

The Principle of the Military Objective in the Law of Armed Conflict

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Development and Articulation of the Principle of the Military Objective

In their commentary on the two 1977 Protocols Additional to the Geneva conventions of 1949, Michael Bothe, Karl Josef Partsch, and the late Waldemar A. Solf remark that the definition of the “military objective” in the sense of targets for attack had, until adoption of Article 52 of Protocol Additional I,¹ “eluded all efforts to arrive at a generally acceptable solution.”² This is surprising in that the principle of distinction, from which the principle of military objective is derived, is one of the two ‘cardinal principles’ of the law of armed conflict.³ The principle of distinction itself, although an inherent part of both customary and conventional law governing the conduct of war, did not receive precise articulation in a treaty document until adopted in Protocol Additional I, which states in Article 48 that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects

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and military objectives and accordingly shall direct their operations only against military objectives.

Despite some embryonic intimations of the emergence of the principle in Canon Law's medieval period,⁴ the chivalric codes of the international order of knighthood, and the early war codes of certain European States,⁵ the modern articulation of the principle of distinction had its origins in the late 19th and early 20th centuries, probably under the influence of Rousseau's proclamation that wars were disputes between States and not between peoples. Consequently, military operations should be conducted exclusively between combatants in uniform, and unarmed civilians should be spared in their persons and property.⁶

The principle of distinction had its first formal recognition as such in Professor Francis Lieber's Instructions which were promulgated to the Federal Forces in the United States Civil War by President Lincoln.⁷ Included among its provisions is a recognition that in remote times the universal rule was, "and continues to be with barbarous armies," that civilians and their property were subject to any privation the hostile commander chose to impose.⁸ But the Instructions also recognize that as civilization has advanced:

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.⁹

The Declaration of St. Petersburg of 1868¹⁰ tacitly recognized this principle, stating in its Preamble that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy." This sentiment was also expressed in the Final Protocol of the Brussels Conference of 1874.¹¹

The *Oxford Manual* (of 1880), in its first article, states, "The state of war does not admit of acts of violence, save between the armed forces of belligerent States."¹² An explanatory statement immediately

following the article notes that “[t]his rule implies a distinction between the individuals who compose the “armed force” of a State and its other *ressortissants* [nationals].”¹³ Despite these advances toward adoption of this principle of distinction in a conventional instrument, the Hague Conventions of 1907 gave only limited and implied respect to the principle. Without specific reference to the principle of distinction or the concept of the military objective, a number of provisions explicitly require respect for the person and property of noncombatants. Article 25 of the Regulations Annexed to Hague IV¹⁴ prohibits bombardment of undefended places in land warfare, as does Article 1 of Hague IX for naval bombardments.¹⁵ In both land and naval bombardments, the commander ordering the bombardment is normally required to give notice prior to the start of the bombardment.¹⁶ In both cases, the commander must take all necessary steps to spare, “as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”¹⁷ Proscriptions against harming inhabitants and taking their property without compensation are found in a number of places in Hague IV.¹⁸

The first explicit reference to the “military objective” as a concrete rule of warfare is found in the 1923 *Hague Rules of Air Warfare*.¹⁹ Article 24(1) of the Rules states:

Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

Although the *Hague Rules* were never adopted in a treaty instrument, they were regarded “as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting point for any future steps in this direction.”²⁰ At least insofar as the definition of “military objective” contained in the rules is concerned, Lauterpacht’s prediction was, as we shall later see, prescient.

Although the international community undertook a major effort in 1949 to bring up to date the international rules for the protection of

the victims of armed conflict, the project was directed primarily to the protection of the victims of war and did not include an attempt to modernize the *Hague Rules* or other conventions dealing with the means and methods of warfare.²¹ As a consequence, the International Committee of the Red Cross (ICRC), in an effort to fill what it believed was a gap in the humanitarian law of armed conflict, prepared Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. The Draft Rules were submitted to the XIXth International Conference of the Red Cross in New Delhi in 1957, which approved them in principle.²² When governments failed to follow up on the draft, the ICRC, at the XXth Conference in Vienna in 1965, proposed the reaffirmation of certain basic principles, which were adopted as Conference Resolution XXVIII. The resolution provided, *inter alia*:

All governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.²³

Soon thereafter the General Assembly of the United Nations became interested in the efforts of the ICRC and adopted a series of resolutions along the lines of Resolution XXVIII, the most significant, insofar as our subject is concerned, being Resolution 2675 (XXV). It stated that the General Assembly affirmed certain basic principles of the law of armed conflict, including:

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations....
4. Civilian populations as such should not be the object of military operations.²⁴

These movements toward a codification of the principle of distinction and defining the military objective received further impetus from a resolution adopted by the Institute of International

Law at Edinburgh in 1969. This Resolution reaffirmed the “fundamental principle” of the obligation of parties to observe the principle of distinction and defined military objectives as only those objects:

which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.²⁵

The culmination of efforts by the ICRC and others to modernize and amplify the 1949 Geneva Conventions was the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), convened by the Swiss Government in 1974. The Conference met in four annual sessions and in 1977 adopted two Protocols Additional to the Geneva Conventions of 12 August of 1949. The first is applicable to international armed conflicts and the second to non-international armed conflicts. Only the former is of interest to us, in that it contains explicit provisions concerning the principle of distinction and the concept of the military objective.²⁶

As a result of the deliberations of the CDDH, the international community has for the first time in a treaty document adopted a specific and explicit articulation of the principle of distinction and its derivative principle of the military objective. Protocol Additional I (as of September 1977) has now entered into effect for 148 States.

Although some aspects of the two principles are reflected in a number of articles in Protocol Additional I,²⁷ they are expressly set forth in two articles, Article 48, set forth above, and Article 52. The latter reads as follows:

Article 52 - General Protection of Civilian Objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.²⁸

It is noteworthy in the foregoing articulation of the definition of the military objective that it follows closely the definition contained in Article 24 of the 1923 *Hague Rules of Air Warfare*, although it is amplified in several respects, reflecting particularly the additional ideas expressed in the Edinburgh Resolution of the Institute of International Law.²⁹ Article 52, in essence, provides a two-pronged test for whether objects are military objectives. The first prong is that they must, by their “nature, location, purpose or use,” make an effective contribution to military action. The second is that their total or partial destruction, capture or neutralization must, in the prevailing circumstances, offer a definite military advantage.

It should also be noted that in Protocol Additional I, the words “whose total or partial destruction, capture or neutralization” have replaced “destruction and injury,” and the words “substantial, specific and immediate” of the Edinburgh Resolution have been replaced by the less specific “definite.”

The term “attacks” is also used in a broader sense than is traditionally meant in military parlance, where the term was generally used to describe the use of military force in an offensive action, particularly the launching of weapons against the enemy. As defined in Article 49, “‘Attacks’ means acts of violence against the adversary, whether in offense or in defense.”

Although the section of Protocol Additional I concerned with attacks does not apply to naval warfare, except insofar as attacks from the sea or air may affect the civilian population, individual civilians, or civilian objects on land,³⁰ many modern navies have the capability and are often employed to conduct attacks on land targets by naval artillery or missiles or by their air arms. Thus, this section of Protocol Additional I is explicitly applicable to this aspect of naval warfare.

For armed conflict at sea generally, however, there has been no modern counterpart to the codification effort reflected in the events leading up to and the convening of the Diplomatic Conference which resulted in the two Protocols Additional of 1977. Consequently, there has been no explicit incorporation of the principle of the military objective into conventional law applicable to armed conflicts at sea. The closest approach to that process has been the series of Round Tables convened by the International Institute of Humanitarian Law of San Remo, Italy, from 1988 to 1994, whose purpose was to provide a contemporary restatement of international law applicable in armed conflicts at sea.³¹ The *Manual* that resulted from the deliberations of the Round Tables was not envisaged as a draft convention but was viewed by participants in the Round Tables as a modern equivalent of the *Oxford Manual* on the Laws of Naval War Governing the Relations between Belligerents adopted by the Institute of International Law at Oxford in 1913.³² The *San Remo Manual* adopts essentially *in haec verba* the definitions of the principles of distinction and of the military objective found in Protocol Additional I. The relevant provisions are included in a Section entitled “Basic Rules” and provide that:

39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.

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

41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.

The Principle of the Military Objective as a Part of the Customary Law of War

Since the United States has not ratified Protocol Additional I, and the *San Remo Manual* does not of itself have any binding effect on States, it is necessary to examine whether the principles of distinction and the military objective have become rules of customary international law, and, in particular, whether the United States recognizes them as such. To state the proposition another way, are Protocol Additional I and the *San Remo Manual* principles of distinction and the military objective declaratory of customary international law? If they are, then they are binding on States not party to Protocol Additional I, not as treaty obligations, but as customary norms of identical content.

According to the *Restatement*, customary international law results from a concurrence of two elements: (1) a general and consistent practice of States; and (2) a sense of obligation on the part of States to adhere to the practice.³³

With respect to the first element (practice), acts which may constitute State practice include diplomatic instructions, public measures, and official statements of policy. They may also include acquiescence in acts of another State.³⁴ The practice required to establish a norm of customary law must be general, but not necessarily universal. It should reflect "wide acceptance among the states particularly involved in the relevant activity."³⁵ As to deviations from the practice, the U.S. Navy's Commander's Handbook on the Law of Naval Operations states:

Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule is no longer regarded as valid.³⁶

With respect to the second element (sense of obligation or *opinio juris*), explicit evidence of a sense of obligation is not necessary, but

is certainly helpful. Some of the same “acts” that demonstrate a general practice also serve to indicate that a State is acting out of a sense of obligation and not just as a matter of courtesy or habit.³⁷ With respect to the law of armed conflict, inclusion of a rule in a State’s military manuals is persuasive evidence that the State regards the rule as obligatory.³⁸ Statements by government officials, even those spoken in their private capacities, are helpful. A noted authority and judge of the International Court of Justice has stated:

The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.³⁹

A number of statements, both official and unofficial, by spokesmen for the United States Departments of State and Defense, spoken primarily in the context of an examination of Protocol Additional I and the U.S. Decision not to ratify it, have suggested that the U.S. regards the principles of distinction and the military objective, as articulated in Protocol Additional I, as customary international law.⁴⁰

Most persuasive insofar as the United States is concerned is the opinion of the General Counsel of the Department of Defense, concurred in by the Army, Navy, and Air Force Judge Advocates General, that the United States recognized as “declaratory of existing customary international law” the general principles of the law of armed conflict stated in General Assembly Resolution 2444.⁴¹ Those principles include:

- (b) that it is prohibited to launch attacks against the civilian population as such, and
- (c) that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible.⁴²

As we have seen, incorporation in national military manuals is a strong indication that a normative principle has matured into

customary international law.⁴³ Internationally, the strong indications from military manuals are that the principle of the military objective, as formulated in Articles 48 and 52 of Protocol Additional I and paragraphs 39 and 40 of the *San Remo Manual*, is recognized as a norm of customary international law. The current German military manual provides:

441. Attacks, i.e., any acts of violence against the adversary, whether in offence or in defence, shall be limited exclusively to military objectives.

442. Military objectives are armed forces—including paratroops in descent but not crew members parachuting from an aircraft in distress—and objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction or neutralization, in the circumstances ruling at the time, offer a definite military advantage.⁴⁴

The *Australian Operations Law Manual* for air commanders contains similar provisions:

An aerial attack must be directed against military objectives. . . . Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action. To be lawful, any attack on such objective should result in a definite military advantage.⁴⁵

The *Canadian Draft Manual* also adopts the Protocol I definition of the military objective essentially verbatim. It provides:

Military objectives are combatants and insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴⁶

Two United States manuals are also pertinent to our inquiry, those of the Air Force and Navy/Marine Corps/Coast Guard.⁴⁷

Although predating the actual signing of Protocol Additional I by one year, the United States Air Force operational manual apparently took into account the ongoing negotiations in the CDDH, for its provisions on the principle of distinction and the military objective are taken almost verbatim from the final provisions of the Protocol. It provides:

In order to insure respect and protection for the civilian population and civilian objects the parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives. Attacks must be strictly limited to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their own nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization in the circumstances ruling at the time offers a definite military advantage.⁴⁸

The *Navy/Marine Corps/Coast Guard Manual*, the most recent revision of which is dated 1995, although pointing out that the United States is not a party to Protocol Additional I,⁴⁹ nevertheless has also adopted, with one variation, the Protocol Additional I formulation of the principle of the military objective. It states, in a chapter entitled "The Law of Targeting:"

Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's *war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.⁵⁰ [emphasis added]

The emphasized part of the foregoing quotation was the object of considerable debate in the San Remo Round Table, which specifically rejected it in favor of the formulation in Article 52 of Protocol Additional I. As stated by Louise Doswald-Beck, who acted as rapporteur for the sessions of the Round Table and was the editor of the *San Remo Manual "Explanation:"*

The majority [of the Round Table] felt that the *Handbook* does not take into account developments in the law relating to target discrimination since the Second World War. In particular, they feared that "war-sustaining" could too easily be interpreted to justify unleashing the type of indiscriminate attacks that annihilated entire cities during that war.⁵¹

An annotation to a previous edition of the *Commander's Handbook* stated that, "This variation of the definition contained in Protocol Additional I, Article 52(2) is not intended to alter its meaning, and is accepted by the United States as declarative of the customary rule."⁵² In the current draft revision of the *Annotated Supplement*, the annotation is revised to state that, "This definition is accepted by the United States as declarative of the customary rule."⁵³ The inference that one may draw from this change in wording is that the United States (at least its naval arm) has rejected the presumptively narrower definition contained in Article 52 of Protocol Additional I in favor of one that, at least arguably, encompasses a broader range of objects and products. In justifying this position, the *Annotated Supplement* cites the American Civil War-era decision of the United States with respect to the destruction of raw cotton within Confederate territory, the sale of which provided funds for almost all Confederate arms and ammunition. It also cites the twelve "target sets" for the offensive air campaign of Operation Desert Storm.⁵⁴ The text of the *Handbook* itself states that, "Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked."⁵⁵

From the foregoing, it would appear that there is a consensus, in which the United States concurs, that the principle of the military objective has become a part of customary international law for armed conflict at sea, as well as on the land and in the air. We shall in the

next section examine what objects the term “military objective” embraces and attempt to discern whether the variation in terminology in the U.S. naval manual does in fact suggest a broadening of the scope of permissible targets for attack.

The “Reach” of the Term, “Military Objective”

In earlier centuries, when wars were generally fought with limited objectives and the boundaries between armed forces and the civilian population were clear, the distinction between military objectives and civilian objects was reasonably apparent. Only in the immediate vicinity of the battle was the civilian populace put in jeopardy by the fire of the contending armed forces. The problem of protecting objects which were not legitimate military objectives could be met by prohibitory rules exempting particular categories of objects, buildings, or installations such as churches, hospitals, and buildings used for charitable or scientific purposes, etc. This was the pattern followed in the *Hague Rules*, for example.⁵⁶ In modern warfare, however, with the tremendous increase in the range and sophistication of weapons and with the mobilization of the populace in support of modern armies, navies, and air forces, the distinction is not nearly as evident. In the two World Wars of this century, the economies of all of the major parties involved were completely mobilized in support of the war effort. Nearly all industries were converted to war production; all power-generating stations provided power for war industries; and the bulk of the adult population was engaged in some activity connected with the war effort. At the same time, the capabilities of the contending forces to strike targets deep in enemy territory, primarily through their air forces, were vastly expanded. As a result, both Allied and Axis powers conducted “strategic” bombing campaigns against the industrial bases of their enemies which, because of the limitations on the accuracy of nighttime and high-altitude bombing at that time, could hardly be said to have discriminated between valid military objectives and the civilian population and property in the vicinity of the military objective that was the target of the bombing.⁵⁷

Nevertheless, most twentieth century international conflicts, particularly those occurring since World War II, have not been of the magnitude and geographic scale of the two World Wars. Most were

undeclared and fought with limited objectives. Although geographically confined to relatively small areas, the fighting was just as intense as in the two World Wars. The Korean, Vietnam, and Gulf Wars in which the United States was engaged were certainly intense, but had little if any physical effect on populations and objects outside the immediate area of conflict. The Falklands/Malvinas war between Great Britain and Argentina was likewise limited. The differences in the intensity and scope of conflicts have led some commentators to suggest that there should be a flexible definition of the military objective, allowing it to expand and contract “according to the intensity, duration, subjects, and location of the armed conflict.”⁵⁸ Both Protocol Additional I and the *San Remo Manual* reject this idea, providing that the same criteria apply in general and limited wars, although the *San Remo Manual* “*Explanation*” recognizes that “the application of these rules to the facts should result in a more restrictive approach to targeting in limited conflicts.”⁵⁹

Rather than follow the traditional pattern of establishing prohibitory rules setting forth what objects were to be protected from hostile action, however, the conference at which the 1977 Protocols Additional were negotiated adopted a formula that provides criteria by which a responsible military commander can determine, under the circumstances existing at the time, which objects are legitimate targets for attack. As we have seen earlier, this resulted in the two-pronged test of Article 52, namely, that, to constitute military objectives, objects must, by their “nature, location, purpose or use” make an effective contribution to military action and that their total or partial destruction, capture, or neutralization must, in the prevailing circumstances, offer a definite military advantage. Since this approach was a departure from the traditional practice of writing prohibitory rules specifying which objects were to be spared, it met considerable opposition at the outset of the negotiations in the CDDH.⁶⁰ This opposition was eventually overcome by inclusion of the first sentence of Article 52, which, in the traditional codification pattern, is prohibitory in nature, albeit without listing exempt objects specifically. The second sentence, upon which we shall focus our discussion, gives the commander a two-prong test for determining which targets are legitimate.

The first prong of the Article 52 test, as well as the San Remo test, states four conditions—nature, location, purpose, and use—which, if they make an effective contribution to military action, make an object a military objective. Some objects, “by their nature,” are military objectives and remain so at all times, regardless of their location or use. Examples of such objects include enemy warships, military aircraft (unless exempt under some specific exception such as those applicable to medical transports), stocks of ammunition, and combatant personnel.⁶¹ On the other hand, the vast majority of objects become military objectives only during the time that their particular location, purpose, or use provides an effective contribution to military action. Civilian buildings, for example, may become military objectives if they are being used by enemy troops for shelter. Their “location” may make them military objectives if they obstruct the field of fire for attack on another valid military objective. Factories making civilian goods are not normally military objectives, but if they are converted to manufacture war goods, their purpose and use may make them military objectives. The *ICRC Commentary* suggests that “*purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function.”⁶² Civilian transportation hubs may also be important military transportation links, and their dual use (civilian/military) does not exempt them from becoming military objectives, although under these circumstances the time of attack should be taken into account to minimize civilian casualties.⁶³ Bothe *et al.* state succinctly:

The objects classified as military objectives under this definition include much more than strictly military objects such as military vehicles, weapons, munitions, stores of fuel and fortifications. Provided the objects meet the two-pronged test, *under the circumstances ruling at the time* (not at some hypothetical future time), military objectives include activities providing administrative and logistical support to military operations such as transportation and communications systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict.⁶⁴

The second aspect of the first prong of the test which must be examined is whether the nature, location, purpose, or use of the object makes an effective contribution to “military action.” As we saw above, the U.S. naval *Commander’s Handbook* substitutes the phrase “enemy’s war-fighting or war-sustaining capability” for “military action.” Is there an actual substantive difference in meaning, or is there merely a difference in perception?

Any difference between the two formulations would seem to come down to the term “war-sustaining” in the *Commander’s Handbook*. The term “war-fighting” is equivalent to the Protocol Additional I term “military action.” On the other hand, “war-sustaining” implies something not quite so directly connected with the actual conduct of hostilities.

The San Remo Round Table specifically addressed the issue of whether to adopt the formulation used in Article 52(2) of Protocol Additional I or that contained in the *Commander’s Handbook*. It concluded that the *Handbook’s* phrasing was too broad and might justify indiscriminate attacks on entire cities.⁶⁵ The suggestion that the latter formulation might justify attacks on entire cities seems to be an exaggerated claim. Nowhere in the *Commander’s Handbook* is there any suggestion that this phrasing would open the way for unrestricted attacks on cities or other population centers. In discussing what objects are included within its definition, the *Manual* states that in addition to targets having obvious military value, military objectives may include:

enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked.

This explanation does not differ materially from the authoritative interpretation of Article 52(2) by Bothe *et al.*, who suggest:

Military objectives must make an “effective contribution to military action.” This does not require a direct connection with combat operation such as is implied in

Art. 51, para. 3, with respect to civilian persons who lose their immunity from direct attack only while they “take a direct part in hostilities.” Thus a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party’s overall war effort.⁶⁶

The *San Remo Manual*, although adopting the Article 52(2) phrasing, nevertheless acknowledged that a civilian object may become a military objective and thereby lose its immunity from, “deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military part of a party’s overall war-fighting capability.”⁶⁷

Probably the only point of difference between the San Remo formulation (which adopts the Article 52(2) phrasing) and that in the *Commander’s Handbook* is with respect to attacks on exports that may be the sole or principal source of financial resources for a belligerent’s continuation of its war effort. In support of the possible legitimacy of such attacks, the *Commander’s Handbook* cites the denial of claims for destruction of British-owned cotton exports from the Confederacy during the American Civil War by an Anglo-American arbitration tribunal.⁶⁸ It also raises the question whether Iraq’s attacks on tankers carrying oil from Iran during the 1980-88 Gulf War may have been justified under the same theory, although it admits that the law on this subject “is not firmly settled.”⁶⁹

The San Remo Round Table, however, firmly rejected the broadening of the military objective to include such targets, “because the connection between the exports and military action would be too remote.”⁷⁰

The second prong of the two-part test provided in Article 52(2)—that the total or partial destruction, capture, or neutralization of the object, in the circumstances ruling at the time, offers a definite military advantage—although incorporated *in haec verba* in the various national manuals and the *San Remo Manual*, has received little attention from commentators. Bothe *et al.* provide the seminal commentary on the subject, stating:

The term military advantage involves a variety of considerations, including the security of the attacking force. Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object.⁷¹

Although Article 51, paragraph (1)(b) and Article 57, paragraph 2(a)(iii) use the more restrictive term “concrete and direct” military advantage, the documents of the CDDH do not disclose the reasons for using different expressions.⁷² Examining the context of the expressions in the three articles, however, it appears that the purpose of using the arguably more restrictive phrase, “concrete and direct,” in Articles 51 and 57 was to provide a less subjective test for applying the rule of proportionality where there was a danger of civilian casualties or damage to civilian objects in a projected attack.⁷³ On the other hand, Article 52, paragraph 2 is concerned only with defining what objects are military objectives. Of course, should the attack on a legitimate military objective involve the possibility of collateral damage to civilians or civilian objects, the arguably more stringent restriction would apply.

The Application of the Principle of the Military Objective to Armed Conflict at Sea

As we have seen above, the term “military objective” received no precise definition in a treaty document until 1977, when Protocol Additional I included one for armed conflict on land (and for attacks on land targets by naval or air forces).⁷⁴ Although this definition does not apply of its own force to States not party to the 1977 Protocol, we have also seen that the principle of the military objective, essentially as articulated in the 1977 Protocol, has been acknowledged to have been assimilated into customary international law.⁷⁵ There also seems

to be no question that it is also a principle of the law of armed conflict applicable to armed conflict at sea.⁷⁶

Despite its relatively recent articulation in its present terminology as a concrete principle of the law of armed conflict at sea,⁷⁷ the concept of the military objective, often referred to as the “law of targeting” or a subdivision thereof,⁷⁸ is reflected in many of the customary rules that have developed in the conduct of naval warfare over the past two centuries—particularly those that apply to what has come to be known as economic warfare.

Just as in land warfare, in warfare at sea, whether a person or object is a legitimate object of attack or is protected from attack depends, in the case of persons, on whether they are combatants or noncombatants (or civilians in the words of Protocol Additional I), and in the case of objects, on whether or not they make an effective contribution to the enemy’s war effort (military action in the words of Protocol I; war-fighting or war-sustaining capability in the words of the *Commander’s Handbook*). Prior to the twentieth century, the distinction was relatively clear. Warships and naval auxiliaries were legitimate objects of attack. Merchant ships and their crews, whether enemy or neutral, were not.

On the other hand, private property at sea had never had the protection from seizure by the enemy that it enjoyed in land warfare. Under the doctrines of blockade and contraband, goods destined for (and in the case of blockade, being shipped from) an enemy port were subject to capture and condemnation by prize courts. The traditional method of enforcing these doctrines was to stop a suspect merchantman and exercise the right of visit and search. Only if the vessel resisted visit and search, was sailing in an enemy convoy, or attempted to run a blockade was it subject to attack.

The advent of the submarine and aircraft and the measures adopted by the adversaries to counteract these new means of naval warfare changed the traditional law forever and irrevocably. Neither submarines nor aircraft were capable of conducting visit and search in the traditional manner. As a consequence, in World War I, German submarines (and to a limited extent aircraft) attacked enemy and neutral merchant ships without warning. The Allied forces in turn armed their merchantmen, formed them into escorted convoys, and generally incorporated their merchant fleets into the war effort.

During the interwar period, the former Allied States sought to outlaw the use of submarines as commerce raiders through a series of diplomatic moves, culminating in the London Protocol of 1936,⁷⁹ which purported to apply the same rules to submarines that were applicable to surface warships. These diplomatic efforts proved fruitless, however, and World War II saw a repetition of the practices of World War I in an even more widespread and cruel manner.⁸⁰

As a result of the practices of both the Axis and Allied powers in World War II, and the assessment of those practices by the Nuremberg Tribunal in the case of Admiral Karl Doenitz,⁸¹ a consensus seems to have been achieved among publicists and national military manuals that although the 1936 London Protocol retains its validity, the realities of modern warfare, particularly global warfare, make it inapplicable in most situations. This consensus is perhaps best expressed in the recent *San Remo Manual*, which provides that enemy merchant ships may be attacked only if they have become military objectives and states that the following activities may render them military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) sailing under convoy of enemy warships or military aircraft;
- (e) refusing an order to stop or actively resisting visit, search or capture;
- (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defense of personnel, e.g., against pirates, and purely deflective systems such as 'chaff;' or
- (g) otherwise making an effective contribution to military action, e.g., carrying military materials.⁸²

Other manuals state the rules somewhat differently, but in essence prescribe similar standards.⁸³ The *San Remo Manual* treats neutral merchant vessels separately, excluding being armed from the list of activities rendering them military objectives and adding refusal to stop or resisting visit, search, and capture.⁸⁴ The *Manual* explicitly states that the mere fact that a neutral vessel is armed does not provide grounds for attack.⁸⁵ The U.S. manual is the most permissive of the manuals examined in that it includes, as a final activity, authorizing attack on enemy merchant vessels, “. . . [i]f integrated into the enemy’s war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.”⁸⁶ This latter provision has been subjected to severe criticism by Frits Kalshoven, who points out that the adoption of Protocol Additional I in 1977 vindicated the view, at least for land warfare, that contribution to the “war effort” is too broad a test for determining whether an object has become a military objective. He suggests that the same should be true in naval warfare.⁸⁷

When the development of aircraft technology reached the point at which air transportation became a factor in international commerce, the international community attempted to adopt the same principles for civil aircraft that were applicable to merchant ships. This was first manifested in the 1923 *Hague Rules of Air Warfare*,⁸⁸ which, with respect to civil aircraft, closely mimic the rules applicable to merchant ships.⁸⁹ Although the *Hague Rules* were never adopted in binding form, they have influenced the development of the law in this field, and the military manuals generally follow the pattern established in 1923. They have likewise adopted the view that activities conducted by them similar to those that would make merchant ships military objectives would also convert civil aircraft into military objectives. Again, turning to the *San Remo Manual* as the typical manifestation of this pattern, it provides that aircraft engaging in any of the following activities will render them military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring

- acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
- (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refueling military aircraft;
- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) flying under the protection of accompanying enemy warships or military aircraft;
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent aircraft;
- (f) being armed with air-to-air or air-to-surface weapons;
- or
- (g) otherwise making an effective contribution to military action.⁹⁰

Because attacks on civil airliners are likely to cause injury or death to embarked civilians, they are exempted from attack while in flight, except in situations in which their conduct is clearly hostile.⁹¹

As we have seen, the principle of the military objective, though slow in coming to recognition as currently articulated in Protocol Additional I and current military manuals, has been imbedded in the law of armed conflict for several centuries. It appeared in numerous nineteenth and twentieth century documents in the form of prohibitions against attacks against certain categories of persons and objects such as undefended towns, churches, hospitals, historic buildings, noncombatant personnel, and combatant personnel who were *hors de combat*. The 1977 Protocol led the way in converting the principle from a list of prohibited targets to a more usable concept for a military commander in appraising whether a particular object or

person could be lawfully attacked. Both the old-style negative list of prohibited targets and the new-style permissive principle of defining the military objective have their drawbacks. The former allowed the literal-minded commander to assume that unless a prospective target was on the prohibited list, he could attack it, perhaps downplaying the related principles of collateral damage, avoiding causing unnecessary suffering, etc. The two-prong test of the latter gives the commander a great deal more discretion and requires the commander to balance the value of the target against the military advantage to be gained from its destruction or capture, obviously importing the relative question of proportionality into the equation. It must be remembered, however, that the old prohibitions have not been excised by the adoption of the new standard of the military object. They remain in effect in the various Hague Conventions of 1907, the Geneva Conventions of 1949, and the treaties for the protection of artistic, scientific, and historic monuments and institutions.⁹² When properly applied, the two-prong test adds an additional layer of protection to those objects and persons who should not and do not constitute legitimate military objectives.

The general acceptance of the principle of the military objective into customary international law, essentially as articulated in Protocol Additional I, marks a step forward in promoting the humanitarian goals represented in the law of armed conflict.

Notes

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, published by the Swiss Federal Political Department, Sept. 26, 1977, at 115-183, *reprinted in* THE LAW OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler and Jiri Toman eds., 3d ed. 1988) [hereinafter Protocol Additional I and Schindler and Toman, respectively].

2. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 1949 321 (1982) [hereinafter BOTHE ET AL.].

3. Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, at 28 [hereinafter ICJ Advisory Opinion on Nuclear Weapons], *reprinted in* 35 I.L.M. 809, 827 (1996). According to the Court, the second cardinal principle is that it is prohibited to use weapons causing unnecessary suffering to combatants. *Id.*

4. See Teodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 23 (1992).

5. For a brief summary of these early developments, see ESBJÖRN ROSENBLAD, INTERNATIONAL LAW OF ARMED CONFLICT—SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 9, 53 (1977). For a fascinating analysis of the status of the law of war during the medieval and English Renaissance periods and its influence upon the development of the current law of armed conflict, see Meron, *supra* note 4.

6. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (18th century trans., C. Frankel ed., 1947).

7. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, originally published as U.S. War Department, Adjutant General's Office, General Orders No. 100 (Apr. 24, 1863), *reprinted in* Schindler and Toman, *supra* note 1, at 3.

8. *Id.*, Art. 24.

9. *Id.*, Art. 22.

10. Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868 [St. Petersburg Declaration], authentic text French, *reprinted in* English in Schindler and Toman, *supra* note 1, at 101.
11. Brussels Conference of 1874, Final Protocol, Aug. 27, 1874, authentic text French, *reprinted in* English in Schindler and Toman, *supra* note 1, at 25.
12. The Laws of War on Land (Oxford Manual), adopted by the Institute of International Law at Oxford, 1880, *reprinted in* Schindler and Toman, *supra* note 1, at 35.
13. *Id.* at 37.
14. Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Oct. 18, 1907, Art. 25, 36 Stat. 2277, [hereinafter Hague IV], *reprinted in* Schindler and Toman, *supra* note 1, at 63.
15. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, Art. 1, 36 Stat. 2351 [hereinafter Hague IX], *reprinted in* Schindler and Toman, *supra* note 1, at 811.
16. Hague IV, *supra* note 14, Art. 26; Hague IX, *supra* note 15, Art. 6.
17. Hague IV, *supra* note 14, Art. 27; Hague IX, *supra* note 15, Art. 5.
18. Hague IV, *supra* note 14, Arts. 23(g), 28, 46, 47, 52, 53, 55 and 56.
19. Hague Rules of Air Warfare, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923 [hereinafter Hague Air Rules], *reprinted in* Schindler and Toman, *supra* note 1, at 207.
20. LASSA OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 519 (Hersch Lauterpacht ed., 7th ed. 1952).
21. In essence, this continued the dichotomy between the so-called “Hague” law (means and methods of war) and the “Geneva” law (protection of victims of war). This dichotomy was obliterated in the Protocols Additional of 1977, which included provisions dealing with means and methods of warfare as well as those designed to further the protection of victims. This development, among others, has led the International Court of Justice to conclude that:

“These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Protocols Additional of 1977 give expression and attest to the unity and complexity of that law.”

ICJ Advisory Opinion on Nuclear Weapons, *supra* note 3, at 27, 35 I.L.M. 827.

22. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949, 587 (1987) [hereinafter ICRC Commentary].

23. *Id.* at 588.

24. *Id.*

25. The Distinction Between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, Resolution adopted by the Institute of International Law at its session at Edinburgh, Sept. 9, 1969, *reprinted in*, 2 ANNUAIRE L'INSTITUT DE DROIT INTERNATIONAL 375 (1969) (English). In commenting on the results of the Edinburgh Resolutions, the General Counsel of the United States Department of Defense, in a letter concurred in by the Judge Advocates General of the Army, Navy, and Air Force, stated that the requirement that there be an “immediate” military advantage for destruction of an object for it to be classified as a military objective does not reflect “the law of armed conflict that has been adopted in the practice of States.” Letter dated Sept. 22, 1972, from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, excerpts from which are quoted in A. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT’L L. 118, 122 (1973).

26. The Diplomatic Conference was preceded by two sessions of the Conference of Government Experts, which was convened by the ICRC and held two sessions in 1972 and 1973. Drafts prepared by these conferences, consolidated and harmonized by the ICRC, served as draft texts for the Diplomatic Conference. For background, see ICRC Commentary, *supra* note 22, at xxxi.

27. These include Article 51 (protection of the civilian population), Article 53 (protection of cultural objects and places of worship), Article 54

(protection of objects indispensable to the survival of the civilian population), Article 55 (protection of the natural environment), Article 56 (protection of works and installations containing dangerous forces, such as dams, dikes, and nuclear electrical generating stations), Article 57 (precautions in attack, in particular, measures to avoid collateral damage), and Article 58 (precautions against effects of attacks by the party under attack, such as relocating civilians in the area, etc.).

28. Protocol Additional I, *supra* note 1, Arts. 48 and 52. Article 52 contains a third paragraph, which reads as follows: "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." It has been omitted from the text since it does not form a part of the definition of a military objective, but rather provides a rule of interpretation for the commander ordering or executing an attack.

29. *See supra* note 23.

30. Protocol Additional I, *supra* note 1, Art. 49.3

31. *See* INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 5 (1995) [hereinafter SAN REMO MANUAL].

32. The Laws of Naval War Governing the Relations Between Belligerents: Manual Adopted by the Institute of International Law (Oxford Manual of Naval War), *reprinted in* English in Schindler and Toman, *supra* note 1, at 857.

33. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

34. *Id.*, cmt. b.

35. *Id.*

36. DEPARTMENT OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (Formerly NWP-9), MCWP5-21, COMDTPUB P5800.7, § 6.1 (1995) [hereinafter COMMANDER'S HANDBOOK].

37. *Id.*

38. W. Michael Reisman and William Leitzau, *Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict, in the Law of Naval Operations*, 64 INTERNATIONAL LAW STUDIES (Horace Robertson ed., 1991).

39. Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y. B. INT'L L. 275, 300 (1965-66).

40. See Michael Matheson (Deputy Legal Adviser, U.S. Department of State), *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*, in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987 [hereinafter *Sixth Annual Conference*]); Lt Col Burrus M. Carnahan, USAF, *id.* at 508-9. See also Panel Discussion, *Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81st Annual Meeting of the American Society of International Law, 1987 PROC. A.S.I.L. 27, remarks of M. Matheson at 29-30; B. Carnahan at 37 (Article 51, para. (2), prohibiting direct attacks on the civilian population "may well restate current customary law. . . . The definition of military objectives in Article 52 has already been incorporated in some military manuals, as well as in treaties other than the protocol; it almost certainly represents customary international law." It should be noted, however, that spokesmen for the U.S. Government have explicitly expressed disagreement with the prohibition of reprisals against the civilian population which is found in Article 51 as well as in Article 52, para. 1. Matheson, *id.* at 426; Remarks of Abraham Sofaer, *id.* at 469.

41. G.A. Res. 2444 (XXIII), U.N. GAOR, Supp. No. 18, at 50, U.N. Doc. A/7218 (1969).

42. Letter of September 22, 1972, *supra* note 25. See also TEODOR MERON, *HUMAN RIGHT AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 68 (1989).

43. See Baxter, *supra* note 39 and accompanying text.

44. FEDERAL MINISTRY OF DEFENCE OF THE FEDERAL REPUBLIC OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL* (DSK VV207320067), paras. 441-442 (1992) (English translation by German Ministry of Defence; internal citations omitted) [hereinafter *GERMAN MANUAL*].

45. ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI (AF) AAP 1003, par. 8-4, 8-5 (1st ed., 1994).

46. Director of Law/Training, Office of the Judge Advocate General, Canadian National Defence Headquarters, Canadian Forces Law of Armed Conflict Manual (Second Draft), para. 516 (undated) [hereinafter Canadian Draft Manual]. In the introduction, the manual states that it was prepared on the assumption that Canada would ratify the two 1977 Protocols Additional. *Id.* at i.

47. The Army manual currently in effect was adopted in 1956 and thus does not take account of developments in the law of armed conflict since that date. It does, however, incorporate the relevant provisions from the Hague Rules which exempt certain categories of persons and objects from attack and contains some general language apparently recognizing as customary international law the general principles of distinction and the military objective. Examples are found in paragraph 25 (“[I]t is a generally recognized rule that civilians must not be made the object of attack directed exclusively against them.”) and paragraph 56 (“Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy’s army.”). DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (FM 27-10) 16, 23 (1956). It is the author’s understanding that the Department of Defense is in the process of preparing a joint service instruction on the law of armed conflict. The Judge Advocate General of the Army is the lead agency in this project. Conversation between the author and Hays Parks, Office of the Judge Advocate General of the Army.

48. DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AFP 110-31, Nov. 19, 1976), para. 5-3b(1) [hereinafter AIR FORCE PAMPHLET].

49. COMMANDER’S HANDBOOK, *supra* note 36, para. 5.4.2.

50. *Id.* at para. 8.1.1.

51. Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L L. 192, 199 (1995).

52. DEPARTMENT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 9 (Rev. A)/FMFM 1-10 para. 8.1.1., note 9 (1989) [hereinafter ANNOTATED SUPPLEMENT].

53. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (Formerly NWP 9 (Rev. A), MCWP 5-21, COMDTPUT P5800.7, para. 8.1.1, note 9 (Draft 1997).

54. *Id.*, note 11. These target sets were Leadership Command Facilities; Electricity Production Facilities; Telecommunications and Command, Control, and Communication Nodes (including civil television and radio installations since they could easily be used for C3 backup for military purposes and were used for Iraqi propaganda); Strategic Integrated Air-Defense System; Air Forces and Air Fields; Nuclear, Biological and Chemical Weapons Research, Production, and Storage Facilities; Scud Missile Launchers and Production and Storage Facilities; Naval Forces and Port Facilities; Oil Refining and Distribution Facilities; Railroads and Bridges; Iraqi Army Units; and Military Storage and Productions Sites. *Id.*

55. *Id.* at para. 8.1.1. The annotation further states that, "Whether this rule permits attacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on the tankers carrying oil exported by Iran during the Iran-Iraq war, is not firmly settled. Authorization to attack such targets is likely to be reserved to higher authority." *Id.* at note 11. In this respect, Ms. Doswald-Beck states that participants in the San Remo Round Table:

indicated that the sinking during the Iran-Iraq War, albeit not as frequent as those during the Second World War, should not be seen as the most significant precedent for an assessment of contemporary law, in view of the extent of violations of international humanitarian law during that conflict generally and the protests that ensued.

Doswald-Beck, *supra* note 51, at 200.

56. *See, e.g.*, Hague IV, *supra* note 14, Art. 27; Hague IX, *supra* note 15, Art. 5.

57. According to a 1940 British study of the Royal Air Force Bomber Command night operations, "two-thirds of all aircrews were missing their targets by over 5 miles." AIR FORCE PAMPHLET, *supra* note 48, para. 5-4d. Even the so-called "precision" daylight bombing by the U.S. Eighth Air Force was precise only in comparison to the night bombing by the British bomber force. According to an Eighth Air Force study, for the September to December 1944 period, only 22 percent of all visually dropped bombs hit within 1,000 feet of their aim point, while only two percent of bombs dropped using blind navigational techniques or radar bombing fell within 1,000 feet of their target. RICHARD HALLION, STORM OVER IRAQ: AIR POWER AND THE GULF WAR 11-12, note 26 (1992), (quoting USAAF, AAF Bombing

Accuracy Report #2 (Eighth Air Force Operational Research Section, 1945), Chart 2, "Distribution of Effort and Results.").

58. Hamilton DeSaussure, conference remarks, in *Sixth Annual Conference supra* note 40, at 512; *see also* Burrus Carnahan, *supra* note 40, at 516. The United States Air Force manual seems to give some credence to this idea, at least with respect to attacks on civil aircraft, stating, "As a practical matter, the degree of protection afforded to civil aviation and the potential military threat represented, varies directly with the intensity of the conflict." AIR FORCE PAMPHLET, *supra* note 48, para. 4-3b.

59. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA "EXPLANATION" 116 (Louie Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL "EXPLANATION"].

60. BOTHE ET AL., *supra* note 2, at 322. The San Remo Round Table was also initially divided between those members who wished to provide a general definition of military objectives and those who wished to provide a list either of vessels and objects that might be attacked or of those which were exempt. Their eventual solution was to proceed with a general definition, but to supplement it with a limited list of those vessels and aircraft which were exempt from attack, either by virtue of their status (*e.g.*, hospital ships) or their employment (*e.g.*, vessels engaged in missions granted special protection such as cartel vessels). *See* SAN REMO MANUAL "EXPLANATION," *supra* note 59, at 114-16.

61. "Military objectives" obviously includes combatants, although there is no explicit statement in Protocol Additional I to that effect. As stated by Bothe *et al.*:

The term "military objectives" is used in different senses in the clauses declaring the two basic principles. In regard to the first clause [of article 48] dealing with the principle of distinction the term "military objective" is used in contrast to "civilian objects," and "combatants" is used in contrast to "civilians." In the last clause, however, "military objective" is used as the sole permitted object of the military operations. It would, of course, be manifestly absurd to conclude from this somewhat imprecise drafting that combatants are not a legitimate object of attack. In any event, the context of Arts. 37, 41, 42, 43(2), 51(3) and 52(2) makes it clear that combatants, as well as objects having military value, are included within the term "military objectives" as used in Protocol I.

BOTHE ET AL., *supra* note 2, at 285.

The ICRC Commentary confirms this view, stating that “the definition is limited to objects but it is clear that members of the armed forces are military objectives. . . .” ICRC Commentary, *supra* note 22, at 635.

Two of the military manuals that have been examined have explicitly incorporated “combatants” into their definitions of “military objectives.” *See, e.g.*, COMMANDER’S HANDBOOK, *supra* note 36, at para. 8.1.1; Canadian Draft Manual, *supra* note 46, at para. 516.

62. ICRC Commentary, *supra* note 22, at 636.

63. *Id.*

64. BOTHE, ET AL., *supra* note 2, at 324-5 (emphasis in original text).

65. SAN REMO MANUAL “EXPLANATION,” *supra* note 59, para. 40.12; L. Doswald-Beck, *supra* note 51, at 199.

66. BOTHE ET AL., *supra* note 2, at 324. In a footnote supporting this statement, Bothe *et al.* refer, *inter alia*, to the U.S. denial of claims for destruction of British-owned cotton in the Civil War, not on the ground that raw cotton had any value as an implement of war, “but because ‘in the circumstances ruling at the time’ it was the Confederacy’s chief export and thus the ultimate source of all Confederate weapons and military supplies.” *Id.* at note 15.

67. SAN REMO MANUAL “EXPLANATION,” *supra* note 59, para. 40.12.

68. ANNOTATED SUPPLEMENT, *supra* note 52, para. 8.1.1, note 11, (citing 6 Papers Relating to the Treaty of Washington (Report of U.S. Agent) 52-57 (1874)).

69. *Id.* The San Remo Round Table also states that the doctrine of contraband is not applicable to exports from enemy territory. With regard to the latter point, there was a division of views whether measures other than blockade may be used to block exports that by sale or barter sustain the enemy’s war effort. Even though a number of participants supported the view that today the doctrine of contraband may be applied to exports from enemy territory, the Round Table at this stage felt unable to extend the traditional law to that effect. That, however, does not prejudice the authority

of the UN Security Council under Chapter VII of the UN Charter. SAN REMO MANUAL "EXPLANATION," *supra* note 59, at 216.

70. *Id.* at para. 67.27.

71. BOTHE ET AL., *supra* note 2, at 324-5. The authors illustrate their point by describing the Allied attacks on the Pas de Calais area of France prior to the Normandy invasion of 1944. The military advantage was not the reduction of German military strength in that area but rather to deceive the Germans as to where the invasion would take place. *Id.*

72. ICRC Commentary, *supra* note 22, at 637.

73. *Id.*, at 683-5; BOTHE ET AL., *supra* note 2, at 365.

74. *See* notes 1 and 2 *supra* and accompanying text.

75. BOTHE ET AL., *supra* note 2, § II.

76. *Id.*

77. As far as I have been able to determine, the U.S. Navy's 1955 LAW OF NAVAL WARFARE MANUAL (NWIP 10-2), which was the immediate predecessor to the current COMMANDER'S HANDBOOK (NWP 1-14M, previously designated NWP 9), does not mention the term "military objective" nor is the term found in the index of Robert W. Tucker, *The Law of War and Neutrality at Sea*, (50 *International Law Studies*, 1955), which was published contemporaneously and includes the 1955 Manual as an appendix.

78. *See, e.g.*, ch. 8, "The Law of Targeting" of the COMMANDER'S HANDBOOK, *supra* note 36; TARGETING ENEMY MERCHANT SHIPPING, 65 *INTERNATIONAL LAW STUDIES*, (Richard J. Grunawalt ed., 1993); Sally Mallison & William Mallison, *Naval Targeting: Lawful Objects of Attack, in the Law of Naval Operations*, 64 *INTERNATIONAL LAW STUDIES* (Horace Robertson ed., 1991), ch. IX.

79. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 173 *L.N.T.S.* 353-37 (1936), *reprinted in* Schindler & Toman, *supra* note 1, at 881-82.

80. For more detailed accounts of the progression of events recounted here, see Mallison & Mallison, *supra* note 78; J. Jacobson, *The Law of Submarine*

Warfare Today, in *The Law of Naval Operations*, *supra* note 78, at 205; L.F.E. Goldie, *Targeting Enemy Merchant Shipping: An Overview of Law and Practice*, in *Targeting Enemy Merchant Shipping*, *supra* note 78, at 2; Sally Mallison & William Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Development*, *Id.* at 87; Horace B. Robertson, Jr., *U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice*, *Id.* at 338.

81. For assessments of the meaning of the Judgment of the Nuremberg Tribunal in Admiral Doenitz's case with respect to the status of the law governing submarine and air attacks on merchant ships, see D. P. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y. B. INT'L L. 52 (1970); Sally Mallison & William Mallison, *Naval Practices*, *supra* note 80, at 87; and *Comments on the Mallisons' essay* by Mark W. Janis and William J. Fenrick, *Id.* at 104 and 110 respectively.

82. SAN REMO MANUAL, *supra* note 31, para.60.

83. See William J. Fenrick, *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, REPORT, COMMENTARIES AND PROCEEDINGS OF THE ROUND-TABLE OF EXPERTS ON INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS AT SEA 31-37 (Wolff Heintschel v. Heinegg ed., 1991), for a comparison of the rules contained in the Canadian, French, Australian and United States Manuals. The subsequently issued German manual conforms essentially to the same listing. GERMAN MANUAL, *supra* note 44, at para. 1025.

84. SAN REMO MANUAL, *supra* note 31, at para. 67.

85. *Id.*

86. COMMANDER'S HANDBOOK, *supra* note 36, § 8.2.2.2.

87. Frits Kalshoven, *Comments on H. B. Robertson's Paper: U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice*, *Targeting Enemy Merchant Shipping*, *supra* note 78, at 358, 362.

88. Hague Air Rules, *supra* note 19, at 207.

89. See *Id.*, Arts. 49-60.

90. SAN REMO MANUAL, *supra* note 31, para. 63.

91. See SAN REMO MANUAL, *supra* note 31, paras. 53 and 56. Compare COMMANDER'S HANDBOOK, *supra* note 36, para. 8.2.3; GERMAN MANUAL, *supra* note 44, para. 1036; Canadian Draft Manual, *supra* note 46, para. 628. For a more extensive discussion of the status of civil aircraft in armed conflict, see Horace B. Robertson, Jr., *The Status of Civil Aircraft in Armed Conflict*, (forthcoming) in __ ISR. Y. B.INT'L L. ____ (1998).

92. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 49 Stat. 3267, *reprinted in English* in Schindler and Toman, *supra* note 1, at 737; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 216, *reprinted in Schindler and Toman, supra* note 1, at 745.

