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## Targeting State and Political Leadership in Armed Conflicts

Dr. Agnieszka Jachec-Neale

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# Targeting State and Political Leadership in Armed Conflicts

*Dr. Agnieszka Jachec-Neale\**

## ABSTRACT

*Despite repeated attacks on various figures of authority and political leaders such as Saddam Hussein, the scholarly debates in the law of armed conflict have not given much attention to an analysis of if, and if so, when, state and political leadership may be subject to lawful attack, or the question of when physical objects associated with exercising of the official functions contributing to the prosecution of military operations can satisfy the criteria of the definition of military objectives. Whilst examining various positions of leadership, such as Prime Ministers and political party figures, it is argued that there is a relationship between the character and the scope of the activity of such individuals, which may impact a legal assessment of the objects used or intended to be used in the furtherance of such functions. The existence of such relationships is best demonstrated by the example of individuals vested with the Commander-in-Chief functions. This Article demonstrates, contrary to previous assertions in the literature, that their status will be based either on their membership in armed forces or on their conduct constituting direct participation in hostilities. The result of such assessment could result in opposing outcomes of legal evaluation of the infrastructure associated with activity of such individuals, with possibly far-reaching consequences of incorrect application of the principle of distinction in armed conflict.*

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## I. INTRODUCTION

Whilst much research and debate in the law of armed conflict has, in recent years, concentrated on the issue of when and how people may be subject to lawful attack,<sup>1</sup> far less consideration has

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1. Selected key publications in this area include: WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 141–64, 426–27, 433–34 (Oxford University Press 1st ed. 2012); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 33–61 (Cambridge University Press 2d ed. 2010); NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 468 (Oxford University Press 2008); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW* 186–250 (Cambridge University Press 2010); Charles H.B. Garraway, *Combatants Substance or Semantics?*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING FAULTLINES* 317 (Michael N. Schmitt & Elena Pejic eds., 2007); Knut Ipsen, *Combatants and Non-Combatants*, in *HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 301–31 (Dieter Fleck ed., Oxford University Press 2013); Kenneth Watkins, *Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21<sup>ST</sup> CENTURY CONFLICTS* 137–79 (David Wippman & Micheal Evangelista eds., Transnational Publishers 2005); Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 *INT'L & COMP. L.Q.* 180 (2010); Jann K. Kleffner, *From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities: on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 *NETHERLANDS INT'L L.*

been given to the question of if, and if so, when, physical objects associated with certain human activity can be regarded as lawful military objectives.<sup>2</sup> It may partly be due to the fact that we have a well-established rule in the law of armed conflict which stipulates that an occurrence of human activity described as “military use” is likely to render such physical objects as legitimate targets in the given circumstances.<sup>3</sup> Quintessential in such an assessment is an identification of the qualifying “use” and the required temporal scope of such a use.

However, in relation to some objects, such an assessment will prove to be far more challenging. These targets include places and infrastructure associated with the direction of the conduct of armed conflict including the control over armed forces by the civilian political leadership. The assessment of such objects raises some fundamental questions about the way in which they satisfy the criteria attached to the definition of military objectives and specifically its first element of “effective contribution to military action” by “use” or other criteria.<sup>4</sup> Such objects may satisfy the definition of military objectives if they are used by combatants or by other individuals for military purposes. In case of the objects used by non-combatants, the activity-centered analysis that is an evaluation

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REV. 315–36 (2007); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. OF INT'L L. & POL. 831 (2010); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. OF RICHMOND L. REV. 845 (2009); Adam Roberts, *Counter-Terrorism, Armed Force and the Laws of War*, 44 SURVIVAL 7, (2002); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance* 42 N.Y.U. J. INT'L L. & POL., 641 (2010).

2. DINSTEN, *supra* note 1, 107–08; IAN HENDERSON, CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 74, 110 (2009); A.V.P. Rogers, *What is a Legitimate Military Target?*, in INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILLARIE MCCOUBREY, 48–52, 123, 176–77 (Richard Burchill et al. eds. 2005); Marko Sassoli, *Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts*, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21<sup>ST</sup> CENTURY CONFLICTS 181, 202–03 (David Wippman & Michael Evangelista eds., Transnational Publishers 2005); SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 365–68 (2012).

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 52.2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (“In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”). For a further discussion of these events, see AGNIESZKA JACHEC-NEALE, THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE 32 (2015).

4. JACHEC-NEALE, *supra* note 3, at 45–110.

of activity undertaken in given locations and buildings will determine the object's satisfaction of the first element of the definition.<sup>5</sup> The question then becomes relevant as to what are the boundaries of activity of civilian political leadership that can be deemed as having military purposes. Similarly, when the objects are used by the combatants for activities related to the conduct of hostilities, such targets are likely to be legitimate. There is also an argument that a use of objects by combatants irrespective of the specific military purposes would equally and in all circumstances render them lawful targets. The question arises, though, whether a similar association of buildings or places with a non-combatant politician, on account of their war-fighting powers or functions, may be considered sufficient to satisfy the requirements of the test.

Recent conflicts provide a plentitude of examples in which targets, namely those associated with leadership exercising command and control over armed forces and other functions or powers vital to the conduct of military operations, have been attacked.

Facilities associated with Saddam Hussein and the Ba'ath Party in Iraq were frequently attacked both in 1991 and in 2003. In 1991, they included a variety of leadership-related national level facilities such as the Ministry of Justice, the Iraqi Central Bank, and the Ministries of Industry, of Planning, and of Information.<sup>6</sup> In addition to these, in 2003, the Internal Security Agency, the Ba'ath Party headquarters, Presidential Secretariat, Presidential Bunker, Dora Farm, and Baghdad Emergency Forces, as well as offices and living quarters of Hussein's guards, were engaged.<sup>7</sup> During the 1999 NATO intervention in Kosovo, Slobodan Milosevic's residence and the Serbian Socialist Party headquarters were subjected to direct and indirect attacks.<sup>8</sup> In April 2011, United Nations (UN) forces fired at the presidential palace believed to be housing Cote D'Ivoire's president, Laurent Gbagbo.<sup>9</sup>

Unprecedented interest in targeting leadership facilities could be, in part, explained by progressive developments in military doctrine in recent years. Enemy leadership and associated infrastructure have become regarded as one of the strategic and operational centers of gravity.<sup>10</sup> This trend in military thinking has been transplanted into operational targeting, with numerous targets being attacked during the past few conflicts, as mentioned above.

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5. For the text of definition, see Additional Protocol I, *supra* note 3.

6. JACHEC-NEALE, *supra* note 3, at 221.

7. JACHEC-NEALE, *supra* note 3 at 241; Rogers, *supra* note 2, at 120.

8. JACHEC-NEALE, *supra* note 3, at 150, 233; Rogers, *supra* note 2, at 116.

9. *Ivory Coast: UN fire on Pro-Gbagbo Camp*, BBC (Apr. 21, 2011), <http://www.bbc.com/news/world-africa-12960308> [<https://perma.cc/KA9V-ZZJA>] (archived Feb. 26, 2018).

10. JACHEC-NEALE, *supra* note 3 (discussed in chapters 7, 9).

Whilst the targeting and attacking of such objects progressively increase, the uncertainties regarding their qualification as military objectives remain.

This Article addresses some of the issues pertinent in the consideration of persons and objects used or associated with state and political leadership as lawful targets. The Article begins by examining the status of state leadership on various levels of authority, both in their individual capacity and as a part of collective bodies, in light of their position within the government and the functions allocated to them. Following from there, consideration will be given to the determination of the status of the members of political parties from the perspective of the application of the principle of distinction. This will complete the first Part of the text.

The following Part will focus on physical objects associated with the state and political party leaderships. Here it will be necessary to introduce the constituent requirements of the definition of military objectives first. This is due to the fact that, while both persons and objects can be deemed military objectives, the definition of military objective will only apply to objects such as infrastructure, buildings, places, equipment, and so on. In this Part, consideration will be given to such objects from the perspective of their relationship to figures of authority in a broader sense of affiliation and in the more concrete aspect of actual use by these individuals. This Part explores intricate aspects of the relationship between the position or functions of the persons in leadership positions and the determination of lawfulness of the targets associated with the individuals. However, this will only be possible after looking at the parameters of the lawfulness of targeting persons in positions of leadership both in the governmental structures and in the highest ranks of political parties.

## II. TARGETING LEADERSHIP<sup>11</sup>

In predominantly democratic political systems, the executive, judiciary, and legislative organs tend to be vested with various competencies of control over armed forces. Civil control over armed forces is usually seen as an attribute of stable democracy, but it is certainly not confined to such a system. There is no single model of such a setup and the degrees of control vary, as well. The ultimate constitutional arrangement defining an adopted approach will depend

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11. The scope of the discussion does not include analysis of the targeted killings of leadership of non-state organised groups, but it may be relevant to the situations known as assassinations or treacherous or partisan killings. For a more detailed discussion, see Rogers, *supra* note 2, at 49–52.

on the political system of the individual state as well as its historical and cultural context.

Civil control over armed forces can take the form of direct or indirect management, command, and supervision by state organs. Direct control may involve decisions that are distinctively "military" in character or functions related to or affecting the prosecution of armed conflicts. Examples of such competencies may include the decision about deployment and re-deployment of armed forces into theater, decisions about belligerent reprisals, and targeting decisions requiring the highest level of authorization. Democratic control and political direction, which are linked to the prosecution of hostilities during armed conflicts, can be undertaken by a President, a Prime Minister, a whole cabinet of ministers, or even whole parliaments. The position of decision-makers involved in such decisions in the military-oriented political structure as well as how directly and effectively they are involved in making decisions about the prosecution of armed conflicts may define the degree to which they are regarded as legitimate targets during armed conflicts. In other words, the position of the the decision-maker vested with the relevant function as well as the scope of the associated function are two key factors subject to this consideration.

The determination of whether a leader can be seen as a lawful target rests on the application of the fundamental principle of distinction.<sup>12</sup> In line with its precepts, distinction will always have to be made between military objectives and civilians or civilian objects. "Military objectives" may include both human beings and physical objects recognized as lawful targets. In international armed conflicts, combatants and civilians directly participating in hostilities constitute two categories of persons who would be classed as military objectives.<sup>13</sup> In other words, the designation of these categories could be respectively status- and conduct-based. In non-international armed conflicts, "combatancy" does not arise, but the members of either the state's armed forces or organized armed groups are considered legitimate targets.

In addition, a determination of the scope of the individual's engagement in hostilities needs to be undertaken. The notion of "direct participation in hostilities," which is inherently difficult to interpret and apply in the context of either type of armed conflict, has

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12. Principle of distinction finds its relevant expression in Additional Protocol I, *supra* note 3, arts. 48, 50–52; *see also* The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (July 8).

13. Additional Protocol I, *supra* note 3, arts. 48, 49, 52.2; *see also* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 ¶¶ 2006–07 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; DINSTEIN, *supra* note 1, at 92; JACHEC-NEALE, *supra* note 3, at 37; Rogers, *supra* note 2 at 11, 102.

received more attention and elaboration in recent years. In 2009, the International Committee of the Red Cross (ICRC) published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Guidance)*, which hugely assisted in clarifying several aspects of this notion.<sup>14</sup> While the *Guidance* does not contain any specific findings with respect to state and political party leaders, it may prove nevertheless useful in shedding light on the application of direct participation to various figures of authority whose position or function involves a certain level of engagement in the prosecution of armed conflict.

The following subparts of this Article will examine such positions or functions starting with two positions that constitute a formal part of the operational military command chain. The first position is that of Commander-in-Chief (CiC). The second is the position of Minister of Defense (MOD), in some states also referred to as the Defense Secretary or Secretary of State for Defense.

#### A. *Commanders-in-Chief*

The CiC is usually a nominated or elected civilian head of armed forces. The person in this position is usually vested with exercising supreme command powers. The prevalent practice is to assume that heads of state are also holders of CiC functions, but this can be misleading. In Germany, the head of state is the President, while the CiC holder is the Federal Minister of Defense when in peacetime, and the Federal Chancellor when in wartime.<sup>15</sup>

In some states, the position of CiC is purely ceremonial or figurative, and the actual command over the armed forces is undertaken by someone else.<sup>16</sup> It is very important to make here a distinction between *de jure* and *de facto* holders of the CiC position. The position of a *de jure* holder of the command authority who delegates this authority or exercises it on the advice of some other organ will be, in practice, purely nominal. In this situation, the other executive organs, the *de facto* CiCs, exercise the supreme command competencies. In a parliamentary democracy, this could be the Prime Minister and/or the Cabinet led by the Prime Minister. In a presidential system, this will be the President, and, in a semi-presidential democracy, it could be either the President or the Prime Minister. It may well be that the *de jure* CiC may appoint the CiC nominated by the President or Prime Minister to discharge the actual

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14. See generally NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

15. JACHEC-NEALE, *supra* note 3, at 60.

16. See *infra* text accompanying note 18.

supreme command functions. The United Kingdom's monarch, Queen Elizabeth II, for example, is the nominated CiC in the United Kingdom, Australia, and Canada.<sup>17</sup> In these states, Her Majesty is regarded as the "Head of the Armed Forces" and the "ultimate authority" to whom military personnel swear allegiance.<sup>18</sup> However, a long-standing constitutional convention, under the exercise of the Royal Prerogative powers, has *de facto* bestowed on the Prime Minister, with the support of the Cabinet, the authority to make the key decisions on the use of the armed forces.<sup>19</sup> In Australia, the same powers are *de jure* delegated to the Governor General as the Queen's representative; however, in practice, CiC functions are executed by the Cabinet chaired by the Prime Minister.<sup>20</sup> This implies *de facto* collective exercise of CiC functions, which is not an unusual arrangement. Sweden has a similar conventional arrangement in which CiC functions are not undertaken by the head of state, namely a non-executive monarch, but rather by the Cabinet led by the Prime Minister and then delegated to the highest-ranking military professional.<sup>21</sup>

In China, Article 93 of the Constitution of the People's Republic of China conferred the authority to direct armed forces onto the Central Military Commission.<sup>22</sup> Separately, the President, as head of state, traditionally has been granted powers to issue orders of general mobilization or to proclaim a state of war.<sup>23</sup> Since 1993, the standard practice has been that the same person holds both positions, but recently the President alone seems to have fully taken over the role and the associated powers of CiC.<sup>24</sup> This would indicate a shift to a

17. See, e.g., *Australian Constitution*, s 68 [hereinafter Australia's Constitution]; Constitution Act, 1867, 30 and 31 Vict., c. 3 (Can.) (1867), <http://laws-lois.justice.gc.ca/eng/const/page-1.html#h-2> (last visited Feb. 4, 2018) [<https://perma.cc/PLR5-9URC>] (archived Feb. 5, 2018).

18. Constitution Act, 1867, 30 and 31 Vict., c. 15 (Can.) (1867); see also Governor of the Commonwealth of Austl., *Governor-General's Role*, <http://www.gg.gov.au/governor-generals-role> [<https://perma.cc/H5KZ-M2MA>] (archived Feb. 5, 2018) [hereinafter Governor-General's Role].

19. GAIL BARTLET & MICHAEL EVERETT, *THE ROYAL PREROGATIVE* 5, 9 (2017).

20. Governor-General's Role, *supra* note 18; see also Australia's Constitution, *supra* note 17.

21. RIKSDAGSORDNINGEN (The Riksdag Act) 1974:152 (see especially ch. 1 art. 5, ch. 5 art. 1, and ch. 10 art. 9); Swedish Armed Forces, *Structure and Responsibility*, <http://www.forsvarsmakten.se/en/about/organisation/organisational-structure-and-responsibilities/> (last visited Feb. 7, 2018) [<https://perma.cc/4P6M-2HYE>] (archived Feb. 7, 2018).

22. XIANFA arts. 80, 93 (2004) (China).

23. *Id.*

24. See Ankit Panda, *Xi Jinping Presides Over Massive PLA Parade as Commander-in-Chief*, *THE DIPLOMAT* (July 31, 2017), <https://thediplomat.com/2017/07/xi-jinping-presides-over-massive-pla-parade-as-commander-in-chief/> [<https://perma.cc/EJ38-6JGH>] (archived Feb. 24, 2018); John Sudworth, *China's Xi Jinping Takes Commander In Chief Military Title*, *BBC NEWS* (Apr. 21, 2016),

similar setup to the one in the United States where the CiC, the President, is the supreme commander in the operational chain of command whilst the Secretary of Defense is second in command.<sup>25</sup> Notably, the Chairman of the Joint Chiefs of Staff *de jure* assists both the President and the Secretary of Defense in the exercise of their command functions, but it is unclear how much of these are, in practice, *de facto* executed by the Chairman of the Joint Chiefs of Staff.

Scholarly sources in the Laws of Armed Conflicts (LOAC) field often indicate that CiCs are considered military objectives.<sup>26</sup> One source even gives an example of the 1993 killing of then Sri Lankan President Ranasinghe Premadasa, an event that is said to have complied with the principle of distinction given both the *de jure* position and *de facto* exercise of CiC functions by the President.<sup>27</sup> The question arises whether such an attack would have been lawful on account of the President's legal status as a combatant due to the CiC position being a part of the operational military chain of command. For the CiC to be regarded as a combatant in international armed conflict, the CiC would have to be, at the very least, a member of the armed forces within the responsible command structure.<sup>28</sup> In some sources, members of armed forces are defined as those who are "actually serving" in such forces indicating combat-readiness.<sup>29</sup> Whilst combatant status is linked to the membership in armed forces, it is worth noting that some members of armed forces such as medical or religious personnel or those assuming civil defense functions will not be afforded combatant status as they are not entitled to directly participate in hostilities.<sup>30</sup> The ICRC *Guidance* suggests referring to the domestic law arrangements with regards to armed forces membership expressed via a "formal integration into permanent units distinguishable by uniforms, insignia and equipment."<sup>31</sup> The U.S. Department of Defense's recent LOAC Manual stipulates that whilst the CiC is not a member of the armed forces, the CiC is still

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<http://www.bbc.co.uk/news/world-asia-china-36101140> [https://perma.cc/3PHE-B896] (archived Feb. 24, 2018).

25. See Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. 111 (1986).

26. See, e.g., DINSTEIN, *supra* note 1, at 115–17.

27. See SIVAKUMARAN, *supra* note 2, at 366.

28. Additional Protocol I, *supra* note 3, art. 4A; see also DINSTEIN, *supra* note 1, at 33.

29. Additional Protocol I, *supra* note 3, art. 4A; see also DINSTEIN, *supra* note 1, at 33.

30. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 13, ¶ 1677; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rules 3 and 4, COMMENTARY (Cambridge Univ. Press 2005).

31. MELZER, *supra* note 14, at 25 (2009).

targetable if he or she is responsible for operational command.<sup>32</sup> This is indicative of the United States' taking a second approach, in which the function, rather than the combatant status, associated with the position of CiC is more relevant.<sup>33</sup> This could be contrasted with clear pictures of China's President Xi Jinping wearing military uniform and insignia indicating that China's CiC is likely to be considered a member of the armed forces and thus a combatant in the event of international armed conflict.

It has to be noted that if, as per the ICRC *Guidance* recommendation, it is up to each individual state to define whether the CiC is a member of the armed forces, then it may be the case that state practice should not be assumed to be uniform in this sphere. Furthermore, it will be vitally important for the state that wishes to launch an attack on the enemy's individual CiC to actually know what the adversary's domestic regulation is in this context. As a combatant, he or she can be targeted anytime and anywhere.<sup>34</sup> It is not clear whether, in the situation where a nominated CiC is *de jure* viewed as a member of the armed forces and thus a combatant, a *de facto* CiC executive should also be afforded the same status.

If, on the contrary, the CiC holder is deemed a non-combatant member of armed forces or a civilian not incorporated into the armed forces under domestic law, then his or her involvement in the decisions related to the prosecution of armed conflict will have to be scrutinized under the requirement of "direct participation in hostilities" (DPH).<sup>35</sup> In this context, exercising effective or actual operational command over armed forces seems to be sufficient to satisfy the definition of the concept provided in the commentary to Article 43 of Additional Protocol I. Accordingly, such participation involves acts of war, which by their nature or purpose are likely to cause actual harm to the enemy armed forces.<sup>36</sup> Depending on the activity at stake, it seems plausible that such operational command can, in theory, satisfy more detailed elements of the concept of direct participation in hostilities espoused in the ICRC *Guidance*, including the threshold of harm and belligerent nexus.<sup>37</sup> Admittedly, there may be a problem with satisfying the "direct causation" requirement,

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32. U.S. DEPT OF DEF., LAW OF WAR MANUAL § 5.7.4 (2016) [hereinafter DOD MANUAL].

33. The United States interprets the notion of DPH broader than it is reflected in ICRC *Guidance*. The DoD Manual outlines in general terms that DPH includes acts that "effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations." This way defined DPH will encompass a wide spectrum of CiC functions. *Id.* §§ 5.7.4, 5.8.3.1.

34. See, e.g., DINSTEIN, *supra* note 1, at 30.

35. DOD MANUAL, *supra* note 32, § 5.7.4.

36. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 13, ¶ 1679.

37. See MELZER, *supra* note 14, at 46–64.

which the ICRC *Guidance* interprets very literally and by and large links with the actual involvement in the combat.<sup>38</sup> The ICRC *Guidance* further states that a distinction has to be made between acts merely facilitating the “creation of capacity to cause harm” and direct involvement. This means that indirect participation such as logistical support or working in a munitions factory will not result in a loss of civilian protection.<sup>39</sup>

One could say that some CiC decisions constitute indirect participation, such as the deployment of armed forces into a theatre of operations, whereas some other decisions may be closer to direct causation, such as issuing a direct order to attack the leadership of the enemy armed forces.<sup>40</sup> What is clear is that CiC functions are rather unlikely to involve literal combat engagement on the battlefield. Two consequences follow from this observation. First, there could be CiCs that cannot be regarded as *prima facie* lawful targets and only as protected civilians because the state’s domestic law does not recognize them as members of the armed forces and their *de facto* scope of authority under CiC competencies cannot, in substantive terms, satisfy the “direct causation” element of DPH.<sup>41</sup> Secondly, where the scope of the CiC is not limited only to functions broadly related to the war effort and capacity-creation, then a determination of the CiC under DPH has to be undertaken on a case-by-case basis. This will also have a temporal limitation of such a CiC being targetable only “for such time” as they engage in the acts constituting DPH.<sup>42</sup> Consequently, a narrow interpretation of the “direct causation” and the scope of the acts falling within the DPH notion, as proposed in the ICRC *Guidance*, will lead to a conclusion that some holders of CiC functions may not be lawful targets based solely on the strength of these functions. Contrary to assertions found

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38. *Id.* at 51–58.

39. *Id.* at 53. This finding has been criticized by W. Boothby, indicating that some acts can be viewed as indirect participation, but in practice the same acts can lead directly to harmful acts. For example, training or equipping members of armed forces may constitute an integral part of the harmful act. See BOOTHBY, *supra* note 1, at 157–58.

40. See DOD MANUAL, *supra* note 32, § 5.7.4. In the 1990–91 Gulf War, the UK Prime Minister and the President of the United States made operational decisions related directly to conduct of hostilities, extending areas of operations and approving certain targets, including leadership ones. See JOEL WESTRA, INTERNATIONAL LAW AND USE OF THE ARMED FORCE: UN CHARTER AND MAJOR POWERS 116–17 (2007).

41. One way of addressing the “membership in armed forces” problem might be through an adaptation of a “functional membership” approach applied by the United States in the context of organized armed groups. See DOD MANUAL, *supra* note 32, § 5.7.3.2. Accordingly, in situations where the CiC position is incorporated into operational military chain of command, but not regarded as a formal member of the armed forces, the CiC authority holder could be considered a functional member based on the CiC functions relating to conduct of hostilities.

42. See MELZER, *supra* note 14, at 70–73.

in LOAC sources, one should not assume that individuals vested with the CiC functions can be uniformly regarded as lawful targets either based on their status or on their conduct constituting DPH.

A separate question arises in the context of the collective exercise of CiC authority. If one assumed for a moment that the CiC was a member of the armed forces, would this mean that all members of the Cabinet, vested with CiC authority, would also be considered combatants in the context of ongoing armed conflict? Or would it suffice that they are members of the Cabinet, an organ as a whole, and thus in a position suggesting a collective sharing of the same powers? In the United Kingdom, for example, the Cabinet is a collective decision-making body comprised of the Prime Minister and over twenty cabinet Ministers.<sup>43</sup> Cabinet Ministers are mostly heads of departments, known as Secretaries of State, each with a specific portfolio. All Secretaries of State jointly hold the same office and, unlike the Cabinet, are vested with legal powers as a whole. All members are bound to support Cabinet decisions even if they were not present.<sup>44</sup> This includes decisions about belligerent reprisals, which do link directly to the conduct of hostilities.<sup>45</sup>

In the situation where the domestic law does not recognize, by practice or by convention, or does not stipulate whether the CiC is a member of the armed forces, then each member of the Cabinet will be subject to scrutiny for DPH. The question remains whether a member of the Cabinet who is not present at a Cabinet meeting that involves acts that satisfy DPH, such as the vetting of a high-value but high-risk enemy target, can still be regarded as DPH. Clearly, the members who are present at the meeting and involved in the act in question can be regarded as military objectives, but only for such time as they are involved in this act. The absent members of the Cabinet should not be seen as lawful targets because they do not satisfy DPH at that time. In practical terms, this also means that once the Cabinet

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43. See UK Government, *Cabinet Ministers*, <https://www.gov.uk/government/ministers> [<https://perma.cc/FA44-PKWV>] (archived Feb. 26, 2018).

44. OONAGH GAY & THOMAS POWELL, *THE COLLECTIVE RESPONSIBILITY OF THE MINISTERS, AN OUTLINE OF ISSUES*, 11–12 (2004).

45. See UNITED KINGDOM MINISTRY OF DEFENCE, *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT* ¶ 16.19.2 (2004) [hereinafter UK Manual]. For an example of decision-making regarding the conduct of hostilities during the Falklands/Malvinas conflict, see MARGARET THATCHER, *THE DOWNING STREET YEARS 173–85* (2012). Mrs. Thatcher, as Prime Minister, and members of her Cabinet, issued the Order-in-Council requisitioning merchant ships for military purposes. *SS Canberra* was subsequently requisitioned and turned into a troop ship. SECRETARY OF STATE FOR TRADE, *THE NOTICE OF REQUISITION* (1982); see also ANDREW VINE, *A VERY STRANGE WAY TO GO TO WAR: CANBERRA IN THE FALKLANDS* (2014); Julian Thompson, *Operational Legacy of Falklands*, in *THE ART OF CREATING POWER: FREEDMAN ON STRATEGY* 184 (2017); Elizabeth Chadwick, *Merchant Ship 'Conversion' in Warfare, The Falklands (Malvinas), and the Requisition of the QE2*, 12 J. HIST. INT'L L. 71–99 (2010).

moves to discussion of other matters of the day, the present Ministers are no longer considered DPH and thus regain their civilian protection.

### B. *Ministers of Defense/Defense Secretaries*

The Ministry of Defense is the government department and highest level of military headquarters controlled by a Minister of Defense or its equivalent. A Minister of Defense acts as both a political and an administrative organ, dealing with administrative, financial, and personnel affairs of armed forces, and he or she normally directs defense planning and operational strategy. As part of these competencies, a Minister of Defense may issue direct orders to armed forces, including orders regarding the conduct of hostilities.<sup>46</sup> Typically, the head of a Ministry of Defense will be a civil, political figure, but invariably the post can also be held by a military professional.<sup>47</sup>

Similarly as in relation to legal position of the CiC, it is reasonable to observe that, unless Ministers with a defense portfolio can be considered members of the armed forces and a part of the operational military chain of command and/or with authority to make specific decisions directly affecting combat operations, then they can be targeted only in specific circumstances. Consequently, lawful attacks on them will be limited to *ad hoc*, limited-in-time occasions when they are involved in acts that satisfy the conditions of DPH as described in the ICRC *Guidance*. The United States may arrive at a different conclusion given its take on the notion of DPH. Accordingly, as clearly contributing to operational combat, the US Secretary of State or Defense would be targetable. Such a determination will become inherently much more difficult in a state that does not define clearly the position of Minister of Defense in the military chain of command. Ascertaining the position of other cabinet Ministers may, too, be complicated especially in the context of non-international armed conflicts.

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46. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶ 422, UN Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Report*].

47. Dagwood Rajha, Syrian Defense Minister, killed in July 2012 during the early stages of the Syrian internal armed conflict, was a former chief of staff of the Syrian Arab Army and the land forces of the Syrian military prior to the appointment as Defense Minister in 2011. See Olga Khazan & Benjamin Gottlieb, *Who were Dawoud Rajha and Asef Shawkat?*, WASH. POST (July 18, 2012), [https://www.washingtonpost.com/blogs/blogpost/post/who-were-dawoud-rajha-and-asef-shawkat/2012/07/18/gJQAKGVVtW\\_blog.html?utm\\_term=.73d4026e1904](https://www.washingtonpost.com/blogs/blogpost/post/who-were-dawoud-rajha-and-asef-shawkat/2012/07/18/gJQAKGVVtW_blog.html?utm_term=.73d4026e1904) [<https://perma.cc/2T99-PRB8>] (archived Feb. 3, 2018).

### C. Members of the Government

Other ministers in the government, such as the Ministers of Interior, the Ministers of Justice, or those responsible for intelligence would normally be presumed to be civilians, unless under the domestic law they would be integrated into armed forces.<sup>48</sup> During a conflict in Darfur, the police were fighting alongside the armed forces, and thus the Darfur Commission questioned the civilian status of the police.<sup>49</sup> They may lose this protection when and for such time as they directly participate in the hostilities.

Whilst this holds true in armed conflicts both of international and non-international character, during internal conflict, the organized groups do not always perceive such Ministers as civilians or respect their civilian immunity. For example, the Revolutionary Armed Forces of Colombia (FARC) claimed throughout its conflict with the state of Colombia that under the Colombian Constitution both police and armed forces were defined as security forces under the control of the Ministry of Defense.<sup>50</sup> Similarly, both the National Democratic Front in the Philippines and the Kosovo Liberation Army viewed the state's police units as constituting security forces and thus possibly as lawful targets.<sup>51</sup> However, this is not a view that can be supported in the context of legal analysis. Unless police forces or intelligence agencies are integrated into the armed forces of the state, they remain civilians.<sup>52</sup> Individual members of the police or intelligence agencies can be targetable if and for such time they satisfy the conditions of DPH.<sup>53</sup> The same applies to other ministers, such as a Minister of Interior or a Minister of Intelligence.

The government may create collective organs dedicated to specific matters. One such departmental committee in the United

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48. See *supra* notes 9–12 (a discussion above related to the collective exercise of the CiC functions).

49. See Darfur Report, *supra* note 46.

50. SIVAKUMARAN, *supra* note 2, at 357, 368.

51. *Id.*; see also DOD MANUAL, *supra* note 32, § 5.7.4.

52. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 13, ¶¶ 1682–83; DINSTEIN, *supra* note 1, at 104, 107; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 30.

53. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 13, ¶¶ 1565, 2278–79. The issue of integration and of the civilian status of police forces can be contested based on the factual context of the particular situation. There is a disparity in how police forces in Gaza have been assessed. See UN Human Rights Council, *Rep. of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, ¶¶ 34, 365–438 (Sept. 25, 2009). *But see* Laurie R. Blank, *The Application of IHL in the Goldstone Report: Critical Commentary*, 12 Y.B. INT'L HUM. L. 347, 359 (2009) (contesting the Mission's finding). In the context of internal conflict in Darfur, the UN Commission of Inquiry found that normally civilian status of policemen was questionable precisely due to the individual actions of members of the police force. See Darfur Report, *supra* note 46, ¶ 422.

Kingdom is the Defence Council.<sup>54</sup> The Defence Council was established in 1964 under the Defence (Transfer of Functions) Act of 1964 and was vested with functions of previously existing bodies including the Admiralty, the War Office, the Air Ministry, and the Ministry of Aviation.<sup>55</sup> It comprises both political executives and military professionals under the lead of the Secretary of State for Defence.<sup>56</sup> Under Royal prerogative powers and through “Letters Patent,” the Queen and the Parliament via Acts of Parliament empowered the Council with command over the armed forces. Defence Council powers are delegated further down to three service boards, though it is clear that decisions to commit the armed forces to operations, allocate resources, and set out strategic limits on using force rest with the Cabinet.<sup>57</sup>

Determination of the status of the members of such Council must always be undertaken on an individual basis. Military members of the Council will satisfy the requirement of combatancy in armed conflicts because of their membership in the armed forces. Political members of such Council will remain civilians who can only be targeted if the acts in which they are involved meet the criteria for DPH, particularly the previously mentioned element of “direct causation” and only for such time as they satisfy DPH.<sup>58</sup> In practice, some of the acts or decisions undertaken by nonmilitary members of such Council, specifically related to the conduct of operations, may well fit this criterion due to the very nature of the vested powers. Having said that, one must not forget all the potential caveats arising in relation to an interpretation of a scope of DPH and the exercise of powers by collective governmental bodies as highlighted above.

#### D. Political Party Leaders

The last consideration in the context of state leadership must be for political party leaders. So far, the discussion of the various competencies related to the exercise of executive authority has shown that there may be instances in which civilians in charge of command

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54. It is noteworthy that Defence Council is not the same as National Security Council, which provides Cabinet’s level collective committee a forum for discussion of matters of national security. The latter is largely concerned with defense strategy, intelligence coordination and other matters related to national security.

55. See generally *State Intelligence*, LONDON GAZETTE, Mar. 20, 1964, No. 43277, at 2545 (overviewing the structure, functions, and honoring awards for positions in the Defence Council).

56. MINISTRY OF DEF., HOW DEFENCE WORKS, ¶¶ 22, 29–30 (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/484941/20151208HowDefenceWorksV4\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484941/20151208HowDefenceWorksV4_2.pdf) [<https://perma.cc/68W9-88T8>] (archived Feb. 3, 2018).

57. *Id.* ¶ 72.

58. See *supra* notes 41–45 and the accompanying text.

over the armed forces, or with oversight of the conduct of hostilities, might be deemed lawful targets depending on the state's constitutional setup, the clarity of domestic legislation, and/or individual circumstances. This is very much different from exercising political party functions and ascertaining one's legal status based on such functions. In general the members of political parties must be classified as civilians, though some of these members may indeed be linked to potential military wings of these parties. In relation to the latter, there may be some situations in which it would be possible to regard such an individual's acts in the context of their relationship to organized armed groups constituting military wings of the political parties as acts of direct participation in hostilities.

In single political party systems, ascertaining such a relationship may be immensely difficult. During the military operations against Iraq in 1990–91 and 2003, for instance, an issue of the status of members of the Iraqi Ba'ath party became pertinent. Christopher Greenwood argued that the combination of the highly military nature of the Iraqi government, and the close integration of the Ba'ath party in government structures, meant it was justifiable to see them as military objectives.<sup>59</sup> While they may be lawful targets, it would not necessarily be based on their combatant status applicable to the party as a whole, but rather on an individual conduct-based assessment in light of the DPH criteria. Reportedly, captured Ba'ath party members were not seen as combatants and were not granted prisoner-of-war status.<sup>60</sup>

More recently, during the 2008–09 Israeli offensive in Gaza, the association of the Palestinian governing authorities with the Hamas party was raised in the context of targeting. It was argued that the Palestinian Ministry of Interior, for example, oversaw the Hamas-controlled governmental forces in Gaza.<sup>61</sup> Others have contested this position.<sup>62</sup> In practice, untangling such relationships, especially in internal armed conflicts, is likely to be very difficult. What is clear is that designating all members of political parties as military objectives based on their general affiliation to a political party is wrong. Membership in a political party does not equate to a membership in an organized armed group, but these two may sometimes overlap.

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59. See Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in *THE GULF WAR 1990–1991 IN INTERNATIONAL AND ENGLISH LAW* 63 (Peter Rowe ed., 1993).

60. Giulio Bartolini, *Air Operations against Iraq (1991 and 2003)*, in *THE LAW OF AIR WARFARE—CONTEMPORARY ISSUES* 228 (Natalino Ronzitti & Gabriella Venturini eds., 2006).

61. Blank, *supra* note 53, 359. This position, however, has been challenged for lack of evidence.

62. See generally Zeray Yihdego, *Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding*, 13 *MELBOURNE J. OF INT'L L.* 24 (2012).

Determination of an individual member's combat-related activity ought to be undertaken on a case-by-case basis. Such assessment could be trifold and include regular membership in an organized armed group, for those who do subscribe to an associated concept: continuous combat function and/or DPH activity in *sensu stricto*.

Given this level of uncertainty around the factual circumstances of the relationship and the qualification of legal status of persons in this area, caution is advised in the future analysis. It may be that a presumption of civilian status from Article 50(1) of Additional Protocol I should be applied more frequently in cases involving individual members of political parties, especially in armed conflicts where delineation of the political and militant party activities may be difficult.<sup>63</sup>

### III. TARGETING INFRASTRUCTURE ASSOCIATED WITH LEADERSHIP

Determination of the lawfulness of objects associated with state and political party leadership in targeting is governed by a different legal standard than the one applied to persons. The relevant standard applied in the context of objects involves the application of a definition of military objectives, which will be introduced next.

#### A. Requirements of the Definition of Military Objectives

The definition of military objectives is found in Article 52(2) of Additional Protocol I. It consists of two main elements, namely: (1) an *effective contribution to military action*; and (2) an *offer of definite military advantage*.<sup>64</sup> The first element relates to the characteristics of the object, which describe its contribution to military action. Such contribution can be achieved through four criteria: *nature*, *location*, *use*, and *purpose*. Three out of four of the criteria, namely location, use, and purpose, are contextual, which means their satisfaction will depend on the circumstances. The fourth criterion, nature, refers to an inherent characteristic of the object, which will always be the same.<sup>65</sup> Effective contribution to military action denotes the object's role in connection to military action.

The first element of the definition is connected to the second element comprising definite military advantage offered by

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63. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 13, art. 50(1), ¶ 1920.

64. For an extensive discussion of the definition of military objectives, see JACHEC-NEALE, *supra* note 3.

65. *Id.* at ch. 3, § 3.1.

*destruction, capture, or neutralization* of the object.<sup>66</sup> This connection occurs in a way that not only appears to require both elements at the same time, but also, and more importantly, guarantees that the first element will always have to be fulfilled.<sup>67</sup> This is an important feature of this relationship, with far-reaching practical consequences. Whilst there are objects that can easily satisfy the second element of the definition without satisfying the first, one would struggle to find an object that satisfies the first element but fails to fulfill the second.<sup>68</sup>

The first criterion of the four specified in the first element of the definition is nature. The nature criterion concerns an intrinsic character of the object that makes effective contribution to military action. What is it about the object that makes its contribution uniquely military in character? To satisfy this requirement, the object needs to possess exclusively military features or qualities that distinguish it from other objects. Such qualities—which relate to its intended application and its functions—must be connected to the conduct of military operations.<sup>69</sup>

In reality, the target's nature cannot change, as it is an inherent feature. However, in some circumstances legal effects flowing from the nature criterion may be suspended, especially when an object ceases to operate in the way that it is required to by its nature and instead serves an exclusively civilian purpose.<sup>70</sup> Consequently, the nature criterion can no longer be a determining factor for an assessment of the first element of the definition, and other criteria will have to be considered.

The most relevant criterion in this respect is use. The use criterion in the definition of military objectives denominates the current or present function of an object, whether inside or outside its normal or habitual use and practice, which can be habitual and repeated or random and perhaps even accidental.<sup>71</sup> Unlawful use or abuse of the object will also be relevant in this determination. In principle, however, the required use will occur outside or in addition to the normal civilian function of the object. The law does not specify

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66. *Id.* at chs. 5–6.

67. *Id.* at ch. 5, § 5.1.

68. *Id.* at 145.

69. Some may be tempted to infer that if the object is identified as contributing by its *nature* then it does not have or need a specific nexus to hostilities. Every object needs to have a specific nexus to military operations to satisfy the first element of the definition. In the case of weapons or ammunition supplies, the nexus to hostilities is clear as it is their very *nature* through which such a nexus is established. *Id.* at 46–51.

70. A change in nature can occur only when the object is so fundamentally and radically transformed that it no longer retains the character by which it previously contributed to military action. In other words, the object would have to cease to exist in its current nature, and be resurrected as something else.

71. JACHEC-NEALE, *supra* note 3, at 66–74.

its volume, intensity, or particular kind, with the exception that by such use the target should effectively contribute to the military action.

Military use is normally understood to mean that it has to serve military purposes for the object to satisfy the first element of the test. It is often assumed that use of the object undertaken by a combatant would render this object a military objective. It is important to stress that even use by a combatant must make an effective contribution to military action.<sup>72</sup> This may be the case when computer infrastructure is used for purposes unrelated or indirectly related to the conduct of hostilities.<sup>73</sup>

The third relevant criterion, albeit less prominent than use in this context, is purpose. The purpose criterion commonly refers to the intended future use of the object.<sup>74</sup> An alternative meaning, that of the reason for the object's existence or creation, might be relevant in certain circumstances.<sup>75</sup> In essence, the purpose requirement is met when the attacker obtains information suggesting that an object, which may or may not have been designed for military purposes, but currently not used for such, is likely to be used for military purposes in the near future. Sometimes this may be inferred from past practice, which must show a frequent and consistent pattern rather than *ad hoc* or occasional activity.<sup>76</sup> Unlike with the use criterion, such use will not have to occur for the object to satisfy the first element of the definition. Like the use criterion, however, the purpose requirement must entail a pertinent activity, albeit a prospective one, which is related to the conduct of hostilities.<sup>77</sup>

In the context of the assessment of the objects during the targeting process in armed conflict, it is vital to remember that such an assessment will be undertaken *ex ante* of the attack, in circumstances ruling at the time.<sup>78</sup> This means it will be done based on the information available to the attacker prior to the attack, often during the planning stage, and not in hindsight. Whilst this

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72. As noted in the recent *Tallinn Manual on The International Law Applicable to Cyber Warfare*, the use of computers, for example, by armed forces for non-military activity may not necessarily be regarded as satisfying the definition. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 133 (Michael N. Schmitt ed., Cambridge Univ. Press 2013).

73. Even if the computers were used to access civilian email software, a transfer of 'militarily useful information' through such software would render such infrastructure legitimate targets. *Id.*

74. JACHEC-NEALE, *supra* note 3, at 75–80.

75. *Id.* at 75–76.

76. *Id.* at 80.

77. See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2013) [hereinafter AMW Manual].

78. JACHEC-NEALE, *supra* note 3, at 136–44.

information might be verified shortly before the actual engagement, it cannot be expected to include information that came to light after the object was engaged.<sup>79</sup>

Having outlined the legal requirements, one must explore whether infrastructure associated with state organs, individuals, or political leaders, whose work is vital to the prosecution of armed conflict and who may exercise supreme command over armed forces, may be regarded as satisfying the requirements of the definition of military objectives. There is a caveat to be made before further analysis ensues. When considering objects associated with the direction of the conduct of armed conflict and control over armed forces in a post-attack analysis, it is not always clear if, and to what extent, buildings, facilities, or other physical objects linked to the political leadership are in fact targeted for their own contribution. It may be that such buildings and places are damaged as a result of an attack on the people in them and are therefore essentially subject to an assessment of the collateral damage.

There are two fundamental ways in which infrastructure associated with the leadership can be analyzed in the context of military objectives. First, some of these objects may satisfy the nature condition of the first element of the definition. This will exclusively be applied to Ministries of Defense (MoD) on account of their own military and defense-related functions. Second, any other facilities related to leadership may comply with the use or the purpose criterion. Beyond these two situations, the question remains whether any such targets can be lawful targets based on general affiliation to persons whose position or functions relate to the conduct of hostilities. All three will be discussed in turn, starting with an evaluation of the status of Ministries of Defense.

### *B. Functions of the Buildings: Ministry of Defense*

Where the buildings themselves are targeted, this may occur solely because of their function in the activity undertaken within them or because of their association with people whose functions are relevant to the conduct of war. One specific building that normally satisfies the definition of military objectives on account of functions, such as serving in the role of the supreme command and control center, is an MoD.<sup>80</sup> The MoD, being a place where the most senior military leadership performs the highest defense functions, is viewed

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79. See Additional Protocol I, *supra* note 3, art. 57.2 (a)(i) (requirement regarding the verification of military objectives before the attack).

80. JACHEC-NEALE, *supra* note 3, at 59.

as an object satisfying the nature criterion on account of its functions as an institution.<sup>81</sup>

If an MoD is viewed as a military objective because of its nature, would this also hold true if an MoD has departments dealing exclusively with civilian functions? One source gives the example of the Swiss Federal Department of Defense, Civil Protection and Sports, whose civil protection and sports sections are dedicated exclusively to civilian purposes.<sup>82</sup> The setup of the Swiss Department is unusual in that it combines governmental departments dealing with strictly civilian issues with other ones dealing with military functions.

MoDs normally act as both political and administrative organs, dealing with the administrative, financial, and personnel affairs of the armed forces. They have the highest central defense command (General Staff), responsible for commanding troops.<sup>83</sup> This means that, unlike facilities associated exclusively with the Defense sector of this Department, the Swiss Federal Department of Defence, Civil Protection and Sports, as a whole, cannot be regarded as military in nature, though such infrastructure is likely to satisfy the use criterion (dual use).<sup>84</sup>

If an MoD is generally regarded as military in nature, then a question arises regarding infrastructure associated with other state executive organs and other political figures, whose work is vital to the prosecution of armed conflict and who may exercise the supreme command over armed forces. The infrastructure of other governmental departments, whether central or local, whose competencies are not linked to functions of military character, such as the Ministry of Interior, cannot be regarded as military objectives under the nature criterion.<sup>85</sup> During an armed conflict, such facilities may be used for military purposes, even exclusively so, but their

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81. In 1956, the ICRC Draft Rules had already listed "War Ministries" such as a Ministry of Navy, Army, Air Force, National Defense or Supplies, and other "organs for the direction and administration of military operations" as possible military objectives. INT'L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 1 (1956). Also, in the recently published AMW Manual, it is asserted in Rule 22(a) that Ministries of Defense are objects which would effectively contribute to military action by their nature, at all times and in all circumstances. See AMW Manual, *supra* note 77, Rule 22(a).

82. See AMW Manual, *supra* note 77, Rule 22(a), ¶ 2.

83. See Additional Protocol I, *supra* note 3, art. 58(b) (establishing a potentially relevant consideration that Swiss government may take into account in the future).

84. Objects performing both military and civilian functions could not be considered legitimate targets due to their nature, instead such objects will be judged according to their *use or purpose*.

85. JACHEC-NEALE, *supra* note 3, at 60; Rogers, *supra* note 2, at 123. *But see* DINSTEIN, *supra* note 1, at 97.

nature is not what will guide a legal analysis of their status. This will be explored next.

*C. Use/Purpose: Objects Used or Intended to Be Used by CiCs, Defense Secretaries, Other Members of the Government, or Members of Political Parties*

Most commonly, when infrastructure is targeted because of an association with human activity, it is because it is used in a manner that effectively contributes to military action. This includes, for example, a house used as an ammunition store. Similarly, a hotel providing accommodation for combatants is seen as being used or likely to be used in the future for purposes closely related to military action and thus is considered a lawful target.<sup>86</sup> As such, it is the object's qualities that enable the activity that serves military purposes and consequently contributes to the military action. While the object's contribution is linked to what people do and/or are likely to do in the future, if the purpose criterion is concerned, its basis is the capacity or ability to facilitate the human activity.<sup>87</sup> Importantly, the nature of the human activity in itself must have a belligerent nexus.<sup>88</sup>

It is worth noting that, in principle, it does not matter who undertakes the activity so long as the activity itself serves the military purpose. After all, it is irrelevant who brings and leaves the ammunition at the house; it is the fact that the ammunition is being stored at the house that makes the house a military objective. In the hotel example, it is the facility's function to provide a place to stay for a member of the armed forces that is viewed as serving military purposes. Consequently, a hotel can be targeted even if the combatant is not present at the premises at that time, given that her or his belongings are at the premises or the booking has been made—all also constituting indicators of the purpose criterion. Similarly, if the hotel is used or is intended to be used in the future by a DPH civilian who is a member of an organized armed group and possibly, to those who subscribe to the notion, also understood to hold a continuous combat function, then the hotel can be viewed as satisfying the use or purpose criterion. Such object could be seen as satisfying the first element of the definition because it facilitates or enables combat activity of the said individual, and in this way it contributes effectively to military action in the circumstances given at the time. The decision whether to attack such an object would depend on all the

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86. This can be illustrated by the case of Hotel Vitez used by the Croatian Defence Council, discussed in JACHEC-NEALE, *supra* note 3, at 68.

87. *Id.* at 84–88.

88. *Id.* at 84.

remaining elements of the definition and other provisions regulating how the attack should be undertaken as long as the membership and/or the combat function continues.

On the other hand, in a situation where the hotel is used by a DPH civilian *sensu stricto*, one would have to ensure that the activity in which the person is engaging in relation to the object is indeed serving military purposes—and serving these purposes for so long as the person is engaged in the said activity. Merely staying at the hotel does not necessarily imply an undertaking of an action harmful to the enemy. However, staying at a hotel en route to a planned operation or for a meeting facilitating a planning of harmful action would mean that the object is contributing to the military operation and thus satisfies the use criterion. In this situation an object has to be used in such a way at the time of attack. This does not necessarily mean a person has to be present physically at the premises, though by and large the nature of the harmful activity serving military purposes will involve or even necessitate physical presence. However, one can imagine a different situation where a facility—or any of its elements—is being used remotely to undertake harmful acts, for example in the context of a data center being used for a cyber operation. Such activity, without actual physical presence, will too satisfy the requirement.

The purpose criterion can also be fulfilled depending on the nature of information available to the attacker at the time of attack. However, an attacker would have to ensure, as a part of the verification of the military objective prior to the actual attack, that a person continues to be engaged in the harmful activity which constitutes a factual basis for meeting the purpose criterion in the definition of military objectives.<sup>89</sup>

How does this apply in the context of targeting infrastructure associated with the state and political party leadership? Can a hotel where the CiC stays be regarded as equally contributing to military action? The answer to this may depend on whether, and to what extent, the CiC's functions related to military action are undertaken during his or her stay in the hotel. Such an object's contribution would be linked to who the people are and what their functions are.

There is no doubt that if the persons vested with CiC functions are deemed to hold combatant status due to their integration into the armed forces, then objects used or intended to be used by them are more than likely to satisfy the use and purpose criteria. If CiCs are not combatants as such, but are involved in making decisions related to the prosecution of hostilities or otherwise exercise command over armed forces, then the use or purpose of the object would be

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89. See *supra* notes 82–86 and accompanying text.

determined in relation to the nature of the activity in which they engage.

A Prime Minister who, during a stay in a countryside retreat, connects remotely with the Cabinet in order to issue an authorization to attack a target clearly engages in activity which constitutes direct participation in hostilities. At the same time, he or she uses an internet network established at the retreat facility to connect with other members of the government in order to make this decision or even to oversee the actual attack undertaken at the same time on the battlefield. Clearly at that point the building itself becomes targetable in these circumstances.

Furthermore, a golf course facility, which is frequently used by a President to undertake activity related to the prosecution of hostilities, can also be regarded as satisfying the purpose criterion if the information available in the circumstances given at the time suggests that an enemy's intention is to use such a place for that activity in the specified future. Such activity, however, must directly be linked to the combat operations whether as a part of military operational command or not. This will clearly be applicable to any individual, be it a Prime Minister, a member of the Cabinet, a Secretary of State for Defense, or a member of a political party, who uses or intends to use an object in the furtherance of an activity that constitutes an underlying basis for his or her direct participation in hostilities. At the point when he or she desists from this activity, the object cannot continue to be considered used, or intended to be used, to facilitate such activity.

Taking a step further, can the Minister of Defense's private residence satisfy the requirements of the definition? The answer will be in the affirmative only with respect to the specific nature of the actual activity undertaken or intended to be undertaken in such a residence. Can a political party headquarters qualify in this respect too? Yes, so long as individual members of the party, or in fact anyone else undertaking activity in such a building, engages in an act harmful or likely to be harmful to the adversary, and the concurrent use of the building specifically enables, assists, or facilitates a continuation or accomplishment of the act in question.

The question further arises as to whether assets of any state organs or political entities can be targeted based on their more general association with said organs and entities. This question will be explored in the next subpart.

#### *D. General Affiliation of the Objects*

Buildings or places which appear generally linked to other political structures of the state, but which do not seem to be used in relation to exercising any functions related to the conduct of

hostilities, are unlikely to satisfy even the first element of the definition of military objective. This could be a political party's facilities or local government buildings or a private residence of the Prime Minister or Minister of Justice, when such individuals are clearly not using or intending to use such places to further actions harmful to the enemy and directly linked to the conduct of hostilities during an armed conflict.

Destroying the place where the members of the government or political party normally gather or work does not meet the requirements of the definition.<sup>90</sup> Unless some concrete military nexus can be shown, either through the individuals' directly related activities or separately based on the location criterion, then such facilities, on account of their association with the state political system, cannot be deemed valid military objectives. It may be that a clear distinction cannot be easily identified between the state and party functions of political leadership in states in which the political party is closely incorporated into governmental structures. This, however, would be of lesser importance, as the specific character of actions of the individual members of the organs or party will be only relevant consideration.

#### IV. CONCLUSIONS

In targeting decisions related to the political leadership or infrastructure associated with the political leadership of the state, it is first necessary to establish who or what was or is the intended target of an attack. Establishing whether the attack is directed at the people using the buildings, or at the buildings themselves, is vital as the ensuing legal analysis of the status of the target will be different in the context of the people and the objects.<sup>91</sup> The assessment of objects associated with the political leadership does depend on an assessment of the circumstances which determine their contribution

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90. JACHEC-NEALE, *supra* note 3, at 152.

91. This is not altogether clear, as states tend not to publicly share any detailed explanations when they engage such targets. For example, in 2003, Coalition forces started their operations in Iraq with an attack aimed at Saddam Hussein, who was believed to have been visiting the al-Dora farm on the outskirts of Baghdad. This clearly indicated that the object of the attack was a human one. It is entirely possible that the facilities in the farm might have separately been of military significance. JACHEC-NEALE, *supra* note 3, at 152, 241. Similarly, reasons behind an attack by NATO forces on the convoy transporting Col. Muammar Gaddafi do not seem to be entirely clear but it is plausible to assert that Gaddafi could have been the actual target of the attack. Thomas Harding, *Col Gaddafi killed: convoy bombed by the pilot in Las Vegas*, TELEGRAPH (Oct. 20, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839964/Col-Gaddafi-killed-convoy-bombed-by-drone-flown-by-pilot-in-Las-Vegas.html> [<https://perma.cc/2NR8-HZQE>] (archived Feb. 4, 2018).

to military action, as well as the advantage resulting from their destruction, capture, or neutralization as required by the second part of the definition of military objectives.

It is conceivable that the destruction, capture, or neutralization of facilities that house the work of the political organs who make decisions regarding the prosecution of military operations would offer a definite military advantage. An MoD is considered a lawful target on account of the command and control functions of the Ministry as an institution. It is viewed as an object satisfying the nature criterion in the definition because of its intrinsic military character. In other words, an MoD effectively contributes to military action because its functions are intrinsically linked to the conduct of military activities. There is no doubt that an attack on an MoD would offer definite military advantage.

The same cannot be said in the case of a building occupied by the CiC, who has delegated his supreme command authority to other state organs and who does not use the facility to engage in any activity that could amount to direct participation in hostilities. The destruction of the buildings where a *de jure* and *de facto* CiC, recognized as a combatant, sits and whose decisions are directly related to the conduct of hostilities, is likely to bring substantial military benefits whilst satisfying the first element of the definition.<sup>92</sup> There may be other civilians in the state's political structure who exercise also functions that may directly impact the conduct of military operations. Insofar and so long as such civilians use or intend to use the objects in furtherance of these functions, such objects can be considered lawful targets on account of their contribution to military action and their definite military advantage. It is clear that such buildings cannot be legitimately characterized as satisfying the nature condition except for an MoD. However, because of their specific use, such buildings may satisfy the use or purpose requirements of the definition, in addition to the location criterion. The basis of their contribution to military action will inevitably and intrinsically be linked to the character of the activity of the person.

Therefore, two key factors inevitably need to be taken into account when considering the status of such targets, namely (1) the character and scope of the individual's activity that gives rise to an object's contribution to military action, and (2) whether there is any time limitation that may affect the existence and duration of such activity. Specifically, the application of the test will depend very much on the assessment of the activity of those exercising the official functions contributing to the prosecution of military operations. The general affiliation of the objects with a political structure does not

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92. JACHEC-NEALE, *supra* note 3, at 152.

suffice. As the use or intended future use of an object depends on the factual circumstances which are often fluid and subject to rapid change, so the status of the specific target can also be potentially variable. One must recognize that with respect to MoDs, due to the characteristics of the nature condition, such change will enable the application of the other contextual criteria found in the first part of the definition of military objectives.

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