
Article

The Duty to Capture

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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,¹ Paki-

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1. See *How U.S. Forces Killed Osama Bin Laden*, CNN (May 3, 2011,

stan, and the drone strike in Yemen that killed the leader of al-Qaeda in the Arabian Peninsula (AQAP), Anwar al-Awlaki.² In particular, political critics questioned the Obama 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.³ 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.⁴

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 “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.⁵ 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.⁶ Generally speaking, killings are justified as lawful self-defense only if the action is, in a sense, unavoidable.⁷ 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

11:59AM), <http://edition.cnn.com/2011/WORLD/asiapcf/05/02/bin.laden.raid/index.html>.

2. See *Al Qaeda's Anwar al-Awlaki Killed in Yemen*, CBSNEWS (Sept. 30, 2011, 3:08 PM), http://www.cbsnews.com/2100-202_162-20113732.html.

3. See, e.g., Tom Junod, *The Lethal Presidency of Barack Obama*, ESQUIRE MAG., Aug. 2012, at 100.

4. *Id.* at 104.

5. See *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

6. See *People v. Goetz*, 497 N.E.2d 41, 47 (N.Y. 1986).

7. *Id.* at 41.

of the culpable aggressor and the innocent defender, the law comes down on the side of protecting the life of the defender.⁸

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.⁹ In a recent case, the Supreme 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.¹⁰

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.¹¹ Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants.¹² To suggest that combatants could only be killed if capture 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.¹³

That 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

8. For a discussion of the curious relevance of the wrongfulness of the attacker, see generally George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973) (comparing Western jurisdictional approaches to basing a right to self-defense on the reasonableness or proportionality of the response to the provocation).

9. See *Garner*, 471 U.S. at 11 (applying the Fourth Amendment).

10. See *Scott v. Harris*, 550 U.S. 372, 384 (2007).

11. See Beth Van Schaack, *The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 Y.B. INT'L HUMANITARIAN L. 255, 292 (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.").

12. *Id.* at 292.

13. For a historical analysis of aerial bombardment, see Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of World War II*, 87 INT'L REV. RED CROSS 429, 433 (2005).

by opposing combatants.¹⁴ The rationale for this rule is that surrendered combatants are *hors de combat*, one step removed from prisoner-of-war (POW) status only because they have not yet been received into custody.¹⁵ 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.¹⁶ 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.

Resolving these questions requires a coherent account of the duty to capture 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 said, the concept of necessity provides less cross-context unity to the analysis than one might hope; necessity, it turns out,

14. See Rome Statute of the International Criminal Court art. 8(2)(b)(xii), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (giving jurisdiction of war crimes to the International Criminal Court, including the refusal to give quarter); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (protecting those who express an intention to surrender or are incapacitated from attack); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Conventions] (regulating treatment of “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms”); Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 60 (Apr. 24, 1863) [hereinafter Lieber Code] (“No body of troops has the right to declare that it will not give, and therefore will not expect, quarter . . .”).

15. See, e.g., Geneva Conventions, *supra* note 14, art. 3, 75 U.N.T.S. at 136–38 (regulating the treatment of all combatants *hors de combat* [outside the fight], whether due to sickness or surrender).

16. See Van Schaack, *supra* note 11, at 256–57.

means something quite different depending on the background legal norms that structure each particular body of law. In other words, it is not so clear that the concept of necessity in the domestic law of self-defense can be transplanted, without significance alteration, to the domain of IHL. The concept of necessity turns out to be something resembling a term of art in IHL, with a specific meaning that diverges from how the term is understood and applied in other normative regimes.

This 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; (iii) IHL on its own includes a previously unrealized duty to capture; and (iv) the U.S. Constitution (if applicable to the attack) operates as an overlay that imposes the requirement over and above the requirements of IHL. The Article begins by considering the underlying issues with the first three potential reasons; the last reason is addressed only at the end of the Article once all issues pertaining to international law are fully addressed.

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.¹⁷ 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

17. See *infra* note 108 and accompanying text.

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 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,¹⁸ or more likely, constitutional rights attach because the target is an American citizen like al-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.¹⁹ Moreover, confederate soldiers during the Civil War, all American citizens, were not owed a duty to capture either.²⁰ 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

18. See KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 241–47 (2009) (analyzing the way geography and territoriality affect the scope of the American legal system).

19. See Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 338 (2009).

20. See Andrew Kent, *Federal Courts, Practice and Procedure: The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1868 (2010).

might require the U.S. 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 wartime cases, within the detention context, not targeting.²¹ 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.²²

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 government? This was certainly the case when the United States 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.

21. Compare *Tennessee v. Garner*, 471 U.S. 1, 1 (1985) (discussing the constitutionality of a Tennessee statute granting officers the right to use deadly force), with *Hamdi v. Rumsfeld*, 542 U.S. 507, 539–40 (2004) (granting U.S. citizen enemy combatants the right of habeas corpus to challenge their detention).

22. See, e.g., *Hamdi*, 542 U.S. at 507 (citing the Geneva Conventions).

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 al-Qaeda 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 International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Tadić*.²³ 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.²⁴ Under this view, the only true entities that can engage in an armed conflict are states that have legal personality under international law.²⁵ But this view has long been displaced by the necessity to make internal disputes—civil wars—subject to a minimal degree of legal regulation.²⁶ The Geneva regime, and in particular Common Article 3, was specifically designed with such internal conflicts in mind, subject to a smaller—but still

23 See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 557–60 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

24. Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159, 171 (2006).

25. See Marko Milanović & Vidan Hadzi-Vidanovic, A Taxonomy of Armed Conflict 5–7 (Jan. 20, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988915.

26. *Id.* at 6.

crucial—set of legal prohibitions that applied against governments and non-state actors.²⁷

The conflict with al-Qaeda presents a challenge of classification.²⁸ It cannot be an international armed conflict (IAC) because it is not an armed conflict between two states—in other words, it isn't international enough.²⁹ On the other hand, it cannot be a non-international armed conflict (NIAC) because it is far *too* international. Because it is not confined to the geography of one nation-state, such as an internal civil war, and because it crosses transnational borders, it cannot qualify as an NIAC.³⁰ So to the extent that the presumptive armed conflict with al-Qaeda clearly crosses transnational borders, it cannot be an NIAC.³¹ This structure of this argument tries to sandwich the armed conflict between an IAC and an NIAC and conclude that because the armed conflict with al-Qaeda qualifies as neither, it cannot be an armed conflict at all.³² It cannot be a true IAC because it involves a non-state actor, and it cannot be an NIAC because it is international. Being neither, it is no armed conflict at all.³³

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.³⁴ Such a cate-

27. *Id.* at 11.

28. *Id.* at 13.

29. For a discussion, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 46 (Elizabeth Wilmshurst ed., 2012).

30. *Id.* at 50.

31. See, e.g., Noam Lubell, *The War (?) Against al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 29, at 421, 429.

32. For a normative argument that the distinction between international and non-international armed conflicts is obsolete, see Akande, *supra* note 29, at 39; Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685, 702 (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 G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313, 314 (2003).

33. For a general discussion, see Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009) (discussing issues related to the lack of definitional understanding of armed conflict).

34. But see Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT'L

gory would be a *transnational* NIAC, an *internationalized* NIAC, or some other hybrid notion or mixed category.³⁵ The standard response to these suggestions is that they are purely speculative and aspirational—a statement about what the law ought to be, not a description of the current state of the law.³⁶

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

REV. RED CROSS 95, 111 (2009) (arguing for sufficiency of current paradigms).

35. See, e.g., Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 300 (2006) (noting the “limitations inherent in the traditional Geneva Convention-based law-triggering paradigm”); cf. Akande, *supra* note 29, at 39 (interpreting the Geneva Conventions as applying to all international armed conflicts).

36. Milanović & 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 Milanović & Hadzi-Vidanovic, *supra* note 25, at 13 (criticizing Hamdan v. Rumsfeld, 548 U.S. 557 (2006)); see also Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2468–70 (2008); Dino Kritsiotis, *The Tremors of Tadić*, 43 ISR. L. REV. 262, 263 (2010). There are two responses to this critique. First, one must sidestep the ordinary meaning of the term “armed conflict” as being illusory and hence mere shorthand for the phrase “either an IAC or NIAC”—a curious result since both the legal literature and the *Tadić* decision are replete with mentions of the phrase “armed conflict.” Second, the argument by itself does not entail that the armed conflict with al-Qaeda 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 *Tadić* 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 32, at 327, one could imagine the following commonsensical definition: “protracted armed violence between any organized armed groups.”

state of war is not recognized by one of them,”³⁷ 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,”³⁸ 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.³⁹ Further support for this view allegedly comes from Additional Protocol II (APII), which states in Article 1(1) 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.⁴⁰

Under the view being examined, this APII provision both mirrors the geographical limitation on NIACs first offered in

37. Geneva 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 [hereinafter First Geneva Convention]; *see also* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva 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 [hereinafter Third Geneva Convention]; Geneva 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 [hereinafter Fourth Geneva Convention].

38. *See* First Geneva Convention, *supra* note 37, art. 3, 75 U.N.T.S. at 32–34.

39. 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. *See, e.g.*, Milanović & Hadzi-Vidanovic, *supra* note 25, at 46.

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

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 Treaties⁴¹—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 prohibitions contained therein would necessarily involve armed conflicts between two or more “High Contracting Parties,” since the signatories could not 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.⁴² 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.”⁴³ 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 one of the High Contracting

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

42. Marco Odello, *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW* 15, 15 (Roberta Arnold & Noelle Quenivet eds., 2008).

43. See First Geneva Convention, *supra* note 37, art. 3, 75 U.N.T.S. at 32–34.

Parties.”⁴⁴ 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 farfetched. 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. An NIAC is defined as y.” But that is not how Geneva was drafted.

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 an 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

44. *Id.*

armed groups that could reciprocate the humanitarian treatment, the APII is predictably silent.⁴⁵

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.⁴⁶ 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 by the International Committee of the Red Cross (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.”⁴⁷ Finally, the International Criminal Court (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.⁴⁸

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 standards of a customary norm, and the United States has persistently objected to APII.⁴⁹ Either way, even if Common Article 3 is now

45. 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.

46. See Additional Protocol II, *supra* note 40, 1125 U.N.T.S. at 675 (showing that the United States has not signed the Protocol).

47. See Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC 4 (Mar. 2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

48. *Id.* (“The Statute of the International Criminal Court . . . confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II.”); see also Rome Statute, *supra* note 14, art. 8(2)(f), (“Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions . . .”); Paulus & Vashakmadze, *supra* note 34, at 105 (noting that the Rome Statute “exacerbates the problem” already existing because of the conflicting standards in Common Article 3 and Additional Protocol II); Vité, *supra* note 33, at 81–82 (canvassing different interpretations of drafters’ intent regarding Rome Statute article 8(2)).

49. See, e.g., John B. Bellinger, III & William J. Haynes, II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 448

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 APII 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.⁵⁰ If that isn't an armed conflict, it would be hard to conceive of what is an armed conflict. 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.⁵¹

B. IS AL-QAEDA 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 to be capable of mounting sustained military operations while also meeting the standards of conduct embodied in IHL—in essence, the trigger requirements for APII.⁵² Under this proposed view,

(2007) (noting that the Additional Protocols are not customary and that a significant number of states, including the United States, have rejected them).

50. See, e.g., President Barack Obama, *Address on the War in Afghanistan* (May 1, 2012), available at http://www.pbs.org/newshour/bb/world/jan-june12/obamaspeech_05-01.html (“Our goal is to destroy al Qaeda . . .”).

51. See Mary Ellen O’Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 393–94 (2009) (discussing the International Law Association’s report on the meaning of armed conflict, which concludes the United States has been engaged in armed conflict in Afghanistan and Iraq, but that it is not engaged in a global armed conflict).

52. See, e.g., Int’l Comm. of the Red Cross, *supra* note 47, at 3 (1979) (citing Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL 147 (1979)) (“[N]on-governmental groups involved in the conflict must be considered as ‘parties to the conflict’, meaning that they possess organized armed forces. This means for example that these forces have

al-Qaeda is neither sufficiently well organized to sustain military operations nor does it follow the precepts of IHL.⁵³ Consequently, the United States cannot be engaged in an armed conflict with al-Qaeda.⁵⁴ 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.⁵⁵ 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*

to be under a certain command structure and have the capacity to sustain military operations.”).

53. 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, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 60 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (“[C]ontrol over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time.”). However, some non-state actors might be capable of launching military attacks even in the absence of territorial control, and in fact terrorist organizations often eschew territorial control to concentrate on their operational capacities.

54. See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 118 (2010) (“As for Al-Qaeda it is hard to conclude that it currently possesses the characteristics of a party to a conflict.”); Kai Ambos & Josef Alkatout, *Has ‘Justice Been Done’? The Legality of Bin Laden’s Killing Under International Law*, 45 ISR. L. REV. 341, 347–50 (2012) (“These criteria are not met by a loose and decentralized terrorist network such as Al Qaeda.”); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263–91 (Simon Bronitt et al. eds., 2012) (arguing that the United States’s use of drones in Afghanistan does not meet international law rules Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POLY 237, 260 (2009) (“[S]ome non-state actors, such as al Qaeda, do not meet the test for insurgent status.”). On the issue of organization generally, compare RONALD C. SLYE & BETH VAN SCHAACK, *The Internationalization of Crimes*, in INTERNATIONAL CRIMINAL LAW: ESSENTIALS 115 (2009) (requiring a level of organization before triggering IHL), with Marco Sassoli, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, 1 INT’L HUMANITARIAN LEGAL STUD. 5, 14 (2010) (requiring only the existence of a genuine armed group).

55. See Paulus & Vashakmadze, *supra* note 34, at 117 (requiring only minimal level of organization without any particular form).

right way.⁵⁶ But the legal support for centralization is misplaced and stems mostly from ICTY jurisprudence that listed centralization—particularly a command structure and headquarters—as one indicative factor in determining whether an armed group was sufficiently organized for purposes of IHL.⁵⁷ Furthermore, it is clear why the ICTY was considering this element, since for its judicial work the existence of headquarters was highly relevant in determining that 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).⁵⁸ However, the ICTY has 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.⁵⁹ 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.⁶⁰ Assuming that al-Qaeda is a diffuse network of separate

56. See, e.g., Ambos & Alkatout, *supra* note 54, at 349–50 (noting that al-Qaeda lacks the hierarchic and centralized command structure to meet the traditional organizational requirements).

57. See, e.g., Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Trib. for the Former Yugoslavia Apr. 3, 2008), available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> (“[I]ndicative factors include the existence of a command structure and disciplinary rules and mechanisms with the group; the existence of headquarters”); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 94–134 (Int’l Trib. for the Former Yugoslavia Nov. 30 2005), available at <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> (describing the complex command structure in finding the characteristics of an organized armed group).

58. See generally Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 189, 192 (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, 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”).

59. 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) (discussing structure of al-Qaeda and other terrorist organizations).

60. Compare Ambos & Alkatout, *supra* note 54, at 349 (noting that al-Qaeda “lacks the required hierarchic, centralised command structure”), with

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. Another view holds 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.⁶¹ 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 these groups and the large number of drone strikes reportedly launched by the United States in response to these attacks.⁶² 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.⁶³ Further-

Third Geneva Convention, *supra* note 37, art. 4(A)(2)(a), 75 U.N.T.S. at 138 (only requiring that the group be “commanded by a person responsible for his subordinates,” and not dictating any particular form of hierarchy).

61. See, e.g., Rachel Oswald, *Badly Weakened Al-Qaeda Still Seen as Top Terrorist Threat to U.S.*, NUCLEAR THREAT INITIATIVE (Feb. 1, 2012), <http://www.nti.org/gsn/article/even-decline-al-qaeda-still-seen-top-terrorist-threat-us> (quoting U.S. National Intelligence Director James Clapper as saying that the “core al-Qaeda will be of largely symbolic importance to the global jihadist movement. But regional affiliates . . . and to a lesser extent, small cells and individuals will drive the global jihad agenda”).

62. See, e.g., O’Connell, *supra* note 54, at 265–67 (describing the increase in drone attacks in Pakistan).

63. See Ambos & Alkatout, *supra* note 54, at 350 (arguing that when bin Laden was killed, al-Qaeda was decentralized and bin Laden was not acting as

more, 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 United States and al-Qaeda core had long since withered away with the al-Qaeda core's degraded capacity to launch attacks.⁶⁴

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 the al-Qaeda core persisted as an organized armed group during that time.⁶⁵ And it is certainly the case that the United States has maintained a consistent barrage of attacks in these areas during that time.⁶⁶

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.⁶⁷ 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

the commander of an organization within the meaning of IHL).

64. *Id.* (“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.”).

65. *Cf.* O’Connell, *supra* note 54, at 280 (emphasizing illegality under the law of state responsibility for such incursions).

66. *Id.* at 265–67.

67. Additional Protocol II, *supra* note 40, art. 1, 1125 U.N.T.S. at 611.

APII (to “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”)⁶⁸ 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. Al-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.⁶⁹

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.⁷⁰ Under this view, only within this zone does IHL apply; everywhere else, IHL 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

68. *Id.* art. 1, ¶ 1, 1125 U.N.T.S. at 611.

69. 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 of this issue, see Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT’L CRIM. L. Q. 369, 377 (2006).

70. See Mary Ellen O’Connell, *Killing Awlaki Was Illegal, Immoral and Dangerous*, CNN (Oct. 1, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous> (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 of geographic parameters in contemporary armed conflict, see also Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a “Legal Geography of War,”* in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., forthcoming 2013), available at http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf; Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. 1, 14–25 (2010).

and the tribal regions of Pakistan, the conflict did not extend to Abbottabad where bin Laden was located and killed, or in other areas where drones are deployed.⁷¹ 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, and not IHL at all.

The first task in evaluating the hot-battlefield argument is to understand and define the legal standard that it seeks to apply. The ICRC concluded 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.”⁷² The standard citation for the “intensity” requirement comes from the ICTY’s decision in *Tadić*, and proponents of a restrictive hot-battlefield view often cite that landmark case for the proposition that IHL does not apply outside the zone of intense fighting.⁷³ This represents a profound misreading of the logic of the *Tadić* decision.

In *Tadić*, 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.⁷⁴ 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).⁷⁵

71. See Ambos & Alkatout, *supra* note 54, at 352 (“[T]he location where the killing took place (Abbottabad) is not only situated outside a reasonable ‘spillover’ area . . . but also outside the actual Pakistan battle zone.”); O’Connell, *supra* note 54, at 281 (“The *jus in bello* will apply if there is an armed conflict in the state. Peacetime criminal law applies if not.”).

72. Int’l Comm. of the Red Cross, *supra* note 47, at 3.

73. See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 561–68 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (using the scope and intensity of armed conflict to determine that IHL applied).

74. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 128–37 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (describing defendant’s arguments that the Tribunal does not have jurisdiction when armed conflicts are internal).

75. *Id.*

The ICTY Appeals Chamber flatly rejected the defendant's argument that the armed conflict was limited to Prijedor where 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."⁷⁶ The Appeals Chamber went on to note that a temporal restriction was inapposite as well, since the Geneva Conventions make clear that restrictions continue to apply after the fighting has receded.⁷⁷

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 entire territory of the state.⁷⁸ 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).⁷⁹ 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.⁸⁰ 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 in *Tadić Decision on Jurisdiction* 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."⁸¹ The same broad reading

76. *Id.* ¶ 67.

77. *Id.*

78. *Id.* ¶ 68.

79. *See id.* ("With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities.")

80. *See, e.g.,* Vité, *supra* note 33, at 89 ("It is nonetheless not certain whether the territorial aspect is indeed a constitutive factor of non-international armed conflict.")

81. *Tadić Decision on Jurisdiction*, ¶ 69.

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 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.”⁸² 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.⁸³

How then has the *Tadić* 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.⁸⁴ In fact, *Tadić* 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.

82. *Id.* ¶ 69–70.

83. *Id.* ¶ 70. Applying this standard, the ICTY concluded, “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 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.” *Id.*

84. *Id.* ¶ 69.

Why was the ICTY so willing to dispense with a narrow geographical and temporal definition of armed conflict? As Margaret 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 *Tadić* interlocutory appeal was rendered.⁸⁵ 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.⁸⁶ Viewed cynically, the court's business depended on a finding that IHL applied to the region in question.⁸⁷

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 a war crime and prosecuted in a court of law.⁸⁸ Although genocide and crimes against humanity have been untethered 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.⁸⁹ The expansion of international criminal law is parasitic upon an underlying expansion of IHL, since war crimes simply represent the criminalization of underlying

85. Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18, 36–53 (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. Cf. LAURA PERNA, *THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 39–41 (2006) (discussing the importance of the Spanish Civil War in formation of IHL rules).

86. See deGuzman, *supra* note 85, at 38 (“Until [the *Tadić*] decision, the prevailing view was that international law extended individual liability only to crimes committed in *international* armed conflicts.” (emphasis added)).

87. See *id.* at 22 (discussing the distinction between international and internal armed conflict, and 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”).

88. See Rome Statute, *supra* note 14, art. 5, 2187 U.N.T.S. at 90. (“The [International Criminal] Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”).

89. In the case of genocide, it is special intent. *Id.* art. 6. 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. *Id.* art. 7.

norms that originally emerge from this other body of law centered on the existence of an armed conflict.⁹⁰

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.⁹¹ Unlike international criminal-law norms, which are parasitic upon IHL norms, IHRL is a normative competitor to IHL.⁹² 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).⁹³ International human-rights lawyers are therefore strongly inclined to view the scope and applicability of IHL in its narrowest possible terms.⁹⁴

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.⁹⁵ 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 hu-

90. 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) ("Recent decisions reveal a temptation to dilute the laws of war in order to criminalize civilian suffering by invoking the broader concept of crimes against humanity.").

91. Unless, of course, it can be co-applied. See *infra* Part II.C.

92. See David Luban, *Military Lawyers and the Two Cultures Problem*, LEIDEN J. INT'L L. (forthcoming 2013) (manuscript at 20) ("Humanitarianism has little to do with human rights; its source is compassion and pity, not recognition of individual humans as rights-bearers.").

93. See *id.* ("Human rights law is for peacetime, and the [law of armed conflict] vision emphasizes the laws of war as *lex specialis*, 'special law' that displaces more general law under the 'rule of specialty.' That means it displaces human rights law whenever peace gives way to war."). But see *id.* at 29 ("Human rights law may provide lesser protections in wartime than in peacetime, but its obligations don't go away, and the *lex specialis* never supplants them.").

94. See *id.*

95. Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1, 4 (discussing modern international criminal law, and noting that "[s]ince Nuremberg and Tokyo, there have been 274 multilateral treaties ratified that require states to criminalize certain conduct").

manizing 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.⁹⁶ From the vantage point of international human-rights law, IHL—and its privilege of combatancy that it grants to its subjects wherever it is applied—is a moral disaster, one that licenses wholesale killing of thousands of combatants and potentially millions of civilians as long as their killing is collateral and meets the demands of proportionality.⁹⁷ 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.⁹⁸ This underscores the desire for international human-rights lawyers 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; they have their own set of restrictions—these ones universal—already in their legal toolkit, ready to deploy on and off the battlefield.⁹⁹ 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 be. 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.¹⁰⁰ One might argue that this fact

96. Additional Protocol I, *supra* note 14, art. 43, 1125 U.N.T.S. at 23 (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

97. See Akhavan, *supra* note 90, at 34 (“In other words, if a brutal military attack is aimed primarily at intimidating enemy forces and offers substantial military advantage, it is deemed to be lawful even if it spreads terror among the civilian population.”).

98. See *id.* at 28.

99. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) [hereinafter Nuclear Weapons] (stating that “protection of the [ICCPR] does not cease in times of war . . .”).

100. See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 96 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (“This body of law is not grounded on formalistic postulates . . . Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of *detering*

should color our analysis, such that the ICTY's discussion of the scope and intensity of armed conflict should be viewed within this context: a prohibition-side expansionist view of IHL. Would it be appropriate to apply the expansionist *Tadić* 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.¹⁰¹ 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.¹⁰² 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.¹⁰³ The existence of an armed conflict (and what counts as an armed conflict) is fundamentally a legal standard, and is either satisfied or not.¹⁰⁴ One cannot change the standard itself depending on

deviation from its standards to the maximum extent possible." (emphasis added)).

101. See, e.g., Additional Protocol I, *supra* note 14, art. 50, 1125 U.N.T.S. at 26 (giving the definition of "civilians" and "civilian population"). For a discussion, see Adil Ahmad Haque, *Killing in the Fog of War*, 86 S. CAL. L. REV. (forthcoming 2013) (discussing the difficulties of determining civilian or combatant statuses in modern armed conflict).

102. Additional Protocol I, *supra* note 14, art. 44, 1125 U.N.T.S. at 23–24 (giving the definition and protections of "prisoner of war" status).

103. See *id.* pmb., 1125 U.N.T.S. at 6–7 (explaining how the Additional Protocol was drafted in order to protect the victims of "armed conflicts").

104. For example, the First Geneva Convention applies 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

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.¹⁰⁵ 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.¹⁰⁶ 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 and Hague Conventions and other treaty regimes.¹⁰⁷

With regard to the duty to capture, the leading precedent applying the co-application methodology is the Israeli *Targeted*

by one of them." See First Geneva Convention, *supra* note 37, art. 2, 75 U.N.T.S. at 32.

105. *But see* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 91–139 (2009) (exploring the right to life under different courts and jurisdictions); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 47 n.195 (2010) (concluding that even assuming IHL requires capture if feasible, the killing of al-Awlaki was lawful because capture was not practicable in his case).

106. See Paust, *supra* note 54, at 274 n.94 (2009) (referring to *lex specialis* as "Latinized nonsense," and concluding that "I know of no relevant human right that would needlessly inhibit lawful conduct on the battlefield"). The text of the maxim is *lex specialis derogat legi generali*.

107. See, e.g., MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 43 (2011) (discussing the *Tadić* case, and noting that the court had to have recourse in the general rules of state responsibility, "since the rules of international humanitarian law did not provide an answer").

Killings decision.¹⁰⁸ In that case, Justice Barak argued that the principle of proportionality demanded that a targetable terrorist—as a civilian directly participating in hostilities—should be killed only if a “less harmful means” could not be employed.¹⁰⁹ 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.”¹¹⁰ This phrase, coupled with the fact that the principle of proportionality clearly exists under customary international law, suggested to some that the analysis would be the same under international law.¹¹¹ 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.”¹¹²

When the ICRC issued its *Interpretative Guidance on the Notion of 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.¹¹³ A cen-

108. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 53(4) PD 459 [2006] (Isr.).

109. *Id.* ¶ 40.

110. *Id.*

111. See Marko Milanović, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 120 (Orna Ben-Naftali ed., 2011) (noting that although it was “not entirely clear whether the Court derived this rule from IHRL or from domestic constitutional law, but it is clear that it is a human rights norm that it was applying”).

112. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 53(4) PD 459 [2005] (Isr.), ¶ 40; see also *id.* (citing *McCann v. United Kingdom*, 21 Eur. Ct. H.R. (ser. A) at 91 (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.”). However, *McCann* is a problematic precedent for this point of law. See also Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310, 314 (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.”).

113. See NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 82 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE] (“In such situations, 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.”).

tral element of its argument stemmed from the nature of IHL's withdrawal of protection from attack for civilians directly participating in hostilities.¹¹⁴ Suggesting that this withdrawal of protection did not make such civilians always targetable, the report was a bit vague as to 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.¹¹⁵

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.¹¹⁶ 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.”¹¹⁷ The question is how one moves from this general principle to the conclusion that a duty to capture is required.¹¹⁸ 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

114. *Id.* at 70.

115. *Id.*

116. *Id.* at 78; *see also* 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.”).

117. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 79 (quoting UNITED KINGDOM: MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 2.2 (2004)).

118. *Compare* Chesney, *supra* note 105, 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 105, at 290–91 (referring to the concept of *maux superflus* as a preexisting principle that supports his interpretation of the principle of necessity).

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.”¹¹⁹ 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

[m]ilitary necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.¹²⁰

What then does military necessity *not* allow? The Lieber Code is clear on this as well, stating:

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.¹²¹

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.¹²² 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 ex-

119. Lieber Code, *supra* note 14, art. 14.

120. *Id.* art. 15.

121. *Id.* art. 16.

122. Gabriella Blum 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. Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 115, 142–43 (2010).

penditure of life and resources.”¹²³ 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.”¹²⁴

In applying these basic principles to particular situations, the ICRC report concludes that in conflicts between large well-equipped armies, it will rarely prohibit any particular method of attack that is not already prohibited by a more specific rule of IHL.¹²⁵ However, in more asymmetrical conflicts like non-international armed conflicts, the *Interpretative Guidance* concludes 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.¹²⁶

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.”¹²⁷ 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 would 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, the “minimum expenditure of life and resources” of the attacking force.¹²⁸ Under this prong, the attempt to capture will inevitably result in a risk of greater

123. UNITED KINGDOM: MINISTRY OF DEFENCE, *supra* note 117, § 2.2.

124. PRACTICE RELATING TO RULE 14, PROPORTIONALITY IN ATTACK, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule14 (quoting U.S. DEP’T OF THE AIR FORCE, PAMPHLET 110-31: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS §§ 1–3 (1976)).

125. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 80.

126. *Id.* at 81.

127. *Id.* at 79 (citing UNITED KINGDOM: MINISTRY OF DEFENCE, *supra* note 117, § 2.2).

128. *Id.*; see also Lieber Code, *supra* note 14, art. 15 (addressing military necessity in regards to the “unavoidable” destruction of persons).

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."¹²⁹ 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.¹³⁰ The ICRC 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"¹³¹

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.¹³² Given the principle of necessity's codified birth in the Lieber Code, proponents who argue that the principle means something more—a duty to pursue the least-harmful means—are insensitive to the historical context in which Lieber codified the principle.¹³³ 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."¹³⁴

129. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 79.

130. Indeed, Lieber explicitly recognized the importance of surprise. See Lieber Code, *supra* note 14, art. 19 ("Surprise may be a necessity.").

131. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 82.

132. For an extensive critique, see W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 805 (2010) ("The ICRC errs in its attempt to apply an inaccurate law enforcement paradigm in armed conflict.").

133. 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. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 79 n.215.

134. JOHN FABIAN WITT, *LINCOLN'S CODE* 184 (2012).

This did not mean that there were no restrictions on warfare, however. Some prohibitions were categorical, regardless of whether necessity demanded it.¹³⁵ The use of torture was categorically impermissible, as was the use of poison and perfidy.¹³⁶ 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 that emerged long after Lieber and was only recently codified).¹³⁷ But this just 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.¹³⁸

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.¹³⁹ A rational actor has little reason to pursue such actions anyway, unless overcome by emotion, since they are not related to the war effort.¹⁴⁰ 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.¹⁴¹ As Witt points out, Lieber wrote in an

135. See GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 260 (2010) (noting the situations which Lieber considered to be impermissible in war).

136. See Lieber Code, *supra* note 14, art. 16.

137. See Additional Protocol I, *supra* note 14, arts. 11, 20, 1125 U.N.T.S. at 11–12, 15; Additional Protocol II, *supra* note 40, art. 13, 1125 U.N.T.S. at 615. But see Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 820–21 (2010) (citing the ICTY case, *Krupeskić*, which notes the “prohibition on belligerent reprisals against civilians that appears in Additional Protocol I had become customary” however, the author later indicates the United States and the United Kingdom consider these reprisals of military necessity under certain circumstances).

138. 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. See WITT, *supra* note 134, at 234.

139. See Lieber Code, *supra* note 14, art. 11 (stating that military necessity disclaims “all cruelty and bad faith . . . [;] all extortions and other transactions for individual gain; all acts of private revenge”).

140. See, e.g., WITT, *supra* note 134, at 184 (noting that Lieber believed that a brief and focused war effort is the best means of accomplishing military victory).

141. See Van Schaack, *supra* note 11, at 292 (referring as “revisionism” any

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.”¹⁴² 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.”¹⁴³ Simply put, Lieber was not in favor of over-regulating warfare, because making wars too civilized would inevitably prolong them, potentially increasing the overall suffering.¹⁴⁴

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 codifications¹⁴⁵—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

interpretation of the necessity principle that requires capture before killing); *cf.* Blum, *supra* note 122, at 73 (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. *See id.* at 127–31. 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. *See id.* at 120, 154–60. 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 id.* at 126 (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. *See id.* at 157–60.

142. *See* WITT, *supra* note 134, at 234. Witt refers to this as Lieber’s “Clausewitzian perspective” on war (violence rationally related to the political objectives of the state). *Id.* at 236.

143. *Id.* at 234.

144. Lieber Code, *supra* note 14, art. 29 (“Sharp wars are brief.”).

145. *See, e.g.*, Additional Protocol I, *supra* note 14, arts. 11, 20, 1125 U.N.T.S. at 11–12, 15; Geneva Conventions, *supra* note 14, art. 12, 75 U.N.T.S. at 146.

remained unchanged since Lieber.¹⁴⁶ Rather, it is the *specific* prohibitions that have changed in IHL.¹⁴⁷ Indeed, one of the reasons why the specific rules on prohibited methods were adopted within the last fifty years is precisely because the principle of necessity—by itself—was ill-suited to the task.¹⁴⁸ 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.¹⁴⁹ The concept is simply incapable of carrying that heavy a load in the argument.¹⁵⁰

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 apply any amount and kind of force to compel the complete submission of the enemy with the least expenditure of time, life, and money.”¹⁵¹ This formulation closely matches Lieber’s formulation in-

146. See Additional Protocol I, *supra* note 14, art. 54(5), 1125 U.N.T.S. at 27.

147. See, e.g., Additional Protocol I, *supra* note 14, arts. 11, 20 1125 U.N.T.S. at 11–12, 15; Geneva Conventions, *supra* note 14, art. 13, 75 U.N.T.S. at 146.

148. See Luban, *supra* note 92, at 25 (noting that human rights advocates believe that humanitarian treaties were created “to break with the horrifying past”).

149. See Luban, *supra* note 92, at 11–22 (describing the “Laws of Armed Conflict” approach to the laws of war wherein military necessity prevails over broader humanitarian concerns); see also Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Nov. 29, 1868, [hereinafter St. Petersburg Declaration] available at <http://www.icrc.org/ihl.nsf/FULL/130> (only legitimate war aim is “to weaken the military forces of the enemy; [t]hat for this purpose it is sufficient to disable the greatest possible number of men”).

150. But see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 231 (1998) (“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.

151. United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), reprinted in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY

sofar as it permits an 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.”¹⁵² 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.¹⁵³ However, this just highlights the previous point: 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.¹⁵⁴ 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.¹⁵⁵ 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, one might be left with

TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230, 1253 (2007); see also Luban, *supra* note 92, 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).

152. Luban, *supra* note 92, 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 downplays 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. Compare *id.* at 44–46, with Lieber Code, *supra* note 14, art. 14, 15. In fact, a complete reading of Lieber’s notion of military necessity is impossible without considering in to everything from Article 14 through Article 29 (“The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”). See *id.* art. 14–29.

153. See Blum, *supra* note 122, at 124 (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”); Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 3, 39–42 (2012) (formulating necessity in terms of marginal risk).

154. But see Luban, *supra* note 92, at 40 (arguing that “necessity serves both a prohibitive and licensing function”).

155. See Blum, *supra* note 122, at 123.

the perception that “indispensable” means “left with no other choice.”¹⁵⁶ But it certainly did not mean that for Lieber, as Articles 15 through 20 of the Lieber Code make clear.¹⁵⁷ 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.¹⁵⁸ Second, contemporary IHL commentators sensitive to this nuance understand “indispensable” in similar fashion, as proportionately related to prompt resolution of the war effort.¹⁵⁹ Provisions in the Additional Protocols also evidence this prohibition against superfluous suffering.¹⁶⁰

One way of giving content to the notion of causing superfluous suffering is to think of marginal risk.¹⁶¹ If the law were to impose a duty to capture, 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

156. See Lieber Code, *supra* note 14, art. 14.

157. See WITT, *supra* note 134, at 235 (“These were the key words: *Indispensable for securing the ends of the war*. . . . But 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.”); see also Lieber Code, *supra* note 14, art. 14–20.

158. Hays Parks, 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 Parks, *supra* note 132, at 805.

159. See, e.g., MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 194 (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”).

160. See, e.g., Additional Protocol I, *supra* note 14, art. 35(2), 1125 U.N.T.S. at 21 (“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 116, 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. 447, 486–87 (2012); cf. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 75 (1985) (noting change from “superfluous injury” to “unnecessary suffering”).

161. For a discussion of marginal risk in this context, see Lazar, *supra* note 153, 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.

simply killed the target. Military necessity therefore insists on a form of Pareto optimality in which 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 worse 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.¹⁶²

Before continuing, two final objections ought to be considered: (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: (1) regular soldiers who can be attacked at any time; (2) 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, (3) 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 (API). 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

162. *See id.* 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").

to civilians and damage to civilian objects.”¹⁶³ Furthermore, Article 57(3) requires that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”¹⁶⁴ 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.”¹⁶⁵ 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.

163. Additional Protocol I, *supra* note 14, art. 57(2), 1125 U.N.T.S. at 29.

164. *Id.* art. 57(3), 1125 U.N.T.S. at 29.

165. *Id.* art. 52, 1125 U.N.T.S. at 27. 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* MELZER, *supra* note 105, at 289 (“If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.” (quoting PICTET, *supra* note 160, at 75–76)). The same Pictet quote is also cited in the ICRC INTERPRETIVE GUIDANCE, *supra* note 113, 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.” *Id.* at 84. Hays Parks 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* Parks, *supra* note 132, at 786 n.59, 815 n.125. Parks 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 122, at 127–30 (noting different standards for civilian personnel and civilian objects). *But see* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 *EURO. J. INT’L L.* (manuscript at 33–34) (forthcoming 2013), available at <http://ssrn.com/abstract=2213960> (concluding that Pictet’s views were supported at the relevant meetings by several scholars including Hans Blix). However, Goodman points to no specific provision of the Additional Protocol that codified this view other than the article 35 prohibition against “superfluous injury or unnecessary suffering,” a phrase that makes no reference to killing per se. *See* Jens David Ohlin, *The Capture-Kill Debate: Lost Legislative History or Revisionist History?* 12–13 (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=2230486>; Kevin Jon Heller, *A Response to Goodman About the (Supposed) Duty to Capture*, *OPINIO JURIS* (Mar. 13, 2013, 7:15 AM), <http://opiniojuris.org/2013/03/13/a-response-to-goodman-about-the-supposed-duty-to-capture/>.

This view is problematic for several reasons.¹⁶⁶ It misconstrues API, which is designed to generally limit the suffering of innocent civilians, and specifically to augment the pre-API prohibition against causing disproportionate damage with the added requirement to take 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 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 category 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.¹⁶⁷

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

166. See, e.g., Milanović, *supra* note 111, at 121 n.108 (calling this view “unconvincing”).

167. 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 113, at 33–34.

criticism for being both under-inclusive and over-inclusive.¹⁶⁸ The concept of distinction requires that civilians be protected, and the concept of military necessity allows all combatants to be targeted and killed.¹⁶⁹ 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.¹⁷⁰ The first is arguably not a threat but still targetable anyway; 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 counterexamples suggest that the key legal categories of IHL—civilians and combatants—are antiquated or obsolete?¹⁷¹

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 one. There are several points to be made here. First, the alleged under-inclusiveness

168. Criticisms in this vein are found in a number of materials. See LARRY MAY, *WAR CRIMES AND JUST WAR* 112–17 (2007) (critiquing value of social categories to guide decision-making during war); Blum, *supra* note 122, at 138–39 (summarizing the status-based distinction criticism).

169. See Blum, *supra* note 122, at 127–30 (summarizing the effect of distinction on civilians and combatants).

170. See *id.* at 139; *cf.* INT'L COMM. OF THE RED CROSS, *PRESENTATION: THE LAW OF ARMED CONFLICT: CONDUCT OF OPERATIONS* 6-3 (2002), available at http://www.icrc.org/eng/assets/files/other/law3_final.pdf (concluding that civilians "run a risk" by working in a munitions factory, though apparently concluding that the munitions are directly targetable while the civilian employees are collateral damage subject to the rule of proportionality).

171. For this reason, Van Schaack views these arguments as revisionist and not sounding in *lex lata*. Van Schaack, *supra* note 11, at 292–93.

of the rule is contestable, since there is a colorable argument that the munitions worker and the bomb maker (of say al-Qaeda) are directly participating in hostilities by virtue of their craftsmanship in the tools of warfare.¹⁷² 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, it is 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 exercising lawful force must demonstrate that the target posed an immediate risk based on his or her conduct.¹⁷³ But 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 them responsible for the actions of the whole.¹⁷⁴ During wartime, individuals are placed at war simply by virtue of their citizenship or membership in one of the warring parties, making each of them responsible for the actions of the whole.¹⁷⁵ This is the essence of Lieber's famous phrase that "men live in political, continuous societies,

172. 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, 322-24 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman eds., 2012).

173. Both the legal system and moral philosophy require the same question in this scenario.

174. Accord Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 88 (2006).

175. *Contra id.* at 86 (asserting that civilians should not bear the consequences of combat with which they are not associated).

forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.”¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ One aspect of moral individualism is that killing an enemy soldier depends on whether the enemy is pursuing a just war or not.¹⁷⁹ Under this theory, killing a Nazi soldier would have been morally permissible because the Nazi Army was engaged in genocide and aggression, while killing an American soldier would have been morally wrong because the Americans were engaged in a just cause in fighting the Nazis. This philosophical view yields completely different answers from the law of war and its canonical separation of *jus ad bellum* and *jus in bello*.¹⁸⁰ For the most ambitious moral individualists, this disconnect is reason enough to completely reengineer the law of war and transform its cardinal principles.¹⁸¹

A full-blown attack on moral individualism is far beyond the scope of this Article.¹⁸² The modest point here is simply to connect the proposal to move IHL towards conduct-based targeting with the philosophical position of moral individualism. The argument behind conduct-based revisionism in targeting is

176. Lieber Code, *supra* note 14, art. 20.

177. See generally Jeff McMahan, *Collectivist Defenses of the Moral Equality of Combatants*, 6 J. MILITARY ETHICS 50 (2007) (espousing a more individualist perspective and arguing that the collectivist understanding of war fails).

178. See, e.g., JEFF MCMAHAN, *KILLING IN WAR* 84, 156 (2009).

179. See, e.g., *id.* at 36–37.

180. 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 Milanović & Hadzi-Vidanovic, *supra* note 28, at 8; Robert Kolb, *Origin of the Twin Terms jus ad bellum/jus in bello*, 79 INT’L REV. RED CROSS 553, 553–55 (1997).

181. See MCMAHAN, *supra* note 178, at 2–7.

182. For a defense of moral collectivism, see GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY* 177–214 (2008); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1513–26 (2002); cf. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 153–80 (2005) (examining the themes of “collective inculpation and collective exculpation” and their impact in the treatment of irregular, non-uniformed combatants); Lazar, *supra* note 153, at 23–29.

that it produces more *accurate* results regarding targeting (as opposed to over-inclusive results). Accuracy, however, 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.¹⁸³ If this disreputable result is the direct consequence of collectivism, then collectivism must be wrong. But the objection proves too much. 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 suggestions for war reparations and other strategies to make civilian populations less likely to support or tolerate domestic governments controlled by warmongers.¹⁸⁴ 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.¹⁸⁵ This convention recognizes the inherent collectivism of armed conflict—that 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.

There might be additional arguments that could be deployed in favor of a normative position that the law of war ought to recognize a duty to capture enemy soldiers.¹⁸⁶ Many of these normative arguments stem from philosophical arguments regarding the moral value of human lives even in the case of combatants. Perhaps it is wrong for the law of war to be so cavalier regarding the lives of combatants, especially in states that continue to use a draft system and the line between “civilian”

183. Lieber Code, *supra* note 14, art 20.

184. See, e.g., MCMAHAN, *supra* note 178, at 203–35; Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants*, 38 PHIL. & PUB. AFF. 342, 345 n.3 (2010).

185. See Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 19–21 (Dieter Fleck ed., 2008).

186. See Blum, *supra* note 122, at 160–63.

and “combatant” is only a few months in basic training. Such arguments might represent the future trajectory of the philosophy of warfare, but their full consideration is outside the scope of the present inquiry. Suffice it to say that the law of war has always been conservative in its embrace of vanguard moral theories that require revision of the laws of war. Although change has come in some areas—outlawing reprisals is a classic example—the law of war only adopts them if there is a reasonable chance that states will actually follow these new prescriptions.¹⁸⁷ While human rights law has the luxury of codifying aspirational norms couched in universalistic terms, the law of war is in danger of collapsing if the content of the law runs too far ahead of the actual practice of belligerents. Therefore, the space between *lex lata* and *lex ferenda* is zealously guarded in IHL in a way that it is not in IHRL.

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 IHLR 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 International Covenant on Civil and Political Rights (ICCPR), “[e]very human being has the inherent right to life . . . [that] . . . shall be protected by law.”¹⁸⁸ With regard to proportionality, most European constitutional courts generally recognize that the balancing of interests implied in cases of conflicting rights is to be governed by the rule of proportionality.¹⁸⁹ In

187. See *supra* Part II.A.

188. 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 ICCPR].

189. For a discussion of proportionality, see generally Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 465 (2011) (tracing the spread of proportionality from Prussian administrative law to its later adoption by the European Court of Human Rights); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72 (2008) (noting that proportionality balancing has become a dominant technique of rights adjudication, discussing its genealogy, and theorizing about why it has become attractive to judges worldwide). See also *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser.

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.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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.¹⁹³ Given the general paucity of codified rules governing NIACs—Common Article 3 and APII being two of the most notable exceptions—one might look to IHRL to fill in the

A) at 24 (1981) (“On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects”); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (explaining that penalties imposed “must be proportionate to the legitimate aim pursued”).

190. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 752 (2008) (“[I]n matters ranging from the regulation of property to constraints on human rights, the proportionality principle has emerged as ‘one of the most important principles invoked’ . . . to challenge the effect of regulations on the rights of persons.” (quoting 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 ALEXYS 131, 136–41 (George Pavlakos ed., 2007).

191. See *Isayeva v. Russia*, App. No.57950/00, 41 Eur. Ct. H.R. 847, 883 (2005) (“Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.”).

192. See Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges From the “War on Terror”*, 27 FLETCHER F. WORLD AFF. 55, 64–65 (2003) (noting that drone attacks violate human right to life).

193. See 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, 888–903 (2006).

gaps left by IHL with regard to NIACs.¹⁹⁴ Under this co-application approach, the concept of proportionality used by IHRL would be imported into situations already acknowledged as being governed by IHL.¹⁹⁵

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.”¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ When there is no direct IHL rule on point, this flavor of co-application has huge practical consequences because it allows extraterritorial operation of an IHRL norm during an armed conflict through its gap-filling function.¹⁹⁹ And even when there is an IHL rule on point,

194. See Milanović, *supra* note 111, at 95–96.

195. Cf. LUBELL, *supra* note 54, at 236–42 (arguing that IHL proportionality would apply during full-blown armed conflicts but situations falling below that threshold might require IHRL principles of proportionality).

196. See *Nuclear Weapons*, *supra* note 99, at 240; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9) (describing IHL as the *lex specialis* applicable during armed conflict).

197. See Milanović, *supra* note 111, at 95–96.

198. See Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 338–40 (2007).

199. See generally Noam Lubell, *Parallel Application of International Hu-*

this flavor 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.²⁰⁰

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*).²⁰¹ First, the basic foundational norms of the two regimes are logically incompatible.²⁰² 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.²⁰³ 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.²⁰⁴ So the incompatibility goes straight to the core of the two fields.

manitarian Law and International Human Rights Law: An Examination of the Debate, 40 ISR. L. REV. 648 (2007) (generally discussing co-applicability of IHL and IHRL and highlighting some discrepancies); 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 ISR. L. REV. 592 (2007) (arguing that IHL and IHRL are incompatible and a seamless integration of the two should not be attempted).

200. A prime example is the ECHR case involving Chechnya, which applied human-rights law directly, in spite of the existence of an armed conflict. 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. It is thus unclear whether the ECHR would render the same rulings when faced with a state, like the United States, that insists that its actions are justified by IHL. See *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847, 875 (2005). See generally William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741 (2005) (analyzing ECHR application of human rights law in Chechnya cases). Blum, *supra* note 122, at 132 n.39; *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 59 (1998) (applying human rights law).

201. See, e.g., *Nuclear Weapons*, *supra* note 99, at 240.

202. See Schabas, *supra* note 199, at 593–94 (arguing 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); see, e.g., *Isayeva*, 41 Eur. Ct. H.R. at 888 (referring to the “legitimate aim” of the action); Schabas, *supra* note 199, at 607 (noting correctly that legitimate aim is irrelevant under IHL proper).

203. See Droege, *supra* note 198, at 313 (discussing reciprocity).

204. See Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does*

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.”²⁰⁵ Perhaps the central rule of distinction in IHL—killing combatants and protecting civilians—is a principled rule that is hardly arbitrary.²⁰⁶ 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.²⁰⁷ 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, this is a deal with the devil that IHRL and its proponents ought to stay as far

International Humanitarian Law Provide All the Answers? 88 INT’L REV. RED CROSS 881, 882 (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); Gloria Gaggioli & Robert Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, 37 ISR. Y.B. HUM. RTS 115, 134–36 (discussing the right to life in IHL); see also Noëlle Quénivet, *The Right to Life in International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 331, 338–40 (Roberta Arnold & Noëlle Quénivet eds., 2008) (discussing grounds for deciding on the justification of the use of force in IHL); cf. Doswald-Beck, *supra* note 193, at 882 n.2. (noting that one exception includes *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95 rev. 271 (1997)). *But see* G.I.A.D. 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 200, at 745 (“The drafters of the ECHR presumably envisioned that states involved in armed conflicts would derogate to humanitarian law with respect to the right to life.”).

205. ICCPR, *supra* note 188.

206. See Abresch, *supra* note 200, 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.”).

207. See Milanović, *supra* note 111, at 97.

away from as possible.²⁰⁸ As Milanović puts the point sharply, “[F]or all its humanitarian ethos, IHL is still a discipline about killing people, albeit in a civilized sort of way.”²⁰⁹

A good example of the incompatibility of the two normative regimes is *McCann v. United Kingdom*, the European Court of Human Rights (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 were not feasible.²¹⁰ In *McCann*, the Court applied Article 2 of the European Convention on Human Rights, which provides strict criteria for when the right to life can be infringed, and noticeably fails to exclude armed conflict from its provisions.²¹¹ Article 2, Section 1 starts by proscribing that “[n]o 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.²¹² 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.²¹³ There is no mention of the privilege of combatancy in armed conflict against lawful targets.²¹⁴

Most importantly, these three categories (defense, arrest, and riots) are only excluded if *absolutely necessary*.²¹⁵ Not only is the concept of absolute necessity much more demanding than the concept of military necessity, as will be explained below,

208. See, e.g., Schabas, *supra* note 199, at 593–94. 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 Attempts to Abuse or Subvert It*, 87 INT’L L. STUD. 483, 488 (2011) (“[O]ften today we encounter 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* note 92, at 4. Luban notes that though Dinstein’s rhetoric is “exaggerated and unusually belligerent,” the phenomenon he describes is real. *Id.*

209. Milanović, *supra* note 111, at 98.

210. See *McCann v. United Kingdom*, 21 Eur. Ct. H.R. (ser. A) ¶ 97 (1995).

211. *Id.* ¶ 150.

212. ICCPR, *supra* note 188, art. 2(1).

213. *Id.* art. 2(2).

214. *Id.*

215. See *McCann*, 21 Eur. Ct. H.R. ¶ 149.

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.²¹⁶ 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.²¹⁷ The court concluded that, 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.²¹⁸ 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.²¹⁹

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 neces-

216. *See id.*

217. This is arguably similar to the U.S. standard of reasonableness governing domestic law enforcement cases. *See, e.g.,* Scott v. Harris, 550 U.S. 372, 376 (2007); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985); Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994). For a criticism of the standard, see George M. Dery III, *The Needless “Slosh” Through the “Morass of Reasonableness”: The Supreme Court’s Usurption of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 GEO. MASON U. C.R. L.J. 417, 436–48 (2008). *But see* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1413 (2008) (supporting reasonableness as the operative principle governing targeting in international law).

218. *See McCann*, 21 Eur. Ct. H.R. ¶ 213 (1995). (“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(2)(a) of the Convention.”).

219. This is also sometimes referred to as the “least-harmful-means” or “least restrictive means” test. *See* Blum, *supra* note 122, at 120; *see also* Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 385 (2012) (arguing that transplanting least-restrictive means test from constitutional law to IHL is not advisable).

sity “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.”²²⁰ 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.”²²¹ Although *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.²²² It is precisely for this reason that the destruction of the enemy’s “life or limb” is consistent with this standard.²²³

So the two notions of necessity, though closely related, are far from compatible, leading to the anxiety of watering down human-rights law. As Milanović 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.”²²⁴

220. Lieber Code, *supra* note 14, art. 14–16.

221. See, e.g., INT’L AND OPERATIONAL LAW DEP’T, U.S. ARMY, LAW OF WAR DESKBOOK 8 (2011); MELZER, *supra* note 105 at 78–79; U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE ¶ 3 (July 1956); UNITED KINGDOM MINISTRY OF DEFENCE, *supra* note 117, § 2.4.

222. See Lazar, *supra* note 153, 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.”).

223. But see MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, HOW DOES LAW PROTECT IN WAR?: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 1–2 n.16, (3d ed. 2011), available at <http://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf> (stating on the one hand that “[i]n 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”).

224. See Milanović, *supra* note 111, at 97.

Milanović argues that *lex specialis* is a rule of conflict avoidance rather than the conflict resolution, so that if one could make IHL and IHRL simpatico with each other, one ought to do so rather than viewing IHL as taking precedence when its rules conflict with IHRL.²²⁵ 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 Milanović concedes, “It is questionable . . . whether this necessity requirement could be effectively applied in a more traditional battlefield setting” and “[t]here is perhaps no other area of potential conflict where the infusion of IHLR with IHL could lead to a greater slide into utopia, with a consequent slide into irrelevance.”²²⁶

Second, there are other ways to go about solving the alleged codification gap sparked by the paucity of rules governing NIACs. 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.²²⁷ Whether applied by analogy or custom, there are strong prudential reasons to import rules from within IHL rather than look outside to another body of law to fill the gap.²²⁸ 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 be-

225. The warrant for this position is that no treaty expressly gives IHL this power over human-rights law. *See id.* at 115. *But cf.* Draper, *supra* note 204 (finding that IHL as *lex specialis* is implicitly incorporated by human-rights provisions recognizing state parties’ power to “derogate” from the right to life).

226. *See* Milanović, *supra* note 111, 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?

227. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–35 (Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (applying rules of IAC on the basis of customary law); *see also* Abresch, *supra* note 200, 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); Christopher Greenwood, *International Humanitarian Law and the Tadić Case*, 7 EUR. J. INT’L L. 265, 280 (1996).

228. For a list of customary human rules applicable in NIAC, see generally CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (outlining 161 rules related to IHL).

tween IAC and NIAC; the rules of the former are gradually being adopted to apply to the latter.²²⁹ This is a preferable solution especially since essential building blocks like the principle of necessity mean different things in IHL and IHRL (as Part II.B 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 rights.²³⁰ 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.²³¹ That is the reason why IHL is considered a *lex specialis*.²³² 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 quoque* 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.²³³ At least one example is the immediate

229. *Tadić Defence Motion*, ¶ 126; Review of Indictment, *Prosecutor v. Martić*, ICTY Trial Chamber, 8 Mar. 1996, ¶ 11; see also KNUT DÖRMANN 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); John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISR. L. REV. 398, 398 (2007) (substantial convergence between rules of IAC and NIAC); Milanović & Hadzi-Vidanovic, *supra* note 25, at 1.

230. See SOLIS, *supra* note 135, at 23 (“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 122, at 127 (stating that the animating principle of IHL is the “sparing of all those who do not partake in hostilities”).

231. See, e.g., Blum, *supra* note 122, at 120 (“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.”).

232. See Parks, *supra* note 132, at 797–98.

233. See, e.g., ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN 33–35 (2006) (discussing prisoner's dilemma problems in international

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.²³⁴

Fourth, and finally, the co-application of IHRL and IHL is problematic because the two legal regimes govern two different *relationships*.²³⁵ IHL is based on reciprocity, on co-equal belligerents meeting each other on the battlefield, each one subject to the same rules as the other.²³⁶ 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 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.²³⁷ 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.²³⁸ 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 cru-

law).

234. See generally Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004); Jens David Ohlin, *Nash Equilibrium And International Law*, 96 *CORNELL L. REV.* 869, 880–90 (2011) (finding the source of international legal obligations in self-interested contractarianism).

235. See Schabas, *supra* note 199, at 607 (stating that these 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").

236. SOLIS, *supra* note 135, at 9–10.

237. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 13–14 (1996).

238. *Id.*

cial 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

Having failed to find that IHRL must govern—or partly govern—combat situations, 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.²³⁹ 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.²⁴⁰ 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.²⁴¹

239. Before the Obama administration launched its fatal drone strike against al-Awlaki, the Justice Department’s Office of Legal Counsel reportedly drafted memoranda to the Attorney General concluding that such a strike would be lawful. The memoranda have not been publicly released but a summary document was leaked in February 2012. See DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADERS OF AL-QA’IDA OR AN ASSOCIATED FORCE (2011), [hereinafter DOJ White Paper] available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>. The analysis in the white paper suggests that the U.S. Constitution imposes additional constraints on the government’s actions, and that the strike was permissible if capture was deemed unfeasible. See also Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9; Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1; see also First Amendment Coal. v. U.S. Dep’t of Justice, 2012 WL 3027460, at *3–*4 (N.D. Cal. July 24, 2012) (litigation seeking release of memorandum).

240. U.S. CONST. amend. V.

241. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 35 (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 lacked 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

A. CAPTURE AS A CONSTITUTIONAL 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 Fourth Amendment 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.²⁴² *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.²⁴³ Major Supreme Court cases applying *Garner* to different facts, such as *Scott v. Harris*,²⁴⁴ 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.²⁴⁵

Nor do the other standard precedents on extraterritorial application of the Constitution shed any light on the issue or represent facts even remotely similar to targeting situations. *Reid v. Covert*,²⁴⁶ a standard citation for the proposition that the Constitution follows the flag,²⁴⁷ involved a murder commit-

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.

242. See 471 U.S. 1, 2 (1985); see also DOJ White Paper, *supra* note 239, at 9 (concluding that the Fourth Amendment requires balancing individual and governmental interests).

243. See *Garner*, 471 U.S. at 11–12.

244. See *Scott v. Harris*, 550 U.S. 372, 383–84 (2007) (applying the *Garner* formulation to car chases); see also DOJ White Paper, *supra* note 239, at 9 (noting that Fourth Amendment test is “situation-dependent”).

245. In fact, the Justice Department white paper concludes that “there exists no appropriate judicial forum to evaluate these constitutional considerations.” See DOJ White Paper, *supra* note 239, at 10. Although the white paper appears to concede that these constitutional considerations are applicable extraterritorially, it is possible that the analysis was designed as an alternative argument designed to win the day assuming *arguendo* that the Fourth or Fifth Amendments applied. *Id.* at 5 (“The Department assumes that the rights afforded by the Fifth Amendment’s Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad.”).

246. 354 U.S. 1 (1957).

247. See RAUSTIALA, *supra* note 18, at 150 (noting one theory out of *Reid* was “that the Constitution applied to the United States government wherever

ted on a U.S. military installation overseas—an environment where the federal government was already exercising control.²⁴⁸ The holding simply asserted that no treaty or executive agreement could allow the Federal Government to circumvent the Bill of Rights.²⁴⁹ The *Insular Cases* involved even *more* control than was exercised in *Reid v. Covert*, since the territories in question were governed by the Federal Government, though not incorporated as states.²⁵⁰ *Boumediene v. Bush* applied the Constitution “extraterritorially,” but only in a very weak sense since the Court concluded that the federal government had de facto control over Guantanamo Bay.²⁵¹ In cases where the United States had little or no territorial control, the decisions go in the opposite direction.²⁵² One might rely on Justice Harlan’s famous concurring dictum in *Reid v. Covert* that the Fifth Amendment did not always apply to Americans overseas when it would be anomalous and impracticable, which some commentators might seize upon as a hinge to suggest that constitutionally protected targeting decisions during war would be analogous and impracticable.²⁵³ But one need not rely on or appeal to such pragmatics. The simpler answer is that all of the precedents applying the Constitution extraterritorially have taken place outside of armed conflict, or in situations in which the United States exercised control verging on jurisdiction, or in scenarios involving detention but not targeting (detention necessarily implying some level of territorial control).

However, an entire line of cases analyzing the due process rights of Americans during armed conflict might prove more

and whenever it acted”).

248. *Reid*, 354 U.S. at 3.

249. *Id.* at 6 (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”); see RAUSTIALA, *supra* note 18, at 141–50.

250. The *Insular Cases* are a series of Supreme Court decisions which addressed the legal status of newly-acquired U.S. overseas territories. *Id.* at 80. They include *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

251. 553 U.S. 723, 755 (2008); see Anthony J. Colangelo, “*De Facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 625 (2009); see also *United States v. Tiede*, 86 F.R.D. 227, 244 (U.S. Ct. Berlin 1979) (extending the right to a jury trial to civilians charged with non-military offenses in U.S.-occupied Berlin).

252. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (denying extraterritorial application of the Fourth Amendment).

253. *Reid*, 354 U.S. at 74 (Harlan, J., concurring).

promising. In *Hamdi v. Rumsfeld*, 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;²⁵⁴ the Bush administration responded by creating the Combatant Status Review Tribunals (CSRTs) to satisfy the holding.²⁵⁵ 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.²⁵⁶ 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.²⁵⁷ Such an argument turns upside down the liberty interest at stake in these cases.²⁵⁸

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's use-of-force authorization to the executive branch.²⁵⁹ As far as detention goes, the relevant proscription in Geneva is the requirement articulated in Article 5 of the Third Geneva Convention which provides:

Should 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.²⁶⁰

254. 542 U.S. 507, 533 (2004).

255. *Boumediene*, 553 U.S. at 734.

256. See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 *CARDOZO L. REV.* 405, 409–10 (2009) (arguing that, under *Boumediene*, the executive branch has the due process obligation to develop fair and rational procedures for reviewing targeted killings, wherever they take place).

257. See Ido Rosenzweig & Yuval Shany, *Supreme Court Rejects Tort Claim Following Targeted Killing Operation*, 37 *TERRORISM & DEMOCRACY*, Jan. 2012, available at <http://en.idi.org.il/analysis/terrorism-and-democracy/issueno-37/supreme-court-rejects-tort-claim-following-targeted-killing-operation/>.

258. See Murphy & Radsan, *supra* note 256, at 437 (“[T]he executive branch has an obligation to use fair and reasonable procedures to control how it goes about depriving people of life, liberty, or property anywhere in the world.”).

259. *Hamdi*, 542 U.S. at 520–21.

260. Third Geneva Convention, *supra* note 37, art. 5, 75 U.N.T.S. at 140–42.

So, in a sense, the foundation for the Constitution's requirement that Hamdi and other citizen belligerents were entitled to contest their determination turned out to be a function of pre-existing IHL requirements.²⁶¹

None of this suggests that *Hamdi* cannot serve as a precedent for a duty to capture in targeting cases.²⁶² But rather, two things are apparent about *Hamdi*. First, it does not do much to establish a domestic constitutional overlay that would 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.²⁶³ 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.²⁶⁴ Although this might be thought to render the Due Process Clause superfluous in these cases, 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 Fifth Amendment requires an extra level of process for Ameri-

261. 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, 335 (1976). *Hamdi*, 542 U.S. at 529. However, *Hamdi*'s analysis of the scope of Congress's authorization to the executive (including detention) was "based on longstanding law-of-war principles." *Id.* at 521.

262. See Murphy & Radsan, *supra* note 256, at 440 (arguing that the *Hamdi/Boumediene* model proposes subjecting targeted killings to a form of judicial review in civil actions initiated by private parties, such as a *Bivens*-style action); see also DOJ White Paper, *supra* note 239, at 6 (concluding that a due process balancing test would find that the government need not provide "further process" to a citizen belligerent if capture is infeasible and the "targeted individual poses an imminent threat of violent attack").

263. See *supra* note 261 and accompanying text.

264. But see Jenny S. Martinez, *International Decision: Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatant—Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 785 (2004) (arguing that *Hamdi* evidences an uncertain relationship between U.S. law and IHL); 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."). One possible interpretation of *Hamdi* is that IHL law influenced the Court's analysis of Congress's 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. See Murphy & Radsan, *supra* note 256, at 424–25 (discussing how Justice O'Connor's plurality opinion "straddled the civil liberties and executive supremacy camps").

can 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 the Court's reasons 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 mattered for the formal holding of *Hamdi*,²⁶⁵ 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 in *Boumediene v. Bush*, the Court reaffirmed the detainees' constitutional right to habeas corpus and the full effect of the Suspension Clause at Guantanamo (which had not been satisfied).²⁶⁶ Since the habeas corpus 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.²⁶⁷ In a sense, the outcome in *Boumediene* was written on the wall once *Hamdi* was decided and its decidedly non-citizen reasons for decision articulated.

So even under the *Hamdi* and *Boumediene* framework, much of the constitutional analysis is arguably structured by the question of whether IHL is triggered and what IHL provides.²⁶⁸ In the previous two Parts of this Article, I critically considered several potential obstacles to the application of IHL,

265. *Hamdi v. Rumsfeld*, 542 U.S. 507, 523–24 (2004) (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); *see also* DOJ White Paper, *supra* note 239, at 6 (discussing “realities of combat” and the government's compelling interest).

266. *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)).

267. *Id.* at 804 (Roberts, C.J., dissenting) (criticizing the majority opinion because “surely the Due Process Clause does not afford *non-citizens* in such circumstances greater protection than citizens are due”).

268. Although *Hamdi* did not critically examine the question of whether IHL was triggered by the conflict with al-Qaeda, the question was squarely addressed in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (concluding that an armed conflict “not of an international character” exists between the United States and al-Qaeda, triggering the applicability of Common Article 3 of the Geneva Conventions).

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 said, neither section offered an overwhelmingly 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.

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 al-Awlaki incident.²⁶⁹ Does the government have the power to order the summary killing of one of its citizens? In his speech at Northwestern Law School, 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).²⁷⁰ Furthermore, Holder noted that an extra level of due process analysis is triggered when the target is an American citizen.²⁷¹

269. See *supra* notes 3–16 and accompanying text.

270. Eric Holder, Att'y Gen., Address at Northwestern Law School (Mar. 15, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (explaining the due process analysis conducted by the executive branch prior to using lethal force against a target).

271. See *id.* (“[T]he 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 United States only targets citizens after determining that capture is not feasible, though he left was vague as to 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

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.²⁷² Even so, this sovereign entitlement—the killing of a citizen without judicial review—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.²⁷³ 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.

with applicable law of war principles.

Id. (emphasis added).

272. However, most of these examples involve neutral decision-makers, such as Administrative Law Judges, situated within the executive branch. See generally *Mission, Constitution and Bylaws*, FED. ADMIN. L. JUDGES CONF., <http://www.faljc.org/mission-constitution-bylaws/> (last visited Jan. 31, 2013) (describing the role of Administrative Law Judges in upholding the right to due process). Indeed, the *Hamdi*-inspired CSRTs are precisely a case in point: judicial-like proceedings performed within an Article II setting. See Memorandum from the Deputy Sec’y of Def. to the Sec’y of the Military Dep’ts Enclosure 1 (July 14, 2006), available at <http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>. In contrast, the executive determinations described by Holder in his Northwestern speech, *supra* note 270, are purely extrajudicial. These create the very asymmetry that provokes anxiety among the citizenry: the administration provides greater due process protection for detainees, in the form of CSRTs and constitutionally guaranteed habeas corpus proceedings in district courts, as compared with targeted killings, which are subject only to internal executive branch deliberations without judicial involvement. The DOJ White Paper speaks of an “informed, high-level official” of the Executive Branch who makes the determination regarding the target’s threat. See DOJ White Paper, *supra* note 239, at 6.

273. See Murphy & Radsan, *supra* note 256, at 408 (describing how human rights law limits a state’s law enforcement operations).

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.²⁷⁴ The former mode is engaged when the government treats its own subjects and internally regulates the affairs of its country;²⁷⁵ the law enforcement paradigm is part-and-parcel with the government acting as a sovereign,²⁷⁶ though law enforcement is just one aspect of that relationship between subject and sovereign.²⁷⁷ 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

274. 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 15–19* (2010) (describing the different bodies of law that apply when a state is acting as a sovereign versus when it is acting as a belligerent). For a discussion of Neff's book, see Alan G. Kaufman, *Book Review: Justice in Blue and Gray: A Legal History of the Civil War by Stephen C. Neff*, *LAWFARE* (Mar. 7, 2012, 6:44 PM), <http://www.lawfareblog.com/2012/03/justice-in-blue-and-grey-a-legal-history-of-the-civil-war/>.

275. See also Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 *LEIDEN J. INT'L L.* 857, 872 (2012) (concluding that jurisdiction, as a threshold criterion for applicability of human rights, is based on effective power, overall control, and normative guidance).

276. See NEFF, *supra* note 274, at 15 (explaining that a government acting in a sovereign capacity acts "as the enforcer of its own national laws").

277. When I use the phrase "subject of a sovereign," I mean to refer to all individuals subject to the control and jurisdiction of a state's government. This usage departs from the more technical use of the term as a distinction between subjects of a monarchy (such as England) and citizens of a republic (such as the United States). See JOHN SALMOND, *JURISPRUDENCE* 133 n.e (Glanville L. Williams ed., 10th ed. 1947) (describing the traditional distinction between citizens and subjects). Under this technical usage, subject and citizen are roughly analogous, though the transition from one to the other may have profound political consequences as it did during the American Revolution. See *id.* ("[T]he term citizen brings into prominence the rights and privileges of the status . . . while the reverse is the case with the term subject."). However, I use the term here in the wider sense to denote the class of individuals, whether citizens or resident aliens, who are governed by a state. See *id.* ("[T]he term subject is capable of a different and wider application, in which it includes all members of the body politic, whether they are citizens (*i.e.*, subjects *stricto sensu*) or resident aliens. All such persons are subjects, all being subject to the power of the state and to its jurisdiction, and as owing to it, at least temporarily, fidelity and obedience."). BLACK'S LAW DICTIONARY 1561 (9th ed. 2009) (quoting SALAMOND, *supra* note 277, at 133).

relationship inevitably structured by the principle of reciprocity.²⁷⁸

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 subjects.²⁷⁹ Such relationships are especially susceptible to abuse, which is why the development of the post-World-War-II human-rights movement was so significant.²⁸⁰ 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.²⁸¹

Finding the dividing line between these two modes of action is exceptionally difficult, especially in NIACs.²⁸² 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 has ripened into a full-blown civil war.²⁸³ Prior to that ripening, the

278. See SOLIS, *supra* note 135, at 10 (“We obey the law of war if for no other reason than because reciprocity tells us that what goes around comes around.”).

279. See Julia Dobtsis, *Doctrinal Insights of the Goldstone Report* 16 (Jan. 23, 2013) (unpublished 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*, in *INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 111, at 13, 14–22 (describing the relationship between human rights law and the “law and order” paradigm of international conflict).

280. See Dobtsis, *supra* note 279, at 17 (“[H]uman rights law protects individuals from all sorts of arbitrary behavior by their national government at regional, national, and international levels.”).

281. See *supra* Part II.C.

282. See NEFF, *supra* note 274, at 28 (noting the ability of governments 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. *Id.*

283. *Id.* at 18 (“[T]he two types of crisis do not, in practice, separate quite so cleanly into the two categories just described.”).

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).²⁸⁴

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 War.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷

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 en-

284. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 81–88 (2009).

285. NEFF, *supra* note 274, at 113–14 (using property confiscations as examples of how a government action may straddle the borderline between the two categories).

286. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

287. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“[A] state of war is not a blank check.”).

emy personnel.²⁸⁸ 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.²⁸⁹ 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 status.²⁹⁰ 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.²⁹¹ 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.²⁹² Hence, Confederate soldiers were met on the battlefield as enemy combatants, not subject to a duty to capture but instead subject to the taking of "life and limb" in accordance with Lieber's notion of military necessity.²⁹³ If a duty to capture had applied, the Civil War would have been

288. See discussion *supra* Parts II.A.–B.

289. Indeed, arguments that rely on al-Awlaki's citizenship alone to determine his legal relationship to his government simply beg the question, since citizens are capable of standing in a belligerent stance with their own government; this is precisely what the war paradigm and IHL regulate.

290. One notable example is Martin Monti, an American pilot who defected to Nazi Germany. See Michael W. Lewis, *Potential Pitfalls of "Strategic Litigation": How the al-Aulaqi Lawsuit Threatened to Undermine International Humanitarian Law*, 9 LOY. U. CHI. L.J. 177, 178 n.8 (2011). See generally THOMAS J. MORROW, *NEBRASKA DOPPELGÄNGER* (2006) (detailing a historic fictional account of American citizens of German ancestry who returned to Germany to fight in World War II).

291. *Id.* at 177–78.

292. See NEFF, *supra* note 274, at 19–20.

293. See *id.* at 21 ("The Union therefore never wavered in its policy of treating soldiers in the confederate armies as enemy belligerents rather than as traitors."). 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. See *id.* at 61–62 (providing an illustrative example from the Civil War of modern military necessity).

fought far differently; indeed, it would not have been a war at all but rather a simple police action.²⁹⁴

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 a 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 usually between collectives. The state meets an individual on the battlefield as a co-equal belligerent when the individual is acting qua member of a collective.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷ To the extent that the individual is a member of this enemy collective, his relationship with the state is mediated by the belligerency between his collective organization and the state.²⁹⁸

In theory, a lone individual operating independently could launch a devastating attack against the United States. Such an individual would inevitably have great resources at his or her disposal that could inflict great harm without the use of human subordinates. (Once human subordinates are added to the mix, the conflict is by definition between collectives again.) Although such an attack would be devastating, it is unclear if the individual could be in a direct relationship of belligerency against a state without being mediated through a larger organization.

294. *See id.* at 19.

295. *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 27–28.

296. These standards are expressed in the Montevideo Convention. *See* Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. A contrasting set of criteria was presented by the Badinter Commission. *See* THOMAS D. GRANT, THE RECOGNITION OF STATES 159 (1999).

297. ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 22.

298. *Id.*

Indeed, the U. S. has taken great pains to argue that such “lone wolves” would not be subject to the law of armed conflict, and with good reason.²⁹⁹ The law of armed conflict is a species of public international law, which traditionally governs the relationship between collectives.³⁰⁰

However, one might argue that the functional standard for belligerency should be insensitive to the distinction between individuals and collectives. The relevant standard for individual belligerency would be the same as collective belligerency: is the individual capable of carrying out attacks and is the individual capable of following the laws of war if he is inclined to do so? At the collective level, one asks whether the collective is organized in such a way as to meet this functional standard; at the individual level, one simply asks about personal capability rather than organization. However, we need not answer this question to pursue the central argument of this Article. Individual belligerency is not likely to happen in real life and remains a hypothetical thought experiment; the more likely scenario is collective belligerency.³⁰¹

As discussed in Part I.B, 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.³⁰² 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 re-

299. See Jeh Charles Johnson, Gen. Counsel of the U.S. Dep’t of Def., *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?*, Speech at the Oxford Union, Oxford University (Nov. 30, 2012), in Benjamin Wittes, *Jeh Johnson Speech at the Oxford Union*, LAWFARE (Nov. 30, 2012, 12:01 PM), <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/> (“Nor does our enemy in this armed conflict include a ‘lone wolf’ who, inspired by al Qaeda’s ideology, *self-radicalizes* in the basement of his own home, without ever actually becoming part of al Qaeda. Such persons are dangerous, but are a matter for civilian law enforcement, not the military, because they are not part of the enemy force.”).

300. Orla Marie Buckley, Note & Comment, *Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara*, 37 N.C.J. INT’L L. & COM. REG. 793, 810–12 (2012) (providing a brief overview of the progression of recognized actors in international law).

301. See William A. Schabas, *Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT’L L. 847, 847–49 (2010).

302. See *supra* text accompanying note 47.

quirement is the level of organization and whether it meets the functional standard of being capable of supporting ongoing attacks against the state.³⁰³

The government's capacity to act as a belligerent would not follow back to within its territorial jurisdiction, thus explaining why the government may not use a targeted killing or drone strike to kill a suspected terrorist, absent exigency, residing in the United States. In these situations, the United States has complete control over the subject by virtue of its exclusive jurisdiction of the underlying territory, thus triggering the legal architecture of human rights as a constraint on governmental action.³⁰⁴ In limited situations this distinction might evaporate if an armed conflict within the territory of the United States eviscerates or substantially degrades the government's control over its subjects.³⁰⁵ In all other situations, though, the government's control over its own territory triggers the application of the subject-sovereign relationship, even when combatants may occasionally appear within that territory.³⁰⁶

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.³⁰⁷ First, the distinction between status and conduct is partly illusory, or at the very least exaggerated.³⁰⁸ In this case, the individual only becomes a member of an enemy

303. See, e.g., 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, 985 (2011) ("The concept of organized armed group refers to non-state armed forces in a strictly functional sense.").

304. See *supra* text accompanying note 239.

305. See NEFF, *supra* note 274, at 20–22 (detailing the blurred distinction between the federal government as sovereign and belligerent in the Civil War).

306. See *supra* note 277 and accompanying text.

307. 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 AND MORALITY IN AN ASYMMETRICAL WORLD, *supra* note 172, at 60, 79–80.

308. See *id.* at 87.

collective by virtue of his prior actions.³⁰⁹ 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.³¹⁰ 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 essentially only collectives (and their members) are capable of standing in a relationship of belligerency with the state.³¹¹

As a final point, it is often said that IHL targeting can be based on either status or conduct. Status targeting, 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 a continuous combat function within that organization.³¹² 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.³¹³ 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.³¹⁴ Formal membership, including employment by a national department of defense, might be appropriate for national armies, but mem-

309. *Id.* at 86.

310. *Id.* at 78.

311. See *supra* text accompanying notes 295–301.

312. See ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 20 n.33.

313. *Id.* at 20.

314. See MELZER, *supra* note 105, at 350–52; Van Schaack, *supra* note 11, at 291 n.244 (discussing “combatants” within non-state armed groups).

bership in a non-state organization requires more functional criteria.³¹⁵ 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.³¹⁶ 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.³¹⁷ Functional membership imposes a level of symmetry to an otherwise asymmetrical conflict, by emphasizing the reciprocal relationship of the collectives as co-equal belligerents whose actions towards each other are governed by IHL.³¹⁸

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.³¹⁹ 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 mem-

315. See ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 25 (discussing functional combatancy).

316. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (applying functional criteria for membership based on presence and movement on the battlefield with an organization-affiliated brigade and carrying a brigade-issued weapon); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (“The key inquiry, then, is . . . whether the individual functions or participates within or under the command structure of the organization—i.e., whether he receives and executes orders or directions.”).

317. 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 113, at 34 (“An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”). Blum notes that a more restricted 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 122, at 129 (citing CLAUDE PILLOUD ET AL., ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 515 (1987)).

318. See *supra* text accompanying note 237.

319. The issue is discussed in *Hamlily*, 616 F. Supp. 2d at 73–74 (citing Additional Protocol II, *supra* note 40, art. 13, 1125 U.N.T.S. at 615); *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *Prosecutor v. Blaski*, Case No. IT-95-14-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (allowing detention of all members of al-Qaeda and Taliban as consistent with IHL based on membership in non-state armed groups).

bership necessary 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.³²⁰ 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.³²¹

320. See *Hamilly*, 616 F. Supp. 2d at 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) (identifying examples of civilian components of armed forces).

321. 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 Sec. & Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Address at the Woodrow Wilson Center, Washington, D.C. (Apr. 30, 2012), in *International Security Studies*, WILSON CENTER, <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (last visited Jan. 23, 2013) ("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 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. 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. See Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

CONCLUSION

The duty to capture rests at the fault line between IHRL and IHL. The core protection of 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.