

Article

## **Advantageous Attacks: The Role of Advantage in Targeting People Under the Law of Armed Conflict**

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### **Abstract**

*The law of armed conflict (LOAC) requires that attacks on objects promise a military advantage, but allows attacks on certain categories of people regardless of utility. This Article compares the law on targeting people and objects and suggests that the law on targeting people should be reformed to include the advantage requirement that governs the targeting of objects. Other proposals to refine the law on targeting people draw from law enforcement or peacetime human rights law; critics claim that those proposals inappropriately treat war like peace, and armed forces like police. By contrast, this Article's proposal draws from LOAC itself and would help tailor the law to the strategic concerns at the heart of military operations. Indeed, this proposal would advance LOAC's fundamental effort to prohibit useless violence, extending the requirement of advantageous attacks to people.*

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### Introduction

The question of who may be attacked under the law of armed conflict (LOAC) has given rise to controversy and uncertainty.<sup>1</sup> The practice of targeted killing in counterterrorism operations has brought attacking people to the forefront of LOAC debates.<sup>2</sup> According to current approaches to the war on terror, killing people has taken on a strategic importance – not just prominence – that it has not had in other recent conflicts.<sup>3</sup> The rules regarding targeting

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<sup>1</sup> See Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 38

<sup>1</sup> See Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 38 (2013); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS*, 154-55 (2010).

<sup>2</sup> See, e.g., Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings*, ¶ 57, U.N. Doc. A/HRC/ 14/24/Add.6 (May 28, 2010) (“The greatest source of the lack of clarity with respect to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.”); Harold Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the American Society of International Law Annual Meeting: The Obama Administration and International Law (March 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>; Charlie Savage, *At White House, Weighing Limits of Terror Fight*, N.Y. TIMES, Sept. 15, 2011, [http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?pagewanted=all&_r=0) (on the debate on killing lower-level Al Qaeda members).

<sup>3</sup> See, e.g., Kenneth Anderson, *Book Review: Extraterritorial Use of Force Against Non-State Actors by Noam Lubell*, LAWFARE (Nov. 19, 2011), <http://www.lawfareblog.com/2011/11/extraterritorial-use-of-force-against-non->

people in non-international armed conflict continue to generate considerable controversy, even as they govern prominent ongoing policies like targeted killings. The relatively clear rules on targeting in international armed conflict have prompted new interpretations and proposals. Both sets of rules raise questions about the criteria and principles behind targeting rules, including the role of status, membership in militaries or armed groups, behavior, and threat. However, the rules used to distinguish between people do not include a fundamental concept at the heart of distinguishing between objects – the advantage anticipated to result from the attack.

This Article first explains the rules on targeting people and contrasts them with the rules on targeting objects, showing how the rules on targeting people do not require anticipated advantage. The second section outlines a potential advantage requirement and weighs arguments for and against the addition of such a requirement. An advantage requirement would operate over and above existing rules, acting as an additional layer of protection. This Article concludes that an advantage requirement could be a desirable, strategically flexible constraint that rejects the assumption that attacks on people promise a military advantage and serves the fundamental LOAC goal of reducing useless violence.

### **I. Attacking People and Objects Under the Law of Armed Conflict**

The regulation of attacks – “acts of violence against the adversary, whether in offence or in defence” – stands at the conceptual and practical center of LOAC.<sup>4</sup> LOAC approaches attacks

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state-actors/ (suggesting that the Obama administration’s drone program changed the character of war in the counterterrorism context).

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. See also Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT’L L.J. 39, 110-12 (2010) (distinguishing between attack and destruction). While attacks may be governed by other legal regimes, LOAC serves as the *lex specialis* in armed conflict, and this analysis focuses on that law.

as a matter of targeting, which may be defined as the selection of objects and people subject to or intended to be made the object of attack and the process by which those attacks are carried out.<sup>5</sup> Encompassing fundamental rules like distinction and proportionality, targeting law draws together key elements of LOAC. Yet, at the center of targeting law lies a divide. The law breaks the universe of potential targets into two major categories – objects and people – and governs those categories with different rules. This section contrasts the differing rules on distinction, which lacks an advantage requirement for targeting people, and then looks beyond distinction to see whether other parts of targeting law may fill the gap.

#### A. *Distinction and People*

The rules on who may be targeted vary somewhat based on the status of the person (combatant or civilian) and the status of the armed conflict (international or non-international). The law's approach to distinction with respect to people focuses on two main categories: combatants and civilians, with key exceptions. The International Committee of the Red Cross (ICRC) study on customary international humanitarian law lists as the first rule: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."<sup>6</sup> The ICRC study

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<sup>5</sup> See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 519 (2010); Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 277, 277-78 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006) (on the linear nature of the law of attack). The definition used here was inspired partly by the definition used by Gary Solis with respect to objects, but it is broader in two ways. First, it covers people as well as objects. Second, it includes the process of selecting objects or people which may be attacked and not just objects or people against which an attack is planned. This second notion suggests that lawful attacks may be conducted against a category or group of objects or people; one need not select particular objects or individuals to be attacked.

<sup>6</sup> JEAN-MARIE HENCHKAERTS & LOUIS DOWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3 (2009), <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [hereinafter ICRC CUSTOMARY LAW STUDY]. The ICRC's study

describes this rule as a “norm of customary international law applicable in both international and non-international armed conflicts,” and explains that in this rule the term “combatant” indicates “persons who do not enjoy the protection against attack accorded to civilians,” and does not address combatant status or prisoner-of-war status.<sup>7</sup> While distinctions between combatants and others have implications for detention and trial, the core goal of distinction is to determine which people and objects are open to attack.

In international armed conflict (IAC), persons are open to direct attack if they are members of the armed forces of a party to the conflict (excepting religious and medical personnel), participants in a *levée en masse*, or civilians directly participating in hostilities (DPH).<sup>8</sup> In non-international armed conflict (NIAC), persons are open to direct attack if they are members of a state’s armed forces or an organized armed group (which constitutes the armed forces of a non-state party to the conflict), or civilians DPH.<sup>9</sup> In non-

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generated considerable controversy, but this rule was not the source of it. For treaty law, see Additional Protocol I, *supra* note 4, arts. 48, 51(2), 52(1). Roberts and Guelff write that Additional Protocol I Article 48 reflects the principle articulated in the St. Petersburg Declaration that the only legitimate object is to weaken the military forces of the enemy. DOCUMENTS ON THE LAWS OF War 53 (Adam Roberts & Richard Guelff eds., 3d ed. 2010).

<sup>7</sup> See ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 3.

<sup>8</sup> See *id.* at 11-14; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 872 INT’L REV. RED CROSS 991, 995 (2008) [hereinafter *ICRC Interpretive Guidance*]; Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land art. 2, Oct. 18 1907 [hereinafter *Hague Regulations*](on *levée en masse*). Medical personnel and chaplains are not combatants under Additional Protocol I and are not prisoners of war under the Third Geneva Convention. See Additional Protocol I, *supra* note 4, art. 43(2); Convention (III) relative to the Treatment of Prisoners of War art. 33, Aug. 12, 1949 [hereinafter *Geneva Convention III*]. One can conceive of these exceptions as the product of a sort of categorization – medical personnel and chaplains fall into different categories – or the product of conduct concerns, because those people provide distinct and sensitive services which may justify exemption from certain designations.

<sup>9</sup> See *ICRC Interpretive Guidance*, *supra* note 8, at 995. For a discussion of targeting law in NIAC and IAC, see Charles Garraway, ‘To Kill or Not to Kill?’ –

international as well as international armed conflicts, “members of State armed forces may be considered combatants” for the purposes of distinction, though there is some resistance to the idea that “combatants” exist in non-international armed conflict.<sup>10</sup> In NIAC, the role of non-state actors has inspired varied approaches to combatants and civilians, with the controversy arising largely out of discussions of membership in organized armed groups and civilians DPH, discussed in greater depth below.

Combatants may be targeted at any time and place, even when they are not fighting.<sup>11</sup> A combatant can be *hors de combat* and thus protected from direct attack in certain circumstances, for example when in the power of the adversary or after surrender.<sup>12</sup>

The rules on attacking people reflect ideas about what actions are useful and legitimate in military operations. The 1868 St. Petersburg Declaration, an early LOAC instrument which banned certain explosive projectiles, states: “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ... for this purpose it is sufficient to

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*Dilemmas on the Use of Force*, 14 J. CONFLICT & SEC. L. 499 (2010). Geography plays an uncertain and disputed role in the rules. See, e.g., Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65, 81-86 (2013); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 863 (2009).

<sup>10</sup> See ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 11; Alston, *supra* note 2, at 19. See also Marco Sassòli and Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters : Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 605-08 (2008); Kenneth H. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004).

<sup>11</sup> See, e.g., SOLIS, *supra* note 5, at 188; Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN THE HONOUR OF KNUT IPSEN 145, 148 (Wolff Heintschel von Heinegg & Volker Epping, eds., 2007).

<sup>12</sup> See Hague Regulations, *supra* note 8, art. 23(c); Additional Protocol I, *supra* note 4, arts. 41 and 85(3)(e); Geneva Convention III, *supra* note 8, art. 3 (“Common Article 3”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 4, June 8, 1977 [hereinafter Additional Protocol II]; See also SOLIS, *supra* note 5, at 188-89.

disable the greatest possible number of men.”<sup>13</sup> This legal instrument presents a strategic vision based on neutralizing large numbers of people who are members of armed forces, and this strategic vision underlies the rules on attacking people.

Membership also forms the foundation for targeting rules on organized armed groups, members of which may be attacked at any time and in any place.<sup>14</sup> The determination of membership presents challenges; for example, membership in an organized armed group other than dissident armed forces (parts of a state’s armed forces that have turned against their government) may be informal and may not coincide completely with affiliation.<sup>15</sup> The ICRC determines membership in an organized armed group on the basis of a correspondence between the individual’s function and the conduct-of-hostilities function exercised by the group as a whole.<sup>16</sup> An alternative approach holds that membership in an organized armed group should be determined in the way that determines membership in a state’s armed forces, with the key factor being membership in an organization under a command structure and less emphasis placed on combat function.<sup>17</sup>

The rule that civilians are immune from attack unless they directly participate in hostilities, which appears in treaty and customary law, has generated controversy and uncertainty.<sup>18</sup> The acts

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<sup>13</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29 1868 (The St. Petersburg Declaration).

<sup>14</sup> See *ICRC Interpretive Guidance*, *supra* note 8, at 1006; Kevin Jon Heller, ‘One Hell of a Killing Machine’: *Signature Strikes and International Law*, 11 J. INT’L CRIM. JUST. 89, 93 (2013) (“Members of an organized armed groups [sic] are targetable anywhere, at any time – even when they are not fighting.”).

<sup>15</sup> See *ICRC Interpretive Guidance*, *supra* note 8, at 1006-07.

<sup>16</sup> See *Id.*, at 1007.

<sup>17</sup> See 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, 690-91(2010).

<sup>18</sup> See Additional Protocol I, *supra* note 4, 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.”); Additional Protocol II, *supra* note 12, art. 13(3) (“Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”); ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 19-24 (Rule 6); HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. ¶

that constitute direct participation defy comprehensive or uncontroversial listing, and the determination of DPH may proceed on a case-by-case basis.<sup>19</sup> Activities involving the application of violence may clearly constitute direct participation, while financial and other non-combat support may clearly be excluded.<sup>20</sup> For

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30 [2005](Isr.). Bill Boothby writes that “the customary rule, though distinct, clearly owes much to the rule in AP1.” 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, 744 (2010). Common Article 3 of the 1949 Geneva Conventions grants protection to persons “taking no active part in the hostilities.” See also Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 699 (2010); ICRC *Interpretive Guidance*, *supra* note 8. See also A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 11-12 (2d ed., 2004) (presenting and assessing a list of activities that may or may not constitute direct participation in hostilities). For analysis of the ICRC study, see, e.g., Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L.Q. 180 (2010). The ICRC's claims regarding civilians DPH and restraints on the use of force were the subject of considerable criticism, some of which came from experts who participated in the study supporting the Interpretive Guidance. See, e.g., W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010). The author of the guidance, Nils Melzer, has also elaborated on these topics in other works. See NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2008). 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).

<sup>19</sup> See *Prosecutor v. Strugar*, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶ 177-78 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008); *Prosecutor v. Tadic*, Case No. IT 94-1-T, Judgment, ¶ 616 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); ROGERS, *supra* note 18, at 11-12 (presenting and assessing a list of activities that may or may not constitute direct participation in hostilities); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 618-19 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEAEC12563CD0051DC9E> [hereinafter ICRC COMMENTARY].

<sup>20</sup> Alston, *supra* note 2, at ¶ 60.

example, attacking members and equipment of enemy forces may clearly qualify as direct participation in hostilities, whereas working in a munitions factory may not.<sup>21</sup> There have been efforts to create more general criteria for DPH; for example the ICRC's three cumulative criteria for these acts: a threshold of harm, direct causation of the harm by the act or operation of which it is a part, and belligerent nexus governing the design of the act.<sup>22</sup>

A key difficulty with respect to civilians DPH is the temporal limitations (unless *and for such time as* they take a direct part in hostilities), which may allow civilians to engage in hostile acts with impunity, slipping back into immunity from attack if their opponents cannot attack or capture them while they are directly participating.<sup>23</sup> One possible solution to the revolving door problem is the ICRC Interpretive Guidance's highly contested notion of a continuous combat function (CCF): "In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function')." <sup>24</sup> The ICRC suggests that persons who have a CCF lose their protection on a continuous basis, as long as they assume their CCF, wherever they are and whatever they are doing.<sup>25</sup> The notion of

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<sup>21</sup> See ROGERS, *supra* note 18, at 11; Alston, *supra* note 2, at ¶ 61.

<sup>22</sup> See ICRC *Interpretive Guidance*, *supra* note 8, at 995-96. See also Schmitt, *Deconstructing*, *supra* note 18, at 711-39.

<sup>23</sup> The language of Additional Protocols' rules on civilians DPH – "and for such time as" – suggests that openness to direct attack is limited to the period surrounding the participation. See ICRC *Interpretive Guidance*, *supra* note 8, at 996. See also 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).

<sup>24</sup> ICRC *Interpretive Guidance*, *supra* note 8, at 995. For a description of continuous combat function, see *Id.*, at 1007.

<sup>25</sup> *Id.* at 996. This may depend on whether a person performing a CCF is a member of an organized armed group, who are targetable wherever they are and whatever they are doing. See, e.g., Heller, *supra* note 14, at 93 ("Members of an organized armed groups [sic] are targetable anywhere, at any time – even when they are not fighting."). Claims regarding CCF and members of organized armed groups may not overlap because there may be different views as to how a person becomes a member of an organized group and in particular whether a CCF constitutes the only path to membership. See also Alston, *supra* note 2, at ¶ 62, ¶ 65 (discussing the ICRC's Interpretive Guidance).

CCF constitutes a combatant-like category which leaves persons open to attack regardless of their conduct.<sup>26</sup> Criticism of the CCF arises from those who think the notion leads to too narrow a scope for targeting and those who think it may expand the scope of targeting impermissibly.<sup>27</sup> The notion of CCF may be *lex ferenda*, not *lex lata*.<sup>28</sup>

Even apart from CCF, there may be a temptation to allow civilians DPH to lose immunity from attack on a continuous basis in order to prevent the revolving-door problem.<sup>29</sup> Civilians DPH do not have a clear end point equivalent to retirement or demobilization, though surrender would certainly end direct participation.<sup>30</sup> Nevertheless, rules on civilians DPH challenge somewhat the idea of an enduring or inherent categorization, allowing targeting based on conduct rather than status or membership in armed forces or groups.

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<sup>26</sup> See Garraway, 'To Kill or Not to Kill?', *supra* note 9, at 506.

<sup>27</sup> See Schmitt, *Deconstructing*, *supra* note 18, at 739 ("it is necessary to dispense with the 'belonging to a Party' and 'continuous combat Function' aspects of the concept of organized armed groups, extend participation as far up and downstream as there is a causal link, and close the revolving door of participation."); Alston, *supra* note 2, at ¶ 65 ("[t]he creation of CCF category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to 'for such Time' as opposed to 'all the time.'").

<sup>28</sup> See Ohlin, *Crisis*, *supra* note 1, at 37. However, the ICRC claims that "the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts." *ICRC Interpretive Guidance*, *supra* note 8, at 991 (bold removed).

<sup>29</sup> For example, one could treat members of organized armed groups as civilians DPH and expand the temporal aspect of DPH to allow them to be targeted on a continual basis. See LUBELL, *EXTRATERROTORIAL USE OF FORCE*, *supra* note 1, at 151-52, 154.

<sup>30</sup> See Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 536 (2004) ("[A] civilian who participates in hostilities remains a valid military target until unambiguously opting out through extended nonparticipation or an affirmative act of withdrawal"). The mechanics of surrender are not clear in the context of air operations.

B. *Distinction and Objects*

The law's approach to distinguishing between people is not the only way to apply the principle of distinction. In the law on objects, advantage plays an explicit role. Article 52(2) of Additional Protocol I provides the following definition of military objectives with respect to objects: "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."<sup>31</sup> This definition of military objectives contains two requirements: A) the object must make an effective contribution to military action, and B) the object's destruction, capture or neutralization must offer a definite military advantage. Under this definition, even an object which contributes to military action by its nature – a category which covers traditional military objects – is subject to the demands of the second part of the definition which requires a definite military advantage.<sup>32</sup> An object's

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<sup>31</sup> Additional Protocol I, *supra* note 4, art. 52(2). This definition is a norm of customary international law. See ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 29-31. The literature on military objectives is extensive. See, e.g., GEOFFREY BEST, WAR AND LAW SINCE 1945, at 272-75 (1994); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82-112 (2004); Marco Sassòli, *Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts*, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21<sup>ST</sup> CENTURY CONFLICTS 181 (David Wippman & Matthew Evangelista eds., 2005); see also W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 142 n.421 (1990) (commenting on Article 52(2)'s neglect of uncertainty and speculative decision-making in war). Charles Garraway writes that in the 1991 Gulf War, the Article 52(2) definition "proved workable." Charles Garraway, *25 Years of the Two Additional Protocols: their Impact on the Waging of War; Challenges from New Types of Armed Conflicts*, in THE TWO ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS: 25 YEARS LATER 147 (Guido Ravasi & Gian Luca Beruto eds., 2004).

<sup>32</sup> Some analyses collapse the two parts of Article 52(2) into one overarching question, but retain the notion of advantage. See, e.g., U.S. AIR FORCE, AFP 14-210, USAF INTELLIGENCE TARGETING GUIDE 147 (Feb. 1, 1998), available at <http://www.fas.org/irp/doddir/usaf/afpam14-210/index.html> (stating that "[t]he key factor is whether the object makes an effective contribution to the adversary's

status is tethered to circumstances, periods of time, and strategies; it does not fall into an enduring category. Under Article 52(2), even traditional military objects may not be military objectives. But that fact may lead to counterintuitive classifications, or at least appellations – could a fighter jet in some circumstances be a civilian object? Additional Protocol I offers no category for “traditionally military but disadvantageous or useless” objects.<sup>33</sup>

However, other parts of Additional Protocol I reveal the possibility that objects can have an assumed or permanent status as military objectives. For example, Article 58 states that parties to a conflict shall “avoid locating military objectives within or near densely populated areas.”<sup>34</sup> The ICRC’s commentary on Additional Protocol I states that as “regards permanent objectives [for example, a barracks], governments should endeavour to find places away from densely populated areas to site them. These concerns should already be taken into consideration in peacetime.”<sup>35</sup> This provision suggests

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military action, *so that* its capture, destruction, or neutralization offers a definite military advantage in the circumstances ruling at the time.”) (emphasis added); *see also* Sassòli, *supra* note 31, at 185-86 (noting the difficulty of fulfilling the second part of the Art. 52(2) definition of military objectives without fulfilling the first). The ICRC Commentary states that the “nature” category “comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.” ICRC COMMENTARY, *supra* note 19, at 636.

<sup>33</sup> Additional Protocol I Article 52(1) states in part that “[c]ivilian objects are all objects which are not military objectives as defined in paragraph 2.” Thus, the text suggests that all objects are either military objectives or civilian objects, and military objects which are not associated with the required contribution or advantage would thus fall outside the military objectives definition and into the category of civilian objects. *See also* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 69, 84 (Spring 2010) (on the example of a tank in a museum). Additional Protocol I arts. 59 (on non-defended places) and 60 (on demilitarized zones) provide that in certain circumstances some traditional military objects would not be subject to attack.

<sup>34</sup> Additional Protocol I, *supra* note 4, art. 58(b).

<sup>35</sup> ICRC COMMENTARY, *supra* note 19, at 694. Sassòli states that, at least in the 1954 Hague Cultural Property Protocol, the prohibition on placement of cultural property near military objectives suggests objects that could be military objectives, not objects that already are. *See* Sassòli, *supra* note 31, at 199. Nonetheless, there appears to be a presumption – like the law’s benefit of the doubt for traditional civilian objects – that certain objects are military objectives. Furthermore,

that not all determinations regarding military objectives may be made on the basis of anticipated military advantage “in the circumstances ruling” at a particular point in an armed conflict. Proposed lists of military objectives highlight this approach.<sup>36</sup>

Debates within the 1999 NATO campaign over Kosovo – Operation Allied Force – illustrate both the assumption that certain objects are always legitimate military objectives and also challenges to that assumption. Lieutenant General Michael Short, the commander of the air campaign, stated in a post-campaign interview that “[o]ne of my peers called it ‘random bombing of military targets.’”<sup>37</sup> However, some potential targets were rejected for lack of utility. Harvey Dalton, standing in for the Legal Counsel to the Chairman of the Joint Chiefs of Staff at a post-campaign conference, stated that “even though it was hostilities, we did not go after all military objects. We went after those that counted, or least the ones we thought counted.”<sup>38</sup>

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Additional Protocol I Article 52(3) gives examples of objects “normally dedicated to civilian purposes,” identifying “a place of worship, a house or other dwelling or a school.” Additional Protocol I, *supra* note 4, art. 52(3). Such objects may get the benefit of the doubt if there is uncertainty as to whether they would meet the first part of the definition of military objectives in Article 52(2).

<sup>36</sup> See ROGERS, *supra* note 18, at 64, 67, 69-70, 83-85. Before offering his list, Rogers writes that “[t]he mere fact that an object, such as a bridge or a communications installation, is in the list does not mean that it is necessarily a military objective. It must make an effective contribution to military action and its neutralization must offer a definite military advantage.” *Id.* at 83. See also Hague Rules of Aerial Warfare, Feb. 1923. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 6, at 139-41 (for background). While rejected in the negotiation of Additional Protocol I, lists of military objectives suggest that some lawmakers and scholars believe it is possible to state that an object is a military objective without undertaking the utility assessment required by Article 52(2).

<sup>37</sup> Interview by PBS Frontline with Michael Short, Lt. Gen., <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/short.html> [hereinafter Short Frontline Interview]. At the same time, there were accusations of LOAC violations. See HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 2 (February 2000), available at <http://www.hrw.org/sites/default/files/reports/natbm002.pdf> [hereinafter HRW NATO Report].

<sup>38</sup> Harvey Dalton, *Commentary: Harvey Dalton*, 78 INTL. LAW STUDIES 199, 202 (2002).

Unlike the definition of military objectives with respect to objects, the rules on which kinds of people may be military objectives contain no explicit advantage requirement. Instead, the approach focuses on status, membership, and conduct. This approach to distinction may presume that people who are combatants or direct participants in hostilities are strategically advantageous objects of attack; the criteria might be seen as proxies for advantage. But there is no requirement, for the purposes of distinction, that the individuals who can be made the object of an attack would be militarily advantageous targets.

Though sometimes eclipsed by status- or membership-based approaches, conduct-based approaches may be ascendant in scholarship and practice.<sup>39</sup> Conduct may be a preferable basis for targeting, especially when status (either combatant or civilian) and membership provide uncertain or inadequate guidance. Greater reliance on conduct may either expand or contract the scope of targeting rules. On the one hand, some conduct-based approaches may cover individuals who would not fall within the civilian DPH or combatant categories.<sup>40</sup> Targeting unnamed individuals on the basis of conduct alone has been controversial.<sup>41</sup> On the other hand, conduct-based targeting standards may operate above and beyond

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<sup>39</sup> See Ohlin, *Crisis*, *supra* note 1, at 38 (“Several scholars have suggested that IHL, in both academic theory and state practice, is moving from primarily status-based targeting towards an increased reliance on (and demand for) conduct-based targeting.”) (citing Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, N.Y.U. L. REV. (forthcoming), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2129860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129860) (last visited May 29, 2013). At the same time, there may be moves toward status. See Ohlin, *Crisis*, *supra* note 1, at 39 (“[T]he development of the ‘continuous combat function’ standard could suggest a return to the primacy of status-based targeting. For some human rights lawyers this is a disconcerting development. However, the relative merits of status-based and conduct-based targeting are difficult to evaluate.”).

<sup>40</sup> See Heller, *supra* note 14, at 92-106 (examining conduct-based “signature strikes” and concluding that a significant number of U.S. signature strikes violate IHL); See Ohlin, *Crisis*, *supra* note 1, at 39 (“According to Heller, while some of the signatures used by the United States result in attacks that are legally valid under IHL, others are per se illegal under international law because the signature may be over-inclusive and pick out targets that are neither directly participating in hostilities nor exercising a continuous combat function.”)

<sup>41</sup> See Heller, *supra* note 14, at 92-106.

existing rules, perhaps decreasing the number and scope of persons open to direct attack.<sup>42</sup>

Conduct-based approaches may include or encourage consideration of the threat a person poses. A May 2013 U.S. government statement on policy standards for the use of lethal force outside areas of active hostilities suggests that a person who is targeted must pose a “continuing, imminent threat to U.S. persons.”<sup>43</sup> This threat requirement, however, operates over and above the “legal basis” for using lethal force.

Conduct resembles the contribution requirement in the first prong of Article 52(2). This factor helps determine whether people or objects are targetable based on the contribution they make to the efforts of one’s opponent. For people, contribution is a matter of conduct, and may be captured by terms such as “take part” or “participation.” Under a conduct- and contribution-based approach, the contribution that targeting an individual or object will make to one’s own effort is not directly taken into consideration. The notion of contribution, but not necessarily conduct, depends at least in theory on utility *for one’s opponent*. This is not to say that the contribution to one’s own effort is irrelevant; it could be presumed or indirectly served through actions that hamper the enemy’s ability to advance their own aims.

By contrast, advantage focuses on the anticipated benefits of one’s actions. This approach determines that people and objects are targetable on the basis of the attack’s potential to advance one’s

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<sup>42</sup> See *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITEHOUSE.GOV (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (last visited June 7, 2013).

<sup>43</sup> See *id.* (“*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks. *Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.”). See also, Blum, *Dispensable Lives of Soldiers*, *supra* note 33, at 108 (proposing that distinction’s current status-based approach to combatants should be revised to include a threat-based test.).

goals. For example, if an armed force faces enemy tanks – traditionally military objects – protecting a key site, the destruction of those tanks would probably promise some benefit. On the other hand, a tank may be passed over if an armed force wishes to leave its opponent's military power largely intact.

C. *Beyond Distinction: Advantage and Other Targeting Rules*

Do other targeting rules, for example rules on the manner in which attacks must be carried out rather than those which determine who can be targeted, impose an advantage requirement with respect to targeting people? Probably not.<sup>44</sup>

1. Proportionality and Advantage

One key candidate for an advantage requirement is proportionality, which weighs anticipated damage against anticipated advantage.<sup>45</sup> In some circumstances, proportionality may ensure that attacks on people promise to bring a military advantage. If armed forces anticipate that an attack will cause damage to civilians or civilian objects, they must also anticipate that the attack will bring a sufficient military advantage. If the anticipated civilian damage is excessive in relation to the anticipated military advantage, then under Additional Protocol I Article 57(2)(b) the attack must be cancelled or suspended. Thus, the military advantage element of proportionality can function as an advantage requirement in some situations.

However, there are several reasons proportionality may not impose an advantage requirement in attacks on people in at least some cases. Proportionality does not guarantee anticipated advantage

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<sup>44</sup> The rules on the manner in which attacks must be carried out may function differently in IAC and NIAC. But proportionality, unnecessary suffering, and military necessity probably exist in similar form in both international and non-international armed conflict. *See, e.g.*, ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 46, 237.

<sup>45</sup> *See* Additional Protocol I, *supra* note 4, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b). For a discussion of military advantage in proportionality, *see, e.g.*, JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 100-02 (2004).

when there is no anticipated civilian damage.<sup>46</sup> Proportionality does not require military advantage or civilian damage; it only balances one against the other. Indeed, proportionality focuses on reducing costs, not ensuring benefits.<sup>47</sup> Any advantage requirement that arises out of proportionality would be indirect in the sense that proportionality seeks to establish not military advantage but rather a particular relationship between advantage and damage. While proportionality may ensure that some targeting decisions are made in anticipation of a military advantage, it does not constitute or ensure an advantage requirement for targeting people.<sup>48</sup>

## 2. Unnecessary Suffering and Advantage

Another candidate for an advantage requirement in attacks on people is the principle of unnecessary suffering.<sup>49</sup> Judith Gardam identifies the principle of unnecessary suffering as the means by which LOAC “today purports to limit the impact of armed conflict on combatants.”<sup>50</sup> The St. Petersburg Declaration made the goal of protecting combatants from useless violence an express motivation

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<sup>46</sup> Michael Schmitt states that “When harm to civilians cannot be avoided during an attack on a lawful target...proportionality applies.” Schmitt, *Fault Lines*, *supra* note 5, at 322. Gardam discusses the determination of military advantage first and the calculation of the expected level of civilian casualties second; if that discussion indicates a required sequence for the application of proportionality, then it suggests the utility determination would take place in every case. *See* GARDAM, *supra* note 45, at 98, 102-05.

<sup>47</sup> *See* ROGERS, *supra* note 18, at 21-22 for a discussion of extensive damage, which helps indicate the secondary place of the utility assessment.

<sup>48</sup> Proportionality in *jus ad bellum* may present limits on the harm done to those open to attack. Gardam suggests that proportionality under *jus ad bellum* presents a requirement to limit combatant deaths, writing that because combatants are legitimate targets, “the level of combatant casualties never became an issue in [international humanitarian law] and remains a matter for the proportionality equation in *ius ad bellum*.” GARDAM, *supra* note 45, at 14.

<sup>49</sup> *See* Hague Regulations, *supra* note 8, art. 23(e); Additional Protocol I, *supra* note 4, art. 35(2). For analysis, *see, e.g.*, GARDAM, *supra* note 45; and Henri Meyrowitz, *The Principle of Superfluous Injury and Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 INT’L REV. RED CROSS 98 (1994).

<sup>50</sup> GARDAM, *supra* note 45, at 14.

of modern LOAC in its early days. Perhaps unnecessary suffering has not seemed to prohibit – in some circumstances – targeting combatants because it has been considered useful to incapacitate as many of them as possible, at all times. Perhaps, if that strategic idea no longer corresponds to reality, unnecessary suffering will preclude some attacks.

Nevertheless, unnecessary suffering probably does not present an advantage requirement. Unnecessary suffering is strongly associated with the principle of humanity, which focuses on the elimination or at least minimization of suffering.<sup>51</sup> As articulated in one military manual, “Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.”<sup>52</sup> Unnecessary suffering may not present an advantage requirement because it focuses on suffering rather than advantage, and in particular focuses on the amount of suffering caused by attacks rather than the decision to attack in the first place. But the greater challenge to the proposition that unnecessary suffering supplies or constitutes an advantage requirement in attacks on people may be a lack of supportive state practice. The role of unnecessary suffering in limiting the ability to attack people, and in particular to engage in lethal attacks, has given rise to considerable debate and less considerable support.<sup>53</sup> These

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<sup>51</sup> Humanity may serve as a principle which motivates the development, interpretation, and application of LOAC rules. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague IV], pmbl. ¶ 8 (the “Martens Clause”); and Mika Nishimura Hayashi, *The Martens Clause and Military Necessity*, in THE LEGITIMATE USE OF MILITARY FORCE: THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICT 135 (Howard M. Hensel ed., 2008). But it is not clear that it functions as a rule of LOAC which governs the application of force.

<sup>52</sup> UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 23 (2004).

<sup>53</sup> See e.g., Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013); Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013); Jann K. Kleffner, *Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?*, 45 ISR. L. REV. 35 (2012); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536 (2013).

debates often focus on the necessity-related concepts explored below.

### 3. Necessity and Advantage

Necessity is another candidate for an advantage requirement. In LOAC, the notion of necessity takes the form of “military necessity,” commonly presented as a fundamental principle.<sup>54</sup> This form of military necessity can be distinguished from the explicit justification for exceptions to LOAC rules set out in treaties, as in Article 53 of the Fourth Geneva Convention.<sup>55</sup> While the principle of military necessity has long been considered a fundamental part of the law of armed conflict, the details of its nature and form are the

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<sup>54</sup> For analysis, see, e.g., Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (April 1998); William V. O'Brien, *The Meaning of “Military Necessity” in International Law*, 1 WORLD POLITY 109 (1957). This work is based on O'Brien's doctoral dissertation: William v. O'Brien, *Military Necessity; the Development of the Concept of Military Necessity and its Interpretation in the Modern Law of War* (1953) (unpublished Ph.D. Dissertation, Georgetown University); William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. (April 1953); Yoram Dinstein, *Military Necessity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010), available at [www.mpepil.com](http://www.mpepil.com); and MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* (1994) (Originally published by Yale University Press in 1961 under the title *Law and Minimum World Public Order: The Legal Regulation of International Coercion*). See also Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L. J. 771, 826-829 (April 1958). For an early articulation during the American Civil War, see Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, War Department, Adjutant General's Office, Washington D.C., April 24, 1863 [hereinafter the Lieber Code]. For necessity in *jus ad bellum*, see GARDAM, *supra* note 45.

<sup>55</sup> Article 53 of Geneva Convention IV reads: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Convention (IV) relative to the relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949.

source of confusion and little rigorous analysis,<sup>56</sup> which casts doubt on the principle's ability to serve as an advantage requirement. The Lieber Code offers the following definition, which has influenced military doctrine and operations as well as some scholarship and case law: "Military Necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."<sup>57</sup>

This definition suggests that military necessity bears a resemblance, at least, to the concept of utility – and may be the source of an advantage requirement. In this articulation military necessity is a mirror image of humanity, and may more directly address the minimization of useless force, not just useless suffering.<sup>58</sup> Three questions have particular relevance for the existence of an advantage requirement originating in military necessity: 1) whether military necessity governs exceptional or normal actions in armed conflict, 2) whether military necessity presents restrictions over and above other LOAC rules, and 3) whether military necessity presents a strict (requiring a lack of alternatives) or loose (something like advantage) requirement.

Possible answers to these questions flow from military necessity's strong association with Article 52(2).<sup>59</sup> If military

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<sup>56</sup> See H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, MIL. L. & L. WAR REV. 217, 218 (1991).

<sup>57</sup> Lieber Code, *supra* note 54, art. 14. See also Henri Meyrowitz, *supra* note 49, at 106 (quoting the Russian Brussels Conference Draft); U.S. DEP'T OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Joint Publication 1-02 (Apr. 12, 2001, as amended through Aug. 26, 2008); Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Chamber Judgment, p. 130, n. 939 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) (Strugar Trial Judgment).

<sup>58</sup> See, e.g., UK MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 52, at 23. This definition of the principle of humanity is really military necessity turned backwards, not its own idea. However, McDougal and Feliciano argue that even if this is the same idea, it makes sense to have two separate principles to emphasize competing values. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 522 (1961).

<sup>59</sup> See, e.g., Strugar, Case No. IT-01-42-T, ¶ 295; Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeal Chamber Judgment, ¶ 337 (Int'l Crim. Trib. for the

necessity is captured by Article 52(2) – which governs normal rather than exceptional actions, constitutes a specific rule, and presents a loose advantage requirement – then military necessity may present an advantage requirement. However, in this form it may not operate above and beyond existing positive rules, requiring advantage where LOAC takes a different approach (i.e., in attacks on people). Recent debates highlight resistance to the notion that military necessity's requirements extend beyond existing rules.

The targeted killing and civilians DPH debates have included prominent interpretations of military necessity. The ICRC Interpretive Guidance suggests that there is a necessity-based restraint on the use of force against people:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>60</sup>

The author of the ICRC Interpretive Guidance, Nils Melzer, has elsewhere interpreted military necessity to present an advantage-like requirement for targeting people. Comparing the law on people

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Former Yugoslavia Apr. 3, 2007) (Brdanin Appeal Judgment); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Chamber Judgment, n.76 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (Galić Trial Judgment); and Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment ¶ 330 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008) (Strugar Appeal Judgment); Meyrowitz, *supra* note 49, at 113; Michael N. Schmitt, *Book Review: Law on the Battlefield*, 8 U.S. AIR FORCE AC. J. LEG. STUD. 255, 258 (1997-1998); U.S. DEP'T OF THE NAVY, UNITED STATES NAVY COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M) (July 2007)(sections 5.3.1 on principles and 6.2.6.4.2 on defenses).

<sup>60</sup> ICRC Interpretive Guidance, *supra* note 8, at 1040. For analysis, see discussion below and also Garraway, *25 Years of the Two Additional Protocols*, *supra* note 31, at 506-10.

and objects, Melzer argues that “the core criteria for the assessment of military necessity, namely that military action must be reasonably expected to lead to a ‘definite military advantage’, can be generalized and applied also to action against persons [in addition to objects].”<sup>61</sup> Thus, Melzer posits that the law on targeting people contains an advantage requirement similar to that contained in Article 52(2), though he claims that he is not advocating the direct extension of that requirement to people.<sup>62</sup>

Melzer’s ICRC study recommendation, along with his views on targeted killing, generated significant opposition, not least amongst some experts participating in the study. Michael Schmitt, who participated in the ICRC study, writes in a review of Melzer’s “Targeted Killing in International Law” book that Melzer’s characterization of the kill or capture choice is “a classic example of *lex ferenda*, not *lex lata*.”<sup>63</sup> Hays Parks, who also participated in the ICRC study, contests the claim that targeting law requires an Article 52(2)-like assessment for people as well as objects, and otherwise suggests that Melzer’s work incorrectly imposes law enforcement and human rights standards in the LOAC realm.<sup>64</sup>

By contrast, Gabriella Blum suggests revisions to the current law. First, she recommends that distinction’s current status-based approach to combatants should be revised to include a threat-based test or, as she puts it: “an obligation to assess the individual threat emanating from any particular human target.”<sup>65</sup> Second, Blum suggests that military necessity – which she claims currently allows

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<sup>61</sup> MELZER, *supra* note 18, at 292.

<sup>62</sup> *Id.*

<sup>63</sup> Michael N. Schmitt, *Book Review: Targeted Killing in International Law*, AM. J. INT’L L. 813, 817 (Oct. 2009). *See also* Garraway, *25 Years of the Two Additional Protocols*, *supra* note 31, at 507-10.

<sup>64</sup> Parks, *supra* note 31, at 796-97.

<sup>65</sup> Blum, *Dispensable Lives of Soldiers*, *supra* note 33, at 108. For a discussion of the threat-based approach to the use of force in contrast to LOAC’s status-based approach, *see* Garraway, *25 Years of the Two Additional Protocols*, *supra* note 31, at 502, 506-510. For a discussion of the difficulty of applying a threat-based or human rights-based approach, *see id.*, at 509. Monica Hakimi’s functional approach to targeting comes closer to the notion of advantage, but still rests largely on threat. *See* Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

for the killing of any combatant, regardless of threat – should be reinterpreted to require a “least-harmful-means test” that would require capturing instead of killing where possible.<sup>66</sup> Although Blum is addressing the problem of needless targeting of combatants, neither of her recommendations would lead to an advantage requirement for targeting people. The first recommendation – the threat-based test – aligns with the idea of contribution in Article 52(2) and conduct in rules on civilians DPH. Just because a combatant presents a threat to enemy forces does not mean that neutralizing – either capturing or killing – that combatant would promise an advantage.

Blum’s second recommendation – to reinterpret military necessity – would dictate the choice between means, not the promise of utility. Here, Blum seems to presume that all the means to be chosen between would advance one’s ends.<sup>67</sup> But, much like proportionality, this notion of necessity is orientated toward the minimization of harm, and advantage may fall by the wayside. Indeed, if both of Blum’s recommendations had the force of law, an armed force may be able to lawfully kill a combatant after determining that the combatant presented a threat and precluding capture, without engaging in a separate determination that attacking the combatant would bring an advantage. Advantage suggests that there can be – indeed, if advantage is a requirement, must be – purpose even without strict or lesser-evil necessity.

## II. Adding Advantage

Although some scholars have criticized the limitations of the current law, past proposals for the law’s development do not offer an advantage requirement. As outlined below, an advantage requirement has been absent in both *lex lata* and *lex ferenda*.

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<sup>66</sup> Blum, *Dispensable Lives of Soldiers*, *supra* note 33, at 114-15. Gabriella Blum suggests in another article that LOAC should contain a lesser-evil justification – which she calls a “humanitarian necessity” justification – for breaking rules: Gabriella Blum, *The Laws of War and the “Lesser Evil”*, 35 YALE J. INT’L L. 1 (2010). That piece promotes a notion of necessity familiar in some municipal criminal law contexts.

<sup>67</sup> Blum, *Dispensable Lives of Soldiers*, *supra* note 33, at 115.

A. *The Possible Form of an Advantage Requirement*

First, what might an advantage requirement look like? The key elements are the requirements of 1) expected advantage and 2) placement of expected advantage in the context of a particular time and strategic circumstances. The precise wording is less important at this stage than the general idea, but an advantage requirement might read: In order for a person to be a legitimate military objective, the wounding or killing of that person must offer a definite military advantage in the course of an attack or series of attacks, and in the context of the circumstances ruling at the time.<sup>68</sup> If this requirement supplements rather than replaces current rules, as this Article recommends, then language could be added to clarify that this requirement does not replace existing rules.

This provision largely mirrors Article 52(2), with key differences. First, it does not contain the first part of Article 52(2) regarding contribution. If utility supplements other rules, then a person might be targeted on the basis of their status, membership, or conduct and the fulfillment of the advantage requirement. Second, the provision clarifies the question of whether an attack might be considered as a whole, and whether advantage can be considered on a cumulative basis.<sup>69</sup>

An advantage requirement might take various forms, including a legal policy or regulation, or a treaty provision. A treaty provision seems unlikely, as wide support is required for such a move and current debates reveal extensive disagreement regarding rules on targeting people. Another option includes a reinterpretation

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<sup>68</sup> LOAC recognizes that actions may not yield the advantage parties anticipate, and parties may be judged on what they anticipate and not on the actual usefulness or success of their actions. *See* United States v. List (*The Hostages Trial*), 8 L. REP. TRIALS WAR CRIM. 69 (U.S. Military Trib. at Nuremberg 1949).

<sup>69</sup> Judith Gardam suggests that military advantage cannot be assessed on a cumulative basis, with an eye to future rather than short-term benefits. GARDAM, *supra* note 45, at 101. But she acknowledges that some states assess military advantage on the basis of an attack as a whole. *Id.* at 102. *See also* DOCUMENTS ON THE LAWS OF WAR, *supra* note 6, at 511 (on the United Kingdom's understanding); ICRC CUSTOMARY LAW STUDY, *supra* note 6, at 49.

of current legal principles (for example, military necessity). Perhaps the most likely form is a legal policy, creating a soft or prudential requirement. Like Article 52(2), an advantage requirement might best be seen as an expression of distinction. An advantage requirement could serve as an additional rather than alternative approach to distinction, supplementing rather than replacing rules based on status, membership, and conduct. As an additional requirement, it would only contract or shift rather than expand the pool of potential targets.

If utility served as an alternative requirement – as the sole determinant of lack of immunity from attack – decisions would depend only on the strategic perspective of the attacker and high levels of uncertainty and dynamism would result. If the pool of potential targets shifts based on an estimate of utility, people might not be able to understand what it takes to fall within the pool and thus would not know whether they are in it or how to get out. An advantage requirement that operates over and above current rules would preclude this uncertainty and dynamism. At the same time, an additional requirement would not avoid the confusion or difficulty of existing rules. In the midst of confusion, interpretations which allow for more targeting rather than less may prevail, leaving people open to attack in a wider range of situations. An advantage requirement could provide an extra level of protection.

*B. Reasons For and Against the Addition of an Advantage Requirement*

There are two main reasons to add an advantage requirement to the rules on targeting people. First, an advantage requirement would reflect strategic realities. An advantage requirement is flexible, acknowledging that the significance of attacking people varies according to circumstances. The St. Petersburg Declaration links the neutralization of combatants with a particular strategic vision that does not necessarily represent the circumstances in any given conflict. Just as the St. Petersburg Declaration is rooted in strategy, so too is an advantage requirement rooted in strategy – namely, the notion that *it is not a given* that wounding or killing combatants promises a military advantage. Given the diversity of

conflicts and strategies pursued since St. Petersburg, the utility of attacking combatants in armed conflict, and the centrality of wounding the greatest possible number of men, cannot be assumed.<sup>70</sup> For example, counterinsurgency operations do not necessarily benefit from, and often do not focus on, wounding the largest possible number of opponents. In addition, some recent research casts doubt on the effectiveness of “decapitation,” the strategy of killing a terrorist organization’s leadership.<sup>71</sup> While strategic contexts vary, they may not often involve a conventional battlefield where disabling as many combatants as possible is the major if not sole goal.

Second, an advantage requirement in the law on targeting people would reflect the core LOAC goal of limiting useless violence and destruction.<sup>72</sup> Current rules on attacking people do not contain a clear mechanism for that limitation. While the St. Petersburg Declaration explicitly connects advantage and targeting combatants, its strategic vision leaves all combatants open to attack at all times, and there is no clear path by which new strategic perspectives can present an advantage requirement in the targeting of people. The protection of both civilians and combatants has been justified by a mix of reasons – a humanitarian drive to reduce suffering and a strategic recognition that killing certain kinds of people promises little or no gain. An advantage requirement might serve both motivations.

Objections might challenge an advantage requirement as 1) unnecessary because utility will be taken into consideration through sources other than LOAC; 2) too costly; 3) ineffective; and 4) harmful to humanitarian values.

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<sup>70</sup> See, e.g., THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 1-141, 1-149 (2007).

<sup>71</sup> See Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SEC. STUD. 719 (2009); Jenna Jordan, *Killing al-Qaeda?* FOREIGN POLICY (October 6, 2011, 5:54 PM), [http://afpak.foreignpolicy.com/posts/2011/10/06/killing\\_al\\_qaeda](http://afpak.foreignpolicy.com/posts/2011/10/06/killing_al_qaeda); and Jenna Jordan & Robert Pape, *How the U.S. Can Finish Off al-Qaeda*, ATLANTIC, MAY 4, 2011.

<sup>72</sup> For analysis of core LOAC provisions and principles, see W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852 (2006).

One possible counterargument is that an advantage requirement is unnecessary because considerations outside LOAC – for example, strategic considerations set out in military doctrine and plans – will ensure that advantage will be taken into consideration in targeting decisions. Should we not expect military forces to constrain their behavior to what is necessary or at least advantageous? However, non-legal sources alone may not ensure that targeting decisions will promise advantage. The use of status or membership as a proxy for advantage may be relatively easy, though it may be problematic when there is a gap between the strategic assumptions underlying existing rules and strategic circumstances. Moreover, an advantage requirement has the potential to require analysis that is more costly (e.g., more time-consuming) than the current proxy-based targeting analysis, in which advantage may be assumed. And an advantage requirement might be costly if it led forces to pursue alternatives to attacks – for example, detention.<sup>73</sup>

Second, one might argue that an advantage requirement would be too difficult or costly. However, an advantage requirement would not necessarily be more costly than existing rules, and additional costs may be outweighed by benefits. The analysis required would not necessarily depend on assessment of the threat a potential human target poses. While a threat-based obligation focuses on one's opponent (asking, for example, whether the opponent's behavior is sufficient to justify the use of force), an advantage requirement would draw attention to one's own strategy as well as the circumstances of the armed conflict. Therefore, an advantage requirement would not subject armed forces to the strictures of a law enforcement or peacetime human rights paradigm in the midst of armed conflict. An advantage requirement draws less from law enforcement and more from armed conflict because it depends on

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<sup>73</sup> Benjamin Wittes has also written about incentives created by a costly detention policy – namely, the incentive to forego detention and engage in targeted killing instead. See BENJAMIN WITTES, *DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTANAMO* 23-24 (2011). See also Blum, *Dispensable Lives of Soldiers*, *supra* note 33, at 116-17 (discussing the costs of her recommendations). If targeting is not possible in situations where detention is possible, then armed forces may be faced with a more complicated or costly capture and detention process as the only lawful way to neutralize an enemy.

advancing one's military aim. Indeed, the notion of a useful – as distinct from an unavoidable and proportionate – attack hews to a core concern in armed conflict and LOAC: eliminating militarily useless violence.

Furthermore, an advantage requirement would not preclude the use of proxies and categorization entirely. For example, in a large-scale conventional battle there may be a high-level decision that the neutralization of all members of opponents' armed forces may be expected to bring advantage in a large geographic area for the course of a large campaign.

While an advantage requirement may raise certain costs, it may also remove the costs of useless violence and destruction. And the law already demands potentially large costs in order to protect people in certain ways. The U.S. Military Tribunal at Nuremberg stated that “the rules of International Law must be followed even if it results in the loss of a battle or even a war.”<sup>74</sup> In the face of decreasing costs of attacking people in some contexts, the effort to prevent useless attacks might require a more rigorous advantage analysis.<sup>75</sup>

A third potential counterargument is that an advantage requirement will not be effective. This argument may stem from several concerns, including a concern about the effectiveness of LOAC in general. However, while an advantage requirement goes to the heart of military decision-making, various existing rules are just as invasive – most notably the advantage requirement in the law on attacking objects. An advantage requirement for attacking people may function like current rules in many scenarios, and it would depend on deference to commanders' judgment as current rules do.

The precise form of an advantage requirement may influence its effectiveness. Policies and legal clarifications may – for military and humanitarian reasons – emphasize strategic sensitivity, even if

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<sup>74</sup> *Hostages Trial*, 8 L. REP. TRIAL WAR CRIM., at 66-67. *But see* Schmitt, *A Critical Analysis*, *supra* note 18, at 6.

<sup>75</sup> See Eric Posner, *The Killer Robot War Is Coming*, SLATE, May 15, 2013 (2:57 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/05/dro-ne\\_warfare\\_and\\_spying\\_we\\_need\\_new\\_laws.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/05/dro-ne_warfare_and_spying_we_need_new_laws.html).

this is more than the law demands. Indeed, LOAC is a baseline standard that may be greatly surpassed in restrictiveness by policy, for example in the form of rules of engagement. But policies can be abandoned. Furthermore, advantage would exist amidst – and sometimes as part of – various other principles and considerations, and may be lost in the shuffle. Even if there were an advantage requirement for targeting people, it may not have much effect because other factors – including categorization and contribution – may be considered sufficient to justify targeting decisions.

If parties do wish to abide by an advantage requirement, technological advances may make it more achievable. For example, the ability of remotely piloted aircraft (RPA or drones) to reconnoiter for extended periods of time and thus gain extensive information on potential targets may allow forces to make more agile and frequent advantage assessments. Ultimately the functioning of an advantage requirement presents an empirical question to be addressed in subsequent analyses.

Fourth, one might argue that an advantage requirement would subvert humanitarian goals because it depends on parties' military concerns and goals. But an advantage requirement would not burst an air-tight bubble of civilian protection. First, the law on targeting people already includes provisions on civilians DPH which break through categories and make the more dynamic notion of conduct a determining factor in some attacks. Furthermore, as a supplemental rather than alternative requirement, it would create more rather than fewer restrictions. An advantage requirement might reduce suffering more, and for a wider range of people – e.g., combatants as well as civilians.

In summary, an advantage requirement might flexibly reflect a wide variety of strategic contexts, and serve the core LOAC goal of reducing useless violence and destruction. The confusion surrounding existing rules on attacking people may make the addition of an advantage requirement even more compelling. Further information may be needed in order to determine the value and desirability of an advantage requirement.

### **Conclusion**

Current approaches to distinction allow a person to be attacked even if the destruction or neutralization of that person does not promise to bring a military advantage. The law contains an explicit advantage requirement for objects but not people through differing approaches to the principle of distinction. Other potentially applicable rules probably do not present an advantage requirement for the targeting of people. Proportionality offers an indirect and occasional advantage requirement. Critiques of purported and proposed restraints based on unnecessary suffering and military necessity highlight the uncertainty of those potential sources of advantage.

While advantage raises questions at the heart of both law and strategy, convenience and assumptions about the utility of attacking people may prevent it from playing a more central role in attacks on people. At the same time, current developments may push in the direction of a reorientation of the law toward a greater concern for achieving benefits – a reorientation which an advantage requirement would promote. As technology lowers the costs of attacking people, even those outside easily recognized battlefields and military forces, a greater emphasis on the achievement of benefits may help prevent useless attacks. And in the midst of confused rules regarding which people are open to attack, an advantage requirement might provide an additional, flexible layer of protection and a reflection of the core LOAC goal of limiting useless violence and destruction.