ARTICLE

Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters

JOHN J. MERRIAM*

The Law of Armed Conflict (LOAC) principle of distinction is undoubtedly the cornerstone of that regime of law, which seeks to balance military necessity against humanitarian considerations in order to mitigate the horrifying effects of war on its many victims. The principle of distinction requires belligerents to take constant care to spare civilians and to direct their attacks only against combatants, fighters, and military objectives. Together with the related rule of proportionality, the principle of distinction operates to restrain military decision-makers, prohibiting them from launching attacks that directly or indiscriminately target civilians.

Over the past two decades, the United States has required its forces to obtain "positive identification" (PID) of military targets prior to engaging them. PID is defined as a "reasonable certainty that the object of attack is a legitimate military target." However, as this Article argues, the PID formulation could stand to be refined. It sets a standard that is at once both too rigid and too narrow; it appears to require a degree of precision that is often impossible to achieve in war, while at the same time providing little guidance on the nature of the information that must inform the decision to attack a target. This Article argues for a new, more accurate formulation of the LOAC principle of distinction: the requirement for the affirmative identification of a target. The Article traces the history and evolution of the principle of distinction, identifies the critical characteristics of both war and law that affect the distinction determination, and examines its application in international criminal cases, State practice, Treaty law, military manuals, and other sources of international law. The Article then explores the origins of the PID formulation, demonstrating its inherent flaws and the potential risk posed by continuing to employ it, before proposing a more accurate and comprehensive standard.

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* John Merriam is an Army Judge Advocate currently serving as Associate Director for the Law of Land Warfare at the U.S. Naval War College's Stockton Center for the Study of International Law. This article is written in his personal capacity and all views of those of the author; they do not reflect the position of the Department of Defense.

I. OPERATIONALIZING THE PRINCIPLE OF DISTINCTION

When U.S. forces deploy to combat, they are directed to obtain "positive identification" (PID) of a target prior to engagement—defined as "a reasonable certainty that the proposed target is a legitimate military target."[1] This directive is given in the rules of engagement (ROE) or as

1. See the definition of "PID" contained on the U.S. CFLCC and MNC-I ROE Cards, *reprinted in* U.S. Army, OPERATIONAL LAW HANDBOOK 107–108 (2014) [hereinafter OPLAW HANDBOOK].

part of other military directives and instructions designed to regulate their use of force.[2] It is, in effect, the phrase by which the U.S. military "operationalizes" the law of armed conflict (LOAC) principle of distinction. This article argues that this formulation is fundamentally flawed. "Positive identification" based on a "reasonable certainty" is a misleading and unhelpful formulation that was not originally designed to implement the principle of distinction and does not accurately state the legal principle it is now used to enforce. By using the words "positive" and "certainty," the language appears to impose too rigid a standard; as this article will show, the LOAC recognizes that military commanders are rarely dealing in certainties. At the same time, it does not provide any guidance to commanders and soldiers about their duty to gather information about the nature of their proposed targets, or about what type of information they must seek. Nor does the LAOC recognize that there are practical limitations on the ability of warfighters engaged in actual combat to achieve perfect or near-perfect information. While not wholly deficient, the "positive identification" formulation could stand to be refined.

This article argues that the better formulation for the principle of distinction is a requirement for the affirmative identification of a target. "Affirmative Target Identification" is an honest and reasonable belief—based on such affirmative evidence as is reasonably available at the time—that the object of attack is a lawful military target. This term and its definition cure the defects present in the "PID" formulation. By requiring "affirmative evidence," it properly recognizes the attacker's duty to distinguish civilians, civilian objects, and other protected persons and objects from lawful military targets based on some affirmative quality of the proposed target. By requiring an honest and reasonable belief, it adopts the correct legal standard (subjective honesty and objective reasonableness) to judge both the information-gathering and the decision-making of the attacker. As will be seen, honesty and reasonableness, in combination, have been repeatedly used to evaluate the conduct of military commanders and others involved in an attack in order to judge their

2. Rules of engagement are "directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." Chairman, Joint Chiefs of Staff, Joint Publication 1-02 Dept. of Def., J. Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms (2015), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. c. *Id.* at 93. The US Standing Rules of Engagement are outlined in CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005), the unclassified portion of which is excerpted in the OPLAW HANDBOOK, *supra* note 1, at 88. "The purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense." *Id.*, at 93.

compliance with the fundamental principles of the LOAC. Finally, by requiring that this belief be based on such evidence as is reasonably available at the time, it ensures that the attacker will consider all available information, while at the same time recognizing that information will rarely be perfect.

In order to demonstrate why the proposed formulation is superior to the current one, the article begins by analyzing the principle of distinction in order to highlight several characteristics that must be considered when developing a methodology to give it tactical effect. It then examines how compliance with the principle of distinction should be evaluated in order to determine the standard of care required and the method by which that standard can be enforced. This discussion is followed by an explanation of how the U.S. "PID" formulation is flawed. The article concludes by proposing a new formulation that better articulates the principle of distinction for the warfighter in a practical and legally precise manner.

II. DECONSTRUCTING DISTINCTION

The law of armed conflict principle of distinction has been justly called one of the two "cardinal principles contained in the texts constituting the fabric of humanitarian law"[3] and one of the "red threads weaving through the whole tissue of [the LOAC]."[4] Flowing from the "major premise"[5] that the right of a belligerent to adopt means of injuring the enemy or to choose methods or means of warfare is not unlimited,[6] the principle of distinction has been deemed to be "intransgressible"[7]—one that cannot be deviated from, no matter the military exigency. As such, war-fighting nations must prescribe rules for the conduct of hostilities that ensure that this principle is honored in practice by requiring their forces to distinguish between combatants and civilians, and between military objectives and civilian objects.[8]

It is difficult to trace the precise origins of the legal principle of distinction. Hugo Grotius entirely eschewed any principle of distinction,

3. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) [hereinafter Nuclear Weapons Case].

4. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 8 (2d ed. 2010).

5. *Id.*

6. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 35(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations].

7. Nuclear Weapons Case, *supra* note 3, ¶ 79.

8. AP I, *supra* note 6, art. 48.

holding instead that the right to inflict injury on the enemy extends even over infants and women, captives, those desiring to surrender, and others now protected under the LOAC.[9] By 1758, Scholastics such as Vattel recognized a principle of distinction, holding that "the law of nations" forbade attacking "women, children, feeble old men, and the sick" as well as "ministers of public worship" who did not take up arms.[10] And, in the famed "Lieber Code," President Abraham Lincoln outlined the law of war that would bind the armies of the United States, which included this reference to the notion of distinction:

> [A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.[11]

This principle was perhaps first articulated by States in treaty form in the St. Petersburg Declaration of 1868, which stated "[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[12] The clear implication of this declaration is that attacks on civilians would be illegitimate, as they are not aimed at weakening the *military* forces of the enemy.

In the modern age, the principle of distinction is most clearly set forth in Article 48 of Additional Protocol I (AP I) to the Geneva Conventions, which requires that Parties to a conflict "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."[13] AP I, which applies to international armed conflict (IAC)[14] and which is largely held to generally state customary international

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9. HUGO GROTIUS, DE JURE BELLI AC PACIS, Bk. III, Chap. IV, Parts VI–XIV (Francis K. Wesley, trans., 1925) (1646), http://heinonline.org/HOL/Page?handle=hein.beal/cilnc0002&size=2&id=3-06.).

10. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, Bk. IIIIV, Ch. VIII, §§ 145–47 (Charles G. Fenwick, trans., 1916) (1758), http://heinonline.org/H-OL/Page?handle=hein.beal/cilne0003&id=377. 1916).

11. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 22, Apr. 24, 1863 [hereinafter Lieber Code].

12. 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29–Dec. 11, 1868, *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000), at 53.

13. AP I, *supra* note 6, art. 48.

14. AP I, supra note 6, art. 1(3).

law,[15] provides a useful vehicle for exploring the various rules in the LOAC that effectuate the principle of distinction because the rules are laid out very clearly in that treaty. While the United States is not a party to the Additional Protocols, it apparently accepts most of the provisions of AP I related to distinction as reflecting customary international law, albeit with several reservations and exceptions.[16] For these reasons, much of the discussion that follows will refer to the rules of distinction as they have been expressed in AP I, with appropriate comment on those areas where Parties or non-Parties diverge from the text of that document.

The principle of distinction also applies in non-international armed conflict (NIAC), as a matter of customary international law[17] as well as in treaty law. Common Article 3 to the 1949 Geneva Conventions applies to

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15. Customary international law is "a general practice accepted as law." Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. According to the International Court of Justice,

> Not only must the acts concerned amount to a settled practice, but they must also be such . . . as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

16. Michael N. Schmitt, *The Principle of Distinction in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999). For example, the basic rule contained in Article 48 is restated in the U.S. joint doctrine, which requires military forces to "distinguish between combatants and noncombatants and to distinguish between military objectives and protected property and places." U.S. DEP'T OF DEFENSE, Joint Chiefs of Staff, JOINT PUB. -04, Legal Support to Military Operations (2011), at ix, http://www.dtic.mil/doctrine/new_pubs/jp1_04.pdf. Article 51(2) and Article 52(2) have both been cited in unofficial but illustrative statements by former State Department attorneys as articles that the U.S. accepts as customary law. *See, e.g.*, Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. L. & POL'Y 419, 426 (1987); Report of the U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts—Fourth Session—Mar. 17–June 10, 1977, Submitted to the Secretary of State by George H. Aldrich, Chairman of the Delegation on Sep. 8, 1977, 30–31, *reprinted in* 1977 Digest of U.S. Practice in International Law at 917–919. *See also* Memorandum from W. Hays Parks et al. to Mr. John H. McNeill, Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 8, 1988) available at http://usnwc.libguides.com/ld.php?content_id=2998314) (last accessed 9 Oct. 2014).

17. MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006), *available at* http://www.dur.ac.uk/ resources/law/NIACManualIYBHR15th.pdf [hereinafter NIAC MANUAL], Commentary on Para. 1.2.1.a. and Commentary on Rule 1.2.2. (noting that "[t]oday, it is indisputable that the principle of distinction is customary international law for both international and non-international armed conflict."); Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); Michael N. Schmitt ed., TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (2013) [hereinafter TALLINN MANUAL], Commentary to Rule 31, ¶ 2, at 111.

any NIAC and provides a minimum standard of protection to persons.[18] In particular, the prohibition on "violence to life and person"[19] directed against "persons taking no active part in the hostilities" (to include those *hors de combat*)[20] can be understood as a rudimentary statement of the principle of distinction, at least as to persons. In addition to Common Article 3, Additional Protocol II (AP II) to the Geneva Conventions applies to some NIACs.[21] Under AP II, the basic prohibition remains the same: "the civilian population as such, and individual civilians, shall not be the object of attack."[22] Admittedly, AP II only refers to persons and does not explicitly address distinction between civilian objects and military objectives at all,[23] but there is growing (though by no means complete) consensus that the rules of distinction in a NIAC roughly mirror those in an IAC.[24] The extent to which the principle of distinction applies in a NIAC has been substantially broadened by recent developments in international criminal law, where tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) have imported the

18. Article 3 common to the Geneva Conventions [hereinafter Common Article 3] affords a minimum level of humanitarian protection in "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC I, GC II, GC III, and GC IV, respectively].

19. Common Article 3(1)(a).

20. Common Article 3(1).

21. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. AP II sets a relatively high threshold for when it will apply in a NIAC——Article 1 limits its application to NIACs which take place in the territory of a Party "between its armed forces and dissident armed forces or other organized armed groups . . . ." AP II, art. 1. So the fact that distinction applies in NIACs as a matter of customary law is very important because it means that the principle is applicable even in conflicts that fall below the threshold established in AP II, which may otherwise be covered only by Common Article 3 of the four 1949 Geneva Conventions. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 609–610, 614 (Dieter Fleck, ed., 2d. ed. 2010) [hereinafter HANDBOOK ON IHL]; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19–28 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CIL STUDY: RULES].

22. AP II, art. 13(2).

23. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, ¶ 4759 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (hereinafter ICRC COMMENTARY ON AP I).

24. *See, e.g.*, NIAC MANUAL, *supra* note 17, para. 1.2.2; ICRC CIL STUDY: RULES, *supra* note 21, Rule 10; TALLINN MANUAL, *supra* note 17, Rule 31(3), and commentary to Rule 40, paras 1 and 2, at 137.

equivalent customary rules of IACs into NIACs in order to fill in the otherwise sparse details of the protections provided by AP II.[25]

Careful consideration of the law of distinction reveals five basic characteristics that underpin its application in practice and are essential to any formulation that purports to fully implement the principle. First, distinction is an affirmative duty borne by belligerents; a civilian bears no corresponding duty to distinguish himself from a combatant. As such, the decision to attack a proposed target must be based on some affirmative quality of the target that indicates it is a lawful one, and not on the mere lack of contrary evidence. Second, it is a reciprocal one between adversaries—both the attacker and the defender in any engagement have an obligation to comply with it, and while the attacker alone bears the burden of properly distinguishing when targeting, the LOAC contains provisions to deter the defender from deliberately frustrating this process. Third, the duty to distinguish applies to decision-makers at all echelons of command; it is not solely the province of senior leadership. Fourth, one may violate the principle through the direct, intentional attack of civilians and through indiscriminate attacks. Finally, the process of distinction consists of two closely related components. There is an "informational component," whereby the attacker gathers information about the target, and then there is a "decisional component," whereby the attacker draws a conclusion about the character of the target based on the information at hand and decides to strike. Though not always easily severable, it is useful to consider them separately when evaluating compliance with the principle. Each of these five characteristics of the principle of distinction

25. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 57–58 (2012). The prohibition on attacking civilians has been interpreted by the ICTY as including a prohibition on indiscriminate attacks, a requirement to take precautions in attacks, and a prohibition on attacking civilian objects—all rules derived from the customary law applicable to IAC. *See, e.g.*, Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 57–58 (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003), http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf [hereinafter Prosecutor v. Galic]; Prosecutor v. Hadžihasanovic and Kubura, Case No. IT-01-47-T, Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, (Int'l Crim. Trib. for the former Yugoslavia Sept. 27, 2004), ¶ 98. The ICTY in the Tadic case explained the rationale:

> [E]lementary considerations of humanity and common sense make it preposterous that [acts by States which are] prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals in their own territory. What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

will be developed in order to highlight how they must influence its implementation in practice.

A. The Affirmative Duty of Distinction

As noted above, the "basic rule" of distinction outlined in Article 48 of AP I states that "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."[26] Military objectives are "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."[27] The importance of the basic rule cannot be overstated; the International Committee of the Red Cross (ICRC) *Commentary* on AP I rightly calls it "the foundation upon which the codification of the laws and customs of war rests."[28] The basic rule is amplified by several subsequent provisions in AP I: Article 51 specifically prohibits making civilians the object of attack[29] and prohibits indiscriminate attacks,[30] and Article 52 prohibits attacking civilian objects.[31]

AP I goes beyond simply requiring distinction and prohibiting attacks on civilians, however: it also specifically mandates "precautions in attack" and insists that Parties "do everything feasible" to identify the objective to be attacked and to choose means and methods that will avoid civilian death, injury, or property damage.[32] Taken as a whole, these articles of AP I, which generally reflect customary international law and thus bind all states,[33] constitute a clear *command* to military forces; they are not merely hortatory.

The concept of distinction as an affirmative duty of the attacker is reinforced throughout the LOAC, particularly in the manner in which civilian persons and objects are defined, as well as in the status presumptions that apply. With respect to persons, AP I defines a civilian negatively: a "civilian is any person who does not belong to one of the categories of persons referred to in [select provisions of Article 4 to the

26. AP I, *supra* note 6, art. 48.. The term "Basic Rule" is used in the title of this Article.
27. AP I, *supra* note 6, art. 52(2).
28. ICRC COMMENTARY ON AP I, *supra* note 23, ¶ 1863.
29. AP I, *supra* note 6, art. 51(2).
30. AP I, *supra* note 6, art. 51(4).
31. AP I, *supra* note 6, art. 52(1).
32. AP I, *supra* note 6, art. 57(2).
33. See note 16, *supra*.

Third Geneva Convention]."[34] In cases of doubt, a person "shall be considered to be a civilian."[35] The ICTY recognized this negative definition of a civilian as reflecting customary international law,[36] and characterized the status presumption as an "imperative" with respect to the "expected conduct of a member of the military."[37] This clearly places the onus of distinction on the attacker.

Of course, civilians may lose their protected status, which extends only "unless and for such time as they take a direct part in hostilities."[38] The United States and many experts from other States disagree with the ICRC's non-binding *Interpretive Guidance* on this rule, and thus the precise boundaries that define "direct participation" and "for such time as" are disputed.[39] However, there is no dispute over the essential fact that civilians who directly participate cease to be protected by the principle of distinction, and consequently become lawful targets.

With respect to objects, the LOAC applies a similar, though not identical, approach. Civilian objects are defined negatively in much the same way as persons: "civilian objects are all objects which are not military objectives."[40] However, the presumption of civilian status is limited to those cases of doubt about objects which are "normally dedicated to civilian purposes."[41] Notably, because the defender normally controls the objects an attacker may wish to strike, the United States has raised

34. AP I, *supra* note 6, art. 50. The categories of persons encompassed by this reference to Article 4 to GC III, and which are therefore "not civilians," include several discrete sets. Art. 4A(1) covers the "members of the armed forces of a Party to the conflict as well as members of militia or volunteer corps forming part of such armed forces." Art. 4A(2) extends to "members of other militias and members of other volunteer corps . . . provided that such [persons] fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws of war." Art. 4A(3) covers members of other armed forces professing allegiance to some authority not recognized by the Detaining Power. Finally, art. 4A(6) extends to the *levee en masse*, provided they "carry arms openly and respect the laws and customs of war." GC III, art. 4.

35. AP I, *supra* note 6, art. 50(1).

36. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) [hereinafter Prosecutor v. Kordić].

37. *Id.*, ¶ 48.

38. AP I, *supra* note 6, art. 51(3).

39. NILS MELZER INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE ON DPH] outlines the ICRC position on direct participation. For contrary views, see, e.g., 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); 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 (2009—2010).

40. AP I, *supra* note 6, art. 52(1).

41. AP I, *supra* note 6, art. 52(3).

objections regarding the status of this presumption as applied to objects in some circumstances.[42]

There is no dispute over the negative definitions of civilian persons and objects. However, there is dispute over when the status presumptions are triggered. With respect to both persons and objects, the presumptions apply only "in case of doubt,"[43] and there are a variety of positions on the matter of doubt. The ICRC *Commentary* suggests that the attacker should not proceed if doubt remains, "even if there is only a slight doubt."[44] However, this position is rejected by many States, and even Parties to the Protocol like the U.K., which maintains that the presumption is only triggered when "substantial doubt" still remains after the attacker has assessed all the information available to him.[45] Thus the view expressed in the *Commentary* on the matter of doubt has clearly not achieved the status of customary international law such that it would bind a non-Party to the Protocols, like the United States.[46] Expert legal scholars also have a variety of positions on doubt. Some experts hold that the existence of doubt simply requires the attacker to "act reasonably" in deciding to attack such objects or persons.[47] In addition, since the duty to distinguish applies to

42. *See, e.g.*, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, at O-15 (available at http://www.dod.mil/mwg-internal/de5fs23hu73ds/progress?id=ILPFzh9e6y) (last accessed Sep. 2014), wherein the presumption of the civilian status of objects was rejected as "not a codification of the customary practice of nations" and "contrary to the traditional law of war" because it demanded "a degree of certainty of an attacker that seldom exists in combat." *Id.* On the other hand, the U.S. accepted the presumption under other circumstances when it became a party to Amended Protocol II to the Convention on Certain Conventional Weapons. Article 3(8) of that treaty states that "[i]n case of doubt as to 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." Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 3(8), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Amended Mines Protocol]. This portion of the convention referred only to the use of mines and booby-traps, but the willingness of the U.S. to become a party to a treaty using this language may indicate a general acceptance of the presumption, at least with respect to objects "normally dedicated to civilian purposes." *Id.* The debate surrounding whether and how the presumption applies to objects remains a live one, and experts continue to struggle to find consensus on this point. See, e.g., TALLINN MANUAL, *supra* note 17, Commentary on Rule 40, ¶ 4, at 138.

43. AP I, *supra* note 6, art. 50(1).

44. ICRC COMMENTARY, *supra* note 23, at ¶ 2195.

45. *See, e.g.*, Declaration 'h' Made by the UK at the Time of Ratification of Additional Protocol I (20 Jan. 1998, et. seq.), available at: https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last accessed 19 Sept. 2014).

46. Ove Bring, *International Humanitarian Law After Kosovo: Is Lex Lata Sufficient?*, 71 NORDIC J. INT'L L. 39, at 43 (2002).

47. PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH AT HARVARD UNIV., MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE rule 12(a) and accompanying commentary (2009) [hereinafter AMW MANUAL], at 90, says that "the degree of doubt necessary to preclude an attack [on persons] is that which would cause a reasonable attacker . . . to abstain . . . ." In the commentary accompanying Rule 12(b), para. 4, at 91, the AMW MANUAL refers to doubt as to the character of objects, and states that the attacker "must act reasonably in

both parties to any particular combat action,[48] many experts maintain that the attacker alone should not bear the burden of resolving any doubt that may exist.[49] Given the defender's obligation to take precautions against the effects of attack,[50] and the fact that the defender generally exercises control over objects an attacker may wish to strike, there must be some corresponding obligation to avoid intentionally creating doubt about the status of a target.[51] The correct interpretation of the law on the matter of doubt thus remains unsettled.[52]

The dispute over doubt, and therefore about the applicability of a presumption of civilian status, does not affect the basic premise that the attacker must ultimately bear the burden of determining that the target is lawful, and that he must meet this burden by identifying some specific characteristic of the target that makes it so. This is because of the negative definitions of civilians and civilian objects, which have the virtue of leaving "no undistributed middle between the categories of combatants or military objectives and civilians or civilian objects."[53] Since all persons are protected civilians *except* those who qualify as lawful targets,[54] and all objects are civilian objects *except* those which are lawful military objectives,[55] the attacker may not strike a target based solely on a lack of evidence of its civilian status; that would amount to "negative identification" and would inappropriately shift the burden of compliance to the very people and objects this principle is designed to protect. Rather, the attacker must possess *affirmative evidence*—an indicator based on some affirmative quality of the target—that a proposed target meets one of the exceptions. In the case of a person, this may be because the person is a member of the opposing armed force, for example,[56] or that he has lost his protected status by directly participating in hostilities.[57] In the case of an object, this may be because it has become a military objective by virtue of its nature, purpose, location, or use.[58] The point is that in either case, affirmative evidence—not simply a lack of contrary evidence—is required.

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deciding to attack such objects, specifically taking into account, among other factors, the fact that the intended target is normally one used for civilian purposes." In addition, "[i]f there is reason to doubt the reliability of [the targeting information], one cannot reasonably act on that basis." *Id.*

48. See *infra* Part II.B.

49. *See., e.g.*, TALLINN MANUAL, *supra* note 17, commentary to Rule 33, ¶ 2, at 114.

50. AP I, *supra* note 6, art. 58.

51. See *infra* Part II.B.

52. TALLINN MANUAL, *supra* note 17, commentary to Rule 33, ¶ 3, at 114.

53. Dinstein, *supra* note 4, at 123.

54. AP I, *supra* note 6, art. 50(1).

55. AP I, *supra* note 6, art. 52(1).

56. GC III, art. 4A(1).

57. AP I, *supra* note 6, art. 51(3).

58. AP I, *supra* note 6, art. 52(2).

This necessarily flows from the negative definition of civilians and civilian objects.

The presumptions, to the extent they apply in case of unresolved doubt, simply add additional weight to the proposition that affirmative evidence is required. From the perspective of the attacker, the universe of potential targets can be divided into three categories: 1) those that are clearly lawful targets, 2) those that clearly retain their protection from attack, and 3) those about which some doubt exists. Targets that fall into that last category shall be presumed to be civilian, but this is an entirely rebuttable presumption, and the attacker may well gather enough information to resolve the doubt and push the target into either of the other two categories.[59] The only question, then, is what standard of evidence applies—when has the attacker succeeded in rebutting the presumption and resolving the doubt? There is no question that the attacker bears the burden of doing so, and if he cannot, then he must presume the target is civilian. This once again suggests the need for affirmative evidence. An attacker may not resolve doubt solely by a lack of evidence of the target's civilian status, since that alone could not logically rebut the presumption. The attacker must identify some affirmative quality of the proposed target that makes it a lawful one.

The requirement for affirmative evidence relates to the *quality* of the information required—the attacker must observe affirmative characteristics of the target's lawful status. However, the *quantum* of information required is a different matter. As will be explained further in Part III, it is impossible to determine a bright-line threshold for *how much* evidence is required to satisfy the duty. This will depend on a variety of context-specific circumstances that vary from case to case.[60]

This examination of the law of distinction shows that the attacker bears an affirmative duty to distinguish, and that affirmative evidence is required in order to do so. And if that is true, then it follows that any method a State uses to give tactical effect to the legal principle of distinction must start by requiring its forces to *affirmatively identify* targets as lawful ones.

B. Incentives and Reciprocity

The attacker must distinguish and may not intentionally direct attacks against civilians or civilian objects. However, unlawful intent on the part of the attacker is not the only danger that civilians face. The other party may

59. The ICRC COMMENTARY on the presumption of civilian status stresses that it would apply "until further information is available . . . ." ICRC COMMENTARY ON AP I, *supra* note 23, ¶ 1920.

60. See *infra* Part III.C.3.

also put civilians at risk though his own violent acts; defensive counter-strikes may be every bit as damaging as offensive ones.[61] Moreover, to the extent that one adversary deliberately seeks to frustrate the efforts of the attacker to distinguish by hiding his forces and military objectives amongst the civilian population, it increases the risk of targeting mistakes on the part of the attacker.[62]

The LOAC addresses these twin dangers in two ways. First, the duty to distinguish is a reciprocal one between parties to a conflict. While Additional Protocol I uses the term "attacks" when discussing distinction, the term "attacker" refers to the belligerent party conducting a specific violent operation, and not to the belligerent party who is on the offensive or who initiated the conflict.[63] "Attack" is defined by Article 49 as any "[act] of violence against the adversary, whether in offense or defense."[64] In other words, the ICRC *Commentary* notes, "the term 'attack' means 'combat action.'"[65] Thus, for example, when one party targets another with airstrikes in a particular locale, it is conducting an "attack" and must distinguish. When the other party defends itself by launching counter-strikes or attempting to interdict incoming airstrikes, it too is conducting an "attack," and must likewise distinguish.[66] By defining "attack" in this way, the LOAC treats both parties to an engagement in the same way and imposes the same duty to distinguish on each of them.

The second danger posed by the conduct of the defender is perhaps even more severe, and more difficult to address. When the defender deliberately seeks to frustrate the ability of the attacker to distinguish between lawful targets and protected persons and property, it dramatically increases the risk to civilians in two ways: by increasing the probability of honest targeting mistakes because it is difficult to discern a difference between military forces and the civilians amongst which they hide, and by potentially eroding respect for the LOAC on the part of the attacker who is facing an enemy that routinely violates the law.[67]

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61. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1880.

62. *Id.*, at ¶ 1695 (noting that when faced with "guerrilla forces which are indistinguishable from the civilian population, it is more or less certain that the security of this population will end up by being seriously threatened").

63. *Id.*, at ¶ 1882 ("[I]n the sense of the Protocol an attack is unrelated to the concept of aggression or to the first use of armed force . . . Questions relating to the responsibility for unleashing the conflict are of a completely different nature.").

64. AP I, *supra* note 6, art. 49(1).

65. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1880.

66. *Id.* "The definition given by the Protocol has a wider scope since it—justifiably—covers defensive acts (particularly "counter-attacks") as well as offensive acts, as both can affect the civilian population." *Id.*

67. *See, e.g.*, Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS 11, 20 (2011). "If one belligerent constantly violates humanitarian law and if such behaviour yields a tangible military advantage, the other side

Given that, it is reasonable to ask whether the defender has a legal duty to distinguish *his own* forces from civilians—a duty to avoid deliberately frustrating his adversary's ability to comply with the law. In IACs, governed by Additional Protocol I (or by customary law for non-Parties to that treaty), a military force is generally obligated to do so.[68] Article 44 states that combatants "are obliged to distinguish themselves" from civilians,[69] and the United States accepts this obligation as generally reflecting customary international law[70] (although, as noted below, there is some controversy about the degree to which Article 44(3) has relaxed the standard to which combatants should be held). The purpose of this obligation is to enable the other adversary—the attacker, when it comes to targeting—to comply with the affirmative duty to distinguish.[71] If the defender were not obligated to distinguish his forces and military objectives from civilians and civilian objects, it would frustrate the *ratio legis* of Article 44, which is "to ensure respect for and protection of the civilian population."[72]

The significance of this legal obligation is highlighted by examining the basis for the U.S. objection to this portion of Additional Protocol I—the manner in which the Protocol apparently relaxed the requirement of combatants to distinguish themselves from civilians. Article 43 defines "armed forces" as "all organized armed forces, groups and units which are under" a responsible command,[73] much as Article 1 of the Hague

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may eventually also be inclined to disregard these rules in order to enlarge its room for manoeuvre and thereby supposedly the effectiveness of its counter-strategies." *Id.* Fortunately, in Professor Geiss' estimation, "[t]he vicious circle of forthright reciprocal disregard of humanitarian rules, however, has remained largely theoretical." *Id.*

68. *See, e.g.*, W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003). Mr. Parks notes:

> [M]ilitary forces are obligated to take reasonable measures to separate themselves from the civilian population and civilian objects, to distinguish innocent civilians from civilians engaged in hostile acts, *and to distinguish themselves from the civilian population so as not to place the civilian population at undue risk*. This includes not only physical separation of military forces and other military objectives from civilian objects and the civilian population as such, but also other actions, such as wearing uniforms (emphasis added).

Mr. Parks goes on to note that "[t]he customary principle of *distinction* is applicable to the regular military forces. Conventional military forces should be distinguishable from the civilian population in international armed conflict between uniformed military forces of the belligerent states." *Id.* at 514, 515. The thrust of Mr. Parks' argument is that conventional military uniforms are not the *only* way in which such distinction can be made, and that there are a variety of ways in which special forces may effectuate the requirement to distinguish themselves from protected civilians.

69. AP I, *supra* note 6, art. 44(3).

70. Matheson, *supra* note 33, at 425 ("[W]e support . . . the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations.").

71. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1695. ("Since the adversary is obliged at all times to make a distinction . . . such a distinction must be made possible.").

72. *Id.*

73. AP I, *supra* note 6, art. 43(1).

Regulations does.[74] However, the Article 43 definition makes no mention of the *other* requirements in the Hague Regulations:[75] to have a fixed distinctive emblem recognized at a distance,[76] to carry arms openly,[77] and to conduct their operations in accordance with the law of war.[78] Furthermore, Article 44(3) of Additional Protocol I requires that arms be carried openly only "during each military engagement and during such time as he is visible to the adversary . . . preceding the launching of an attack."[79]

The United States objects to both Article 43(1) and Article 44(3) on the grounds that these provisions weaken the requirement of combatants to distinguish themselves from civilians, and therefore put the vast majority of the civilian population at greater risk.[80] The United States insists that the LOAC must continue to uphold incentives to distinguish by requiring full compliance with the Hague criteria, and therefore in this instance AP I does not reflect customary law.[81] The United States does *not* claim that failure of its adversary to meet the Hague criteria relieves the United States of its duty to distinguish, but rather that the failure of the adversary to distinguish himself may warrant denial of the full range of privileges that come with being a combatant—combatant immunity and, upon capture, status as a prisoner of war.[82] Thus, in a very important way, the U.S. objection to this portion of Additional Protocol I serves to underline the importance of distinction in international armed conflict.[83]

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74. Hague Regulations, art. 1(1).

75. Each of these requirements was adopted verbatim by GC III as well. *See* GC III, art. 4A(2).

76. Hague Regulations, art. 1(2).

77. *Id.*, art. 1(3).

78. *Id.*, art. 1(4).

79. AP I, *supra* note 6, art. 44(3).

80. The President of the United States, Letter of Transmittal, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. TREATY DOC. NO. 100-2 (Jan. 29, 1987) [hereinafter President Reagan Letter of Transmittal] http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf. President Reagan singled this provision out as the basis for not recommending ratification of AP I, noting that it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves." *Id.* at IV. *See also* WILLIAM H. BOOTHBY, THE LAW OF TARGETING 84, 86 (2012); Matheson, *supra* note 33, at 425.

81. President Reagan Letter of Transmittal, *supra* note 80; Matheson, *supra* note 33, at 425.

82. The relevance of status is amply explained in HANDBOOK ON IHL, *supra* note 21, at 613. Abraham Sofaer served as Legal Advisor at the U.S. Department of State and was privy to the U.S. rationale for rejecting this portion of AP I. "Fighters who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy." Abraham D. Sofaer, *Remarks on The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 466 (1987).

83. The position of the U.S. and others who objected to this portion of AP I has been summarized thus: "the argument of those who wished to maintain existing standards was that the

However, the requirements outlined above apply only in IACs; there is no corresponding provision in AP II or Common Article 3, which would apply to a NIAC. Moreover, the Article 44 obligation to distinguish oneself from civilians is quite clearly tied to maintaining combatant status, a status that does not exist in a NIAC.[84] Even within the context of an IAC, although the text of the Protocol makes this an "obligation,"[85] the sanction for violating the obligation is the loss of combatant status; it does not alter the requirements of the attacker to distinguish when targeting. After all, Article 51(8) of Additional Protocol I makes it clear that violations of rules by one party "shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians . . . ."[86] Nor is mere failure to distinguish oneself a war crime, absent perfidy.[87] Thus, while some insist that this kind of "defensive distinction" is a legal duty, others prefer to characterize it as simply a legal incentive or a general, but not absolute, obligation.[88]

Regardless of whether there is an absolute duty for the defender to distinguish its forces from civilians, it is certainly the case that the LOAC contains a series of other provisions designed to encourage this reciprocal distinction. Three further examples serve to illustrate this point: the prohibition on human shields, the requirement to take precautions against the effects of attacks, and the prohibition on perfidy. Each of these rules are enumerated in AP I and therefore, strictly speaking, are applicable only

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protection of the civilian population against the hazards of war require[s] the maintenance of the principle of distinction. To alter the form of international law by blurring [the] distinction between combatants and the civilian population degrades the protection of civilians." MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 246 (1982).

84. See NIAC MANUAL, *supra* note 17, at 1.1.2; BOOTHBY, *supra* note 80, at 433.

85. AP I, *supra* note 6, art. 44(3).

86. AP I, *supra* note 6, art. 51(8).

87. DINSTEIN, *supra* note 4, at 233.

88. Matthew Waxman, for example, characterizes rules for defensive distinction as "reciprocal duties." Matthew Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1393 (2008). Hays Parks, *supra* note 68, uses the term "obligation" just as the Additional Protocol does, which certainly suggests that this rule is a duty. However, he maintains it is a very general obligation, which does not apply in all circumstances. E-mail from W. Hays Parks to the author (Dec. 3, 2014, 08:59 EST) (on file with author). The U.S. Navy's Commander's Handbook on the Law of Naval Operations holds that "Commanders have two duties under the principle of distinction. First, they must distinguish their forces from the civilian population." DEP'T OF THE NAVY & DEP'T OF HOMELAND SECURITY, NWP 1-14 M/MCWP 5-12/CMODTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007), ¶ 5.3.2 [hereinafter NWP 1-14]. Yoram Dinstein, on the other hand, offers an alternative view to the idea of self-distinction as a duty—since failing to distinguish one's forces from civilians "is not a direct breach of the LOAC and certainly not a war crime," the obligation in Article 44 should rather be viewed as simply an *incentive,* which "[e]ach Belligerent Party is at liberty to factor in a cost/benefit calculus as to whether or not to retain for its soldiers" the status of lawful combatancy. DINSTEIN, *supra* note 4, at 233.

to Parties, and only in IACs. But all three are broadly considered to also apply in both IACs and NIACs as a matter of customary law.[89]

Article 50 of Additional Protocol I specifically prohibits the use of "human shields" to "render certain points or areas immune from military operations . . . or to shield, favour, or impede military operations."[90] The ICRC Customary International Humanitarian Law Study (CIHL Study) concluded that "state practice establishes this rule as a norm of customary international law applicable to both international and non-international armed conflicts."[91] The CIHL Study notes that, while not expressly mentioned in AP II, "deliberately using civilians to shield military operations is contrary to the principle of distinction."[92] This stands to reason; by using human shields, the defender is making it difficult for the attacker to distinguish.

Article 58 of Additional Protocol I charges both parties, but especially the defender, to take precautions against the effects of attacks, which includes a duty to avoid, when feasible, "locating military objectives" in densely populated areas. It also requires both sides to endeavor to remove civilians under their control from the vicinity of military objectives.[93] Arguably, these requirements to take precautions against the effects of attacks "can only be met by fighters visibly distinguishing themselves from the civilian population."[94] The CIL Study makes a strong case that the requirement to take precautions against the effects of attacks is customary international law even in a NIAC.[95]

The prohibition on perfidy makes it a war crime to "kill, injure, or capture an adversary" through perfidy,[96] defined as "acts inviting the confidence of an adversary" to believe (wrongly) that he is obliged to accord the protections of the LOAC to the perfidious party,[97] and a

89. ICRC CIL STUDY: RULES, *supra* note 21, Rules 22–24, 65, and 97.

90. AP I, *supra* note 6, art. 50(7).

91. ICRC CIL STUDY: RULES, *supra* note 21, Rule 97. *See also* NIAC MANUAL, *supra* note 17, at 2.3.8; NWP 1-14, *supra* note 88, ¶ 11.2. Professor Michael Schmitt asserts that the prohibition on human shields "irrefutably constitutes customary international humanitarian law" and thereby binds the U.S. and other non-signatories to the Protocols. Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. OF TRANSNAT'L L. 292, 306 (2009).

92. ICRC CIL STUDY: RULES, *supra* note 21, Rule 97.

93. AP I, *supra* note 6, art. 58.

94. Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. OF THE RED CROSS 93, 122 (2004).

95. ICRC CIL STUDY: RULES, *supra* note 21, Rules 22–24. The ICRC concedes that doing so may often prove difficult, however, and that some nations accepted this provision only with serious caveats. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2245. Thus the qualifying language in Article 58 that these precautions shall be undertaken "to the maximum extent feasible" takes on added importance. AP I, art. 58. W. Hays Parks therefore holds that this requirement is "not obligatory." W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 159 (1990).

96. AP I, *supra* note 6, art. 37(1).

97. *Id. See also* NWP 1-14, *supra* note 88, ¶ 12.1.2.

specific type of forbidden perfidy is "the feigning of civilian, non-combatant status."[98] The prohibition on perfidy undoubtedly applies in NIACs as a matter of customary international law.[99]

It must be stressed that none of these obligations, whether characterized as a duty or merely a series of incentives, properly belong to the sphere of targeting law. But the logic that underlies them is nonetheless relevant to targeting, because they demonstrate recognition that when one adversary makes it difficult or impossible to distinguish his forces from civilians, the ability of the other adversary to comply with the principle of distinction is affected.[100] These rules are designed to deter such conduct, but it remains the case that one adversary may elect not to comply with them, seeking instead to make his forces indistinguishable from protected civilians. This is exactly the situation faced by United States and NATO commanders in Afghanistan, for example, where the Taliban issued specific instructions to its fighters to hide amongst the civilian population:

> Mujahids should adapt their physical appearance such as hairstyle, clothes, and shoes in the frame of Sharia and according to the common people of the area. On one hand, the Mujahids and local people will benefit from this in terms of security, and on another hand, it will allow Mujahids to move easily in different directions.[101]

While nothing can relieve the attacker of his affirmative duty,[102] the attacker may be faced with conduct by the other party that increases the likelihood of targeting mistakes and consequently increases the loss of civilian life and property. This, in turn, ought to color any judgment made about the attacker's adherence to the principle.[103]

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98. AP I, *supra* note 6, art. 37(1)(c).

99. ICRC CIL STUDY: RULES, *supra* note 21, Rule 65; NIAC MANUAL, *supra* note 17, at 2.3.6.; TALLINN MANUAL, *supra* note 17, Rule 60; AMW Manual, *supra* note 47, Rule 111(a).

100. *See* ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1695.

101. Muhammad Munir, *The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law*, 93 INT'L REV. OF THE RED CROSS 81, 120 (2011). *The Islamic Emirate of Afghanistan: The Layha [Code of Conduct] for Mujahids*, art. 81, was translated and added as an Appendix to this article.

102. AP I, *supra* note 6, art. 51(8).

103. *See, e.g.,* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 129 (2d ed. 2004) ("[A] tribunal considering whether a grave breach had been committed would be able to take into account . . . the extent to which the defenders had flouted their obligations to separate military objectives from civilian objects and to take precautions to protect the civilian population."); *see also* BOOTHBY, *supra* note 80, at 136 ("[T]he subsequent appraisal of . . . unsatisfactory attacks should take properly into account the degree to which both parties departed from their precautionary duties, and the extent to which responsibility for civilian casualties and loss can properly be determined. . . . [P]roper subsequent analysis should take all matters properly into account in determining the degree of fault on each side.").

A bright-line test for compliance that fails to take such effects into consideration when judging the actions of the attacker would be wholly unworkable—and it would potentially undermine the protection of civilians by "tempt[ing] the defender to place its military resources and personnel" among civilians.[104] Rather, any formulation of the principle must provide a way to judge the conduct of the attacker that takes into account the specific context in which he is forced to fight, including any measures taken by the other party to make distinction impossible.[105] As will be demonstrated in Part III, the concept of objective reasonableness provides just such a flexible and context-specific standard.[106]

C. Distinction Applies at All Echelons

A third important element of the duty of distinction is the fact that it applies to any decision-maker faced with a choice to attack a target. This point is easily lost, because so much of the language of AP I suggests a focus on high echelons of command—the requirement to take precautions, for example, is directed at "those who plan or decide upon an attack."[107] However, as discussed below, the plain language of AP I itself makes it applicable to any echelon of command—even, in principle, the individual soldier in ground combat. The key to determining where the duty to distinguish and take precautions lies is to determine whether or not a decision-maker has discretion in launching an attack.[108]

The definition of "attack" in Article 49 as any "[act] of violence against the adversary, whether in offense or defense"[109] logically includes both the planning of attacks at an operational headquarters and the decisions taken to launch attacks at the lowest tactical levels. There is nothing about that definition that suggests that the duty of distinction applies only to one particular echelon of command as opposed to another, or that it applies only to a commander. Certainly, the information available to decision-makers at various echelons may be dramatically different, and in some cases, "the person executing the attack may not be privy to

104. Waxman, *supra* note 88, at 1393.

105. Samuel Eistreicher, *Privileging Asymmetric Warfare Part I: Defender Duties Under International Humanitarian Law*, 11 CHI. J. INT'L L. 425, 435 (Winter 2011).

106. Waxman notes that reasonableness "combines with companion rules to reinforce incentives for parties to comply with the law and protect civilians." Waxman, *supra* note 88, at 1390.

107. AP I, *supra* note 6, art. 57(2)(a).

108. *See, e.g.,* UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004), ¶ 5.32.9, as amended by JSP 383 Amendment 3, Sept. 2010 ("Whether a person will have this responsibility will depend on whether he has any discretion in the way the attack is carried out and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative.") [hereinafter UK MANUAL].

109. AP I, *supra* note 6, art. 49(1).

information as to its character or even the identity of the target."[110] However, in many cases an individual soldier is perfectly capable of "decid[ing] upon an attack,"[111] and staff officers and planners in a headquarters are certainly directly involved in "plan[ning] . . . an attack."[112] Thus, as the United Kingdom's Manual on the Law of Armed Conflict succinctly states, "the responsibility [to distinguish] will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative."[113]

The ICRC *Commentary* on the Additional Protocols explains that State delegations addressed this reality head-on. After noting that the Article 57(2) requirement to take precautions is directed at "those who plan or decide upon an attack," the *Commentary* explains that many of the delegations to the Diplomatic Conference

> wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects. It clearly follows that the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisioned.[114]

Some Parties to the Protocol made declarations stating their understanding of this requirement.[115] For example, Switzerland declared its understanding that this provision only creates obligations to take precautions for commanding officers at the level of battalion or group or above.[116] In the view of the author, this understanding reflects a rather arbitrary determination. It is not clear why echelons below a battalion are not capable of complying with this rule. The arbitrariness of selecting the battalion level of command is further shown by New Zealand's position that precautions cannot realistically be taken below the *Division*

110. TALLINN MANUAL, *supra* note 17, commentary to Rule 53, para. 3, at 167.

111. AP I, *supra* note 6, art. 57(2)(a).

112. *Id.*

113. UK MANUAL, *supra* note 108, at ¶ 5.32.9.

114. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2197.

115. *See* Official Report of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, vol. VI., p. 212, CDDH/SR. 42, paras. 43 and 46 (*available at* http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html) (last accessed 1 Oct. 2014). Additional reservations can be found in the ICRC Treaty Database, which can be accessed via the Naval War College Website: http://usnwc.libguides.com/LOAC-IHL.

116. *See* Declaration 1 Made By Switzerland at the Time of Ratification of Additional Protocol I, *in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 509 (3d. ed., 2000).

headquarters level—two echelons higher than the one used by Switzerland.[117] The older vintage of these documents, and lack of modern combat experience of these States, may explain the decisions of Switzerland and New Zealand to hold only higher-level headquarters responsible for taking precautions in distinction, and they are in a distinct minority among States in so doing. The *UK Manual on the Law of Armed Conflict*, for example, is clear that the responsibility for distinction and precautions applies at all levels.[118] The U.S. Army in Operation Desert Storm included the guidance to "fight only combatants, attack only military targets" and "spare civilian persons and objects"[119] on ROE cards issued to *individual* Soldiers and Marines—clearly placing a duty of distinction on individual combatants. During Operation Iraqi Freedom, these individual ROE cards included the requirement to positively identify targets.[120]

The principle of distinction, including the requirement to do everything feasible to verify targets, applies to targeting at every level.[121] not only the deliberate and carefully orchestrated selection of targets by a headquarters hundreds of miles from the front planning airstrikes, but also the hasty, often nearly immediate selection of a target by an individual front-line combatant. Even the tank commander observing a moving vehicle that will be visible for only five seconds, or the individual rifleman observing muzzle-flashes from a nearby window bears this responsibility.[122] Any standard for evaluating compliance with the principle must therefore be expressed simply and clearly enough that it can be understood at all levels.

D. Intentional Attacks and Indiscriminate Attacks

The principle of distinction prohibits two different types of attack. It is clearly forbidden to directly target an individual civilian or the "civilian population as such."[123] But it is also forbidden to make "indiscriminate

117. New Zealand, *Interim Law of Armed Conflict Manual*, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, Nov. 1992, § 518(2).

118. UK MANUAL, *supra* note 108, at ¶ 5.32.9.

119. OPLAW HANDBOOK, *supra* note 1, at 106.

120. *Id.* at 107–108.

121. *See, e.g.*, TALLINN MANUAL, *supra* note 17, commentary on Rule 53, para. 4, at 167 ("The limitation to those who plan or decide upon . . . attacks should not be interpreted as relieving others of the obligation to take appropriate steps should information come to their attention that suggests [the intended target is protected]."); *see also* UK MANUAL, *supra* note 108, at ¶ 5.32.9.

122. The UK MANUAL uses two examples, "the air or artillery commander drawing up target lists from a distance" and "a tank troop commander who has enemy armoured vehicles in his sights." UK MANUAL, *supra* note 108, at ¶ 5.32.2.

123. AP I, *supra* note 6, art. 51(2).

attacks:"[124] those "not directed at a specific military objective,"[125] those using means and methods that cannot be reliably aimed, or those whose effects cannot be limited to lawful targets.[126] Indiscriminate attacks may in fact be intended by the attacker to strike military targets; it is the disregard for their effects on non-military targets that causes the violation.[127] Thus, the intentional attack of civilians and the indiscriminate attack—which may be intended to strike military targets but fails to distinguish civilians—are both violations,[128] but they are each based on a different subjective intent with respect to the target.

The direct, intentional attack of a civilian or civilian object presupposes that the attacker is aware of the civilian status of the target, and chooses to attack anyway. It could thus be characterized as quite "discriminating" in the conventional sense of the word; the attacker has analyzed the nature of the target, and has concluded it is civilian. The violation of the principle of distinction in this case thus flows from his decision to proceed with the attack, knowing the intended target is unlawful.

The indiscriminate attack of a target implies something quite different. In this case, the attacker does not necessarily know, or care, that the target is civilian (although he may know civilians are at risk by his attack).[129] For

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124. AP I, *supra* note 6, art. 51(4).

125. AP I, *supra* note 6, art. 51(4)(a). The fact that this subparagraph relates to verification or identification of military objectives is obvious from the text, and the ICRC COMMENTARY describes it as a requirement to obtain "precise and recent" information and to comply with the precautions in attack described in Article 57. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1952.

126. AP I, *supra* note 13, art. 51(4)(b) and (c). Some scholars insist, however, that some types of indiscriminate attacks—those whose effects cannot be limited to military objectives, for example—actually violate the principle of proportionality and *not* the principle of distinction. *See, e.g.,* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 113 (2013). This is a compelling argument. However, as this article is concerned primarily with the first category of indiscriminate attacks, which are "not directed at a specific military objective," it will refer to indiscriminate attacks as a violation of the principle of distinction, especially since the standard proposed herein—subjective honesty and objective reasonableness—would apply equally to an evaluation of compliance with either principle.

127. The *ICRC Commentary* provides examples of indiscriminate attacks that would violate the principle of distinction or the related proportionality rule because, although intended to strike military targets, they either cannot be aimed precisely enough or have effects which cannot be limited. As an example of the first, the ICRC referred to the V2 rockets launched in World War 2, which could not be accurately aimed at military targets. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1958. As an example of the second, the *Commentary* noted that "if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighboring buildings, while a less powerful missile would suffice to destroy the building. *Id.* at ¶ 1963.

128. *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgement Vol. II of II, ¶ 1841 (Int'l Crim. Trib. for the Former Yugoslavia, Apr. 15, 2011); *see also* TALLINN MANUAL, *supra* note 17, commentary on Rule 37, para. 6, at 125.

129. DINSTEIN, *supra* note 4, at 127 ("Indiscriminate attacks differ from direct attacks against civilians in that the attacker is not actually *trying* to harm the civilian population: the

example, he may know that a village contains both civilians and lawful military targets. If he targets all buildings in the village, with the intent to destroy the military targets but being fully aware that civilians will also be struck, and not caring, then he has attacked indiscriminately. He has failed to target the specific military objectives within the village, and instead targeted the village as a whole.[130] The violation of the principle of distinction in this case flows from a failure to take care to separate the two; in effect, as the ICRC *Commentary* noted, an indiscriminate attack is one "in which no distinction is made."[131] The indiscriminate attack is thus characterized by the "nonchalant state of mind of the attacker."[132]

E. The Two Components of Distinction: Informational and Decisional

The process of distinction necessarily involves what may be termed an "informational component" and a "decisional component."[133] The attacker first gathers information about the nature of the target, and then draws a conclusion from that information—he makes a decision that the target is military or civilian, and attacks it if it is military. This is evident from the very formulation of the basic rule itself, which first requires belligerents to "at all times distinguish," and then to "direct their operations only against military objectives."[134] There are other steps in the targeting process, of course—assessments of proportionality, consideration of the requirement to issue warnings, choice of means and methods, and the requirement to cancel an attack under some circumstances.[135] But for the purposes of the principle of distinction (and distinction alone), it is sufficient to consider the information-gathering component and the decision-making component.

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injury/damage/injury to civilians is merely a matter of no concern to the attacker." (citing H.M. Hanke, *The 1923 Hague Rules of Air Warfare*, 33 INT'L REV. OF THE RED CROSS 12, 26 (1993)) (emphasis original)).

130. AP I, *supra* note 6, art. 51(5)(a).

131. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1950.

132. DINSTEIN, *supra* note 4, at 127.

133. BOOTHBY, *supra* note 80, at 476 (categorizing these two components as "target-evaluation and decision-making. . . .").

134. AP I, *supra* note 6, art. 48.

135. *See, e.g.*, the 8-step process identified by A.P.V. Rogers, which encompasses consideration of distinction, measures to reduce or eliminate collateral damage, an assessment of proportionality, consideration of cancelling an attack, and giving warnings when feasible—all in addition to verifying the character of the target. ROGERS, *supra* note 103, at 113–14. Ian Henderson has proposed an "IHL 6-step Targeting Process," of which the first two steps are: 1) locate and observe the target; and 2) assess whether the target is a valid military objective. IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 237 (2009). These two steps roughly correspond to the informational and decisional components of distinction proposed in this article.

This bifurcation of the distinction process suggests that, when evaluating compliance with the principle, it is appropriate to consider both what information the attacker possessed (or ignored) and what decision he made based on that information. It is admittedly not always easy to separate these two components in practice. Still, because either a failure to gather information or a wrong decision based on that information can violate the principle, it is necessary to identify a standard that can be applied to both the information-gathering process and the decision-making process.

These five characteristics of the principle of distinction should inform a State's effort to give tactical effect to the principle, such that it is comprehensive, flexible, and clear. The affirmative duty of distinction always rests on the attacker; the civilian has no corresponding obligation to somehow "distinguish himself." Thus any formulation must include a requirement for the attacker to base targeting decisions on affirmative evidence of some quality of the target that makes it a lawful one, not on a mere lack of contrary evidence. The reciprocal nature of the duty between parties, as well as the incentives built into the LOAC for the defender to distinguish himself from civilians, suggests that it should be flexible enough to account for efforts taken by the adversary to frustrate the attacker's performance of his duty. The fact that the duty applies to any person exercising discretion over the selection of a target suggests that it must be simple and clear so that it is capable of being understood and enforced at all echelons of command. The principle of distinction forbids both intentional or direct attacks on civilians and indiscriminate attacks. Any formulation that purports to implement the principle must prohibit both. Finally, the targeting process consists of both information-gathering and decision-making, so the standard must address both the requirement to collect and consider information and the requirement to make a proper decision.

III. EVALUATING COMPLIANCE WITH THE PRINCIPLE OF DISTINCTION

The language of the Additional Protocol, which requires "constant care,"[136] does not, by itself, specify a particular *level* of care required by combatants in order to comply with the duty to distinguish.[137] What is

136. AP I, *supra* note 6, art. 57(1).

137. BOOTHBY, *supra* note 80, at 170–71. With respect to distinction, "[t]he basic rule, as set out in article 48 of AP I, says nothing explicit about the level of care that is required." *Id.* at 170. One way to interpret "constant care" is to take it to mean simply that "there are no exceptions from the duty to seek to spare the civilian population, civilians, and civilian objects." AMW MANUAL, *supra* note 47, commentary accompanying Rule 30, para. 3, at 125. This again does not specify the level of care required, it simply reinforces the universal and intransgressible nature of the duty.

required to meet the standard to take "constant care?" Given its central role as a cornerstone of the LOAC, it is not surprising that distinction has been repeatedly addressed in many of the other sources of international law: statutes establishing international tribunals (including how these statutes define offenses under the LOAC), the decisions of international courts pursuant to these statutes,[138] state practice[139] (as exhibited by some of the reservations and understandings taken by signatories to treaties,[140] published military manuals,[141] rules of engagement,[142] and the like), and expert manuals and scholarship.[143]

As this Part will demonstrate, these various sources of interpretation of international law, viewed as a whole, establish that the appropriate standard must incorporate two elements: subjective honesty and objective reasonableness. In this "subjective-objective test," the attacker's subjective beliefs are assessed alongside the objective reasonableness of his actions. Both the informational and the decisional components of the targeting process must pass the subjective-objective test.

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138. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

139. *Id.*, art. 38(1)(b).

140. Reservations and understandings to treaties are contemplated by the Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331.

141. See BOOTHBY, *supra* note 80, at 483. He notes that "members of the armed forces need to know what the law requires," and military manuals are often the method selected by a State to "articulate[] its interpretation of the law that binds it, and thus that binds its personnel." Charles Garraway is equally explicit:

> [N]ational manuals provide evidence of state practice and *opinio juris* in relation to the states by which they are issued. Whilst such manuals will of course look at contentious areas, their aim is not to reach a consensus agreement but to reflect the position adopted by the state concerned. They do not form law, as of themselves, but inevitably will be cited as examples of 'international custom, as evidence of a general practice accepted as law.'

Charles Garraway, *The Use and Abuse of Military Manuals*, YEARBOOK OF INT'L HUMANITARIAN L., Vol. 7, 425, 431 (Timothy L.H. McCormack and Avril McDonald, eds., 2004). *But see* Letter from John Bellinger III, Legal Adviser, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Dept. of Defense, to Dr. Jakob Kellenberger, President, Int'l Com. of the Red Cross, Re: Customary International Law Study (Nov. 3, 2006), *reprinted in* 46 INT'L LEGAL MATERIALS 514 (2007). Mr. Bellinger criticized the ICRC for relying too heavily on published military manuals as a basis for establishing state practice as evidence of customary law. W. Hays Parks notes that "[w]hile military law of war manuals are not regarded as policy statements binding upon a nation and its military forces, they are *at least* an indication of a nation's probable interpretation of the law of war." Parks, *supra* note 95, at 38 (emphasis added).

142. *See, e.g.*, the U.S. rules of engagement promulgated by CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005), the unclassified portion of which is excerpted in the OPLAW HANDBOOK, *supra* note 1, at 88.

143. Such expert manuals and scholarship are contemplated by the Statute of the International Court of Justice art. 38(1)(d). *See*, *supra* note 138.

A. Distinction in International Criminal Law: A Subjective-Objective Test

It is useful to begin this analysis by examining international criminal cases. Criminal cases involving the LOAC will necessarily include a description of the standard to which the defendant was held, and will generally reach the ultimate question: was the targeting decision a lawful one? While such cases may not always provide analysis about both the informational and decisional components of the distinction process, it is often the case that one or both components are addressed at length.

1. Nuremberg and the "Rendulic Rule."

The famous "Hostage Case" involving General Lothar Rendulic, the German commander of the 20th Mountain Army during the latter stages of World War II,[144] is generally cited as an example of one of the few cases to address the principle of military necessity,[145] and it must therefore be stressed that the judgment in this case does not address the principle of distinction as such. Yet it is widely held to stand for "a broader standard regarding liability for battlefield acts"[146] under the LOAC as a whole, and in that sense the case provides support for the notion that a commander's actions must be evaluated based on subjective honesty and objective reasonableness, and that a determination about reasonableness must be based on the information available to the commander at the time he made the relevant decisions.[147]

The Military Tribunal had to decide whether or not General Rendulic's decision to implement a scorched-earth policy during his retreat from Finland constituted wanton destruction, or whether it was a lawful measure supported by military necessity. The Tribunal was careful not to assess whether the measures undertaken by Rendulic were actually necessary, but rather to determine whether he could have honestly and reasonably concluded that they were.

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144. "Opinion and Judgment of Military Tribunal V," United States v. Wilhelm List, et al., X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1231 (Feb. 19, 1948) (Case 7) [hereinafter the Hostage Case].

145. *See, e.g.*, HANDBOOK ON IHL, *supra* note 21, at 38; GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 265 (2010).

146. OPLAW HANDBOOK, *supra* note 1, at 12.

147. For an example of the Rendulic Rule applied to the principle of distinction and the requirement to take precautions in attack, *see* Eric Talbot Jensen, *Unexpected Consequences from Knock-On Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT'L L. REV. 1145, 1183 (2002-2003) ("While the specific facts of the case dealt with General Rendulic's decision concerning the military necessity of his action, the Court's reasoning reflects that this standard is not confined to solely that decision, but would also apply to a commander's decision contemplated in [AP I's] Articles 51 and 57.").

> We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.[148]

The analysis relies on the concept of "honest judgment" based on the "conditions prevailing at the time."[149] Honest judgment can only mean the subjective honesty of the commander: that this particular commander, with this particular information, actually believed that the acts in question were required. This is the subjective element of the analysis. But the Tribunal also applied an objective test, albeit without explicitly saying so. This is apparent from the fact that the Tribunal gave their own "considered opinion" that the conditions he subjectively believed to exist at the time were "sufficient" to explain his decision.[150] In effect, the Tribunal concluded that a similarly-situated commander in possession of the same information Rendulic *could* have reached the same conclusion. The Tribunal was able to do this only by a sort of substitution—replacing the actual decision-maker (Rendulic) with an outside one, which was, in this case, the Tribunal itself. This is the only logical explanation for their finding that, while mistaken, his decision was within the bounds of the acceptable exercise of judgment.

148. Hostage Case, *supra* note 144, at 1297.
149. *Id.*
150. *Id.*

Some scholars contend that the Rendulic test "transformed military necessity into a purely subjective test,"[151] and that reliance on the "Rendulic Rule" has thereby had a negative effect on subsequent efforts to hold war criminals accountable for their wrongful acts.[152] It is difficult to see how this could be the correct reading of the holding in the Hostage Case, given the substitution the Tribunal undertook by affirming that the evidence Rendulic possessed was "sufficient" to support his subjectively-held belief. A purely subjective inquiry would have stopped when it determined *what General Rendulic believed*, without regard to whether the information he based that belief upon was "sufficient" in the "considered opinion" of a third party. While the Tribunal never used the term "objectively reasonable" in the Hostage Case judgment, this is the manner in which the Rendulic Rule has often been subsequently construed,[153] and in the opinion of the author, this is the only way in which the judgment can be read. Thus, far from being a purely subjective test, the Rendulic tribunal applied both subjective and objective analyses.

The Nuremberg trials occurred decades before States attempted to partially codify customary law in Additional Protocol I. But the basic reasoning applied in the case against Rendulic serves as a good point of departure for consideration of how to evaluate compliance with the LOAC. Rendulic's decisions were evaluated in light of the information he had available to him, with due consideration given to military considerations which the commander could not ignore.

2. The International Criminal Tribunal for the Former Yugoslavia and the Crime of Unlawfully Attacking Civilians

By the 1990's, AP I had long since been ratified by many States, and the war in Yugoslavia provided new opportunities for an International Tribunal to apply the LOAC in a criminal setting. The statute establishing the ICTY did not specifically define the elements of the

151. KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 311 (2011).

152. *Id.*, at 375.

153. *See, e.g.*, Brian J. Bill, *The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare, in* 12 YEARBOOK OF INT'L HUMANITARIAN LAW 136 (Michael N. Schmitt and Louise Arimatsu, eds., 2009); Chris Jenks and Geoff Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law*, 7 BERKELEY J. INT'L L. PUBLICIST (2011), at 6 (noting that the Rendulic Rule is a "subjective and objective test") available at http://bjil.typepad.com/publicist/2011/03/index.html; Aaron Schwabach, *NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, 9 TULANE J. COMP & INT'L L. 167, 176 (2001) (noting that Rendulic was acquitted because, even though incorrect, his belief "was not unreasonable and was a sufficient defense.").

crime of "unlawful attack of civilians."[154] Thus, when Stanislav Galic was tried for this offense, charged under Article 3 as a "violation of the laws or customs of war," the Tribunal had to resort to customary law and Additional Protocol I in order to establish the elements of this crime, and particularly the *mens rea* required.[155]

The Tribunal referred to Article 85 of AP I, which made it a grave breach to "willfully . . . mak[e] the civilian population or individual civilians the object of attack."[156] Clearly, an intentional attack on known civilians, "with his mind on the act and its consequences, and willing them," would be unlawful.[157] In that case the attacker believed his target to be civilian, not military, and attacked anyway. The commentary to Article 85 explains that willfulness also includes acts of "recklessness," defined as "the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening."[158] A willfully unlawful attack on civilians would thus be one that either deliberately sought to target civilians, or deliberately ignored the affirmative duty to take care by making no effort to distinguish.

These questions of *mens rea* are necessarily subjective ones. The inquiry seeks to determine the state of mind of the attacker when he made the decision to strike. This involves an effort to determine what the actual decision-maker honestly believed about the nature of the target. If the Tribunal in *Galic* had possessed some damning statement, order, or other direct evidence which indicated that Galic honestly believed his targets were civilian, the inquiry could have ended there. In practice, however, such orders are often hard to come by, and even when they exist, they may be subject to several different interpretations. In the trial of Ante Gotovina, for example, the ICTY considered the implications of a written order issued by the defendant in which he

154. Statute of the International Criminal Tribunal for the former Yugoslavia arts. 2 and 3, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808. Article 2 lists grave breaches of the Geneva Conventions, and Article 3 includes a non-exhaustive list of other serious violations of the laws and customs of war. Neither defined the elements of these offenses. Unlawful attacks are simply "not enumerated offenses in the ICTY Statute." William J. Fenrick, *The Prosecution of Unlawful Attack Cases Before the ICTY*, *in* 7 YEARBOOK OF INT'L HUMANITARIAN LAW 153, 164 (Timothy L.H. McCormack & Avril McDonald, eds., 2004).)

155. Prosecutor v. Galic, *supra* note 25, ¶ 45; Hague Regulations, *supra* note 6, art. 1(4).

156. AP I, *supra* note 13, art. 85.

157. ICRC COMMENTARY ON AP I , *supra* note 23, at 3474.

158. *Id.* The ICTY's reliance on the ICRC *Commentary* to support the inclusion of recklessness in the wider concept of intent has been heavily criticized by Jens David Ohlin, *supra* note 126, at 93, where he notes that the "sole citation that the ICRC offered in favor of this proposition was a scholarly source that in fact conceded that these terms had different meanings in domestic penal systems."

directed strikes at several towns.[159] The language of that order included the direction to place "[those towns] . . . under artillery fire."[160] The order was the subject of considerable testimony from expert witnesses for both sides, with one expert arguing that it was an order to conduct an indiscriminate attack,[161] while another suggested it simply meant to attack military targets within those towns.[162] A third expert argued that it was "open to several interpretations."[163] Thus, even when a written military order is preserved and available for a post hoc review by a criminal tribunal, it may be difficult to conclusively determine the subjective intent of the attacker.

Consequently, it is generally necessary to engage in objective analysis as well. In the absence of some direct proof of subjective *mens rea*, the ICTY in *Galic* held that the prosecutor must prove that "in the given circumstances a *reasonable person could not have believed* that the individual he or she attacked was a combatant" (emphasis added).[164] The same rule was applied to attacks against objects, with the Tribunal holding that "such an object shall not be attacked when it is *not reasonable to believe*, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is [a lawful military objective]."[165] Reasonableness was also the standard used to judge Galic's adherence to the related rule of proportionality. The Tribunal held that the test for determining compliance with this principle is "whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[166]

With respect to the principles of distinction and proportionality, the Tribunal in *Galic* relied on the concept of objective reasonableness, insisting that the principles were violated when a similarly-situated reasonable commander in possession of the information that Galic had could not have concluded that the targets were lawful. Whereas the inquiry into the attacker's actual *mens rea* is subjective in nature, the inquiry into reasonableness is purely objective, placing a "reasonable

159. Prosecutor v. Gotovina and Markač, Case No. IT-06-90-A, Appeals Judgment, ¶¶ 70–74 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012..).

160. *Id.*, ¶ 70.

161. *Id.*, ¶ 72.

162. *Id.*

163. *Id.*

164. Prosecutor v. Galic, *supra* note 155, ¶ 55 (emphasis added).

165. *Id.*, ¶ 51 (emphasis added).

166. *Id.* ¶ 58.

military commander" in the shoes of the actual attacker and assessing his conduct against that standard.

The ICTY has also considered cases in which targets were attacked indiscriminately. In the case against Milan Martić, for example, the Tribunal at the trial level again noted that "there is an absolute prohibition in customary international law against the targeting of civilians."[167] In addition to prohibiting the intentional selection of civilian targets, the Tribunal also held that "indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians."[168] According to the Tribunal, a direct attack on civilians could "be inferred from the indiscriminate character" of the attack.[169] And just as it had in *Galic*, the Tribunal in *Marti* held that the *mens rea* required was either willfulness or recklessness.[170]

The lessons from ICTY jurisprudence regarding the standard required to comply with the principle of distinction are several. First, both directly attacking civilians and indiscriminately attacking a target without regard to the danger to civilians violate the principle of distinction under customary international law. Moreover, in the absence of direct evidence of the subjective state of mind of the attacker, inferences can be drawn about his intent based on the indiscriminate nature of the weapons used or the targets selected. Finally, his conduct will be assessed for both subjective honesty and objective reasonableness. Direct evidence that he intended to kill civilians will clearly show guilt, but the objective unreasonableness of his acts can also prove that an attack was unlawful. The ICTY has clearly applied a mixed subjective-objective test to assess compliance with the principle of distinction.

3. The International Criminal Court: Mens Rea for War Crimes

The Rome Statute of the International Criminal Court (ICC)[171] which entered into force in 2002 and established the world's first permanent international criminal court with jurisdiction over war crimes, raised the bar for prosecution. Article 30 of the Rome Statute

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167. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 68 (Int'l Crim. Trib. For the Former Yugoslavia June 12, 2007) [hereinafter Prosecutor v. Martić].

168. *Id.*, ¶ 69.

169. *Id.*

170. *Id.*, ¶ 72. Just as he did with the ICTY's *mens rea* analysis, Professor Ohlin has heavily criticized the ICTY decision in this case for conflating intentional and indiscriminate attacks on civilians. Ohlin, *supra* note 126, at 94.

171. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter Rome Statute].

provides that, unless otherwise specified by the enumerated elements of a particular offense, the *mens rea* required to convict a defendant of an offense is "intent and knowledge."[172] With respect to intent, the defendant has to intend the act itself, and then has to "mean to cause" the criminal consequence or be "aware that it will occur in the ordinary course of events."[173] The element of knowledge requires actual knowledge that a circumstance exists or a consequence will occur in the ordinary course of events.[174] The elements of the war crimes of attacking civilians or civilian objects require that the defendant intend the civilian persons or objects to be the object of attack;[175] in other words, the specific elements of the crimes associated with failure to distinguish do not "otherwise provide" a different mental element from that in the Rome Statute itself.[176]

This is clearly a higher *mens rea* requirement than that used by the ICTY, as it appears to rule out recklessness as a basis for criminal culpability. Where the ICTY standard of recklessness would find guilt if the defendant, while not specifically desiring a particular outcome, nonetheless "accepts the possibility" of it happening,[177] the ICC requires more than a mere possibility. To be found guilty, a defendant before the ICC must accept that the undesired consequence "*will* occur in the ordinary course of events."[178] Some scholars maintain that the ICC formulation is akin to the civil law concept of *dolus eventualis*,[179] which differs from common law recklessness in that it requires proof of volition, namely that the defendant actually considered the risk that the consequence would occur and reconciled himself to that

172. *Id.*, art. 30.1.

173. *Id.*, art. 30.2.(a) and (b).

174. *Id.*, art. 30.3.

175. Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), arts. 8(2)(b)(i) and 8(2)(b)(ii), respectively. The war crime of attacking civilians requires that "[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack." *Id.*, art. 8(2)(b)(i)(3). The war crime of attacking civilian objects requires that "[t]he perpetrator intended such civilian objects to be the object of the attack." *Id.*, art. 8(2)(b)(ii)(3); *see also* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 131 (2003) ("The crime thus demands that the perpetrator intended to direct an attack . . . and that he/she intended the civilian population or individual civilians to be the object of the attack.").

176. Rome Statute, *supra* note 171, at art. 30.

177. Prosecutor v. Stakic´, Case No. IT-97-24-T, Judgment, ¶ 587 (Int'l Crim. Trib. for the former Yugoslavia July 31, 2003); *see also* ICRC COMMENTARY ON AP I , *supra* note 23, at ¶ 3474.

178. Rome Statute, *supra* note 171, at art. 30.2.(b) (emphasis added).

179. *See,. e.g.*, Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective*, 19 CRIM. L. FORUM 473, 487–488 (2008).

consequence.[180] The ICC has ruled out *dolus eventualis* as a basis for liability in several cases, however, when the risk of harm to civilians has a low probability. Instead, it has construed *dolus eventualis* to strictly apply the statutory requirement that criminal liability will attach only when a foreseeable consequence "will occur."[181]

This does not necessarily undercut the concept of objective reasonableness altogether, but it does appear that in trials before the ICC, even some unreasonable attacks may not be war crimes in the absence of evidence that civilians were intentionally targeted. There must be some volitional element to the decision taken by the defendant, and some proof that, at a minimum, he was aware of the highly probable or even inevitable consequences and reconciled himself to their occurrence. Presumably then, more emphasis must be placed on the subjective elements of the analysis in cases before the ICC. Of course, just as in the case of Martić before the ICTY,[182] it is possible that the sheer unreasonableness of an attack may itself be circumstantial evidence of subjective intent, if the only possible inference of such an attack was that civilians were intentionally targeted as such. This appears to have been the basis for the conviction of Germain Katanga before the ICC in March 2014.[183] Still, it is obvious that prosecutors before the ICC have to clear a high bar in order to show that an alleged perpetrator intended to attack civilians;[184] it is not enough to show that he was merely reckless in launching his attack.

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180. See Ohlin, *supra* note 126, at 100–106, for a serious critique of the confusing manner in which the ICC has applied the concept of *dolus eventualis* in its case law, despite the fact that the drafters of the Rome Statute appear to have rejected it as a basis for criminal liability.

181. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment, ¶¶ 1009–1013 (Mar. 14, 2012); Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Confirmation of Charges, ¶ 369 (June 15, 2009); *see also* DÖRMANN, *supra* note 175, at 131 (noting that "intend" means that "the perpetrator means to cause the consequence or is aware that it will occur in the ordinary course of events.").

182. Prosecutor v. Martić, *supra* note 167.

183. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment, ¶ 865 (Mar. 7, 2014). ("[T]he Chamber . . . considers that the civilians who fled the Institute were killed intentionally. . . . By firing on people fleeing without distinction, [the attackers] knew that death would occur in the ordinary course of events.").

184. *See, e.g.*, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Dissenting Opinion of Judge Christine Van den Wyngaert, ¶ 4, wherein Judge Van den Wyngaert maintained that the prosecution had failed to show intention. As she was in dissent, her objection was clearly not enough to carry the day, but it is nonetheless illustrative.

> [I]t has not, I believe, been established to the necessary threshold that the civilians in Bogoro were targeted 'as such' in the attack. Bogoro was a UPC-stronghold with a military base, which occupied a strategic position on the road that connects Bunia with Kasenyi and, by extension, Uganda. In order to satisfy the evidentiary standard, the inference that the Bogoro attack was aimed at the civilian population should be the only possible inference on the evidence produced at trial. Whereas I do not claim that it is unreasonable to think, from a first look at some of the evidence about what happened in

4. The Limits of Criminal Law

Caution is warranted when relying solely on criminal cases to determine the standard of care required to comply with the principle of distinction. The presumption of innocence, and the generally high burden of proof required to sustain a conviction that flows from it,[185] may lead criminal tribunals to acquit defendants of war crimes charges while still leaving open the possibility that the defendant (and the belligerent state)[186] has actually violated the principle of distinction. Indeed, just because intentionality (as in the ICC) or recklessness (as in the ICTY) are required to meet the burden of proof in a criminal trial,[187] it does not follow that some lower state of *mens rea*—culpable negligence, for example—would not also violate the principle of distinction, even if it does not expose the attacker to criminal culpability in a particular international forum.[188]

Furthermore, a State is perfectly capable of criminally punishing its own soldiers for failing to distinguish, and may use a lower *mens rea* standard to do so. The United States may, for example, determine that a soldier was grossly negligent in failing to distinguish, and pursue criminal charges of negligent homicide,[189] dereliction of duty,[190] or some other charge. The ICRC *Commentary* on AP I makes exactly this point when addressing the *mens rea* requirements for grave breaches: "ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by

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Bogoro, that the attackers made no distinction between UPC combatants and civilians, I strongly reject that this is the only reasonable interpretation of the evidence.

Id. at 185. It is a general principle of international criminal law that both the construction of a rule and the appraisal of evidence must be done in favor of the accused when faced with doubt. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 35 (3d ed. 2013), revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting.

186. *See, e.g.*, arts. 4 and 5 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l L. Comm'n, 53d Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

187. Michael Bothe, 78 LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 173, 185 (2002) (Vol. 78, U.S. Naval War College International Law Studies) ("The definition of war crimes contained in the statute of the permanent International Criminal Court requires intent. Violations of the laws of war committed by negligence are not subject to the jurisdiction of that court. The situation is, however, different with respect to the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY). Any violation of the laws and customs of war comes within the jurisdiction of that court according to Article 3 of its statute.")

188. See BOOTHBY, *supra* note 80, at 176–77.

189. Uniform Code of Military Justice, 10 U.S.C. § 934, art. 134, ¶ 85 (2012).

190. *Id.*, art. 92.

disciplinary sanctions)."[191] The fact that "national legal systems may penalize a mental state that is less grave than the one criminalized at the international level should not be surprising,"[192] given the severe consequences and stigma associated with the commission of international crimes.

The enduring lesson from these criminal cases is that both subjective and objective questions must be asked in order to determine compliance with the principle of distinction. When the evidence allows a court or tribunal to directly determine the subjective state of mind of the attacker, that alone may suffice to establish a violation when the attacker knew the targets were civilian in nature. However, the actions of the attacker must also be objectively reasonable, and a flagrantly unreasonable act may allow the tribunal to draw inferences about the subjective *mens rea* of the attacker from that circumstantial evidence.[193]

B. State Practice: Precautions and Feasibility

International criminal jurisprudence is a valuable tool for assessing the standard to which military decision-makers will be held, but these judgments are necessarily rendered after the fact. It is also vital to determine how States understand their obligations and translate them to their military commanders in advance. In that vein, additional evidence of the LOAC's standard of care may be found in how States describe the standards to which their military commanders will be held, as well as how they interpret one particularly critical component of distinction and precautions—the concept of "feasibility." After all, the attacker is not required to flawlessly distinguish; he must do "everything feasible" to distinguish.[194] The deliberate use of the term "feasible" clearly implies the fact that information will be imperfect and that not all measures to gather information will be practicable. Moreover, in Article 57(2), the word "feasible" is used with respect to both distinction and to measures to minimize collateral damage.[195] The concept of feasibility is thus quite central to compliance with the LOAC.

The ICRC *Commentary* on AP I notes that extensive discussions occurred over the selection of the term "everything feasible," and great

191. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 3474.

192. CASSESE, *supra* note 185, at 53.

193. *Id.* at 57. ("As in national criminal law, in [international criminal law] a culpable state of mind is normally proved in court by circumstantial evidence. In other words, one may infer from the facts of the case whether or not the accused, when acting in a certain way, willed, or was aware, that his conduct would bring about a certain result.").

194. AP I, *supra* note 6, art. 57(2)(a)(1).

195. AP I, *supra* note 6, art 57(2)(a)(i) and (ii).

care was taken to settle on a term that was acceptable to all Parties.[196] When they became Parties to the Additional Protocols, many States included understandings related to feasibility and the nature of the information required to comply with distinction, and some have subsequently incorporated these understandings into their published military manuals and other directives. Even non-parties such as the United States have indicated their understanding of what it takes to comply with these precautions. A survey of the manner in which feasibility and the standard of care has been described in the context of distinction shows a continuing reliance on subjective honesty and objective reasonableness.

The Canadian Ministry of Defence *Manual on the Law of Armed Conflict* identifies the standard of care to which commanders will be held when implementing the principle of distinction, making clear that they "will not be held to a standard of perfection"[197] but rather that any assessment of their conduct will be based on the "circumstances ruling at the time."[198] Canada requires commanders to make targeting decisions based on their "honest judgment"[199] and to give due consideration to that information "reasonably available to them . . . taking fully into account the urgent and difficult circumstances"[200] that are inherent in combat. The Canadian formulation reflects the understanding made by Canada at the time Canada ratified AP I.[201] With respect to the feasibility of measures taken to distinguish, Canada understood the term "feasible" to mean "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."[202]

The *UK Manual* similarly employs both honesty and reasonableness in implementing the principle of distinction. After stating the basic obligation to distinguish, the *UK Manual* notes that "the reliable discharge of this obligation is dependent on the quality of the information available" to the commander at the time.[203] The principle of

196. *See* ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2198. The ICRC notes that many delegations settled on a definition of feasible that meant "everything that was practicable or practically possible." *Id.*

197. *Law of Armed Conflict at the Tactical and Operational Levels, in* CANADIAN JOINT DOCTRINE MANUAL B-GJ-005-104/FP-021 ¶ 418.1 (2001).

198. *Id.*, at ¶ 418.2.

199. *Id.*

200. *Id.*

201. Statements of Understanding Made by Canada at the Time of Ratification Of Additional Protocol I, available at: https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314 (last visited July 15, 2015).

202. *Id.*

203 UK MANUAL, *supra* note 108, at ¶ 2.5.3.

distinction will be honored provided that the commander makes "reasonable efforts to gather intelligence . . . and concludes in good faith that he is attacking a legitimate military target."[204] As with the *Canadian Manual*, the *UK Manual* directly reflects the declaration it made when it ratified AP I: "[m]ilitary commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time."[205] Similarly, the U.K. adopted an understanding of the term "feasible" that was identical in every respect to that made by Canada.[206]

In 2013, Germany published a new version of its *Manual on the Law of Armed Conflict*, which stresses the need for commanders to "do everything feasible to verify on the basis of all information available at the time" that the proposed target is a lawful one.[207] Germany specifically understood the verification requirement to preclude consideration of information discovered only in hindsight.[208] According to Germany, "feasible refers to anything that is practicable or practically possible, considering all circumstances prevailing at a given time, including humanitarian and military considerations."[209]

These positions on feasibility and the requirement to consider reasonably available information are echoed by the United States—albeit as the United States is not a Party to the Additional Protocols, that echo is sometimes more difficult to discern. In public comments regarding the decision not to join the Protocols, several officials with a good view of the rationale for this decision noted that the United States believed that precautions in the attack warranted "all practicable precautions, taking into account military and humanitarian considerations,"[210] and that "commanders . . . necessarily have to reach

204. *Id.*

205. Declaration 'c' Made by the UK at the Time of Ratification of Additional Protocol I (20 Jan. 1998, et. seq.), available at: https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last accessed 19 Sept. 2014).

206. Declaration 'b' Made by the UK at the Time of Ratification of Additional Protocol I (20 Jan. 1998, et. seq.), available at: https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp (last accessed 19 Sept. 2014).

207. Federal Republic of Germany, Ministry of Defense, "Law of Armed Conflict Manual," Joint Service Regulation (ZDv) 15/2, DSK AV230100262 (May 2013), ¶ 416 [hereinafter German Manual].

208. Understanding '4' Made by Germany at the Time of Ratification of Additional Protocol I (14 Feb., 1991), available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStat-es=XP-ages_NORMStatesParties&xp _treatySelected=470 (last accessed 16 Oct. 2014).

209. German Manual, *supra* note 207, at ¶ 412.

210. Matheson, *supra* note 33, at 426.

decisions on the basis of their assessment of the information from all sources that is available to them at the relevant time."[211]

Whatever the reliability of such statements as legal authority,[212] the United States has joined conventions which expressly address distinction and feasibility. For example, Amended Protocol II to the Convention on Certain Conventional Weapons (Amended Mines Protocol),[213] a treaty governing the use of mines and booby-traps, defined feasibility as: "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[214] This has led some authors to conclude that "States [including the United States] used the [Amended Mines Protocol] as an opportunity to define 'feasible' in a manner that reflects the exigencies of military operations."[215] Notably, the United States clarified its understanding that "any decision by a military commander . . . shall only be judged on the basis of that person's assessment of the information reasonably available . . . at the time."[216]

U.S. doctrinal publications only serve to reinforce the primacy of "reasonableness" in complying with the principle of distinction. The U.S. Army's Field Manual on the Law of Land Warfare states that the attacker "must take all reasonable steps to ensure . . . that the objectives are identified as military."[217] The U.S. Navy's Commander's Handbook similarly states that "all reasonable precautions must be taken."[218]

It is striking that these U.S. publications eschewed the word "feasible" in lieu of "reasonable." In its influential Final Report to the Prosecutor, the Committee Established to Review the NATO Bombing Campaign in Kosovo described what "everything feasible" means to an operational commander. "The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential

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211. George H. Aldrich, *Prospects for unitedUnitedunited States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. OF INT'L. L. 1, 18. (1991). *See also* George Cadwalader Jr., *The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References,* 14 YEARBOOK OF INT'L HUMANITARIAN L. 133, 139 (Michael N. Schmitt and Louise Artimatsu, eds., 2011).

212. There is a great deal of dispute as to whether or not the remarks of former officials who had been involved in negotiating AP I can be construed as an authoritative expression of the U.S. position on specific articles of AP I. See Cadwalader, *supra* note 211, at 144.

213. Amended Mines Protocol, *supra* note 42.

214. *Id.*, art. 10.

215. Cadwalader, *supra* note 211, at 154.

216. Declaration II.1(A), Made by the U.S. at the Time of Ratification of the Amended Mines Protocol, *supra* note 42, *available at* https://treaties.un.org/doc/Treaties/1996/05/19960503%2001-38%20AM/Related%20Documents/CN.394.1999-Eng.pdf (last accessed 19 Sept. 2014).

217. Department of the Army, The Law of Land Warfare FM 27-10, ¶ 41 (1956).

218. NWP 1-14, *supra* note 88, ¶ 8.1.

targets. The commander must also direct his forces to use available technical means to properly identify targets during operations."[219]

While everything feasible must be done to distinguish, in the context of distinction feasible simply means those things which are practicable under the circumstances, *including the military situation*.[220] The attacker is not bound to take "non-feasible precautions,"[221] and he may properly include considerations of intelligence reports,[222] past patterns of behavior by enemy forces,[223] the amount of time available to make a determination, and even "the risks to his own forces necessitated by target verification."[224]

Given those qualifications, some authors have questioned how high, in fact, the standard of care truly is. Waxman, for example, suggests that States actually employ a "reasonable effort" standard, balancing the duty to verify targets against the potential costs in time and resources that a more searching distinction analysis might entail.[225] In other words, "feasibility" is simply another way of stating "reasonableness"—those things which a reasonable military commander, in the same circumstances, would be expected to do in order to comply with an obligation to distinguish that is "high but not absolute."[226] The qualified nature of the obligation to distinguish by taking all feasible measures can therefore also be expressed as an obligation to "take all *reasonable* steps" to distinguish.[227] Perfection is neither attainable nor required, because the fog of war must allow for the possibility of honest errors of judgment. "In the final analysis, the determination of feasibility under the law of international

219. Final Rep. to the Prosecutor by the Comm. Est. to Review the NATO Bombing Campaign Against the Fed. Rep. of Yugoslavia, ¶ 29 [hereinafter Final Report to the Prosecutor]. The Committee noted that Article 57 of AP I provides the "practical application" of the principle of distinction.

220. It must be stressed that the ICRC *Commentary* disfavors the inclusion of circumstances "relevant to the success of military operations." ICRC COMMENTARY ON AP I, *supra* note 23, at 2198. The concern expressed in the Commentary is that "by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed here." *Id.*

221. BOOTHBY, *supra* note 80, at 71.

222. *See* UK MANUAL, *supra* note 108, ¶ 5.32.2.c.

223. This particularly means past efforts of the defender to violate his own duty to distinguish, such that "unlawful behavior of the other party to the conflict on this and/or previous occasions may have contributed to" an error in targeting. BOOTHBY, *supra* note 80, at 177.

224. UK MANUAL, *supra* note 108, ¶ 5.32.2.e.; BOOTHBY, *supra* note 80, at 179 (noting that "the attacker's interest in self-preservation of his platform and indeed of the pilot himself is a valid and significant consideration here."). *But cf.* Bring, *supra* note 46, at 47–48, raising concerns about the extent to which the notion of self-preservation as a legitimate military consideration has impacted the ability of States to comply with humanitarian requirements.

225. Waxman, *supra* note 88, at 1387.

226. Final Report to the Prosecutor, *supra* note 219.**Error! Bookmark not defined.**

227. BOTHE, PARTSCH, AND SOLF, *supra* note 83, at 362 (emphasis added).

armed conflict remains 'a matter of common sense and good faith'."[228] This perhaps explains why the U.S. Field Manual and Commander's Handbook have so easily substituted "reasonable" for "feasible" when articulating the standard to military commanders.

Each of the instances cited above, in which States have articulated the standard to which their commanders will be held, contain both subjective and objective elements. The subjective beliefs of the commanders—whether expressed as their "honest judgment"[229] or in terms of a conclusion reached "in good faith"[230]—are clearly relevant considerations, as are the subjective conditions under which they must make their decisions.[231] However, the objective reasonableness of their acts is also a factor; commanders must make "reasonable efforts,"[232] take "all reasonable steps,"[233] and consider all information "reasonably available"[234] to them.

C. Synthesis of Criminal Law and State Practice

Considering the positions taken by States and the decisions of international criminal tribunals with regard to the standard of care required by the duty to distinguish, it is easy to discern a common thread running through the law—subjective honesty and objective reasonableness are the keys to compliance. Moreover, one must examine both the efforts to gather information about the target, and the decision that is ultimately made based on that information. Assessing the targeting decision thus involves both subjective and objective questions, and that subjective-objective test will be applied to both the informational and the decisional components of the process of distinction.[235]

1. Subjective Question: What did the Attacker Honestly Believe?

A subjective analysis of the attacker's compliance with the principle of distinction discerns what the attacker honestly believed about the nature and quality of the information at hand, and about the nature of the target

228. AMW MANUAL, *supra* note 47, commentary accompanying Definition (q), para. 6, at 39 (quoting ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2198).

229. Canadian Joint Doctrine Manual, *supra* note 197, at ¶ 418.2.

230. UK MANUAL, *supra* note 108, at ¶ 2.5.3.

231. Canadian Joint Doctrine Manual, *supra* note 197, at ¶ 418.2.

232. UK MANUAL, *supra* note 108, at ¶ 2.5.3.

233. Department of the Army, *supra* note 217, at ¶ 41.

234 Canadian Manual, *supra* note 197, at ¶ 418.2; Declaration 'c' Made by the UK at the Time of Ratification of Additional Protocol I (20 Jan. 1998, et. seq.), *supra* note 205.

235. *See* Bill, *supra* note 153, at 137 ("[the commander] will be held to a standard of reasonableness, both as to what he should know prior to making his decision, and in the actual decision he makes.").

itself. Logically, this is the first step in the analysis. If the commander actually concluded that his information-gathering efforts were insufficient to resolve his doubt about the nature of the target, or actually believed the proposed target was an unlawful one, then the inquiry stops there. The relevant subjective questions, then, are these: Did the attacker honestly believe that he had sufficient information about the target? Did the attacker honestly believe that further information-gathering efforts were not feasible? And, did the attacker honestly believe that the proposed target was a lawful one?

The first two questions are focused on the informational component of distinction. The attacker must honestly conclude that he has sufficient information to make a decision and that it is impracticable to further refine that information. If he believes he lacks enough information to decide, then he per se continues to harbor doubt, and is bound by the presumption that applies "in case of doubt."[236] If he believes he could resolve this doubt by taking further measures to gather information and believes those measures are feasible, but declines to do so, then he has failed to comply with the required precautions in attack by failing to do "everything feasible."[237]

The final question relates to the decisional component, and again speaks to the state of mind of the attacker. If he honestly believes the target is military—assuming his information-gathering efforts are sufficient—then his subjective state of mind is proper.

Subjective questions about the state of mind of the attacker are often framed in terms of *mens rea*. If he subjectively believed the target was civilian and attacked anyway, he has committed an intentional or willful direct attack on civilian persons or objects. If he believed he lacked sufficient information about the target, or believed he could have further refined that information but did not care to do so, then he has potentially acted recklessly or in a culpably negligent way. Since we are concerned here with what the attacker honestly believed, one must consider whether he was honestly mistaken. In the language of the criminal law, a mistake of fact may excuse otherwise criminal conduct, but such a mistake must be both honest and reasonable.[238] Thus, a subjective inquiry into the honest belief of the attacker is an essential component of an assessment of any mistakes made in targeting.

These subjective questions also provide an opportunity to consider the actual conditions faced by the attacker when gathering information and making targeting decisions. States will judge their commanders'

236. AP I, *supra* note 6, art. 50.
237. AP I, *supra* note 6, art. 57(2)(a)i).
238. Rome Statute, *supra* note 171, at art. 32(1).

compliance with the principle of distinction "taking fully into account the urgent and difficult circumstances" they face in a dynamic and stressful combat situation[239] and not based on perfect hindsight. This is explicit in the Canadian, U.K., German, and U.S. positions that a commander's decision should be judged on the basis of "information *reasonably available* at the time."[240] Tribunals, too, emphasize the need to see the battlefield through the same lens as the attacker. The tribunal trying General Rendulic, for example, took into account "the conditions, *as they appeared to the defendant* at the time."[241]

2. Objective Questions: Were the Attacker's Actions Reasonable?

The objective analysis of compliance is one that is easier to parse into the informational and decisional components of distinction. Whereas the subjective questions addressed the state of mind of the actual attacker, each objective question substitutes a reasonable military decision-maker for the actual attacker in order to determine if his actions were reasonable.

a) Reasonable Efforts to Gather Information

With respect to the informational component, the objective question is: were the attacker's efforts to gather information about the target reasonable, or did he unreasonably ignore additional information that was readily available? As Boothby notes, "if relevant information is reasonably available to [the] decision-maker, he is required to take it into account when determining whether the intended attack would be lawful."[242] The application of a test of reasonableness to the information-gathering

239. Canadian Manual, *supra* note 197, at ¶ 418.2.

240. See *supra* notes 200, 203-205, 216 and accompanying text. These are not the only States to have stressed the necessity of avoiding judgments based on hindsight and focusing instead on the information available to the commander at the time. See., e.g., the understandings made at the time of ratification of AP I by Algeria (understanding feasible to mean those measures feasible in view of "circumstances, information, and means available at the time."); Austria (decisions will be assessed based on the "information actually available at the time."); Belgium (feasible measures to distinguish are those which "can be taken in the circumstances prevailing at the moment, which include military considerations as much as humanitarian ones" and the "only information on which the decision can possibly be taken is such relevant information as is then available and that it has been feasible for him to obtain for that purpose."); Egypt ("commanders . . . make their decisions on the basis of all kinds of information available to them at the time of the military operations."); Germany (a commander will be judged based on "all information available to him at the relevant time, and not on the basis of hindsight."); Italy (feasible means "practicable or practically possible" and commanders will be judged based on "information . . available at the relevant time."); and Spain (a "decision made by commanders . . . cannot necessarily be based on more than relevant information available at the time and which it has been possible to obtain to that effect."). Declarations and Understandings Made at the Time of Ratification of Additional Protocol I are available at the ICRC database at: https://www.icrc.org/applic/ihl/ihl.nsf/ vwTreatiesByCountry.xsp (last accessed 23 Sept. 2014).

241. Hostage Case, *supra* note 144, at 1297 (emphasis added).

242. BOOTHBY, *supra* note 80, at 172.

process is important, because it speaks directly to the overall reasonableness of the decision to target. If the attacker "simply ignores relevant, persuasive, and readily available information that would . . . have caused a reasonable military decision-maker [in the same position] to have decided otherwise,"[243] it calls into question the reasonableness of the targeting decision.

b) Mistake of Fact

As noted above, an honest and reasonable mistake of fact may serve to excuse a mistake in targeting.[244] Whereas the matter of honesty is a subjective question, the matter of reasonableness is an objective one. Reckless disregard or culpable negligence—the "inexcusable failure to take practically possible precautions"[245] or to utterly ignore the duty to affirmatively identify targets as military[246]—cannot be the basis for a reasonable mistake of fact.[247] Depending on the forum, recklessness in targeting may amount to a war crime, whereas culpable negligence may be punishable only under the domestic law of the targeting state. But simple negligence, in the form of "errors of judgment, mistakes, and momentary inadvertence," would not.[248]

c) Reasonable Targeting Decisions

As noted above, the subjective question regarding the targeting decision was simply: did the attacker honestly conclude that the target was a lawful one? However, this subjective inquiry is followed by an entirely *objective* analysis of the decisional component of distinction,[249] in which a "reasonable military decision-maker"[250] is placed in the shoes of the attacker. The objective question is whether a reasonable military decision-maker could have drawn the same conclusion that the actual attacker drew—namely, that the target was a lawful one.

It is not necessary to show that such a conclusion was the *only* possible one to be drawn, because given the same set of data, "different decision-makers may reach differing conclusions as to the legitimacy of an attack, or as to the appropriateness of prosecuting that attack in a particular

243. *Id.*
244. *See supra* note 238.
245. BOOTHBY, *supra* note 80, at 191.
246. ICRC COMMENTARY ON AP I , *supra* note 23, para. 3474.
247. CASSESE, *supra* note 185, at 251.
248. BOOTHBY, *supra* note 80, at 191.
249. *See., e.g.*, Canadian Joint Doctrine Manual, *supra* note 197, at ¶ 418.3 ("The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner, or staff officer do what a reasonable person would have done in the circumstances?").
250. *Id.*

way."[251] It must simply be the case that a reasonable person *could* have drawn the same conclusion. This was the holding by the ICTY in *Galic*, when the Tribunal found that "a reasonable person could not have believed"[252] that his targets were lawful ones.

This same reasoning applies to the matter of "doubt."[253] Doubt is often present in armed conflict, and absolute certainty about whether a person or object is of military character is not required.[254] Since the standard to be applied is that of the reasonable military commander, it follows that in any case of doubt, "[t]he degree of doubt necessary to preclude an attack is that which would cause a reasonable attacker in the same or similar circumstances to abstain from ordering or executing an attack."[255] When the attacker has taken all feasible measures to resolve his doubt and verify the character of the target, and he "reasonably concludes" that it is military, then the decision to target it is a lawful one.[256] What is reasonable will vary with the circumstances and the military situation. For example, when faced with a possible threat that may pose a grave risk to his forces, the commander is entitled to consider the present risk to his own troops as well as the military situation in reaching a conclusion that is reasonable, even in the face of some doubt. The *UK Manual*, for example, explicitly holds that "the rule of doubt does not override the commander's duty to protect the safety of troops under his command or to preserve the military situation."[257]

3. Application in Practice

In sum, any method for evaluating compliance with distinction must consider both the informational component and the decisional component. And with respect to both components, either the wrong subjective state of mind or objective unreasonableness will result in a failure to comply. These subjective and objective questions, applied to the

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251. BOOTHBY, *supra* note 80, at 172; *see also* Final Report to the Prosecutor, *supra* note 240, at ¶ 50, (noting that in close cases, different military commanders may reach different judgments based on the same information. Although this passage referred to the principle of proportionality and not to distinction per se, it has been previously noted that the same standard of reasonableness should apply, and the Final Report suggests that the "reasonable military commander" is the appropriate objective standard against which to measure such judgments).

252. Prosecutor v. Galic, *supra* note 25, ¶ 55.

253. See Part II.A., *supra*.

254. TALLINN MANUAL, *supra* note 17, commentary to Rule 40, para. 8, at 139; AMW Manual, *supra* note 47, commentary to Rule 12(b), paras. 4 and 5, at 91–92.

255. AMW MANUAL, *supra* note 47, commentary to Rule 12, para. 4, at 87; *see also* TALLINN MANUAL, *supra* note 17, commentary to Rule 40, para. 8, at 139.

256. TALLINN MANUAL, *supra* note 17, commentary to Rule 40, para. 9, at 139–140.

257. UK MANUAL, *supra* note 108, ¶ 5.3.4.

informational and decisional components of distinction, can be graphically represented thus:

Figure 1: A Mixed Subjective and Objective Test

	Subjective	Objective
Informational	Did the attacker honestly believe that he had enough information? Did he honestly believe that further information-gathering was not feasible?	Did the attacker take all feasible (objectively reasonable) measures to verify the target? Did he consider all reasonably available information?
Decisional	Did the attacker honestly believe that the proposed target was a lawful one?	Was it objectively reasonable to conclude the target was a lawful one?

Practically speaking, however, it is not always necessary to draw a bright line between the information relied upon and the conclusion drawn from it, as inferences can be drawn from a failure of either to satisfy a test of reasonableness. Just as a failure to consider relevant and readily available information may make the decision to target unreasonable, an unreasonable interpretation of that information may likewise do so.[258]

An obvious point in favor of using a test of reasonableness comes from the fact that the principle of distinction applies to targeting at all echelons of command. As outlined in Part II.C., this means both deliberate targeting at a higher headquarters and the hasty targeting done by frontline combatants. Consider first the decision to target an enemy military headquarters located at a fixed site, done by an operational headquarters several days in advance of the attack and based upon satellite imagery, signals intelligence, and other technical sources of information. Contrast that with the decision to attack a movable target of opportunity, presenting itself for only a few minutes, made by a front-line commander based on his own direct observation. For obvious reasons, it is impossible to develop a one-size-fits-all set of legal requirements for proper information collection and analysis, because the time available, the quality

258. BOOTHBY, *supra* note 80, at 172.

of the information, and the requirement to make a decision to strike vary enormously between the two situations.[259]

For the same reasons, it is impossible to set a particular *quantum* of evidence required to satisfy the requirement for affirmative evidence. While some authors have argued in favor of various analogies to, for example, domestic criminal law burdens of proof, [260] this can at best serve to outline in general terms the contours of what will be considered reasonable.[261] The *quantum* of evidence required must vary depending on the circumstances under which the targeting decision is being made.[262] We should instead be concerned with the *quality* of the evidence—however scanty it may be, what does it tell us about the target that affirmatively demonstrates its lawful status?

Reasonableness is not a threshold; rather, it is an attribute of decision-making that can be judged only in context. A targeting decision based on a particular degree of certainty about a target may be entirely reasonable in one context, but unreasonable in another. While assigning a percentage to certainty is inherently dangerous, consider for the sake of argument a case in which the attacker has 70% confidence that he has identified the enemy. If the proposed target is simply one combat team among hundreds fielded by the enemy, and that group of fighters does not pose an immediate threat, reasonableness may require further information-gathering. On the other hand, if the proposed target is the opponent's battlefield commander, proceeding on 70% confidence may be entirely reasonable. In this case, the value of the target itself provides context that might explain the choice to proceed in the face of some doubt. To take a second

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259. The *UK Manual* notes that in this example, "the former has more time to make up his mind; the latter is more easily able to verify the target." UK MANUAL, *supra* note 108, at ¶ 5.32.2. The Dutch Manual on the law of armed conflict also makes this point explicit: "The extent to which commanding officers and their staffs can be held accountable for compliance with these rulesrules [on precautions in attack] is determined by three factors: freedom of choice of means and methods, availability of information and available time. The higher the level [of command], the stricter the required compliance is." Netherlands, *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0544, *quoted in* 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 359 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CIL STUDY: PRACTICE]. The Netherlands' manual is not currently available to the author in English, hence the reliance upon the ICRC CIL Study's characterization of the relevant language. The clear implication of the Dutch formulation is that at lower levels of command, time and available intelligence may not allow the same measures to be taken to distinguish as might be expected at an operational-level headquarters.

260. *See, e.g.*, Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437 (2012). Corn suggests employing U.S. Fourth Amendment law concepts such as probable cause, clear and convincing evidence, etc. to targeting decisions, by way of analogy.

261. *Id.*, at 461.

262. *See* A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. OF THE RED CROSS 165, 181 (2000) (noting that "[t]he precise degree of care required depends on the circumstances . . . .").

example, the attacker may identify two targets of roughly equal value, with a 70% degree of confidence as to both. However, striking one may be expected to generate a great deal of collateral damage, while striking the other would not. Before even arriving at the proportionality analysis, it may be appropriate for the attacker to conclude that he has not yet taken all reasonable steps to verify the first target—he has not yet met his burden to distinguish and resolve doubt. On the other hand, since the second target carries little risk of collateral damage, the attacker may conclude that 70% confidence is enough to proceed. In this case, it is the risk posed by the possibility of error that changes the calculation of reasonableness. In both cases, context is crucial.

The bifurcation of the distinction process into an informational and a decisional component, and the application of a reasonableness test to both, also provides a method to address the effects of enemy conduct on the ability of the attacker to comply. Consider the case of a NIAC involving the forces of a State fighting against an organized armed group that routinely fails to distinguish itself from the surrounding civilian population. To the extent that this practice is widely understood by the targeting force, it may warrant far greater care on the part of the attacker to gather information in order to carefully distinguish fighters from true civilians. In effect, reasonableness would require greater caution in the information-gathering process under such circumstances. On the other hand, assuming that all feasible measures to gather information about the target have been taken, then the fact that the adversary routinely fails to distinguish himself from civilians may serve to explain or excuse a faulty targeting decision based on that information, since the enemy's conduct will undoubtedly lead to mistakes on the part of the attacker.[263] With respect to the decisional component of distinction, reasonableness may allow for more latitude when considering the consequences of such mistakes.[264]

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263. The ICRC *Commentary* on AP I, when addressing the reciprocal nature of the duty to distinguish, contemplates the fact that an adversary who fails to distinguish himself from civilians will increase the likelihood of civilian casualties.

> Since the adversary is obliged at all times to make a distinction between the civilian population and combatants, in order to ensure respect for and protection of the civilian population, such a distinction must be made possible. If, for example, the invader is confronted by . . . guerrilla forces which are indistinguishable from the civilian population, it is more or less certain that the security of this population will end up by being seriously threatened.

ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 1695. *See also* ROGERS, *supra* note 103, at 129.

264. "A breach of the defender's duty to separate its military forces from civilians does not excuse the attacker from his discrimination and proportionality requirements, but it factors into assessment of whether the attacker's efforts are reasonable under the circumstances." Waxman, *supra* note 88, at 1393.

The subjective-objective test also addresses the question of whether an attacker may rely upon the performance of the duty of distinction by a higher headquarters, or by an observer with a better view of the actual target at the time of the attack. For example, when a pilot is directed to strike a target, he may not personally observe any characteristics of the target that obviously denote its military character. In the case of over-the-horizon weapons launches, he may not even observe the target at all. Can the pilot act upon the order to strike, without independently confirming the character of the target?

It seems logical that the pilot in this instance should be able to rely upon the determination made by others, unless the pilot has better information that indicates that his headquarters or ground controller is wrong. This is exactly the rationale used by scholars writing about air warfare: "the question for the aviator is whether the [superior] commander's determination is evidently faulty in view of what is visible on site."[265] Every echelon of command bears the affirmative duty to distinguish, but that duty is met by an attacker when he reasonably relies in good faith upon the orders of a higher echelon of command or the determination made by a better observer of the target, especially when he lacks independent means to make his own determination of the character of the target.[266] Once again, the virtue of a rule of subjective honesty and objective reasonableness is apparent—the pilot's conduct will be assessed to determine if he acted in good faith, and if it was reasonable to rely upon the determination made by another. If he possessed contrary information such that no reasonable person could have concluded the target was lawful, or if he honestly believed the target was unlawful, he would have violated the principle of distinction.[267]

For a host of reasons then, a mixed subjective-objective test seems well-suited to regulate compliance with the principle of distinction. It has the great virtue of being both flexible and practical, capable of application to all forms of targeting decisions, at all echelons of command, and across the entire spectrum of conflict. Most importantly, it provides a vehicle for assessing targeting decisions in context rather than against some quantitative threshold. Reasonableness is not a quantitative threshold to be crossed, but a quality that must be present in lawful decision-making.

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265. AMW MANUAL, *supra* note 47, commentary on Rule 32(a), para. 4, at 126.

266. *See, e.g.*, TALLINN MANUAL, *supra* note 17, commentary on Rule 53, para. 3, at 167 ("Under these circumstances, the duty of the individual carrying out the . . . attack would be limited to those measures that are feasible in the circumstances.").

267. The *UK Manual* describes this situation very well: "Those who do not have this discretion [that of determining the target or the way it will be struck] but merely carry out orders for an attack also have a responsibility: to cancel or suspend the attack if it turns out that [the attack would violate the law]." UK MANUAL, *supra* note 108, at ¶ 5.32.9.

IV. THE FLAWS OF POSITIVE IDENTIFICATION

Given the parameters which bound the law of distinction, it is difficult to justify the current manner in which the United States attempts to operationalize it: the requirement for the "positive identification" (PID) of a target. PID is defined as "a reasonable certainty that the proposed target is a legitimate military target,"[268] a formulation which seems to impose a standard that is at once both too high and too narrow. On the one hand, the requirement for "positive identification" based on a "reasonable certainty" imposes a much higher and more rigid standard of care than the law requires; the law does not require "certainty." On the other hand, the PID definition is too narrow in that it makes no mention of the informational component of distinction. It makes no reference, in particular, to the requirement that a commander consider information that is reasonably available, nor that he take all feasible steps to gather such information. PID appears to require that the attacker be "positive" and possess "certainty" that the target is lawful, while leaving open the possibility that he arrives at that "certainty" without regard for contrary information that is reasonably available. If this is the manner in which the U.S. gives tactical effect to the principle of distinction, it is no wonder that its application has repeatedly given rise to what one experienced Army lawyer has called "recurring vexing problems."[269]

A. PID was Not Designed for this Purpose

The origins of the term itself should serve to demonstrate its unfitness as a method for implementing the legal principle of distinction. The United States first applied the PID standard during no-fly zone enforcement in Operations Provide Comfort (later Northern Watch) and Southern Watch, following the Gulf War in 1991.[270] In the context of those operations, commanders determined that an extremely high standard for targeting was necessary—"almost a no-mistakes standard," according to a former Staff Judge Advocate for Operation Northern Watch.[271] The

268. *See, e.g.*, OPLAW HANDBOOK, *supra* note 1, at 107, 108 (including the requirement and definition of "Positive Identification" on the Rules of Engagement cards used in Operation Iraqi Freedom); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681, 733 (2014).

269. Marc Warren, *The Fog of Law: The Law of Armed Conflict in Operation Iraqi Freedom*, *in* THE WAR IN IRAQ: A LEGAL ANALYSIS, vol. 86 (U.S. Naval War College International Law Studies) 167, 170 167 (Raul A. "Pete" Pedrozo, ed., 2004).

270. Michael Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, *in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, vol. 85 (U.S. Naval War College International Law Studies) 307, 316 (Michael N. Schmitt, ed., 2003).

271. *Id.* at 316. *See also* DINSTEIN, supra note 4, at 123. Professor Michael N. Schmitt, the author of the article cited in n. 270, previously served as a Staff Judge Advocate in the U.S. Air Force and

no-fly zones, which the U.N. Security Council Resolution (UNSCR) established by implication,[272] were designed to ensure the protection of Kurds and Shiite Iraqis from acts of retaliation by the Hussein regime. They prohibited only the flight of certain Iraqi military aircraft beyond a specific line of latitude.[273] The PID formulation was not designed to distinguish military targets from civilians per se, but rather to distinguish even among various types of military targets, and ensure that only military aircraft that violated the no-fly zone were targeted. Naturally, this heightened standard also protected civilian aircraft, but the rationale for a standard that exceeded the requirements of the LOAC was predicated on other limits to the use of force in this operation—the operational limits imposed by the designated no-fly zones.[274]

There were, perhaps, other concerns that warranted a higher standard for target verification during air operations over Iraq in the 1990's. Fratricide is one example. In 1994, a U.S. Air Force pilot enforcing the no-fly zone mistakenly shot down a U.S. Blackhawk helicopter carrying U.S. Army Soldiers and military members from allied States.[275] The subsequent investigation detailed a series of corrective actions that were taken in response to this incident, including revisions to the rules of engagement and more restrictive procedures for engaging Iraqi helicopters;[276] it must be stressed that this report did not directly lead to the development of the PID threshold, but it is fair to conclude that the incident played a role.[277] There are certainly many valid reasons to be concerned about fratricide, and to implement highly restrictive rules of engagement to prevent it. There may even be legal reasons, as it is possible that a fratricide may

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relied for this proposition on his own experience providing legal advice to commanders enforcing the no-fly zone. *Lessons Learned from Afghanistan and Iraq, Major Combat Operations* 1, 96 (Center for Law and Military Operations, Judge Advocate General's Legal Center and School) (11 Sept. 2001—1 May 2003) [hereinafter CLAMO Lessons Learned: AFG and IR], places the origin of the term specifically in Operation Southern Watch.

272. S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991). Resolution 688 itself makes no mention of the no-fly zones. U.N. S. C. Res. 678, U.N. Doc. S/RES/788 (Nov. 29, 1990) had authorized all necessary means to restore peace and stability in Iraq, and this language, coupled with the humanitarian considerations spelled out in S.C. Res. 688, was relied upon for authority to enforce the no-fly zones. *See* JEREMIAH GERTLER ET AL, CONG. RESEARCH SERV. 7-5700, NO-FLY ZONES: STRATEGIC, OPERATIONAL, AND LEGAL CONSIDERATIONS FOR CONGRESS, R41781 (Mar. 18, 2011), at 5.

273. GERTLER, *supra* note 272, at 2.

274. *See, e.g.*, the various policy and operational considerations relevant to no-fly zone enforcement outlined in Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 LOY. INT'L & COMP. L.J. 727, 775–789 (1998).

275. U.S. GEN. ACCOUNTING OFFICE, GAO/OSI-98-4, REPORT TO CONGRESSIONAL REQUESTERS, OPERATION PROVIDE COMFORT: REVIEW OF U.S. AIR FORCE INVESTIGATION OF BLACK HAWK FRATRICIDE INCIDENT (1997), at 17 [hereinafter GAO REVIEW]; Schmitt, *supra* note 274, at 741.

276. GAO REVIEW, *supra* note 275, at 47.

277. *See supra* note 274, at 741.

constitute negligent homicide under domestic law.[278] However, any such rationale is based on domestic law, on military order and discipline, and on the commander's justifiable concern for the safety and welfare of his troops. The LOAC has nothing to do with fratricide; the LOAC is concerned with balancing military considerations against humanitarian ones,[279] and its protective measures are aimed at protecting civilians and other specific classes of persons and objects, not at protecting combatants from the danger posed by their own friendly forces.[280]

Whatever the initial purposes of the heightened standard imposed by the PID formulation, there is no doubt it was never designed for use in ground combat. It made its way into the ground combat lexicon during operations in Afghanistan from 2002-2003, when commanders struggled to find a way to address "likely and identifiable threats."[281] During a series of meetings between lawyers and operators at U.S. Central Command, the PID standard was selected as the method to employ, although not without reservations on the part of some participants.[282] From that point onward, however, the PID formulation has repeatedly been used to give tactical effect to the principle of distinction in all kinds of combat operations. The Standing Rules of Engagement do not include PID,[283] and since the U.S. Department of Defense Law of War Manual makes no reference to PID,[284] there is no official source available to the general public for the use and definition of the PID formulation. Yet it has still made its way into the lexicon of legal scholars and military practitioners to such an extent that

278. Indeed, the pilots involved in the 1994 fratricide were charged with negligent homicide. Iver Peterson, *Court-Martial Begins in 'Friendly Fire' Deaths in Iraq*, N.Y. TIMES, June 3, 1995, http://www.nytimes.com/ 1995/06/03/us/court-martial-begins-in-friendly-fire-deaths-in-iraq.html.

279. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2206.

280. The LOAC principle of humanity, often referred to as the rule against unnecessary suffering, does serve to protect combatants by limiting the means and methods of warfare to prohibit the use of weapons "calculated to cause," or "of a nature to cause," unnecessary suffering. *See supra* note 6; Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 art 23.e [hereinafter Hague Regulations]; AP I, *supra* note 13, art. 35(2). This rule is unrelated to fratricide prevention, however.

281. Schmitt, *supra* note 270, at 315.

282. Schmitt, *supra* note 270, FN 52 (citing CLAMO Lessons Learned: AFG and IR, *supra* note 271, at 96, FN. 59: "Some [participants in this review] contended that the effort to more precisely define PID with the 'reasonable certainty' qualifier simply added more confusion.").

283. The unclassified portion of CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (2005), which contains definitions of relevant legal and operational principles, is excerpted in the OPLAW HANDBOOK, *supra* note 1, at 84. As noted by CLAMO Lessons Learned: AFG and IR, *supra* note 282, at 97, PID is not a part of the SROE. *But see* sources cited *supra* note 1; PID may not be a part of the SROE, but it has repeatedly appeared on the "ROE Cards" issued to Soldiers and Marines in ground combat operations.

284. Office of General Counsel, Department of Defense, LAW OF WAR MANUAL (2015).

virtually anyone seeking to learn how the U.S. military implements distinction will refer to PID.[285]

B. PID is Misleading and Incomplete

The PID formulation suffers two chief defects, although one is of greater concern than the other. The major defect of the PID formulation is that it appears to uniformly require what one military practitioner has described as "a degree of precision impossible to attain as a matter of course, at least for conventional forces."[286] This is apparent first from the very term "positive identification." The word "positive" implies certainty—that the attacker is absolutely positive his target is military. Admittedly, the word positive is subject to several different interpretations, including simply the opposite of negative. However, one connotation—and at least arguably, the most commonly understood colloquial one—is "completely certain."

This problem is only compounded by the definition that follows, which begins with "a reasonable certainty." This formulation does include the critical word "reasonable." However, it does not use "reasonable" in the right way; by linking it to certainty, it takes on the character of a *quantum*. One is left with the impression that it denotes a *level* of certainty—perhaps short of "absolute certainty," but "certainty" nonetheless. As the preceding examination of the law of distinction shows, the concept of reasonableness does not amount to certainty, or to any specific *quantum* of evidence.[287] Rather, it is a flexible standard that is amenable to use under the full range of conditions that may be present in war. At a high echelon of command, with ample intelligence, surveillance resources, and time to refine the information presented, reasonableness may very well approach certainty. But at the ground level where an individual combatant or a small-unit commander must make decisions

285. The dubious provenance of PID as a method to give tactical effect to the principle of distinction probably explains, in part, why it is so hard to locate sources for it in official publications. It has been restated many times in U.S. joint doctrinal publications, for example, and while most of them are unclassified, they are generally marked "For Official Use Only," and therefore not available to non-military practitioners. The fact that it is so used, however, is made clear by many of the citations in this and other articles on the topic. *See generally*, Laurie Blank, *Extending Positive Identification from Persons to Places: Terrorism, Armed Conflict, and the Identification of Military Objectives*, 2013 UTAH L. REV. 1227 (2013).

286. Warren, *supra* note 269, at 170.

287. BOOTHBY, *supra* note 80, at 94. *See also* BOTHE, PARTSCH, AND SOLF, *supra* note 83, at 183 ("the targeting decision is certainly one which has to be taken in a context of uncertainty. It is unrealistic to require absolute certainty . . . but not requiring absolute certainty is not the same as permitting disregard of the facts.").

under compressed timelines and with perhaps far fewer sources of information, reasonableness requires much less.

Moreover, the fact that reasonableness (in the form of "feasibility") allows for consideration of the military situation,[288] among other factors, means that certainty may not be required even at the highest levels of command. The military situation may make further intelligence collection so impracticable, due to competing demands on surveillance assets arising from pressures on other fronts or to the risk of mission failure that might come from operational exposure, that something far short of certainty may nevertheless be entirely reasonable.[289]

The second problem with the definition is the lack of any reference to what this article has termed the "informational component of the distinction process."[290] The law of distinction requires the commander to first consider such information as is reasonably available, and then to make a reasonable decision in light of that information. The U.S. PID formulation says nothing about the requirement to consider such information as is reasonably available. This is a weaker critique of PID, because it can certainly be argued that "reasonable certainty" implies that all aspects of the distinction process, including information-gathering and decision-making, must be reasonable. But if the purpose of articulating the standard to battlefield commanders is to guide their decision-making, one is hard put to justify leaving such an important component of the distinction process to be inferred. A commander should have the sure knowledge that the "Rendulic Rule" will apply:

> It should be of comfort to him to know that he will not be second-guessed based on information he did not possess or on circumstances he could not predict. On the other hand, he should not be surprised to learn that he will be held to a standard of reasonableness, *both as to what he should know prior to making his decision, and in the actual decision he makes*.[291]

Given the centrality of distinction to the LOAC as a whole, and the need to provide battlefield commanders and their legal advisors with a practical method to implement the principle of distinction, it is vital that the United States use a rule of distinction with all of the required components. It must address the requirement for honesty and reasonableness, it must address the requirement to consider all

288. *See, e.g.*, Amended Mines Protocol, *supra* note 42, art. 10.

289. Michael N. Schmitt and Eric Widmar, *On Target: Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y 21 (2014).

290. Part II.E., *supra*.

291. Bill, *supra* note 153, at 137 (emphasis added).

information reasonably available, and it must *not* appear to hold commanders to a standard far more inflexible than what the law requires.

C. Policy, Not Law: the Danger of Conflation

Rules of engagement, as well as related tactical directives or other instruction, are not always based solely on law. There are many reasons to restrict the use of force, which may include political or policy concerns as well as purely military ones.

> ROE are the primary tools for regulating the use of force. . . . [T]he legal factors that provide the foundation for ROE, including customary and treaty law principles regarding the right of self-defense and the laws of war, are varied and complex. However, they do not stand alone; non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE.[292]

Thus, for example, the rules of engagement or other tactical directives may restrict the use of force in order to avoid fratricide, or in order to avoid actions that, while lawful, may nonetheless have a detrimental impact on operational or strategic goals. The tactical directive first issued by the Commander of the International Security Assistance Force in 2009, wherein General Stanley McChrystal restricted the use of force based on operational concerns, as opposed to legal ones, is a classic example of this.[293] General McChrystal stressed that "excessive use of force resulting in an alienated population will produce far greater risks," which include the risk of "suffering strategic defeats . . . by causing civilian casualties and thus alienating the people."[294] Such directives may thus exceed the minimum requirements of the LOAC.[295]

If the PID formulation reflects policy, and not law, then in the strict sense it is not legally problematic that it rigidly imposes a higher standard than the law requires (although this does not address the critique that PID fails to explicitly address the informational component of distinction). Nonetheless, the longer the United States employs a standard that is higher than the law requires, the harder it will become to retreat from it,

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292. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (2005), *supra* note 285, at 85.

293. HEADQUARTERS, INT'L SEC. ASSISTANCE FORCE, TACTICAL DIRECTIVE, 6 July 2009 [hereinafter TACTICAL DIRECTIVE], available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last accessed 9 Oct. 2014).

294. *Id.*

295. Geiss & Siegrist, *supra* note 67, at 20–21.

and the time may well come when operational imperatives do not warrant adhering to such a high standard.[296]

This same problem has been noted with respect to other statements of U.S. policy on targeting. In 2013, President Obama publicly announced "U.S. Policy Standards" (PPG)[297] for counter-terrorism operations which dramatically increased the standard of distinction, even beyond the PID threshold. According to that policy guidance, use of lethal force against terrorist targets requires "[n]ear certainty that the terrorist target is present" as well as "[a]n assessment that capture is not feasible at the time of the operation" and that "no other reasonable alternatives exist."[298] Just as with the PID formulation, this constitutes policy and not law, and as such it is not necessarily problematic from the purely legal standpoint. However, the "near certainty" standard and the requirement that "no reasonable alternatives exist" derive from international human rights law, not from the LOAC,[299] and this apparent "convergence" of the two bodies of law in U.S. policy arguably "dilutes the clarity" of both bodies of law.[300]

The danger of conflating law and policy is that U.S. practice may solidify over time into a position that, while not quite representing a statement on customary international law,[301] is nonetheless extraordinarily difficult to walk back.[302] By continuing to employ the PID standard, the

296. Some academics, such as Gabrielle Blum, have already begun to consider the potential of applying higher standards of compliance to more powerful States. Gabrielle Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163 (2011). While Blum is careful not to endorse such a "common-but-differential" approach to the rules in the LOAC and confines herself to analysis of the utilitarian and other rationales for such an approach, the fact that such an approach is under consideration suggests that there is already some impetus towards formalizing standards that exceed the current requirements of the LOAC. *Id.* at 217–218.

297. THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, 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 (May 23, 2013), available at: http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf (last accessed 9 Oct. 2014) [hereinafter PPG].

298 *Id.*

299. Naz Modirzahdeh, *Folk International Law and Syrian Airstrikes*, LAWFARE (Oct. 2, 2014), http://www.lawfareblog.com/folk-international-law-and-syrian-airstrikes.

300. Naz K. Modirzahdeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 228 (2014).

301. Customary international law requires both a widespread or nearly universal practice, as well as *opinio juris* (the belief that such practice is required as a matter of law). Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. As such, it is hard to see how U.S. practice can become customary law per se, unless and until enough other States join such practice out of a sense of legal obligation.

302. Indeed, critics of the concerns outlined by Naz Modirzahdeh, *supra* notes 299 and 300, have already pointed out that the U.S. Policy Guidance does not create law, but that we should nevertheless applaud the application of a higher standard as a positive development in State practice.

United States is effectively ceding ground that it may wish to occupy later: for example, if a major conflict with a near-peer adversary poses a real existential threat to the United States. A far better practice, in the view of the author, would be to state and adhere to the standard imposed by the LOAC. Then, when policy or military considerations warrant a departure upward from this standard, that guidance may be couched in a limited way as applying only to the specific operation at issue, and only for such time as is necessary.[303]

Certainty in targeting is a noble aspiration. It is also one that happily aligns with both military and humanitarian considerations.[304] Any military commander would like to be certain of his target every time, and would like to strike it precisely—this is how one achieves decisive effects in war. Resources are scarce, the lives of one's soldiers and the effectiveness of one's military materiel are precious, and in a close-fought contest it is imperative that every blow count by hitting something dear to the enemy. Commanders are also aware of the effects of errant strikes on public perception of the war effort, as well as on morale. Moreover, in the modern era in which wars are often fought amongst the civilian population, commanders understand that every civilian casualty may generate further resistance by the adversary or alienate potential allies. These are all militarily sound reasons for commanders to seek certainty.

> The PPG rules, however, do not purport to reflect any view of what international law requires: Indeed, the whole point is that the PPG imposes restrictions above and beyond what the governing international (or statutory domestic) law requires, as a matter of policy. They are, in Naz's own characterization, "shockingly stringent" norms. From the perspective of humanitarian protection, surely this is an unalloyed positive development, something to be applauded and encouraged rather than second-guessed.

Marty Lederman, *Of So-Called "Folk" International Law and Not-So-Grey Zones*, JUST SECURITY (Oct. 2, 2014), http://justsecurity.org/15830/folk-international-law-grey-zones/. Gabrielle Blum observes the rationale: "Tying the hands of more powerful states in the name of humanitarian concerns, especially when this hand-tying is at the advertised consent of the more powerful, may serve to spread and reinforce humanitarian ideals." Blum, *supra* note 296, at 203. A similar argument for a sliding scale has been advanced by Marco Sassoli, who states, "we must consider abandoning the fiction of the equality of belligerents and require full respect of customary and conventional rules of IHL from the government, while demanding respect only according to their ability from their enemies." Marco Sassoli, *Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?*, 93 INT'L REV. OF THE RED CROSS, 426, 431 (2011). Admittedly, Sassoli's position would involve lowering the standard applicable to non-state actors, rather than raising the bar for powerful states. This is a different argument, but still highlights the potential danger involved in the U.S. publicly championing a higher standard for itself than the LOAC requires.

303. The TACTICAL DIRECTIVE, *supra* note 293, is an example of such a limited and operation-specific measure that raises the standard beyond that which the law requires, but carefully avoids creating the impression that this is now U.S. policy in all conflicts or that it reflects a new U.S. understanding of the LOAC.

304. *See* ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2195.

But certainty is not the law; reasonableness is the law. The PID formulation has confused and conflated the two.

V. AFFIRMATIVE TARGET IDENTIFICATION: THE PROPER FORMULA FOR DISTINCTION

The goal of this article has been to propose a new way for the United States to operationalize the principle of distinction. Parts II and III reviewed the law of distinction, as it is found in treaty and customary international law, international criminal law, and state practice, with a view towards identifying the proper standard of care and the characteristics of distinction that inform it. Part IV argued that the current U.S. formulation of "positive identification" is flawed in several respects, chiefly because it appears to require certainty in targeting rather than reasonableness in information-gathering and decision-making. It now remains to propose an alternative to PID that would cure these defects.

The proposed alternative is "Affirmative Target Identification," defined as "an honest and reasonable belief, based on such affirmative evidence as is reasonably available at the time, that the object of attack is a lawful military target." Both the proposed title of this rule, and its definition, will cure the defects in the current PID formulation. The title is designed to resolve any ambiguities arising from the current use of the word "positive." The definition contains four discrete components, each of which serves a specific purpose and responds to a discrete requirement in the law of distinction. Those four components are: 1) subjective honesty, 2) a reasonable belief, 3) affirmative evidence, based on 4) information that is reasonably available at the time.

The term "Affirmative Target Identification" is selected to replace "positive identification" for several reasons. First, changing the title of this rule is necessary simply to indicate that it is a new standard that replaces PID wholesale, in order to avoid the possibility of confusion that may arise if one simply redefined the current term. After all, in order to give tactical effect to a legal principle, it is important not only to properly state the standard, but also to train commanders and soldiers on how to use it.[305] By eliminating PID entirely, as opposed to merely redefining it, the United States can help ensure that education and training on the new formula is clear and has the desired effect.

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305. Boothby observes that "[if] they are to comply with the law, members of the armed forces need to know what the law requires." BOOTHBY, *supra* note 80, at 483 ("Having set out its understanding of what the law requires, the State is then required to train the members of its armed forces in those legal obligations."). Training and education of the armed forces on the law of armed conflict is required by many LOAC treaties. *See, e.g.*, AP I, *supra* note 6, art. 53; GC III, *supra* note 6, art. 127; GC IV, *supra* note 6, art. 144.

The second virtue of the new title is to do away with the misleading term "positive." By using "affirmative" instead, there is no danger that a commander or soldier would construe the requirement as requiring that he be "positive" or "certain" of the character of the target. The term "affirmative" makes it clear that one particular connotation of the term "positive" is meant: the opposite of "negative." Put simply, the use of "affirmative" in this way suggests that, when considering the character of a target, the commander must be able to answer the question "is the target a lawful one?" in the affirmative.

A. Subjective Honesty

The proposed definition begins by requiring that the attacker hold an "honest" belief. It may be argued that this requirement is so obvious as to not need stating,[306] but in the view of the author, it serves two important purposes. First, it identifies the subjective requirements of the duty to distinguish. The first question that must be asked about an attacker's targeting decision is: what did the attacker honestly believe? This leaves aside the question of whether that belief was reasonable, and focuses solely on what he honestly believed (whether reasonable or not). If he actually believed his target was a civilian person or object, then he has already failed to distinguish and further examination is unnecessary—he has acted unlawfully, because he subjectively believed his target was unlawful. A related question, with respect to how he arrived at his decision, is: did he honestly believe he had enough information, and that further information-gathering efforts were not feasible? Any examination of how an attacker arrived at his targeting decision must address the information he actually relied upon in reaching it. The attacker must honestly believe that he has enough information to attack, and that further efforts to gather information are not feasible under the circumstances. Again, this leaves aside the subsequent examination of whether acting only on that information was reasonable.

Stating the requirement of honesty up front also serves a second purpose, which is to deter an unscrupulous decision-maker from acting in bad faith on the belief that a *post hoc* assessment of the circumstances might conclude the attack was objectively reasonable. It doesn't matter whether someone else might have concluded a target was lawful, if the

306. The requirement of honesty has nonetheless repeatedly been stated, both by States and by tribunals. In the Hostage Case, *supra* note 144, at 1297, the Tribunal referred to Rendulic's "honest judgment" and whether one could "honestly conclude" that the acts were necessary. The *Canadian Manual* on the law of armed conflict speaks to the commander's "honest judgement." Canadian Joint Doctrine Manual, *supra* note 197, at ¶ 418.2. The *UK Manual* requires that the commander "concludes in good faith" that his target is a legitimate one. UK MANUAL, *supra* note 108, at ¶ 2.5.3.

actual decision-maker in question never believed it to be so. The requirement of subjective honesty is fundamental to a lawful targeting decision.

B. Reasonable Belief

The "reasonable belief" component of this new formulation gets to the heart of the matter: was the decision to strike a particular target a reasonable one? This is an objective test, in which a "reasonable military commander" is placed in the shoes of the actual decision-maker in order to determine whether the decision to target was lawful.[307] The mere existence of alternative possible conclusions based on the same evidence does not make a belief unreasonable; it is enough that a reasonable person *could* have reached the same conclusion when in possession of the same information and under the influence of the same factors.[308]

Objective reasonableness is a context-specific and flexible standard, capable of application to both deliberate and hasty targeting decisions, and to decisions made by high echelons of command as well as individual combatants. It allows for consideration of the effects of various battlefield factors, including the deliberate failure of the enemy to distinguish himself from civilians, on the practical ability of the attacker to meet his obligation. Most importantly, it allows for the proper exercise of military judgment by the attacker, while still providing an outer periphery for that judgment, beyond which the attacker may not go.

This is hardly a controversial proposal. The United States and virtually every other State has long recognized that targeting decisions must be reasonable. Rather, it is the effort to somehow quantify reasonableness that ought to be controversial. Seeking to set a 'level' or threshold of certainty is a fool's errand, predicated on the false notion that all possible combat scenarios can be foreseen and accounted for. It wishes away the exercise of judgment and discretion by military decision-makers. Conversely, as two commentators have eloquently put it, "[a]n objectified decision-making standard—the standard of the 'reasonable military commander'—does not curtail a soldier's margin of discretion in the assessment of situational realities but simply forestalls arbitrariness in the exercise of this discretion."[309] It is the *quality* of decision-making that is at

307. It is assessed by the act of substitution so ably performed by the International Military Tribunal in the Hostage Case in deciding the fate of General Rendulic. Hostage Case, *supra* note 144, at 1297.

308. Prosecutor v. Galic, *supra* note 155, at ¶ 55.

309. Geiss & Siegrist, *supra* note 67, at 34.

issue in war, and not any particular threshold of certainty or quantity of evidence.

C. Affirmative Evidence

The requirement for affirmative evidence specifically addresses the fact that the attacker, and not the civilian on the battlefield, bears the duty to distinguish his target. It especially applies in cases of doubt, where there is a rebuttable presumption in favor of civilian status.[310] Affirmative evidence means some actual evidence that the target is a military one, as opposed to "negative evidence," or the lack of evidence to the contrary. In other words, it is not enough that there are no indications that the proposed target is a civilian person or object; the attacker must identify some affirmative characteristic of the target that makes it a lawful one. Affirmative evidence need not mean "direct" evidence; circumstantial evidence may very well suffice. For example, when intelligence indicates an enemy column will move along a particular road at night and a tank commander observes a column of vehicles moving exactly when, how, and in the numbers predicted, it may be entirely reasonable to conclude the column of vehicles is a valid military target.

There is no particular *quantum* of evidence required; the information must simply be sufficient to give rise to a reasonable belief. Depending on the circumstances, including the time available, access to intelligence, and other factors, the duty may be satisfied by only one indicator—but there must be at least one.[311] The requirement is designed to prevent a decision-maker from striking a target solely because he did not see evidence of its civilian character, as well as to prevent a decision-maker from targeting blindly or indiscriminately, in the absence of any evidence whatsoever.

This component of the proposed formulation is perhaps novel. The PID definition does not speak to what *type* of information is required in order to comply with distinction. But the negative definition of civilians and civilian objects in the LOAC can lead to no other conclusion, and thus this component ought not be objectionable. One need only imagine the inverse to see this point: if "civilian" had some positive definition, then it would be lawful to target any person or object that lacked the qualities specified by that definition. The attacker could examine a potential target, and, failing to identify any positive quality that makes the target "civilian," could strike. Under such a legal regime, the civilian desiring to retain the protection of the LOAC would have to take care to make itself identifiable as such. This is clearly not the law. Civilian is defined negatively precisely

310. AP I, *supra* note 6, at art. 50; Prosecutor v. Kordić, *supra* note 36, at ¶ 97.
311. *See* Part III.C.3., *supra*.

to avoid this problem. So long as the status of "civilian" encompasses the entire universe of persons and objects that are *not* military objectives, then the only basis for targeting must be some quality of the proposed target that makes it a military objective. This is what is meant by "affirmative evidence."

D. Reasonably Available at the Time

The final component of this definition addresses the informational component of the distinction process. The subjective honesty requirement has already assessed what information the attacker actually used; the question here is an objective one: what *other* information was reasonably available to him? This speaks to the requirement that the attacker do "everything feasible" to verify the nature of his target,[312] and in that way echoes the Rendulic Rule.[313]

The factor of time is often unfairly discounted when assessing the actions of a military commander. When an attack goes awry, the temptation will often be to ask why the attacker did not take further measures to verify the target, even though that may require additional time. But time is a vital factor in military decision-making. Targets may be fleeting, and the tempo of operations—both one's own operation and the adversary's—may be rapid. Under such circumstances, time is not a luxury that the commander may freely dispense with; time is absolutely of the essence. Time is a "military factor" that is entirely within the scope of the definition of "feasible."

Feasible means "practicable or practically possible."[314] Determination of what is feasible includes consideration of both humanitarian and military factors.[315] Thus, an attacker is not required to consider every possible source of information available, or to perpetually refrain from action until perfect information is obtained. He is required to consider such information as is reasonably available at the moment in which a decision must be made. He is entitled to consider such factors as the practicability of obtaining more or better information, the time required to do so, and the risk that delay may pose to himself or to forces under his

312. AP I, *supra* note 6, at art. 57(2)(a)(i); BOTHE, PARTSCH & SOLF, *supra* note 83, at 362.

313. Bill, *supra* note 153, at 137.

314. ICRC COMMENTARY ON AP I, *supra* note 23, at ¶ 2198; Amended Mines Protocol, *supra* note 42, art. 10.

315. *See, e.g.,* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Nov. 20, 1990, 2014; Canadian Joint Doctrine Manual, *supra* note 197 https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314 (Article 41, 56, 57, 58, 78 and 86 (Meaning of "feasible")); Canadian Manual, *supra* note 197, at ¶ 418.2; Amended Mines Protocol, *supra* note 42, at art. 10.

command.[316] And by limiting consideration of reasonably available information to that information available at the time the attacker had to make the decision, this component avoids the danger of second-guessing based on more perfect hindsight.[317]

VI. CONCLUSION: A NEW RULE, OR THE OLD RULE?

This article demonstrates the flaws in the positive identification standard currently used by the United States to implement the principle of distinction. That term and its definition are confusing and incomplete, in part because positive identification was never intended to become the standard for distinction. Prudence and due consideration for the inherent difficulties that commanders face on the battlefield dictate the use of a formulation that is purpose-built. This article has proposed exactly that.

However, this article also demonstrates that the proposed Affirmative Target Identification rule is not a new standard. It is simply a reaffirmation of the standard that has long existed in international law. Honesty and reasonableness is the standard that international tribunals employ,[318] and that States outlining the standards to which their commanders will be held have repeatedly demonstrated they are willing to use. It is the very essence of the "Rendulic Rule."[319]

This article proposes that the United States abandon the phrase "positive identification" and replace it with the more accurate and more comprehensive one—Affirmative Target Identification. The recently-published DoD Law of War Manual reinforced the U.S. commitment to the principle of distinction, but did not address the PID standard; future revisions to the Manual may provide the opportunity to put forth a new approach.[320] If the United States publishes a revision to its Standing Rules of Engagement, then that document too could be used to promulgate this concept. Whatever the vehicle, the United States should seize the opportunity to do away with the confusing concept of PID and instead embrace the concept of Affirmative Target Identification, defined as an honest and reasonable belief, based on such affirmative evidence as is

316. *See* UK MANUAL, *supra* note 108, at ¶ 5.32.2.e.; BOOTHBY, *supra* note 80, at 179.

317. BOTHE, PARTSCH & SOLF, *supra* note 83, at 279 ("The standard for judging the actions of commanders . . . must be based on a reasonable and honest reaction to the facts known to them from information reasonably available to them *at the time they take their actions and not on the basis of hindsight*.") (emphasis added).

318. As they did in the Hostage Case, *supra* note 144, at 1297, and in Prosecutor v. Galic, *supra* note 25, at ¶ 55.

319. Hostage Case, *supra* note 144, at 1297; Bill, *supra* note 153, at 137.

320. Office of General Counsel, Department of Defense, LAW OF WAR MANUAL, *supra* note 284, §§ 2.5.2, 5.3.2, 5.3.3 (2015).

reasonably available at the time, that the object of attack is a lawful military target.