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## Belligerent Targeting and the Invalidity of a Least Harmful Means Rule

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*Laurie R. Blank*

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*[Y]ou may fly over a land forever; you may bomb it, atomize it, pulverize it and wipe it clean of life—but if you desire to defend it, protect it, and keep it for civilization, you must do this on the ground, the way the Roman legions did, by putting your young men into the mud.*

— *T.R. Fehrenbach, THIS KIND OF WAR (1963)*

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## I. INTRODUCTION

The M-4 carbine, standard issue for U.S. armed forces, has two firing options: semi-automatic and three-shot burst. When set to three-shot mode, the carbine discharges three rounds each time the trigger is pulled. These rounds inflict devastating injury. At the very moment you read this article, it is likely that hundreds if not thousands of U.S. service members, like their counterparts in multiple nations, are engaged in training with this and similar weapons. The training conditions soldiers<sup>1</sup> to employ a three-round burst aimed at the center mass of the human silhouette once the decision to attack has been made. It does not involve sophisticated discussions about why shots are aimed at center mass, or why three-shot bursts are employed. For the soldier, the logic is self-evident: the employment of combat power against an enemy—whether an individual soldier firing her rifle, a tank gunner firing a highly-explosive anti-tank round, or an Apache pilot letting loose a salvo of rockets—is intended to completely disable the enemy in the most efficient manner in order to eliminate all risk that the opponent remains capable of continued participation in the fight. 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 such 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.

Military training and professional development strives to inculcate this ethos into both the soldiers at the proverbial tip of the spear, and the commanders and staff officers who plan their operations. *Close with and destroy the enemy* is the mantra of the U.S. infantry, and warfare is replete with examples of the lethality associated with combat operations. How soldiers are equipped, trained, and mentally developed for combat is just one indication of the brutal and deadly nature of warfare, or armed conflict in international legal parlance. At its core, this endeavor involves the deliberate application of combat power that produces a high probability of causing

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1. The term “soldier” is used as a generic description of all service members, and is not intended to suggest that the analysis in this article is limited to members of the U.S. Army or to diminish the challenges confronted by their counterparts in the Marine Corps, Air Force, Navy, or Coast Guard.

death—the use of weapons (means) and tactics (methods) of warfare that could never, in any other context, be considered justified by domestic or international legal principles. One of the axiomatic rules of war is that the authority to employ this combat power—to attack—is justified based on a determination of enemy belligerent status: once a potential object of attack is positively identified as a member of an enemy belligerent group, these devastating means and methods of warfare may lawfully be utilized. This authority is not, however, unlimited, and terminates as no longer justified once the enemy is rendered combat ineffective as the result of disabling wounds or capture, conditions that clearly indicate the enemy belligerent is physically incapable of engaging in hostile conduct presumptively associated with this status.

There is virtually no disagreement in the contemporary international discourse on the law of armed conflict (LOAC) with the rule that once an enemy belligerent becomes *hors de combat*—what a soldier would recognize as “combat ineffective”—the authority to employ deadly force terminates.<sup>2</sup> However, what qualifies as *hors de combat* and accordingly operates to rebut the status-based presumption of hostility and accordant targetability has become a flashpoint of current international legal debate. Until recently, almost all experts interpreted *hors de combat* to mean incapacitation resulting from wounds, sickness, or capture.<sup>3</sup> Accordingly, an enemy belligerent falls within the proverbial crosshairs of status-based targeting authority unless and until rendered physically incapable of continuing to perform a belligerent function. Furthermore, unless this incapacity is involuntary as the result of wounds or sickness, the individual enemy bears the burden of demonstrating this incapacity through the act of surrender. Indeed, it is no exaggeration to assert that members of the armed forces, especially members of the military legal profession charged with educating, training, and advising the armed forces, universally embrace this understanding of the law.

Recently, however, some have forcefully asserted that the LOAC includes an obligation to capture in lieu of employing deadly force whenever doing so presents no meaningful risk to attacking forces, even if the enemy

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2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

3. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 159 (2010); A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 48–49 (2004); FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 97 (2011).

belligerent is neither physically disabled nor manifesting surrender. The convergence of a number of influences seems to have fueled this theory, including the increasing emphasis on the humanitarian foundation of the LOAC,<sup>4</sup> the renewed assertion by the International Committee of the Red Cross (ICRC) that the principle of humanity imposes a “capture instead of kill” rule whenever tactically feasible,<sup>5</sup> the widely-cited Israeli High Court of Justice opinion analyzing the legality of targeted killings,<sup>6</sup> and most recently the work of one scholar who claims to have discovered highly probative but heretofore overlooked evidence of state practice and *opinio juris* that conclusively establishes this obligation.<sup>7</sup> Proponents of this *obligation* to capture rather than kill, or to use the least harmful means to incapacitate enemy belligerents, do not contest the general authority to employ deadly force derived from belligerent status determinations. Instead, they insist that the conditions that rebut this presumptive attack authority are broader than the traditional understanding of the meaning of *hors de combat* embraced by military experts and include any situation where an enemy belligerent who has yet to be rendered physically incapable of engaging in hostilities may be subdued without subjecting friendly forces to significant risk of harm.<sup>8</sup>

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4. See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000); Marko Milanovic, *Norm Conflicts, International Humanitarian Law and Human Rights Law*, in XIX/1 HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 95–128 (Orna Ben-Naftali ed., 2010); Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL LAW REVIEW 648–60 (2007).

5. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 81–82, (2008) [hereinafter INTERPRETIVE GUIDANCE].

6. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel 26 [2005] (Isr.) [hereinafter *Targeted Killings Case*].

7. Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2013).

8. *Id.*; David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 315, 320 (2013) (“I disagree that LOAC’s licensing function is as fundamental as its constraining function.”). *But see* Jens David Ohlin, *The Duty to Capture*, 97 MINNESOTA LAW REVIEW 1268, 1272–73 (2013) (“in international humanitarian law . . . there simply is no *codified* duty to attempt the capture of enemy combatants”); Beth Van Schaack, *The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 255, 292 (2012) (“As a matter of established IHL doctrine, there is no express duty to capture privileged combatants in

This essay offers our collective and—we hope—comprehensive rebuttal of this least harmful means LOAC interpretation. Our approach relies on three analytical pillars. First, Section II reviews the fundamental principles of the LOAC that permit status-based attacks against enemy belligerents with combat power highly likely to cause death unless and until the enemy is rendered physically incapable of participating in hostilities. This section also explains how the corporate notion of “enemy”—fundamentally different from the concept of individualized threat that dominates human rights law’s perspective on the use of force—contributes to an effective understanding of attack authority. Section II also analyzes the consequences of presumption-based use-of-force authority.

After briefly exploring the LOAC’s foundational components relating to a potential least harmful means rule—both core treaty provisions and customary principles—Section III thoroughly analyzes the affirmative prohibitions on the use of force that the LOAC—and specifically Additional Protocol I—does require. This section then highlights what Additional Protocol I does *not* require. In particular, this section demonstrates that the fact that Additional Protocol I—by any account the most humanitarian-oriented LOAC treaty ever developed—did not impose any affirmative least harmful means obligation vis-à-vis belligerents undermines any assertion that any such obligation may be derived from the positive LOAC. Indeed, the logical inference derived from the absence of any such positive obligation, coupled with the clearly limited scope of the protection provided by the LOAC principle of proportionality, rebuts the assertion that a least harmful means obligation can be found in the interstitial regions of the positive LOAC.

Finally, and perhaps most importantly, Section IV emphasizes how this least harmful means concept, especially when derived from an expanded interpretation of the meaning of the concept of *hors de combat*, is fundamentally inconsistent with the tactical, operational, and strategic objectives that dictate employment of military power. The LOAC, and its presumption-based rules regarding use-of-force authority, serves the interests of all armed forces by providing a modicum of clarity in the midst of the chaos of armed hostilities.<sup>9</sup> A least harmful means rule introduces extraordinary

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IACs [international armed conflicts] in lieu of killing them in the absence of an unambiguous offer of unconditional surrender.”).

9. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 394, (Claude Pilloud et al. eds., 1987) (noting that Max Huber, former president of the ICRC, stated that “there is no branch of law in

operational complexities, running the gamut from training to implementation to accountability. Effective implementation of LOAC depends on the clarity of the legal principles, their application during the heat of battle, and their credible application post-hoc in investigations and prosecutions. Commanders and their forces can best adhere to the law and carry out its central tenets when the law and the obligations it imposes are predictable and operationally logical. Clarity and predictability in the form of bright line rules also bolster the law's equally important role with regard to soldiers' moral—not just physical—well-being. Restraint, when and where appropriate, is certainly central to the effective execution of combat operations and the development of morally grounded warriors. But ill-conceived demands to extend restraint beyond the scope of well-settled tactical and operational logic actually subjects soldiers to unjustified moral hazard.

We are under no illusion that we will persuade all proponents of this least harmful means rule to reconsider their position. Nor are we insensitive to the profound human consequences of a rule that legally authorizes attack with methods and means of warfare that are likely to cause death as a measure of first resort with no obligation to consider lesser means to incapacitate the target—even against an individual who may in fact pose little or no threat to an attacking force at that precise moment. If anything, the combined sixty-two years of military experience shared by three of the authors—experience that required a very personal sensitivity to the human dimension of warfare—makes it impossible for us not to appreciate these consequences. But this experience, and our continued collective experience of working closely with those who remain engaged in the physically, mentally, and morally demanding business of fighting our nation's wars, also informs our view that the LOAC must, as it has historically, remain rationally grounded in the realities of warfare.

We are confident that anyone grappling with this issue understands that decisions related to the employment of combat power are not resolved in the quiet and safe confines of law libraries, academic conferences, or even courtrooms; they are resolved in the intensely demanding situations into which our nation thrusts our armed forces. Even in the context of deliberate targeting decisions from stand-off locations (which many scholars and commentators characterize as more sanitized or “easier” than engaging in

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which complete clarity is more essential than in that of the laws of war . . . .”) [hereinafter PROTOCOL COMMENTARY].



close combat,<sup>10</sup> an assertion that reveals a lack of appreciation of the true nature of such decisions), the intensity of the demands associated with the decision to take human life are profound. We cannot and will not deny the significant influence this focus on the actual implementation of law in the wide array of situations within which combatants must function imposes on our analysis. Ultimately, we believe this operational perspective remains the essential analytical perspective for a body of law developed principally to regulate armed hostilities.

## II. WHAT THE LOAC'S FUNDAMENTAL PRINCIPLES TELL US

The LOAC's unambiguous objective is to facilitate the ability of armed forces to achieve their strategic military objective while mitigating, to the extent feasible, the humanitarian suffering resulting from armed conflict. The entire corpus of the LOAC (positive treaty provisions and customary international law) serves this objective in any type of armed conflict, making it an essential animating force in any interpretation of the law. Interpretations inconsistent with this objective undermine the credibility of the law by attenuating conflict regulation from the realities and necessities of the battle space.

The core LOAC principles of military necessity and humanity, which together provide the normative foundation for the increasingly expanding corpus of more specific LOAC regulatory principles and rules, frame and underlie the LOAC's central objective. These two core principles, therefore, provide the logical starting point for analyzing the scope of the authority to use force when attacking a belligerent opponent. Although military necessity and humanity are often characterized as reflecting the balance between authority and constraint inherent in the legal regulation of hostilities, viewing these principles only as competing is misleading. Instead, military necessity and humanity are more properly understood as complementary: since military necessity justifies only those measures not otherwise prohibited by international law that are necessary for bringing about the prompt submission of an enemy, it never justifies any measure that violates

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10. See, e.g., John Kaag, *Drones, Ethics and the Armchair Soldier*, OPINIONATOR, NEW YORK TIMES (Mar. 17, 2013), <http://opinionator.blogs.nytimes.com/2013/03/17/drones-ethics-and-the-armchair-soldier/>.

the principle of humanity.<sup>11</sup> Accordingly, the LOAC provides that any measure justified by military necessity is conclusively consistent with the principle of humanity, because if it were not, it would already be prohibited.<sup>12</sup> The remaining two core principles of the LOAC are distinction and proportionality. As these four principles form the foundation for the more specific rules of the contemporary LOAC and the arguments we advance, a brief discussion of each principle's primary attributes is necessary to set the foundation for the detailed discussion to follow.

### A. The Core Principles

Military necessity “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”<sup>13</sup> Accordingly, military necessity provides the normative basis for employing those measures necessary to bring an enemy to submission, including the application of deadly combat power. However, the principle also provides an essential constraint on the authority of armed forces.<sup>14</sup> Indeed, military necessity does not justify departures from the LOAC.<sup>15</sup> Military necessity therefore reflects a balance between the au-

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11. See U.S. Department of the Army, FM 27-10, *The Law of Land Warfare* 9 ¶ 3(a) (1956) [hereinafter FM 27-10]; see also LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, 122–25 (2d ed. 2000); ROGERS, *supra* note 3, at 3–7.

12. See generally Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 795 (2010).

13. FM 27-10, *supra* note 11, at 3–4.

14. See, e.g. Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgement, ¶ 109 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Galić, Case No. IT-98-29-T, Judgement, ¶ 44 n. 76 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

15. See PROTOCOL COMMENTARY, *supra* note 9, at 393 (“Military necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war. Consequently a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question.”). Up through World War II, some nations viewed military necessity as a trump card for all other humanitarian constraints. The German doctrine of *Kriegsraison* asserted that war could justify any measures—even in violation of the laws and customs of war—when justified by the necessities of any particular situation. However, “[w]ar crimes trials after World War II clearly rejected this view. Military necessity cannot justify actions absolutely prohibited by law, as the means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits set by International Law.” OFFICE OF THE JUDGE ADVOCATE GENERAL, CANADIAN DEFENCE FORCES, JOINT DOCTRINE MANUAL, B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT

thority to inflict harm and the obligation to limit suffering that lies at the very core of combat regulation. This balance is reflected in Napoleon's maxim, "[i]n politics and war alike, every injury done to the enemy, even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal."<sup>16</sup>

The principle of humanity provides an essential counterbalance to the authority to employ measures to defeat an enemy in armed conflict. In practice, the principle of humanity provides the foundation for two critical limits on the authority to inflict suffering in the context of armed conflict: first, the prohibition against subjecting an opponent to superfluous injury or unnecessary suffering (injury or suffering beyond that which is necessary to efficiently incapacitate the opponent); and second, the obligation to ensure the humane treatment of any person (even a captured enemy) who is no longer or never was actively participating in armed hostilities.<sup>17</sup> Common Article 3 extended the principle of humanity to non-international armed conflicts in 1949,<sup>18</sup> leading to a general symmetry in the application

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AT THE OPERATIONAL AND TACTICAL LEVELS 2-1-2-2 (2001), *available at* [http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA\\_2004-eng.pdf](http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf).

16. GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 242 (1994) (citing 7 MAX HUBER, *ZEITSCHRIFT FÜR VOLKERRECHTE* 353 (1913)).

17. *See* UNITED KINGDOM MINISTRY OF DEFENCE, JSP 383, *THE JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT 2.4-2.4.3* (2004) [hereinafter *UK MANUAL ON THE LAW OF ARMED CONFLICT*]. This principle of humanity is the central focus of the four Geneva Conventions of 1949 and is implemented through numerous LOAC treaty provisions. These include the prohibition against the use of any type of coercion against a prisoner of war or civilian internee; the obligation to search for and collect the wounded and sick and ensure that priority of medical care is based solely on medical considerations; the obligation to search for and collect the shipwrecked at sea; the obligation to provide notice of capture of enemy personnel to the enemy state through a neutral intermediary; the obligation to facilitate the efforts of neutral relief agencies; the extensive immunities from attack afforded to places engaged in medical functions; and even the obligation to maintain and record the location of interment of the enemy dead. *See generally* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *GC I*]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *GC II*]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *GC III*]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *GC IV*].

18. *See* art. 3 of *GC I*, *GC II*, *GC III*, and *GC IV*, all *supra* note 17 [hereinafter *Common Article 3*].

of the principle of humanity to both interstate armed conflicts and armed conflicts between a state and non-state belligerent groups. This symmetry is consistent with the universally accepted view that humane treatment is a fundamental principle found at the very core of the Geneva tradition of protecting victims of war in all situations of hostilities.<sup>19</sup>

The principle of distinction, one of the “cardinal principles” of the LOAC,<sup>20</sup> further implements the authority derived from military necessity in relation to attack decisions. This principle obligates all participants in hostilities to distinguish between individuals who qualify as lawful objects of attack (enemy belligerents and any other individual taking a direct part in hostilities) and all other persons.<sup>21</sup> Only the former may be deliberately attacked.<sup>22</sup> Distinction also obligates parties to distinguish between civilian objects and military objectives, and target only the latter. Article 48 of Additional Protocol I sets forth the basic rule:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all

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19. According to the *Commentary* on Common Article 3:

Humane treatment.—We find expressed here the fundamental principle underlying the four Geneva Conventions. It is most fortunate that it should have been set forth in this Article, in view of the decision to dispense with a Preamble. The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For “the greater obligation includes the lesser”, as one might say.

INTERNATIONAL COMMITTEE OF THE RED CROSS, 3 GENEVA CONVENTION: RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 38 (Jean S. Pictet ed., 1960) [hereinafter GC III COMMENTARY].

20. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (Higgins, J., dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).

21. A second and equally important aspect of distinction is that persons who are fighting (whether soldiers, members of organized armed groups or others) must distinguish themselves from inoffensive civilians. Like the prohibition on deliberately targeting civilians, this obligation is central to the LOAC’s fundamental goal of protecting civilians in the course of armed conflict. To this end, the LOAC prohibits perfidy, which occurs when an individual launches an attack while leading the enemy to believe he or she (the attacker) is protected from attack. In other words, an individual cannot pretend to be inoffensive and then attack—such as a suicide bombing by an individual dressed as a local civilian.

22. AP I, *supra* note 2, art. 51.

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.<sup>23</sup>

This principle ensures that the application of combat power is restricted to targets that contribute to the submission of an opponent's military capability, or fall within the scope of military necessity.

Distinction requires identification of lawful targets as a prerequisite to launching an attack. A lawful attack may only be directed at a legitimate target as defined by the LOAC: either a combatant, a member of an organized armed group, a civilian directly participating in hostilities, or a place or thing qualifying as a military objective. The principle of distinction rests on two presumptions: belligerent personnel, their equipment and facilities, and all other places and things that meaningfully contribute to an enemy's military capabilities are lawful objects of attack; all other persons, places, or things are immune from attack. However, neither of these presumptions is conclusive. An enemy belligerent operative who is captured or unambiguously indicates desire to surrender is no longer the lawful object of attack for the obvious reason that disabling him by attack is no longer justified by military necessity.<sup>24</sup> A civilian who takes up arms and engages in hostilities against military forces is no longer immune from attack for the equally obvious reason that disabling that civilian is necessary in order to protect allied forces.<sup>25</sup>

These presumptions demonstrate that distinction is unquestionably derived from the concept of military necessity. Because the law presumes that deliberately employing combat power against civilians or civilian property does not contribute to the core objective of defeating the enemy, distinction prohibits combatants from making civilians or civilian property the deliberate objects of attack. This prohibition is not, however, absolute. If a civilian engages in conduct that is considered to be taking a "direct part in hostilities"—in other words, conduct that presents a threat to armed forces analogous to that posed by an enemy soldier—the protection is suspended

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23. *Id.*, art. 48. Article 48 is considered customary international law. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–8 (2005) [hereinafter CIHL].

24. See AP I, *supra* note 2, art. 41.

25. See *id.*, art. 51(3).

for the duration of the participation and the civilian may be attacked.<sup>26</sup> Analogous limitations apply to the protections established for places and things; for example, a hospital, a place benefiting from perhaps the most extensive LOAC protection from attack, loses that protection if it is used by enemy forces to launch attacks in violation of its protected status.<sup>27</sup>

Finally, the principle of proportionality requires that parties refrain from attacks on lawful military objectives when the expected loss of life or damage to civilian property will be excessive in relation to the anticipated concrete and direct military advantage to be gained.<sup>28</sup> Proportionality is not a separate legal standard as such, but imposes the obligation that those deciding to launch an attack must balance the military advantage anticipated from attacking a lawful target against the known but non-deliberate detrimental consequences to persons and places protected from deliberate attack when they believe the attack is likely to cause incidental damage to civilian personnel or collateral damage to civilian property. However, an attack does not become unlawful when the expected collateral damage or incidental injury is slightly greater than the military advantage anticipated (as is suggested by the term “disproportionate”), but only when those effects are “excessive.”<sup>29</sup> For the purposes of this article, it is even more important to note that unlike the peacetime principle of proportionality,<sup>30</sup> the

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26. *Id.*

27. GC IV, *supra* note 17, art. 19.

28. Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any “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.” AP I, *supra* note 2, art. 51(5)(b). *See also* FM 27-10, *supra* note 11, ¶ 41. This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears again in Articles 57(2)(a)(iii) and 57(2)(b), each of which refers specifically to precautions in attack. Proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that are likely to cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts. Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶ 20; CIHL, *supra* note 23, at 46; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW* 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006); DINSTEIN, *supra* note 3.

29. DINSTEIN, *supra* note 3, at 130–31.

30. *See* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force*

LOAC principle in no way protects the object of attack—the lawful target. Instead, it protects *only* civilians and civilian property the commander reasonably knows or should know will be harmed by attacking the lawful proximate target where the commander does not have the purpose to inflict that harm.

### B. *Belligerents vs. Civilians*

The LOAC categorizes persons in armed conflict as belligerents or civilians in order to facilitate implementation of the distinction obligation. Indeed, because belligerents are subject to attack based on that status, this categorization lies at the heart of the operationalization of the principle of distinction. 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. The rule of military objective included in Additional Protocol I further implements the principles of military necessity and distinction in relation to defining individuals who qualify as lawful objects of attack. All members of an enemy belligerent force fall within the scope of that definition, and may therefore be attacked at all times and in all places.<sup>31</sup> Indeed, this scope of attack authority is a tactical and operational maxim, and is inherent in the weapons and tactics historically associated with armed forces and armed conflict.<sup>32</sup>

In international armed conflicts, the Third Geneva Convention and Additional Protocol I define categories of belligerents who qualify for prisoner of war status and are combatants. All members of the state's regular

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*and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> [hereinafter UN Principles]; see also *McCann and Others v. The United Kingdom*, 324 Eur. Ct. H.R. (Ser. A) ¶ 149 (“In this respect the use of the term ‘absolutely necessary’ in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.”) (citing the Convention for the Protection of Human Rights and Fundamental Freedoms, *infra* note 201).

31. PROTOCOL COMMENTARY, *supra* note 9, at 515; DINSTEIN, *supra* note 3 at 89. See also note 132 and accompanying text, *infra*.

32. PROTOCOL COMMENTARY, *supra* note 9, at 635; see also note 130 and accompanying text, *infra* (emphasis added).

armed forces are combatants and can be identified by the uniform they wear, among other characteristics.<sup>33</sup> Other persons falling within the category of combatant include members of volunteer militia who meet four requirements: wearing a distinctive emblem, carrying arms openly, operating under responsible command, and abiding by the LOAC.<sup>34</sup> Members of the regular armed forces of a government not recognized by the opposing party and civilians participating in a *levée en masse* also qualify as prisoners of war in international armed conflict.<sup>35</sup> Such persons can be attacked at all times and enjoy no immunity from attack, except when they are *hors de combat* due to sickness, wounds, or capture. In non-international armed conflicts, including state versus non-state actor conflicts, there is no combatant status pursuant to treaty definition, but individuals who are members of state forces or members of organized armed groups are customarily understood to qualify as belligerents, and are therefore legitimate targets of attack at all times.<sup>36</sup> State practice validates that the authority to attack members of the armed forces applies with equal force to attacking members of any organized belligerent group engaged in armed conflict, whether international or non-international in nature;<sup>37</sup> a view supported by a majority of LOAC experts.<sup>38</sup>

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33. GC III, *supra* note 17, art. 4(1).

34. *Id.*, art. 4(A)(2).

35. *Id.*, arts. 4(A)(3), 4(A)(6).

36. See Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgement, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2005); INTERPRETIVE GUIDANCE, *supra* note 5, at 27, 28; see also JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 70–76 (2011) (Discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack” in international armed conflict; and (2) “subjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”).

37. See generally INTERPRETIVE GUIDANCE, *supra* note 5.

38. For example, such belligerent operatives are characterized as “fighters” in the *San Remo Manual on the Law of Non-International Armed Conflict*. The *Manual* indicates that fighters are analogous to combatants for targeting purposes. See MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006). Similarly, the ICRC’s *Interpretive Guidance* emphasizes that non-international armed conflict is a contest between organized belligerent groups. See INTERPRETIVE GUIDANCE, *supra* note 5, at 27–28. See also Geoffrey S. Corn & M. Christopher Jenks, *Two Sides of the Combatant COIN: Untangling Continuous Combat Function from Belligerent Status in Non-International Armed Conflicts*, 33 UNIVER-



Article 43 of Additional Protocol I established the first treaty definition of “combatant.”<sup>39</sup> It incorporates by reference the categories of prisoners of war from the Third Geneva Convention noted above,<sup>40</sup> but excludes from the definition civilians who qualify for prisoner of war status by virtue of their association with the armed forces and the support roles they perform (the so-called “civilians accompanying the forces in the field”). Article 43’s definition thus clarifies that all members of the regular armed forces, and all militia and volunteer forces associated with the regular armed forces (as well as partisans), qualify as combatants within the meaning of the LOAC.<sup>41</sup>

As noted above, the attack authority derived from belligerent group membership and status is then extended by custom and practice to other belligerent operatives who do not qualify as lawful combatants within the meaning of Article 43. Accordingly, the LOAC permits attack, or deliberate targeting of individuals, based not on a manifestation of actual threat, but instead based on the presumptive threat derived from the determination of enemy belligerent status.<sup>42</sup> Once that status is determined, these individuals qualify as lawful objects of attack, meaning that the LOAC permits armed forces to use the most efficient means to incapacitate them, which in warfare is synonymous with the use of deadly combat power as a measure of first resort.

Understanding this LOAC framework for the categorization of belligerents and civilians and the accordant consequences of such categorizations and status is critical when analyzing whether the law imposes an additional least harmful means obligation. As explained in greater detail below, the authority to employ deadly combat power as a first resort applies only to the status-based targeting of belligerents and not to civilians. As a result,

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SITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 313 (2012).

39. AP I, *supra* note 2, art. 43(2) (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”).

40. GC III COMMENTARY, *supra* note 19, at 510.

41. AP I, *supra* note 2, art. 43 (“(1) The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. . . . 2) Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

42. *See* DINSTEIN, *supra* note 3, at 84–85.

lawful attack always requires a predicate assessment of civilian or belligerent status.<sup>43</sup> Furthermore, rules and obligations with regard to the use of force against civilians do not provide any definitive interpretive weight to extend this least harmful means obligation to operations directed against enemy belligerents.

This distinction is critical background when considering the impact of the Israeli High Court opinion in the *Targeted Killings* case, which is commonly proffered as support for the asserted evolution of a least harmful means obligation. In that case, the Israeli High Court of Justice required the Israel Defense Forces to use the least-harmful means feasible when targeting civilians who are directly participating in hostilities in the West Bank.<sup>44</sup> However, because the Court concluded that the individuals subject to the attacks at issue in that case could not qualify as combatants and were subject to attack only as civilians taking a direct part in hostilities, it never addressed the applicability of this least harmful means rule to anyone qualifying as a belligerent operative. While undoubtedly controversial, extending this limitation to *civilians* directly participating in hostilities is arguably tolerable, as those individuals are not being attacked due to a status that triggers a presumption of threat, but instead due to individual conduct that establishes threat. Accordingly, their incapacitation is focused on an individualized objective and is not intended to exact the broader goal of impacting enemy belligerent leadership or the “enemy” in the collective sense.<sup>45</sup> The fact that the High Court held that such an obligation exists for targeting civilians directly participating in hostilities simply does not provide any support for the existence of such an obligation with regard to belligerents.<sup>46</sup>

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43. See Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 54 (2010); see also GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 164–65 (2012); Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VALPARAISO UNIVERSITY LAW REVIEW 765 (2012).

44. *Targeted Killings Case*, *supra* note 6, ¶ 60 (“Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed.”).

45. See generally Corn & Jenks, *supra* note 38.

46. With regard to the relevance of the *Targeted Killings* case for other facets of the least harmful means debate, see *infra* notes 208–19 and accompanying text.

*C. Military Necessity and Humanity Do Not Mandate a Least Harmful Means Rule*

The relationship between military necessity and the strategic, operational, and tactical objectives of armed hostilities provides the essential context for analyzing if and when the LOAC imposes a least harmful means limitation on attacking enemy belligerent forces. From the first codified articulation of military necessity until the present day, this principle has been understood to authorize the application of deadly combat power against any belligerent opponent under the operational authority of enemy leadership and physically capable of acting to effectuate that leader's will.<sup>47</sup> This broad scope of authority is directly linked to the primary objective of engaging in armed conflict: to bring the enemy into prompt submission as rapidly and efficiently as possible. Accordingly, military necessity has always been distinct from the peacetime authority provided by the concept of necessity. In the peacetime context, necessity certainly permits the use of force against individuals when such use is required to prevent unlawful conduct that presents an imminent threat of death or grievous bodily harm to government actors or other members of society.<sup>48</sup> In that context, therefore, the sole objective of the use of force justified by necessity is to subdue the individual threat. In contrast, *military* necessity provides a much broader scope of authority: that which is required to bring the enemy, in the collective sense, into submission. The enemy belligerent is acting as an agent for the enemy leadership;<sup>49</sup> as a result, the authority to use force extends well beyond the peacetime objective of subduing or disabling the individual.

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47. See, e.g., FRANCIS LIEBER, WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code].

48. See UN Principles, *supra* note 30; see also McCann, *supra* note 30; Tennessee v. Garner, 471 U.S. 1 (1985).

49. The concept of the individual soldier as the agent of the state dates back nearly two centuries to Jean Jacques Rousseau, who used the concept in formulating the principle of noncombatant immunity:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter's defenders so long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.

Daphné Richemond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in NEW BATTLEFIELDS/OLD LAWS: FROM THE HAGUE CONVENTION TO ASYMMETRIC WARFARE 116 (William Banks ed., 2010) (citing JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 111 (1762)).

This distinction highlights an essential aspect of the prohibition against arbitrary state action, which is a norm of universal applicability.<sup>50</sup> International law prohibits all arbitrary deprivations of life inflicted by a state actor—a killing not justified by legal necessity would qualify as arbitrary in violation of international law.<sup>51</sup> However, these distinct concepts of peacetime and LOAC necessity dictate that the assessment of when such use of force is in fact arbitrary must be different in the two contexts and therefore must be made based on the relevant applicable law.<sup>52</sup> From a military operations perspective, conceding that state actors are prohibited in either context from arbitrary deprivations of life is not particularly troubling, as long as the most critical distinction between peacetime and wartime authority is recognized—that an essential aspect of armed conflict is the legitimate ap-

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50. See Kenneth M. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 8 (2004); International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”). See also PROTOCOL COMMENTARY, *supra* note 9, at 391 (“If one were to renounce the rule, by which Parties to the conflict do not have an unlimited right, one would enter the realm of arbitrary behavior, i.e. an area where law does not exist, whether this was intended or not.”).

51. According to the International Court of Justice:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The 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. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶ 25.

52. See, e.g., *id.*; McCann, *supra* note 30. See also Ohlin, *supra* note 8, at 1272–73 (“Necessity, it turns out, means something quite different depending on the background legal norms that structure each particular body of law. In other words, it is not so clear that the concept of necessity in the domestic law of self-defense can be transplanted, without significance alteration, to the domain of IHL. The concept of necessity turns out to be something resembling a term of art in IHL, with a specific meaning that diverges from how the term is understood and applied in other normative regimes.”); William Gerald Downey Jr., *The Law of War and Military Necessity*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 251, 252 (1953) (“One of the most important concepts in the law of war is that of military necessity, but there is no concept more elusive.”).

plication of deadly combat power as a measure of first resort—and the justification for such use is not limited to the reduction of an individualized actual threat.

The principle of humanity does protect belligerent operatives, notwithstanding a reliance on lethal force as a first resort. However, this protection is principally applicable only after the individual belligerent has been incapacitated as an operative of enemy leadership, either as the result of wounds, sickness, or capture.<sup>53</sup> Pre-incapacitation, the principle of humanity protects belligerent operatives only from the infliction of unnecessary suffering.<sup>54</sup> Although the importance of this principle of constraint is well established, it must be emphasized that a prohibition against inflicting *unnecessary* suffering upon combatants necessarily implies that the infliction of a wide range of *necessary* suffering is legitimate. It is therefore essential to determine when harm intentionally inflicted upon an active belligerent opponent is necessary within the meaning of the law.

The starting point for this analysis is the rule of military objective: because enemy personnel automatically qualify as lawful military objectives,

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53. For example, the UK Ministry of Defense *Manual on the Law of Armed Conflict* notes that:

A combatant is entitled to continue fighting up to the moment of his surrender without losing the benefits of quarter and his rights as a prisoner of war. No vengeance can be taken since that person has simply done his duty up to the moment of his surrender. The mere fact that a soldier is wounded does not necessarily mean that he is incapacitated. There have been many examples of soldiers who continued to fight though wounded. It is only when he surrenders or is rendered incapable of fighting because of his wounds that he becomes *hors de combat*.

UK MANUAL ON THE LAW OF ARMED CONFLICT, *supra* note 17, at 5.6.1.

54. *See* Convention No. IV Respecting the Laws and Customs of War on Land and Its Annex, Regulation Concerning the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] (establishing that the right of belligerents to adopt means of injuring the enemy is not unlimited); *see also* Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶ 78 (concluding that this prohibition against the infliction of unnecessary suffering is a “cardinal” principle of international humanitarian law); FM 27-10, *supra* note 11, ¶ 34; Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> [hereinafter St. Petersburg Declaration] (“the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men”).

they are lawful objects of attack by virtue of that status.<sup>55</sup> Accordingly, the engagement of such personnel with deadly combat power, and the suffering inflicted upon them as a result of such engagement, is considered necessary as a matter of law. 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*. Article 23 of the Regulations Annexed to the 1899 Hague Convention II accordingly prohibited employing means of warfare of a “nature” to cause unnecessary suffering.<sup>56</sup> However, when revised in 1907, the language was modified to include a scienter element, prohibiting only means of warfare *calculated* to cause unnecessary suffering.<sup>57</sup> Additional Protocol I then extended the prohibition to both means and methods of warfare, and included within the scope of the prohibition means and methods calculated *or* of a nature likely to produce such needless aggravation.<sup>58</sup>

Whether the contemporary customary law principle prohibiting employing methods or means of warfare that cause unnecessary suffering includes a scienter requirement is unlikely, but not absolutely clear. However, as explained in detail below, even Additional Protocol I’s resurrection of the 1899 Hague “of a nature to” language and extension to methods of warfare does not result in a prohibition against attacking an enemy with deadly combat power when capture is a possible alternate option for subduing the individual. Nor, as explained below, do the limitations that arise in the “twilight zone” between pre- and post-submission status—such as the restraint applicable once an enemy belligerent becomes *hors de combat*, but before he is within the full control of a capturing power—alter these

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55. See DINSTEIN, *supra* note 3, at 89, 92.

56. See Hague Convention (II) with Respect to the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 23(e), July 29, 1899, 31 Stat. 1803, 1 Bevans 247 (“To employ arms, projectiles, or material of a nature to cause superfluous injury”) [hereinafter Hague II].

57. See Hague IV, *supra* note 54, art. 23(e) (“To employ arms, projectiles, or material calculated to cause unnecessary suffering”).

58. AP I, *supra* note 2, art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

presumptions. Instead, the law clearly places the burden on the enemy belligerent who has not been incapacitated as the result of wounds or sickness to affirmatively manifest his surrender and accordant severance from enemy leadership. Absent such manifestation, the presumptive threat associated with belligerent status continues to justify attack, even if the individual poses no actual threat and may be easily subdued with less harmful means.

As noted above, this broad scope of attack authority—an authority that permits employing methods and means of warfare likely to produce death as a first resort—is diametrically opposed to the authority of state actors to employ deadly force in a peacetime context. Use of deadly force against individuals who are not reasonably identified as belligerent opponents in an armed conflict is strictly cause-based: there must be a causal connection between the conduct of the particular individual subjected to the use of force and the resort to deadly force.<sup>59</sup> Accordingly, resort to force likely to produce death as a first resort is presumptively invalid, and is justified only when the state actor reasonably assesses a genuine individual necessity to bypass or forego a less harmful means and to resort immediately to such force.<sup>60</sup> Moreover, even when individual cause justifies resort to force, the degree of force may be only that which is necessary to reduce the *individual* threat. The state actor can therefore only employ deadly force when no lesser means will effectively reduce a direct and specific threat.<sup>61</sup> As a result, any resort to force likely to produce death outside the context of belligerent targeting in armed conflict is always considered a measure of last resort, (or, as one court in the United Kingdom noted, the deliberate killing

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59. See generally INTERPRETIVE GUIDANCE, *supra* note 5; William A. Schabas, *Parallel Applicability of International Humanitarian Law and International Human Rights Law: Lex Specialis? Belt and Suspenders? The Parallel Operations of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 ISRAEL LAW REVIEW 592, 604 (2007); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 176 (2005).

60. Schabas, *supra* note 59, at 604. See also Milanovic, *supra* note 4, at 118–19 (Distinguishing attack authority in the LOAC from the necessity-based principle in peacetime: “[i]n other words, [in armed conflict] one belligerent party does not need to prove any kind of necessity to kill combatants belonging to the other belligerent party in order to be able to do so lawfully.”).

61. UN Principles, *supra* note 30, at 112 (Stating that force can only be used “in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when the less extreme means are insufficient to achieve these objectives”); Schabas, *supra* note 59, at 604.

of a human being is always *prima facie* unlawful).<sup>62</sup> Understanding the nature and purpose of belligerent targeting in armed conflict and the specific presumptions on which it rests is therefore an essential component of any analysis of a potential capture rather than kill obligation.

### 1. Military Necessity and the Corporate Aspect of the Enemy

A rule that prohibits attacking an enemy belligerent operative when incapacitation can be feasibly achieved by capture is based on an inference that using deadly combat power in such a situation cannot rationally be considered justified by military necessity and therefore amounts to the unlawful infliction of unnecessary suffering.<sup>63</sup> If, it is posited, the enemy operative can be totally incapacitated by capture with no additional risk to friendly forces, then any harm inflicted in excess of that necessary to capture is excessive. Armed conflict is, however, a contest between organized belligerent forces, not individual operatives. The authority to use all measures not otherwise prohibited by international law to compel the prompt submission of the enemy is thus not based on an individualized assessment of threat. Rather, all attacks are directed towards the enemy in the collective sense. Because the law presumes that attacking enemy operatives who might otherwise be captured contributes to this collective objective, such attacks are indeed justified by military necessity.<sup>64</sup>

An essential aspect of military, and in particular combat, operations is the goal of seizing and retaining the initiative. This objective always focuses on the enemy in the collective sense, a tenet of military operations reflected in the concept of operational initiative, defined as the first foundational principle of land operations in bedrock U.S. Army doctrine:

To seize, retain, and exploit the initiative, Army forces strike the enemy, both lethally and nonlethally, in time, places, or manners for which the enemy is not prepared. To seize the initiative (set-

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62. Attorney General for Northern Ireland's Reference (No. 1 of 1975)[1977] AC 105, 136–37, (“[I]o kill or seriously wound another person by shooting is *prima facie* unlawful . . .”).

63. See Goodman, *supra* note 7.

64. See, e.g., Marco Sassóli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 599, 606 (2008) (“Combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential.”).



ting and dictating the terms of action), Army forces degrade the enemy's ability to function as a coherent force. Leaders then prevent the enemy's recovery by retaining the initiative. They follow up with a series of actions that destroy enemy capabilities, seize decisive terrain, protect populations and critical infrastructure, and degrade the coherence of the enemy force. Leaders continue to exploit the initiative until they place the enemy in a position that disables any ability to coherently employ military capability. This continued resistance can only lead to the physical destruction of the enemy military potential and the exposure of the enemy's sources of power to imminent destruction or capture. These are typically the military conditions required for the termination of a conflict on favorable terms. From the enemy's point of view, U.S. operations must be rapid, unpredictable, and disorienting.<sup>65</sup>

Offensive action and the synchronization and allocation of combat power are central to seizing and retaining tactical, operational, and strategic initiative. This same doctrinal publication also emphasizes synchronization of combat capabilities focused on a totality conception of the enemy:

Synchronization is the arrangement of military actions in time, space, and purpose to produce maximum relative combat power at a decisive place and time (JP 2-0). It is the ability to execute multiple, related, and mutually supporting tasks in different locations at the same time, producing greater effects than executing each task in isolation. For example, in a tactical action, the synchronization of intelligence collection, obstacles, direct fires, and indirect fires results in the destruction of an enemy formation.<sup>66</sup>

These tenets and associated principles are absolutely central to the doctrinal and practical understanding of effective combat operations. Military commanders are expected to understand intuitively that imposing their will on an enemy requires them to seize and retain the initiative of the battle. Force is employed to produce this effect. All allocations of combat power must be focused by this principle in order to keep the collective enemy off balance so that the friendly commander may dictate the tempo of the fight.

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65. U.S. Department of Army, ADP 3-0, Unified Land Operations ¶ 20 (2011) [hereinafter ADP 3-0].

66. *Id.*, ¶ 32.

Additional Protocol I's definition and use of the term "attack"<sup>67</sup> is entirely consistent with, and reinforces, this doctrinal principle. Indeed, the *Commentary* notes that "military instruction manuals in many countries define an attack as an offensive act aimed at destroying enemy forces and gaining ground."<sup>68</sup> If an attack is an act to destroy enemy forces, this terminology suggests that the range of such acts must naturally include those that kill enemy forces, and therefore the authority to attack includes the authority to kill enemy belligerents.

Commanders are guided by operational tenets and other key principles of war when planning and executing combat operations. Lethality is a key doctrinal tenet of combat operations, and it involves the synchronized application of combat power in all phases of a military campaign, including offensive, defensive, and stability operations. This allows commanders to concentrate the effects of combat power at the decisive place and time in order to dictate the terms of the engagement to the enemy. According to Army Doctrinal Publication (ADP) 3-0, the U.S. Army's core warfighting doctrine:<sup>69</sup>

The capacity for physical destruction is fundamental to all other military capabilities and the most basic building block for military operations. Army leaders organize, equip, train, and employ their formations for unmatched lethality under a wide range of condi-

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67. Article 49(1) of Additional Protocol I states: "Attacks' means acts of violence against the adversary, whether in offence or in defence."

68. PROTOCOL COMMENTARY, *supra* note 9, at 603. The *Commentary* emphasizes that the rules and obligations with regard to attacks encompass defensive attacks as well as offensive attacks to ensure that both parties comply with the LOAC regardless of whether they are in an offensive or defensive posture at the time.

69. As noted in this publication:

Unified land operations is the Army's warfighting doctrine. It is based on the central idea that Army units seize, retain, and exploit the initiative to gain a position of relative advantage over the enemy. This is accomplished through simultaneous combination of offensive, defensive, and stability operations that set conditions for favorable conflict resolution. The Army's two core competencies—combined arms maneuver and wide area security—provide the means for balancing the application of Army warfighting functions within the tactical actions and tasks inherent in offensive, defensive, and stability operations. It is the integrated application of these two core competencies that enables Army forces to defeat or destroy an enemy, seize or occupy key terrain, protect or secure critical assets and populations, and prevent the enemy from gaining a position of advantage.

ADP 3-0, *supra* note 65, ¶ 19.

tions. Lethality is a persistent requirement for Army organizations, even in conditions where only the implicit threat of violence suffices to accomplish the mission through nonlethal engagements and activities. The capability for the lawful and expert application of lethal force builds the foundation for effective offensive, defensive, and stability operations.<sup>70</sup>

These tenets are historically validated, and reflect the military operational axiom that when an enemy is constantly reacting, and the friendly commander can produce intended effects at the decisive points in the battle, the enemy's defeat will become inevitable. This process is repeated at every level of military operations. As a result, it is often the case that a commander will employ overwhelming combat power against an enemy at decisive points of the battle, perhaps inflicting mortal casualties on more enemy forces than was actually necessary to bring the forces at that point in the battle into submission. In other places, enemy forces may fortunately be spared based on a determination that economizing the employment of combat power against those forces is unnecessary. But, when made, that determination of lack of necessity is *not* based on the conclusion that disabling the individual enemy operatives is unnecessary; rather, it is based on the conclusion that the enemy in the collective sense will be brought into submission efficiently by allocating the resources necessary to attack those forces elsewhere.

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70. *Id.*, ¶ 27. ADP 3-0 replaced the seminal Army doctrinal manual on operations, FM 3-0. This previous doctrine included reference to classic “principles of war,” including the principle of mass, which, like the tenet of lethality, emphasizes the decisive and overwhelming employment of combat power to seize and retain initiative against a “collective” enemy:

Commanders mass the effects of combat power in time and space to achieve both destructive and constructive results. . . . Commanders select the method that best fits the circumstances. Massed effects overwhelm the entire enemy or adversary force before it can react effectively.

Army forces can mass lethal and nonlethal effects quickly and across large distances. This does not imply that they accomplish their missions with massed fires alone. Swift and fluid maneuver based on situational understanding complements fires. Often, this combination in a single operation accomplishes what formerly took an entire campaign.

In combat, commanders mass the effects of combat power against a combination of elements critical to the enemy force to shatter its coherence. Some effects may be concentrated and vulnerable to operations that mass in both time and space. Other effects may be spread throughout depth of the operational area, vulnerable only to massing effects in time.

U.S. Department of the Army, FM 3-0, Operations A-6 (2008) (amended Feb. 22, 2011).

Maneuver commanders<sup>71</sup> devote a substantial portion of their professional careers learning how to manage the allocation and application of combat power consistent with these principles. Where and when mass is called for, there is no hesitation on the amount of force employed based on the possible over-breadth of belligerent casualty infliction. Those casualties, even if perhaps not necessary in the individual sense, are the necessary cost of the calculated leverage of combat power to produce enemy submission most efficiently. Analyzing the validity of a least harmful means rule must begin with this context, and not with fanciful and far less common hypotheticals of enemy soldiers found in the shower or swimming in a lake. Allowing hypotheticals that are operationally unrealistic and attenuated from the art of war to dictate the evolution of the law will ultimately undermine the law's perceived validity.

The goal of attack is always nested within the broader operational and strategic objectives of using force, and cannot properly be understood as simply neutralizing the individual enemy object of attack. Accordingly, because attack is always properly understood as initiated to produce a dual effect (neutralize the object of attack and negatively influence the enemy effort writ large, including the decision-making process of enemy leader-

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71. The term "maneuver commander" is commonly used to refer to officers in command of combat units, or units that are organized and employed to engage in maneuver warfare. Combined arms maneuver is the doctrinal method of employing U.S. military power, and is defined for the Army by ADP 3-0:

Combined arms maneuver and wide area security provide the means for balancing the application of the elements of combat power within tactical actions and tasks associated with offensive, defensive, and stability operations. Combined arms maneuver is the application of the elements of combat power in unified action to defeat enemy ground forces; to seize, occupy, and defend land areas; and to achieve physical, temporal, and psychological advantages over the enemy to seize and exploit the initiative. It exposes enemies to friendly combat power from unexpected directions and prevents an effective enemy response.

ADP 3-0, I *supra* note 68, ¶ 22. Likewise, the Chairman of the Joint Chiefs of Staff publication on operations includes "movement and maneuver" as a "joint function" and defines it as follows:

This function encompasses the disposition of joint forces to conduct operations by securing positional advantages before or during combat operations and by exploiting tactical success to achieve operational and strategic objectives. This function includes moving or deploying forces into an operational area and maneuvering them to operational depths for offensive and defensive purposes. It also includes assuring the mobility of friendly forces.

Chairman, Joint Chiefs of Staff, JP 3-0, Joint Operations XV (2011).

ship),<sup>72</sup> it is impossible to reconcile a least harmful means rule with the underlying tactical, operational, and strategic objectives of military action.

## 2. Presumptions, Clarity, Over-breadth and Under-inclusiveness

This contrast between peacetime and armed conflict necessity reveals an even more significant distinction between the scope of belligerent attack authority and all other justifications for the use of deadly (or any) force: only in the armed conflict context does the law permit reliance on a presumption of threat to justify a use of force. In all other contexts, employing force based on such a presumption would be *per se* unreasonable.<sup>73</sup> Thus, unlike in the armed conflict context, during peacetime there is never a conclusive presumption of necessity to employ force in the form of an attack based on status determinations. Rather, the peacetime use of force must always be exclusively conduct-based.<sup>74</sup> This paradigm ensures the protection of the objects of state violence from overbroad applications of authority with the accordant arbitrary deprivations of life.<sup>75</sup> In armed conflict, the collective nature of the enemy belligerent forces justifies a conclusive presumption that all individuals falling within that status represent a threat justifying attack. That presumption may at times be factually overbroad, but as noted above this is inherent in status-based targeting authority. More importantly, it provides clarity and the space for the type of unhesitating attack initiative that protects friendly forces from the risk that would result from ceding the initiative to the enemy.

This tolerance for launching an attack based solely on a presumption of threat—an action that involves methods and means of warfare likely to produce death as a first resort—reveals the true inconsistency between the core LOAC authority inherent in the principle of military necessity and a proposed least harmful means obligation. Like any other rules of presumption,<sup>76</sup> status-based attack authority reflects an inherent acceptance of the inevitable factual over-breadth such a rule produces. Because application of deadly combat power is justified based on status instead of conduct—

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72. See Hays Parks, *Conventional Weapons and Weapons Review*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, 55, 72–73 n.65 (2005).

73. See, e.g., Attorney General for Northern Ireland's Reference, *supra* note 62.

74. Parks, *supra* note 72.

75. See, e.g., McCann, *supra* note 30.

76. See, e.g., Geoffrey S. Corn, *The Missing Miranda Warning: Why What You Don't Know Really Can Hurt You*, 3 UTAH LAW REVIEW 761 (2011).

based on a conclusive presumption that attacking belligerent operatives will always contribute to bringing about the submission of the enemy in the collective sense—the LOAC permits infliction of death on enemy belligerent operatives irrespective of the actual risk they present at the time of attack unless and until they are no longer capable of executing their belligerent function due to physical incapacity, or they affirmatively disassociate themselves from the control of the enemy leadership through surrender.<sup>77</sup>

Here, again, is an essential point of emphasis: this attack authority is not an obligation. It certainly does not mandate that combatants employ the full scope of authority the law grants to subdue an enemy. When, where, and how military commanders and their subordinates invoke this full scope of authority has always been, and remains, a choice dictated by operational considerations. Thus, there have been and will continue to be many instances where military forces who *may* lawfully employ deadly force against an enemy choose not to do so, but instead choose to employ a lesser degree of force to bring the enemy into submission. However, such self-imposed constraint simply does not indicate the existence of a less harmful means obligation; any assertion that it does reveals a misunderstanding of the motive that drives such limitations on the use of deadly force. More problematically, it presents a genuine risk of distorting the probative effect of tactical and operational discretion on the analysis of legal obligation.

A commander's assessment that self-imposed limitations on the full scope of LOAC attack authority contribute to a tactical, operational, or strategic military objective will always be the operational rationale for such limitations. In essence, such restraint reflects a militarily driven cost/benefit tradeoff. When the commander believes that the military advantage of imposing such constraint outweighs the advantage of exercising the full scope of attack authority, she will make a reasoned choice to subject her own subordinate forces to increased risk in order to enhance the likelihood of mission accomplishment. Commanders always have the prerogative to make such judgments and often do so. The accordant assumption of risk is an inherent aspect of achieving a collective operational objective, and accepting such risk for the collective objective of mission accomplishment is the very nature of military service. For example, consider a

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77. Thus a uniformed military cook holding only a ladle, or an infantry soldier not presently holding a weapon, assuming they are not physically incapacitated or surrendering, may be permissibly targeted and killed. At the time of attack they may well present little to no risk. Their targeting is permissible because of the conclusive presumption that their incapacitation will contribute to the submission of enemy writ large.

unit lying in an ambush position with orders not to fire until the enemy has fully entered the kill zone. Individual soldiers are constrained at their own personal peril from engaging enemy operatives as they walk right past, but this constraint is imposed to achieve the overall collective objective of the ambush. A more common example in the context of counter-insurgency operations is the use of rules of engagement (ROE)<sup>78</sup> to limit tactical and operational lethality in favor of strategic restraint, such as limiting the use of indirect fires or the conduct of night raids in Afghanistan.<sup>79</sup> For example, as General Stanley McChrystal's 2009 Tactical Directive emphasized: "the carefully controlled and disciplined employment of force entails risk to our troops—and we must work to mitigate that risk wherever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level in our force."<sup>80</sup>

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78. Rules of engagement are "directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." Chairman, Joint Chiefs of Staff, JP 1-02, Department of Defense Dictionary of Military and Associated Terms (Apr. 12, 2001, as amended through Sept. 30, 2010), available at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf) [hereinafter DoD Dictionary]. See DoD Directive 2311.01E, *infra* note 249.

79. See, e.g., ISAF Releases, *General Petraeus Issues Updated Tactical Directive: Emphasizes "Disciplined Use of Force"*, Kabul, Afghanistan, 2010-08-CA-004, available at <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html> (discussing the emphasis on limiting the use of lethal combat power as part of the overall counter-insurgency strategy).

80. Memorandum from General Stanley McChrystal, Tactical Directive, Afghanistan, ISAF Headquarters (July 6, 2009), available at [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf) [hereinafter Tactical Directive]. The directive further explained:

We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. But we will not win based on the number of Taliban we kill, but instead on our ability to separate insurgents from the center of gravity—the people. That means we must respect and protect the population from coercion and violence—and operate in a manner which will win their support.

This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of terrain or attrition of enemy forces. We must avoid the trap of winning tactical victories – but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.

While this is also a legal and a moral issue, it is an overarching operational issue – clear-eyed recognition that loss of popular support will be decisive to either side in this struggle. The Taliban cannot militarily defeat us—but we can defeat ourselves.

*Id.*

Like all such constraints on otherwise lawful authority, these are imposed to enhance the likelihood of mission accomplishment rather than because of legal obligation.

It may be tempting to conclude that requiring some indicia of actual threat to justify the necessity for attacking an enemy belligerent with deadly combat power is thoroughly consistent with the LOAC's humanitarian objective of mitigating the suffering caused by armed conflict. How can military necessity permit the killing of enemy personnel whose conduct seems relatively non-threatening because of function, isolation, or some combination of factors indicating *de minimis* risk associated with capture? Difficult in the abstract, this question becomes only more difficult if it is assumed that the need to subdue the individual object of attack is the sole basis for attack. But this is not the case. First, as noted above, the objective of all military action in armed conflict is achieving enemy submission in the collective sense. Second, the presumption-based attack authority inherent in the concept of military necessity and the rule of military objective inherently recognizes such potential factual over-breadth. The LOAC tolerates this over-breadth in order to provide the clarity needed to enable armed forces to operate in hostile environments with the type of aggressiveness necessary not only to achieve this overall objective, but also to do so while legitimately minimizing their own risk. It is precisely because the LOAC presumes that *all* members of an enemy force represent a threat sufficient to justify the use of deadly force as a means to produce enemy submission that this over-breadth exists and is tolerated. In short, because the law includes enemy belligerent operatives within the category of lawful military objectives, the law eliminates any obligation to make individualized assessments of whether each enemy soldier represents an actual threat to the attacking force.

This over-breadth is offset, however, by the inverse presumption applicable to civilians. Unlike its framework for combatants, the LOAC establishes a powerful presumption that there is no legitimate necessity to subject civilians to attack or any other use of deadly force. This presumption is based on the fact that civilians are not agents of an enemy belligerent leadership and therefore are normally inoffensive. Both Additional Protocol I and Additional Protocol II manifest this presumption in the codification of the customary international law rule that protects civilians from being made



the deliberate object of attack.<sup>81</sup> However, like the belligerent status presumption of hostility, this presumptive inoffensiveness is not conclusive. For the civilian, the presumption is rebutted when and for such time as he takes a direct part in hostilities.<sup>82</sup> In contrast, and as noted above, the presumption of threat triggered by belligerent status is rebutted only when the belligerent operative is rendered *hors de combat* by surrender, wounds, or sickness.<sup>83</sup> This dichotomy is consistent with the difference between the status-based attack authority applicable to the belligerent, and the conduct-based use-of-force authority applicable to the civilian. Use of force against a civilian is justified by military necessity only when the soldier identifies actual conduct that qualifies as direct participation in hostilities, conduct

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81. See PROTOCOL COMMENTARY, *supra* note 9, at 598 (“The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, which had stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly.”).

82. See *id.* at 619:

In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. However, there is nothing to prevent the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45 (Protection of persons who have taken part in hostilities) or on the basis of the provisions of the Fourth Convention (assigned residence, internment etc.) if his civilian status is recognized. Further it may be noted that members of the armed forces feigning civilian non-combatant status are guilty of perfidy under Article 37.

83. See Common Article 3, *supra* note 18; AP I, *supra* note 2, art. 41.

that therefore rebuts the presumption of inoffensiveness.<sup>84</sup> No such validation is required to justify attacking an enemy belligerent.

Attempting to extend a conduct-based least harmful means rule from a law enforcement or human rights context into the belligerent targeting equation—by asserting that the soldier has an obligation to ensure actual conduct justifies attacking the belligerent even when the enemy belligerent is still physically functional and has yet to affirmatively separate himself from the enemy leadership through surrender—is therefore inconsistent with the underlying presumptions upon which attack authority is based. The operational clarity these presumptions provide is an essential component in developing a warrior ethos.<sup>85</sup>

Soldiers are not police officers, and while it is certainly possible to train soldiers to operate with the type of restraint incumbent in the police function,<sup>86</sup> asking them to operate under such a framework during armed conflict is inconsistent with their fundamental purpose: to be ready, willing, and able to employ deadly combat power on demand. Ordering restraint is, as noted above, always an option available to a commander who chooses not to exercise the full scope of his or her authority against an enemy. However, once the law requires that soldiers assess the *actual* threat an enemy combatant poses, the inevitable consequence of a rule that requires

84. AP I, *supra* note 2, art. 51(3); *see also* INTERPRETIVE GUIDANCE, *supra* note 5.

85. *See* 2009 Army Posture Statement, Soldier's Creed, *available at* [http://www.army.mil/aps/09/information\\_papers/soldiers\\_creed.html](http://www.army.mil/aps/09/information_papers/soldiers_creed.html) ("The Army has combined the Soldier's Creed with the Warrior Ethos in order to establish a set of principles by which every Soldier lives. In a broader sense, the Warrior Ethos is a way of life that applies to both our personal and professional lives. They define who we are and who we aspire to become."). The Soldier's Creed states:

I am an American Soldier. I am a Warrior and a member of a team. I serve the people of the United States and live the Army Values. I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade. I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills. I always maintain my arms, my equipment and myself. I am an expert and I am a professional. I stand ready to deploy, engage, and destroy the enemies of the United States of America in close combat. I am a guardian of freedom and the American way of life. I am an American Soldier.

*Soldier's Creed*, ARMY VALUES, *available at* <http://www.army.mil/values/soldiers.html> (last visited May 2, 2013).

86. *See* Mark Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MILITARY LAW REVIEW 1, 90 (1994) ("Although in some operations other than war soldiers may feel as if they are policemen, a soldier will never be strictly analogous to a cop on the beat.").

least harmful means based on the absence of an actual threat, the effectiveness of combat capability risks dilution and tactical clarity will be degraded.<sup>87</sup>

### III. THE POSITIVE LAW

The next step to understand the LOAC's framework with regard to the use of force against belligerent operatives—the location for any potential rule requiring least harmful means—is to consider how the LOAC's fundamental principles are reflected in the positive treaty law. Although Additional Protocol I of 1977 provides the most extensive and detailed treaty provisions bearing on the use of force and the constraints on that authority, its predecessors also form an important foundation for this analysis, starting with the Lieber Code, through the Hague Regulations, and the 1949 Geneva Conventions. Together, these early and contemporary LOAC treaties—the positive law of the LOAC—inform not only the specific provisions of

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87. Soldiers cannot simply “shift” from one use of force framework to another with ease. Moving between a law enforcement framework and an armed conflict framework requires extensive training to “reset” the warrior mentality. A classic example, used during instruction at the U.S. Army JAG School for many years, was an audio tape made by a U.S. soldier in a fighting position in Panama on the night of the U.S. intervention in 1989. He and his “battle buddy” had been in Panama for several months prior to the invasion. During that time, they operated pursuant to restrictive peacetime rules of engagement that limited their authority to employ deadly force to situations in which they or other soldiers confronted an actual threat of deadly force. That night, their rules of engagement changed to “wartime” rules, and once the Panamanian Defense Forces (PDF) were declared hostile, these rules permitted them to employ deadly force against these enemy soldiers based on status identification.

The audiotape recorded the two soldiers observing a PDF soldier moving in the direction of their fighting position. The sound of a Vulcan anti-aircraft gun firing into a PDF barracks kept punctuating the recording. One soldier, obviously concerned about the approaching PDF soldier, can be heard over and over saying “I swear, if he gets much closer I am going to shoot him.”

This is an example of the confusion produced by subjecting warriors to divergent legal frameworks regulating the employment of force. It is clear that at the time of the audio recording the soldier speaking had full authority to engage the PDF soldier he observed with deadly force, based on his status as an enemy belligerent. However, he continued to assume that his authority was contingent on the manifestation of actual threat—the authority under which he had been operating for the months prior to the conflict. The consequence of this confusion was not only that he and his fellow soldiers were subjected to unnecessary risk, but that the opportunity to kill or disable an enemy soldier had been lost, with all the second and third order consequences resulting.

Additional Protocol I and how they are interpreted, but also the appropriate understanding of the intention of the drafting parties at the Diplomatic Conference of 1974-1977 that produced the Additional Protocols.

*A. Early Law: Lieber, Oxford Manual and Hague IV*

During the American Civil War, Professor Francis Lieber authored a code of rules for the Union forces to follow during the conflict against the Confederacy.<sup>88</sup> President Abraham Lincoln promulgated this code, now commonly known as the Lieber Code, in 1863 as General Order 100, *Instructions for the Government of Armies of the United States*. The Lieber Code represents the first attempt to codify and “operationalize” the laws and customs of war and establish the basic structure and relationship of the rules governing the application of force.

As explained above, one key distinction between the LOAC and the law applicable during peacetime is that during armed conflict, the principle of military necessity authorizes the use of deadly combat power as a first resort against legitimate targets (as defined by the LOAC). Lieber’s definition of military necessity is the touchstone from which the modern LOAC developed in this area and is therefore an essential pillar in the construction of use of force authority against belligerent operatives. The Lieber Code articulates the principle of military necessity as consisting “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>89</sup> Lieber bluntly acknowledged the true and harsh import of military necessity while nonetheless qualifying that soldiers in combat continue to be moral beings who are accountable for their actions.<sup>90</sup>

The Lieber Code’s subsequent articulation of military necessity highlights both the breadth of this authority and the inherent incorporation of notions of humanity therein:

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88. Lieber Code, *supra* note 47.

89. *Id.*, art. 14. Lieber emphasized these two components of military necessity in his annotated notes on the Code, writing, “I believe it is necessary to express the ideas of indispensableness and lawfulness. This seems to me very important.” Lieber’s Annotations to the Code, on file at the National Archives.

90. Lieber was no stranger to war’s harsh effects—during the Civil War, two of his sons fought on behalf of the Union, another son fought, and died, on behalf of the Confederacy. See JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012).

Art. 15. Military necessity admits of all direct destruction of life or limb of “armed” enemies, and of other persons whose destruction is incidentally “unavoidable” in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

The Lieber Code contains an even more explicit statement of the limits on military necessity in Article 71: “[w]hoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted. . . .”<sup>91</sup> Indeed, as the following discussion shows, the parameters for the application of deadly combat power against enemy belligerents have not changed dramatically from this articulation, demonstrating a remarkable consistency over the past 150 years that only serves to reinforce the conclusion that the LOAC does not contain a least harmful means obligation.

Eighty-five years after Lieber’s Code was promulgated, the U.S. Military Tribunals following World War II offered an even more direct articula-

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91. Lieber Code, *supra* note 47, art. 71.

tion of necessity: “[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel submission of the enemy with the least possible expenditure of time, life and money.”<sup>92</sup> Neither formulation restricts the amount of force permitted when attacking an opposing belligerent as long as there is a rational nexus between the degree of force used to prosecute the attack and compelling the submission of the enemy *forces*—the enemy writ large. As the previous section emphasizes, this notion of the enemy as a corporate, collective entity rather than a collection of individual threats is integral to the proper understanding and application of the principle of military necessity as it was codified in the Lieber Code and applied at Nuremberg, and as it continues to be applied today.

The U.S. Army relied on the Lieber Code well into the twentieth century. More significantly, the Lieber Code was the starting point for several nineteenth century international conventions codifying the laws and customs of war. Like the Lieber Code, none of these subsequent foundational expressions of the LOAC included a least restrictive means requirement. The initial example is the 1868 St. Petersburg Declaration, the first international treaty in which States parties renounced the use of a particularly pernicious means of warfare (certain explosive projectiles) for the purpose of minimizing unnecessary suffering *of belligerents*. The Declaration’s preamble, which has served as a foundation of the LOAC since 1868, declared:

The only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.<sup>93</sup>

At the time, these statements were directly linked to the purpose for which the states signing the St. Petersburg Declaration were convened—to limit the use of weapons, indeed one weapon in particular, that they concluded by consensus caused unnecessary suffering. For example, according to one description of the exploding projectile banned in 1868, the “blast itself [from the weapon] resulted in a serious wound, but the expanding gases and the scattering of fragments from the casing aggravated the condi-

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92. United States v. Wilhelm List et al., XI TWC 1253 (1948).

93. St. Petersburg Declaration, *supra* note 54.

tion of the victim, who inevitably died in agony.”<sup>94</sup> Thus, as this purpose demonstrates, the limitations sought and agreed upon were not limits on attacking the enemy with deadly combat power, but on the use of particular means of deadly force (i.e., particular weapons) that in addition to creating a high probability of death (a characteristic of virtually all weapons and ammunition developed for armed hostilities and provided to armed forces), also resulted in suffering considered superfluous to that necessary to efficiently disable the object of attack and, therefore, beyond that justified by military necessity.

Two additional and important LOAC documents followed soon after the St. Petersburg Declaration: the Brussels Declaration and the Oxford Manual. Neither of these took the form of treaties, so they did not impose positive binding obligations on states. Rather, they are best understood as statements of best practices in the field of conflict regulation and are considered essential historical sources for interpreting the meaning of the contemporary LOAC. The Brussels Declaration of 1874 pronounced that “the laws of war do not recognize an unlimited power in the adoption of means of injuring” the enemy.<sup>95</sup> It is significant, however, that in listing restrictions on the means of injuring the enemy, the Brussels Declaration did not set forth any restriction on killing the enemy when capture was a feasible alternate disabling option.<sup>96</sup> Instead, consistent with the St. Petersburg Declaration, it focused on certain especially pernicious weapons (such as poisoned weapons) and certain attacks against an enemy traditionally con-

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94. Hans-Peter Gasser, *A Look at the Declaration of St. Petersburg of 1868*, 33 INTERNATIONAL REVIEW OF THE RED CROSS 509, 512 (1993).

95. Brussels Declaration, Project of an International Declaration concerning the Laws and Customs of War, art. 12 (Aug. 27, 1874), <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=1D6CAC9F1AFBF559C12563CD0051553E>.

96. *See id.*, art. 13:

According to this principle are especially forbidden: (a) Employment of poison or poisoned weapons; (b) Murder by treachery of individuals belonging to the hostile nation or army; (c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion; (d) The declaration that no quarter will be given; (e) The employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868; (f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention; (g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.

sidered inconsistent with chivalrous custom (such as the prohibition on denial of quarter, murder by treachery, or killing an enemy who surrendered). These limitations on attack authority, and the Brussels Declaration writ large, provided the basis for an even more comprehensive statement of best practices: the Manual of the Laws and Customs of War adopted in Oxford, England in 1880, which reiterated these limitations.<sup>97</sup>

It was not until the 1899 and 1907 Hague Conventions and their accompanying Regulations, therefore, that a comprehensive set of rules to regulate the conduct of hostilities took the form of a binding multi-lateral international convention.<sup>98</sup> Building on these prior efforts, the 1907 Hague Convention IV included regulations for the conduct of hostilities that were annexed to the treaty. These regulations included rules governing the means of injuring the enemy, rules that are today regarded as foundational principles of the law. Among the most important are Article 22, which states that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited,”<sup>99</sup> and Article 23, which provides that “[i]n addition to the prohibitions provided by special Conventions, it is especially forbidden . . . (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering.”<sup>100</sup> This rule against weapons and systems calculated to cause unnecessary suffering is a specific prohibition that qualifies but does not supplant the broad grant of authority under military necessity to use any amount of force to subdue the enemy. Moreover, that prohibition places limitations on the use of force that causes unnecessary *suffering*. It does not include, and thus does not proscribe, the use of force to kill a belligerent. The 1899 and 1907 Hague Conventions also included prohibitions on attacking an enemy who has surrendered and on the denial of quarter,<sup>101</sup> affirming the prohibitions first delineated in the Brussels Declaration and Oxford Manual. Like the restrictions on the use of weapons that cause unnecessary suffering, these prohibitions remain central components of the protections for belligerents during armed conflict.

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97. The Laws of War on Land, Sept. 9, 1880, *available at* <http://www.icrc.org/ihl/INTRO/140?OpenDocument> (commonly referred to as “The Oxford Manual”). The Oxford Manual addressed many of the same subjects as the Brussels Declaration, although using different language.

98. Hague IV, *supra* note 54, pmb.

99. *Id.*, art. 22

100. *Id.*, art. 23.

101. Hague II, *supra* note 56, art. 23(c), (d); Hague IV, *supra* note 54, art. 23(c), (d).



*B. Geneva Law*

Unlike the focus on regulating means and methods of warfare that developed through the Hague Conventions, the focus of the Geneva Conventions, from their inception in 1864 through the promulgation of the current Conventions in 1949, was and remains almost exclusively the protection of victims of war—individuals who were not or are no longer active participants in hostilities (wounded, sick, shipwrecked, prisoners of war, civilians subject to enemy control).<sup>102</sup> Considering the clear humanitarian foundation and focus of these treaties, it is worth noting that there is absolutely no reference to or support for the assertion of a least harmful means obligation applicable to pre-submission belligerents. It also seems significant that the humane treatment obligation established by Common Article 3 of the four Geneva Conventions of 1949 applies, *inter alia*, to belligerent operatives in non-international armed conflict *only* after they are no longer “actively” involved in hostilities, which is indicated by the following language: “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . .”<sup>103</sup> According to the associated *Commentary*, these are individuals who “have laid down their arms or have been placed *hors de combat*.”<sup>104</sup> The drafting history of Common Article 3 shows that it is almost self-evident that this concept was understood as analogous to the concept of *hors de combat* applicable in international armed conflicts.

First, several of the original proposals suggested extending prisoner of war protections to members of belligerent groups in non-international armed conflicts.<sup>105</sup> Although these proposals were rejected, it seems clear that the humane treatment protection was understood as applying only after an individual belligerent operative surrendered or was physically disabled and taken into custody by a detaining force, which is the identical trigger for prisoner of war status. Indeed, the *Commentary* appears to confirm this when explaining the terminology ultimately agreed upon:

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102. See INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 19–33 (1995).

103. Common Article 3, *supra* note 18.

104. GC III COMMENTARY, *supra* note 19, at 40.

105. *Id.* at 32–34.

Taken literally, the phrase “including members of armed forces who have laid down their arms” can be interpreted (in the French version) in one of two ways, depending on whether the words “who have laid down their arms” are taken as referring to “members” or “armed forces”. The discussions at the Conference brought out clearly that it is not necessary for an armed force as a whole to have laid down its arms for its members to be entitled to protection under this Article. The Convention refers to individuals and not to units of troops, *and a man who has surrendered individually is entitled to the same humane treatment as he would receive if the whole army to which he belongs had capitulated*. The important thing is that the man in question will be taking no further part in the fighting.<sup>106</sup>

The use of the term “will” in the “no further part in the fighting” sentence indicates a *conclusive* condition, and not an *anticipated* condition. In other words, it is not until the opponent is incapacitated by submission to friendly forces, or by physical wounds or sickness, that he “will be taking no further part in hostilities.”

Second, the dual nature of the conditions that trigger the humane treatment obligation, which focus on what appears to be synonymous with surrender (laid down their arms) or incapacitation by wounds or sickness (*hors de combat*) is telling. Just as the absence of any mention in the 1949 Geneva Conventions of a class of individuals entitled to a least harmful means rule demonstrates that no such category existed or was contemplated, so the formulation of the triggers for the humane treatment obligation indicate that even in the context of the Geneva tradition, states have never recognized a least harmful means obligation applicable to belligerents.

### C. *Additional Protocol I*

Derived from the humanitarian tradition of the Geneva Conventions, and updating and merging means and methods rules from the Hague tradition with Geneva’s humanitarian tradition, Additional Protocol I established the most comprehensive positive rules providing both the authority to attack lawful targets and the limitations on that authority. As this section demonstrates, those limitations do not include a least harmful means obligation when targeting (attacking) belligerents. Given the specific and heavily em-

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106. *Id.* at 38–39.

phasized humanitarian focus of Additional Protocol I, the absence of such a limitation on lawful attack authority is particularly significant. Indeed, the authors believe the proposed least harmful means rule could credibly be rejected based solely on the absence of such a limitation in a treaty so heavily devoted to imposing humanitarian-based limitations on the use of combat power.<sup>107</sup>

### 1. AP I's Humanitarian Emphasis

Additional Protocol I is traditionally viewed as the consolidation of the law of Geneva (the Geneva Conventions from 1864 to 1949 focused on the protection of war victims) and the law of The Hague (the 1899 and 1907 Hague Conventions focused on the means and methods of warfare and the conduct of belligerents). As the International Court of Justice explained in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,

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107. Interestingly, Professor Goodman appears to have significantly constricted his assertion of a least harmful means rule, recently arguing that,

[t]he law forbids, in some circumstances, killing an enemy fighter when doing so is manifestly [unnecessary]—for instance, when capture is equally effective and does not endanger the attacking party's armed forces. That prohibition is the Law of the Protocol: unnecessary killing is a form of 'superfluous injury or unnecessary suffering' under Article 35(2).

Robert Chesney, *The Capture-or-Kill Debate #10: Goodman Responds to Heller*, LAWFARE: HARD NATIONAL SECURITY CHOICES (Mar. 12, 2013), <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-10-goodman-responds-to-heller/>. (This stands in stark contrast to his initial statement of the rule: "The 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."). Ryan Goodman, *The Lesser Evil: What the Obama Administration isn't Telling You About Drones. The Standard Rule is Capture, Not Kill*, SLATE.COM, Feb. 19, 2013, [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). It is apparent from this article that we strongly disagree with any claim that such a "law of the Protocol" exists. In addition, such a phrase is an odd way to characterize a rule originally asserted as a default obligation applicable to the United States. We disagree that even Additional Protocol I imposes such a rule. However, even assuming, *arguendo*, that such a rule can be properly characterized as "the law of the Protocol," it would not bind states not parties to Additional Protocol I, most notably the United States. Proponents have also failed to demonstrate that such a rule should be considered customary international law, a conclusion that seems conceded by the "law of the Protocol" characterization. To this end, it is highly relevant that no country that has engaged in armed conflict since Additional Protocol I entered into force has recognized a legal obligation to use least harmful means, providing almost insurmountable support for the negative—such a rule does not exist as a matter of law.

[These] two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity of that law.<sup>108</sup>

The drafters of Additional Protocol I also saw the treaty as the essential next step in the inexorable process of “reliev[ing] the sufferings of the victims of war.”<sup>109</sup> On the first day of the Diplomatic Conference, the Acting President of the conference highlighted the important work of developing and codifying the laws of war since the time of Henri Dunant, but emphasized that:

[T]he work which had been going on for a century, which did honour to the whole international community and testified to an increasingly clear realization of the need to give better protection to the human person, was unfortunately still unfinished, since the continual recurrence of violence and the constant development of new armaments had led to an extension of human suffering.<sup>110</sup>

That need to continue to develop and bolster the law applicable during armed conflict was the driving force behind the Additional Protocols. In essence, although saving the world from the “scourge of war” might not be possible, “the participants in the Conference at least had the power to make war less implacable and less indiscriminate, and to reach an agreement that would be instrumental in relieving much terrible suffering, in sparing innocent lives and in giving better protection to the weak.”<sup>111</sup>

Additional Protocol I provides the most extensive humanitarian protections codified in the LOAC to the present day, most notably the detailed catalog of protections for civilians during hostilities. These protections appear in Section I of Part IV of the treaty, entitled “General Protection

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108. Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶ 75.

109. Federal Political Department, V Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974–1977), at 7 (1978) [hereinafter Official Records].

110. *Id.* at 8, ¶ 4.

111. *Id.* at 9, ¶ 7.

Against Effects of Hostilities” and include the principle of distinction,<sup>112</sup> prohibitions on indiscriminate attacks,<sup>113</sup> the principle of proportionality,<sup>114</sup> the protection of cultural objects and places of worship,<sup>115</sup> the protection of objects indispensable to the civilian population,<sup>116</sup> the protection of the natural environment,<sup>117</sup> and a prohibition on attacking objects containing dangerous forces.<sup>118</sup> These and other prohibitions on the means and methods of warfare demonstrate Additional Protocol I’s principal humanitarian focus vis-à-vis the employment of combat power: civilians. As the *Commentary* explains, this section “obviously represents the crowning achievement of the Diplomatic Conference of 1974-1977 and the most significant victory achieved in international humanitarian law”<sup>119</sup> since the adoption of the Fourth Geneva Convention (devoted exclusively to the protection of civilian victims of war) in 1949.

Both the ICRC (which initiated and convened the Diplomatic Conference that produced Additional Protocol I) and the negotiating state parties saw an equally important need to update the law of The Hague, which was not the subject of the 1949 Geneva Conventions and “had not undergone any significant revision since 1907.”<sup>120</sup> Laws regulating the means and methods of warfare and the conduct of belligerents also fulfill the LOAC’s humanitarian purpose by safeguarding participants in armed conflict from unnecessary suffering and cruel treatment. In this regard, and particularly because this component of Additional Protocol I forms the backdrop for the legal analysis of any potential least harmful means rule, it is important to emphasize that the provisions codified in Additional Protocol I represented the consensus view of the negotiating parties and the incorporation of customary rules into the positive LOAC.<sup>121</sup>

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112. AP I, *supra* note 2, arts. 51, 52.

113. *Id.*, art. 51.

114. *Id.*, arts. 51, 57.

115. *Id.*, art. 53.

116. *Id.*, art. 54.

117. *Id.*, art. 55.

118. *Id.*, art. 56.

119. PROTOCOL COMMENTARY, *supra* note 9, at 583.

120. *Id.* at xxix.

121. *Id.* at xxxiv–xxxv.

## 2. Protections for Civilians from the Effects of Attacks: In Brief

As noted above, Additional Protocol I implements the cardinal LOAC principle of distinction, obligating belligerents to distinguish between lawful objects of attack and all other persons, places, and things on the battlefield. Thus, belligerents may only deliberately direct force against lawful objects of attacks. These obligations reflect the humanitarian focus of Additional Protocol I; civilians and civilian property are protected from deliberate attack because the application of combat power is restricted to targets that contribute to the submission of an opponent's military capability, or military objectives.

The principle of proportionality set forth in Additional Protocol I, explained in Section I above, bolsters the conclusion that protecting belligerents with a least harmful means rule is not mandated or introduced by the Protocol's humanitarian focus. Proportionality focuses on civilians who may be the potential victims of incidental injury from otherwise lawful attacks between and against belligerents. But civilians are the exclusive beneficiaries of the rule's protections. Proportionality protection is simply inapplicable to the intended lawful object of attack—belligerents.<sup>122</sup> Thus, “[p]roportionality in relation to the military advantage anticipated is inextricably linked to the topic of collateral damage to civilians (and civilian objects) expected from attacks against lawful targets and has nothing to do with injury or suffering sustained by combatants.”<sup>123</sup> To that end, the proportionality rule is but one part of a broader mosaic of rules in Additional Protocol I that function to limit targeting authority with the specific and common purpose of protecting civilians. The notable absence of a parallel rule of proportionality applicable to belligerents is clear indication of the shared view of Additional Protocol I's drafters and signatories that no such limitation exists.<sup>124</sup>

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122. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 40 (2010).

123. DINSTEIN, *supra* note 3, at 65.

124. Much attention has been focused on the statements of a leading commentator on the LOAC and former vice president of the ICRC, Jean Pictet, that “if a combatant can be put out of action by taking him prisoner, he should not be injured; and if he can be put out of action by light injury, grave injury should be avoided.” INTERNATIONAL COMMITTEE OF THE RED CROSS, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS 13 (1973). Simply put, Pictet's view could have been, but was not, codified in AP I. Pictet's statement reflects a perhaps laudable aspiration of the direction in which the LOAC should move or evolve.

Finally, the LOAC mandates that all parties take certain precautionary measures to protect civilians, another foundational component of the protection of civilians and an equally important marker of the distinction between the protections for civilians and for belligerents. In accordance with Article 57 of Additional Protocol I, parties launching attacks must ensure that targets are military objectives, refrain from indiscriminate attacks (including those violating the principle of proportionality), choose means and methods of warfare offering the least harm to civilians, choose the military objective offering the least harm to civilians when two objectives offer similar military gain, and provide effective advance warning, where feasible, of attacks that may affect the civilian population.<sup>125</sup> Like the protections inherent in the principle of proportionality, the protections mandated by Article 57's obligations to take precautions are focused solely on civilians, civilian property and the civilian population. Precautions are essential to the fulfillment of Additional Protocol I's humanitarian goals—namely, protection of civilians—because “the effective implementation of the safeguard principles expressed in the Protocol largely depends on [compliance with these precautionary obligations].”<sup>126</sup>

### 3. Affirmative Prohibitions on the Use of Lethal Force

Given Additional Protocol I's humanitarian focus, it is unsurprising that the treaty outlines specific constraints on the use of force, such as those noted briefly above. Any analysis of Additional Protocol I's restraints on and parameters for the use of force must therefore start with the specific principles and obligations that the treaty sets forth. In addition, it is important to note the difference between protections mandated with regard to civilian persons and protections for belligerent enemy personnel.<sup>127</sup> The proscriptions noted above—prohibitions against targeting civilians, attacking cultural objects, *et cetera*—are aimed directly at the protection of individual civilians and the civilian population. Although these rules lie at the heart of Additional Protocol I's humanitarian goals and framework, they do

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But the statement must be identified for what it was—and remains—which is *lex ferenda* and not *lex lata*.

125. AP I, *supra* note 2, art. 57(2)(a)(i), 57(2)(a)(ii), 57(2)(a)(iii), 57(2)(b), 57(2)(c), 57(3).

126. PROTOCOL COMMENTARY, *supra* note 9, at 680.

127. Indeed, these two separate sets of protections are located in separate sections of Additional Protocol I, reinforcing the difference between them.

not apply to the use of force against or the treatment of belligerent personnel or military objectives. Invoking these rules to assert a broader least harmful means obligation that extends to belligerent operatives is therefore inconsistent with the very framework of the treaty.

Indeed, the provisions of Additional Protocol I clearly delineate between the beneficiaries of various protections, whether civilian or belligerent. The very obligation at the heart of the principle of distinction manifests this essential framework. Although the protective aspects that flow from the principle of distinction are critically significant, “no *less* important is the corresponding exposure to attack of combatants and military objectives.”<sup>128</sup>

Article 52 of Additional Protocol I defines military objectives as “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>129</sup> Certainly there can be debate as to the qualification of certain objects, but it is without question that members of belligerent armed forces are per se military objectives and thus legitimate targets. As noted in the *Commentary* to Article 52,

[t]he definition of [military objective] is limited to objects but it is clear that members of the armed forces are military objectives, for, as the Preamble of the Declaration of St. Petersburg states: “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; [...] for this purpose it is sufficient to disable the greatest possible number of men”.<sup>130</sup>

The *Commentary* to Article 43, the first treaty definition of combatant,<sup>131</sup> also reinforces the legality of attacking belligerents with deadly combat power: “it should be explicitly stated that all members of the armed forces [with the exception of medical and similar non-combatant members] can

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128. DINSTEIN, *supra* note 3, at 89.

129. AP I, *supra* note 2, art. 52(2).

130. PROTOCOL COMMENTARY, *supra* note 9, at 635.

131. Article 43(1) provides that “[t]he Armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party.”



participate directly in hostilities, i.e. attack and be attacked.”<sup>132</sup> The word “attack” is subsequently defined in Additional Protocol I as “acts of violence against the adversary, whether in offence or in defence.”<sup>133</sup> Nowhere is the definition of “attack” limited to a certain measure of force, specific operational contexts, or specific conditions of the belligerent operative. In short, nothing in the meaning of the concept of attack supports a least harmful means limitation on the measure of such acts of violence. In fact, the *Commentary* explicitly indicates that “it refers to the use of arms with the intent of deliberately killing or wounding the enemy.”<sup>134</sup> As a result, it is wholly inconsistent with the positive LOAC to interpret the authority to attack as limited to only injuring or disabling the enemy rather than killing.

This section thus analyzes the express prohibitions on the use of force that Additional Protocol I sets forth with regard to enemy belligerents—in contrast to the protections for civilians mentioned above. These affirmative prohibitions include the protection for those who are *hors de combat*, limitations on the means and methods of warfare, the prohibition of the denial of quarter, and constraints on the use of force against escaping prisoners.

#### a. *Hors de Combat*

The notion of *hors de combat* is central to the LOAC’s core purpose of minimizing suffering during armed conflict. As the *Commentary* notes, “one might argue that the whole secret of the law of war lies in the respect for a disarmed man.”<sup>135</sup> Proponents of a least harmful means obligation often argue that such a rule falls within a broad conception of *hors de combat*, in addition to or as an alternative to a separate obligation to use the least harmful means.<sup>136</sup> For that reason, analysis of the meaning of *hors de combat* provides useful illumination for the debate over the parameters for the use of deadly combat power against belligerents.<sup>137</sup>

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132. PROTOCOL COMMENTARY, *supra* note 9, at 515.

133. AP I, *supra* note 2, art. 49(1).

134. PROTOCOL COMMENTARY, *supra* note 9, at 482.

135. *Id.* at 480.

136. See generally a string of blogs debating the issue on LAWFARE: HARD NATIONAL SECURITY CHOICES between the current authors, Kevin Heller, Jens Ohlin, and Ryan Goodman, <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-11-good-man-responds-to-ohlin/> (last visited May 2, 2013); Chesney, *supra* note 107.

137. For an excellent analysis of the application of Article 41 of Additional Protocol I and the doctrine of *hors de combat*, see MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY

Building on the framework established in the Hague Regulations and other foundational LOAC sources, the ICRC draft that was the basis for the negotiations at the 1974-1977 Diplomatic Conference contained a provision concerning attacks on persons who are out of combat, or *hors de combat*. Originally proposed as Article 38,<sup>138</sup> the provisions on persons who are *hors de combat* went through numerous amendments<sup>139</sup> and were considered by both Committee One and Committee Three.<sup>140</sup> The provision was eventually divided into two separate articles and the portion focused on persons who are *hors de combat* became Article 41.

Article 41 of Additional Protocol I is derived from Article 23 of the 1907 Hague Regulations (discussed above)<sup>141</sup> and the 1949 Geneva Conventions,<sup>142</sup> but expands the application. Article 23 applied only to surren-

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ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 218–24 (1982); IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 83–97 (2009).

138. The originally proposed version by the ICRC, draft Article 38, stated:

1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:
  - (a) is unable to express himself, or
  - (b) has surrendered or has clearly expressed an intention to surrender,
  - (c) and abstains from any hostile act and does not attempt to escape.
2. Any Party to the conflict is free to send back to the adverse Party those combatants it does not wish to hold as prisoners, after ensuring that they are in a fit state to make the journey without any danger to their safety.
3. It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.

I Official Records, *supra* note 109, pt. III, at 13.

139. *Id.* at III Official Records 169–71.

140. *Id.* at XIV Official Records, CDDH/III/SR 1, at 7. The Diplomatic Conference split into three Committees for the task of negotiating and adopting the component parts of the Additional Protocols. Committee One addressed general and final provisions, those on execution in Protocol I and those on fundamental guarantees in Protocol II; and Committee Three was assigned means and methods of warfare and the protection of the civilian population. BOTHE, *supra* note 137, at 4.

141. Hague IV, *supra* note 54, art. 23(c) provides that it is forbidden “[t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”

142. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, 1 Bevans 516, *available at* <http://www.icrc.org/ihl/INTRO/180?OpenDocument>; GC III, GC IV; XIV Official Records, *supra* note 109, CDDH/III/SR.29, at 276 ¶¶ 30–31; PROTOCOL COMMENTARY, *supra* note 9, at 480–82; BOTHE, PARTSCH & SOLF, *supra* note 137, at 218.

der, and listed laying down arms as one aspect of demonstrating surrender. In contrast, Article 41 expands the defined descriptions of those who are *hors de combat* in two important ways: first, it extends the coverage of those who can be considered *hors de combat* to more than combatants belonging to a declared “enemy,” and second, it includes within the definition of *hors de combat* more than merely those who have surrendered.

With regard to the first expansion, although the heading of Article 41 is “Safeguard of an enemy *hors de combat*,”<sup>143</sup> the text of the provision is not limited to “an enemy.” Article 23(c) of the Hague Regulations specifically provides protections to the “enemy.”<sup>144</sup> Article 41 of Additional Protocol I goes beyond that characterization and states that “[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.”<sup>145</sup> The use of the term “person” as opposed to “enemy” was deliberate.<sup>146</sup> As discussed in the *Commentary*, “this change was designed to make clear that what was forbidden was the deliberate attack against persons *hors de combat*.”<sup>147</sup> Article 41 thus manifests the recognition that more than just those officially declared as an enemy, such as civilians who are directly participating in hostilities and irregular fighters, can become *hors de combat* and benefit from these protections.<sup>148</sup>

With regard to the second expansion, Article 41 broadens the meaning of *hors de combat* beyond surrender. Article 23(c) of the 1907 Hague Convention<sup>149</sup> applies to those who surrender and lists having laid down one’s arms or no longer having a means of defense as apparent indicators for an attacker to use as support for the affirmative desire to surrender by a combatant. Under that provision, once an enemy had clearly demonstrated his intent to surrender, an attacker was obligated to accept that surrender.<sup>150</sup>

143. AP I, *supra* note 2, art. 41.

144. Hague IV, *supra* note 54, art. 23(c).

145. AP I, *supra* note 2, art. 41(1).

146. See PROTOCOL COMMENTARY, *supra* note 9, at 482 (“Perhaps it is because a person *hors de combat* can no longer be considered as an enemy that the Conference has also abandoned here the terminology of Article 23(c) of the Hague Regulations in favour of the word ‘person’ . . .”).

147. *Id.*

148. PROTOCOL COMMENTARY, *supra* note 9, at 483 (“The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions and respect for the rule is also imposed on the civilian population, who should, like the combatants, respect persons *hors de combat*.”).

149. Hague IV, *supra* note 54, art. 23(c).

150. DINSTEIN, *supra* note 3, at 161.

Article 41(1) of Additional Protocol I reaffirmed that attacking those who are *hors de combat* is prohibited, but then, in Article 41(2), expands the *hors de combat* categories beyond those listed in Hague IV. Although surrender remains explicitly applicable, Article 41(2)(b) states that a person is also *hors de combat* if “he clearly expresses an intention to surrender.”<sup>151</sup> The doctrine of surrender is a part of customary law and was never questioned during the negotiations.

Article 41’s expanded list also includes those “in the power of an Adverse Party” and those incapable of defending themselves due to physical incapacity.<sup>152</sup> The *Commentary* demonstrates that this expansion is, in effect, merely a consolidation of existing protections for wounded, sick and shipwrecked (as referenced in Article 10 of Additional Protocol I) and the protection for those who “no longer [have] the means of defence,” which dates back to the 1907 Hague Regulations.<sup>153</sup> Most important, the *Commentary* emphasizes that *hors de combat* is just that—“out of the fight”—and that an enemy operative who can still present a threat, even if wounded or sick, does not fall within the definition of *hors de combat*. Thus, the *Commentary* states, “there is no obligation to abstain from attacking a wounded or sick person who is preparing to fire, or who is actually firing, regardless of the severity of his wounds or sickness.”<sup>154</sup> This telling statement serves as an important reminder of a fundamental premise of military operations during armed conflict: the enemy is presumed hostile and offensive until such presumption is clearly rebutted.

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151. AP I, art. 41(2)(b); see PROTOCOL COMMENTARY, *supra* note 9, at 487 (“If the intention to surrender is indicated in an absolutely clear manner, the adversary must cease fire immediately; it is prohibited to refuse unconditional surrender.”).

152. See AP I, *supra* note 2, art. 41(2)(c) (including in the definition of *hors de combat* a person who “has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself”).

153. Hague IV, *supra* note 54, art. 23(c). See also PROTOCOL COMMENTARY, *supra* note 9, at 488 (“In fact, it is not only because a person of the adverse Party is wounded, or partially handicapped, that this obligation arises, but because he is incapable of defending himself. In this respect, the text goes back to the wording of Article 23(c) of the Hague Regulations, which prohibits especially the killing or wounding of an enemy who no longer has the means of defence.”).

154. PROTOCOL COMMENTARY, *supra* note 9, at 488.

## i. “in the power of”

The states who negotiated Additional Protocol I amended the ICRC’s proposed definition of persons who qualified as *hors de combat* in several ways.<sup>155</sup> One of the most obvious was the desire to combine the Third Geneva Convention’s reference to persons “who have fallen into the power of the enemy”<sup>156</sup> with those who surrender and might otherwise be *hors de combat*. In doing so, the negotiating nations changed the language to cover those who are “in the power of an Adverse Party.”<sup>157</sup> The purpose of the chosen language was to be more inclusive, and to incorporate situations in which a person might not yet have the opportunity to surrender but might have no means of defense.<sup>158</sup>

With regard to who could be considered *hors de combat*, the ICRC representative at the Diplomatic Conference explained that

[t]he determining factor [in determining who was *hors de combat*] was abstention from hostile acts of any kind, either because the means of combat were lacking or because the person in question had laid down his arms. It was therefore necessary that there should be an objective cause, the destruction of means of combat, or a subjective cause, surrender.<sup>159</sup>

The representative from Uruguay then elaborated, stating, “[i]n view of recent events, it was clear that if an enemy was *hors de combat*, it was because he had laid down his arms and had thereby lost his status as a combatant.”<sup>160</sup> When confronted with an enemy, that individual was no longer able or did not have the will to conduct combat and therefore was *hors de combat*. The Brazilian representative echoed this understanding: “An enemy was

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155. See notes 143–52 *supra* and accompanying text.

156. GC III, *supra* note 17, art. 4.

157. AP I, *supra* note 2, art. 41(2). See also PROTOCOL COMMENTARY, *supra* note 9, at 484–85. As a drafting note, the other place where Additional Protocol I uses the words “in the power” is Section III (and references to it), addressing civilian treatment during occupation. Although no clear tie between the use of these exact words within the Official Records is apparent, it seems appropriate to assume that using those same words in both places was meant to mean similar levels of control when determining who is “in the power” of an adversary.

158. XIV Official Records, *supra* note 109, CDDH/III/SR.29, at 278 ¶ 4 & 284 ¶ 75; PROTOCOL COMMENTARY, *supra* note 9, at 481.

159. XIV Official Records, *supra* note 109, CDDH/III.SR.29, at 276 ¶ 30.

160. *Id.* at 276 ¶ 33.

*hors de combat* when he no longer had *any* possibility of defending himself or when he had surrendered.”<sup>161</sup> The lack of either will (manifested by the affirmative act of surrender) or capability (manifested by disabling wounds or sickness) thus form necessary elements of a person being “in the power of” an adversary. In addition, as discussed below, it is important to consider these comments in the context of who bears the burden in the determination of whether someone is *hors de combat*.

Proponents of a least harmful means obligation appear to nest their asserted rule within a broad conception of the term “in the power of” in Article 41 of Additional Protocol I. They posit the question, “if an enemy belligerent is surrounded by an overwhelming number of friendly forces, and he can be subdued with no meaningful risk to those forces, isn’t he functionally ‘in their power’ and therefore *hors de combat*?”<sup>162</sup> We believe that the positive LOAC and the intent of the drafters, as exemplified in the *Commentary’s* reminder that an enemy who is preparing to fire, can still fire, or is still firing, regardless of the hopelessness of his situation, is not *hors de combat*, affirm that the answer to this question remains “no” and the historical foundation for the inclusion of the term “in the power of” rebuts their assertion.

Not only do neither the Protocol itself nor the *travaux préparatoires* reflect such a broad conception of “in the power of”, but such an argument actually further detracts from any proposed least harmful means rule. The very argument that a least harmful means obligation exists only pursuant to an expansive interpretation of “in the power” means that it certainly does not exist as an accepted LOAC rule, but rather at best as an aspirational constraint on belligerent targeting derived from a tactically incoherent interpretation of a LOAC concept whose meaning has been settled for centuries. Conflating the two concepts represents an unfortunate misunderstanding of both the LOAC and the meaning of “in the power of.”<sup>163</sup> In

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161. *Id.* at 276 ¶ 34.

162. *See, e.g.*, Goodman, *supra* note 7.

163. For example, proponents of a least harmful means rule often rely on the following statement by Fritz Kalshoven and Liesbeth Zegveld to support the existence of an obligation to use least harmful means:

Admittedly, no treaty rule lays down in express terms that an enemy cannot be killed if they could be taken prisoner instead. But neither is there solid ground for the assertion that an enemy ‘has surrendered’ (and, hence, can no longer be killed) only from the moment their capture has been formally completed. If not against the terms, the argument goes against the spirit of Article 23(c-d) and, indeed, against the very notion of humanitarian law as the body of law aiming

addition, it assumes that Additional Protocol I's slight expansion from "surrender" to "in the power of"<sup>164</sup> provides fodder for an infinite expansion of "in the power" to impose an obligation to constantly assess whether an enemy belligerent who is not actively firing or preparing to fire should no longer be considered capable of acting pursuant to the dictates of enemy belligerent leadership, action that is the duty of every soldier. These arguments are simply inconsistent with the LOAC and misunderstand the fundamental conclusion of the Protocol drafters—that clarity and "implementability" must and do outweigh any potential rule that is based on no more than "maybe" as its foundation for split-second decision-making in the course of combat.<sup>165</sup>

ii. The burden to establish "*hors de combat*"

An essential underlying foundation to Article 41 is the presumption that a combatant is targetable based on his status. Though it is conceivable that this status-based attack authority may in some rare circumstances result in a factually overbroad application of combat power, it is a necessary presumption to the conduct of hostilities. Although often viewed solely as identifying who can be attacked and when, Article 41 essentially provides infor-

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to protect human life and ward off unnecessary human suffering; or, in terms of the Martens clause, against the notion of 'the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.

KALSHOVEN & ZEGVELD, *supra* note 3, at 98. However, what this statement does is to (1) highlight that there is no rule in the LOAC creating a least harmful means obligation, and (2) specifically place any urging to use less harmful means within the concept of "in the power"—and only within a very narrowly expanded conception of "in the power" that tracks quite closely the interpretation set forth in AP I and in the *Commentary*. The assertion that "formal capture" is not the only trigger for "in the power" is exactly what the drafters of AP I had in mind, as noted in the text above, and therefore this and similar statements simply highlight the development of the definition of *hors de combat* between Hague IV and AP I and do not support the existence of a least harmful means obligation as a LOAC rule.

164. See notes 156–61 *supra* and accompanying text.

165. As explained extensively in this article, overbroad attack authority may, in rare situations, be a necessary and unfortunate effect of this clarity. However, that is the price armed forces have paid historically for the benefit of targeting clarity. Accordingly, even a narrow conception of a least harmful means rule characterized as "the law of the Protocol" remains invalid and inconsistent with both positive law and as the intent of the Protocol drafters.

mation on how an individual can overcome that presumption of targetability and obtain the humanitarian protection derived from the alternate status of *hors de combat*. Article 41 indicates that “[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.”<sup>166</sup> Using the language “who is recognized or who, in the circumstances, should be recognized” demonstrates that attackers must be aware of and be alert for indications from enemy fighters that they are no longer in combat in order to overcome that presumption. How such determinations are made and the information on which these determinations rest are also relevant to understanding the protection of *hors de combat* and whether it contributes to a least harmful means rule.

The discussions during the negotiations reinforced that the decision regarding whether someone is in the power of an enemy is based on the enemy’s perception of that person’s situation. The Parties generally agreed that “the prohibition extended only to attacks directed against persons who were, in fact, recognized to be *hors de combat* and those who, under the circumstances, should have been recognized by a reasonable man as *hors de combat*.”<sup>167</sup> In that vein, the Brazilian representative stated, “[o]nly combatants facing such an enemy could decide whether or not he had any possibility of defending himself.”<sup>168</sup> Soldiers should certainly be looking for signals from those who seek to manifest their disassociation with enemy belligerent leadership by rendering themselves *hors de combat*, either affirmative signals from those who are capable or recognition of an individual’s inability to affirmatively signal, but each soldier must ultimately use his or her discretion to determine if that signal is being effectively communicated.

Significantly, resting discretion in the attacker to judge when an enemy belligerent is *hors de combat* goes hand in hand with the LOAC’s imposition of the burden on the enemy individual to clearly signal that he is *hors de combat*. Thus, the language concerning surrender places the burden on the surrendering soldier to indicate his intention to surrender “in an absolutely clear manner”<sup>169</sup> before the attacker has the legal obligation to accept the surrender. More broadly in the *hors de combat* equation, the determination of

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166. AP I, *supra* note 2, art. 41(1).

167. XV Official Records, *supra* note 109, CDDH/236/Rev.1, at 384, ¶ 23. This paragraph from the official record of the conference is also quoted in PROTOCOL COMMENTARY, *supra* note 9, at 483. *See also* BOTHE, *supra* note 137, at 220.

168. XIV Official Records, *supra* note 109, CDDH/III/SR.29, at 277 ¶ 34.

169. PROTOCOL COMMENTARY, *supra* note 9, at 487.



whether an individual is in the power of an adversary rests with the attacker, after clear signaling from the person being attacked.<sup>170</sup> That is, the attacking party determines when it has an opposing fighter within its power, but can only do so, and is only obligated to do so, if there are clear and objectively unambiguous indications that the determination are warranted. Such indications are framed objectively by the nature of the confrontation, one that presumes all enemy belligerent personnel are hostile. The *Commentary* explains, “a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands.”<sup>171</sup> He must do something to signal to the attacker that there is a reason to overcome the presumption that he is hostile and to instead consider him as no longer taking hostile actions and as *hors de combat*.

As A.P.V. Rogers encapsulates the approach of the negotiating States in *Law on the Battlefield*,

Protocol I goes on to state that a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack. A person is *hors de combat* if he is in the power of an adverse party, he clearly expresses an intention to surrender, or has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself. However, he must abstain from any hostile act and must not attempt to escape.

No procedure is laid down, but normally a soldier surrendering would be expected to put down his weapons and come out into the open with his hands raised above his head . . . [using a surrender example from Iraq war]. In the case of the wounded, it is only those who either stop fighting, or are prevented by their wounds from fighting, who are protected . . . [using an example of a soldier who carried on fighting despite wounds until he was killed].<sup>172</sup>

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170. XV Official Records, *supra* note 109, CDDH/236/Rev.1, at 384 ¶ 23. *See also* DINSTEIN, *supra* note 3, at 161.

171. PROTOCOL COMMENTARY, *supra* note 9, at 486. The *Commentary* offers alternative options, including “to cease fire, wave a white flag and emerge from a shelter with hands raised. . . . Even if he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.” *Id.* at 487.

172. ROGERS, *supra* note 3, at 55.

In summary, combatants and fighters are presumptively targetable, but can signal to attacking forces that they are *hors de combat*, and thereby overcome that presumption, by surrendering or otherwise indicating clearly that they are unable or unwilling to continue engaging in combat. The decision of whether someone is in the power of an attacker is based on an objectively reasonable determination by the attacker.<sup>173</sup> These two components of the *hors de combat* equation—the burden on the individual for a clear indication of being “out of the fight” and the soldier’s discretion in interpreting such indications—are highly relevant to the potential existence of a least harmful means rule. First, the very fact that only after those two distinct elements are satisfied does the authority to attack terminate provides strong reaffirmation of a broad and historically recognized right to attack (with the full import of the meaning of the term “attack” as explained above) enemy belligerents in the absence of an *hors de combat* determination. Second, this *hors de combat* framework is not a continuum of use of force, but rather an either/or determination—again severely undermining the argument that the LOAC includes a least harmful means rule or obligation.

iii. “Abstains from any hostile act”

*Hors de combat* provides permanent protection from attack as long as the individual abstains from hostile acts. Article 41(2)(c) therefore adds a proviso to the list of situations rendering an individual *hors de combat*, noting that such person will be *hors de combat* “provided that in any of these cases he abstains from any hostile act and does not attempt to escape.”<sup>174</sup> Indeed, the negotiating record from the Diplomatic Conference reinforces that *hors de combat* and hostile acts are simply incompatible, that “the determining factor [in identifying a person as *hors de combat*] was abstention from hostile acts of any kind.”<sup>175</sup> An individual who might at one point be considered *hors de combat* could then revert to participating in hostilities and become subject again to the presumption of hostility either by taking hostile actions or by attempting to escape.

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173. XV Official Records, *supra* note 109, CDDHI236/Rev.1, at 383 ¶ 21. This decision is not always easy to make in the heat of the battle. The *Commentary* recognizes this by stating “It would be useless to deny that in the heat of action and under the pressure of events, this rule is not always easy to follow.” PROTOCOL COMMENTARY, *supra* note 9, at 480.

174. AP I, *supra* note 2, art. 41(2)(c).

175. XIV Official Records, *supra* note 109, CDDH/III/SR.29, at 276 ¶¶ 30, 39.

The *Commentary* echoes the significance of resumption of hostile conduct as revoking *hors de combat* protection.

A man who is in the power of his adversary may be tempted to resume combat if the occasion arises. Another may be tempted to feign a surrender in order to gain an advantage, which constitutes an act of perfidy. Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be *hors de combat* once again.<sup>176</sup>

Thus, once an individual has been determined to be *hors de combat*, he remains so characterized throughout the fight, and potentially even after the conflict ends,<sup>177</sup> although hostile actions or attempts to escape will forfeit such protection.

*b. Limits on the Means and Methods of Warfare*

The *hors de combat* rules protect belligerents based on their condition or actions when confronted with potential deadly attack by an opponent. Additional Protocol I includes and reaffirms an equally important set of protections based on how belligerents are attacked, through limitations on the means and methods of warfare. States have long negotiated agreements prohibiting the use of certain methods or means of warfare, and, as noted earlier, one of the LOAC's foundational documents, the St. Petersburg Declaration, stemmed from precisely such motivation.<sup>178</sup> The section of

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176. PROTOCOL COMMENTARY, *supra* note 9, at 488. See also DINSTEIN, *supra* note 3, at 169 (a hostile act includes "still participating in the battle, or directly supporting battle action.").

177. XV Official Records, *supra* note 109, CDDH/236/Rev.I, at 385 ¶ 26.

178. For example, see St. Petersburg Declaration, *supra* note 54; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58A096110540867AC12563CD005187B9>; Convention for Protection of Cultural Property in Event of Armed Conflict & Regulations, May 14, 1954, 249 U.N.T.S. 240, available at <http://www.icrc.org/ihl/INTRO/400>; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons

Additional Protocol I addressing Methods and Means of Warfare (Section I of Part III) has the primary purpose of reaffirming the fundamental principles of the rules governing conduct between belligerents established more than a century ago. As the *Commentary* explains, “[i]n addition to the general principle by which the right of belligerents to adopt means of injuring the enemy is not unlimited, they contain two types of fundamental rules: on the one hand, humanitarian rules, and on the other hand, rules on good faith.”<sup>179</sup> Reaffirming and bolstering these principles rests on the principle of limited warfare, central to the LOAC since the first codifications of the modern LOAC in the Lieber Code and the St. Petersburg Declaration.

Additional Protocol I’s limitations on the means and methods of warfare are: 1) the prohibition on the use of weapons and methods of warfare of a nature to cause unnecessary suffering; 2) the prohibition on using means or methods of warfare intended or expected to cause widespread and severe damage to the environment; 3) the prohibition of perfidy; and 4) prohibitions on using recognized emblems or the flags, uniforms or emblems of the enemy party.<sup>180</sup> Only the first of these is relevant to whether a potential least harmful means obligations exists in the LOAC. The negotiating parties engaged in extensive debate about how and where to set the parameters of the prohibition against inflicting unnecessary suffering, and ultimately refrained from “rendering it more complete and precise.”<sup>181</sup> The decision to leave the prohibition, set forth in Article 35(2), as a general statement without either specifying certain weapons or making only abstract humanitarian statements also reflected the fact that, as one party not-

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and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, *available at* <http://www.icrc.org/ihl/INTRO/450?OpenDocument>; Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333 (1977), *available at* <http://www.icrc.org/ihl/INTRO/460?OpenDocument>.

179. PROTOCOL COMMENTARY, *supra* note 9, at 381–82. *See also* Downey, *supra* note 52, at 261 (“Regulated violence is generally considered as that violence directed or authorized by superior authority for the purpose of disabling the greatest possible number of the enemy, but the military effect of which is not disproportionate to the suffering it entails. This definition is a compromise between the conflicting military and humanitarian concepts of the purpose of war. Under this definition of regulated violence the paramount military interest is to kill or disable the greatest possible number of the enemy and the subservient humanitarian interest is to relieve the individual soldier from all unnecessary suffering.”).

180. *See* AP I, *supra* note 2, arts. 35, 37, 38, 39.

181. PROTOCOL COMMENTARY, *supra* note 9, at 407.

ed, “[i]n humanitarian law, of course, it was essential to bear in mind present-day realities.”<sup>182</sup>

Section II of this Article analyzed the meaning and breadth of the principle of unnecessary suffering and the limits it sets on the use of attack authority against belligerents. It is important to emphasize here, however, that the limitations on means and methods of warfare do not, as some argue,<sup>183</sup> support the conclusion that employing combat power as a first resort that is highly likely to kill an opponent is also prohibited. There is an important distinction between these two assertions. Use of methods or means of warfare that create a high probability of death as a first resort does not indicate that death is the intended outcome of the engagement. Instead, the intended outcome is to *attack* the enemy with the type of overwhelming combat power that results in the enemy’s “prompt submission” in the most efficient manner possible, an objective unquestionably justified by military necessity.<sup>184</sup> While these methods and means will often kill the lawful objects of attack, their employment cannot be understood as rendering death inevitable in the sense of the LOAC prohibition.<sup>185</sup> Instead, it is a method of warfare intended to maximize the probability of disabling an opponent.

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182. VI Official Records, *supra* note 109, CDDH/SR.39, at 100 ¶ 52.

183. See Goodman, *supra* note 7; INTERPRETIVE GUIDANCE, *supra* note 5, at 82; Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 831, 904–09 (2010); JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 75–76 (1975); Luban, *supra* note 8, at 40.

184. BOTHE, PARTSCH & SOLE, *supra* note 137, at 194–95 (defining military necessity as the principle justifying measures “relevant and proportionate” to securing the prompt submission of the enemy).

185. The use of the term “attack” throughout this article reflects an important aspect of lawful targeting authority. An order to attack may routinely result in infliction of death as a first resort. However, an order to attack should not be equated with an order to kill. This is not a distinction without significance. Causing death as a measure of first resort as the result of an attack is unquestionably permissible when force is directed against enemy belligerents. However, because such attacks are not conducted to kill, but to bring the enemy into submission as efficiently as possible, they do not render death “inevitable”, as prohibited by the LOAC. Even in the most tactically practical vernacular of combat forces, it is far more likely that a junior leader will direct soldiers to “shoot him!” or “engage that target!” rather than to “kill him” or “kill that enemy.” While it is obviously impossible to claim that use of the word “kill” in such orders never occurs, we believe combat leaders instinctively characterize the employment of deadly combat power as “engagements” or “attacks.” No matter what terminology may be used, as a legal matter it is an order to attack with means creating a high probability of causing death. However, it is error to char-

Achieving this effect is central to military operations, and the consistent practice of state armed forces engaged in combat operations, their training, and the type of weapons they are provided reflects this purpose as well. Hays Parks, one of the most respected experts on the application of the LOAC to the use of military weaponry (who not only personally experienced close combat as a Marine officer in Vietnam, but also served as the principal U.S. government LOAC expert for nearly four decades and was integrally involved in virtually every significant LOAC treaty development during that period) also emphasized this point. Criticizing the ICRC's reliance on the principle of unnecessary suffering as a basis for a least harmful means obligation in the LOAC, Parks explains,

For example, the document suggests that the prohibition of unnecessary suffering or superfluous injury meant "if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided." This argument is not consistent with state practice or the practical nature of the battlefield, much less the domestic law of most nations with regard to law enforcement use of deadly force against its own citizens. Subsequent negotia-

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acterize such attacks as "kill" missions. The enemy often will be killed, but that is an inevitable consequence of belligerent targeting authority. The authors therefore caution against use of terminology such as "kill lists" to characterize approved enemy targets. Targets are attacked with methods and means assessed as ideal to produce the necessary tactical and operational effect and, therefore, "attack" or "targeting" lists are a more accurate characterization. Indeed, U.S. joint doctrine reflects this by defining targeting and targets as follows:

The purpose of targeting is to integrate and synchronize fires into joint operations. Targeting is the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities. Targeting also supports the process of linking the desired effects of fires to actions and tasks at the joint force component level.

A target is an entity or object considered for possible engagement or action. It may be an area, complex, installation, force, equipment, capability, function, individual, group, system, entity, or behavior identified for possible action to support the commander's objectives, guidance, and intent. Targets relate to objectives at all levels—strategic, operational, and tactical.

Chairman, Joint Chiefs of Staff, JP 3-60, Joint Targeting vii (2007). This same doctrinal publication defines different categories of targets and target lists, such as the Joint Integrated Prioritized Targeting List. *Id.* at II-8. With regard to the LOAC prohibition on "rendering death inevitable," see Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶¶ 13-17.

tions in the CCW [Convention on Certain Conventional Weapons] process did not support this argument as a definition of what constitutes unnecessary suffering or superfluous injury.<sup>186</sup>

In essence, therefore, limitations on specific means and methods do not equate to a general principle requiring that the least restrictive means must be used in every (or any) combat engagement. So long as the intended object of attack is an enemy belligerent not yet rendered *hors de combat* and the methods and means (weapons and tactics) used to attack that target are lawful (in U.S. practice, this is established for weapons fielded in accordance with a legal review at the time of procurement, and for tactics subject to legal review during operational planning<sup>187</sup>), the suffering resulting from the attack is conclusively necessary and therefore lawfully inflicted—even if some less harmful means may have been effective in disabling the enemy.

*c. Denial of Quarter*

The prohibition on the denial of quarter, which appears in Article 40, has formed part of the law of war for centuries and across many cultures. The article reads: “It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”<sup>188</sup> Originally suggested as part of the article discussed above on safeguarding individuals who are *hors de combat*,<sup>189</sup> upon agreement of the negotiating states, it was ultimately included as a separate provision.<sup>190</sup>

The purposes underlying the prohibition on denial of quarter and its inclusion as separate article, apart from the obligation to safeguard those who are *hors de combat*, bear on the question of whether the LOAC includes a least harmful means rule. First, the prohibition derives not only from humanitarian concerns, but also directly from the principle of military necessity and its symmetry with military operational logic. As one of the au-

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186. Parks, *supra* note 72, at 72–73 n.65.

187. AP I, *supra* note 2, art. 36. The United States has implemented the requirement to review proposed weapons in Deputy Secretary of Defense, DOD Directive 5000.01, The Defense Acquisition System ¶ E1.1.15 (2003) (Certified Current as of Nov. 20, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/500001p.pdf>. See CORN ET AL., *supra* note 43, at 228–31 for an example of a weapons review.

188. AP I, *supra* note 2, art. 40.

189. I Official Records, *supra* note 109, pt. III, at 312.

190. *Id.*, XIV Official Records, CDDH/III/SR.38, at 277 ¶ 34; *Id.*, XV Official Records, CDDH/236/Rev.1, at 383 ¶ 21.

thoritative commentaries on Additional Protocol I explains, a “declaration or order that there shall be no survivors, or that no prisoners shall be taken, tends to stiffen the adversary’s will to resist and is therefore counterproductive to the achievement of the legitimate objectives of a military operation.”<sup>191</sup> Second, the negotiating history and analysis of this provision also highlights that the denial of quarter provision is concerned solely with the treatment of captured adversaries, not with either the determination of who is *hors de combat* or with the use of combat power against enemy belligerents before they are captured.<sup>192</sup> Thus, it provides no support for the imposition of an obligation to *offer* an enemy suspected of a practical inability to effectively resist the opportunity to surrender (although as a matter of policy this will often be done), and therefore is almost irrelevant to the least harmful means debate.

*d. Escaping Prisoners*

Some commentators argue that one other provision of Additional Protocol I is relevant to a least harmful means rule: the rules governing the use of force against escaping prisoners. As noted above, prisoners lose their protections as persons who are *hors de combat* when they attempt to make an escape. This rule is not new to Additional Protocol I, but originally appeared in the Brussels Declaration of 1874.<sup>193</sup> Under Article 41(2)(c) of Additional Protocol I, attempted escape is considered a hostile act and when a prisoner of war attempts to escape, the presumption of hostility returns until that individual meets the criteria of *hors de combat* once again. The *Commentary* echoes the negotiating parties’ determination in this regard by adding this elaboration:

If they make an attempt to escape or commit any hostile act, the use of arms against them is once more permitted within the conditions prescribed in the Third Convention. The same applies *a fortiori* for adversaries who benefit only from the safeguard of Article 41 without being recognized as prisoners of war. In fact, the proviso at the end of the present paragraph specifically provides it.<sup>194</sup>

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191. BOTHE, PARTSCH & SOLF, *supra* note 137, at 217.

192. *See, e.g.*, PROTOCOL COMMENTARY, *supra* note 9, at 476–77.

193. Brussels Declaration, *supra* note 95, art. 28(2) (“Arms may be used, after summoning, against a prisoner of war attempting to escape.”).

194. PROTOCOL COMMENTARY, *supra* note 9, at 485.



The reference to the Third Geneva Convention is useful here for understanding the reach of this rule and the difference between the use of force against escaping prisoners and against belligerents in the course of combat operations. Both the *Commentary* to the Additional Protocols and the *Commentary* to the Third Geneva Convention explain that only such force as required by the circumstances—stopping the escape—is allowed.<sup>195</sup> This is, admittedly, a different measure of force than that which the LOAC permits against belligerents in the course of military operations, but the circumstances and the accordant presumptions associated with the escapee are fundamentally different.

That difference is crucial to understanding why the more restricted use of force (“if circumstances require it”) authorized against escaping prisoners is not the rule with regard to belligerents in general. Before the escape, the prisoner is protected from attack as one who is *hors de combat*. For this reason, acts preparatory to escape do not justify the use of deadly force precisely because at that time, the individual is still *hors de combat* and protected.<sup>196</sup> Only once the prisoner has begun and is in the process of escape does he lose the protection of *hors de combat* (as explained above) and become susceptible to the use of deadly force, for it is at this point that the risk of his re-association with enemy belligerent leadership and his potential to engage in hostilities on behalf of that leadership become significant enough to justify the use of deadly force to prevent that return to belligerent status. The situation of a belligerent is simply inapposite to that of a prisoner preparing to or thinking about escape: the belligerent, until *hors de*

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195. *See id.* at 488 (“An escape, or an attempt at escape, by a prisoner or any other person considered to be *hors de combat*, justifies the use of arms for the purpose of stopping him. However, once more, the use of force is only lawful to the extent that the circumstances require it. It is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances.”); GC III COMMENTARY, *supra* note 19, at 246–47 (“Captivity is based on force, and although there can be no doubt on the matter, it is recognized in international customary law that the Detaining Power has the right to resort to force in order to keep prisoners captive. At the same time, this consideration also limits the use of weapons against prisoners. Whether in the case of attempted escape or any other demonstration . . . , the use of weapons ‘shall constitute an extreme measure, which shall always be preceded by warning appropriate to the circumstances.’”).

196. *See* GC III COMMENTARY, *supra* note 19, at 246 (“It is also important, however, to make a distinction between escape proper and acts or phases preparatory thereto. If a prisoner is surprised within the camp limits while making preparations to escape, there is no justification for opening fire on him.”).

*combat*, remains subject to attack pursuant to the presumption of hostility derived from that status. That individual therefore does not benefit from any protections that would mandate a lesser use of force than that which the LOAC permits in accordance with the fundamental principles of military necessity and humanity.

#### *D. What AP I Does Not Require*

Proponents of a least harmful means rule—an obligation to capture rather than kill when attacking enemy belligerents—rely ultimately on the oft-repeated and foundational provision of the LOAC: “the right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>197</sup> This notion, appearing with varying wording first in the St. Petersburg Declaration, then the 1907 Hague Regulations, and ultimately in Article 35 of Additional Protocol I, is indeed fundamental to understanding the LOAC and the complementary and interlocking relationship between military necessity and humanity. No more, however, it is an equally powerful reminder that belligerents have extensive means—and authority—for injuring the enemy. The fact that Article 35 of Additional Protocol I’s statement of this principle is then followed by several important affirmative limits on the means of attacking the enemy—discussed extensively in the previous section—is decisive evidence that those stated limitations and prohibitions are the only limits, and that any other required restraints on attacking enemy belligerents would have appeared in the same location in the positive LOAC.

##### 1. The *Travaux Préparatoires* and the Treaty Itself

The previous section details Additional Protocol I’s affirmative prohibitions and constraints on the use of combat power to attack belligerents. These prohibitions stem from the treaty law and customary principles dating back to the foundational documents of the mid-nineteenth century. Nowhere in Additional Protocol I can one find a rule obligating belligerents to use the least harmful means available in targeting enemy belligerents. Such a rule, if it did exist or was even intended to be added by the State parties, would naturally fit in Part III, “Methods and means of warfare—Combatant and prisoner-of-war status.” This section, devoted to the reaffirmation of both humanitarian rules, such as minimizing unnecessary

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197. Hague IV, *supra* note 54, art. 22.

suffering, and good faith rules, such as the prohibition on perfidy, “has a key function in relation to the other provisions of the Protocol, since non-respect for the rules of combat entails non-respect for all other rules.”<sup>198</sup> Consider also the hierarchical importance of a least harmful means rule, if it were to exist. Such a rule would apply to all belligerents, not just those wounded, captured, or attempting escape. It would therefore not only be present in this section of Additional Protocol I, but would have primacy of place. Indeed, the absence of such a rule is telling, in and of itself.

Nor does the *travaux préparatoires* or the *Commentary* provide any indication that such a rule was actually the intent of the drafters and simply not expressed in a coherent positive manner. Rather, the Protocol is understood as the pinnacle of humanitarian protections during armed conflict, for both civilians and combatants. The *Commentary* emphasizes the humanitarian success story of Additional Protocol I, declaring that “[i]f it had not been possible to impose limitations on certain methods of combat, there would have been reason to fear that the credibility of humanitarian law would suffer seriously as a consequence.”<sup>199</sup> At the same time, the drafters also understood the need to keep the rules and principles applicable to the realities of combat and workable for those tasked with their implementation, and believed that they had accomplished both tasks in a manner both protective and effective. As Jean Pictet wrote in the introduction to the *Commentary*, “it is all the more necessary to explain [the Protocols] and ensure that they are understood at all levels, and most of all, by those who will be responsible for putting them into practice.”<sup>200</sup> Were a new rule requiring least harmful means—one not present in the treaty or customary antecedents to the Protocols—incorporated into Additional Protocol I, this need for clarity and understanding would have demanded a clear statement of the rule so as to make it both evident and understandable for the commanders and soldiers obligated to execute it in the course of military operations.<sup>201</sup> Again, the absence of such interpretive guidance and explication is deafening.

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198. PROTOCOL COMMENTARY, *supra* note 9, at 382.

199. *Id.* at 589.

200. *Id.* at xxxv.

201. For example, provisions of human rights law requiring the use of the least harmful means state such obligation clearly. *See* ICCPR, *supra* note 50, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 222.

## 2. Proportionality versus Proportionality and the Consequences of Conflation

One explanation for the assertion of a least harmful means rule is that it is an explicit (or perhaps subtle) effort to extend human rights law's proportionality protections applicable to peacetime law enforcement activities into the treatment of belligerents during armed conflict. A look at the unfortunately all too common conflation and confusion of the various legal principles of proportionality explains how, first, the principle of proportionality found in Additional Protocol I does not apply to belligerents and, second, Additional Protocol I, and the LOAC in general, does not include a separate proportionality obligation with regard to belligerents. Proportionality is a term discussed in a variety of ways and settings with regard to the use of force by states and individuals and against states, individuals and objects. It is a central principle of the LOAC, a key normative requirement framing the right to use force in self-defense, and an essential factor limiting the use of force within law enforcement and human rights parameters.

These forms of proportionality differ substantially from each other. “[P]roportionality in law enforcement is a strikingly different concept from its meaning and function under the law of armed conflict.”<sup>202</sup> The former focuses on the object of state violence—the target of the deadly force—while the latter focuses on the unintended victims of the use of force, which is directed at legitimate targets of attack. When the two are conflated, the result is that one or more of these different forms of proportionality may be applied when it is not relevant or, perhaps more troubling, may not be applied when it should.<sup>203</sup> Still more problematic, when they become conflated or the lines between them become blurred, the force of these key principles of international law will be diminished.

As a preliminary matter therefore, consider the scenario in which soldiers fighting in an armed conflict would no longer be able to use lethal force as a first resort absent a showing of individualized threat and necessity in every case, which is the exact effect of a least harmful means rule. Here, the LOAC's acceptance of targeting on the basis of status (for certain categories of persons) would be substantially diluted, if not nullified. On

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202. Dale Stephens, *Military Involvement in Law Enforcement*, 92 INTERNATIONAL REVIEW OF THE RED CROSS 453, 462 (2010).

203. See, e.g., Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Self-Defense and Armed Conflict Justifications*, 38 WILLIAM MITCHELL LAW REVIEW 1655 (2012); Corn, *Mixing Apples and Hand Grenades*, *supra* note 43.

first glance, many might argue that such a development seems more protective of rights. However, it would unravel the inherent delicate balance between military necessity and humanity that lies at the heart of the LOAC, likely trending too far in the direction of the latter. “There is no treaty language regarding ‘proportionate force’ applied against military units or other military objectives, and State practice historically has emphasized application of ‘overwhelming force’ against enemy forces.”<sup>204</sup> More important, “[c]onflating these disparate principles into a singular regulatory norm substantially degrades the scope of lawful targeting authority and confuses those charged with executing combat operations.”<sup>205</sup> In addition, when soldiers can no longer use force in a manner appropriate to fulfill their mission to defend against and defeat the relevant threat, the state fails to protect its own citizens from ongoing or future attacks, in and of itself a severe decrease in the protection of civilians from the dangers of war.

The relationship between attack authority and the core LOAC principle of proportionality further bolsters the conclusion that the law does not include a least harmful means limitation.<sup>206</sup> The LOAC principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. It therefore does impose additional limitations on attack

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204. W. Hays Parks, *Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 769, 806–07 n.103 (010); *see id.*, at 815 (noting that the use of a law enforcement paradigm subjects wartime military operations to an unrealistic “use-of-force continuum . . . beginning with the least-injurious action before resorting to ‘grave injury’ in attack of an enemy combatant or a civilian taking a direct part in hostilities”). In addition, the application of human rights law as a governing paradigm for armed conflict “is still widely perceived as battlefield-inadequate, risky to implement, and therefore unrealistic.” Robin Geiß & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 11, 25 (2011); *see also* Corn & Jenks, *supra* note 38, at 347 (“[I]t is common practice to use overwhelming force against . . . enemy objectives in order to influence the subsequent behavior of enemy leadership and other enemy forces.”).

205. Geoffrey S. Corn, *Self Defense Targeting: Conflict Classification or Willful Blindness?*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 16, 20 (Kenneth Watkin & Andrew J. Norris eds., 2012)(Vol. 88, U.S. Naval War College International Law Studies).

206. *See* AP I, *supra* note 2, art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

authority even when directed at a lawful military objective (target). However, this limitation in no way operates to protect lawful objects of attack, e.g. enemy belligerents. Rather, attacks will violate this principle when the anticipated harm *to civilians* is excessive compared to the military advantage anticipated by the otherwise lawful attack against enemy belligerents.<sup>207</sup> Thus, unlike the peacetime/human rights proportionality counterpart, the intended object of attack—the enemy belligerent—is never the beneficiary of the LOAC variant of this principle.<sup>208</sup>

In contrast, proportionality in human rights law refers to the measure of force directed at the intended target of the attack. Law enforcement authorities can use no more force than is absolutely necessary to effectuate an arrest, defend themselves, or defend others from attack. “In the domestic context, the force used must be strictly proportionate to the aim to be achieved.”<sup>209</sup> In Resolution 34/169, the United Nations General Assembly adopted a Code of Conduct for Law Enforcement Officials, which states that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”<sup>210</sup> The commentary to this provision states that the principle of proportionality restricts the use of force by such officials. In particular, in human rights law and law enforcement, “the principle of proportionality operates to protect the object of state violence by allowing only that amount of force necessary to subdue a hostile actor.”<sup>211</sup>

This disparate focus of the proportionality protections is logical in relation to the disparate purposes of the employment of violence within these distinct contexts. When state actors employ violence during peacetime, it is considered an exceptional situation.<sup>212</sup> The goal of such violence is to re-

207. See *id.*, art. 51; see also ROGERS, *supra* note 3, at 17–23; DINSTEIN, *supra* note 3, at 128–38.

208. See *Targeted Killings Case*, *supra* note 6, ¶ 46, (“[P]roportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might—like a combatant—be the objective of a fatal attack. That killing is permitted.”).

209. Watkin, *supra* note 50, at 32–33 (citing McCann, *supra* note 30, ¶ 149).

210. Code of Conduct for Law Enforcement Officials art. 3, G.A. Res. 34/169, U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

211. GURULÉ & CORN, *supra* note 36, at 80.

212. See Code of Conduct, *supra* note 210. In September of 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.” According to these principles, “law enforcement officials, in carrying out their duty, shall,

store the status quo ante—a safe environment for society—and the individual disrupting that safety retains the same legal protections enjoyed by all citizens of the state. As a result, only the amount of force necessary to restore a safe and secure environment is tolerated, because employing additional force cannot be justified by the purpose of state action.

During armed conflict, in contrast, the objective of using force against any enemy belligerent is to contribute to the submission of an enemy as promptly and efficiently as possible. History testifies to the fact that this objective is often implemented by unrelenting and violent application of force in a manner that demonstrates to an enemy the futility of continued resistance. Even fundamental principles of military operations reflect this truism. For example, pursuant to the principle of mass, a military commander is instructed to bring maximum firepower and resources to bear on critical points of the battlefield and enemy vulnerabilities in order to overwhelm the enemy.<sup>213</sup> The notion of striking an enemy with “overwhelming” force is a basic and core principle of military operations,<sup>214</sup> but it is also a

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as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.” See UN Principles, *supra* note 30. This human rights based Code of Conduct also provides that:

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
  - (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
  - (b) Minimize damage and injury, and respect and preserve human life;
  - (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
  - (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

*Id.*

213. See FM 3-0, *supra* note 70, at 4-39 (2011). Although this foundational doctrinal publication is now superseded by ADP 3-0, Unified Land Operations, the principles of war remain central to the synchronization and effective application of combat power. The principle of mass is synonymous with the concentration of combat power in order to produce decisive effect. See *supra* note 70. This definition reveals that it is a fundamental principle of combat operations to bring overwhelming combat power to bear against an opponent at the decisive place and time. Any interpretation of the law that would require an operational commander to “capture instead of wound” and “wound instead of kill” would be inconsistent with this principle.

214. *Id.* This principle was also central to what came to be known as the “Weinberger” and “Powell” doctrines—both of which proposed criteria for assessing the propriety of committing United States armed forces to combat operations. Both Weinberger and Powell made the identification and achievement of a clearly defined objective by forc-

reflection that the fundamental objectives of armed conflict are inconsistent with making enemy forces the beneficiaries of a proportionality rule.

The contrasting implementation of the proportionality obligation in the context of peace operations or belligerent occupations also illustrates the disparate meaning and application of this principle. During such operations, presumptive threats in the form of hostile forces are rarely recognized. Instead, like police officers, armed forces conducting such missions operate under use-of-force authority triggered by the conduct of the individuals they encounter, rather than by status.<sup>215</sup> When that conduct presents a threat, the use of force is authorized in response. However, because the purpose of such use is to restore the status quo ante of a safe and secure environment—as for a police officer—and because individuals creating a threat are normally not considered to be agents of a collective belligerent enemy—unlike defined enemy belligerents—extensive effort is expended to train soldiers to react to such threats with only that amount of force necessary to subdue the object of the use of force. In short, the object of state action in peace operations, like the object of force used by a police officer, is the beneficiary of the proportionality protection.

An oft-cited example of the conflation of the LOAC and human rights principles appears in the 2006 *Targeted Killings* case before the Israeli Supreme Court. In analyzing the lawfulness of the Israeli government’s policy of “targeted frustration,” the Court held, *inter alia*, that

[a] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. . . . Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed per-

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es capable of overwhelming opposition central to their proposed criterion. *See* Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFFAIRS, Winter 1992/1993, at 32. A classic example of striking an enemy with overwhelming combat power was Operation Just Cause, the U.S. intervention in Panama in 1989 to oust General Manuel Noriega and disable the Panamanian Defense Forces. *See* THOMAS DONNELLY ET AL., OPERATION JUST CAUSE: THE STORMING OF PANAMA (1991).

215. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS & UNITED NATIONS DEPARTMENT OF FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES (2008). *See also* Prosecutor v. Sesay, Kallon and Gbao (RUF case), Case No. SCSL-04-15-T, Judgement (Special Court for Sierra Leone March 2, 2009) (holding that peacekeepers are entitled to the protections granted to civilians and civilian objects under the LOAC because, *inter alia*, they are only authorized to use force in self-defense under their rules of engagement and operational orders); TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (2002).



son is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.<sup>216</sup>

This case is often cited as a persuasive example of state practice supporting a least harmful means obligation in the LOAC. However, the Israeli Supreme Court's finding that targeting is only lawful if no less harmful means are available—even in the context of an armed conflict—“impose[s] a requirement not based in [the LOAC].”<sup>217</sup> Indeed, the Israeli Supreme Court “used the kernel of a human rights rule—that necessity must be shown for any intentional deprivation of life, to restrict the application of [a LOAC] rule—that in armed conflict no necessity need be shown for the killing of combatants or civilians taking a direct part in hostilities.”<sup>218</sup> Of equal importance is the fact that the ruling is limited to the unique set of facts applicable to a decades-long occupation of Palestinian territories. In those circumstances, infusion of human rights principles, which would include a least harmful means rule in relation to military use of force against hostile civilians, is not overly controversial. But that analysis is wholly inapposite to situations of armed conflict not involving the additional layer of norms applicable to belligerent occupation.<sup>219</sup> Accordingly, the ruling does

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216. *Targeted Killings Case*, *supra* note 6, at 40. The Court held that (1) the conflict between Israel and the relevant Palestinian armed groups is an international armed conflict; (2) terrorists are not combatants but are civilians taking a direct part in hostilities; and (3) such terrorists can be lawfully targeted during and for such time as they are taking a direct part in hostilities.

217. Michael N. Schmitt, *Targeted Killings and International Law: Law Enforcement, Self-Defense, and Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 525, 552 (Roberta Arnold & Noëlle Quénié eds., 2008).

218. Milanovic, *supra* note 4, at 120.

219. As the Court explained,

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities.

*Targeted Killings Case*, *supra* note 6 at 40; *see also* GURULÉ & CORN, *supra* note 36, at 86 (Suggesting that the mixing of the LOAC and law enforcement paradigms “may be explained by the unique occupation relationship between the two parties to the conflict, a relationship that implicitly implicates law enforcement type authorities and constraints. Or per-

not support a broader capture rather than kill obligation.<sup>220</sup> Even though a “proportional” use of force restriction protecting the object of attack was clearly an aspect of this ruling, it is limited both in context (belligerent occupation) and with regard to the object of protection (civilians directly participating in hostilities, not belligerents<sup>221</sup>) in such a way that it does not support the broader application of the rule.

It is therefore logical to infer from the exclusion of the pre-submission belligerent from the LOAC’s proportionality protection that there is no analogous limitation imposed on lawful attack authority. If the LOAC did expressly, or even implicitly, include a least harmful means limitation applicable to belligerents, then why would belligerents have been excluded from a positive rule that prohibits attack when the harm is considered “excessive” to the military advantage anticipated? The answer seems clear: unlike a use of force against an individual who represents an actual threat in peacetime where human rights proportionality operates to protect the intended object of state violence,<sup>222</sup> resort to deadly combat power is justified based exclusively on the presumption of threat triggered by belligerent status, and once justified is unrestrained by any type of analogue to a proportionality obligation.

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haps the Court was tempering the effect of its broad interpretation of direct participation in hostilities, attempting to ensure that individuals not actually causing immediate harm to the [army] be subdued by less than lethal means when feasible. Ultimately, that aspect of the opinion, like the international armed conflict aspect, is arguably limited to the unique situation in the West Bank and Gaza”). Note, however, that since the time this case was decided, Israel has disengaged from the Gaza Strip, altering the nature of the legal regime applicable to targeted strikes in that area.

220. See generally Watkin, *supra* note 50.

221. See *supra* notes 44–46 and accompanying text.

222. See UN Principles, *supra* note 30; McCann, *supra* note 30, ¶ 149 (“In this respect the use of the term ‘absolutely necessary’ in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.”).

## IV. SYNCHRONIZING LAW, POLICY, AND OPERATIONAL PRACTICE

*A. The Relationship Between Law and Policy*

There is no question that contemporary military operations increasingly manifest the operational necessity for constraints on the otherwise lawful scope of use of force authority, constraints that frequently take the form of a least harmful means limitation. These constraints are routinely manifested in ROE. No understanding of the LOAC and how it affects the planning and execution of military operations would be complete without an examination of the relationship between the law and ROE. Although the LOAC and ROE are inextricably intertwined, they are two distinct sources of operational regulation.

As defined in U.S. military doctrine, ROE are “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”<sup>223</sup> In other words, ROE are intended to give military leaders at all levels of command greater control over the execution of combat operations by subordinate forces. The history of warfare is replete with examples of what have essentially been ROE. For example, during the Battle of Bunker Hill, Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive, “Don’t shoot until you see the whites of their eyes.”<sup>224</sup> Given his limited resources against a much larger and better-equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was, in effect, an ROE is remembered to this day for two primary reasons: it enabled the colonial militia to maximize enemy casualties and, in so doing, exposed these forces to increased risk—risk that the law did not oblige them to accept.

ROE have become a key aspect of modern military operations<sup>225</sup> and a key component of mission planning for U.S. and many other armed forces.<sup>226</sup> Although ROE are not coterminous with the LOAC, they must be

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223. DoD Dictionary, *supra* note 78.

224. See JOHN BARTLETT, FAMILIAR QUOTATIONS 446 & n.1 (Emily M. Beck ed., 14th ed. 1968), *quoted in* Martins, *supra* note 86, at 34.

225. See Daily Press Briefing, U.S. State Department (Oct. 3, 2007), *available at* <http://2001-2009.state.gov/r/pa/prs/dpb/2007/oct/93190.htm>.

226. See International & Operational Law Department, Judge Advocate General’s Legal Center & School, Operational Law Handbook 84 (2007); Center for Law and Military

completely consistent with it. In other words, while some aspects of the LOAC do not affect a mission's ROE, all ROE must comply with this law. For example, consider an ROE provision that allows a soldier to attack all members of the enemy armed forces once declared hostile. Although this provision is completely appropriate, the authority it provides extends only to enemy personnel who qualify as lawful objects of attack pursuant to the LOAC, and therefore would never permit attack against an enemy rendered *hors de combat*.<sup>227</sup> Similarly, if an ROE allows for a pilot to destroy a bridge with a bomb, it does not relieve the pilot of his responsibility to terminate the attack if he believes it will violate the principle of proportionality.<sup>228</sup> ROE will also often contain provisions that remind soldiers that they can only engage those who engage in defined conduct endangering soldiers or others, so called conduct-based ROE. This limitation even sometimes applies to enemy belligerents when the commander decides to limit the normal status-based attack authority. In so doing, ROE ensure LOAC compliance and routinely prohibit uses of force consistent with the LOAC in order to advance some additional strategic, operational, or tactical goal.

Appreciating this interrelationship is therefore vital to understanding why the violation of a constraint imposed by a mission-specific ROE, or even customarily imposed by ROE, does not *ipso facto* establish a LOAC violation. To assess that apparent discrepancy, it is necessary to determine whether the ROE constraint was coterminous with the LOAC, or more restrictive than the scope of permissible authority derived from the LOAC. In contemporary military operations, including armed conflict, it is common for ROE to be more restrictive than the LOAC in order to satisfy policy considerations related to the application of combat power.<sup>229</sup> Accordingly, identifying a common ROE constraint is simply not probative to the analysis of the existence of a *legal* rule imposing a similar constraint. In the context of a least harmful means rule, this distinction and interaction between the LOAC and ROE is therefore essential to understanding the content of the LOAC's obligations with regard to belligerent attack authority and when that authority terminates as a matter of law.

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Operations, Rules of Engagement Handbook 1-1-1-32 (2000).

227. Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEXAS LAW REVIEW 139, 165 (1994) ("In both cases, Marine snipers said they were firing at men with machine guns, actions allowed under the Americans' 'rules of engagement' (ROE).").

228. AP I, *supra* note 2, arts. 57(2)(a)(iii), 57(2)(b).

229. *See, e.g.*, Tactical Directive, *supra* note 80.

Although ROE have and will likely continue to periodically impose a least harmful means restraint on operations directed against enemy belligerents, military operational art provides many logical explanations for imposing, on a contextual basis, such a limitation. These range from the desire to capture the enemy as a means of obtaining intelligence to the effort to demonstrate to other enemy personnel the wisdom of submission. It is critical to recognize, however, that such restraints derive from operational motivations, and not humanitarian concern for the enemy belligerent operative. This indicates the fallacy in invoking such practices as evidence of a least harmful means obligation that limits the scope of attack authority. Indeed, the history of armed conflict and tactical realities indicate that there are many situations where commanders choose to employ the full force of their combat capability with clear knowledge that many of the enemy operatives subject to attack might be inclined to surrender, or pose no immediate significant threat to friendly forces. Attacking enemy forces in such situations confirms that the LOAC does not mandate a least harmful means consideration when engaging in operations to disable enemy belligerent operatives.

### *B. Operational Challenges*

If a least harmful means rule did exist within the LOAC, or if such a rule were to be imposed, it would present significant and potentially crippling impediments in the implementation of that obligation. From training, to execution of operations, to investigation and accountability for violations of the law, no aspect of the intersection between law and military operations would be untouched or unhindered by the rule's consequences. Furthermore, although proponents of a least harmful means rule argue that it fulfills the LOAC's core humanitarian purpose, such a rule has an equally opposite effect of undermining the LOAC's role in protecting soldiers from the corrosive psychological and moral effects of combat.

#### 1. Training

The first and most obvious of these challenges is translating the rule into training and the ROE applicable to a declared hostile force. Proponents of the least harmful means rule cite the practice of including such a restriction in ROE to rebut any assertion that such a challenge is in any way signifi-

cant.<sup>230</sup> These proponents fail to appreciate, however, two significant factors that undermine this argument. First, even if it is operationally feasible to implement such a restriction in one tactical environment, this does not mean it is feasible in all tactical environments. Relying on the counterinsurgency context as a touchstone of feasibility therefore lacks credibility. What is necessary, rather, is to consider implementation of such a rule in *every* tactical context associated with the full range of operations that occur in armed conflict. Second, ROE are never effectively implemented simply by enunciating the relevant restriction on the use of force in an order, directive, or ROE card. Rather, these restrictions are only as effective as the training that prepares soldiers to implement them. Accordingly, training for a combat environment is indelibly linked to the effectiveness of any ROE or other imposition of battlefield regulation.

In considering this latter impediment, it is essential to note that if a least harmful means obligation were recognized, the obligation would not be context-specific, like ROE for a particular conflict or mission, but would require adherence in all conflict situations. As a result, this least harmful means rule would have to become an element of the baseline training for *all* members of the armed forces. From the inception of all combat training, an effective method would have to be developed to incorporate compliance with this obligation into the combat instincts that military training seeks to instill in the soldier.

Certainly, the LOAC's protection for individuals rendered *hors de combat* means that limitations on the legality of using force in combat are already an aspect of such training. The symmetry between the clarity provided by the rules of presumption associated with status-based targeting authority and such training is essential, however. The explicit indicia that trigger *hors de combat* status discussed above, coupled with the requirement that the non-disabled belligerent operative bears the burden to affirmatively manifest surrender, facilitates a baseline standard of training and development that is effective for all soldiers, from the newly-minted private to the senior attack aircraft pilot. Injecting a least harmful means rule into this equation would compromise the efficacy of this warrior development process. By demanding the exercise of case-by-case judgment when engaged in hostilities with a declared hostile opponent, it would significantly increase the burden on the attacking force to assess when the enemy belligerent opponent fell within the protections afforded to those considered *hors de combat*.

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230. See, e.g., Goodman, *supra* note 7, at 9.

In contrast, leaving any least harmful means limitation within the policy realm provides the military commander the flexibility to tailor it to the mission, enemy, terrain, troops available, time and civilian considerations<sup>231</sup> applicable during a given operation.

Training armed forces for armed conflict is thus in no way analogous to the training provided for peace officers or even for armed forces focused on a peacekeeping or stability support mission precisely because in armed conflict there is no expectation that responding to enemy threats will be graduated. Instead, unlike hostile actors encountered during peace operations, enemy combatants are presumed to *always* represent a threat of death or grievous bodily harm. Furthermore, the organizations they belong to also pose such a threat. It might be tempting to assume that shifting from one use of force paradigm to another is a simple task, but those familiar with the relationship between training and operational effectiveness know this is a highly complex process.<sup>232</sup> As a result, effective training must be mission-driven, which means that preparation for armed conflict must focus primarily on developing a warrior ethos derived from the armed conflict use of force paradigm.<sup>233</sup> Therefore, soldiers are trained to employ deadly force against such targets, irrespective of the conduct they encounter.

The inclusion of a least harmful means rule in contemporary counterinsurgency ROE indicates that this challenge is not insurmountable, of course. Indeed, soldiers can be trained to even more restrictive ROE standards, such as when they are engaged in peace-support or occupation operations. However, imposition of this type of policy-based constraint, as noted above, reflects a conscious command judgment that the increased risk imposed on friendly forces is offset by the tactical, operational, and strategic value of the constraint. This might make sense in the context of counterinsurgency (COIN) operations, where the cost of perceived use of force over-breadth produced by status-based presumptions is not considered acceptable based on the risk associated with limiting that authority. In such contexts, the benefits of restraining otherwise lawful uses of force may justify this increased risk, but they do not dictate it. In other contexts, such as a high intensity conflict in Korea, the cost/benefit equation would likely be fundamentally different. Nor does the imposition of such con-

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231. Department of the Army, FM 5.0, The Operations Process (2012).

232. See *supra* note 88.

233. See Martins, *supra* note 86, at 90.

straints reflect recognition of a humanitarian obligation to impose such additional risk on friendly forces.

Furthermore, units operating pursuant to such ROE require significant training that prepares them to “ramp down” from the LOAC-based norm of pure status-based targeting.<sup>234</sup> As a practical matter, restraining the instinctual level of combat aggressiveness developed in baseline training pursuant to a pure status-based targeting standard makes it feasible to “ramp up” to the baseline norm on order. If, in contrast, the baseline standard of training must prepare the soldier to constantly question the permissibility of employing deadly combat power against a declared hostile enemy belligerent operative who is still physically capable of engaging in operations and has not surrendered, it will produce an inevitable dilution of the aggressiveness that is frequently an essential component of seizing and retaining the initiative during an attack against enemy personnel.

## 2. Operational Complexity and Lack of Clarity

The mix of status-based targeting authority with a conduct-based limitation that a least harmful means rule mandates would also compromise operational clarity. Unlike in the traditional execution of combat operations, belligerents would be adversely influenced by a *de facto* (if not *de jure*) presumption that every use of force could be assessed as potentially unjustified and excessive, and every “shoot/don’t shoot” decision would be subject to critique requiring belligerents to justify their decision to attack on an individual basis. This is acceptable in an operational context that does not involve confrontation with organized opposition belligerent groups, precisely because individuals encountered in such operational contexts are not pre-

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234. One of the authors, while advising a U.S. Army ground combat unit in Mosul, Iraq, during Operation Iraqi Freedom, observed the difficulties in quickly “ramping down” the ROE. In Mosul, suicide bombings of U.S. and Iraqi checkpoints and convoys were unfortunately commonplace. The corresponding ROE reflected that reality and U.S. forces would employ lethal force against vehicles approaching checkpoints or convoys that failed to heed warning signs and measures. Operational needs dictated reassigning one U.S. Army unit, which had been operating under these permissive ROE, to the Kurdish region of northern Iraq. That region was considerably safer and force was employed differently and sparingly. But soldiers are not light switches, and within hours of relocating, the former Mosul-based soldiers were conducting a vehicle convoy, and when an unknown vehicle approached the convoy at a high rate of speed and ignored warnings, the soldiers instinctively employed force appropriate for their previous operating environment with tragic results to the occupants of the approaching vehicle, a family of four.



sumptively hostile. As a result, requiring individualized justification for employing deadly force would not be expected to compromise mission effectiveness or subject friendly forces to significant risk. When, however, the operational context involves confronting organized belligerent opponents whose operations transcend normal criminality and rise to the level of armed conflict, imposing an individualized threat justification not only endangers individual members of the force by producing an inevitable hesitancy to employ deadly force, but also compromises the legitimate function of the state action by degrading the effectiveness of forces in subduing the opponent.<sup>235</sup> It is therefore unsurprising that the history of armed conflict and the law developed to regulate armed conflict compel the conclusion that it is the precise opposite presumption that must dictate belligerent relations in the battle space.

It cannot be overemphasized that a legal obligation to implement a least harmful means rule would not apply only to certain types of tactical contexts (such as COIN operations) or certain methods of warfare (such as attack with remotely piloted vehicles). Instead, were the LOAC to include such a rule, it would be one of universal applicability. How would such a rule be translated into ROE language that is simple and clear enough to facilitate combat decision-making in the context of a medium or high-intensity armed conflict against a declared hostile enemy? Just attempting to propose such a rule indicates the level of analytical complexity that would result, with its accordant tactical hesitation. For example, perhaps the ROE would initially indicate: “Redland forces are declared hostile and may be attacked at all times once positively identified unless captured or disabled by wounds.” But then the least harmful means rule would require a further qualifier: “However, if you assess that a positively identified member of the Redland forces cannot [meaningfully] [seriously] [viably] [genuinely] resist or threaten you or friendly forces, you are prohibited from engaging this enemy.” Just attempting to articulate (let alone implement) the limitation vis-à-vis an enemy force in a medium or high-intensity conflict reveals how inconsistent it would be with the art of war.

Any individual who has trained or been trained on ROE can see immediately how dangerous this qualifier would be. First, how does a soldier make this assessment? What is the standard of certainty? What happens when two soldiers disagree on this assessment? At what point would a

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235. With regard to the complex training and accountability dilemmas produced by such a paradigm, see *supra* III.B.1 and *infra* III.B.3.

subordinate be obligated to disobey an order to attack a declared hostile enemy in order to comply with a least harmful means obligation? Ultimately, all of these implementation complexities translate into tactical hesitation. Soldiers would be subjected to the constant risk that their decisions to attack an enemy, even after being positively identified, would be investigated and potentially condemned. Thus, deviating from the existing bright-line standard for determining when attack authority terminates will inevitably subject every use of force decision to an implied conduct based analysis, thereby diluting critical battlefield aggressiveness and initiative.

The arguments for a least harmful means rule have developed most recently in the context of COIN operations or attacks conducted during a sophisticated deliberate targeting process (such as air attacks). This focus, which severely oversimplifies the issue, highlights multiple reasons why such a rule is inconsistent with the LOAC and operationally unworkable. First, even these environments, in which the ROE often do include restraints akin to a least harmful means rule (leading proponents of such a rule to argue that it is indeed workable and obligatory<sup>236</sup>), demonstrate the complete disconnect from operational realities. Second, attempting to translate a least harmful means rule into a legal obligation in international armed conflicts is proof positive that such a rule simply cannot be reconciled with the LOAC's purposes or application.

As a starting point, consider that if a least harmful means rule were law, every use of deadly force against an enemy belligerent would need to be justified by the individual threat that enemy operative was posing at the time. Attempting to discern which soldier fired which rounds, even in a discrete engagement in a COIN environment, is incredibly difficult.<sup>237</sup> Moreover, even in COIN combat rarely occurs as discrete events. Consider incidents in Afghanistan where insurgents attempted to overrun U.S. Army positions. Engagements at Combat Outpost Keating<sup>238</sup> or the Wanat Val-

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236. Goodman, *supra* note 7; JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (1985); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008).

237. Consider the multiple investigations the U.S. Army conducted to determine the sequence of events that led to U.S. forces accidentally shooting fellow soldier Pat Tillman. *See* [http://www.defense.gov/home/pdf/Tillman\\_Redacted\\_Web\\_0307.pdf](http://www.defense.gov/home/pdf/Tillman_Redacted_Web_0307.pdf) (last visited May 2, 2013).

238. The battle for COP Keating involved more than three hundred Taliban insurgents fighting fifty-three U.S. Army soldiers supported by artillery and air support for more than twelve hours. *See* <http://graphics8.nytimes.com/packages/pdf/world/AR15-6Sum.pdf> (last visited May 2, 2013).

ley<sup>239</sup> involved sustained engagements lasting hours. Thousands of small arms rounds fired, machine guns, grenades, mortar and artillery rounds and both rotary and fixed wing close air support, resulting in scores of insurgents killed and many more wounded. Proponents of a least harmful means rule tend to utilize *sui generis* and unrealistic hypotheticals to illustrate the rule's application. Unfortunately, such methodology offers little opportunity to examine whether such a rule is actually feasible or desirable. Even when proposed in the context of imaginary situations, ones that are exceedingly unlikely to arise, the rule's application must still be contemplated in all types of combat engagements that *will* occur and where such a rule would be debilitating to combat initiative. What proponents of a least harmful means rule must (but cannot) do is explain how such a rule applies not only to engagements like COP Keating, or the Battle for Wanat Valley, but to close combat in the Ia Drang valley of Vietnam,<sup>240</sup> the deliberate attack on the Panamanian Defense Forces Commandancia, or the potential battles of mass scale that will occur if war were to break out again in Korea.<sup>241</sup> What then is the utility of a rule with no practical application?

Although COIN operations dominate contemporary LOAC discussions, the least harmful means rule would also apply in traditional international armed conflict, where medium or high-intensity conflict involving both deliberate and time-sensitive targeting and service members of all levels of expertise make such a rule even harder to reconcile. As much as a least harmful means rule fails to account for COIN combat realities like COP Keating or Wanat, that level of futility pales in comparison when considering high-intensity operations during international armed conflicts. In such conflicts, sustained combat operations are the default setting or

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239. Similarly, the 2008 battle in Wanat Valley involved several hundred insurgents repeatedly attacking a forward outpost comprised of roughly forty-eight American and twenty-four Afghan soldiers. See <http://www.cgsc.edu/carl/download/csipubs/Wanat.pdf> (last visited May 2, 2013).

240. HAROLD G. MOORE AND JOSEPH GALLOWAY, *WE WERE SOLDIERS ONCE AND YOUNG—IA DRANG THE BATTLE THAT CHANGED THE WAR IN VIETNAM* (1992) (depicting the United States' first large scale battle in the Vietnam War, a four-day battle that claimed the lives of close to 250 American soldiers and roughly 1000 North Vietnamese).

241. During the Korean War, there were instances of unarmed Chinese forces charging American positions employing the brutal—but often correct—calculus that there were more Chinese attackers than the Americans had time or ammunition to shoot during the attack. When the attackers reached the American positions, deadly hand-to-hand combat ensued where anything—a knife, a helmet, a rock—was used as a weapon. See T.R. FEHRENBACH, *THIS KIND OF WAR* (1963).

norm. Combat engagements flow into other engagements, often involving varying and differing units and modalities of force, leveraging and massing lethal force at the same target. The purpose of combat operations is to mass a range of effects at a decisive point in time and space. And a least harmful means rule would introduce indecision at the moment it can be least tolerated—actions on the objective. As noted earlier, military doctrine details the importance of seizing and maintaining the initiative, interrupting the enemy's decision cycle and forcing the enemy to react.<sup>242</sup> A least harmful means rule would cede that initiative. In the process, most perversely, the least harmful means rule, articulated as an expression of humanity, would prove to be anything but and would very likely lead to more, not fewer, casualties on the battlefield.

Even when international armed conflicts have been short in duration, such as the 2003 U.S. invasion of Iraq, they nonetheless involve hundreds of thousands of soldiers on both sides employing lethal force. For example, U.S. Army VII Corps, which conducted the main attack of the war, led a coalition of 146,000 soldiers from several different nations,<sup>243</sup> including over 1,500 tanks and mechanized assault vehicles, and 800 helicopters. They were involved in almost non-stop combat operations for 100 hours in discrete battles in places like Al Busayyah and Medina Ridge and in rolling engagements without clear beginning and end points.<sup>244</sup> The least harmful means rule would require that each of those soldiers assess—before firing each round—whether the enemy belligerent could not be disabled by using less than lethal force.<sup>245</sup> Consider also the prospect of ground maneuver

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242. See *supra* notes 65–66 and accompanying text.

243. Proponents of a least harmful means rule utilize hypotheticals of discrete engagements involving one state's army encountering individual soldiers from an opposing force. This completely disregards the reality of not only joint operations involving other services' ground, air, and artillery assets but combined operations involving multiple countries fighting together

244. See U.S. ARMY CENTER OF MILITARY HISTORY, WAR IN THE PERSIAN GULF: OPERATIONS DESERT SHIELD AND DESERT STORM AUGUST 1990–1991 (2010), available at [http://www.history.army.mil/html/books/070/70-117-1/CMH\\_70-117-1.pdf](http://www.history.army.mil/html/books/070/70-117-1/CMH_70-117-1.pdf).

245. Without a comprehensive understanding of combat operations and the thought process central to the effective execution of such operations, it can be hard to grasp how seemingly brutal tactics are nonetheless lawful and desirable. One classic example of this divergent mindset was the reaction to a tactic used during the first Gulf War, Operation Desert Storm. In order to effect the prompt submission of thousands of entrenched Iraqi soldiers, U.S. commanders settled on the tactic of using M-1 tanks fitted with earth moving blades to plow these functionally helpless enemy soldiers underneath their own trenches. Doing so was intended to compel the most rapid possible capitulation without

warfare in Korea—forces from the United States and Republic of Korea moving cross country, engaging enemy forces, could never even begin to have the time or ability to implement a least harmful means rule. The sight of an enemy who had discarded his weapon with hands held high is the type of clarity, and the only type of clarity, that facilitates the discrimination—mandated by one of the LOAC’s “intransgressible principles”<sup>246</sup>—between which enemy belligerent is and is not properly an object of lethal attack.

Apart from the fact that, as demonstrated in Sections I and II above, the positive LOAC does not include any such least harmful means obligation, these operational inconsistencies and obstacles are telling. In short, any such rule should only be embraced if it is effective and susceptible to implementation in the most difficult of contexts, for if it is indeed a LOAC obligation it must be respected in every operation. Ultimately, we believe the detrimental impact of this rule in the much more common context that has been and will continue to be the primary focus of the LOAC indicates the folly of the least harmful means assertion.

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subjecting U.S. forces to the immensely dangerous task of dismounted trench clearance. The soldiers who executed these missions almost certainly caused the death of hundreds (if not thousands) of Iraqi soldiers who, in many cases, might well have posed little individual threat. But collectively these trenches represented a major tactical and operational enemy threat, and therefore the use of lethal methods and means of warfare to produce submission and defeat this enemy was not only lawful, it was regarded within military circles as a model of tactical innovation. For the civilian press, however, the brutality of the tactic seemed somehow unjustifiably harsh. Were those troops really all that dangerous? Was there some less harmful means that might have spared many enemy lives? In contrast, for commanders who conceived of and executed this mission (and, we assume, the military lawyers who advised them), the only relevant questions were whether this tactic contributed to the prompt submission of the enemy in the collective sense and whether it was lawful—not whether there was a less harmful method or means (and likely less effective) to accomplish the same end. Their conclusion that it would be borne out in battle as hundreds of Iraqi soldiers (the overwhelming majority of those in the trenches) surrendered as rapidly as possible to avoid the fate of their comrades subjected to these attacks. See Eric Schmitt, *U.S. Army Buried Iraqi Soldiers Alive in Gulf War*, NEW YORK TIMES, (Sept. 5, 1991), <http://www.nytimes.com/1991/09/15/world/us-army-buried-iraqi-soldiers-alive-in-gulf-war.html>.

246. Legality of the Threat or Use of Nuclear Weapons, *supra* note 20, ¶ 79.

### 3. Investigations and Accountability

Accountability would also become a far more complex issue than is currently the case, in a manner that inhibits both the effective implementation of the LOAC and accountability for violations. Under the current use of force paradigm, most battlefield killings are presumptively lawful, and accountability focuses on the exceptions indicating an unreasonable application of threat identification criteria, attacking enemy belligerents already rendered *hors de combat* by wounds or sickness, or deliberately attacking protected persons or places. Under a least harmful means rule, effectively injecting a human rights use of force paradigm into the use of force equation, every attack on an enemy belligerent would ostensibly trigger an investigatory requirement, creating a chilling effect on the warrior spirit and effectiveness of armed forces.<sup>247</sup>

The U.S. Department of Defense Law of War Directive requires the military to promptly report and thoroughly investigate all “reportable incidents.”<sup>248</sup> A reportable incident is “a possible, suspected, or alleged violation of the law of war, for which there is credible information.”<sup>249</sup> The threshold criteria for reporting are deliberately low.<sup>250</sup> As a result, the U.S. military conducts inquiries, if not formal administrative investigations, following use of force situations that result in injury or death to someone not clearly identified as an enemy belligerent. Although the result can be a number of investigations ongoing at any one time, units currently do not investigate engagements where those who were wounded or killed were exclusively, and conclusively, enemy belligerents.

Under a least harmful means rule, every use of lethal force, even against a positively identified enemy belligerent, would require an investigation to determine whether a lesser means of force was viable. Soldiers would know this—they would witness the numerous informal and formal inquiries into uses of force by their units. It would not take long for them to become in-

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247. Even without wounding, where lethal force was unsuccessfully employed and failed to even wound, the soldier firing possessed specific intent to wound or kill. Would a least harmful means rule require an investigation of an attempted violation?

248. U.S. Department of Defense, DoD Directive 2311.01E, DoD Law of War Program (2006) (Incorporating Change 1, November 15, 2010 Certified Current as of February 22, 2011) [hereinafter DoD Directive 2311.01E]; *see also* Chairman, Joint Chiefs of Staff, Instruction 5810.01B, Implementation of the DoD Law of War Program (2002).

249. DoD Directive 2311.01E, *supra* note 248, at 3-2.

250. Dick Jackson, *Reporting and Investigation of Possible, Suspected or Alleged Violations of the Law of War*, ARMY LAWYER, June 2010, at 95.

creasingly risk averse, hesitating to attack an enemy in order to avoid the potential consequences of investigatory second-guessing. Uses of force on the battlefield already occur in the “fog of war”; diluting the relatively bright lines that currently exist, even if proponents of the least harmful means rule argue that it would normally not apply to combat operations, cannot but have the effect of injecting additional uncertainty into life and death decisions to pull a trigger that must take place in split seconds. This consequence is simply unacceptable.

#### 4. Protecting Soldiers’ Morality

Finally, the LOAC plays a fundamental role in the protection of belligerents, not only physically but morally as well. In this vein, the least harmful means rule and its proponents do not seem to truly appreciate the intense challenge of making the decision to take another human life, even when that decision is made in combat and the life taken is that of a positively identified enemy belligerent. Although it may be tempting to contemplate the ease with which indicia of no “genuine” threat could be assessed in combat, the reality is quite different. There is a necessary tactical and moral clarity that results from the existing bright-line *hors de combat* standard. Soldiers know, with relative certainty and without the need to engage in a totality of the circumstances-type assessment, when to engage an enemy and when that authority terminates.

The assurance and knowledge that the always difficult decision to take another human life was legally and operationally justified thus plays an important role in safeguarding and bolstering a soldier’s moral well-being. The importance of such clarity obviously contributes to tactical initiative. However, it also provides soldiers a sense of confidence that the suffering inflicted at their own hands when executing an order to attack enemy forces was not only tactically necessary, but also morally justified. In so doing, it contributes to preserving the bond of confidence between leaders and their troops, and also makes a subtle but essential contribution to good order and discipline.

Perhaps of equal importance is the benefit such clarity provides beyond the field of battle. Service members who engage in armed hostilities, no matter how inexperienced or experienced, or how attenuated they may be from the point of kinetic impact or from the means of warfare they unleash, must live with the moral and emotional consequences of knowing they have killed other human beings. It is unlikely that anyone who has not

had to carry this burden can truly understand the enormity of its weight. Tactical clarity in the attack process provides moral clarity that aids in lightening this load, and this benefit should not be underestimated. The moral confidence that the deadly consequences of executing a duty were tactically justified and lawful, without having to question whether the harm inflicted in battle was “really necessary” is essential to protecting the moral integrity of combatants.<sup>251</sup>

In this regard, the clarity derived from the LOAC’s use of force framework contributes to the type of effective leadership that is essential to preserve the good order and discipline of a fighting force. As James McDonough emphasized so poignantly in his memoir of small unit leadership in Vietnam:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. . . . War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to

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251. It might be tempting to question how a rule that permits attack on a functionally defenseless enemy can genuinely protect the moral integrity of a combatant. Some might argue that such a rule has the exact opposite effect—that it is morally corrosive. However, like the tactical value of the targeting presumptions provided by the law, the moral value that flows from these same presumptions must be assessed by focusing on those situations combatants are most likely to encounter in conflict, and not fanciful hypotheticals that rarely if ever arise in warfare. It would be folly to reject the moral value of a rule that is intended to address 99% of attack decisions because it might not be logically applied to 1%. Moreover, in contemporary conflicts, unconventional tactics render the notion of assessing functional defenselessness even more impracticable. It is today common knowledge that many of the most significant threats confronted by U.S. and coalition forces in theaters such as Afghanistan and Iraq did not come from enemies carrying their arms openly, but from those employing improvised explosive devices triggered by seemingly otherwise innocuous remote controls like garage door openers and cell phones, or suicide bombers wearing explosive vests under their clothes. Just as U.S. forces encountered enemies who feigned defenseless status in order to launch deadly attacks in places like the Pacific islands in World War II or Vietnam, close combat against determined enemies, whether conventional or unconventional, bears out the wisdom of placing the burden to clearly manifest surrender on the enemy. Ultimately, no matter what rule applies, any killing in combat is susceptible to a lifetime of subjective second-guessing by the person who knows she is responsible for the death. However, depriving the combatant of the clarity derived from the LOAC’s bright-line rule can only exacerbate this risk, not only for the *sui generis* situations proffered by proponents of the least harmful means rule, but for every combat engagement.



help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed.

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War is, at its very core, the absence of order; and the absence of order leads very easily to the absence of morality, unless the leader can preserve each of them in its place.<sup>252</sup>

Diluting tactical clarity will inevitably dilute this moral clarity. Soldiers do not have the luxury of pondering use of force decisions in the quiet and calm environment of academic debates; they make life and death decisions amidst the chaos of war. The law must provide maximum clarity to that process to facilitate not only the ability to accomplish the mission, but to protect the soldier herself from the corrosive moral consequences that come from questioning the legitimacy of taking life.

Perhaps this explains why there is almost universal opposition among members of the military profession to any potential least harmful means rule or proposal. We certainly do not believe nor intend to suggest that experience in the armed forces is a necessary predicate to understanding the LOAC. However, such experience certainly does provide a relatively unique understanding of soldiers, training, and the demands imposed on our armed forces. Nor should it be overlooked that virtually the entire corpus of the LOAC rests on a foundation laid by members of the profession of arms. Indeed, the symmetry between the LOAC and military logic lies at the very core of the law. Accordingly, no credible analysis of this issue can occur without a genuine and comprehensive consideration of the constituent who must implement a least harmful means rule.

That constituent, in the overwhelming number of circumstances, is a young, junior service member who is taught to trust the decision-making criteria he or she is taught by superiors, and to act violently and aggressively when ordered to engage an enemy target. He completed basic combat training upon entering the military, training that “transforms civilians into soldiers.”<sup>253</sup> At its core, basic military training is indoctrination on subordi-

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252. JAMES R. McDONOUGH, *PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT 77* (1985).

253. In the U.S. Army, Basic Combat Training (BCT) is a ten-week training course during which recruits “learn about the Seven Core Army Values [loyalty, duty, respect,

nating oneself to the broader organization and unit purpose and mission. In the combat arms (infantry, armor, field artillery, attack aviation), the types of units most likely to be engaged in ground combat, basic Army and Marine Corps training is about breaking down the natural human instinct *against* employing combat power that is likely to take the life of a fellow human being.<sup>254</sup> Basic training is also about developing basic combat skills, training to enable service members to instinctively and reflexively continue to accomplish their mission under the stressors of combat, fatigue, hunger and the literal and figurative fog of the battlefield.<sup>255</sup> This description is not

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selfless service, honor, integrity and personal courage], how to work together as a team and what it takes to succeed as a Soldier in the U.S. Army.” See *Basic Combat Training: The Ten-Week Journey from Civilian to Soldier*, GOARMY, <http://www.goarmy.com/soldier-life/becoming-a-soldier/basic-combat-training.html> (last visited May 2, 2013). Although the Army speaks in general terms about how BCT “pushes recruits’ minds and bodies to new limits, and gives them a deeper respect for themselves and those around them,” *id.* at <http://www.goarmy.com/soldier-life/becoming-a-soldier/basic-combat-training/graduation.html>, it is important to place that in the context of the mission of the U.S. Army—“to fight and win [U.S.] wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of combatant commanders.” *Organization*, U.S. ARMY, <http://www.army.mil/info/organization/> (last visited May 2, 2013).

254. See DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (1995). Grossman, who taught psychology at West Point, determined that most soldiers have a phobia-like resistance to using force and need to be specifically trained to kill. Noted military historian S.L.A. Marshall concluded that the American soldier comes “from a civilization in which aggression, connected with the taking of life, is prohibited and unacceptable....The fear of aggression has been expressed to him so strongly and absorbed by him so deeply and pervadingly—practically with his mother’s milk—that it is part of the normal man’s emotional make-up. This is his great handicap when he enters combat. It stays his trigger finger even though he is hardly conscious that it is a restraint upon him.” S.L.A. MARSHALL, *MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND* 78 (1947).

255. Basic training provides but a training foundation. Other military schools expand on that base. The U.S. Army Ranger School, for example, is the Army’s premier combat leader training course, from which only 50% of the students graduate. Ranger School is a physically and mentally grueling sixty-one-day course designed to replicate and prepare soldiers for the rigors of combat operations. During the course, service members operate on little sleep and food while training on small unit military tactics, including the conduct of raids and ambushes. See *Ranger Training Brigade*, U.S. ARMY MANEUVER CENTER OF EXCELLENCE, <http://www.benning.army.mil/infantry/RTB/> (last visited May 2, 2013). Ranger school hones an almost primal appreciation for the importance of standardized operating procedures because at the small unit level, when soldiers are cold, tired, hungry, and stressed, the vast majority of their actions during combat are reactions and not the product of decision-making. For soldiers to react properly requires discipline and repeti-

offered to suggest that service members are automatons; far from it. But the hesitancy injected into the soldier's decision-making process from a least harmful means rule would be potentially fatal to their tactical effectiveness and, just as important, to their ability to function as moral human beings in the midst of a chaotic and violent enterprise. In this regard, it is helpful to remember the profoundly insightful passage from Telford Taylor, the U.S. chief prosecutor at Nuremberg:

War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge. Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.<sup>256</sup>

#### V. CONCLUSION: PRESERVING THE LAW'S EFFECTIVENESS AND CORE PURPOSES

Vigilance to avoid confusing what a military commander *may* do with what he *must* do is essential to preserve the integrity of the law and the fundamental nature of attack authority derived from the principle of military necessity. Such distortion of policy constraints into imagined legal obligations has almost certainly added weight to assertions that the LOAC includes a least harmful means obligation to forego attack with deadly combat power whenever capture might be feasible. The authors believe that these assertions reflect a lack of appreciation for the nature of armed conflict and military operations in general, and fundamentally alter the presumptions of permissible conduct that have provided operational clarity for individuals engaged in hostilities for more than two centuries. But what is most troubling about this distortion is that it reflects a fundamental shift from a

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tive training on clearly articulated and unchanging tactics, techniques, and procedures. A least harmful means rule assumes the ability of service members to employ calm, cool and independent decision-making wholly incongruent with the nature of combat and how soldiers must be trained.

256. Telford Taylor, *War Crimes, in WAR, MORALITY, AND THE MILITARY PROFESSION* 415, 429 (Malham M. Wakin ed., 1979).

LOAC-based theory of authority towards a human rights-based theory. It thus has severe consequences for both the LOAC and human rights law as critical protections for individuals in the face of violence and conflict. The proposal rests ultimately on a rejection of the significance of identifying an enemy as a “military objective”: the conclusive presumption that, until rendered *hors de combat*, the threat inherent in that designation/determination justifies the employment of deadly force. Instead, by substituting for that presumption an unavoidable (and unfounded in the law) linkage between the authority to attack with deadly force and an assessment of *actual* threat represented by a belligerent target, the least harmful means rule denies such authority when that actual threat is marginal or non-existent.

Many might see this result as simply adding greater protection to the LOAC, a seemingly admirable and universally appealing goal. The conflation of human rights law and the LOAC inherent in the least harmful means rule is dangerous from either direction, however: it is likely to either emasculate human rights law’s greater protections or undermine the LOAC’s greater permissiveness in the use of force, either of which is a problematic result. Soldiers faced with an obligation to always consider less harmful means when attacking an enemy belligerent may well either refrain from attacking the target—leaving the mission unfulfilled or the innocent victims of an enemy force’s planned attack unprotected—or disregard the law as unrealistic and ineffective. Neither option is appealing. The former exposes friendly forces to unjustified risk and undermines the protection of innocent civilians from unlawful attack, both of which are core purposes of the LOAC. The latter weakens respect for the value and role of the LOAC altogether during conflict, a central component of the protection of all persons in wartime.<sup>257</sup>

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257. Ironically, this rule could also have a perverse influence on human rights law. If the imposition of a least harmful means rule caused the armed conflict rules for capture and surrender to bleed into the human rights and law enforcement paradigm, the restrictions on the peacetime use of force in self-defense would diminish. Outside of armed conflict, persons suspected of posing a threat to the safety of others or to society are entitled to the same set of rights as other persons under human rights law. A relaxed set of standards will only minimize and infringe on those rights. If states begin to use lethal force as a first resort against individuals outside of armed conflict because the distinction between the use-of-force parameters in the two situations has disintegrated, the established framework for the protection of the right to life would begin to unravel. Not only would targeted individuals suffer from reduced rights, but innocent individuals in the vicinity would also be subject to significantly greater risk of injury and death as a consequence of the broadening use of force outside of armed conflict.

When humans cause such consequences, either through evil intent or mistake, the results are harmful enough. When the law itself facilitates consequences that contradict its very purpose, the effects are exacerbated and simply too damaging to countenance. The law must, as it always has, remain animated by the realities of warfare in the effort to strike a continuing credible balance between the authority to prevail on the battlefield and the humanitarian objective of limiting *unnecessary* suffering. The clarity of the existing paradigm achieves that goal and scholars should be hesitant to tamper with it.