

# RECAPTURING THE CONCEPT OF NECESSITY

Jens David Ohlin\*

## INTRODUCTION

The recent growth of the U.S. targeted killing program has prompted no shortage of reaction, but the most trenchant criticism is that the targets should have been captured and prosecuted rather than targeted and killed. These are assassinations, the critics claim. In a recent article, *The Duty to Capture*, I argued that finding a duty to attempt capture, prior to resorting to lethal force, is fundamentally incompatible to the laws of war which allow the summary killing of enemy combatants.<sup>1</sup> The laws of war protect enemy civilians from attack (under the principle of distinction), but enemy combatants are subject to the summary killing and reciprocal risk implicit in the core principles of *jus in bello*. For that reason, I argued that the most plausible avenue for finding a duty of capture is to “co-apply” the laws of war with international human rights law, such that the two bodies of law operate in tandem in isolated situations.<sup>2</sup> Under this approach, the duty to capture might be imported from human rights law into situations of armed conflict by virtue of the co-application strategy. I expressed skepticism about this approach, arguing that co-application was more vexing than it might otherwise appear, in particular because the human rights definition of necessity and the law of war definition of necessity are incompatible with each other.<sup>3</sup> These concepts are not so easily co-applied when they mean different things.

In a recent essay, Ryan Goodman offers a vigorous defense of the duty to capture during armed conflict, and concludes that attacking soldiers have a duty to attempt capture and can only use lethal force if capture is not feasible.<sup>4</sup> However, his argument is far more ambitious than the co-application strategy because it purports to find the duty to capture in the laws of war *simpliciter*, without importing any norms from international human rights

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\* Professor of Law, Cornell Law School; [jdo43@cornell.edu](mailto:jdo43@cornell.edu). An earlier and shorter version of this essay was circulated in embryonic form under the title *The Capture-Kill Debate: Lost Legislative History or Revisionist History?*

<sup>1</sup> See Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2131720> (all subsequent page references are to this ssrn version).

<sup>2</sup> *Id.* at 38-47.

<sup>3</sup> *Id.* at 25-33.

<sup>4</sup> See Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EURO. J. INT'L L. (forthcoming), available at <http://ssrn.com/abstract=2213960>.

law.<sup>5</sup> This is an ambitious claim since many commentators writing today assume that the laws of war do not impose a duty to capture. Indeed, when the International Committee on the Red Cross (ICRC) commissioned an expert report on the notion of civilian “direct participation in hostilities,” the final report included a controversial section that referred to the duty to capture under the laws of war.<sup>6</sup> The report generated a scholarly shouting match among the experts that spilled over to the pages of numerous law reviews.<sup>7</sup>

Goodman contends in his new intervention that the debate prompted by the ICRC has relied on an impoverished reading of the legislative history of the key international protocols drafted in 1973 and 1974. Having unearthed a wealth of documents regarding those negotiations, Goodman mounts a multi-pronged defense of the duty to capture. In particular, he argues that: (i) the law of war already severely restricts the use of force in various contexts by virtue of specific prohibitions on methods of warfare; (ii) the law of war already prohibits killing enemy combatants who are rendered *hors de combat*; and (iii) the drafters of the Additional Protocols supported a “least-restrictive-means” interpretation of the concept of necessity, meaning that killing is only lawful when soldiers have no other way of neutralizing the enemy (e.g. capture is not feasible).

Goodman’s work does not stand alone, but rather exists in a line of diplomatic and scholarly attempts to redefine the concept of necessity to give it more regulatory bite. The line starts in 1973-74 with Jean Pictet, who argued in favor of a least-restrictive-means interpretation of necessity in Geneva during the negotiations that led to the drafting of the Additional Protocols to the Geneva Conventions.<sup>8</sup> Nils Melzer’s monograph from 2008 also seeks to buttress the least-restrictive-means interpretation.<sup>9</sup> Finally, the ICRC Inter-

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<sup>5</sup> See Ryan Goodman, *A Surreply to the Second Critique by Corn, Blank, Jenks, and Jensen*, *Lawfare* (March 4, 2013), available at <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-7-goodman-responds/> (emphasizing that his argument does not rely on human rights analysis).

<sup>6</sup> See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereafter cited as *ICRC Interpretive Guidance*].

<sup>7</sup> Compare W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, N.Y.U. J. INT’L L. & POL. 769, 805 (2010), with 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).

<sup>8</sup> According to Goodman, Pictet did not stand alone in this attempt but was supported by other experts. See Goodman, *supra* note x, at x.

<sup>9</sup> See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008).

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pretive Guidance on Direct Participation in Hostilities also supported a least-restrictive-means interpretation of necessity (and by extension a duty to attempt capture before killing), though this conclusion was controversial and unsupported by many of the experts involved in the original drafting process.<sup>10</sup> Goodman's recent essay is only the latest entry in a long-standing debate that stretches back decades.

At the same time, philosophers and ethicists have conducted a parallel debate regarding the value of combatant lives and whether their liability to summary killing in battle is morally justified. For example, a recent essay by Gabriella Blum concedes that the current law codifies a permissive version of military necessity, but questions whether the law should evolve towards a narrower conception of military necessity. At the same time, Just War Theorists have struggled to identify the particular element of combatancy that makes an individual subject to summary killing while protecting civilians in almost any situation except their direct participation in hostilities. As Jeff McMahan has noted, there may be moral reasons to permit targeting of civilians who are causally responsible for an unjust war effort – a conclusion that stands in stark contrast with today's codification of the laws of war. So the concept of necessity as a baseline principle for military targeting is being questioned in both the philosophical and legal domains. While legal scholars such as Pictet, Goodman, and Melzer are marking arguments about the state of the law today, *lex lata*, philosophers such as Blum and McMahan are making arguments about the way the law ought to be, *de lege ferenda*.

For reasons that I will articulate in the following sections, I believe that none of the arguments sounding in *lex lata* provide definitive support for a duty to capture under the laws of war. While generally each piece of evidence cited Goodman, Pictet and Melzer is correct, I believe that the legal evidence paints a far different picture. Military necessity has always permitted the summary killing of enemy military personnel and nothing in the Geneva Conventions or the Additional Protocols changed that. However, the philosophical questions are far more complex and their analysis produces a far more nuanced result. The philosophers are generally correct that justifying the wholesale killing of enemy soldiers is difficult to do, especially since the difference between an enemy soldier and an enemy civilian may be nothing more than 30 days in basic training and the issuance of a service rifle that has never been fired (for a soldier conscripted into a poorly trained and equipped army). That being said, changing the principle of necessity to a least-restrictive-means may have significant consequences that effect the philosophical calculus. Specifically, a requirement to capture where feasible requires an analysis of an individual's level of threat that may unravel the

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<sup>10</sup> The final document was eventually drafted by Nils Melzer.

modern principle of distinction and the collective dimension of warfare upon which it rests.<sup>11</sup> The proposed new definition of necessity would require an individualized threat assessment that is just as unwieldy as the individualized threat assessments suggested by McMahan and other revisionist Just War Theorists – assessments that cannot be reliably performed by combatants engaged in warfare.

Part I of this Chapter begins by considering the specific prohibitions of the laws of war, and concludes that these specific prohibitions do not add up to a more general duty to refrain from using lethal force against enemy combatants. Part II then introduces a historical analysis and shows that the concept of military necessity enshrined in the Lieber Code was incredibly broad, and that recent attempts to redefined the principle of necessity are historically insensitive to the principle's origins. Part III then looks at the prohibition regarding killing soldier's hors de combat and concludes that it provides no support for a narrow conception of necessity. In fact, despite popular misconception, wounded soldiers are only *hors de combat* if they are receiving medical treatment or incapable of engaging in belligerency. Part IV then examines the *travaux preparatoires* for the Additional Protocols to the Geneva Conventions and concludes that the least-restrictive-means, though by all means a subject of discussion at the Geneva conferences, was not codified into the Additional Protocols. The result was that the traditional conception of military necessity remains in force, unbroken, from Lieber's time, through the St. Petersburg Declaration, and enduring in the present.<sup>12</sup> Finally, Part V engages in the far more vexed task of evaluating the philosophical arguments regarding how warfare *ought* to be conducted. Although the traditional principle of necessity is difficult to defend from the perspective of moral philosophy, the revisionist principle of necessity might be so unworkable as to produce a morally worse outcome.

## I. SPECIFIC PROHIBITIONS VERSUS GENERAL DUTIES

Goodman styles his argument as one sounding in *lex lata*, not *lex ferenda*; he is making an ambitious claim not just about what the law ought to be in the future but what the law is today. As an interpretation of *lex lata*, Goodman's arguments are highly provocative and have cast new light on the raw materials for this debate. I am unaware of a single prosecution at an in-

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<sup>11</sup> See Pildes and Issachoriff.

<sup>12</sup> See Preamble to the St. Petersburg Declaration ("The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."). See also Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INTERNATIONAL AFFAIRS 311, 321 (2012).

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ternational tribunal of a soldier or commander for killing enemy soldiers who had not surrendered or are incapacitated. There are not only no convictions, there are also no indictments of this nature at the ICTY, ICTR, ICC, STL, SCSL, ECCC or any other international criminal tribunal. Of course, one might argue that the putative restrictions on the use of force are not criminal prohibitions—just violations of IHL. But it is telling that the restrictions on the use of force asserted by Goodman are out of step not only with the actual practice of ICL but also the actual practice of modern aerial warfare.

If the duty to capture was required by IHL, then it is hard to understand how any aerial military campaign could be legal, given that an infantry campaign could attempt capture rather than killing by air. Does this mean that every state that has engaged in aerial warfare since 1973 has violated the least-restrictive-means test? After the 1999 NATO bombing of Serbian targets, there was widespread discussion of whether NATO's 15,000-foot flight ceiling impermissibly prioritized allied force protection over enemy civilian casualties; the ICTY prosecutor declined to commence an investigation based on this controversy.<sup>13</sup> But few claimed that the bombing was per se illegal because it killed enemy soldiers when they could have been captured in an infantry campaign. If there were any complaints about the lack of an infantry campaign, it was due to the aerial campaign's perceived impotence at stemming the ethnic cleansing occurring on the ground, and a question about whether the rules of engagement represented an obstacle to compliance with the principle of distinction.

Goodman has performed an important service by unearthing the lost legislative history of the Geneva Convention's Additional Protocols. I say "lost" because, although this history is well known to those who participated in the negotiations, the recent literature on the law of armed conflict has forgotten many of the details that Prof. Goodman helpfully excavates. Goodman is surely right that many recent statements regarding the Additional Protocol negotiations were conclusory and fail to capture the nuance of the negotiations.<sup>14</sup>

Goodman spends several pages cataloguing the various prohibitions on means and methods of warfare – prohibitions that provide evidence that the right to kill enemy combatants is not unlimited.<sup>15</sup> Perfidy is not permitted, nor is wounding treacherously. A combatant may not declare that no

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<sup>13</sup> See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at para. 56, available at [http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf).

<sup>14</sup> See Goodman, *supra* note 4, at 35.

<sup>15</sup> *Id.* at 16-20.

quarter will be given; indeed this is a war crime once the words are uttered even before the killing begins. Reprisals are also forbidden.<sup>16</sup> If a unit is unable to logistically handle the captivity of a group of soldiers that it has taken prisoner, it cannot summarily execute them – even if the only alternative is to let them go free.<sup>17</sup> Finally, various types and classes of weapons are prohibited.

Goodman suggests that this long catalogue of specific prohibitions provides some evidence for a general IHL principle regarding restrictions on the use of force (RUF), of which the least-restrictive-means test becomes the prime example. The argument here is that the law of armed conflict already engages in restrictions on the use of force.<sup>18</sup> While this last statement is undoubtedly true, the question is whether this proposition provides an additional reason to believe in a wholesale principle that requires that the least amount of force be used during a military engagement.

Goodman's argument has the relationship between the parts backward. The reason that the use of force is restricted in these situations is precisely because the relevant treaties codified *specific prohibitions* against weapons and methods that produced unnecessary suffering and specific actions, like perfidy and treachery, that made the return to peace too difficult. Goodman notes that his general principle on the least restrictive means can also be justified because unrestrained force would make the return to peace too difficult.<sup>19</sup> But this point is inapposite. It does not matter whether both could conceivably be justified by the same type of normative arguments. The important point is that the specific prohibitions and a general restriction on the use of force are operating on different levels. One cannot turn the specific prohibitions on their head; indeed, in Goodman's approach, the *specific* prohibitions of *jus in bello* must become superfluous once they are swamped by the more general principle that Goodman purports to find in their penumbra. With Goodman's general principle in place, the specific prohibitions would

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<sup>16</sup> One must be careful in the sense that the recent history of the laws of war has shown remarkable development regarding this norm in a very short period of time, and the exact scope of the current prohibition may be controversial. See Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, rule 147 at 523 (2005) ("Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities.").

<sup>17</sup> See Goodman, *supra* note 4, at 19 (describing "release on the spot" rule).

<sup>18</sup> *Id.* at 7 ("In the final analysis, RUF—and the least restrictive means approach in particular—fit well within the law of modern warfare.").

<sup>19</sup> *Id.* at 18 n.81.

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lose their urgency and *raison d'être*. This signals that something has gone amiss in the argument.

Although Goodman engages in a substantial discussion of Grotius,<sup>20</sup> his analysis is strangely insensitive to the historical development of the laws of war. He ignores Francis Lieber's definition of military necessity codified in the Lieber Code; this definition was absolutely central to the history and development of *jus in bello* and it represents the greatest obstacle to the least-restrictive-means approach.<sup>21</sup> Whatever Lieber meant by military necessity, the phrase clearly did not mean the least restrictive means – a definition of necessity that now reigns in human rights law. As I discussed in *The Duty to Capture*, necessity in human rights law is not the same thing as necessity in *jus in bello*, and one should not be lured into thinking they are the same concepts just because they carry the same label.<sup>22</sup> Although Goodman is not applying human rights law in his analysis, his argument does suffer from the same infirmity that I identified in the human rights “co-application” arguments: they both misunderstand that the concept of necessity in the law of war has a technical meaning that can be traced back to the Lieber Code.<sup>23</sup> Although Jean Pictet and others have tried to displace that definition, it must at least be conceded that the historical definition of necessity in the Lieber Code did not mean “least-restrictive means.” The following analysis explains why.

### II. LIEBER'S CONCEPTION OF MILITARY NECESSITY

According to the Lieber Code, military necessity “admits of all direct destruction of life or limb of armed enemies” unless a specific prohibition applies, such as the prohibition against causing unnecessary suffering or perfidy.<sup>24</sup> Why is this insight ignored by modern human rights scholars tempted to redefine the principle of necessity?

The confusion stems in part from the structure of the Lieber Code itself. In article 14, the Code states that “[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful ac-

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<sup>20</sup> *Id.* at 17.

<sup>21</sup> Instructions for the Government of Armies of the United States in the Field, General Order No. 100, April 24, 1863 [hereinafter cited as *Lieber Code*].

<sup>22</sup> See Ohlin, *supra* note 1, at 30.

<sup>23</sup> *Id.*

<sup>24</sup> Lieber Code, *supra* note 21, article 15.

ording to the modern law and usages of war.” If one stops there and focuses exclusively on the phrase *indispensable*, then the Lieber Code may indeed sound like it supports the least-restrictive-means conception of military necessity. However it would be a mistake to stop after article 14, because the definition of military necessity continues into article 15:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.<sup>25</sup>

Consequently, the Lieber Code categorically establishes that destruction of enemy forces, including killing them, is clearly within the margin of military necessity. If that is the case, what *is* prohibited by military necessity? The following article provides the crucial answer to that question:

Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.<sup>26</sup>

This provision makes clear that military necessity, at least as a historical matter, cannot be used as grounds to establish a positive obligation to attempt capture prior to killing an enemy combatant. The principle of necessity permits actions taken to secure the ends of the war, including killing enemy forces and destroying enemy installations, but not actions that violate specific prohibitions in the laws of war underlying the treatment of POWs or wounded soldiers receiving medical care. It does, however, outlaw all actions *unrelated* to the war aim, such as killing inspired by pure hatred or vengeance alone. These actions have no rule to play in the decisions of the professional soldier. The full scope of Lieber's principle of necessity only becomes clear

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<sup>25</sup> Lieber Code.

<sup>26</sup> Lieber Code, article 16.



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once one understands that the definition of military necessity spans three whole articles of the Code.

Indeed, John Witt's magnificent historical study of Lieber and Lincoln details that whatever necessity meant, "it did not mean that armies were permitted to take only those actions that were necessary in the sense of leaving no other choice."<sup>27</sup> Witt also notes that Lieber's version of necessity did not

invoke a less restrictive but still demanding approach that would have prohibited acts of force for which there were less destructive substitutes. This has been an appealing notion for humanitarian lawyers ever since, some of whom have sought to adopt a least-destructive-means requirement to lessen the human suffering of war. But Lieber thought that the attempt to reduce the human suffering arising out of any one decision in wartime might well increase suffering in warfare more generally. 'When war is begun,' Lieber told his students, 'the best and most humane thing is to carry it on as intensely as possible so as to be through with it as soon as possible.' He repeated the same idea in the code. 'The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.' If this was so, then the least destructive means were not necessarily the most humane. The opposite might be true. Indeed, if war was sufficiently terrible, there might be fewer wars. Human suffering from warfare might be reduced most by a rule that not only permitted but required the greatest possible destruction.<sup>28</sup>

Whether Lieber was correct or not when he claimed that sharp wars are brief is beside the point. It is a debatable empirical claim that may or may not be borne out by the facts; one need not subscribe to its veracity. Rather, one simply has to recognize that this vision of necessity represented the basic structure of the laws of war. Military necessity permits killing and destruction of enemy forces, while the specific prohibitions (distinction, proportionality, restrictions on various weapons, the prohibition on unnecessary suffering, perfidy, etc.) restrict the use of force. But it is important not to confuse the two and one certainly cannot use the specific prohibitions as a rationale for reading the general principle of necessity in a wider fashion.

This analysis of the Lieber Code is strengthened by Lieber's own writings on military necessity. These writings are not widely available, perhaps contributing to the occasional misinterpretations of the Lieber Code. However, his unpublished manuscript on the *Law and Usages of War* makes abundantly clear that necessity simply means related to the object of the war. Although Lieber is not given his due as a theorist of war, his edifice is impecca-

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<sup>27</sup> JOHN FABIAN WITT, LINCOLN'S CODE 235 (2012).

<sup>28</sup> *Id.* at 235-36.

bly constructed, built from first principles inspired equally from Kant and von Clausewitz. He first defines war as “a protracted physical contest between large numbers.”<sup>29</sup> Once there has been a resort to force, violence between the parties becomes lawful: “Physical destruction and [stratagem] (not cruelty or treachery) are lawful.” The major limitations on this right are the principles of reciprocity and retaliation. He defines the first as what “what is right for the one, is right for the other (or perfect equality of the belligerents).” The cases where the enemy violates these norms, the principle of retaliation creates a form of self-enforcement that helps ensure the principle of reciprocity. Simply put, the threat of retaliation itself enforces the principle of reciprocity, thereby ensuring that both sides of the conflict have the potential to suffer the same fate.

That being said, not all violence is permitted, Lieber maintains: “That no more hostility be resorted to, than necessary, and that the intercourse between the belligerents remains, even in war, that of honourable, truthful men.”<sup>30</sup> But Lieber is quick to clarify that “necessary” in this context does not mean something akin to the least restrictive means, i.e. the only avenue to achieve that particular result. Rather, he is clear that belligerents “may indeed inflict death or wounds – both may be, frequently are painful, but cruelty consists in inflicting pain for the sake of pain.” In other words, cruelty is sadism, the act of being “*pleased with the pain of others*.”<sup>31</sup> So for Lieber, the principle of necessity outlaws cruelty and “unnecessary infliction of pain, pain for its own sake to satisfy the lust of revenge or a fiendish hatred.”<sup>32</sup>

Lieber could not be more clear that the killing of enemy combatants is consistent with the principle of necessity: “Simple infliction of death is not considered cruelty,” he writes.<sup>33</sup> Lieber also thinks that the resort to cruelty is counter-productive: “Probably he who on principle abstains from treachery and cruelty will in the long run obtain the advantages generally attending a high-minded course, but whether or not, cruelty and treachery are not to be admitted in modern law of nations however provoking the enemy may be.”<sup>34</sup> While this may sound *prima facie* counter-intuitive because refusing to follow the constraints of warfare would seem to place a fighting force in a better position, thus suggesting that rational self-interest would counsel in favor of violating the laws of war while only morality would counsel compliance. Not

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<sup>29</sup> FRANCIS LIEBER, LAW AND USAGES OF WAR (1861) (Notebook II).

<sup>30</sup> LIEBER, LAW AND USAGES OF WAR (1861) (Notebook II).

<sup>31</sup> *Id.* at Notebook II.

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

<sup>33</sup> LIEBER, LAW AND USAGES OF WAR, Notebook IV.

<sup>34</sup> *Id.*

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so, from Lieber's perspective.<sup>35</sup> Cruelty means engaging in violence and causing pain for its own sake, rather than engaging in violence in order to achieve the end-result of war: causing the enemy to submit to one's conditions. Therefore cruelty *by definition* is rationally unjustified because it is unrelated to the external aim of the war and is tethered only to its purely internal logic of violence for its own sake. In fact, Lieber even translates the phrase military necessity as "*raison de guerre*,"<sup>36</sup> literally meaning the reason for war. The principle of military necessity is axiomatically satisfied by all actions that are performed in order to reach the goal of the war: submission of the enemy as quickly as possible to one's terms. "Peace of some sort must be the end of all war – a return to the normal state. The who would carry on war for its own sake are enemies to civilization, to mankind," Lieber writes.<sup>37</sup> "War is not its own end; hence the battle – a portion of the war – neither. The object of the war and of each battle must lie beyond the war and beyond the battle."<sup>38</sup>

This represents the central and undeniable move of Lieber's ethical program. What separates murder from lawful belligerency is the collective nature of the conflict and the fact that the killing is performed in order to achieve the collective geo-political aim of the war. Without that collective context, the killing becomes murder *simpliciter*:

A word as to firing on centinels or single men of battle. All the principles which we have endeavoured carefully to lay down, and all the truths which we have endeavoured certain concerning the essence of war, must show you that firing upon single men, for no other purpose than killing them, is simple murder... The object of the war, and therefore, of the battle, lies *beyond* the war, and all killing which is not believed to be *conducive to the obtaining of this end*, is, as I have purposely so often stated, murder.<sup>39</sup>

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<sup>35</sup> Lieber also notes: "War would be but destruction itself if treachery were adopted as a principle. It would be illogical; for how can we carry on transactions with the enemy if we allow the principle of treachery to be acted upon. How could we conclude peace -- a lasting, honest peace? On the ground of expediency, it would be better to abstain from treachery."

<sup>36</sup> LIEBER, LAW AND USAGES OF WAR, Notebook VII.

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<sup>38</sup> *Id.* See also LIEBER, LAW AND USAGES OF WAR ("The object of all civilized war is either defence or the forcing of the enemy to conditions which we think necessary and just. It lies beyond the war and beyond the battle. Destruction of the hostile army is rarely the object of a land battle, but even when it is, it is only a means to obtain the [other] end of the war.").

<sup>39</sup> Lieber (emphasis added).

So Lieber's collectivism runs deep. He views the soldier as implementing the will of the commander and the will of the political body under whose authority he fights. The soldier is a professional, deserving the respect due generated by the relationship between opposing soldiers on opposite sides of the conflict. Lieber even takes this point to its logical extreme, viewing the soldier as a "belligerent" in name only. The real "belligerents" are the nations they represent in warfare:

Enemies are the contending parties. The contending parties are the political societies. *The hostile states are the real belligerents.* In regular wars the citizens of a warfaring state is [expected] to be an enemy to each citizens of the hostile state, but this is only because members of the hostile" society, and not on account of individual hostility. The farther civilization advances the more distinctly are the two characters separated... Individual citizens cannot be made to suffer in person or property, as individuals. As such they are not enemies in truth.<sup>40</sup>

The soldiers themselves are therefore deserving of moral respect in their mutual combat.

So the moral nature of combat flows from multiple sources. First, Lieber concludes that all nations belong to the same "family" of nations, not just a mere state of nature. This family is civilization itself – as opposed to mere savagery – that is represented by the international community of nations. The moral nature of combat stems from our *membership* in this family of moral nations. War represents a breakdown of peacetime relations, but human beings do not shed their "moral" or "social" character during war because they all belong to the same family of nations, i.e. civilization. Consequently, the rules of warfare are designed to keep that family intact:

War being a physical contest, yet man remaining forever a moral being, and peace being the ultimate object of war, the following conclusions [result]: (c) only so far as necessary for this object and (d) we must abstain from everything that would make the ulterior peace, the normal state, unnecessarily difficult or [unobtainable].<sup>41</sup>

This represents Lieber's Kantian impulses.<sup>42</sup> The goal of international discourse is to reach the normal state of peace (and ideally perpetual peace). Consequently, warfare should be conducted in ways that hastened the return

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<sup>40</sup> Lieber.

<sup>41</sup> Lieber.

<sup>42</sup> See IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (1795). For a discussion, see Richard Baxter, *The First Modern Codification of the Law of War*, 3 INT'L REV. RED CROSS 171-89 (1963), reprinted in RICHARD BAXTER, HUMANIZING THE LAWS OF WAR 121, 124, 139 (2013).

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to peace and do not needlessly frustrate its return. Prohibitions on treachery and cruelty fit nicely into this framework, since treachery and perfidy linger and foster distrust that extends well beyond the cessation of hostilities, making the return to peace difficult.<sup>43</sup> Similarly, cruelty inflames the passions with hatred that simmers long after the battle is over, thus preventing the establishment of a lasting peace – which is paradoxically the true goal of war: the *return* to peace.

Other *jus in bello* restrictions apply. For example, the prohibition against killing a soldier *hors de combat* follows the same logic. Soldiers who have effectively communicated their surrender are no longer a threat, and therefore their killing can only satisfy the demands of cruelty or vengeance. “A soldier on the field of battle makes known that he [submits] as prisoner of war, by laying down his arms and asking for quarter,” Lieber writes.<sup>44</sup> “It must be granted except where there is an impossibility of making him a prisoner. Formerly some regiments would declare that they never give quarter and of course would receive none... This is now very rare, perhaps abolished in all organized armies....”<sup>45</sup>

Similarly, wounded soldiers are also protected persons once they are *hors de combat*. Lieber even goes so far as to state: “*The wounded enemy is a sacred person.*”<sup>46</sup> He continues: “He is of course a prisoner, but must be provided for by him into whose hands he falls. No difference is to be made between him and the victor’s own wounded.”<sup>47</sup> This statement follows logically from his view that the real belligerents are the enemy collectives and the soldiers are professionals working on behalf of their commanders and political leaders. Killing wounded soldiers who cannot fight is just as bad as declaring that no quarter will be given.<sup>48</sup>

Lieber’s definition of belligerency is so well defined that it even provides him with an argument against slavery. As Witt explains in his history of the Civil War, President Lincoln used Lieber’s concept of military necessity in order to justify his executive actions to abolish slavery. However, there is

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<sup>43</sup> Lieber also says that “[w]ars of extirpation... wars of plunder, belong to the savage state of man.”

<sup>44</sup> Notebook VII.

<sup>45</sup> Notebook VIII.

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<sup>47</sup> LIEBER, LAW AND USAGES OF WAR, Notebook V.

<sup>48</sup> Lieber also refers to the Battle of Balaclava (1854) during the Crimean War, in which an officer was charged for “having ordered his men, in battle, to bayonet wounded English and Frenchmen on the ground.”

another connection between Lieber's laws of war and the abolishment of slavery. For Lieber, slavery becomes possible when one nation vanquishes another and takes their enemies as slaves. This practice was once common and even purportedly justified on the grounds that the victorious army was permitted to kill members of the vanquished people. Under this approach, enslaving the enemy population was a humane gift given to the enemy population: sparing their lives and taking their labor and freedom instead.

In Lieber's understanding, this argument for the legitimacy of slavery is fallacious because it starts from false premises about the spoils that are due to the victor:

The victor has no primary or absolute right of killing the enemy. That is an idea belonging to the internecine period. We kill in battle to remove the opposing obstacle, that is the armed soldier in our way; when vanquished or disarmed he ceases to be the warlike obstacle in our way of obtaining the end of war. Granting him therefore to live is the very proof that the right of killing him has slipped from our hands, and, consequently, the right of enslaving founded upon the presumed right of killing... The right of killing ceases with the necessity of killing; hence the right of selling the life.<sup>49</sup>

So the prohibition against slavery stems from the basic principles of the laws of war: killing is permitted during warfare insofar as it is related to the aim of bringing hostilities to a close as quickly as possible. But once the hostilities are complete, the right to kill enemy combatants evaporates. So the putative right to enslave the enemy population is built upon a right to kill the enemy population that is purely illusory.

So Lieber's version of the laws of war are incredibly progressive in some respects and less so in others. Lieber believed categorically that wounded soldiers incapable of fighting could not be killed, and that to do so was criminal. Wounded soldiers were sacred. Soldiers who laid down their arms and surrendered should be captured, although he apparently believed that the prohibition on declaring no quarter might be suspended in situations where the taking of prisoners was logistically impossible.<sup>50</sup> Civilians were generally protected from the horrors of warfare and could not be enslaved or killed simply because their side of the conflict was defeated. On the other hand, they were not wholly immune from actions, such as the poisoning of drinking wells, that might be taken by enemy forces as method for securing the end of the war. This just shows how wide Lieber's conception of military necessity was.

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<sup>49</sup> LIEBER, LAW AND USAGES OF WAR, Notebook VI.

<sup>50</sup> This rule has certainly changed. In the contemporary law of war, logistical limitations are not considered a justification for failing to take enemy soldiers as prisoners.

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Why then do scholars think of military necessity as far more constraining than it actually is? First, they confuse the regulating function of the laws of war with the licensing function of the law of war. The constraints regarding prisoners of war, wounded soldiers who are hors de combat, and the principles of distinction and proportionality that protect civilians – these are all regulating principals that constrain the behavior of combatants during armed conflict. But the concept of necessity belongs most to the licensing function of the law of war, with only one small foot in the regulating sphere. Military necessity transforms, in warfare, what would otherwise constitute an immoral and illegal act of murder; but because the killing is performed in pursuit of the aim of winning the war, the killing is transformed into a lawful act of belligerency. This is the licensing function of the law of war, and the principle of necessity stands at its core. True, necessity also has a regulating function but it is incredibly weak. It outlaws only acts of vengeance, cruelty and sadism.

Of course, one might ask what the principle of necessity is good for if it always allows the killing and destruction of enemy forces unless another more specific prohibition applies. The answer is that in most cases the principle of necessity more closely tracks the *licensing* function of the law of armed conflict—i.e. that aspect of the law of armed conflict that changes the default rule that reigns in peacetime that says that killing is impermissible. Necessity is the expression of the law of armed conflict’s changing of that default rule to one where the killing of enemy combatants becomes permitted. The one situation where necessity *does* provide a regulating function that restrains the use of force is when killing is performed for reasons that have nothing to do with prosecuting the war effort and getting the enemy to succumb as quickly as possible – a principle announced in article 14 of the Lieber Code.<sup>51</sup> Think of killing for pure sadistic pleasure or vengeance, for example.<sup>52</sup> Necessity would not permit such killings because they were unrelated to the goal of winning the war.

One might also object that although this was Lieber’s vision of the concept of necessity, the law of war has evolved substantially since then and has jettisoned Lieber’s Clausewitzian notion of necessity. Perhaps we are no longer living in the era of Lieber? While it is true that the laws of war have evolved, and perhaps gained rigor, codification, and theoretical sophistication in the process of adding new *specific* prohibitions on particular methods of

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<sup>51</sup> See Lieber Code, *supra* note 21, article 14 (“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”).

<sup>52</sup> WITT, *supra* note 27, at 236.

warfare, its original structure remains relatively unchanged. The concept of necessity provides a license to kill enemy combatants, while the specific prohibitions constrain that use of force against specific targets (civilians) and with specific methods (perfidy) or weaponry.

Lieber's conception of military necessity survives to this day and is by no means a relic of American history. In fact, it was applied by the U.S. Military Tribunals sitting in Nuremberg in the *Hostages Case*, which included this famous definition: "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money."<sup>53</sup> This formulation replicates the conceptual structure of Lieber's definition of military necessity by linking it with the submission of the enemy and doing so as quickly as possible.<sup>54</sup> It is also codified in modern military manuals.<sup>55</sup>

Notice, however, that neither Lieber nor the *List* formulations of necessity permitted the concept to override the other, more specific, prohibitions contained in the law of war. In Article 14 of his Code, Lieber limited military necessity to actions "which are lawful according to the modern law and usages of war," while the *List* formulation says the actions must be "subject to the laws of war." These formulations present a consistent framework: military necessity provides a broad licensing function for all actions designed to pursue the ends of war, and outlawing only those actions that are de-linked from the aims of the war and are pursued for irrational or emotional reasons. Then, the analysis moves to the more specific prohibitions, including respecting the right of surrendered or wounded soldiers to be treated humanely. But the truly humane aspects of the law of war stem more from the specific prohibitions, not from the principle of military necessity, which has always been incredibly broad and remains so today.

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<sup>53</sup> *US v. List [The Hostages Case]*, American Military Tribunal Sitting at Nuremberg, 1948), 11 N.M.T. 1230, 1253. See also Heller, at x.

<sup>54</sup> David Luban argues that the *List* formulation of military necessity is even more permissive than Lieber's definition of military necessity. See David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 315, 341-42 (2013). However, Lieber's conception of military necessity was just as broad -- permitting all military actions related to securing the ends of war and outlawing only sadistic and cruel killings inspired by vengeance and other evil emotions.

<sup>55</sup> See UK Ministry of Defence Manual (2004) (necessity is "that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the 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").



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### III. THE HORS DE COMBAT ARGUMENT

Restrictions on the use of force might also be achieved through another doctrinal route: the prohibition against killing soldiers who are *hors de combat*. This would not represent the same argument as the least-restrictive-means interpretation of necessity, but it would cover roughly the same conceptual ground by producing a similar result: fewer instances in which lethal force would be permitted and an increased duty to detain or capture enemy combatants. But as the following analysis will make clear, I believe that an excessively broad interpretation of the *hors de combat* rule would conflate soldiers who might be defenseless in the future with soldiers who are presently defenseless (two completely different scenarios). The former are *hors de combat* while the latter are not. A full explanation of this point follows.

Goodman is one prominent defender of a broad *hors de combat* rule. For example, Goodman notes that a wounded or completely defenseless soldier is *hors de combat* and not a legitimate target.<sup>56</sup> Consequently, the rules restricting force against persons *hors de combat* occupy much of the same conceptual space as general restrictions on the use of force embodied by a least-restrictive-means interpretation of the concept of necessity. In fact, Goodman writes, “a very broad definition of *hors de combat* could even place more limits on the use of force than RUF,”<sup>57</sup> and the two types of restrictions “can effectuate the same result.”<sup>58</sup> If a combatant falls *hors de combat*, he cannot be killed and must be “apprehended and detained.”<sup>59</sup> These considerations are important because they recognize that a supposed duty to capture might be located in multiple doctrinal sources and a least-restrictive-means interpretation of the principle of necessity is just one of them. The prohibition against killing soldiers *hors de combat* is another, and it too can be interpreted narrowly and broadly. A broad reading of the *hors de combat* rule might effectuate the same practical result as the attempt to redefine necessity in least-restrictive-means terms. Like the principle of necessity, caution is warranted when dealing with expansive definitions of *hors de combat*.

It is clear that combatants receiving medical attention, having surrendered, or taken into custody, are all *hors de combat* and cannot be attacked under existing rules of *jus in bello*. However, there are seeds for a more ambitious reading of the rule in article 41(2) of Additional Protocol I, which defines a person as *hors de combat* if “he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is

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<sup>56</sup> Goodman, *supra* note 4, at 20-26.

<sup>57</sup> *Id.* at 20.

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

<sup>59</sup> *Id.*

incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.”<sup>60</sup> Presumably, the argument here is that a soldier who shoots and wounds an enemy combatant is prohibited from deploying a second kill shot if the wounded soldier is truly “incapable of defending himself.” This prohibition was very much at issue in the Navy Seals raid that targeted Osama Bin Laden in Abbottabad. Critics have complained that U.S. forces may have violated the rule if they shot Bin Laden after he was already incapacitated, though there might be a factual dispute regarding whether he was sufficiently incapacitated so as to prevent him from deploying a suicide explosive. However, it seems clear that absent a reasonable suspicion that he was holding such a device, then his killing may have violated the *hors de combat* rule if he was already incapacitated by the first attack and genuinely unable to offer any resistance.

Although this conclusion arguably represents a legitimate interpretation of the current prohibitions,<sup>61</sup> it is hard to see the relevance of it. Goodman concludes that “in the final analysis, the rules defining *hors de combat* share much in common with RUF... RUF regulate the kind and degree of violence that can be employed against individuals who are legitimate military targets.”<sup>62</sup> But this represents a fundamental misinterpretation of the rules regarding persons *hors de combat*. The *hors de combat* rules are specific provisions that remove specified *targets* from the category of legitimate combatants.<sup>63</sup> They do not, however, count as restrictions against the use of force

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<sup>60</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (hereinafter cited as *Additional Protocol I*), art. 41(2).

<sup>61</sup> Not all commentators agree with Goodman’s interpretation. Henderson notes that the ICRC study on customary law suggests that defenselessness is limited to unconsciousness, shipwreck, wounds or sickness. See Ian Henderson, *Comments*, EJIL Talk (Feb. 21, 2013), available at <http://www.ejiltalk.org/the-power-to-kill-or-capture-and-the-doj-white-paper/>.

<sup>62</sup> Goodman, *supra* note 4, at 25.

<sup>63</sup> Goodman’s account of the *hors de combat* rules suffers from the same conceptual infirmity as his account of the specific prohibitions on methods of warfare discussed in Part I of this commentary: both arguments confuse the *lex specialis* rules with the *lex generalis*. Although his description of the various rules are arguably correct readings of the existing law, it is unclear whether they do the argumentative work that he assigns to them; he uses the *lex specialis* as evidence for an imaginary *lex generalis* that does not exist. To be fair, Goodman never claims that the specific prohibitions on methods of warfare, or the rules on *hors de combat*, provide *direct* evidence for RUF. Rather, he only asserts that they provide *indirect* evidence. *Id.* at 20 (“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.”). However, even this assertion sounds like a category mistake. One cannot use the specific

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against combatants. Why? Because a soldier *hors de combat*—whether a POW, a hospitalized patient, or unconscious and incapacitated—is the functional equivalent of a civilian (i.e. a non-combatant) and hence is a protected person in the eyes of the law and its chivalric conception of warfare. The specified rules regarding when a soldier is *hors de combat* are *lex specialis* rules against the more general legal regime of *jus in bello* that allows summary killing of enemy combatants who are lawful targets – as long as there is no specific legal prohibition against it.

However, there is a much more powerful argument regarding the definition of *hors de combat* that threatens to unravel the conceptual clarity of the prohibition. Some scholars argue that *defenseless* soldiers are *hors de combat*, and cite as their evidence the Additional Protocol reference to a soldier who is “incapable of defending himself.” Then, in an attempt to define defenselessness, they include situations where the soldier is facing overwhelming firepower and its incapable of surviving the assault. His victory and survival are, as it were, practically impossible, because the attacking force has greater numbers of greater firepower. In this situation, is not the soldier for all practical purposes defenseless, and thus *hors de combat*? If this is the case, then the attacking force has a duty to attempt capture, since the killing of a defenseless soldier who violated the prohibition against killing *hors de combat*. The resulting conclusion of this argument gets to the same result as a least-restrictive-means interpretation of necessity, except via a different doctrinal route.

This argument is problematic for multiple reasons. First, the Additional Protocol only prohibits the killing of defenseless soldiers whose defenseless is caused by unconsciousness or incapacitating wounds/sickness. Defenselessness might be caused by other factors – such as overwhelming firepower or an imbalance in military strength – but this type of defenseless is not covered by the prohibitions regarding killing soldiers *hors de combat*. This might seem unnecessarily harsh, though it is important to remember that soldiers in such a situation are protected by another provision, i.e. the prohibition against killing soldiers who have effectively communicated their decision to surrender.

Second, the expansive interpretation of the *hors de combat* argument is problematic because it infringes on the conceptual territory of the prohibition on targeting surrendered soldiers. If soldiers are facing overwhelming force and they feel that their resistance would be futile, then they always retain the option of laying down their arms and communicating their surrender

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prohibitions as evidence for a general principle that exceeds the contours of the specific prohibitions; this argumentative move ignores and betrays the very specificity of these prohibitions, which were designed to regulate isolated activity.

to their adversary. The result of surrendering is that the soldier regains protected status and becomes the functional equivalent of a civilian. However, the wide version of the *hors de combat* rule effectively replicates this result, except it skips over the step where the soldier actually needs to surrender. In this sense, the wide *hors de combat* argument infringes on the surrender rule, but without requiring the actual requirements of that rule, i.e. the requirement that the soldier *actually* communicate his surrender. One might even view this as an impermissible end-run around the surrender rule.

Third, the expansive interpretation of *hors de combat* jumps the causal chain that is anticipated by the rule. A soldier who is facing overwhelming firepower is not necessarily *hors de combat*. Nor is a soldier who is simply wounded. A soldier facing an overwhelming level of force may *become hors de combat* once injured, assuming that they survive the original onslaught and are severely injured in the attack. This outcome might seem very likely from the standpoint of probabilities but it is by no means absolutely certain, nor has the anticipated result come to pass. Similarly, an injured soldier may become *hors de combat* if his injury is sufficient enough to render him incapacitated and unable to mount any defense at all. But the point here is that one must follow the causal chain to the required result – not preempt the causal chain and simply *assume* the result. The soldier must be *actually* defenseless, not potentially defenseless in the future by virtue of his inferior firepower or tactics at his disposal. Similarly, the wounded soldier must be *actually* incapacitated and incapable of participating in combat, as opposed to simply being wounded in a way that might lead, through the passage of time, to incapacitation. What matters is the state of the combatant at the time of the attack, and even a wounded soldier is capable of engaging in defensive actions. If the soldier retains the ability to respond at that moment in time, then he remains a legitimate target.

In short, it is important not to jump this causal chain and skip to the end, without letting the chain of causation run its course. It is possible for a severely injured soldier to stay within the zone of combat by continuing to represent a threat. They might fire their weapon, communicate with other combatants to coordinate counter-attacks (thus taking part in hostilities), or deploy an explosive either as a suicide device to directly solely against the enemy. These are all actions that a severely wounded soldier might engage in. It is therefore not necessarily the case that severely wounded soldiers are automatically *hors de combat*. They are *likely* to fall *hors de combat* eventually, though this is by no means certain. The law of war only places restrictions on their targeting once they become incapacitated to the point of being unable to engage in any threatening or belligerent actions, not before.

Consider the case of Sergeant Alexander Blackman, a U.K. serviceman sentenced to life in prison for the murder of an injured Taliban soldier in

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Afghanistan.<sup>64</sup> A helmet camera recorded the killing, thus removing much of the factual uncertainty that lingers over most battlefield killings. In this case, Blackman was recorded approaching a Taliban insurgent who was severely wounded in an Apache helicopter strike. Blackman quoted Shakespeare – “Shuffle off this mortal coil” – and uttered some derogatory profanity before shooting the insurgent at point blank range with a pistol.<sup>65</sup> He was court-martialed by a British court and convicted of murder. The basis for the conviction was not simply that the Taliban soldier was wounded or that he face overwhelming firepower from his adversary. Rather, the act of killing him was criminal simply because his injuries from the helicopter attack were so severe that he was incapable of exercising any belligerent actions at all. A minor injury would not have sufficed to render the target’s killing illegal. The victim’s severe infirmities rendered him *hors de combat*, making him a “sacred person” in Lieber’s memorable phrase. Killing him was no better than killing a prisoner of war. But his protected status stemmed from his incapacitation, not from a more causally attenuated claim about his “defenselessness” in the face of superior force.

#### IV. DID LEAST-RESTRICTIVE-MEANS CARRY THE DAY?

Disagreements regarding the appropriate scope of the principle of necessity, and the *hors de combat* rule, are longstanding. The issue was discussed during the Geneva conferences in 1973-74. If the negotiators had adopted the least-restrictive-means version of necessity and codified it in the Additional Protocols, then Geneva would represent a decisive turning point in the law of war – an explicit shift away from Lieber’s conception of necessity and towards more human-rights-oriented approach to necessity. However, though the issue was hotly debated, there is no evidence that the least-restrictive-means interpretation actually carried the day and made its way into the final text of the Additional Protocols. If anything, the evidence suggests that its deliberate exclusion was indicative of the failure of the adherents of the least-restrictive-means interpretation to sway the majority of the conference to their view.

Recent scholarship regarding the 1973-74 conferences has substantially improved our understanding of the Additional Protocols. For example, in his recent essay, Goodman has performed an important and invaluable service by enriching our understanding of the 1973 and 1974 conferences that eventually resulted in the adoption of Additional Protocol I and Additional Protocol II. Indeed, much of the recent scholarship has failed to take a suffi-

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<sup>64</sup> Blackman was sentenced to life in prison but eligible for parole after 10 years.

<sup>65</sup> The quote comes from Shakespeare’s Hamlet.

ciently skeptical eye toward the version of events offered by Hays Parks, one of the leading U.S. experts on the laws of war and a participant in the ICRC process that eventually produced the *Interpretive Guidance on Direct Participation in Hostilities*.<sup>66</sup> Parks' view has always been that the least-restrictive-means interpretation of necessity was the brain child of one individual, Jean Pictet, who argued in Geneva 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>67</sup> Parks concludes that Pictet's statement gained no support from other delegations or scholars, with the exception of its rehabilitation three decades later by Nils Melzer, the ICRC expert responsible for drafting the recent *Interpretive Guidance* that included the controversial Chapter IX that supported a duty to capture.<sup>68</sup> Parks' view is that Melzer dusted off Pictet's universally rejected theory and falsely presented it as representative of the Additional Protocol negotiations.<sup>69</sup> This difference in opinion explains Park's forceful assault against the process and substance of the *Interpretive Guidance*.<sup>70</sup>

Goodman has surveyed the *travaux préparatoires* from 1973 and 1974 and discovered that Hays Parks is almost certainly wrong.<sup>71</sup> It may very well be the case that Hays Parks overstated his case when he claimed that Pictet was an outlier and that his views were decidedly rejected, or even ignored, at

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<sup>66</sup> See Parks, *supra* note 7, at 786.

<sup>67</sup> See ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS 13, ¶ 23 (1973), *cited in* Goodman, *supra* note 4, at 33.

<sup>68</sup> It should be noted that the *Interpretive Guidance* supports a duty to capture but only within the context of civilians directly participating in hostilities, a point that the Guidance makes by citing the Israeli *Targeted Killings* case and *U.K. v. McCann*, a European Court of Human Rights case that did not arise during armed conflict. See *McCann v. United Kingdom*, 21 E.H.R.R. 97 (1995); HCJ 769/02 *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.* 53(4) PD 459 [2005]. The scope of the *Interpretive Guidance* was limited to the appropriate use of force against civilians who engage in combatancy, and it said nothing about a generalized duty to capture with regard to enemy combatants *per se*.

<sup>69</sup> See Parks, *supra* note 7, at 807.

<sup>70</sup> *Id.* at 830 ("The decision by the ICRC to press forward with Section IX against the knowledge, experience, and advice of its experts was not only unfortunate but wrong. As the article shows, it was not a matter of reasonable people disagreeing. It is that the ICRC in Section IX began with a faulty argument for which it failed to provide any, much less credible, supporting information.")

<sup>71</sup> Goodman, *supra* note 4, at 25.

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these conferences.<sup>72</sup> At the very least, Goodman has quite rightly demonstrated that there were others besides Pictet who either shared his view or espoused very similar positions.<sup>73</sup> Indeed, Goodman notes that the famous “Pictet” quote appeared in an expert conference report from 1973 and that therefore it is not properly attributed to Pictet personally, but rather to the group of experts as a whole – a group that included, *inter alia*, Hans Blix of Sweden and Frits Kalshoven.<sup>74</sup> Other experts made statements in support of Pictet’s views and other experts made their own pronouncements that were substantially similar to Pictet’s view.<sup>75</sup> It is therefore incorrect to suggest that Pictet was the *only* individual to discuss and support the least-restrictive-means interpretation of necessity. The over-emphasis to the point of obsession on Pictet—and his one quote—has no doubt distorted the scholarship of this important topic.<sup>76</sup> Goodman’s scholarship is a valuable corrective in this regard.

But one need not claim that Pictet had little support to conclude, as I and others do, that Pictet was *wrong* in his reading of core IHL principles. First of all, one of these conferences was an expert meeting, and although experts and “publicists” of international law might be a secondary source of law, they are just that—secondary. And the same goes for the analysis of the leading ICRC commentaries, at least some of which were written by the same experts.<sup>77</sup> It is important to avoid *Commentary*-fetish. They are, by definition, secondary interpretations of existing primary texts. Although sometimes suggestive of scholarly consensus, their status as law is only as persuasive as the quality of the underlying legal analysis. Indeed, it matters little whether the views of Pictet or any other expert represent a majority or minority view of the field—what matters is whether their views are *correct*. That being said, it is true that the views of the experts are important insofar as they might provide an interpretive gloss on the text of a major international treaty. But in that case, the experts and commentaries are relevant not as scholarly opin-

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<sup>72</sup> See Parks, *supra* note 7, at 815.

<sup>73</sup> See Goodman, *supra* note 4, at 33.

<sup>74</sup> *Id.* at 33-34.

<sup>75</sup> *Id.*

<sup>76</sup> To be fair to Hays Parks, the quote is also correctly attributable to Pictet personally. Pictet uses the quote in his own publications and other scholars, including proponents of the least-restrictive-means theory, attribute the quote to his writings. See JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75 (1985) (presenting the same quote), *cited in* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 288 (2009) and *Interpretive Guidance*, *supra* note 6, at 82 n.221.

<sup>77</sup> See, e.g., MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982).

ion but only as evidence of legislative intent when a given treaty or protocol was being drafted by experts.

But even with this conceit, I do not read Goodman's *travaux préparatoires* in the same way that he does. Assuming *arguendo* that Goodman is correct that Pictet had support from several colleagues at the conferences (including Hans Blix of Sweden or even the majority of his expert sub-group), this does not mean that Pictet's view won the day, or even that his view was then carried over and codified in the Additional Protocol. Indeed, it was not. The *travaux préparatoires* confirm, as Goodman concedes, that other experts *disagreed* with Pictet.<sup>78</sup> Goodman notes that the official record summarized the opposing view in the following way:

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>79</sup>

Strangely, Goodman takes this quote as evidence in *favor* of the least-restrictive-means test, on the theory that even Pictet's opponents were using a theoretical rubric that could be encompassed by the least-restrictive-means test. This argument is hard to countenance, though, because the quoted passage is limited to a choice-of-weapons situation—not a generalized claim about the least-restrictive-means theory. In fact, the U.S. “support” for this view also makes clear that the point was limited to choice of weapons.<sup>80</sup> A more plausible reading of the passage is that it concerns the prohibition on *unnecessary suffering* – which according to the view quoted above, requires a balancing analysis that considers, *inter alia*, friendly force protection to determine whether the suffering is necessary or not.

Of course, one reason that Goodman thinks that the two issues are connected is because he believes that the Additional Protocol restriction on

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<sup>78</sup> Goodman, *supra* note 4, at 36-37 (noting that there were concerns raised at the conference that the least-restrictive-means interpretation was not practicable for implementation on the battlefield).

<sup>79</sup> ICRC LUCERNE CONFERENCE REPORT 9, ¶ 25, *cited in* Goodman, *supra* note 4, at 36 n.170.

<sup>80</sup> See U.S. STATE DEPARTMENT, REPORT OF US DELEGATION TO LUCERNE CONFERENCE 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.”), *cited in* Goodman, *supra* note 4, at 36 n.170.



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unnecessary suffering represents a codification of the least-restrictive-means theory; for him, the two concepts are two sides of the same coin. However, I do not share this reading of the “unnecessary suffering” provisions, as the following analysis will explain.

In order to demonstrate that a generalized duty to capture was codified in Geneva in 1973-74, Goodman must demonstrate that Pictet’s view carried the day and that it won over in a contest against his adversaries when it came time to draft a final version of the Additional Protocols. To be absolutely fair, Goodman does not overstate his case; his conclusion displays considerable nuance. He does not claim that the evidence in favor of the least-restrictive-means test is unambiguous and obvious. Rather, he claims that the evidence is far stronger than the current debates suggests, and also that the burden should fall to opponents of the least-restrictive-means test to demonstrate that it was rejected at Geneva.<sup>81</sup> His is a burden-shifting argument.

However, regardless of which side of the debate has the burden, Goodman must demonstrate that the least-restrictive-means test found its way into the Additional Protocol. Arguing that the majority of the experts who helped negotiate the instrument believed in this interpretation—even if this were true—does not demonstrate that the Additional Protocol codifies a least-restrictive-means test. Negotiators of an international treaty hold many views and only some of them manage to make themselves into the actual text of the treaty, or are relevant for interpreting its text. One need not be an ardent textualist to accept this proposition. Indeed, any canon of interpretation must concede that the legal understanding of the drafters is most relevant when it concerns a specific provision of the treaty that has an ambiguous meaning. Then the views of the drafters carry great weight in interpreting the provision.

So where does the least-restrictive-means view emerge in the text of Additional Protocol I? Goodman can only point to article 35(1) (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”) and article 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”). Goodman reads article 35 as codifying Pictet’s view: “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.

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<sup>81</sup> See Goodman, *supra* note 4, at 41 (“It must be admitted, however, that Protocol I does not expressly codify such an understanding... but the Protocol contemplates the LRM model”).

Indeed, a mountain of evidence strongly supports that conclusion.”<sup>82</sup> However, this argument is only valid if the article 35 prohibition on unnecessary suffering tells us something about a putative prohibition on unnecessary killing that underpins the least-restrictive-means theory. But the two are not the same thing, nor does the former provide evidentiary support for the latter.

Article 35 deals with unnecessary suffering, not unnecessary killing, which are two very different contexts. The former deals with cases where soldiers are injured and the extensive nature of their suffering does nothing to improve the military standing of the attacking force. As such, article 35 and the laws of war prohibit weaponry and methods of attack that simply increase the suffering and pain of enemy soldiers but confer no military advantage for the attacking force. So article 35 appears to do the exact opposite from what Goodman wants it to do; it gives attacking forces license to quickly and cleanly kill enemy combatants, and prohibits them from inflicting injuries that needlessly prolong their pain. Kevin Heller makes the nice point that article 35(2) quite explicitly does *not* use the terms “unnecessary killing” or “unnecessary death” – both of which would have indicated unambiguous support for a duty to capture.<sup>83</sup> In the absence of those terms, unnecessary suffering simply refers to pain and suffering related to injury, not death. Moreover, it is not clear that the leading ICRC *Commentary* on the Additional Protocol supports Goodman’s reading. As Heller puts the point sharply, “the ICRC views Art. 35(2) as limited to combatants who survive an attack; dead combatants have no feelings.”<sup>84</sup>

Consider the following passage from the ICRC *Commentary* that Goodman dwells upon:

[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.<sup>85</sup>

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<sup>82</sup> Goodman, *supra* note 4, at 44.

<sup>83</sup> See Kevin Jon Heller, *The Capture-or-Kill Debate #8: Kevin Heller Joins the Conversation*, Lawfare (March 4, 2013), available at <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-8-kevin-heller-joins-the-conversation/>.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., International Committee of the Red Cross (Sandoz et al, eds), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12

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First, it is unclear if the *Commentary* has sufficient evidence for applying the *jus in bello* concept of proportionality to combatant deaths—a debatable proposition since *jus in bello* proportionality calculations are traditionally reserved for civilian collateral deaths.<sup>86</sup> Assuming, *arguendo*, that the *Commentary*'s interpretation of proportionality is legitimate, the passage does little to support the least-restrictive-means interpretation of Article 35. Rather, it ties the concept of pointless extermination that it claims underlies the principle of proportionality with the concept of pointless suffering that underlies the article 35 prohibition of unnecessary suffering caused by injuries. The unifying element of this passage is pointlessness, not death.

Some have argued that the introduction of the technical term *maux superflus* was designed to shift the meaning of unnecessary suffering to a broader conception that includes unnecessary killing as well. Under this argument, the shift to the French legal term was a meaningful, not accidental, attempt to get around the folk conception of unnecessary suffering, which would seem to have little room to encompass painless killings as a form of unnecessary suffering. But with a new French term, or so the argument goes, a broader conception was introduced into the language of the Additional Protocols.

While it is plausible to think that the introduction of the *maux superflus* term was designed to incorporate a broader conception of unnecessary suffering, there is little support to conclude that it was designed to incorporate unnecessary but painless killings within its ambit.<sup>87</sup> For example, Ingrid Detter Delupis notes that the shift to *maux superflus* was designed to preserve a broader mental element than its English correlate – a change that has nothing to do with unnecessary killings.<sup>88</sup> Under this account, the English phrase “calculated to cause” suggests that the principle is only designed

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AUGUST 1949 (1987) [hereinafter cited as ICRC COMMENTARY], at 477 para. 1598, *cited in* Goodman, *supra* note 4, at 43.

<sup>86</sup> It should be noted that a *jus ad bellum* proportionality calculation may be relevant to such situations, although that analysis falls under a different legal domain.

<sup>87</sup> For a discussion of the evolution of the rule, see HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, at 63-64 (not mentioning unnecessary killing). *See also* Frits Kalshoven, The Diplomatic Conference in Armed Conflicts, Geneva, 1974-77, in REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 252 (“Perhaps not surprisingly, the Conference records contribute precious little to a clear understanding of this phrase.”); Su Wei, *Application of Rules Protecting Combatants and Civilians*, in 1 IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: RESEARCH PAPERS 382-83 (Hague conference proceedings “do not show what precisely this principle means”).

<sup>88</sup> INGRID DETTER DELUPIS, THE LAW OF WAR 165.

to prohibit situations where the attacking force *intends* to cause unnecessary suffering (by virtue of its choice of weapon). The move towards the French phrase *maux superflus* represented a shift away from this heightened mental state requirement, such that weapons that cause unnecessary suffering, objectively considered, would violate the principle regardless of the intent of the attacking force. Obviously, this issue has absolutely nothing to do with the issue of unnecessary suffering versus unnecessary killings. Other accounts suggest that the switch to the French version was designed to include both physical and psychological suffering, while the English version only prohibited the former.<sup>89</sup>

Finally, article 35(1) does little, by itself, to support the Pictet view, since it merely points to the other more specific prohibitions regulating the use of force, which are then codified in the rest of article 35. So in the end, my reading of article 35 is the exact opposite of Goodman's. The fact that the least-restrictive-means test was not explicitly included in the Additional Protocol indicates either that there was insufficient support to include it, or *at best*, that a fundamental disagreement was left unresolved in the final text. But the actual result in Additional Protocol I does *not* sound to me like confirmation that the least-restrictive-means view was codified in a treaty. To me, it reads like the exact opposite: Pictet's views, while interesting and even garnering support from other experts and delegations, did not find their way into the Additional Protocol. If they *had* found their way into the Additional Protocol, article 35 would have been drafted quite differently.<sup>90</sup>

In the end, it is clear that the prohibition against unnecessary suffering made its way into the Additional Protocol, but Goodman reads this result backward. The prohibition applies to weapons that cause suffering to their victims but as to weapons that kill quickly the rule is silent – and this result is telling. While it may be true that one diplomat referred to this as “false humanitarianism,”<sup>91</sup> it is the only humanitarianism that the Additional Protocol has left us with.

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<sup>89</sup> See EITAN BARAK, DEADLY METAL RAIN: THE LEGALITY OF FLECHETTE WEAPONS IN INTERNATIONAL LAW 135 (2011).

<sup>90</sup> The US is not a party to Additional Protocol I, and one cannot simply assume that each and every norm of API represents custom or *jus cogens*; some are certainly not. So the Additional Protocol does not necessarily represent the totality of the international law analysis on the duty to capture, though it does represent an appropriate starting point for the analysis, which is the spirit in which Goodman's intervention is presented.

<sup>91</sup> See Goodman, *supra* note 4, at 34.

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### V. NORMATIVE DEFENSE OF LIEBER'S NECESSITY

Several scholars, including Gabriella Blum,<sup>92</sup> have argued that there are good normative reasons to change the law going forward; some of these arguments are compelling, though even they must contend with Lieber's arguments. In particular, Blum points out that current international humanitarian law values civilian lives as hierarchically superior to combatant lives – an assumption that stands in need of moral justification. Consider that in some countries the division between a civilian and a conscript might be nothing more than 30 days in basic training and a standard-issue rifle that has never been fired. Are these facts sufficient to ground a categorical moral distinction between them?

So the legal debates surrounding the correct interpretation of necessity (as well as *hors de combat*) are hardly isolated; they sit within a broader philosophical debate regarding the nature of combatancy, distinction, and targeting that cuts to the very center of our modern system of legal regulation of warfare. Understanding and evaluating the normative appeal of the new definitions of necessity is impossible without first coming to terms with the broader philosophical positions of which they are a limited part.

Traditionally, Just War Theory conceived of *jus ad bellum* and *jus in bello* as entirely separate – a position that gained renewed vigor after Michael Walzer's publication of *Just and Unjust Wars* in 197x. Given the canonical separation of the two spheres of justice, principles of *jus in bello* targeting were made without reference to the overall justice of the war effort – the so-called moral equality of combatants. So Nazi soldiers were subject to the same privilege of belligerency as Allied soldiers, despite the fact that the Nazis were engaged in a war of aggression and the Allies were engaged in a campaign of legitimate defense. Revisionist just war theorists such as Jeff McMahan have argued that the moral equality of combatants is illusory, and that combatants participating in an unjust war have no right, *ceteris paribus*, to kill in battle. If this view were accepted, it would require wholesale revision of the principle of distinction as it is currently practiced in the law of war.

Janina Dill (individually and collectively with Henry Shue) has recently defended an intermediate position between the traditional Walzerian approach and the revisionist approach championed by McMahan.<sup>93</sup> Dill cor-

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<sup>92</sup> See, e.g., Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 69, 73 (2010).

<sup>93</sup> See Janina Dill, *Should International Law Ensure the Moral Acceptability of War?*, 26 LEIDEN J. INT'L L. 253-70 (2013). See also Dill & Shue, *supra* note x, at 313 ("It follows that the moral calibration of individual conduct during combat operations on the basis of the rights of individual adversaries is not an achievable goal. Any set of rules

rectly notes that the revisionist view is almost impossible for individual soldiers to operationalize. In order for a soldier to determine whether they are permitted to launch an attack against a specific target, they would need to make the following determinations, each one of which they lack crucial information to make an informed assessment: (1) whether the enemy's cause is just (or lawful) which requires access to information at the national and political level; (2) a subtle understanding of contested principles of *jus ad bellum* including the exact contours of self-defense, defense of others, imminence, preemptive force, and preventive attacks; and (3) the individual target's level of contribution to this effort which may or may not be temporally removed from the time of the attack. Consequently, the attacking soldier faces what Dill refers to as an "epistemically cloaked forced choice" in war.<sup>94</sup>

Dill does not deny that an international legal system based on McMahan's individualistic principles would be, *ceteris paribus*, morally beneficial. Ideally, those fighting for unjust causes would be denied liability from attack, and those fighting for just causes would be immune from attack. But this outcome is impossible to operationalize and an international legal system built around these principles would likely result in far greater deprivations of individual rights than the Walzerian system currently in place. So the current legal system is justified as the system that produces the very best moral outcome that can be achieved: the fewest deprivations of individual rights that can be achieved. With the principle of distinction currently in place, civilians are immune from attack. Though this prohibition is arguably overbroad (since some civilians contribute politically to unjust causes), the result is an overall system that limits the number of unjust killings during wartime. One might refer to this as a quasi-instrumentalist defense of the principle of necessity. It neither accepts the Walzerian moral position that soldiers are inherently subject to attack simply by their status as soldiers, nor does it accept the ambitious revisionism of McMahan's individualism. It stakes out a middle ground, saying that the current system produces outcomes that reduce as far as possible the number of unjust killings.

We can now connect up this dispute with our particular concern about the principle of necessity. The key point here is that the modern principle of necessity is intimately connected with the more general principle of distinction. At a philosophical level, the question is what makes combatants subject to being killed in battle, even absent an individual claim of self-defense to justify their killing. The principle of necessity, where combatants are subject to killing at any time regardless of whether they might be captured instead,

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that pretends to possess the virtue of conformity with an individual rights-based morality in fact permits the harming of individuals that are not (fully) liable to that fate. Individualized rules for the conduct of war are hypocritical and/or unworkable.”).

<sup>94</sup> *Id.* at 254.

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is only the most extreme version of the principle of distinction. One might therefore distinguish between thick and thin versions of distinction. In the thick version of distinction, killing is permitted against all combatants, regardless of whether they might be captured instead. In the thin version of distinction, killing is permitted against all combatants by virtue of their status, but only if there is no other means by which they might be disabled. In order to tackle the normative question regarding necessity, one must also tackle the question of distinction itself. It is inevitable.

So what moral principle could possibly justify the principle of distinction under either of its two manifestations? One might appeal to the soldier's decision to bear a weapon and fight – a decision that comes with it the reciprocal risk of killing. While this argument might be valid for volunteer armies, it by no means applies to conscripted armies, whose soldiers fight under various degrees of state-backed coercion. It is simply incorrect to suggest that all soldiers have voluntarily picked up their weapons and are therefore subject to the inherent risk from the principle of distinction. One might also appeal, as Walzer did, to the inherent dangerousness of the soldier – all soldiers represent a threat by virtue of their training. This seems like the most-likely candidate, but it requires that we confine the analysis to soldiers as a collective group. Indeed, soldiers *are* more threatening than civilians as a class, but by limiting the analysis to classes we just beg the question. As for any particular soldier, some are more threatening than others, and the proverbial sleeping soldier is hardly any threat at all, at least while he is sleeping (though he may certainly represent a future threat).

The better answer, which takes Dill's instrumentalism as its departure, is that a thin version of the principle of distinction may very well be morally preferable but it is not an option on the table. Once we try to implement thin distinction, the very structure of the law of war may deteriorate and we may ironically produce a situation that results in more immoral killings, not less. Here's why. The revisionist program requires a level of individual analysis that is simply unworkable in practice; soldiers would need to determine whether their enemy has contributed sufficiently to an unjust war cause to become liable to attack. Similarly, the least-restrictive-means test requires that attacking soldiers engage in a level of threat-analysis of their individual target to determine whether capture is feasible and whether killing as a last resort is justifiable. This requires complex assessments of the individual's capacity to engage in defensive force – a fraught analysis well-known to any criminal lawyer. Instead of making lethal attack hinge on the military-status of the target, the least-restrictive-means would require an individualized analysis much closer to the individual analysis required by the criminal law in cases of force by police officers and civilians exercising self-defense – judgments that even juries struggle with. If it moved to the least-restrictive-means version of necessity, the law would require the very same

individualistic assessments that McMahan and the moral revisionists would celebrate, but which Dill and the instrumentalists would rightly fear as morally disastrous. It requires a level of threat analysis of the type that McMahan's revisionism requires. At that point, one might as well simply move to an entirely individualistic version of self-defense of the type that McMahan proposes. In short, the thin conception of distinction, as a half-way measure between thick distinction and McMahan's revisionism, is an implausible alternative: it degenerates into the revisionist position by requiring an individual analysis of threat. At this point, one is thrown back into the civilian realm of police enforcement, rather than the collective world of armed conflict where status-based determinations guide targeting decisions.

It bears noting that among the supporters for the least-restrictive-means interpretation of necessity, the international criminal lawyers are conspicuously absent. There are important international lawyers, human rights scholars, and even IHL experts. But generally, bread-and-butter international criminal lawyers are under-represented in the coalition that supports the least-restrictive-means version of necessity. Why? International criminal lawyers are acutely concerned with fostering *actual* norm-compliance during armed conflict, and they also have a preference for norms whose violations are easy to adjudicate before courts of law. And these two points are connected. If a norm is comparatively more difficult to adjudicate in court, the norm is more likely to go unpunished and the offending conduct is likely to proliferate. To the extent possible, international criminal lawyers prefer enforceable norms, since enforcement is their stock-in-trade.

International criminal lawyers are also generally hostile to McMahan's revisionism and his rejection of the classical principal of distinction. And that's because McMahan's revisionism tinkers with both sides of the principle of distinction. Sure, the revisionist position grants protective status to soldiers fighting for a just cause, but it also removes protected status for civilians who are responsible (or causally connected) to the war effort. So civilians might become liable to attack under this conception – a fundamental weakening of the civilian protection that is one of the hallmarks of contemporary IHL and ICL. To conceive of a new system where civilians not participating in fighting are liable to attack is an unmitigated disaster from the point of view of most international criminal lawyers. Lawyers have been fighting for decades for militaries to confer protection on civilian targets, and now the revisionists are trying to take that away.

Again, the two points are connected. Once you weaken the principle of distinction, you weaken it *tout court* and open up the possibility for unrestricted warfare. IHL is built around status-based determinations and the principles of distinction and necessity are the two most important elements of that structure. By pulling on the thread of necessity, you risk unraveling the entire tapestry of distinction, leading to a world where legal arguments about



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jus in bello violations now implicate precisely the type of considerations that they were designed to circumvent: contested determinations of jus ad bellum and deeply difficult threat-assessments for individual targets. Under a revisionist legal order, it would become very difficult for the world community to criticize offending soldiers, who would be ignorant of the relevant jus ad bellum considerations. And it would also be difficult for the world community to criticize attacks that violate the least-restrictive-means, since the offending soldiers can always claim that the individual targets were acting dangerously, and third parties have no way to stand in judgment of that assessment. The result is that attacking forces will *always* assert that their targets were dangerous.

An analogy might be appropriate here. Compare the principles of distinction and proportionality as they are currently understood in the law of war. The principle of distinction is widely understood and adhered to, and violations are relatively easy to police and adjudicate. When victims of an attack are not wearing uniforms or bearing weapons, tough questions about the lawfulness of the attack will be asked. In contrast, violations of proportionality (by killing too many civilians to achieve a military result) are almost never prosecuted,<sup>95</sup> because it requires determining the value of a military target – an inherently qualitative assessment that engenders widespread disagreement. It is no surprise that violations of distinction are so well prosecuted while the law of proportionality is so impoverished. It is because distinction is transparent, easy to apply and prosecute, and subject to independent confirmation with relative ease. On the other hand, the prohibition against disproportionate attacks requires highly contested determinations of military value that lack transparency and have played almost no role in the legal regulation of armed conflict. Tinkering with the modern principle of distinction – the shining star of modern IHL – will only bring it down to the level of proportionality: an important normative constraint whose lack of bright-line clarity has prevented it from having the operational influence that it deserves. The criminal law has an important lesson to offer here and it is one that IHL has traditionally heeded: that the legal and moral content of normative constraints cannot be entirely divorced from practical considerations regarding their adjudication and enforcement.

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<sup>95</sup> One small example is *Prosecutor v. Prlic* (ICTY Trial Chamber), which held that the destruction of a bridge was disproportionate to the value of the military objective. However, the case did not deal with disproportionality of civilian deaths, since no civilians were killed. The holding dealt solely with the disproportionality involved in destroying the bridge as a civilian infrastructure. For more discussion of the lack of prosecutions for the war crime of launching disproportionate attacks, see my *Targeting and the Concept of Intent*.

What I want to emphasize is that the instrumental argument does more than simply provide a reason to reject revisionist just war theory and its attempt to undermine the modern principle of distinction. It also provides a rationale for rejecting attempts to redefine the principle of necessity, since necessity is one component of a thick version of distinction. Requiring individual threat assessments prior to the deployment of lethal force might sound like a good idea when considered at the level of abstract moral theory, but it fails when it is operationalized in institutional form.<sup>96</sup> With third parties unable to transparently determine whether individual targets were sufficiently threatening to warrant lethal force, soldiers will ignore the rule and the principle of distinction – in either variation – will be undermined. With compliance undermined, the result will be a net moral deficit.

#### CONCLUSION

In this Chapter, I have outlined notes of skepticism regarding the least-restrictive-means interpretation of necessity. Am I on the wrong side of history? Why would anyone support an interpretation of the laws of war that permits more—rather than less—killing? Does this run counter to the animating impulse of *humanitarian* law? Does this run counter to the continuing and inevitable progressive development of human rights thinking in international law? As a general strategic matter, I would be pleased to live in a world where the current *jus in bello* prohibitions were adhered to by combatants on all sides of an armed conflict. A world without war crimes is a worthy goal, and we should not move the yardsticks to a potentially unattainable distance. Indeed, when the laws of war move too far beyond current state practice, they risk being ignored entirely—a potentially disastrous consequence for humanitarianism.

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<sup>96</sup> See Michael Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 EUR. J. INT'L L. 855-61 (2013); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks, & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INTERNATIONAL LAW STUDIES 536 (2013).