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Legitimate Military Objectives Under The Current Jus In Bello

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The Principle of Distinction and Military Objectives

In its Advisory Opinion of 1996 on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice recognized the "principle of distinction"—between combatants and noncombatants (civilians)—as a fundamental and "intransgressible" principle of customary international law.[1] The requirement of distinction between combatants and civilians lies at the root of the *jus in bello*. It is reflected in Article 48 of Protocol Additional I of 1977 to the 1949 Geneva Conventions for the Protection of War Victims, entitled "Basic rule:" "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[2] There is no doubt that, irrespective of objections to sundry other

1. Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports 226, 257 (July 8).
2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 447 (Adam Roberts and Richard Guelff eds., 3d. ed. 2000) [hereinafter Protocol I].

stipulations of Protocol I,[3] "the principle of the military objective has become a part of customary international law for armed conflict" whether on land, at sea or in the air.[4]

The coinage "military objectives" first came into use in the non-binding 1923 Rules of Air Warfare, drawn up at The Hague by a Commission of Jurists[5] (set up in 1922 by the Washington Conference on the Limitation of Armament). It also appears in the 1949 Geneva Conventions for the Protection of War Victims[6] (which fail to define it[7]), the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[8] and especially the 1999 Second Protocol appended to the Cultural Property Convention,[9] as well as the 1998 Rome Statute of the International Criminal Court.[10]

A binding definition of military objectives was crafted in 1977, in Article 52(2) of Protocol I:

> 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

3. *See, e.g.*, Guy Roberts, *The New Rules for Waging War: The Case against Ratification of Additional Protocol I*, 26 VIRGINIA JOURNAL OF INTERNATIONAL LAW 109, 124–170 (1985–1986).

4. *See* Horace Robertson, *The Principle of the Military Objective in the Law of Armed Conflict* 197, 207, *in* THE LAW OF MILITARY OPERATIONS, LIBER AMICORUM PROFESSOR JACK GRUNAWALT (Michael Schmitt ed., 1998) (Vol. 72, US Naval War College International Law Studies).

5. Hague Rules of Air Warfare, 1923, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, art. 24(1), at 139, 144.

6. *See* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, art. 19 2d para., at 195, 205; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, *id.*, art. 18 5th para., at 299, 308. Both texts refer to the perils to which medical establishments may be exposed by being situated close to "military objectives."

7. *See* EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 141 (1992).

8. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, art. 8(1)(a), at 371, 376.

9. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, art. 6(a), 8, 13(1)(b), at 699, 702, 703–4, 706.

10. Rome Statute of the International Criminal Court, Jul. 17, 1998, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, art. 8(2)(b)(ii), (v), (ix), at 667, 676–7.

> action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[11]

The term "attacks" is defined in Article 49(1) of the Protocol as "acts of violence against the adversary, whether in offence or in defence."[12] Any act of violence fits this matrix: not only massive air attacks or artillery barrages, but also small-scale attacks (like a sniper firing a single bullet). As Article 52(2) elucidates, all attacks must be strictly limited to military objectives.

The definition of military objectives appearing in Article 52(2) is repeated word-for-word in several subsequent instruments: Protocols II and III, Annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects;[13] and the 1999 Second Protocol to the Hague Cultural Property Convention.[14] It is also replicated in the (non-binding) San Remo Manual of 1995 on International Law Applicable to Armed Conflicts at Sea.[15] Many scholars regard the definition as embodying customary international law.[16] With one significant textual modification—to be examined *infra*—that is also the view of the United States, which objects on other grounds to Protocol I.[17]

Notwithstanding its authoritative status, Article 52(2)'s definition leaves a lot to be desired. It is an exaggeration to claim (as does Antonio Cassese) that "[t]his definition is so sweeping that it can cover practically anything."[18] Still, it is regrettable that the wording is abstract and generic, and no list of specific military objectives is provided (if only on an illustrative, non-exhaustive basis). Under Article 57(2)(a)(i) of the Protocol, those who plan or decide upon an

11. Protocol I, *supra* note 2, at 450.
12. *Id.* at 447.
13. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 515; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, *id.*, art. 2(4), at 528; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, *id.*, art. 1(3), at 533.
14. Second Protocol, *supra* note 9, art. 1(f), at 701.
15. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 114 (Louis Doswald-Beck ed., 1995).
16. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64–65 (1989).
17. *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 402 n.9 (A.R. Thomas & J.C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
18. ANTONIO CASSESE, INTERNATIONAL LAW 339 (2001).

attack must "do everything feasible to verify that the objectives to be attacked . . . are military objectives within the meaning of paragraph 2 of Article 52."[19] Due to its abstract character, the definition in Article 52(2) does not produce a workable acid test for such verification. The text lends itself to "divergent interpretations" in application, and, needless to say, perhaps, "[a]mbiguous language encourages abuse."[20]

The relative advantages of a general definition versus an enumeration of military objectives—or a combination of both—have been thoroughly discussed in connection with the preparation of the San Remo Manual.[21] The present writer believes that only a composite definition—combining an abstract statement with a non-exhaustive catalogue of concrete illustrations[22]—can effectively avoid vagueness, on the one hand, and inability to anticipate future scenarios, on the other. No abstract definition standing by itself (unaccompanied by actual examples) can possibly offer a practical solution to real problems emerging—often in dismaying rapidity—on the battlefield.

The noun "objects," used in the definition, clearly encompasses material and tangible things.[23] However, the phrase "military objectives" is certainly not limited to inanimate objects,[24] and it is wrong to suggest that the Protocol's language fails to cover enemy military personnel.[25] To be on the safe side, the framers of Article 52(2) added the (otherwise superfluous) words "[i]n so far as objects are concerned," underscoring that not only inanimate objects constitute military objectives. Human beings can categorically come within

19. Protocol I, *supra* note 2, at 452.

20. ESBJORN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 71 (1979).

21. SAN REMO MANUAL, *supra* note 15, at 114–116. *See also* William Fenrick, *Military Objectives in the Law of Naval Warfare*, *in* THE MILITARY OBJECTIVE AND THE PRINCIPLE OF DISTINCTION IN THE LAW OF NAVAL WARFARE: REPORT, COMMENTARIES AND PROCEEDINGS OF THE ROUND-TABLE OF EXPERTS ON INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS AT SEA 1, 4–5 (Wolff Heintschel v. Heinegg ed., 1991).

22. This legal technique is epitomized in Articles 2–3 of the 1974 General Assembly consensus Definition of Aggression, G.A. Resolution 3314 (XXIX), 15 UNITED NATIONS RESOLUTIONS: SERIES I, RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 392, 393 (Dusan Djonovich ed., 1984).

23. Claude Pilloud & Jean Pictet, *Article 52*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 633–4 (Yves Sandoz et al. eds., 1987).

24. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 33 (1996).

25. Such a suggestion is made by Hamilton DeSaussure, *Comment*, 31 AMERICAN UNIVERSITY LAW REVIEW 883, 885 (1981–1982).

the ambit of military objectives.[26] Indeed, human beings are not the only living creatures that do. Certain types of animals—cavalry horses and pack mules in particular—can also be legitimate targets.

The pivotal issue is what ingredient or dimension serves to identify a military objective. On the face of it, under Article 52(2), an object must fulfill two cumulative criteria in order to qualify as a military objective: (a) by nature, location, purpose or use it must make an effective contribution to military action; and (b) its destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage.[27] However,

> In practice . . . one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy.[28]

Article 52(2) refers to "a definite military advantage" that must be gained from the (total or partial) destruction, capture or neutralization[29] of the targets. The expression "a definite military advantage" (like "military objectives") is derived from the Hague Rules of Air Warfare, which resorted to the formula "a distinct military advantage."[30] There is no apparent difference in the present context between the adjectives "distinct" and "definite" or, for that matter, several other alternatives pondered by the framers of Article 52(2).[31] Whatever the adjective preferred, the idea conveyed is that of "a concrete and perceptible military advantage rather than a hypothetical and

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26. *See* Elmar Rauch, *Attack Restraints, Target Limitations and Prohibitions or Restrictions of Use of Certain Conventional Weapons*, 18 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 51, 55 (1979).

27. *See* MARCO SASSÒLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 161 (1999).

28. *Id*. at 140.

29. The term "neutralization" in this setting means denial of use of an objective to the enemy without destroying it. *See* Waldemar Solf, *Article 52*, *in* NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 318, 325 (Michael Bothe, Karl Partsch & Waldemar Solf eds., 1982).

30. Hague Rules of Air Warfare, *supra* note 5, art. 24(1), at 144.

31. *See* Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977, Part II*, 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 107, 111 (1978).

speculative one."[32] The advantage gained must be military and not, say, purely political[33] (hence, "forcing a change in the negotiating attitudes" of the adverse party[34] cannot be deemed a proper military advantage). But when coalition war is being waged, the military advantage may accrue to the benefit of an allied country—or the alliance in general—rather than the attacking party itself.[35]

The process of appraising military advantage must be made against the background of the circumstances prevailing at the time, so that the same object may be legitimately attacked in one temporal framework but not in others.[36] A church, as a place of worship, is not a military objective; nor is it a military objective when converted into a hospital; yet, if the church steeple is used by snipers, it becomes a military objective.[37] In this sense, the definition of military objectives is "relativized:"[38] there is "no fixed borderline between civilian objects and military objectives."[39]

The trouble is that the notion of "military advantage" is not singularly helpful. Surely, military advantage is not restricted to tactical gains.[40] The spectrum is necessarily wide, and it extends to the security of the attacking force.[41] The key problem is that the outlook of the attacking party is unlikely to match that of the party under attack in evaluating the long-term military benefits of any action contemplated.[42] Moreover, the dominant view is that assessment of the military advantage can be made in light of "an attack as a

32. Solf, *supra* note 29, at 326.
33. *See* Hamilton DeSaussure, *Remarks*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 511, 513–514 (1987).
34. Forcing such a change is viewed (wrongly) as a legitimate military advantage by Burrus Carnahan, *'Linebacker II' and Protocol I: The Convergence of Law and Professionalism*, 31 AMERICAN UNIVERSITY LAW REVIEW 861, 867 (1981–1982).
35. *See* Henri Meyrowitz, *Le Bombardement Stratégique d'après le Protocole Additionnel I aux Conventions de Genève*, 41 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 1, 41 (1981).
36. *See* DeSaussure, *supra* note 33, at 513.
37. *See* B.A. Wortley, *Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions*, 54 BRITISH YEAR BOOK OF INTERNATIONAL LAW 143, 154 (1983).
38. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 272 (1994).
39. Albrecht Randelzhofer, *Civilian Objects*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 603, 604 (Rudolf Bernhardt ed., 1992).
40. *See* James Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to Be Learned*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 129, 132 (2000).
41. *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 402.
42. *See* Dieter Fleck, *Strategic Bombing and the Definition of Military Objectives*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 41, 48 (1997).

whole," as distinct from "isolated or specific parts of the attack."[43] The attacking party may thus argue, e.g., that an air raid of no perceptible military advantage in itself is justified by having misled the enemy to shift its strategic gaze to the wrong sector of the front.[44] Nonetheless, "an attack as a whole" is a finite event, not to be confused with the entire war.[45]

The Definition of Military Objectives by Nature, Location, Purpose and Use

The text of Article 52(2) incorporates helpful definitional guidelines by adverting to the nature, location, purpose and use of military objectives "making an effective contribution to military action." The requirement of effective contribution relates to military action in general, and there need be no "direct connection" with specific combat operations.[46] All the same, an American attempt (reflected in the United States' Commander's Handbook on the Law of Naval Operations[47]) to substitute the words "military action" by the idiom "war-fighting or war-sustaining capability," goes too far.[48] The "war-fighting" limb can pass muster, since it may be looked upon as equivalent to military action.[49] But the "war-sustaining" portion is too broad. The American position is that "[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked," and the example offered is that of the destruction of raw cotton within Confederate territory by Union forces during the Civil War on the ground that the sale of cotton provided funds for almost all Confederate arms and ammunition.[50] As will be seen *infra*, multiple economic objects do constitute military objectives, inasmuch as they directly support military action. Yet, the raw cotton illustration (which may be substituted today by the instance of a country relying

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43. *See* Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 162 (Dieter Fleck ed., 1995).
44. *See* Solf, *supra* note 29, at 325.
45. *See* Francoise Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, *in* THE GULF WAR 1990–91 IN INTERNATIONAL AND ENGLISH LAW 89, 94 (Peter Rowe ed., 1993).
46. *See* Solf, *supra* note 29, at 324.
47. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 402.
48. *See* JAMES BUSUTTIL, NAVAL WEAPONS SYSTEMS AND THE CONTEMPORARY LAW OF WAR 148 (1998).
49. Roberts, *supra* note 4, at 209.
50. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 403.

almost entirely on the export of coffee beans or bananas)[51] displays the danger of introducing the slippery-slope concept of "war-sustaining capability." The connection between military action and exports, required to finance the war effort, is "too remote."[52] Had raw cotton been acknowledged as a valid military objective, almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort (especially when hostilities are protracted). For an object to qualify as a military objective, there must exist a proximate nexus to military action (or "war-fighting"). No wonder that the San Remo Manual rejected an attempt to incorporate the wording "war-sustaining effort."[53]

As far as "nature, location, purpose or use" are concerned, each of these terms deserves a closer look.

1. The Nature of the Objective

"Nature" denotes the intrinsic character of the military objective. To meet this yardstick, an object (or living creature) must be endowed with some inherent attribute which *eo ipso* makes an effective contribution to military action. As such, the object, person, etc., automatically constitutes a legitimate target for attack in wartime.

Although no list of military objectives by nature has been compiled in a binding manner, the following non-exhaustive enumeration is believed by the present writer to reflect current legal thinking:[54]

(a) Fixed military fortifications, bases, barracks[55] and installations, including training and war-gaming facilities;

(b) Temporary military camps, entrenchments, staging areas, deployment positions, and embarkation points;

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51. *See* ROGERS, *supra* note 24, at 41.
52. *See* SAN REMO MANUAL, *supra* note 15, at 161.
53. *Id.* at 150.
54. Compare the various lists of legitimate military objectives offered by ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 402; A.P.V. ROGERS & PAUL MALHERBE, MODEL MANUAL ON THE LAW OF ARMED CONFLICT 72 (1999). *See also* LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 191 (2d ed. 2000).
55. A question has been raised about the status of deserted military barracks (*see* Konstantin Obradovic, *International Humanitarian Law and the Kosovo Crisis*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 699, 720 (2000)). But the whole point about military barracks is that they constitute a military objective *per se*, irrespective of being deserted. When military units are stationed there, they qualify as military objectives by themselves (see (c)).

(c) Military units and individual members of the armed forces, whether stationed or mobile;

(d) Weapon systems, military equipment and ordnance, armor and artillery, and military vehicles of all types;

(e) Military aircraft and missiles of all types;

(f) Military airfields and missile launching sites;

(g) Warships (whether surface vessels or submarines) of all types;

(h) Military ports and docks;

(i) Military depots, munitions dumps, warehouses or stockrooms for the storage of weapons, ordnance, military equipment and supplies (including raw materials for military use, such as petroleum);

(j) Factories (even when privately owned) engaged in the manufacture of arms, munitions and military supplies;

(k) Laboratories or other facilities for the research and development of new weapons and military devices;

(l) Military repair facilities;

(m) Power plants (electric, hydroelectric, etc.) serving the military;

(n) Arteries of transportation of strategic importance, principally mainline railroads and rail marshaling yards, major motorways (like the interstate highways in the US,[56] the *Autobahnen* in Germany and the *autostradas* in Italy), navigable rivers and canals (including the tunnels and bridges of railways and trunk roads);

(o) Ministries of Defense and any national, regional or local operational or coordination center of command, control and communication relating to running the war (including computer centers, as well as telephone and telegraph exchanges, for military use);

(p) Intelligence-gathering centers (even when not run by the military establishment).

56. Appropriately enough, the mammoth US interstate highway network (with a total length of more than 45,000 miles)—initiated by President Eisenhower—is formally known as the National System of Interstate and Defense Highways. *See* 26 THE NEW ENCYCLOPEDIA BRITANNICA 324 (15th ed. 1997).

2. The Purpose of the Objective

More often than not, the "purpose" of a military objective is determined either by its (inherent) nature or by its (de facto) use. But if the word "purpose" in Article 52(2) is not redundant, it must be distinguished from both nature and use. The present writer is of the opinion that the purpose of an object—as a separate ground for classifying it as a military target—is determined after the crystallization of its original nature, yet prior to actual use. In other words, the military purpose is assumed not to be stamped on the objective from the outset (otherwise, the target would be military by nature). Military purpose is deduced from an established intention of a belligerent as regards future use. As pointed out by the official ICRC Commentary: "the criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function."[57]

At times, enemy intentions are crystal clear, and then the branding of an object (by purpose) as a military target becomes rather easy. A good illustration might be that of a civilian luxury liner, which a belligerent overtly plans (already in peacetime) to turn into a troop ship at the moment of general mobilization. Although by nature a civilian object, and not yet in use as a troop ship, it may be attacked as a military objective at the outbreak of hostilities (assuming that it is no longer serving as a passenger liner).

Unfortunately, most enemy intentions are not so easy to decipher, and then much depends on the gathering and analysis of intelligence which may be faulty. In case of doubt, caution is called for. Thus, field intelligence revealing that the enemy intends to use a particular school as a munitions depot does not justify an attack against the school as long as the munitions have not been moved in.[58] The Allied bombing in 1944 of the famous Abbey of Monte Cassino is a notorious case of a decision founded on flimsy intelligence reports, linked to a firm supposition ("the abbey made such a perfect observation point that surely no army could have refrained from using it") which turned out to have been entirely false.[59] This writer cannot accept the conclusion that the Abbey was a military objective only because it appeared to be important to deny its potential use to an enemy (who in reality refrained from using it).[60] Purpose is predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a "worst case scenario."

57. Pilloud & Pictet, *supra* note 23, at 636.
58. *See* ROGERS, *supra* note 24, at 36.
59. *Id*. at 54–55.
60. *Id*. at 55.

3. The Use of the Objective

Actual "use" of an objective does not depend necessarily on its original nature or on any (later) intended purpose. A leading example is that of the celebrated "Taxis of the Marne" commandeered in September 1914 to transport French reserves to the frontline, thereby saving Paris from the advancing German forces.[61] "So long as these privately owned taxicabs were operated for profit and served their normal purposes, they were not military equipment. Once they were requisitioned for the transportation of French troops, their function changed."[62] They became military objectives through use.

Article 52(3) of the Protocol prescribes: "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."[63] There are three elements here:

(a) Certain objects are normally (by nature) dedicated to civilian purposes and, as long as they fulfill only their essential function, they must not be treated as military targets. The examples given are places of worship, civilian dwellings and schools.

(b) The same objects may nevertheless be used in actuality in a manner making an effective contribution to military action. When (and as long as) they are subject to such use, outside their original function, they can be treated as military objectives. The dominant consideration should be "the circumstances ruling at the time" (referred to in the text of Article 52(2)).

(c) Article 52(3) adds a caveat that, in case of doubt whether an object normally dedicated to civilian purposes is actually used to make an effective contribution to military action, it must "be presumed not to be so used." The presumption has given rise to controversy at the time of the drafting of this clause, and an attempt to create an exception with respect to objects located in the contact zone failed in the ensuing vote.[64] While the results of the vote may reflect a "[r]efusal to recognize the realities of combat" in some situations,[65] it must be taken into account that the presumption (which is rebuttable) comes into play only in case of doubt. Often there is no doubt at all, especially when combatants are exposed to direct fire from a supposedly

61. *See* GEORGE SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 112 (1968).
62. *Id.* at 113.
63. Protocol I, *supra* note 2, at 450.
64. *See* Solf, *supra* note 29, at 326–327.
65. *See* W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 137 (1990).

civilian object.[66] If, for instance, the minaret of a mosque is used as a sniper's nest, the presumption is rebutted and the enemy is entitled to treat it as a military objective.[67] The degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear. But surely that doubt has to exist in the mind of the attacker, based upon "the circumstances ruling at the time."

It follows that, by dint of military use (or, more precisely, abuse), virtually every civilian object—albeit, innately, deemed worthy of protection by the *jus in bello*—can become a military objective.[68]

4. The Location of the Objective

"Location" of an objective must be factored in, irrespective of the nature, purpose and use thereof. Logic dictates that, if a civilian-by-nature object (like a supermarket) is located within a sprawling military base, it cannot be immune from attack. If a merchant vessel is anchored in a military port, it becomes a military objective by location.

The real issue with respect to location goes beyond these elementary observations. The notion underlying the reference to location is that a specific land area can be regarded per se as a military objective.[69] Surely, the incidence of such locations cannot be too widespread: there must be a distinctive feature turning a piece of land into a military objective (e.g., a mountain pass, a specific hill of strategic value, a bridgehead or a spit of land controlling the entrance of a harbor).[70]

5. Bridges

The quadruple subdivision of military objectives by nature, purpose, use and location is not as neat as it sounds, and certain objectives can be catalogued within more than one subset. Bridges may serve as a prime illustration. Bridges constructed for the engineering needs of major motorways and rail tracks are surely integrated in the overall network: like the roads and the tracks that they serve, they constitute military objectives by nature. But even where bridges connect non-arterial lines of transportation, as long as they are

66. *See* Solf, *supra* note 29, at 327.
67. Countless other examples can be postulated. Rogers refers to the case of a cathedral used as divisional headquarters. ROGERS, *supra* note 24, at 35.
68. *See* SASSÒLI & BOUVIER, *supra* note 27, at 161.
69. For the underlying reasons, see ROGERS, *supra* note 24, at 38–39.
70. See Elmar Rauch, *The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines*, 24 GERMAN YEARBOOK OF INTERNATIONAL LAW 262, 273–277 (1981).

apt to have a perceptible role in the transport of military reinforcements and supplies, their destruction is almost self-explanatory as a measure playing havoc with enemy logistics. It is wrong to assume (as does Michael Bothe in the context of bridges targeted during the Kosovo air campaign of 1999) that bridges can be attacked only "where supplies destined for the front must pass over" them.[71] The destruction of bridges can be effected to disrupt any movements of troops and military supplies, not necessarily in the direction of the front.

If not by nature, most bridges may qualify as military objectives by purpose, use or—above all—location.[72] Every significant waterway or similar geophysical obstruction to traffic (like a ravine) must be perceived as a possible military barrier, and there comes a time when the strategy of either belligerent would dictate that all bridges (even the smallest pedestrian overpass) across the obstacle have to be destroyed or neutralized. Surely, there is nothing wrong in a military policy striving to effect a fragmentation of enemy land forces through the destruction of all bridges—however minor in themselves—spanning a wide river. Thus, in the Gulf War in 1991, destruction of bridges over the Euphrates River impeded the deployment of Iraqi forces and their supplies (severing also communications cables).[73]

It has been asserted that "[b]ridges are not, as such, military objectives,"[74] and that a bridge is like a school: the question whether it "represents a military objective depends entirely on the actual situation."[75] However, the comparison between bridges and schools is meretricious. A school is recognized as a military objective only in the extraordinary circumstances of military use by the adverse party. A bridge, as a rule, would qualify as a military objective (by nature, location, purpose or use). It would fail to be a military objective only under exceptional conditions, when it is neither actually nor potentially of any military use to the enemy.

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71. Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 531, 534 (2001).
72. For the view that bridges are military objectives by location, see Pilloud & Pictet, *supra* note 23, at 636.
73. *See* ROGERS, *supra* note 24, at 42.
74. Francoise Hampson, *Proportionality and Necessity in the Gulf Conflict*, 86 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 45, 49 (1992).
75. FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 90 (1987).

6. Military Objectives Exempt from Attack

The determination that an object constitutes a military objective is not always conclusive in legitimizing an attack. Some objects are exempted from attack, notwithstanding their distinct character as military objectives. The most extreme illustration appears in Article 56(1) of the Protocol:

> Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works and installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.[76]

Granted, according to Article 56(2), the special protection is not unqualified: it ceases when the dam, dyke or nuclear electrical generating station regularly, significantly and directly supports military operations, and there is no other feasible way to terminate such support.[77] In any event, the entire stipulation of Article 56 is innovative and binding only on contracting Parties.

For their part, the Geneva Conventions prohibit attacks against protected military persons, i.e., those combatants who become *hors de combat*, either by choice (through surrender) or by force of circumstances (being wounded, sick or shipwrecked);[78] fixed establishments and mobile military medical units of the Medical Service; [79] hospital ships;[80] medical aircraft;[81] medical personnel engaged in the treatment of the wounded and sick;[82] and chaplains attached to the armed forces[83] (to name the most important categories). Protection

76. Protocol I, *supra* note 2, at 451.
77. *Id.*
78. Geneva Convention (I) , art. 12, *supra* note 6, at 379; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 12, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 221, 226–7; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *id.* art. 13, at 243, 250.
79. Geneva Convention (I), *supra* note 6, art. 19, at 205.
80. Geneva Convention (II), *supra* note 78, art. 22, at 230.
81. Geneva Convention (I), *supra* note 6, art. 36, at 210–1.
82. *Id.*, art. 24, at 207.
83. *Id.*

from attack is also granted by customary international law to other categories, like cartel ships.[84]

Additionally, an attack against a military objective—which is not protected as such—may be illicit owing to the principle of proportionality, whereby the "collateral damage" or injury to civilians (or civilian objects) must not be excessive. This issue is dealt with separately by the present writer.

General Problems Relating to the Scope of Military Objectives

The definition of military objectives, as discussed *supra*, raises a number of question marks:

1. Retreating troops

It is sometimes contended that when an army has been routed, and its soldiers are retreating in disarray—as epitomized by the Iraqi land forces during the Gulf War—they should not be further attacked.[85] But this is a serious misconception. The only way for members of the armed forces to immunize themselves from further attack is to surrender, thereby becoming *hors de combat*.[86] Otherwise, as the Gulf War amply demonstrates, the fleeing soldiers of today are likely to regroup tomorrow as viable military units.

2. Targeting Individuals

Is it permissible to target specific individuals who are members of the armed forces? As a rule, when a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack (even if he does not participate in actual hostilities and does not pose an immediate threat to the enemy). The *jus in bello* prohibits treacherous assassination, yet nothing prevents singling out as a target an individual enemy combatant (provided that the attack is carried out by combatants).[87] The prohibition of assassination does not cover "attacks, by regular armed military forces, on specific individuals who are themselves legitimate military targets."[88] The United States was, consequently, well within its rights during

84. *See* Louise Doswald-Beck, *Vessels, Aircraft and Persons Entitled to Protection during Armed Conflicts at Sea*, 65 BRITISH YEAR BOOK OF INTERNATIONAL LAW 211, 239 (1994).
85. *See* ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS 246 (2d ed. 1999).
86. *See* Peter Barber, *Scuds, Shelters and Retreating Soldiers: The Laws of Aerial Bombardment in the Gulf War*, 31 ALBERTA LAW REVIEW 662, 690 (1993).
87. *See* ROGERS & MALHERBE, *supra* note 54, at 62.
88. Burrus Carnahan, *Correspondent's Report*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 423, 424 (1999).

World War II when it specifically targeted the Commander-in-Chief of the Japanese Fleet, Admiral Yamamoto, whose plane was ambushed (subsequent to the successful breaking of the Japanese communication codes) and shot down over Bougainville in 1943.[89] The ambush of the car of SS General Heydrich in 1942 is different, but only because he was killed by members of the Free Czechoslovak army (parachuted from London) who were not wearing uniforms and were therefore not lawful combatants: otherwise, Heydrich—as a military officer—was a legitimate target, just like Yamamoto.[90]

3. Police

Can police officers and other law enforcement agents be subsumed under the heading of members of armed forces (who are legitimately subject to attack)? The answer to the question depends on whether the policemen have been officially incorporated into the armed forces[91] or (despite the absence of official incorporation) have taken part in hostilities.[92] If integrated into the armed forces, policemen—like all combatants—"may be attacked at any time simply because they have that particular status."[93]

4. Industrial plants

It is exceedingly difficult to draw a dividing line between military and civilian industries. Sometimes, even the facts are hard to establish. Who is to say whether a textile factory is producing military uniforms or civilian clothing? In wartime, civilian consumption gives way as a matter of course to military priorities. Can one seriously asseverate that certain steel works ought not to be classified as military objectives only because their output has heretofore been channeled to the civilian market? The long-time civilian-oriented character of an industrial center in peacetime provides no guarantee that production would not transition in the course of hostilities into war materials. A line of production, even when introduced for plainly civilian ends (e.g., tractors for agricultural use), can often be swiftly adjusted to military use (in this

89. *See* Joseph Kelly, *Assassination in War Time*, 30 MILITARY LAW REVIEW 101, 102–103 (1965).
90. *See* Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER LAW REVIEW 615, 628 (1991–1992).
91. On such incorporation, *cf*. Article 43(3) of Protocol I, *supra* note 2, at 444.
92. See Peter Rowe, *Kosovo 1999: The Air Campaign*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 147, 150–151 (2000).
93. *Id*. at 151.

instance, the assembly of tracked vehicles, such as tanks). The children's toys factory of today may become tomorrow's leading manufacturer of electronic precision-munitions. Besides, in the present era of high technology, the construction of any computer hardware architecture or software program can turn into a central pillar of the war effort.[94] "The problem is that the [computer] technology capable of performing . . . [military] functions differs little, if at all, from that used in the civilian community."[95] If that is not enough, subcontracting in the manufacture of components of modern weapon systems causes a dispersion in the fabrication of war materials which is almost impossible to trail.[96] All in all, it is easy to object to the automatic removal of any industrial plant from the list of military objectives.

5. Oil, coal and other minerals

What is the status of oil fields and rigs, refineries, coal mines, and other mineral extraction plants, which are not ostensibly tied to military production? In the final analysis, despite their civilian bearings, all of them can be deemed to constitute the infrastructure of the military industry. It can well be argued that "oil installations of every kind are in fact legitimate military objectives open to destruction by any belligerent."[97] As for petrol filling stations, only those functioning in civilian residential areas—away from major motorways—may be exempted from attack.

6. Electric grids

Can power plants in civilian metropolitan areas be set apart from military power plants? During the Gulf War, the Coalition air campaign in 1991 treated as a military target the integrated Iraqi national grid generating and distributing electricity (used both by the armed forces and civilians).[98] Undeniably, an integrated power grid makes an effective contribution to modern military action:[99] any shortfall in military requirements can be compensated at

94. As regards the growing military reliance on computers, see Michael Schmitt, *Computer Network Attacks and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 887 (1998–1999).
95. Michael Schmitt, *Future War and the Principle of Discrimination*, 28 ISRAEL YEARBOOK ON HUMAN RIGHTS 51, 68 (1998).
96. *See* Parks, *supra* note 65, at 140.
97. Leslie Green, *The Environment and the Law of Conventional Warfare*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 222, 233 (1991).
98. *See* Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, *in* THE GULF WAR 1990–91, *supra* note 45, at 63, 73.
99. *Id*. at 74.

the expense of civilian needs. Indeed, the Coalition attacks against Iraqi power generating plants and transformer stations had a great impact on the Iraqi air defense structure (supported by computers), unconventional weapons research and development facilities, and telecommunications systems.[100] The large-scale attacks also had unintended—albeit inevitable—non-military consequences, such as the disruption of water supply (due to loss of electric pumps) and the inability to segregate the electricity that powers a hospital from "other" electricity in the same lines.[101] But these unfortunate results did not detract from the standing of the Iraqi electric grid system as a military objective.[102]

7. Civilian airports and maritime ports

It would be imprudent to disregard the possibility that civilian airports and maritime ports can become hubs of military operations, side by side with continued civilian activities (which can conceivably be a fig leaf). No wonder that the 1954 Hague Cultural Property Convention refers to "an aerodrome" or "a port"—in a generic fashion—as a military objective.[103]

8. Trains, trucks and barges

If strategic arteries of transportation come within the bounds of military objectives (as stated), should the definition not incorporate all the railroad rolling stock, the truck fleets which are the backbone of motorway traffic, and the barges plying the rivers and canals? The consequences for civilian traffic are palpable. Unlike passenger liners or airliners (mentioned *infra*), passenger trains do not have any visible hallmarks setting them apart from troop-carrying trains. If an inter-urban train (as distinct from a city tram) is sighted from the air, there being no telling signs of the civilian identity of the train riders, this writer believes that the train would be a legitimate military objective. In the Kosovo air campaign of 1999, a passenger train (not targeted as such) was struck while crossing a railway bridge.[104] In analyzing the case,

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100. *See* Daniel Kuehl, *Airpower vs. Electricity: Electric Power as a Target for Strategic Air Operations*, 18 JOURNAL OF STRATEGIC STUDIES 237, 251–252 (1995).
101. *Id*. at 254.
102. *See* Christopher Greenwood, *Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability*, 1 SINGAPORE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 441, 461 (1997).
103. Hague Cultural Property Convention, art. 8(1)(a), *supra* note 8, at 376.
104. *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 58–62, 39 INTERNATIONAL LEGAL MATERIALS 1257, 1273–1275 (2000), *reprinted* herein as Appendix A [hereinafter Report to the Prosecutor].

Natalino Ronzitti seems to take the position that—although the bridge was no doubt a legitimate military objective—a passenger train should not be attacked.[105] However, in the opinion of this writer it would all depend on whether or not the passengers were identified by the aviators as civilians.

9. Civilian television and radio stations

In wartime, control of civilian broadcasting stations can at any time be assumed by the military apparatus, which may wish to use it in communications (e.g., summoning reservists to service), in pursuit of psychological warfare, and for other purposes. In April 1999, NATO intentionally bombed the (State-owned) Serbian Television and Radio Station in Belgrade.[106] Was the bombing legally warranted? The Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia averred that if the attack was carried out because the station played a role in the Serbian propaganda machinery, its legality might well be questioned.[107] In the Committee's opinion, the attack could be justified only if the TV and radio transmitters were integrated into the military command and control communications network.[108] However, it is noteworthy that the Hague Cultural Property Convention of 1954 refers to any "broadcasting station" as a military objective (in the same breath with an aerodrome and a port).[109] The phrase clearly covers civilian TV and radio stations.[110]

10. Government offices

It is occasionally questioned "whether government buildings are excluded under any clear rule of law from enemy attack."[111] But this sweeping statement is wrong. Government offices can be considered a legitimate target for attack only when used in pursuance or support of military functions. The premises of the Ministry of Defense have already been mentioned. Any subordinate or independent Department of the Army, Navy, Air Force, Munitions and so forth

105. Natalino Ronzitti, *Is the Non Liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 1017, 1025 (2000).
106. *See* Report to the Prosecutor, Appendix A, ¶ 75.
107. *Id.*, ¶ 76.
108. *Id.*, ¶ 75.
109. Hague Cultural Property Convention, art. 8(1)(a), *supra* note 8, at 376.
110. For reference to a radio broadcasting station in the Vatican City, see the UNESCO Commentary on the Hague Cultural Property Convention: THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY 106 (Jiri Toman ed., 1996).
111. INGRID DETTER, THE LAW OF WAR 294 (2d ed. 2000).

is embraced. As for the edifice of the Head of State, circumstances vary from one country to another. Whereas the White House in Washington would constitute a legitimate military target (since the American President is the Commander–in-Chief of all US armed forces), Buckingham Palace in London would not (inasmuch as the Queen has no similar role).

11. Political leadership

Obviously, members of the political leadership of the enemy country can be attacked (even individually) if they serve in the armed forces.[112] Additionally, when civilian leaders are present in any military installations or government offices constituting military objectives—or when they are visiting either the front line or munitions factories in the rear areas, when they board military aircraft or are driven by military command cars, etc.—they expose themselves to danger. However, notwithstanding the personal risk run when present in a military objective, a civilian member of the political leadership does not become a military objective by himself and cannot be targeted away from such objective.

Defended and Undefended Localities in Land Warfare

The real test in land warfare is whether a given place, inhabited by civilians, is actually defended by military personnel. Should that be the case, the civil object becomes—owing to its use—a military objective. The criterion of the defense of an otherwise civilian place is highlighted in Article 25 of the Hague Regulations: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[113]

Similar language appears in Article 3(c) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).[114] Article 8(2)(b)(v) of the Rome Statute brands as a war crime: "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and

112. *See* ROGERS & MALHERBE, *supra* note 54, at 62.

113. Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to 1899 Hague Convention (II) and 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 63, 83–84 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988). The words "by whatever means" were added to the text in 1907.

114. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 INTERNATIONAL LEGAL MATERIALS 1159, 1193 (1993).

which are not military objectives."[115] The last words are plainly an addition to the original Hague formula. They sharpen the issue by denoting that some undefended civilian habitations may still constitute military objectives.

Article 59(1) of Protocol I sets forth: "It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities."[116] Once more it is the Hague criterion of defending a place that counts: if a place is defended, it may be attacked. But the expression "localities," employed by the Protocol, is wider than single buildings, albeit narrower than a whole city or town. This is important to bear in mind, for land warfare cannot always be analyzed on a building-by-building basis. Not infrequently, large-scale combat is conducted in an extensive built-up area, particularly a large city. It goes without saying that "any building sheltering combatants becomes a military objective."[117] In extreme cases, when fierce fighting is conducted from house to house (*à la* Stalingrad), a whole city block—or even section—may be regarded as a single military objective: partly by (actual) use and partly by purpose (namely, potential use). The fact that, in the meantime, a given building within that block or section is not yet occupied by any military unit is immaterial. The reasonable expectation is that, as soon as the tide of battle gets nearer, it would be converted into a military stronghold. Hence, it may be bombarded even prior to that eventuality. Yet, the old Hague sweeping reference to a town *in toto* (defended or undefended) must be regarded as obsolete.[118]

A belligerent desirous of not defending a city—with a view to saving it from harm's way—can convey that message effectively to the enemy. Article 59(2) of the Protocol prescribes:

> The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfill the following conditions:
>
> (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
>
> (b) no hostile use shall be made of fixed military installations or establishments;

115. Rome Statute, *supra* note 10, at 676.
116. Protocol I, *supra* note 2, at 454.
117. Pilloud & Pictet, *supra* note 23, at 699, 701.
118. *See* Oeter, *supra* note 43, at 171.

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.[119]

There seem to be some complementary implicit conditions not enumerated in the text: roads and railroads crossing the locality must not be used for military purposes, and factories situated there must not manufacture products of military significance.[120] Nevertheless, the presence in the non-defended locality of police forces retained for the sole purpose of maintaining law and order is permissible under Article 59(3).[121]

Apart from the explicit and implicit cumulative conditions, it is *sine qua non* that (i) the declared non-defended locality would be in or near the contact zone,[122] and that (ii) it would be open for occupation.[123] A declared non-defended locality cannot be situated in the *hinterland*—far away from the contact zone—for the simple reason that it is not yet within "the effective grasp of the attacker's land forces."[124] *Au fond*, a non-defended locality cannot be established in anticipation of future events, but only "in the 'heat of the moment', i.e., when the fighting comes close."[125]

Article 59(4) goes on to state that the declaration mentioned in paragraph (2)—defining as precisely as possible the limits of the non-defended locality—is to be addressed to the adverse party, which must treat the locality as non-defended unless the prerequisite conditions are not in fact fulfilled.[126] The outcome is that, subject to the observation of all the conditions (specified and unspecified in the text), the unilateral declaration of a locality as non-defended binds the adverse party by virtue of the Protocol.[127]

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119. Protocol I, *supra* note 2, at 454.
120. *See* Pilloud & Pictet, *supra* note 23, at 702.
121. Protocol I, *supra* note 2, at 454.
122. A contact zone means the area where the most forward elements of the armed forces of both sides are in contact with each other. *See* Pilloud & Pictet, *supra* note 23, at 701 n.2.
123. Indeed, prior to Protocol I, the expression commonly used was not a "non-defended locality" but an "open city." For the transition in terminology, see J. Starke, *The Concept of Open Cities in International Humanitarian Law*, 56 AUSTRALIAN LAW JOURNAL 593–597 (1982).
124. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTE—AND WAR—LAW 622 (2d ed. 1959). The comment was made prior to the drafting of Protocol I, but it is still valid.
125. Claude Pilloud & Jean Pictet, *Localities and Zones under Special Protection*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 23, at 697. *See also* M. Torrelli, *Les Zones de Sécurité*, 99 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 787, 795 (1995).
126. Protocol I, *supra* note 2, at 454.
127. Solf, *Article 59*, *supra* note 29, at 379, 383–384.

Article 59(5) adds that the two parties to the conflict may agree on the establishment of non-defended localities, even when the conditions are not met.[128] But manifestly, in that case, it is the bilateral agreement (as distinct from the unilateral declaration) that is decisive. Article 15 of Geneva Convention (IV)[129] provides that the belligerents may establish in the combat zone neutralized areas intended to serve as a shelter for (combatant or noncombatant) sick and wounded, as well as for civilians who perform no work of a military character, but the creation of such areas and their demarcation is contingent on the agreement of the parties.

Special Problems Relating to Sea Warfare

1. Areas of Naval Warfare

Hostile actions by naval forces may be conducted in or over the internal waters, the territorial sea, the continental shelf, the exclusive economic zone and (where applicable) the archipelagic waters of the belligerent States; the high seas; and (subject to certain conditions) even the continental shelf and the exclusive economic zone of neutral States.[130] Military objectives at sea include not only vessels but also fixed installations (especially weapon facilities and detection or communication devices), which can be emplaced on—or beneath—the seabed, anywhere within the areas of naval warfare.[131] Cables and pipelines laid on the seabed and serving a belligerent may also constitute legitimate military objectives.[132]

2. Warships

Every warship is a military objective. The locution "warships" covers all military floating platforms, including submarines, light craft (e.g., torpedo boats), and even unarmed auxiliary naval vessels (except hospital ships). A warship can be attacked on sight and sunk (within the areas of naval warfare). "These attacks may be exercised without warning and without regard to the safety of the enemy crew."[133]

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128. Protocol I, *supra* note 2, at 454.
129. Geneva Convention (IV), *supra* note 6, at 307.
130. *See* SAN REMO MANUAL, *supra* note 15, at 80.
131. *See* Tullio Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 808, 809, 819 ff (1980).
132. *See* SAN REMO MANUAL, *supra* note 15, at 111.
133. William Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 238, 269 (1991).

3. Enemy Merchant Vessels

Enemy merchant vessels are generally deemed to be civilian objects, and are therefore exempt from attack (even though they are subject to capture as prize).[134] Still, the San Remo Manual lists no less than seven exceptions to the rule.[135] In these seven instances, merchant vessels may be attacked and sunk as military objectives:

(a) When an enemy merchant vessel is engaged directly in belligerent acts (e.g., laying mines or minesweeping).

(b) When an enemy merchant vessel acts as an auxiliary to the enemy armed forces (e.g., carrying troops or replenishing warships).

(c) When an enemy merchant vessel engages in reconnaissance or otherwise assists in intelligence gathering for the enemy armed forces.

(d) When an enemy merchant vessel refuses an order to stop or actively resists capture.

(e) When an enemy merchant vessel is armed to an extent that it can inflict damage on a warship (especially a submarine).

(f) When an enemy merchant vessel travels under a convoy escorted by warships, thereby benefiting from the (more powerful) armament of the latter.

(g) When an enemy merchant vessel makes an effective contribution to military action (e.g., by carrying military materials).[136]

Some vessels—above all, passenger liners exclusively engaged in carrying civilian passengers—are generally exempted from attack.[137] Even if the passenger liner is carrying a military cargo in breach of the requirement of

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134. *See* Natalino Ronzitti, *Le Droit Humanitaire Applicable aux Conflits Armés en Mer*, 242 RECUEIL DES COURS 9, 69–71 (1993).

135. SAN REMO MANUAL, *supra* note 15, at 146–151.

136. The war materials under this rubric cannot be exports. Except in the context of refusing an order to stop while blockade running, a private tanker would not constitute a military objective when carrying oil exported from a belligerent oil-producing State, even though the revenue derived from the export may prove essential to sustaining the war effort. *See* Michael Bothe, *Neutrality in Naval Warfare: What Is Left of Traditional International Law?*, *in* HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 387, 401 (Astrid Delissen & Gerard Tanja eds., 1991). *Cf.* the comments *supra* about raw cotton in the American Civil War.

137. On passenger liners, see SAN REMO MANUAL, *supra* note 15, at 132.

exclusive civilian engagement, an attack against it may be unlawful because it would be clearly disproportionate to the military advantage expected.[138]

4. Neutral Merchant Vessels

Neutral merchant vessels are generally immune from attack, although subject to visit and search by belligerent warships (and military aircraft) and possible capture for adjudication as prize in appropriate circumstances.[139] Nevertheless, according to the San Remo Manual, neutral merchant vessels are liable to attack—as if they were enemy military objectives—in the six following cases:[140]

(a) When a neutral merchant vessel is engaged in belligerent acts on behalf of the enemy.

(b) When a neutral merchant vessel acts as an auxiliary to the enemy armed forces.

(c) When a neutral merchant vessel assists the enemy's intelligence system.

(d) When a neutral merchant vessel is suspected of breaching a blockade or of carrying contraband and clearly refuses an order to stop, or resists visit, search or capture.

(e) When a neutral merchant vessel travels under a convoy escorted by enemy warships.

(f) When a neutral merchant vessel makes an effective contribution to the enemy's military action (e.g., by carrying military materials).[141]

Thus, "[t]he mere fact that a neutral merchant vessel is armed provides no grounds for attacking it."[142] As for traveling under convoy, the entitlement to attack a neutral merchant vessel exists only when the convoy is escorted by enemy warships. Neutral merchant vessels traveling under convoy escorted by neutral warships, in transit to neutral ports, cannot be attacked (and are not subject to visit and search).[143] The neutral escort can also belong to a State other than the State of the flag.[144] During the Iran-Iraq War, the practice developed of reflagging the merchant vessels of one neutral State (like Kuwait)

138. *See id.*
139. *See id.* at 154, 212–213.
140. *Id.* at 154–161.
141. *See supra* note 136.
142. SAN REMO MANUAL, *supra* note 15, at 161.
143. *See* GEORGE POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY 560–561 (1998).
144. *See id.* at 571–575.

escorted by warships of another (like the United States).[145] But reflagging (in the absence of a "genuine link" between the merchant vessels and their new flag State[146]) is not strictly necessary. Suffice it for the two neutral States to conclude an agreement enabling the flag State of the escorting warships to verify and warrant that the merchant vessel (flying a different neutral flag) is not carrying contraband and is not otherwise engaged in activities inconsistent with its neutral status.[147]

Of course, neutral passenger liners would benefit from special protection.[148]

5. Destruction of Enemy Merchant Vessels after Capture

When enemy merchant vessels are protected from attack that does not mean that they cannot be destroyed. The rule is that warships (and military aircraft) have a right to capture enemy merchant vessels, with a view to taking them into port for adjudication and condemnation as prize.[149] As an exceptional measure, when circumstances preclude taking it into port, the captured merchant vessel may be destroyed.[150] The legality of the destruction of the captured ship is to be adjudicated by the prize court.[151]

There is a vital distinction between the destruction of an enemy merchant vessel subsequent to capture and an attack launched against it on the ground that it constitutes a military objective. An enemy merchant vessel liable to attack as a military objective can be sunk at sight with all those on board. Conversely, the destruction of an enemy merchant vessel in the exceptional circumstances following capture can only take place subject to the dual condition that (i) the safety of passengers and crew is assured; (ii) the documents and papers relating to the prize proceedings are safeguarded.[152] A special

145. *See id*. at 560–571.
146. *See* Myron Nordquist & Margaret Wachenfeld, *Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf*, 31 GERMAN YEARBOOK OF INTERNATIONAL LAW 138, 140–151 (1988).
147. *See* SAN REMO MANUAL, *supra* note 15, at 197–199.
148. *See* George Walker, *Information Warfare and Neutrality*, 33 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1079, 1164 (2000).
149. SAN REMO MANUAL, *supra* note 15, at 205, 208.
150. *See id*. at 209.
151. *See* Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 283, 309 (1991).
152. *See* SAN REMO MANUAL, *supra* note 15, at 209.

Procès-Verbal of 1936 applies this general rule to submarine warfare.[153] The *Procès-Verbal* specifies that the ship's boats are not regarded as a place of safety for the passengers and crew unless that safety is assured by the existing sea and weather conditions, the proximity of land, or the presence of another vessel in a position to take them on board.[154] The San Remo Manual follows the *Procès-Verbal*, adding an important caveat: the vessel subject to destruction must not be a passenger liner.[155]

6. Exclusion Zones

The San Remo Manual rejects the notion that a belligerent may absolve itself of its duties under international humanitarian law by establishing maritime "exclusion zones," which might enable it to attack enemy merchant vessels and even neutral ships entering the zones.[156] The practice of establishing exclusion zones evolved during World Wars I and II, and was resorted to—albeit with considerable conceptual differences—in the Iran-Iraq War and in the Falkland Islands War.[157] It is clear from the 1946 Judgment of the International Military Tribunal at Nuremberg that the sinking of neutral merchant vessels without warning when entering unilaterally proclaimed exclusion zones, is unlawful.[158] This holding is not germane, however, to enemy merchant vessels in such zones.[159]

Most commentators agree that, given the on-going practice, the legality of exclusion zones should be acknowledged in some manner.[160] The San Remo Manual itself concedes that belligerents may establish exclusion zones as exceptional measures, subject to the condition that no new rights be acquired—and no existing duties be absolved—through such establishment.[161]

153. *Procès-Verbal* Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 1936, THE LAWS OF ARMED CONFLICTS, *supra* note 113, at 883, 884.
154. *Id*.
155. SAN REMO MANUAL, *supra* note 15, at 210.
156. *Id*. at 181.
157. *See* William Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91–126 (1986).
158. International Military Tribunal (Nuremberg), Judgment and Sentence, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 304 (1947).
159. *See* Edwin Nwogugu, *1936 London Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930*, *in* THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 349, 358–359 (Natalino Ronzitti ed., 1988).
160. *See* POLITAKIS, *supra* note 143, at 145.
161. SAN REMO MANUAL, *supra* note 15, at 181–182.

The condition is somewhat softened when the Manual adds that, should a belligerent create an exclusion zone, "it might be more likely to presume that ships or aircraft in the area without permission were there for hostile purposes."[162] This proviso "allows a 'grey area,'"[163] although incontestably exclusion zones must not become "free-fire zones," and specified sea lanes ensuring safe passage to hospital ships, neutral shipping, etc., must be made available.[164] Evidently, the specifics of a new law regarding exclusion zones have not yet crystallized.[165] Until the new law emerges in detail, the *lex lata* remains valid, so that "an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent."[166]

The reverse side of the coin is that enemy warships—being military objectives subject to attack at sight—do not gain any protection by staying away from an exclusion zone. Consequently, there was no legal fault in the sinking by the British of the Argentine cruiser *ARA General Belgrano* outside a proclaimed exclusion zone (in the course of the Falkland Islands War of 1982): an enemy warship "has no right to consider itself immune" from attack beyond the range of an exclusion zone.[167]

7. Bombardment of Coastal Areas

A special problem arises with respect to the bombardment from the sea of enemy coastal areas. The matter is governed by Hague Convention (IX) of 1907, which sets forth in Article 1: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden."[168] Article 2, for its part, clarifies that military works, military or naval establishments, depots of arms or war materials, workshops or plants which can be utilized for the needs of the hostile fleet or army, and warships in the harbor, are excluded

162. *Id.* at 181.
163. Fausto Pocar, *Missile Warfare and Exclusion Zones in Naval Warfare*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 215, 223 (1997).
164. *See* Wolff Heintschel von Heinegg, *The Law of Armed Conflicts at Sea*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 43, at 405, 468.
165. *See* L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, *in* THE LAW OF NAVAL OPERATIONS 156, 193–194 (Horace B. Robertson ed., 1991) (Vol. 64, US Naval War College International Law Studies).
166. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 395–396.
167. *See* Howard Levie, *The Falklands Crisis and the Laws of War, in* THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY AND INTERNATIONAL LAW 64, 66 (Alberto Coll & Anthony Arend eds., 1985).
168. Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 111, 113.

from this prohibition.[169] Article 3—which is "a throwback to a bygone era of naval warfare"[170]—permits the bombardment of ports, towns, etc., if the local authorities (having been summoned to do so) fail to furnish supplies to the naval force before them.[171]

Article 1 of Hague Convention (IX) applies to coastal bombardment a land warfare rule, laid down in Article 25 of Hague Convention (IV). As noted, the sweeping reference in the Hague Conventions to entire towns as either defended or undefended (and accordingly subject to, or exempted from, attack) is obsolete, and the term "localities"—employed by Protocol I—is more precise. Additionally, coastal bombardments are in general different from land warfare. Whereas on land a bombardment usually serves as a prelude to assault on the target with a view to its occupation, naval bombardment is more frequently intended to inflict sheer destruction on the enemy rear (only exceptionally is the intention to land troops).[172] If there is room for some elasticity in treating whole sections of a city as a single military objective—when house-to-house combat is raging—no similar impetus affects coastal bombardment. The grafting of a land warfare rule onto coastal bombardment is therefore inappropriate.[173]

A specific issue in the context of coastal bombardment is that of lighthouses. Can they be treated as military objectives? On the one hand, they deserve protection as installations designed to ensure the safety of navigation in general.[174] On the other hand, the French Court of Cassation held in 1948 that a lighthouse is a military objective, since it can be used for the needs of a hostile fleet.[175] The present practice of States is certainly not conclusive.

169. *Id*.
170. Horace Robertson, *1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War*, *in* THE LAW OF NAVAL WARFARE, *supra* note 159, at 149, 166.
171. Hague Convention (IX), *supra* note 168, at 113.
172. *See* ROBERT TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 143 (1955) (Vol. 50, US Naval War College International Law Studies).
173. *See* Robertson, *supra* note 170, at 163–164.
174. *See* Matthias Hartwig, *Lighthouses and Lightships*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 220 (Rudolph Bernhardt ed., 1997).
175. *In re Gross-Brauckmann* (France, Court of Cassation [Criminal Division], 1948), 1948 ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 687, 688.

Special Problems Relating to Air Warfare

1. Military Aircraft

Enemy military aircraft—and any other military aerial platforms, including gliders, drones, blimps, dirigibles, etc.—are legitimate targets for attack. In fact, air combat is intrinsically different from land or sea combat, considering that (i) it is most difficult for a military aircraft in flight to convey a wish to surrender (*i.e.*, there is no effective counterpart in the air to the land or sea method of hoisting a white flag, striking colors or—in the case of submarines—surfacing); and (ii) it is generally permissible to continue to fire upon a military aircraft even after it has become clearly disabled.[176] (Although, under Article 42 of Protocol I, persons parachuting from an aircraft in distress—in contradistinction to airborne troops—must not be made the object of attack during their descent, and upon reaching hostile ground must be given an opportunity to surrender.[177])

2. Civilian Aircraft

Enemy civilian aircraft per se do not constitute military objectives. Still, civilian aircraft are subject to rather stringent strictures under the nonbinding Hague Rules of Air Warfare, whereby enemy civilian aircraft in flight are liable to be fired upon—as if they were military objectives—in the following circumstances:

(a) When flying within the jurisdiction of their own State, should enemy military aircraft approach and they do not make the nearest available landing.[178]

(b) When flying (i) within the jurisdiction of the enemy; or (ii) in the immediate vicinity thereof and outside the jurisdiction of their own State; or (iii) in the immediate vicinity of the military operations of the enemy by land or sea (the exceptional right of prompt landing is inapplicable).[179]

Even neutral civilian aircraft are exposed to the risk of being fired upon if they are flying within the jurisdiction of a belligerent, are warned of the approach of military aircraft of the opposing side, and do not land

176. *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 17, at 407–408.
177. Protocol I, *supra* note 2, at 444.
178. Hague Rules of Air Warfare, *supra* note 5, art. 33, at 147.
179. *Id.*, art. 34.

immediately.[180] Thus, the only advantage that neutral civilian aircraft have over belligerent civilian aircraft within enemy airspace is that the neutral civilian aircraft must be warned first (belligerent civilian aircraft in that situation must establish at their own peril whether the enemy military aircraft are approaching).

These provisions have been criticized as impractical, addressing an improbable contingency (of civilian aircraft venturing into the enemy's jurisdiction), and creating new and difficult categories (what is the vicinity of the enemy's jurisdiction?).[181] Although the Hague Rules have generally had a substantial influence on the evolution of customary international law[182]—and their impact on the terminology adopted by the framers of Protocol I has been noted—it is impossible to forget that they were enunciated in 1923, at the dawn of civil aviation and prior to the exponential growth of passenger traffic by air. The normal modern procedure of declaring air exclusion zones in wartime is supposed to preclude any type of undesirable overflight in sensitive areas.[183] But even within a "no-fly" zone, it is arguable that attack against civilian aircraft in flight should follow a due warning.[184] Outside "no-fly" zones, the contemporary *jus in bello* (as corroborated by military manuals) forbids attacks against civilian aircraft in flight unless they are utilized for military purposes or refuse to respond to interception signals; and civilian airliners (engaged in passenger traffic) are singled out for special protection.[185] Still, as demonstrated by the lamentable 1988 incident of the US cruiser *USS Vincennes* shooting down an Iranian passenger aircraft (with 290 civilians on board), the speed of modern electronics often creates insurmountable problems of erroneous identification.[186]

The status of civilian aircraft is different when they are not in flight (nor in the process of taking off or landing with passengers), but parked on the

180. *Id.*, art. 35, at 148.
181. *See* J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 402 (3d ed. 1947).
182. *See* Richard Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 115 (1988).
183. *See* F.J.S. Gómez, *The Law of Air Warfare*, 38 INTERNATIONAL REVIEW OF THE RED CROSS 347, 356 (1998).
184. *See* Torsten Stein, *No-Fly-Zones*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 193, 196 (1997).
185. *See* Horace Robertson, *The Status of Civil Aircraft in Armed Conflict*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 113, 125–126 (1997).
186. On this incident, see Jose Reilly & R.A. Moreno, *Commentary*, *in* THE MILITARY OBJECTIVE AND THE PRINCIPLE OF DISTINCTION IN THE LAW OF NAVAL WARFARE, *supra* note 21, at 111, 114–115.

ground. It must be recalled that the airport in which they are parked is liable to be deemed a military objective, so the civilian aircraft may be at risk owing to its mere presence there.[187] Moreover, irrespective of where they are situated, civilian aircraft are often viewed as constituting "an important part of the infrastructure supporting an enemy's war-fighting capability," since they can be used later for the transport of troops or military supplies.[188]

3. Strategic and "Target Area" Bombing

The most crucial issue of air warfare is that of strategic bombing, to wit, bombing of targets in the interior, beyond the front line (the contact zone). Conditions of air warfare have always defied the logic of the distinction between defended and undefended sites, enshrined in the traditional law of Article 25 of the 1907 Hague Regulations, although the words "by whatever means" were inserted into the Article with the deliberate intention of covering "attack from balloons."[189] After all, there is no real meaning to lack of defenses *in situ* as long as the front line remains a great distance away. First, a rear zone is actually defended (however remotely) by the land forces facing the enemy on the front line. Secondly, the fact that a place in the interior is undefended by land forces while the front line is far-off is no indication of future events: it may still be converted into an impregnable citadel once the front line gets nearer. Thirdly, and most significantly for air warfare, the emplacement of anti-aircraft guns and fighter squadrons *en route* from the front line to the rear zone may serve as a more effective screen against intruding bombers than any defense mechanism provided locally.[190]

For these and other reasons, the Hague Rules of Air Warfare introduced the concept of military objectives, endorsed and further elaborated—with a new definition—by Protocol I. However, strategic bombing triggers the complementary question whether it is permissible to treat a cluster of military objectives in relative spatial proximity to each other as a single "target area." The issue arises occasionally in some settings of long-range artillery bombardment. But it is particularly apposite to air warfare, in which target identification may be detrimentally affected by poor visibility (especially as a result of

187. *Cf*. Leslie Green, *Aerial Considerations in the Law of Armed Conflict*, 5 ANNALS OF AIR AND SPACE LAW 89, 109 (1980).
188. Robertson, *supra* note 185, at 127.
189. THOMAS HOLLAND, THE LAWS OF WAR ON LAND (WRITTEN AND UNWRITTEN) 46 (1908).
190. *See* R.Y. Jennings, *Open Towns*, 22 BRITISH YEAR BOOK OF INTERNATIONAL LAW 258, 261 (1945).

inclement weather), effective air defense systems, failure of electronic devices (sometimes because of enemy jamming), sophisticated camouflage, etc. Thus, when the target is screened by determined air defense, the attacking force may be compelled to conduct a raid from the highest possible altitudes, compromising precision bombing (especially when "smart bombs" are unavailable).[191] The practice which evolved during World War II was that of "saturation bombings," aimed at large "target areas" in which there were heavy concentrations of military objectives (as well as civilian objects).[192] Such air attacks were designed to blanket or envelop the entire area where military objectives abounded, rather than search for a point target.[193] The operating assumption was that, if one military objective would be missed, others stood a good chance of being hit. This practice (entailing, as it did, immense civilian casualties by way of "collateral damage") was harshly criticized after the war.[194]

The World War II experience may create the impression that "target area" bombing is relevant mostly to sizeable tracts of land—like the Ruhr Valley in Germany—where the preponderant presence of first-class military objectives stamps an indelible mark on their surroundings, thereby creating "an indivisible whole."[195] But the dilemma whether or not to lump together as a single target several military objectives may be prompted even by run-of-the-mill objects when they are located at a relatively small distance from each other. The dilemma is addressed by Article 51(5)(a) of Protocol I, where it is prohibited to conduct "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects."[196]

While placing a reasonable limitation on the concept of "target area" bombing, Article 51(5)(a) does not completely ban it. "Target area" bombing is still legitimate when the military objectives are not clearly separated and

191. It must be appreciated that "smart bombs" are not a panacea: much can go wrong even when they are available. *See* A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 165, 170–172 (2000).
192. *See* STONE, *supra* note 124, at 626–627.
193. *See* E. Rosenblad, *Area Bombing and International Law*, 15 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 53, 63 (1976).
194. *See*, *e.g.*, Hans Blix, *Area Bombardment: Rules and Reasons*, 49 BRITISH YEAR BOOK OF INTERNATIONAL LAW 31, 58–61 (1978).
195. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 335–336 (1959).
196. Protocol I, *supra* note 2, at 651.

distinct. Understandably, "the interpretation of the words 'clearly separated and distinct' leaves some degree of latitude to those mounting an attack."[197] In particular, the adverb "clearly" blurs the issue: is the prerequisite clarity a matter of objective determination or subjective appreciation (depending, e.g., on the degree of visibility when weather conditions are poor)?[198] Another question is what a "similar concentration" of civilian objects within the "target area" means in practice. The ambiguities are regrettable, keeping in mind that "target area" bombing stretches to the limit the principle of distinction between military objectives and civilian objects.

Conclusion

It is difficult to overstate the importance of establishing authoritatively the compass of military objectives in conformity with the *jus in bello*. In exposing military objectives to attack, and (as a corollary) immunizing civilian objects, the principle of distinction provides the main line of defense against methods of barbarism in warfare. The validity of the principle cannot be seriously contested today, and it may be regarded as lying at the epicenter of the law regulating the conduct of hostilities. Unfortunately, the Devil is in the detail. As this paper should amply demonstrate, the detail is far from resolved by the current *lex scripta* (specifically Protocol I). There is an evident need for further expounding quite a few aspects of the accepted definition of military objectives. This need becomes more urgent with the dramatic changes in the modern techniques of combat. The *jus in bello* cannot afford to lag far behind the changing conditions of combat.

197. *See* Pilloud & Pictet, *supra* note 23, at 613, 624.
198. See Hamilton DeSaussure, *Belligerent Air Operations and the 1977 Geneva Protocol I*, 4 ANNALS OF AIR AND SPACE LAW 459, 471–472 (1979).