.[164]

The preponderance of evidence standard is used to protect civil interests.[165]

Clear and convincing evidence is the standard of proof that falls above a preponderance of the evidence and under beyond a reasonable doubt on the continuum of proof. The clear and convincing standard is used to protect an "important individual interest in civil cases."[166] It applies when "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money,"[167] such as where the state is attempting to terminate parental rights[168] or where civil commitment is sought because of mental illness.[169]

In *Addington v. Texas*, the Supreme Court determined that "clear and convincing evidence" was the appropriate standard for civil commitment. In that case, Addington's mother petitioned the court to have her son indefinitely committed to a state mental hospital after he was arrested for "assault by threat against his mother."[170] At the time, only a preponderance of the evidence was required to civilly commit someone under state law.[171] The defendant argued that, as in criminal law, indefinite civil incarceration demanded proof beyond a reasonable doubt of the conditions necessary for commitment.[172] The Court began by stating that "in considering

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[164] *See, e.g.*, Williams v. Eau Clair Pub. Schs., 397 F.3d 441, 444 (6th Cir. 2005) (quoting the jury instruction explaining preponderance of evidence).

[165] For example, in *Williams v. Eau Claire Public Schools*, the judge issued the jury instruction above in an employment discrimination lawsuit. *Id.* In this case, Joyce Williams, the plaintiff, "applied for and was denied the position of Assistant Athletic Director . . . . She filed a charge of gender discrimination . . . and shortly thereafter, she claims, she was denied a pay raise in her position as secretary to the . . . principal." *Id.* at 443.

[166] Addington v. Texas, 441 U.S. 418, 424 (1979).

[167] *Id.*

[168] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

[169] *Addington*, 441 U.S. at 432.

[170] *Id.* at 420.

[171] *Id.* at 422.

[172] *Id.* at 421-22.

what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed."[173] The Court noted that the state has a legitimate interest in providing care for the mentally ill. It also noted that "[a]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable."[174]

The Court ultimately determined that it was because of the second category—the abnormal behavior that is actually acceptable—that a preponderance of the evidence was not a sufficient level of proof. However, for the Court, proof beyond a reasonable doubt was too strict a standard given the limitations of psychiatric diagnoses. The Court stated,

> Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question—did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.[175]

The Court held that the middle standard—clear and convincing evidence—was the appropriate standard for cases involving civil commitment.[176]

The various quantum of information standards in the judicial context, as well as the burden of proof standards, find an appropriate place in American jurisprudence based on the gravity of the interest threatened. Courts have recognized that finding an appropriate framework often depends on recognizing the realities of the contexts in which the threatened deprivation takes place, and the ability of the state to protect its interests in that situation. Because targeting decisions are made in myriad

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[173] *Id.* at 425.
[174] *Id.* at 426-27.
[175] *Id.* at 429.
[176] *Id.* at 432-33.

contexts—where the state interest, the ability of the state to protect its interest, and the threatened deprivation are always different—the rubric for assessing targeting decisions should change to reflect these changing contexts.

IV. CONTEXTUAL REASONABLENESS AND OPERATIONAL TARGETING

Fourth Amendment reasonableness jurisprudence is built on a three-pillar foundation. First, assessing what is or is not reasonable government action is contextually contingent. Second, a deprivation of rights based on mere speculation or instinct is per se unreasonable. Third, the amount of information required beyond speculation to render such a deprivation reasonable is contingent on the extent of the deprivation or intrusion—the more significant the intrusion, the greater the quantum of information required to render the intrusion reasonable.

Like searches, target decision making involves variable levels of certainty. Information supporting a determination of target legality can range from pure speculation or hunch, to a degree of certitude akin to proof beyond a reasonable doubt, and in many situations even proof of an almost absolute certainty. It would, of course, be possible to impose a unitary quantum requirement on all target legality decisions (for example, requiring proof sufficient to support a military objective conclusion beyond a reasonable doubt). However, such an approach is unnecessarily inflexible, and inconsistent with the nature of military operations.[177]

The proportional relationship between the nature of the intrusion on a protected interest and the quantum of information required to render that intrusion reasonable offers a valuable analogue to the targeting process. In determining the legality of a proposed target, the quantum of information necessary to establish reasonableness should be directly linked to the potential consequences of erroneous judgments. Like

[177] For example, military doctrine and practice recognizes that in many situations of armed conflict, forces may employ fires based almost exclusively on intelligence predictions of enemy dispositions. These "templated" fires are rarely based on a degree of certainty that enemy forces will in fact be present at the location of attack. Instead, commanders employ such fires based on the combination of the anticipated disposition of enemy forces and their battlefield intuition. In this context, a proof beyond a reasonable doubt standard would be functionally disabling. *See* Corn & Corn, *supra* note 2.

search and seizure law, this equation will adjust the requisite quantum to render a targeting judgment reasonable in relation to the risk of error—the greater the risk, the more demanding the information required to support the judgment. At the implementation level, this would result in an ascending quantum of information requirement in relation to the descending probability that the object of attack is a lawful military objective. The greater the presumption that a potential object of attack is not a legal military objective, the greater the quantum of information necessary to justify attacking the target.

A. Context, Cause, and Target Selection

In the context of targeting, the variable is not the degree of intrusion on a privacy interest, but instead the presumptive nature of the anticipated target of attack. Because all targets fall along a continuum of targeting legality, it is the strength of this presumption that varies from target to target. Traditionally, potential targets presumptively fall into one of two categories: military or civilian. As noted above, neither of these presumptions is conclusive, as each is subject to rebuttal by the appropriate facts and circumstances. Nonetheless, the fact that the law establishes presumptive legality of attack directed against military personnel, equipment, and facilities—and the presumptive illegality of attacking all other persons, places, or things—provides a logical framework for a variable quantum of information requirement in relation to the reasonableness of targeting decisions.[178] Thus, the quantum of information requirement should be directly linked to the accordant variation in initial presumption.

In addition to these two broad categories—military and civilian—there is an emerging subcategory of lawful object of attack: presumptive civilians outside the area of active combat operations.[179] Targeting these individuals is an integral aspect of what the United States initially characterized as the global "war

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[178] *See* Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.

[179] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors & Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 271-72 (2010); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1212; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm).

on terror" (but what is now referred to as self-defense targeting operations).[180] According to the United States, these individuals fall within a category of underprivileged belligerents associated with a nonstate, transnational enemy: al Qaeda.[181] Based on this characterization, the United States argues they are designated as lawful objects of attack pursuant to the inherent right of national self-defense (and possibly the principle of military objective).[182] Treating the struggle against al Qaeda as an armed conflict and subsequently attacking individuals who are not located within an active theater of ongoing military operations—including the attack on Osama bin Laden in Pakistan and drone attacks against al Qaeda operatives in Yemen—are both highly charged and controversial propositions.[183] Nonetheless, there seems to be no indication that the U.S. practice of attacking these individuals based on the conclusion that they qualify as lawful military objectives will abate any time soon.[184] One thing seems undisputed: targeting decisions related to these individuals are even more complicated than targeting decisions related to presumptive civilians operating within an area of active hostilities.

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[180] *See* Koh, *supra* note 179 ("Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force . . . . Fourth and finally, some have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'").

[181] *See Al-Aulaqi*, 727 F. Supp. 2d at 5; Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 45, 4 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380; Paust, *supra* note 179, at 237; Radsan & Murphy, *supra* note 179, at 1210.

[182] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2; DINSTEIN, *supra* note 6, at 90-91.

[183] *See Rise of the Drones: Unmanned Systems and the Future of War: Subcomm. Hearing Before H. Comm. on Oversight and Gov't Reform Subcomm. on Nat'l Sec. and Foreign Affairs*, 111th Cong. 5 (2010) (written testimony of Kenneth Anderson), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579411. *See, e.g.*, *Al-Aulaqi*, 727 F. Supp. 2d at 8-9; Andrew M. Harris, *ACLU Sues U.S. Over Targeting Killing of Citizens*, BLOOMBERG (Aug. 30 2010, 4:41 PM), http://www.bloomberg.com/news/2010-08-30/aclu-sues-u-s-government-over-targeted-assassination-of-american-citizens.html.

[184] *See Al-Aulaqi*, 727 F. Supp. 2d at 52 (labeling targeting decisions as a political question and declining to address their legality); Koh, *supra* note 179 ("What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.").

It may be appropriate (from at least a national policy perspective) to impose a more demanding quantum of information on the targeting of individuals presumed not to be lawful military objectives than on those who fall within that presumption. The further attenuated the nominated object of attack becomes from a uniformed enemy (or his equipment or facilities), the greater the risk that the decision will result in an erroneous deprivation of life (or property). Informed by the evolution of the contextual meaning of reasonableness in the context of U.S. search law, the quantum of information required to render such a decision reasonable should not be uniform between these categories of potential targets precisely because the risk or error is not uniform.

This leads to the key question: what quantum of information is sufficient to justify an attack on each category of target along the legality spectrum, ranging from military personnel, facilities, and equipment to civilians and civilian property qualifying as lawful objects of attack pursuant to the rule of military objective (often referred to as dual-use targets)? Fourth Amendment jurisprudence provides a useful and logical framework to begin to answer this question.

While the different target categories each justify a different degree of certainty before attacking, one principle of constitutional law is clear: government decisions that intrude upon an important individual interest can never be reasonable when based on speculation or hunch.[185] In the search and seizure context, the classic example of acting on speculation is when a police officer engages in a search or seizure based solely on her instincts. Interestingly, this is probably the closest area of explicit symmetry between the law related to targeting and search and seizure law. The rule of military objective includes the requirement that the decision maker conclude that subjecting a person, place, or thing to attack will produce a "definite" contribution to military action.[186] According to the ICRC Commentary,

> [D]estruction, capture or neutralization must offer a "definite military advantage" in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into

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[185] Terry v. Ohio, 392 U.S. 1, 27 (1968) ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

[186] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2.

> account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.[187]

Distinguishing the term *definite* from *potential* or *indeterminate* suggests that the rule of military objective prohibits commanders from launching attacks based on only speculation or conjecture as to the value that will result from the attack. Accordingly, like search and seizure law, the rule of military objective excludes reliance on instinct or speculation alone as a sufficient basis to reasonably justify the conclusion that a person, place, or thing qualifies as a lawful military objective.[188] However, in another striking similarity between the two bodies of law, the key to transforming operational instinct into a reasonable determination of military objective is some articulable fact that validates the instinct.[189]

While no class of target may be attacked based solely on mere suspicion, the other defined degrees of certainty appropriately correspond to the particular presumptive target categories in a contextual basis.

B. *Presumptive Enemy Targets*

Targets that the LOAC presumes to be military (and therefore legal to attack) logically demand the lowest quantum of information for such an attack to be reasonable. The reasonable suspicion standard articulated in *Terry v. Ohio* is the lowest threshold of justification that may satisfy the reasonableness requirement of the Fourth Amendment.[190] Thus, when faced with a presumptive enemy force, this quantum equation is logically suited to provide the minimum acceptable quantum for reasonable targeting decisions.

The transformation of unreasonable speculation to reasonable cause was central to the Supreme Court's *Terry* holding.[191] According to *Terry*, it is the additional element of some "articulable fact" that combines with experience-based intuition to rise above speculation and transform police instinct or hunch (speculation) into a reasonable suspicion.[192] The Court

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[187] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 636.

[188] *Id.*

[189] *Id.* This is ostensibly emphasized in the quoted Commentary reference to "sufficient information." *Id.*

[190] *See generally* Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

[191] Terry v. Ohio, 392 U.S. 1, 30 (1968).

[192] *Id.* at 21.

acknowledged that it only requires a modest amount of information to satisfy this requirement and allow suspicion to be constitutionally reasonable without rising to the level of probability.[193] But this was precisely because the degree of intrusion—and by implication the consequence of error—was lower than the degree of intrusion traditionally requiring evidence sufficient to establish a probability.[194]

This quantum equation is logically suited to provide the minimum acceptable quantum for reasonable targeting decisions. Both targeting law and search and seizure law require more than speculation to render a judgment reasonable. The concept of reasonable suspicion is responsive to this requirement. However, what is most appealing about analogy to this standard of reasonableness is that it was developed specifically to be responsive to the realities of the "street": the entire *Terry* opinion is focused on the need to develop a standard of reasonableness flexible enough to address the realistic situation of fast-developing police encounters.[195] Equally compelling is the Court's endorsement of reliance on experience-based intuition to transform seemingly insignificant information into reasonable suspicion.

Just as in *Terry*, a test for reasonableness in the targeting context must account for the experience and intuition of the military commander. Information that may seem innocuous to those unfamiliar with military operations will often provide critical insight into enemy dispositions and intentions. Indeed, the process by which police officers combine information with their experience-based instincts to produce reasonable judgments, as explained by the Supreme Court, is almost identical to the process by which many commanders utilize tactical intelligence to inform their experience-based decisions.[196]

The standard of reasonable suspicion is satisfied by a very modest amount of information, and relies heavily on instinct and intuition. This standard should only support a determination of legality for proposed targets that fall within a category of presumptive military objectives—namely enemy military personnel, equipment, and facilities. For these targets, a commander is justified in ordering an attack so long as there is some evidence that, when considered through the lens of

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[193] *Id.* at 10, 21.

[194] *See id.* at 17-19.

[195] *Id.* at 9-10.

[196] This assertion is based on the author's experience as a tactical officer with the United States Army.

military experience and intuition, supports the conclusion that the targets are lawful objects of attack.

This flexible and concededly modest equation of reasonableness is necessarily tailored to the reality of military operations. Commanders are justified in attacking such targets on a minimal level of information because once such information is available, the risk of hesitation is grave: hesitation may be perceived as ceding initiative to the enemy force. Accordingly, prompt and decisive action in response to some articulable facts that indicate the target is an acceptable object is the operational norm and is justified by the risk associated with hesitation inherent in requiring a higher degree of certainty. This also bolsters the analogy to the origins of the reasonable suspicion standard, which was specifically responsive to the reality that once a police officer becomes aware of some facts that support instinct or intuition that "criminal activity may be afoot"—especially criminal activity involving violence—hesitation would be inconsistent with operational reality.[197]

This modest quantum is also necessary to accommodate *templated targeting* of enemy capabilities. Templated targeting involves attacking areas based on a prediction that either the enemy is occupying those areas or the enemy will utilize those areas.[198] This targeting process is not based on mere speculation but instead is based on complex intelligence estimates involving a combination of known enemy dispositions, enemy doctrine, and anticipated enemy courses of action. Examples of such attacks include blind fires against an area determined to be the likely location of enemy artillery groups, or enemy assembly areas; blind fires along entry or egress routes for friendly aircraft focused on areas where the enemy would logically locate air defense assets; or blind fires against natural or man-made choke points along an anticipated enemy axis of advance or withdrawal.[199]

All these situations involve the use of unobserved indirect fires against targets without verified presence of enemy forces or capabilities.[200] The articulable facts that render the decision to attack such targets reasonable include assessment of enemy

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[197] *Terry*, 392 U.S. at 9-10.

[198] *See* DEP'T OF THE ARMY, *supra* note 60, at 1-69, 1-95.

[199] *See generally* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-09: JOINT FIRE SUPPORT III-10(g) (June 30, 2010), *available at* http://www.dtic.mil/doctrine/new_pubs/jp3_09.pdf (stating that nonlethal fire can be used to locate the enemy).

[200] WAR DEP'T, FM 6-20: TACTICAL EMPLOYMENT, FIELD ARTILLERY FIELD MANUAL, III-12, III-16 (Feb. 5, 1944), *available at* http://www.lonesentry.com/manuals/fm6-20-artillery/artillery-general-ch1.html.

doctrine, prediction of enemy courses of action, and the instincts of commanders and intelligence analysis supporting those instincts. Requiring more than this minimal quantum of proof would effectively disable the use of such tactics, because it would almost inevitably pressure the commander to verify the actual presence of enemy forces. The key element in reasonableness is not, however, pure instinct. It is instead the combination of instinct with doctrine and predictions of enemy courses of action, evidence that will only be available in relation to targeting against organized enemy opposition groups.

The modest quantum of information required to render suspicion reasonable is appropriate to support a judgment of target legality for the personnel, equipment, and facilities of a regular enemy armed force. Something more than this minimum, however, is required for targets that are presumptively civilian in nature.

C. Rebutting the Presumption of Protection from Attack

The reasonable suspicion quantum is insufficient to justify targeting objectives that are presumptively civilian because the quantum is too low to rebut this legal presumption. Accordingly, once the anticipated object of attack falls outside the category of enemy forces, equipment, or facilities, reasonableness dictates imposition of a heavier informational burden on the commander. The appropriate quantum here is the next higher standard established in Fourth Amendment jurisprudence: probable cause. As detailed in this section, the analysis is somewhat different for presumptively civilian individuals and presumptively civilian places and things.

As noted earlier in this article, the rule of military objective explicitly accounts for the reality that many places and things presumed to be civilian may become lawful objects of attack by virtue of their nature, purpose, location, or use.[201] Military operators often refer to such places and things as dual-use targets, which suggests that they are being used for both civilian and military purposes. This is somewhat misleading, because pursuant to the rule of military objective, it is the transformation to military value that justifies subjecting them to attack; that they may also offer some nonmilitary value is irrelevant to determining whether or not they qualify as lawful military objectives (although it is certainly relevant to the

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[201] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2.

additional assessment of whether an attack would violate the rule of proportionality[202]). Nonetheless, the initial civilian character of such objectives indicates that the target is presumptively protected from being made the deliberate object of attack.

Because contemporary armed conflict rarely involves force-on-force engagements in areas isolated from civilian populations and infrastructure,[203] it is a virtual axiom of military operations that attacks are routinely launched against places and property presumed to be civilian. Even when close combat falls into the increasingly rare category of isolation from civilian population centers (for example, when Coalition forces engaged Iraqi armed forces in sparsely populated areas of Kuwait and Iraq during the first Persian Gulf War), influencing the battle routinely involves targeting command, control, communications, intelligence, and logistics capabilities located within civilian populations centers.[204]

Presumptively civilian targets are materially different than presumptively military targets. Unlike enemy forces in uniform, their equipment, or their installations, these targets have no preconflict association with enemy military capabilities. Instead, it is the "nature, purpose, location, or use"[205] of these things and places that renders them lawful military objectives. Unlike presumptive military targets, the LOAC implicitly imposes a higher quantum requirement to justify the reasonable determination that these places and things qualify as lawful military objectives. According to Article 52 of AP I, "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

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[202] DINSTEIN, *supra* note 6, at 105.

[203] INT'L REVIEW OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2007), *available at* http://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf ("The majority of contemporary armed conflicts are not of an international character. The daily lives of many civilians caught up in these conflicts are ruled by fear and extreme suffering. The deliberate targeting of civilians, the looting and destruction of civilian property, the forced displacement of the population, the use of civilians as human shields, the destruction of infrastructure vital to civilians, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world. The challenges presented by these conflicts are, to a certain extent, related to a lack of applicable rules, but more importantly, to a lack of respect for IHL.").

[204] *See Persian Gulf Wars*, INFOPLEASE, http://www.infoplease.com/ce6/history/A0838511.html (last visited Jan. 26, 2011); '*Shock & Awe' Campaign Underway in Iraq*, CNN (Mar. 22, 2003, 3:58 AM), http://edition.cnn.com/2003/fyi/news/03/22/iraq.war/ (indicating the bombing occurred in the capital, Baghdad—a civilian population center).

[205] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 52.2.

a school, is being used to make an effective contribution to military action, *it shall be presumed* not to be so used."[206] The associated ICRC Commentary states, "[E]ven in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects."[207] While the Commentary indicates a requirement that the commander be "certain" before attacking such a proposed target, there is absolutely no indication of the amount of information necessary to establish such certainty. This once again reveals the ambiguity produced by failing to link certitude requirements to a quantum framework.

This presumptive protection from attack warrants an increased quantum of information to establish target legality, a quantum more fact-oriented than reasonable suspicion. Probable cause, which is the next level of proof in the search and seizure continuum, is thus a logical standard. Like reasonable suspicion, probable cause is intended to be a practical, common sense assessment of available facts and circumstances.[208] Unlike reasonable suspicion, these facts and circumstances must establish a fair probability.[209] A probability that a proposed target is a military objective by virtue of its nature, purpose, location, or use provides a sufficient quantum to establish the reasonableness of subjecting presumptively civilian property or areas to attack. However, in light of the consequences associated with attacking an individual as opposed to attacking a place or thing, this quantum is insufficient to justify attacking civilians who have forfeited their protection by directly participating in hostilities.[210] While both civilian property and civilians themselves benefit from a presumption that protects them from being made the deliberate object of attack, the consequences of an erroneous judgment rebutting that presumption is obviously more significant for

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[206] *Id.* art. 52.3 (emphasis added).

[207] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 638.

[208] Illinois v. Gates, 462 U.S. 213, 232 (1983); Brinegar v. United States, 338 U.S. 160, 175 (1949).

[209] *Gates*, 462 U.S. at 238.

[210] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 51; INT'L REVIEW OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW 1008-09 (2008), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf [hereinafter INTERPRETIVE GUIDANCE] (stating that if there is a doubt as to a civilian's participation in hostilities the civilian should receive the "presumption of protection").

persons than for property. The quantum of information that justifies attack on persons should therefore be more demanding.

It is true that civilians will often be present in the vicinity of civilian property or places determined to qualify as military objectives and will therefore be subjected to attack, which will often endanger their lives. However, the targeting process begins with the decision to render a person, place, or thing a deliberate object of attack.[211] Whether the nominated target may be made the deliberate object of attack requires an initial assessment pursuant to the rule of military objective (to which this proposed quantum component is related). The risk of inflicting casualties on civilian persons is not a factor in the military objective analysis so long as those casualties are the *knowing* but *nondeliberate* consequences of the attack. For example, a commander deciding whether to attack an apartment building being used by enemy personnel as a strongpoint in a city may know that civilians reside in the building, and may know that the attack will produce civilian casualties. This knowledge will trigger an assessment of whether the harm to civilians will be excessive in relation to the concrete and direct military advantage anticipated (the proportionality test).[212] However, the commander does not engage in a proportionality analysis unless and until he determines the apartment building qualifies as a lawful military objective, which is the first step in the target-legality analysis. It is this determination that justifies the deliberate attack on what is presumed to be a protected place.[213] Acting on the probability that civilian property or a civilian place qualifies as a lawful military objective strikes a logical balance between the realities of the operational environment, the protection of civilian property, and the level of risk inherent in the targeting decision.

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[211] In most cases, attacking presumptive civilian property or places—for example attacking an apartment building being used by enemy forces as a vantage point for artillery spotting or attacking a crossroads in a town in anticipation that it will be used by enemy forces to bring reinforcements to the close battle—will involve a known risk of inflicting casualties on civilians. But in these situations, those casualties will be the incidental and collateral consequence of the deliberate attack on property or a place.

[212] Article 51.5(b) prohibits attacks that "may be expected to cause [injury to the civilian population] which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions, *supra* note 4, art. 51.5(b). This language is again repeated in Article 57.2(b) which requires an attack to be canceled if it "may be expected to cause [injury to the civilian population] which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* art. 57.2(b). The ICRC commentary to Article 57 recognizes that this is not a cut-and-dry standard. Instead, it requires military commanders to act in good faith and weigh the injury to the civilian population against the "military interest at stake." COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 683-84.

[213] *See, e.g.*, Corn & Corn, *supra* note 2.

The decision to deliberately attack an individual civilian involves a different balance of interests. First, the likelihood that a civilian will engage in the type of activity necessary to rebut the presumption of protection from attack—any activity that qualifies as a direct part in hostilities—is much lower than the likelihood that civilian property or places will be transformed into lawful military objectives. Second, and perhaps more importantly, the risks associated with erroneous judgment are normally more profound when deciding to target a person as opposed to a place or a thing. While attacking a presumptively civilian building might often involve inherent risk of injury to the occupants, attacking an individual always implicates risk to life. This reduced-likelihood/increased-risk relationship has, in practice, rendered the presumption of protection afforded to civilian persons more significant than that afforded to property or places.[214]

Like property or places, however, this presumption is and must be rebuttable. When civilians take a direct part in hostilities, they forfeit protection from being made the deliberate object of attack for the duration of their participation.[215] While there has never been a consensus definition of the meaning of direct participation in hostilities (a topic of considerable contemporary debate)[216] there has always been consensus that the combatant bears a heavy burden to verify that the civilian has crossed the line from inoffensive conduct to conduct that qualifies as direct participation.[217] This determination subjects the individual to deliberate attack, normally with deadly combat power. Accordingly, the combatant's judgment will almost always involve life and death consequences. While attacking places or things that also fall

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[214] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 613-23.

[215] Protocol Additional to the Geneva Conventions, *supra* note 4, art. 51.3; INTERPRETIVE GUIDANCE, *supra* note 210, at 994.

[216] *See* INTERPRETIVE GUIDANCE, *supra* note 210, at 994. *See generally* Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741 (2010); Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT'L L. & POL. 637 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

[217] DINSTEIN, *supra* note 6, at 151-52.

under the presumption of civilian protection can also result in loss of life, the certainty of that effect is not comparable to the certainty associated with deliberately targeting human beings.

All this leads to an unquestioned reality: civilians benefit from the strongest presumption of nontargetability, both legally and as a matter of operational practice. As a result, the extremely high risk to human life associated with the determination that a civilian is directly participating in hostilities warrants a more demanding quantum standard than what should be required to target civilian property or places. Acting on information that supports a mere probability is therefore insufficient to satisfy this requirement, because such a quantum fails to exclude alternate probabilities—it merely creates one among several. Increasing the quantum requirement to information sufficient to establish a preponderance—that it is more likely than not that the presumptive civilian is taking a direct part in hostilities—is the minimally acceptable quantum to rebut this critically significant presumption.[218]

A preponderance requirement would normally be easily satisfied—and in fact exceeded—where the test for what qualifies as direct participation in hostilities is restrictive. Such a test would essentially require the civilian to be actually engaging in, or about to engage in, armed hostilities against friendly forces.[219] In such situations, the use of deadly force in response to the threat would be based on a determination that the civilian presented a threat of overwhelming actual and imminent risk to the combatant. As a result, the test implicitly requires information that establishes beyond any doubt that the civilian has forfeited the presumptive protection provided by the law. Of course, there might be issues related to the quality of the evidence relied on by the combatant to engage the civilian. This, however, is a fundamentally different issue than the requisite quantum needed to render the judgment reasonable. In the former situation, the individual or tribunal reviewing the combatant judgment is essentially questioning whether the judgment was reasonable based on the facts and circumstances

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[218] The ICRC, in their report on direct participation, states that "[i]n order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part." INTERPRETIVE GUIDANCE, *supra* note 210, at 1019. The study, however, does not address the quantum of proof required in the determination of a presumptive civilian's participation in hostilities. *Id.*

[219] COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 43, at 619.

available at the time of the decision. While the quality of the information (the probative value of the information considered by the combatant) available at the time of the decision is certainly related to whether the requisite quantum was satisfied, these are two fundamentally distinct questions.

The quantum requirement becomes far more significant in relation to an expanded definition of direct participation in hostilities, the type of definition that is gradually emerging in the international community. In its recently published Interpretive Guidance on the Meaning of Direct Participation in Hostilities, the ICRC endorses the use of what is referred to as the "continuing combat function" test as a basis to conclude a civilian is taking a direct part in hostilities.[220] Unlike the traditional actual and immediate harm standard reflected in the ICRC Commentary to AP I, the continuous combat function test extends the concept of direct participation in hostilities to individuals who routinely participate in activities that provide combat support to members of a belligerent party to a conflict.[221] It was developed specifically to address the very difficult problem of individuals who conduct combat functions periodically for a belligerent party but then routinely return to their civilian activities.[222] This so-called "revolving door" problem was perceived by the experts gathered by the ICRC as necessitating this expanded test for determining when an individual was directly participating in hostilities and thus subject to lawful attack.[223]

The relative merit of this expanded concept of direct participation in hostilities is beyond the scope of this article. What is relevant for this analysis is the challenge in determining when targeting an individual falling within this expanded definition of direct participation in hostilities is reasonable. Unlike the narrow definition of direct participation, this expanded definition will rarely produce the type of overwhelming evidence showing that the civilian has forfeited protection from attack that is inherent in a test requiring the civilian to have actually engaged in hostile action. Instead, commanders called upon to make the target-legality

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[220] INTERPRETIVE GUIDANCE, *supra* note 210, at 1007-08.

[221] *Id.*

[222] *Id.* at 993-94.

[223] An analogous expanded definition was adopted by the Israeli High Court of Justice in the Targeted Killing case. *See* HCJ 769/02 Public Comm. Against Torture in Israel v. Israel (Targeted Killings Case) 57(6) PD 285 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm; INTERPRETIVE GUIDANCE, *supra* note 210, at 1035.

determination will be required to assess a variety of facts and circumstances related to the habitual conduct of the individual nominated for attack. Requiring the commander to be satisfied that the facts and circumstances make it more likely than not that such an individual is in fact engaging in a continuous combat function will make application of this expanded definition of direct participation in hostilities more legitimate. While a more demanding quantum may evolve over time as a matter of operational practice, a more-likely-than-not quantum standard is both rational and logical to balance the competing interests associated with application of this emerging and critically important test for target legality.

D. A Third Category of Individual Targets: Belligerent Actors Outside an Area of Active Hostilities

Many legal experts have criticized the invocation of LOAC authority as a justification for using predator drones to attack individuals significantly removed from the area of active combat operations in Afghanistan or Iraq.[224] This criticism has focused on both the inherent invalidity of characterizing the struggle against terrorism as an armed conflict[225] and the invalidity of treating civilian terrorists as lawful military objectives.[226] Addressing these criticisms is well beyond the scope of this article, which assumes arguendo that these characterizations are justified and that the United States will continue to invoke the LOAC to justify attacks on such individuals.[227] Instead, what is critical for this analysis is the requisite quantum of information necessary to justify the

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[224] Letter from Jonathan Manes, ACLU, to Dir., Freedom of Info. & Sec. Review, Dep't of Def. (Jan. 13, 2009), *available at* http://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf (outlining recent news reports of drone attacks and expressing a need for more information as to their justification); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), *available at* https://webspace.utexas.edu/rmc2289/LT/Mary%20Ellen%20OConnell%20on%20Drones.pdf; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 85-86, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

[225] Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 539 (2006).

[226] *See* O'Connell, *supra* note 224, at 21-25.

[227] Mark Hosenball, *Obama Administration Official Publicly Defends Drone Attacks*, DAILY BEAST (Mar. 26, 2010, 11:33 AM) http://www.thedailybeast.com/newsweek/blogs/declassified/2010/03/26/obama-administration-official-publicly-defends-drone-attacks.html (last visited Sept. 17, 2011) (stating that the "considered view of this administration . . . that targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war").

military objective determination and render the attack on such individuals reasonable. While this may have been close to conclusive in the case of Osama bin Laden, it is far more complex for a deliberate attack of "day-to-day" terrorist operatives.[228]

One of the most complex legal issues resulting from the U.S. decision to characterize the struggle against transnational terrorism as an armed conflict[229] is the legality of targeting nonstate belligerent actors outside of the area of active combat operations. This challenge is exemplified by the debate over the use of predator drones to attack suspected Al Qaeda operatives in places like Pakistan, Somalia, and Yemen.[230] One aspect of these attacks that is straightforward is identifying the legal basis relied on by the United States: a determination that the individual subjects of attack qualify as lawful military objectives.[231]

The quantum related to the determination of target legality becomes critical in this decision-making process. In essence, targeting of such terrorist operatives adds new levels of complexity to this complicated issue of targeting civilians who take a direct part in hostilities. Initially, it is not even clear that if al Qaeda operatives fall within the LOAC targeting authority they should be considered presumptive civilians.[232] Although the emerging concept of continuing combat function seems to accommodate the perceived need to attack such operatives, the position of the United States appears to indicate that they are instead considered enemy belligerents for targeting purposes, not civilians taking direct part in hostilities (a position which ironically finds some support in the Direct Participation Interpretive Guidance).[233] Irrespective of whether the legality of

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[228] *See, e.g.*, *FRONTLINE: Kill/Capture* (PBS television broadcast May 10, 2011), *available at* http://www.pbs.org/wgbh/pages/frontline/kill-capture/#ixzz1Vn10mWyR.

[229] *See* Corn & Jensen, *supra* note 181, at 49; Koh, *supra* note 179. *See generally* Geoffrey S. Corn & Eric Talbot Jensen, *The Obama Administration's First Year and IHL: A Pragmatist Reclaims the High Ground*, 12 Y.B. OF INT'L HUMANITARIAN L. 263 (2009).

[230] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010); *see also* Paust, *supra* note 179, at 250-55.

[231] *See* Mark Mazzetti & Eric Schmitt, *C.I.A. Steps Up Drone Attacks on Taliban in Pakistan*, N.Y. TIMES (Sept. 27, 2010), http://www.nytimes.com/2010/09/28/world/asia/28drones.html (discussing the targets of the drone attacks).

[232] *See* Geoffrey Corn & Lieutenant Colonel Chris Jenks, *Two Sides of the Combatant COIN: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, U. PA. J. INT'L L. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604626.

[233] Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIOJURIS.ORG, http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

targeting these individuals is analyzed by application of the direct part in hostilities rule or by application of the principle of military objective (by treating these individuals as enemy belligerents), the threat identification issue remains extremely complex. Under either category, the basis upon which the target legality judgment will be made will invariably focus on the continuing and habitual conduct of the individual.

Relying on conduct as a basis to determine target legality is unfailingly more difficult than relying on a traditional objective indication of military status such as a uniform. However, this has always been the criterion used to determine whether a civilian directly participates in hostilities.[234] This conduct-based targeting determination is already complex in the context of ongoing ground combat operations. It becomes increasingly more difficult as the individual object of attack becomes further removed from the area of direct hostilities. Under the traditional restrictive definition of direct participation in hostilities, the weight of the presumption of civilian status arguably increases with attenuation from an area of active ground combat operations. This is the simple consequence of the reality that individuals can only take a direct part in hostilities in the vicinity of combat operations. But the nature of transnational terrorist operations has called into question the correlation between proximity to an area of active combat operations and the weight of the presumption of civilian status.[235]

This complexity is at the heart of the debate surrounding the ICRC Interpretive Guidance.[236] The continuous combat function concept endorsed by that study is an implicit recognition of the effect of the asymmetrical tactics relied upon by contemporary nonstate actors engaged in armed hostilities.[237] These tactics may result in the legitimate determination that individuals who are not proximate to an area of active combat operations may nonetheless directly participate in hostilities. The controversy associated with this proposition is ostensibly based in part on the risk of error associated with the determination of target legality rather than the conclusion that direct participation in hostilities does not

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[234] *See generally* INTERPRETIVE GUIDANCE, *supra* note 210.

[235] *See* Padilla v. Hanft, 423 F.3d 386, 389-90 (4th Cir. 2005); *see also* Al-Bihani v. Obama, 590 F.3d 866, 871-73 (D.C. Cir. 2010).

[236] *See, e.g.*, INTERPRETIVE GUIDANCE, *supra* note 210, at 1009.

[237] *Id.* at 1008-09.

always require proximity to actual combat operations.[238] Recognizing this concern justifies a demanding quantum of information to warrant the determination that an individual is taking a direct part in hostilities (and therefore may be attacked) when attenuated from active military operations. In short, the controversy associated with engaging in these attacks when coupled with the inherent risk of error in the determination of target legality warrants a quantum requirement that will contribute to accuracy and legitimacy.

Commanders cannot be expected to achieve absolute accuracy in their judgments. Still, it does seem legitimate to require that the information available be sufficient to clearly support the target legality conclusion that such individuals are in fact lawful objects of attack.[239] At least one scholar has proposed imposing a proof beyond a reasonable doubt standard,[240] which would certainly be the most demanding quantum standard. However, the inherent judicial nature of this standard and the vagaries of its meaning[241] call into question the utility of this proposal. A clear and convincing requirement seems more logically suited to this decision-making context. Commanders would be required to assess available information and conclude not merely that it is more likely than not that the individual nominated for attack is an enemy belligerent, but that the information establishes this status so convincingly that the conclusion is clear. This quantum standard would require the commander to be convinced that the available information excludes any alternate hypothesis inconsistent with the conclusion that the individual nominated for attack is in fact an enemy belligerent.[242] Unless available information provides that level of certitude, the commander would be required to forego attack. This demanding standard of proof would facilitate attack on enemies operating outside a conflict area while limiting such attacks to only those cases involving a high degree of certitude. In so doing, it would mitigate the risk associated with what

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[238] *Id.* at 1009.

[239] This may in fact be the standard being applied by the government in ongoing target decision making. *See Obama Administration Claims Unchecked Authority to Kill Americans Outside Combat Zones*, ACLU (Nov. 8, 2010), http://www.aclu.org/national-security/obama-administration-claims-unchecked-authority-kill-americans-outside-combat-zone.

[240] Radsan & Murphy, *supra* note 179, at 1207-08.

[241] *See, e.g.*, Victor v. Nebraska, 511 U.S. 1, 21 (1994).

[242] *See* United States v. Gay, 16 M.J. 475, 477 (C.M.A. 1983).

many believe is an overbroad assertion of the LOAC-based targeting authority, protect the government from allegations that targeting decisions are arbitrary in nature, and preserve the ability to attack when the government is able to amass this type of compelling intelligence.

V. A FRAMEWORK FOR APPLICATION OF THE QUANTUM ELEMENT OF REASONABLENESS

No quantum of information can ever universally guarantee that objects of attack are lawful targets. However, the law has never required that commanders must always be correct in their assessments of target legality. Instead, the requirement that targeting judgments be reasonable accepts the inevitable reality that sometimes those judgments are, however innocently, incorrect. Reasonableness, though, is an objective standard. Accordingly, a more defined and predictable quantum of information framework will both improve the assessment of target selection and guide potential post hoc critiques of such judgments. This framework will also enhance the value of operational legal advice by facilitating the legal critique of nominated targets. This table summarizes the variable continuum this article proposes:

Nature of Proposed Target	Analogous Fourth Amendment Quantum Standard	Information Required to Produce Reasonable Belief of Target Legality
Military personnel, facilities, or equipment in an area with minimal civilian presence	Reasonable Suspicion: some articulable fact coupled with experience-based instinct	Operational instinct based on some articulable facts
Presumptively civilian property or location	Probable Cause: a fact-based determination of fair (though not necessarily exclusive) probability	Information sufficient to establish a fair probability, based on facts and circumstances, that property, facility, equipment, or an area is militarily significant
Presumptive civilian in an area of active combat operations	Preponderance: information resulting in a 'more likely than not' determination	Information sufficient to establish fact is more likely than not that the individual is directly participating in hostilities thereby rebutting the presumption of civilian immunity
Presumptive civilian outside the conflict area	Clear and Convincing: information that excludes all other rational conclusions and convinces the decision maker with clarity	Information that indicates the only clearly established conclusion is that the individual is a member of an enemy belligerent organization

CONCLUSION

The battlefield is not an environment where all potential targets are of equal character. Instead, targets range over a broad spectrum of certainty. As such, the reasonableness of a target legality judgment must be responsive to this spectrum of (un)certainty, must accommodate the realities of armed conflict, and must ensure a proper balance between mitigation of risk of error and the necessity of prompt and decisive military action. Furthermore, any quantum of information component for assessing the reasonableness of target decision-making will ultimately require implementation at both the operational level and during post hoc critiques. Indeed, this requirement is already inherent in both of these aspects of assessing target legality.

The notion of providing a more predictable reasonableness assessment framework is not radical. Commanders, and the military staff officers (including military legal advisors) who advise them, instinctively focus on the facts and circumstances available at the time these decisions are made to frame their judgments as to the legality of engaging proposed targets. When these decisions are subject to post hoc critique, the investigators or tribunals assessing the decision-making process must also inevitably focus on the facts and circumstances prevailing at the time as the foundation for their determinations. The inevitability that facts and circumstances will be considered in the assessment of reasonableness absent a defined quantum of information framework undermines the legitimacy of both target decision making and subsequent critiques.

Establishing quantum framework, however, will not necessarily ensure credibility and legitimacy of the target decision-making process. That credibility and legitimacy stems first from a good faith commitment to gather as much information related to potential targets as possible and to assess that information as thoroughly as possible given the conditions of combat. The credibility and legitimacy of any subsequent critique of the target decision-making process must also begin with a good faith commitment to assess the judgment through the subjective lens of the operational decision maker. Any legitimate critique must rely on the situation that was confronted by the commander at the time of the decision, and to refuse to consider facts and circumstances that were unavailable or unknown to the commander at the time. Establishing a quantum of information framework for the target decision-making process

will strengthen the effectiveness of the process at both levels. At the operational level, it will arm legal advisers with a more concrete standard of review in support of their advisory role. Even when commanders do not have the benefit of legal advice, predeployment training that incorporates these quantum requirements will facilitate quality decision making by solidifying and clarifying the standards for target decision making.

Using a quantum framework will make an even more significant contribution to the legitimacy of post hoc critiques of targeting decisions. Legitimacy of such critiques is critically important for ensuring effective accountability for battlefield misconduct, but it is also important to ensure that commanders are able to act decisively in the intensely chaotic environment of armed conflict. This importance has recently been highlighted by the critical response to the Goldstone Report assessing the legality of military operations conducted during Operation Cast Lead, the 2008 Israeli incursion into Gaza.[243] Much of the criticism of the findings of the Goldstone Report focused on an improper methodology utilized to assess the reasonableness of Israeli target selection and engagement.[244] Establishing a quantum framework will contribute to future assessments of reasonableness and potentially mitigate the temptation to critique battlefield decisions retrospectively. Instead, under the quantum of information framework, such critiques would become more properly focused on the facts and circumstances available to an operational decision maker at the time of target selection to see whether the requisite quantum was met.

Providing a framework that will enhance the probability of such focus is consistent with the proper standard of review for any military operational decision. Because targeting decisions are subject to a test of reasonableness, those decisions must be assessed through the subjective lens of the decision

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[243] U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Rep. of the U.N. Fact Finding Mission on the Gaza Conflict, 12th Sess., Sept. 15, 2009, U.N. Doc. A/HRC/12/48 (2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

[244] For a critique of the Goldstone Report, see Lieutenant Colonel Chris Jenks & Geoffrey Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law*, 7 BERKELEY J. INT'L L. PUBLICIST, Winter 2011, http://bjil.typepad.com/publicist/vol-7-winter-2011; *see also* Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report and Lawfare*, CASE W. RES. J. INT'L L. 279, 298 (2010). Judge Goldstone has subsequently acknowledged flaws in the report. *See* Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST (Apr. 1, 2011), http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

maker. While reasonableness does require an objective assessment of the ultimate decision, the facts and circumstances upon which that objective assessment should be made are the facts and circumstances as viewed by the commander at the time of action. In this regard, the proper application of the reasonableness assessment involves a combined subjective/objective critique. The ultimate question is whether, based on the subjective perception of the commander at the time of the decision, the decision was objectively reasonable. A quantum framework will facilitate the legitimacy of the target decision, allow the commander to more effectively articulate her thought process during subsequent review, and ultimately allow the individual or tribunal conducting this critique to focus on the facts and circumstances that were available and consider those facts and circumstances through the commander's perspective.