

**TO TARGET, OR NOT TO TARGET: WHY 'TIS NOBLER TO
THWART THE AFGHAN NARCOTICS TRADE WITH
NONLETHAL MEANS**

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Sherman's advance toward Savanna [sic] in the American war between the north and south was not in search of combat, it was to burn and plunder all along the way. It was a measure used to destroy the economy in the southern army's rear area, to make the southern populace and the southern army lose the ability to resist, thus accomplishing the north's war objective. This is an example of the successful use of unlimited measures to achieve a limited objective.¹

I. Introduction

The Taliban extracts hundreds of millions of dollars from the Afghan opium trade, fueling that country's insurgency.² Recognizing a threat to Afghanistan's stability, the United States has focused on reducing the flow of drug profits to insurgent groups.³ Some military leaders warn that "the Taliban cannot be defeated and good government cannot be established without cutting off the money generated by Afghanistan's

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¹ QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE, CHINA'S MASTER PLAN TO DESTROY AMERICA 181 (Foreign Broad. Info. Serv. trans., Pan Am. Publ'g 2002) (1999).

² STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., AFGHANISTAN'S NARCO WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS 1 (Comm. Print 2009) [hereinafter STAFF OF S. COMM. ON FOREIGN RELATIONS].

³ *Id.*

opium industry, which supplies more than 90 percent of the world's heroin and generates an estimated \$3 billion a year in profits.”⁴

This flow of billions of dollars thoroughly corrupts Afghan society. For example, police chiefs collect hundreds of thousands of dollars in narcotics bribes, permitting them to pay the \$100,000 kickbacks required to obtain their \$150-a-month jobs.⁵ Allegedly, this corruption even goes to the highest levels of the Afghan government and includes President Karzai's brother, Ahmed Wali Karzai.⁶ This widespread drug-related corruption “undermines legitimate political and economic development by promoting a culture of corruption and squeezing out licit agricultural growth.”⁷ Furthermore, the insurgents and drug traffickers developed a symbiotic relationship: “Drug traffickers benefit from terrorists' military skills, weapons supply, and access to clandestine organizations. Terrorists gain a source of revenue and expertise in illicit transfer and laundering of money.”⁸

Recognizing a significant threat posed by the narcotics industry, the U.S. military placed fifty drug traffickers on a target list for kill or capture.⁹ In the Senate Foreign Relations Committee Report on the matter, a U.S. officer reports that the commanders can “put drug traffickers with proven links to the insurgency on a kill list . . . [that] places no restriction on the use of force with these selected targets, which means they can be killed or captured.”¹⁰

The United States apparently does not target all drug traffickers, just ones supporting the Taliban and the insurgency. The traffickers on the kill-or-capture list are called “nexus targets” and are ones who provide money to the Taliban militants.¹¹ The U.S. military also strikes the drugs

⁴ *Id.*

⁵ *Id.* at 11.

⁶ *Id.*

⁷ *Id.* at 13 (quoting e-mail from Ambassador Karl Eikenberry).

⁸ Elizabeth Peterson, Note: *Two Sides of the Same Coin: The Link Between Illicit Opium Production and Security in Afghanistan*, 25 WASH. U. J.L. & POL'Y 215, 229 (2007).

⁹ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 1; James Risen, *U.S. to Hunt Down Afghan Drug Lords Tied to Taliban*, N.Y. TIMES, Aug. 10, 2009, at A1.

¹⁰ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15. These targets “can be captured or killed at any time.” Risen, *supra* note 9, at A1.

¹¹ Jason Straziuso, *50 Drug Barons on US Target List in Afghanistan*, ASSOCIATED PRESS, Aug. 10, 2009, <http://abcnews.go.com/International/wireStory?id=8291554>. Apparently early plans were to lethally target drug traffickers without links to the Taliban, but this

themselves; in one instance, the United States destroyed 300 tons of poppy seeds by dropping a series of 1000 pound bombs.¹²

United States officials believe this targeting furthers their mission in Afghanistan, but that does not necessarily make it legal or right. This article looks through several lenses to analyze the U.S. military's targeting of two distinct sets: the people (the drug traffickers) and the things (the opium plants and processing laboratories). This article uses three lenses: the lens of the widely accepted Additional Protocols to the Geneva Conventions; the lens of the International Committee of the Red Cross (ICRC); and the lens of the United States. The analysis will show that this targeting fails when observed through the lenses of the Additional Protocols and the ICRC and that this targeting represents a troubling policy decision when observed through the U.S. lens.

After analyzing the targeting through these lenses, this article discusses several second-order implications, including contradictions within U.S. counterinsurgency doctrine, reciprocity in targeting of economic objectives, and risks to humanity from expanding the definition of military objective. Ultimately, this article concludes that problems exist with claiming narcotics traffickers are taking a direct part in hostilities; that difficulties exist with claiming narcotics related items are valid military objectives; and that, even if no legal problems existed, targeting of the opium trade may be unwise policy.

II. Narcotics Trafficker: A Criminal, but also a Combatant?

The Afghan opium industry in 2008 produced an export commodity worth \$3.4 billion and employed approximately ten percent of the Afghan population.¹³ Approximately eighty percent of this income,

plan ran into stiff resistance among the NATO allies. Tom Coghlan, *NATO Split Over Order to Strike Afghanistan Drug Smugglers*, THE TIMES (LONDON), Jan. 30, 2009. The NATO disagreement apparently resulted in limitations on the initial plan to ensure agreement. Judy Dempsey, *NATO Chief Presses Afghan Drug Fight*, N.Y. TIMES, Feb. 12, 2009, <http://www.nytimes.com/2009/02/12/world/asia/12nato.html>.

¹² STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 12; CNN, *U.S. Bombs Poppy Crop to Cut Taliban Drug Ties*, July 21, 2009, <http://www.cnn.com/http://www.cnn.com/2009/WORLD/asiapcf/07/21/afghanistan.poppy.strike/index.html#nnSTCText>.

¹³ U.N. OFFICE ON DRUG & CRIME, *Afghanistan: Opium Survey 2008*, at 2–5 (Nov. 2008), available at http://www.unodc.org/documents/afghanistan//Afghanistan_Opium_Survey_

roughly \$2.7 billion, went to the drug traffickers, while the farmers received about \$700 million.¹⁴ The Taliban imposes a “tax” of approximately ten percent on the farmers and traffickers, generating between \$200 and \$400 million in annual revenue.¹⁵ With Taliban insurgent fighters being paid only about ten dollars a day,¹⁶ \$200 million can keep over 50,000 insurgents fighting for an entire year.

The \$700 million garnered by the opium farmers results in an income of \$307 per capita in opium growing households, which is actually less than the nationwide per capita Gross Domestic Product (GDP) of \$415.¹⁷ Per capita income from opium appears quite low, but opium generates many times the income of wheat. In 2007, on a per acre basis, wheat brought a price just one-tenth that of opium.¹⁸ One farmer explained why he grows opium instead of wheat: “Of course we know it’s illegal, but we have no other option. I can’t earn enough to live with wheat.”¹⁹

Having turned to an illicit crop, Afghan opium farmers cannot then look to their government for help but must instead turn to the Taliban.²⁰ In response, the Taliban provides loans for seeds in the spring, loans for living expenses during the growing season, security for the crops (security from criminals, government officials, and foreign soldiers), workers for the harvest, and transportation of the finished product.²¹ One

2008.pdf [hereinafter U.N. OFFICE ON DRUG & CRIME]. The “farm gate” value was \$1 billion, with the refined opium raising the value to \$3.4 billion. *Id.*

¹⁴ U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 29.

¹⁵ *Id.* at 2. Things improved slightly in 2009, with a decrease in farm gate receipts for opium from \$730 million in 2008 to \$438 million in 2009, but opium remains a significant source of revenue. U.N. OFFICE ON DRUG & CRIME, *Afghanistan Opium Survey 2009 Summary Findings 1* (Sep. 2009) [hereinafter U.N. OFFICE ON DRUG & CRIME], available at http://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_opium_survey_2009_summary.pdf.

¹⁶ Risen, *supra* note 9, at A1. Other reports indicate insurgents earn between \$200 and \$500 a month. Eric Schmitt, *A Variety of Sources Feed Into Taliban’s War Chest*, N.Y. TIMES, Oct. 19, 2009, at A1.

¹⁷ U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 5.

¹⁸ Phil Azbriskie, *The World’s Toughest Job?*, FORTUNE, Oct. 12, 2009, at 121, 124. Current data for 2008 and 2009 indicates this multiple has shrunk (now just three to one), but this is still a significant incentive for farmers to grow opium instead of wheat. U.N. OFFICE ON DRUG & CRIME, *supra* note 15, at 25.

¹⁹ Azbriskie, *supra* note 18, at 124 (quoting Hamid Hakmal).

²⁰ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 7.

²¹ *Id.* at 7–8; see also GRETCHEN PETERS, SEEDS OF TERROR: HOW HEROIN IS BANKROLLING THE TALIBAN AND AL QAEDA 5 (2009) (noting that the Taliban does not just profit from the opium trade, but rather “they service it, working for opium smugglers and the mammoth international organized crime rings behind them”).

witness told the Senate Committee on Foreign Relations that the “Sopranos are the real model for the Taliban.”²² The insurgents raise money from the traffickers, and the traffickers buy protection and intimidation from the insurgents.²³ In fact, the insurgents may be focused more on protecting and facilitating the opium trade than on retaking Kabul.²⁴

Traffickers are certainly criminals,²⁵ but that does not necessarily make them legitimate military targets. This section will review the protections of civilians under international law, explaining how civilians cannot be targeted unless they are taking a direct part in hostilities. This section will also outline the different policy interpretations of direct participation and apply those understandings to traffickers in Afghanistan.

A. Who is a Combatant?

1. *Basic Rule of Distinction*

A fundamental principle of the law of armed conflict is distinction.²⁶ The International Court of Justice expressed this fundamental principle as, “States must never make civilians the object of attack.”²⁷ W. Hays Parks agrees, noting that at “the heart of the Just War Tradition and the modern law of war lies the principle of discrimination which, in simple terms, means noncombatant immunity.”²⁸ Codified in Article 48 of Additional Protocol I, this principle dictates that belligerents must “distinguish between the civilian population and

²² STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 9 (quoting Gretchen Peters).

²³ *Id.* Some reports suggest that the Taliban generate between \$70 million and \$400 million a year from the illicit drug trade. Schmitt, *supra* note 16, at A1.

²⁴ PETERS, *supra* note 21, at 5.

²⁵ Hamid Karzai reinforced the Afghan ban on opium soon after taking power. Serge Schmemmann, *A Nation Challenged: The Drugs, Afghanistan Issues Order Taking Hard Line on Opium Production*, N.Y. TIMES, Jan. 17, 2002, at A1.

²⁶ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27 (2004) (noting a “fundamental principle of distinction between combatants and non-combatants (civilians)”).

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (Jul. 8) (noting also that the “cardinal principles . . . are the following. The first . . . establishes the distinction between combatants and non-combatants.”).

²⁸ W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990).

combatants and between civilian objects and military objectives and . . . direct their operations only against military objectives.”²⁹ While it is clear that civilians must not be targeted, one must first determine who is a civilian.

During international armed conflict, a conflict between two high contracting parties,³⁰ Article 50 of Additional Protocol I defines “civilians” in the negative, as anyone who is not a lawful combatant.³¹ The ICRC simplifies this, noting in international armed conflict that “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse* are civilians.”³² Additional Protocol I makes clear in Article 51 that civilians cannot be targeted “unless and for such time as they take a direct part in hostilities.”³³

For non-international armed conflicts, Common Article 3 of the Geneva Conventions of 1949 protects from targeting those not taking an “active part in hostilities.”³⁴ Article 13 of Additional Protocol II outlines protections afforded to civilians in non-international armed conflict.³⁵ Additionally, the commentary to Article 13 incorporates by reference Article 51 of Additional Protocol I and its commentary.³⁶ According to the ICRC, civilians in non-international armed conflict are “all persons who are not members of State armed forces or organized armed groups

²⁹ 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, June 8, 1977, 1125 U.N.T.S. 3, 37–38 [hereinafter Protocol I].

³⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

³¹ Protocol I, *supra* note 29, art. 50. When in doubt about an individual’s civilian status, “that person shall be considered to be a civilian.” *Id.*

³² INT’L COMM. FOR THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 20 (2009).

³³ Protocol I, *supra* note 29, art. 51.

³⁴ GC I, *supra* note 30, art. 3.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (noting that civilians “shall enjoy general protection against the dangers arising from military operations”, that civilians “shall not be the object of attack”, and that “acts or threats of violence . . . to spread terror among the civilian population are prohibited”).

³⁶ CLAUDE PILLOUD ET AL., COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1448 (Yves Sandoz et al. eds., 1987).

of a party to the conflict.”³⁷ In conclusion, civilians generally cannot be targeted in either international or non-international armed conflict.

2. Protection of Civilians is Not Absolute; Civilians Taking an Active or Direct Part in Hostilities May Be Targeted

Civilians generally cannot be targeted, but civilians can forfeit their protections by direct participation in hostilities. Although the English version of Common Article 3 protects civilians taking no “active part” in hostilities, the English versions of the Additional Protocols switches terms and uses the words “direct part.”³⁸ Regardless, these words are considered coterminous as the “equally authentic French text” uses “*participent directement*” in both Common Article 3 and the Additional Protocols.³⁹ Additionally, the International Criminal Tribunal for Rwanda concludes the words are synonymous,⁴⁰ and the U.S. Army Judge Advocate General’s School teaches that the controlling test is the “direct part” test.⁴¹

The commentaries to the Additional Protocols provide one interpretation of direct participation. The commentary to Article 51(3) (protecting civilians not taking a direct part in hostilities)⁴² defines direct

³⁷ INT’L COMM. FOR THE RED CROSS, *supra* note 32, at 27. The International Committee for the Red Cross (ICRC) also recommends that members of organized armed groups be targeted for direct participation in hostilities only if they engage in a continuous combat function. *Id.* at 70–72.

³⁸ Protocol I, *supra* note 29, arts. 43, 51; Protocol II, *supra* note 35, art. 13.

³⁹ INT’L COMM. FOR THE RED CROSS, *supra* note 32, at 43.

⁴⁰ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) (“These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous.”).

⁴¹ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 58TH GRADUATE COURSE DESKBOOK I-7-8 (2009) [hereinafter DESKBOOK] (citing Additional Protocol I, art. 51(3)). The *Deskbook* notes that “the Department of Defense previously identified those civilians who may be directly targeted as those taking an ‘active part’ in hostilities, derived from the language of Common Article 3 of the Geneva Conventions.” *Id.* at I-8 n.17 (citing Memorandum of Law, W. Hays Parks, Office of The Judge Advocate Gen., U.S. Army, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) [hereinafter Law of War Memorandum]). Interestingly, the Military Commissions Act of 2009 uses the term “active” instead of “direct.” National Defense Authorization Act for Fiscal year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2606 [hereinafter Military Commissions Act of 2009] (“‘Protected person’ means . . . include[es] civilians not taking an active part in hostilities.”).

⁴² Protocol I, *supra* note 29, art. 51.

participation as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁴³ The commentary to Article 43 provides a temporal and geographic limit to the definition of direct participation, noting the harm to the enemy must occur when and where the individual’s acts occur.⁴⁴

Under the Additional Protocols, the same definition would apply in both international and non-international armed conflict. Additional Protocol II, Article 13, reiterates the required protection of civilians almost verbatim as stated in Article 51 of Additional Protocol I, indicating the same protection of civilians in both international and non-international armed conflict.⁴⁵ The commentary to Additional Protocol II, Article 13, however, also suggests that direct participation includes preparation for combat and return from combat.⁴⁶

While grappling with drawing a line between civilians and combatants, the commentaries make clear that general participation in the war effort is on the civilian side of the line, noting:

There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole . . . Without such a distinction the effort made to reaffirm and develop international humanitarian law could become meaningless . . . many activities of the nation contribute to the conduct of the hostilities, directly or indirectly; even the morale of the population plays a role in this context.⁴⁷

⁴³ PILLOUDET AL., *supra* note 36, at 619.

⁴⁴ *Id.* at 516 (“Direct participation . . . implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”); *see also* FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON WAGING WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 99 (3d ed., Mar. 2001) (stating that it “must be interpreted to mean that the person in question perform hostile acts, which, by their nature or purpose, are designed to strike enemy combatants or material; acts, in other words, such as firing at enemy soldiers, throwing Molotov-cocktails at an enemy tank, blowing up a bridge carrying enemy war materiel . . .”).

⁴⁵ Protocol II, *supra* note 35, art. 13.

⁴⁶ PILLOUDET AL., *supra* note 36, at 1453.

⁴⁷ *Id.* at 619. The commentaries appear to draw a line between two poles of conduct (clearly civilian and clearly hostile). The Israeli high court described these poles as the

While the commentaries establish one interpretation of direct participation, the commentaries are not binding law. In fact, no binding definition of direct participation exists. Neither Common Article 3 nor the Additional Protocols provides a definition of direct participation in their texts. Additionally, while customary international law protects civilians who are not taking a direct part in hostilities,⁴⁸ customary international law provides no definition of direct participation.⁴⁹

Defining and interpreting the meaning of direct participation is instead left to policy makers. Reviewed above, the commentaries provide one interpretation of direct participation. The ICRC has provided a different interpretation, and the United States has its own interpretation. The next subsections will review the differing ICRC and U.S. interpretations.

3. The International Committee of the Red Cross Recommendations for Interpreting Direct Participation in Hostilities

In 2009, the International Committee for the Red Cross published its interpretation of the meaning of direct participation in hostilities derived from the views of numerous international humanitarian law experts.⁵⁰ This eighty-five-page document culminated several years of meetings among international experts in the law of war. Although a plethora of

two “extremes” of a civilian’s possible conduct. The Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* 28 HCJ 769/02 para. 34 (2005), 46 I.L.M. 375, available at http://e1yon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf. The commentary to Article 43 notes the tension: “[T]o restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad.” PILLOU ET AL., *supra* note 36, at 516.

⁴⁸ The United States agrees that customary international law protects civilians. *See The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POLICY 416, 426 (1987) [hereinafter Matheson Remarks] (transcript of remarks made by Michael Matheson, U.S. Dep’t of State Deputy Legal Advisor) (“We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threat of violence.”).

⁴⁹ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS NO. 857, 175, 197 (2005) (“The study also reveals areas where the law is not clear and points to issues which require further clarification, such as . . . the concept of direct participation in hostilities . . .”).

⁵⁰ INT’L COMM. FOR THE RED CROSS, *supra* note 32, at 43.

experts participated in the meetings, the resulting document “is an expression solely of the ICRC’s views.”⁵¹ The ICRC acknowledges that their document is not intended to change the law; rather, the ICRC intends only to recommend how to interpret existing law.⁵²

Within the report, the ICRC published a three-part cumulative test for direct participation in hostilities: “(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.”⁵³ The ICRC posits that direct participation should be interpreted the same in international armed conflict as in non-international armed conflict.⁵⁴

Analyzing the first prong of the test, the ICRC defines the “threshold of harm” as harm “likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.”⁵⁵ The lack of actual harm is irrelevant; one must evaluate the likelihood of harm, or what “may reasonably be expected to result from an act in the prevailing circumstances.”⁵⁶

The second prong is expanded as “a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”⁵⁷ The ICRC makes clear that general war effort support and indirect support have insufficient causation to justify targeting.⁵⁸ The ICRC recommends

⁵¹ *Id.* at 6. Many of the expert participants requested their names be removed from the publication, evincing the highly charged disagreements among the many interested parties. See, e.g., W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT’L LAW & POLITICS 769, 785 n.56 (2010) (“The number of participants who requested deletion of their names was at least one-third.”).

⁵² *Id.* at 9 (explaining their study as “how existing [law] should be interpreted”). Additionally, by issuing their interpretive guidance, the ICRC implicitly admits that no binding definition currently exists.

⁵³ *Id.* at 46.

⁵⁴ *Id.* at 44 (noting in its interpretive guidance that “direct part in hostilities . . . should be interpreted in the same manner in international and non-international armed conflict”).

⁵⁵ *Id.* at 46.

⁵⁶ *Id.* at 47.

⁵⁷ *Id.* at 46.

⁵⁸ *Id.* at 51.

that there be a “sufficiently close causal relation between the act and resulting harm.”⁵⁹ The ICRC notes that the “harm in question must be brought about in one causal step.”⁶⁰ The ICRC gives numerous examples of conduct that they do not consider direct participation, to include general war efforts⁶¹ and war sustaining efforts.⁶²

Finally, the third nexus prong requires an act be “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”⁶³ In other words, action that may satisfy the first two prongs is not direct participation if not designed to “harm a party to the conflict . . . in support of another party.”⁶⁴ Belligerent acts must be more than just random or criminal outbursts of violence; they must support a party to the conflict.

Additionally, the ICRC recommends temporal limits on the duration of an individual’s direct participation and corresponding loss of civilian protections. In addition to the actual execution of the hostile act, the ICRC states that any “measures preparatory to the execution . . . [and] deployment to and return from the location of its execution” may be considered direct participation when these acts “constitute an integral part of such a specific act or operation.”⁶⁵

The one exception to this temporal limit exists in non-international armed conflict for “members of organized armed groups . . . whose continuous function it is to conduct hostilities.”⁶⁶ The ICRC envisioned that this would address the asymmetry in non-international armed conflict that “encourage[s] organized armed groups to operate as farmers by day and fighters by night.”⁶⁷ However, the ICRC makes clear that mere membership in an armed group is not sufficient: “Individuals who continuously accompany or support an organized armed group, but

⁵⁹ *Id.* at 52.

⁶⁰ *Id.* at 53.

⁶¹ *Id.* at 51 (citing “design, production and shipment of weapons . . . repair of roads, ports, bridges . . . and other infrastructure outside the context of concrete military operations”).

⁶² *Id.* (including “political propaganda, financial transactions, production of agriculture or non-military goods”).

⁶³ *Id.* at 46.

⁶⁴ *Id.* at 59.

⁶⁵ *Id.* at 65.

⁶⁶ *Id.* at 70.

⁶⁷ *Id.* at 72.

whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL.”⁶⁸

4. *The U.S. Functionality Test*

The United States rejects the predominant “direct part” interpretation⁶⁹ and takes a broader view of direct participation in hostilities.⁷⁰ The United States has never stated an official position on direct participation in hostilities, but commentators point to a 1999 memo by W. Hays Parks⁷¹ as the clearest statement of the United States’ functionality test.⁷² In his memo, Mr. Parks notes that “[a] civilian entering the theater of operations in support or operation of sensitive, high value equipment, such as a weapons system, may be at risk for intentional attack because of the importance of his or her duties.”⁷³ Accordingly, this functionally test evaluates a civilian’s role and function to determine that civilian’s importance.⁷⁴

⁶⁸ *Id.* at 34. This distinction is meant to prohibit targeting of members of armed groups who serve in only administrative or other non-combat roles (similar to civilians serving in non-military branches of a legitimate government). *Id.* at 33–34 (“[I]t distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized bases, or who assume exclusively political, administrative or other non-combat functions.”).

⁶⁹ DESKBOOK, *supra* note 41, at I-7 to I-8.

⁷⁰ *Id.* at I-8.

⁷¹ W. Hays Parks is currently the Law of War Chair in the Office of the General Counsel, Department of Defense, and has spent over forty years in public service as a law of war expert. UVa Legal and Policy Issues of the Indochina War—Guest Speakers, <http://faculty.virginia.edu/jnmoore/vietnam/vietnam-guest-speakers.html> (last visited Jan. 14, 2010). Mr. Parks participated in the ICRC’s expert meetings discussing direct participation in hostilities; his presentation to that conference is posted on the ICRC’s webpage. W. Hays Parks, *Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces*, Oct. 2005, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-expert-paper-icrc.pdf>.

⁷² See e.g., Major Douglas W. Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, ARMY LAW., July 2009, at 1, 20–21. The United States Judge Advocate General’s School teaches that the U.S. functionality test analyzes the importance of the function served by the civilian. DESKBOOK, *supra* note 41, at I-8 (noting that a “person whose function remains critical at all times” is always a lawful target and a “person whose function is critical only while performing” is a lawful target only during such performance).

⁷³ Law of War Memorandum, *supra* note 41, at 4.

⁷⁴ Moore, *supra* note 72, at 21.

W. Hays Parks expressed a slightly different view a decade earlier in an *Army Lawyer* article, noting that “there is no agreement as to the degree of participation necessary to make an individual civilian a combatant.”⁷⁵ Mr. Parks outlined four types of participants: (1) non-participants; (2) war effort participants (“activities which by their nature and purpose would contribute to the military defeat of the adversary”); (3) military effort participants (“activities by civilians which objectively are useful in defense or attack in the military sense, without being the direct cause of damage”); and (4) military operations participants.⁷⁶ Mr. Parks then posited that policy—not law—dictates which categories of participants qualify as targets.⁷⁷ Mr. Parks advanced this same argument in his seminal *Air War and the Law of War* article, rejecting the Additional Protocol I “direct part” language and noting that determining what constitutes direct participation “has been a policy decision made by national leaders.”⁷⁸

With no binding definition of direct participation, national interpretations will necessarily become policy decisions. There must, however, be some limit to interpretations of direct participation; otherwise, an overly broad interpretation could eviscerate the rule.⁷⁹ At a minimum, it would seem that the U.S. interpretation for offensive targeting should be consistent with the U.S. interpretation of targeting directed at its own citizens.

⁷⁵ W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4–6.

⁷⁶ *Id.*

⁷⁷ *Id.* Mr. Parks states that this policy decision is also made in counterinsurgencies. *Id.* at 7.

⁷⁸ Parks, *supra* note 28, at 134.

⁷⁹ Currently, the United States’ interpretation of “direct part” faces no binding independent review. As the United States is not a party to the International Criminal Court (ICC), the United States need not overly worry about conflicting interpretations. INT’L CRIM. CT., The State Parties to the Rome Statute, <http://www.icc-cpi.int/Menu/ASP/states+parties/> (last visited Feb. 21, 2010) (listing the 110 countries, not including the United States, that are parties to the ICC).

This may not last, however, as the chief prosecutor at the ICC has begun investigating potential war crimes in Afghanistan. Louis Charbonneau, *ICC Prosecutor Eyes Possible Afghanistan War Crimes*, REUTERS, Sep. 9, 2009, <http://www.reuters.com/article/idUSTRE58871K20090909>. As Afghanistan is a party to the ICC, the chief prosecutor claims jurisdiction over all war crimes in Afghanistan, including any committed by U.S. forces. Daniel Schwammenthal, *Prosecuting American “War Crimes,”* WALL ST. J., Nov. 27, 2009, at A21. In a worst case scenario, U.S. servicemembers might have to defend their actions in Afghanistan with a policy decision made in Washington.

B. Are Drug Traffickers Taking a Direct Part in Hostilities?: A Look Through Three Lenses

Looking through the three lenses of direct participation—Additional Protocol I, the ICRC Direct Participation Interpretive Guidance, and the U.S. functionality test—this article analyzes the U.S. targeting of drug traffickers in Afghanistan. To accomplish this analysis, we must first establish hypothetical facts about the fifty drug traffickers on the kill-or-capture target list. Drawing solely from the media and congressional reports about the operations, one can deduce several basic facts. First, the targets are called “nexus” targets and not Taliban drug dealers.⁸⁰ Accordingly, we can assume the drug traffickers’ nexus is that they provide money to the Taliban in exchange for some combination of protection, labor, and transportation. Second, we can assume the targets are not actual members of the Taliban or insurgency. If they were members of the Taliban, they would not be called “nexus,” but rather “members.”⁸¹ Third, U.S. forces can lethally engage targets on the kill-or-capture list at any time or place.⁸² Finally, we can infer from these facts that the transfer of money to the Taliban triggers the targeting. The mere involvement in the opium trade is not enough; otherwise the U.S. would not require a Taliban nexus for inclusion on the target list.

1. Through the Lens of Additional Protocol I, Drug Traffickers Pose No Direct Threat to U.S. Personnel and Therefore Are Not Taking a Direct Part in Hostilities

The drug traffickers do not take a direct part in hostilities under the Additional Protocol I standard. First, no direct link exists between the traffickers’ activities and harm to the enemy. Merely providing financial resources to the Taliban, traffickers do not cause direct harm to the enemy. With these financial resources, the Taliban could fund a number of different things, including purely civilian activities (such as aiding the United Nations’ polio vaccination program).⁸³ Additionally, the need to

⁸⁰ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15.

⁸¹ Apparently, 367 targets appear on the Afghanistan kill-or-capture list, of which fifty are “nexus” targets. *Id.*

⁸² *Id.* at 1; Risen, *supra* note 9, at A1.

⁸³ Yaroslav Trofimov, *Risky Ally in War on Polio: The Taliban*, WALL ST. J., Jan. 11, 2010, at A14 (describing how the Taliban assists the U.N. polio vaccination teams working in Afghanistan).

transform financial resources into military resources further illustrates the lack of a causal link.

Second, even if a direct causal link existed, no harm would occur at the time and place of the traffickers' activities.⁸⁴ The interactions between the traffickers and the Taliban are temporally separated from any potential harm to the enemy. The traffickers provide the Taliban money at one point in time, but only at a later time (after some conversion from monetary resources into military resources) does the enemy potentially suffer harm.

Additionally, the U.S. Army teaches that this Additional Protocol I commentary test is "closely analogous" to self defense to an "immediate threat."⁸⁵ Without unduly stretching the meaning of "immediate," the transfer of money from the drug traffickers to the Taliban cannot be reasonably considered an immediate threat triggering the right to self-defense.

2. *Through the Lens of the ICRC, Drug Traffickers Fail on All Three Prongs and Therefore Are Not Taking a Direct Part in Hostilities*

a. *No Threshold of Harm*

The activities of the drug traffickers appear neither to affect the military capabilities of the United States nor to inflict injury or death upon protected people or places. Accordingly, they do not meet the threshold of harm prong. The drug traffickers merely provide financial resources to the Taliban. Providing money to the Taliban does not, on its face, appear to harm the U.S. military; it only helps the Taliban by improving their resource base and, indirectly, their military capabilities.

The activities of the drug traffickers could harm civilians, notably the users of the end product, but the U.S. military does not target the traffickers for their criminal activities. Rather, the U.S. military targets the traffickers because they have a nexus to the Taliban. Additionally,

⁸⁴ PILLOUD ET AL., *supra* note 36, at 516 (noting that "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place").

⁸⁵ DESKBOOK, *supra* note 41, at I-8 (noting that "the Additional Protocol I test is closely analogous to a self-defense response to an immediate threat").

the U.S. military targets only fifty of the drug traffickers.⁸⁶ Thousands more Afghans participate in the trafficking of opium, harming the civilian end users, but the United States does not apparently target them.

One could argue that the drug traffickers' actions are detrimental to the United States because the drug traffickers control numerous opium processing laboratories and poppy fields. In their recommendations, the ICRC notes that the threshold of harm "may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary."⁸⁷ Controlling the poppy fields (territory), the opium processing laboratories (objects), and the finished refined opium (objects), the traffickers may harm the U.S. by undermining the Afghan government and contributing to the insurgency. However, if the drug traffickers instead farmed dates, bribed local officials for protection, and provided proceeds to the Taliban, one could make a similar argument about the date fields, the date processing equipment, and the dates themselves. Accordingly, a fairer reading of the ICRC's recommendation would have the adjective "military" modifying not just "personnel" but also "object and territory." It would then note that the threshold of harm "may also arise from capturing or otherwise establishing or exercising control over military personnel, [military] objects and [militarily relevant] territory to the detriment of the adversary."⁸⁸ Dates and date trees are not items of military equipment, and neither are opium and poppy fields. Although the geographic location could have military significance, its significance is independent from the particular cash crop being cultivated.

As the drug traffickers do not adversely affect the military capabilities of the United States or Afghanistan, the threshold of harm prong fails. But even if harm existed, the other two prongs must also be met.

b. No Direct Causation

No causal link appears to exist between the transfers of money and any potential harm to the United States. The ICRC's interpretation requires "a direct causal link between the act and the harm likely to result

⁸⁶ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15.

⁸⁷ INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 48.

⁸⁸ *Id.*

. . . from that act.”⁸⁹ Fungible, the money provided by the traffickers does not directly harm the United States. Even if the traffickers were providing weapons and ammunition as payment for protection, there would be no direct causal link to any later harm to the United States. The drug traffickers simply provide the Taliban with resources.

The ICRC gave several examples of activities that were *per se* not a causal link to harm, to include “economic . . . activities supporting the general war effort” such as “political propaganda, financial transactions, production of agriculture or non-military goods.”⁹⁰ The drug traffickers simply provide financial resources, and their actions appear to be nothing more than an economic effort supporting the general war effort. U.S. taxpayers pay income taxes to the state for, among many things, protection from foreign and domestic enemies. Similarly, Afghan drug traffickers pay protection money (taxes)⁹¹ to the Taliban.

Commentators support this view: A.P.V. Rogers notes that “[t]aking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort and it would not include taking part in arms production or military engineering works or military transportation.”⁹² His interpretation would likely find drug trafficking not a direct enough cause of harm. Although the ICRC and A.P.V. Rogers would likely agree that the traffickers’ activities do not meet the causal link prong, one must still consider if a belligerent nexus exists.

⁸⁹ *Id.* at 46.

⁹⁰ *Id.* at 51.

⁹¹ The United Nations calls this tax levied by the Taliban an “ushr.” U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2.

⁹² A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 8–9 (2d ed. 2004). Others find the same thing, to include Hans-Peter Gasser who notes:

Not only direct and personal involvement in such activities but also preparation of a military operation, or of a personal participation therein, may suspect the immunity of a civilian. Such activities, however, must be directly related to acts of hostilities, in other words, they must represent a direct threat to the other party to the conflict. . . [cannot] be understood too broadly. . . Employment in the (civilian) armament industry, for example, does not mean that its employees are necessarily taking an active part in hostilities.

HANS-PETER GASSER, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 261–62 (Deiter Fleck ed., 2d ed. 2008).

c. A Belligerent Nexus? Probably Not

The drug traffickers could have a variety of reasons for paying money to the Taliban. Perhaps the traffickers seek a simple business arrangement. The traffickers could be paying for labor and access to markets.⁹³ Perhaps the traffickers seek protection or an authorization to operate (remembering that the Taliban, when in control of Afghanistan, banned opium production).⁹⁴ The traffickers could be paying for a permit to operate (similar to a legitimate corporation paying taxes and fees to a sovereign for a charter). Or, as a third alternative, perhaps the drug traffickers provide money to the Taliban for ideological reasons (similar to how the Taliban receives funding from radical Islamic charities).⁹⁵ The traffickers can give the same amount of money, providing the Taliban with the same amount of financial resources, for a variety of reasons.

The ICRC definition of belligerent nexus requires an act be “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”⁹⁶ While this sounds like a subjective intent or *mens rea* criterion, the ICRC clarifies, stating that the “belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act and does not depend on the mindset of every participating individual.”⁹⁷ In practical application, the ICRC notes that acts must be “specifically designed to support one party to the conflict by causing harm to another.”⁹⁸ Additionally, merely engaging in criminal acts, according to the ICRC, is not enough to warrant targeting.⁹⁹

⁹³ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 7–8.

⁹⁴ Barbara Crossette, *Taliban's Ban on Poppy a Success*, *U.S. Aides Say*, N.Y. TIMES, May 30, 2001, at A1.

⁹⁵ General McChrystal submitted a report noting that the Taliban raised a significant amount of money from foreign donors. Memorandum from Commander, U.S. Forces-Afg., to Sec'y of Def., subject: COMISAF's Initial Assessment 2–8 (Aug. 30, 2009) [hereinafter McChrystal Memo], available at http://media.washingtonpost.com/wp-srv/politicis/documents/Assessment_Redacted_092109.pdf. Although General McChrystal was subsequently relieved of command (for unrelated reasons), no media reports have indicated a change in the U.S. targeting policy.

⁹⁶ INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 46.

⁹⁷ *Id.* at 59.

⁹⁸ *Id.* at 61.

⁹⁹ The ICRC notes: “Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behavior . . .” *Id.* at 62.

Regardless of the purpose of the drug traffickers' payments (business transaction, protection money, or ideological support), the money does not harm the other party to the conflict—it only benefits the Taliban and the insurgents. Additionally, the drug traffickers apparently care less about who governs and more about maintaining their freedom to engage in the lucrative opium trade. Reports indicate that senior members of the Afghan government accept narcotics bribes,¹⁰⁰ indicating the traffickers will bribe anyone they can. This demonstrates that they just want to maintain their control of the opium market and that they do so without a belligerent nexus.

d. No Continuous Combat Function

The kill-or-capture list permits military forces to engage selected “nexus” drug traffickers with lethal force at any time.¹⁰¹ This means the United States could kill these selected drug traffickers not only when they are paying the Taliban, but also when they are resting at home, visiting with friends and relatives, or overseeing their narcotics trade activities.

Assuming the conflict is a non-international armed conflict and the Taliban is considered an “organized armed group,”¹⁰² using the ICRC recommendations, such continuous targeting would only be authorized if the drug traffickers fulfill a continuous combat function for the Taliban.¹⁰³ One could argue that everything these drug traffickers do somehow relates to the illicit narcotics trade, and this trade provides the financial resources for the Taliban. Even if true, this would not distinguish the daily function of these “nexus” targets from the daily function of the thousands of other drug traffickers in Afghanistan.

¹⁰⁰ Thomas Schweich, *Is Afghanistan a Narco-State?*, N.Y. TIMES MAG., July 27, 2008, at 45 (“[President Karzai] appointed a convicted heroine dealer, Izzatulla Wasifi, to head his anticorruption commission.”).

¹⁰¹ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 1; Risen, *supra* note 9, at A1.

¹⁰² The Additional Protocol II regime is triggered by “organized armed groups which, under responsible command, exercise such control over a part of [a State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol II, *supra* note 35, art. 1.

¹⁰³ See discussion *supra* Part II.B.2.

Logically, the “nexus” targets differ from the other traffickers because they pay the Taliban. These “nexus” targets must do something more than merely traffic drugs to become targets of the United States. However, these “nexus” drug traffickers apparently only interact with the Taliban on a very limited basis (spending most of their time trafficking drugs). If they did more than just interact with the Taliban, they could be considered members of the Taliban, negating the need to call them “nexus” targets. In short, their continuous function is to oversee the narcotics drug trade.

Consequently, using the ICRC construct of “continuous combat function,” the nexus drug traffickers cannot be legally targeted at all times and locations (even if they could be targeted while interacting with and paying off the Taliban). The traffickers are not engaging in a combat function for the Taliban; rather, they are engaging in financial deals for and with the Taliban. Courts in Israel and the Organization of American States reached similar conclusions in analogous cases involving individuals providing financial support to terrorist organizations.¹⁰⁴

¹⁰⁴ The Israeli Supreme Court, hearing a case from the Israeli conflicts in Gaza and the West Bank, addressed the question of whether individuals providing indirect support to terrorist groups are taking a direct part in hostilities. The Israeli court recognized the difficulties in drawing a line between two poles (clear participation and innocent civilian activity). While providing no definitive test, the Israeli court noted several activities that were clearly direct participation: ordering or planning attacks; collecting intelligence on the army; transporting combatants to and from an attack; and operating or supervising the operation of weapons used by unlawful combatants. The court also gave several examples of activities that are not direct participation in hostilities: selling food or medicine to unlawful combatants; distributing propaganda, and providing support, to include monetary aid. H CJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [Dec. 11, 2005] slip op. para. 37, *available at* http://e1yon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

Ravaged by a war between the government and the Revolutionary Armed Forces of Columbia (FARC) guerrillas tied to the cocaine trade, the Columbia government faced a similar issue in trying to determine how to treat those who provided support, to include financial support, to the FARC guerrillas. The Inter-American Commission on Human Rights, part of the Organization of American States (OAS), issued a country report on Colombia in 1999 and commented on targeting of individuals not taking a direct part in hostilities, noting:

In contrast, civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve

3. *Through the Lens of the U.S. Functionality Test Drug Traffickers Support the Taliban, but Perhaps Do Not Fulfill a Critical Military Function*

Reviewing the importance of a civilian's function or contribution,¹⁰⁵ one finds that the drug traffickers in Afghanistan serve an important role for the Taliban. Providing \$200 to \$400 million in annual revenue,¹⁰⁶ the traffickers provide resources to the Taliban and potentially fund tens of thousands of insurgents.¹⁰⁷ From this perspective, the drug traffickers' contributions fulfill an important function.

However, in a report to Secretary Gates, General McChrystal notes:

Narcotics activity also funds insurgent groups; however, the importance of this funding must be understood within the overall context of insurgent financing, some of which comes from other sources. Insurgent groups also receive substantial income from foreign donors as well as from other criminal activities within Afghanistan such as smuggling and kidnapping for ransom. Some insurgent groups "tax" the local population through check points, demanding protection money, and other methods. Eliminating insurgent access to narco-profits—even if possible, and while disruptive—would not destroy their ability to operate so long as other funding sources remain intact.¹⁰⁸

From General McChrystal's report, one can see that eliminating the Taliban's profits from narcotics, while perhaps necessary, is not sufficient to undermine Taliban insurgent activities. Additionally, General McChrystal's report indicates that only one of the three major

acts of violence which pose an immediate threat of actual harm to the adverse party.

INTER-AM. COMM'N ON HUMAN RIGHTS *Third Report on the Human Rights Situation in Columbia*, ¶ 56, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (Feb. 26, 1999).

¹⁰⁵ Law of War Memo, *supra* note 41, at 4; Moore, *supra* note 72, at 21.

¹⁰⁶ U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2.

¹⁰⁷ It costs only about \$10 a day to fund an insurgent in Afghanistan. Risen, *supra* note 9, at A1.

¹⁰⁸ McChrystal Memo, *supra* note 95, at 2-8.

insurgent groups participates in the drug trade.¹⁰⁹ Accordingly, if all drug trafficking ceased, two of the three main insurgent groups would see zero loss of revenue. The third group would lose some revenue, but perhaps not enough to significantly impact operations, as General McChrystal indicates the insurgents are not solely dependent on the narcotics trade.

Since General McChrystal filed his assessment, news reports suggest that trafficking is not the leading source of income for the Taliban. Rather, foreign donors make up the largest source of income for the Taliban.¹¹⁰ In fact, reports indicate that the United States may find it impossible to cut off the narco-profits flowing to the Taliban.¹¹¹

Regardless, the United States has apparently made a policy decision that these fifty drug traffickers can be lethally targeted because they serve a critically important function. This may, however, conflict with the functionality test. The functionality test was derived by analyzing the status of civilians operating “sensitive, high value equipment, such as a weapon system.”¹¹² In Afghanistan, however, the fifty “nexus” traffickers do not appear to be operating any weapon system for the Taliban. Stretching the functionality test to include these drug traffickers disconnects the test from its origin; this stretched interpretation seems to no longer require any performance of a military function.

Ultimately, with no binding definition of direct participation in international law, the interpretation of direct participation comes down to a policy decision. The U.S. functionality test merely reflects changeable U.S. policy; however, how the U.S. interprets direct participation for targeting of Afghan civilians should probably mirror how the U.S. interprets direct participation for targeting of U.S. civilians.

¹⁰⁹ Only the Quetta Shura group participates in the opium trade, and they also receive support from foreign donors. *Id.* at 2-6.

¹¹⁰ Craig Whitlock, *Taliban's Diverse Funding Defies Interdiction*, WASH. POST, Sept. 26, 2009, at B1. The story indicates the CIA has recently greatly reduced its estimate of narco-profits going to the Taliban, while still estimating that foreign donors contributed \$106 million to the Taliban over the past year. *Id.*

¹¹¹ *Id.*

¹¹² Law of War Memo, *supra* note 41, at 4.

III. Narcotics Materiel: Criminal Contraband, but also a Military Objective?

In addition to targeting drug traffickers, the United States also kinetically targets processed opium, opium processing facilities, and the poppy plants themselves.¹¹³ Military forces, however, can only target those objects and locations that are valid military objectives.¹¹⁴ This section will review the legal standard defining military objectives and will apply that standard to U.S. military targeting of narcotics materiel in Afghanistan. This section analyzes the targeting through the lens of Additional Protocol I and the lens of the U.S. definition of military objective found in the Military Commissions Act of 2009 (MCA)¹¹⁵ and the U.S. Navy's *Commander's Handbook on the Law of Naval Operations (Navy Commander's Handbook)*.¹¹⁶

A. Distinction Applies to Both People and Objects

As discussed above in Part II, distinction is a fundamental principle of the law of war.¹¹⁷ Article 48 of Additional Protocol I directs that combatants will at all times “distinguish . . . between civilian objects and military objectives and accordingly shall direct their operations only

¹¹³ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 12 (recounting an incident where U.S. forces “bombed an estimated 300 tons of poppy seeds”); *see also* BBC NEWS, *NATO to Attack Afghan Opium Labs*, Oct. 10, 2008, <http://news.bbc.co.uk/2/hi/7663204.stm> (noting that NATO planned to attack “opium factories and distribution networks”).

¹¹⁴ Protocol I, *supra* note 29, art. 48.

¹¹⁵ Military Commissions Act of 2009, *supra* note 41. The original (2006) Military Commissions Act was passed in response to *Hamdan v. Rumsfeld* where the Supreme Court found the then existing military commissions to be unconstitutional. 548 U.S. 557 (2006). In response to the Supreme Court, the Congress passed the Military Commissions Act of 2009 (MCA) to provide the president with statutory authority to convene the military commissions in essentially the same form. *See* JONATHAN MAHLER, *THE CHALLENGE, HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 299–301 (2008) (discussing the political maneuvering after *Hamdan v. Rumsfeld*).

¹¹⁶ U.S. DEP'T OF NAVY & DEP'T OF HOMELAND SECURITY, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.yA, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* 5.3.1 (July 2007) [hereinafter *COMMANDER'S HANDBOOK*].

¹¹⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

against military objectives.”¹¹⁸ This principle of distinction applies in both international and non-international conflicts.¹¹⁹

The principle of distinction turns on the definition of military objective. Additional Protocol I provides one definition of military objective,¹²⁰ considered by the ICRC to be customary international law applying in both international and non-international armed conflict.¹²¹ The United States, while perhaps partially accepting the Additional Protocol I definition,¹²² disagrees that customary international law limits military objectives to items providing a purely military advantage.¹²³ Although a definitive U.S. definition does not exist, the Military Commissions Act of 2009 provides one potential definition. The definition in the MCA closely parallels the definition of military objective found in the *Navy Commander’s Handbook*. The next sections discuss these competing definitions.

B. Differing Definitions of Military Objective

1. *Additional Protocol I*

Additional Protocol I defines military objective as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

¹¹⁸ Protocol I, *supra* note 29, art. 48.

¹¹⁹ DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 614 (Dieter Fleck ed., 2d ed. 2008); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW RULES 3* (2005) (listing the rule of distinction as rule number one, applicable to both international and non-international armed conflict).

¹²⁰ Protocol I, *supra* note 29, art. 52(2).

¹²¹ 1 HENCKAERTS & DOSWALD-BECK, *RULES 29*, *supra* note 119 (stating the Additional Protocol I definition as customary international law applicable in all conflicts).

¹²² *Id.* at 31 (noting that “the United States accepts the customary nature of the definition contained in Article 52(2) . . . [but its position is] that this definition is a wide one which includes areas of land, objects screening other military objectives and war-supporting economic facilities”).

¹²³ Parks, *supra* note 28, at 141 (“The principal problems with the definition of military objective contained in Article 52 are the phrases requiring that any attack make an ‘effective contribution to military action’ and constitute a ‘definite military advantage.’”). Mr. Parks describes the Protocol I definition and customary international law as being “miles apart.” *Id.* at 144. Assumably the United States does not object to the nature, location, purpose, and use construct for analysis. See *DESKBOOK*, *supra* note 41, at E-3–E-5 (discussing the nature, location, purpose, and use prongs).

capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹²⁴ The commentary to the Additional Protocols provides interpretive guidance on the nature, location, purpose, and use prongs.

a. Nature

The nature prong focuses on the inherent nature of an object; the commentary to Article 52 explains “nature” as those items or objects that are “directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.”¹²⁵ Yoram Dinstein restates this as requiring that an “object . . . must be endowed with some inherent attribute which *ep ipso* makes an effective contribution to military action.”¹²⁶ The ICRC notes that a “tank, . . . , an artillery emplacement, an arms depot, or a military airfield” can be “presumed to be a military objective.”¹²⁷

b. Location

The location prong addresses terrain and identifies times when terrain itself can become a valid military objective. The commentary to Additional Protocol I notes that terrain may be a military objective because of “special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.”¹²⁸ Yoram Dinstein notes that “there must be a distinctive feature turning a piece of land into a military objective (e.g., an important mountain pass, a trail in the jungle

¹²⁴ Protocol I, *supra* note 29, art. 52(2).

¹²⁵ PILLOUD ET AL., *supra* note 36, at 636.

¹²⁶ DINSTEIN, *supra* note 26, at 88.

¹²⁷ KALSHOVEN & ZEGVELD, *supra* note 44, at 100.

¹²⁸ PILLOUD ET AL., *supra* note 36, at 636. The commentary notes that “because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.” *Id.*

or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbor).¹²⁹

c. Purpose

The purpose prong looks not at the object itself, but at the enemy's intended future use of the object.¹³⁰ Dinsten notes that "purpose is deduced from an established intention of a belligerent as regards to future use."¹³¹ Looking at the future employment, objects that presently appear to be civilian objects may in fact become valid military objectives.

d. Use

The use prong focuses on the current employment of an object or "its present function."¹³² Almost every object, including apparently completely civilian objects, can be used by a military force.¹³³ Dinsten notes that it "does not depend necessarily on its original nature or on any (later) intended purpose."¹³⁴ While Article 52(3) of Additional Protocol I notes that objects should be presumed to be civilian objects,¹³⁵ Dinsten argues that this rebuttable presumption applies only in cases of doubt.¹³⁶

¹²⁹ DINSTEIN, *supra* note 26, at 92. A.P.V. Rogers notes, "If an area of land has military significance, for whatever reason, it becomes a military objective." ROGERS, *supra* note 92, at 39.

¹³⁰ PILLOUD ET AL., *supra* note 36, at 636 (noting that "'purpose' is concerned with the intended future use of an object").

¹³¹ DINSTEIN, *supra* note 26, at 89.

¹³² PILLOUD ET AL., *supra* note 36, at 636.

¹³³ *Id.* ("Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives.").

¹³⁴ DINSTEIN, *supra* note 26, at 90.

¹³⁵ Protocol I, *supra* note 29, art. 52 ("In cases of doubt whether an object . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.").

¹³⁶ DINSTEIN, *supra* note 26, at 91. ("The degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear. But surely that doubt has to arise in the mind of the attacker, based upon 'circumstances ruling at the time.'").

2. *The Military Commissions Act of 2009 and Its “War-Fighting or War-Sustaining Capability” Language*

The United States accepts as customary international law the principle of discrimination,¹³⁷ which requires combatants to distinguish between civilian objects and military objectives.¹³⁸ The United States, however, deviates from the Additional Protocol I definition of military objective.¹³⁹ Mr. Hays Parks severely criticizes the Additional Protocol I definition of military objective as not reflecting customary international law, noting that it unduly limits military objective to targets with a “nexus to a ‘military’ rather than strategic, psychological, or other possible advantage.”¹⁴⁰ Although the United States views the Additional Protocol I definition as too narrow, no clear U.S. definition exists. One commentator, describing the United States’ almost complete disregard of Additional Protocol I, asked, “What is the U.S. definition of military objective?”¹⁴¹

The MCA contains one potential definition. Although the MCA governs criminal trials of “alien unprivileged enemy belligerents,”¹⁴² the MCA defines many terms in the law of war. Assumingly, these definitions apply to all belligerents and not just captured enemy belligerents. Additionally, to forestall claims of retroactive lawmaking,

¹³⁷ Letter from J. Fred Buzhardt, Gen. Counsel, Dep’t of Def., to Sen. Edward Kennedy, Chairman, Subcomm. on Refugees of the Comm. on the Judiciary (Sept. 22, 1972) reprinted in *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT’L L. 122, 123–24 (1973); see also Parks, *supra* note 28, at 113 (“Article 48 states the fundamental principle of discrimination, a principle with which there should be no disagreement.”).

¹³⁸ Protocol I, *supra* note 29, art. 48.

¹³⁹ Mr. Parks pans the Additional Protocol I definition of military objective. Parks, *supra* note 28, at 135–144 (noting customary practice of targeting economic targets, power generation target, industrial targets, and transportation target). Additionally, even the Matheson remarks only endorsed the Additional Protocol’s protection of civilians, without specifically adopting the definition of military objective. Matheson Remarks, *supra* note 48, at 426. Even this partial embrace of Additional Protocol I may no longer be valid. Charles Garraway, “England Does Not Love Coalitions?” *Does Anything Change?*, in 82 INTERNATIONAL LAW STUDIES, THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 233, 238 (Anthony M. Helm, ed. 2006) (“It appears the Matheson analysis is no longer considered ‘authoritative.’”).

¹⁴⁰ Parks, *supra* note 28, at 141.

¹⁴¹ Garraway, *supra* note 139, at 238; see also Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1, 6 (noting a “general ‘rollback’ by the executive branch of the treatment of Additional Protocol I provisions.”).

¹⁴² Military Commissions Act of 2009, *supra* note 41, § 948(b).

Congress clearly states that the MCA does not make new law but that it merely “codif[ies] offenses that have traditionally been triable under the law of war.”¹⁴³ Accordingly, although the MCA does not explicitly apply to U.S. targeting decisions, the MCA states a position on the law of war. Passed by Congress and signed by the President, the MCA contains a definition of military objective that warrants examination. Examining the MCA definition reveals that it differs from Additional Protocol I only slightly in form, but significantly in meaning.

a. MCA Definition

The MCA defines military objectives as follows:

[C]ombatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.¹⁴⁴

While similar in form and style, the MCA definition differs significantly in meaning from that of the Additional Protocol I. Notably, Additional Protocol I requires objects to make an “effective contribution to military action,”¹⁴⁵ while the MCA requires objects to “effectively contribute to the war-fighting or war-sustaining capability of an opposing force.”¹⁴⁶ This slight change significantly expands the reach of military objective; numerous objects could contribute to the war-fighting or war-sustaining capability without contributing to any particular military action.¹⁴⁷

¹⁴³ *Id.* § 950(p).

¹⁴⁴ *Id.* The 2009 definitions made several non-substantive grammatical changes to the 2006. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v, 120 Stat. 2600, 2625, *invalidated* by National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2606.

¹⁴⁵ Protocol I, *supra* note 29, art. 52.

¹⁴⁶ Military Commissions Act of 2009, *supra* note 41, § 950(p).

¹⁴⁷ A.P.V. Rogers raises these objections while discussing the Navy’s definition, noting that it will “widen considerably the range of targets that might be attacked, including some of the targets that are problematic under Protocol I, especially economic, leadership and propaganda targets.” ROGERS, *supra* note 92, at 81.

The MCA leaves unexplained the meaning of war-fighting and war-sustaining capabilities; however, several similar definitions preceded the MCA. These earlier expanded definitions of military objective help flesh out the potential meaning of the war-sustaining language.

b. Targeting Cotton: The Navy Commander's Handbook, Annotated Supplement to the Navy Commander's Handbook, and Joint Doctrine

The *Navy Commander's Handbook* includes a definition of military objective very similar to the MCA, defining military objective as follows:

An object is a valid military objective if by its nature (e.g., combat ships and aircraft), location (e.g., bridge over enemy supply route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war fighting/war sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance at the time, offers a definite military advantage.¹⁴⁸

While the *Navy Commander's Handbook* uses the same "war-sustaining" language as the MCA, the *Navy Commander's Handbook* provides further discussion of possible military objectives, noting that "economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked."¹⁴⁹

The Navy's *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (Annotated Supplement)* provides supporting information. This annotated supplement notes:

Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing

¹⁴⁸ THE COMMANDER'S HANDBOOK, *supra* note 116, at 5-2-5-3.

¹⁴⁹ *Id.* at 8-3.

war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.¹⁵⁰

The *Annotated Supplement* justifies enlarging the definition of military objective with a footnote citing the destruction of the South's cotton crop by the Union Army during the American Civil War.¹⁵¹ This supplement notes that "the sale of cotton provided funds for almost all Confederate arms and ammunition."¹⁵² The critical nature of the cotton exports to the Southern economy certainly explains the targeting decision, but this reasoning appears to permit targeting based solely on the economic value of an object.

One commentator limits the broad language of the *Navy Commander's Handbook* by positing that war-sustaining targets must have some military link, noting that "some nexus to military capability is required."¹⁵³ This commentator, however, also argues that targeting economic resources is a legitimate and legal undertaking when these assets are at sea.¹⁵⁴ If an economic export could be a military objective while at sea, arguably, it would also be valid target while still on land. The commodity is the same, regardless of location; being located at sea does not seem to provide any nexus to military capability. Accordingly, it remains unclear what this nexus to military capability could mean.

Looking elsewhere for clarification, Joint Publication 3-60, *Joint Doctrine for Targeting* (Joint Pub. 3-60), also adopts economic targets as potentially valid. Joint Pub. 3-60 notes that valid targets "may include economic targets that indirectly but effectively support and sustain the

¹⁵⁰ U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, INT'L L. STUD. NO. 73, at 8-3 (A.R. Thomas & James C. Duncan, eds., 1997) [hereinafter ANNOTATED SUPPLEMENT].

¹⁵¹ *Id.* at 8-3 n.11.

¹⁵² *Id.*

¹⁵³ Lieutenant David A. Melson, *Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I*, ARMY LAW., July 2009, at 44, 51. Lieutenant Melson notes that "war-sustaining targets should be defined according to careful economic analysis of a belligerent's military and industrial capacity." *Id.* While economic analysis may assist in application of this standard, better application of a standard does not logically justify the proffered standard.

¹⁵⁴ *Id.* at 45. ("Denying naval forces a traditional and legal target set through the application of rules of warfare derived from state practice on land denies military planners a useful strategy and risks prolonging conflicts.").

adversary's warfighting capability."¹⁵⁵ While this language seems analogous to the MCA and *Navy Commander's Handbook*, other language in the same paragraph suggests some restrictions. Joint Pub. 3-60 notes, "Economic targets (i.e., factories, workshops, and plants) that make an effective contribution to an adversary's military capability are considered legitimate military targets."¹⁵⁶ This additional language appears to require objects to contribute to the military capabilities of an adversary before an object can become a military target. This suggests that general support to a regime does not contribute to the military capabilities of that regime.

This U.S. definition is not without criticism. Yoram Dinstein argues that the definition in the *Navy Commander's Handbook* is a "slippery-slope" because "almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort (especially when hostilities are protracted)."¹⁵⁷ W. Hays Parks, however, argues that the Additional Protocol I definition displays "a serious ignorance of the art of war."¹⁵⁸ Mr. Parks argues that the historic practice of nations makes clear that the Additional Protocol I definition is too narrowly drawn.¹⁵⁹ Parks argues that World War II demonstrates that valid military objectives include much more than just those permitted by the Additional Protocol I definition.¹⁶⁰

¹⁵⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING, at A-3 (Jan. 17, 2002) [hereinafter JOINT PUB. 3-60].

¹⁵⁶ *Id.* at 3-30.

¹⁵⁷ DINSTEIN, *supra* note 26, at 87 (noting that there "must exist a proximate nexus to military action").

¹⁵⁸ Parks, *supra* note 28, at 139.

¹⁵⁹ *Id.* at 139-44. In addition to the targeting of cotton mentioned in the ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11, the Lieber Code provides another Civil War example that suggests economic targeting is acceptable. Headquarters, U.S. Dep't of Army, Gen. Order No. 100, sec. 17 (24 Apr. 1863), reprinted in FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf ("War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.").

¹⁶⁰ Parks, *supra* note 28, at 21. One commentator would disagree, and notes that "humanitarian considerations on which the principle of distinction are rooted must be a necessary complement to the principle of economy in the use of force as a key criterion in the interpretation of the notion of military objective." HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY'S CASE LAW TO THE ROME STATUTE 138 (2008). In other words, the limits on military objectives must be in addition to a commander's self imposed logistical limits—otherwise, the principle of military objective means very little at all.

The full reach of the U.S. definition remains unclear. The discussion above illustrates that the U.S. definition is not coterminous with Additional Protocol I. The U.S. definition reaches considerably farther, but exactly how far remains unclear.

C. Can We Smoke the Weed? Application to Poppy Plants and Opium Processing Laboratories

Having reviewed the abstract definitions of military objective, this article now applies the Additional Protocol I and U.S. definitions to targeting actions in Afghanistan, using the same facts discussed in Part II.

1. *Additional Protocol I Standard: Are Narcotics-Related Objects Military Objectives Because of Their Nature, Location, Purpose, or Use?*

Under the Additional Protocol I definition of military objective, narcotics-related materiel cannot be targeted. The drugs and processing centers, while perhaps valuable to drug traffickers and the Taliban, do not make an effective contribution to military action by their nature, location, purpose, or use.

No inherent characteristic of poppy plants, processing equipment, or refined opium makes them military objects. None of these items is “directly used by the armed forces.”¹⁶¹ Although some traffickers are connected to the Taliban and the Taliban may provide labor for the processing and trafficking,¹⁶² this processing by “military” personnel does not make them inherently military objects. These “military” forces are merely providing manual labor unrelated to their militant functions. Accordingly, the narcotics do not by their nature contribute to military action.

Likewise, the opium processing laboratories and the fields planted with poppy plants are not locations of military importance. Some of these

¹⁶¹ PILLOU ET AL., *supra* note 36, at 636. These narcotics materials are not any of the examples given by the commentary. *Id.* (listing examples of “weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.”).

¹⁶² PETERS, *supra* note 21, at 12.

processing labs or fields may happen to be on militarily significant terrain, but any significance of the terrain is independent of these narcotics related items. In short, the sites have no “special importance for military operations,”¹⁶³ and, therefore, the narcotics do not by their location contribute to military action.

The narcotics trade items also do not serve a military purpose, as the insurgents apparently do not intend to put the objects to a future military use.¹⁶⁴ The traffickers and the Taliban appear to treat narcotics as they would treat wheat—a commodity that can be consumed or sold for cash. Neither personal consumption nor export for sale can be considered a military use. Nevertheless, one potential military use of opium could be to undermine the opposition’s military strength by facilitating the addiction of enemy soldiers to heroin. President Reagan once favorably considered undermining the Soviets in Afghanistan by “flooding them with hard drugs.”¹⁶⁵ However, there appears to be no indication that the Taliban uses or intends to use opium to undermine the military readiness of international troops in Afghanistan.

Finally, the same analysis applies to the Taliban’s current use of poppy plants, processing centers, and refined opium. Just as there exists no planned future military use of opium, there appears to be no current use of opium for military purposes in “its present function.”¹⁶⁶ Accordingly, the use does not contribute to military action.

In conclusion, the narcotics materiel does not make a military contribution by its nature, location, purpose, or use; narcotics materiel cannot be considered valid military objectives. Commentators have addressed similar issues involving the targeting of exported goods. One commentator opined that targeting the coffee or banana exports of a country that relied almost entirely on those exports would not be permissible.¹⁶⁷ Another commentator noted that targeting of a merchant ship that was carrying oil for export would not be permissible.¹⁶⁸

¹⁶³ PILLOU ET AL., *supra* note 36, at 636. It likewise does not fit any of the examples given by Dinstein. DINSTEIN, *supra* note 26, at 92 (“[A]n important mountain pass, a trail in the jungle or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbor.”).

¹⁶⁴ The commentary notes that “‘purpose’ is concerned with the intended future use of an object.” PILLOU ET AL., *supra* note 36, at 636.

¹⁶⁵ PETERS, *supra* note 21, at 45.

¹⁶⁶ PILLOU ET AL., *supra* note 36, at 636.

¹⁶⁷ A.P.V. Rogers makes an argument about a hypothetical coffee-growing country:

2. *The MCA “War-Sustaining” Standard*

This section analyzes the narcotics materiel in Afghanistan using the MCA definition. Although the MCA definition uses the same nature, location, purpose, and use construct, this section will not readdress those issues as the analysis would mirror the previous section. Instead, this section applies the “war-sustaining” standard to the targeting. This section also looks for potential insights from the charging decisions at the Military Commissions and from the U.S. Army’s field manual on the law of war.

a. Is the Opium Trade a “War-Sustaining” Activity?

The narcotics materiel in Afghanistan may in fact effectively contribute to the war-sustaining or war-fighting capabilities of the Taliban. As noted above, narcotics trafficking provides the Taliban with several hundred million dollars in annual revenue.¹⁶⁹ While narcotics trafficking may no longer be (if it ever was) the leading source of the Taliban’s income,¹⁷⁰ the narcotics trade still provides a significant share

If a country relies almost entirely on, say, the export of coffee beans or bananas for its income and even if this income is used to great extent to support its war effort, the opinion of the author is that it would not be legitimate to attack banana or coffee bean plantations or warehouses. The reason for this is that such plants would not make an effective contribution to military action nor would their destruction offer a definite military advantage. The definition of military objectives thus excluded the general industrial and agricultural potential of the enemy. Targets must offer a more specific military advantage.

ROGERS, *supra* note 92, at 70–71. Substitute opium for coffee, and this quote could be describing Afghanistan. The opium plants and the material supporting the narcotics trade do not offer a “specific military advantage.”

¹⁶⁸ DINSTEN, *supra* note 26, at 102–03 n.131 (noting that “a private tanker cannot be attacked as a military objective when carrying oil exported from a belligerent oil-producing State, even though the revenue derived from the export may prove essential to sustaining the war effort”).

¹⁶⁹ U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2. Things improved slightly in 2009, with a decrease in farm gate receipts for opium from \$730 million in 2008 to \$438 million in 2009, but opium is still a significant source of revenue. U.N. OFFICE ON DRUG & CRIME, *supra* note 15, at 1.

¹⁷⁰ Whitlock, *supra* note 110, at B1. The CIA has recently greatly reduced its estimate of narco-profits going to the Taliban, but estimating that foreign donors contributed \$106 million to the Taliban over the past year. *Id.*

of the Taliban's revenue.¹⁷¹ Additionally, aiming to protect their profits, the Taliban may now focus more on protecting their lucrative narcotics trade than on recapturing Kabul.¹⁷²

Providing the Taliban significant monetary resources, the narcotics trade certainly provides support to the Taliban that might increase their war-fighting or war-sustaining capability. If the Taliban were solely an armed group, then arguably all money going to the Taliban goes to an opposing force. As noted above, however, the Taliban runs a shadow government throughout much of Afghanistan and even cooperates with the United Nations.¹⁷³ Accordingly, the Taliban appears not to use all of its resources for armed attacks, making it unclear if narcotics are war sustaining.

Utilizing the *Navy Commander's Handbook* definition of economic targets, one finds that the opium materiel may make an effective contribution.¹⁷⁴ As economic objects, the opium-related items may "indirectly but effectively support and sustain the [Taliban's] war-fighting capability."¹⁷⁵ Although the Taliban may get more of its resources from foreign donors, this does not devalue the money they garner from the opium trade. The millions of dollars they collect by taxing opium can still fund a significant number of insurgents.¹⁷⁶ However, as General McChrystal noted in his report, "Eliminating insurgent access to narco-profits—even if possible, and while disruptive—would not destroy their ability to operate so long as other funding sources remain intact."¹⁷⁷ General McChrystal's comments indicate that narco-profits are not a "but for" causation of the insurgency. Perhaps this indicates—depending on one's definition of "effectively"—that opium does not "effectively" support the Taliban's war-sustaining capability.

¹⁷¹ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2; U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2.

¹⁷² PETERS, *supra* note 21, at 12 (noting that "battles are more often diversionary attacks to protected big shipments, rather than campaigns for strategic territorial gain").

¹⁷³ Trofimov, *supra* note 83, at A14 (outlining the efforts of the Taliban to assist the U.N. anti-polio program).

¹⁷⁴ COMMANDER'S HANDBOOK, *supra* note 116, at 5-2 to 5-3.

¹⁷⁵ ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3.

¹⁷⁶ See discussion *supra* Part I.

¹⁷⁷ McChrystal Memo, *supra* note 95, at 2-8.

Applying the Joint Pub. 3-60 definition, one reaches the same inconclusive result. Although Joint Pub. 3-60 explicitly condones targeting of economic targets, it requires economic targets “make an effective contribution to an adversary’s military capability.”¹⁷⁸

As discussed in the previous paragraph, one cannot clearly conclude that the narcotics trade makes an effective contribution to the Taliban’s military capabilities. The money could go to a variety of non-military uses, and narcotics are not the sole source of resources for the insurgents. Additionally, as only one of three major insurgent groups participates in the narcotics trade,¹⁷⁹ opium does not effectively contribute to the military capabilities of the other two insurgent groups.

The *Annotated Supplement* uses the targeting of cotton during the Civil War as justification for economic targeting,¹⁸⁰ and the targeting of cotton in the antebellum South provides an interesting analogy. The American South was dependent on cotton for cash.¹⁸¹ Afghanistan has only \$327 million in legitimate exports while the opium trade collects \$3 billion a year.¹⁸² By a multiple of 10, opium is Afghanistan’s most valuable export, indicating Afghanistan is similarly dependent on opium for cash.

Afghanistan’s opium differs from the South’s cotton in two notable ways. First, the American South was completely dependent on the sale of cotton to purchase arms and equipment,¹⁸³ while insurgents in Afghanistan survive on more than just the opium trade. This difference suggests that opium is not nearly as important as cotton was to the South. Accordingly, the narcotics trade provides less of an effective contribution than cotton contributed to the South.

Cutting the other way, the second major difference is opium’s lack of legitimate civilian use. Once opium is processed into heroin, opium becomes contraband. Arguably, heroin can be targeted because it retains no legitimate civilian use.

¹⁷⁸ JOINT PUB. 3-60, *supra* note 155, at 3-30.

¹⁷⁹ McChrystal Memo, *supra* note 95, at 2-8.

¹⁸⁰ ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11.

¹⁸¹ *Id.*

¹⁸² CIA, THE WORLD FACT BOOK: AFGHANISTAN (Jan. 15, 2010), <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Jan. 15, 2010) (\$327 million in exports in 2007); U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2-5.

¹⁸³ ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11.

Focusing on the illegality of the substance, however, reverses the presumption that objects are civilian unless demonstrated to have a military function.¹⁸⁴ Additionally, this argument summarily equates “illegal” with military objective, which is not a supportable conclusion. Many things can be illegal without having any military association or use. While an object’s civilian treatment may factor into a proportionality analysis (e.g., destruction of contraband may cause minimal civil damage), the mere absence of a legal civilian use does not make this object a valid military target.

Ultimately, one reaches an inconclusive result using the MCA and *Navy Commander’s Handbook*. While the narcotics trade supports the Taliban, it may not make an effective contribution to military capability. Regardless, the Department of Defense Law of War Chair in the Office of the General Counsel believes that all economic targets are valid with the “degree of contribution establish[ing] the priority of attack, not the legality of the target.”¹⁸⁵ From that perspective, the narcotics trade is a valid target, just perhaps not a high priority target.

b. Good for the Goose? The Charging of Khalid Sheikh Mohammed (KSM) at the Military Commissions

While the previous section applies the MCA definition of military objective to U.S. targeting in Afghanistan, review of the Military Commissions’ charging documents uncovers a potential U.S. double standard.¹⁸⁶ At the Military Commissions, the United States charged KSM (and alleged accomplices) with “intentionally engage[ing] in attacks on civilian property, to wit: the World Trade Center (New York, New York) . . . that is property that was not a military objective.”¹⁸⁷

¹⁸⁴ The MCA definition limits military objectives to items that “effectively contribute.” Military Commissions Act of 2009, *supra* note 41, § 950(p). This necessarily means that items are valid military objects by what they do for the enemy and not by an absence of civilian use.

¹⁸⁵ Parks, *supra* note 28, at 55.

¹⁸⁶ A plethora of articles undertake to attack or support the Military Commissions. Regardless of one’s opinion about the Military Commissions, how the MCA is applied at the Military Commissions demonstrates how the United States believes the MCA should be interpreted, and, at least arguably, what the United States accepts as valid military objectives.

¹⁸⁷ U.S. DEP’T OF DEF., Referred Charges Khalid Sheikh Mohammed 21 (May 9, 2008), <http://www.defense.gov/news/d20080509Mohammed.pdf>. Although the charging documents also charge Khalid Sheikh Mohammed with attacking civilians at the World

While KSM and accomplices clearly attacked the World Trade Center using illegal means and killed innocent civilians, the United States based this particular charge on the selection of the World Trade Center as the target.

While the 9-11 attacks were clearly acts of terrorism, potentially affecting the entire United States population, could one consider the World Trade Center to be a valid military objective using the U.S. economic targeting analysis? Does Wall Street contribute to the war-fighting or war-sustaining capability of the United States? How different is the contribution of the narcotics trade to the war-fighting and war-sustaining ability of the Afghanistan insurgency? Neither Wall Street nor the opium trade provides direct military assistance; rather, both merely provide financial resources to institutions that wield power through other activities and organizations.¹⁸⁸

Charging KSM with targeting the World Trade Center, arguably an economic object, the United States undermines its claim that the Taliban's economic base is a valid military objective. The World Trade Center, much like the Internal Revenue Service and the Treasury Department, "indirectly but effectively support and sustain" the United States. Likewise, the narcotics trade indirectly supports the Taliban. Should the United States be permitted to criminally charge KSM with targeting an economic object, but then simultaneously target a Taliban economic object?¹⁸⁹

This potentially disparate treatment of economic targeting may illustrate a warning found in the commentary to Additional Protocol I.

Trade Center, Shanksville, Pennsylvania, and the Pentagon, the charging documents do not refer to the Pentagon as a civilian object. *Id.*

¹⁸⁸ Although narcotics may be illegal, they are used as a financial resource by the Taliban. One could also argue that narcotics are merely *malum prohibitum* rather than *malum in se*. Also, not everything that happens on Wall Street is legal, and some acts are in fact *malum in se*. See George Packer, *A Dirty Business*, THE NEW YORKER, June 27, 2011 http://www.newyorker.com/reporting/2011/06/27/110627fa_fact_packer.

¹⁸⁹ Since narcotics are contraband, the United States and the Government of Afghanistan may be able to destroy narcotics materiel through a variety of legally permissible means. Regardless, just because narcotics could be destroyed legally, one cannot justify treating narcotics as military objectives. Whatever the justification, outside observers can likely conclude that dropping 1,000-pounds bombs on poppy seeds is military targeting. CNN, *U.S. Bombs Poppy Crop to Cut Taliban Drug Ties*, July 21, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/07/21/afghanistan.poppy.strike/index.html#cn-STCText> ("show of force designed to break up the Taliban's connection to heroin").

The commentary notes that opinions on the limits of the military objective have often “differed considerably, depending on whether the territory concerned was their own territory, enemy territory, or territory of an ally occupied by enemy forces.”¹⁹⁰ One could argue that the U.S. definition of military objective fluctuates, depending on whether the potential target lies in Kandahar or New York.

c. Field Manual 27-10 and Its Language Parallel Additional Protocol I

Although the MCA, *Navy Commander’s Handbook*, and Joint Pub. 3-60 all offer reinforcing definitions of military objective, another U.S. publication closely parallels the Additional Protocol I definition. The Army Field Manual 27-10 (FM 27-10), *The Law of Land Warfare*, defines military objectives as follows:

[T]hose 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—are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations¹⁹¹

Mirroring the “effective contribution to military action” language found in Additional Protocol I, FM 27-10 also provides informative examples that conflict with Joint Pub. 3-60. Joint Pub. 3-60 notes that factories may be valid military objectives;¹⁹² Field Manual 27-10, however, limits military objectives to factories producing military

¹⁹⁰ PILLOU ET AL., *supra* note 36, at 631.

¹⁹¹ U.S. DEP’T OF ARMY, FIELD MANUAL (FM) 27-10, THE LAW OF LAND WARFARE 5 (15 July 1976) [hereinafter FM 27-10].

¹⁹² JOINT PUB. 3-60, *supra* note 155, at A-3.

supplies.¹⁹³ Similarly, Joint Pub. 3-60 notes that workshops may be valid objectives;¹⁹⁴ Field Manual 27-10, however, limits it to warehouses “storing munitions and military supplies.”¹⁹⁵ Likewise, FM 27-10’s definition of military objective would allow targeting of ports and railroads—but only such facilities “used for the transportation of military supplies.”¹⁹⁶

Interestingly, the World War II era version of FM 27-10 similarly suggests that military objectives are limited to purely military targets. The 1940 version of FM 27-10 has a paragraph entitled “Train Wrecking” that notes, “Train wrecking and burning of camps or military depots are legitimate means Wrecking of trains should be limited strictly to cases which tend directly to weaken the enemy’s military forces.”¹⁹⁷ This paragraph explicitly limits train wrecking to weakening of an opponent’s military, suggesting that it is not permissible to wreck trains carrying purely economic objects.¹⁹⁸ Accordingly, the 1940 version suggests economic targeting is not permitted.

In summary, under Additional Protocol I, the narcotics industry is not a valid military objective, while using the MCA definition the narcotics might be a valid target. The narcotics trade might effectively contribute to the war-fighting or war-sustaining capability of the Taliban, but so might Wall Street contribute the war-sustaining capability of the United States. The charging of KSM at the Military Commissions and FM 27-10 also seem to conflict with the U.S. targeting of narcotics in Afghanistan. While the U.S. definition of military objective may differ from the Additional Protocol I definition, the U.S. definition should not differ based on the geographic location of the target.

¹⁹³ FM 27-10, *supra* note 191, at 5 (“factories producing munitions”).

¹⁹⁴ JOINT PUB. 3-60, *supra* note 155, at A-3.

¹⁹⁵ FM 27-10, *supra* note 191, at 5.

¹⁹⁶ *Id.*

¹⁹⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 10 (Oct. 1, 1940).

¹⁹⁸ Of course, it does limit burning of depots to “military” depots, but it may be assumed that all depots are military materiel. *Id.* Of note, the prohibition in the 1940s uses the word “should” and not “must” without explanation or reference—but it also uses the words “limited strictly,” also without explanation.

IV. More Than Legally Problematic: Kinetic Targeting of Drugs and Traffickers Conflicts With Counterinsurgency Doctrine, Unwisely Encourages the Targeting of Economic Objectives, and Undermines the Limits on Military Necessity

Thus far, this article has identified several problematic areas. The U.S. targeting of traffickers certainly conflicts with the understanding of direct participation expressed by the Additional Protocols and the ICRC. The targeting also suggests an overextension of the U.S. functionality test. Similarly, the U.S. targeting of narcotic materiel conflicts with the Additional Protocol I definition of military objective while possibly reflecting an overstretching of the U.S. definition.

Regardless, even if the targeting were universally accepted as legal and consistent with established policy, the targeting would still be unwise. Counterinsurgency doctrine, reciprocity, and desires to limit the power of military necessity—all these arguments suggest that kinetic targeting of the narcotics trade risks unwelcomed results.

A. Counterinsurgency Doctrine Calls for Host Nation Handling of Security Through the Criminal Justice System

Field Manual 3-24 (FM 3-24), *Counterinsurgency*, provides the U.S. Army and Marine Corps doctrine for counterinsurgency warfare.¹⁹⁹ Assembled by General David Petraeus, FM 3-24 directs and focuses Marines and Soldiers conducting counterinsurgency warfare.²⁰⁰ Written for a military audience, FM 3-24 has nonetheless also been widely distributed by civilian publishers, including 1.5 million electronic downloads the first month after release (and even a review in the *New York Times*).²⁰¹

Discussing the counterinsurgent's focus, FM 3-24 states that ultimate success depends on the local population "taking charge of their own

¹⁹⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].

²⁰⁰ *Id.*

²⁰¹ Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at 7-1 (calling FM 3-24 the book to begin with in devising a strategy for the 21st century).

affairs and consenting to the government's rule."²⁰² Accordingly, the manual notes that the "primary objective of any COIN operation is fostering development of effective governance."²⁰³ The manual notes that the rule of law greatly increases the legitimacy of a government.²⁰⁴

The field manual also instructs leaders to establish security through the rule of law, highlighting the importance of building "sustainable security institutions"—police, courts, and prisons—"perceived by the local populace as fair, just, and transparent."²⁰⁵ Accordingly, FM 3-24 calls for commanders to move quickly from combat to law enforcement and to handle criminals in the local criminal justice system to provide the host government with added legitimacy.²⁰⁶ The field manual also warns that "unjustified or excessive use of force" undermines the legitimacy of the government.²⁰⁷

Applying the U.S. counterinsurgency doctrine to the Afghan narcotics trade, the United States should work with the Afghan government to arrest and prosecute the traffickers. The coalition in Afghanistan has spent tens of millions of dollars to establish a semi-functional Afghan drug court,²⁰⁸ and this court has heard hundreds of cases and convicted 259 drug defendants in a one-year period.²⁰⁹ Unfortunately, to date, the court has thus far convicted mostly low-to medium-level actors.²¹⁰

Despite disappointing initial returns, the prosecution of some drug traffickers, both in Afghanistan and in the United States,²¹¹ demonstrates

²⁰² FM 3-24, *supra* note 199, at 1-1. This paragraph also notes, "Over time, counterinsurgents aim to enable a country or regime to provide the security and rule of law that allow establishment of social services and growth of economic activity." *Id.*

²⁰³ *Id.* at 1-21.

²⁰⁴ *Id.* at 1-22.

²⁰⁵ *Id.* at D-8.

²⁰⁶ *Id.* at 1-23 to 1-24.

²⁰⁷ *Id.*

²⁰⁸ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 11; Farah Stockman, *Karzai's Pardons Nullify Drug Court Gains*, BOSTON GLOBE, July 3, 2009, at A1.

²⁰⁹ STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 11 (citing prosecutions between March 2008 and March 2009).

²¹⁰ *Id.* Some of these offenders were pardoned by President Karzai during the run-up to the Afghan election. Stockman, *supra* note 208, at A1. Some convicts did not need to be pardoned as they bribed their way out of prison shortly after arrival. Thomas Schweich, *Is Afghanistan a Narco-State?*, N.Y. TIMES MAG., July 27, 2008, at 45.

²¹¹ Two major drug traffickers were tricked into leaving Afghanistan and then brought to the United States for prosecution. Clearly not an Afghan solution, this action is

the possibility of law enforcement actions. The United States should build on this initial progress. In addition to imprisoning traffickers, prosecutions would provide the Afghan government with additional legitimacy.

Working to develop an Afghan rule of law solution, the U.S. military would demonstrate one of the identified “Paradoxes of Counterinsurgency Operations.” The paradox holds that “The Host Nation Doing Something Tolerably Is Normally Better than Us Doing It Well.”²¹² Accordingly, getting the Afghans to tolerably address their narcotics problem through their justice system is probably better than military targeting by the United States.

Kinetic targeting also risks appearing excessive and unjust, which could undermine the counterinsurgency effort. When traffickers are killed, local Afghans may view the deaths as innocent civilian casualties, even if the targeting was fully justified. On the contrary, when traffickers are arrested and prosecuted, the process demonstrates the legitimacy of the counterinsurgents and the host nations.

In summary, getting the Afghans to address the opium trade through Afghan criminal courts makes more sense from a counterinsurgency doctrine perspective, than targeting the opium trade with U.S. military force.

B. Turnabout is Fair Play: The Wisdom of Legitimizing Economic Targeting

Possessing the “largest and most technically powerful economy in the world,”²¹³ the United States owns the most economic objects that could “indirectly but effectively support and sustain [its] warfighting

particularly difficult without an extradition treaty with Afghanistan. STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 16.

²¹² FM 3-24, *supra* note 199, at 1-27 to 1-28. The field manual takes this from T.E. Lawrence who said, “Better the Arabs do it tolerably than you do it perfectly. It is their war, and you are to help them, not win it for them.” T.E. Lawrence, *Twenty-Seven Articles*, ARAB BULL., Aug. 20, 1917, available at http://wwi.lib.byu.edu/index.php/The_27_Articles_of_T.E._Lawrence.

²¹³ CIA, THE WORLD FACT BOOK: UNITED STATES (Jan 12, 2010), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Jan 12, 2010).

capability.”²¹⁴ Facing no current threat of economic targeting, the United States may view economic targeting in Afghanistan as a costless expansion of military objective. This shortsighted view presents risks. The United States may face far different adversaries in the future, and future adversaries may have the desire and means to strike economic targets in the United States.

For example, Chinese military theory embraces non-linear and asymmetrical attacks against economic targets.²¹⁵ Noting the power of financial warfare, Chinese military theorists observe that an “economic crisis . . . [can] weaken [an adversary’s] overall power, including its military strength.”²¹⁶ This theory even notes that “heavy economic losses . . . would certainly be better than a military strike.”²¹⁷ Other nations have probably also noticed such possibilities.

Targeting economic resources in Afghanistan, the United States may legitimize and encourage such thinking and planning for economic warfare. The Taliban may be unable to militarily strike U.S. economic interest (although Al Qaeda demonstrated they could on 9-11),²¹⁸ but future adversaries may have the capability.

C. No Reciprocity: Targeting Asymmetry Encourages the Taliban to Ignore the Laws of War

W. Hays Parks notes, “The law of war succeeds only insofar as it does not provide, or appear to provide, an opportunity for one party to gain a tactical advantage over another.”²¹⁹ This requirement for reciprocity in the law of war may be lacking in Afghanistan, and may provide further incentives for the Taliban to ignore the law.

²¹⁴ JOINT PUB. 3-60, *supra* note 155, at A-3.

²¹⁵ See LIANG & XIANGSUI, *supra* note 1, at 39–41, 165–68 (discussing asymmetric economic targeting).

²¹⁶ *Id.* at 167.

²¹⁷ *Id.*

²¹⁸ U.S. DEP’T OF DEF., Referred Charges Khalid Sheikh Mohammed 4 (May 9, 2008), <http://www.defense.gov/news/d20080509Mohammed.pdf> (Between 1996 and 2001, Khalid Sheikh Mohammed . . . decided to target economic, political, and military buildings in the United States and Western Pacific.”).

²¹⁹ Parks, *supra* note 28, at 15.

The U.S. targeting of narcotics and narcotics traffickers may provide a tactical advantage in Afghanistan. If the law of war—at least how the United States interprets the law of war—sanctions the targeting of narcotics and trafficker (which are economic assets of the Taliban), then the Taliban may view the law as providing an advantage to the United States.²²⁰ Because the Taliban cannot directly target U.S. economic assets, the Taliban is disadvantaged by the United States being permitted to target the Taliban's economic assets.

Although this targeting asymmetry results mostly from difference in conventional military capabilities,²²¹ the law may have some effect. Policy makers should consider whether targeting narcotics and narcotics traffickers encourages the Taliban to continue to disregard the laws of war.

D. The Bothersome Broadening of Military Necessity by Manipulating the Meaning of Military Objective

Military necessity and military objective are linked by definition. Military necessity is defined as “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”²²² Since international law strictly limits targeting to military objectives,²²³ the definition of military necessity (for targeting purposes) becomes “that principle which justifies [targeting of military objectives] which are indispensable for securing the complete submission of the enemy.”²²⁴

²²⁰ The ICRC, in their direct participation recommendations, notes the corrosive effects of disparate treatment when addressing the potential asymmetry from abuse of the “revolving door” of civilian protections. INT’L COMM. FOR THE RED CROSS, *supra* note 32, at 72 (noting that “the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessive liberal interpretations of IHL to outright disrespect for the protections it affords”).

²²¹ U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY 4 (June 2008), *available at* <http://www.defense.gov/news/2008%20National%20Defense%20Strategy.pdf> (“U.S. dominance in conventional warfare has given prospective adversaries, particularly non-state actors and their state sponsors, strong motivation to adopt asymmetric methods to counter our advantages.”).

²²² FM 27-10, *supra* note 191, at 4.

²²³ Protocol I, *supra* note 29, art. 52; Parks, *supra* note 28, at 32.

²²⁴ FM 27-10, *supra* note 191, at 5 (with substituted words).

Because of these linked definitions, the larger the set of objects considered military objectives, the greater the power of military necessity. If military objective was an empty set, then military necessity would prohibit all targeting. Conversely, if military objective contained every conceivable object and person, then military necessity would permit all targeting. Accordingly, changes to the definition of military objective affect the meaning of military necessity. This link could permit states to quietly and nefariously expand the power of military necessity by expanding the reach of military objective.

Although international humanitarian law constrains the power of military necessity, individuals and groups occasionally attempt to avoid these restrictions by “citing the exigencies of necessity.”²²⁵ Historically, states have used necessity arguments to defend their actions by claiming a lack of alternatives.²²⁶ Over time, the acceptability of these calls to military necessity has ebbed and flowed, with an impact on the conduct of war.²²⁷

As the most powerful state, the United States will drive the behavior of other states, influencing whether they use or accept a broad definition of military objective to increase the power of military necessity.²²⁸ The U.S. targeting in Afghanistan implicitly sanctions such a broadening of military objective.

The U.S. targeting could cause impacts far outside of Afghanistan in conflicts not involving the United States. Some would argue that the global hegemony is obliged to consider these secondary effects of its

²²⁵ Gregory A. Raymond, *Military Necessity and the War Against Global Terrorism*, in *THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE* 1, 2 (Howard M. Hensel ed., 2007). Raymond notes, “Appeals to necessity challenge the wrongfulness of an act on the basis that it was the only means of safeguarding an essential interest against a grave and imminent period.” *Id.*

²²⁶ *Id.* at 4.

²²⁷ *Id.* at 8-11. Raymond tracked the ebb and flow of the power of necessity by cataloging how international law scholars of particular periods referred to military necessity. Raymond tracked the power of necessity as strong during the era of Napoleon and then declining until a spike in the mid-1800s followed by another period of decline that again spiked during the World Wars of the 20th century followed by another period of decline until 9/11. *Id.*

²²⁸ Raymond, *supra* note 225, at 13. Raymond argues, “Throughout history, the behavior of the powerful has exerted a major impact on whether prevailing international norms were permissive or restrictive. . . . When the reigning hegemony justifies certain behavior, it alters the frame of reference for virtually everyone else.” *Id.*

targeting decisions.²²⁹ This may overstate the case, but the United States should recognize the far-reaching impacts of its targeting decisions in Afghanistan.

V. Murky Through Many Lenses: A Tenuous Application of Military Objective and Military Necessity

The U.S. targeting of the Afghan narcotics industry raises many problematic issues. This article first viewed the targeting of the traffickers through several lenses to determine if the traffickers were taking a direct part in hostilities. Looking through the lenses of Additional Protocol I and the ICRC, one would find the targeting illegal because the traffickers are not taking a direct part in hostilities. Looking through the lens of the U.S. functionality test, one finds the issue murky, requiring a stretch of the functionality test to justify targeting. Ultimately, the interpretation of direct participation is a policy matter. The U.S. interpretation, however, may not be the best policy choice as it suggests an interpretation of Afghan civilian direct participation different from the interpretation applicable to U.S. civilians.²³⁰

Next, this article analyzed the targeting of narcotics materiel through several lenses to determine if the opium and opium-related materiels were valid military objectives. Viewing these objects through the Additional Protocol I definition, the materiel fails to make a direct contribution to the military capability of the Taliban. Accordingly, the narcotics trade should not be considered a valid military objective. Viewing the opium through the U.S. war-sustaining definition, however, one finds a less clear picture. While narcotics contribute to the Taliban, the propriety of the targeting may depend on the meaning of war-sustaining capability. A narrow reading, as applied to KSM at the Military Commissions, suggests economic objects, such as the opium trade in Afghanistan, remain civilian objects. A broader reading, as outlined in the *Navy Commander's Handbook*, suggests narcotics-related objects are valid military objectives.²³¹

All of this raises several policy concerns. First, U.S. kinetic targeting conflicts with counterinsurgency theory. Under counterinsurgency

²²⁹ *Id.* at 13–14.

²³⁰ See discussion *supra* Part II.

²³¹ See discussion *supra* Part III.

doctrine, the Afghans should address the narcotics trade as a criminal matter. Second, the targeting legitimizes economic-based targeting, which potentially harms the United States in future conflicts. Third, the targeting asymmetry encourages the Taliban to further disregard the laws of war. Fourth, by expanding the definition of military objective, the United States increases the power of military necessity, and potentially increases human suffering in times of war.²³²

VI. Conclusion

Although the narcotics trade may provide hundreds of millions of dollars to the insurgency, military targeting of fifty drug traffickers with peripheral ties to the Taliban may not be worth the total costs. The world is watching: U.S. targeting in Afghanistan legitimizes economic targeting, further encourages insurgent groups to disregard the laws of war, and increases the breadth, scope and power of military necessity—presenting an unsettling example for other belligerents.

The targeting of the Afghanistan narcotics trade by the United States exposes more civilians and objects to the harms of war by using less limited measures to achieve limited objectives. These measures tumultuously stretch legal constructs dangerously close to their breaking point, and threaten to hinder counterinsurgency efforts in Afghanistan. Targeting the narcotics trade leaves in its wake a ripple effect far removed from the Afghanistan battlefield. Left unobstructed, these waves could lead other belligerents to use unlimited measures to pursue limited objectives, not unlike Sherman's burning and plundering.

²³² See discussion *supra* Part IV.