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# The Duty to Capture

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# THE DUTY TO CAPTURE

Jens David Ohlin\*

## ABSTRACT

*The duty to capture stands at the fault line between competing legal regimes that might govern targeted killings. If human rights law and domestic law enforcement procedures govern these killings, the duty to attempt capture prior to lethal force represents a cardinal rule that is systematically violated by these operations. On the other hand, if the Law of War applies then the duty to capture is fundamentally inconsistent with the summary killing already sanctioned by jus in bello. The following Article examines the duty to capture and the divergent approaches that each legal regime takes to this normative requirement, and evaluates internal debates within these regimes over when a duty to capture might apply. At issue in these debates, regardless of the body of law that applies, is the scope and content of the concept of necessity, i.e. when is it truly necessary to target an individual with lethal force. The key question is whether a unified and trans-regime understanding of the concept could promote doctrinal unity across legal regimes. However, this Article concludes that the concept of necessity stubbornly defies such attempts; necessity is a term of art with a distinct history and meaning in each body of law, and unification of these meanings can only come at the cost of betraying the fundamental precepts of one legal regime over the other. Part I begins by examining the scope of international humanitarian law and concludes that its application is often unduly constrained; a new analysis is offered of the classification of armed conflicts, the level of organization required before a non-state actor can be a party to an armed conflict, and the legal geography of armed conflict. Part II examines the concept of necessity and concludes that military necessity (destruction of “life and limb” related to the war aim) is fundamentally incompatible with human rights law and its understanding of necessity as the least-restrictive means. Finally, Part III concludes that the IHL regime, and its permissive notion of military necessity, should apply when the state is acting as a belligerent against other co-equal belligerents, but that human rights law, and its more restrictive notion of necessity, should apply when the state acts as a sovereign over its own subjects.*

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INTRODUCTION

The United States’ increased reliance on targeted killings has prompted no shortage of legal and moral criticisms. Critics have focused on the two most well known strikes, the Navy Seal raid against Bin Laden’s compound in Abbottabad, Pakistan, and the drone strike in Yemen that killed the leader of Al-Qaeda in the Arabian Peninsula (AQAP), Anwar al-Awlaki. In particular, political critics questioned the Administration’s decision to use lethal force. Why were the targets not arrested and placed on trial, either before a military commission or a federal district court? Their deaths were ordered by Executive Branch officials and then personally confirmed by the president. To some, this smacked of an imperial presidency, unencumbered by judicial restraint.<sup>1</sup> While death by jury – capital punishment -- is still the law of the land in the United States, death by executive fiat is presumably unconstitutional under domestic law and illegal under international law.

When transposed in legal terms, the criticism implied that the United States had a duty to capture Bin Laden and al-Awlaki, or at the very least had a duty to *attempt* capture before resorting to lethal force. Although this

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<sup>1</sup> See, e.g., Tom Junod, *The Lethal Presidency of Barack Obama*, ESQUIRE MAGAZINE, August 2012.

“duty to capture” argument is essential to resolving the legality of targeted killings, the legal contours of this duty are often poorly understood, in part because the duty to capture depends entirely on which body of law applies to the situation at hand.

For example, the U.S. constitutional norms that attach to domestic criminal law situations clearly entail a duty to attempt capture.<sup>2</sup> In cases of individual self-defense, a citizen may only kill his or her attacker if a non-lethal means – say escape, retreat, or capture – is unavailable, impossible, or impracticable.<sup>3</sup> Generally speaking, killings are only justified as lawful self-defense if the action is, in a sense, unavoidable. In practical terms, though, the capture requirement will rarely affect the analysis if the attacker is armed with a weapon. In such situations, it is usually assumed that a private citizen could not capture the attacker without unduly risking his own life. If there is a trade-off to be made between protecting the life of the culpable aggressor and the innocent defender, the law comes down on the side of protecting the life of the defender.<sup>4</sup>

However, the duty to capture is far more relevant in law enforcement situations. Police officers have a duty to attempt capture and are only permitted to use lethal force against a fleeing felon if the police have probable cause to believe that the felon constitutes a danger to the public.<sup>5</sup> In a more recent case, the court concluded that a fleeing motorist was driving so recklessly that the police were constitutionally entitled to believe that his reckless driving constituted a danger to the public.<sup>6</sup>

But the situation is markedly different in International Humanitarian Law (IHL), where there simply is no *codified* duty to attempt the capture of enemy combatants.<sup>7</sup> Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants. To suggest that combatants could only be killed if cap-

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<sup>2</sup> See *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

<sup>3</sup> See *People v. Goetz*, 68 N.Y.2d 96 (N.Y. 1986).

<sup>4</sup> For a discussion of the curious relevance of the wrongfulness of the attacker, see George P. Fletcher, *The Psychotic Aggressor*.

<sup>5</sup> See *Tenn. v. Garner*, 471 U.S. 1 (applying the Fourth Amendment).

<sup>6</sup> See *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>7</sup> See Beth Van Shaack, *The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 *Yearbook of Int'l Humanitarian L.* (2012) (“As a matter of established IHL doctrine, there is no express duty to capture privileged combatants in IACs in lieu of killing them in the absence of an unambiguous offer of unconditional surrender.”).

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ture was unfeasible would make the modern practice of aerial bombardment per se illegal. Whatever the merits of this as a moral argument, it cannot be taken to represent the current state of codified IHL because it would require wholesale revision of the very practice of warfare itself, and would therefore be radically inconsistent with current and past state practice since the advent of aerial warfare.<sup>8</sup>

That being said, IHL does include a duty to respect *surrender*. Both the Geneva Conventions and the underlying chivalric customs of warfare require that an intention to surrender, effectively and unambiguously communicated, ought to be respected by opposing combatants.<sup>9</sup> The rationale for this rule is that surrendered combatants are *hors de combat*, one step removed from POW status only because they have not yet been received into custody.<sup>10</sup> But the duty to respect surrender should not be confused with an alleged duty to offer the enemy the *opportunity* to surrender, nor is there a duty to attempt a capture prior to attempting killing. The requirement to announce one's presence and demand surrender – as the police do – is a creature of the domestic law enforcement paradigm, not the laws of war.

But the duty to capture cannot be so cavalierly dismissed. The use of force against suspected terrorists is complicated by grave uncertainty over which body of law, and which normative regime, applies. If IHL – and IHL alone – applies, then I argue in this Article that there is no implied duty to capture, though this claim will need to be defended. On the other hand, if international human rights law (IHRL) applies, either alone or in tandem with IHL, then the duty to capture might be relevant.

To resolve these questions, what is needed is a coherent account of the duty to capture, one that spans across the diverse bodies of law and explains what the concept means in the abstract and how the concept is applied in more specific contexts. What emerges from this investigation is an underlying account of necessity that performs much of the heavy lifting in the analysis. That being said, the concept of necessity provides less cross-context unity to the analysis than one might hope; necessity, it turns out, means

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<sup>8</sup> For a historical analysis of aerial bombardment, see Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of WWII*, 87 INT'L REV. RED CROSS 429, 433 (2005).

<sup>9</sup> See Geneva Conventions, *supra* note x, art. 3 (regulating treatment of “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms”); Additional Protocol I, art. 40; Lieber Code, *supra* note x, art. 60 (“No body of troops has the right to declare that it will not give, and therefore will not expect, quarter”); Rome Statute, *supra* note x, art. 8(2)(b)(xii).

<sup>10</sup> See, e.g., Common Article 3, *supra* note x, which regulates the treatment of all combatants *hors de combat*, whether due to sickness or surrender, in the same phrase.

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.

The following article proceeds by examining four potential reasons why the duty to capture might be thought to apply to targeted killings: (I) IHRL, not IHL, governs; (II) IHRL and IHL both apply at the same time, or IHL on its own includes a previously unrealized duty to capture; and (III) the U.S. Constitution (if applicable to the attack) operates as an overlay that imposes the requirement over and above the requirements of IHL.

Part I concentrates on arguments that conclude that there is no armed conflict to trigger the application of IHL, because: (i) the armed conflict is not properly classified as either an international or non-international armed conflict; (ii) an armed conflict is impossible against Al-Qaeda because the non-state actor is not sufficiently organized or hierarchical; and (iii) the legal definition of “armed conflict” limits the concept to so-called hot battle zones. The analysis will suggest that the standard scholarly view on the hot battlefield – based on the so-called “intensity” of hostilities – has systematically misunderstood the relevant precedents in this area.

Part II concentrates on the co-application of IHL and IHRL to determine if the duty to capture can be deduced from a combination of these two bodies of law together – a methodology inspired by the Israeli Supreme Court in its *Targeted Killings* decision.<sup>11</sup> But IHRL can only be used to interpret the basic concepts of IHL if the two normative regimes are talking the same language.

Accordingly, this Article investigates the different senses of necessity in IHRL and IHL and concludes that the concept of “military necessity,” so often at the center of IHL debates, is frequently misunderstood to mean the same thing as necessity as the concept is understood in civilian contexts. The two versions of the concept operate differently because the underlying legal assumptions of the two bodies of law are radically different – IHRL assumes that killing is illegal while IHL assumes that the killing of combatants is presumptively privileged. Moreover, the two bodies of law are designed for completely different purposes: IHL regulates the relationship between co-equal belligerents in battle, while IHRL constrains the sovereign’s treatment of subjects under its control. The argument will therefore conclude that there

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<sup>11</sup> See *infra* note x and related text.

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was insufficient legal support for the variety of co-application inspired by the Israeli Supreme Court.

For the same reasons, the IHL principle of military necessity does not require, even in the absence of IHRL, a duty to capture. This conclusion would only be possible if one covertly engaged in the type of norm importation already rejected in Part II. Military necessity, by itself, never meant what it means in other contexts: the only available option. Rather, as far back as Francis Lieber, the principle of military necessity only required that the attack confer a bona fide military advantage.

Finally, Part III will consider the possibility of a constitutional overlay to the analysis. The source of the overlay might attach to the conduct because the constitution follows the flag, so to speak,<sup>12</sup> or more likely, constitutional rights attach because the target is an American citizen like Awlaki. But the overlay is arguably inconsistent with historical practice, since citizen combatants during World War II – fighting for the Nazi Army – were not granted a special right to be captured, and were targeted in like manner to their German comrades. Moreover, confederate soldiers during the Civil War, all American citizens, were not owed a duty to capture either. Consequently, predicating the *constitutional* duty to capture on the American citizenship of the target requires the marshaling of an additional argument.

In such a case, either the Fourth or Fifth Amendments might require the United States government to afford the target with a chance to contest the executive branch's determination of his status before a neutral decision-maker. Unfortunately, the best Supreme Court precedents to establish this constitutional overlay all take place either within the domestic law enforcement context or, if they are war-time cases, within the detention context, not targeting.<sup>13</sup> Deep problems emerge when one analogizes from one context to the other, particularly because the U.S. Supreme Court cases on detention all refer back to IHL in order to establish the parameters of the constitutional protection regarding detention.<sup>14</sup>

This Article concludes that the analysis inevitably swings back full circle to the original issue: whether domestic or wartime targeting principles apply. The answer lies in determining whether the U.S. government, when targeting its own citizen, is acting as a sovereign or acting as a belligerent. If the former, then the normative constraints of IHRL certainly apply; if the latter, then the regulations of IHL apply. Does the citizen-belligerent stop being a citizen-subject when he or she takes up arms against his own gov-

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<sup>12</sup> See KAI RUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?

<sup>13</sup> Compare *Tennessee v. Garner*, *supra*, with *Hamdi v. Rumsfeld*.

<sup>14</sup> See, e.g., *Hamdi*, *citing* the Geneva Conventions.

ernment? This was certainly the case when the U.S. fought the Civil War against confederate soldiers. Presumably, though, there is something deeply distressing about concluding that the U.S. government might consider a citizen-belligerent targetable wherever they are located, perhaps even within the continental United States. The limiting principle that prevents this universal extension of citizen-belligerency is whether the sovereign has complete control over the territory in question. In such instances, the sovereign is indeed acting as a sovereign with regard to its subject and is constrained by the principles of IHRL. In areas where the sovereign is not in complete territorial control – is not *sovereign* in a sense – then the sovereign meets even the citizen (and the armed group to which he belongs) on the battlefield as a co-equal belligerent.

## I. THE SCOPE OF INTERNATIONAL HUMANITARIAN LAW

There are several factors that might preclude the application of IHL to a given military engagement. Although a cluster of overlapping arguments might preclude IHL from applying, they can all be grouped into three major categories. The first category of arguments denies the possibility of an armed conflict when it cannot properly be classified as international or non-international. The second category of arguments concentrates on the alleged enemy and concludes that AQ is not sufficiently organized to qualify as a non-state actor against whom an armed conflict is possible. The third category of arguments concentrates on the legal geography of armed conflict and concludes that the conflict with al-Qaeda does not meet the territorial standard as applied by the ICTY in *Tadic*. If any of these arguments is successful, then IHL does not apply to the present conflict, with the consequence that IHRL – and with it the duty to capture – might still apply to these killings and similar killings in the future.

### *A. Is the Armed Conflict International or Non-international?*

It was once a basic principle of international law that only nation-states were proper subjects of international law. Under this view, the only true entities that can engage in an armed conflict are states that have legal personality under international law. But this view has long been displaced by the necessity to make internal disputes – civil wars – subject to a minimal degree of legal regulation. The Geneva regime, and in particular Common Article 3, was specifically designed with such internal conflicts in mind, subject to a smaller – but still crucial – set of legal prohibitions that applied against governments and non-state actors.

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The conflict with al-Qaeda presents a challenge of classification.<sup>15</sup> It cannot be an international armed conflict because it is not an armed conflict between two states – in other words, it isn't international enough.<sup>16</sup> On the other hand, it cannot be a non-international armed conflict because it is far *too* international. Because it is not confined to the geography of one nation-state, viz an internal civil war, and because it crosses transnational borders, it cannot qualify as an NIAC. So to the extent that the presumptive armed conflict with al-Qaeda clearly crosses transnational borders, it cannot be a NIAC.<sup>17</sup> This structure of this argument tries to sandwich the armed conflict between an IAC and a NIAC and conclude that because the armed conflict with al-Qaeda qualifies as neither, it cannot be an armed conflict at all.<sup>18</sup> It cannot be a true IAC because it involves an IAC, and it cannot be a NIAC because it is international. Being neither, it is no armed conflict at all.<sup>19</sup>

Several scholars have responded to this style of argument by altering the classification scheme and suggesting that a third category, unrecognized in any codified treaty or convention, captures the armed conflict with al-Qaeda.<sup>20</sup> Such a category would be a *transnational* NIAC, an *internationalized* NIAC, or some other hybrid notion or mixed category.<sup>21</sup> The standard

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<sup>15</sup> See Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW (Nigel White, Christian Henderson, eds. 2012).

<sup>16</sup> For a discussion, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 46 (Elizabeth Wilmshurst ed., forthcoming 2012), at 46.

<sup>17</sup> See, e.g., Noam Lubell, *The War Against al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., forthcoming 2012).

<sup>18</sup> For a normative argument that the distinction between international and non-international armed conflicts is obsolete, see Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685 (2012) (criticizing bifurcation and arguing that the same international rules should apply whenever the sovereign exercises military force, regardless of the status of its enemy); James Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 83 INT'L REV. RED CROSS 313 (2003); Akande, *supra* note x, at 7.

<sup>19</sup> For a general discussion, see Sylvain Vit , *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009).

<sup>20</sup> *But see* Andreas Paulus and Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95 (2009) (arguing for sufficiency of current paradigms).

<sup>21</sup> See, e.g., Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANS'L

response to these suggestions is that they are purely speculative and aspirational, i.e. a statement about what the law ought to be, not a description of the current state of the law.<sup>22</sup>

However, the correct answer to the paradox lies not in an aspirational change to the law but rather a deeper analysis of the original classification scheme. The legal evidence for the allegedly mutually exhaustive categories stems from a textual reading of the Geneva Conventions and their related protocols, which can be summarized in the following way. First, Common Article 2 of the Geneva Conventions refers to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,”<sup>23</sup>

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L. 295, 302 (2006) (noting that “limitations inherent in the traditional Geneva Convention-based law-triggering paradigm”); cf. Akande, *supra* note x, at x.

<sup>22</sup> Milanovic and Hadzi-Vidanovic argue that this strategy is wrong because there is no *a priori* concept of armed conflict *simpliciter* prior to the determination of its status as international or non-international. On this basis they fault arguments that start from the presumption that an armed conflict exists and it must be categorized in one of the two existing categories or a new third category. See Milanovic and Hadzi-Vidanovic, *supra* note x, at x, *criticizing* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); D. Kritsiotis, *The Tremors of Tadić*, 43 Israel L. Rev. 262 (2010); N. Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461 (2008). There are two responses to this critique. First, one must sidestep the ordinary meaning of the term “armed conflict” as being illusory and hence a mere shorthand for the phrase “either an IAC or NIAC” – a curious result since both the legal literature and the *Tadic* decision are replete with mentions of the phrase “armed conflict.” Second, the argument by itself does not entail that the armed conflict with AQ does not qualify as an armed conflict “not of an international character” – an additional argument would be needed. Third, and most important, the argument merely entails that there is no *a priori* definition of armed conflict in the Geneva Conventions, but this does not establish that there is no *a priori* concept of armed conflict in *customary* law. Furthermore, the ICTY definition of armed conflict from the *Tadic* case is not a formal source of international law; it is simply one interpretation of the treaty language and it offers no analysis regarding a customary definition of armed conflict. Despite some anxiety that an abstract definition would be difficult to construct, see Stewart, *supra* note x, at x, one could imagine the following commonsensical definition: “protracted armed violence between any organized armed groups.”

<sup>23</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [First Geneva Convention]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Fourth Geneva Convention].

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thus demonstrating that IACs necessarily involve conflicts between states. Second, Common Article 3 refers to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties,”<sup>24</sup> thus supposedly demonstrating that NIACs are legally defined as being geographically constrained to the territory of one state. Since the armed conflict with Al-Qaeda fulfills neither the Common Article 2 definition nor the Common Article 3 definition, the conflict with al-Qaeda per se does not qualify as an armed conflict under IHL, though it might be the case that fighting in a particular state – say Yemen – might meet the Common Article 3 definition. But the *overall* conflict against al-Qaeda would not, under this view, be legally recognized as an “armed conflict” triggering the rules of IHL.<sup>25</sup> Further support for this view allegedly comes from Additional Protocol II, which states in Article 1(1) which states that it covers “all armed conflicts which are not covered by Article 1 of [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>26</sup> Under the view being examined, this APII provision both mirrors the geographical limitation on NIACs first offered in Common Article 3, but then also adds additional content to the standard by demanding additional criteria of operational command, territorial control, and capacity for sustained military operations.

This view is mistaken, however. A closer examination of the structure of Common Articles 2 and 3 suggests a stronger textual analysis animated by a consideration of the *purpose* of the Geneva Conventions. To think of the Geneva Conventions as primarily definitional – like say the background rules of treaty interpretation contained in the Vienna Convention on Treaties<sup>27</sup> – is to fundamentally misunderstand the purpose of Geneva, which was to enact *regulations* regarding the conduct of warfare. Common Article 2 defines IACs not for the purpose of defining them *in abstracto* but rather to limit which conflicts are governed by the provisions contained in the rest of the Geneva Conventions. And, of course, it is almost axiomatic that the pro-

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<sup>24</sup> See First-Fourth Geneva Conventions, *supra* note x, art. 3.

<sup>25</sup> Scholars who hold this view sometimes resort to conflating the global armed conflict with al-Qaeda described above with the Bush Administration’s early rhetoric of a global war on terror.

<sup>26</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

<sup>27</sup> Vienna Convention on the Laws of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force May 23, 1980).

hibitions contained therein would necessarily involve armed conflicts between two or more “High Contracting Parties,” since how would it be possible for the signatories to regulate – by treaty – the conduct of non-signatories? Under standard rules of treaty interpretation (e.g. consent), such obligations would be impossible to impose on non-signatories as a matter of pure treaty law. Common Article 2 is thus silent on the issue of regulating conflicts with non-signatories, with the only proviso that during a multi-state armed conflict among signatories and non-signatories, the signatories are bound to follow the Geneva rules between them, and are also bound to follow the Geneva rules against the non-signatory if the non-signatory “accepts and applies the provisions thereof.”<sup>28</sup> So the structure of the Article makes clear that it is not defining international armed conflicts but rather laying out the parameters for which armed conflicts are subject to the regulations of Geneva.

Common Article 3 displays a similar structure. The provision applies a smaller set of protections – the so-called mini-Convention – to conflicts “not of an international character” but which occur “in the territory of a High Contracting Party.”<sup>29</sup> The latter phrase is not meant to define the former phrase but rather limit its application. The contracting parties to Geneva were regulating NIACs that occur on their respective territory and were not regulating NIACs that do not. To suggest that they were abstractly pronouncing that they were defining that the latter category *simply does not exist* is a bit far fetched. Instead, it seems more likely that the High Contracting Parties were limiting their Common Article 3 regulation of warfare to only a subset of NIACs (occurring on their territory between the government and rebel forces or between two non-state armed groups), either because they did not wish to regulate the others or perhaps simply because they were not yet thinking of the various forms such conflicts could take. Either way, it is clear that, like common Article 2, the signatories were regulating conflicts for which their purpose and authority to regulate were crystal clear. To suggest, on the basis of Common Article 3, that IHL does not apply to NIACs that exceed the boundaries of a contracting party is to misread the function of the second clause “in the territory...”

It is also worth noting that if Common Articles 2 and 3 were meant to function as a classification scheme, they would have been constructed in a far different manner. One could very well imagine a treaty provision that starts by saying: “There are two and only two forms of armed conflict: IAC and NIAC. An IAC is defined as x. A NIAC is defined as y.” But that is not how Geneva was drafted.

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<sup>28</sup> See First-Fourth Geneva Conventions, *supra* note x, art. 2.

<sup>29</sup> *Id.*, art. 3.

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What then of Additional Protocol II and its additional requirements for NIACs, including their location in the territory of a contracting party as well as the organizational structure of the non-state armed group involved in the conflict? Here again, the purpose was not to add additional requirements to the definition of a NIAC. Rather, the purpose was to apply a larger set of humanitarian protections to the types of conflicts regulated by Common Article 3; the APII requirement that the non-state armed group be sufficiently organized to maintain sustained military operations is meant to clarify that the signatories are accepting the APII limitations for conflicts on their territory and against non-state armed groups that are at least *capable* of reciprocating those limitations. Regarding conflicts that do not take place on their territory, or do not involve armed groups that could reciprocate the humanitarian treatment, the APII is predictably silent.<sup>30</sup>

Even if none of this were correct, it is important to note that the United States, like many world powers, is not a signatory to APII and has never consented to its application. Furthermore, it is completely wrong to think of Article 1 of APII as simply adding more content to the Common Article 3 definition of armed conflict. Rather, Common Article 3 and APII represent *distinct* normative regimes, as has been confirmed both by the ICRC which has concluded that the “restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general.”<sup>31</sup> Finally, the ICC Statute even refers to NIACs that do not meet the definitional requirements of APII, thus confirming that even the international court regards these two regimes as separate.<sup>32</sup>

What then of the alleged customary status of the protections contained in Common Article 3 and APII? With regard to Common Article 3, its customary status is on strong footing, whereas APII and its contentious nature among the world’s military powers makes it ill-suited for meeting the

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<sup>30</sup> This view does not entail that armed conflicts falling outside of this classification scheme are unregulated by international law. Rather, the argument is that if a given armed conflict does not meet the text of the Geneva standard, then the armed conflict is regulated by customary prohibitions that emerge from the Geneva regime but apply to a larger number of conflicts.

<sup>31</sup> See ICRC Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (March 2008) at 4, available at <http://www.scribd.com/doc/100378658/Opinion-Paper-Armed-Conflict>.

<sup>32</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 8(2)(f); ICRC Opinion Paper, *supra* note x, at 4; Vite, *supra* note x, at 81-82 (cavassing different interpretations of drafters’ intent regarding Rome Statute article 8(2)); Paulus & Vashakmadze, *supra* note x, at 105 (noting that the Rome Statute “exacerbates the problem” already existing by the conflicting standards in Common Article 3 and Additional Protocol II).

standards of a customary norm, and the United States has persistently objected to APII. Either way, even if Common Article 3 is now considered *jus cogens*, and APII has ripened into customary law, this ripening leaves completely open the correct analysis of these provisions. One cannot offer an analysis of Common Articles 2 and 3 and AP II and then claim that their customary status automatically supports one reading over another. It is, of course, logically possible that there is better interpretation of these treaty protections and it is *that* interpretation which is now binding as a matter of custom. Asserting the customary status of Geneva does not entail which normative interpretation has become custom.

An additional benefit of this view is that it accords with the facts on the ground. Al-Qaeda attacked the United States and continues to attack the United States and its allies, and in turn the United States is trying to destroy Al-Qaeda and kill its members. If that isn't an armed conflict, then nothing is. The question, though, is how to classify it. But the problem about classification should not distract one from the inestimable truth regarding the existence of an armed conflict.<sup>33</sup>

#### *B. Is AQ Sufficiently Organized and Hierarchical?*

There is, however, a second asserted legal basis that would block the application of IHL to targeted killings. According to most scholars, IHL is only triggered when a state or other organized armed group is engaged in a conflict against another organized armed group that is sufficiently well organized that they are capable of mounting sustained military operations and also meeting the standards of conduct embodied in IHL – in essence, the trigger requirements for APII.<sup>34</sup> Under this proposed view, al-Qaeda is neither sufficiently well organized to sustain military operations nor do they follow the precepts of IHL.<sup>35</sup> Consequently, the United States cannot be engaged in

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<sup>33</sup> Compare with Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. (2008).

<sup>34</sup> See, e.g., ICRC Opinion Paper, *supra* note x, at 3-4, citing D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RCADI 147 (1979).

<sup>35</sup> Even territorial control is not, by itself, a triggering requirement, though scholars often mistakenly state that it is. Rather, territorial control is an *indicator* that the non-state actor is capable of carrying out military operations. See Prosecutor v. Al Bashir, Decision on the Prosecutor's Application for a Warrant of Arrest. Case No. ICC-02/05-01/09, ICC Pre-Trial Chamber, March 4 2009, para. 60; Prosecutor v. Milutinovic', Judgment, ICTY Trial Chamber, Case No. IT-05-87-T (Feb. 26 2009), para. 791; However, some non-state actors might be capable of launching military

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an armed conflict with al-Qaeda.<sup>36</sup> Since there is no armed conflict, IHL does not apply; since IHL does not apply, drone attacks cannot be justified by the IHL legal regime.

What are the standards by which al-Qaeda – and other non-state actors -- ought to be judged regarding its internal structure? Although it is clear that some level of organization is required, it is unclear whether IHL requires any particular type or form of organization.<sup>37</sup> Potential standards that have been proposed include *centralized* organization and *hierarchical* organization, both of which have been used to claim that al-Qaeda is not sufficiently organized or not organized *in the right way*. But the legal support for centralization is misplaced and stems mostly from ICTY jurisprudence that listed centralization – a command structure and headquarters -- as one indicative factor in determining whether an armed group was sufficiently organized for purposes of IHL.<sup>38</sup> Furthermore, it is clear why the ICTY was considering this element, since for its judicial work a headquarters was highly evident in determining whether the various armed groups operating in the former Yugoslavia were indeed sufficiently well organized to be engaged in an armed conflict (for the most part they were).<sup>39</sup> However, the ICTY has

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attacks even in the absence of territorial control, and in fact terrorist organizations often eschew territorial control to concentrate on their operational capacities.

<sup>36</sup> See, e.g., Kai Ambos and Josef Alkatout, *Has 'Justice Been Done'? The Legality of Bin Laden's Killing under International Law*, 45 ISRAEL L. REV. 341, 347-50 (2012); Jordan J. Paust, *Self-Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan*, 19 J. TRANS. L. & POL'Y 237, 260 (2009); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 118 (2010); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in *SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT* (Simon Bronitt, ed., forthcoming 2012). On the issue of organization generally, see BETH VAN SCHAACK & RON SLYE, *THE INTERNATIONALIZATION OF CRIMES* 115 (2009) (requiring level of organization before triggering IHL). Compare with Marco Sassoli, *Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law*, 1 INT'L HUMANITARIAN LEG. ST. 5, 14 (2010) (requiring only the existence of a genuine armed group).

<sup>37</sup> See Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – a Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 117 (2009) (requiring only minimal level of organization without any particular form).

<sup>38</sup> See, e.g., Prosecutor v. Limaj, Judgment, ICTY Appeals Chamber, Case No. IT-03-66-T (Nov. 30 2005), para. 94-134; Ramush Haradinaj et al., Judgment, ICTY Trial Chamber, Case No. IT-04-84-T (April 3, 2008), para. 60.

<sup>39</sup> See generally Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 189 (2011) (noting the following factors for organization: “the existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure,

never once said that centralization in a formal headquarters was a sine qua non of “organization” necessary for triggering the application of IHL.

As for the requirement that the armed group be hierarchical, again, the question is what *kind* of hierarchy. If one means a centralized hierarchy, then the requirement just falls back on the notion of centralization. If it is different, then other forms of hierarchy must be permissible.<sup>40</sup> Although some scholars have claimed that al-Qaeda is not hierarchical, this can only be possible if one is using the notion of a centralized hierarchy.<sup>41</sup> Assuming that Al-Qaeda is a diffuse network of separate franchises, each one operating under independent command, it would still be the case that each independent franchise is sufficiently organized to meet the standard for participation in an armed conflict. The standard US government view is that the larger organization is one non-state actor, with each affiliate – Al-Qaeda core in Pakistan/Afghanistan, AQAP, al-Qaeda in Iraq – being roughly analogous to separate battalions within the same army.<sup>42</sup> The legitimacy of this metaphor depends, of course, on the degree of centralized control over these units. Although there is no doubt some centralized oversight – or attempted oversight – by al-Qaeda core over the regional affiliates, the nature and quality of this control, though perhaps “operational” in the general sense, may not arise to operational in the very specific way that a traditional centralized army headquarters coordinates the behavior of its battalions on a daily basis. Whether that difference in degree – not kind – is sufficient to defeat the requirement of a centralized hierarchy depends on whether the centralized authority must be exercised on a daily level, or whether a coordinated grand strategic vision is sufficient to demonstrate that centralized authority.

In any event, less hinges on this analysis than one might initially believe. Even if al-Qaeda does not represent a single atomic non-state actor, each regional affiliate certainly meets the definition, in which case the United States is still engaged in an armed conflict with AQAP in Yemen and al-Qaeda core in Afghanistan and Pakistan, given the attacks committed by

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transport, and distribute arms; the group’s ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords”).

<sup>40</sup> For a discussion, see Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 679 (2010), *citing* BRUCE HOFFMAN, *INSIDE TERRORISM* 285-88 (2006) (discussing structure of al-Qaeda and other terrorist organizations).

<sup>41</sup> *See* Ambos, *supra* note x, at 349, *citing* Geneva Convention III, art. 4(A)(2)(a), which only requires that the group be “commanded by a person responsible for his subordinates,” and does not dictate any particular form of hierarchy.

<sup>42</sup> John Brennan.

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these groups and the large number of drone strikes reportedly launched by the US in response to these attacks. Some scholars who segment the analysis by affiliates have then gone on to argue that Bin Laden's killing could not be justified as a response to recent attacks by other affiliates.<sup>43</sup> Furthermore, if forced to tie the killing to attacks by the *same* affiliate, the Bin Laden killing took place too long after the original 9/11 attacks in the United States, and that whatever armed conflict existed between the US and al-Qaeda core had long since withered away with the al-Qaeda core's degraded capacity to launch attacks.<sup>44</sup>

This view is mistaken because it conflates *jus ad bellum* with *jus in bello*. Even if it were the case that al-Qaeda core had not launched a major attack in some time, the United States certainly had continuously engaged in military strikes against al-Qaeda core during that time, and that alone is sufficient for the application of IHL to the conflict. If the United States did, hypothetically, lack a justification under international law for such attacks, this might demonstrate the existence of a *jus ad bellum* violation (say, aggression), but it would not demonstrate the existence of a *jus in bello* violation, since IHL would continue to apply as long as the United States continued to engage in military strikes and al-Qaeda core persisted as an organized armed group during that time.<sup>45</sup> And it is certainly the case that the US has maintained a consistent barrage of attacks in these areas during that time.

The final argument that al-Qaeda, either in total or its particular affiliates, cannot engage in an armed conflict with the United States, stems from the fact that al-Qaeda members, as terrorists, do not follow the laws and customs of war, according to the APII standard. But this argument confuses capacity with compliance. The test is not whether the organized armed group complies with the laws and customs of war or not. If that *were* the standard, then it would be *ipso facto* impossible to ever engage in an armed conflict, and trigger IHL, with a group that betrays the central tenets of IHL – thus creating a system of perverse incentives. Moreover, such a standard completely misreads the structure of the APII standard, which requires that the armed group be sufficiently organized to have the *capacity* to follow the laws and customs of war as embodied by Geneva. The rationale for this functional standard embodied in APII (“exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations

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<sup>43</sup> See Ambos, *supra* note x, at 350.

<sup>44</sup> *Id.* (arguing that when Bin Laden was killed, “Al Qaeda’s activity had slowed down; it therefore no longer posed a serious military threat, nor did it have a centralised military command structure”).

<sup>45</sup> *Cf.* O’Connell, *supra* note x, at x (emphasizing illegality under the law of state responsibility for such incursions).

and to implement this Protocol”) is that it would be absurd for a state party to remain compelled by treaty to follow the Geneva proscriptions against groups that are *incapable* of returning the favor in reciprocal fashion. But whether they do or not is irrelevant. As for al-Qaeda, it is clear that the group has no interest in following the central tenets of Geneva, but that decision remains a choice. Qaeda groups are well organized enough – indeed devastatingly so – to wear a fixed emblem recognizable at a distance, to carry arms openly, to observe the principle of distinction, and to treat prisoners of war humanely. The fact that they have chosen the craft of terror over the path of IHL compliance in no way diminishes their capacity to meet the functional criteria embodied in APII.<sup>46</sup>

### C. The Legal Geography of Armed Conflict

The third and final category of possible obstacles to applying IHL to these killings revolves around the actual location of the killings. Under a geographical understanding of armed conflict, the application of IHL is limited to areas with sufficient intensity of fighting – the so-called hot battlefield.<sup>47</sup> Under this view, only within this zone does IHL apply; everywhere else, IHLR and its capture-first requirement arguably applies. Critics of the Obama drone program have asserted that although an armed conflict against Al-Qaeda may exist in Afghanistan and the tribal regions of Pakistan, the conflict did not extend to Abbotabad where Bin Laden was located and killed.<sup>48</sup> But the analysis in this section will suggest that the standard scholarly view on the so-called hot battle zone – based on the so-called “intensity” of hostilities – has systematically misunderstood the relevant precedents in this area, which are actually drawn from criminal cases, not IHL at all.

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<sup>46</sup> For the moment it is beyond the scope of this Article to address whether it is fair to bind non-state groups with rules of international law that they are incapable of participating in through the formation of state practice, *opinio juris*, or treaty negotiation. For a discussion, see S. Sivakumaran, *Binding Armed Opposition Groups*, 55 INT’L CRIM. L. QUARTERLY 369, 19-20 (2006).

<sup>47</sup> See Mary Ellen O’Connell, *Killing Awlaki was Illegal, Immoral and Dangerous*, CNN Online (Oct. 1, 2011) (charging that the U.S. assertion that it is involved in a worldwide armed conflict with al Qaeda, the Taliban and associated forces “defies common sense”). For a discussion, see also Laurie Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GEORGIA J. INT’L & COMP. L. 1, 14 (2010); Ken Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a “Legal Geography of War,”* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz, ed. forthcoming 2012).

<sup>48</sup> O’Connell, *supra* note x, at x; Ambos, *supra* note x, at x.

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The first task in evaluating the hot battlefield argument is to understand and define the legal standard that it seeks to apply. The ICRC concludes that “the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents instead of mere police forces.”<sup>49</sup> The standard citation for the “intensity” requirement comes from the ICTY’s decision in *Tadic*, and proponents of a restrictive hot battlefield view often cite the landmark ICTY case for the proposition that IHL does not apply outside the zone of intense fighting.<sup>50</sup> This represents a profound misreading of the logic of the *Tadic* decision.

In *Tadic*, the defendant (on interlocutory appeal) had argued to the court that no armed conflict existed in the Prijedor region where the charged crimes took place.<sup>51</sup> If there was no armed conflict in the area, neither the defendant (nor anyone) could have committed *war* crimes there, thus depriving the ICTY of jurisdiction over the allegations (hence the interlocutory nature of the appeal since the argument was fundamentally jurisdictional).<sup>52</sup>

That being said, the ICTY Appeals Chamber flatly rejected the defendant’s argument that the armed conflict was limited to Prijedor were the actual fighting was taking place, stating in plain terms that: “The definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal but, contrary to Appellant’s contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”<sup>53</sup> The Appeals Chamber went on to note that neither a temporal restriction was inapposite as well, since the Geneva Conventions make clear that restrictions continue to apply after the fighting has receded.<sup>54</sup>

As to the geographical scope of the armed conflict, the ICTY correctly referred to the view that IACs apply to the entire territory of the parties to the conflict, since many of the Geneva restrictions, such as the treatment of prisoners of war, apply “not just to the vicinity of actual hostilities” but to the

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<sup>49</sup> See *ICRC Opinion Paper*, *supra* note x, at 3.

<sup>50</sup> See Judgment, Prosecutor v. Dusko Tadic, ICTY Trial Chamber, Case No. IT-94-1-T, 7 (May 7, 1997), para. 561-568.

<sup>51</sup> See, e.g., Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1, ICTY Appeals Chamber, ¶¶ 128-137 (Oct. 2, 1995) (hereinafter *Tadic Decision on Jurisdiction*).

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

<sup>53</sup> See *Tadic Decision on Jurisdiction*, *supra* note x, para. 67.

<sup>54</sup> *Id.*, para. 67.

entire territory of the state.<sup>55</sup> For example, it would be absurd if a state party could circumvent the Geneva restrictions on POW treatment if it moved the prisoners to an outlying district away from the battlefield (as one might expect them to do).<sup>56</sup> Although some scholars concede this point with regard to IACs, which externally regulate nation-states and therefore obviously apply to the entire territory, they deny the same point with regard to NIACs, thus creating an asymmetry between the two types of armed conflict. Under this type of scheme, IACs apply to entire states, but NIACs only apply to hot battlefield zones; outside of these intense zones of fighting, only IHRL applies.

But the ICTY flatly rejected the possibility of this asymmetry, concluding that the “geographical and temporal frame of reference for internal armed conflicts is similarly broad,” because the Common Article 3 protections apply “outside the narrow geographical context of the actual theatre of combat operations.”<sup>57</sup> The same broad reading applies to the temporal scope of armed conflict as well, since the Common Article 3 protections apply in NIACs even after the intense fighting has subsided.

What limiting principle was the ICTY willing to offer to explain the outer reaches of the geographical and temporal scope of armed conflicts? In its reading of the Geneva protections, the ICTY offered a legally and philosophically astute standard, one based on a causal criterion: “The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.”<sup>58</sup> In other words, if there is a sufficiently close causal connection between the event and the armed conflict, then IHL applies, even if not in the middle of battle.

Applying all of these principles together, the ICTY distilled the following statement of law: “International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>59</sup>

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<sup>55</sup> *Id.*, para. 68.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* para. 69.

<sup>58</sup> *Id.*, para. 69-70.

<sup>59</sup> Applying this standard, the ICTY concluded that “Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former

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How then has the *Tadic* opinion been so consistently misunderstood? Readers have taken its reference to the “intensity” of fighting and have then applied this standard blindly without reference to the manner in which the ICTY applied it – in particular the ICTY Appeals Chamber’s explicit rejection of a narrowly construed geography of armed conflict.<sup>60</sup> In fact, *Tadic* standards for the opposite proposition: the notion of armed conflict should be applied broadly in both time and space, beyond the zone of intense fighting, to events that are causally connected to that intense fighting, until such time as a lasting peace is accomplished and the conflict is completed.

Why was the ICTY so willing to dispense with a narrow geographical and temporal definition of armed conflict? As Meg deGuzman has ably demonstrated, international criminal law is in an expansionist phase, and the ICTY was at the forefront of that movement in 1995 when the *Tadic* interlocutory appeal was rendered.<sup>61</sup> If the Court had found that IHL did not apply to Prijedor, no war crimes prosecutions would be possible against the defendant and other individuals who committed killings. Viewed cynically, the court’s business depended on a finding that IHL applied to the region in question.<sup>62</sup>

At issue here is that international criminal lawyers and international human rights lawyers have exactly opposite interests with regard to the scope of IHL. For international criminal lawyers, the expansion of IHL is a good and necessary development. The more conduct that is governed by IHL, the more conduct can be described as war crimes and prosecuted in a court of law. Although genocide and crimes against humanity have been untethered

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Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.” *Tadic Decision on Jurisdiction*, *supra* note x, para. 70.

<sup>60</sup> Cite.

<sup>61</sup> See Margaret deGuzman, *How Serious are International Crimes? The Gravity Problem in International Criminal Law*, COLUM. J. TRANSNAT’L L. (2012). It should also be noted that IHL’s engagement with the rules for non-international armed conflicts is long and deep, especially since the Lieber Code was formulated for the conduct of an *internal* civil conflict. See also LAURA PERNA, THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS 39 (2006) (discussing importance of Spanish Civil War in formation of IHL rules).

<sup>62</sup> See DeGuzman, *supra* note x, at 22 (noting that “[r]easoning that international humanitarian law should apply as broadly as possible, judges have taken a fairly expansive approach to that distinction thereby effectively diminishing the gravity required for international adjudication of war crimes”).

from a nexus with armed conflict, these two categories of crimes have additional doctrinal requirements that often prove to be an impediment to their application to particular conflicts.<sup>63</sup> The expansion of international criminal law is parasitic upon an underlying expansion of IHL, since war crimes simply represent the criminalization of underlying norms that originally emerge from this other body of law centered around the existence of an armed conflict.<sup>64</sup>

On the other hand, the international human rights lawyers have the opposite interest. International human rights law applies chiefly in situations where IHL does not apply.<sup>65</sup> Unlike international criminal law norms, which are parasitic upon IHL norms, IHRL is a normative competitor to IHL.<sup>66</sup> Simply put, IHRL is universal in nature and application (according to its adherents), and the *lex specialis* of IHL carves out a distinct normative regime where IHRL does not apply (or at the very least takes a back seat to the more primary rules regarding targeting and detainability that come from IHL). International human rights lawyers are therefore strongly inclined to view the scope and applicability of IHL in its narrowest possible terms.<sup>67</sup>

In a sense the two camps are *both* correct because they are each looking at different sides of IHL. International criminal law is primarily concerned with the restrictions on conduct imposed by IHL, some of which are then criminalized by international criminal law: the prohibition against torture, against cruel treatment of POWs, the declaration that no quarter will be given, etc. This is the side of IHL that restricts how participants in armed conflicts conduct themselves, and the international criminal lawyer has every reason to expand these humanizing restrictions as broadly as possible. It is a noble impulse.

On the other hand, the international human rights lawyer is primarily concerned with the privilege granted by IHL, which is possibly the most severe privilege in any legal regime: the privilege of combatancy, or the right to kill enemy forces with legal impunity. From the vantage point of international human rights law, IHL and its privilege of combatancy that it grants to

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<sup>63</sup> In the case of genocide, it is special intent; in the case of crimes against humanity, the widespread and systematic nature of the attacks, and in particular the state or organizational plan or policy requirement.

<sup>64</sup> Cf. Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence*, 6 J. INT'L CRIM. JUST. 21, 22 (2008).

<sup>65</sup> Unless, of course, it can be co-applied; see *infra* Part IIB.

<sup>66</sup> See Luban, *supra* note x, at x.

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

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its subjects wherever it is applied, is a moral disaster, one that licenses wholesale killing of thousands of combatants about potentially millions of civilians as long as their killing is collateral and meets the demands of proportionality. From this viewpoint of its privileges granted, IHL ought to be restricted and restrained as far and as much as possible, limited to tightly controlled situations where it, as a body of law, can do as little damage as possible. Hence the desire to view IHL as constrained in time and space to a hot battlefield. And what of the humanizing effects of the restrictions on conduct inherent in IHL? International human rights lawyers are not so impressed with them as they have their own set of restrictions – these ones universal – already in their legal toolkit, ready to deploy on and off the battlefield. The participants and victims do not need extra protections from warfare if the protections of human rights law were applied globally and universally as they should. So IHL is more of a disaster than anything else.

This partially explains why the ICTY was in an expansionist mode; it was more concerned with the prohibitions of IHL than the privileges of IHL. One might argue that this fact should color our analysis, such that the ICTY's discussion of the scope and intensity of armed conflict should be viewed within this context, i.e. a prohibition-side expansionist view of IHL. Would it be appropriate to apply the expansionist *Tadic* standard when discussing the privileges of IHL? At least some scholars more interested in the prohibitions of IHL might argue that the two different domains ought to have different presumptions: a presumption against IHL applying when discussing its privileges, but a presumption in favor of IHL applying when discussing its prohibitions.

But the two sides of the IHL coin cannot be so easily disentangled from each other. Each side represents a symmetrical relation of the consequences triggered by the existence of a special legal regime. True, a different presumption might be warranted with regard to particular facts that are of great importance to IHL. For example, it is certainly true that there is a presumption in favor of civilian status within the context of targeting; a soldier in doubt should presume that a target is civilian rather than a combatant.<sup>68</sup> The opposite factual presumption might apply when dealing with the prohibitions of IHL; soldiers should presume that captured individuals are entitled to POW status if their status is uncertain. So the presumption regarding civilian status would be opposite depending on whether one was discussing the privileges or prohibitions of IHL. But the presumption of civilian status is far different from the existence of armed conflict. The former fact triggers certain rules within IHL, but the latter fact triggers the entire application of IHL as a body of law. The existence of an armed conflict (and what counts as

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<sup>68</sup> See Additional Protocol I, *supra* note x, art. 50. For a discussion, see Adil Ahmad Haque, *Killing in the Fog of War*, 86 SOUTHERN CAL. L. REV. (2012).

an armed conflict) is fundamentally a legal standard, and one that is either satisfied or not. One cannot change the standard itself depending on whether one is discussing the privileges or prohibitions of IHL, so as to engineer ad hoc results.

## II. THE CO-APPLICATION DOCTRINE AND THE VARIETIES OF NECESSITY

Until this point in the analysis, we have assumed that the application of IHL would prevent the duty to capture from applying.<sup>69</sup> However, there is another possible route that would result in the application of the duty to capture, even if IHL is triggered by the existence of an armed conflict against a sufficiently organized non-state actor. Under this route, both IHL and IHRL would apply *at the same time*. Co-application of the two normative regimes is only possible if one rejects IHL as a *lex specialis* regime that knocks out other legal rules from application.<sup>70</sup> If IHL is not a *lex specialis*, this opens the door to apply the rules of IHRL in two manners: first, when there is no IHL rule on point; and second, when the governing IHL rule has little content and can be interpreted in light of a relevant IHRL rule. In either situation, co-application of IHL and IHRL functions as a gap-filling exercise, plugging the holes left by the skeletal nature of IHL. The need to fill gaps is allegedly especially acute in NIACs, which have comparatively fewer codified rules as compared against their international cousins (IACs), which are well regulated by Geneva, Hague and other treaty regimes.<sup>71</sup>

With regard to the duty to capture, the leading precedent applying the co-application methodology is the Israeli *Targeted Killings* decision.<sup>72</sup> In that case, Justice Barak argued that the principle of proportionality demanded that a targetable terrorist -- as a civilian directly participating in hostili-

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<sup>69</sup> However, see Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK INT'L HUMANITARIAN LAW 47 n.195 (2010), who concludes that even assuming IHL requires capture if feasible, the killing of Awlaki was lawful because capture was not practicable in his case. See also Melzer, *supra* note x, at 112.

<sup>70</sup> See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNATIONAL L. & POLICY 237, 247 n.94 (2009) (referring to *lex specialis* as "Latinized nonsense"). The text of the maxim is *Lex specialis derogat legi generali*.

<sup>71</sup> See, e.g., MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011) Lubell, Heller?

<sup>72</sup> See HCJ 769/02 *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.* 53(4) PD 459 [2005] [hereafter cited as *Targeted Killings Decision*].

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ties -- should be killed only if a “less harmful means” could not be employed.<sup>73</sup> Although the source of this exact interpretation of the principle of proportionality was listed as a domestic (Israeli) source of law, it was also referred to as a “human right.”<sup>74</sup> This coupled phrase with the fact that the principle of proportionality clearly exists under customary international law suggested to some that the analysis was the same under international law.<sup>75</sup> The court concluded that “if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed” because a “rule-of-law state employs, to the extent possible, procedures of law and not procedures of force.”<sup>76</sup>

When the ICRC issued its *Interpretative Guidance on Directly Participating in Hostilities*, it too recognized a qualitative duty to capture in Chapter IX of its document, though it purported to do so solely on the basis of IHL.<sup>77</sup> A central element of its argument stemmed from the nature of IHL’s withdrawal of protection from attack for civilians directly participating in hostilities.<sup>78</sup> Suggesting that this withdrawal of protection did not make such civilians always targetable, the report was a bit vague whether this placed civilians directly participating in hostilities in a liminal category between combatants and protected civilians, or whether the asserted restrictions regarding attacks against civilian directly participating in hostilities were applicable to attacks against combatants as well.

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<sup>73</sup> *Targeted Killings Decision*, *supra* note x, para. 40.

<sup>74</sup> *Id.*, para. 40.

<sup>75</sup> See Milanovic, *Norm Conflicts*, *supra* note x, at 120 (noting that although it was “not entirely clear whether the Court derived this rule from IHRL or from domestic constitutional law, but is clear that it is a human rights norm that it was applying”).

<sup>76</sup> *Targeted Killings Decision*, *supra* note x, para. 40, *citing* *McCann v. United Kingdom*, 21 E.H.R.R. 97 (1995) (“[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk” (p. 148, at paragraph 235).” However, *McCann* is a problematic precedent for this point of law. See *infra* Part IIB at x. See also Amichai Cohen & Yuval, *The Application of the Principle of Proportionality in the Targeted Killings Case: A Development of Modest Proportions*, 5 J. INT’L CRIM. JUST. 310 (2007) (“While it is hard to contest that the *McCann* formula should govern the conduct of law-enforcement agencies under human rights law in times of peace, its full application to situations of armed conflict is questionable.”).

<sup>77</sup> See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereafter cited as *ICRC Interpretive Guidance*].

<sup>78</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 70.

The basis for the view that civilians directly participating in hostilities could not be targeted without restriction stemmed from its understanding of the principle of military necessity – one of the key building blocks of IHL.<sup>79</sup> The report correctly identified the principle as permitting “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”<sup>80</sup> The question is how one moves from this general principle to the conclusion that a duty to capture is required.<sup>81</sup> The only way to answer this question is to provide an account of what the phrase military necessity means and what the principle permits and demands from attacking forces.

#### A. *The History of Military Necessity*

The ICRC definition of military necessity harkens back to the principle’s earliest codification in Article 14 of the Lieber Code: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>82</sup> Although the Lieber Code does not provide a complete account of military necessity, it does explain in more detail what it does and does not allow, fleshing out the principle via family resemblance. Regarding permissions, it famously states that

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

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<sup>79</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 78; William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT’L L. 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.”).

<sup>80</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 79.

<sup>81</sup> Compare Chesney, *supra* note x, at 46 (correctly concluding that the ICRC’s position, and Melzer’s argument, rests almost exclusively on its interpretation of the principle of necessity and its logical culmination in the principle of humanity), with Melzer, *supra* note x, at 96 (referring to the concept of *maux superflus* as a preexisting principle that supports his interpretation of the principle of necessity).

<sup>82</sup> Instructions for the Government of Armies of the United States in the Field, General Order No. 100, April 24, 1863 [hereinafter cited as *Lieber Code*].

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of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.<sup>83</sup>

What then does military necessity *not* allow? Lieber is clear on this as well, stating that “Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”<sup>84</sup> In other words, the principle of military necessity prohibits acts that are gratuitous or superfluous in the sense that they do not confer a military advantage – i.e. they are based in pure cruelty without practical advantage.<sup>85</sup> And clearly, killing enemy troops confers a large practical advantage insofar as it achieves, in the words of Article 14, “the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”<sup>86</sup> The mirror image of the principle of necessity is the principle of humanity, which restricts “suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”<sup>87</sup>

In applying these basic principles to particular situations, the ICRC report concludes that in conflicts between large well-equipped armies, they will rarely prohibit any particular method of attack that is not already prohibited by a more specific rule of IHL. However, in more asymmetrical conflicts like non-international armed conflicts, the *Interpretative Guidance* con-

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<sup>83</sup> Lieber Code, *supra* note x, art. 15.

<sup>84</sup> Lieber Code, *supra* note x, art. 16.

<sup>85</sup> Blum, *supra* note x, at 96-97, suggests that burgeoning domestic support for the war effort (by reporting high casualties of enemy troops) is not a legitimate military advantage for purposes of military necessity.

<sup>86</sup> Lieber Code, *supra* note x, art. 14.

<sup>87</sup> THE US AIR FORCE PAMPHLET (1976); ICRC, STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Practice Relating to Rule 14, Proportionality in Attack, available at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_us\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule14).

cludes that the principles would yield substantive restrictions. It offers the following hypothetical:

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.<sup>88</sup>

Strangely, the conclusion stands in stark contrast with the basic definition of the principle of military necessity offered at the beginning of Section IX of the *Interpretive Guidance*. Military necessity only prohibits actions that do not advance “the complete or partial submission of the enemy at the earliest possible moment.”<sup>89</sup> If this were the sole criterion, then perhaps the killing of an enemy terrorist who is lawfully targetable under IHL would not result in the submission of the enemy at an earlier moment than will his arrest and trial, because both killing and capture immobilize the threat. However, there is a second part to military necessity under both Lieber’s formulation and the ICRC formulation, i.e. the “minimum expenditure of life and resources” of the attacking force. Under this prong, the attempt to capture will inevitably result in a risk of greater damage to the assaulting force and will offend the necessity principle’s caveat that the assaulting force is permitted to achieve legitimate war aims “with the *minimum* expenditure of life and resources.” Consequently, risking *any* number of lives in an attempt to capture offends this principle as written. Indeed, even offering the *opportunity* to surrender might run afoul of this provision in certain circumstances, because it either eliminates the element of surprise or delays legitimate victory, or both.<sup>90</sup> The report offers little to explain why the principles of necessity and humanity would require capture, except for the conclusory statement that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender.”<sup>91</sup>

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<sup>88</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 81.

<sup>89</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 79, citing UNITED KINGDOM: MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* section 2.2 (2004) (discussing military necessity).

<sup>90</sup> Indeed, Lieber explicitly recognized the importance of surprise. See Lieber Code, *supra* note x, art. 19 (“surprise may be a necessity”).

<sup>91</sup> See *ICRC Interpretive Guidance*, *supra* note x, at 82.

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We are left then with a startling disconnect between the ICRC's *formulation* of the principle of military necessity and its *application* with regard to capture.<sup>92</sup> Given its codified birth in the Lieber Code, proponents who argue that the principle of necessity means something more – a duty to pursue the least harmful means – are insensitive to the historical context in which Lieber codified the principle.<sup>93</sup> As John Witt makes clear in his recent historical study of Lieber:

Here then was a compelling but potentially ferocious framework for the laws of war. Outside of torture, virtually all destruction seemed permissible so long as it was necessary to advance a legitimate war effort. The law thus permitted the use of any weapon, including “those arms that do the quickest mischief in the widest range and in the surest manner.” And it did so for a simple reason. As Lieber said more than once in the course of his lectures, short wars were more humane wars, and the way to ensure short wars was to fight them as fiercely as possible. The prospect of fierce wars might even prevent war from breaking out in the first place. It was thus critical that statesmen “not allow sentimentality to sway us in war,” he warned. “The more earnestly and keenly wars are carried on, the better for humanity, for peace and civilization.”<sup>94</sup>

This did not mean that there were no restrictions on warfare, however. Some prohibitions were categorical, regardless of whether necessity demanded it.<sup>95</sup> The use of torture was categorically impermissible, as well as the use of poison and perfidy.<sup>96</sup> And today, the execution of captured POWs – even if taken during a reprisal to punish and induce a recalcitrant enemy to obey the laws of war – is impermissible under any situation (a categorical prohibition which emerged long after Lieber and was only recently codified).<sup>97</sup> But this just

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<sup>92</sup> For an extensive critique, see W. Hays Park, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, N.Y.U. J. INT’L L. & POL. 769, 805 (2010).

<sup>93</sup> Indeed, the ICRC Interpretive Guidance concedes that military necessity is “strongly influenced” by the Lieber Code but includes no historical analysis of the development of the principle. See *ICRC Interpretive Guidance*, *supra* note x, at 79 n.215.

<sup>94</sup> See JOHN FABIAN WITT, *LINCOLN’S CODE* (2012).

<sup>95</sup> See Gary Solis, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 259 (2010).

<sup>96</sup> See Lieber Code, *supra* note x, art. 16.

<sup>97</sup> Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA J. INT’L L. 795, 820 (2010) (who argues that the UK is unwilling to categorically dismiss the possibility of using the technique against an adversary who steadfastly refuses to comply with basic Law of War protections), *citing* U.K. MINISTRY OF DEF., *THE MANUAL OF THE LAW OF ARMED CONFLICT* 421 (2004)

shows how little of the argumentative work is performed by the principle of necessity; the real prohibitory work in IHL is done by the specific prohibitions regarding outlawed methods of warfare, not the general principle of necessity which allows prosecution of the war effort with maximum speed.<sup>98</sup>

As far as the general principle goes, what is outlawed by the principle of necessity is death and destruction not related to the war effort – actions performed purely out of cruelty, avarice, revenge, madness or nihilism, one would suppose.<sup>99</sup> A rational actor has little reason to pursue such actions anyway, since they are not related to the war effort, unless overcome by emotion. But the principle of necessity under IHL does not mean that the attacking force needs to sacrifice *more* in order to comply with the principle.<sup>100</sup> As Witt points out, Lieber wrote in an unfinished book that attacks were “lawful only as a means to obtain the great end for which a war is undertaken, and not for its own sake” and that this represented “the chief difference between the wars of barbarous ages and the armed contests of civilized people.”<sup>101</sup> Witt concludes that, “[i]n Lieber’s hands, military necessity was both a broad limit on war’s violence and a robust license to destroy.”<sup>102</sup> Simply put, Lieber

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<sup>98</sup> In his illuminating book, Witt argues that the Emancipation Proclamation was a war measure justified on the basis of military necessity – hence the greater social impact of Lieber’s principle of necessity.

<sup>99</sup> See Lieber Code, *supra* note x, art. 11 (military necessity disclaims “all cruelty and bad faith . . . all extortions and other transactions for individual gain; all acts of private revenge”).

<sup>100</sup> See Van Shaack, *supra* note x, at 33 (referring as “revisionism” any interpretation of the necessity principle that requires capture before killing). Compare with Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 69, 73 (2010) (arguing that the duty to capture based on military necessity could be enshrined as a legal obligation through amendment and supporting, like Melzer, a least-harmful-means test as a gloss on military necessity). However, Blum also has an innovative argument based on the principle of distinction. Just as IHL requires attacking forces to use technology to distinguish between combatants and civilians, the same technology might be used to distinguish further *within* the category of combatants between threatening combatants and non-threatening combatants. However, Blum fails to contend with the fact that the very concept of combatancy within IHL is based on the notion that all combatants are by definition threatening, hence their targetability based on status. See Blum, *supra*, at 80 (conceding that IHL presumes that all soldiers are “seeking to kill”). To talk of “nonthreatening” combatants is a contradiction in terms unless one introduces a temporal element, i.e. the combatant is not threatening at a discrete moment in time because he is sleeping or otherwise disengaged from direct fighting.

<sup>101</sup> See Witt, *supra* note x, at x. Witt refers to this as Lieber’s “Clausewitzian perspective” on war (violence rationally related to the political objectives of the state).

<sup>102</sup> *Id.*

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was not in favor of over-regulating warfare, because making wars too civilized would inevitably prolong them, potentially increasing the overall suffering.<sup>103</sup>

### *B. The Modern Notion of Military Necessity*

One might object that IHL has moved beyond the Lieber Code, and that many of the customs of war permitted in Lieber's time have long since been outlawed by treaty or custom in the current post-World War II era of IHL. While this is true – the Lieber Code was undoubtedly replaced by more modern codifications – the question is more properly whether the principle of necessity has undergone a similar transformation. But based on the particular codification of the principle of necessity that one hears most often, and that has been adopted by the ICRC, it is clear that the principle of necessity has largely remained unchanged since Lieber. Rather, it is the *specific* prohibitions that have changed in IHL. Indeed, one of the reasons why the specific rules on prohibited methods were adopted within the last 50 years is precisely because the principles of necessity – by itself – was ill-suited to the task. Since military necessity means – and has always meant – that the attack is legitimately related to the expeditious pursuit of war aims with minimal risk of life and limb to the attacker, there is no possible way that the concept of military necessity could perform the wide-ranging normative work that some human rights lawyers today have ascribed to it.<sup>104</sup> The concept is simply incapable of carrying that heavy a load in the argument.<sup>105</sup>

The more modern precedents support and extend this reading of military necessity as being essentially unchanged since the time of Lieber. In the *Hostage Case*, the U.S. Military Tribunal sitting in Nuremberg concluded that “[m]ilitary necessity permits a belligerent, subject to the laws of war, to

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<sup>103</sup> *Id.*, citing Lieber Code, *supra* note x, art. 29 (“Sharp wars are brief.”).

<sup>104</sup> See David Luban, *Military Lawyers and the Two Cultures Problem*, LEIDEN J. OF INT’L L. (2012). See also Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, Nov. 29/Dec. 11, 1868 [hereinafter St. Petersburg Declaration] (only legitimate war aim is “to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men”).

<sup>105</sup> *But see* Carnahan, *supra* note x, at 230 (“Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.”). Carnahan argues that the principle of military necessity has chastised military conduct, citing as examples the reluctance to bomb food crops during the Korean Conflict. See *id.* at 229.

apply any amount and kind of force to compel the complete submission of the enemy with the least expenditure of time, life, and money.”<sup>106</sup> The formulation closely matches Lieber’s formulation insofar as it permits the unrestricted amount of force as long as it is rationally related to defeating the enemy, unless prohibited by a more specific rule. David Luban is correct when he concludes that the *Hostage* formulation of military necessity “includes any lawful act that saves a dollar or a day in the pursuit of military victory.”<sup>107</sup> Some scholars are critical of such formulations on normative grounds because they do not require an attacker to give up even a trivial amount of marginal risk to their own troops in order to reduce the amount of casualties to the opposing force.<sup>108</sup> However, this just highlights the previous point, i.e. that military necessity tracks the licensing function of IHL more than it tracks the regulating function of IHL, the latter being carried by more specific prohibitory rules.<sup>109</sup> As explained in Part I, IHL involves two functions; it licenses the privilege of combatancy, permitting killing that would otherwise be illegal, and it then places constraints on that license, by virtue of specific prohibitions regarding methods and tactics.<sup>110</sup> Though it straddles both domains, the concept of military necessity belongs far more to the former than the latter.

The first question is what is meant by the term “indispensable” with regard to defining necessary actions as those that are indispensable for securing the ends of the war. First, if one reads only Article 14 of the Lieber Code,

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<sup>106</sup> See *United States v. List*, 100 M.T. 100 (1948), quoted in Luban, *supra*, at 43 (referring to this as the *Hostages* formulation of military necessity). For a discussion of this standard in relation to the entire *List* case, see KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011).

<sup>107</sup> See Luban, *supra* note x, at 44. However, Luban views the *Hostage* formulation as a substantial expansion of Lieber’s original formulation, mostly because Luban focuses exclusively on Article 14 of the Lieber Code (defining military necessity in relation to actions that are “indispensable” to the war aims) but ignores Article 15 (“Military necessity admits of all direct destruction of life or limb of armed enemies”) as well as the historical context, including the state practice and *opinio juris*, of Lieber’s Code. In fact, a complete reading of Lieber’s notion of military necessity is impossible without considering in toto everything from Article 14 through Article 29 (“The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”).

<sup>108</sup> See Seth Lazar, *Necessity in Self-Defense and War*, 40 *PHILOSOPHY & PUBLIC AFFAIRS* 3, 39-42 (2012) (formulating necessity in terms of marginal risk); Blum, *supra* note x, at 78 (noting that necessity “justifies not only what is required to win the war, but also what reduces the risks of losses or costs of the war”).

<sup>109</sup> But see Luban, *supra* note x, at x.

<sup>110</sup> See Blum, *supra* note x, at 77.

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one might be left with the perception that indispensable means left with no other choice. But it certainly did not mean that for Lieber, as articles 15 through 20 of the Lieber Code make clear.<sup>111</sup> A holistic reading of the entire first section of the Lieber Code makes clear that necessity allows not only the wholesale destruction of life and limb but also anything non-gratuitous.<sup>112</sup> Second, contemporary IHL commentators sensitive to this nuance understand “indispensable” in similar fashion, understanding it as proportionately related to prompt resolution of the war effort.<sup>113</sup> This prohibition against superfluous suffering is also evidenced by provisions in the Additional Protocols.<sup>114</sup>

One way of giving content to the notion of causing superfluous suffering is to think of marginal risk.<sup>115</sup> If the law were to impose a duty to cap-

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<sup>111</sup> See Witt, *supra* note x, at x (“There were the key words: *Indispensable for securing the ends of the war*. What did indispensable mean? One thing was certain: It did not mean that armies were permitted to take only those actions that were necessary in the sense of leaving no other choice. Read this way, the necessity principle would have prohibited virtually every act of war, for it was rarely the case that any course of conduct (in war or otherwise) offered the only available path forward.”).

<sup>112</sup> Hays Park, a member of the ICRC Direct Participation Working Group, also notes that the ICRC *Interpretive Guidance* fails to cite Article 15 and ignores its “life and limb” language, thus leading to its erroneous interpretation and application of military necessity. See W. Hays Park, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, N.Y.U. J. INT’L L. & POL. 769, 805 (2010).

<sup>113</sup> See, e.g., MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 194 (check) (1982) (allowing relevant and proportionate action); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 521-22 (1961) (equating Lieber’s “indispensable” with “relevant and proportionate”), both cited in Carnahan, *supra* note x, at 215 n.20.

<sup>114</sup> See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (hereinafter cited as *Additional Protocol I*), art. 35(1) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”). For an example, see Downey, *supra* note x, at 261 (discussing regulated weapon systems such as explosive bullets that aggravate “the recipient without furthering the military purpose of the projectile.”). See also Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT’L L. n.301 (2012). Cf. Jean Pictet, *supra* note x, at 75 (noting change from “superfluous injury” to “unnecessary suffering”).

<sup>115</sup> For a discussion of marginal risk in this context, see Lazar, *supra* note x, at 13. However, Lazar’s analysis of necessity is more applicable for self-defense since his formulations all assume the wrongfulness of one side of the conflict – an assumption that is entirely inconsistent with contemporary *jus in bello* built around the equality of combatants.

ture, the burden imposed on the attacking party would take the form of additional risk; troops would be placed at risk that they would not otherwise suffer if they simply killed the target. Military necessity therefore insists on a form of Pareto optimality, where there is no Pareto superior move that makes one side better off without making the other side worse off. Foregoing the use of lethal force (and using capture instead) would definitely benefit the target, but this advantage could only be secured by making the attacking side better off (through the risk to its troops). Since there will always be risk associated with capture instead of kill (with the exception of enemy troops who have already surrendered and laid down their weapons), requiring capture would not be a Pareto superior move. Consequently, Pareto optimality is reached at a rather low level in the necessity of armed conflict, since additional risk is always a potential burden for either side. That is why IHL offers so little protection to enemy combatants, other than gratuitous suffering.<sup>116</sup>

Before continuing, two final objections ought to be considering: (1) whether civilians directly participating in hostilities represent a special case that requires a duty to capture, and (2) whether IHL's core distinction between combatants and civilians is a crude and obsolete proxy that ought to be abandoned.

### *1. Capturing Civilian Combatants*

Perhaps the calculation required by military necessity is different when dealing with civilians who are subject to attack because they are directly participating in hostilities. Under this argument, the duty to attempt capture would not apply to regular soldiers, but would apply to civilians subject to attack. This would lead to three categories for purposes of targeting: (i) regular soldiers who can be attacked at any time; (ii) innocent civilians who can never be directly attacked but may suffer collateral consequences just as long as they are disproportionate to the military objective; and in between these two categories is (iii) civilians directly participating in hostilities who may be captured and only killed if capture is impossible.

Under IHL, the warrant for recognizing this third, liminal category is Additional Protocol I. Article 57(2) of API requires the taking of "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects."<sup>117</sup> Furthermore, article 57(3) requires that "[w]hen a choice is possible between several military objectives

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<sup>116</sup> See Lazar, *supra* note x, at 41 (noting that "the interests of enemy combatants are almost wholly discounted, and additional weight is given to the interests of civilians, regardless of their affiliation").

<sup>117</sup> See Additional Protocol I, *supra* note x, art. 57(2).

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for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”<sup>118</sup> Finally, article 52 provides that civilian objects shall not be the object of attack, and that “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>119</sup> When combined together, these provisions might be interpreted to require attacking forces to take greater precautions to prevent harm to civilians directly participating in hostilities, killing them only if capture is impossible.

This view is problematic for several reasons,<sup>120</sup> not the least of which is that it misconstrues API, which is designed to limit the suffering of innocent civilians generally, and more specifically to augment the pre-API prohibition against causing disproportionate damage to now requiring all feasible precautions to reduce civilian damage, even below the threshold of mere proportionality. To reread these protections so as to require the capture of civilians directly participating in hostilities has perverse consequences. It would essentially discourage individuals from complying with the laws of war, because individuals who want to fight but refuse to don a uniform or carry arms openly would gain protections that far outstrip the protections that regular combatants are afforded. They would be entitled to be treated as civilians for

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<sup>118</sup> See Additional Protocol I, *supra* note x, art. 57(3).

<sup>119</sup> See Additional Protocol I, *supra* note x, art. 52. Melzer concludes that article 52 embodies Pictet’s “use of force continuum” which requires that modest levels of force be contemplated before resorting to lethal force. See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 288 (2009), *citing* JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75 (1985) (“[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil”). The same Pictet quote is also cited in the ICRC *Interpretive Guidance*, *supra* note x, at 82 n.221, for the ICRC’s conclusion that “the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.” Hays Park mocks the ICRC’s description of the Pictet quote as “famous” and concludes that it is neither famous nor correct, is mere *lex ferenda*, and contrary to both state practice and *opinio juris*. See Park, *supra* note x, at 786 n.59 & 815 n.125. Park also argues that Article 52 of API deals with civilian “objects,” not civilian personnel or civilians proper. See *id.* at 796. See also Blum, *supra* note x, at 81-84 (noting different standards for civilian personnel and civilian objects).

<sup>120</sup> See Milanovic, *Norm Conflicts*, *supra* note x, at 121 n.108 (calling this view “unconvincing”).

purposes of API calculations with regard to “feasible precautions,” while regular combatants complying with the laws of war would still be subject to wholesale attack. That cannot be the purpose of API.

The correct view is to think of civilians directly participating in hostilities as functionally equivalent to regular combatants for purposes of targeting; they are subject to the same reciprocal risk of killing by virtue of their self-insertion into the armed conflict. No special duty to capture applies to them, because in a sense they are civilians in name only; they become functional combatants. The only difference between civilians directly participating in hostilities and regular combatants is that the former includes a transitory and temporal element, while the latter does not. Regular combatants are *always* subject to killing, whereas civilians directly participating in hostilities are only targetable “during such time” as they participate in hostilities; but this fact alone does not entail that their targeting status demands that they be treated like innocent civilians.<sup>121</sup>

## 2. *The Proxy and Convention Arguments*

The current IHL rules, and in particular the interplay between the principles of distinction and necessity, are subject to criticism for being both under-inclusive and over-inclusive.<sup>122</sup> The concept of distinction requires that civilians be protected and the concept of military necessity allows all combatants to be targeted and killed. On a moral level, this scheme assumes that the categories of civilian and combatant track the morally relevant distinctions, such as threat level and dangerousness, such that combatants are dangerous and civilians are not. But these legal categories are crude proxies at best -- usually matching the underlying moral reality but at the margins departing from them substantially. In that vein, it is possible to consider a combatant who is neither threatening nor dangerous, either because he is asleep or because he works at a non-combat function such as cooking or cleaning (because he is a private and also behind the front lines). As a corollary, consider the well-known example of the civilian working in the munitions factory.<sup>123</sup> The first is arguably not a threat but still targetable anyway;

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<sup>121</sup> The one exception is civilians who exercise a continuous combat function in a non-state armed group, who are targetable at any time in analogous fashion to regular combatants. See ICRC *Interpretive Guidance*, *supra* note x, at 33.

<sup>122</sup> Criticisms in this vein can be found in LARRY MAY, *WAR CRIMES AND JUST WAR* 115-20 (2007) (critiquing value of social categories to guide decision-making during war); Blum, *supra* note x, at 92-93;

<sup>123</sup> Cf. ICRC, *Presentation: The Law of Armed Conflict: Conduct of Operations*, at 6-3 (concluding that civilians “run a risk” by working in a munitions factory, though apparently concluding that the munitions are directly targetable while the civilian em-

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the second is making a significant contribution to the war effort but not targetable (depending on one's definition of "participating" in hostilities). Do these counter-examples suggest that the key legal categories of IHL – civilians and combatants – are antiquated or obsolete?<sup>124</sup>

Proxies are everywhere in the law and the mere existence of a proxy is not by itself a sufficient argument for its elimination. Proxies provide clarity, systematicity, and promote publicity – all essential qualities for a field like IHL that must be self-administered and self-enforced by the parties of an armed conflict. The question is whether the benefits of the proxy in this case outweigh its lack of precision at the margins; in other words, whether the IHL distinction between combatants and civilians is a crude proxy or a successful. There are several points to be made here. First, the alleged under-inclusiveness of the rule is contestable, since there is a colorable argument that the munitions worker and the bomb maker (of say AQ) are directly participating in hostilities by virtue of their craftsmanship in the tools of warfare.<sup>125</sup> This leaves the problem of over-inclusiveness stemming from the sleeping soldier or the proverbial Army Cook. In both situations, the argument for their lack of dangerousness stems entirely from a temporal dimension; the individuals may be dangerous in past or future (with different assignments) but they are not dangerous *right now*, and thus their targeting is morally problematic.

So the key to the objection is really status-based targeting itself, as opposed to conduct-based targeting which will more closely track the temporal element of dangerousness. So the central question is thought to be: is the combatant doing anything at this moment in time that makes him dangerous enough to be targeted?

Once the real basis of this objection is revealed, its clear why it must be rejected. The very notion of status-based targeting is carefully woven into the very fabric of IHL because armed conflict is a collective enterprise. Conduct-based targeting is entirely appropriate for the law of *individual* self-defense, where both private citizens and police exercise lawful force must demonstrate that the target poses an immediate risk based on his or her con-

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ployees are collateral damage subject to the rule of proportionality), available at [http://www.icrc.org/eng/assets/files/other/law3\\_final.pdf](http://www.icrc.org/eng/assets/files/other/law3_final.pdf). See also Blum, *supra* note x, at 93.

<sup>124</sup> For this reason, Van Shaack, *supra* note x, at x, views these arguments as revisionist and not sounding in *lex lata*.

<sup>125</sup> For a discussion of the targetability of bomb-makers, see Amos Guiora, *The Importance of Criteria-Based Reasoning in Targeted Killing Decisions*, in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD 303, 323 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

duct.<sup>126</sup> Both armed conflict is a collective endeavor between groups, whether nation-states or non-state actors. During wartime, individuals are placed at war simply by virtue of their citizenship or membership in one of the warring parties, making each of us responsible for the actions of the whole.<sup>127</sup> This is the essence of Lieber's famous phrase that "men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war."<sup>128</sup> To transform IHL targeting to an entirely conduct-based system is to cling to the fiction that we can pursue war as atomic individuals.

For moral individualists, this would be a virtue.<sup>129</sup> Moral individualists deny that collectives are relevant during wartime; they claim that the same rules of self-defense ought to apply in war as they do in peacetime.<sup>130</sup> One consequence of moral individualism is that killing an enemy soldier depends on whether the enemy is pursuing a just war or not. So, killing a Nazi soldier is morally permissible because the Nazi Army was engaged in genocide and aggression; killing the American soldier is morally wrong because the Americans were engaged in a just cause. This philosophical view yields completely different answers from the law of war and its canonical separation of *jus ad bellum* and *jus in bello*.<sup>131</sup> For the most ambitious moral individualists, this disconnect is reason enough to completely reengineer the law of war and transform its cardinal principles.

A full-blown attack on moral individualism is far beyond the scope of this Article.<sup>132</sup> The modest point here is simply to connect the proposal to

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<sup>126</sup> Both the legal system and moral philosophy require the same question in this scenario.

<sup>127</sup> Compare with Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISRAEL L. REV. 81, 88 (2006).

<sup>128</sup> Lieber Code, *supra* note x, art. 20.

<sup>129</sup> See, e.g., Jeff McMahan, *Collectivist Defenses of the Moral Equality of Combatants*, 6 J. MILITARY ETHICS (2007).

<sup>130</sup> See, e.g., JEFF MCMAHAN, *KILLING IN WAR* (2009).

<sup>131</sup> Incidentally, though the legal separation of *in bello* and *ad bellum* is canonical, scholars have recently asserted that the terms are of modern vintage. See R. Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 37 INT'L REV. RED CROSS 553 (1997); Milanovic & Hadzi-Vidanovic, *supra* note x, at 8.

<sup>132</sup> For a defense of moral collectivism, see Lazar, *supra* note x, at x; George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002); GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY* (2008). Cf. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFFAIRS 148-90 (2005).

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move IHL towards conduct-based targeting with the philosophical position of moral individualism. The impulse behind conduct-based revisionism in targeting is that it produces more *accurate* results regarding targeting (as opposed to over inclusive results), but accuracy here is pegged to the dangerousness of the *individual*, a standard that reigns in individual self-defense cases in domestic criminal law. This assumes that targeting is inappropriate because an individual belongs to an organized group (whether a state or a non-state group) that collectively threatens another state who must respond with collective force of its own.

One might object that collectivism of this sort entails total wars fought against civilian populations just as much as against combatants, since civilians are members of the nation that ought to “advance and retrograde” together, as Lieber says. If this disreputable result is the direct consequence of collectivism, then collectivism must be wrong. But the objection proves too much, because theorists have long recognized that civilians are not morally innocent and ought to share in the burdens of the war effort – especially unjust ones – leading to suggests for war reparations and other strategies to make civilian populations less likely to support or tolerate domestic governments controlled by warmongers.<sup>133</sup> Furthermore, IHL long ago developed conventions to limit the relevant membership for purposes of targeting, so that membership in the nation is insufficient but membership in the armed forces is sufficient to make an individual a lawful target. This convention recognizes the inherent collectivism of armed conflict – combatants represent a threat by virtue of their participation in a collective effort -- by crafting a rule for targeting that all sides in the conflict can and will abide by.

#### C. The Different Flavors of Co-Application

Another basis for challenging Lieber’s concept of military necessity is to consider the question as involving both IHL and IHRL *at the same time*. Under this view, the normative prescriptions of IHRL are viewed as universal and applicable in all situations, including armed conflict. Of particular relevance are the IHRL protections involving the right to life and the general notion of proportionality that has swept human rights discourse and global constitutionalism. As for the first -- the right to life -- it is generally taken as axiomatic that, in the words of the ICCPR, “[e]very human being has the inherent right to life” and “[t]his right shall be protected by law.”<sup>134</sup> With re-

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<sup>133</sup> See, e.g., Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants*, 38 PHIL. & PUB. AFFAIRS 342, 345 (2010).

<sup>134</sup> See International Covenant on Civil and Political Rights, art. 6(1), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter cited as ICCPR].

gard to proportionality, it is generally recognized by most European constitutional courts that the balancing of interests implied in cases of conflicting rights is to be governed by the rule of proportionality.<sup>135</sup> In such cases, the government can infringe the right of the individual no more than is necessary to achieve its legitimate interest; anything beyond this level would be impermissibly disproportionate.<sup>136</sup> Implicit in the notion of the proportionality is the notion of necessity, in the sense that actions that are unnecessary to achieve the government interest become disproportionate and responses requiring judicial intervention on the basis of human rights law.<sup>137</sup> As applied to targeted killings, the argument would be that the inherent right to life of the individual terrorist suspects can only be infringed if it is truly necessary to achieve the government result; since capture would disable the foreign terrorist as much as killing him, the decision to forego capture in favor of military killing represents a disproportionate response by the government.<sup>138</sup>

Although this view is uncontestedly the correct analysis for situations governed wholly by human rights law, the question is whether a situation could be governed by *both* IHL and IHRL, such that they are co-applied in the analysis, each one enriching the other and filling in the gaps left by the other's normative regime.<sup>139</sup> Given the general paucity of codified rules governing NIAC – Common Article 3 and APII being two of the most notable exceptions – one might look to IHRL to fill in the gaps left by IHL with regard to

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<sup>135</sup> For a discussion, see Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 465 (2011) (tracing spread of proportionality to Prussian administrative law and its later adoption by the European Court of Human Rights). See also *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

<sup>136</sup> See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 752 (2008), citing Axel Desmedt, *Proportionality in WTO Law*, 4 J. INT'L ECON. L. 441, 442 (2001). See also Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131 (George Pavlakos ed., 2007).

<sup>137</sup> See *Isayeva I*, *supra* note x, para. 169 (“Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.”).

<sup>138</sup> Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges From the “War on Terror,”* FLETCHER FORUM WORLD AFF., Summer/Fall 2003 (drone attacks violate human right to life).

<sup>139</sup> See Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?*, 88 INT'L REV. RED CROSS 881 (2006).

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NIACs.<sup>140</sup> Under this co-application approach, the concept of proportionality used by IHRL would be imported into situations already acknowledged as being governed by IHL.<sup>141</sup>

It is important to distinguish between different flavors of co-application. In the *Nuclear Weapons* case, the ICJ famously concluded that the human right not to be arbitrarily deprived of life “falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>142</sup> In other words, although human rights are universal and apply in some abstract sense in every situation, including armed conflict, their *content* is determined exclusively by reference to IHL, which simply is a human rights framework for armed conflict. Consequently, the full scope of a party’s legal obligations is determined by the operative legal rules of IHL, not the formal rules of IHRL. This mildest form of co-application has little or no practical consequences above an IHL-only view, because IHL remains the *lex specialis* that expresses what human rights law requires during armed conflict.

In contrast, a stronger flavor of co-application assumes that the operation of both fields of law *would* have practical consequences because the content of universal human rights norms is not exclusively determined by the relevant rules of IHL.<sup>143</sup> Instead, the norms and doctrines of IHRL apply when there is no direct IHL rule on point, and even when there is an IHL rule on point, its interpretation is to be influenced in the background by the universal IHRL norm.<sup>144</sup> When there is no direct IHL rule on point, this flavor of co-application has huge practical consequences because it allows extra-territorial operation of an IHRL norm during an armed conflict through its gap-filling function.<sup>145</sup> And even when there is an IHL rule on point, this fla-

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<sup>140</sup> See Milanovic, *Norm Conflicts*, *supra* note x, at x.

<sup>141</sup> See Lubell, *supra* note x, at x (discussing proportionality).

<sup>142</sup> *Legality of the Threat or Use of Nuclear Weapons* [hereinafter cited as *Nuclear Weapons*], Advisory Opinion, International Court of Justice, 8 July 1996, at § x. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 2004 I.C.J. 136 ¶ 106 (July 9) (describing IHL as the *lex specialis* applicable during armed conflict).

<sup>143</sup> See Milanovic, *supra* note x, at x.

<sup>144</sup> See also Cordula Droegge, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL L. REV. 310 (2007).

<sup>145</sup> For a discussion, see William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 ISRAEL L. REV. 592 (2007). Compare with Noam

vor of co-application provides a canon of interpretation that has the potential to strongly influence the outcome of the analysis, depending on the relevant norms in question.<sup>146</sup>

While the co-application approach arguably fills gaps, there are several arguments to support IHL as an independent body of law – *a lex specialis* – that either knocks out all other governing legal regimes, including IHRL, or provides the decision rule for the content of human rights during situations of armed conflict (as the ICJ suggested in *Nuclear Weapons*).<sup>147</sup> First, the basic foundational norms of the two regimes are logically incompatible.<sup>148</sup> While IHRL is based on the foundational norm that everyone has the right to life, IHL is based on the reciprocal risk of killing, or the idea that each soldier has the right to kill other soldiers with impunity, and in so doing opens himself up to a reciprocal risk of killing.<sup>149</sup> In other words, a universal right to life simply does not exist in IHL; indeed the entire body of law is based on its rejection because IHL assumes that killing in warfare can be regulated by distinguishing between lawful and unlawful targets.<sup>150</sup> So the incompatibility goes straight to the core of the two fields.

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Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL L. REV. 646 (2007).

<sup>146</sup> Two prime examples include the ECHR cases involving Chechnya, which applied human rights law directly, in spite of the existence of an armed conflict. See *Isayeva, Yusupova and Bazayeva v. Russia*, ECHR, No. 57947–49/00 (24 Feb. 2005) (hereinafter *Isayeva I*); *Isayeva v. Russia*, ECHR, No. 57950/00 (24 Feb. 2005) (hereinafter *Isayeva II*). For analysis, see William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN J. INT'L L. 741 (2005). See also *Ergi v. Turkey*, 1998-IV ECHR 1751 (applying human rights law). However, as Blum and Abresch both correctly note, neither Russia nor Turkey argued that it was derogating from human rights law due to the existence of an armed conflict and the triggering of IHL. See Blum, *supra* note x, at 86 n.39. It is thus unclear whether the ECHR would render the same rulings when faced with a state, like the US, that insists that its actions are justified by IHL.

<sup>147</sup> See, e.g., *Nuclear Weapons*, *supra* note x, at § 25.

<sup>148</sup> Similarly, see Schabas, *supra* note x, at x, who argues that there is a fundamental incompatibility between the two systems stemming from the Law of War's separation of *jus in bello* and *jus ad bellum*, a distinction which is not replicated in human rights law. For an example, see *Isayeva I*, *supra* note x, referring to the "legitimate aim" of the action, which Schabas correctly notes is irrelevant under IHL proper.

<sup>149</sup> See Droege, *supra* note x, at 313 (discussing reciprocity).

<sup>150</sup> Cf. G. Gaggioli and R. Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, 37 ISRAEL YEARBOOK HUMAN RIGHTS 115, 146. See also Noelle Quinivet, *The Right to Life in International Humanitarian Law and Human Rights Law*, in Roberta Arnold & Noelle Quinivet, INTERNATIONAL HUMANITARIAN LAW

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One answer to this objection is that the right to life, even in IHRL, is hardly universal. Article 6 of the ICCPR goes on to qualify the inherent right with “[n]o one shall be *arbitrarily* deprived of his life.”<sup>151</sup> Perhaps the central rule of distinction in IHL – killing combatants and protecting civilians – is a principled rule that is hardly arbitrary.<sup>152</sup> However, the concept of “arbitrariness” in IHRL means something far more substantial than this. In wartime, a combatant wearing a uniform is legally targetable at almost any moment in time, with very few exceptions (when he is *hors de combat*, injured, or providing medical services), including when he is asleep. These arbitrary killings are permissible simply by virtue of the target’s enemy uniform – his status alone – yet undeniably lawful under IHL.

The potential incompatibility with the two bodies of law has led to anxiety that their co-application will necessarily involve a watering down of human rights law.<sup>153</sup> Nowhere is that anxiety in greater display than in the right to life; in order to reconcile itself with the central privilege of combatancy at the core of armed conflict, IHRL must radically scale down its ambitions regarding the right to life. For some, it is a deal with the devil that IHRL and its proponents ought to stay as far away from as possible.<sup>154</sup> As

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AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 331 (2008); Louise Doswald-Beck, *The right to life in armed conflict: does international humanitarian law provide all the answers?* 88 INT’L REV. RED CROSS 881 (2006) (noting that Human Rights Courts adjudicating the right to life must make reference solely to the Human Rights Conventions that created these courts, partially explaining the absence of IHL from these decisions). One exception includes *Abella v. Argentina*, Inter-American Commission of Human Rights, Report No. 55/97, Case 11.137, 18 November 1997, 11 152–189, cited in Doswald-Beck, *supra*, at 882 n.2. For a contrary view, see Draper, *Human Rights and the Law of War*, 12 VA J. INT’L L. 326, 338 (1972) (concluding that Article 15 of the European Convention on Human Rights incorporates, by reference, all of IHL). See also Abresch, *supra* note x, at 745.

<sup>151</sup> ICCPR, *supra* note x, art. 6.

<sup>152</sup> See Abresch, *supra* note x, at 745 (“Most human rights treaties provide that the right to life is non-derogable, leaving the word ‘arbitrary’ as the only hook for humanitarian law.”).

<sup>153</sup> See Milanovic, *supra* note x, at x.

<sup>154</sup> See, e.g., Schabas, *Belts and Suspenders*, *supra* note x, at x. In a sense, this is the mirror image of the anxiety that IHL lawyers have regarding the importation of human rights law into their discipline, which will unravel the carefully structured deal that yields success in IHL. See, e.g., Yoram Dinstein, *Concluding Remarks: LOAC and the Attempts to Abuse or Subvert It*, 87 INT’L STUDIES 483, 488 (2011) (discussing the “unpleasant phenomenon of human rights-niks who, hoisting the banner of human rights law, are attempting to bring about a hostile takeover of LOAC.”). The institutional conflict between human rights and military lawyers is explored in Luban, *supra*

Milanovic puts the point sharply, “for all its humanitarian ethos, IHL is still a discipline about killing people, albeit in a civilized sort of way.”<sup>155</sup>

A good example of the incompatibility of the two normative regimes is *McCann*, the ECHR case relied upon by the Israeli Supreme Court when it concluded that civilians directly participating in hostilities could be killed only if capture, arrest, and trial was not feasible.<sup>156</sup> In *McCann*, the Court applied Article 2 of the European Convention on Human Rights, which provides strict criteria when the right to life can be infringed, and noticeably fails to exclude armed conflict from its provisions.<sup>157</sup> Article 2, section 1 starts by proscribing that “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law,” thus carving out capital punishment from the article’s scope.<sup>158</sup> Section 2 then goes on to catalog areas where a killing is not considered a violation of section 1, including self-defense and defense of others (legitimate defense); lawful arrest or preventing escape from custody; and lawfully quelling riots and insurrection.<sup>159</sup> There is no mention of the privilege of combatancy in armed conflict against lawful targets.

Most importantly, these three categories (defense, arrest, and riots) are only excluded if *absolutely necessary*.<sup>160</sup> Not only is the concept of absolute necessity much more demanding than the concept of military necessity, as will be explained below, but the ECHR concluded that absolute necessity is a far more demanding legal test than the notion of “necessary in a democratic society” which governs many other rights provisions in the ECHR.<sup>161</sup> Moreover, the Court noted that a domestic UK inquest after the killings examined their lawfulness under the standards of “reasonable force” and “reasonable necessity,” both of which were incapable of expressing the highest form of exigency required by absolute necessity.<sup>162</sup> The court concluded that

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note x, at x (noting that though Dinstein’s rhetoric is “exaggerated and unusually beligerent,” the phenomenon he describes is real).

<sup>155</sup> See Milanovic, *Norm Conflict, IHL, and IHRL*, *supra* note x, at 98.

<sup>156</sup> See *McCann*, *supra* note x, at para. x.

<sup>157</sup> *Id.* at para. 150.

<sup>158</sup> ICCPR, *supra* note x, art. 2(1).

<sup>159</sup> *Id.*, art. 2(2).

<sup>160</sup> See *McCann*, *supra* note x, at para. 149.

<sup>161</sup> See *McCann*, *supra* note x, at para. 149.

<sup>162</sup> This is arguably similar to the U.S. standard of reasonableness governing domestic law enforcement cases. See, e.g., *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007); *Tennes-*

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although the actions of the individual soldiers did not violate the absolute necessity standard, the planning of the operation by commanders, and other actions by government officials, did violate the standard.<sup>163</sup> The standard therefore requires that the underlying situation left the government with *no other alternative* than the use of lethal force, a standard that goes well beyond the more familiar test of reasonableness.<sup>164</sup>

This notion of absolute necessity must be contrasted with the concept of military necessity, both as it was first formulated by Lieber and its more modern formulations. Recall first that Lieber defined it as “measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war,” and concluded that necessity “admits of *all* direct destruction of life or limb of armed enemies” but outlawed cruelty, “the infliction of suffering for the sake of suffering or for revenge,” as well as anything that, like perfidy, “makes the return to peace unnecessarily difficult.”<sup>165</sup> In the more modern ICRC formulation – influential though not binding – military necessity allows actions “required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources,” and disclaims attacks that are not “actually necessary for the accomplishment of legitimate military purposes.”<sup>166</sup> Alt-

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see *v. Garner*, 471 U.S. 1, 11-12 (1985); *Plakas v. Drinski*, 19 F.3d 1143 (7<sup>th</sup> Cir. 1994). For a criticism of the standard, see George M. Dery III, *The Needless “Slosh” Through the “Morass of Reasonableness”*, 18 GEO. MASON U. CIV. RTS. L.J. 417 (2008). *But see* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and the Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1413 (2008), who supports reasonableness as the operative principle governing targeting in international law.

<sup>163</sup> See McCann, *supra* note x, para. 213 (“In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.”).

<sup>164</sup> This is also sometimes referred to as the “least restrictive means” test. See Blum, *supra* note x, at x. See also Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VIRGINIA J. INT’L L. 355, 385 (2012) (arguing that transplanting least-restrictive means test from constitutional law to IHL is not advisable).

<sup>165</sup> Lieber Code, *supra* note x, art. 16.

<sup>166</sup> See, e.g., ICRC; Melzer, *supra* note x, at 284; UK MANUAL OF THE LAW OF ARMED CONFLICT, section 2.4 (2004); International and Operational Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army, LAW OF WAR

though *actual necessity* may sound like stringent criteria – and tonally similar to *absolute necessity* – in fact the far more relevant element is the *ends* for which the action must be necessary. Unlike in human rights law, where the action must be absolutely necessary to save the life of another, here the action need only be actually necessary for the accomplishment of the conflict, which includes defeating the enemy as quickly as possible with the fewest risks to one’s own personnel.<sup>167</sup> It is precisely for this reason that the destruction of the enemy’s “life or limb” is consistent with this standard.<sup>168</sup>

So the two notions of necessity, though closely related, are far from compatible, leading to the anxiety of watering down human rights law. As Milanovic puts the point, “allowing the state to kill combatants or insurgents *under human rights law* without showing an absolute necessity to do so, or to detain preventively during armed conflict, might lead to allowing the state to do the same outside armed conflict, with one precedent leading to another, and the another, and yet another.”<sup>169</sup> Milanovic argues that *lex specialis* is a rule of conflict avoidance rather the conflict resolution, so that if IHL and IHRL could be made simpatico with each other, one ought to do so rather than viewing IHL as taking precedence when its rules conflict with IHRL.<sup>170</sup> Regardless of whether this is plausible as a general matter, the fact remains that on standards of necessity in the realm of targeting, IHL and IHRL *do* conflict, and no amount of interpretation can square the circle. As Milanovic concedes, “it is questionable... whether this necessity requirement could be effectively applied in a more traditional battlefield setting” and “there is perhaps no other area of potential conflict where the infusion of IHLR with IHL

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DESKBOOK 8 (2011); U.S. Department of the Army, Field Manual 27-10, THE LAW OF LAND WARFARE (July 1956), para. 3.

<sup>167</sup> See Lazar, *supra* note x, at 43 (“The problem is essentially that identified in 57(2.a.ii): minimizing risks to civilians often involves imposing additional risks on friendly combatants.”).

<sup>168</sup> But see Marco Sassòli, Antoine A. Bouvier, Anne Quintin, *How Does Law Protect in War?*, ICRC OUTLINE OF INTERNATIONAL HUMANITARIAN LAW 1 n.16 & 2 (stating on the one hand that “In order to ‘win the war’ it is not necessary to kill all enemy soldiers; it is sufficient to capture them or to make them otherwise surrender” but on the other hand conceding that IHL “does not prohibit the use of violence”), *available at* <http://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf>.

<sup>169</sup> See Milanovic, *Norm Conflicts*, *supra* note x, at 97.

<sup>170</sup> The warrant for this position is that no treaty expressly gives IHL this power over human rights law. See *id.* at 115. Compare with Draper, *supra* note x, finding that IHL as *lex specialis* is implicitly incorporated by human rights provisions recognizing state parties’ power to “derogate” from the right to life.

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could lead to a greater slide into utopia, with a consequent slide into irrelevance.”<sup>171</sup>

Second, there are other ways to go about solving the alleged codification gap sparked by the paucity of rules governing NIAC. Importing the rules of IHRL is one solution, but one might also apply the rules from IAC, either on the basis of analogy or because these rules have become customary in NIACs as well.<sup>172</sup> Whether applied by analogy or custom,<sup>173</sup> there are strong prudential reasons to import rules from within IHL rather than look outside to another body of law to fill the gap. The rules of IHL applicable in IACs are, at the very least, engineered to deal with the very particular situation of warfare. Moreover, IHL as a field is moving in a direction whereby the rules of warfare are becoming insensitive to the distinction between IAC and NIAC; the rules of the former are gradually being adopted to apply to the latter.<sup>174</sup> This is a preferable solution especially since essential building blocks like the principle of necessity mean different things in IHL and IHRL (as Part IIB explained), but at least the principle of necessity means the same thing in IAC as NIAC and its borrowing between them will not be subject to the same failures of translation.

Third, the rules of IHL, from Geneva to Hague Conventions, were already designed with the purpose of protecting innocent civilians and their

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<sup>171</sup> See Milanovic, *Norm Conflicts*, *supra* note x, at 121. Presumably, this leaves open the possibility of using co-application in cases *away* from the traditional battlefield. However, it is unclear if the analysis can be segmented in this fashion. If the two forms of necessity are inconsistent, why should they be co-applied in cases on the traditional battlefield either?

<sup>172</sup> See, e.g., Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1, ICTY Appeals Chamber, ¶¶ 128-137 (Oct. 2, 1995) (hereinafter *Tadic Decision on Jurisdiction*) (applying rules of IAC on the basis of customary law). See also Abresch, *supra* note x, at 742 (noting three methods, including analogy and custom, that international lawyers have used to borrow the rules from IAC to apply them to NIAC); C. Greenwood, *International Humanitarian Law and the Tadić Case*, 7 EUR. J. INT'L L. 265 280 (1996).

<sup>173</sup> For a list of customary rules applicable in NIAC, see J.-M. Henckaerts & L. Doswald-Beck (eds.), *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005).

<sup>174</sup> *Tadic Decision on Jurisdiction*, *supra* note x, para. 126; Review of Indictment, *Prosecutor v. Martić*, ICTY Appeals Chamber, para. 11. See also John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISRAEL L. REV. 72 (2007) (substantial convergence between rules of IAC and NIAC); KNUT DORMANN ET AL., *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 444 (2003) (discussing the ICTY's application of rules to internal armed conflicts); Milanovic & Hadzi-Vidanovic, *supra* note x, at 1.

rights.<sup>175</sup> The central building blocks of IHL – the principles of necessity, proportionality, distinction, and humanity – were designed so as to balance the interests of the relevant parties and achieve a humanizing result that reduced the amount of suffering caused by armed conflicts. The importation of IHRL rules, designed to protect rights during peacetime, upsets the carefully calibrated rules that were designed to do the same thing during armed conflict.<sup>176</sup> That is the reason why IHL is considered a *lex specialis*.<sup>177</sup> In fact, the humanizing rules of IHL are designed to achieve practical results because they consider their compliance and self-enforcement as well as their normative pull. Throughout the whole field – including notions of *tu quo que* and reprisals – the field has explicitly grappled with how to impose normative restraints on the conduct of warfare even in the absence of a global sovereign to demand compliance.<sup>178</sup> At least one example is the immediate notion that the rules of armed conflict are bilateral and apply to both sides of the conflict; the collapse of IHL as a normative regime will harm one’s own soldiers as well, thus giving each side of the conflict some self-interested reasons to comply with its prohibitions.<sup>179</sup>

Fourth, and finally, the co-application of IHRL and IHL is problematic because the two legal regimes govern two different *relationships*.<sup>180</sup> IHL is based on reciprocity, on co-equal belligerents meeting each other on the bat-

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<sup>175</sup> See Gary Solis, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 23 (2010) (“Like its fraternal twin, LOAC, IHL refers to the body of treaty-based and customary international law aimed at protecting the individual in time of international or non-international armed conflict”); Blum, *supra* note x, at 81 (animating principle of IHL is the “sparing of all those who do not partake in hostilities”).

<sup>176</sup> See, e.g., Blum, *supra* note x, at 74 (“The obvious advantage of the existing paradigm has been its purportedly straightforward applicability to the battlefield: In reliance on a status-based rule of distinction, soldiers need not engage in a costly and dangerous process of ascertaining the merits of each individual target.”).

<sup>177</sup> See Park, *supra* note x, at 797-98.

<sup>178</sup> See, e.g., ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN* 33-35 (2006) (discussing Prisoner’s Dilemma problems in international law).

<sup>179</sup> See generally Eyal Benevisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 85 (Eyal Benevisti & Moshe Hirsch eds. 2004); Jens David Ohlin, *Nash Equilibrium & International Law*, 96 *CORNELL L. REV.* 880-90 (2011) (finding source of international legal obligations in self-interested contractarianism).

<sup>180</sup> See Schabas, *supra* note x, at x (legal regimes are incompatible because human rights law’s “fundamental concern is not with finding a fair and balanced approach to a conflict between two combatant parties but rather with regulating the essentially unequal relationship between state and individual.”).

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tlefield, each one subject to the same rules as the other.<sup>181</sup> Although the belligerents may not be equal in military strength, their equality as a formal matter is undeniable under the law of war, because the concept of reciprocity governs their relationship. That being said, IHRL is based on a completely different relationship between the sovereign and her subject. As a body of law, IHRL constrains how a government treats its own citizens (and other non-citizen subjects) internally.<sup>182</sup> These rules do not reciprocally apply against the citizen in his or her dealing with the sovereign; this would be a category mistake. To the extent that there is any reciprocity at all it is completely different: each sovereign reciprocally promises to other sovereigns to treat his own subjects (not just foreign nationals) in accordance with certain codified standards of human rights.<sup>183</sup> But it is important to distinguish between, on the one hand, the source of the promise (reciprocally bilateral or multilateral at the level of sovereigns) and on the other hand, the object of the regulation in question, which is the sovereign's internal treatment of her subjects as constrained by IHRL.

This distinction – between the government acting as a sovereign and the government acting as a belligerent -- will be crucial for the third and final part of this essay, which examines in more detail the possibility of a domestic constitutional overlay where the targeting of citizens is concerned. To that task we now turn.

### III. ACTING AS A SOVEREIGN VS. ACTING AS A BELLIGERENT

We now turn to the final legal avenue that might ground a duty to capture in cases of targeted killings. In situations where the *target* is an American citizen, such as Anwar al-Awlaki, there is at least a colorable legal argument that the U.S. Constitution imposes additional requirements that surpass the applicable standards in cases where noncitizens are targeted.<sup>184</sup>

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<sup>181</sup> Solis, *supra* note x, at x.

<sup>182</sup> See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* (1996).

<sup>183</sup> *Id.*

<sup>184</sup> Before the Obama administration launched its fatal drone strike against Awlaki, the Justice Department's Office of Legal Counsel reportedly drafted a memorandum to the Attorney General concluding that such a strike would be lawful. The memorandum has not been publicly released. According to some reports, the authors of the document concluded that the U.S. Constitution imposed additional constraints on the government's actions, and that the strike was permissible if capture was deemed unfeasible. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, NEW YORK TIMES (Oct. 8, 2011); *Secret U.S. Memo Sanctioned Killing of Aulqi*, WASHINGTON POST (Sept. 30, 2011). See also *First Amendment Coalition v. United*

Although the U.S. Constitution does not include a codified right to life – as the European Convention and many European domestic constitutions do – it does include the right to due process.<sup>185</sup> The due process rights afforded to U.S. citizens might provide a constitutional overlay that requires something more than summary killing -- say an opportunity to contest one's status as a targeted individual or, at the very least, the opportunity to be captured and arrested and subject to the judicial process prior to the executive branch's last resort of summary killing by drone warfare.<sup>186</sup>

*A. Capture as a Due Process Requirement*

However, the precedents underlying a *constitutional* duty to capture provide less guidance than one might hope because they set the standard for the use of lethal force by law enforcement personnel in domestic police operations. *Tennessee v. Garner* announced the modern standard that allows the police to use lethal force, instead of arrest, only when the police reasonably believe that such force is necessary to stop the fleeing felon whose conduct poses an immediate threat to the officer or others.<sup>187</sup> *Garner* rightly rejected -- as a crude and ineffective proxy -- the old common law rule that prohibited deadly force against fleeing misdemeanants but allowed it for all felons, regardless of the level of danger they posed to the officer or the public.<sup>188</sup> Major Supreme Court cases applying *Garner* to different facts, such as *Scott v. Harris*,<sup>189</sup> all take place within the domestic context; none of them involve operations conducted by the U.S. military or the CIA or implicate the relationship between the domestic constitutional norms and the requirements of IHL.

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States Dept. of Just., 2012 U.S. Dist. LEXIS 103202 (N.D. Cal. Jul 24, 2012) (litigation seeking release of memorandum).

<sup>185</sup> U.S. Const., amend. V.

<sup>186</sup> See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (suit alleging deprivation of Fifth Amendment right not to be deprived of law without due process of law dismissed because father lacking standing). In a controversial holding, the court concluded that the father lacked standing because al-Aulaqi “can access the U.S. judicial system by presenting himself in a peaceful manner... the same choice presented to all U.S. citizens.” *Id.* at 18. In essence, the court placed the duty on the target to surrender if he wanted to trigger the judicial process, rather than place the duty on the government.

<sup>187</sup> See *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>188</sup> *Id.* at 11-12.

<sup>189</sup> See *Scott v. Harris*, 550 U.S. 372 (2007) (car chases).

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However, an entire line of cases analyzing the due process rights of Americans during armed conflict might prove more promising. In *Hamdi*, the Court concluded that under the Due Process Clause a citizen-belligerent detained on the battlefield was entitled to contest his detention before a neutral decision-maker;<sup>190</sup> the Bush Administration responded by creating the Combatant Status Review Tribunals (CSRTs) to satisfy the holding.<sup>191</sup> Might the same reasoning apply in targeting cases? In other words, if the Due Process Clause requires the opportunity to contest one's detention before a neutral decision maker, then surely being targeted for summary killing – a far worse fate – must trigger, at a minimum, the same level of due process, or perhaps an even greater level of scrutiny.<sup>192</sup> It would produce a system of perverse incentives if one could short-circuit the requirements of the Due Process Clause by killing, rather than simply detaining, the citizen-belligerent.<sup>193</sup> Such an argument turns upside down the liberty-interest at stake in these cases.<sup>194</sup>

The problem with this argument is that the *Hamdi* case looked to the *international* (i.e. IHL) rules of detention to generate a gloss on the scope of Congress' use-of-force authorization to the Executive Branch.<sup>195</sup> As far as detention goes, the relevant proscription in Geneva is the requirement articulated in Article 5 of the Third Geneva Convention which provides that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [entitling them to POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”<sup>196</sup> So, in a sense, the foundation for the Constitution's requirement that *Hamdi* and other citi-

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<sup>190</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 533 (2004).

<sup>191</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) (detainees entitled to habeas proceeding to contest CSRT determinations in district court).

<sup>192</sup> See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (arguing that under *Boumediene* executive branch has due process obligation to develop fair and rational procedures for targeted killing wherever they take place).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Hamdi*, 542 U.S. 507, at 520-21.

<sup>196</sup> Third Geneva Convention, *supra* note x, art. 5.

zen belligerents were entitled to contest their determination turned out to be a function of pre-existing IHL requirements.<sup>197</sup>

None of this suggests that *Hamdi* cannot serve as a precedent for a duty to capture in targeting cases.<sup>198</sup> But rather, two things are apparent about *Hamdi*. First, it does not do much to establish a domestic constitutional overlay that will change or alter the analysis in any way, since much of the *content* of the analysis in *Hamdi* curls back around and relies on the relevant rules of IHL. So when transposed to the realm of targeting, one cannot use *Hamdi* as an anchor for an argument that the Constitution requires something in *addition* to what IHL already requires. Rather, *Hamdi* arguably stands for the proposition that the Constitution requires what IHL requires.<sup>199</sup> Although this might be thought to render the Due Process Clause superfluous, it does limit the degree to which the Executive and legislative branches can depart from the international requirements.

Second, *Hamdi* cannot stand for the proposition that the Constitution requires an extra level of process for American citizens. Although that was nominally what *Hamdi* stated, this was simply because *Hamdi* himself was an American citizen and the Court was not confronted with the question of how the Due Process Clause applied with regard to the detention of non-citizens. When it came time to explain the reasons for its holding in *Hamdi*, none of them were reasons that applied solely to citizens; rather, in relying on basic principles of detention regulation under IHL, the court was providing reasons that apply to citizens and non-citizens. So although citizenship mat-

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<sup>197</sup> Ostensibly, O'Connor's plurality opinion in *Hamdi* applied the "balancing of interests" due process analysis first articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), *cited in Hamdi*, 542 U.S. 507, at 529. However, the analysis of the scope of Congress' authorization to the executive (including detention) was "based on longstanding law-of-war principles." *See Hamdi*, 542 U.S. at 521.

<sup>198</sup> *See* Murphy & Radsan, *supra* note x, at x.

<sup>199</sup> *But see* David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1395 (2011) ("the complexities of humanitarian law are at the center of the plurality opinion's lack of clarity"); Jenny S. Martinez, *International Decision: Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant - Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 785 (2004) (*Hamdi* evidences uncertain relationship between U.S. law and IHL). One possible interpretation of *Hamdi* is that IHL law influenced the court's analysis of Congress' grant of power to the Executive branch, as a matter of statutory interpretation of the AUMF, but that the same IHL norms played no rule in the constitutional analysis of due process under the *Mathews* framework.

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tered for the formal holding of *Hamdi*,<sup>200</sup> citizenship did *not* matter for the *reasons* relied upon in the *Hamdi* opinion.

When it came time to determine the rights of non-citizen detainees at Guantanamo Bay, the court reaffirmed their Constitutional right to *habeas* and the full effect of the Suspension Clause at Guantanamo (which had not been satisfied).<sup>201</sup> Since the *habeas* rights vindicated in *Boumediene* were greater than those asserted in *Hamdi*, it is clear that even the Court itself recognized that the Due Process Clause analysis in *Hamdi* had little basis in citizenship.<sup>202</sup> In a sense, the outcome in *Boumediene* was written on the wall once *Hamdi* was decided and its decidedly non-citizen reasons for articulated.<sup>203</sup>

So even under *Hamdi* and *Boumediene* framework, much of the constitutional analysis is arguably structured by the question of whether IHL is triggered and what IHL provides.<sup>204</sup> In the previous two Parts of this Article, I critically considered several potential obstacles to the application of IHL, including the alleged lack of an armed conflict with al-Qaeda or the inability of al-Qaeda as an organization to qualify as a participant to an armed conflict. Part II critically examined the possibility of co-applying IHRL and IHL together – a legal strategy fraught with difficulty given the competing normative frameworks of the two fields. That being said, neither section offered a knock down positive argument for which paradigm applied and whether IHL or IHRL should govern such attacks. Furthermore, given the conclusions of *Hamdi* and *Boumediene*, it is unlikely that a target’s status as an American citizen will alter whether IHL or IHRL should apply.

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<sup>200</sup> *Hamdi*, 542 U.S. 507, at 523-24 (making clear that the court’s holding was tied to the facts of the case, i.e. the detention of an American citizen captured on a foreign battlefield).

<sup>201</sup> *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (concluding that “[b]ecause the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles”) (citations omitted).

<sup>202</sup> *Boumediene v. Bush*, 553 U.S. at 804 (C.J. Roberts, dissenting) (criticizing majority opinion because “surely the Due Process Clause does not afford non-citizens in such circumstances greater protection than citizens are due”).

<sup>203</sup> See Murphy & Radsan, *supra* note x, at x.

<sup>204</sup> Although *Hamdi* did not critically examine the question of whether IHL was triggered by the existence of an armed conflict, the question as squarely addressed in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (concluding that an armed conflict exists between U.S. and al Qaeda).

However, the public's common-sense intuitions about the killing of American citizens, even if they play no formal role in the analysis, are highly relevant for examining what is so troubling about the Awlaki incident. Does the government have the power to order the summary killing of one of its citizens? In his speech at Northwestern, Attorney General Eric Holder argued that the requirements of the Due Process Clause were satisfied by the internal deliberative process that the Executive Branch, involving personal decisions by President Obama himself, undergoes before deciding to place an individual on the target list (which in effect is a kill list).<sup>205</sup> Furthermore, Holder noted that an extra level of analysis is triggered when the target is an American citizen.<sup>206</sup> The process involves no check on Executive Branch discretion, however, which is precisely what many consider to be at the core of Due Process protections, though there are other examples of constitutional "process" that do not involve judicial branch determinations.<sup>207</sup> Even so, this sovereign entitlement – the killing of a citizen without judicial review –

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<sup>205</sup> Eric Holder, Address at Northwestern Law School, Chicago, Illinois (March 15, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (explaining due process analysis conducted by the Executive Branch prior to using lethal force against a target).

<sup>206</sup> See *id.* (concluding that "the government must take into account all relevant constitutional considerations with respect to United States citizens – even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law."). Holder also noted that the U.S. only targets citizens after determining that capture is not feasible, though he left it deliberately vague whether the administration views this as a legal or prudential constraint: "Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful *at least* in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles." See *id.* (emphasis added).

<sup>207</sup> However, most of these examples involve neutral decision-makers, such as Administrative Law Judges, situated within the Executive Branch. Indeed, the *Hamdi*-inspired CSRTs are precisely a case in point: judicial-like proceedings performed within an Article II setting. In contrast, the determinations described by Holder in his Northwestern speech, *supra* note x, are purely extrajudicial. These creates the very asymmetry that provokes anxiety among the citizenry: the administration provides greater due process protection for detention, in the form of CSRTs and constitutionally guaranteed *habeas* proceeding in district courts, as compared with targeted killings, which are subject only to internal executive branch deliberations without judicial involvement.

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smacks of royal prerogative and represents precisely the kind of unchecked power that both human rights law and the domestic Due Process Clause were designed to constrain. This intuition is legitimate and ought to be the basis for further analysis. It contains the seeds of a strong argument.

At issue in this intuition is the *relationship* between the citizen and his government – a relationship that is trampled or infringed when the government orders his or her summary killing. Indeed, there is something problematic going on when a citizen is killed by his own government. Although there are other examples -- capital punishment being the most obvious – these other examples usually involve prior judicial review. Although killing a terrorist as part of the armed conflict with al-Qaeda will always generate controversy, the killing of a terrorist by his own government inevitably raises eyebrows. Indeed, the sovereignty of the government – its capacity to act – ought to be at its lowest ebb when it engages in the killing of one of its own subjects.

### B. Sovereignty and Belligerency

Given that the key issue here is the relationship between the citizen-terrorist and his government, I wish to introduce a central distinction in the government's capacity to act: when the government acts as a sovereign versus when the government acts as a belligerent.<sup>208</sup> The former mode is engaged when the government treats its own subjects and internally regulates the affairs of its country; the law enforcement paradigm is part-and-parcel with the government acting as a sovereign, though law enforcement is just one aspect of that relationship between subject and sovereign. On the other hand, the government acts a belligerent when it is engaged in armed conflict and meets another co-equal belligerent on the field of battle, a relationship inevitably structured by the principle of reciprocity.<sup>209</sup>

The key point here is that both modes of government – acting as a sovereign and acting as a belligerent – are subject to regulation by international law. The former mode is regulated by international human rights law because it involves a relationship of subjugation that can only be checked by international agreements that constrain how sovereigns treat their own sub-

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<sup>208</sup> This distinction is central to Professor Neff's historical study of U.S. legal regulation during the Civil War. See STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 19 (2010). For a discussion, see Alan G. Kaufman, *Book Review: Justice in Blue and Gray: A Legal History of the Civil War by Stephen C. Neff*, *Lawfare* (March 7, 2012).

<sup>209</sup> Neff, *supra* note x, at 20-21.

jects.<sup>210</sup> Such relationships are especially susceptible to abuse, which is why the development of the post-World War II human rights movement was so significant.<sup>211</sup> The latter mode – acting as a belligerent -- is regulated by IHL because it involves a relationship of co-equal belligerents who meet each other on the battlefield, both hoping to destroy the other with brute force tempered only by self-interested legal constraints.

Finding the dividing line between these two modes of action is exceptionally difficult, especially in NIACs.<sup>212</sup> In the case of an IAC, most incidents of warfare involve the state acting as a belligerent. At the other end of the spectrum, during moments of absolute peacetime, almost every action of the state is action as a sovereign with regard to its subjects. However, since NIACs often involve internal conflicts, it may be difficult to know when an internal disturbance, riot, or insurrection as ripened into a full-blown civil war.<sup>213</sup> Prior to that ripening, the conflict involves the sovereign's treatment of its own citizens under its own control; at some point when control has utterly evaporated the state meets even its own former subjects on the battlefield as co-equal belligerents. In that moment, the state acts as a belligerent under the laws of war even if its enemies were once its subjects. At some point, if the state is victorious in its military campaign, "acting as a belligerent" inevitably ends and the state returns to acting as a sovereign again; IHRL or the law of occupation as *lex specialis* is triggered (depending on the nature of the conflict).<sup>214</sup>

The relationship between the two modes is especially complex since, as historian Stephen Neff makes clear, the state may act as sovereign and as belligerent at the same time, as the United States did during the U.S. Civil

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<sup>210</sup> On this point, see Julia Dobtsis, *Doctrinal Insights of the Goldstone Report*, at 16 (manuscript on file with author) (noting that, unlike IHL, "international human rights law emerged as a supplement to the uneven internal distribution of power between a government and its citizens"). See also Yuval Shany, *Human Rights and Humanitarian Law As Competing Legal Paradigms for Fighting Terror*, 19 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW (2009).

<sup>211</sup> See Dobtsis, *supra* note x, at 17.

<sup>212</sup> See Neff, *supra* note x, at 28 (noting ability of government in NIACs to exercise both sovereign and belligerent powers *at the same time*). Indeed, Neff considers this the essence of an asymmetrical conflict, because the government has this luxury while the non-state forces do not).

<sup>213</sup> *Id.* at 18 ("two types of crises do not, in practice, separate quite so cleanly into the two categories just described").

<sup>214</sup> YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009).

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War.<sup>215</sup> In cases where a state acts as a belligerent, this does not mean that all actions conducted by the state fall under the belligerent mode; this would be implausible. The regular affairs of the state, unconnected to its prosecution of the war effort, continue unabated and are best understood as acting as a sovereign with regard to its subjects. One might even view the famous *Youngstown Steel* edict that the President is commander-in-chief of the armed forces – but not commander-in-chief of the nation – as an expression of that reality.<sup>216</sup> The existence of the armed conflict does not turn the Executive (and the federal government generally) into a military government with plenary authority over every aspect of daily life.<sup>217</sup>

How might this help answer the question of al-Awlaki's fate? The question is whether the government, in attempting to kill him, was acting as a sovereign or acting as a belligerent. If the state was acting as a sovereign, then the constraints of international human rights law ought to apply, including its higher requirements of necessity (such as the least-restrictive means test), but if the state was acting as a belligerent, the killing ought to be regulated by IHL, including the notion of military necessity that allows the taking of life and limb of enemy personnel.<sup>218</sup> But how does one know whether the state is acting as a sovereign or a belligerent; whether it is wielding its sovereign power over its own subjects or whether it is meeting its enemies on the battlefield as a co-equal belligerent? The mere existence of the categories does not, by itself, entail an account that explains when each is applicable.

Furthermore, although the target's identity as an American citizen may create a presumption that the relationship is one of sovereign-subject, the target's status as an American citizen is not outcome determinative.<sup>219</sup> After all, Nazi soldiers during World War II who happened to hold U.S. citizenship were not entitled to any extra level of due process by virtue of their

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<sup>215</sup> See *id.* at 113-14 (discussing actions such as property confiscations that straddle the borderline between the two categories).

<sup>216</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952).

<sup>217</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“a state of war is not a blank check”).

<sup>218</sup> See *supra* Part IIA and IIB.

<sup>219</sup> Indeed, arguments that rely on Awlaki's citizenship alone to determine his legal relationship to his government simply beg the question, since U.S. citizens are capable of standing in a belligerent stance with their own government, which is precisely what the war paradigm and IHL regulate. The argument from citizenship would only be outcome determinative if

status.<sup>220</sup> The U.S. Army simply treated them – for purposes of targeting – just as it treated German nationals, subject to killing in accordance with the traditional IHL principles of military necessity and humanity; there was no extra duty to attempt capture of Americans fighting for the Nazi Army before killing them. Similarly, all members of the Confederate Army during the Civil War were presumptively American citizens, since the Union did not recognize the legitimacy of the putative Southern secession.<sup>221</sup> Hence, Confederate soldiers were met on the battlefield as enemy combatants, not subject to a duty to capture, but were instead subject to the taking of “life and limb” in accordance with Lieber’s notion of military necessity.<sup>222</sup> If a duty to capture had applied, the Civil War would have been fought far differently; indeed, it would not have been a war at all but rather a simple police action.

So if citizenship is not outcome-determinative, how do we distinguish between the government’s action as a sovereign and the government’s actions as a co-equal belligerent on the battlefield? The answer that I want to sketch out here is that state never meets an individual qua individual on the battlefield as a co-equal belligerent, because belligerency between a state and an individual is logically impossible. The whole structure of belligerency requires the existence of an adversary that is capable of exercising the core elements of belligerency – not just engaging in an isolated hostile act – but rather engaging in a sustained conflict that triggers the relationship of belligerency between hostile powers.

Such belligerency is only possible between collectives. Consequently, the state only meets an individual on the battlefield as a co-equal belligerent when the individual is acting qua member of a collective. However, the relevant collective need not be a state; nothing hinges on the enemy’s formal status as a recognized state meeting the standards necessary for conducting international relations.<sup>223</sup> The enemy collective must simply be capable of exercising enough military operations such that the enemy stands in a relationship of belligerency with the attacking state. To the extent that the individu-

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<sup>220</sup> One notable example is Martin Monti, an American pilot who defected to Nazi Germany. *See also* Tom Morrow, *NEBRASKA DOPPELGÄNGER* (2006) (detailing American citizens of German ancestry who returned to Germany to fight in World War II).

<sup>221</sup> *See* Neff, *supra* note x, at x.

<sup>222</sup> Not only was the Civil War fought in accordance with Lieber’s notion of military necessity, it was the birth of the modern notion of necessity that still governs IHL today.

<sup>223</sup> These standards are expressed in the Montevideo Convention. *See* Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19. A contrasting set of criteria was presented by the Badinter Commission.

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al is a member of this enemy collective, his relationship with the state is mediated by the belligerency between his collective organization and the state.

As discussed in Part IIC, IHL already includes standards for determining collective belligerency. According to the standard elucidated in Additional Protocol II, which is as good as any, the group must be capable of exercising sustained military operations and capable of reciprocating the key elements of the Geneva Conventions. Although a linear hierarchy might be one way of meeting these criteria, it is not a necessary condition. It is logically possible to be organized in different ways and still carry out sustained military operations; the key requirement is the level of organization and whether it meets the functional standard of being capable of supporting ongoing attacks against the state.<sup>224</sup>

### 1. *The Objection From Status*

This account produces one surprising result: the animating principle that governs the result is based on the individual's status as a member of an enemy collective. Although this concentration on status might prove disconcerting to civil libertarians who believe that an individual's conduct alone ought to govern the analysis, there are central insights that ought to be kept in mind.<sup>225</sup> First, the distinction between status and conduct is partly illusory, or at the very least exaggerated.<sup>226</sup> In this case, the individual only becomes a member of an enemy collective by virtue of his prior actions. Second, IHL is already based on status targeting in the sense that enemy soldiers are targetable based on their status as members of an enemy Army. What this account does, then, is simply recognize the importance of the collective organization and how its existence transforms the individual qua individual into an individual qua member. That transformation is central to the outcome of the analysis, because only collectives (and their members) are capable of standing in a relationship of belligerency with the state.

As a final point, it is often said that IHL targeting can be based on either status or conduct. Status conduct, as just mentioned, includes targeting based on the individual's status as a member of a regular Army or, in a slightly more contentious standard, as a member of a non-state actor who has

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<sup>224</sup> In accord, see Jean-Philippe Kot, *Israeli Civilians versus Palestinian Combatants? Reading the Goldstone Report in Light of the Israeli Conception of the Principle of Distinction*, 24 LEIDEN J. INT'L L. 961 (2011) ("The concept of organized armed group refers to non-state armed forces in a strictly functional sense.").

<sup>225</sup> For a discussion of this surprising result, and a full normative defense of its application, see Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD, *supra*, at 79-80.

<sup>226</sup> *Id.*, at 87.

a continuous combat function within that organization.<sup>227</sup> However, it is also the case that individuals who are directly participating in hostilities may also be targeted under IHL, and this is often described as conduct-based targeting.<sup>228</sup> While directly participating in hostilities is far more conduct-oriented, it is not wholly without status. The notion of directly participating in hostilities presumes that there is already a state of hostility between two warring collectives, and the individual in question joins one side of the conflict by directly contributing to its cause. The notion of membership is replaced by the notion of contribution or participation, but all of them involve the individual's relationship to the collective effort. And the state's belligerency is always maintained at the collective level.

## 2. *Is the Collective Organization Military in Nature?*

A second objection remains. Since membership in the warring collective is key for determining whether the state is acting as a belligerent in its interactions with the individual, it is imperative to provide an account of membership.<sup>229</sup> Formal membership, including employment by a national department of defense, might be appropriate for national armies, but membership in a non-state organization requires more functional criteria.<sup>230</sup> Although there are many factual elements that could do the trick, the most plausible criterion is placement in a command structure in the form of giving or taking of orders.<sup>231</sup> This ensures that the individual stands in a roughly analogous position as a regular combatant in more traditional armed forces. The conclusion of this argument is that all members of both the state's armed forces, and the non-state actor, are by definition combatants and can be targeted.<sup>232</sup> Functional membership imposes a level of symmetry to an other-

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<sup>227</sup> See *ICRC Interpretive Guidance*, *supra* note x, at x.

<sup>228</sup> *Id.* at x.

<sup>229</sup> See Van Shaack, *supra* note x, at x n.244 (discussing "combatants" within non-state armed groups); Melzer, *supra* note x, at 350-52.

<sup>230</sup> See Lubell, *supra* note x, at 737-48, (analyzing functional combatancy).

<sup>231</sup> See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 872-3 (applying functional criteria for membership based presence and movement on the battlefield with brigade and carrying brigade-issued weapon).

<sup>232</sup> The warrant for this position is that all members of the armed forces have received basic training and are therefore capable of firing a weapon, even if their primary assignment is not a combat assignment. See *ICRC Interpretive Guidance*, *supra* note x, at x; Melzer, *supra* note x, at x. Blum notes that a more restriction definition of combatant (so as not to include all members of armed forces) was explicitly rejected during the negotiations of API. See Blum, *supra* note x, at 83; Claude Pilloud et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 515 (1987).

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wise asymmetrical conflict, by emphasizing the reciprocal relationship of the collectives as co-equal belligerents whose actions towards each other are governed by IHL.

But this argument relies on the force of an analogy, i.e. that the non-state organization is a military organization, analogous to the armed forces of a state.<sup>233</sup> This may or may not be the case, depending on whether the non-state organization exercises civilian functions or not. In other words, if the non-state organization is military through-and-through, then membership necessarily places the individual in a position of belligerency with the state. However, if the non-state organization is composed of military and civilian divisions, membership alone in the umbrella organization is insufficient to demonstrate the individual's status as a targetable belligerent.<sup>234</sup> In these situations, the individual might be a member of the civilian division of the organization. In such situations, the government must demonstrate either that the individual is a member of the military "wing" of the organization or that the organization is exclusively military in nature and has no civilian (i.e. nonmilitary) functions. Whether al-Qaeda, or any of its predicates (including al-Qaeda "core", al-Shabab, and AQAP) are military organizations or dual civilian-military organizations is a factual question beyond the scope of this Article. However, a factual conclusion that al-Qaeda is a dual-use organization would demonstrate that membership alone in al-Qaeda is insufficient to place an individual in a position of belligerency with the state and hence insufficient to trigger the permissive targeting rules of IHL, including its principle of military necessity.<sup>235</sup>

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<sup>233</sup> The issue is discussed in *Hamilly v. Obama*, 616 F.Supp.2d 63, 73-74 (D.D.C. 2009) (allowing detention of all members of al-Qaeda and Taliban as consistent with IHL based on membership in non-state armed groups), *citing* Additional Protocol II, art. 13, *Prosecutor v. Galic*, ICTY Trial Chamber, Case No. IT-98-29-T, P 47 (Dec. 5, 2003), and *Prosecutor v. Blaskic*, ICTY Trial Chamber, Case No. IT-95-14-T, P 180 (Mar. 3, 2000).

<sup>234</sup> See *Hamilly*, 616 F.Supp.2d 63, 74-75. See also Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1084 (2008).

<sup>235</sup> Members of the Obama Administration have publicly stated that the United States does not target individuals simply based on membership alone and that a higher threshold is required. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Address at the Woodrow Wilson Center, Washington, D.C. (April 30, 2012) ("Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security. For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests."). Brennan's speech implied that the U.S. view is that it is lawful to target based

CONCLUSION

The duty to capture rests at the fault line between IHRL and IHL. The core protection of the IHRL is the right to life; the core privilege of IHL is combatancy, the right to kill with impunity. Although this formulation throws the normative tension of the two bodies of law into sharp relief, the gulf is inevitable and inescapable. The duty to capture applies in the former body of law but not the latter. Straddling these bodies of law is the ever-present concept of necessity. But the preceding analysis has argued that a unified notion of necessity that extends across domains is over-ambitious and inevitably risks covertly importing the norms of one body of law across the divide into the other body of law. Necessity in human rights means that the government, when acting as sovereign with regards to its subjects, must pursue the least restrictive means of securing its interests when doing so involves a deprivation of the rights of its subjects. In such situations, the duty to attempt capture, if feasible, applies. In contrast, necessity in IHL means that the government meets its enemies as a co-equal belligerent and destroys “life and limb” in order to secure the aims of the war (victory) with the fewest possible casualties to its troops. In such situations, the duty to capture fades away, replaced by the privilege of belligerency and the core principles that find their purest expression in the concept of military necessity.

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on membership in al-Qaeda but that the Administration as a *prudential* matter only targets individuals who pose a direct threat to the United States and its interests. The recent strategic development of so-called “signature strikes,” if factually correct, cast some doubt on the veracity of this prudential rule. See Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, NEW YORK TIMES (May 29, 2012). Signature strikes target individuals whose exact identity remains elusive but are present at known terrorist locations – such as training camps or hideouts – a strategy which bears a striking similarity to membership-based targeting.