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### TARGETING TIKTOK: ADAPTING DISTINCTION TO THE AGE OF SOCIAL MEDIA

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**TARGETING TIKTOK: ADAPTING DISTINCTION TO THE AGE OF SOCIAL MEDIA**CHANDLER B. COLE<sup>†</sup>

## ABSTRACT

*This Essay explores how modern military information operations—particularly those conducted via social media platforms like TikTok—challenge traditional rules under international humanitarian law (IHL). Drawing on recent conflicts, it argues that the current legal standard for targeting propaganda, which hinges on “incitement,” fails to capture the real-world operational impact of narrative warfare. Instead, the Essay proposes adopting “instigation”—a doctrine also grounded in international criminal law—as the more appropriate threshold. This approach would better align with IHL’s foundational principles of distinction and military necessity, enabling states to lawfully respond to weaponized information campaigns that directly influence battlefield outcomes. It would also better suit traditional targeting frameworks, which require that targets have a direct effect on military operations. In an era where algorithms can shift the tide of conflict, updating the coherence and application of IHL frameworks in this way is not only doctrinally sound but strategically essential.*

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## INTRODUCTION

In early 2025, the popular social media application TikTok was banned in the United States, making it inaccessible to over 170 million American users for twelve hours.<sup>1</sup> Once restored, the app remained unavailable for download by new users for three weeks thereafter.<sup>2</sup> The driving legislation<sup>3</sup> stated clearly its reason for the ban: TikTok’s Chinese ownership was a threat to “national security.”<sup>4</sup> “National security” justifications are naturally secretive—even opposing counsel was denied access to information about the cited national security threats when the Supreme Court heard oral argument about the ban’s legality.<sup>5</sup> As a result, speculation abounded.

For the most part, analysts focused on the potential threats to data privacy.<sup>6</sup> The U.S. government previously raised objections to TikTok’s data collection practices, which TikTok addressed by storing sensitive information on U.S.-based servers for American users.<sup>7</sup> But the real threat to national security is not private data. It is publicly posted videos.<sup>8</sup> Social media—and TikTok specifically—has created unprecedented access to citizens by foreign governments. Social media algorithms amplify select messages with a great deal of success.<sup>9</sup> When foreign governments exploit this feature, they effectively control broader public discourse with real-world implications, like whether they will recruit enough troops, receive weapons, or benefit from other coalition resources.<sup>10</sup> This Essay calls that discourse “the narrative.” In Ukraine’s fight against Russian invasion, Ukraine took control of the narrative using TikTok.<sup>11</sup> Trending videos from the frontlines rallied support and fostered goodwill from Western populations, which translated to warfighting

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<sup>1</sup> Kevin Collier, et. al., *TikTok Says It's Restoring Service to US Users Based on Trump's Promised Executive Order*, NBC NEWS (Jan. 19, 2025), <https://www.nbcnews.com/tech/tech-news/tiktok-says-restoring-service-us-users-rcna188320>.

<sup>2</sup> *Id.*

<sup>3</sup> Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 1123 (2024).

<sup>4</sup> *Id.*

<sup>5</sup> See Transcript of Oral Argument at 144, *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (24-656) (“You get to look at it, but your friends on the other side don’t get to look at it. That doesn’t seem fair.”).

<sup>6</sup> See, e.g., Jason L. Riley, *Banning TikTok Won’t Solve Your Data-Security Problem*, WALL ST. J. (Jan. 8, 2025); Andrew R. Chow, *Why DeepSeek Is Sparking Debates Over National Security, Just Like TikTok*, TIME (Jan. 29, 2025).

<sup>7</sup> Nate Lavoy, *TikTok Is a Threat to National Security, but Not for the Reason You Think*, RAND CORP. (Aug. 14, 2024), <https://www.rand.org/pubs/commentary/2024/08/tiktok-is-a-threat-to-national-security-but-not-for.html>.

<sup>8</sup> *Id.*

<sup>9</sup> See Katie Fink, “Point and Shoot”: *How Technology Blurs the Lines Between Civilians and Combatants*, CTR. ON L., ETHICS & NAT’L SEC., Essay No. 20 (Aug. 7, 2023) (explaining how social media reaches its users).

<sup>10</sup> Raphael S. Cohen, *Ukraine Needs a New Storyline*, RAND CORP. (Sept. 8, 2024), <https://www.rand.org/pubs/commentary/2024/09/ukraine-needs-a-new-storyline.html>.

<sup>11</sup> *Id.*

resources and operational support.<sup>12</sup> With research showing that people under 30 trust social media as much as traditional news outlets, TikTok provides fertile ground for all militaries to employ significant information campaigns.<sup>13</sup>

Information campaigns are fairly protected under IHL. Indeed, the Department of Defense (“DoD”) Law of War Manual recognizes information operations like propaganda as legitimate military tactics, so long as they comply with the law of war. Compliance is a low bar: propagandists cannot engage in unlawful deception, like pretending to be part of the Red Cross or falsely claiming any other protected status.<sup>14</sup> They also cannot incite war crimes, and there is some precedent suggesting they cannot instigate crimes against humanity.<sup>15</sup> But otherwise, disinformation remains a familiar military tactic, used alongside physical operations during armed conflicts.<sup>16</sup> Most often, even unlawful disinformation campaigns are too attenuated in their causal connection to a manifest the kind of harm that might support criminal responsibility under existing international law frameworks.<sup>17</sup>

Recently, the international community has reacted to the threat of social media propaganda with disfavor. After Russia’s invasion of Ukraine in February 2022, the European Union suspended Russian-sponsored broadcasts within the EU and required social media companies to remove user speech referencing those broadcasts.<sup>18</sup> European regulators acted against X soon after fighting began between Israel and Palestine because of disinformation concerns.<sup>19</sup> And in the United States, the Supreme Court considered whether Google—which owns

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<sup>12</sup> Fink, *supra* note 8, citing Tess Lowery, *WarTok: How Ukraine is Using TikTok to Fight Putin’s Invasion*, GLOB. CITIZEN (Mar. 11, 2022), <https://www.globalcitizen.org/en/content/wartok-how-ukraine-using-tiktok-putin-invasion/>.

<sup>13</sup> Timothy Higgins & Kate Linebaugh, *Israel-Hamas War Tests Musk’s Content Policies*, WALL ST. J. (Oct. 16, 2023).

<sup>14</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37, June 8, 1977, 1125 U.N.T.S. 3 (banning perfidy).

<sup>15</sup> Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 (war crimes); *id.* art. 7 (crimes against humanity). See Charlie Dunlap, *Law and the Killing of a Russian Propagandist: Some Q & A*, LAWFIRE (Oct. 9, 2022), <https://sites.duke.edu/lawfire/2022/10/09/law-and-the-killing-of-a-russian-propagandist-some-q-a/> (explaining that incitation of war crimes violates IHL).

<sup>16</sup> See Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 GEO. L.J. ONLINE 36, 38 (2018) (“Throughout history, psychological operations have been inherently limited in scope and considered legal insofar as they did not constitute perfidy or violate the prohibition of intervention.”).

<sup>17</sup> Ali Strongwater, *Combating Disinformation through International Law*, 55 N.Y.U. J. INT’L L. & POL. 33, 35 (2022).

<sup>18</sup> See Evelyn Aswad, *Propaganda for War & International Human Rights Standards*, 24 CHI. J. INT’L L. 1, 3 (2023) (“Shortly after Russia’s illegal invasion of Ukraine in February 2022, the European Union (EU) suspended Russia Today (RT) and Sputnik, two Russian state-sponsored media outlets, from broadcasting within the EU. . . .”).

<sup>19</sup> See Stuart A. Thompson & Mike Isaac, *Hamas Is Barred From Social Media. Its Messages Are Still Spreading.*, N.Y. TIMES (Oct. 18, 2023), <https://www.nytimes.com/2023/10/18/technology/hamas-social-media-accounts.html> (discussing how Hamas has disseminated messages through alternative means after being banned from traditional social media sites).

YouTube—could be held liable for a terrorist attack promoted by ISIS via the platform’s algorithm.<sup>20</sup> The TikTok ban is simply a recent manifestation of these same concerns.

So, there is an international appetite for cabining the massive spread of propaganda or disinformation through social media. But to date, developments in international law remain limited. Instead, domestic legislation remains the principal tool for combatting these campaigns, with concerned states imposing either restrictions or liability on private media providers.<sup>21</sup> This response raises questions about international law’s ability to address risks posed by social media-fueled propaganda during wartime. Consider legal commentator David French’s hypothetical about TikTok’s national security threat: what if the United States, posed to deploy Marines to deter a Chinese invasion of Taiwan, was suddenly infiltrated with TikTok messages about Chinese peace designed to delay troop movement?<sup>22</sup> Or worse: what if China used its control of TikTok to plant seeds of doubt within the American consciousness about their government, designed in the long-term to provoke civic unrest during a conflict? Social media is specially designed to facilitate provocation of this sort.<sup>23</sup>

In the Special Operations world, new military strategies are designed to combat this very scenario.<sup>24</sup> Strategic disruption, which seeks to frustrate “adversary-preferred strategies” through counter-campaigns, can be used by U.S. forces to disrupt propaganda when traditional deterrence alone is inadequate.<sup>25</sup> By proactively undermining the adversary’s legitimacy, expanding influence in contested regions, and creating uncertainty about the adversary’s operational reach, U.S. forces do their best to combat information campaigns before they successfully take root.<sup>26</sup>

But if these preemptive military efforts fail and a conflict begins, social media sites are likely insulated from military attack unless they incite war crimes or genocide.<sup>27</sup> States can thus hide military information campaigns amongst

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<sup>20</sup> See *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (where the Supreme Court considered whether Google could be liable under the Anti-Terrorism Act for aiding and abetting ISIS when it failed to censor its YouTube videos).

<sup>21</sup> See, e.g., Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 1123 (2024), Swedish Psychological Defence Agency Act, Lag (2021:1058) om Myndigheten för psykologiskt försvar (Swed.), Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information [Law No. 2018-1202 of Dec. 22, 2018 on the Fight Against Information Manipulation] (Fr.).

<sup>22</sup> David French, *It’s September 26th, and the Pentagon is Alarmed*, N.Y. TIMES (Jan. 9, 2025), <https://www.nytimes.com/2025/01/09/opinion/tiktok-supreme-court-china.html>.

<sup>23</sup> See Smitha Milli et al., *Engagement, User Satisfaction, and the Amplification of Divisive Content on Social Media*, KNIGHT FIRST AMENDMENT INST. (Jan. 3, 2024) (finding that social media algorithms amplify divisive content).

<sup>24</sup> Eric Robinson, et al., *Strategic Disruption by Special Operations Forces: A Concept for Proactive Campaigning Short of Traditional War*, RAND CORP. (Dec. 5, 2023).

<sup>25</sup> *Id.* at ix.

<sup>26</sup> *Id.*

<sup>27</sup> See *infra* Part I.B (describing the legal landscape).

civilians, using influencers and individual users as human shields while they weaponize algorithms to push war-winning content.<sup>28</sup>

In this Essay, I argue that IHL's current framework for targeting propaganda and information operations is both conceptually and operationally inadequate because it relies on an 'incitement' threshold for targeting civilian or dual-use objects like social media platforms based on their propaganda. Incitement is a high bar, requiring both direct calls to violence and direct impact.<sup>29</sup> In contrast, propaganda is usually considered too indirect to "effectively contribute to military operations," so media facilities remain unlawful targets even when they broadcast militarily significant messages.<sup>30</sup> Despite this, consensus shows that platforms using propaganda to incite crimes—like the radio stations used to incite genocide in Rwanda—are probably targetable.<sup>31</sup> But incitement is a standard used to broaden criminal accountability by eliminating the causal requirement.<sup>32</sup> As a result, the present framework makes propaganda-broadcasting media a lawful target only when used to incite war crimes, even though incitation requires no direct effect and therefore cannot "effectively contribute to military operations" more than other propaganda.

This Essay ultimately proposes replacing 'incitement' with the doctrine of 'instigation' to identify lawful media targets—a shift grounded in international criminal law precedent and better aligned with IHL's targeting criteria as-applied to the modern landscape. Part I explains how social media has been used to conduct psychological operations or otherwise control the narrative in a way that leads to real-world military success. In so doing, it identifies the existing international law limitations on PSYOP campaigns. Part II introduces existing restrictions on targeting media facilities under IHL, focusing on facilities that spread propaganda. Finally, Part III explores a potential legal solution—that is, concluding that a media facility's "instigation" of military activity should be a sufficient basis for lawful targeting.

## I. THE WEAPONIZATION OF SOCIAL MEDIA

In line with Carl von Clausewitz's view that "the essence of maneuver warfare [is] that you defeat the enemy's *will* rather than his ability to fight,"<sup>33</sup> the power of persuasion is a long-recognized weapon in war.<sup>34</sup> Modern Psychological

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<sup>28</sup> Because current legal frameworks make application of IHL standards to cyber acts difficult, there is little ground for deterrence in this context, which undermines IHL. *See* International Committee of the Red Cross, *Respect for IHL*, ICRC (Oct. 29, 2010) ("Such frameworks need to include effective sanctions against wrongdoers that act as a deterrent and appropriate compensation for victims.").

<sup>29</sup> *See infra* Part IV (explaining the distinction between instigation and incitation as applied to media targets).

<sup>30</sup> *See infra* Part III (describing discrimination principles as applied to media objectives).

<sup>31</sup> *See infra* Part IV (explaining when propaganda objectives were probably lawful targets).

<sup>32</sup> *Id.*

<sup>33</sup> David A. Grossman, *Defeating the Enemy's Will: The Psychological Foundations of Maneuver Warfare*, at 1 (*paraphrasing* CARL VON CLAUSEWITZ, *ON WAR*) (emphasis added).

<sup>34</sup> Propaganda has been a cornerstone of military theory since ancient times. *See* SUN TZU, *THE ART OF WAR* (1910) ("The supreme art of war is to subdue the enemy without fighting.").

Operations (PSYOPs) seek to leverage this weapon, targeting the attitudes and behavior of adversary and civilian populations to achieve military objectives.<sup>35</sup> With the advent of universal internet access and the ever-increasing popularity of platforms like TikTok, social media presents a critical new frontier for PSYOPs campaigns.<sup>36</sup>

This part explains how PSYOPs, when conducted via modern media like TikTok, are used to influence real-world military outcomes.<sup>37</sup> Nevertheless, IHL leaves PSYOPs largely unchecked, even though modern technology threatens to enhance their speed and magnitude, facilitating unprecedented levels of influence.<sup>38</sup>

#### A. *PSYOPs: Introducing the “LikeWar”*

Social media threatens to eclipse traditional PSYOPs as militaries aim to “disrupt, corrupt, or usurp” their adversary’s decision-making and erode morale<sup>39</sup> while simultaneously striving to “protect” domestic populations from disinformation and preserve local support for war efforts.<sup>40</sup> U.S. PSYOP units successfully relied on old-form technology in the past: for example, Military Information Support Teams in Iraq and Afghanistan used “broadcasts, leaflets, and handbills” to communicate with target populations.<sup>41</sup> These tactics worked well in the fight against ISIS, where its internet bans created “constrained information environments,”<sup>42</sup> but have limited efficacy where social media and other technologies penetrate the operational landscape at unprecedented rates.<sup>43</sup> The U.S.

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<sup>35</sup> Tilman Rodenhäuser, *The Legal Boundaries of (Digital) Information or Psychological Operations Under International Humanitarian Law*, 100 INT’L L. STUD. 361, 542 (2023) (They are typically geared toward affecting “the views, attitudes, or behavior of adversaries or civilian populations to achieve political and military objectives.”).

<sup>36</sup> P. W. Singer & Emerson T. Brooking, *What Clausewitz Can Teach Us About War on Social Media*, FOREIGN AFFS. (Oct. 4, 2018), <https://www.foreignaffairs.com/world/what-clausewitz-can-teach-us-about-war-social-media> (“The online world is now just as indispensable to governments, militaries, activists and spies as it is to advertisers and shoppers.”).

<sup>37</sup> See *infra* Part I.B (providing examples)

<sup>38</sup> Anna Anderson et. al., *Concerns About Democracy in the Digital Age*, PEW RSCH. CTR. (Feb. 21, 2020) (“New revolutions in digital and information technologies have amplified the power of states to wage war in ways that were previously inconceivable.”).

<sup>39</sup> Clausewitz argued that the morale of an adversary’s population was the most important asset. See Grayson S. Walker, *From Instagram to Infowar: The Weaponization of Social Media and Its Consequences*, 38 EMORY INT’L L. REV. 673, 680–81 (2024) (“The moral forces are among the most important subjects in War. They form the spirit which permeates the whole being of War.”).

<sup>40</sup> Eian Katz, *Liar’s War: Protecting Civilians from Disinformation during Armed Conflict*, 102 INT’L REV. RED CROSS 659, 677 (2021).

<sup>41</sup> Jon Reisher, Charity Jacobs & John Beasley, *Data as a Weapon: Psychological Operations in the Age of Irregular Information Threats*, MODERN WAR INST. (May 2, 2022), <https://mwi.westpoint.edu/data-as-a-weapon-psychological-operations-in-the-age-of-irregular-information-threats/>; see also Nicolas, *supra* note 15, at 39 (describing the use of “traditional tactics and tools including print media, broadcasts, and leaflet campaigns.”).

<sup>42</sup> Reisher, Jacobs, & Beasley, *supra* note 39.

<sup>43</sup> *Id.* See also Walker, *supra* note 39, at 674, citing Anna Anderson et. al., *Concerns About Democracy in the Digital Age*, PEW RSCH. CTR. (Feb. 21, 2020) (“New revolutions in digital and information technologies have amplified the power of states to wage war in ways that were previously inconceivable.”).

military has recognized this shift, now defining its PSYOPs as using “social media,” “digital marketing” and “all [other] forms of media” to “share information meant to help shift beliefs and behaviors in the U.S. [military’s] interest.”<sup>44</sup>

Indeed, social media has had an astronomical rise over the last 20 years. The percentage of U.S. adults using social media increased from five-percent in 2005 to 79% in 2019.<sup>45</sup> From Facebook to TikTok, social media platforms have come to dominate the information world: interested entities can instantly reach two-thirds of global internet users using social media websites and applications.<sup>46</sup> With this broad reach, social media lays the ground for what ethicist Peter Singer coins the “LikeWar,”<sup>47</sup> where virality drives political and thereby military influence.

As a result, social media can be weaponized using public-facing content, like videos posted on TikTok. These videos can psychologically influence individual users to recruit critical resources, like funds and troops.<sup>48</sup> For example, the Islamic State used social media “as a key recruiting tool, source of fundraising, and platform for disseminating graphic propaganda to a global audience.”<sup>49</sup> Likewise in Ukraine, media campaigns merge “digital culture with military recruitment.”<sup>50</sup> And in the United States, the recent military recruiting crisis relied on social media sites to drive up intake.<sup>51</sup> The DoD used social media influencers with established audiences to deliver strategic messaging to the civilian population.<sup>52</sup> These public messages relied heavily on the influencers’ savvy—they knew how to establish authentic connections using social media, and were effective at persuading people to consider military service.<sup>53</sup>

Similarly, military PSYOPs can use social media users to effectively hide behind noncombatant users. Whereas traditional media sources, like radio broadcasts, clearly emanated from a specific facility, social media propaganda is usually more diffuse in origin. Even if a message is deliberately deployed from a military PSYOP unit, using individual users to circulate that message makes it difficult to identify the source. In this way, states can lawfully achieve submission of the enemy’s will more subversively and therefore more effectively.

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<sup>44</sup> Reisher, Jacobs, & Beasley, *supra* note 39.

<sup>45</sup> Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>.

<sup>46</sup> *Id.*

<sup>47</sup> Singer, *supra* note 34.

<sup>48</sup> Haroro J. Ingram & Craig Whiteside, *After the Islamic State: Social Media and Armed Groups*, WAR ON THE ROCKS (Apr. 6, 2021), <https://warontherocks.com/2021/04/after-the-islamic-state-social-media-and-armed-groups/>.

<sup>49</sup> Rodenhäuser, *supra* note 33, at 543.

<sup>50</sup> Peter Schrijver, *From the Shadows to the Social Sphere: Ukraine’s Strategy of Engagement*, IRREGULAR WARFARE INITIATIVE (May 28, 2024), <https://irregularwarfare.org/articles/from-the-shadows-to-the-social-sphere-ukraines-strategy-of-engagement/>.

<sup>51</sup> Mike Knapp, *Arms and Influencers: Leveraging the Social Media Stars in the US Military’s Ranks*, MODERN WAR INST. (Jan. 4, 2024), <https://mwi.westpoint.edu/arms-and-influencers-leveraging-the-social-media-stars-in-the-us-militarys-ranks/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



Public-facing videos can also be used to influence the collective public's view of a given conflict itself.<sup>54</sup> Today, half of all U.S. adults receive most of their news from social media.<sup>55</sup> Social media news thus spreads quickly and accessibly, making the truth “more widely available than ever before.”<sup>56</sup> But with that comes a slew of disinformation, too: psychologically moving content tends to advance in the algorithm, notwithstanding its veracity.<sup>57</sup> This is driven in part by human nature. People are more inclined to organically share and promote emotional and moralized content, which induces high arousal emotions and highlights societal wrongs.<sup>58</sup> Warfighting in the digital age is particularly likely to produce this kind of content, given its violent character. In turn, that content is more likely to be promoted. Militaries can capitalize on this aspect of social media algorithms to solicit resources: in Ukraine, the Main Intelligence Directorate (HUR) deliberately uses public content to “personalize the conflict, highlight humanitarian operations, and effectively crowdsource support for defense initiatives against the Russian invasion.”<sup>59</sup>

Psychological influence of this kind is subordinate to algorithmic features, though. While emotional and moralized war content is more likely to be promoted and spread, an algorithm could limit whether certain types of war content are shared with users. This is a risk posed by TikTok: ByteDance, which owns the social media site, is Chinese-owned with strong ties to the government.<sup>60</sup> And for the most part, legal discussions about TikTok center on its highly effective algorithm.<sup>61</sup> If China manipulated that algorithm to promote pro-Chinese content or facilitate the spread of anti-American sentiment, it would successfully defeat any organic growth by American PSYOPs relying on that algorithm from the outside.

A military's social media influence has significant effects in both gathering real-world support and crafting online narratives. These online narratives are not limited to cyberspace, though—they become decisive, real victories, shielded by a framework designed to identify old-form military targets.

#### *B. The LikeWar Leads to Real-World Gains*

Recent examples show how narrative control directly impacts military outcomes, with purely expressive content driving operational military effects.

1. *Russo-Ukraine War.* In 2014, the social media battlespace came to the forefront. When the Russian Federation sought to annex Crimea, its Ministry of Defense emphasized a hybrid warfare strategy, which “combine[d] conventional

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<sup>54</sup> Singer, *supra* note 34.

<sup>55</sup> Knapp, *supra* note 49.

<sup>56</sup> Singer, *supra* note 34.

<sup>57</sup> See Katie Grace Frisbee, *Caught in the Content Tornado: How to Protect Violent-Crime Trials from the Prejudicial Effects of Live Streaming*, 74 DUKE L.J. 1053, 1058–59 (2025) (describing this phenomenon).

<sup>58</sup> *Id.*

<sup>59</sup> Schrijver, *supra* note 48.

<sup>60</sup> Lavoy, *supra* note 6.

<sup>61</sup> See, e.g., Transcript of Oral Argument at 6, *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (24-656) (“TikTok, . . . uses an algorithm that, in its view, reflects the best mix of content.”).

military engagements with information warfare and political or economic subversion.”<sup>62</sup> Employing this strategy, Russia spent an estimated nineteen million dollars to sway international opinion using online propaganda, including social media posts and comments on news articles.<sup>63</sup> Although it is not definitively proven that these Russian campaigns directly changed public opinion, it is notable that the “overwhelming majority of Crimeans viewed the Russian annexation as leading to a positive impact for the region.”<sup>64</sup> This evidence suggests that the Russians successfully used social media as a tool to exert narrative control and make Crimeans more receptive, both by emphasizing to Russian annexation positive impact and “exploiting already-existing divisions and opinions with Ukraine as it concerns reunification with Russia.”<sup>65</sup>

In 2019, Ukraine established their Ministry of Digital Transformation (the “Ministry”) to preemptively combat these known tactics.<sup>66</sup> By the time Russia invaded Ukraine in 2022, Ukraine had the decisive advantage in the social media space.<sup>67</sup> Their social media presence successfully drove western support and, as a result, on-the-ground benefits like weapons systems and other resources.<sup>68</sup> It was “arguably the first war to be documented and fought on social media.”<sup>69</sup>

The Ministry likewise leveraged social media to its advantage at-home. Using a Discord server and subreddit, the Digital Ministry continues to employ Ukrainian civilians who, among other objectives, raise funds, engage in information wars, and establish political influence.<sup>70</sup> These civilians facilitate control of public discourse: one task, for example, involves attacking the credibility of officials and journalists that do not support pro-Ukrainian war efforts.<sup>71</sup>

Ukraine also used social media to burgeon misinformation campaigns. The Ministry worked with political leaders to perpetuate the myth of the “Ghost of Kyiv,” a masked fighter pilot who quickly became a symbol of resistance when stories that he shot down six Russian planes circulated on social media.<sup>72</sup> The Ukrainian Air Force Command later admitted that the Ghost of Kyiv was fabricated, but the story served as a tool to “procure more weapons and blank checks for the war effort.”<sup>73</sup> Soon following the Ghost of Kyiv’s rise to prominence,

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<sup>62</sup> Walker, *supra* note 39, at 691.

<sup>63</sup> *Id.* at 693.

<sup>64</sup> *Id.* at 691, n. 109 (citing Michael Holloway, *How Russia Weaponized Social Media in Crimea*, THE STRATEGY BRIDGE (May 10, 2017), <https://thestrategybridge.org/the-bridge/2017/5/10/how-russia-weaponized-social-media-in-crimea>).

<sup>65</sup> Walker, *supra* note 39, at 694.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 696.

<sup>68</sup> *Id.* at 681.

<sup>69</sup> Reisher, Jacobs, & Beasley, *supra* note 39.

<sup>70</sup> Walker, *supra* note 38, at 695.

<sup>71</sup> *Id.* at 696.

<sup>72</sup> Arijeta Lajka, *Ukraine Admits the 'Ghost of Kyiv' Pilot is a Myth*, AP NEWS (May 1, 2022), <https://apnews.com/article/russia-ukraine-kyiv-europe-media-social-cc6e278ae22f37476eb95e5133541047>.

<sup>73</sup> Walker, *supra* note 38, at 681.

Ukraine's successful Kherson counteroffensive showed those resources turning into actual battles won.<sup>74</sup>

As the war continues, Ukraine's masterful control over its strategic storyline has waned.<sup>75</sup> Unable to deliver decisive victories on key counteroffensives, Ukraine has struggled to maintain critical Western support.<sup>76</sup> Recruitment is increasingly challenging as Russia holds its gains.<sup>77</sup> And the shift in narrative is apparent abroad: U.S. President Donald J. Trump and Vice President J.D. Vance recently confronted Ukrainian President Vladimir Zelenskyy about Ukraine's wartime struggles.<sup>78</sup> Despite its initial digital dominance, some argue that Ukraine is on the verge of losing the narrative of possible victory, making it increasingly difficult to sustain war efforts.<sup>79</sup>

2. *Israel-Gaza*. Recently, commentators have levied similar criticisms against Israel, though for different reasons. While the Ukrainian narrative needs a revived likelihood of success,<sup>80</sup> Israel is confronting a tainted image. Although the Israeli Defense Forces may be able to justify their actions as IHL-compliant,<sup>81</sup> the media coverage is nevertheless troubling.<sup>82</sup> Uncurated content circulated on social media has by all accounts fueled a loss of Israel's narrative control, since "[o]n social media many of the barriers and gatekeepers that exist in traditional media are not a factor."<sup>83</sup>

Gazan journalists have had significant success in reaching audiences through social media platforms—younger people are more likely to get news from social media, and the unedited, moralized content showing atrocities of war is amplified by social media algorithms.<sup>84</sup> Moreover, social media algorithms tend to reflect users' views back to them.<sup>85</sup> Since younger people are likely to get their news from social media *and* more likely to support Gaza in the conflict,<sup>86</sup> they are

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<sup>74</sup> *Id.*

<sup>75</sup> Cohen, *supra* note 9.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Kathryn Watson, et al., *Zelenskyy's White House Meeting Ends in Blowup with Trump and Vance*, CBS NEWS (Mar. 1, 2025), <https://www.cbsnews.com/news/ukraine-rare-earth-minerals-trump-zelenskyy/>.

<sup>79</sup> Cohen, *supra* note 9.

<sup>80</sup> *Id.*

<sup>81</sup> See generally Charlie Dunlap, *Why Israeli Operations in Gaza Are Legally Complex*, LAWFIRE (Oct. 28, 2023), <https://sites.duke.edu/lawfire/2023/10/28/why-israeli-operations-in-gaza-are-legally-complex/> (explaining the relevant complexities in IHL).

<sup>82</sup> Israeli retaliation has resulted in the deaths of an estimated 30,000 people since Hamas attacked Israeli civilians on October 7, 2023. "That many civilian deaths in a relatively short war would be problematic in any context." Thomas L. Friedman, *Israel is Losing its Greatest Asset: Acceptance*, N.Y. TIMES (Feb. 27, 2024), <https://www.nytimes.com/2024/02/27/opinion/israel-gaza-peace-thomas-friedman.html>.

<sup>83</sup> *Id.*

<sup>84</sup> See Frisbee, *supra* note 59, at 1058–59 (explaining how algorithms are user-driven).

<sup>85</sup> *Id.*

<sup>86</sup> Laura Silver, *Younger Americans Stand Out in Their Views of the Israel-Hamas War*, PEW RSCH. CTR. (Apr. 2, 2024), <https://www.pewresearch.org/short-reads/2024/04/02/younger-americans-stand-out-in-their-views-of-the-israel-hamas-war/> (explaining that only 16% of U.S. adults under

being fed unbridled pro-Gazan content without the traditional fact-checking or credibility offered by traditional media sources.<sup>87</sup>

Of course, that is not to say that the pro-Palestinian content shared on social media is inaccurate or more likely to include misinformation than pro-Israel content. But notwithstanding legality, a flood of troubling videos showcasing Israeli violence is actively shifting the stance of American youth.<sup>88</sup> And here too, the impact of algorithmic control is apparent. Some have speculated that TikTok, for example, intentionally pushes pro-Palestinian content and suppresses pro-Israeli perspectives.<sup>89</sup>

Whether Israel's loss of the public narrative will turn into its defeat has yet to be seen. But "[e]ach day brings new calls for Israel to be banned from international academic, artistic and athletic competitions or events."<sup>90</sup> In one commentator's view, "Israel is imperiling decades of diplomacy to get the world to recognize the right of the Jewish people to national self-determination and self-defense in their historic homeland."<sup>91</sup>

#### B. *Few Legal Limitations on Modern PSYOPs*

There are existing legal limitations on information operations, though limited.<sup>92</sup> Additional Protocol I explicitly permits "ruses of war," or "acts which are intended to mislead an adversary or induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious."<sup>93</sup> As a result, the bedrock limitation that a ruse must be "lawful" grants significant leniency to armies employing information campaigns. For example, the U.S. Army interprets IHL as permitting "false or misleading radio or telephone messages" and "deception of the enemy by bogus orders purporting to have been issued by the enemy commander."<sup>94</sup> Only deception that qualifies as an IHL violation or perfidy—in this context, usually military actions that feign protected status to kill, injure, or capture an adversary—is outright banned.<sup>95</sup>

This broad range of permissible tactics extends to modern technology: the *Tallin Manual 2.0 on the International Law Applicable to Cyber Operations*

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30 favor military aid to Israel, and that same demographic is more likely to cite social media as their primary news source than older groups).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Friedman, *supra* note 80.

<sup>91</sup> *Id.*

<sup>92</sup> See Rodenhäuser, *supra* note 33, at 546 ("Information or psychological operations during armed conflicts are not, as such, unlawful.").

<sup>93</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

<sup>94</sup> *Id.* See also GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (3d ed. 2022).

<sup>95</sup> International Committee of the Red Cross, *Perfidy*, HOW DOES LAW PROTECT IN WAR? – ONLINE CASEBOOK, (truce, surrender, incapacitation, civilian/noncombatant, Red Cross).

(“Tallin 2.0”)<sup>96</sup> maintains the concepts of ruses and perfidy in cyberspace.<sup>97</sup> Because cyber operations involve non-kinetic attacks, the central requirement that perfidious conduct aims to kill, injure, or capture narrows the prohibition for online conduct.<sup>98</sup> A military could violate IHL by using social media to lure an enemy soldier for capture under the guise that they were Red Cross personnel providing humanitarian services.<sup>99</sup> But absent these kinds of physical effects, most online behavior circumvents the ban on perfidy even when it relies on disinformation.

Indeed, some scholars have concluded that “IHL takes a remarkably lenient approach” to disinformation during armed conflict.<sup>100</sup> And the prominence of social media today grants almost unfettered access to target populations. Together, both have facilitated the meteoric rise of weaponized disinformation.<sup>101</sup> The International Committee of the Red Cross (ICRC) has expressed concerns about protecting civilians from these potentially massive campaigns.<sup>102</sup> Given the modern landscape, disinformation can now vilify disfavored groups to provoke foreseeable acts of violence, distort information needed to secure human needs, and directly instill fear or other negative mental states in a population.<sup>103</sup> As a result, some scholars argue that the “ruse of war” framework is an outdated tool for combatting the negative effects that disinformation can have on civilians.<sup>104</sup> But nevertheless, most online deception remains lawful.

Disinformation aside, IHL imposes few limitations on the content of PSYOPs. The United States Department of Defense, for example, says that “in general, the use of propaganda is permissible under the law of war, even when it encourages acts that violate an enemy State’s domestic law or is directed toward civilian or neutral audiences.”<sup>105</sup> As a result, PSYOPs are generally governed by IHL restrictions only when they have traditionally unlawful physical effects.<sup>106</sup>

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<sup>96</sup> Michael N. Schmitt ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge Univ. Press 2017).

<sup>97</sup> *Id.* See Nicolas, *supra* note 15, at 49 (explaining that most disinformation qualifies as a lawful ruse). See also SOLIS, *supra* note 92.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Tilman Rodenhäuser & Cordula Droege, *Foghorns of War: IHL and Information Operations during Armed Conflict*, ICRC HUMANITARIAN LAW & POLICY BLOG (Oct. 12, 2023), <https://blogs.icrc.org/law-and-policy/2023/10/12/foghorns-of-war-ihl-and-information-operations-during-armed-conflict/>.

<sup>101</sup> See generally *id.* (explaining that IHL frameworks have failed to accommodate the breadth of operations enabled by social media).

<sup>102</sup> See Katz, *supra* note 38, at 662.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> U.S. DEP’T OF DEF., LAW OF WAR MANUAL § 5.27.1 (rev. ed., Dec. 2017).

<sup>106</sup> Rodenhäuser, *supra* note 33, at 548, citing Article 1 common to four 1949 Geneva Conventions; Additional Protocol I, art. 37, 51(2), 75(2), Convention Rel. to Treatment of POWs. These rules aim to mitigate harm against people who do not participate in hostilities, banning: encouragement of IHL violations; perfidy; certain terrorist or violent threats; the recruitment of protected persons; and inhumane treatment, such as distributing photos of prisoners of war. IHL also imposes an obligation to “respect and protect medical and humanitarian relief personnel, and to allow and facilitate human relief operations.” *Id.*

## II. THE LEGAL LANDSCAPE: TARGETING THE MEDIA

Given the critical role social media plays in conducting strategically-advantageous PSYOPs, this Part now turns to consider an underexplored law of war implication: that is, whether social media sites and their respective headquarters—like TikTok and its ByteDance headquarters—could become lawful targets under IHL when used for propaganda during war.

Applying existing IHL targeting standards to TikTok illuminates several gaps in the framework. First, under the current interpretation of the targeting requirements, civilian social media platforms are probably lawful targets only if their propaganda incites violence—a high bar given the intentionally indirect and widespread nature of PSYOPs campaigns, and one that does not fit targeting goals. Second, as domestic legislation targets the national security threat posed by these platforms, IHL is out of step.

### A. *What Is an “Attack” on Social Media?*

Military attacks must adhere to discrimination principles, which require belligerents to distinguish between civilian and military objectives, targeting only the latter.<sup>107</sup> These principles form the cornerstone of IHL’s targeting framework, designed to minimize civilian harm and acknowledge military necessity.<sup>108</sup>

1. *The Algorithm: there is limited consensus on identifying cyberattacks.* Militaries might target social media, or its algorithm, via cyberattack. In the cyberwarfare context, identifying an “attack” is not always straightforward.<sup>109</sup> It is not clear, for example, that disrupting an online social media site would be an “attack” under IHL if it caused no physical consequences, such as the “destruction of objects or injury or death of persons.”<sup>110</sup> Some scholars argue that acts causing the destruction of data, or “interference with information systems,” should trigger IHL limitations.<sup>111</sup> But *Tallin* implies that non-kinetic attacks are most likely subject to targeting rules only when they are “reasonably expected to cause an injurious or damaging effect.”<sup>112</sup> Although *jus ad bellum* and *jus in bello* determinations are separate under IHL,<sup>113</sup> the question of which cyber operations are an Article 2(4) “use of force” relies on a similar distinction: attacks on another country’s computer networks or hacking military infrastructure would qualify,<sup>114</sup> but disruptions that lack “a considerable effect upon the targeted party” are

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<sup>107</sup> SOLIS, *supra* note 92.

<sup>108</sup> *Id.*

<sup>109</sup> See International Committee of the Red Cross, *Cyber Warfare*, in ICRC CASEBOOK (“Given the nature of cyber warfare, there is some debate as to whether all cyberattacks trigger the applicability of IHL and – a distinct but related question – whether they constitute ‘attacks’ for the purposes of IHL.”).

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* (providing interference with information systems, destroying data, or disabling banking systems as examples).

<sup>112</sup> See Schmitt, *supra* note 94, at 478, citing WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 384 (Oxford Univ. Press 2012).

<sup>113</sup> See SOLIS, *supra* note 92.

<sup>114</sup> Walker, *supra* note 38, at 685.

probably not limited by IHL at all.<sup>115</sup> In sum, only cyberattacks that cause physical destruction must clearly discriminate between civilian and military objects to be lawful. Those with non-kinetic effects are less clearly required to do so.

2. *The Headquarters: Kinetic Attacks.* Alternatively, a belligerent may consider attacking the physical Headquarters running a social media site to shut down the site's capabilities. A physical attack of this sort is straightforwardly an Article 49(1) "act[] of violence against the adversary" which must comply with the distinction principles.<sup>116</sup>

## B. *Military Objectives*

Distinction requires that parties to an armed conflict differentiate between civilian objects and military objectives, since only military objectives may be the target of attack.<sup>117</sup> Article 52(2) of the 1977 Additional Protocol (I) to the 1949 Geneva Convention expressly codifies this principle and more widely-accepted customary international law, establishing that "[i]n so far as objects are concerned, military objectives are limited to those objects which by their *nature, location, purpose, or use* make an *effective contribution to military action* and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, *offers a definite military advantage*."<sup>118</sup>

1. *Objects that make an "effective contribution to military action."* Whether the object makes "an effective contribution to military action" depends on its relationship to military action more generally—"there need be no 'direct connection' with specific combat operations."<sup>119</sup> The American position interprets "military action" broadly, including both "war-fighting" and "war-sustaining" operations.<sup>120</sup> This position renders "economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability" legitimate targets of attack.<sup>121</sup> An example would be Union attacks on cotton during the Civil War, which the U.S. recognizes as lawful.<sup>122</sup> But this position is often narrowed by the international community, where many experts argue that exports are not

<sup>115</sup> International Committee of the Red Cross, *supra* note 107.

<sup>116</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 49(1), June 8, 1977, 1125 U.N.T.S. 3. See Yoram Dinstein, *Legitimate Military Objectives Under The Current Jus In Bello*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN, 78 INTERNAT'L L. STUDIES 139, 141 ("Any act of violence fits in this matrix: not only massive air attacks or artillery barrages, but also small-scale attacks (like a sniper firing a single bullet).").

<sup>117</sup> SOLIS, *supra* note 92.

<sup>118</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(2), June 8, 1977, 1125 U.N.T.S. 3.

<sup>119</sup> See Dinstein, *supra* note 114, at 145, citing WALDEMAR SOLF, Article 52, in NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 318, 325 (Michael Bothe, Karl Parttsch & Waldemar Solf eds., 1982).

<sup>120</sup> Dinstein, *supra* note 114, at 145.

<sup>121</sup> *Id.* citing ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS.

<sup>122</sup> *Id.*

sufficiently “contribut[ing] to military action” just because they are central to a belligerent’s economy.<sup>123</sup> Still, economic targets with clearer relationships to a warfighting effort—like merchant vessels or factories producing weapons—would qualify.<sup>124</sup> As a result, “effective contributions” can be indirect, but the degree of directness required remains a nebulous standard.

2. *By their nature, location, or use, or purpose.* An object contributes to such military action by its nature, location, purpose, or use. Although social media platforms could be categorized by nature—say, if they were overtaken as intelligence harbors<sup>125</sup>—most targeting justifications will rely on *use* or *purpose* in this context.

*Use.* When an object is “normally dedicated to civilian purposes” by nature but “is being used to make an effective contribution to military action,” it transforms into a legitimate military target if its destruction creates a direct military advantage.<sup>126</sup> Article 52(3) prescribes caution in “use” determinations, though: “In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, *it shall be presumed not to be so used.*”<sup>127</sup> Civilian objects are thus presumed to be protected from attack unless,<sup>128</sup> based on reasonably available information, they are verifiably used as military objectives.

So, a civilian object becomes targetable based on its “use” when it is actually used for military purposes; it remains targetable only while the object is used in a military manner.<sup>129</sup> For example, French forces used civilian taxicabs to transport troops to the frontlines during World War II.<sup>130</sup> Before they were troop carriers, the privately-owned taxis were categorically civilian objects and therefore unlawful targets.<sup>131</sup> Once the taxicabs began transporting troops, though, they became legitimate military targets because they supported the warfighting effort by

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<sup>123</sup> *Id.* at 146.

<sup>124</sup> *See id.* at 145 (saying this position “goes too far”).

<sup>125</sup> Michael N. Schmitt, *International Humanitarian Law and the Targeting of Non-State Intelligence Personnel and Objects*, 30 DUKE J. COMP. & INT’L L. 309 (2020). *See* Dinstein, *supra* note 115, at 146–47 (listing examples of objects which could be military in nature, few of which are related to media objects).

<sup>126</sup> Dinstein, *supra* note 115, at 149, citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(3), June 8, 1977, 1125 U.N.T.S. 3.

<sup>127</sup> *Id.*

<sup>128</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(3), June 8, 1977, 1125 U.N.T.S. 3. Some countries, including the United States, have not adopted this position, instead asserting that there is “no legal presumption of civilian status . . . for persons or objects.” U.S. DEP’T OF DEF., LAW OF WAR MANUAL § 5.4.3.2 (rev. ed., Dec. 2017). This position is widely criticized, though, and may not reflect how the U.S. operates as a matter of policy.

<sup>129</sup> *See supra* note 123.

<sup>130</sup> Dinstein, *supra* note 115, at 149. Note that these famous taxis were not as decisive as they are often presented in the lore, but nevertheless did support. John Hanc, *A Fleet of Taxis Did Not Really Save Paris From the Germans During World War I*, Smithsonian Mag. (July 24, 2014).

<sup>131</sup> Dinstein, *supra* note 115, at 149.



use.<sup>132</sup> If an adversary later had reason to know that taxicabs no longer facilitated troop movement, those taxicabs would revert to their civilian status.

Notably, the presence of combatants alone does not render a civilian structure targetable for contributing to military action by use. Of course, oftentimes combatant presence will be evidence of the object's military use—as a command-and-control center, for example<sup>133</sup>—but a combatant attending church does not render the church building a per se military object if that combatant is not directly participating in hostilities at the time.

*Purpose.* In an active conflict, a building may qualify as a military objective even before it is occupied for military use—whether it has the requisite *purpose* does not depend on its actual use, but rather its *potential* for military use.<sup>134</sup> The official ICRC Commentary distinguishes: “*purpose* is concerned with the intended future use of an object, while *use* is concerned with its present function.”<sup>135</sup>

“Purpose” tends to be more difficult to establish than “actual use.” Evaluating the adversary's intentions for an object is rarely straightforward. A state may expressly designate some civilian infrastructure as war reserves, perhaps by establishing a comprehensive plan for transforming commercial ships into troop carriers, for instance.<sup>136</sup> But most often, the adversary's intentions for an object will be obfuscated or unpredictable. When this is the case, Article 52(3)'s presumption of civilian use kicks in.<sup>137</sup>

Without the adversary's express designation, armed forces must rely on solid intelligence to justify targeting a civilian object using a “purpose” designation. Inferences are narrowly permissible but cannot rely solely on the targeting force's strategic judgment.<sup>138</sup> For example, when the Allied forces bombed the Abbey of Monte Cassino, they relied on the belief that “the abbey made such a perfect observation point that surely no army could have refrained from using it.”<sup>139</sup> However, the attack is considered unlawful because there was no additional evidence.<sup>140</sup>

3. *The destruction of which offers a definite military advantage.* If a civilian object contributes to military action by its use, nature, location, or purpose, it can be classified as a targetable “military object” only if destruction of that object creates a “definite military advantage.”<sup>141</sup> The additional protection this element provides for civilian objects is a matter of debate.<sup>142</sup> It is difficult to imagine an

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> International Committee of the Red Cross (ICRC), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, art. 52(3) (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

<sup>136</sup> Dinstein, *supra* note 115, at 149.

<sup>137</sup> *Supra* note 125.

<sup>138</sup> Dinstein, *supra* note 115, at 148.

<sup>139</sup> *Id.* citing A.P.V. ROGERS, LAW ON THE BATTLEFIELD 54–55 (1996).

<sup>140</sup> Dinstein, *supra* note 115, at 148.

<sup>141</sup> *Supra* note 125.

<sup>142</sup> Dinstein, *supra* note 115, at 144.

object that contributes to military action, the destruction of which would not offer a definite military advantage.<sup>143</sup> And yet, the two requirements remain separate under IHL.

This language (“definite military advantage”) comes from the Hague Rules of Air Warfare, which indicates that the advantage must be “a concrete and perceptible military advantage rather than a hypothetical and speculative one.”<sup>144</sup> To that end, purely political gains do not qualify.<sup>145</sup> Thus “forcing a change in the negotiating attitudes” of the North Vietnamese leadership during the Vietnam War was not a proper basis for attack.<sup>146</sup>

Outside of these boundaries, however, “military advantage” is an amorphous standard—much like “effective contribution to military action.”<sup>147</sup> The ICRC defines it as an “advantage or gain that . . . will result from an attack,” requiring that the benefits be “military in nature.”<sup>148</sup> However, the “spectrum is necessarily wide” and not limited to tactical gains.<sup>149</sup> One difficulty is that a party’s perspective may drive their assessment: as Israeli scholar Yoram Dinstein points out, “[t]he key problem is that the outlook of the attacking party is unlikely to match that of the party under attack in evaluating the long-term military benefits of any action contemplated.”<sup>150</sup> Moreover, in assessing military advantage, parties to an armed conflict can consider either the precise attack or a broader campaign, making the determination even more perspective-dependent.<sup>151</sup>

### C. *Targeting Dual-Use Structures*

Not uncontroversially, the United States and much of the international community have begun classifying some objects as neither military nor civilian—instead, they are “dual use.”<sup>152</sup> The central debate is whether these structures, which include both military and civilian components, should be considered military objectives in their entirety or as “consisting of separate and distinct entities.”<sup>153</sup> Two viewpoints emerge about dual use objects.<sup>154</sup>

1. *U.S. View.* One approach is to consider the entire object a military objective. The United States follows this approach: the DoD Law of War Manual

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 143 (citing Hague Rules of Air Warfare, 1923, DOCUMENTS ON THE LAWS OF WAR 447 (3d. ed. 2000)).

<sup>145</sup> *See id.* at 144 (“The advantage gained must be military and not, say purely political.”).

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* (“The trouble is that the notion of the ‘military advantage’ is not singularly helpful.”).

<sup>148</sup> International Committee of the Red Cross, *Military Advantage*, ICRC CASEBOOK.

<sup>149</sup> Dinstein, *supra* note 115, at 144.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Oona A. Hathaway, Azmat Khan, & Mara Redlich Revkin, *The Dangerous Rise of Dual-Use Objects in War*, YALE L. J. (forthcoming 2025).

<sup>153</sup> Michael N. Schmitt, *Targeting Dual-Use Structures: An Alternative Interpretation*, LIEBER INST. ARTICLES OF WAR (June 28, 2021), <https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/>.

<sup>154</sup> Compare Hathaway, et. al., *supra* note 150 (arguing that proportionality analysis is required for dual use objects), with *supra* note 155 (U.S. taking the opposite view). Professor Schmitt puts forth a third view, encouraging precision based on the attacking military’s capabilities. *Id.*

provides that “[i]f an object is a military objective, it is not a civilian object and may be made the object of attack.”<sup>155</sup> Because the whole object is designated a military one, this approach obviates the need for proportionality analysis.<sup>156</sup> And U.S. Commander’s handbooks confirm that proportionality analysis is unnecessary to comply with IHL, saying that “[t]he principle of proportionality does not impose an obligation to reduce the risk of harm to military objectives.”<sup>157</sup> Other armed forces follow this approach, too, though often militaries try to mitigate harm as a matter of policy, notwithstanding their lack of acknowledged legal obligations.<sup>158</sup>

2. *ICRC View*. Like the first position, the ICRC view characterizes “dual-use” structures as military objectives.<sup>159</sup> It maintains the proportionality analysis, though, arguing that “while the dual use object is a military objective, the impact of the attack on the civilian part . . . or on the simultaneous civilian use or function of the object . . . must also be taken into consideration in the assessment of proportionality.”<sup>160</sup>

3. *Precautions in the Attack*. Even when targeting lawful military objectives, attacking forces are required under IHL to take all feasible precautions to minimize civilian harm.<sup>161</sup> This includes verifying that that military targets are not civilian objects,<sup>162</sup> choosing means and methods that reduce incidental damage,<sup>163</sup> and canceling or suspending attacks if proportionality would be violated.<sup>164</sup> Where possible, attackers must also give civilians advance warning.<sup>165</sup>

#### D. *Targeting Propaganda: When Media Becomes a Lawful Target*

Media professionals and facilities are typically classified as civilian objects, protected during both international and non-international armed conflict.<sup>166</sup> As a result, media facilities must qualify as military (or dual-use) objects to be lawfully attacked. There is some precedent for targeting media when its propaganda incites genocide or war crimes. However, this standard does not comport with targeting frameworks or account for threats posed by social media.

1. *Media typically cannot be targeted because of propaganda alone*. The ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) informed the contours of targeting standard as-applied to media facilities when it evaluated the

<sup>155</sup> U.S. DEP’T OF DEF., LAW OF WAR MANUAL § 5.6.12 (rev. ed., Dec. 2017).

<sup>156</sup> Schmitt, *supra* note 151.

<sup>157</sup> *Id.*

<sup>158</sup> Schmitt, *supra* note 151.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*; International Committee of the Red Cross, *Direct Participation in Hostilities under International Humanitarian Law: Summary Report of the ICRC Expert Meeting*, 30 (2003).

<sup>161</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57, June 8, 1977, 1125 U.N.T.S. 3.

<sup>162</sup> *Id.* art. 57(2)(a)(i).

<sup>163</sup> *Id.* art. 57(2)(a)(ii).

<sup>164</sup> *Id.* art. 57(2)(b).

<sup>165</sup> *Id.* art. 57(2)(c).

<sup>166</sup> See Michael N. Schmitt, *Legal Protection of the Media in Armed Conflict: Gaza*, LIEBER INST. ARTICLES OF WAR (May 18, 2021) (explaining that the conflict between Israel and Gaza can be classified as a non-international armed conflict).

NATO bombing of Serbian television and radio facilities.<sup>167</sup> NATO forces viewed the attacks as a “more general attack aimed at disrupting . . . Command, Control, and Communications” and “dismantle[ing] the FRY [Federal Republic of Yugoslavia] propaganda machinery.”<sup>168</sup> Insofar as the attack was geared toward disrupting military communications, the Committee concluded that “it was legally acceptable.”<sup>169</sup> But the propaganda rationale was legally questionable: the Committee suggested that “justifying an attack on a civilian facility on such grounds alone may not meet the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by the Additional Protocols.”<sup>170</sup>

In other words, if a civilian media facility broadcasts propaganda, it may have a military use or purpose. But its effect on military action and the subsequent military advantage from its destruction do not clearly satisfy targeting standards. Since the two elements are interrelated,<sup>171</sup> this Essay will henceforth group the elements together as the “direct effect” requirement for simplicity.

2. *Propaganda that incites could be a lawful target.* The ICTY made one concession to its media rules: “[w]hether the media constitutes a legitimate target group is a debatable issue,” but concluding that attacks against media which incites crimes could be lawful.<sup>172</sup> The ICRC, too, concludes that propaganda inciting war crimes, acts of genocide, or violence is forbidden, and “news media that disseminate such propaganda” may become legitimate targets.<sup>173</sup> The ICTY cites Rwanda as an example.<sup>174</sup>

Although its targetability was not squarely addressed, the International Criminal Tribunal for Rwanda (ICTR) evaluated the role that Radio Television Libre des Mille Collines (RTL) played in inciting the 1994 Rwandan genocide.<sup>175</sup> The popular radio station openly encouraged ethnic hatred against the Tutsis, dehumanizing them with heavily biased news and propaganda-laced misinformation.<sup>176</sup> The station was not exclusively used as a propaganda vehicle or to incite violence. It was also “unique among the Rwandan media in its mixture of

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<sup>167</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 71–79, ICTY, June 13, 2000.

<sup>168</sup> *Id.*

<sup>169</sup> Schmitt, *supra* note 164,

<sup>170</sup> *Id.*

<sup>171</sup> Recall that eliminating an object which makes effective contributions to military action will usually be advantageous.

<sup>172</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Int’l Crim. Trib. for the Former Yugoslavia (June 13, 2000).

<sup>173</sup> International Committee of the Red Cross, *Protection of Journalists*, ICRC CASEBOOK.

<sup>174</sup> *Supra* note 166.

<sup>175</sup> See International Committee of the Red Cross, *ICTR, The Media Case*, ICRC CASEBOOK (discussion questions).

<sup>176</sup> David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 129 Q.J. ECON. 1947 (2014).

<sup>177</sup> *Id.*

popular music [and] political commentary,” along with sports news and other youth-oriented programming.<sup>178</sup>

Several leaders who ran the radio station during the Rwandan genocide were convicted of “incitement to commit genocide” for their RTLM broadcasts.<sup>179</sup> Consensus suggests that these convictions are evidence that the radio station itself was targetable while it was used to incite. Amnesty International, a non-governmental human rights organization, asserts that the distinction relies on the legality of the propaganda itself—which is unlawful when it incites.<sup>180</sup>

For example, Nazi propagandist Hans Fritzsche was acquitted of his crimes against humanity charges at Nuremberg.<sup>181</sup> In so holding, the tribunal drew a key distinction: although Fritzsche’s broadcasts aimed to “arouse popular sentiment in support of Hitler and the German war effort” during World War II, the International Military Tribunals was “not prepared to hold that [he] intended to incite the German People to commit atrocities on conquered peoples,” such that he could be “held to have been a participant in the crimes charged.”<sup>182</sup> Because his propaganda was lawful, the media facility he used would not be targetable in this view.

In contrast to Fritzsche, Nazi press chief Otto Dietrich was convicted for inciting crimes against humanity because he directed the German media to “enrage the Germans against the Jews” and justify genocide.<sup>183</sup> Like Fritzsche, Dietrich’s propaganda was geared toward promoting ideas about the “noxiousness of the Jews” and classifying them as a “world danger,” rather than specifically calling for genocide itself.<sup>184</sup> But the connection between his rhetoric and preferred outcome was direct enough to warrant conviction.<sup>185</sup> This view would consider his media stations lawful targets.

3. *It is not clear that targeting turns on the legality of the propaganda itself.*  
It is not settled that a media facility is targetable when its propaganda is unlawful—

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<sup>178</sup> *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, ICTR-99-52-T.

<sup>179</sup> Article 25(3)(e) of the Rome Statute of the International Criminal Court bans incitement to genocide. Rome Statute of the International Criminal Court art. 25(3), July 17, 1998, 2187 U.N.T.S. 90.

<sup>180</sup> W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT’L L. 489, 496 (2001).

<sup>181</sup> United States Holocaust Memorial Museum, *Additional Trials of Propagandists: Hans Fritzsche*, STATE OF DECEPTION: THE POWER OF NAZI PROPAGANDA; Trial of the Major War Criminals Before the International Military Tribunal, vol. 22, at 479–508 (1948) (Judgment of Hans Fritzsche).

<sup>182</sup> *cf.* United States Holocaust Memorial Museum, *Additional Trials of Propagandists: Otto Dietrich*, STATE OF DECEPTION: THE POWER OF NAZI PROPAGANDA. (“A crime does not begin when you murder people. . . . The moment propaganda turns against another nation or against any human being, evil starts.”); United States v. Ernst von Weizsaecker et al. (The Ministries Case), 14 Trials of War Criminals Before the Nuremberg [sic] Military Tribunals Under Control Council Law No. 10, at 308–25 (1952) (Judgment of Otto Dietrich).

<sup>183</sup> Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT’L REV. RED CROSS 823, at 831–32 (2006).

<sup>184</sup> *Id.*

<sup>185</sup> The “clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which the Jews were being subjected.”

it is still “not clearly established” that media inciting genocide or war crimes constitutes a legitimate target.<sup>186</sup>

The ICRC suggests that an attack on inciting media *could* be justified based on IHRL principles, because of “some generalized right to prevent the continuing commission of crimes.”<sup>187</sup> This explanation is left wanting, however. First, there is no international criminal tribunal that criminalizes propaganda—instead, it is usually *evidence* of crimes, like incitement to genocide.<sup>188</sup>

Second, IHRL is more broadly restrictive than IHL as-applied to propaganda.<sup>189</sup> “War propaganda” is banned under the United Nations International Covenant on Civil and Political Rights (ICCPR) Article 20(1).<sup>190</sup> Article 20 likewise bans incitement of race-based hatred or discrimination.<sup>191</sup> Both “war” and “propaganda” are undefined, however, and the hate speech ban is undermined by competing international conceptions of “hate speech.”<sup>192</sup> These would be difficult standards to apply in war. And while it could be argued that inciteful posts or “hate media” are legitimate targets because of IHL obligations to repress breaches of the Geneva Conventions,<sup>193</sup> this obligation is still subject to distinction principles and would therefore require targeting analysis.

Regardless, the threshold for responding to IHRL violations with an *attack* is high, even in the genocide context. Indeed, the international community seemed to recognize that RTLM—Rwanda’s inciting radio station—should be targeted via non-kinetic acts instead, calling for jammers to stop its broadcasts.<sup>194</sup> Although

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<sup>186</sup> International Committee of the Red Cross, *Protection of Journalists*, ICRC CASEBOOK; see *supra* note 77 (discussion questions).

<sup>187</sup> Fenrick, *supra* note 178, at 496.

<sup>188</sup> Riley Flewelling, *Not Just Words: Grappling with the Doxing of Civilians in War*, CTR. ON L., ETHICS & NAT’L SEC., Essay No. 19, at 13 (July 25, 2023), citing Michael G. Kearney, *Propaganda in the Jurisprudence of the ICTY*, in PROPAGANDA, WAR CRIMES TRIALS, AND INTERNATIONAL LAW: FROM SPEAKERS’ CORNER TO WAR CRIMES 231, 234 (Pedrag Dojcinoivic ed., 2012) (“Propaganda to commit war crimes is not explicitly incorporated in any relevant criminal codes, nor has it been recognized under customary international law.”).

<sup>189</sup> See Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EURO. J. INT’L L. 1, 161–82 (2008) (“In some cases, humanitarian law is considered relevant where it is understood as less of a barrier than human rights law.”).

<sup>190</sup> See Aswad, *supra* note 17, at 8 (“This provision contains two principal but undefined terms: ‘propaganda’ and ‘war.’”).

<sup>191</sup> See Toby Mendel, *Hate Speech: Can the International Rules be Reconciled with Freedom of Expression?*, presented at the Expert Seminar on the Links between Articles 19 and 20 of the ICCPR, Santiago, Chile (Oct. 2008) (suggesting the International Convention on the Elimination of All Forms of Racial Discrimination and International Covenant on Civil and Political Rights are incompatible).

<sup>192</sup> See Aswad, *supra* note 17, at 8 (“This provision contains two principal but undefined terms: ‘propaganda’ and ‘war.’”).

<sup>193</sup> See Common art. 1, Geneva Conventions of Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (“Parties undertake to “*respect and ensure respect*” for the Conventions “*in all circumstances.*”) (emphasis added). This has been interpreted as including: an obligation to suppress and prevent violations (including grave breaches), and an obligation to repress violations, through domestic legislation and prosecution.

<sup>194</sup> Jamming is not an attack technically, but it is disruptive. See Robert Lawless & Hitoshi Nasu, *Electronic Warfare and the Law of Armed Conflict*, LIEBER INST. ARTICLES OF WAR (Oct. 28,

these goals were thwarted by principles of sovereignty and non-intervention<sup>195</sup>—since the Rwandan genocide involved intrastate violence, the United Nations’ intervention would have been legally complicated—the idea received broad academic support.<sup>196</sup>

4. *State control may offer a basis for targeting inciting propaganda.* An alternative explanation could rely on the degree of state control over the media. “If the state controls essentially all of the media, and the political leadership directing the war effort uses that media as part of a system to control the civilian population, it is conceivable that media focal points could be regarded as legitimate military objectives.”<sup>197</sup> This could be the case if the media is used solely to disseminate propaganda, because it then lacks a civilian use.<sup>198</sup> It could also be because the strict state-sponsorship indicates an official intended *purpose* to use the media for military support. However, this presents a high bar. The FRY media was state-controlled to a degree, but the ICTY nevertheless suggested that it was an illegitimate target.<sup>199</sup>

5. *Traditional targeting principles are the likely basis.* Finally, the ICRC suggests instead that an attack on inciting media could be justified under Article 52(2) of Additional Protocol I, which removes civilian protections for those who directly participate in hostilities.<sup>200</sup> When a civilian object is used by individuals who directly participate in hostilities, it satisfies the “use” requirement in targeting law.<sup>201</sup> By this view, targeting the media object would be lawful because of traditional targeting principles—i.e., because using the media to incite has a “direct effect” on military operations. Existing interpretations seem to presume this is the case.

Altogether, courts and scholars alike are reticent to deem media facilities targetable unless they facilitate command and control.<sup>202</sup> Propaganda is usually an insufficient justification.<sup>203</sup> This is most likely because “broadcasting and other media activities that enhance the morale of the civilian population or otherwise generate support for the broader war effort” are unlikely to satisfy the direct effect requirement of targeting law,<sup>204</sup> unless they are used to incite violence—at which

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2024) (“Jamming is the use of electronic warfare capabilities to disrupt, usually temporarily, the signals relayed through the EMS between the communication equipment and sensors. In general, jamming is not considered an attack because of its temporary and non-destructive effects.”).

<sup>195</sup> Alexander C. Dale, Note, *Countering Hate Messages that Lead to Violence: the United Nations’s Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts*, 11 DUKE L.J. 109, 117 (2001).

<sup>196</sup> *Id.*

<sup>197</sup> Fenrick, *supra* note 178, at 497.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* The nuances and competing interpretations of “direct participation in the hostilities” by noncombatants is beyond the scope of this paper. For a helpful breakdown, see Fink, *supra* note 8.

<sup>201</sup> Dinstein, *supra* note 115, at 149.

<sup>202</sup> SOLIS, *supra* note 92, at 413; U.S. DEP’T OF DEF., LAW OF WAR MANUAL § 5.7.5.2 (rev. ed., Dec. 2017). See also Fenrick, *supra* note 178, at 497.

<sup>203</sup> *Id.*

<sup>204</sup> Schmitt, *supra* note 164. Hathaway, et. al., *supra* note 150, at 81.

point targeting would probably be justified as an interpretation of Article 52 where inciters are directly participating in hostilities, using the civilian media object to directly affect military actions.

### III. TARGETING TIKTOK: INSTIGATION, NOT INCITEMENT

Applying existing IHL targeting standards to social media illuminates several gaps in the framework. IHL's reliance on incitement as a threshold for targeting propaganda creates two key distortions: (1) a categorical conflation of expressive and operational acts, and (2) a misalignment with actual combat operations. This Part attempts to remedy those shortcomings in a way that better aligns with the existing targeting framework.

Using TikTok as an example, this Part argues that social media can have a “direct effect” on military operations when its contents *instigate* violence. The proposed standard does not run the risk of rendering all objects targetable based on the broad goal of inhibiting the adversary,<sup>205</sup> because it is circumscribed by a causal element. Moreover, when domestic legislation imposes restrictions on a platform for “national security” reasons, that legislation should be viewed as evidence that the platform has a military *purpose*, increasing the likelihood that it satisfies “direct effect” requirements in armed conflict.

#### A. *Comparing The Legal Standards: Incitement Versus Instigation*

Under current doctrine, TikTok could only feasibly be a lawful target if it incites war crimes or genocide. However, an instigation standard more directly aligns with discrimination principles, which require a direct effect on military operations.

1. *Incitement requires direct calls but not direct effects.* Article 25(3)(3) of the Rome Statute of the International Criminal Court criminalizes incitement to genocide.<sup>206</sup> Public incitement to genocide was addressed and developed by IMT at Nuremberg and later the ICTR in the aftermath of the Rwandan genocide.<sup>207</sup> At Nuremberg, charges against Nazi propagandists were based on Article 6 of the IMT, which allowed prosecutions for “crimes against peace,” “war crimes, and “crimes against humanity.”<sup>208</sup> Between Fritzsche (who was acquitted) and Dietrich (who was convicted), the key distinction seemed to be the directness of the calls toward a particular purpose—distinguishing between political provocation and encouraging genocide.

The ICTR further developed the doctrine of incitement. Three media leaders associated with RTLM were convicted for incitement to genocide in the *Media*

<sup>205</sup> This was a concern with the ICTY justification, that broadly-defined strategic objectives would render it all targetable. See Fenrick, *supra* note 178, at 497.

<sup>206</sup> Rome Statute of the International Criminal Court art. 25(3)(d), July 17, 1998, 2187 U.N.T.S. 90.

<sup>207</sup> Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence (Trial Chamber) (Jun. 1, 2000).

<sup>208</sup> Flewelling, *supra* note 186, at 13.



*Case*.<sup>209</sup> The ICTR defined the elements of incitement thusly: an inciter must (1) “possess the intent to *directly* prompt or provoke another to commit genocide;” and (2) “must also have a specific intent to destroy, in whole or in part, a protected group.”<sup>210</sup> Incitement is an inchoate crime, so the intended crime (here, genocide) need not occur.<sup>211</sup>

Inchoate responsibility is typically reserved for more serious crimes: the ICTR emphasized that “[g]enocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.”<sup>212</sup>

Assessing the directness of the incitement recurred as a key component of the *Media Case* analysis, ensuring that the calls to violence were clear enough to warrant inchoate criminal responsibility.<sup>213</sup> As a result, an important limitation on incitement involves the directness of the inciting speech itself. In *Prosecutor v. Jean-Paul Akayesu*,<sup>214</sup> the ICTR noted that speech criminalized for incitement must be direct, “public” and “perceived” in order to effectively constitute a call-to-action worthy of punishment.<sup>215</sup> When “the persons for whom the message was intended immediately grasp[] the implications thereof,” this requirement is met.<sup>216</sup> Indirect calls, such as those aiming at disparagement or the glorification of violence to lay the foundations for genocidal acts, are less clearly unlawful.<sup>217</sup> There is some precedent for holding indirect speech of this sort to account,<sup>218</sup> but free speech protections tend to be stronger in this area.<sup>219</sup> For example, United Nations Secretary General Ban Ki Moon argued that incitement is necessarily separate from glorification, and that a legal charge for incitement should not rely on such “vague terms uncertain of scope.”<sup>220</sup>

Likewise, “incitement to terrorism” may “consist of public provocation to commit terrorism or public praise for terrorist acts, dehumanization of the victims of terrorist attacks, or mere understanding for the underlying reasons for terrorist

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<sup>209</sup> U.N. Int’l Crim. Trib. for Rwanda, Press Release, *Three Media Leaders Convicted for Genocide* (Dec. 3, 2003).

<sup>210</sup> Timmermann, *supra* note 181, at 841 (emphasis added).

<sup>211</sup> *Inchoate*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Imperfect; unfinished; begun, but not completed; as a contract not executed by all the parties.”).

<sup>212</sup> Timmermann, *supra* note 181, at 840.

<sup>213</sup> *Id.*

<sup>214</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

<sup>215</sup> Ezekiel Rediker, *The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union*, 36 MICH. J. INT’L L. 321, 328 (2015).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Appeal Judgment (Nov. 28, 2007), (“... more than a vague or indirect suggestion.”).

<sup>218</sup> *Supra* note 181 and accompanying text.

<sup>219</sup> See generally Aswad, *supra* note 17 (discussing war propaganda propositions weighed against free expression values).

<sup>220</sup> Yaël Ronen, *The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union*, 36 MICH. J. INT’L L. 321, 328 (2015).

attacks” even if the intended terrorism never occurs.<sup>221</sup> Its prosecution requires careful delineation between provocative political speech (which is generally protected) and direct or indirect incitement to violence or terrorism (which is not).<sup>222</sup>

So, the conviction of Rwandan leaders for incitement required the recognition that they made *direct* prompts toward violence, but did not require that those calls had a direct, real effect. Indeed, the *Nahimana* tribunal clarified that there was no “specific causation requirement linking the expression at issue with the demonstration of a direct effect” to establish incitement.<sup>223</sup>

2. *Instigation requires a direct effect.* On the other hand, International criminal tribunals treat “incitement” and “instigation” differently.<sup>224</sup> The principal distinction is that, to satisfy an instigation standard, a prosecutor must prove that the provoked crime actually occurred.<sup>225</sup>

According to the ICTY and ICTR, criminal “instigation” includes “prompting another to commit an offence” or “urging, encouraging or prompting” someone to commit a crime.<sup>226</sup> To be punishable, that prompting must intentionally *cause* the commission of the underlying substantive crime.<sup>227</sup>

International Criminal Tribunals were initially reticent to establish criminal liability for propaganda that instigates. It was instead evidence for other crimes.<sup>228</sup> In *Prosecutor v. Kordic*,<sup>229</sup> for example, Dario Kordic was convicted of persecution based on evidence that he used propaganda to instigate crimes.<sup>230</sup> The tribunal did not recognize his instigation as a standalone offense, however, instead charging the underlying crime itself.<sup>231</sup>

Later, the ICTY seemed to recognize instigation by propaganda as its own offense.<sup>232</sup> Radoslav Brđjanin was convicted of instigating crimes against humanity, in part because of his “unambiguous public statements” calling upon the nation’s population to facilitate criminal acts.<sup>233</sup> In addressing causation, the tribunal noted that the “only reasonable conclusion” for the real-world deportations

<sup>221</sup> *Id.* at 326, citing Bibi Van Glinkel, *Incitement to Terrorism: A Matter of Prevention or Repression?* 3 (Aug. 2, 2011) (Int’l Ctr. For Counter-Terrorism Research Project).

<sup>222</sup> See *Sürek v. Turkey* (No. 1), App. No. 26682/95, 1999-IV Eur. Ct. H.R. 353 (holding that speech that glorifies or incites violence can justify restrictions on free expression).

<sup>223</sup> *Supra* note 217.

<sup>224</sup> Timmermann, *supra* note 181, at 838.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 838–39.

<sup>227</sup> See *id.* at 839 (“causal connection between the effect and the actus reus of the crime.”).

<sup>228</sup> Flewelling, *supra* note 186, at 13.

<sup>229</sup> *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

<sup>230</sup> *Id.*

<sup>231</sup> Flewelling, *supra* note 186, at 13.

<sup>232</sup> *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶¶ 574–77 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

<sup>233</sup> See Flewelling, *supra* note 186, at 17 (citing *id.* ¶ 574).

that followed these calls was that Brdjanin's political position, public influence, and actions to facilitate the crimes had some role in actually causing them.<sup>234</sup>

In *Prosecutor v. Seslji*,<sup>235</sup> the ICTY further developed instigation's causal requirement. Connecting the specificity of Seslji's calls to action and the subsequent crimes committed, as well as their close relationship in time, the tribunal concluded that his influence caused the crimes and convicted him of instigation to persecution.<sup>236</sup>

In sum, criminal instigation requires that the instigator (1) prompt, encourage, or urge a crime; (2) while either intending to cause the crime or aware of the substantial likelihood that the crime will be committed; (3) with the intent to bring that crime about; and (4) the instigator's acts must contribute significantly to the commission of the crime.<sup>237</sup> Causation can be shown using a combination of evidence: similarity between the call to action and subsequent conduct, time between the two, directness, and the relationship between the instigator and instigated population. In contrast, criminal incitement eliminates (4), the causal requirement.

3. *For targeting purposes, instigation is the better fit.* So, incitement to commit genocide or other crimes requires direct, public calls—but those calls need not actually cause the encouraged act. If relying on an interpretation of Article 52,<sup>238</sup> broadcasters who directly participate in hostilities by using media facilities to *incite* would have to satisfy the “direct effect” test through a theory of reasonably foreseeable effects on military action—in this context, genocide or war crimes—or, alternatively, as a recognized *per se* exception.

In retrospect, we know that RTLM's prompting did indeed exacerbate the scale of harm, contributing to up ten percent of the violence in the Rwandan genocide.<sup>239</sup> During a radio interview broadcast at the height of the genocide, an RTLM host spoke of the “war of media, words, newspapers and radio stations,” which he described as a complement to bullets.<sup>240</sup> In sentencing him, one judge said, “You were fully aware of the power of words, and you used the radio – the medium of communication with the widest public reach – to disseminate hatred and violence . . . Without a firearm, machete or any physical weapon, you caused the death of thousands of innocent civilians.”<sup>241</sup>

However, for targeting purposes, before this type of evidence is available, instigation is the better fit. Using incitement as a blanket standard to assess whether propaganda made an “effective contribution to military action” is contradictory. The very feature that makes incitement attractive for expanding criminal

<sup>234</sup> *Id.* ¶ 575.

<sup>235</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-A, Judgment, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 11, 2018).

<sup>236</sup> Flewelling, *supra* note 186, at 17 (citing *id.*).

<sup>237</sup> Timmermann, *supra* note 181, at 838.

<sup>238</sup> *Supra* note 116.

<sup>239</sup> David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 129 Q.J. ECON. 1947 (2014).

<sup>240</sup> *Three Media Leaders Convicted for Genocide*, U.N. Int'l Crim. Trib. for Rwanda (Dec. 3, 2003).

<sup>241</sup> *Id.* (emphasis added).

accountability—its elimination of causal requirements—makes it incompatible with IHL, which predicates targeting on direct and effective contribution to military action. The standard is thus both over and under-restrictive. It is over-restrictive in that it requires media to be used for war crimes or crimes against humanity in order to be targetable, rather than simply requiring a “direct effect” on military operations. This undermines military necessity in the modern landscape. It is under-restrictive in that a broad incitation standard divorced from enumerated crimes would render any propaganda-broadcasting media facility a legitimate target so long as it incites, even if it does not have a “direct effect,” thereby circumventing existing targeting standards.

Some may argue that lowering the targeting threshold to instigation risks criminalizing or attacking expressive conduct. But unlike incitement, instigation requires a link between the encouragement and actual conduct—ensuring that only media playing a functional operational role becomes a target.

*B. Example: Social Media Instigates*

Although social media certainly could be used to incite genocide, war crimes, or crimes against humanity, these types of crimes are crafted to hold individuals to account after the fact. Since social media makes individual attribution more difficult and supplements kinetic operations in real time, instigation is a more adaptable standard for determining whether technology is a military object.

A hypothetical example is illustrative. If the United States and China were in conflict, ByteDance might choose to adapt its algorithm to instigate U.S. citizens toward violence, with the goal of creating political instability.

1. *Instigating what?* The proposition in this Essay is meant to serve as a starting point for identifying standards that both satisfies existing targeting frameworks and addresses threats posed by modern technology. To that end, it uses the intentionally vague stand-in of “instigating violence.” This could mean instigating war crimes, which would broaden existing media targetability. But given the causal relationship, it could be expanded to also include a broader conception of crimes, violence, or simply military action itself.

2. *Use or Purpose.* TikTok would most likely become a lawful target by military *use*: if during wartime China used TikTok’s algorithm to widely circulate anti-American sentiment, animate its own troops, or otherwise control the narrative about the conflict, for example. For a platform like TikTok to be targeted for its *potential* military use, or its *purpose*, there must be reason to believe that the adversary intends to use it in warfighting operations.<sup>242</sup> Although China has not explicitly tagged TikTok for future use in an armed conflict, legislators in the United States have already considered the platform’s threat to American national security and decided the app’s Chinese ownership created enough risk to shut it down in peacetime, notwithstanding free speech concerns.<sup>243</sup>

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<sup>242</sup> See *supra* Part II (explaining targeting frameworks).

<sup>243</sup> French, *supra* note 21.

When legislators enact laws like these, they engage in a careful calculus about the risks posed by the platform, weighing them most often against free speech protections.<sup>244</sup> If media content warrants shut down for its threat to national security during *peacetime*, then surely that site or platform poses enough of a threat to national security during wartime to fulfill the “purpose” requirement.<sup>245</sup> As a result, media that has been restricted domestically for reasons of national security should automatically qualify as having a “purpose for effective contribution to military action,” because there is reason to believe the adversary is prepared to use it in that capacity. It would then be subject to the instigation standard.

3. *Direct Effect*. To meet the “direct effect” requirement, TikTok would have to either (1) incite; or (2) instigate violence. Instigation would require a threshold determination by U.S. commanders about whether Chinese officials were using TikTok or its algorithm to promote content that encouraged violence and whether the content had some real-world effect on conduct.<sup>246</sup> In other words, the United States would have to establish causation—or that the *use* of TikTok for propaganda made an *effective contribution to military action* such that its destruction would create a *definite military advantage*.

Causation could be shown using the same factors identified by the ICTY. If suddenly American youth, specifically the demographic on TikTok, began acting violently in a way that aligned with Chinese interests, that evidence might satisfy the standard based on precedent if there is also evidence of specific and related inflammatory content. ByteDance’s relationship to the Chinese government and TikTok’s relationship to the young American population, in combination with the timing and nature of the acts, could establish a reasonable causal link.

This is a challenging task, but tying the provocation to an observed, real-world effect creates a limiting principle.<sup>247</sup> And it helps solve the attribution problem—since social media makes the original author of a message unclear, establishing individual liability might be difficult in the future. By assessing the effect of the *entire platform*, the instigation standard would deter militaries from using civilians and civilian objects to circulate military messages where there is otherwise little incentive not to do so.

Of course, the targeting calculus might be different if ByteDance did not intentionally manipulate its algorithm, but instead just capitalized on it. To borrow from Ukraine’s Ghost of Kyiv example, the Ministry would qualify as a political entity with a certain relationship to the Ukrainian population. If it put out TikToks indirectly or directly encouraging its citizens to attack a Russian camp, and soon thereafter there was an attack, it would probably meet the causal standard. This could prove difficult to apply in the cyber context, though. Instead, it may be fruitful to borrow from the existing standard for causation set forth in *Tallin 2.0* for

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<sup>244</sup> See generally Aswad, *supra* note 17 (discussing war propaganda propositions weighed against free expression values).

<sup>245</sup> See Orakhelashvili, *supra* note 187, at 161–82 (“In some cases, humanitarian law is considered relevant where it is understood as less of a barrier than human rights law.”).

<sup>246</sup> *Supra* Part III.A.

<sup>247</sup> Reasonable foreseeability & reasonable commander in the circumstances standards, for example, which constrain both causation and general decision-making on the ground. SOLIS, *supra* note 92.

cyberattacks, which accounts for “any reasonably foreseeable consequential damage, destruction, injury, or death.”<sup>248</sup> If content circulating on social media can be reasonably foreseen to cause any of these, the *algorithm* could then be subject to attack.<sup>249</sup> And as established, the nature of this attack (non-kinetic) would limit the circumstances where targeting principles were relevant to the operation at all.<sup>250</sup>

4. *Proportionality*. Since TikTok is primarily for civilian use, it would be a dual use object. Under the ICRC view, targeting either TikTok’s algorithm or its ByteDance headquarters would thus be subject to proportionality analysis.<sup>251</sup> While positive civilian outcomes may not be part of proportionality analysis, it is also worthwhile to note that this kind of attack could *benefit* civilians. A military attack which shuts down TikTok would resolve some of the ICRC’s concerns about protecting civilians from disinformation.<sup>252</sup>

5. *Definite Military Advantage*. Once TikTok has been shown to contribute to military action by its use or purpose, it can be lawfully targeted only if its destruction creates a “definite military advantage.”<sup>253</sup> Usually, destroying an object that serves a military use or purpose will meet this requirement. If the above-described use or purpose is established, and the causal requirement satisfied TikTok would not be targeted simply to bring the adversary to the negotiating table.<sup>254</sup> Instead, it would be to intentionally disrupt propaganda that was either burgeoning enemy strength or eroding domestic fortitude. As-applied to TikTok, this element would likely be met.

## CONCLUSION

International humanitarian law’s current targeting framework insufficiently addresses the strategic use of propaganda and disinformation in modern conflict. By treating *incitement* as the de facto threshold for determining whether a media facility may be lawfully targeted, IHL inadvertently imports a criminal law doctrine designed to broaden individual culpability—not assess operational effect. This creates a category error: incitement focuses on intent and expression, while targeting law requires a demonstrable contribution to military action. As a result, the existing framework excludes facilities that materially shape the battlespace without explicitly inciting war crimes, even as those facilities generate decisive military outcomes.

Instead, *instigation* requires a causal link between the conduct encouraged and the military effect produced, aligning precisely with the discrimination

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<sup>248</sup> Schmitt, *supra* note 94.

<sup>249</sup> Recall that cyberattack might not be an attack. *Supra* note 107.

<sup>250</sup> See International Committee of the Red Cross, *Cyber Warfare*, in ICRC CASEBOOK (“Given the nature of cyber warfare, there is some debate as to whether all cyberattacks trigger the applicability of IHL and – a distinct but related question – whether they constitute ‘attacks’ for the purposes of IHL.”).

<sup>251</sup> Schmitt, *supra* note 151.

<sup>252</sup> Katz, *supra* note 38, at 662.

<sup>253</sup> Dinstein, *supra* note 115, at 144.

<sup>254</sup> Which would be an impermissible political justification. See *supra* note 143.

principle's requirement of a "direct effect" on military operations. Replacing incitement with instigation would maintain protections for expressive content while enabling states to lawfully target adversarial propaganda tools that shape the conflict's trajectory. In an era where social media algorithms and PSYOPs shape battlefield realities as much as bullets, this realignment is not only doctrinally sound but operationally imperative.