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## Targeted Capture

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## Targeted Capture

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Alexander K.A. Greenawalt\*

*This Article confronts one of the most difficult and contested questions in the debate about targeted killing that has raged in academic and policy circles over the last decade. Suppose that, in wartime, the target of a military strike may readily be neutralized through nonlethal means such as capture. Do the attacking forces have an obligation to pursue that nonlethal alternative? The Article defends the duty to employ less restrictive means (“LRM”) in wartime, and it advances several novel arguments in defense of that obligation. In contrast to those who look to external restraints—such as those imposed by international human rights law, U.S. constitutional law, or, indeed, the laws of war themselves—to check the operation of military necessity, I argue that the most plausible LRM obligation exists as a limitation embedded within the necessity principle itself. Indeed, the principle of military necessity supports not one, but two, related LRM restraints. The first restraint—virtually ignored yet highly relevant to contemporary debates—is a right reason requirement: it prohibits the killing of combatants for reasons unrelated to the pursuit of military advantage. Specifically, the necessity principle does not permit a preference for lethal force over capture when that preference is driven by considerations such as retributive justice, a desire to avoid due process obligations relating to capture and trial, raising morale, and diplomatic sensitivities. The second restraint—more familiar to the debate yet still deserving of further exploration—is objective in nature. It demands that lethal force benefit from a cognizable expectation of military advantage. The Article develops and defends these claims, engages both contrary and complementary viewpoints, and anticipates objections.*

### INTRODUCTION

When is it permissible to kill another human being? Almost never, the law tells us. The norm against murder is a bedrock moral principle and exceptions are recognized only in strictly defined cases, most notably when killing is necessary to the exercise of self-defense against an imminent and unlawful threat of deadly force, or when law enforcement must use lethal force to prevent a dangerous felon from escaping.<sup>1</sup> These limitations are

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1. See, e.g., *Scott v. Harris*, 550 U.S. 372, 386 (2007) (“A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”); *Tennessee v. Garner*, 471 U.S. 1, 22 (1985) (holding that an officer’s use of lethal force without adequate physical threat of harm was unconstitutional); MODEL PENAL CODE § 3.04(1) (AM. LAW INST. 1985) (stating that the use of force is justifiable if “immediately necessary” to protect against an attack); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 21.03, at 275–78 (6th ed. 2012) (discussing the rules governing use of deadly force at common law).

common to domestic legal systems and also find recognition in international law.<sup>2</sup>

The conduct of wartime hostilities, however, opens up an entirely different legal landscape, one that is far less protective of human life. Indeed, the practice of war is so regrettably familiar that it can be easy to forget how dramatically its operation deviates from the normal rules and intuitions governing the resort to lethal force. The international obligations regulating the conduct of hostilities are known as International Humanitarian Law (“IHL”).<sup>3</sup> Yet despite the humanitarian aspirations reflected in this title, the core of this law embraces a remarkable permission. Enemy soldiers are constant targets of attack, whether they are bearing arms on the battlefield, sleeping in their beds at night, or performing clerical duties in an office. They are targeted by virtue of their status irrespective of the particular, individual threat they may or may not present at any given moment.<sup>4</sup> Civilians receive greater, but nevertheless diminished, protection. While they may not themselves be the object of attack, that protection does not prohibit (within limits) the knowing taking of civilian life as loss incidental to an attack directed against a military objective.<sup>5</sup>

Recent years have focused renewed attention on these rules as the conduct of warfare has evolved in new, and sometimes troubling, directions as a consequence of evolving global challenges and profound technological advances. In particular, the United States government has invoked the permissive war-

2. See *McCann & Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 45–6, 64 (1995) (holding that killing must be “absolutely necessary” to defend against unlawful violence, effect lawful arrest or prevent escape, or quell a riot or insurrection).

3. The core international rules governing the conduct of hostilities are set forth in the 1977 First Additional Protocol to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Although the United States has not ratified this treaty, it has embraced its rules as a matter of U.S. law. See, e.g., U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL (2015, updated Dec. 2016), <https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> [hereinafter DOD, LAW OF WAR MANUAL]. Moreover, there is broad recognition that the Additional Protocol I rules reflect requirements of customary international law. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. 57(6) PD 285, ¶ 4 (2005) (Isr.) (Additional Protocol I “reflects the norms of customary international law, which obligate Israel”); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 75 (July 8) (noting that “[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity” of the “large number of customary rules [that] have been developed by the practice of States”); *id.* ¶ 78 (summarizing “[t]he cardinal principles contained in the texts constituting the fabric of humanitarian law”); see generally 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) (identifying rules of customary international law that, to a large extent, parallel the requirements of Additional Protocol I).

4. See *infra* Part I.

5. Additional Protocol I, *supra* note 3, art. 51(3) (specifying that “[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities”); *id.* art. 51(5)(b) (prohibiting “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

time legal regime to justify its practice of targeted killing.<sup>6</sup> In many cases, including the 2011 killing of Anwar al-Aulaqi, the United States has employed lethal force by way of unmanned aerial vehicles (“UAVs”), or so-called “drones.”<sup>7</sup> By one estimate, drone strikes in Afghanistan, Pakistan, Yemen, and Somalia have claimed more than 4,000 lives since 2004.<sup>8</sup> In other cases, such as the 2011 killing of Osama bin Laden, the United States has deployed special forces on the ground.<sup>9</sup> In all these instances, the basic legal theory is the same: the United States is at war with Al Qaeda and its affiliates, and the targets are enemy belligerents in this conflict.<sup>10</sup>

The use of targeted killing since 9/11 has provoked debate on a range of legal questions. Many of these have focused on the various triggering conditions necessary to justify the use of armed force. Such questions include whether a state of armed conflict exists between all of the groups against which the United States has conducted strikes,<sup>11</sup> whether existing armed conflicts extend to all of the countries where the United States has con-

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6. Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden> (justifying bin Laden’s killing under International Humanitarian Law (“IHL”)); Barack Obama, President of the United States, Remarks by the President at the National Defense University (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (defending legality of drone strikes on the ground that “under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces”) [hereinafter Obama, NDU Speech]; Eric Holder, Attorney General of the United States, Eric Holder Speaks at Northwestern University School of Law (March 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> (maintaining that “it is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of Al Qaeda and associated forces”); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice to the Att’y Gen. 29 (July 16, 2010) [hereinafter OLC Memorandum], in *N.Y. Times v. Dep’t of Justice*, 756 F.3d 100 (2d Cir. 2014) (invoking “fundamental law-of-war norms” to justify the targeting of Al-Aulaqi); U.S. Dep’t of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of al-Qa’ida or an Associated Force* (Nov. 8, 2011) [hereinafter DOJ White Paper], <https://fas.org/irp/eprint/doj-lethal.pdf>.

7. See Mark Mazetti et al., *Two-Year Manhunt Led to the Killing of Awlaki in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

8. *Get the Data: Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://v1.thebureauinvestigates.com/category/projects/drones/drones-graphs> (last visited Sept. 23, 2017).

9. See Barack Obama, President of the United States, Remarks by the President on Osama bin Laden (May 2, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.

10. See sources cited in *supra* note 6.

11. The United States has claimed authority to conduct targeted killings based on the fact that it is engaged in a non-international armed conflict against the Taliban, Al Qaeda, and associated forces. See sources cited in *supra* note 6. For a critical perspective, see, for example, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 118 (2010) (“As for Al-Qaeda it is hard to conclude that it currently possesses the characteristics of a party to a conflict.”); Kai Ambos & Josef Alkatout, *Has ‘Justice Been Done’? The Legality of Bin Laden’s Killing Under International Law*, 45 ISR. L. REV. 341, 347–50 (2012) (arguing against the existence of an armed conflict with Al Qaeda on the ground that Al Qaeda is insufficiently organized). For a defense of the United States’ position, see, for example, Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1282–87 (2013).

ducted strikes,<sup>12</sup> whether there are geographic limits to the laws of war that prohibit targeted killings in places that are not “hot” battlefields,<sup>13</sup> and whether the intended victims of these strikes—including members of Al Qaeda and affiliated groups—all properly qualify as military targets rather than protected civilians.<sup>14</sup> In different ways, each of these questions asks whether the targets are the kind against whom the United States has the right to use military force.

A separate and especially difficult debate, however, has focused on the nature of the permission to kill belligerents when all of these status-based requirements are met. Suppose that the target of a strike may readily be neutralized through nonlethal means such as capture. Do the attacking forces have an obligation to pursue this nonlethal option? Although there are well-settled cases—such as surrender, incapacitation by wounds, and impermissible risks to civilian life—where the law clearly prohibits the killing of enemy combatants, the primary legal sources do not explicitly impose a

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12. On this point, a particular controversy has focused on whether the existence of armed conflict is sufficient to justify strikes conducted against these groups on the territory of states which have not consented to the strikes and with which the United States is not itself at war. See, e.g., Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. on Extrajudicial, Summary or Arbitrary Executions*, ¶ 39, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter Alston Report], <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (noting that “[I]n the absence of consent, or in addition to it, States may invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings . . . [c]ontroversy has arisen, however, in three main areas: whether the self-defence justification applies to the use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to ‘anticipatory’ or ‘pre-emptive’ self-defence.”); Ashley S. Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483, 499 (2012) (arguing that international law recognizes a right of self-defense in response to attacks by non-state groups launched from within the territory of a state that is “unable or unwilling” to suppress the threat itself); Beth Van Schaack, *The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 Y.B. INT’L HUMANITARIAN L. 255, 265–82 (2012) (analyzing various possible justifications for killing of Osama bin Laden notwithstanding Pakistan’s apparent lack of consent to the operation).

13. See, e.g., Alston Report, *supra* note 12, ¶ 53 (concluding that it is “problematic for the US to show that—outside the context of the armed conflicts in Afghanistan or Iraq—it is in a transnational non-international armed conflict against ‘al Qaeda, the Taliban, and other associated forces’ without further explanation of how those entities constitute a ‘party’ under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist” (footnote omitted)); Ambos & Alkatout, *supra* note 11, at 352 (disputing the applicability of IHL to the bin Laden killing on the ground that “the location where the killing took place (Abbottabad) is not only situated outside a reasonable ‘spillover’ area . . . but also outside the actual Pakistan battle zone”); Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. 1, 15–20 (2010); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1176–92 (2013); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) [hereinafter Brennan Speech], <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”).

14. See, e.g., Alston Report, *supra* note 12, ¶ 57 (noting that “[t]he greatest source of the lack of clarity with respected [sic] to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted”).

general obligation to choose capture over killing when feasible.<sup>15</sup> Nevertheless, various authorities and commentators have argued that precisely such an obligation to favor less restrictive means (“LRM”) does indeed govern the conduct of hostilities. Several decades ago, esteemed IHL expert Jean Pictet famously propounded that

[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.<sup>16</sup>

More recent support for this position finds expression in a 2005 opinion of the Israeli Supreme Court governing Israel’s counterterrorism efforts in the West Bank,<sup>17</sup> and in a 2009 interpretive guidance issued by the Legal Advisor to the International Committee of the Red Cross among other sources.<sup>18</sup> The legal arguments in defense of LRM obligations have invoked various sources including IHL, international human rights law (“IHRL”), and, in cases where the United States has targeted its own citizens, constitutional due process protections.

Each of these theories has met with fierce opposition. Critics of Pictet’s approach argue that it misunderstands the structure of the laws of war.<sup>19</sup>

15. See *infra* Part I.

16. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985).

17. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., HCJ 769/02, 57(6) PD 285, ¶¶ 18–23 (2005) (Isr.).

18. NILS MELZER, INT’L COMM. OF THE RED CROSS [ICRC], INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 80–82 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>; see also Alston Report, *supra* note 12, ¶ 76 (“Especially in the context of targeted killings of civilians who directly participate in hostilities, and given that IHL does not create an unrestrained right to kill, the better approach is for State forces to minimize the use of lethal force to the extent feasible in the circumstances.” (footnote omitted)); Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. 819, 819–20 (2013) [hereinafter Goodman, *Kill or Capture*] (“The modern law of armed conflict (LOAC) supports the following maxim: if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided.” (footnote omitted)); Ryan Goodman, *The Lesser Evil: What the Obama Administration Isn’t Telling You About Drones: The Standard Rule Is Capture, Not Kill*, SLATE (Feb. 19, 2013, 9:04 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/02/the\\_obama\\_administration\\_and\\_drones\\_the\\_rule\\_of\\_law\\_is\\_capture\\_not\\_kill.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/the_obama_administration_and_drones_the_rule_of_law_is_capture_not_kill.html) [hereinafter Goodman, *The Lesser Evil*].

19. See, e.g., Geoffrey Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 537–42 (2013); Jens David Ohlin, *Recapturing the Concept of Necessity* 4–7 (Cornell Legal Studies Research Paper No. 13-90, 2013), [hereinafter Ohlin, *Recapturing*] [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2230486](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230486); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 796–97 (2010); Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Goodman’s ‘The Power to Kill or Capture Enemy Combatants,’* 24 EUR. J. INT’L L. 855, 858–61 (2013); Shane R. Reeves & Jeffrey S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT’L SEC. J. FEATURES 3–6 (2013), [http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance\\_PDF-format1.pdf](http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf); Kevin Jon Heller, *The Capture-or-Kill Debate* #8:

They invoke the longstanding principle of military necessity that authorizes the use of lethal force against all enemy belligerents: for centuries combatants have deployed lethal force on the battlefield without stopping to ask whether each enemy soldier might be neutralized through less restrictive means.<sup>20</sup> These critics argue that no such requirement appears in the applicable treaties and customs, and that imposing one would be dangerous, exposing combatants to undue risk and compromising their ability to effectively pursue military advantage.<sup>21</sup>

Notably, the legal justifications offered by the United States in support of its targeted killing operations make no mention of a legal duty to choose less harmful means in lieu of lethal force, and the Department of Defense's newly promulgated Law of War Manual squarely repudiates such an obligation.<sup>22</sup> Nevertheless, since the fall of 2011, U.S. officials have expressed a policy preference for choosing nonlethal force in counterterrorism operations when feasible. However, it remains unclear what, if any, impact this policy has had on actual targeted killing operations, or indeed, how much of that policy the administration of President Donald J. Trump will preserve.<sup>23</sup>

So framed, the debate presents a relatively straightforward matter of legal interpretation. Does IHL impose an LRM obligation or not? Answering this question involves layers of complexity that may not immediately be appar-

*Kevin Jon Heller Joins the Conversation*, LAWFARE (Mar. 4, 2013, 10:01 PM), <https://www.lawfareblog.com/capture-or-kill-debate-8-kevin-heller-joins-conversation>.

20. See Corn et al., *supra* note 19, at 624; Ohlin, *supra* note 11, at 1335; Parks, *supra* note 19, at 806.

21. See Corn et al., *supra* note 19, at 537 ("Because hesitation in the midst of armed hostilities produces unquestionable risk to friendly forces and erodes the good order and discipline essential to effective execution of military operations, the goal of [weapons] training is to develop a genuine sense of combat aggressiveness that is uncompromised by any such hesitation once an enemy target has been positively identified."); Parks, *supra* note 19, at 810–12.

22. The manual notes that "[s]ome commentators have argued that *military necessity* should be interpreted so as to permit only what is actually necessary in prevailing circumstances, such as by requiring commanders, if possible, to seek to capture or wound enemy combatants rather than to make them the object of attack." DOD, LAW OF WAR MANUAL, *supra* note 3, at 57 (emphasis omitted). But it counters that "[t]his interpretation . . . does not reflect customary international law or treaty law applicable to DoD personnel." *Id.*

23. See Brennan Speech, *supra* note 13 ("I want to be very clear—whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration."); Obama, NDU Speech, *supra* note 24 ("America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute."); *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITE HOUSE (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> ("The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots."). Recent reports indicate that the Trump administration is preparing to loosen some Obama-era restrictions on targeted killings. See, e.g., Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES, Sept. 22, 2017, at A1; Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), [https://www.nytimes.com/2017/10/28/us/politics/aumpf-congress-niger.html?smid=tw-share&\\_r=0](https://www.nytimes.com/2017/10/28/us/politics/aumpf-congress-niger.html?smid=tw-share&_r=0).

ent. At its root, the debate highlights a tension between two basic values that lie at the core of IHL. On the one hand, there is the bedrock value of human life. The norm against murder is perhaps the most deep-seated legal prohibition there is, and protection of that norm demands that justifications for killing be treated with caution. On the other hand, there is the principle of military necessity that establishes a broad tolerance for killing in wartime.<sup>24</sup> In many ways, the debate over LRM is one over how these two values coexist, and what implications they have for the interpretation of IHL in cases where the law is silent or fails to speak with sufficient clarity. The problem of targeted killing provides an especially salient context for exploring this issue because it focuses special attention on the evolving methods of warfare, asking to what extent legal understanding must adapt to changing functional requirements.

This Article defends the existence of a legal duty to refrain from unnecessary force when attacking belligerents in wartime, and it advances several original arguments about the source, nature, and weight of that obligation. In particular, I argue that this restraint on wartime killing lies at the core of IHL: it is embedded in the principle of military necessity, which is the very principle that justifies wartime killing in the first instance. My argument proceeds from a straightforward premise. Since it is military necessity that justifies killing in wartime, IHL provides no justification for militarily unnecessary killings. Hence, the obligation to consider LRM is internal to the necessity principle itself.

Some have attempted to locate an LRM obligation in other legal sources. In its decision in *Public Committee Against Torture in Israel v. the Government of Israel* (“Targeted Killing Case”), for instance, Israel’s Supreme Court relied on international human rights principles.<sup>25</sup> The fundamental trouble with that argument is that the use of lethal force in wartime presents an acknowledged exception to the usual rules on lethal force. If one believes that IHL is silent or ambiguous with respect to LRM obligations, then it becomes plausible to argue that an external source of law such as international human rights or domestic constitutional principles may play a gap-filling role.<sup>26</sup> But that position is more difficult to maintain if one believes, as do opponents of LRM obligations, that IHL affirmatively authorizes the killing of combatants without consideration of LRM. Hence, these arguments from external sources of law still demand interrogation of IHL itself.

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24. INT’L COMM. OF THE RED CROSS [ICRC], COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 392–93 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY TO ADDITIONAL PROTOCOL I] (“The law of armed conflict is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other.”); *id.* at 399 (“Warfare entails a complete upheaval of values.”).

25. See *infra* notes 53–56, 60 and accompanying text.

26. See, e.g., Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L.J. 233, 289 (2003); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 201–04 (2005).



Others have looked to specific prohibitions within IHL. A recent article by Ryan Goodman argues powerfully that the 1977 First Additional Protocol to the Geneva Conventions introduced an LRM obligation through its prohibition in Article 35(2) on methods of warfare whose nature it is to cause “superfluous injury” and “unnecessary suffering.”<sup>27</sup> This position raises various interpretive questions such as the meaning of the word “injury” (a focus of heated debate between Goodman and his critics) and the phrase “methods of warfare.” Although I argue that the best reading of this language does indeed support Goodman’s view, the more fundamental problem is that the prohibition applies only to actions that are “superfluous” or “unnecessary.”<sup>28</sup> Consequently, the most plausible reading of Article 35(2) is that it only prohibits actions that fall outside the necessity principle in the first place. Although that provision does, I argue, provide important interpretive guidance regarding the scope of the necessity principle, it fails to support a restriction of lethal force that is otherwise justified by military necessity. Similar difficulties also accompany attempts to locate an LRM obligation in Additional Protocol I’s *hors de combat* protections.<sup>29</sup>

In these respects, my argument exhibits a formal similarity with the position advanced by opponents of LRM obligations. They do not argue, in so many words, that IHL permits unnecessary killing. Rather, they maintain that LRM obligations are incompatible with the broad understanding of military necessity that has prevailed in the history of warfare.<sup>30</sup> Pursuant to this broad understanding, it would seem, all killings of combatants not prohibited by one of several uncontroversial restrictions will satisfy the demands of necessity. Yet, as I explore, there remain cases that even this broad understanding of military necessity cannot cover. Indeed, the principle of military necessity supports not one, but two, related types of LRM restraints.

The first restraint arises when a combatant is killed for reasons subjectively unrelated to the pursuit of military advantage. While military necessity may authorize the broad use of lethal force against enemy belligerents it does not authorize the use of such force for any reason whatsoever. Remarkably, this point has gone virtually ignored in the literature, yet it has important consequences for the debate. In particular, this restraint appears immune to the type of practical objections routinely asserted by opponents of LRM obligations. The common objection that LRM obligations will frustrate the effective pursuit of military necessity can hardly apply to killings not motivated by military necessity in the first place. More specifically, I argue that IHL does not permit a preference for lethal force over capture when that preference is driven by such considerations as retributive justice, a

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27. See Goodman, *Kill or Capture*, *supra* note 18, at 851–52.

28. See *infra* Section II.A.

29. See *infra* Section II.B.

30. See *infra* Part IV.

desire to avoid due process obligations relating to capture and trial, or raising morale. I also explore some complexities concerning whether diplomatic sensitivities—a major factor in recent targeted killing operations—may justify killing in lieu of capture. More broadly, I argue that scholars and policy-makers should dedicate greater attention to defining the boundaries of permissible military rationale.

A second case arises when a decision to deploy lethal force benefits from inadequate anticipated military advantage. The clearest example is when the decision offers zero or negative anticipated advantage as compared to non-lethal measures. This case is closely related to the first case because the objective lack of anticipated net advantage supplies powerful evidence that the use of lethal force was not in fact motivated by valid considerations of military advantage in the first place. A more difficult question arises when the killing of a combatant may have some military benefit that is nevertheless too insignificant to justify the use of lethal force. While I argue that the principle of military necessity should be understood to demand some *de minimis* threshold of cognizable advantage, arguments for more robust protection—though plausible—face greater challenges given the structure of IHL.

My argument proceeds in four parts. Part I situates the debate over LRM within the structure of IHL and the principle of military necessity, and it critically evaluates arguments that the conduct of hostilities is restrained by an LRM obligation emanating from sources of law external to IHL, in particular international human rights law and U.S. constitutional law. Part II examines arguments rooted in IHL's specific prohibitions—namely those governing the imposition of unnecessary suffering and superfluous injury and the treatment of *hors de combat* combatants. Part III elaborates my claim that limits internal to military necessity preclude the killing of combatants in cases involving inadequate reason and inadequate advantage. Part IV defends and elaborates this position against various common objections.

## I. THE PERMISSION TO KILL IN WARTIME

As with much of the law of armed conflict (“LOAC”), the law governing killing in wartime is defined by the split between so-called *jus ad bellum* (the law governing the resort to armed force) and *jus in bello* (the law governing the conduct of hostilities). States violate *jus ad bellum* when they resort to armed force without benefit of a legal justification such as self-defense or authorization by the U.N. Security Council.<sup>31</sup> Although rarely

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31. See U.N. Charter, art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); *id.* art. 42 (providing the U.N. Security Council with authority to authorize the use of armed force “as may be necessary to maintain or restore international peace and security”); *id.* art. 51 (upholding the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”).

prosecuted, the international crime of aggression assigns individual criminal responsibility to state leaders for culpable contributions to illegal uses of force.<sup>32</sup>

While not the focus of my Article, these *jus ad bellum* obligations deserve particular mention because they represent one area in which the law clearly does regulate the unnecessary killing of combatants: the lives of combatants wrongly drawn into armed conflict must surely be counted alongside those of civilians when tallying the victims of aggression. The point applies most evidently to the casualties suffered by the opposing forces who have sacrificed their lives in the lawful self-defense of their states, but one can also count among the victims the attacking soldiers who have become obligated to fight for an illegal cause.

Considerations as to the causes of war disappear at the level of *jus in bello*, where common rules of conduct apply to combatants on all sides.<sup>33</sup> In the words of Michael Walzer, “[t]he moral equality of the battlefield distinguishes combat from domestic crime.”<sup>34</sup> Individual soldiers are not responsible for the aggressive actions of their leaders, and combatant immunity protects lawful participants in international armed conflicts from prosecution under both international and domestic law so long as they do not violate the prohibitions established by IHL.<sup>35</sup> Although international law provides no corresponding prohibition on the domestic prosecution of participants in non-international armed conflicts, such participation does not violate IHL, and, indeed, the Second Additional Protocol to the Geneva

32. See generally Sean D. Murphy, *The Crime of Aggression at the ICC*, in THE OXFORD HANDBOOK ON THE USE OF FORCE 533 (Marc Weller et al. eds., 2015). Following World War II, senior German and Japanese leaders were prosecuted for crimes against peace before international criminal tribunals. No successor tribunals have enjoyed jurisdiction over the crimes, although an amendment to give the International Criminal Court (ICC) jurisdiction over aggression is currently pending approval by the Court’s States Parties. See *id.* at 534; Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression art. 8 *bis*, June 11, 2010, \_\_\_ U.N.T.S. \_\_\_, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/38544/A-38544-08000002802a6182.pdf>.

33. See Additional Protocol I, *supra* note 3, *pmb.* (affirming that “this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict”).

34. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 128 (1977).

35. Pursuant to Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, “[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.” Geneva Convention Relative to the Treatment of Prisoners of War art. 87, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention]. Article 99 in turn provides that “[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.” *Id.* art. 99. As one U.S. court has noted, “[t]hese Articles, when read together, make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war.” *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002).

Conventions recommends in these cases “the broadest possible amnesty to persons who have participated in the armed conflict.”<sup>36</sup>

### A. Military Necessity

It is here that the principle of military necessity comes into focus. Notably this principle receives no explicit affirmation in the modern international treaties governing the conduct of war. A reader of the most significant twentieth-century treaty on the conduct of hostilities—1977’s First Additional Protocol to the Geneva Conventions—will find no general statement defining the affirmative permission to kill in wartime.<sup>37</sup> Instead, this permission exists largely as a negative implication, one to be inferred from the gaps between the express prohibitions that the treaty does elaborate. The treaty provides that civilians “shall not be the object of attack,”<sup>38</sup> while providing a parallel protection only for a combatant who is “hors de combat,” defined as one who “is in the power of an adverse [p]arty,” who “clearly expresses an intention to surrender,” or who “has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.”<sup>39</sup> The Convention specifies that attacks on objects must be limited to those objects that “make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>40</sup> No parallel provision expressly qualifies the circumstances under which combatants may be targeted.<sup>41</sup> There is a prohibition against attacks that produce excessive incidental harm to civilians and civilian objects,<sup>42</sup> but again, no express parallel requirement that combatants’ lives be weighed against the military advantage gained by their destruction or injury.

Yet if the principle of military necessity exists primarily by implication in Additional Protocol I, it receives more express affirmation in other

36. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6(5), June 8, 1977, 1125 U.N.T.S. 609.

37. See Additional Protocol I, *supra* note 3. The United States is not a party to Additional Protocol I, and by its terms the treaty applies only to international armed conflicts between states, and not to non-international armed conflicts between a state and non-state entity, or between non-state entities. Nevertheless, the treaty codifies core principles of IHL that are widely accepted as customary international law applicable both to international and non-international armed conflicts. See sources cited in *supra* note 3 (on Additional Protocol I’s customary status).

38. Additional Protocol I, *supra* note 3, art. 51(2).

39. *Id.* art. 41(1)–(2) (emphasis omitted).

40. *Id.* art. 52(2).

41. As discussed below, there is debate over whether such a requirement may lie in the Convention’s rule forbidding the employment of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” *Id.* art. 35(2); see *infra* Part IV.

42. *Id.* art. 51(5)(b) (defining as indiscriminate attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

sources. There is, for instance, the seminal Lieber Code of 1863, which regulated the Union forces in the American Civil War, and represents the first modern codification of *jus in bello*.<sup>43</sup> The Code explains 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 according to the modern law and usages of war,”<sup>44</sup> and, more critically, that “[m]ilitary 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.”<sup>45</sup> Another oft-cited account appears in the judgment of the World War II-era *Hostages Case*, decided by a U.S. military tribunal established in occupied Germany.<sup>46</sup> This formulation, echoed in various U.S. military regulations including the Department of Defense’s recently promulgated Law of War Manual, provides that “[m]ilitary 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>47</sup>

As these formulations reveal, the concept of necessity that has prevailed in military tradition differs markedly from the strict necessity required to justify deadly force under ordinary criminal law.<sup>48</sup> It is instead one closer to that endorsed by the U.S. Supreme Court in 1819 in an entirely different context, when it considered Congress’s constitutional authority to pass legislation “necessary and proper, for carrying into execution” the powers delegated to the Federal Government.<sup>49</sup> “To employ the means necessary to an end,” reasoned the Court, “is generally understood as employing any means calculated to produce the end, and not as being confined to those single

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43. See U.S. WAR DEP’T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES IN THE FIELD (General Orders No. 100, prepared by Francis Lieber, L.L.D.) (1863) [hereinafter Lieber Code]. On the history of the Lieber Code, see generally JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2013).

44. Lieber Code, *supra* note 43, art. 14.

45. *Id.* art. 15.

46. See *United States v. List (The Hostages Case)*, XI Trials of War Criminals Before the Nuernberg Military Tribunals 1230, 1253–54 (1948).

47. *Id.* at 1253. See DOD, LAW OF WAR MANUAL, *supra* note 3, at 52 (“*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”); see also U.S. WAR DEP’T, RULES OF LAND WARFARE ¶¶ 9–11 (1914) (“[A] belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of the war; that is, the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money. . . . Military necessity justifies a resort to all measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war.”); U.S. DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 4a (1940) (“[A] belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”); U.S. DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 3a (1956) (Change No. 1 1976) (“[T]hat principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”).

48. See *supra* notes 1–2 and accompanying text.

49. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (emphasis omitted).

means, without which the end would be entirely unattainable.”<sup>50</sup> The point is not that deadly force must be the only available way to neutralize an armed opponent, but instead that the opposing forces are free to use whichever level of force they deem to be appropriate to the pursuit of military advantage.<sup>51</sup> Hence, the principle of military necessity is widely understood to justify the large-scale killing of enemy soldiers whether they are engaged in combat on the battlefield or, as the case may be, asleep in their camps at night.<sup>52</sup>

I return to necessity, and its possible limits, in Part IV of this Article, where I argue that the most convincing source of an LRM obligation lies within the internal limits of this principle. However, the breadth of the necessity principle helps explain why much of the debate over the disputed duty to capture has focused on the possibility that some additional source of law provides a relevant exception to the general rule that combatants may be killed in wartime. Particular attention has focused on the possibility of restraints imposed by an external source of law such as IHRL and, in the context of the U.S. military, constitutional due process protections.

### B. International Human Rights

The claim that IHRL “co-applies” with IHL to restrict the killing of belligerents draws support from one important judicial precedent: the Israeli Supreme Court’s 2005 decision in the *Targeted Killing Case*.<sup>53</sup> The dispute involved a challenge to the policy by which Israel’s security forces acted “to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.”<sup>54</sup> In defining when such action was permissible, the Court ruled *inter alia* that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if

50. *Id.* at 413–14.

51. See Ohlin, *supra* note 11, at 1273 (“Military necessity, by itself, never meant what it means in other contexts: the only available option. Rather, as far back as Francis Lieber, the principle of military necessity only required that the attack confer a bona fide military advantage.”).

52. See WALZER, *supra* note 34, at 138 (“The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 117 (2010) (noting that “[t]he existing interpretation of the laws of war supports Walzer’s conclusion” that a soldier stripped naked and swimming in the lake is a legitimate target during an armed conflict); Corn et al., *supra* note 19, at 548 (“Status-based targeting means that belligerent personnel qualify as lawful objects of attack at all times and in all places for as long as they remain under the operational command and control of enemy leadership and are physically capable of acting under that authority.”); Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 145, 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (“[O]rdinary combatants . . . can be attacked (and killed) wherever they are, in and out of uniform: even when they are not on active duty. There is no prohibition either of opening fire on retreating troops (who have not surrendered) or of targeting individual combatants.”).

53. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., HCJ 769/02, 57(6) PD 285, ¶ 18 (2005) (Isr.).

54. *Id.* ¶ 2.

a less harmful means can be employed.”<sup>55</sup> Notably, the Court derived the general authority to conduct such attacks from IHL—which it found applicable to the circumstances in dispute—but to support the LRM restriction on such attacks it cited instead to IHRL jurisprudence concerning the right to life.<sup>56</sup>

I do not exclude the possibility that human rights norms may play a role in the regulation of killing in wartime, but that argument does not avoid interrogation of IHL. That is because the co-application approach rests on assumptions about the inter-relationship between IHRL and IHL which themselves hinge on the strength and nature of IHL’s necessity principle. To understand why, consider the following ways in which IHRL might interrelate with IHL.

One approach, endorsed by the International Court of Justice in its 1996 advisory opinion on the legality of nuclear weapons, dictates that IHL is itself a body of IHRL.<sup>57</sup> Hence, the Court allowed that “[i]n principle, the [IHRL] right not arbitrarily to be deprived of one’s life applies also in hostilities,” but it specified that “[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>58</sup> If one reads this conceptualization strictly to exclude the application of non-IHL principles, then the invocation of IHRL has no practical impact. It is IHL itself that supplies the relevant IHRL standards.<sup>59</sup>

In the *Targeted Killing Case*, the Israeli Supreme Court was not entirely clear on how it reconciled its consideration of IHRL with the *lex specialis* aspect of IHL. In part of its opinion, the Court emphasized the balance between military necessity and human dignity, such that “human rights are protected by the law of armed conflict, but not to their full scope.”<sup>60</sup> Perhaps, then, the Court applied a second approach, deriving an LRM requirement from its own independent determination of how military necessity should be balanced against the right to life. But this possibility begs a question: considering that IHL itself strikes a balance between the protection of human life and the demands of military necessity, what basis is there for interpreting IHRL to demand a different balance than the one that the detailed requirements of IHL endorse? Moreover, the balancing itself requires

55. *Id.* ¶ 40.

56. *Id.*; see also Additional Protocol I, *supra* note 3, art. 51(3) (permitting attack on civilians “for such time as they take a direct part in hostilities”).

57. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

58. *Id.*

59. See, e.g., JENS DAVID OHLIN & LARRY MAY, NECESSITY IN INTERNATIONAL LAW 223 (2016) (observing that “this mildest form of co-application has little or no practical consequences above an IHL-only view”).

60. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, HCJ 769/02, 57(6) PD 285, ¶ 22.

interpretation of IHL: one cannot weigh the principle of military necessity against other values without taking a position on how much weight that principle exerts in a given situation. Doing so with respect to LRM obligations requires one to first consider the compatibility of LRM obligations with the necessity principle.

A third, more plausible, approach looks to IHRL for guidance only when IHL does not speak with sufficient clarity. That, for example, was the conclusion reached by a 2010 study on targeted killing by Philip Alston, serving then as the UN Human Rights Council's Special Rapporteur on extrajudicial, summary, or arbitrary executions. After noting that "[b]oth IHL and human rights law apply in the context of armed conflict," and that "whether a particular killing is legal is determined by the applicable *lex specialis*," the Report offers the following rule of interpretation: "[t]o the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law."<sup>61</sup>

Here, too, there are complications given the contrasting normative frameworks embraced by these two bodies of law.<sup>62</sup> Most critical for my purposes, however, is that IHL also plays a central role under this version of co-application. To apply IHRL one must first conclude either that "IHL does not provide a rule," or that the meaning of an existing, but unclear, rule "cannot be ascertained from the guidance offered by IHL principles."<sup>63</sup> And these are precisely the conclusions that LRM opponents refuse to draw with respect to the existence of a general LRM obligation. They argue, instead, that the rules and principles of IHL leave no room for such obligations beyond the specific restrictions already codified in IHL. They argue that recognizing such an obligation would do great damage to IHL.<sup>64</sup>

Finding space for IHRL in this debate therefore requires one to defeat the arguments of those who maintain that no such space exists. And doing so requires one to engage the very IHL debates that are the focus of this Article.

### C. Constitutional Rights

I will consider U.S. constitutional law only briefly. As a domestic law constraint, the U.S. Constitution has only limited scope: it restricts only the conduct of U.S. government actors, and current judicial understandings limit its application overseas.<sup>65</sup> Hence, the constitutional debate has focused on the specific scenario in which the U.S. government conducts a targeted

61. Alston Report, *supra* note 12, ¶ 29; see also Ben-Naftali & Michaeli, *supra* note 26, at 289.

62. For an extensive discussion of this problem, see OHLIN & MAY, *supra* note 59, at 126–39.

63. Alston Report, *supra* note 12, ¶ 29.

64. See *infra* Section IV.A.

65. See generally KAI RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).



killing of a U.S. citizen, as was the case with the strike on Anwar al-Aulaqi. Even in that limited scenario, moreover, the appeal to U.S. constitutional rights—including, in particular, the Fifth Amendment right to life whose deprivation requires due process of law—faces the same basic obstacle as does the analogous IHRL right to life. In its memorandum justifying the killing of al-Aulaqi, the U.S. Department of Justice's Office of Legal Counsel ("OLC") acknowledged that "[b]ecause al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process, as well as the Fourth Amendment, likely protects him in some respects even while he is abroad."<sup>66</sup> Nevertheless the memorandum suggests that the laws of war provide a *lex specialis*, such that "the military may constitutionally use force against a U.S. citizen who is part of enemy forces."<sup>67</sup> The memorandum further concludes that al-Aulaqi's killing would not violate any applicable constitutional protection considering, *inter alia*, the threat that al-Aulaqi posed and the representation by both the CIA and Department of Defense that "an operation . . . to capture al-Aulaqi in Yemen would be infeasible at this time."<sup>68</sup>

The idea that constitutional rights could provide some additional source of obligation does find some support in the U.S. Supreme Court's decision in *Hamdi v. Rumsfeld*, which ruled that Yaser Esam Hamdi, a U.S. citizen, had a right under the Fifth Amendment's Due Process Clause to challenge his detention by the President as an enemy combatant.<sup>69</sup> Notably, Justice Clarence Thomas argued in dissent that the approach advocated by a plurality of the justices would also apply to "a decision to bomb a particular target," and "seems to require notice to potential targets."<sup>70</sup> This was not an invitation the plurality was willing to accept, however, and the OLC Memorandum on the al-Aulaqi killing emphasizes that the plurality "accord[ed] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize[d] that the scope of that discretion necessarily is wide."<sup>71</sup>

Despite this acknowledgment, the plurality did not go so far as to preclude categorically the application of constitutional rights to the conduct of warfare. Moreover, the distinction between "the actual prosecution of war"<sup>72</sup> and the detention of enemy combatants is not completely air tight, suggesting perhaps that there might be some basis for extending the *Hamdi* analysis to the former context. Indeed, the due process rights at issue in *Hamdi* concerned Hamdi's ability to contest the government's determination

66. OLC Memorandum, *supra* note 6, at 38.

67. *Id.*; see also DOJ White Paper, *supra* note 6, at 3 ("The Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is part of enemy forces.").

68. OLC Memorandum, *supra* note 6, at 40.

69. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion). There was no majority opinion; a total of eight justices agreed that some constitutional protections applied. *Id.* at 573 (Scalia, J., dissenting).

70. *Id.* at 597 (Thomas, J., dissenting).

71. OLC Memorandum, *supra* note 6, at 40–41 (quoting *Hamdi*, 542 U.S. at 535).

72. *Hamdi*, 542 U.S. at 535.

that he was in fact a detainable enemy combatant. Status determination is also critical to combat operations where the principle of distinction prohibits attacks on civilians.<sup>73</sup> If the Due Process Clause constrains the government's ability to classify Hamdi as a combatant for detention purposes, should it not also restrain the government's ability to do so for targeting purposes? Of course, the realities of the battlefield will often preclude the trial-type process demanded by the *Hamdi* plurality in the detention context, but in some situations, such as a long-planned targeted killing operation, a greater degree of procedural protection would seem feasible.<sup>74</sup>

Some scholars have advanced arguments along these lines, maintaining that constitutional rights do indeed provide an independent source of protection when the government targets U.S. citizens as enemy combatants.<sup>75</sup> Whatever the answer to that debate may be, however, it cannot not support a general, universal LRM obligation of the sort that IHL might impose. Relying on constitutional law rather than international law to support an LRM requirement also has the normatively questionable result of producing a two-tiered system of war according to which the United States applies different standards when targeting its own citizens abroad than it does when targeting most foreign citizens.<sup>76</sup> And this distinction once again underscores the highly limited scope of constitutional arguments to restrict the

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73. See Additional Protocol I, *supra* note 3, art. 48 (“[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”); *id.* art. 57(2)(a) (“[T]hose who plan or decide upon an attack shall . . . [d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.”).

74. Notably, however, IHL itself regulates these determinations. It does so principally through the requirement that the attacking forces “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives.” *Id.* art. 57(2)(i). Additional Protocol I also provides the evidentiary presumption that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” *Id.* art. 50. On this issue, see generally Adil Haque, *Killing in the Fog of War*, 86 S. CAL. L. REV. 63 (2012). Although Additional Protocol I does not elaborate on specific verification techniques, it would appear self-evident that long-planned operations against named targets permit more robust verification processes than are feasible in the heat of combat. The more important question, then, is not whether constitutional protections apply at all in this context, but instead whether they operate to alter the obligations already existing under IHL. One could argue that the constitutional due process framework, benefited by the balancing test applied in *Hamdi*, provides more detailed guidance than IHL on how verification should work, therefore supporting a version of co-application that allows constitutional law to fill in details not addressed by international legal sources. But even under this approach, the application of constitutional protections presupposes a compatibility between IHL and constitutional due process.

75. See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410–12 (2009); Deborah Pearlstein, *Enhancing Due Process in Targeted Killing*, AM. CONST. SOC'Y FOR LAW & POL. ISSUE BRIEF 6–11 (Oct. 2013), [https://www.acslaw.org/sites/default/files/Pearlstein\\_-\\_Due\\_Process\\_in\\_Targeted\\_Killing.pdf](https://www.acslaw.org/sites/default/files/Pearlstein_-_Due_Process_in_Targeted_Killing.pdf); cf. H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 65 (2016) (maintaining that “Bill of Rights prohibitions do not apply to legitimate military exercises of the federal government’s war powers”).

76. I put aside for these purposes the question of what protections might apply to aliens, such as permanent residents, who have a significant connection to the United States. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990) (rejecting the extension of Fourth Amendment rights to an alien abroad “with no voluntary attachment to the United States”). Nor do I consider the legal framework applicable to a targeted killing conducted on U.S. territory. See *id.* at 271 (acknowledging

conduct of hostilities abroad. These arguments apply only to the U.S. government, and only to actions it takes against a subset of targets. Hence, they address only a small minority of wartime killings.

## II. IHL'S PROHIBITIONS

Another line of argument dictates that IHL imposes a general LRM requirement through its express restraints on the principle of military necessity. Recent work by Ryan Goodman presents perhaps the most sustained defense of this position. Goodman argues that “[t]he international rules of warfare require nations to capture instead of kill enemy fighters, especially when lethal force is not the only way to take them off the battlefield.”<sup>77</sup> Notably, Goodman views LRM obligations as a relatively recent innovation: through the first part of the twentieth century it was the Grotian rule that “killing is a right of war” which prevailed, but by the late 1970s the law came to embrace LRM obligations.<sup>78</sup> His evidence lies in two provisions of Additional Protocol I: (1) the treaty’s prohibition of means and methods of warfare that are “of a nature to cause superfluous injury or unnecessary suffering,”<sup>79</sup> and (2) its stipulation that one who is “in the power of an adverse Party” has become “*hors de combat*” and accordingly “shall not be the object of attack.”<sup>80</sup> To support this position, Goodman invokes both the treaty text and external sources such as the ICRC’s commentary to Additional Protocol I, and the records of expert and diplomatic opinion preceding and surrounding the treaty’s adoption.<sup>81</sup>

This position has proven controversial, with Goodman’s interpretive approach sparking pushback.<sup>82</sup> IHL’s regulation of injury and suffering does not, argue Goodman’s critics, extend to the infliction of death per se, and thus provides no support for a general LRM requirement. Nor, according to this view, do the *hors de combat* protections prohibit the killing of belligerents who have not surrendered, been captured, or become physically incapacitated.

As I argue in this Part, Goodman is half right. The best reading of Article 35(2) does indeed restrict lethal force in a manner that will sometimes favor capture over killing. But the focus on that particular claim distracts from a larger problem: Article 35(2) only prohibits injury that is “superfluous” and

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Supreme Court precedent establishing “that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”).

77. Goodman, *The Lesser Evil*, *supra* note 18.

78. *Id.*

79. Goodman, *Kill or Capture*, *supra* note 18, at 848 (quoting Additional Protocol I, *supra* note 3, art. 35); Goodman, *The Lesser Evil*, *supra* note 18.

80. Goodman, *Kill or Capture*, *supra* note 18, at 832 (quoting Additional Protocol I, *supra* note 3, art. 41(2)); Goodman, *The Lesser Evil*, *supra* note 18.

81. See Goodman, *Kill or Capture*, *supra* note 18, at 839–52.

82. See *infra* notes 92–94 and accompanying text.

suffering that is “unnecessary.”<sup>83</sup> Hence, the most natural reading of Article 35(2) does not limit the principle of military necessity. Instead, it regulates actions that lack military necessity in the first instance. As with the appeal to IHRL and constitutional law, the hope that IHL establishes an express LRM constraint on military necessity proves illusory. Instead, it is the principle of military necessity itself that requires interrogation. And unless Additional Protocol I codified an evolution of that principle, the notion that Additional Protocol I spurred a transformation with respect to an LRM requirement is also illusory.

At the same time, Article 35(2) remains critically important for what it reveals about the necessity principle. Whether or not its particular scope extends to kill or capture questions, the operation of Article 35(2) presupposes the ability of combatants to make common sense judgments about the limits of necessity that would be insupportable according to the most far-reaching understandings of that principle. In this way, Article 35(2) confirms that the necessity principle is not quite so broad as sometimes supposed, and that conclusion has important implications for the debate over LRM.

#### A. Article 35(2)

Article 35 of Additional Protocol I begins with a basic rule: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>84</sup> It further specifies that “[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”<sup>85</sup>

This prohibition has a history. It is the successor to a provision in the 1907 Hague Convention (IV) Respecting the Laws and Customs of Wars on Lands, which declares it illegal to “[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering.”<sup>86</sup> That 1907 prohibition is itself the successor to a provision of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land which prohibits the “employ [of] arms, projectiles, or material of a nature to cause superfluous injury.”<sup>87</sup> Both of these provisions, in turn, trace their lineage to the Saint Petersburg Declaration of 1868 which addressed the emergence of exploding bullets causing far greater injury than those caused by conventional bullets.<sup>88</sup> The treaty renounces the use of these projectiles on the grounds that the “only legiti-

83. Additional Protocol I, *supra* note 3, art. 35(2).

84. *Id.* art. 35(1).

85. *Id.* art. 35(2).

86. Convention (IV) Respecting the Laws and Customs of Wars on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

87. Convention (II) with Respect to the Laws and Customs of Wars on Land art. 23, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

88. Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297 [hereinafter St. Petersburg Decla-

mate object” of war is to “weaken the military forces of the enemy,” and that “for this purpose it is sufficient to disable the greatest possible number of men.” Accordingly, it would be “contrary to the laws of humanity” to employ “arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”<sup>89</sup>

Goodman argues that Additional Protocol I enacts a more general prohibition against the needless killing of combatants, and he marshals support from the drafting history and Commentary to Additional Protocol I to maintain that Article 35(2) implements Jean Pictet’s lesser evil formula, according to which

[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.<sup>90</sup>

Indeed, part of Goodman’s argument is that the very idea of a Pictet formula is something of a misnomer, as that label misleadingly attributes this view to a single individual when, in fact, Pictet’s approach was uncontroversial among the leading experts of the day and even, it would seem, among members of the U.S. delegation to the 1974 Lucerne Conference on the Use of Certain Conventional Weapons.<sup>91</sup>

This interpretation has not gone unchallenged. An article co-authored by four U.S. IHL experts—three of whom have significant military experience—maintains that:

Employing deadly combat power against a belligerent operative when capture might have been a feasible alternative for subduing him has never been considered to violate the prohibition against inflicting unnecessary suffering. Instead, the principle prohibits employing methods or means of warfare that cause death in a way considered by the international community to be unnecessarily painful or pernicious (for example, chemical weapons), or that needlessly aggravate the suffering of an opponent who survives attack but is rendered *hors de combat*.<sup>92</sup>

Jens Ohlin likewise argues that “[A]rticle 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 in-

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ration]; see Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977*, 34 INT’L REV. RED CROSS 98, 102 (1994).

89. St. Petersburg Declaration, *supra* note 88.

90. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985).

91. Goodman, *Kill or Capture*, *supra* note 18, at 839–52.

92. Corn et al., *supra* note 19, at 555.

flicting injuries that needlessly prolong their pain.”<sup>93</sup> Kevin Jon Heller also identifies a “fundamental problem with Ryan’s interpretation of Art. 35(2): he is trying to shoehorn a prohibition on unnecessary killing into a prohibition that—as has long been assumed by scholars—deals solely with preventing superfluous injury or unnecessary suffering to combatants who survive an attack with a particular weapon.”<sup>94</sup>

### 1. *Injury and Suffering*

Puzzling through this debate reveals several interpretive complexities surrounding Goodman’s argument. Much of the disagreement has focused on the ordinary meaning of the text, and in particular, the choice of the words “injury” and “suffering.” Article 35(2), notes Heller, “does not expressly prohibit unnecessary killing per se, nor does it broadly prohibit unnecessary ‘harm.’”<sup>95</sup> Had the drafters intended to regulate unnecessary killing, he argues, they would have done so more explicitly.<sup>96</sup> In response, Goodman points out that dead combatants are killed by mortal injuries and argues that “Heller has a considerable burden to show that ‘injury’ does not include this subset (and most severe form) of injury.”<sup>97</sup>

So framed, the textual validity of Goodman’s position would appear to hinge on whether the word “injury” is broad enough to encompass death, but closer examination reveals that the real dispute lies elsewhere. The narrow reading of “injury,” for instance, is entirely compatible with the portion of the Pictet formula that demands less injurious means over more injurious means, even with respect to nonlethal force. Yet, neither Heller nor Goodman’s other critics appear to concede that combatants attempting a live capture of a combatant must avoid injuring their opponent if there is a feasible non-injurious method of capture available (such as shouting “hands up” before inflicting a nonlethal wound).

Likewise, a prohibition on unnecessary killing is also consistent with a narrow interpretation of the word “injury.” Killing in wartime is accomplished by the infliction of physical injuries. Even if death itself is not a form of injury per se, a physical injury might still be “superfluous” on the ground that its only purpose is to cause death unnecessarily.<sup>98</sup> Hence, it

93. Ohlin, *Recapturing*, *supra* note 19, at 26.

94. Heller, *supra* note 19; *see also* OHLIN & MAY, *supra* note 59, at 223 (agreeing with Heller that “[i]n the absence of [the terms unnecessary killing or unnecessary death], unnecessary suffering simply refers to pain and suffering related to injury, not death”).

95. Heller, *Capture-or-Kill Debate* #8, *supra* note 19.

96. *Id.*

97. Ryan Goodman, *The Capture-or-Kill Debate* #10: *Goodman Responds to Heller*, LAWFARE (Mar. 12, 2013, 1:13 PM), <https://www.lawfareblog.com/capture-or-kill-debate-10-goodman-responds-heller>.

98. Even Heller appears to accept this conclusion—or at least does not outright reject it—with respect to “weapons that not only disable a combatant, but also inevitably cause him to die from his wounds after the battle is over.” Kevin Jon Heller, *A Response to Goodman About the (Supposed) Duty to Capture*, OPINIO JURIS (Mar. 13, 2013, 7:15 AM), <http://opiniojuris.org/2013/03/13/a-response-to-goodman-about-the-supposed-duty-to-capture/>.

would appear that the real question is not how to define the word “injury” in isolation, but instead, how to define the range of alternative choices that makes an injury “superfluous.”

A similar observation applies to the prohibition relating to “unnecessary suffering,” which Goodman stipulates, “for the sake of argument,” does not regulate the infliction of death.<sup>99</sup> Putting aside the indirect emotional suffering of third parties such as grieving comrades and relatives, one may stipulate that instantaneous death causes no suffering. But death in wartime often is not instantaneous. Commonly, mortal wounds cause suffering before they cause death. Hence, there remains the possibility that Article 35(2) separately restricts the infliction of non-instantaneous death preceded by predictable suffering that could easily have been avoided by alternate means of incapacitation (including either instantaneous killing *or* capture).

As I understand it, however, the core objection to Goodman’s interpretation focuses not on the definition of injury, but instead on the assumption that Article 35(2) applies to capture-or-kill / capture-or-injure decisions at all.<sup>100</sup> Yet if that is the position, then one might turn the textual objection on its head: if the drafters of Additional Protocol I meant to exclude these sorts of choices from regulation by this Article, why did they not make that limitation explicit?

## 2. *Methods of Warfare*

A further complication—one that has received less attention in the debate over LRM but which might answer the question just posed—lies in the remaining language of that provision. As written, Article 35(2) does not prohibit the general infliction of superfluous injury or unnecessary suffering, however defined. It limits the prohibition to the employment of “weapons, projectiles and material and methods of warfare” that are “of a nature” to produce these consequences.<sup>101</sup> As a matter of ordinary meaning, this language lends itself better to some applications than to others. For instance, one can readily see how Article 35(2) operates to prohibit certain kinds of weapons—such as expanding bullets and poisonous gases (both the subject of previous treaty prohibitions)—based on the nature of the injury and suffering that those weapons inflict.<sup>102</sup> On the other hand, contrast the example of a soldier who makes a split-second decision to fatally shoot an opponent rather than attempt capture. One may stipulate that the soldier’s decision results in superfluous injury, but does that make the decision a “method” of warfare that is “of a nature” to cause such suffering?

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99. Goodman, *supra* note 97.

100. See *supra* note 94 and accompanying text.

101. Additional Protocol I, *supra* note 3, art. 35(2)

102. Convention (IV) Respecting the Laws and Customs of Wars on Lands, *supra* note 85, annex art.

The ICRC's Commentary to Additional Protocol I leaves the answer to this question somewhat opaque. Addressing Article 35(1)'s separate statement that "[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited," the Commentary observes as follows:

The words "methods and means" include weapons in the widest sense, as well as the way in which they are used. The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. It would automatically fall under the prohibition of Article 57 (*Precautions in attack*), paragraph 2(a)(ii). However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.<sup>103</sup>

Although there is nothing in this language that directly addresses Article 35(2), its approach has direct relevance for that provision as well. The final sentence of the passage makes reasonably clear that firing a permitted weapon is a "method of warfare," and that one who does so abusively violates IHL in the same way as does someone who employs a prohibited weapon "whose very nature" is to cause prohibited damage.<sup>104</sup> But this contrast between the nature of weapons, on the one hand, and the method of their use, on the other hand, creates difficulties for the interpretation of Article 35(2)'s prohibition on *both* "weapons" and "methods of warfare" that are "of a nature" to cause prohibited harm. The Commentary does not expressly identify a method of warfare that possesses such a nature.

Returning to the example of a soldier who shoots an opponent whom he might have captured, one could argue that the relevant method of warfare is simply the firing of the weapon, and that there is nothing in the very nature of that act that produces superfluous injury. A drawback of that interpretation is that it appears to permit even paradigmatic inflictions of superfluous injury and suffering such as when a soldier deliberately shoots a victim in a part of the body calculated to ensure a slow and painful death, or with a view to maim for life. Avoiding that result—as other passages of the Commentary appear to do, albeit without confronting this particular language<sup>105</sup>—requires characterizing the method of warfare more specifically,

103. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1402.

104. *Id.*; see also, e.g., Meyrowitz, *supra* note 88, at 103 ("[I]n Article 35 (2), 'methods of warfare' is to be understood as the mode of use of means of warfare in accordance with a certain military concept or tactic.").

105. See ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1424 ("It is worth noting that none of the rules explicitly protects combatants from incendiary weapons such as flame-throwers or napalm. However, it is generally admitted that these weapons should not be used in such a



for instance as the targeting of a weapon in a manner expected to increase suffering.<sup>106</sup> So framed, the nature of the method does produce the prohibited result. But that framing also supports the extension of Article 35(2) to kill or capture decisions: shooting to cause superfluous death may likewise be characterized as a distinct method of warfare whose nature produces prohibited harms.

I am not sure that the answer to this particular interpretive puzzle has critical importance to the debate over LRM, however. The clearest effect of the more restrictive interpretation is not to ignore consideration of LRM altogether but instead to focus responsibility on decisions that are made at a policy level rather than those made at the ground level by individual combatants. Imagine, for example, that my hypothetical combatant is a member of a special forces unit that has been dispatched to conduct a targeted killing against an individual target. Imagine, moreover, that this killing is conducted pursuant to a general policy of targeted killings that gives no weight whatsoever to the feasibility of capture, demanding instead the use of lethal force even in situations where capture could be conducted without incurring additional expense or presenting additional risks or burdens to the forces conducting the operation.

On these facts, the language of Article 35(2) presents a less awkward fit. It is sensible to describe the targeted killing policy (along with its associated rules of engagement) as a method of warfare pursuant to Additional Protocol I. And clearly, it is the nature of the policy to demand lethal force even in cases where non-injurious alternatives are available.

### 3. *Article 35(2) and Military Necessity*

Treaty interpretation, however, does not conclude merely with consideration of the text's ordinary meaning, and neither does the debate over Article 35(2). Goodman marshals a variety of sources from before, during, and after the drafting of Additional Protocol I to support his claim that Article 35(2) codifies Pictet's LRM formula. As Goodman reveals, the famous endorsement of LRM attributed solely to the former ICRC President by Hays Parks actually appears in the final report of an expert group meeting held in Ge-

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way that they will cause unnecessary suffering, which means that in particular they should not be used against individuals without cover.”)

106. This position finds support in the observation that the words “of a nature” were chosen as a substitute for “calculated to.” *Id.* ¶ 1426 (“The Conference certainly considered that the expression ‘calculated to cause,’ which was used in English as an equivalent of the French expression ‘propre à,’ and which can be found in the 1907 version of the Hague Regulations was not appropriate, and consequently the text was amended to ‘of a nature to.’”). Perhaps then, the point was to de-emphasize intent with a looser mental requirement. However, the problem seems instead to have been that “calculated to” offered a poor translation of the French version of the same prohibition. See Meyrowitz, *supra* note 88, at 102 (noting that Article 35(2) modified the “principle expressed in [the] 1899 and 1907 [Hague Conventions] by designating it as a ‘basic rule,’ by adding the words ‘methods of warfare’ . . . and by replacing the expression ‘calculated to’ by ‘of a nature to’—although in French the corresponding expressions (*propres à* and *de nature à*) have exactly the same meaning”).

neva in 1973 and reflects the opinion of the entire group, including Pictet and others.<sup>107</sup> Goodman identifies further support for this position in a 1970 report of the U.N. Secretary General, the proceedings of the 1974 intergovernmental Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference, and the writings of several IHL experts.<sup>108</sup> Perhaps most notably, the ICRC's own commentary to Additional Protocol I contains several passages lending support to the existence of an LRM requirement that applies to capture/injure/kill choices.<sup>109</sup> Moreover, Goodman cites evidence that the choice of the phrase "unnecessary suffering and superfluous injury" in Article 35(2) marked a deliberate attempt to reconcile the English version of the phrase with the French version's "*maux superflus*" precisely so as to make clear (as the French allegedly does) that the prohibition "conveys the further notion of superfluous deaths."<sup>110</sup>

The reliance on these sources is also contested, both with regard to their interpretation and relevance. Heller, for instance, has argued that they do not support as broad a vision of LRM as the one that Goodman identifies.<sup>111</sup> Ohlin, on the other hand, acknowledges that Goodman's "work does not stand alone," but instead "exists in a line of diplomatic and scholarly attempts to redefine the concept of necessity to give it more regulatory bite."<sup>112</sup> He allows that 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," but nevertheless concludes that "Pictet was *wrong* in his reading of core IHL principles."<sup>113</sup>

Although I do not agree entirely with this assessment (subject to the further proviso that, as I shall explore below, there is some ambiguity regarding what, if anything, distinguishes Ohlin's position from Goodman's), Ohlin is right to focus attention on the relationship between the alleged LRM obligation and military necessity. This issue is of critical importance not only to the theory of IHL, but to the interpretation of Article 35(2) itself. After all, Article 35(2) does not prohibit the infliction of suffering and injury under all circumstances. It only does so with respect to suffering that is "unnecessary" and injury that is "superfluous." If Article 35(2) does establish an LRM obligation, the obligation triggers only when this threshold is met. Hence, the choice of language raises another, more critical question that has received inadequate attention in the debate: what, if anything, dis-

107. Goodman, *Kill or Capture*, *supra* note 18, at 841–42.

108. *Id.* at 839–52.

109. *Id.* at 848–52.

110. Goodman, *supra* note 97 (quoting Meyrowitz, *supra* note 88, at 104).

111. See Heller, *supra* note 19.

112. Ohlin, *Recapturing*, *supra* note 19, at 2.

113. *Id.* at 21, 23. In more recent work, Ohlin and May have also challenged Goodman's account of the drafting history, arguing that there was greater disagreement on the matter of LRM obligations than Goodman allows. See OHLIN & MAY, *supra* note 59, at 221 ("[W]e do not read the *travaux préparatoires* of the Additional Protocols as supporting a duty to use non-lethal force.").

tinguishes Article 35(2) from the principle of military necessity itself? Consider the following possibilities.

*a. Is Article 35(2) co-extensive with military necessity?*

As a matter of ordinary meaning, the most plausible interpretation is that Article 35(2) deals only with actions that lack support in military necessity. The choice of the word “unnecessary” to modify “suffering” may convey that meaning most directly: suffering inflicted for reasons of military necessity is presumably not “unnecessary.” But the choice of the phrase “superfluous injury” is equally telling in how it suggests—without reference to the specialized meaning of necessity in the military context—that Article 35(2) is highly deferential to military judgment. As a *prima facie* matter at least, injuries that might be avoidable according to some strict conception of necessity would appear to be non-superfluous so long as they are inflicted with a view to achieving some tangible military advantage—however modest—as compared to other methods of incapacitation.

This conclusion may seem unremarkable, even obvious, yet it has several profound implications for the debate regarding LRM that have thus far gone unobserved. One implication concerns how this interpretation facilitates a formal agreement between proponents and opponents of an LRM requirement. Article 35(2) does indeed require LRM in lieu of unnecessary killing, one might concede. But the victory for LRM is pyrrhic, the opponents will argue, because the expansive approach to military necessity prevailing in legal tradition ensures that Article 35(2) does not actually trigger an LRM obligation in any of the cases that LRM advocates actually care about. One can oppose that conclusion, but doing so requires going beyond Article 35(2). The real dispute has to do with the principle of military necessity and how that principle drives the application of Article 35(2).

Another important implication of this interpretation is that it complicates Goodman’s position that the LRM requirement is a mid-twentieth century innovation.<sup>114</sup> If Additional Protocol I does indeed confirm a transformation within IHL with respect to LRM obligations, Article 35(2)—under this view—cannot be the locus of that transformation. If that provision merely prohibits actions that are already unlicensed by military necessity, then Article 35(2) alone adds relatively little. The argument must further establish that the principle of military necessity itself—which is not defined anywhere in Additional Protocol I—underwent such a transformation.

A third implication is that Article 35(2)’s dependence upon the principle of military necessity has the apparent effect of making Article 35(2) redundant. Since military necessity is already a basic requirement of force in wartime, why does the law require a specific prohibition addressing unnecessary

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114. Goodman, *The Lesser Evil*, *supra* note 18.

injury and suffering? Interestingly, this critique—based on Article 35(2)'s impotence—mirrors a critique that Ohlin levels against Goodman for the opposite reason that Goodman's reading makes Article 35(2) too robust. On Ohlin's account, the problem with reading Article 35(2) to prohibit unnecessary killing is that *other* provisions of IHL become redundant. "[T]he *specific* prohibitions of *jus in bello* must become superfluous," argues Ohlin, "once they are swamped by the more general principle that Goodman purports to find in their penumbra."<sup>115</sup>

But this concern about redundancy—in either guise—may prove too much. There is nothing inherently incoherent or illogical about a legal regime that embraces both a general prohibition on actions that lack military necessity and more specific rules that either fall within or supplement the broader prohibition. The specific rules—such as those regulating *hors de combat* status—may clarify the general prohibition by providing more concrete guidance on its operation, or they may tighten that prohibition by restricting activities not otherwise covered by the general rule. In either instance, there is still value to a general prohibition that is broad enough to encompass circumstances not explicitly addressed by the specific rules. And considering that Additional Protocol I does not otherwise include a general statement of the necessity principle, a key purpose Article 35(2) may simply be to reinforce the centrality of military necessity to the permissible infliction of suffering and injury.

In addition, it makes sense that a more general prohibition against the infliction of unnecessary harm would coexist with specific prohibitions that either restrict the principle of necessity or elucidate its meaning in specific contexts. It might well be, for example, (as would follow from Goodman's interpretation) that killing a combatant who has surrendered or become incapacitated by wounds violates Article 35(2), thus making redundant Article 41(1)'s specific prohibition on doing so. Even if so, Article 41(1) remains valuable by supplying more specific guidance on the boundaries of necessity than would be provided by Article 35(2) alone. The general prohibition in Article 35(2), meanwhile, remains operative in residual cases not covered by this and other express prohibitions.

That is not the end of the analysis, however, because this interpretation of Article 35(2)—according to which it forbids the infliction of only such suffering and injury as lacks support in military necessity—faces a deeper problem. If indeed IHL truly embraces the broadest understanding of military necessity that permits "any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money," then Article 35(2) appears to become toothless even with regard to its non-controversial scope.<sup>116</sup> For instance, using exploding bul-

115. Ohlin, *Recapturing*, *supra* note 19, at 6.

116. *United States v. List (The Hostages Case)*, XI Trials of War Criminals Before the Nuernberg Military Tribunals 1230, 1253 (1948).

lets—a paradigmatic Article 35(2) violation<sup>117</sup>—becomes justifiable so long as doing so helps subdue the enemy in ways not as readily achievable by other means—for example, by preventing or delaying the return of wounded opponents to the battlefield or by deterring new recruits from joining the fight.<sup>118</sup>

If Article 35(2) is merely parasitic upon the necessity principle, then rescuing its prohibition requires acknowledging that necessity is not quite so permissive as the broadest interpretation would suggest. Unless it is a dead letter, the article presupposes that necessity does not in fact extend to claims as tenuous as the one just described. Remarkably, this reading of Article 35(2) provides support for an LRM obligation whether or not one reads Article 35(2) itself to establish that obligation. The primary contribution of Article 35(2) may be to confirm limitations on the broader necessity principle that are transferable to the LRM debate.

I realize that this line of argument may appear to head down a path that even Goodman disavows: the argument comes close to suggesting that one restriction (a general obligation to consider LRM) can be derived analogically from the rationale underlying another restriction (a prohibition on certain types of weapons).<sup>119</sup> The problem with this approach, explains Ohlin, is that it upsets the delicate balance according to which IHL endorses both a broad permission to deploy lethal force and identifies specific restraints on that prohibition.<sup>120</sup> This reasoning by analogy threatens that balance, it would seem, by discovering additional restrictions that may end up swallowing the rule.

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117. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1420 (“The weapons [including exploding bullets] which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under the paragraph of Article 35 with which we are concerned here.”).

118. The point that such weapons might indeed achieve some military advantage in this way was acknowledged by the report of a 1973 expert group meeting, which noted that:

Clearly the authors of the ban on dum-dum bullets felt that the hit of an ordinary rifle bullet was enough to put a man out of action and that infliction of a more severe wound by a bullet which flattened would be to cause “unnecessary suffering” or “superfluous injury.” The circumstance that a more severe wound is likely to put a soldier out of action for a longer period was evidently not considered a justification for permitting the use of bullets achieving such results.

Int’l Comm. of the Red Cross [ICRC], *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts*, ¶ 23 (1973); see also Goodman, *Kill or Capture*, *supra* note 18, at 836–37 (“For example, if a lawful objective is to disable as many combatants as possible to remove them from the battle field, presumably the law would permit military means that ensure that those fighters would not return to battle ever again. So why not allow weapons deliberately designed to render their deaths inevitable? If enemy fighters never get off the operating table, is that not optimal in terms of military objectives?”).

119. See Goodman, *Kill or Capture*, *supra* note 18, at 836–37; Ryan Goodman, *The Capture-or-Kill Debate # 11: Goodman Responds to Ohlin*, LAWFARE (Mar. 20, 2013), <https://www.lawfareblog.com/capture-or-kill-debate-11-goodman-responds-ohlin> (noting that his article “steer[s] clear of deriving a general principle from the specific prohibitions and structure of LOAC” because “that line of analysis is not sustainable.”).

120. Ohlin, *Duty to Capture*, *supra* note 11, at 1322.

But that concern is unwarranted in light of how Article 35(2) is drafted. The Article does not, for example, list certain classes of weapons and methods of warfare which are prohibited notwithstanding their potential marginal contribution to military advantage. Such a formulation might indeed caution strongly against the analogical derivation of other restrictions not identified. Instead, Article 35(2) appeals to general concepts of necessity and superfluity to implement a more general prohibition.<sup>121</sup> It assumes that these terms have prohibitory relevance and it trusts the informed reader to understand how certain weapons and methods cannot be justified by military necessity. Article 35(2) presupposes the existence of reasonable limits on the necessity principle that restrain that principle independently from obligations that impose external checks on necessity. And if such limits do in fact exist, then one should also ask how they impact the debate over LRM.

*b. Does Article 35(2) demand more than military necessity?*

There is, however, another possible reading of Article 35(2). Perhaps that provision does not require such direct interrogation of the general military necessity principle because the article instead codifies a different and stricter necessity requirement for conduct within its scope. On this account, certain weapons and methods of warfare that generally advance military necessity as a *prima facie* matter might nevertheless violate Article 35(2) by virtue of the injury or suffering they inflict.

Perhaps the strongest support for this view is the ICRC's Commentary to Additional Protocol I, which describes Article 35(2) in terms of a proportionality test requiring one "to weigh up the nature of the injury or the intensity of suffering on the one hand, against the 'military necessity', on the other hand, before deciding whether there is a case of superfluous injury or unnecessary suffering as this term is understood in war."<sup>122</sup> So framed, Article 35(2) does more than reinforce an internal limit within necessity.

But that reading is problematic given its apparent incompatibility with the treaty text, which says nothing about balancing. The drafters of Additional Protocol I knew how to require balancing when they wanted to do so. That is what the treaty's proportionality requirement does when it forbids attacks "expected to cause incidental harm to civilians and civilian objects," when such harm would "be excessive in relation to the concrete and direct military advantage anticipated."<sup>123</sup> The failure to provide likewise in Article 35(2) supports the general assumption that military necessity is sufficient to

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121. And, indeed, within the treaty itself, Article 35 appears under the label of "Basic Rules," rather than among the more specifically labeled prohibitions that follow. Additional Protocol I, *supra* note 3, art. 35.

122. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1428; see also Goodman, *Kill or Capture*, *supra* note 18, at 837–38 (citing numerous sources in support of this position).

123. Additional Protocol I, *supra* note 3, art. 51(5)(b).

justify the killing of combatants but insufficient—without further balancing—to justify incidental harms to civilians and objects.

Of course, the ICRC's contrary conclusion is hardly helpful to LRM opponents. Once combined with the ICRC's additional conclusion in the same commentary that Article 35 supports an LRM obligation,<sup>124</sup> the balancing approach produces a more robust version of that obligation, one that raises the legal bar by rendering military necessity insufficient to justify the killing of an otherwise targetable combatant. Avoiding that conclusion requires some interpretive acrobatics on the part of LRM opponents: the ICRC must be right that Article 35(2) demands a proportionality approach (despite the lack of explicit textual support in the treaty) while also wrong that Article 35(2) imposes an LRM obligation (despite more plausible textual support). I am skeptical that such an interpretation can survive international law's command that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>125</sup>

In sum, then, both readings of Article 35(2)'s necessity principle support an LRM obligation. The most viable interpretation is that that obligation exists within the principle of necessity itself rather than through any textual innovation of Article 35(2). At the same time, the wording of Article 35(2) suggests that the principle is not quite so broad as is sometimes supposed.

#### D. Article 41(1): *Hors de Combat* Status

The debate over LRM has also focused on another provision of Additional Protocol I: Article 41(1)'s rule that a person "shall not be the object of attack" if she "is in the power of an adverse Party."<sup>126</sup> The exemption from attack on this basis exists independent of, and alongside, additional *hors de combat* protections for those who have "clearly express[ed] an intention to surrender,"<sup>127</sup> and those who are "incapable of defending [themselves]" because they are either unconscious or "otherwise incapacitated by wounds or sickness."<sup>128</sup> Goodman advances the "tentative[]" claim that the "in the power of" category includes not only those who have already been captured but, also, "combatants who are defenseless and at the complete mercy of an

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124. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1397 (reasoning that the broad *Hostages* formulation of necessity "has the disadvantage that it does not in fact take into account the paragraph of Article 35 with which we are concerned, and therefore it cannot stand on its own. Moreover, it should be quite clear that the requirement as to minimum loss of life and objects which is included in this definition refers not only to the assailant, but also to the party attacked. If this were not the case, the description would be completely inadequate.").

125. Vienna Convention on the Law of Treaties art. 31.1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

126. Additional Protocol I, *supra* note 3, arts. 41(1)–41(2)(a).

127. *Id.* art. 41(2)(b).

128. *Id.* art. 41(2)(c).

attacking party.”<sup>129</sup> Although this interpretation would not establish an LRM obligation per se (*hors de combat* status precludes attack entirely, whether by lethal or nonlethal means), its effect is to render capture the only option for attacking forces in at least some of the cases that might otherwise be subject to an LRM obligation.

There is support for the view that the “in the power of” category includes at least some individuals who have neither communicated an intention to surrender nor fallen into the physical custody of the opposing side.<sup>130</sup> Consider, for instance, the case of a soldier who has abandoned his weapons and left the fight without intending to surrender (perhaps he is trying to catch a train home, or to a third country). The more difficult question concerns how far this concept extends, including, for example, cases of momentary defenselessness in which a short window of opportunity arises to safely and easily capture a combatant who remains very much in the fight. Such cases present a more difficult fit considering, in particular, that *hors de combat* status produces a blanket prohibition on attack, even if capture is not a feasible alternative.<sup>131</sup>

It is possible to describe such a combatant as being momentarily “in the power of” the opposing side, but that conclusion is hardly intuitive. If that case can be made, then once again the critical question concerns the scope of military necessity. Extending *hors de combat* status to cover a more expansive set of scenarios is more plausible if one believes that these scenarios already fall outside the permission afforded by military necessity.<sup>132</sup> Failing that, the

129. Goodman, *Goodman Responds to Oblin*, *supra* note 119; Goodman, *Kill or Capture*, *supra* note 18, at 830–836. Notably, the corresponding language of the 1899 and 1907 Hague Conventions is more limited, extending protection only “in the case of capture by the enemy.” Convention (IV) Respecting the Laws and Customs of Wars on Land, *supra* note 86, art. 3 (similar); Convention (II) with Respect to the Laws and Customs of Wars on Land, *supra* note 87, art. 3 (similar).

130. See, e.g., MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 252 (2d ed. 2013) (“Under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless.”); ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1612 (“A defenceless adversary is *hors de combat* whether or not he has laid down arms.”); HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 59 (1978); Schmitt, *supra* note 19, at 860 (“It is here that I find common ground with Professor Goodman. I do not accept the premise that defenselessness alone shields enemy forces or civilian direct participants from attack. But capture (and detention) does not necessarily require taking the fighters into ‘custody.’ In some circumstances, an individual has effectively been captured without an affirmative act on either the captor’s or prisoner’s part, a point made, as Professor Goodman notes, by Professor Howard Levie decades ago.”). As Adil Haque observes, there is language in the ICRC COMMENTARY TO PROTOCOL I that suggests yet broader interpretation of the *hors de combat* limitation, restricting even attacks by the airforce against defenseless soldiers who cannot otherwise be captured. See ADIL HAQUE, *LAW AND MORALITY AT WAR* 102–03 (2017); ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1612 (discussing *hors de combat* protection in the context of an attack “conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters”).

131. See *supra* note 126 and accompanying text.

132. Haque draws a similar connection between *hors de combat* protection and military necessity, noting that “states could interpret ‘in the power’ to mean ‘both defenseless and susceptible to capture,’” but that “such an approach seems to miss the point” because “[i]t is wrong to kill [such a combatant] not



argument that Additional Protocol I packed a more fundamental transformation of military prerogative into the words “in the power of” is more tenuous.

### III. THE BORDERS OF NECESSITY

All roads, then, lead to the necessity principle: if there is a duty to choose less restrictive means, then that duty exists within that principle as a limitation on its reach. My defense of an LRM obligation begins with a basic claim that should be uncontroversial: the law does not permit the unnecessary killing of combatants. As a formal matter, the debate over LRM reveals no disagreement over this proposition. Indeed, despite its express rejection of an LRM obligation,<sup>133</sup> the Department of Defense Law of War Manual also embraces the principle of humanity “that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”<sup>134</sup>

The central controversy, as I have explained, concerns how one defines what is unnecessary in light of the broad understanding of military necessity that has prevailed historically.<sup>135</sup> Complicating this interpretive question is the general lack of specificity in the relevant treaties and other legal sources. Additional Protocol I does not expressly state that combatants must prefer less restrictive means when they are available. On the other hand, neither that treaty nor any of the historical formulations of military necessity specify that combatants may target their opponents with lethal force at any time no matter how feasible and riskless capture might be, and no matter how much the context of the killing might deviate from the traditional battlefield scenarios that inspired the IHL rules. Hence, this is not a question that can be decided based on text alone without engaging in a further interpretive exercise.

That exercise, in turn, must confront a tension between two interpretive presumptions that one might invoke to resolve the issue. One presumption derives a clear statement rule from the principle of military necessity. According to this view, IHL permits the use of lethal force in armed conflict unless the law establishes an express exception. Those who reject the existence of an LRM obligation have argued largely along these lines.

On the other hand, the permission to kill in wartime is itself an exception to a more fundamental rule prohibiting the taking of human life.<sup>136</sup> As such, the claimed duty to exercise LRM exists as an exception to an exception to

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because he is defenseless and susceptible to capture but because killing him is unnecessary to prevent him from posing future threats.” HAQUE, *supra* note 130, at 104.

133. See *supra* note 19.

134. DOD, LAW OF WAR MANUAL, *supra* note 3, at 58.

135. See *supra* Section II.A.

136. See *id.*

one of the most fundamental rules that there is.<sup>137</sup> This structural aspect of IHL suggests a second interpretive presumption, one that protects human life by treating claimed justifications for killing with skepticism. This presumption supports a different sort of clear-statement rule: one demanding clarity regarding the scope of the permission to kill in wartime.

There is no inherent contradiction between these two presumptions: the law may demand clarity regarding both the permission to kill and claimed exceptions to that permission. However, framing the issue in these terms reveals that the debate over LRM is not simply a matter of searching for specific exceptions in the law. It is also a matter of understanding the scope of the special permission to kill in wartime.

From a normative perspective, the moral status of wartime killing presents many puzzles. Why, for example, should the existence of armed conflict trigger rules that are so less protective of human life than those that normally prevail? And how can it be that IHL's permission to kill, along with its corresponding constraints, makes no distinction between unlawful aggressors and their victims? Perhaps the IHL rules benefit from an underlying moral foundation that justifies the use of lethal force in wartime. Or perhaps, as Jeremy Waldron has argued, the rules of war have proceeded on the basis of a "moral sociology": the law accepts without justifying the historical inevitability of war, and tries merely to preserve some dose of humanity by imposing limited restrictions that have a realistic chance of acceptance by the warring parties themselves.<sup>138</sup>

In either event, the structure of IHL reflects an accommodation between military prerogative and humanity.<sup>139</sup> It accepts the functional requirements of war. But it does with limitations. As I argue here, the express side constraints by which IHL restricts necessity are supplemented by two related internal restrictions that are intrinsic to that principle and define its contours. The first restriction is that military necessity incorporates a right reason requirement. It does not permit the killing of combatants for any reason whatsoever, but instead only in pursuit of military advantage. The second restriction is objective in nature. Killing in wartime must advance some anticipated military advantage.

The debate over LRM thus far has paid inadequate attention to the difference between these subjective and objective considerations. Analyzing them

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137. See Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle?*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 112, 113 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (arguing that the rule permitting killing in wartime "represents a relaxation of one of the most important norms we have—the norm against murder—and the justifications adduced for [that rule] or for similar principles represent a significant modification of our usual way of arguing about murder").

138. *Id.* at 127.

139. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 798 (2010) ("IHL represents a carefully thought out balance between the principles of military necessity and humanity. Every one of its rules constitutes a dialectical compromise between these two opposing forces.").

separately as they impact specific scenarios reveals areas of potential agreement among the different sides of this debate as well as areas requiring further examination. As I explain, both restrictions are compatible with the broad formulations of military necessity that have prevailed in military tradition. The practical effect of each restriction, however, is impacted by various interpretive choices.

#### A. *Insufficient Reason*

Consider the following hypothetical cases:

1. In World War II, a German soldier crosses enemy lines under orders to attempt a quiet nighttime capture, and he comes across a sleeping American soldier. Upon spotting evidence that his sleeping opponent is Jewish, the German soldier is overcome by hatred. He fires his rifle, disobeying orders and threatening the mission.
2. A general in wartime discovers that a man suspected of killing his brother before the war is a low-level combatant for the opposing side. Angered that the suspect has escaped justice, the general orders a successful targeted killing operation against him. The risky mission has no appreciable anticipated military benefit, and it diverts important resources from other critical missions.
3. A general receives word that a group of enemy troops has found itself encircled, outnumbered, and practically defenseless. She initially orders the transmission of a request for surrender (believing this can be done safely and that intelligence purposes favor capture if possible). She then substitutes an order to bomb after discovering that her military does not wish to expend resources on keeping prisoners of war.

Notwithstanding important differences among these examples, I do not believe that any of them find justification in military necessity. The problem in each case is that the actor who exercises lethal force fails to do so for the reasons that are privileged by necessity and that have informed that principle's historical development. At best, the target's status as a lawful target serves as pretext for killing otherwise motivated by unnecessary considerations.

The centrality of reasons to the permission to kill in wartime is evident both as a matter of basic logic and from the ways in which the necessity has been historically formulated. Take for instance, the Lieber Code's account, which defines the principle generally as "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>140</sup> The Code broadly allows that "[m]ilitary necessity admits of all direct destruction of life or

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140. Lieber Code, *supra* note 43, art. 14.

limb of ‘armed’ enemies, and of other persons whose destruction is incidentally ‘unavoidable’ in the armed contests of the war,<sup>141</sup> but it also qualifies that definition with various provisos, including the limitation that “[m]ilitary 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.”<sup>142</sup> As framed by Lieber, then, reasons play a central role in defining military necessity. The principle privileges the killing of enemy combatants for the purpose “of securing the ends of war,”<sup>143</sup> but prohibits the infliction of suffering “for the sake of suffering or for revenge.”<sup>144</sup>

A similar limitation inheres in the influential *Hostages* formulation which provides that “[m]ilitary 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>145</sup> So framed, military necessity confers broad authority to kill enemy combatants, but only for a specified purpose. Likewise, the 1868 Saint Petersburg Declaration explains that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; [t]hat for this purpose it is sufficient to disable the greatest possible number of men.”<sup>146</sup>

Considerations of right reason have been largely, albeit not entirely, ignored in the LRM debate. Reasons receive no mention in the Pictet formula, nor in the primary contemporary sources—the ICRC’s Interpretive Guidance,<sup>147</sup> Israel’s *Targeted Killing* case,<sup>148</sup> and the Alston Report<sup>149</sup>—endorsing that formula. Goodman, by contrast, briefly notes the range of non-

141. *Id.* art. 15.

142. *Id.* art. 16. Article 16 further excludes “torture to extract confessions,” “the use of poison in any way,” the “wanton devastation of a district,” “acts of perfidy,” and “in general . . . any act of hostility which makes the return to peace unnecessarily difficult.”

143. *Id.* art. 14.

144. *Id.* art. 16.

145. United States v. List (The Hostages Case), XI Trials of War Criminals Before the Nuernberg Military Tribunals 1230, 1253 (1948); see DOD, LAW OF WAR MANUAL, *supra* note 3, at 52 (“Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”); see also 1914 RULES OF LAND WARFARE, *supra* note 47, ¶¶ 9–11 (“A belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of the war; that is, the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money. . . . Military necessity justifies a resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war.”); 1940 RULES OF LAND WARFARE, *supra* note 47, ¶ 4a (“A belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”); 1956 FM 27-10 (Change No. 1 1976), *supra* note 47, ¶ 3a (“That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”).

146. St. Petersburg Declaration, *supra* note 88.

147. See ICRC INTERPRETIVE GUIDANCE, *supra* note 18, at 82.

148. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., HCJ 769/02, 57(6) PD 285 (2005) (Isr.).

149. See Alston Report, *supra* note 12.

military “factors that military and civilian authorities would be entitled to take into account if states had unfettered discretion to kill enemy combatants,” but he does not identify right reason as a distinct precondition of necessity or otherwise devote much attention to the issue.<sup>150</sup> LRM opponents, for their part, have also generally ignored the distinction between subjective and objective advantage altogether, choosing instead to reject LRM restraints in broader strokes.<sup>151</sup>

### 1. *Cruelty, Hatred, and Revenge*

One important exception in this respect is Jens Ohlin, who does acknowledge the centrality of reason to Lieber’s prohibition on cruelty: he accepts that “[a]s far as the general principle goes, what is outlawed by the principle of necessity is death and destruction not related to the war effort—actions performed purely out of cruelty, avarice, revenge, madness or nihilism, one would suppose.”<sup>152</sup> Yet he assigns the point no great significance because “[a] rational actor has little reason to pursue such actions anyway, unless overcome by emotion, since they are not related to the war effort.”<sup>153</sup> Presumably then, Ohlin would agree that an LRM obligation applies in cases like the first hypothetical, involving killing driven by anti-Semitic hatred.

One can imagine other grim reasons that might drive soldiers to kill in contravention of military advantage, including hatred of the enemy, score keeping among comrades, and the pursuit of trophies of war.<sup>154</sup> One should be careful, however, because in some cases it may be precisely these negative emotions that enable individual soldiers to perform their lethal duties in conformity with IHL. In the heat of battle, dehumanization of the enemy may to some degree be a subjective precondition to the pursuit of military advantage.<sup>155</sup> I do not argue here that a combatant who carries out lawful orders, but does so with evil thoughts, violates the law. Instead, my hypothetical imagines that illicit reasons have overridden the pursuit of military advantage, providing a decisive reason to kill.

150. Goodman, *Kill or Capture*, *supra* note 18, at 822.

151. This is true, for example, both of W. Hays Parks’ oft cited rebuttal to the ICRC INTERPRETIVE GUIDANCE, *see* Parks, *supra* note 19, and of Corn et al.’s analysis which rejects Goodman’s position without addressing his questions concerning improperly motivated attack, *see* Corn et al., *supra* note 19, at 596.

152. Ohlin, *supra* note 11, at 1301.

153. *Id.*

154. E.B. SLEDGE, WITH THE OLD BREED: AT PELELIU AND OKINAWA 120 (1981) (recalling the practice of Marines in World War II of collecting gold teeth from dead Japanese soldiers and in one case, a live but wounded soldier, and reflecting that “[s]uch was the incredible cruelty that decent men could commit when reduced to a brutish existence in their fight for survival amid the violent death, terror, tension, fatigue, and filth that was the infantryman’s war”).

155. *See, e.g.*, Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT’L CRIM. JUST. 638, 662 (2007) (noting that “military training and command structures are expressly designed to dissolve the social inhibitions that normally prevent people from committing acts of extreme violence, and to remove their sense of moral agency when committing such acts”).

## 2. *Avoiding Post-Capture Obligations*

Ohlin might also agree that an LRM obligation applies in my second hypothetical—involving the targeting of a suspected murderer—since it involves killing for reasons of revenge rather than military advantage. Like my first hypothetical, the example is rather farfetched, but it is instructive because it presents a rationale for killing—retributive justice—that is neither related to the war effort nor a result of purely irrational impulses. Instead, it raises the possibility that IHL could be invoked to pursue rational—even desirable—objectives through impermissible means.

This second hypothetical has special salience for post-9/11 debates that have navigated the border between the criminal law and IHL. For instance, in his speech announcing the successful operation to kill Osama bin Laden, President Obama appealed to values of criminal justice when he recalled the crimes of 9/11 and proclaimed that, with bin Laden's killing, “[j]ustice has been done.”<sup>156</sup> Likewise, one narrative dictates that the legal and political controversy surrounding the detention and trial of detainees at Guantanamo Bay and elsewhere spurred the United States to rely more heavily on targeted killing as an alternative to detention and prosecution.<sup>157</sup>

Perhaps, one might argue, military necessity is permissive enough to recognize the advantage of avoiding trial and detention. After all, killing combatants provides a cheaper alternative, promoting the efficiency values endorsed by the *Hostages* formulation. But reading the principle that broadly creates irreconcilable tensions with the broader framework of IHL, and in particular with the various protections that regulate detention and trial of combatants post-capture. If post-capture savings cannot justify the killing of *hors de combat* belligerents, why should they justify the killing of armed combatants? There is, of course, a material difference between those belligerents who are *hors de combat* and those who are not—after all, it is only the latter

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156. President Barack Obama, *Osama Bin Laden Dead* (May 2, 2011), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

157. DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 126–27 (2012) (noting with respect to the lethal 2009 raid in Somalia against Al Qaeda leader Saleh Ali Saleh Nabhan that “[r]umors swirled through the Pentagon that Nabhan had been killed because the White House didn’t want to face the tangled and politically fraught detention issues. Jeh C. Johnson, the military’s top lawyer, was so concerned, he conducted his own inquiry to satisfy himself that that was not the case. In the end, no direct evidence has ever emerged showing that the decision to pursue a kill over a capture in the Nabhan case was dictated by the lack of a long-term detention policy. Yet participants in the conference call that day realized that over time, the lack of a policy would foreclose important tactical avenues in the war on terror. The inability to detain terror suspects was creating perverse incentives that favored killing or releasing suspected terrorists over capturing them. ‘We never talked about this openly, but it was always a back-of-the-mind thing for us,’ recalled one of Obama’s top counterterrorism advisers. ‘Anyone who says it wasn’t is not being straight.’”); see also Goodman, *Kill or Capture*, *supra* note 18, at 823 (citing the same and asking, “Would a state be permitted to adopt a strategy that in effect prefers trying to kill rather than capture combatants because detention options are limited by domestic politics?”); Blum, *supra* note 52, at 162 (noting that “the military, political, and legal costs of holding enemy combatants in Guantanamo Bay create a strong incentive to kill rather than capture”).

who are subject to attack. But that distinction lies most obviously in the threat posed by armed combatants. As Gabriella Blum notes, “[t]he rules about *hors de combat* all share one underlying principle: Once soldiers are incapacitated—through surrender, capture, or injury—they no longer pose a threat.”<sup>158</sup>

This distinction suggests a fairly straightforward division regarding the scope of military necessity. The point of killing in wartime is to incapacitate enemy fighters, and the principle of military necessity authorizes lethal means for that purpose. But it does not authorize lethal force merely for the purpose of avoiding the legal protections that IHL guarantees for those combatants who have already become incapacitated. Hence, on this account, my third hypothetical, involving a general who denies an opportunity for surrender precisely for purposes of avoiding post-capture obligations, also lacks support in military necessity.

Perhaps one might disagree with this conclusion and identify some reason why avoidance of *hors de combat* status for one’s enemies is itself a legitimate military objective, but at minimum, the point is not one that can be resolved merely by appealing to the summary account provided by common formulations of military necessity. Instead, the necessity principle itself requires more nuanced interpretation.

### 3. *Morale*

These examples also raise the question of what other reasons might lie outside the necessity principle. Blum, for instance, questions whether a decision to kill rather than capture could be justified on the basis of “garnering domestic support for the war or weakening the morale of the enemy.”<sup>159</sup> In a broad sense, such morale related considerations may advance the effective prosecution of war, and might therefore be “necessary,” as Blum observes, in the sense of being “convenient or beneficial.”<sup>160</sup> She elaborates that “whether we allow the killing of people because it has a positive effect on domestic support or a negative effect on the enemy’s morale is ultimately a normative judgment.”<sup>161</sup> Indeed, I think there is evidence that modern IHL already rejects killing for that purpose. To take one example, the proportionality test demands that attacking forces weigh expected harm to civilians and civilian objects against “the concrete and direct military advantage anticipated.”<sup>162</sup> That language operates to exclude more indirect advantages such as morale raising, yet if military necessity does privilege the use of lethal force for those purposes, one would also expect that advantage to count against civilian harms in the proportionality balance.

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158. *Id.* at 126.

159. *Id.* at 142.

160. *Id.* (internal quotations omitted)

161. *Id.* at 142–43.

162. Additional Protocol I, *supra* note 3, art. 51(5)(b).

Imagine, for instance, a decision to kill rather than capture that is justified purely by reference to morale and that causes anticipated harm to civilians. The attack would surely be an illegal, disproportionate attack on the grounds of having no concrete and direct military advantage in comparison to capture. Can one simultaneously conclude that the combatants themselves were killed for a valid military reason?

Similarly, Additional Protocol I's targeting rule defines military objectives as "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."<sup>163</sup> While there is no corresponding limitation on the targeting of combatants, the apparent explanation for that omission is the idea that combatants, unlike inanimate objectives, are presumed to make an "effective contribution to military action," and that their killing, almost as a *per se* matter, "offers a definite military advantage" under "the circumstances ruling that time."<sup>164</sup> That rationale supports, at best, the broad permission to kill combatants as a means of incapacitation, but it fails to support the use of lethal force for morale-related purposes in cases when the perceived military advantage otherwise favors capture.

#### 4. *Diplomatic Relations*

Goodman, in his own defense of LRM obligations, questions whether the United States may invoke diplomatic relationships as a reason to choose killing over capture.<sup>165</sup> The claim is an interesting one because it reveals some of the grey area involved both in defining the permissible scope of military reason and in assigning responsibility for actions that lack necessity.

One can imagine scenarios in which diplomatic concerns would present clear-cut failures of necessity in the sense that I have been exploring. Suppose that a target, if captured, will disclose embarrassing information about government corruption that could threaten bilateral economic relations with a third state for reasons that have nothing at all to do with the ongoing armed conflict. Although killing the target will prevent the disclosure, that non-military consideration cannot, in my view, inform a decision to use lethal force.

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163. *Id.* art. 52(2).

164. *Id.* See, e.g., Walzer, *supra* note 34, at 144–45 (justifying the killing of soldiers based on the dangers they pose as a class). This assumption has not gone unchallenged, however. See Blum, *supra* note 52, at 139 (summarizing philosophical critiques of a purely class-based permission to kill combatants and presenting additional "reasons to question whether modern warfare still warrants an interpretation of the principle of military necessity as justifying the killing of as many combatants as possible").

165. See Goodman, *Kill or Capture*, *supra* note 18, at 823 ("Would the government of Yemen, for example, be able to request the CIA to bomb the house of a known militant if local forces could easily arrest him, but the government preferred to avoid the local political costs of holding him in long-term detention?").



But arguments about diplomatic relations and U.S. targeted killing have involved the more complex claim that the presence of U.S. troops on the territory of certain states presents diplomatic complications that are avoided by conducting drone strikes that allow no possibility of capture. For instance, diplomatic sensitivities have at various times reportedly reduced the feasibility of ground operations in Yemen.<sup>166</sup>

One reason why that scenario is more complicated is because the diplomatic issue may directly impact the very legality of a capture operation under international law. A drone strike conducted in Yemen with the consent of Yemen's government will not violate *jus ad bellum*, but a ground operation conducted without such consent might.<sup>167</sup> Hence, the government might argue, the drone strike offers the clear military advantage of being the only legally permissible means of incapacitation.

The answer is not so straightforward, however, because it is not clear that state consent should be allowed to restrict the operation of IHL in this way. Consider, for example, how the denial of ground forces may also endanger civilian lives by making the verification of targets more difficult and requiring less discriminate means of attack. Is it also permissible for a state to conduct strikes that are less protective of civilian lives than another method that is entirely feasible and could be pursued with equal or more military advantage but for the lack of state consent?<sup>168</sup> A strong counterargument dictates that states cannot rely on this type of constrained consent to justify actions that would otherwise justify an IHL violation. Holding otherwise effectively allows the territorial state to redefine *jus in bello* as it wishes simply by foreclosing more protective options. There is also a third possibility according to which such actions violate IHL, but that responsibility for the violation lies only with the territorial state, and not with the state conducting the strike. Under any of these scenarios, however, the issue is not really one of diplomatic relations. The real question concerns the interaction

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166. See KLAIDMAN, *supra* note 157, at 237 (noting in one case that “[a] capture operation in Yemen was not feasible because of the political backlash it would cause”); Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES, Apr. 7, 2013, at A1 (reporting that “according to experts on counterterrorism inside and outside the government” the “policy on targeted killing” is shaped in part by “the resistance of the authorities in Pakistan and Yemen to even brief incursions by American troops”); David E. Sanger & Eric E. Schmitt, *Yemenis Tell U.S. It Must Suspend Ground Missions*, N.Y. TIMES, Feb. 8, 2017, at A1.

167. See, e.g., Van Schaack, *supra* note 12, at 267 (arguing that “[a]lthough a self-defense rationale is ultimately the most defensible *jus-ad-bellum* justification for the breach of Pakistan’s territorial integrity occasioned by the Bin Laden operation, it is not unassailable. By contrast, consent provides an easy answer to the question of the legality of the American incursion into Yemen.”).

168. In particular, Additional Protocol I requires that:

those who plan or decide upon an attack shall . . . do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives [and] take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Additional Protocol I, *supra* note 3, art. 57(2)(a).

of *jus ad bellum* and *jus in bello* in situations where compliance with *jus ad bellum* hinges on a limited state consent. And this question has broader implications than the kill or capture debate.

For its part, the United States has never maintained that the legality of a particular targeted killing has hinged on state consent. It asserts the broader claim that international law permits it to conduct strikes in states that are unwilling or unable to constrain the threat posed by armed groups such as Al Qaeda that are operating in its territory.<sup>169</sup> On this account, the concern about diplomatic relations assumes a weaker form: the issue is not legality per se, but the military advantage inherent in conducting operations in a way that permits cooperation with the territorial state. But the central difficulty remains the same, as the claim entails one state finding military advantage in respecting another state's wish to limit the protections of IHL.

### B. *Insufficient Advantage*

Apart from considerations regarding subjective motivation, a separate set of questions concerns whether even properly motivated lethal force against combatants may lack sufficient justification in military necessity because, as an objective matter, capture presents a viable alternative. In principle, the existence of some such limitation should be uncontroversial. The point of the necessity principle is to privilege actions that advance military advantage, and so it would seem obvious that that principle does not privilege the use of force beyond what is necessary to pursue military advantage. Indeed, as the DOD Law of War Manual observes, “[a]lthough *military necessity* justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible, *military necessity* cannot justify actions not necessary to achieve this purpose.”<sup>170</sup>

#### 1. *Zero or Negative Advantage*

At minimum, then, one would at least expect agreement on the point that capture must be preferred to killing in cases where killing offers no comparative military advantage whatsoever over less restrictive means. And indeed, that is precisely the scenario that LRM advocates have focused on. Consider the following examples:

1. The authorities find an unarmed terrorist sitting in a restaurant away from active hostilities directing air strikes over a cell phone. He is killed instantly.

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169. See, e.g., Brennan Speech, *supra* note 13 (“Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”).

170. DOD, LAW OF WAR MANUAL, *supra* note 3, art. 58.

2. A target is killed showering in his home, never aware that he was surrounded by a special forces unit.
3. A terrorist suspect passes security in a European train station while *en route* to the planned site of a terrorist attack. The police are about to undertake what is, by all appearances, a routine and safe arrest, but they receive information that the suspect has been designated an enemy combatant. Instead, they wait for a military unit to arrive and kill the unsuspecting target.

The first example appears in the ICRC Interpretive Guidance on Direct Participation in Hostilities, as evidence why an LRM obligation exists in cases where “there manifestly is no necessity for the use of lethal force.”<sup>171</sup> The second example is one of seven that Ryan Goodman invokes in support of an LRM obligation.<sup>172</sup> In all but two of his scenarios, Goodman hypothesizes that there is no military advantage at all to capturing rather than killing the combatant.<sup>173</sup> If one accepts that premise, it is difficult to see how one can simultaneously justify lethal force based on military necessity. Indeed, such cases are barely distinguishable from those involving improper motive as the absence of any anticipated military advantage provides the best evidence that an attack was not in fact motivated by military considerations to begin with.

Oddly, those adopting the opposing position have generally declined to engage the particular examples advanced by LRM proponents, and have focused instead on scenarios in which contemplation of LRM would impose risks on combatants.<sup>174</sup> Yet none have argued, to my knowledge, that combatants are affirmatively permitted to use force absent military necessity.

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171. ICRC INTERPRETIVE GUIDANCE, *supra* note 18, at 81–82. The ICRC also invokes the IHL principle of humanity when it maintains that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” *Id.* at 82. This principle finds its best known enunciation in the Martens Clause which, pursuant to the version appearing in Additional Protocol I, provides that “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Additional Protocol I, *supra* note 3, art. 1(2); *see also* Convention (IV) Respecting the Laws and Customs of Wars on Land, *supra* note 86, pmbl. (similar); Convention (II) with Respect to the Laws and Customs of Wars on Land, *supra* note 87, pmbl. (similar). As Adil Haque notes, there is debate over whether or not the principle of humanity is a rule with “independent legal status” or, instead, simply a principle to “inform the development, interpretation, and application of specific rules of treaty or custom.” HAQUE, *supra* note 130, at 98 (2017). My own argument, however, does not turn on the outcome of this debate because a killing not justified by military necessity will lack authorization by IHL in either event.

172. Goodman, *Kill or Capture*, *supra* note 18, at 821.

173. *See id.* at 821–22.

174. For instance, Ohlin responds to the example in the ICRC INTERPRETIVE GUIDANCE by noting that “risking *any* number of lives in an attempt to capture offends [the necessity] principle as written,” Ohlin, *supra* note 11, at 1300, but that response does not address the situation assumed by the Guidance, in which it is “possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population,” ICRC INTERPRETIVE GUIDANCE, *supra* note 18, at 81.

The general argument, instead, is that an LRM obligation is incompatible with military necessity.

One reason for this alleged incompatibility lies in the breadth of the necessity principle that, pursuant to the *Hostages* formulation, permits “the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money.”<sup>175</sup> As David Luban observes, a literal reading of this language would seem to permit “any lawful act that saves a dollar or a day in the pursuit of military victory.”<sup>176</sup> Hence, it may be that many uses of lethal force that appear to lack necessity do in fact pursue necessity according to a proper understanding of that principle. It may be, for instance, that the showering combatant has no chance against the special forces unit that has entered his home, but that attempting capture nevertheless presents some risk of a physical altercation that could cause a small delay. Attempting capture, therefore, will not advance the submission of enemy “at the earliest possible moment” in the most literal sense of those words.<sup>177</sup>

Yet even this broadest interpretation leaves open the possibility that some cases will still present failures of necessity. It may be, for instance, that lethal force carries its own risks—ranging from the equally trivial to the more substantial—that are sufficient to equalize or outweigh the considerations opposing capture. Hence, even the broadest reading of necessity will operate merely to narrow, rather than eliminate, the scenarios in which killing offers no comparative advantage compared to capture.

## 2. De Minimis or Trivial Advantage

There are, moreover, compelling reasons to avoid the most extreme interpretation of military necessity. As a textual matter, even the broad *Hostages* formulation leaves room for interpretation, as its permissive but general language does not explicitly address the matter of trivial or *de minimis* military advantage. A plausible interpretation—one consistent with the basic international rule demanding that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”<sup>178</sup>—dictates that the necessity principle endorses the pursuit of cognizable military advantage that meets some *de minimis* threshold of significance.

Other rules of IHL support this view both directly and indirectly. Perhaps most significant is Additional Protocol I’s regulation of “superfluous in-

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175. United States v. List (The Hostages Case), XI Trials of War Criminals Before the Nuernberg Military Tribunals 1230, 1253–54 (1948).

176. See David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT’L L. 315, 342 (2013).

177. *Id.*

178. Vienna Convention on the Law of Treaties, *supra* note 125, art. 31.

jury” and “unnecessary suffering.”<sup>179</sup> As I have already explored, that language presupposes that combatants can make reasonable judgments about when the infliction of injury and suffering become militarily unnecessary.<sup>180</sup> Yet if the necessity principle has no *de minimis* threshold, then Article 35(2) becomes largely a dead letter, permitting even the use of arms such as exploding bullets that are acknowledged to fall within the core of the prohibition.<sup>181</sup>

Less direct, analogical support exists within the rule protecting combatants who are *hors de combat* pursuant to Article 41. My point here is not that an unenumerated LRM protection can be identified simply by process of analogy from the existing *hors de combat* protection. Rather, my analogy rests on how the *hors de combat* protection itself requires similar interpretive work beyond what the bare text itself provides. The law demands, for instance, that a combatant’s immunity from attack will depend on whether that combatant has “clearly express[ed] an intention to surrender,” but Additional Protocol I does not specify what level of certainty is required to know that the surrender is genuine, nor does it specifically address cases in which surrender is impossible to effectuate, no matter how clearly expressed the intention may be.<sup>182</sup> An interpretation demanding absolute certainty in the face of even trivial or barely cognizable risk would likewise nullify the operation of this provision as well.

Notably, the United States has put its own gloss on this language. In defending the killing of Osama bin Laden, the U.S. State Department’s then Legal Advisor, Harold Koh, explained that “consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept.”<sup>183</sup> By emphasizing the importance of a safe surrender, this language gives more explicit priority to considerations of military necessity than does the bare text of Additional Protocol I. Nevertheless, it too falls short of complete clarity because it fails to specify either the degree of safety required or the level of certainty concerning that degree of safety. If safety means zero risk of any harm whatsoever, then the safety requirement would swallow the *hors de combat* rule: after all, there is always a risk the capturing soldier might receive a scratch or catch a cold from the surrendering combatant. But clearly that is not what a safe surrender means: implicit in the safety requirement is some threshold of significance regarding the risk and level of threatened harm.

It is a similar process of reasoning that identifies some threshold of significance within the principle of military necessity itself: the point of killing in

179. Additional Protocol I, *supra* note 3, art. 35(2).

180. See *supra* Section II.A.3.

181. See *supra* notes 79–89 and accompanying text.

182. Additional Protocol I, *supra* note 3, art. 41(2).

183. Koh, *supra* note 6.

wartime is to advance legitimate military purposes. The permission to kill is broad, but it implies the pursuit of some cognizable, non-trivial military goal.

There are, in addition, two more, indirect arguments supporting the view that the permissibility of killing in wartime is restrained by some threshold of significant advantage. The first of these is a point already made with respect to attacks offering zero or negative advantage. Just as the objective absence of military advantage provides good evidence that an attack was not, in fact, undertaken for subjectively permissible reasons, so too does the absence of any significant military advantage.

The second point is that the prohibition against disproportionate attacks will often operate to prohibit lethal force unsupported by significant military advantage. That rule forbids as indiscriminate “[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>184</sup> Application of this standard presents complexities, and the difficulty of determining when civilian losses outweigh anticipated military advantage has led to a legal status quo highly deferential toward military prerogative.<sup>185</sup> It is noteworthy, for instance, that the now voluminous case law of international criminal tribunals reveals barely a single war crimes conviction based on a finding that an attack directed against a military objective lacked sufficient anticipated military advantage in comparison to the expected harm to civilians.<sup>186</sup>

Nevertheless, recognition of these difficulties has not precluded acknowledgement that clear cases will present straightforward proportionality violations.<sup>187</sup> And attacks undertaken for little or no military benefit are precisely

184. Additional Protocol I, *supra* note 3, art. 51(5).

185. See *infra* note 215 and accompanying text.

186. Ohlin and May give one example. See OHLIN & MAY, *supra* note 59, at 117 & n.82 (citing the case of *Prosecutor v. Prlić* while also noting that “violations of proportionality (by killing too many civilians to achieve a military result) are almost never prosecuted”). In *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013), a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ruled that the destruction of the historic Old Bridge in Mostar, Bosnia-Herzegovina reflected an attack on a military objective that caused disproportionate harm to the civilian population in light of the resulting “serious deterioration of the humanitarian situation” and the “very significant psychological impact on the Muslim population.” *Id.* ¶ 1583. The Court, however, also emphasized the bridge’s “immense cultural, historical, and symbolic value,” and found that “the HVO command intended to destroy the Old Bridge of Mostar, thereby sapping the morale of the Muslim population of Mostar.” *Id.* ¶ 1586. Perhaps, then, the Court’s ruling on proportionality was informed by its sense that the bridge was not targeted for its military value in the first place. An appeal of the judgment is currently pending. Another trial judgment at the same tribunal also convicted the accused in part based on their participation in allegedly disproportionate attacks. See *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011). However, that judgment was reversed on appeal. See *Prosecutor v. Gotovina*, Case No. IT-06-90-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Appeals Chamber Nov. 16, 2012).

187. See Int’l Crim. Trib. for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 50 (June 13,

the kind most likely to present such a clear case. For instance, in cases where capture presents a safe and feasible option, almost any risk to civilian life resulting from lethal force becomes unjustifiable. Indeed, if the anticipated military advantage of a lethal attack is zero or negative as compared to non-lethal options, then even minor damage to inanimate civilian objects—such as a window broken by a bullet—is disproportionate. Of course, the prohibited harm under this rule is only the incidental injury to civilians and civilian objects, and so an attack that is unlawful merely because of relatively minor harm to a non-living object does not compare in terms of gravity to one that involves the unlawful taking of a combatant's life. Nevertheless, these proportionality considerations provide an additional reason to conclude that—in many cases—lethal force undertaken with only a minimal expectation of military advantage will lack legal justification.

### 3. *Risk and Inconvenience*

A more difficult question concerns situations where LRM obligations apply to captures that are in some sense feasible but only at the expense of a more significant advantage. The ICRC's Commentary to Article 35(1) of Additional Protocol I suggests such a path by casting doubt on the *Hostages* formulation of military necessity. It objects that this formulation "has the disadvantage that it does not in fact take into account the paragraph of Article 35 with which we are concerned, and therefore it cannot stand on its own."<sup>188</sup> "Moreover," the Commentary continues, "it should be quite clear that the requirement as to minimum loss of life and objects which is included in this definition refers not only to the assailant, but also to the party attacked. If this were not the case, the description would be completely inadequate."<sup>189</sup>

The implications of these observations are not entirely straightforward, and it is worth considering each statement in turn. Article 35(1) provides that "[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."<sup>190</sup> The Commentary's reliance on this article raises a similar question to the one I have previously explored with respect to Article 35(2)'s regulation of superfluous injury and unnecessary suffering.<sup>191</sup> Does this provision restrict the scope of necessity, or does it instead merely affirm the more general point that the use of force in wartime is subject to certain restrictions? How exactly Article 35(1) narrows the broad necessity principle is a question the Commentary leaves largely unexplored.

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2000), <http://www.icty.org/xi/file/Press/nato061300.pdf> (observing that "there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained").

188. ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1397.

189. *Id.*

190. Additional Protocol I, *supra* note 3, art. 35(1).

191. See *supra* Section II.A.3.

The Commentary's second point—favoring an obligation to minimize the loss of combatant lives on both sides of the conflict—is more provocative, as it could be read to suggest that combatants must sometimes risk their own lives in order to save those of their opponents.<sup>192</sup> But the Commentary does not acknowledge or answer the critical underlying question of how one balances the value of enemy combatant lives against either the lives of one's own soldiers or against considerations relating to time and resources. Depending on how one orders these values, the Commentary's interpretation of necessity may be consistent with the one that I have defended: the obligation to minimize combatant lives may simply take the form of a prohibition on attacks that do not pursue a cognizable military advantage.

Alternately, one might hold that combatants must assign the same value to their opponents' lives as to their own, but this view is hard to imagine gaining acceptance among states and is one that poses perplexing implementation problems for a field of law premised on the assumption that war is waged primarily through the killing of enemy combatants. Is it necessary, for instance, that a military sacrifice its own soldiers' lives merely to achieve a military advantage in a way that spares a greater aggregate number of enemy combatant lives? Or perhaps one might adopt an intermediate approach that avoids this result but nevertheless maintains that the preservation of enemy lives demands some reasonable expenditure of time and expense that could otherwise be avoided by lethal force. Goodman, for instance, suggests that LRM obligations may apply even when capture presents some inconvenience, such as delaying the work of a military unit that otherwise is not pressed for time, although he avoids taking a firm position on this point.<sup>193</sup>

In part, such examples merely reinforce the importance of line drawing. If the pursuit of military advantage is subject to a *de minimis* threshold, then inevitably there will be controversy in some cases as to what exactly qualifies as a military advantage and as to whether the threshold has been crossed. More deeply, the difficulty with such proposals has to do with the central structural feature of IHL that I have already identified: in wartime, the norm against killing is relaxed in order to privilege the pursuit of military advantage. While specific restrictions within IHL limit the pursuit of such advan-

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192. The Commentary advances a similar claim with respect to the proportionality test itself when it observes that the "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." ICRC COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 24, ¶ 1598.

193. See Goodman, *Kill or Capture*, *supra* note 18, at 823 ("Properly conceived, the rule may require that the risk to attacking forces involve a 'definite military advantage' rather than just military inconvenience. And, in Section 3, I assess the evidence that a form of proportionality analysis might also apply. Those features, however, are secondary considerations about the precise formulation of the rule. A threshold question in current debates is whether LOAC prohibits the use of lethal force when it is manifestly unnecessary to kill an individual rather than injure or capture them, that is, when killing is unnecessary to accomplish a military objective or to avoid harm to the attacking forces.").



tage in defined scenarios, the internal logic of IHL does not itself provide criteria for limiting military necessity in ways that are stricter than what I have proposed but nevertheless more permissive than the peacetime rules. My own identification of an LRM requirement rests on the claim that lethal force unaccompanied by a proper reason or by some cognizable advantage does not pursue military necessity at all. Proposals for a more robust LRM requirement may have normative weight, but become more difficult to defend without alteration to existing legal principles.

#### IV. COUNTERARGUMENTS AND SCOPE

So far, I have argued that IHL supports a duty to capture rather than kill combatants in two circumstances not otherwise covered by the *bors de combat* protections or other explicit constraints on necessity. First, killing is impermissible when the decision to kill (or to choose killing over capture) is not motivated by considerations of military advantage. In connection with this claim, I have further argued that the post-capture costs associated with detention do not provide a valid justification for killing under IHL. Second, I have argued that the decision to kill rather than capture must be justified by some cognizable expectation of military advantage. In this Part, I test those claims against two types of counterarguments. One, commonly advanced by LRM opponents, dictates that an LRM obligation would be impracticable, unjustifiably hobbling the pursuit of military advantage. The other counterargument, perhaps attractive to those who favor greater restraint on the use of military force, objects that the restrictions I identify are too insignificant to have practical effect.

##### A. *Impracticability*

Objections based on impracticability operate at various levels of generality. Beginning at the micro level, there is the concern that combatants will have trouble correctly assessing the threat posed by enemy combatants. Arguing along these lines, Hays Parks levels substantial skepticism at Pictet's "use-of-force continuum." For Hays Parks, the problem with Pictet's embrace of LRM—and with the section of the ICRC Interpretive Guidance that relies on it—is that it presents unreasonable expectations to the soldier facing split-second life and death decisions without the luxury of knowing whether a single shot to wound will be adequate to neutralize a dangerous opponent.<sup>194</sup> Although Hays Parks levels his most blistering critique at the idea that soldiers should shoot to wound rather than kill, his point applies equally to decisions to attempt capture rather than inflict injury or death.<sup>195</sup>

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194. Parks, *supra* note 19, at 814–15. The "reasonableness" issue and the critical factor of a split-second decision is not considered in Section IX of the ICRC INTERPRETIVE GUIDANCE.

195. *Id.*

It is not clear, however, why these concerns should preclude rather than inform an LRM requirement. Properly understood, these arguments appeal to considerations of military necessity to explain why, in many combat situations, consideration of nonlethal alternatives will prove infeasible. But they do not explain why an LRM requirement should not apply in those cases where lethal force lacks support in military necessity or even contravenes military necessity. The appropriate response is to interpret and apply the standard in a way that accommodates Hays Park's concerns by giving substantial leeway to combatants facing the uncertainties and split-second judgments endemic to the battlefield. Another way to accommodate these concerns is to impose strict *mens rea* standards, declining to hold individuals liable for unnecessary killing unless they do so purposefully based on actual knowledge of the circumstances rendering the use of lethal force unnecessary.<sup>196</sup>

At a broader level of generality, however, even such a solution may fail to allay systemic concerns about the impact of an LRM requirement. For Corn et al., the central concern is that the very introduction of an LRM requirement into the rules of engagement, with the accompanying obligation to train soldiers in its application, will itself hamstring the conduct of war.<sup>197</sup> Pursuant to this line of argument, even a narrowly framed obligation will burden the mental process of the individual combatant, leading to uncertainty and hesitation in situations that cannot afford indecision. As an example, they cite the case of a U.S. soldier fighting in Panama in 1989 who, having switched abruptly from the peacetime engagement rules followed during previous months' deployment in Panama to the new wartime engagement rules, found himself unable to navigate the transition.<sup>198</sup>

Taking things a step further, one could object that my interpretation of military necessity operates to prohibit even the routine use of force on the battlefield. After all, the war effort will rarely depend on whether any particular combatant lives or dies, and in many cases, it will be implausible to maintain that the killing of a particular enemy combatant—viewed in isolation—results in a military advantage of any significance. Yet the military that refuses to kill anyone would, in most armed conflicts, fail to get very far at all.

These examples operate to remind us that necessity works at the collective level in addition to the individual level. The ultimate purpose of killing in wartime is not to neutralize isolated, individual combatants, but to prevail

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196. See Goodman, *Kill or Capture*, *supra* note 18, at 829 ("For example, criminal liability may apply (if it applies at all) only if an individual *purposefully* resorts to excess force.").

197. Corn et al., *supra* note 19, at 567–68 ("[O]nce the law requires that soldiers assess the actual threat an enemy combatant poses, the inevitable consequence of a rule that requires least harmful means based on the absence of an actual threat, the effectiveness of combat capability risks dilution and tactical clarity will be degraded.").

198. *Id.* at 568 n.87.

in the armed conflict.<sup>199</sup> What may seem appropriate and costless at the individual level may look very different in the aggregate. Implementation of an LRM obligation must, therefore, take account of the collective consequences.

Yet even, here, it remains perplexing why the appropriate legal response should be rejection rather than adaptation of an LRM requirement. Properly understood, these arguments explain why the principle of military necessity discourages or precludes consideration of LRM in many circumstances. They may also explain why IHL does not—at least in so many words—regulate the killing of combatants with an express LRM requirement: historically speaking, the functional requirements of the battlefield have deterred consideration of LRM. Hence there was no need to make explicit a limitation on necessity that did not generally arise on the battlefield and thus did not present the same concern for policy makers as did, say, the development of exploding bullets, chemical weapons, and other inhumane technological innovations.<sup>200</sup> (Yet neither do Additional Protocol I nor its predecessors make explicit the opposite assumption—apparently embraced by LRM opponents<sup>201</sup>—that military necessity always permits the status-based killing of belligerents for any reason and under any circumstance unless an explicit restriction applies.) But this explanation does not speak to cases that do not involve these practical considerations.

For example, the argument that an LRM requirement would impede the pursuit of military necessity does nothing to justify killings not pursued for reasons of military necessity in the first instance.<sup>202</sup> Hence, the requirement of right reason survives the appeal to practical necessity, as does the accompanying need to distinguish between those reasons that are privileged by military necessity and those that are not. In addition, it is not clear why the concern about collective effect may not also be met by appropriate interpretation of necessity. An LRM obligation may introduce some uncertainty into combat operations, but if the obligation is limited to the clearest cases, the impact on military judgment would seem relatively minor in comparison to undisputed requirements such as the obligation to distinguish between civilian and military targets, the proportionality rule, and the protections af-

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199. Corn et al., *supra* note 19, at 565 (“[T]he objective of all military action in armed conflict is achieving enemy submission in the collective sense.”).

200. At the same time, neither API nor its predecessors explicitly set forth the opposite rule—defended by LRM opponents—that status-based killing of belligerents is always permitted for any reason and under circumstance unless an explicit restriction appears.

201. The Department of Defense’s Law of War Manual asserts that neither “customary international law [nor] treaty law applicable to DoD personnel,” supports the position of “some commentators . . . that *military necessity* should be interpreted so as to permit only what is *actually necessary in the prevailing circumstances*, such as by requiring commanders, if possible, to seek to capture or wound enemy combatants rather than to make them the object of attack,” but the Manual cites no legal authority expressly stating the opposite. DOD LAW OF WAR MANUAL, *supra* note 3, at 57 (emphasis in original).

202. See *supra* Section III.A.

forded by *hors de combat* status, all of which may demand split second judgments.<sup>203</sup>

More broadly, however, the appeal to practical necessity operates to a large extent as a straw man argument because it focuses on scenarios that are not contested by many proponents of an LRM standard. For instance, the ICRC Interpretive Guidance on civilians directly participating in hostilities openly acknowledges that LRM obligations are generally not suited to the traditional battlefield. The Guidance concedes that “[i]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL.”<sup>204</sup> Recent efforts to identify an LRM requirement within IHL emerge not from an impulse to impose fundamental changes on the conduct of warfare but instead from concerns about the rote application of battlefield understandings to conflicts whose functional requirements differ markedly from the scenarios that inspired the IHL rules in the first place. The practice of targeted killing, in particular, presents a scenario in which states have invoked the IHL rules to justify lethal operations planned and conducted against a single individual who may or may not be located in or near an area of active combat. Indeed, as Gabriela Blum has noted, the modern battlefield has complicated the distinction between combatants and civilians to a degree that “[m]ore nuanced targeting decisions already require a substantial investment at the stage of application, limiting the advantage of the current rule-like doctrines over a more complex standard that would place further limits on the targeting of combatants.”<sup>205</sup> My point here is not that the IHL rules cannot apply to such situations, but instead that the principle of military necessity will not always apply in the same way to such operations as it does to more conventional engagements.

Arguing along these lines, the ICRC Guidance emphasizes that:

The practical importance of [the] restraining function [imposed by the principles of military necessity and humanity] will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.<sup>206</sup>

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203. See *supra* Part II.

204. ICRC INTERPRETIVE GUIDANCE, *supra* note 18, at 80.

205. Blum, *supra* note 52, at 151.

206. ICRC INTERPRETIVE GUIDANCE, *supra* note 18, at 80–81.

The Guidance illustrates the point with a hypothetical example I have already mentioned: it imagines an “unarmed civilian sitting in a restaurant” who engages in hostilities—and thus becomes a military target—by “using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force.”<sup>207</sup> Should the target do so “within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.”<sup>208</sup> The power of this example lies in how it presents the application of IHL to scenarios whose functional requirements have little to do with the battlefield modalities that have historically driven the laws of war. Of course, there may always be some risk accompanying a legal duty to capture even in circumstances such as these, but it becomes harder to explain that risk by reference to military necessity. Notwithstanding the target’s hostile status, the scenario is functionally closer to the kind of threat faced by law enforcement officials in peacetime who are more restricted in their use of force than are combatants on the battlefield.<sup>209</sup>

Notably, Hays Parks does not claim that practical considerations demand rejecting an LRM requirement in cases like these. He acknowledges that “[t]here have been, and no doubt in future armed conflicts will be, situations such as those described in . . . the ICRC text,” but he concludes that “other than the law of war prohibitions on perfidy and denial of quarter, governments and courts have seen the prudence in declining to draw such a line owing to the many vagaries that exist not only in domestic law enforcement situations but also, and in particular, on the battlefield.”<sup>210</sup> Hence, Hays Parks’ principal objection to LRM in such scenarios is that it lacks support in positive law. As I have argued, however, the better interpretation of IHL is that it does not authorize the use of lethal force in cases where the justification for killing over capture offers no military advantage beyond some *de minimis* threshold.<sup>211</sup>

There still remains the concern that the very introduction of an LRM requirement will inevitably have a negative spillover effect by complicating the rules of engagement in other situations that cannot afford consideration of less restrictive means.<sup>212</sup> There are several reasons to doubt the inevitability of that result. In the first place, there is no question that the military is

207. *Id.* at 81.

208. *Id.* Note that this statement does not directly reference the specific example I have quoted, but instead refers to the ICRC’s more general statement that “while operating forces can hardly be required to take additional risks . . . in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” *Id.* at 82.

209. See *supra* notes 1–2 and accompanying text (summarizing peacetime rules).

210. Parks, *supra* note 20, at 809–10.

211. See *supra* Section III.B.

212. See Corn et al., *supra* note 19, at 568 n.87 (arguing that “[s]oldiers cannot simply ‘shift’ from one use of force framework to another with ease”).

capable of implementing an LRM standard in cases where capture is perceived to offer greater military advantage than killing. This is a point that both Hays Parks and other LRM opponents acknowledge. It also finds expression in recent U.S. policy dictating that “[t]he policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”<sup>213</sup> Implementing such a policy necessarily impacts the rules of engagement in particular operations: special forces embarking on an operation to capture an individual terrorist for intelligence purposes will necessarily follow different rules of engagement than will combatants facing anonymous opponents on a traditional battlefield.

The objection based on spillover effects embraces the mistaken assumption that implementing such a duty necessarily entails across-the-board adaption of the rules of engagement, such that every individual combatant must remain sensitive to the possibility of capture in every situation. But as the ICRC Guidance itself suggests, the choice is not a binary one between an across-the-board LRM obligation and no such standard at all.<sup>214</sup> The law might instead acknowledge that broad swathes of combat activity simply do not afford consideration of capture.

As others have observed, one way to implement the obligation is to assign primary responsibility for its implementation to commanding officers.<sup>215</sup> Along these lines, the law might also embrace a broad presumption that instructions on LRM are not appropriate for most combat operations. Individual soldiers would not in most instances follow rules of engagement requiring consideration of LRM and individuals acting pursuant to such a rule would not be held responsible for failing to consider LRM.

As these reflections reveal, the central question is not whether an obligation to consider LRM can be reconciled with the principle of military necessity. The central question is how it should be. And answering that question does not presuppose the type of wholesale alteration to the conduct of war that critics have feared.

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213. Obama, NDU Speech, *supra* note 24.

214. See *supra* note 201 and accompanying text.

215. See Frits Kalshoven, *The Soldier and His Golf Clubs*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, IN HONOUR OF JEAN PICTET 385 (C. Swinarski, ed., 1984) (exploring some practical obstacles to implementing the Pictet formula at the level of the individual soldier, while also concluding that “taken less literally, Pictet’s argument appears to carry full weight; that is, if it is understood as addressed to the authorities who decide on the armament of the armed forces and, even, the military commanders who do have a choice of weapons at their disposal.”); Goodman, *Kill or Capture*, *supra* note 18, at 829 (“The rule may be devised such that top-level commanders are held to a higher standard of care. That is, only those actors may be liable for reckless or grossly negligent behaviour.”).

### B. Unenforceability

I turn now to a second line of objection: that my framework involves too great a concession to military necessity. While it may be possible to identify hypothetical situations in which the deployment of lethal force against a combatant lacks justification in military necessity, in real life it will almost always be possible to identify some concrete reason why the pursuit of military advantage advocated that course, especially when judged against the broad definition of necessity that prevails in military tradition.

To some degree, this critique gives voice to what is in fact a central claim of this Article. One can identify a duty to avoid unnecessary killing, but doing so does not itself resolve the question of when that duty is triggered, or how much weight that duty carries against claims of necessity. I have argued that existing law best supports such a duty where there is an absence of necessity resulting from the pursuit of non-military reasons or insignificant military advantage. It is the broad understanding of necessity that has prevailed in military tradition that will justify a decision to kill rather than capture in all but a small fraction of cases governed by IHL.

In addition, the claimed LRM obligation would hardly be alone among IHL obligations in proving resistant to enforcement. Take for instance, the principle of proportionality.<sup>216</sup> An oft-cited report by prosecutors at the International Criminal Tribunal for the former Yugoslavia allowed that certain scenarios would present demonstrable violations, such as “bombing a refugee camp . . . if its only military significance is that people in the camp are knitting socks for soldiers.”<sup>217</sup> But it cautioned that

[M]ost applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.<sup>218</sup>

As I have already mentioned, the case law of international criminal tribunals reflects almost no enforcement of this principle.<sup>219</sup>

At the same time, the enforcement of IHL has not relied exclusively or even primarily on judicial application. Instead, the protections of IHL have relied on other mechanisms, including internalization by states and various forms of public accountability. In the context of drone strikes, civilian casu-

216. Additional Protocol I, *supra* note 3, art. 51(5)(b); *see also* text accompanying note 184.

217. Int'l Crim. Trib. for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* ¶ 48 (2000), <http://www.icty.org/xi/file/Press/nato061300.pdf>.

218. *See id.*

219. *See supra* note 186 and accompanying text.

alties have been a constant focus of attention both inside and outside the government, affirming that proportionality-based concerns remain an important restraint, even when not judicially enforced.<sup>220</sup> Likewise, while the U.S. government has emphasized considerations of military advantage to justify its stated policy of preferring capture over killing, the decision to publicize that approach as general policy may also reflect a tacit recognition that there are limits to the reach of necessity in these circumstances.<sup>221</sup>

Finally, LRM obligations do not exist in isolation, and their importance will typically reveal itself in combination with other, more clearly established, IHL restraints. Consider an operation like the one that took the life of Osama bin Laden in Abbottabad, Pakistan. Reports indicate that the U.S. government faced a preliminary decision about whether to target bin Laden's compound with a drone strike or instead, as President Obama ultimately ordered, to deploy special forces to the scene.<sup>222</sup> Adopting the first option would have rendered capture impossible, yet this is not the type of kill-or-capture decision that is likely to be constrained by the LRM obligation I have outlined. There are, instead, various considerations of military advantage that could privilege an aerial strike, including the protection of forces who would otherwise conduct the ground operation. So far as military advantage is concerned, this is the type of decision appropriately left to military discretion pursuant to the necessity principle.

This is not to say, however, that the choice between an aerial strike and a ground operation is unregulated by law. The more relevant prohibition is the proportionality rule's protection of civilian life.<sup>223</sup> One powerful argument dictates that the marginal military advantage achieved by protecting one's own forces may never outweigh an even greater risk to civilian lives that could be avoided through a different choice of means.<sup>224</sup> Accounts of the bin Laden operation indicate that apprehension about civilian casualties was indeed a major factor in the ultimate decision to pursue a ground operation.<sup>225</sup> Depending upon how the respective risks to civilian and combatant lives were assessed, the law of proportionality may in fact have demanded this choice.

220. See, e.g., Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES, July 2, 2016, at A1 (noting *inter alia* that "President Obama issued an executive order making civilian protection a priority and requiring the government in the future to disclose the number of civilian deaths each year"); Steve Coll, *The Unblinking Stare: The Drone War in Pakistan*, NEW YORKER, Nov. 24, 2014, at 98, 100 (noting that "researchers found that C.I.A.-operated drones were nowhere near as discriminating toward noncombatants as the agency's leaders have claimed," but also that "drones have probably spared more civilians than American jets have in past air wars," and that "over time, the Administration's record improved significantly in avoiding civilian casualties").

221. See *supra* note 23 and accompanying text.

222. See, e.g., Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, Aug. 8, 2011, at 34, 35–36 (recounting the mission and its planning).

223. See Additional Protocol I, *supra* note 3, art. 51(5)(b).

224. See David J. Luban, *Risk Taking and Force Protection*, in READING WALZER 38 (Itzhak Benbaji & Naomi Sussman eds., 2014).

225. See, e.g., Schmidle, *supra* note 222, at 10.



The LRM obligation assumes greater relevance once a decision has been made to undertake the kind of operation that is conducive to capture. I do not argue here that that particular operation necessarily triggered such an obligation, or much less that, on this basis, the killing of bin Laden lacked authorization under international law. Any such assessment would necessarily hinge on a more detailed factual assessment than I can attempt here or that may be possible given the established facts that are publicly available. My argument instead is focused on the more general point that the kind of operation at issue—one targeted against a residential compound in a suburban neighborhood many miles away from an active combat zone<sup>226</sup>—is the sort that could, under the right circumstances, give life to the type of LRM requirement that I have posited, in which targeted capture might involve no sacrifice of anticipated military advantage as compared to targeted killing. Moreover, as I have suggested, the very feasibility of capture may be a result of particular tactical choices that are themselves dictated by other legal obligations, most notably the obligation to avoid disproportionate attacks.

#### CONCLUSION

In the conduct of war, is there a legal duty to prefer capture over killing? I have argued that there is. I have also argued that the issue is less binary than that question might assume, and that the distance between opposing positions may be smaller than imagined.

This duty to capture, such as it is, lies along a central fault line forged by the principle of military necessity. While there is a tendency among some to see necessity as the principle authorizing purely status-based killing in the absence of any explicit exception, that is not what that principle provides. At minimum, necessity demands that wartime killing pursue military advantage. That is the sole basis upon which the laws governing warfare carve out their remarkable exception to the deeply embedded norm against murder. Two distinct limitations are embedded in that demand. The resort to lethal force requires both a military reason and an actual expectation of military advantage.

As I have explored, the permission is a broad one. Indeed, in the regular conduct of hostilities, the pursuit of military advantage will usually preclude consideration of LRM. That is a point that serious defenders of the LRM obligation commonly acknowledge. But that acknowledgment is hardly grounds to deny the very existence of an LRM obligation, or to assume that the functional requirements of the traditional battlefield apply unaltered to all contexts in which in which states today pursue military necessity. The debate over LRM obligations is not new, but its recent

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226. Ambos & Alkatout, *supra* note 11, at 352 (“In this case, the location where the killing took place (Abbottabad) is not only situated outside a reasonable ‘spillover’ area (about 160 kilometres away from the Afghan border), but also outside the actual Pakistan battle zone.”).

reemergence reflects the changing nature of warfare in the twenty-first century, and underscores the ways in which new modalities demand vigilance to ensure adherence to the fundamental principles that have long underpinned the legal regulation—and indeed the moral justification—of warfare.