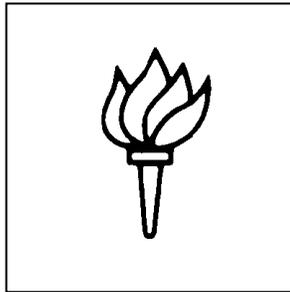


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The Power to Kill or Capture Enemy Combatants

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## The Power to Kill or Capture Enemy Combatants

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During wartime a critical legal question involves the scope of authority to choose whether to kill or capture enemy combatants. An important view, expressed by many contemporary experts, maintains that a combatant can be subject to lethal force wherever the person is found—unless and until the individual offers to surrender.<sup>1</sup> I argue that, in certain well-specified and narrow circumstances, the use of force should instead be governed by a least-restrictive-means (LRM) analysis. That is, I contend that the modern law of armed conflict (LOAC)<sup>2</sup> supports the

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<sup>1</sup> Jeffrey Addicott, the former legal adviser to Army Special Forces, remarked: “We can kill them when they're eating, we can kill them when they're sleeping. They are enemy combatants, and as long as they're not surrendering, we can kill them.” Adam Entous, *Special Report: How the White House Learned to Love the Drone*, Reuters, May 18, 2010; *see also* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, 161 U. PENN. L. REV. \_\_ (forthcoming 2013) (“[T]he prevailing view is that the military need not weigh the possibility of capture when deciding to carry out a strike.”); WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 526 (2012).

<sup>2</sup> In this article, I consider the law of armed conflict in isolation. I do not consider rules that might apply as an application of international human rights law. I have previously taken the position that the conflict between the United States and Al Qaeda constitutes an armed conflict under LOAC. *See* Brief for Professors Ryan Goodman, Derek Jinks and Anne-Marie Slaughter as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); *cf.* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 48 n.1 (2009).

following maxim: if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided.<sup>3</sup> Admittedly, there are all manner of caveats and conditions that will qualify the application of this maxim.<sup>4</sup> However, the general formula—and its key components—should be understood to have a solid foundation in the structure, rules and practices of modern warfare.

Whether the use of violence against combatants is governed by such constraints has important consequences. One of the most direct implications involves the rules of engagement for forces across the globe—including military powers such as Israel, Russia, and the United States.<sup>5</sup> As U.S. Major Richard S. Taylor recently wrote, the issue of whether there are rules that require capturing instead of killing unlawful combatants “is a highly relevant—and contentious—question for today’s military commanders and lawyers” and has the potential to alter important practices of western-led coalition partners.<sup>6</sup> Another implication involves the type of factors that military and civilian authorities would be entitled to consider if states have unfettered discretion to kill enemy combatants during combat. For example, could decision-makers choose to kill rather than try to capture an adversary based on factors such as the diplomatic fallout from potentially having to hold the individual in custody?<sup>7</sup> Indeed, would a state be permitted to adopt a strategy that in effect prefers trying to kill rather than capture enemy combatants because detention options are constrained by domestic politics?<sup>8</sup> Note that these

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<sup>3</sup> This formulation is derived, almost verbatim, from the articulation of the rule by other authorities, which are discussed at multiple points in this article. *See, e.g., infra* notes 16 & 157.

<sup>4</sup> *See infra* Part II.

<sup>5</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on Targeted Killings (2010), UN Doc. A/HRC/14/24/Add.6, at 4-9.

<sup>6</sup> Richard S. Taylor, *The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?*, THE ARMY LAWYER 103, 104 (June 2011); *cf.* Damien Van Der Toorn, ‘Direct Participation in Hostilities’: A Legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan, 17 AUSTL. INT’L L.J. 7, 17 (2010) (explaining that the ICRC’s recent guidance on this topic “may well influence the framing and implementation of rules of engagement by states for current operations such as in Afghanistan and Iraq, as well as for future conflicts”).

<sup>7</sup> *Cf.* DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 126 (2012).

<sup>8</sup> *Cf.* KLAIDMAN, *supra* note \_\_, at 126-27 (“The inability to detain terror suspects was creating perverse incentives that favored killing or releasing suspected terrorists over capturing them. “We never talked about this openly, but it was always a back-of-the-mind thing for us,” recalled one of Obama’s top counterterrorism advisers. “Anyone who says it wasn’t is not being straight.”); Lisa Hajjar, *Anatomy of the US Targeted Killing Policy*, JADALIYYA, Aug. 27, 2012 (“Harvard law professor Jack Goldsmith, who served in the Defense and Justice Departments under the Bush administration, summed up the dilemma: ‘We are all obsessed with Gitmo, but I don’t think that’s where the important action is. The important action is who we are not detaining because Gitmo has become this black-eye place where we can’t have future detentions.’ The reason, as he explained, stems from domestic politics: Congress has restricted the president’s ability to move people out of Guantánamo .... The barriers to getting people out of Guantánamo function as a political deterrent to moving anyone new in ... According to Goldsmith, ‘The lack of a detention policy and the inability to detain members of the enemy going forward creates a heightened incentive to kill people.’”); Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS, May 18, 2010 (“By some accounts, the growing reliance on drone strikes is partly a result of the Obama administration’s bid to repair the damage to America’s image abroad in the wake of Bush-era allegations of torture and secret detentions. Besides putting an end to harsh interrogation methods, the president issued executive orders to ban secret CIA detention centers and close the Guantanamo Bay prison camp. Some current and former counterterrorism officials

questions arise even if there is no direct military advantage in choosing to kill rather than capture. Indeed, a theoretical question that helps get to the heart of the matter is whether belligerents can decide to kill rather than capture—even when the attempt to capture would not pose a greater risk to their own soldiers’ lives.

The significance of this issue has also recently been brought to light by the U.S. Department of Justice White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen.<sup>9</sup> First, the White Paper states that—as a matter of constitutional law—the lawfulness of the use of lethal force in a foreign country against a U.S. citizen who is a senior member of Al Qaeda turns, in part, on whether “the operation would be conducted in a manner consistent with applicable law of war principles.”<sup>10</sup> Second, the government suggests that—independent of the constitutional question—Congress has passed legislation making it a federal crime to kill an enemy fighter who is a U.S. citizen outside of the United States if that action violates LOAC.<sup>11</sup> Third, the government acknowledges that if aspects of U.S. kill or capture operations violate LOAC, those executive actions would presumably not be allowed by Congress’s Authorization to Use Military Force.<sup>12</sup>

Another important implication of the broader topic—and what is at stake—is the reputation and institutional legitimacy of the International Committee of the Red Cross (ICRC). In 2009, the ICRC adopted a position favoring an LRM approach in the use of force against legitimate military targets. The statement by the ICRC was part of a report—*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*—which the organization issued after a several-year-long study involving military experts around the world.<sup>13</sup> The principal focus of the consultative process and final publication involved questions concerning when civilians who are involved in hostilities and members of the military forces of nonstate actors can be considered lawful targets subject to military attack. To the reported surprise of many of the study’s expert advisors,<sup>14</sup> the ICRC added a section at the end of the

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say an unintended consequence of these decisions may be that capturing wanted militants has become a less viable option. As one official said: ‘There is nowhere to put them.’”)

<sup>9</sup> U.S. Department of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force. Michael Isikoff, Justice Department Memo Reveals Legal Case for Drone strikes on Americans, Jan. 4, 2013, available at <nbcnews.com>.

<sup>10</sup> U.S. DOJ White Paper, *supra* note \_\_ at 1. As an independent prong of the constitutional test, the government states that lethal force can be used only when capture is “infeasible.” The standard for infeasibility is only briefly and ambiguously defined. *Id.* at 8 (“[C]apture would not be feasible if it could not be physically effectuated during the relevant window of opportunity . . . . Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant.”). It is unclear, for example, how this standard would match the rules set forth in LOAC. And, the protection it offers is highly circumscribed: the condition applies (as a constitutional right) only to members of Al Qaeda and associated forces who are U.S. citizens.

<sup>11</sup> *Id.* at 10-15.

<sup>12</sup> *Id.* at 3; see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2088-2100 (2005); cf. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Mar. 13, 2009), at 1.

<sup>13</sup> International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) [hereinafter ICRC, *Interpretive Guidance*].

<sup>14</sup> See, e.g., A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, 48 MIL. L. & L. WAR REV. 143, 158 (2009) (“Recommendation IX deals with a matter that the experts were not asked to decide, it was raised late in the expert process, was strongly objected to by a substantial number of the experts present, was not

Interpretive Guidance concerning the restraints on the use of force (RUF). In that section, the ICRC declared its support for the following proposition: “The kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>15</sup> And, the ICRC invoked the “famous statement” of a former President of the organization, Jean Pictet, who had written, “if we can put a soldier out of action by capturing him we should not wound him, if we can obtain the same result by wounding him, we must not kill him, if there are two means to achieve the same military advantage we must choose the one which causes the lesser evil.”<sup>16</sup>

The ICRC’s analysis has been criticized severely by a growing number of international law experts, including current and former military legal advisors, across the world.<sup>17</sup> The section of the Guidance on RUF has quickly become the most controversial aspect of the report.<sup>18</sup> And, no other significant academic writing has risen to support this part of the Guidance—with the exception of Nilz Melzer the principal author of the report.<sup>19</sup> The mildest criticisms have

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fully discussed and so should not, in my opinion, have been included in the document.”); BOOTHBY, *supra* note \_\_, at 526; Parks, *supra* note \_\_, at 794.

<sup>15</sup> ICRC, Interpretive Guidance, *supra* note \_\_, at 77.

<sup>16</sup> ICRC, Interpretive Guidance, *supra* note \_\_, at 82 (quoting JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75 (1985)).

<sup>17</sup> See, e.g., Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. (forthcoming 2013); BOOTHBY, *supra* note \_\_, at 526; Beth Van Shaack, *The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 Yearbook of Int’l Humanitarian L. 255, 292-93 (2012); Jann K. Kleffner, *Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?*, 45 ISRAEL LAW REVIEW 35 (2012); Wolff Heintschel von Heinegg, *The Impact of Law on Contemporary Military Operations: Sacrificing Security Interests on the Altar of Political Correctness?*, in II COEXISTENCE, COOPERATION AND SOLIDARITY 1177 (Holger P. Hestermeyer, Doris König, Nele Matz-Lück & Volker Röben eds. 2011); Marko Milanovic, *Norm Conflicts, International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 95, 121 n. 108 (Orna Ben-Naftali ed. 2011); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 828 (2010); Dapo Akande, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities*, 59 INT’L & COMP. L.Q. 180, 192 (2010); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 Journal of Legal Analysis 69 (2010); William H. Boothby, *Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance*, 1 INTERNATIONAL HUMANITARIAN LEGAL STUDIES 143,163-64 (2010); William J. Fenrick, *ICRC Guidance on Direct Participation in Hostilities*, 12 YEARBOOK OF INT’L HUMANITARIAN LAW 287 (2009); Rogers, *supra* note \_\_, at 158; Taylor, *supra* note \_\_. Der Toorn, *supra* note \_\_; cf. Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INT’L HUMANITARIAN LAW 3, 45-47(2010).

<sup>18</sup> Fenrick, *supra* note \_\_, at 295 (“the provision concerning restraints on the use of force in direct attack is by far the most contentious”); Schmitt, *A Critical Analysis*, *supra* note \_\_, at 39: (“Possibly the area of the Interpretive Guidance that attracted the greatest criticism among the experts who participated in the DPH Project”); Akande, *supra* note \_\_ at 191 (stating that the section on RUF “will probably be the most controversial aspect of the ICRC’s approach in the Interpretive Guidance”).

<sup>19</sup> Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831 (2010); cf. Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT’L REV. RED CROSS 11, 25-26 (2011).

concluded that RUF lack support in international law and practice.<sup>20</sup> Other criticisms have been more reproachful. In an academic analysis of the report, the head of the U.S. Naval War College’s International Law Department states, “The claim that an individual who has not surrendered must, when feasible, be captured (or at least not attacked) is purely an invention of the Interpretive Guidance.”<sup>21</sup> A leading law of war expert U.S. Colonel Hays Parks—in an article subtitled “No Mandate, No Expertise, and Legally Incorrect”—asserts that the Interpretive Guidance’s “ill-constructed theory is flawed beyond repair.”<sup>22</sup> Writing in *The Army Lawyer*, U.S. Major Richard Taylor argues that “the ICRC effectively created the requirement,”<sup>23</sup> and he concludes that “the ICRC has lost sight of its role as trusted advisor and has assumed the position of international legislator.”<sup>24</sup>

Before delving further into this debate, some concrete cases should help illustrate the type of situations that are potentially subject to RUF. The examples below demonstrate the manifold scenarios in which this set of rules is potentially relevant. More specifically, they showcase contexts in which the behavior of a belligerent might violate the maxim that if a combatant can be put out of action by capturing him, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided. Before assessing each example, note that (i) a violation of the maxim does not necessarily entail criminal liability and (ii) the maxim could be formulated to include (or exclude) a proportionality analysis.<sup>25</sup> With those two qualifications in mind, consider some stylized examples:

1. *No military advantage versus kill or capture:*

A Special Forces unit secures a house, and heads into the bedroom area where they discover the target of their operation—a military commander—is in the shower. His back is turned to them, and he is unaware of their presence. They could easily apprehend him. They fire a bullet into the back of his head.

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<sup>20</sup> See, e.g., BOOTHBY, *supra* note \_\_, at 526 (stating that “the legal logic that underpins [the Interpretive Guidance on RUF] is suspect, state practice and the lessons of history suggest that they are misconceived”); Van Der Toorn, *supra* note \_\_, at 27 (“Such an issue could only be definitively resolved by an in-depth analysis of state practice and opinio juris in relation to these principles [of humanity and military necessity]. The ICRC has not carried out such an analysis. ... [T]he existence of such a customary rule is far from settled.”); Kleffner, *supra* note \_\_, at 52 (concluding that this section of the Guidance “is not firmly rooted in international law as it presently stands”); Blum, *supra* note \_\_; Van Schaack, *supra* note \_\_, at 292-93; Rogers, *supra* note \_\_, at 158.

<sup>21</sup> Schmitt, *A Critical Analysis*, *supra* note \_\_, at 42; see also *id.* (“Inclusion of the proposed restrictions on attack in the Interpretive Guidance was unfortunate. ... Ultimately, doing so merely provided additional fodder for criticism ...”).

<sup>22</sup> Parks, *supra* note \_\_, at 828.

<sup>23</sup> Taylor, *supra* note \_\_, at 104.

<sup>24</sup> Taylor, *supra* note \_\_, at 111; see also *id.* at 111 (“as part of the traditional targeting analysis, the ICRC is in effect attempting to legislate in an area in which the states have not consented”); *id.* at 104 (“the ICRC effectively created the requirement”); *id.* at 106 (stating that the ICRC was “[c]ognizant that black letter IHL provided no restraints on the use of deadly force against otherwise lawful military objectives, the ICRC crafted an interpretation of IHL”).

<sup>25</sup> See *infra* Part II (discussing modules in which criminal liability and proportionality analysis would not apply to RUF).

2a. *No military advantage versus kill or capture (with refusal to surrender):*

A fighter loses his last weapon, and is crouched on the ground, closely surrounded by a circle of enemy soldiers aiming their rifles at him. He shouts, “I shall not surrender!” They open fire.

2b. *No military advantage versus kill or capture (and “consent”):*

Same as 2a, except the man drops to his feet and shouts, “Kill me!” They open fire.

3a. *No military advantage versus kill or capture:*

After clearing a town, a platoon of soldiers discover an enemy fighter has tried to hide down a well, where he is now sitting at the bottom. He is armed with a handgun, but has no provisions and no rope to get himself out. The platoon is not pressed for time. However, they do not try to wait or coax him out. Instead, the commanding officer instructs his soldiers to drop three grenades down the well.

3b. *Military convenience versus kill or capture (proportionality analysis<sup>26</sup>):*

Same as 3a, except the commanding officer explains that it would be inconvenient to expend time trying to get the man out of the well, and the platoon should save its energy for the next day’s military operations.

4. *Military convenience versus kill or capture (proportionality analysis<sup>27</sup>):*

A unit of ten soldiers comes across an unarmed enemy combatant, but the man will not give up without a fight. They could subdue him either through a physical fight or by shooting him. They consult, and decide to shoot the man. Their decision is based on their view that it would take longer and more resources to walk back to camp with a captive soldier than with a dead one.

5. *Militarily advantageous to capture rather than kill:*

High-level civilian leaders and military commanders meet to plan a kill or capture operation that will take place in a few weeks. They conclude that it will be more militarily feasible to capture the target than to kill him. That is, from a military standpoint, the attempt to capture is superior than the attempt to kill. They decide, however, to try to kill the individual. Their decision is due to information from their ministry of foreign affairs that holding the individual in captivity would harm diplomatic relations, and it would be better to present the death of the individual as a *fait accompli* to the international community.

In this article, I discuss important evidence that has been overlooked and, in some cases, mischaracterized by commentary on RUF. In particular, critics contend that the notion of RUF was the product of a leading but lone expert—Jean Pictet—in the 1970s whose idea was flatly

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<sup>26</sup> The example in 3b (and 4) involves a proportionality analysis because the situation potentially calls for weighing abstract and remote military benefits against the harm to the enemy fighter. However, one might instead consider the example to involve the limitation that any attack must serve a concrete and direct military advantage—which arguably does not involve a proportionality analysis. Or one might consider the example to involve a distinction between military necessity and minor military inconvenience—which arguably also does not involve a proportionality analysis.

<sup>27</sup> See *supra* note accompanying example 3b.

rejected at the time and “lay moribund for almost four decades”<sup>28</sup> until the ICRC attempted to resurrect it in 2009. The critics’ account is at best a serious oversimplification, and at worst involves misattributions and a disregard for other sources of authority on the subject. That said, most all of these same sources are also overlooked by the ICRC’s study. And, indeed, the Interpretive Guidance eschews the legal foundation that I argue for here.<sup>29</sup>

Through original research, this article recovers a history that has been lost in contemporary debates. In particular, I present and analyze voluminous support by international authorities that contradicts the critics’ narrative and largely supports the same end point reached by the Interpretive Guidance. The full record that I foreground thus sheds significant light on the proper interpretation of key legal instruments such as Additional Protocol I to the Geneva Conventions. This analysis shows how RUF fits into the overall structure of LOAC. And it shows how a parallel set of rules—on the definition of *hors de combat*—achieves many of the same effects as RUF. In the final analysis, RUF—and the least restrictive means approach in particular—fit well within the law of modern warfare. In certain circumstances, belligerents must comply with an important (albeit conditional) set of constraints in planning and conducting kill or capture operations against enemy fighters.

## I. Weaknesses in Support of Restraints on the Use of Force

In this Part, I consider the major weaknesses of the ICRC’s study, and, in some cases, of any study interpreting LOAC to include RUF obligations. I discuss three significant challenges: (1) the lack of explicit treaty law; (2) the lack of state practice; and (3) other aspects of LOAC that cast doubt on an RUF obligation.

First, aside from some limited exceptions, there is no treaty provision explicitly providing for RUF. The exception includes the prohibition on superfluous injuring and unnecessary suffering in Additional Protocol I.<sup>30</sup> The ICRC study, however, primarily relies on general principles of humanity, general principles of necessity, and interpretation by inference. However, as Michael Schmitt explains, in the civilian context there are explicit treaty obligations, such as article 57 of Additional Protocol I,<sup>31</sup> requiring belligerents to choose military attacks that safeguard civilians’ lives. And, as he explains, there is no equivalent provision concerned with the lives of combatants.<sup>32</sup> RUF lacks that kind of definite and direct textual authority.

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<sup>28</sup> Parks, *supra* note \_\_, at 815 n. 125.

<sup>29</sup> The Interpretive Guidance does not develop the idea that RUF derives from the prohibition on superfluous injury and unnecessary suffering. Kleffner, *supra* note \_\_, at 43-44 (“The ICRC’s Guidance does not develop the principle as a possible basis for Section IX. Instead, it merely restates that the prohibition of employing methods and means of a nature to cause superfluous injury and unnecessary suffering is one of the limitations that the law imposes, in addition to which the restraints contemplated in Section IX operate.”).

<sup>30</sup> Additional Protocol I to the Geneva Conventions, art. 35.

<sup>31</sup> Article 57 states in part: “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” API, art. 57.

<sup>32</sup> Schmitt, *A Critical Analysis*, *supra* note \_\_, at 40; *see also* von Heinnegg, *supra* note \_\_, at 1185-86.

Second, as a matter of customary international law, RUF arguably lacks state practice.<sup>33</sup> (And the lack of such practice also creates difficulties for the interpretation of treaty obligations.) This problem is especially acute for the ICRC Guidance because of flaws in the most directly relevant state practices cited to support its conclusions. That is, the ICRC and Nils Melzer reference three primary examples of “state practice”: an Israeli High Court decision, Colombia’s military manual, and the UK’s military manual.<sup>34</sup> The first two examples, however, have problems related to their timing. And the latter is potentially troubled by textual ambiguity.

Consider first the Israeli High Court opinion, which is the most important instance of a state authority explicitly supporting RUF. The problem with its timing was revealed, albeit indirectly, in an exchange between Hays Parks and Melzer. Parks argued that the ICRC’s decision to introduce RUF into its study was unduly influenced by the decision of the Israeli High Court.<sup>35</sup> Parks contends that the court’s holding is “wholly unique to Israel’s situation,” and should not have served as the impetus for the ICRC.<sup>36</sup> In response, Melzer noted that the final ICRC experts meeting on the subject occurred in November 2006, a month before the Israeli High Court decision. He added: “Therefore, [the High Court judgment] may provide additional support for the final position taken by the ICRC but, contrary to what Parks seems to suggest, can hardly have served as its original basis.” That response, however, invites a different, and in some ways more challenging, objection: the ICRC had already reached its conclusions without the Israeli High Court opinion. The Interpretive Guidance thus appears to have been written with an even weaker basis in existing state practice.

The Colombia case involves similar problems for the Interpretive Guidance. In his defense of the Interpretive Guidance, Melzer draws support from Colombia’s military manual, which was issued in December 2009. And Melzer highlights the fact that the manual repeatedly refers to the Guidance. Once again, a problem is that the Colombia manual did not precede the Interpretive Guidance and was, therefore, not a foundation for it. Moreover, although the manual’s multiple references to the Guidance demonstrate state support for the rule, they also evince a weakness in that support. That is, critics could argue that the ICRC has engaged in bootstrapping: Colombia was influenced to think the RUF is a legal obligation due to the ICRC’s position, and the ICRC then used the Colombia practice to support the claim that RUF is binding international law. That said, it would be a stretch to consider the Colombia case void of support for RUF or negative evidence. On balance, the military manual provides some affirmative evidence of state practice (and *opinio juris*).

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<sup>33</sup> BOOTHBY, *supra* note \_\_, at 526 (“State practice shows that when deciding upon attacks and conducting targeting decision-making during an armed conflict, States recognize no requirement to use minimum force, nor is there any obligation to capture rather than kill those whom it is permissible to target in accordance with the law of armed conflict.”); Schmitt, *A Critical Analysis*, *supra* note \_\_, at 41 (“No state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack.”); Akande, *supra* note \_\_, at 1921-92 (“[T]here seems to be no practice of States in which it is contended that the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular case.”).

<sup>34</sup> Melzer, *supra* note \_\_, at 909-13; ICRC, *Interpretive Guidance*, *supra* note \_\_, at 79.

<sup>35</sup> See, e.g., Parks, *supra* note \_\_, at 788 (“It became apparent during the experts’ meetings from the timing of the ICRC’s addition of Section IX and the subsequent discussion that the ICRC’s decision to add Section IX was driven in large measure by the decision of the Supreme Court of Israel in *The Public Committee against Torture in Israel v. The Government of Israel*.”).

<sup>36</sup> Parks, *supra* note \_\_, at 788 n. 64.

The third example of state practice is the UK military manual. Although the phraseology in the manual includes slight ambiguity, the section on necessity does appear to support the same standard set forth by the Interpretive Guidance.<sup>37</sup> And the Guidance explicitly relies upon the manual.<sup>38</sup> Michael Schmitt, however, contends that drafters of the manual disagreed with the ICRC interpretation of their document.<sup>39</sup> Such statements do undermine the support to some degree. However, drafters of a manual are not the only or final authority of its subsequent interpretation. Their disagreement with the ICRC has also occurred during the heat of hostilities when there is extraordinary pressure to give the United Kingdom and its allied forces broad freedom of action in the conduct of hostilities. Post hoc interpretations—especially of relatively unambiguous text—should be evaluated in that light.

There are three additional considerations that should qualify the concern about state practice. First, some critics of the Interpretive Guidance acknowledge that states often incorporate limits on the use of force against enemy combatants in their military operations. And, indeed, several states appear to do so—including in diverse military operations across the conflict spectrum.<sup>40</sup> These critics contend, however, that such practices reflect pragmatic policy choices, not legal obligations under LOAC.<sup>41</sup> Nevertheless, it is an important concession that much state practice is consistent with the proposed LOAC rule. Second, it is questionable which side of the argument needs to demonstrate state practice. A proponent of the Interpretive Guidance could argue that there is a conspicuous lack of state practice contradicting RUF. Indeed, in Part III I discuss

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<sup>37</sup> United Kingdom Ministry of Defence, *The Manual on the Law of Armed Conflict* § 2.2 (2004) (stating that the principle of necessity allows only that “degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve a legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”).

<sup>38</sup> ICRC, *Interpretive Guidance*, *supra* note \_\_, at 79.

<sup>39</sup> Schmitt, *A Critical Analysis*, *supra* note \_\_ at 40.

<sup>40</sup> See also John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) (“[W]henver it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.”); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (April 30, 2012) (“[O]ur unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible.”); United Kingdom, *Card Alpha: Guidance for Opening Fire for Service Personnel Authorised to Carry Arms and Ammunition on Duty* (2003) (“You may only open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.”); Rules of Engagement for Operation Provide Comfort -- reprinted in Department of the Army, *Field Manual 100-23: Peace Operations* (1994), appendix D (“Hostile Intent - The threat of imminent use of force by an Iraqi force or other foreign force, terrorist group, or individuals .... When the on-scene commander determines, based on convincing evidence, that hostile intent is present, the right exists to use proportional force to deter or neutralize the threat.”) (“These rules of engagement were extracted from the Rules of Engagement Card carried by all coalition soldiers.”).

<sup>41</sup> See, e.g., Schmitt, *A Critical Analysis*, *supra* note \_\_, at 43 (“Of course, military considerations will often augur against attacking an individual who, although not hors de combat, can be captured; this is especially true in counter-insurgency operations, where the rules of engagement are typically restrictive. However, such considerations are grounded in policy and operational concerns and not in international humanitarian law.”) (citing U.S. ARMY & U.S. MARINE CORPS, *COUNTERINSURGENCY*, USA FM 3-24 & USMC WARFIGHTING PUB. 3-33.5 (2006)); Fenrick, *supra* note \_\_, at 299 (“[O]ne can certainly envisage situations, particularly in occupied territory or in noninternational armed conflicts, where, for reasons of policy, military personnel will be directed to take risks to ensure proper target identification or to limit incidental casualties or even to limit death or injury inflicted on opposing forces.”).

several instances in which states and international institutions have explicitly supported RUF as a legal constraint. In that light, there may be a heavier burden on critics to show contrary state practice. Third, some of the critics' claims about state practice seem inflated and lack evidentiary support. William Fenrick, for example, asserts: "There is unambiguous state practice to demonstrate that armed forces have, over the centuries, directed attacks against legitimate human targets without regard to minimum use of force rules, except as an integral element of the proportionality test, and that states have regarded such acts as lawful."<sup>42</sup> If Fenrick were correct, it would be a significant point against RUF. Fenrick, however, follows this statement with no citation and an unusual admission: "The dogmatism of the above assertion is tempered by the fact that the author has not gathered the necessary empirical evidence to support it. It is, however, substantiated to a degree by wide and relevant reading over the years."<sup>43</sup> Such an unsupported assertion is even weaker when one considers that many rules of engagement and official state policies are entirely consistent with RUF.<sup>44</sup> And Fenrick would presumably need to show at least some evidence that state practice to the contrary reflects a different international legal rule rather than violations of existing international law.<sup>45</sup>

Third, some doubt is cast on the viability of RUF by two other areas of LOAC—the prohibition on perfidy and the law on reprisals. Those two areas of law turn on the scope of protections that apply to combatants on the battlefield. Protections that would be afforded by an RUF regime, however, are generally absent from the standard definition of perfidy and reprisals.

Consider perfidy, which is defined as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict."<sup>46</sup> In other words, it is perfidious to simulate surrender or to use a flag of truce. Conspicuously absent from the standard definitions of perfidy, however, are actions that would be protected under an RUF regime. Perfidy is not clearly defined to include, for example, simulating that one is defenseless and unable to resist. Yet the Interpretive Guidance assumes that if a combatant is defenseless and unable to resist, they receive protection. That said, the examples of perfidy generally provided by the *ICRC*

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<sup>42</sup> Fenrick, *supra* note \_\_, at 299.

<sup>43</sup> Fenrick, *supra* note \_\_, at 299 n. 34.

<sup>44</sup> See *supra* note \_\_ (discussing U.S. practices in armed conflict with Al Qaeda, Taliban and associated forces); see also CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR., STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, 3121.01B Enclosure A (June 13, 2005) ("Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required."); cf. COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11.8 (1987) ("Combatants cease to be subject to attack when they have individually laid down their arms to surrender, *when they are no longer capable of resistance*, or when the unit in which they are serving or embarked has surrendered or been captured.") (emphasis added).

<sup>45</sup> Compare Melzer, *supra* note \_\_, at 909 ("Although Parks contends that Section IX of the Interpretive Guidance is not supported by State practice and case law, he fails to provide any evidence of contrary practice or jurisprudence, which would imply the permissibility of manifestly excessive force ....").

<sup>46</sup> Additional Protocol I, art. 37.

*Commentaries* as well as by leading studies of the laws of war are not exhaustive.<sup>47</sup> They do not exclude the possibility of feigning defenselessness, for example, as an act of perfidy.<sup>48</sup>

Consider another area of LOAC: the law on reprisals in armed conflict. The standard definition of reprisals generally evinces no consideration of the type of protections that an RUF regime would afford. Accordingly, a negative inference about the viability of RUF can be drawn from this area of law as well. Lawful reprisals allow belligerents to take actions—including the use of violence—that would otherwise be prohibited by LOAC. Where better to find RUF analysis? That is, if combatants were legally protected from lethal force under certain conditions, the law of reprisals would presumably be well understood to suspend that protection. The problem is that RUF considerations are not part of the standard accounts of reprisal law. Indeed, some accounts are arguably inconsistent with the concept of RUF. Consider the Canadian Ministry of Defense internal memorandum on ratification of Additional Protocol I,<sup>49</sup> which states: “Under [the 1977 Additional Protocol I], the only legitimate reprisal targets are enemy armed forces or military objectives. *Since these are already legitimate targets*, the only means for carrying out reprisals would be the use of unlawful methods of combat, such as denial of quarter, or the use of unlawful weapons, such as biological weapons or lethal gases ...”<sup>50</sup> That said, the extant commentary on reprisals only indirectly undermines the legal viability of RUF. This area of LOAC helps to build the case against RUF. But, like the other issues discussed above, it does not conclusively discredit the conclusions of the Interpretive Guidance.

Accordingly, direct support for RUF remains an open possibility. In the balance of this article, I advance the affirmative case for RUF—and, in particular, the least-restrictive-means approach. The following discussion explains the strong support for such legal restraints. Before assessing that case, however, it is important first to understand the possible scope of conditions on the application of RUF. That consideration will inform our subsequent discussion of the positive support of RUF.

## II. Conditions on the Application of Restraints on the Use of Force

What one thinks about the legal status and practicality of RUF may depend on the kind of restrictions placed on its application. For example, some conditions on the application of the rule could effectively preclude RUF from areas of combat that most concern its critics. In evaluating RUF—and the legal claims favoring and disfavoring it—there are several conditions that should be considered.

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<sup>47</sup> ICRC Commentary to API, Part V, § II (Repression of breaches) ¶ 3457; ICRC, Practice Rule 145: Reprisals, available at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule145#refFn6](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule145#refFn6)>).

<sup>48</sup> Furthermore, other areas of the laws of war might provide indirect support. In some contexts, for example, it is perfidious to feign “distress.” San Remo Manual on International Law Applicable to Armed Conflicts at Sea, art 111 (“Perfidious acts include the launching of an attack while feigning ... surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.”); cf. J. Ashley Roach, *Ruses and Perfidy: Deception During Armed Conflict*, 4. 23 U. TOL. L.REV. 395, 416 (1992).

<sup>49</sup> Memorandum on Ratification of Additional Protocol I, 1986 (quoted in ICRC, Practice Rule 145: Reprisals, *supra* note \_\_\_\_).

<sup>50</sup> *Id.* (emphasis added).

## 1. Internalization of risk for attacking party

Perhaps the most important condition on the application of RUF involves the question whether an attacking party ever has to assume a risk to its own military personnel in choosing the degree or kind of force used against an adversary. The Interpretive Guidance maintains that there is no obligation on the part of the attacking party to assume even a modicum of risk to its own forces.<sup>51</sup> The Interpretive Guidance is not simply conservative in this regard. The Guidance is on the far end of the spectrum. That is, the Guidance countenances no balancing whatsoever, and it categorically excludes consideration of tradeoffs no matter how disproportionate. This position, one might argue, is founded upon a long settled understanding of LOAC. On this view, the principle of proportionality requires attacking forces to internalize risks to minimize the loss of civilian lives. And, in contrast, the principle of proportionality does not require attacking forces to endanger themselves to minimize the loss of enemy combatants' lives.

An alternative position holds that RUF require an attacking party to assume some risk to its own military personnel in choosing the degree or kind of force used against an adversary. The High Court of Israel, for example, took the position that such a risk is part of the RUF inquiry. In its landmark decision on targeted killing, the Court held that the Israeli military forces have an obligation to apply RUF in calculating the degree of force necessary to achieve the military purpose of disabling an enemy combatant. And, the Court suggested that the risk to Israeli forces is a part of that calculation: "Arrest, investigation, and trial are not means which can always be used. ... [A]t times it involves *a risk so great to the lives of the soldiers*, that it is not required. However, it is a possibility which should always be considered."<sup>52</sup>

This position also finds some support in LOAC. As Part III elaborates in detail, multiple aspects of LOAC require attacking forces to protect the lives and wellbeing of enemy combatants. At a general level of abstraction, much of the POW protection regime potentially entails large costs to the detaining power. And it is important to recognize the existence of that general tradeoff in the overall structure of the modern international regime. However, our specific concern here is within the ambit of rules protecting combatants who are engaged in hostilities. And the important point is that a subset of rules within that domain will, under some circumstances, require forces to reduce their level of self-protection—to internalize costs to themselves—to safeguard the interests of enemy fighters.

Consider two examples. First, prohibitions on specific weaponry will often mean that an attacking force cannot resort to more "cost effective" methods of disabling or killing their adversary. For instance, poison may be a more effective means of killing ground forces that are

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<sup>51</sup> See, e.g., ICRC, Interpretive Guidance, *supra* note \_\_, at 82 (stating that "operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive"). The principal author of the Guidance also maintains this position in his own academic writing. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 289 (2009) ("the operating forces can hardly be required to take additional risks in order to capture rather than kill an armed adversary"); *id.* at 288.

<sup>52</sup> The Public Committee against Torture in Israel et al v. The Government of Israel, Supreme Court of Israel sitting as the High Court of Justice, Judgment, Dec. 11, 2006, HCJ 769/02, at ¶ 40 (emphasis added), *available at* <[http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.HTM](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM)>; *id.* at ¶ 40 ("[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our internal law, that rule is called for by the principle of proportionality.") *But see* MELZER, *supra* note \_\_, at 294 (arguing that the Israeli High Court opinion applies a test of necessity despite the opinion's use of the term "proportionality").

dug into trenches while minimizing risks to the attacking force. LOAC, however, categorically precludes that option because of humanitarian concerns for the targets of such an attack. Second, other LOAC rules foreclose tactics that a military might otherwise employ to minimize its own casualties. For example, LOAC categorically prohibits perfidy, assassination, treacherous killing, and the threat to deny quarter (i.e., to declare that there will be no survivors).<sup>53</sup> Indeed, some of these prohibitions have the potential to foreclose the very tactics that a military force could use to win a battle or stave off defeat.

Regardless of which of the two positions—the ICRC position or the Israeli High Court position—is adopted, the important point is that this factor has significant implications for the acceptability of RUF. Proponents of RUF are generally on stronger ground if they stipulate that the rule does not apply when attacking forces would incur any risk to themselves (the Interpretive Guidance’s position), or incur anything more than a moderate risk. The ICRC position is thus relatively conservative in its approach, and is best viewed in this respect as a compromise position.

## 2. Effective territorial control

RUF may be limited to circumstances in which the attacking force possesses effective territorial control. Our discussion in Part III finds no substantial precedent for this constraint.<sup>54</sup> However, this concept is introduced explicitly by the ICRC in the Interpretive Guidance.<sup>55</sup> And, this condition could obviously help to address questions about the practical administration of the rule. Indeed, it might limit the application of the rule to situations that more closely approximate law enforcement operations rather than standard international armed conflicts and active battlefields.<sup>56</sup>

## 3. Level of decision-making authority

A third condition involves the level of decision-making authority. A central question here is whether RUF primarily involves a duty that applies to the individual soldier engaged in a military operation or to individuals further up the chain of command. Such questions have implicated the formulation of related rules under LOAC.<sup>57</sup> For the purpose of our discussion, one might accept an RUF standard only in so far as it applies to commanders or high-level military planners. On this view, an individual soldier in the heat of battle should not have to make the

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<sup>53</sup> For a discussion of how the denial of quarter rule protects combatants actively engaged in hostilities, and not just soldiers once their defeat or surrender is assured, see *infra* note \_\_\_\_.

<sup>54</sup> *But cf.* The Public Committee against Torture in Israel et al v. The Government of Israel, Israel High Court of Justice, *supra* note \_\_, at § 40 (“It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities”).

<sup>55</sup> ICRC, Interpretive Guidance, *supra* note \_\_, at 80.

<sup>56</sup> *Id.* at 80-81 (“The practical importance of the[] restraining function [of the principles of military necessity and humanity] will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control ....”).

<sup>57</sup> *See, e.g.*, CDDH/III/SR.29 Vol XIV, p. 284 ¶ 69 (Finland) (in discussing draft Article 38 [final Article 41] of Additional Protocol I “suggest[ing] that the opening words of the paragraph ‘A Party to a conflict’ should be replaced by the words ‘A commander in the field’”); ICRC Commentary to API, art. 35, at .398 n. 36.

kind of split-second decisions about whether to wound rather than kill or to injure lightly rather than gravely an adversary. That limitation on the rule would not preclude its application to military planners who place soldiers in a position that compels them to use an excessive amount of force against lawful targets (e.g., machine guns to clear a group of unarmed civilians deliberately blocking a bridge).

#### **4. Burdens of proof, standards of proof, and thresholds of justification**

Any legal prohibition can be made more or less stringent through the formulation of different burdens of proof, evidentiary standards, and thresholds of justification. Changes to those elements will affect the acceptability and efficacy of the rule in different contexts. The situation of an armed conflict requires legal rules to appreciate, for example, the special character of decision-making on the battlefield. There are three dimensions along which RUF may be tailored to address such considerations.

The first is the benefit of assumption (or burden of proof) set by the rule. For illustrative purposes, consider two potential default rules:

##### **Presumption of illegality:**

The actor conducting an attack against a legitimate military target must establish that the kind and degree of force is necessary to accomplish a military purpose (an assumption disfavoring the attacking party);

##### **Presumption of legality:**

The actor conducting an attack against a legitimate military target acts lawfully unless it is established that the kind or degree of force was unnecessary to accomplish a military purpose (an assumption favoring the attacking party).

A second related element is the standard of proof. For example, the rule could refer to action that is “manifestly unlawful,”<sup>58</sup> “manifestly necessary,” “manifestly unnecessary,”<sup>59</sup> or “clearly unnecessary.” A third element is the threshold of justification. A rule can range, for example, from “necessity,” to “absolute necessity,”<sup>60</sup> “strict military necessity,”<sup>61</sup> “imperative military necessity,”<sup>62</sup> and even “exceptional cases of unavoidable military necessity.”<sup>63</sup>

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<sup>58</sup> ICC statute art 33.

<sup>59</sup> See, e.g., INT’L COMM. OF THE RED CROSS, FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 15 (2008).

<sup>60</sup> Cf. Civilians Convention, art. 42.

<sup>61</sup> The Laws of War on Land, Oxford, 9 Sept. 1880 (Oxford Manual), art 22; INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 217 (2000).

<sup>62</sup> ICRC Commentary to API, Part V, § II (Repression of breaches) ¶ 3457 (referencing “imperative necessity”); The Laws of War on Land, Oxford, 9 Sept. 1880, (Oxford Manual), art 32 (“imperative necessity of war”); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, art. 4(2) (“in cases where military necessity imperatively requires”); Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 23(g) (“unless ... imperatively demanded by the necessities of war”).

Additionally, these elements may vary according to other conditions discussed in this Part. For example, the presumption may vary depending on the level of decision-making authority. That is, military planners may be held to a higher standard than low-level soldiers in the field. Perhaps only the former may operate under an affirmative obligation as provided by the first presumption presented above. Thus, in planning an operation, high-level officials might have an affirmative obligation to ensure that soldiers are not put into a position where the only choice of weaponry is an excessive military method.

## 5. Mental intent and liability regime

Additional conditions that qualify the application of RUF include the *mens rea* or mental state in performing a prohibited act. That is, the rule could sanction the purposeful, negligent, or reckless use of excessive force.<sup>64</sup> And, another condition involves the form of liability that attaches to violation of the rule. Some violations of LOAC entail criminal liability, and some infractions trigger a legal responsibility but would not constitute a war crime. Obviously the two conditions—intent and liability—can also relate to one another. For example, criminal liability may apply (if it applies at all) only if an individual *purposefully* engaged in an excessive use of force.

These conditions may also vary in accord with other conditions discussed in this Part. For example, consider interactions between the level of decision-making authority and mental intent. The rule may be devised such that top-level commanders are held to a higher standard of care. That is, only those actors could be sanctioned for acting out of negligence or recklessness with respect to excessive uses of force.

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The conditions identified above help to determine the potential scope of the rule and accompanying responsibilities for relevant actors. These various conditions also help to assess the degree to which various experts and institutional actors might have supported RUF. Indeed, the discussion in Part III highlights, in part, disagreements between different actors that are ultimately not about the viability of RUF itself; rather the point of disagreement often relates to one or more conditions on the application of the rule. Understanding the relationship between these conditions and the core rule thus helps to assess the level of support and extent of agreement on RUF in the past.

The legal conditions on the application of RUF also help to understand particular formulations of the rule, and, in that regard, the ICRC's Interpretive Guidance in particular. Indeed, in important respects, the above conditions show that the Interpretive Guidance is a

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<sup>63</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, art 11(2).

<sup>64</sup> Notably the Interpretive Guidance states that “the kind and degree of force ... must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.” ICRC, Interpretive Guidance, *supra* note \_\_, at 17. And, commentators have been critical of this element. *See, e.g.*, Schmitt, A Critical Analysis, *supra* note \_\_, at 40 n. 113 (“Use of the term “actually” is problematic for it introduces an objective test that would not account for situations in which such force reasonably appeared necessary in the circumstances, but which later proved unnecessary.”); *see also* Charles Garraway, *The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of “Direct Participation in Hostilities,”* in 87 INTERNATIONAL LAW STUDIES 177, 181 (2011).

moderate or compromise position—and not, as some critics suggest, an extreme vision of the law.<sup>65</sup> First, consider the most important qualification that the Guidance places on RUF: a categorical condition that the rule applies only when the attacking party would in no way endanger its own forces. The Guidance is accordingly a substantially more modest position than the one adopted by some states.<sup>66</sup> Second, the Guidance’s emphasis on effective territorial control is another substantial restriction on the application of the rule. Third, the Interpretive Guidance does not suggest that a violation of the rule is a war crime. And the principal author of the Guidance has stated that the rule does not incur criminal liability.<sup>67</sup> An obvious implication of this third point is that the Interpretive Guidance, once again, supports a relatively moderate version of RUF. Another (less obvious) implication is that by foreclosing criminal liability, the Guidance has a stronger basis for being more ambitious along other dimensions. For example, if the violation of RUF does not incur criminal liability, it is more acceptable to prohibit conduct that results not only from the *purposeful* use of excessive force but also reckless or negligent uses of excessive force. Accordingly, dimensions along which the Interpretive Guidance might appear to be more liberal should be considered in relation to other, more conservative conditions that affect the Guidance’s framework.<sup>68</sup>

### III. The Case for Restraints on the Use of Force

#### A. Allied Rules of LOAC

Several LOAC rules already qualify the authority to kill enemy fighters. The relevant question is whether RUF constitutes another such qualification on the right to kill. Indeed, critics of RUF who make absolutist or highly exaggerated claims about the general LOAC regime obscure this basic point. Indeed, in suggesting that there are essentially no restraints on the right to kill, these critics raise significant doubts about the assumptions that underpin their position. For example, one scathing<sup>69</sup> critique of the Interpretive Guidance ends with this purported truism: “the historic consequence of combat is that combatants lawfully may kill their enemies and are at constant risk of being killed by them. This article closes with a reminder of that important point.”<sup>70</sup> To substantiate the claim, the author invokes the following authority: “As the

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<sup>65</sup> See *supra* text at notes \_\_ - \_\_.

<sup>66</sup> For Israel, see *supra* text at note \_\_; see Colombia, Comando General Fuerzas Militares, Manual de Derecho Operacional, FF.MM 3-41 (2009), *quoted in* Melzer, *supra* note \_\_, at 910 (referring to “unacceptable risks and without losing operational effectiveness”).

<sup>67</sup> Nils Melzer, *Targeted Killing or Less Harmful Means? – Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity*, 9 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 87, 111 & n. 113 (2006).

<sup>68</sup> See *supra* note \_\_ (discussing the use of the term “actually necessary”).

<sup>69</sup> Colonel Parks, for example, states that the Interpretive Guidance’s “ill-constructed theory is flawed beyond repair.” Parks, *supra* note \_\_, at 828.

<sup>70</sup> Parks, *supra* note \_\_, at 830; cf. Taylor, *supra* note \_\_, at 105 (“First, conventional and customary IHL expressly regulates whom and what belligerents can attack. Second, conventional and customary IHL does not expressly restrict the kind and degree of force that can be applied against an individualized target so long as the attack is otherwise lawful under IHL.”); Talyor *supra* note \_\_, at 110 (“Strikingly absent . . . is any customary or conventional restraint on the kind and degree of force permissible in the direct attack. According to one IHL expert, this was no mistake; ‘positive IHL essentially left it up to the parties to the conflict to decide what kind and degree of force was permissible against persons not entitled to protection against direct attack.’”); Boothby, *supra* note \_\_, at 163-64 (“Once the object (or person) has become a military objective, it is for the decision maker to determine how to prosecute the attack in a manner compliant with the distinction and discrimination rules. 68 To require the attacker

Dutch international law scholar Hugo Grotius stated, ‘in general killing is a right in war’ and ‘according to the law of nations, anyone who is an enemy may be attacked anywhere.’”<sup>71</sup>

LOAC has come a long way since Grotius---especially concerning the right to kill.<sup>72</sup> Indeed, in the same discussion as the above quotation, Grotius also wrote that under the law of nations: “[h]ow far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity;”<sup>73</sup> “[i]t is permissible to slay deserters ... wherever they may be found;”<sup>74</sup> “[n]ot even captives are exempt from this right to inflict injury;”<sup>75</sup> and “[t]he right to inflict injury extends even over those who have surrendered unconditionally ... [and] whose unconditional surrender was accepted.”<sup>76</sup> Moreover, some limits on killing were evident even by the time Grotius’ wrote. Grotius stated, for example, that under the law of nations, it was forbidden “to kill an enemy by poison;”<sup>77</sup> “to poison weapons ... the poisoning of javelins;”<sup>78</sup> and to use “assassins who act treacherously” in killing the enemy.<sup>79</sup> In short, the proposition that killing enemy fighters is essentially an unlimited right is an anachronism and deeply flawed. And, *a fortiori*, so is the reliance on Grotius for such a claim.

The modern law of war imposes several restrictions on the use of lethal force against individuals who are otherwise legitimate military targets. The important point is not that these parts of the general structure of LOAC provide direct support for RUF. The point is more generally that the design of LOAC already encompasses similar forms of constraint. Indeed, it is important as a starting point to consider other significant restrictions that qualify the right to kill enemy fighters.

First, several rules regulate the type of violence that can be used against enemy combatants. Those rules include prohibitions on assassination; killing or wounding treacherously; killing, injuring or capturing an adversary perfidiously, and the denial of quarter.<sup>80</sup> A critic might argue that these prohibitions are distinct from RUF because they are based on instrumental considerations of upholding other aspects of LOAC. For example, the prohibition on perfidy helps to safeguard individuals who have special protections under LOAC (e.g., fighters who surrender, members of the ICRC, medical personnel). These rules, however, are also based on

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also to limit the force used in that attack in some other way is to go clearly beyond what the law stipulates and is not, it is suggested, either realistic or reflective of State practice.”)

<sup>71</sup> Parks, *supra* note \_\_, at 830 n. 179 (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS (1646 ed., trans. by Kelsey, 1925), Book viii, 1.

<sup>72</sup> Cf. G.I.A.D. Draper, *Grotius’ Place in the Development of Legal Ideas about War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177, 197-98 (Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds. 1990).

<sup>73</sup> GROTIUS, *supra* note \_\_, at ix 1.

<sup>74</sup> *Id.* at viii, 1.

<sup>75</sup> *Id.* at x, 1.

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

<sup>77</sup> *Id.* at xv, 1.

<sup>78</sup> *Id.* at xvi, 1.

<sup>79</sup> *Id.* at xviii, 4.

<sup>80</sup> AP I art 40. A skeptic might object that the prohibition on the denial of quarter is unlike the other rules because it protects combatants once they have laid down their arms or surrendered. LOAC, however, not only prohibits the act of denying quarter once the fight is over. It also prohibits a declaration, or threat, to deny quarter to enemy combatants while they are engaged in hostilities. This aspect of the rule is designed to protect combatants from terrorization that is inherent in such a declaration or threat. *See, e.g.*, ICRC Commentary to Protocol I, art. 40, at ¶¶ 1591 & 1594.

considerations that are common to RUF. For example, the general prohibition on perfidy is also based on non-instrumental values of military honor. And these rules, like RUF, are also arguably designed to discourage forms of destructiveness that can impede the ability of enemies to return to peace.<sup>81</sup>

Second, the law on reprisals also limits the use of lethal force against combatants. LOAC no longer allows reprisals against civilians and POWs; however, it does allow such measures against combatants. In exacting a lawful reprisal, a party can, for example, potentially use an outlawed weapon or declare that no quarter will be given to enemy fighters.<sup>82</sup> At first blush, those measures might suggest that reprisals are a domain in which the kind and degree of force against combatants lacks restraint. The more informed view is that the law of reprisal involves another domain—similar to RUF—that shows how LOAC constrains belligerents' use of force against legitimate military targets.

Consider the conditions placed on the use of reprisals on the battlefield. A reprisal must be necessary<sup>83</sup>—reprisals are, indeed, “a special case of necessity”<sup>84</sup>—and they must be proportionate.<sup>85</sup> The target of a reprisal must also be given warning and ample opportunity to alter their practices to avoid the use of force.<sup>86</sup> Also significant, a reprisal cannot be taken in anticipation of an impending unlawful attack. A belligerent can resort to such countermeasures only after an illegal assault on its forces has begun. It is important to underscore that all these conditions restrict a belligerent's right to engage in self-help—even when doing so is vital to

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<sup>81</sup> See, e.g., Report of the ICRC, Report to the Conference of Gov't Experts on the Reaffirmation and Development of IHL Applicable in Armed Conflicts, Vol. IV (Rules Relative to the Behaviour of Combatants), 1971, at 11 (with respect to *refusal of quarter*: “[B]ecause [the refusal of quarter] incites the opposing side to employ methods of a similar type, and in this way the struggle may degenerate to a hateful, implacable and inhuman level, making the restoration of peace all the more difficult.”); Report of the ICRC to the XXIst International Conference of the Red Cross, Istanbul, 1969, Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts, at 80-81 (with respect to *perfidy*: “In general, everything that is perfidious should be prohibited. But, as the experts pointed out, it is no longer so much a matter of obtaining a spirit of chivalry on the battlefield or an ideal of loyalty, as of denouncing everything that can make a return to peace more difficult. Mention was made of Kant's Project for Lasting Peace, in which it is said that a humane attitude should be preserved towards the enemy, since otherwise peace could never be re-established.”); id. at 75 (with respect to superfluous injury and unnecessary suffering: “abuses add not only to the difficulty of reverting to peace but of mutual reconciliation”).

<sup>82</sup> ICRC Commentary AP I, art. 40, at ¶ 1596; United States, Annotated Supplement to Commander's Handbook on the Law of Naval Operations sec. 11.7 n. 45 (1997) (“Although it is not prohibited to issue ... an order [that no quarter will be given or that no prisoners will be taken] as a reprisal, this form of reprisal offers little military advantage.”) quoted in ICRC, United States of America, Practice Relating to Rule 145: Reprisals, available at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_us\\_rule145\\_sectiona](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule145_sectiona)>. But see ICRC, 1971 Report, *supra* note \_\_, at 11 (“Whereas in 1863 Francis Lieber still considered that the belligerent who gave no quarter could expect to be given none, the general principles of law no longer leave room for such a line of thought in our days. Quite the contrary, the refusal to give quarter by one of the armies does not legitimate a refusal of quarter by the opposing army.”). See also ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR 447-48 (1976) (discussing unsettled international law on denial of quarter as a form of reprisal).

<sup>83</sup> The ICRC Commentary to Additional Protocol I refers to a standard of “imperative necessity.” ICRC Commentary to API, part V, § II, at ¶ 3457.

<sup>84</sup> Donald A. Wells, *The Limits of War and Military Necessity*, 19 J. SOCIAL PHIL. 3, 4 (1988)

<sup>85</sup> ICRC, Practice Rule 145: Reprisals, *supra* note \_\_; ICRC Commentary to API, Part V, § II ¶ 3457.

<sup>86</sup> Reprisals are accordingly measures of “last resort.” ICRC, Practice Rule 145: Reprisals, *supra* note \_\_; Prosecutor v. Martić, Appeals Chamber, Judgment, IT-95-11-A (Oct. 2, 2008) ¶¶ 264-65; ICRC Commentary Part V, § II ¶ 3457; Greenwood (1989), *supra* note \_\_, at 47; Prosecutor v. Kupreškić, Trial Chamber, Judgment, IT-95-16-T (Jan. 14, 2000) § 535).

protecting its own forces from severe and unlawful attacks. As the Annotated Supplement to the U.S. Naval Handbook (1997) states: “[A]n offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the enemy’s illegal acts.”<sup>87</sup> Yet even in that context, LOAC restricts the degree and kind of force against enemy combatants.

Third, consider the “release on the spot” rule.<sup>88</sup> Under LOAC, if a military unit comes upon enemy combatants in the field whom the unit can capture but is unable to detain, the unit cannot kill these adversaries but must release them.<sup>89</sup> In other words, if the unit has no capacity to detain (and to detain humanely), the only option is release. The enemy combatants cannot be killed;<sup>90</sup> indeed, if feasible for the capturing force, the enemy fighters must be equipped upon release with supplies to ensure their safety and survival.<sup>91</sup>

Fourth, consider the restrictions on the use of force against an enemy fighter escaping captivity. Under the POW Convention, using weapons against an individual escaping captivity constitutes “an extreme measure”<sup>92</sup>--one of last resort<sup>93</sup>--and “shall always be preceded by warnings appropriate to the circumstances.”<sup>94</sup> It is thus remarkable that there are even situations

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<sup>87</sup> United States, Annotated Supplement to Commander’s Handbook on the Law of Naval Operations, *supra* note \_\_, at § 6.2.3.1 n. 38.

<sup>88</sup> ICRC Commentary to API, art. 41(3); *see also* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, 118 HARV. L. REV. 2653, 2659-61 (2005).

<sup>89</sup> AP I art 41(3). The provision applies to “persons entitled to protection as prisoners of war.” The ICRC Commentaries explain that “[r]ead in a literal sense, the text applies equally to prisoners whose status is doubtful, as they are covered by the protection of the Third Convention pending clarification of their status by a competent tribunal.” ICRC Commentary to API, art. 41, ¶ 1626. The ICRC’s study on Customary International Humanitarian Law states: “Practice recognizes that the duty to give quarter is to the benefit of every person taking a direct part in hostilities, whether entitled to prisoner-of-war status or not. This means that mercenaries, spies and saboteurs also have the right to receive quarter and cannot be summarily executed when captured.” Int’l. Comm. Red Cross, Customary International Humanitarian Law, Rule 47: Attacks against Persons Hors de Combat, *available at* <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule47](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47)>; *see also* ROSAS, *supra* note \_\_, at 439-40.

<sup>90</sup> *See, e.g.*, Switzerland’s Basic Military Manual (1987): “If a commando raids an enemy post and captures soldiers by surprise without being able to take them along with it in its retreat, it shall not have the right to kill or injure them. It may disarm them, but it shall free them.” *reprinted in* ICRC CIHL, Practice Rule 47; Israel’s Manual on the Laws of War (1998) states: “Considerations such as the delay involved in guarding prisoners of war as opposed to the attainment of an objective, or even the allocation of manpower for transferring them to the rear line, do not permit the harming of prisoners who surrendered and were disarmed. It is hard to imagine a military mission so urgent as to render impossible the evacuation of prisoners to the rear or even binding them until additional forces arrive and which justifies their murder.” *reprinted in* ICRC, CIHL Practice Rule 47; The U.S. Field Manual (1956) states: “A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces.”

<sup>91</sup> POW Convention art 41(3) (“[T]hey shall be released and all feasible precautions shall be taken to ensure their safety.”). Notably, acceptance of this rule in 1977 did not go without notice; it was a remarkable advance that was won after difficult negotiations. O.R. XV, p. 383 & 384, CDDH/236/Rev.1, ¶¶ 21 & 24 (“Article 38 on quarter posed no drafting problems. Article 38 bis on hors de combat proved considerably more difficult.”; “Paragraph 3 dealing with the release of prisoners who could not be evacuated proved quite difficult.”).

<sup>92</sup> GC III, art. 42.

<sup>93</sup> ICRC Commentaries to GC III, art. 42, p. 246 (“‘An extreme measure’ means that fire may be opened only when there is no other means of putting an immediate stop to the attempt.”).

<sup>94</sup> GC III, art. 42; *see also* ICRC Commentaries to API, art. 42, at 247 (“The essential thing is that the warnings must be clearly perceived and understood by those to whom they are addressed. The number of warnings is not stipulated, but it will be noted that the Convention uses the plural form, which necessarily implies at least two warnings ....”).

during armed conflict in which belligerents are supposed to warn an adversary that they are about to shoot to kill. Admittedly, captivity inherently involves forceful measures, and the legal restrictions may thus be interpreted simply to define the kind and degree of force permitted to keep enemies captive.<sup>95</sup> However, a key factor in the design of the rule is that such individuals are no longer considered *hors de combat*. Article 41 of Additional Protocol I, for example, states: “A person is *hors de combat* if ... he is in the power of an adverse Party ... provided that in any of these cases he ... does not attempt to escape.” And the escaping individual retains the status of *entre de combat* until “the moment the person attempting to escape comes to a halt, [whereby] he again places himself under the protection of the Detaining Power.”<sup>96</sup>

In summary, modern LOAC already qualifies the right to kill or injure enemy fighters along several important dimensions. The argument in favor of RUF would have a higher threshold to cross if these other constraints did not exist. Indeed, the more LOAC has evolved away from the Seventeenth Century conception of an unfettered right to kill and maim, the more plausible an affirmative case for RUF becomes. The above discussion details multiple and profound ways in which the modern legal regime has developed since Grotius. The remaining question is whether RUF is another such development.

## **B. An Alternate Path: The scope of *hors de combat***

Before discussing the direct support for RUF itself, it is important to analyze another area of LOAC that has, over time, given rise to some of the very same constraints that an RUF regime would produce. The degree to which this alternate set of rules generates the same legal effects as RUF will—even more directly than the rules previously discussed—support the case for RUF.

Perhaps the most important line drawn by RUF is between the use of force to kill versus the use of force to capture. According to the Interpretive Guidance, for instance, a soldier who is rendered defenseless or incapable of resistance should not be subject to attack. Importantly, the application of another set of rules—the definition and protection of *hors de combat*—can effectuate the same result.<sup>97</sup> That is, once a combatant becomes *hors de combat*, he cannot be subject to attack but can be apprehended and detained.

The rules governing *hors de combat* can thus perform much of the same work as the legal boundaries set by RUF. The most important question is how expansively the definition of *hors de combat* is drawn. Indeed, a very broad definition of *hors de combat* could even place more limits on the use of force than RUF. That is, when a soldier becomes *hors de combat*, he is

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<sup>95</sup> Cf. ICRC Commentary to POW Convention, art. 42 (“Captivity is based on force, and although there can be no doubt on the matter, it is recognized in international customary law that the Detaining Power has the right to resort to force in order to keep prisoners captive.”).

<sup>96</sup> ICRC Commentaries to POW Convention, art. 42; *see also* ICRC Commentary to Protocol I, art 41, at 1613 (“From the moment that combatants have fallen “into the hands” of the adversary, the applicability of the Third Convention can no longer be contested. They are prisoners of war and should never be maltreated, but should always be treated humanely. If they make an attempt to escape or commit any hostile act, the use of arms against them is once more permitted .... The same applies a fortiori for adversaries who benefit only from the safeguard of Article 41 without being recognized as prisoners of war.”).

<sup>97</sup> Indeed, other commentators have suggested that prohibitions on the degree or kind of force preclude the killing of combatants who are “completely defeated” and “practically defenseless” without giving them an opportunity to surrender. *See* Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 34 INT’L REV. OF THE RED CROSS 98, 116 (1994); Melzer, *Targeted Killing or Less Harmful Means*, *supra* note \_\_, at 97 n. 54.

completely immune from attack—from being either killed or injured. Such a categorical bar and fixed effect on the use of force can be more restrictive than the context-specific calibration of LRM against a changing enemy target. In addition, willful violation of the rule protecting *hors de combat* is clearly a war crime.<sup>98</sup> Violation of RUF may or may not incur criminal liability.<sup>99</sup>

The important point is that the *hors de combat* framework has the potential to effectuate the same results as RUF in many cases involving the decision to kill or capture an adversary. And the greater degree to which the *hors de combat* regime provides the same or greater protections as RUF, the more conventional and acceptable RUF itself becomes.

Contemporary LOAC includes a relatively broad definition of *hors de combat*. Prior to 1977, the safeguard from attack arguably applied only to combatants who surrendered or were wounded and sick. In the march to codify a new set of protocols, an important and influential report by the United Nations Secretary-General in 1970 called for the expansion of the class of protected actors.<sup>100</sup> After referring generally to “imperfections, inadequacies and gaps”<sup>101</sup> in the Geneva Conventions of 1949, the Secretary-General’s Report suggested the need for a conference to draft “protocols additional to the existing conventions.”<sup>102</sup> In identifying deficiencies in the law, the Report stated that consideration might be given to “elaborating or supplementing the existing rules on the basis of the following ... principle[.]”:

It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.<sup>103</sup>

Three years later, in 1973, the ICRC submitted the Draft Additional Protocols to the Geneva Conventions, which adopted a similar position. The text for draft article 38 mirrored, in the most important respects, the Secretary-General’s report. In addition to combatants who had surrendered, the draft included a separate class of protected actors: an enemy who “no longer has

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<sup>98</sup> Additional Protocol I provides that “making a person the object of attack in the knowledge that he is *hors de combat*” constitutes a grave breach “when committed wilfully ... and causing death or serious injury.” API, art 85(3). See also ICRC Commentary to API, art. 85, at 998; paras. 3491-93 (discussing intent standard for criminal liability). The Netherlands was among the first to recognize important relationships between the rule defining *hors de combat* and the grave breaches regime. And the delegation accordingly helped to shape the element of intent for criminal liability. At the 1977 conference, the Dutch representative explained: “The part with which the Committee was concerned ... described as a grave breach of the Protocol refusal to spare the life of an enemy who, having laid down his arms, no longer had any means of defence or had surrendered. ... His delegation was prepared to consider the extension of the definition of grave breaches given in the third Geneva Convention of 1949 relative to the treatment of prisoners of war to cover situations in which combatants were *hors de combat*, in other words the situation in which they found themselves just prior to being captured and becoming prisoners of war. But it would be necessary to adopt a prudent approach and to define those grave breaches in terms of wilful killing and wilfully causing serious unnecessary injury to an adversary *hors de combat*.” CDDH/III/SR.29 Vol XIV, p. 281 para 60; p. 282 paras. 62 (Netherlands).

<sup>99</sup> See text at notes \_\_\_ and \_\_\_.

<sup>100</sup> UN Secretary-General, Report on Respect for Human Rights in Armed Conflict, UN Doc. A/8052, 18 Sept. 1970 [hereinafter Secretary-General 1970 Report].

<sup>101</sup> *Id.* at ¶ 15; p. 10.

<sup>102</sup> *Id.* at ¶ 18; p. 11.

<sup>103</sup> *Id.* at ¶ 107; pp. 35-36.

any means of defence.”<sup>104</sup> The accompanying Commentary explained that “this cardinal rule” is based on the following principle:

“[The] underlying principle is that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance, that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting....”<sup>105</sup>

At the final treaty conference in Geneva, the states agreed to a broad definition of *hors de combat* that went far beyond the condition of combatants who have surrendered.<sup>106</sup> Draft article 38 was codified as Article 41 in the final text. Article 41(2) of the Protocol provides:

A person is *hors de combat* if:

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

The key element is the protection of individuals who are “in the power of an adverse party.” Most obviously, that provision includes a class of actors independent of individuals who have surrendered. Indeed, the latter are covered by the separate provision of Article 41(2)(b). A few states at the treaty conference had proposed restricting the definition to provide only for combatants who have surrendered, or are wounded or sick. Those formulations, however, failed to obtain sufficient support. Instead, the drafters understood that such restrictions would

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<sup>104</sup> The full text of the draft article provided:

Article 38. -Safeguard of an enemy *hors de combat* and giving quarter

1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:

- (a) is unable to express himself, or
- (b) has surrendered or has clearly expressed an intention to surrender
- (c) and abstains from any hostile act and does not attempt to escape.

2. Any Party to the conflict is free to send back to the adverse Party those combatants it does not wish to hold as prisoners, after ensuring that they are in a fit state to make the journey without any danger to their safety.

3. It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.

Int'l Comm. Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (Oct. 1973), at 44 [hereinafter ICRC, 1973 Draft Protocols with Commentary].

<sup>105</sup> ICRC, 1973 Draft Protocols with Commentary, *supra* note \_\_, at 44.

<sup>106</sup> It perhaps should be noted that the article also covers unlawful and irregular combatants. *See, e.g.*, ICRC Commentary to API, art. 41, at p. 483 ¶ 1606 (“The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions ....”); cf. also CDDH/III/SR.29 Vol XIV, p. 281 ¶¶ 59; (Netherlands) (“the term ‘enemy’ should have the broadest possible interpretation, namely anyone taking part in hostilities, whether lawful combatant or not”).

exclude, for example, the members of several militaries that prohibit any form of surrender.<sup>107</sup> And the three categories in the final text of Protocol I—Article 41(2)(a), (b), and (c)—thus provide separate and sufficient conditions for *hors de combat* status.<sup>108</sup>

Several aspects of Article 41(2)(a) and its negotiating history indicate that the scope of this category is relatively broad. First, the terminology was specifically chosen to apply to individuals prior to the point of capture. In contrast, the Hague Conventions of 1899 and 1907 had both extended protections to members of the armed forces “in the case of *capture* by the enemy.”<sup>109</sup> And the 1929 POW Convention also extended protections to individuals who were “captured” by the adverse party.<sup>110</sup> That terminology, according to the *ICRC Commentaries*, “might have led to the belief that they first should have been taken into custody in order to be protected.”<sup>111</sup> The 1949 Geneva Conventions expanded the protected class further. That is, the POW Convention of 1949 accorded protection to individuals who had “fallen into the power” of the adverse party—an expression that had “a wider significance”<sup>112</sup> than the term used in the 1929 Convention. As Howard Levie explained, “Rhetorically, ‘capture’ implies some affirmative act by the military forces of the capturing power. On the other hand, an individual can have ‘fallen into the power of the enemy’ by means other than capture ....”<sup>113</sup>

The 1977 Additional Protocol involved a further expansion by discarding the terminology of the 1949 Convention (“fallen into the power”) and replacing it with “is in the power.” As the *Commentary* to the Protocol explains: “Although the distinction may seem subtle, there could be a significant difference between ‘being’ in the power and having ‘fallen’ into the power.”<sup>114</sup> The former, according to the *Commentary*, is intended to safeguard individuals who have not even been “apprehended.”<sup>115</sup>

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<sup>107</sup> ICRC Commentary to Protocol I, art. 41, at 1612 (“A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted.”).

<sup>108</sup> ICRC Commentary to Protocol I, art. 41, at ¶ 1610 (“In accordance with this paragraph, a person is considered to be rendered ‘hors de combat’ either if he is ‘in the power’ of an adverse Party, or if he wishes to surrender, or if he is incapacitated.”).

<sup>109</sup> Regulations attached to the Second Hague Convention of 1899, art. 3; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), art. 3.

<sup>110</sup> Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, art. 1.

<sup>111</sup> ICRC Commentary to Protocol I, art. 41, at ¶ 1602.

<sup>112</sup> ICRC Commentary to 1949 Geneva Convention III, art. 4, at 50; ICRC Commentary to Protocol I, art. 41, at 1602 (“The expression adopted in 1949, ‘fallen into the power,’ seems to have a wider scope [than ‘captured’], but it remains subject to interpretation as regards the precise moment that this event takes place.”); Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 237 (“At the invitation of the Chairman, Mr. Wilhelm (International Committee of the Red Cross) explained that at the Conference of Government Experts held at Geneva in 1947, it had been suggested that the words ‘fallen into enemy hands’ had a wider significance than the word ‘captured’ which appeared in the 1929 Convention, the first expression also covering the case of soldiers who had surrendered without resistance or who had been in enemy territory at the outbreak of hostilities. This suggestion had been accepted.”); Secretary-General Report 1970, ¶ 105.

<sup>113</sup> HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 35 (1978).

<sup>114</sup> ICRC Commentary to Protocol I, art. 41, at ¶ 1612.

<sup>115</sup> ICRC Commentary to Protocol I, art. 41, at ¶ 1612. *See also* Secretary-General Report, *supra* note \_\_, at ¶ 105 (“There may still be some doubts, however, whether the article [of the 1949 POW Convention] becomes operative in all cases from the moment a disabled combatant is surrounded or otherwise within the range of the weapons of the enemy or whether it requires actual apprehension by the enemy.”); ICRC Commentary to Protocol I, art. 41, ¶ 1612

Most important for our discussion of RUF, the class under 41(2)(a) potentially includes the types of actors contemplated in the Secretary-General's 1970 report and in the Draft Protocol of 1973. That is, the drafters of article 41 appear to have opted for a more general category—"in the power of an adverse Party"—with the potential to include the more specific situations identified in the Secretary-General's Report (a combatant "who has obviously no longer any weapons, without need for any expression of surrender on his part") and in the Draft Protocol (an individual who "no longer has any means of defence"). In particular, the *ICRC Commentary* to Article 41 explains that the broader category of individuals in the power of an adverse party includes "cases [in which] land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat."<sup>116</sup> The decision to kill an adversary in such a vulnerable position is thus prohibited. Moreover, the *Commentary* explains that the protection applies as long as the individual is defenseless or all his means of defense have been exhausted. The *Commentary* states: "A defenceless adversary is 'hors de combat' whether or not he has laid down arms."<sup>117</sup> That statement generally comports with the understanding expressed during the treaty negotiations. That is, it corresponds with the framework used by Jean de Preux, on behalf of the ICRC, in formally introducing the draft text.<sup>118</sup> And it corresponds with statements made by various delegations in support of that framework.<sup>119</sup> Furthermore, the leading treatise on Protocol I is in general agreement. Bothe, Partsch, and Solf's *New Rules for Victims of Armed Conflict* states: "under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless."<sup>120</sup>

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("Some delegations considered that this situation was already covered by the Third Geneva Convention. If so, those concerned are protected both as prisoners of war and by the present provision. In this sense there is an overlap. On the other hand, others considered that the Third Convention only applies from the moment of the actual capture of the combatant, and that therefore the present provision constitutes the only safeguard in the interim.")

<sup>116</sup> ICRC Commentary to Protocol I, art. 41, at 1612; Cf. ICRC Commentary to Protocol I, art. 41 at 1614 (stating in another context, "when they fall into the power of the adverse Party, i.e., when the latter is able to impose its will upon them").

<sup>117</sup> ICRC Commentary to Protocol I, art. 41, at 1612; Cf. ICRC Commentary to Protocol I, art. 41 at 1614.

<sup>118</sup> At the conference, Jean de Preux, on behalf of the ICRC, introduced the draft article stating that the article "was concerned with the safeguard of an enemy *hors de combat*, whether or not he was actually a prisoner. ... The determining factor was abstention from hostile acts of any kind, either because the means of combat were lacking or because the person in question had laid down his arms. It was therefore necessary that there should be an objective cause, the destruction of means of combat, or a subjective cause, surrender." CDDH/III/SR.29 Vol XIV, p. 276 ¶ 30.

<sup>119</sup> During the treaty negotiations, the USSR stated that "the various amendments submitted ... were in line with the ICRC text and could be moulded without too much difficulty into a single text, even though, on some points, they differed." CDDH/III/SR.29 Vol XIV, 279 ¶ 52; see also CDDH/III/SR.29 Vol XIV, 284 ¶ 74 (Czechoslovakia) (stating "that on the whole he supported the ICRC text of article 38. He noted that the amendments submitted were not in contradiction with that text."); CDDH/III/SR.29 Vol XIV, 281-82 ¶¶ 60 & 62 (Netherlands); CDDH/III/SR.29 Vol XIV, at 283 ¶ 68 (USSR); cf. *id.* at 283 ¶ 69 (Finland). The U.S. delegate, George Aldrich, in his capacity as Rapporteur, reported to the conference that although drafting the article "had required considerable effort owing to the difficulty of defining the concept of a person hors de combat," it was possible to "draft a text which commanded general approval and on the subject of which no reservation had been made." CDDH/III/SR.29 Vol XIV, at \_\_\_\_.

<sup>120</sup> BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 219; see also KNUT DÖRMANN, LOUISE DOSWALD-BECK, ROBERT KOLB, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 190 (2003).

One of the few commentators to study the record closely, Ian Henderson, reaches a different conclusion about the treaty negotiations.<sup>121</sup> His analysis, however, depends on a misunderstanding of a proposal made by Brazil during the proceedings. Henderson bases his argument on the following contention: Brazil proposed an amendment to article 38 (which included the phrase “no longer has any possibility of defence or has surrendered”<sup>122</sup>), and that proposal was rejected by the conference. However, that phrase was already part of the 1973 Draft Protocol.<sup>123</sup> It was not novel to the Brazilian proposal. The principal contribution of the Brazilian proposal instead involved the idea that, in the words of the Brazilian delegate, “It was necessary to stipulate the conditions that an enemy had to fulfil in order to be deemed to have surrendered. Those conditions were laid down in the Brazilian amendment. ... The effect of the Brazilian amendment would be to improve paragraph 1 of article 38, by making it more precise and easier to understand and apply.”<sup>124</sup> Thus the Brazilian proposal does not shed much light on the fate of safeguards that apply to individuals outside of the situation of surrender, including combatants rendered defenseless.

Although Henderson does not mention it, admittedly a few states explicitly took issue with the Draft Protocol’s phrase “no longer has any means of defence.”<sup>125</sup> And, as already mentioned, some states proposed draft language that would have limited the class of *hors de combat* to only the wounded, the sick, and those who surrender. However, the general support for the 1973 Draft Protocol was significant. And, the drafters finally opted for a broad, independent class of combatants who are “in the power of an adverse Party” in addition to the class of combatants who are wounded, sick, or surrender. If anything, the negotiations alerted the drafters to the substantial support for the idea that defenselessness might independently render an individual *hors de combat*—which could be covered under the breadth of Article 41(2)(a). It is in this light that the *Commentary*, as discussed above, states that “a defenceless adversary is ‘hors de combat’”<sup>126</sup> and that the Bothe, Partsch, and Solf treatise concurs.

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In the final analysis, the rules defining *hors de combat* share much in common with RUF. And early on, the UN Secretary-General and ICRC recognized this commonality. RUF regulate the kind and degree of violence that can be employed against individuals who are legitimate military targets. That analysis is obviated, however, if the relevant individual should not be

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<sup>121</sup> IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 84 (2009).

<sup>122</sup> The proposed amendment stated: “An enemy ‘hors de combat’ is one who has no longer any possibility of defence or has surrendered. An enemy is considered as having surrendered when, having laid down his arms, has clearly expressed an intention to surrender and abstaining from any hostile act does not attempt to escape.”

<sup>123</sup> There is one immaterial difference: The 1973 Draft Protocol used the term “any *means* of defence” rather than any *possibility* of defence”. ICRC, 1973 Draft Protocols with Commentary, *supra* note \_\_, at 44.

<sup>124</sup> CDDH/III/SR.29 Vol XIV, p. 277 ¶¶ 35-36.

<sup>125</sup> See CDDH/III/7 Vol III p. 169 (amendment proposed by Uruguay to delete “no longer has any means of defence”); CDDH/III/SR.29 Vol XIV, p. 276 ¶ 33 (Uruguay) (“introducing amendment CDDH/III/7, said ... it was clear that if an enemy was hors de combat, it was because he had laid down his arms and had thereby lost his status as a combatant. He should therefore be regarded from that moment as a non-combatant”); CDDH/III/SR.29 Vol XIV, p. 284 ¶ 72 (Spain) (“He would like the present paragraph 1 to reproduce the wording of Article 23 c) of The Hague Regulations of 1907 and the words ‘no longer has any means of defence’ to be replaced by the words ‘or having no longer means of defence,’ the comma implying a condition. Otherwise he would rather the phrase was deleted.”); CDDH/III/SR.29 Vol XIV, p. 280 ¶ 55 (Venezuela) (endorsing the Uruguayan amendment).

<sup>126</sup> ICRC Commentary to Protocol I, art. 41, at 1612; *see also supra* text at notes \_\_ - \_\_.

considered a legitimate military target in the first place. Thus a threshold question is whether the targeted individual is *hors de combat*. The understanding reached in the 1970s codification effort was that combatants who no longer have the means to defend themselves—who are at the mercy of their adversary—are, indeed, covered by this more direct and, in some cases, more protective framework. It would fit within this general structure if LOAC also imposed restraints on the kind and degree of force when a fighter clearly poses no threat and can be easily apprehended without grave violence. We turn now to that part of the legal regime.

### C. Direct Support for a Least-Restrictive-Means Analysis

It is important to locate RUF in the general structure of the LOAC regime. The most direct source of support for RUF can be traced back not to Grotius, but to the reconstitution of LOAC in 1868. At a meeting hosted by Russia in Saint Petersburg, an international military commission produced a Declaration that generally circumscribed the use of force during combat and more specifically reached the first international agreement prohibiting the use of a particular weapon. The Declaration's preamble provides that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." According to the Declaration, it is therefore perfectly legitimate to use military violence to overcome and incapacitate the enemy, that is, "to disable the greatest possible number of men;" however, "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." This modern understanding on the limits of force was reaffirmed at the Hague Conferences of 1899 and 1907,<sup>127</sup> and in more recent times by the International Court of Justice.<sup>128</sup>

The 1868 Saint Petersburg Declaration thus constituted a turning point. And it is important to reflect on how fundamental a challenge this new understanding posed to notions of an unfettered right to kill.<sup>129</sup> For example, if a lawful objective is to disable as many combatants as possible to

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<sup>127</sup> The preambular language of the Saint Petersburg declaration is also embodied in the following provision of the Hague Convention: "The right of belligerents to adopt means of injuring the enemy is not unlimited." Hague Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907 (Hague IV), art. 22. And Article 23 of the Hague Regulations prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering." *Id.* at art. 23. See also Project of an International Declaration concerning the Laws and Customs of War. Brussels, Aug. 26, 1874, arts. 12 & 13; The Laws of War on Land, Oxford Manual, Sept. 9, 1880, arts. 8 & 9.

<sup>128</sup> In the 1996 *Advisory Opinion on Nuclear Weapons*, the Court described the protection against unnecessary suffering of combatants as one of two "cardinal principles" of the LOAC regime:

[T]he conduct of military operations is governed by a body of legal prescriptions [prescriptions juridiques]. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations .... The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable." ... The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects ... According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. ...

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *Advisory Opinion*, 1996 I.C.J. 66, ¶¶ 77-78.

<sup>129</sup> Shortly after the 1907 Hague conferences, Spaight wrote:

The terms of the Declaration of St. Petersburg and Articles XXII-XXIV of the [Hague Regulations] are an authoritative[sic] refutation of ... the contention that everything is permissible which will induce an enemy to sue for peace. The civilised world has signed and sealed its approval of two great principles. ... The general

remove them from the battlefield, presumably the law would permit military means that ensure those fighters will not return to combat again. So why not allow weapons deliberately designed to render their deaths inevitable? If enemy fighters never get off the operating table, all the better from the other side's view of military objectives.

Part of the answer is the principle of humanity (and another part is the definition of necessity). Even if a weapon offers some military advantage, its use could be considered inhumane. Rendering death inevitable has been deemed inhumane by the international community, and so have particular forms of dying and suffering such as by poison. In a few instances, states have thus agreed to outlaw a form of weaponry even though its use might have offered military benefits under particular conditions.<sup>130</sup> Implicit in such decisions is the determination that the inhumane effects of a weapon are categorically unacceptable (regardless of the military benefits) or that the inhumane effects are generally disproportionate to the potential military advantage. In many other cases, however, the international community has lacked the necessary consensus to prohibit a weapon because a number of states have wanted to preserve the option of employing it in some situations.

However, even in the latter case, a particular use of the weapon may be prohibited. That is, states may preserve the option to use the weapon to achieve military objectives. States do not, however, retain the prerogative to use the weapon when there is clearly no military benefit. It is in this sense that the prohibition on superfluous injury and unnecessary suffering operates. That is, either as a result of a general principle of necessity or as a more specific prohibition on *unnecessary* suffering,<sup>131</sup> LOAC forbids the use of methods and means of combat that are neither able nor intended to achieve a military benefit. The use of force in such situations is generally considered cruel,<sup>132</sup> wanton,<sup>133</sup> or “useless suffering.”<sup>134</sup>

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principle of war law is this—that no engine of war may be used which is (if one may use the term) *supererogatory* in its effect. The principle results from a compromise of humanitarian and military interests, the latter—for war is war—being the more powerful interest of the two. The military commander, intent on victory, seeks to employ such instruments as will best achieve the end of war—the disabling of the greatest possible number of the enemy. Death, agony, mutilation these he would avoid if he could: they are not ends in themselves.

J. M. SPAIGHT, *WAR RIGHTS ON LAND* 74-75 (1911).

<sup>130</sup> Greenwood, *supra* note \_\_, at 190-91; *cf.* Meyrowitz, *supra* note \_\_, at 111 (“The use of a means prohibited by HR, Article 23 e), or of a method of warfare contrary to PI, Article 35 (2), may indeed provide a belligerent with a military advantage of a tactical or strategic nature which in certain cases may have a decisive influence on the outcome of the conflict.”).

<sup>131</sup> BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 194-95 2.2.2-2.2.3; Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* 524 (1961); Christopher Greenwood, *Command and the Laws of Armed Conflict*, 4 *THE OCCASIONAL* 23 (1993) (“what this principle [of unnecessary suffering] seeks to prohibit is the infliction of injuries or suffering which serve no useful military purpose”). *Cf.* Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 2 (1974) CE/COM III/C 3, at 51 (Proposal by Federal Republic of Germany) (“It is forbidden to use means of combat in a way calculated to cause unnecessary suffering. This prohibition covers the use of means of combat which offer no greater military advantage than other available means of combat, while causing substantially greater suffering. Those who use or give orders for the use of means of combat are bound to weigh the concrete military advantages pursued against the suffering caused thereby to the adversary.”).

<sup>132</sup> *See, e.g.*, Report of the ICRC to the XXIst International Conference of the Red Cross, Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts, Istanbul, 1969.

LOAC may include an additional restriction—a principle of proportionality directed at the protection of combatants. According to several states’ practices and studies by leading experts, this proportionality constraint can be derived from various sources including the rule protecting combatants from “superfluous injury,”<sup>135</sup> the rule protecting combatants from “unnecessary suffering,”<sup>136</sup> a combination of those two rules,<sup>137</sup> the principle of “necessity,”<sup>138</sup> or a stand-alone

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<sup>133</sup> WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 635 (8TH ED. 1924); Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, 71 *INTERNATIONAL LAW STUDIES* 185, 194 (Michael N. Schmitt & Leslie C. Green, eds. 1998).

<sup>134</sup> See, e.g., Report of the ICRC to the XXIst International Conference of the Red Cross, Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts, Istanbul, 1969.

<sup>135</sup> See, e.g., BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 195 2.3.1; Greenwood, *Command and the Laws of Armed Conflict*, *supra* note \_\_, at 23 (“[W]hat this principle [of unnecessary suffering] seeks to prohibit is the infliction of injuries or suffering which serve no useful military purpose. It therefore requires a *balance* to be struck between the military advantage which a weapon or a particular method of warfare may be expected to achieve and the *degree* of injury or suffering which it is likely to cause.”).

<sup>136</sup> U.S. DEP’T OF STATE, REPORT OF THE UNITED STATES’ DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS, LUCERNE, SWITZERLAND SEPT. 24-OCT 18, 1974 (1974) [hereinafter DEP’T OF STATE, REPORT OF US DELEGATION TO LUCERNE CONFERENCE] (“It is the U.S. view that the ‘necessity’ of the suffering must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon.”); see *infra* notes \_\_ - \_\_ (discussing U.S. position at Lucerne Conference); U.S. OPERATIONAL LAW HANDBOOK 14 (2012) (“A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused thereby is considered by governments as disproportionate to the military necessity for that effect, that is, the military advantage to be gained from use.”); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, at 586, ¶¶ 14-15 (Higgins, J., dissenting) (“It is thus unlawful to cause suffering and devastation which is in excess of what is required to achieve these legitimate aims. Application of this proposition requires a balancing of necessity and humanity. This approach to the proper understanding of ‘unnecessary suffering’ has been supported, inter alia, by the Netherlands (Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Written Statement, ¶ 27), the United Kingdom (*ibid.*, Written Statement, ¶¶ 36 ff. and oral statement (CR 95/34)); the United States (*ibid.*, Written Statement, ¶ 25) and New Zealand (Written Statement, ¶ 69, submitted in connection with the present request for advisory opinion). Subsequent diplomatic practice confirms this understanding of “unnecessary suffering.”); Written Statement of the Government of the Netherlands, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (1995), at ¶¶ 20-21 (“[S]uffering may be called ‘unnecessary’ when its infliction ... greatly exceeds what could reasonably have been considered necessary to attain that military advantage. ... [T]he causing of suffering out of proportion to the military advantage to be gained therefore appear to be the essential yardstick for determining whether the use of certain weapons must be deemed to cause ‘unnecessary’ suffering. This approach has governed the development of rules with regard to means and methods of warfare since 1868.”). See also provisions of several military manuals—Australia’s Defence Force Manual (1994); Australia’s LOAC Manual (2006); Canada’s LOAC Manual (1999); Canada’s LOAC Manual (2001); Ecuador’s Naval Manual (1989); Germany’s Military Manual (1992); New Zealand’s Military Manual (1992); South Africa’s LOAC Manual (1996); Socialist Federal Republic of Yugoslavia’s Military Manual (1988)—quoted in ICRC, Customary International Humanitarian Law: Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, available at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter20\\_rule70](http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter20_rule70)> [hereinafter ICRC, Practice Rule 70].

<sup>137</sup> UNITED STATES, JUDGE ADVOCATE GENERAL, OPERATIONAL LAW HANDBOOK 14 (2012) (“The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to the military advantage realized as a result of the weapon’s use.”); Written Statement of the Government of the United Kingdom, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (1995), at ¶ 3.65 (“The principle prohibits only the use of weapons which cause unnecessary suffering or superfluous injury. It thus requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. The more effective the weapon is from the military point of view, the less likely that the suffering which

principle of proportionality.<sup>139</sup> Accordingly, the particular use of a method or means of combat may be unlawful if the magnitude of harm to enemy fighters far outweighs the military benefit. That calculus obviously informs some of the prohibitions on specific weapons—for example, the ban on undetectable glass fragments, poison, and bacteriological devices. It is more questionable whether this calculus more generally regulates methods and means of delivering force during battle.

In sum, there are three potential restrictions on methods and means of combat:

*Category 1:* some weapons are categorically outlawed—by treaty or by custom—in all situations even if their use could provide a military benefit;

*Category 2:* some methods and means are prohibited in situations in which their use would (clearly) not provide a (definite) military benefit; and

*Category 3:* some methods and means may be prohibited in situations in which their use would (clearly) result in suffering that is (grossly) disproportionate to the military benefit.

The foundation for RUF could be based on either category 2 (no military benefit), category 3 (disproportionate suffering), or both. As discussed in Part II, the conditions placed on the application of RUF might restrict it to category 2. That is, RUF might apply only in those situations in which there is clearly no military benefit (including any risk to one’s own forces) to be gained from killing rather than capturing an individual. Alternatively, RUF might also be based in part on category 3. For example, the rule would prohibit killing rather than capturing when the military benefit is very modest compared with the deaths involved. It is important to keep these distinctions in mind in the discussion that follows. Indeed, RUF of the former type—restricted to category 2—is a less radical, more easily accepted and sustainable proposition. It would be mistaken to assume that expressions of support for RUF by international authorities over the years have necessarily assumed a category 3 approach. If one worked with that assumption, the degree and strength of support for RUF would be more doubtful.

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its use causes will be characterized as unnecessary.”); but see *id.* at p. 50 (“In particular, it has to be asked whether the same military advantage can be gained by using alternative means of warfare which will cause a lesser degree of suffering. The use of a nuclear weapon may be the only way in which a State can concentrate sufficient military force to achieve a legitimate military objective such as the defeat of an invader. In those circumstances, it cannot be said that the use of such a weapon causes unnecessary suffering however great the casualties which it produces among enemy combatants.”); see also Ecuador’s Naval Manual (1989); Germany’s Military Manual (1992) quoted in ICRC, Practice Rule 70, *supra* note \_\_\_\_.

<sup>138</sup> See, e.g., BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 196 ¶ 2.3.3 (“‘Necessity,’ like its components of relevance and proportionality, is a relational concept.”); *id.* at 194-95 ¶¶ 2.2.2-2.2.3 & 2.3.1; McDougal & Feliciano, *supra* note \_\_ at 524 (“Proportionality is commonly taken to refer to the relation between the amount of destruction effected and the military value of the objective sought in the operation being appraised. Disproportionate destruction is thus, almost by definition, unnecessary destruction.”). For a historical source, see HALL, *supra* note \_\_, at 635 (“But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportionate to the object to be obtained.”).

<sup>139</sup> Cf. Max Huber, *Quelques Considérations sur une Révision Éventuelle des Conventions de La Haye relatives à la Guerre*, 37 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 417, 423 (1955); HALL, *supra* note \_\_, at 635 (explaining recourse to “general limitation forbidding wanton or disproportionate violence”); cf. ICRC Commentary on Protocol I, art. 40, at 477 n. 23.

It is important to ground RUF in an understanding of these possible foundations of the rule. That said, our discussion need not deduce RUF from these more abstract formulations. Instead, the historical record includes more direct and specific evidence supporting an RUF framework. Indeed, as discussed shortly, the RUF framework has been endorsed by several international authorities over time. And that support for RUF fed directly into drafting the Additional Protocols to the Geneva Conventions.

Critics of RUF, however, suggest that the ICRC's Interpretive Guidance attempts to resuscitate an idea first proposed by a solitary expert—Jean Pictet—in the 1970s and ever since rejected. Indeed, in recent commentaries, one of the most significant elements of the foundation of RUF has become the position expressed by Pictet and the reception of that position. On the critics' account, in the early 1970s Pictet expressed the same proposition that is now contained in the Guidance,<sup>140</sup> and he presented this concept at the important Lucerne Conference of Government Experts in 1974.<sup>141</sup> There is no cause for disputing those basic points. According to the official record of the Lucerne Conference, Pictet expressed the following proposition in the context of discussing military necessity:

According to some experts, the element of military necessity consisted solely in the capacity of a weapon to put an enemy hors de combat, this in conformity with the preamble to the St. Petersburg Declaration of 1868 ... An expert [Jean Pictet], elaborating this idea, felt that *the subjective element* it contained could be reduced, e.g. *by a formulation which would require that, if two or more weapons would be available which would offer equal capacity to overcome (rather than "disable") an adversary, the weapon which could be expected to inflict the least injury ought to be employed.*<sup>142</sup>

The critics, however, suggest that Pictet's position was flatly rejected at the conference, and was never embraced—"lay[ing] moribund for almost four decades"<sup>143</sup>—until the ICRC resurrected his theory in 2009.<sup>144</sup>

The following recovers a lost history. It shows the wide support for RUF by institutional actors and independent experts—before and after Pictet's statement at Lucerne. And the discussion shows multiple ways in which this understanding of RUF fed into the codification of international law during that period. Indeed, when states finally drafted the Additional Protocols to the Geneva Conventions in the latter part of the 1970s, voluminous support for RUF had been expressed. (And, on some occasions, the support was even stronger than Pictet's.) As the

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<sup>140</sup> Parks, *supra* note \_\_, at 785; Kleffner, *supra* note \_\_, at 44; cf. Blum, *supra* note \_\_, at 114-15.

<sup>141</sup> Parks, *supra* note \_\_, at 786.

<sup>142</sup> INT'L COMM. RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS, LUCERNE, 24 SEPTEMBER- 18 OCTOBER 1974, 9, ¶ 25 (1975) [hereinafter ICRC, LUCERNE CONFERENCE REPORT].

<sup>143</sup> Parks, *supra* note \_\_, at 815 n. 125 ("Given that Pictet's statement was made in the period of the 1974-1977 Diplomatic Conference, but lay moribund for almost four decades amid the numerous law of war conferences held during that time until rediscovered by Dr. Melzer in his dissertation and then incorporated into the draft Interpretive Guidance by the ICRC in 2007, the validity of it as an accurate statement of law, much less one that can be characterized as 'famous,' is dubious.").

<sup>144</sup> Parks, 786-87; 812; Van Shaack, *supra* note \_\_, at 292-93; cf. Blum, 115 (not necessarily a critic of the Guidance, but providing a similar depiction, namely, that the ICRC endorsed Pictet's anomalous position despite its universal rejection).

following analysis demonstrates, those conceptions of the rules are now a part of the LOAC regime, and reflected in multiple provisions of Additional Protocol I.

### 1. The UN-Secretary General and the ICRC (1970-73)

Support for LRM occurred in the early part of the codification process that would eventually culminate in the 1977 Protocols to the Geneva Conventions. As we discussed in the previous section concerning draft article 38 [final article 41] of Protocol I,<sup>145</sup> the UN Secretary-General's Report of 1970 and the ICRC's Commentary on the 1973 Draft Protocol expressed a similar, if not shared, understanding of an "underlying principle ... that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance, that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting ...."<sup>146</sup> That support for RUF, however, is indirect.

The period of heightened attention to the rules of combat also included more direct support for RUF. In the early run up to the diplomatic conferences for drafting the protocols, the ICRC submitted a report to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. And that document (published in January 1971) contained a more direct reference to RUF using a two-prong approach. The first-prong involved a reiteration and elaboration of the Saint Petersburg principle. In a section entitled, "Limitation as to the choice of means of harming the enemy," the 1971 Report reiterated the principle that "the right of belligerents to adopt means of injuring the enemy is not unlimited."<sup>147</sup> And the report elaborated an understanding of that principle in accord with an LRM formula:

[R]ecourse to force must never be an end in itself. It will consist in employing the constraint necessary to obtain that result. Any violence reaching beyond this aim would prove useless and cruel. The principle of humanity enjoins that capture is to be preferred to wounding, and wounding to killing; that the wounding should be effectuated in the least serious manner -- so that the wounded person may be treated and may recover -- and in the least painful manner; that the captivity should be as bearable as possible, etc.<sup>148</sup>

The 1971 report concluded that these propositions were part of the principles of existing Hague law that "should be maintained or reaffirmed."<sup>149</sup>

As a second prong, the report turned to more specific Hague rules, and here the report called for updating the law. That is, the report referenced the prohibition on particular *means* of

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<sup>145</sup> See *supra* Part III(B).

<sup>146</sup> Int'l Comm. Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (Oct. 1973), at 44; Sec-Gen Report 1970, *supra* note \_\_, at 35-36 ¶ 107 ("It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons .... Only such force as is strictly necessary in the circumstances to capture him should be applied.").

<sup>147</sup> International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. IV, *Rules Relative to Behaviour of Combatants* (CE/4b) (1971), at 5 (citing The Hague Regulations, art. 22; XXth International Conference of the Red Cross; and UN General Assembly Res. 19 Dec. 1968)) [hereinafter ICRC, 1971 Report].

<sup>148</sup> *Id.* at 6.

<sup>149</sup> *Id.* at 6.

warfare, and suggested expanding the scope of the prohibition to include *methods* of warfare: “The Hague rule should be retained. But since it covers explicitly only arms, projectiles or material, might it not be given a more general scope by extending it to take in all means *or methods* calculated to cause unnecessary suffering?”<sup>150</sup>

The 1973 Draft Protocol reflected the “two-prong approach” outlined in the ICRC’s 1971 report. That is, draft article 33 (entitled “Prohibition of Unnecessary Injury”), included two provisions. The first stated (in accord with the first prong): “The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited.” And the second provision stated (in accord with the other prong): “It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances.”<sup>151</sup> As discussed below (in section 5), the final text of the Additional Protocol I would be consistent with these background documents and deliberations.

## 2. Expert Group Meeting in Geneva (1973)

Another significant event occurred in 1973: the meeting of a highly respected expert group in Geneva. There are two important points about this meeting, one small and the other one much larger. The first involves an error of misattribution made by Hays Parks, the leading and influential critic of the ICRC Guidance. Parks states that Pictet made a second statement in the course of the 1974-77 conferences specifically elaborating and endorsing the LRM model—and that this statement was likewise repudiated by other experts. However, Parks mistakenly attributes the statement to Pictet.<sup>152</sup> The original text is actually from the meeting held more than a year before, in 1973, in Geneva.<sup>153</sup> And the actual source of the quote is not Pictet (and thus not an expression of Pictet’s “personal view”<sup>154</sup>) or any individual. Instead the words are from the expert group’s final report, which presents their collective views on international law.<sup>155</sup>

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<sup>150</sup> *Id.* at 6 (emphasis added).

<sup>151</sup> *Id.* at 41.

<sup>152</sup> Parks states:

Pictet offered similar arguments in the experts’ meetings on the law of war related to conventional weapons hosted by the ICRC during the 1974-1977 Diplomatic Conference. First, “if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action, grave injury should be avoided.”

Parks, *supra* note \_\_, at 786. Parks thus attributes the statement to Pictet himself and to the 1974-77 proceedings. Notably, Parks’ article properly cites the 1973 report in the adjoining footnote, even though in the body of the text he refers to Pictet and the “1974-77 Diplomatic Conferences.”

<sup>153</sup> ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS 13 (1973) [hereinafter 1973 Expert Group Report].

<sup>154</sup> Parks, *supra* note \_\_, at 786 n. 58.

<sup>155</sup> The Report explains the procedures for drafting the report and including the views of the experts:

[D]rafting assignments for the individual chapters of the report were distributed among the experts. The drafts that were subsequently submitted were edited at the ICRC and then considered by the working group during the second session. The amendments and revisions recommended by the experts at the second session were subsequently incorporated by the ICRC during their editing of the final report. ...

The present report is purely documentary in character.

The larger point is more momentous: the relevant text supporting LRM is properly attributed to a report of an expert group considering “existing legal limitations”<sup>156</sup> issued in the early 1970s. Indeed, the analysis in the 1973 report (which includes the line that Parks quotes) elaborates the LRM principle in a fulsome manner. It states:

What suffering must be deemed "unnecessary" or what injury must be deemed "superfluous" is not easy to define. Clearly the authors of the ban on dum-dum bullets felt that the hit of an ordinary rifle bullet was enough to put a man out of action and that infliction of a more severe wound by a bullet which flattened would be to cause "unnecessary suffering" or "superfluous injury". The circumstance that a more severe wound is likely to put a soldier out of action for a longer period was evidently not considered a justification for permitting the use of bullets achieving such results. The concepts discussed must be taken to cover at any rate all weapons that do not offer greater military advantages than other available weapons while causing greater suffering/injury. This interpretation is in line with the philosophy that if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided.<sup>157</sup>

Notably, the expert group included Dr. Hans Blix and Frits Kalshoven among its prominent members.<sup>158</sup> And, as will become evident shortly, they would both continue to serve as important proponents of the LRM in other venues.

### **3. Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference (1974)**

A few months later, in early 1974, a first meeting was held of the intergovernmental Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference. After a substantive discussion on legal issues, the Ad Hoc Committee approved a proposal to convene the conference in Lucerne. Importantly, discussions during the Ad Hoc Committee meetings and in its final report provided additional direct support for a LRM model. According to the summary record, Sweden’s Head of Delegation, Dr. Hans Blix made a statement remarkably similar to the one attributed to Pictet at Lucerne. Indeed, Blix may have gone further in applying a proportionality constraint to the use of force. He stated:

The philosophy which underlay the concept “unnecessary suffering” was that, if two means of weakening the adversary's military forces were roughly equivalent for the purpose of placing an adversary hors de combat; the less injurious must be chosen. Again, the less injurious means must be chosen where the additional suffering inflicted by the more injurious means was out of proportion to the advantage to be gained by it. The rule was stated in the ICRC report more generally to be that the concepts of “unnecessary suffering” and “superfluous injury” called for weighing the military advantages of any given weapon against humanitarian considerations.

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1973 Expert Group Report, *supra* note \_\_, at 8 ¶¶ 10-11.

<sup>156</sup> 1973 Expert Group Report, *supra* note \_\_, at 9 ¶ 13.

<sup>157</sup> 1973 Expert Group Report, *supra* note \_\_, at 13 ¶ 23.

<sup>158</sup> 1973 Expert Group Report, *supra* note \_\_, at 5.

.. It was not, on the other hand, legitimate military advantage that a weapon caused more or more severe injuries than were needed to disable a combatant.<sup>159</sup>

Other governments concurred with Blix. Switzerland (represented by Professor Rudolf Bindschedler), for example, immediately followed with a statement that it “entirely agreed with the Swedish representative.”<sup>160</sup> And the Australian representative called on the Ad Hoc Committee not to lose sight of the original basis for LRM:

His delegation felt that there might have been a tendency in recent studies to place undue emphasis on unnecessary suffering as manifested in wounds of a complex or serious nature, and perhaps in that way to lose sight of the initial and basic St. Petersburg principle that it was better to wound than to kill an enemy combatant. The Committee should consider whether, from the point of view of the soldier involved, it was doing him a service if it fell into the error of giving preference to weapons that tended to kill cleanly, rather than to weapons that wounded, but did not kill. That would seem to be false humanitarianism.<sup>161</sup>

The Ad Hoc Committee issued a final report agreeing to the establishment of the Lucerne Conference, and elaborating the statements of various representatives. The final report included a further reference to Blix’s position this time adding a line that “if the choice was between killing the adversary or injuring him; then he should be injured; and a light injury should be preferred to a grave one.”<sup>162</sup> Notably, Frits Kalshoven was well aware of these positions. He notably served as the rapporteur for the Ad Hoc Committee meeting.<sup>163</sup>

#### 4. The Lucerne Conference (1974)

A few months later, experts met at the conference in Lucerne. Recall the statement made by Pictet during the course of the conference:

According to some experts, the element of military necessity consisted solely in the capacity of a weapon to put an enemy hors de combat, this in conformity with the preamble to the St. Petersburg Declaration of 1868 ... An expert [Jean Pictet], elaborating this idea, felt that *the subjective element* it contained could be reduced, e.g. *by a formulation which would require that, if two or more weapons would be available which would offer equal capacity to overcome (rather than "disable") an adversary, the weapon which could be expected to inflict the least injury ought to be employed.*<sup>164</sup>

As ostensibly strong evidence of the repudiation of Pictet’s view, Hays Parks, Michael Schmitt and other critics rely on an essay by Frits Kalshoven—entitled *The Soldier and His Golf*

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<sup>159</sup> CDDH/IV/SR.1 p. 11, ¶¶ 18-19 (Mar. 13, 1974) (summary record); *see also* CDDH/IV/SR.7, at p. 54.

<sup>160</sup> *Id.* at p. 12, ¶ 24.

<sup>161</sup> *Id.* at 15 ¶ 42. Notably, the final Report of the Ad Hoc Committee refers to this statement as reflective of the views of multiple delegations. Report of the Ad Hoc Committee on Conventional Weapons, CDDH/47/Rev.I (1st Session, 1974), 458, ¶ 28; cf. CDDH/IV/SR.2, 18, ¶ 5 (New Zealand) (“One should not fall into the error of giving preference to weapons that killed cleanly rather than to weapons that wounded but did not kill.”).

<sup>162</sup> Report of the Ad Hoc Committee on Conventional Weapons, CDDH/47/Rev.I (1st Session, 1974), 458, ¶ 27.

<sup>163</sup> *Id.* at 453.

<sup>164</sup> ICRC, LUCERNE CONFERENCE REPORT, at 9 ¶ 25.

*Clubs*<sup>165</sup>—which discusses the Lucerne Conference and apparently exposes the rejection of Pictet’s view.<sup>166</sup> Reliance on Kalshoven’s work for such a purpose is, at the least, a significant oversimplification. To help set the stage for the following analysis, it might be noted that Kalshoven originally published *The Soldier and His Golf Clubs* as part of a *Festschrift* to honor Pictet.<sup>167</sup> It would be curious, indeed, if Kalshoven used that opportunity simply to critique Pictet or set out to prove his lack of influence. Also, Pictet was not just a participant at Lucerne. He was President of the meeting. Kalshoven served as the conference’s principal rapporteur, and his essay draws directly from the official record. The critics seize upon Kalshoven’s statements that Pictet used the conference as an opportunity to advance his conceptualization of an LRM model; that the record shows other experts criticized aspects of Pictet’s claim; and that Kalshoven expounded upon those criticisms. That account contains considerable flaws.

First, the critics’ account that Pictet’s view was resoundingly rejected proves too much. Especially in the context of the conventional weapons conference, Pictet’s analysis also directly relates to questions about which weapons states should refrain from using. That set of issues is not the same as the choice of weapons a soldier might select on the battlefield. As one of the most influential experts of his time, Pictet’s work was intellectually important for the general application of humanity and necessity principles to weapons prohibitions. Indeed, the understanding that these general principles can restrict states’ use of a weapon if human suffering cannot be justified by a military benefit was shared by leading IHL experts in that period<sup>168</sup> and more recently.<sup>169</sup> It would thus be odd if Pictet’s analysis—at least in its application to such weapons prohibitions—would have been entirely or resoundingly rejected.

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<sup>165</sup> Frits Kalshoven, *The Soldier and His Golf Clubs*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET 369 (Christophe Swinarski ed. 1984), also reprinted in FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR 359 (2007)

<sup>166</sup> Parks, *supra* note \_\_, at 787 n. 61 (“Pictet’s argument and the quoted response prompted Professor Kalshoven’s *The Soldier and His Golf Clubs*, which facetiously suggested that to comply with Pictet’s interpretation each soldier would be legally obligated to go into combat with a bag of weapons and to select the weapon that enabled compliance under the circumstances, much as a golfer selects a golf club for each individual stroke.”); Schmitt, *Military Necessity and Humanity*, *supra* note \_\_, at 835 (referencing only Kalshoven’s *The Soldier and His Golf Clubs* as authority for claim that “attempts to impose a continuum of force on the battlefield, the most notable being Jean Pictet’s famous dictum that ‘[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him,’ have been rejected by states and scholars alike.”); Hiyashi n. 321 (citing three authorities for “the rejection of Pictet’s assertion”: Kalshoven’s *The Soldier and His Golf Clubs*, Parks, \_\_ and Schmitt, *Military Necessity and Humanity*, *supra* note \_\_).

<sup>167</sup> STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET 369 (Christophe Swinarski ed. 1984).

<sup>168</sup> Antonio Cassese, *Weapons Causing Unnecessary Suffering: Are They Prohibited?*, 58 RIVISTA DI DIRITTO INTERNAZIONALE 12 n. 49 (1975) (explaining at the time that “[t]he gross imbalance between the military result (or the military necessity for the use of a weapon) and the injury caused is regarded as the decisive test ... by a number of authors” and citing a dozen scholars); cf. George H. Aldrich, *Remarks on Human Rights and Armed Conflict*, 67 AM. SOC’Y OF INT’L L. PROC. 141, 148 (1973) (“Whether the suffering a weapon causes is ‘unnecessary’ in the sense required to make it unlawful requires a balancing of this suffering against the military necessity for its use.”).

<sup>169</sup> See, e.g., Greenwood, *Command and the Laws of Armed Conflict*, *supra* note \_\_ (“In deciding whether the use of a particular weapon or method of warfare contravenes the unnecessary suffering principle, the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury.”); Greenwood, *supra* note \_\_, at 195 & 197; Theodor Meron, *International Law in the Age of Human Rights*, 301 RECUEIL DES COURS 9, 97-98 (2003) (arguing for

Second, the two concerns that Kalshoven (and the official record) discusses would result only in qualifying Pictet’s proposition, not discarding it. The first concern is that Pictet failed to articulate a sufficiently broad definition of military necessity. Immediately following Pictet’s proposal, the official record summarizes the opposing view along these lines:

Other experts held, in contrast, that the element of military necessity in the choice of weapons included, besides their capacity to disable enemy combatants, such other requirements as the destruction or neutralization of enemy materiel, restriction of movement, interdiction of lines of communication, weakening of resources and, last but not least, enhancement of the security of friendly forces.<sup>170</sup>

This objection, it could be said, even implicitly embraces Pictet’s formula; it simply calls for more factors to be considered on one side of the equation: the scope of military necessity.<sup>171</sup> Academic commentary immediately following Lucerne also suggested that the conference had reached this broader consensus.<sup>172</sup> For present purposes it is worth noting that the more expansive definition of military necessity is consistent with the 2009 Interpretive Guidance, as well as with variations of RUF—including LRM—that I described in Part II. This “objection” can thus be easily incorporated and synthesized with the LRM model.

The other objection, raised at the conference as well as by Kalshoven, essentially concerns whether it is realistic for the rule to be implemented by individual soldiers on the battlefield.<sup>173</sup>

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proportionality as a basis for such restrictions); BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 196 2.3.3; *see also* DEP’T OF STATE, REPORT OF US DELEGATION TO LUCERNE CONFERENCE, *infra* note \_\_.

<sup>170</sup> ICRC, LUCERNE CONFERENCE REPORT, *supra* note \_\_, at 9, ¶ 25. This interpretation is consistent with the U.S. Delegation’s report of the Lucerne conference. *See* DEP’T OF STATE, REPORT OF US DELEGATION TO LUCERNE CONFERENCE, *supra* note \_\_, at 5 (“There was a general agreement that the basic test of whether a weapon causes ‘unnecessary suffering’ requires comparing the suffering caused with the military utility of the weapon. However, there was considerable divergence as to the relative weight to be given to the military considerations as opposed to what factors should be considered as components of military utility.”).

<sup>171</sup> Consider as well Kalshoven’s statement of explanation in introducing the Lucerne Report to the Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference in 1975. CDDH/IV/SR.8 , Feb 5. 1975, pp. 69-70, ¶ 15 (“On the question of unnecessary suffering, the matters discussed had included . . . the elements to be taken into account in assessing what suffering should be considered unnecessary. Some had held that the element of military necessity in that equation consisted solely of the capacity of a weapon to put an enemy hors de combat; even then, however, the question how much injury was required to disable an enemy combatant would remain open. Other experts had held that military necessity as an element of choice of weapon included completely different requirements, ranging from the destruction or neutralization of enemy materiel to the enhancement of the security of friendly forces.”). *See also* Frits Kalshoven, *The Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September- 18 October 1974*, 6 NETHERLANDS YEARBOOK OF INT’L L. 77, 90 (1975) (summarizing this part of the conference debate as a difference over definitions and assessments of military necessity).

<sup>172</sup> *See, e.g.*, Paul A. Robblee, *The Legitimacy of Modern Conventional Weaponry*, 71 MIL. L. REV. 95, 119 (1976) (“[T]here was general agreement at the Lucerne Weapons Conference that the correct legal test for ‘unnecessary suffering’ requires a comparison between the suffering or damage caused by the weapon and the weapon’s anticipated military advantage. Specifically, if the former is excessive when compared to the latter, then the weapon’s use is unlawful.”); *id.* at 119 n. 144 (“There was widespread agreement among experts that in determining what injury was superfluous and what suffering was unnecessary, one balanced the injury or suffering inflicted (humanitarian aspect) against the military necessity for using the particular weapon (military side).”).

<sup>173</sup> ICRC, LUCERNE CONFERENCE REPORT, *supra* note \_\_, at 9, ¶ 27 (“A remark made in this connection by some experts was that, whereas the ideal solution might perhaps be that the soldier be equipped with a range of weapons from which he could select the one that would, in the concrete situation, put his enemy out of action with the least

Even in that regard, the conference record reflects a muted criticism: the concern expressed was that the capacity of an individual soldier to avoid “even much graver injury than the minimum *strictly required* in a given situation could *not always* be avoided.”<sup>174</sup> As we discussed in Part II, such concerns can be largely, if not completely, resolved by conditions placed on application of the rule. The objection, for example, suggests that soldiers might have a duty to ensure that the injuries they inflict are “strictly required.” And the objection relates specifically to cases in which a soldier’s resort to a highly injurious weapon “could not be avoided.” The rule, however, could be formulated to avoid such concerns—for example, by modifying the mental requirement or the threshold of justification. That is, the rule might impose a duty on soldiers not to inflict injuries deliberately for the purpose of creating unnecessary suffering. And the rule might require a soldier to forego military measures that will cause clearly unnecessary suffering when he knows that an equally or more effective alternative is obviously and readily available.

More fundamentally, the objection can be resolved by restricting the application of RUF to high levels of military command or decision-making authority. Perhaps the most glaring oversight of the critics is their failure to acknowledge that Kalshoven makes this very point. Indeed, to help set the stage, consider that Kalshoven published his essay as part of a *Festschrift* to honor Pictet.<sup>175</sup> In his contribution, Kalshoven could not have been clearer that Pictet’s view was unassailable—when restricted to a higher level of command. In his concluding passage, Kalshoven provides the following summation:

In conclusion, the question may be asked what became of the principles of St. Petersburg, and in particular of Jean Pictet’s view of these principles. As to the first part of this question, it appears safe to conclude that, generally speaking, all the discussions in subsequent years have tended to reaffirm the validity of the principles enunciated in 1868.  
...

What about the second part of our question? It seems fairly evident that Jean Pictet’s statement, taken literally, was untenable; a combatant simply cannot be equipped with a wide array of weapons for all kinds of situations, as the golf player is with his bag of golf clubs. In certain situations, therefore, the individual combatant cannot avoid inflicting graver suffering than would have been strictly necessary to put his enemy hors de combat; in other situations, for that matter, the weapons at his disposal will be insufficient to achieve that legitimate object. But taken less literally, *Pictet’s argument appears to carry full weight*; that is, if it is understood as addressed to the authorities who decide on the armament of the armed forces and, even, the military commanders who do have a choice of weapons at their disposal. Considerations of military efficacy will again tend to preponderate in the deliberations of these authorities; at the same time, they will fail in

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possible injury, this solution was impracticable and that, hence, even much graver injury than the minimum strictly required in a given situation could not always be avoided.”)

<sup>174</sup> ICRC, LUCERNE CONFERENCE REPORT, *supra* note \_\_, at 9, ¶ 27 (emphasis added). In the final summation of his essay, Kalshoven expresses the objection in the following manner: “In certain situations, therefore, the individual combatant cannot avoid inflicting graver suffering than would have been strictly necessary to put his enemy hors de combat ...” Kalshoven, *Golf Clubs*, *supra* note \_\_, at 385.

<sup>175</sup> STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET 369 (Christophe Swinarski ed. 1984).

their duty if they lose sight of the humanitarian requirement of minimization of human suffering.<sup>176</sup>

Of course Kalshoven's analysis rejects the full extension of Pictet's formula. But that difference amounts to a relatively modest discrepancy in the larger debate over RUF.<sup>177</sup> Indeed, the disagreement explicitly concerns only one condition on the application of RUF (the level of decision-making authority). As described in Part II, a modification of that condition has no devastating effect on the viability of LRM. It might simply make the operation of the rule more feasible and more acceptable. Indeed, with that adjustment, "Pictet's argument appears to carry full weight," according to Kalshoven.

Additional evidence suggests that Pictet's statement resonated with other experts at Lucerne. First, eight experts who were members of the 1973 group also participated at Lucerne.<sup>178</sup> Presumably they generally held the same affirmative view of RUF that they had expressed the prior year. And, two of these experts held special positions of leadership in Lucerne: Blix served as a Vice President of the Lucerne Conference, and Kalshoven was appointed the principal rapporteur. Second, the 1973 expert group report was as one of the most important background documents for Lucerne. Indeed, in 1975, Kalshoven reported to the Ad Hoc Committee that "[a] fair amount of work had been accomplished, in part thanks to the documentation submitted to [the Lucerne] Conference," at which point he specifically credited two reports—the 1973 expert group report and a UN report on incendiary weapons.<sup>179</sup> Hans Blix also reported to the 1975 Ad Hoc Committee meeting in glowing terms about the significance of the 1973 expert group report for the Lucerne Conference.<sup>180</sup> Third, statements by the Australian delegation at Lucerne reflected broad support for Pictet's position.<sup>181</sup> The Australian delegation made "[a]n attempt to do Dr. Pictet's idea maximum justice while at the same time putting it in its proper perspective ... suggesting a formulation which closely followed the idea expressed by Dr. Pictet."<sup>182</sup> And, in an

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<sup>176</sup> (emphasis added).

<sup>177</sup> Kalshoven's other writings suggest even greater alignment with Pictet on these issues. See, e.g., Frits Kalshoven, *Implementing Limitations on the use of Force: The Doctrine of Proportionality and Necessity*, 86 Am. Soc'y Int'l L. Proc. 39, 42 (1992) ("if combatants are not clearly expressing an intention to surrender and cannot be recognized as being hors de combat on other grounds either, they are not legally protected from attack. But what if they are in actual fact utterly defenseless; could it not be argued that for want of any military necessity to attack them, they cease to be military objectives?"). See also *supra* note \_\_\_ (explaining that Kalshoven was part of the 1973 expert group that expressed support for LRM principle in its final report).

<sup>178</sup> The eight experts included representatives from Austria (Erich Kussbach), Egypt (Esmat Ezz), Germany (Heinz Freiwald), the Netherlands (Frits Kalshoven); Norway (Hans Wilhelm Longva), and Sweden (Hans Blix; Bo Rybeck; Torgil Wulff).

<sup>179</sup> CDDH/IV/SR.2, at 68-69.

<sup>180</sup> CDDH/IV/SR.8, p. 77, ¶ 49 ("Mr. Blix (Sweden) drew attention to paragraph 10 of the Introduction to the report of the [Lucerne] Conference of Government Experts, which said that the statements made at the Conference, which amounted to a confirmation or an endorsement of earlier documents, were rendered in the report in a somewhat summarized form. For that reason, the Lucerne report suggested that it should be supplemented by a reading of earlier documents, inter alia the ICRC report of 1973 entitled *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects* and the reports of the United Nation's Secretary-General on *Napalm and other incendiary weapons and all aspects of their possible use.*").

<sup>181</sup> Recall that the Australian representative in the 1974 Ad Hoc Committee meeting had already voiced support for LRM. See *supra* text at note \_\_\_.

<sup>182</sup> This quotation comes from a separate paper written by Kalshoven, which Parks and the other critics do not cite or discuss. Frits Kalshoven, *Conventional Weaponry: The Law from St. Petersburg to Lucerne and Beyond*, in ARMED

accompanying comment, the Australian Ambassador Frederick Blakeney stated that any formulation of this idea “‘obviously needs to be looked at in respect of the enemy as an individual, and as a group. There already seems *a wide measure of agreement* that as few as possible should be killed, no more than necessary should be wounded and those lightly rather than gravely.’”<sup>183</sup>

Pictet’s explication of RUF at Lucerne was, therefore, well in line with actors and institutions that supported the LRM model before and during the conference. It is no great surprise that Ambassador Blakeney—in the presence of Blix, Kalshoven, Pictet, and others—would refer to such views as generally obtaining “a wide measure of agreement.” Indeed, Pictet’s 1974 statement came on the heels of the 1970 Secretary-General Report, the 1971 ICRC Report to the Conference of Government Experts, the ICRC Commentary on the 1973 Draft Protocol, the 1973 expert group report, and the report of the 1974 Ad Hoc Committee of the Diplomatic Conference. It is thus understandable that criticisms of his position would focus on fine-tuning and refining the rule. For example, disagreement might arise with respect to the understanding of military necessity in the formulation of the rule, and whether the rule entailed specific duties for individual soldiers on the battlefield. At the very least, it would be highly erroneous to describe the position set forth by Pictet either as simply his “personal view” or an outlier.

Finally, we should address an argument made by Hays Parks, namely, that the U.S. delegation’s report on the Lucerne Conference provides evidence of the failure of Pictet’s position. In particular, Parks asserts that “the highly-detailed, 126-page U.S. Delegation report on the Lucerne conference mentioned neither of Pictet’s points, suggesting the lack of serious regard given them by the participants.”<sup>184</sup> First, Parks has apparently confused the 1973 (Geneva) expert group meeting and the 1974 intergovernmental conference in Lucerne. The 126-page report concerned only the U.S. government’s participation in the latter. And the primary articulation of LRM that Parks identifies as one of “Pictet’s points” was made in 1973 at Geneva (and, as discussed above, not by Pictet). Secondly, the failure of the U.S. delegation to mention Pictet’s (actual) statement<sup>185</sup> at Lucerne (or Ambassador Blakeney’s statement) might suggest, on the contrary, that Pictet’s point was not highly controversial. Indeed, the U.S. delegation’s report includes statements that are generally consistent with Pictet’s analysis.<sup>186</sup> And, as a reflection of broader agreement with U.S. legal currents, it is notable that commentaries, including in U.S. military law reviews published around that time, were also consistent with Pictet’s formulation.<sup>187</sup>

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CONFLICT AND THE NEW LAW (Michael A. Meyer, ed. 1989), and *reprinted in* FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR 377, 386 (2007).

<sup>183</sup> Kalshoven, *supra* note \_\_, at 386-87 (quoting Ambassador Frederick Blakeney) (emphasis added).

<sup>184</sup> Parks, *supra* note \_\_, at 786 n. 59.

<sup>185</sup> See *supra* text at note \_\_.

<sup>186</sup> See, e.g., U.S. DEP’T OF STATE, REPORT OF US DELEGATION TO LUCERNE CONFERENCE, *supra* note \_\_, at 5 (“There was a general agreement that the basic test of whether a weapon causes ‘unnecessary suffering’ requires comparing the suffering caused with the military utility of the weapon. However, there was considerable divergence as to the relative weight to be given to the military considerations as opposed to what factors should be considered as components of military utility.”).

<sup>187</sup> See, e.g., Keith D. Suter, *An Enquiry into the Meaning of the Phrase “Human Rights in Armed Conflicts,”* 15 MIL. L. & L. WAR REV. 393, 406 (1976) (“[T]he ‘Law of the Hague’ contains the general prohibition on unnecessary suffering so that the aim is to use only sufficient force to put a person out of combat, if this can be done by only

Moreover, in one important respect, the U.S. position at Lucerne arguably involved a more expansive prohibition on the use of force than the proposition Pictet expressed. Pictet's formulation supports a category 2 approach to superfluous injury and unnecessary suffering. That is, his formulation suggests restricting the kind and degree of force when there is no additional military benefit to be gained in a choice between weapons. In contrast, the United States—in one statement by Waldemar Solf and another by Ronald Bettauer—adopted the broader position that unnecessary suffering also includes a (category 3) proportionality analysis.<sup>188</sup> When the Ad Hoc Committee on Conventional Weapons reconvened in Geneva in 1975, the United States referred to the argument it made at Lucerne by framing the analysis of specific weapons through a proportionality formula.<sup>189</sup> All these statements in favor of a proportionality framework notably comported with rules of LOAC drafted by the U.S. military around the same time.<sup>190</sup> Hence, in some respects, the U.S. position bore a greater resemblance to Hans Blix's more expansive formulation than to Pictet's.

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inflicting a wound then this is preferable to killing him ..."); Paul A. Robblee, *The Legitimacy of Modern Conventional Weaponry*, 71 MIL. L. REV. 95, 112 (1976).

<sup>188</sup> The same 126-page report contains the following statement made by the US delegation during the Lucerne proceedings:

It is the U.S. view that the "necessity" of the suffering must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon. This is the test recognized by the drafters of the 1899 Hague Regulations and articulated by contemporary writers such as Hall, Hyde and Spaight.

... And indeed all such comparative judgments logically lead to an inquiry into how much suffering various weapons systems cause and whether alternate weapons can achieve the same military advantage effectively but cause less suffering.

A meaningful analysis of the criterion requires a comparison of and balancing between suffering and military effectiveness ... in order to assure some degree of consensus on when the criterion is met, it is usually stated in terms of suffering "clearly" outweighing military utility.

Ronald J. Bettauer, *Statement on Legal Criteria*, Sept. 25, 194, in DEP'T OF STATE, REPORT OF US DELEGATION TO LUCERNE CONFERENCE, *supra* note \_\_, at 23-24; also *reprinted in* Ronald J. Bettauer, Deputy Assistant Legal Adviser in the Department of State and Acting Chairman of the U.S. Delegation to the Conference, Sept. 25, 1974, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 709 (1974). Waldemar Solf on behalf of the US delegation at Lucerne also stated that "there is general agreement; in determining whether weapons cause unnecessary suffering one must consider the military utility of the weapon and determine whether the incidental suffering is needless, superfluous *or disproportionate* to the military advantage expected from the weapons." Statement of Waldemar Solf, Chief of the International Affairs Division at the Lucerne Conference, Sept. 26, 1974, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 709 (1974) (emphasis added).

<sup>189</sup> CDDH/IV/SR.I0, at 97 ¶ 27 (United States -- Ronald Bettauer) (referring to US government position at Lucerne that "the suffering caused by incendiary weapons had to be considered in relation to their military utility, the proportion of the casualties they caused in comparison with other weapons and the seriousness of those casualties").

<sup>190</sup> See United States, Air Force Pamphlet § 6-3(b)(2) (1976) ("The rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law. ... This prohibition against unnecessary suffering is a concrete expression of the general principles of proportionality and humanity. ... Weapons are lawful, within the meaning of the prohibition against unnecessary suffering, so long as the foreseeable injury and suffering associated with wounds caused by such weapons are not disproportionate to the necessary military use of the weapon in terms of factors such as effectiveness against particular targets and available alternative weapons. .... The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself."); *id.* at §1-3(1) (defining military necessity to include "the force used is no greater in effect on the enemy's personnel or property than needed to achieve his prompt submission"); United States, Judge Advocate General, Air Force Pamphlet 110-34 (1980) *quoted in* ICRC, Practice Rule 70 *supra* note \_\_ ("Weapons that cause unnecessary suffering or superfluous injury are prohibited. Note that the degree of suffering is not the principal issue; the true test

## 5. The Codification of Additional Protocol I

These various meetings and documents served as the backdrop for the 1977 treaty conference on the Additional Protocols to the Geneva Conventions. The most important reference was the Draft Protocol of 1973 (discussed above in subsection 1). Article 33 of the Draft Protocol would become finalized as Article 35. And, indeed, its wording—and its two-prong framework—would hardly change. The first provision of Article 35 repeats the principle derived from the precedent set at Saint Petersburg. It states: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>191</sup> And the second provision of Article 35 states: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”<sup>192</sup>

Article 35 of Protocol I is consistent with the ICRC’s explanation of LRM presented in its commentary accompanying the 1973 Draft Protocol and in its 1971 report to the Conference of Government Experts. It must be admitted, however, that Protocol I does not expressly codify such an understanding. Nevertheless, two important sources provide further evidence that the Protocol contemplates the LRM model—the *ICRC Commentary* to Protocol I and the leading treatise on Protocol I by Michael Bothe, Karl Partsch, and Waldemar Solf.<sup>193</sup>

Before turning to the *ICRC Commentary*, first consider the Bothe, Partsch and Solf treatise. In an important passage concerning Article 35, the treatise appears to synthesize Pictet’s position at the 1974 Lucerne conference with the opposing views on the scope of military necessity. (Recall that Solf was also a participant at Lucerne.) The treatise explains that (1) Article 35 requires belligerents to use a weapon that causes less injury when an alternative, equally effective weapon is available; (2) Article 35 allows for a broad definition of military necessity; and (3) the resulting application of the rule will be difficult to apply in many circumstances. The treatise states:

In applying para. 2 of Art. 35, the suffering or injury caused by a weapon must be judged in relation to the military utility of the weapon. ... All such comparative judgments logically lead to *an inquiry into how much suffering various weapons cause and whether available alternate weapons can achieve the same military advantage effectively but cause less suffering*. The comparison of, and balancing between, suffering and military effectiveness is difficult in practice because neither side of the equation is easy to quantify. Inevitably, the assessment will be subjective .... The problem cannot be simplified by restating the preamble of the 1968 St. Petersburg Declaration that to weaken the enemy's military forces it is sufficient to disable the greatest possible number of men .... [Examples of] military requirements other than merely disabling enemy combatants ... include the destruction or neutralization of military material, restriction of military movement, the interdiction of

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is whether the suffering is needless or disproportionate to the military advantage expected from the use of the weapon.”).

<sup>191</sup> AP I, art. 35(1).

<sup>192</sup> AP I, art. 35(1).

<sup>193</sup> Notably, Hays Parks praises both texts as important sources of authority on the question of RUF. Parks, however, does not consider the following content of these sources which I discuss. This observation might be read as a criticism of Parks’ analysis. However, it also qualifies any criticism, because Parks has not yet had occasion to explain how these parts of the record might integrate with his interpretation of the law. In addition, it is an important attribute of Parks’ article that he credits the contribution of the *Commentaries*, since he understands that Pictet played a significant role in drafting the *Commentaries*.

military lines of communications, the weakening of the enemy's war making resources and capabilities, and the enhancement of the security of friendly forces.<sup>194</sup>

In addition, to resolve the difficulty in making these “subjective” assessments, the treatise refers to devices that we discussed in Part II as part of the conditions on the application of the rule. Specifically, Bothe, Partsh, and Solf state: “Because of the impossibility of quantifying either side of the equation it is important that military advantage be qualified by such words as ‘definite’, and also that the disproportionate suffering be ‘manifest’ or ‘clear’.”<sup>195</sup>

The *ICRC Commentary* to Protocol I provides additional evidence to support this interpretation of Article 35. First, recall that a combatant who becomes *hors de combat* forfeits that status if he engages in a hostile act or resumes combat. Once he takes such actions, he can be lawfully attacked. The right to use lethal force against him, however, is not unlimited. In such situations, the *ICRC Commentary to Protocol I* explains that an LRM formula under Article 35 applies. Specifically, the *Commentary* explains that the force should be proportionate to the threat:

A man who is in the power of his adversary may be tempted to resume combat if the occasion arises. ... Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be 'hors de combat ' once again. Obviously the remarks made above with regard to Article 35 '(Basic Rules),' paragraph 2, concerning the prohibition of superfluous injury or unnecessary suffering, continues to apply in full. The retort should be proportional to the measure of danger.<sup>196</sup>

It should be noted that the phrase “proportional to the measure of danger” appears to apply a necessity test (Category 2 above<sup>197</sup>) rather than a standard proportionality test (Category 3 above<sup>198</sup>). That is, the *Commentary* suggests that the use or degree of force should not exceed what is necessary to achieve the military objective. The *Commentary* does not state that the use or degree of force should be balanced against the extent of suffering.

The *Commentary* contains a similar explanation with respect to the use of force against individuals who are in the course of escaping the power of an adverse party. It states: “An escape, or an attempt at escape, by a prisoner or any other person considered to be ‘hors de combat,’ justifies the use of arms for the purpose of stopping him. However, once more, the use of force is only lawful to the extent that the circumstances require it. It is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances.”<sup>199</sup>

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<sup>194</sup> BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 196, 2.3.3 (emphasis added).

<sup>195</sup> BOTHE, PARTSCH & SOLF, *supra* note \_\_, at 197, 2.3.3

<sup>196</sup> ICRC Commentary to Protocol I, art. 41, at ¶ 1621.

<sup>197</sup> See *supra* p. \_\_.

<sup>198</sup> See *supra* p. \_\_.

<sup>199</sup> ICRC Commentary to Protocol I, art. 41, at 1623.

The *Commentary* applies a similar principle to combatants in other contexts. This analysis occurs with respect to unarmed nonstate combatants whose participation in military operations remains indirect. Examples of such actions include “carrying out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla fighters.”<sup>200</sup> The *Commentary* states: “As a general rule, combatants of this category, whose activity may indicate their status, should be taken under fire only if there is no other way of neutralizing them.”<sup>201</sup> In other words, this framework applies the maxim that if such combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed.

This understanding is demonstrated further by a related rule of modern LOAC—the prohibition on the denial of quarter. As we discussed above,<sup>202</sup> that rule is similar to RUF at a general level. That is, they both regulate the kind or degree of violence that can be used against enemy fighters. More fundamentally, the *Commentary* draws connections between the two sets of rules in a manner that assists in the proper interpretation of RUF under Article 35. That is, the *Commentary* explains that a principle prohibiting the needless use of force against combatants unites the rule on quarter and Article 35 on RUF. The *Commentary* states:

[T]he rule of proportionality also applies with regard to the combatants, up to a point. The deliberate and pointless extermination of the defending enemy constitutes disproportionate damage as compared with the concrete and direct advantage that the attacker has the right to achieve. It is sufficient to render the adversary “hors de combat.” The prohibition of refusing quarter therefore complements the principle expressed in Article 35 “(Basic rules),” paragraph 2, which prohibits methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

It should be noted that, in the above passage, the *Commentary* suggests that the two sets of rules reflect a principle of “proportionality.” However, the *Commentary*’s exposition appears, more accurately, to rely on a narrower ground: necessity (Category 2). That is, the *Commentary* refers to “pointless extermination” which is surely the same as *unnecessary* deaths.<sup>203</sup> Importantly, this more conservative basis for the denial of quarter—the principle of necessity—still unites the two sets of rules, but on a firmer legal foundation.

Finally, the *Commentary*’s explanation of Article 35 is consistent with our analysis of the full span of the negotiation process. That is, the *Commentary* explains that the Article reflects the initial position that the ICRC had set forth early in the process. The *Commentary* states that the Rapporteur of the treaty conference wrote that “several representatives wished to have it recorded that they understood the injuries covered by that phrase to be limited to those which were more severe than would be necessary to render an adversary *hors de combat*,”<sup>204</sup> and the *Commentary* explains that this entry in the record “corresponds to the position of the ICRC and

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<sup>200</sup> ICRC Commentary to Protocol I, art. 44, at 528 n. 35.

<sup>201</sup> ICRC Commentary to Protocol I, art. 44, at 1694.

<sup>202</sup> See *supra* note \_\_\_\_.

<sup>203</sup> The *Commentary* also suggests that the denial of quarter does not constitute a “concrete and direct advantage that the attacker has the right to achieve.” That statement is consistent with the Saint Petersburg principle, which holds there is no right to cause the inevitable death of enemy fighters (e.g., to deny them quarter). However, as discussed above, that principle is consistent with either proportionality, necessity, or a strict humanity test.

<sup>204</sup> *Id.* at ¶ 1417 (quoting O.R. XV, p. 267, CDDH/215/Rev. 1, ¶ 21).

to the intent of the original rule.”<sup>205</sup> Moreover, the *Commentary* states that the concept of necessity under Article 35 entails “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money. ... [I]t should be quite clear that the requirement as to the minimum loss of life ... refers not only to the assailant, but also to the party attacked. If this were not the case, the description would be completely inadequate.”<sup>206</sup> Finally, the *Commentary* also includes language suggesting that the test involves a proportionality analysis (Category 3). It states: “in principle it is necessary to weigh up the nature of the injury or the intensity of suffering on the one hand, against the ‘military necessity’, on the other hand, before deciding whether there is a case of superfluous injury or unnecessary suffering as this term is understood in war.”<sup>207</sup>

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In summary, the application of an LRM model to the use of force against combatants has a long and distinguished career in the laws of war. Pictet’s promotion of such a model was consistent with the positions adopted by several important legal authorities. The best reading of Additional Protocol I is that it maintained this understanding in Article 35. Indeed, a mountain of evidence strongly supports that conclusion. It is unclear whether the rule entails a proportionality test. Nevertheless, the analysis in this Part provides a compelling case that RUF—and LRM in particular—constitutes a well-established part of modern LOAC.

## Conclusion

“if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided”

ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS (1973)

The right to kill and injure in war is not unlimited. The limitations on that right, however, are themselves not unconditional. In this article, I have discussed two tracks that govern the decision to kill, injure, or capture an adversary—the definition of *hors de combat* and the restraints on the use of force. I have also examined several conditions that could limit the application of the latter and help in its more precise formulation. One of the principal insights of this article is the

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<sup>205</sup> *Id.* at ¶ 1417; *id.* at ¶ 1431 (“Despite the difficulties encountered by the Ad Hoc Committee in its task, the reaffirmation of the prohibition on unnecessary suffering and superfluous injury corresponds to the ICRC’s own proposals.”). Compare *id.* at 1411 (“The object of combat is to disarm the enemy. Therefore it is prohibited to use any means or methods which exceed what is necessary for rendering the enemy ‘hors de combat.’ ... Neither the combatants nor the Parties to the conflict are free to inflict unnecessary damage or injury, or to use violence in an irrational way. All in all, this is the position adopted by the ICRC.”)

<sup>206</sup> ICRC *Commentary* to AP I, art. 35, at ¶ 1397 (internal quotation marks and citation omitted (“Another definition in very general terms is given as follows: military necessity constitutes ‘the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money.’ However, this description has the disadvantage that it does not in fact take into account the paragraph of Article 35 with which we are concerned, and therefore it cannot stand on its own. Moreover, it should be quite clear that the requirement as to minimum loss of life and objects which is included in this definition refers not only to the assailant, but also to the party attacked. If this were not the case, the description would be completely inadequate.”).

<sup>207</sup> *Id.* at ¶ 1428.

identification of a unified system that emerged out of the codification of both sets of rules in the 1970s. An important lesson from that study is, with respect to the line between killing and capturing, the scope of *hors de combat* may effectuate the same result as RUF in many cases. And this understanding apparently was not lost on the ICRC, the UN Secretary-General, or leading experts participating in the deliberations at the time.

In its 2009 Interpretive Guidance, the ICRC invoked Pictet’s “‘famous statement’” in support of RUF. In retort, Parks contented that this “characteriz[ation] as ‘famous,’ is dubious,” because the idea failed to be recognized by Pictet’s contemporaries or gain any further traction. Neither the ICRC nor Parks’ account is wholly accurate. Pictet’s statement was not as famous as the ICRC hagiography might suggest. But that is not because the idea was isolated and discarded. Instead, Pictet’s views were largely in agreement with the UN Secretary-General; the ICRC through 1971-77; the collective judgment of a group of experts in 1973; thought leaders in the laws of war such as Hans Blix, Frits Kalshoven, Michael Bothe, Karl Partsch, and Waldemar Solf; and influential government delegations involved in drafting the protocols to the Geneva Conventions.

Indeed, the original research in this article reveals relatively consistent recognition of RUF that long predates present-day discussions of the subject. Remarkably, this research has uncovered a wealth of material (and a legal foundation for the rule) that was overlooked by both contemporary critics and the ICRC itself. In the final analysis, the record most clearly indicates that restraints on the use of force—and the least-restrictive-means approach in particular—are well-grounded in international law and institutional practice.