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Targeting, Command Judgment, and a Proposed Quantum of Proof Component: A Fourth Amendment Lesson in Contextual Reasonableness

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Abstract

No decision by a military commander engaged in hostilities has more profound consequence than the decision to launch an attack. Pursuant to the law of armed conflict (LOAC), that decision must be based on the judgment that the object of attack – a person, place, or thing - qualifies as a lawful military objective. This judgment almost always sets in motion the application of deadly combat power, and routinely produces loss of life or grievous bodily injury, often times to individuals and property not the intended object of attack, but considered 'collateral damage.' In operational terms, this judgment determines whether the nominated target is lawful. This target legality judgment is made in a myriad of contexts, sometimes involving split second decisions by soldiers at the proverbial tip of the spear; sometimes involving complex and deliberate process at high levels of command; sometimes involving summarized process at those same levels of command to address time sensitive targeting requirements. In all of these contexts, the LOAC provides the test for ensuring target legality. This test is intended to ensures that the harmful consequences of armed conflict are confined as much as possible to the lawful objects of violence, thereby providing the primary (although not exclusive) barrier against producing unjustified injury to other persons, places, and things that are protected from being made the deliberate object of attack.

It is clear that the law requires that targeting judgments be reasonable under the circumstances prevailing at the time. What is less clear is the amount of combat information and/or intelligence required to render a judgment reasonable. Because the reasonableness of targeting judgments are and by their nature must be contextually dependent, it is almost inevitable that reasonableness cannot be assessed based on a unitary quantum component. Furthermore, because the LOAC establishes inverse presumptions of legality *vis a vis* combatants and civilians (and their respective property), a unitary quantum component of reasonableness would be inconsistent with the law itself. Thus, while the contextual nature of targeting and the weight of presumptions applicable to potential targets suggest an inherent variable quantum component, virtually nothing in the law or the scholarly treatment of the law of targeting addresses this component of reasonableness.

This article proposes a quantum of proof methodology to aid in the operational assessment of target reasonableness. In support of this proposal, the article will provide a comparative analysis of U.S. constitutional Fourth Amendment jurisprudence, focused specifically on the relationship between several distinct quanta standards for assessing reasonableness and the interests they were developed to balance. The article will then discuss the basic foundation of the law of targeting with a particular emphasis on the established presumptions. This will lead to an analysis of how different

quantum standards established to define reasonableness in the U.S. Fourth Amendment context offer a logical starting point for providing a similar touchstone for assessing the reasonableness of targeting decisions in armed conflict.

Targeting, Command Judgment, and a Proposed Quantum of Proof Component: A Fourth Amendment Lesson in Contextual Reasonableness

Geoffrey S. Corn*

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

No decision by a military commander engaged in hostilities has more profound consequence than the decision to launch an attack. Pursuant to the law of armed conflict (LOAC), that decision must be based on the judgment that the object of attack – a person, place, or thing - qualifies as a lawful military objective. This judgment almost always sets in motion the application of deadly combat power, and routinely produces loss of life or grievous bodily injury, often times to individuals and property not the intended object of attack, but considered 'collateral damage.' In operational terms, this judgment determines whether the nominated target is lawful. This target legality judgment is made in a myriad of contexts, sometimes involving split second decisions by soldiers at the proverbial tip of the spear;[2] sometimes involving complex and deliberate process at high levels of command; sometimes involving summarized process at those same levels of command to address time sensitive targeting requirements. In all of these contexts, the LOAC provides the test for ensuring target legality. This test is intended to ensures that the harmful consequences of armed conflict are confined as much as possible to the lawful objects of violence, thereby providing the primary (although not exclusive) barrier against producing unjustified injury to other persons, places, and things that are protected from being made the deliberate object of attack.[3]

This article proposes a quantum of information framework to aid in the operational assessment of target reasonableness. In support of this proposal, the article will provide a comparative analysis of U.S. constitutional Fourth Amendment

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

[2] One U.S. Marine Corps commander characterized this process as the "three second decision cycle" – the front line combatant has one second to observe, one second to assess, and one second to decide.

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

jurisprudence, focused specifically on the relationship between several distinct quanta standards for assessing reasonableness and the interests they were developed to balance. The article will then discuss the basic foundation of the law of targeting with a particular emphasis on the established presumptions. This will lead to an analysis of how different quantum standards established to define reasonableness in the U.S. Fourth Amendment context offer a logical starting point for providing a similar touchstone for assessing the reasonableness of targeting decisions in armed conflict.

Introduction

The legal standard for assessing what qualifies as a lawful object of attack during armed conflict is central to conflict regulation, and is universally regarded as a customary element of the law applicable to all armed conflicts.[4] It also lies at the very core of the LOAC framework for the regulation of hostilities. The foundation of this framework is the principle of military necessity, which justifies the deliberate infliction of destructive power only when doing so is necessary to bring about the prompt submission of an enemy, and by implication prohibits any such application that is not expected to contribute to this effect.[5] This principle is directly related to the protection of the civilian population from the sufferings associated with armed conflict, and is central to the derivative principle of distinction. This principle obligates belligerents to constantly draw a distinction between lawful objects of attack and all other persons, places, and things; and limit their deliberate attacks to lawful military objectives.[6] Implementing both of these principles is the rule of military objective. This rule is expressly included in Article 52 of The 1977 Protocol I Additional to the Four Geneva Conventions of 1949 (AP I).[7]

Although this treaty has not been adopted by a number of states (including the United States and Israel[8]), the equation it established for determining what qualifies as a lawful military objective predated its inclusion in the treaty.[9] Accordingly, by 1977 it was generally understood as a treaty expression of an existing rule of customary international law, an understanding that led the United States to add the military

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[4] *See* Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 129 (2nd ed.); *See* Maj. Michael L. Smidt, *Yamashita, Medina, & Beyond: Command Responsibility in Contemporary Military Operations,* 164 MILITARY L. REV. 155 (2000), *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004).

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

[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, 8 June 1977; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89 (2nd ed.) (interpreting Article 48 of Additional Protocol I).

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52, 8 June 1977.

[8] *See* ICRC, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Jan. 26, 2011).

[9] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, CHANGE NO. 1 (July 1976), *available at* https://rdl.train.army.mil/soldierPortal/atia/adlsc/view/public/9421-1/fm/27-10/CHANGE1.htm.

objective rule to its U.S. Army Field Manual for the Law of Land Warfare *one year before* AP I was completed.[10] The customary international law status of the rule of military objective has been confirmed repeatedly since 1977 through the practice of states, decisions of national and international tribunals, and analysis by LOAC experts and scholars.[11] As a result, it is a LOAC axiom that only those persons, places, or things that qualify as lawful military objectives in accordance with the Article 52 equation may be made the lawful objects of attack.

It would be a mistake, however, to conclude that the customary law status of this equation indicates that there is perfect clarity as to what is or is not a lawful military objective. The rule establishes its own analytical methodology for assessing the legality of potential targets – a methodology that itself produces uncertainties. In relation to enemy armed forces, application of this equation and the accordant assessment of attack legality is relatively simple: members of the armed forces, their equipment, or their installations are lawful military objectives until rendered *hors de combat.*[12] Complexity arises, however, as belligerents consider attacking persons, places, and things that do not fall into this clearly defined category of presumptively lawful objects of attack. Sometimes referred to as 'dual use targets', there is an almost endless potential variety of such persons, places, and things in the contemporary battle-space.[13] While the legality of attacking such potential targets is not presumptive (unlike inherently military targets), Article 52 provides an equation for determining when their attack is lawful.[14] Pursuant to that rule, virtually anything can qualify as a lawful object of attack, so long as its "nature, location, purpose, or use makes an effective contribution to

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[10] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 246 (July 1956).

[11] *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, paras. 47, 51 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 5, 2003); GARY S. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 519-20 (2010); *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2nd ed.); *See* Maj. Michael L. Smidt, *Yamashita, Medina, & Beyond: Command Responsibility in Contemporary Military Operations,* 164 MILITARY L. REV. 155 (2000), *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004).

[12] Article 41 (2) of Protocol I provides:

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

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 41, 8 June 1977.

[13] Battle Space Awareness, DOD DICTIONARY OF MILITARY & ASSOCIATED TERMS, http://www.dtic.mil/doctrine/dod_dictionary/ (last visited Jan. 10, 2011).

[14] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(3), 8 June 1977.

the enemy's war effort; and the total or partial destruction offers the attacking force a definite military advantage based on the circumstances prevailing at the time."[15]

The application of the rule to the range of potential targets in contemporary armed conflicts is extremely complex. It is therefore unsurprising that the rule of military objective has been a significant subject of scholarship, analysis by legal departments of many armed forces, and judicial decision.[16] Because deliberately attacking an individual or object that *does not* qualify as a lawful military objective violates the LOAC, the meaning of the rule has also been central to war crimes prosecutions related to unlawful targeting, and a significant aspect in the development of the Rome Statute for the International Criminal Court.[17] Most of these analytical efforts have focused on defining the constituent elements of the military objective test: clarifying the substantive meaning to terms like "definite military advantage", "effective contribution", "circumstances prevailing at the time", and the cumulative effect of all of these qualifiers for making the military objective determination.[18]

Reliance on violation of this rule as a source of potential criminal liability highlights another constituent element of the equation: the requirement that the judgment related to determining what qualifies as a lawful military objective be reasonable. Whether as the first step in assessing the willfulness of an attack on protected person, place, or thing (which is the culpability standard reflected in AP I and the crime of attacking civilians for the International Criminal Court[19]), or as the basis for a conclusion that a targeting judgment was reckless and therefore a LOAC violation (which appears to have been the culpability standard applied by the International Criminal Tribunal for the Former Yugoslavia[20]), almost any post hoc critique of a targeting decision will involve an assessment of reasonableness. This is unremarkable when one considers that the law routinely requires judgments by government agents that involve the exercise of discretion (particularly when that discretion implicates life

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[15] *Id.* at art. 52(2).

[16] . *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, paras. 47, 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); GARY S. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 520-27 (2010); *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89-92 (2nd ed.); *See* Maj. Michael L. Smidt, *Yamashita, Medina, & Beyond: Command Responsibility in Contemporary Military Operations,* 164 MILITARY L. REV. 155 (2000), *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 20 (2004).

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

[18] *Id.*

[19] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art. 8(2)(e) (Sept. 1993), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

[20] Prosecutor v. Galić, Case No. IT-98-29-T, Separate & Partially Dissenting Opinion of Judge Nieto-Navia (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), at para 15 ("Despite my aforementioned disagreements with the Majority, I share in the conclusion that the Prosecution has proved that, in a number of instances, the SRK either deliberately or recklessly fired upon civilians in Sarajevo during the Indictment Period.").

or liberty) be reasonable. In relation to the rule of military objective, the primary emphasis of this aspect of compliance has been twofold. First, determining the appropriate perspective for critiquing the reasonableness of battlefield judgments (the critique of objective reasonableness must be made through the subjective perception of the decision-maker at the time the decision was made, not retrospectively). Second, assessing the probative value of information available to the commander[21] at the time of the decision (resulting in a principle analogous to the doctrine of willful blindness: when a decision-maker had information available but chose to ignore that information, the knowledge that would have been gained will effectively be imputed to the decision-maker for purposes of assessing reasonableness).[22]

There has, however, been a notable omission from analysis and evolution of the test of reasonableness: what is the requisite quantum of proof that legitimately results in a reasonable belief that a person, place, or thing qualifies as a lawful military objective? The doctrine of individual criminal responsibility renders the commander's decisions to subject a person, place, or thing to deliberate attack vulnerable to *post hoc* criminal adjudication. The failure to define some quantum framework – at least in the opinion of the author – contributes to the potential for transforming what is supposed to be a prospective critique into a retrospective critique.[23] Without some framework to apply to the post hoc assessment of a targeting judgment, a finder of fact will be invited to substitute its own quantum standard to the decision review.

Any post hoc targeting decision review necessitates such a framework. Without defining the requisite quantum of proof to support a reasonable determination of lawful military objective, how can the reasonableness of that judgment be legitimately assessed? In short, reasonable is an arbitrary term without such a quantum component. Providing greater clarity on the requisite quantum element, in contrast, will contribute to assessment of targeting judgments from the perspective of the commander at the time the judgment was made. It will preserve the objective nature of such assessment without inviting a wholesale substitution of post hoc judgment for that of the commander at the time the decision was made. Even assuming *arguendo* that an unreasonable judgment does not *ipso facto* satisfy the culpability standard for war

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

[22] *See* Melvyn Zarr et al., Pattern Criminal Jury Instructions for the District Courts of the First Circuit, http://www.med.uscourts.gov/practices/crpji.97nov.pdf; Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, para. 184 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

[23] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 286-90 (2010) (citing The Hostage Case and concluding that "[a]s the opinion makes clear, …, the standard of guilt or innocence is the facts as they appeared to the accused at the time, given the circumstances at the time.").

crimes liability, enhancing the ability of the commander to articulate precisely why she considered a judgment reasonable will invariably mitigate the subjectiveness of post hoc critique and facilitate both the decision-making and critique process.

This latter assertion is well understood by lawyers and law enforcement officials involved in criminal practice in the Unites States. Like combatants, police officers constantly exercise operational judgment in fast moving tactical situations. While these judgments don't routinely involve the application of deadly physical force, the investigation of and response to crime in a myriad of operational situations presents analogous challenges to ensuring the reasonableness of government action; and like their battlefield counterparts, although police officers are normally not lawyers their exercise of operational discretion is regulated by a legal requirement of reasonableness - a requirement derived from the 4th Amendment of the U.S. Constitution, which prohibits unreasonable search and seizure.[24] Accordingly, like targeting decisions, reasonableness is the focal point of post hoc critiques of the legality of searches and seizures by law enforcement officers, and therefore central to the legitimacy of police action. In fact, the Supreme Court of the United States has consistently emphasized that "reasonableness is the touchstone of the Fourth Amendment."[25]

Nor is the reasonableness touchstone[26] the only analogy between law enforcement officers and military commanders. There are a number of additional interesting similarities between U.S. search law and the law of targeting: the imposition of a legal regulatory framework on non-lawyers engaged in operational decision-making[27]; judicial definition of the parameters of the framework (what qualifies as a military objective; what qualifies as a search or seizure)[28]; and subjecting operational judgment applying the framework to subsequent administrative and judicial scrutiny.[29]

There is, however, one significant difference in application of the reasonableness touchstone in these two distinct contexts: unlike the law of military objective, a central component of assessing reasonableness in relation to U.S. search and seizure law is a defined quantum of proof. Every law student in the United States learns the quantum of proof required for a government search or seizure to be determined reasonable. Perhaps more importantly for purposes of the analogy offered herein, the quantum component of reasonableness is not static but adjusted contextually. U.S. search and seizure law has evolved to recognize a continuum of justification matched to the degree

[24] Terry v. Ohio, 392 U.S. 1, 19, 21-22 (1968).
[25] United States v. Knights, 534 U.S. 112, 118 (2001); Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
[26] *See, e.g.,* United States v. Knights, 534 U.S. 112, 118 (2001); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).
[27] *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979.
[28] *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89-120 (2nd ed.).
[29] *See, e.g.,* Kyllo v. United States, 533 U.S. 27, 32 (2001) (citing Katz v. United States, 389 U.S. 347 (1967)); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

of intrusion and operational context of the government action.[30] Thus, students learn that in order to assess reasonableness, they must first determine the point along this continuum where the intrusion falls. U.S. criminal search and seizure practice provides a useful template for understanding the relationship between reasonableness and amount of information relied upon by the government actor. This relationship between operational context and the quantum of information necessary to justify government action offers a potentially beneficial analogy that may contribute to the targeting process. At a minimum, it offers an opportunity to begin to consider whether a similar approach might be effective for filling the lacunae in LOAC targeting analysis.

In the search and seizure context, there is a well-accepted continuum of information related to the reasonableness of a government action. At the bottom end of the continuum is speculation, or a judgment based on no information whatsoever. This is never sufficient to render a government intrusion into a liberty interest reasonable.[31] At the other end of the continuum is proof beyond a reasonable doubt, credible information that rebuts the presumption of innocence in a criminal trial. This is the highest level of proof known to the law, and has been defined as proof that excludes every fair and rational hypothesis except that of guilt.[32] Near the middle of the continuum is a preponderance of evidence, information sufficient to prove a fact is more likely than not.[33] Below preponderance is probable cause, which has been defined as a common sense conclusion, based on fact, establishing a fair probability of accuracy.[34] Finally, below the probable cause but above the mere speculation is reasonable suspicion, a standard of proof developed by the U.S. Supreme Court to justify cursory investigatory intrusions.[35] Reasonable suspicion is established based on a combination of some articulable fact with a police officer's experience based instinct. In other words, the instinct based suspicion is rendered constitutionally reasonable because there is some relevant articulable fact that makes that suspicion more than mere speculation or hunch.[36]

While only reasonable suspicion and probable cause are related to search and seizure law, all of these information quantums are related to the legitimacy of a government deprivation of liberty interests. Furthermore, they all reflect two critical principles of regulating government action in the criminal law context. First, the

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[30] *See, e.g.,* Peter E. Moran, *Casenote: Forth Amendment – Unreasonable Searches & Seizures – Unprovoked Flight Upon Noticing Police Officers While Present in a High-Crime Area Are Relevant Factors Which Create a Reasonable Suspicion to Justify a Terry Stop & Thus Does Not Violate the Fourth Amendment's Prohibition of Unreasonable Searches and Seizures,* 11 SETON HALL CONST. L.J. 859, 859-76 (2001) (discussing *Terry* and the recognition of the level of government intrusion).
[31] Terry, 392 U.S. at 22, 27.
[32] Hopt v. Utah, 120 U.S. 430, 440-41 (1887).
[33] *See, e.g.,* Williams v. Eau Clair Pub. Sch., 397 F.3d 441, 444 (6th. Cir. 2005) (quoting the jury instruction explaining preponderance of evidence).
[34] *See* Illinois v. Gates, 462 U.S. 213 (1964).
[35] *See, e.g.* Terry, 392 U.S. 1.
[36] *Id.* at 21.

quantum of proof required to render government action justified cannot be unitary, for each step in that process involves a different balance of interests. Second, a definition of the requisite quantum of information is essential to facilitate a *post hoc* critique of the reasonableness of government action.

Like government efforts to detect and punish crime, targeting involves the exercise of judgment with profound consequences for the object of government action - potential deprivations of life and property. It is axiomatic that like the domestic criminal context, these decisions must be reasonable.[37] Furthermore, because both the LOAC and human rights law prohibit arbitrary deprivations of life or property (even during armed conflict) reasonable deprivations of these fundamental interests in this context must require more than mere speculation or hunch.[38] Unlike the domestic criminal context, what is strikingly absent from the law of targeting is a quantum of information framework for assisting in the determination of reasonableness (and potentially assisting in the subsequent critique of these determinations). This is extremely problematic for a number of reasons - reasons that are exposed by analogy to U.S. search and seizure law.

First, like U.S. search and seizure law, the LOAC is intended to provide individuals operating in a complex and fast moving environment with a meaningful and logical standard to guide their decisions. Indeed, many would argue that the pressure on battlefield decision-makers is almost invariably more intense and the situations in which these decisions are made more confused than that which confronts the police officer on the street. This complexity is only exacerbated by the reality that the human stakes involved in battlefield targeting are normally more significant than those involved in law enforcement operations. While it is true that law enforcement officers must in certain circumstances make judgments that jeopardize life, because use of deadly force is a measure of last resort this is normally an exceptional situation. In contrast, use of deadly force is an authorized measure of first resort in armed conflict.[39] Accordingly, placing life in jeopardy is the inevitable consequence of routine targeting judgments. Furthermore, even when law enforcement officers employ deadly force, the nature of that force rarely involves substantial risk of collateral damage to innocent bystanders. In contrast, the armed conflict targeting decision routinely unleashes combat power that creates a substantial risk of collateral damage and incidental injury to individuals who were not the deliberate objects of attack.

Second, in both contexts the law that regulates the government actor is intended to balance two critical but competing interests: achievement of the government

[37] United States v. Knights, 534 U.S. 112, 118 (2001); Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
[38] GARY S. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 273 (2010); Geoffrey Corn, *Mixing Apples & Hand Grenades*, J. INT'L LEGAL STUD., Volume 1, Number 1, October 2010, pp. 52-94(43).
[39] *See* Geoffrey Corn, *Mixing Apples & Hand Grenades*, J. INT'L LEGAL STUD., Volume 1, Number 1, October 2010, pp. 52-94(43).

objective and protection of the innocent from deprivations of life or liberty. Third, and perhaps most important for this article, the LOAC exists not only to guide the decisions of battlefield operatives, but also to provide a standard by which those decisions may be properly critiqued. Whether for the purpose of improving procedures, administrative discipline, or criminal sanction, the law of targeting like the search and seizure law must provide a meaningful standard to assess the reasonableness of battlefield judgments for those who engage in these *post hoc* critiques. That, in turn, requires a more definite framework related to the contextual exercise of judgment. Drawing from U.S. Fourth Amendment jurisprudence, this article proposes such a standard. Like the Fourth Amendment counterpart, this standard will not be unitary, but responsive to the variables of the target decision-making process.

First, however, a note of caution is in order. Nothing in this article is intended to suggest that domestic criminal law principles should define the law of battlefield targeting. Indeed, challenging the intrusion of human rights based domestic law enforcement principles into the realm of target decision-making was the focus of an article recently published by the author.[40] Nor is this article intended to suggest that the analogy to Fourth Amendment principles is a perfect solution for addressing the quantum of information lacunae in the law of military targeting, or that it will eliminate all subjectivity in the target decision-making process. No legal test can achieve that goal, and no matter what framework is employed to assess target legality, its efficacy will almost invariably depend on the subjective good faith of the decision-maker. Instead, this article simply asserts that the many analogies between Fourth Amendment principles of reasonableness and the reasonableness component of the target legality assessment warrant careful consideration of the methodologies employed in the domestic sphere to add clarity to the decision-makers judgment.

I. Target Decision Making.

Targeting refers to the process of identifying lawful objects of attack, determining the desired effect to be achieved by attack, selecting the means and method of producing this effect, striking the target, and assessing the effect.[41] From a military operational perspective, the targeting process is central to achieving tactical and operational success by maximizing the effectiveness of friendly capabilities in bringing about submission of an enemy.[42] According to U.S. joint targeting doctrine,

> The purpose of the joint targeting process is to provide the commander with a methodology linking objectives with effects throughout the battlespace. The targeting process provides a logical progression as an aid

[40] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89-120 (2nd ed.).
[41] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 519 (2010).
[42] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING I-3 (Jan. 17, 2002), http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf.

to decision-making and ensures consistency with the commander's objectives.[43]

In the simplest terms, targets are those persons, places, or things made the deliberate object of attack by a military force.[44] The target selection and engagement process begins with the military mission. Operational planners determine how to best leverage the capabilities of the military unit to achieve the effects deemed necessary to accomplish the mission. These effects generally include destruction, neutralization, denial, harassment, and disruption.[45] Nor is this process limited to a mature planning context. Every soldier who aims and fires a rifle on the battlefield is in fact engaging in this decision-making process, although the extent of analysis will normally by virtue of the situation be substantially abbreviated.

The legal regulation of the targeting process implicates one of the LOAC's most complicated and profoundly important equations to determine what qualifies as a lawful object of attack? The LOAC establishes a framework for assessing the legality of deliberately attacking any person, place, or thing.[46] This framework reflects two countervailing presumptions. Members of the enemy armed forces (including members of armed organized opposition groups in the context of non-international armed conflicts), their equipment, and their military facilities are presumed to be lawful objects of attack.[47] Rebutting this presumption requires surrender or some other event that renders the person, place, or thing effectively out of combat (such as wounds, sickness, or incapacitation of the equipment).[48] In contrast, all other persons, places, or things are considered civilian, and are accordingly presumed protected from being made the deliberate object of attack.[49] This presumption, however, is also rebuttable. For persons, it is rebutted by their direct participation in hostilities.[50] For places and things, it is rebutted when those places and things "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a

[43] *Id.*at I-2(a).
[44] *Id.* at I-4.
[45] *Id.* at II.
[46] *See, e.g.,* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 arts. 41, 48, 51.; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89-92 (2nd ed.).
[47] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 89 (2nd ed.) (interpreting Article 48 of Additional Protocol I).
[48] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 41.
[49] *Id.* at art 51.
[50] *Id.* at art 51.3 ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.")

definite military advantage."[51]

These presumptions are based on the LOAC principle of distinction.[52] Characterized by the International Court of Justice as a "cardinal" principle of the law, distinction is designated in the 1977 Additional Protocol I to the Geneva Conventions of 1949 as "The Basic Rule."[53] It applies in all types of armed conflicts,[54] requiring belligerents to constantly distinguish between lawful objects of attack and all other persons, places, and things.[55] Distinction reflects the balance between the two foundational principles of the LOAC: military necessity and humanity. Military necessity justifies belligerents to inflict death and destruction on their enemies;[56] humanity prohibits the infliction of any suffering that is not necessary to bring about the prompt submission of enemy forces.[57] The principle of distinction is a manifestation of this balance, but also an expression of perhaps an even more central tenet of the LOAC: the assumption that the only legitimate object of war is to weaken enemy forces.[58] Accordingly, the legal regulation of targeting is based on a conclusive presumption that the deliberate infliction of death or destruction to civilians or civilian property will never contribute to this objective, thereby obligating belligerents to limit their destructive efforts to military objectives.[59]

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[51] *Id.* art 52.2.
[52] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 62 (2nd ed.).
[53] Legality of the Threat or Use of Nuclear Weapons, Judgment ¶ 78 (ICJ July 8, 1996), *available at* http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Advisory_Opinion.htm; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 48, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079.
[54] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 62 (2nd ed.)(stating that "no circumstance would justify any deviation from the principle [of distinction]).
[55] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 48.
[56] U.S. WAR DEPARTMENT, GENERAL ORDERS NO. 100 (The Lieber Code of 1863)(Apr. 24, 1863), http://www.civilwarhome.com/liebercode.htm.
[57] GEOFFREY CORN, PRINCIPLES OF HUMANITY, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oxford University Press); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 258 (2010).
[58] This tenet of the law was articulated in one of the first multi-lateral treaties developed to regulate hostilities, the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November (Dec. 11, 1868) *available at* http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument ("Considering: That the only legitimate object which States should endeavour [sic]to accomplish during war is to weaken the military forces of the enemy;")
[59] Legality of the Threat or Use of Nuclear Weapons, Judgment ¶¶ 78-79 (ICJ July 8, 1996), *available at* http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Advisory_Opinion.htm (describing the principle of distinction as an "intransgressible principle[] of international customary law.").

The principle of distinction is implemented by compliance with the LOAC rules of military objective[60] and proportionality.[61] These rules were developed to ensure that the deliberate objects of attack are limited to only lawful military objects, and that anticipated and unavoidable incidental consequences of attacking lawful objectives are not so excessive as to nullify the legitimacy of the deliberate attack. Accordingly, the rule of military objective ensures that commanders select only lawful targets for deliberate attack;[62] the rule of proportionality ensures that these targets are not engaged in an indiscriminate manner.[63] This does not, however, mean that the knowing infliction of harm on civilians or civilian property renders an attack unlawful. Instead, the rule of military objective provides the *prima facie* standard for determining the legality of attacking a target. The knowing but unavoidable harm to civilians or civilian property is considered as part of a second level of analysis to determine whether the attack will be indiscriminate and therefore unlawful. This assessment process occurs, either formally or informally, within the targeting process.[64]

In order to facilitate compliance with this basic principle of distinction, AP I established an express definition of lawful military objectives, codified in Article 51 of the treaty.[65] The first Article 51's definition provides that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[66] Elsewhere in AP I captives entitled to prisoner of war status are excluded from the definition of civilian[67]

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[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.2 ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage.").

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

[62] *Id.* at art. 52.2.

[63] *Id.* (defining military objectives); *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 128-30 (2nd ed.) (discussing proportionality).

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

[65] Passed in 1977, API is a supplementary treaty to the 1949 Geneva Conventions which broadens the scope of protection for victims of international armed conflicts. *See* Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 31. More specifically, Article 51 is given the distinction as 'one of the most important articles in the Protocol' by the drafters of the commentary to API. *See Id.* at 615. This article codifies the rule of customary international law that requires armed forces to refrain, a much as possible, from endangering or harming innocent civilians in the mist of an armed conflict. *Id.* Article 51 also provides standards by which to apply this rule. *Id.*

[66] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 51.2.

[67] *Id.* at art. 50.1(excluding from the definition of civilians "persons referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention); Convention (III) relative to the Treatment of Prisoners of War, 12 Aug. 1949, art. 4, *available at* http://www.icrc.org/ihl.nsf/WebART/375-590007?OpenDocument (defining prisoners of war);

(with the exception of civilians who accompany the armed forces in the field to provide support[68]). Accordingly, these "combatants" are by implication lawful objects of attack.[69] Places and things, however, must be analyzed pursuant to a different equation. In recognition of the inevitable variables of the operational environment, AP I does not provide an exhaustive list of military objectives. Instead, it provides a test for assessing each place or thing –proposed as a target to assess whether it qualifies for attack or whether it must be treated as a civilian place or object protected from attack. This test is codified in Article 52, which provides:

> 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.[70]

Accordingly, determining the legality of subjecting places or things to deliberate attack requires a case by case analysis based on a combination of factors related to the military situation, what U.S. military doctrine defines as METT-T-C (the mission, enemy, troops available, terrain, time, and presence of civilians).[71] A central component of this analysis is the complimentary rule established by Article 51 of AP I which provides that:

> [t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.[72]

Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 611.

[68] Convention (III) relative to the Treatment of Prisoners of War, 12 Aug. 1949, art. 4

[69] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 50; Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 610-12; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 146 (2nd ed.).

[70] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.2.

[71] THE U.S. ARMY/ MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 145-46 (United States Dept. of the Army, 2007), *available at* http://books.google.com/books?id=lbyFW9eCUJ4C&pg=PA379&lpg=PA379&dq=US+DOD+manual+on+METT-TC&source=bl&ots=seVNSmlwBr&sig=WRhRPHakOZEaKHh1_NjpY5cCxhw&hl=en&ei=ptTBTJSFLsOqlAfY_fC_DA&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCIQ6AEwAw#v=onepage&q=METT-T-C&f=false.

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 51.7.

In accordance with this rule, a determination that civilians are located in the vicinity of a place or thing that otherwise qualifies as a lawful military objective does not render the objective immune from attack. Instead, the attacking commander is obligated to analyze the legality of the attack pursuant to the complimentary prohibition against indiscriminate attacks and assess whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated (commonly referred to as proportionality analysis and discussed in greater detail below).[73]

Perhaps the three most important aspects of the military objective test are contained in the prong of the rule that provides "whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[74] First, it is clear that the law recognizes that the desired effect of an attack need not be total destruction.[75] This is consistent with principles of military operations. Commanders employ combat power to achieve desired effects, and these effects often do not require total destruction or capture of an enemy capability.[76] For example, a doctrinal mission of indirect fire assets includes not only target destruction, but to also disruption, harassment, and degradation. Another example is the use of a minefield to deny access or egress to an enemy. If the use of the mines never results in the destruction of an enemy asset, the effect may nonetheless be achieved by depriving the enemy of a certain area.

Second, operational judgments must be made (and ultimately critiqued) based on the situation prevailing at the time of the decision.[77] The purpose of this qualification was to prevent the 'slippery slope' that would result if commanders could justify attacks based purely on speculation that the place or thing might be used in the future in a manner that would render it a military objective. This does not, of course, mean considering anticipated value is not permissible. However, a commander must have some basis in fact to support the conclusion that a future use of a potential place or thing renders it a military objective.

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[73] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 130-33 (2nd ed.).
[74] *Id.* at art 52,2.
[75] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 631-32, *available at* http://www.icrc.org/ihl.nsf/COM/470-750067?OpenDocument.
[76] *See* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING (Jan. 17, 2002), http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf.
[77] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 637-38; *See also* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 286-90 (2010) (citing The Hostage Case and concluding that "[a]s the opinion makes clear, …, the standard of guilt or innocence is the facts as they appeared to the accused at the time, given the circumstances at the time.").

Third, the advantage gained by targeting a place or thing must be "definite."[78] Again, the purpose of this qualifier was to prevent unfounded speculation or conjecture on the value gained by targeting a place or thing. However, no commander can know with absolute certainty the value to be gained from attacking a target until the attack is actually executed (and even then assessment of effects is often incomplete). What the "definite" qualifier is intended to prevent general speculation on some attenuated value of target engagement.[79] So long as the commander acts with a good faith basis that the target engagement will produce a tangible operational or tactical advantage for his force, the qualifier is satisfied.[80]

The significance of these three elements of the military objective test reveals that determination of legality must inevitably require the reliance on and evaluation of information available to the operational decision-maker. Ideally in the form of intelligence, but often in the form of unrefined battlefield information,[81] the quantity and quality of this information is highly dependent on multiple variables, ranging from the time available to assess a potential target to the sophistication of the intelligence, surveillance, and reconnaissance capabilities supporting the decision.[82] However, even in the most time-sensitive decision-making situations, the law of military objective requires some factual information to support a reasonable judgment of target legality, thereby rejecting speculation based on nothing more than operational instinct.

The amount of information required by the law is, however, uncertain. Nothing in the Article 50 or its associated International Committee of the Red Cross Commentary indicates the quantum of information necessary to render a judgment of target legality reasonable. Instead, the Commentary merely emphasizes the importance of satisfying the elements of the military objective test.[83] Because AP I focused primarily on operational regulation (and only secondarily on criminal responsibility), this might be understandable. What is less understandable is the failure to address the requisite quantum as the rule has slowly transformed into a basis for criminal

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[78] *Id.* at 636.
[79] *Id.* at 684.
[80] *Id.* at 682.
[81] Battlefield information is not intelligence because it is information that has not been subjected to analysis. Intelligence is the product of such analysis.

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

DEPT. OF THE ARMY, FM-2-0: INTELLIGENCE 1-8 (Mar. 2010), http://www.fas.org/irp/doddir/army/fm2-0.pdf.
[82] *Id.* at 1-21.
[83] *Id.* at 635-36.

responsibility both at the *ad hoc* international war crimes tribunals[84] and in the Rome Statute for the International Criminal Court.[85]

This may be attributable to the fact that the criminal liability standards related to unlawful attack requires a higher standard of mental culpability than mere unreasonableness. As noted above, both AP I and the offenses established for the International Criminal Court prohibit the intentional attack on protected persons or property. For example, the war crime of "attacking civilian objects" established for the International Criminal Court limits liability to the intentional attack on civilians:

> **Article 8 (2) (b) (ii)[86]**
> **War crime of attacking civilian objects**
> **Elements**
> 1. The perpetrator directed an attack.
> 2. The object of the attack was civilian objects, that is, objects which are not military objectives.
> 3. The perpetrator intended such civilian objects to be the object of the attack.
> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Proof of intent obviously requires more than an unreasonable judgment: while an intentional attack on civilians or civilian property is *ipso facto* unreasonable, an unreasonable judgment of target legality is not *ipso facto* an intentional violation of that protection. Accordingly, because if properly applied the culpability standard for attacking protected persons and property demands proof of a purpose to violate that protection, which in turn requires proof of knowledge that the target was in fact protected, the apparent need to address the test for reasonableness may not have been considered significant.

However, in the opinion of the author this heightened culpability standard does not obviate the value of a more defined framework for assessing reasonableness. Because such an assessment will invariably be the predicate question when assessing illegality, facilitating that assessment process will contribute to the ability to apply a genuine *post hoc* critique of targeting judgments. Perhaps more importantly, it should

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[84] *See* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, para. 51 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 5, 2003) (stating that "an object must be attacked when it is not reasonable to believe…" but failing to address the meaning of reasonableness).
[85] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (Sept. 1993), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.
[86] *See Id.* at art. 8(2)(b)(ii).

facilitate the ability of a commander to articulate the basis for the judgment subject to critique. Furthermore, commanders may confront situations where the attack itself is not the basis for an allegation of criminality, but instead evidence supporting a broader allegation of improper conduct. For example, the propriety of an attack may be related to a broader allegation of Genocide or Crimes Against Humanity based on individual or joint criminal enterprise. In such a case, it is not at all clear that it would be necessary to prove an intentional attack against protected civilians or civilian property. Instead, establishing that targeting decisions were unreasonable would contribute to proving the broader allegation by creating an inference that the overall purpose of the military operation was illicit. Assessing the reasonableness of such decisions without a quantum of information framework arguably invites arbitrary and subjective determinations. If this is true, then it seems fundamentally inconsistent with the assessment of reasonableness, which requires an objective critique. What is necessary is a methodology of assessing the objective reasonableness of a decision through the subjective perspective of the commander at the time of the decision. A quantum of information framework will contribute to the legitimacy of this process.

II. What does reasonable mean?

Reasonableness is unquestionably the focal point of compliance with the military objective rule, and by implication the principle of distinction.[87] What, however, does 'reasonable' mean in practical terms? There two potential answers to this question. The first, which seems consistent with current practice, is to merely emphasize the reasonable judgment requirement of each *ad hoc* decision. Commanders make *ad hoc* assessments of target legality based on instinctual assessments of the amount of information necessary to satisfy the elements of the military objective test (at times guided by the advice of a military legal staff officer, who like the supported commander is left with his own subjective judgment of what amount of information renders the decision reasonable).

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

[87] MAJ. R. CRAIG BURTON, 86TH LAW OF WAR COURSE: MEANS & METHOD OF WARFARE D-4 (International Operational Law TJAGLCS Law of War Course, 2006).

related to the third deficiency: the lack of a consistent framework for *post hoc* critique the reasonableness of the commander's decision.

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

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

This latter effect was apparent to me when I participated in a trial that provided the motivation for this article. General Ante Gotovina is currently awaiting judgment by the International Tribunal for the Former Yugoslavia.[88] Central to the prosecution's theory that Gotovina engaged in ethnic cleansing of Croatian Serbs from the Krajina was the allegation that his use of indirect fires against the city of Knin (Knin was at the time was the capital of the Croatian Serb break-away region of Krajina[89]) was intended to terrorize the civilian population. By demonstrating the inherent unreasonableness of his target selections, the use of those indirect fire assets would support a circumstantial inference that the overall objective of the operation he commanded (Operation Storm) was to force Serbs from the territory. Accordingly, it was not necessary for the prosecutor to establish intent to attack protected persons and places. Instead, by demonstrating the inherent unreasonableness of his selection of methods and means of attack against targets within the city, the prosecutor would achieve the purpose of corroborating the broader illicit motive.

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

Called by the defense, my testimony focused on the propriety of designating certain buildings and areas within Knin as lawful objects of attack (and the methods and means used to attack those objectives). Based on my review of all the facts available at the time of Gotovina approved the attacks, I opined that each nominated target qualified as a lawful military objective. I also challenged the probative value of a report offered by the prosecution by their own expert who reached the exact opposite conclusion. In my view, it was reasonable for Gotovina to conclude that all of the nominated targets located within the city of Knin were either being utilized by Croatian Serb forces for military purposes (such as use as headquarters or barracks) or were valuable for other military purposes (such as to facilitate movement of reinforcements or supplies). The prosecutor challenged much of this opinion, particularly in relation to buildings and places that were not purely military in nature (such as a rail yard, or an apartment building housing the civilian leader of the Croatian Serb forces). Ultimately, the Tribunal was left with differing opinions on the reasonableness of General Gotovina's judgments, punctuated by periodic interventions by the Presiding Judge who emphasized his view that reasonableness would depend on all the variables presented to General Gotovina at the time of his decisions – a conclusion I endorsed.

It seemed relatively apparent that the Presiding Judge was determined to critique the reasonableness of General Gotovina's judgments by carefully considering all the facts and circumstances prevailing at the time.[90] However, there was never any discussion of the amount of information required to render those judgments reasonable. As a result, four distinct conclusions were invited: the conclusions reached by General Gotovina when he approved targets; my conclusion based on review of the evidence available to him at that time; the Prosecutor's conclusion that the evidence did not justify Gotovina's legality conclusions; and the inchoate conclusion of the Tribunal. As I contemplated this effect of the absence of a clear quantum to define reasonableness, I was struck by the inherent arbitrariness of this assessment.

For a charge of unlawful attack on civilians or civilian property, the current state of the law arguably does require a prosecutor to prove beyond a reasonable doubt that an attack on a target intentional.[91] However, requiring a prosecutor to meet this standard and prove that a target subjected to attack was *not* a lawful military objective does not eliminate the disabling effect of an undefined reasonableness quantum. Proof beyond a reasonable doubt requires the prosecutor to exclude every fair and rational hypothesis except that of guilt.[92] In more specific terms, it requires the prosecutor to prove that there was no fair and rational justification for concluding a target qualified a

[90] Consistent with controlling LOAC principles. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 265, 286-90 (2010) (citing The Hostage Case and concluding that "[a]s the opinion makes clear, …, the standard of guilt or innocence is the facts as they appeared to the accused at the time, given the circumstances at the time.").
[91] About the ICTY: Criminal Proceedings, ICTY, http://www.icty.org/sid/146 (last visited Oct. 21, 2010).
[92] *See, e.g.,* United States v. Gay, 16 M.J. 475, 477 (C.M.A. 1983).

lawful military objective. Without a quantum standard, there is no meaningful criterion upon which to meet this burden in any but the most extreme cases: so long the commander can point to *some* information relied on for the target legality judgment, the *post hoc* assessment of whether the attack was intentionally directed against a protected person or place, which implicitly requires assessing the reasonableness of the judgment, without the ability to critique the quantum and quality of available information against a defined standard renders the critique inherently subjective.

Reasonableness should not be based only an assessment of whether a commander considered information in support of his decision, but instead on the quality of the information that supported the decision. While this is almost certainly consistent with the application of the military objective test in current practice, it highlights the importance of defining the quantum component of reasonableness. Furthermore, the appropriately high standard for criminal responsibility for attacking civilians or civilian property[93] should not be relied upon as a justification to avoid a more functional assessment of reasonableness in the decision-making process. Obviously, any commander who willfully (and according to the ICTY recklessly) attacks a target he knows is civilian in nature has violated the principle of distinction and the law of military objective. However, at the operational execution level, the principle of distinction and law of military objective requires more of a commander: a good faith determination that the object of attack qualifies as a military objective. It is this determination that should be the focal point of improving the decision-making process by identifying a rational quantum of information framework. Shifting the focus of compliance with the military objective test to the criminal consequence of non-compliance and the appropriately high burden of proof required to establish that liability undermines the efficacy of the law to achieve its intended goal: facilitate good-faith and factually sound attack decisions.

All of this indicates that both the operational decision-making process and the *post hoc* critique of those decisions would be enhanced by linking the concept of target decision-making reasonableness with a quantum of information framework. The value

[93] Several decisions of the International Criminal Tribunal for the Former Yugoslavia have addressed the culpability requirements to sustain a charge of unlawful attack on non-combatants.[93] These cases have appropriately focused on the question of whether the commander knew the object of attack was a civilian or civilian property. *See, e.g.,* Prosecuter v. Blaskić, Case No. IT-95-14-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010). Thus, culpability for violation of the principle of distinction attaches only when the prosecution can prove beyond a reasonable doubt that the commander launched the attack "intentionally in the knowledge . . . that civilians or civilian property were being targeted." Prosecuter v. Blaskić, Case No. IT-95-14-A, Judgment, para. 180 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004). This has been further defined as including a reckless judgment. Prosecutor v. Martic, Case No. IT-95-11-T, Judgment, paras. 90, 96 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, para. 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

of such a linkage is illustrated by considering another context where operational decisions are routinely subjected to *post hoc* investigatory and judicial critique: criminal investigations. Indeed, U.S. constitutional jurisprudence makes the link between a defined quantum component and the ultimate assessment of reasonableness a central tenet of government compliance with the Fourth Amendment's reasonableness requirement.

III. US Criminal Procedure as a Model of Contextual Reasonableness:

a. Probable Cause and the importance of developing a workable standard to meet the realities of pragmatic decision-making

The Fourth Amendment to the United States Constitution[94] requires that all searches and seizures be reasonable. Historically, establishing probable cause satisfied the substantive component of this "touchstone" of Fourth Amendment compliance. The definition of probable cause is therefore central to Fourth Amendment jurisprudence. According to the Supreme Court:

> Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.[95]

The Court then emphasized the pragmatic nature of the definition:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[96]

It is clear from these definitions that there is no exact definition of probable cause.[97] In fact, "[p]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual context – not readily, or even usefully, reduced to a neat set of legal rules."[98] When determining if probable cause exists, the courts look to the totality of the circumstance from the stand point of an "objectively reasonable police

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[94] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. CONST. amend. VI.

[95] Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (*citing Carroll v. United States*, 267 U.S. 132, 162(1925)).
[96] *Id.* at 175.
[97] Maryland v. Pringle, 540 U.S. 366, 371 (2003).
[98] Illinois v. Gates, 462 U.S. 213, 232 (1983).

officer."[99] Unlike other standards under the law – *i.e.* proof beyond a reasonable doubt – probable cause is a not a ridged concept. Instead, it is intended to be responsive to the realities of police investigatory practices, providing the officer some flexibility in the use of his judgment but still ensuring ample protection for citizen against unreasonable government action.

One example of the application of the probable cause standard is *Maryland v. Pringle*.[100] In this case the defendant was riding in the passenger seat of a car when the police pulled the driver over for speeding. When the driver opened the glove compartment to get his registration the officer noticed a large amount of rolled up cash. Upon the officer's request the driver consented to a search of the vehicle which revealed $763 in cash in the glove compartment and five baggies of cocaine in the armrest in the backseat of the car.[101] Neither the driver, the defendant, nor the other passenger in the car would tell the officer who the drugs and money belonged to, so the officer arrested all three of the men. At the police station Pringle confessed that the drugs and money belonged to him. At trial the defense attempted to suppress the confession on the ground that it was the fruit of an illegal arrest.[102]

The trial court denied the defense's motion and the jury convicted Pringle of possession with intent to distribute cocaine.[103] The court of appeals reversed the trial court's ruling stating that "absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, 'the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car . . . is insufficient to establish probable cause for an arrest."[104] The Supreme Court granted *certiorari* and overruled the state court. In so doing, the Supreme Court concluded that there Pringle's arrest was in fact based on probable cause.[105] Using the totality of the circumstance test outlined above, the Court found that the officer had probable cause to arrest all three individuals, including Pringle.[106] The Court stated:

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

[99] Pringle, 540 U.S. at 371.
[100] *Id.* at 366.
[101] *Id.* at 367.
[102] *Id.* at 369.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at 372.

officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[107]

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

Another case which describes the process courts go through to determine if probable cause existed is *Illinois v. Gates.*[108] In *Gates,* the Bloomingdale Police Department received an anonymous letter by mail purporting to detail the illegal drug activity of Mr. and Mrs. Gate.[109] The letter informed the police of the Gate's address, where they bought the drugs, and how they picked up the drugs. It concluded by stating that, "[a]t the time [Mr. Gates] drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drug in their basement."[110] The police department investigated each of the details of the letter regarding the address and the travel activities of the defendant's and found them to be true; they then signed an affidavit and presented it, along with the letter, to a judge who granted them a warrant to search the Gates' residence and automobile.[111]

Acting pursuant to the warrant the police "search[ed] the trunk of [the automobile], and uncovered approximately 350 pounds of marihuana. A search of the Gateses' home revealed marihuana, weapons, and other contraband."[112] The question before the Court was whether the anonymous letter along with the affidavit provided enough information to conclude that there was probable cause to issue the search warrant.[113]

The Illinois Supreme Court determined that the information was insufficient. To reach this conclusion they relied on the Supreme Court's decision in *Spinelli v. United States*[114] which required an anonymous letter to "adequately reveal the 'basis of knowledge' of the letterwritter… [and] provide facts sufficiently establishing either the 'veracity' of the affiant's information, or, alternatively, the 'reliability' of the informant's report."[115] The Illinois court applied a strict interpretation of this rule and found that

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[107] *Id.*
[108] 462 U.S. 213 (1983).
[109] *Id.* at 225.
[110] *Id.*
[111] *Id.* at 226.
[112] *Id.* at 227.
[113] *Id.*
[114] 393 U.S. 410 (1969).
[115] Gates, 462 U.S. at 228-29.

because there was no possible way for the Bloomingdale police department to determine the veracity of the person who wrote the letter, it could not be used to establish probable cause.[116]

The U.S. Supreme Court "agree[d] with the Illinois Supreme Court that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report. [They did] not agree, however, that these elements should be understood as entirely separate and independent requirement to be rigidly exacted in every case."[117] Instead the Court applied a "totality-of-the-circumstances approach."[118] This approach rejects any hard and fast rule and allows courts to weigh out probable cause with all of the facts in front of them. In this case, the Court considered all of the facts and concluded:

> Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities. … It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . [concluding]" that probable cause to search the Gateses' home and car existed.[119]

This decision provides an important manifestation of the Court's emphasis that probable cause is a practical standard intended to be applied by non-lawyers, and not a technical legal standard. Probability is the key, and in determining probability all facts and circumstances must be considered.

b. Evolution of the *reasonable suspicion standard*:

In 1968, the Supreme Court addressed the question of whether probable cause was the exclusive quantum for satisfying the reasonableness requirement of the Fourth Amendment. Up to that point in time, the Court had never considered whether the

[116] *Id.* at 229.
[117] *Id.* at 230.
[118] *Id.*
[119] *Id.* at 245-46.

amount of proof required to render a government intrusion into a privacy interest reasonable might be subject to contextual adjustment. The context that triggered this assessment was not a government arrest or investigatory search. The requirement that these government actions be supported by probable cause was well settled, and there was never any indication the Court would reconsider this requirement. Instead, what led the Court to address this question was the recognition that not all police intrusions into a privacy interest were made for the purpose of arrest or evidentiary search. Instead, the Court recognized that in many situations the police act on suspicion that an individual poses a danger of violence to them or surrounding individuals, or that the individual may be preparing to engage in criminal conduct.

Responding to such suspicion was, in the view of the Court, a reality of police work. These responses are not, as the Court noted, as intrusive as full-blown arrests or evidentiary searches, but are instead far more cursory. Accordingly, the Court was confronted with a choice: either it could exclude these routine low level intrusions from the reasonableness requirement of the Fourth Amendment, or it could demand the same quantum of proof to justify these lower level intrusions as the quantum required for full-blown arrests and searches (probable cause), or it could adjust the quantum required to satisfy the reasonableness requirement. Ultimately, the Court chose the last option, and thereby established a context driven test for reasonableness.

The Supreme Court addressed this issue in *Terry v. Ohio.*[120] *Terry* involved the investigatory actions of a plain clothes officer in downtown Cleveland, Officer McFadden. McFadden, a detective with thirty-five years experience noticed three individuals "pacing, peering, and conferring" outside of a store window.[121] Believing that the individuals maybe planning to rob the store, Officer McFadden watched them and when they left, he followed. He approached the individuals to question them. Fearing they might have a gun, he "spun [Terry] around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol."[122] The officer then had Terry remove his coat and took the pistol from him. Terry was charged and convicted of carrying a concealed weapon.[123] On appeal the Terry challenged the admissibility of the pistol into evidence claiming that because McFadden lacked probable cause that he was armed, it was seized as the product of an illegal search.[124]

The Supreme Court granted *certiorari* to answer the question of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for

[120] 392 U.S. 1 (1968).
[121] *Id.* at 6.
[122] *Id.* at 7.
[123] *Id.* at 4.
[124] *Id.* at 9.

weapons unless there is probable cause for an arrest?"[125] The Court first rejected the government argument that only a full-blown arrest or evidentiary search implicates the reasonableness requirement of the Fourth Amendment. For the Court, there was no question that Officer McFadden conducted a seizure and search of Terry; any other conclusion would be "sheer torture of the English language."[126] Therefore, the Court was forced to decide whether the search and seizure where reasonable under the Fourth Amendment, a decision complicated by the fact that the government conceded McFadden did not act based on probable cause.[127]

The Court determined that, when weighed in the balance of officer safety and Forth amendment protection, a search like the one conducted by Officer McFadden is reasonable. The Court held:

> …that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing maybe armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquires, and where nothing in the initial stages of the encounter serve to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself and other in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[128]

The Court's holding is very narrow. This exception to the probable cause requirement to justify a search applies only when the officer has a reasonable suspicion the suspect is armed. In order for a police officer's conclusion to be considered reasonable it must be based on "not [on] inchoate and unparticularized suspicion or 'hunch,' but [on] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[129] The officer must have some "specific and articulable facts" that lead to his conclusion that the suspect is armed[130]. When an officer forms reasonable suspicion that "crime is afoot" without suspicion the suspect is armed, it is reasonable for the officer to conduct a "brief investigatory seizure"[131] to confirm or deny the suspicion.[132] The brevity of such seizures distinguishes the degree of intrusion from an arrest, and therefore justifies a reduced quantum of proof to justify the action.[133]

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[125] *Id.* at 15.
[126] *Id.* at 16.
[127] *Id.* at 15-16.
[128] *Id.* at 30.
[129] *Id.* at 27.
[130] *Id.* at 21.
[131] *See Id.* at 29.
[132] *See Id.*
[133] *See Id.*

Whether in relation to a search or a seizure, there are three important aspects of the Supreme Court's reasonable suspicion jurisprudence for purposes of the analogy proposed herein. First, the Court's recognition that the quantum of proof required to render government action reasonable is contingent on the extent of the intrusion resulting from the government action. Second, the Court's conclusion that it is reasonable to intrude into a privacy interest based on a reduced quantum of proof when the extent of that intrusion is likewise reduced. Third, the Court's insistence that objective reasonableness can never be established by reliance on the pure instincts of the police officer, but instead demands some articulable fact to justify inferences based on those instincts.

c. PC to preponderance to clear and convincing.

As discussed above, the amount of certainty a government agent must possesses before depriving any person of their liberty is contingent on the liberty interest at stake. The highest quanta of proof – proof beyond a reasonable doubt – is required before an individual can be convicted of a crime and deprived of his life or liberty through incarceration or execution.[134] Probable cause, on the other hand, is a much lower standard – requiring only a reasonable belief – which justifies the search or seizure of property or a person.[135] Although less common in the criminal procedure context, there are two additional quanta relevant to the analysis herein – a preponderance of the evidence and clear and convincing evidence. Both of these quanta fall between proof beyond a reasonable doubt and reasonable suspicion on the quanta continuum.

Preponderance of the evidence falls fourth on the continuum under clear and convincing and above probable cause. It is defined in federal jury instructions for civil law suits as "to prove something is more likely so than not so. In other words, a preponderance of the evidence means such as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true."[136] The preponderance of evidence standard is used to protect the civil interest of individuals. For example, in *Williams v. Eau Claire Public School*, the judge issued the jury instruction above in an employment discrimination lawsuit.[137] In this case Joyce Williams, the plaintiff, "applied for and was denied the position of Assistant Athletic Director…. She filed a charge of gender discrimination … and shortly thereafter, she claims, she was denied a pay raise in her position as secretary to the…principal."[138]

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[134] In Re Winship, 397 U.S. 358, 363-64 (1970).
[135] Maryland v. Pringle, 540 U.S. 366, 371 (2003).
[136] *See, e.g.,* Williams v. Eau Clair Pub. Sch., 397 F.3d 441, 444 (6th. Cir. 2005) (quoting the jury instruction explaining preponderance of evidence).
[137] *Id.* at 442.
[138] *Id.*

The preponderance of the evidence standard is also used in paternity actions. For example in *Rivera v. Minnich*[139], Minnich brought an action in state court to establish Rivera as the father of her child which was born out of wedlock. The state court applied the standard of proof by a preponderance of the evidence but Rivera felt that this standard was too low and wanted the court to apply the clear and convincing evidence standard.[140] The U.S. Supreme Court agreed that a preponderance of the evidence was sufficient to prove paternity and require the father to pay child support. The court stated:

> Resolving the question whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father will not trammel any pre-existing rights; the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law… Rather the primary interest of the [father] is in avoiding the serious economic consequence that flow from a court order that establishes paternity and its correlative obligation to provide support for the child.[141]

Because the father's interest in *Rivera* where economic the Court found that a preponderance of the evidence was sufficient to establish paternity. By contrast, a preponderance was not sufficient in *Santosky v. Kramer*[142], to strip a parent's parental rights. In *Santosky,* the State of New York brought an action to strip the perennial rights of Mr. and Mrs. Santosky. Under New York law, in order to terminate the rights the parents over the parent's objection, the state had to prove by a "fair preponderance of the evidence" that the child had been "permanently neglected."[143] The question before the Court was whether or not this standard of proof was sufficient to meet the Constitution's Due Process requirement.[144] The Court first recognized that the amount of proof needed is contingent on the loss of liberty that the defendant will suffer if the state is incorrect or in other word, the liberty issue at stake.[145] Because, under U.S. law the right of "natural parents [to] care, custody, and management of their child" is a "fundamental liberty interest" a preponderance of the evidence was not sufficient to take it away.[146] The Court then held that the burden of proof clear and convincing

[139] Rivera v. Minnich, 483 U.S. 574 (1987).
[140] *Id.*
[141] *Id.* at 579-80.
[142] Santosky v. Kramer, 455 U.S. 745 (1982).
[143] *Id.* at 747.
[144] *Id.*
[145] *Id.* at 758-62.
[146] *Id.* at 753, 769.

evidence "adequately conveys to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process."[147]

Clear and convincing evidence is the standard of proof that falls above a preponderance of the evidence and under beyond a reasonable doubt on the continuum of proof. It is utilized by the courts when, "[t]he interest at stake …are deemed to be more substantial than mere loss of money …. Similarly, [the U.S. Supreme Court] has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interest in various civil cases."[148] It is best understood in context – more than just more likely than not (a preponderance) but less than beyond all reasonable doubt. The Kansas Supreme Court stated that in order for the evidence to be clear and convincing it must be "clear in the sense that it is certain, plain to understand, unambiguous, and convincing in the sense that it is so reasonable and persuasive as to cause you to believe it."[149]

As stated above the clear and convincing standard is used to protect "important individual interest in civil cases."[150] This standard is often used in situations where the state is attempting to terminate parietal rights, as in *Santosky*, or in cases where civil commitment is sought due to mental illness, such as *Addington v. Texas*.[151] In *Addington,* Addington's mother petitioned the court to have her son indefinitely committed after he had been temporarily committed to state mental hospitals seven times with no recovery and was arrested on the charge of "assault by threat against his mother."[152] At the time, state law required that a preponderance of the evidence was required to civility commit someone.[153] Although he did not dispute that he had a mental illness, the defendant appealed claiming that the state should apply the beyond a reasonable doubt standard.[154] The Court began by stating that "in considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed …"[155] The Court noted that the state has a legitimate interest in providing care for the mentally ill. It also noted that "[a]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable."[156]

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[147] *Id.* at 769.
[148] Addington v. Texas, 441 U.S. 418, 424 (1978).
[149] In the Interest of B.D. -Y., 187 P.3d 594, 599 (Kan. 2008).
[150] Addington v. Texas, 441 U.S. 418, 424 (1978).
[151] *Id.*
[152] *Id.* at 420.
[153] *Id.* at 422.
[154] *Id.* at 421.
[155] *Id.* at 425.
[156] *Id.* 426-27.

The Court ultimately determined that it was because of the second category – the abnormal behavior that is actually acceptable – that a preponderance of the evidence was not a sufficient level of proof. However, the states interest in protecting the mentally ill rendered proof beyond a reasonable doubt too strict a standard. The Court stated:

> Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question -- did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.[157]

The Court held that the middle standard – clear and convincing evidence – was the appropriate standard for cases involving civil commitment.[158]

IV. Contextual reasonableness and operational targeting:

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

It is obvious that the nature of the right subject to potential deprivation is different in the military targeting context than it is in criminal search and seizure context. In the search context, the right subjected to deprivation is the right to privacy; in the targeting context, it is the right to life. Nonetheless, this contextual reasonableness equation provides a potential rational framework to facilitate compliance with the reasonableness component of the target decision-making process. Like the assessment of reasonableness in the U.S. Fourth Amendment context, relying on a similar information/reasonableness equation will not only balance the needs of the military

[157] *Id.* at 429.
[158] *Id.* at 433.

commander with individual rights, it will also accommodate the legitimate interests of 'tip of the spear' operatives and of those responsible for assessing their decisions.

Like searches, target decision-making involves variable levels of certainty. Information supporting a determination of target legality can range from pure speculation or hunch, to a degree of certitude akin to proof beyond a reasonable doubt, and in many situations even proof beyond any doubt. It would, of course, be possible to impose a unitary quantum requirement on all target legality decisions (for example, requiring proof sufficient to support a military objective conclusion beyond a reasonable doubt). However, such an approach is unnecessarily inflexible, and arguably inconsistent with the nature of military operations.[159]

The value derived from analogy to U.S. Fourth Amendment jurisprudence is that it provides an illustration of how and why the quantum associated with reasonableness must be situation dependent. This contextual reasonableness equation is based on the premise that a logical symmetry should exist between the nature of the intrusion on a protected interest, and the quantum of information necessary to render the intrusion reasonable: the greater the degree of intrusion, the more information is required to render the action reasonable.[160] Implicit within this premise is the accordant assumption that as the nature of the intrusion becomes more significant, the law becomes less tolerant of error. Accordingly, the requisite quantum of information is lower for minimal intrusions, and escalates proportionally with the degree of intrusion and the accordant consequence of erroneous government decisions. Thus, while it is an axiom of search and seizure law that 'reasonable does not always mean right', it

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

[160] *Compare* Kyllo v. United States, 533 U.S. 27, 31 (2001) (" 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' Silverman v. United States, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. *See* Illinois v. Rodriguez, 497 U.S. 177, 181, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990);Payton v. New York, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980)."), *and* Terry v. Ohio, 392 U.S. 1, 30-31(1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.").

becomes more difficult to conclude an error in judgment is reasonable as the degree of intrusion increases.[161]

It is this proportional relationship between the nature of the intrusion on a protected interest and the quantum of information required to render that intrusion reasonable that offers a valuable analogue to the target decision-making process. In determining the legality of a proposed target, the quantum of information necessary to establish reasonableness should be directly linked to the potential consequence of erroneous legality judgments. At the implementation level, this would result in an ascending quantum of information requirement in relation to the descending probability that the object of attack is a military objective. Like search and seizure law, this equation will adjust the requisite quantum to render a targeting judgment reasonable in relation to the risk of error: the greater the risk, the more demanding the information required to support the judgment.

In the context of targeting, the variable is not the degree of intrusion on a privacy interest, but instead presumptive nature of the anticipated object of attack. It is this variable to which the accordant variable quantum of information requirement should be linked. Legally, there are two presumptive categories of anticipated objects of attack: military and civilian. As noted above, neither of these presumptions is conclusive, as each is subject to rebuttal by the appropriate facts and circumstances. Nonetheless, the fact that the law establishes presumptive legality of attack directed against military personnel, equipment, and facilities; and the presumptive illegality of attacking all other persons, places, or things, provides a logical framework for a variable quantum of information requirement in relation to the reasonableness of targeting decisions.[162]

In addition to these two broad categories of individuals, there is arguably an emerging sub-category of lawful object of attack: presumptive civilians outside the area of active combat operations.[163] Targeting these individuals is a ubiquitous aspect of what the United States initially characterized as the global war on terror (what is contemporarily characterized as self-defense targeting operations[164]). These individuals

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[161] Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government … is not that they always be correct, but that they always be right.").

[162] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.

[163] *See* Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations,* 42 ISRAEL L. REV. 45 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380; Jordan J. Paust, *Self-Defense Targeting of Non-State Actors & Permissibility of U.S. Use of Drone in Pakistan,* 19.2 J. TRANSNAT'L L. & POL'Y 237 (2010); Afsheen Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, (Wm. Mitchell Research Paper No. 2010-14, Tex. Tech Law School Research Paper No. 2010-25, June 16, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625829##; Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

[164] Harold Hongju Koh, Speech: Annual Meeting of the American Society of International Law, (Mar. 5, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("Third, some have argued that the use of lethal

are determined by the United States to fall within a category of underprivileged belligerent associated with non-state transnational enemy: Al Qaeda.[165] Based on this characterization, they are designated as lawful objects of attack pursuant to the inherent right of national self-defense (and arguably the principle of military objective).[166] Treating the struggle against Al Qaeda as an armed conflict (not to mention attacking individuals who are not located within an active theater of ongoing military operations) are both highly charged and controversial propositions.[167] Nonetheless, there seems to be no indication that the U.S. practice of subjecting these individuals attack based on the conclusion that they qualify as lawful military objectives will abate anytime soon.[168] One thing seems undisputed: targeting decisions related to these individuals are even more complicated than targeting decisions related to presumptive civilians operating within an area of active hostilities.

It may be appropriate from at least a national policy perspective to require a more demanding quantum of information to support the targeting of individuals not presumed to be lawful military objectives than for those who fall within that presumption. The further attenuated the nominated object of attack becomes from a

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

[165] *See* Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations,* 42 ISRAEL L. REV. 45 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380; Jordan J. Paust, *Self-Defense Targeting of Non-State Actors & Permissibility of U.S. Use of Drone in Pakistan,* 19.2 J. TRANSNAT'L L. & POL'Y 237 (2010); Afsheen Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, (Wm. Mitchell Research Paper No. 2010-14, Tex. Tech Law School Research Paper No. 2010-25, June 16, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625829##; Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

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[166] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.2; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 90-91 (2nd ed.).

[167] *See Rise of the Drones: Unmanned Systems and the Future of War*, *Subcommittee Hearing before U.S. House of Representatives Committee on Oversight and Government Reform Subcommittee on National Security and Foreign Affairs* (2010) (written Testimony Submitted By Kenneth Anderson), ¶ 10, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579411; *See, e.g.,* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010); Andrew M. Harris, *ACLU Sues U.S. Over Targeting Killing of Citizens,* BLOOMBERG, (Aug. 30 2010, 4:41 PM CT), http://www.bloomberg.com/news/2010-08-30/aclu-sues-u-s-government-over-targeted-assassination-of-american-citizens.html.

[168] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010)(labeling targeting decisions as a political questions and declining to address their legality); Harold Hongju Koh, Speech: Annual Meeting of the American Society of International Law, (Mar. 5, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.").

uniformed enemy (or his equipment or facilities), the greater the risk that the decision will result in an erroneous deprivation of life (or property). Informed by the evolution of the contextual meaning of reasonableness in the context of U.S. search, the quantum of information required to render such a decision reasonable should not be uniform between these categories of potential targets precisely because the risk or error is not uniform.

This leads to the key question: what quantum of information is sufficient for each category of potential target? U.S. criminal law provides a useful and logical framework to begin to answer this question. The first principle derived from that law is that government decisions that intrude upon an important individual interest can never be reasonable when based on speculation or hunch.[169] In the search and seizure context, the classic example of acting on speculation is when a police officer engages in a search or seizure based solely on her instincts. Interestingly, this is probably the closest area of explicit symmetry between the law related to targeting and search and seizure law. The rule of military objective includes the requirement that the decision-maker conclude that subjecting a person, place, or thing to attack will produce a "definite" contribution to military action.[170] According to the ICRC commentary:

> . . . destruction, capture or neutralization must offer a ' definite military advantage ' in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.[171]

Distinguishing the term definite from potential or indeterminate suggests that the rule of military objective prohibits commanders from launching attacks based on only speculation or conjecture as to the value that will result from the attack. Accordingly, like search and seizure law, the rule of military objective appears to exclude reliance on instinct or speculation alone as a sufficient basis to reasonably justify the conclusion that a person, place, or thing qualifies as a lawful military objective.[172] However, in another striking similarity between the two bodies of law, the key to transforming operational instinct into a reasonable determination of military objective is some

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[169] Terry v. Ohio, 392 U.S. 1, 27 (1968) ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").
[170] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.2.
[171] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987) at 636.
[172] *Id.*

articulable fact that validates the instinct, which is ostensibly emphasized in the quoted Commentary reference to "sufficient information".[173]

The transformation of unreasonable speculation to reasonable cause was central to the Supreme Court's *Terry* holding.[174] Recognizing the need for prompt action by 'street wise' police officers, as noted above the Court coined a new category of reasonable cause called "reasonable suspicion."[175] This level of cause was and remains the lowest threshold of justification to satisfy the reasonableness requirement of the Fourth Amendment. According to *Terry*, it is the additional element of some "articulable fact" that combines with experience based intuition to rise above speculation and transform police instinct or hunch (speculation) into a reasonable suspicion.[176] The Court acknowledged that it only requires a modest amount of information to satisfy this requirement and allow suspicion to be constitutionally reasonable without rising to the level of probability. However, this was precisely because the degree of intrusion – and by implication the consequence of error – was lower that the degree of intrusion traditionally requiring evidence sufficient to establish a probability.[177]

This quantum equation seems logically suited to provide the minimum acceptable quantum for reasonable targeting decisions. Both targeting law and search and seizure law require more than speculation to render a judgment reasonable. The concept of reasonable suspicion is responsive to this requirement. However, what is most appealing about analogy to this standard of reasonableness is that it was developed specifically to be responsive to the realities of the 'street' – the entire *Terry* opinion is focused on the need to develop a standard of reasonableness flexible enough to address the realistic situation of fast developing police encounters.[178] Equally compelling is the Court's endorsement of reliance on experience based intuition to transform seemingly insignificant information into reasonable suspicion.

In *Terry*, this aspect of the equation was illustrated through the incident that led Detective McFadden to approach Terry and his accomplices. It was clear that the Court considered Detective McFadden's reaction to what he observed – which when combined with his experience and intuition amounted to *modus operandi* evidence – a reasonable justification for confronting the suspects.[179] Like that context, a test for reasonableness in the targeting context must account for the experience and intuition of the military commander. Information that may seem innocuous to non-military experts will often provide critical insight into enemy dispositions and intentions. Indeed, as a

[173] *Id.*
[174] 392 U.S. 1 (1968).
[175] Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).
[176] *Id.* at 21.
[177] *See Id.* at 17-19.
[178] *Id.* at 9-10.
[179] *Id.* at 30.

former tactical intelligence officer,[180] the Supreme Court's explanation of the process by which police officers combine information with their experience based instincts to produce reasonable judgments has always struck me as identical to the process by which my commanders would utilize tactical intelligence to inform their experience based decisions.

The standard of reasonable suspicion, however, is satisfied by a very modest amount of information, and relies heavily on police instinct and intuition. As noted above, it is the minimally acceptable level of cause for justifying an intrusion into a protected interest. It is also clear that the information required for reasonable suspicion is much lower than that required to establish a presumption. Accordingly, reasonable suspicion should only support a determination of legality for proposed targets that fall within a category of presumptive military objective, namely military personnel, equipment, or facilities. For these targets, a commander is justified in ordering attack so long as there was some evidence that, when considered through the lens of military experience and intuition, supports the targetability conclusion.

This flexible and concededly modest equation of reasonableness is necessarily tailored to the reality of military operations. Commanders are justified in attacking such targets on a minimal level of information. This is because once such proof is available the risk of hesitation is grave, for it will be perceived as ceding initiative to the enemy force. Accordingly, prompt and decisive action in response to some articulable facts that indicate targetability is the operational norm and justified by the risk associated with hesitation inherent in requiring a higher degree of certainty. This also bolsters the analogy to the origins of the reasonable suspicion standard, which was specifically responsive to the reality that once a police officer becomes aware of some facts that support instinct or intuition that "criminal activity may be afoot" – and especially criminal activity involving violence - hesitation would be inconsistent with operational reality.[181]

This modest quantum is also necessary to accommodate templated targeting of enemy capabilities. Templated targeting involves the use of combat power against areas based on a prediction: either that the enemy is occupying those areas, or that the enemy will utilize those areas.[182] These predictions are not based on mere speculation. Instead, they are based on complex intelligence estimates involving a combination of known enemy dispositions, enemy doctrine, and anticipated enemy courses of action. Examples would include blind fires against an area determined to be the likely location of enemy artillery groups, or enemy assembly areas; blind fires along entry or egress routes for friendly aircraft focused on areas where the enemy would logically locate air

[180] The author's military career began with five years of service as a tactical intelligence officer.
[181] *Id.*
[182] *See* DEPT. OF THE ARMY, FM-2-0: INTELLIGENCE 1-69, 1-95 (Mar. 2010), http://www.fas.org/irp/doddir/army/fm2-0.pdf.

defense assets; or blind fires against natural or man-made choke points along an anticipated enemy axis of advance or withdrawal.[183]

All of these situations involve the use of unobserved indirect fires against targets without verified presence of enemy forces or capabilities.[184] The articulable facts that render the decision to attack such targets reasonable include assessment of enemy doctrine, prediction of enemy courses of action, and the instincts of commanders and intelligence analysis supporting those instincts. Requiring more than this minimal quantum of proof would effectively disable the use of such tactics. The key element in reasonableness is not, however, pure instinct. It is instead the combination of instinct with doctrine and predictions of enemy courses of action, evidence that will only be available in relation to targeting against organized enemy opposition groups.

While the modest quantum of information required to render suspicion reasonable is appropriate to support a judgment of target legality for enemy personnel, equipment, and facilities, it should not be sufficient to justify targeting objectives that are presumptively civilian in nature. The quantum necessary to establish reasonable suspicion is too low to rebut a legal presumption. Accordingly, once the anticipated object of attack falls outside the category of enemy forces, equipment, or facilities, reasonableness demands and a heavier evidentiary burden on the commander.

In the lexicon of U.S. Fourth Amendment jurisprudence, the next stop along the quantum continuum is probable cause. Prior to the endorsement of reasonable suspicion as a valid standard of cause, probable cause was the lowest level of justification along that continuum. As noted earlier, probable cause has been defined in different ways, but in general it refers to sufficient evidence to establish a fair probability.[185] The Supreme Court has emphasized that it is intended to be a practical, not overly technical standard, noting that: "[I]n dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[186] Probable cause, therefore, refers to a level of cause that certainly exceeds mere suspicion.

As noted earlier in this article, the rule of military objective explicitly accounts for the reality that many places and things presumed to be civilian may become lawful objects of attack by virtue of their nature, purpose, location, or use.[187] Military operators

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[183] *See* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-09: JOINT FIRE SUPPORT III-10(g) (June 30, 2010), *available at* http://www.dtic.mil/doctrine/new_pubs/jp3_09.pdf (stating that nonlethal fire can be used to locate the enemy).
[184] WAR DEP'T, FM 6-20: TACTICAL EMPLOYMENT, FIELD ARTILLERY FIELD MANUAL, III-12, III-16, (Feb. 5, 1944), *available at* http://www.lonesentry.com/manuals/fm6-20-artillery/artillery-general-ch1.html.
[185] Illinois v. Gates, 462 U.S. 213, 238 (1983).
[186] Brinegar v. United States, 338 U.S. 160, 175 (1949).
[187] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.2.

often refer to such places and things as dual use targets, suggesting that they are being used for both civilian and military purpose. This is somewhat misleading, because pursuant to the rule of military objective it is the transformation to military value that justifies subjecting them attack; that they may also offer some nonmilitary value is not relevant determination of whether or not they qualify as lawful military objectives (although it is certainly relevant additional assessment of whether an attack would violate the rule of proportionality[188]). Nonetheless, the pre-targetability civilian character of such objectives indicates the target is presumptively protected from being made the deliberate object of attack.

Because contemporary armed conflict rarely involves force on force engagements in areas isolated from civilian populations and infrastructure, it is a virtual axiom of military operations that attacks are routinely launched against places and property presumed civilian. Even when close combat falls into the increasingly rare category of isolation from civilian population centers - for example when Coalition forces engaged Iraqi armed forces in sparsely populated areas of Kuwait and Iraq during the first Persian Gulf war - influencing the battle routinely involves targeting command, control, communications, intelligence, and logistics capabilities located in civilian populations centers.[189]

These targets are materially different than targets presumptively military in nature. Unlike enemy forces in uniform, their equipment or installations, these targets have no pre-conflict association with enemy military capabilities. Instead, it is the "nature, purpose, location, or use" of these things and/or places that renders them lawful military objectives. Unlike presumptive military targets, the LOAC implicitly imposes a higher quantum requirement to justify the reasonable determination that these places and/or things qualify as lawful military objectives. According to Article 52 of AP I, " In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, *it shall be presumed* not to be so used."[190] According to the associated ICRC Commentary, "even in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects. "[191]

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[188] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 105 (2nd ed.).

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

[190] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 52.3.

[191] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987) at 638.

This presumptive protection from attack warrants and increased quantum of information to establish target legality; a quantum more fact oriented than reasonable suspicion. Probable cause, which is the next level of proof in the search and seizure continuum, is a logical standard. Like reasonable suspicion, probable cause is intended to be a practical, common sense assessment of available facts and circumstances.[192] Unlike reasonable suspicion, these facts and circumstances must establish a fair probability.[193] Suspicion refers to "[A] minute amount or slight indication"[194], whereas probability refers to the "likelihood that a given event will occur."[195] Accordingly, probable cause requires a quantum of information establishing the suspected fact beyond a 'slight indication' but to a degree that indicates the likelihood of that fact.[196] Furthermore, this increased quantum requirement renders instinct and intuition less significant in relation to the target legality judgment.

A probability that a proposed target is a military objective by virtue of its nature, purpose, location, or use provides a sufficient quantum to establish the reasonableness of subjecting presumptively civilian property or areas to attack. However, in light of the consequence associated with attacking an individual as opposed to attacking a place or thing, this quantum is arguably insufficient to justify attacking civilians who have forfeited their protection by directly participating in hostilities.[197] While both civilian property and civilians themselves benefit from a presumption that protects them from being made the deliberate object of attack, the consequences of an erroneous judgment rebutting that presumption is obviously more significance for persons than for property. The quantum of information that justifies attack on persons should therefore be more demanding.

It is true that civilians will often be present in the vicinity of civilian property or places determined to qualify as military objectives and therefore subjected to attack, which will often endanger their lives. However, the issue addressed herein is related to the decision to render a person, place, or thing a deliberate object of attack. In most cases, attacking presumptive civilian property or places – for example attacking an apartment building being used by enemy forces as a vantage point for artillery spotting or attacking a crossroads in a town in anticipation that it will be used by enemy forces to bring reinforcements to the close battle – will involve a known risk of inflicting casualties on civilians. But in these situations, those casualties will be the incidental and

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[192] Brinegar v. United States, 338 U.S. 160, 175 (1949); Illinois v. Gates, 462 U.S. 213, 232 (1983).
[193] Illinois v. Gates, 462 U.S. 213, 238 (1983).
[194] Suspicion, THE FREE DICTIONARY, http://www.thefreedictionary.com/suspicion.
[195] Probability, THE FREE DICTIONARY, http://www.thefreedictionary.com/probability.
[196] *See* Brinegar v. United States, 338 U.S. 160, 175 (1949); Illinois v. Gates, 462 U.S. 213, 232 (1983).
[197] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 51; *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law,* at 1009, ICRC (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf (stating that if there is a doubt as to a civilians participation in hostilities the civilian should receive the "presumption of protection"). .

collateral consequence of the deliberate attack on property or a place. Whether the property or place may be made the deliberate object of attack requires an initial assessment pursuant to the rule of military objective (for which this proposed quantum component is related). The risk of inflicting casualties on civilian persons is not a factor in the military objective analysis so long as those casualties are the *knowing* but *non-deliberate* consequences of the attack. Instead, that risk is assessed pursuant to the proportionality rule.[198] Acting on the probability that civilian property or a civilian place qualifies as a lawful military objective strikes a logical balance between the realities of the operational environment, the protection of civilian property, and the level of risk inherent in the targeting decision.

The decision to subject an individual civilian to deliberate attack involves a significantly different balance of interests. First, the likelihood that a civilian will engage in the type of activity necessary to rebut the presumption of protection from attack is much lower than the likelihood that civilian property or places will be transformed into lawful military objectives. Second, and perhaps more importantly, the risks associated with erroneous judgment are obviously more profound when deciding to target a person as opposed to a place or a thing. This reduced likelihood/increased risk relationship has in practice rendered the presumption of protection afforded to civilian persons more significant than that afforded to property or places.[199]

Like property or places, however, this presumption is and must be rebuttable. When civilians take a direct part in hostilities, they lose protection from being made the deliberate object of attack for such time as their participation continues.[200] While there has never been a consensus definition of the meaning of direct participation in hostilities (a topic of considerable contemporary debate)[201] there has always been

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[198] Article 51(5)(b) prohibits attacks that which "may be expected to cause [injury to the civilian population] which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* at art. 51(5)(b). This language is again repeated in Article 57.2(b) which requires an attack to be canceled if it "may be expected to cause [injury to the civilian population] which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* at art 57.2(b). The ICRC commentary to Article 57 recognizes that this is not a cut and dry standard, instead it requires military commander to act in good faith and weigh the injury to the civilian population against the "military interest at stake." Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 683-84.

[199] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 613-24.

[200] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 7 Dec. 1979 art. 51.3; *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law,* at 994, ICRC (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.

[201] *See Id; See also* Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum,* 42 N.Y.U. J. INT'L L. & POL 637 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups & the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements,* 42 N.Y.U. J. INT'L L. & POL 697 (2010); Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities,* 42

consensus that the combatant bears a heavy burden to verify that the civilian has crossed the line from inoffensiveness to conduct that qualifies as direct participation.[202] This determination results in subjecting the individual to deliberate attack, normally with deadly combat power. Accordingly, the combatant's judgment will almost always involve life and death consequences. While attacking places and/or things that also fall under the presumption of civilian protection can also result in loss of life, the certainty of that effect is in no way analogous to the certainty associated with deliberately targeting human beings.

All this leads to an unquestioned reality: civilians benefit from the strongest presumption of non-targetability, both legally and as a matter of operational practice. As a result, the extremely high risk to human life associated with the determination that a civilian is directly participating in hostilities warrants a more demanding quantum standard than what should required to target civilian property or places. Acting on information that supports a mere probability is therefore insufficient to satisfy this requirement, because such a quantum fails to exclude alternate probabilities – it merely creates one among several. Increasing the quantum requirement to information sufficient to establish a preponderance – that it is more likely than not that the presumptive civilian is taking a direct part in hostilities – should be the minimally acceptable quantum to rebut this critically significant presumption.[203]

A preponderance requirement would normally be easily satisfied and in fact exceeded where the test for what qualifies as direct participation in hostilities is restrictive. Such a test would essentially require the civilian to be actually engaging in or about to engage in armed hostilities against friendly forces.[204] In such situations, the use of deadly force in response to the threat would be based on a determination that the civilian presented a threat of overwhelming actual and imminent risk to the combatant. As a result, the test implicitly requires information that established beyond any doubt that the civilian had forfeited the presumptive protection provided by the law. Of course, there might be issues related to the quality of the evidence relied on by the

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N.Y.U. J. INT'L L. & POL 741 (2010); W. Hays Parks, *Part IX of the ICRC "Dirct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect,* 42 N.Y.U. J. INT'L L. & POL 769 (2010); Nils Melzer, *Keeping the Balance between Military Necessity & Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities,* 42 N.Y.U. J. INT'L L. & POL 831(2010).

[202] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 149 (2nd ed.)

[203] The ICRC, in their report on direct participation states that "In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constituted an integral part." *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law,* at 1019, ICRC (2009). The study, however, does not address the quantum of proof required in the determination of a presumptive civilian's participation in hostilities. *Id.* .

[204] Commentary, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (Yves Sandoz et al. ed., 1987), at 619.

combatant to engage the civilian. This, however, is a fundamentally different issue than the requisite quantum needed to render the judgment reasonable. In the former situation, the individual or tribunal reviewing the combatant judgment is essentially questioning whether the judgment was reasonable based on the facts and circumstances available at the time of the decision. While the quality of the information (the probative value of the information considered by the combatant) available at the time of the decision is certainly related to whether or not the requisite quantum was satisfied, these are two fundamentally distinct questions.

The quantum requirement becomes far more significant in relation to an expanded definition of direct participation in hostilities, the type of definition that is gradually emerging in the international community. In its recently published Interpretive Guidance on the Meaning of Direct Participation in Hostilities, the ICRC endorses the use of what is referred to as the continuing combat function test as a basis to conclude a civilian is taking a direct part in hostilities.[205] Unlike the traditional actual and immediate harm standard reflected in the ICRC Commentary to AP I, the continuous combat function test extends the concept of direct participation in hostilities to individuals who routinely participate in activities that provide combat support to members of a belligerent party to a conflict.[206] It was developed specifically to address the very difficult problem of individuals who conduct combat functions periodically for a belligerent party but then routinely return to their civilian activities.[207] This so-called 'revolving door' problem was perceived by the experts gathered by the ICRC as necessitating this expanded test for determining when an individual was directly participating in hostilities and thus subject to lawful attack (an analogous expanded definition was adopted by the Israeli High Court of Justice in the Targeted Killing case[208]).

The relative merit of this expanded concept of direct participation in hostilities is beyond the scope of this article. What is relevant for this analysis is the challenge in determining when targeting an individual who falls into this expanded definition of direct participation in hostilities is reasonable. Unlike the narrow definition of direct participation, this expanded definition will rarely produce the type of overwhelming evidence that the civilian has forfeited protection from attack that is inherent in a test requiring the civilian to actually engage in hostile action. Instead, commanders called upon to make the target legality determination will be required to assess a variety of facts and circumstances related to the habitual conduct of the individual nominated for attack. Requiring the commander to be satisfied that the facts and circumstances make it

[205] *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law,* at 1007-08, ICRC (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.
[206] *Id.*
[207] *Id.* at 993-94.
[208] *Id.* at 1035; *see, e.g.,* HCJ 769/02 Targeting Killings Case [2005], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm.

more likely than not that such an individual is in fact engaging in a continuous combat function will make application of this expanded definition of direct participation in hostilities more legitimate. While a more demanding quantum may evolve over time as a matter of operational practice, a more likely than not quantum standard seems both rational and logical to balance the competing interests associated with application of this emerging and critically important test for target legality.

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

Prior to the U.S. response to the terrorist attacks of September 11, 2001, application of the direct participation in hostilities rule arguably presented the most challenging target legality determination. Since that date, the U.S. decision to characterize the struggle against transnational terrorism as an armed conflict with the accordant invocation of LOAC authority as a legal basis for responding to this threat resulted in an even more complex challenge: the legality of targeting non-state belligerent actors outside of the area of active combat operations. This challenge is exemplified by the debate over the use of predator drones to attack suspected Al Qaeda operatives in places like Pakistan, Somalia, and Yemen.[209] One aspect of these attacks that is not complicated is identifying the legal basis relied on by the United States: a determination that the individuals subjected to attack qualify as lawful military objectives.[210]

Many legal experts have criticized the invocation of LOAC authority as a justification for using predator drones to attack individuals significantly removed from the area of active combat operations in Afghanistan or Iraq.[211] This criticism has focused on both the inherent invalidity of characterizing the struggle against terrorism as an armed conflict,[212] and the invalidity of treating civilian terrorists as lawful military objectives.[213] Addressing these criticisms is well beyond the scope of this article, which

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[209] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010); *See also* Jordan J. Paust, *Self-Defense Targeting of Non-State Actors & Permissibility of U.S. Use of Drones in Pakistan*, 19 TRANSNAT'L L. & POL'Y 237 (2010).

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

[211] *Request Under Freedom of Information Act/ Expedited Processing Requested,* ACLU (Jan. 13, 2009), http://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf (outlining recent news reports of drone attacks and expressing a need for more information as to their justification); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* (Notre Dame Law School Legal Studies Research Paper No. 09-43) at 25-26, *available at* https://webspace.utexas.edu/rmc2289/LT/Mary%20Ellen%20OConnell%20on%20Drones.pdf; Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Study on Targeted Killings*, paras. 85-86 U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

[212] Mary Ellen O'Connell, *When is a War Not a War? The Myth of the Global War on Terror,* 12 I.L.S.A. J. INT'L & COMP. L. 1, 5 (2005).

[213] *See* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* (Notre Dame Law School Legal Studies Research Paper No. 09-43).

assumes *arguendo* that these characterizations are justified and that the United States will continue to invoke the LOAC to justify attack on such individuals.[214] Instead, what is critical for this analysis is the requisite quantum of information to justify the military objective determination and render attack on such individuals reasonable.

The quantum related to reasonable determinations of target legality becomes critical in this decision-making process. In essence, targeting of such terrorist operatives adds new levels of complexity to the complicated issue of targeting civilians who take a direct part in hostilities. Initially, it is not even clear that if Al Qaeda operatives fall within LOAC targeting authority they should be considered presumptive civilians. Although the emerging concept of continuing combat function seems to accommodate the perceived need to attack such operatives, the position of the United States appears to indicate that they are instead considered enemy belligerents for targeting purposes, not civilians taking direct part in hostilities (a position which ironically finds some support in the Direct Participation Interpretive Guidance). Irrespective of whether the legality of targeting these individuals is analyzed by application of the direct part in hostilities rule, or application of the principle of military objective (by treating them as members enemy belligerents), the threat identification issue remains extremely complex. Under either category, the basis upon which the target legality judgment will be made will invariably focus on the continuing and habitual conduct of the individual.

Relying on conduct as a basis to determine target legality is invariably more difficult than relying on a traditional objective indication of military status such as a uniform. However, this has always been the criteria used to determine when a civilian directly participates in hostilities. This conduct based targeting determination is already complex in the context of ongoing ground combat operations. It becomes increasingly more difficult as the individual object of attack becomes further removed from the area of direct hostilities. Under the traditional restrictive definition of direct participation in hostilities, the weight of the presumption of civilian status arguably increases with attenuation from an area of active ground combat operations. This is the simple consequence of the reality that individuals could only take a direct part in hostilities in the vicinity of combat operations. However, the nature of transnational terrorist operations has called into question the correlation between proximity to an area of active combat operations and the weight of the presumption of civilian status.[215]

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[214] *Obama Administration Official Publicly Defends Drone Attacks*, NEWSWEEK, http://www.newsweek.com/blogs/declassified/2010/03/26/obama-administration-official-publicly-defends-drone-attacks.html (last visited Oct. 28, 2010) (stating that the "considered view of this administration ... that targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.").

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

This complexity is at the heart of the debate surrounding the ICRC Interpretive Guidance.[216] The continuous combat function concept endorsed by that study is a direct recognition of the effect of the asymmetrical tactics relied upon by contemporary non-state actors engaged in armed hostilities. These tactics may result in the legitimate determination that individuals who are not proximate to an area of active combat operations may nonetheless take a direct part in hostilities. The controversy associated with this proposition is ostensibly based in part on the risk of error associated with the determination of target legality rather than the conclusion that direct participation in hostilities does not always require proximity to actual combat operations.[217] Recognition of this concern justifies a demanding quantum of information to justify the determination that an individual is taking a direct part in hostilities (and therefore may be attacked) when attenuated from active military operations. In short, the controversy associated with engaging in these attacks when coupled with the inherent risk of error in the determination of target legality warrants a quantum requirement that will contribute to accuracy and legitimacy.

While commanders cannot be expected to achieve absolute accuracy in their judgments, a requirement that the information be sufficient to exclude any fair and rational hypothesis inconsistent with the determination such individuals are lawful objects of attack would respond to this concern. Establishing that level of certainty is traditionally characterized as proof beyond a reasonable doubt.[218] This quantum standard would require the commander be convinced that the only fair and rational conclusion to be derived from the information presented is that the individual nominated for attack is in fact an enemy belligerent. Unless the proof reached that level of certitude, the commander would be required to forego attack. Such a demanding standard of proof (the standard required to rebut the weightiest presumption in U.S. law – the presumption of innocence) would facilitate attack on enemies operating outside a conflict area while limiting such attacks to only those cases involving a high degree of certitude.

B. A Framework for Application of the Quantum Element of Reasonableness

No quantum of information can ever guarantee that objects of attack are in fact lawful targets. However, the law has never required that commanders always be correct in their assessments of target legality. Instead, the requirement that command judgments be reasonable accepts the inevitable reality that sometimes those judgments are in fact incorrect. Reasonableness, however, does indicate that these judgments are ultimately subject to a standard of objective critique. Establishing the quantum of

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[216] *See e.g., Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law,* ICRC (2009), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf.

[217] *Id.*

[218] Hopt v. Utah, 120 U.S. 430, 440-41 (1887).

information to test reasonableness will add clarity to these command judgments, facilitate the role of legal advice, and contribute to ensuring *post hoc* critiques of such judgments are both legitimate and meaningful.

The battlefield, however, is not an environment where all potential targets are of equal character. As noted above, potential targets fall along a spectrum of certainty ranging from individuals, equipment, and facilities that are part of an organized enemy armed force; to operatives of a non-state enemy force operating in an area of ongoing combat operations; to civilians directly participating in hostilities; to individuals far removed from areas of active combat operations who engage in activity subjecting them to attack. The reasonableness of a target legality judgment must be responsive to this spectrum of (un)certainty. Reasonableness also must accommodate the realities of armed conflict, and ensure a proper balance between mitigation of risk of error and the necessity of prompt and decisive military action.

U.S. Fourth Amendment jurisprudence offers a logical foundation for developing variable quantum component to the target reasonableness requirement. This table summarizes this variable continuum proposed by this article:

Nature of Proposed Target	Analogous Fourth Amendment Quantum Standard	Information Required to Produce Reasonable Belief of Target Legality
Military Personnel, Facilities, or Equipment in Area with Minimal Civilian Presence	Reasonable Suspicion: Some articulable fact coupled with experience based instinct	Operational Instinct Based on Some Articulable Facts
Presumptively Civilian Property or Location	Probable Cause: a factual based determination of fair probability (although not exclusive probability)	Information sufficient to establish a fair probability, based on facts and circumstances, that property, facility, equipment, or area is militarily significant
Presumptive Civilian in an area of active combat operations	Preponderance: information resulting in a 'more likely than not' determination	Information sufficient to establish fact is more likely than not that the individual is directly participating in hostilities thereby rebutting the presumption of civilian immunity
Presumptive Civilian Outside the Conflict Area	Proof Beyond a Reasonable Doubt: Information that excludes all other fair and rational conclusions	Information that indicates the only fair and rational hypothesis is that the individual is a member of an enemy belligerent organization

C. A Framework for Application of the Quantum Element of Reasonableness

Any quantum of information component for the assessment of the reasonableness of target decision-making will ultimately require implementation at both the operational level and inevitably during *post hoc* critiques. Indeed, this requirement is already inherent in both of these aspects of assessing target legality. Commanders and the military staff officers (including military legal advisors) who advise them instinctively focus on the facts and circumstances available at the time these decisions are made to frame their judgments as to the legality of engaging

proposed targets. When these decisions are subject to *post hoc* critique, the investigators or tribunals assessing the decision-making process must also inevitably focus on the facts and circumstances prevailing at the time as the foundation for their determinations. As noted throughout this article, the inevitability that facts and circumstances will be considered in the assessment of reasonableness absent a defined quantum of information framework undermines the legitimacy of both target decision-making and subsequent critiques.

Establishing quantum framework, however, will not in and of itself ensure credibility and legitimacy of the target decision-making process. That credibility and legitimacy stems first and foremost from a good faith commitment to gather as much information as possible related to potential targets and to assess that information as thoroughly as possible given the conditions of combat. The credibility and legitimacy of any subsequent critique of the target decision-making process must also begin with a good faith commitment to assess the judgment through the subjective lens of the operational decision-maker. Any legitimate critique must rely on the situation that was confronted by the commander at the time of the decision, and to refuse to consider facts and circumstances that were unavailable or unknown to the commander at the time. Establishing a quantum of information framework for the target decision-making process will contribute to the effectiveness of the process at both levels. At the operational level, it will arm legal advisers with a more concrete standard of review in support of their advisory role. Even when commanders do not have the benefit of legal advice, pre-deployment training that incorporates these quantum requirements will facilitate quality decision-making by making the standards for target decision-making more concrete and identifiable.

The value of a quantum framework will make an even more significant contribution to the legitimacy of *post hoc* critiques of targeting decisions. Legitimacy of such critiques is critically important for ensuring effective accountability for battlefield misconduct, but it is also important to ensure commanders are able to act decisively in the intensely chaotic environment of armed conflict. This importance has recently been highlighted by the critical response to the Goldstone Report assessing the legality of military operations conducted during Operation Cast Lead, the 2008 Israeli incursion into Gaza.[219] Much of the criticism of the findings of the Goldstone report focused on an improper methodology utilized to assess the reasonableness of Israeli target selection and engagement. Establishing a quantum framework will contribute to future assessments of reasonableness and potentially mitigate the temptation to critique battlefield decisions retrospectively. Instead, such critiques would become more properly focused on the facts and circumstances available to an operational decision-

[219] U.N. Human Rights Council, *Human Rights in Palestine & Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48 (2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

maker at the time of target selection; the facts and circumstances that would provide the basis upon which to critique whether the requisite quantum was met.

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