
The Power to Kill or Capture Enemy Combatants

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Abstract

During wartime a critical legal question involves the scope of authority to choose whether to kill or capture enemy combatants. One view maintains that a combatant is lawfully subject to lethal force wherever the person is found – unless and until the individual offers to surrender. In contrast, this article concludes that important restraints on the use of deadly force were a part of the agreement reached by states and codified in the 1977 First Additional Protocol to the Geneva Conventions. When nations of the world focused their attention on balancing principles of humanity and military necessity, and making higher law, they agreed on two important sets of rules. Under Article 35, states agreed to prohibit the manifestly unnecessary killing of enemy combatants. And, under Article 41, they agreed that combatants who are completely defenceless, at the mercy of enemy forces, shall be considered hors de combat – including alternative specifications of standards and burdens of proof. Nevertheless, the general constraint – and its key components – should be understood to have a solid foundation in the structure, rules, and practices of modern warfare.

During wartime a critical legal question involves the scope of authority to choose whether to kill or capture enemy combatants. An important view maintains that a combatant is lawfully subject to lethal force wherever the person is found – unless and until the individual offers to surrender. I argue that, in certain well-specified and narrow circumstances, the use of force should instead be governed by a least-restrictive-means (LRM) analysis. The modern law of armed conflict (LOAC)¹ supports the following maxim: if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not

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¹ In this article, I consider LOAC in isolation. I do not consider the application of human rights law. I have elsewhere argued that the US and Al Qaeda are involved in an armed conflict: see Brief for Professors Ryan Goodman, Derek Jinks and Anne-Marie Slaughter as Amici Curiae Supporting Petitioner, in *Hamdan v. Rumsfeld*, 548 US 557 (2006) (No. 05-184); cf. Goodman, 'The Detention of Civilians in Armed Conflict', 103 *AJIL* (2009) 48, at 48 n.1.

be killed; and if they can be put out of action by light injury, grave injury should be avoided.² Admittedly, there are all manner of caveats and conditions – such as burdens of proof – that will qualify the application of this maxim.³ However, the general formula – and its key components – has a solid foundation in the structure, rules, and practices of modern warfare. In short, LOAC prohibits the manifestly unnecessary killing of enemy combatants in importance circumstances.

A debate on this issue has raged since the International Committee of the Red Cross (ICRC) published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* in 2009.⁴ In the report, the ICRC stated, ‘The kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’.⁵ And the ICRC invoked the ‘famous statement’ of a former Vice President of the organization, Jean Pictet, who had written, ‘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’.⁶ Several of the study’s outside expert advisors reported that the late introduction of this analysis came as a surprise during the consultative process.⁷ Some of those experts, and many others, from around the world have since criticized the ICRC’s position.⁸ Most prominently, US Colonel Hays Parks – in an article subtitled ‘No Mandate, No Expertise, and Legally Incorrect’ – asserts that the Interpretive Guidance’s ‘ill-constructed theory

² This formulation is derived, almost verbatim, from other authorities’ articulation of the rule, which I discuss below. See, e.g., *infra* notes 6, 101, 107, and 123.

³ See *infra* sect. 2.

⁴ International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

⁵ *Ibid.*, at 77.

⁶ *Ibid.*, at 82 (quoting J. Pictet, *Development and Principles of International Humanitarian Law* (1985), at 75).

⁷ See, e.g., Rogers, ‘Direct Participation in Hostilities: Some Personal Reflections’, 48 *Mil. L. & L. War Rev.* (2009) 143, at 158; Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’, 42 *NYU J Int’l L & Politics* (2010) 794; W.H. Boothby, *The Law of Targeting* (2012), at 526.

⁸ See, e.g., Ohlin, ‘The Duty to Capture’, 97 *Minnesota L Rev* (2013) 1268; Boothby, *supra* note 7, at 526; Van Shaack, ‘The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory’, 14 *Yrbk Int’l Humanitarian L* (2012) 255, at 29–2–9; Kleffner, ‘Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?’, 45 *Israel L Rev* (2012) 35; von Heinegg, ‘The Impact of Law on Contemporary Military Operations: Sacrificing Security Interests on the Altar of Political Correctness?’, in H.P. Hestermayer *et al.* (eds), *Coexistence, Cooperation and Solidarity* (2011), i, at 117; Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’, in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011), at 95, 121 n. 108; Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’, 1 *Harvard Nat’l Security J* (2010) 5; Parks, *supra* note 7, at 828; Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’, 59 *Int’l & Comp LQ* (2010) 180, at 192; Blum, ‘The Dispensable Lives of Soldiers’, 2 *J Legal Analysis* (2010) 69; Boothby, ‘Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance’, 1 *Int’l Humanitarian Legal Studies* (2010) 143, at 163–164; Fenrick, ‘ICRC Guidance on Direct Participation in Hostilities’, 12 *Yrbk Int’l Humanitarian L* (2009) 287; Rogers, *supra* note 7, at 158; Taylor, ‘The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?’, *The Army Lawyer* (June 2011) 103; cf. Van Der Toorn, ‘Direct Participation in Hostilities’: A Legal and Practical Road Test of the International

is flawed beyond repair'.⁹ Indeed, Parks' analysis serves as the backbone to much of the conventional wisdom and writings on the subject.¹⁰

Before delving further into this debate, some concrete cases should help illustrate the type of situations that are potentially subject to restraints on the use of force (RUF). The examples below demonstrate the manifold scenarios in which this set of rules is potentially relevant. More specifically, they showcase contexts in which the behaviour of a belligerent might violate the LRM maxim. Before assessing each example, note that (i) a violation of the maxim does not necessarily entail criminal liability and (ii) the maxim could be formulated to include (or exclude) a proportionality analysis.¹¹ With those two qualifications in mind, consider some stylized examples:

1. *No military advantage versus kill or capture:*

A Special Forces unit secures a house, and heads into the bedroom area where it discovers that the target of its operation – a military commander – is in the shower. His back is turned to it, and he is unaware of its presence. It could easily apprehend him. It fires a bullet into the back of his head.

2a. *No military advantage versus kill or capture (with refusal to surrender):*

A fighter loses his last weapon, and is crouched on the ground, closely surrounded by a circle of enemy soldiers aiming their rifles at him. He shouts, 'I shall not surrender!' They open fire.

2b. *No military advantage versus kill or capture (and 'consent'):*

Same as 2a, except the man shouts, 'Kill me!' They open fire.

3a. *No military advantage versus kill or capture:*

After clearing a town, a platoon of soldiers discovers that an enemy fighter has tried to hide down a well, where he is now sitting at the bottom. He is armed with a handgun, but has no provisions and no rope to get himself out. The platoon is not pressed for time. However, it does not try to wait or coax him out. Instead, the commanding officer instructs his soldiers to drop three grenades down the well.

3b. *Military convenience versus kill or capture (proportionality analysis¹²):*

Same as 3a, except that the commanding officer explains that it would be inconvenient to expend time trying to get the man out of the well, and the platoon should save its energy for the next day's military operations.

Committee of the Red Cross's Guidance through Afghanistan', 17 *Australian Int'l J* (2010) 7; cf. Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force', 13 *Yrbk Int'l Humanitarian L* (2010) 3, at 45–47.

⁹ Parks, *supra* note 7, at 828.

¹⁰ Indeed, the bulk of published criticisms are brief and conclusory; and many of them essentially refer readers to the leading article by Col. Hays Parks as the support for their view.

¹¹ See *infra* sect. 2, discussing formulations in which criminal liability and proportionality analysis would not apply to RUE.

¹² The example in 3b (and 4) involves a proportionality analysis because the situation potentially calls for weighing abstract and remote military benefits against the harm to the enemy fighter. However, one might instead consider the example to involve the limitation that any attack must serve a concrete and direct military advantage – which arguably does not involve a proportionality analysis. Or one might consider the example to involve a distinction between military necessity and minor military inconvenience – which arguably also does not involve a proportionality analysis.

4. *Military convenience versus kill or capture (proportionality analysis)*¹³:

A unit of ten soldiers comes across an unarmed enemy combatant, but the man will not give up without a fight. They could subdue him either through a physical fight or by shooting him. They consult, and decide to shoot the man. Their decision is based on their view that it would take longer and more resources to walk back to camp with a captive soldier than with a dead one.

5. *Militarily advantageous to capture rather than kill*:

High-level civilian leaders and military commanders meet to plan a kill or capture operation that will take place in a few weeks. They conclude that it will be more militarily feasible to capture the target than to kill him. That is, from a military standpoint, the attempt to capture is superior to the attempt to kill. They decide, however, to try to kill the individual. Their decision is due to information from their ministry of foreign affairs that holding the individual in captivity would harm diplomatic relations, and it would be better to present the death of the individual as a *fait accompli* to the international community.

In this article, I discuss important evidence that has been overlooked and, in some cases, mischaracterized by commentary on RUF. In particular, critics contend that the notion of RUF was simply the product of Pictet, a leading but solitary expert in the 1970s whose idea was flatly rejected at the time and ‘lay moribund for almost four decades’¹⁴ until the ICRC attempted to resurrect it in 2009. The critics’ account is at best a serious oversimplification, and at worst involves misattributions and a disregard for other sources of authority on the subject. That said, almost all of these same sources are also overlooked by the ICRC’s study. And, indeed, the *Interpretive Guidance* eschews the legal foundation that I argue for here.¹⁵

Under modern LOAC, the legal right to use armed force is limited to the objective of rendering individuals *hors de combat* (taken out of battle) or, in the collective sense, to defeating enemy forces. Parties have a right to kill enemy combatants during hostilities, but that right is constrained when killing is manifestly unnecessary to achieve those ends. In some circumstances, it is thus unlawful to use lethal force when a fighter could clearly be rendered *hors de combat* just as easily – and without endangering the attacking party – by injury or capture rather than death. This rule is embodied in the prohibition on superfluous injury and unnecessary suffering.

How significant is this rule if it applies only when there is no threat to the attacking party? First, consider the type of factors that military and civilian authorities would be entitled to take into account if states had unfettered discretion to kill enemy combatants. For example, could decision-makers choose to kill rather than

¹³ See *supra* note accompanying example 3b.

¹⁴ Parks, *supra* note 7, at 815 n. 125; Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *Virginia J Int’l L* (2010) 796, at 835; Van Shaack, *supra* note 8, at 292–293; cf. Kleffner, *supra* note 8, at 44; Blum, *supra* note 8, at 115 (not necessarily a critic of the *Guidance*, but providing a similar depiction, namely, that the ICRC endorsed Pictet’s anomalous position despite its universal rejection).

¹⁵ Kleffner, *supra* note 8, at 43–44 (explaining that the *Guidance* eschews the prohibition on superfluous injury and unnecessary suffering as the basis for its analysis).

capture an adversary based on factors such as the diplomatic fallout from having to hold the individual in custody?¹⁶ Would a state be permitted to adopt a strategy that in effect prefers trying to kill rather than capture combatants because detention options are limited by domestic politics?¹⁷ Would the government of Yemen, for example, be able to request the CIA to bomb the house of a known militant if local forces could easily arrest him, but the government preferred to avoid the local political costs of holding him in long-term detention?¹⁸ Note that these questions arise in scenarios in which there is no military advantage to killing rather than capturing the enemy fighter.

The rule prohibiting unnecessary killing may also have a broader application. Properly conceived, the rule may require that the risk to attacking forces involve a 'definite military advantage' rather than just military inconvenience. And, in section 3, I assess the evidence that a form of proportionality analysis might also apply. Those features, however, are secondary considerations about the precise formulation of the rule. A threshold question in current debates is whether LOAC prohibits the use of lethal force when it is manifestly unnecessary to kill an individual rather than injure or capture them, that is, when killing is unnecessary to accomplish a military objective or to avoid harm to the attacking forces.

In this article, I present and analyse voluminous evidence that contradicts the critics' narrative and largely supports the same bottom line reached by the *Interpretive Guidance* and some other experts.¹⁹ Most importantly, the full record that I foreground

¹⁶ Cf. D. Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (2012), at 126; Shane, 'Targeted Killing Comes to Define War on Terror', *NY Times*, 7 Apr. 2013 (quoting former US Defense Department official Matthew Waxman, 'we could not capture people without significant risk to our own forces or to diplomatic relations') (emphasis added).

¹⁷ Cf. Klaidman, *supra* note 16, at 126–127 ('The inability to detain terror suspects was creating perverse incentives that favored killing or releasing suspected terrorists over capturing them. "We never talked about this openly, but it was always a back-of-the-mind thing for us", recalled one of Obama's top counterterrorism advisers. "Anyone who says it wasn't is not being straight."); M. Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth* (2013), at 219, 247; A. Entous, *Special Report: How the White House Learned to Love the Drone*, Reuters, 18 May 2010 ('Besides putting an end to harsh interrogation methods, the president issued executive orders to ban secret CIA detention centers and close the Guantanamo Bay prison camp. Some current and former counterterrorism officials say an unintended consequence of these decisions may be that capturing wanted militants has become a less viable option. As one official said: "There is nowhere to put them."'); Hajjar, 'Anatomy of the US Targeted Killing Policy', *Jadaliyya*, 27 Aug. 2012 (describing views expressed by Jack Goldsmith, former Assistant Attorney General and head of the Office of Legal Counsel).

¹⁸ Cf. Savage, 'Drone Strikes Turn Allies Into Enemies, Yemeni Says', *NY Times*, 13 Apr. 2013.

¹⁹ See, e.g., Bradley and Goldsmith, 'Congressional Authorization and the War on Terrorism', 118 *Harvard L Rev* (2005) 2047, at 2120–2121 n. 325 ('The laws of war may require a belligerent, even when targeting a legitimate military target, to avoid unnecessary violence and suffering. This principle might preclude killing a nonthreatening enemy combatant who can easily be arrested without the use of force.');

ICRC, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* (2008), at 11 ('several other experts expressed their support for the view expressed in Section IX of the Interpretive Guidance and rejected any suggestion to delete it. According to these experts, the interpretation provided in Section IX accurately reflected contemporary IHL'); Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977', 34 *Int'l Rev Red Cross* (1994) 98; N. Melzer, *Targeted Killing in International Law* (2009);

sheds significant light on the proper interpretation of Additional Protocol I to the Geneva Conventions. This analysis shows how a parallel set of rules – on the definition of *hors de combat* – is designed to achieve many of the same effects as RUF. And it shows how RUF – and the LRM approach in particular – is, at the very least, the law of the Protocol.

In the final analysis, there is strong evidence that the rule on superfluous injury and unnecessary suffering prohibits manifestly unnecessary killing. Under this regime, belligerents must comply with an important (albeit conditional) set of constraints in planning and conducting kill or capture operations against enemy fighters.

1 Weaknesses in Support of Restraints on the Use of Force

In this section, I consider major weaknesses of the ICRC's study, and, in some cases, of any study interpreting LOAC to include RUF obligations. I discuss two significant challenges: (1) the lack of explicit treaty law; and (2) the lack of state practice.²⁰

First, aside from some limited exceptions, there is no treaty provision explicitly providing for RUF. The important exception includes the prohibition on superfluous injury and unnecessary suffering in Additional Protocol I.²¹ The ICRC study, however, primarily relies on general principles of humanity, general principles of necessity, and interpretation by inference. However, as Michael Schmitt notes, in the civilian context there are explicit treaty obligations, such as Article 57 of Additional Protocol I,²² requiring belligerents to choose military attacks that safeguard civilians' lives. And, as he explains, there is no equivalent provision concerning combatants.²³ RUF lacks that kind of definite and direct textual authority. In section 3, I discuss at length the most relevant treaty text concerning our subject.

Secondly, as a matter of customary international law, RUF arguably lacks state practice.²⁴ (And the lack of such practice also creates difficulties for the interpretation of treaty obligations.) Some of the critics of the *Interpretive Guidance* present a nuanced claim in this regard. They acknowledge that states often incorporate limits on the use of force against combatants in their military operations. And, in practice, several states appear to do so – including in diverse military operations across

J. Römer, *Killing in a Gray Area Between Humanitarian Law and Human Rights* (2010); cf. L.C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, 2008), at 151; Geiss and Siegrist, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?', 93 *Int'l Rev Red Cross* (2011) 11, at 25–26; Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone', 161 *U Pennsylvania L Rev* (2013) 1165, at 1214–1217; Cmdr. Bart, 'Special Operations Commando Raids and Enemy Hors de Combat', *Army L* (2007) 33.

²⁰ For other weaknesses see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213960.

²¹ Additional Protocol I to the Geneva Conventions, Art. 35.

²² Art. 57 states in part: 'When 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.'

²³ Schmitt, *supra* note 8, at 40; see also von Heinegg, *supra* note 8, at 1185–1186.

²⁴ Boothby, *supra* note 7, at 526; Schmitt, *supra* note 8, at 41; Akande, *supra* note 8, at 191–192.

the conflict spectrum.²⁵ Indeed, in the consultative process before publication of the *Guidance*, '[s]everal experts had the impression that the disagreement ... regarding the kind and degree of force that would be appropriate in the different scenarios was not fundamental. For instance, no expert had actually claimed that, as a matter of practice, it would be appropriate for a military commander to kill unarmed enemies where they clearly could have been captured without undue risk.'²⁶ Nevertheless, the critics contend that such practices reflect pragmatic strategic and policy choices, not legal obligations.²⁷

There are three considerations that should qualify the concern about state practice. First, it is an important concession that widespread state practice is consistent with the proposed LOAC rule. That element alone naturally does not satisfy the requirements of customary international law. As a matter of treaty interpretation, however, it does lessen concerns about the absence of subsequent state practice following the 1977 Protocol.²⁸ Secondly, it is questionable which side of the argument needs to demonstrate state practice. A proponent of the *Interpretive Guidance* could argue that there is a conspicuous lack of state practice contradicting RUF.²⁹ In section 3 I discuss several instances in which states and international institutions have explicitly accepted RUF as a legal constraint. In that light, it may be important for critics to show some evidence that contrary state practice exists and that such practice reflects a different legal rule rather than violations of existing law.

²⁵ See Brennan, Assistant to the President for Homeland Security and Counterterrorism, 'Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws' (16 Sept. 2011) ('[W]henver it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.'). UK, *Card Alpha: Guidance for Opening Fire for Service Personnel Authorised to Carry Arms and Ammunition on Duty* (2003) ('You may only open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.'). Rules of Engagement for Operation Provide Comfort—reprinted in Department of the Army, Field Manual 100–23: Peace Operations (1994), appendix D ('Hostile Intent – The threat of imminent use of force by an Iraqi force or other foreign force, terrorist group, or individuals. ... When the on-scene commander determines, based on convincing evidence, that hostile intent is present, the right exists to use proportional force to deter or neutralize the threat.'). ('These rules of engagement were extracted from the Rules of Engagement Card carried by all coalition soldiers.'). see *infra* notes 31 and 42 (referring to the Israel and Colombia cases); cf. Chairman of the Joint Chiefs of Staff Instr., 'Standing Rules of Engagement for U.S. Forces', 3121.01B Enclosure A (13 June 2005).

²⁶ ICRC, Fifth Expert Meeting, *supra* note 19, at 13.

²⁷ See, e.g., Schmitt, *supra* note 8, at 43 (citing US Army and US Marine Corps, Counterinsurgency, USA FM 3–24 & USMC Warfighting Pub. 3–33.5 (2006)); Fenrick, *supra* note 8, at 299.

²⁸ See also *infra* 13.4–13.8 of this proof (explaining how state acceptance of broad *hors de combat* rule can substitute, in part, for explicit inclusion of RUF).

²⁹ Cf. Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', 42 *NYU J Int'l L & Politics* (2010) 831, at 909 ('Although Parks contends that Section IX of the Interpretive Guidance is not supported by State practice and case law, he fails to provide any evidence of contrary practice or jurisprudence, which would imply the permissibility of manifestly excessive force. ...').

In the balance of this article, I advance the affirmative case for RUF – and, in particular, the LRM approach. Before assessing that case, however, it is important to consider a range of possible conditions on the application of RUF.

2 Conditions on the Application of Restraints on the Use of Force

What one thinks about the legal status and practicality of RUF may depend on the kind of restrictions placed on its application. For example, some conditions on the application of the rule could effectively preclude RUF from areas of combat that most concern its critics. In evaluating RUF – and the legal claims favouring and disfavouring it – there are several conditions that should be considered.

A *Internalization of Risk for the Attacking Party*

Perhaps the most important condition on the application of RUF involves the question whether an attacking party ever has to assume a risk to its own military personnel in choosing the degree or kind of force used against an adversary. The *Interpretive Guidance* maintains that there is no obligation on the part of the attacking party to assume even a modicum of risk to its own forces.³⁰ This position is arguably based on a long settled understanding of LOAC. On this view, the principle of proportionality requires attacking forces to internalize risks to minimize the loss of civilian lives. And, in contrast, the principle of proportionality does not require attacking forces to endanger themselves to minimize the loss of enemy combatants' lives.

An alternative position holds that RUF requires an attacking party to assume some risk to its own military personnel in choosing the degree or kind of force used against an adversary. The High Court of Israel, for example, took the position that such a risk is part of the RUF inquiry. In its landmark decision on targeted killing, the court held that the Israeli military forces have an obligation to apply RUF in calculating the degree of force necessary to achieve the military purpose of disabling an enemy combatant. And, the court suggested that the risk to Israeli forces is a part of that equation: '[a]rrest, investigation, and trial are not means which can always be used. ... [A]t times it involves a risk so great to the lives of the soldiers, that it is not required. However, it is a possibility which should always be considered.'³¹

This position also finds some support in LOAC. At a general level of abstraction, much of the POW protection regime potentially entails large costs to the detaining

³⁰ See, e.g., ICRC, *Interpretive Guidance*, *supra* note 4, at 82 (stating that 'operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive'). The principal author of the *Guidance* also maintains this position in his own academic writing: Melzer, *supra* note 19, at 289 ('the operating forces can hardly be required to take additional risks in order to capture rather than kill an armed adversary'); *ibid.*, at 288.

³¹ *The Public Committee against Torture et al. v. Israel*, Sup. Ct Israel sitting as the High Court of Justice, Judgment, 11 Dec. 2006, HCJ 769/02, at para. 40 (emphasis added); *ibid.* ('[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.').

power. And it is important to recognize the existence of that general trade-off in the overall structure of the modern international regime. However, our specific concern here is within the ambit of rules protecting combatants who are engaged in hostilities. And the important point is that a subset of rules within that domain will, under some circumstances, require forces to reduce their level of self-protection – to internalize costs to themselves – to safeguard the interests of enemy fighters.

Consider two examples. First, prohibitions on specific weaponry will often mean that an attacking force cannot resort to more ‘cost effective’ methods of disabling or killing its adversary. For instance, poison may be a more effective means of killing ground forces that are dug into trenches while minimizing risks to the attacking force. LOAC, however, categorically precludes that option because of humanitarian concerns for the targets of such an attack. Secondly, other LOAC rules foreclose tactics that a military might otherwise employ to minimize its own casualties. For example, LOAC categorically prohibits perfidy, assassination, treacherous killing, and the threat to deny quarter. Indeed, some of these prohibitions have the potential to foreclose the very tactics that a military force could use to win a battle or stave off defeat.

B *Effective Territorial Control*

RUF may be limited to circumstances in which the attacking force possesses effective territorial control. Our discussion in section 3 finds no substantial precedent for this constraint.³² This concept, however, is introduced explicitly by the *Interpretive Guidance* – essentially as a sliding scale in which the ‘practical importance’ of RUF ‘increase[s] with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted’.³³ This condition could, in effect, limit the application of the rule to situations that more closely approximate to law enforcement operations rather than active battlefields in standard international armed conflicts.

C *Level of Decision-making Authority*

A third condition involves the level of decision-making authority. A central question here is whether RUF involves a duty that primarily applies to the individual soldier engaged in a military operation or to individuals further up the chain of command. Such questions have implicated the formulation of related rules under LOAC.³⁴ For the purpose of our discussion, one might accept an RUF standard only in so far as it applies to commanders or high-level military planners. On this view, an individual soldier in the heat of battle should not have to make split-second decisions about whether to

³² But *cf. ibid.*, at sect. 40 (‘It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities’).

³³ ICRC, *Interpretive Guidance*, *supra* note 4, at 80–81.

³⁴ See, e.g., CDDH/III/SR.29 Vol. XIV, at 284, para. 69 (Finland) (in discussing draft Art. 38 (final Art. 41) of Additional Protocol I ‘suggest[ing] that the opening words of the paragraph “A Party to a conflict” should be replaced by the words “A commander in the field”’); ICRC Commentary to API, Art. 35, at 398 n. 36.

wound rather than kill or to injure lightly rather than gravely. This limitation on the rule would not preclude its application to military planners who place soldiers in a position that compels them to use excessive force against lawful targets (e.g., equipping them with only machine guns to clear a group of unarmed civilians deliberately blocking a bridge).

D Burdens of Proof, Standards of Proof, and Thresholds of Justification

Any legal prohibition can be made more or less stringent through the formulation of different burdens of proof, evidentiary standards, and thresholds of justification. Changes to those elements will affect the acceptability and efficacy of the rule in different contexts. The situation of an armed conflict requires legal rules to appreciate, for example, the special character of decision-making in battle. There are three dimensions along which RUF may be constructed to address such considerations.

The first is the burden of proof. For illustrative purposes, consider two very different default rules:

Presumption of illegality:

The actor conducting an attack against a legitimate military target must establish that the kind and degree of force is necessary to accomplish a military purpose (an assumption disfavouring the attacking party).

Presumption of legality:

The actor conducting an attack against a legitimate military target acts lawfully unless it is established that the kind or degree of force was unnecessary to accomplish a military purpose (an assumption favouring the attacking party).

A second related element is the standard of proof. For example, the rule could refer to action that is ‘manifestly unlawful’,³⁵ ‘manifestly necessary’, ‘manifestly unnecessary’,³⁶ or ‘clearly unnecessary’. A third element is the threshold of justification. A rule can range, for example, from ‘necessity’ to ‘absolute necessity’,³⁷ ‘strict military necessity’,³⁸ imperative military necessity,³⁹ and ‘exceptional cases of unavoidable military necessity’.⁴⁰

Additionally, these elements may vary according to other conditions discussed in this section. For example, the presumption may vary depending on the level of

³⁵ ICC Statute, Art. 33.

³⁶ See, e.g., ICRC, Fifth Expert Meeting, *supra* note 19.

³⁷ Cf. Geneva Convention IV on Civilians, Art. 42.

³⁸ *The Laws of War on Land*, Oxford, 9 Sept. 1880 (Oxford Manual), Art. 22; Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000), at 217.

³⁹ ICRC Commentary to API, Part V, sect. II, at para. 3457; Oxford Manual, *supra* note 38, Art. 32; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, Art. 4(2); Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 Oct. 1907, Art. 23(g), both available at: www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByDate.xsp.

⁴⁰ Hague Convention for the Protection of Cultural Property, *supra* note 39, Art. 11(2).

decision-making authority. That is, military planners may be held to a higher standard than low-level soldiers in the field. Perhaps only the former may operate under an affirmative obligation as provided by the first presumption presented above. Thus, in planning an operation, high-level officials may have an affirmative obligation to ensure that soldiers are not put into a position where the only choice of weaponry is an excessive military method.

E *Mental Intent and Liability Regime*

Additional conditions that qualify the application of RUF include the *mens rea* in performing a prohibited act. That is, the rule could sanction the purposeful, reckless, or grossly negligent use of excessive force.⁴¹ And another condition involves the form of liability that attaches to violation of the rule. Some violations of LOAC incur criminal liability, while other violations trigger legal responsibility but do not constitute war crimes. Obviously the two conditions – intent and liability – can also interact with one another. For example, criminal liability may apply (if it applies at all) only if an individual *purposefully* resorts to excess force.

These conditions may also vary in accordance with other conditions discussed in this section. For example, consider interactions between the level of decision-making authority and mental intent. The rule may be devised such that top-level commanders are held to a higher standard of care. That is, only those actors may be liable for reckless or grossly negligent behaviour.

* * *

The legal conditions on the application of RUF help us to understand the potential scope of the rule, and the ICRC's *Interpretive Guidance's* conception of it in particular. In important respects, the above conditions show that the *Guidance* is a moderate or compromise position – and not, as some critics suggest, an extreme vision of the law. First, consider the most important qualification that the *Guidance* places on RUF: a categorical condition that the rule applies only when the attacking party would in no way endanger its own forces. The *Guidance* is accordingly a substantially more modest position than the one adopted by some states.⁴² Secondly, the *Guidance's* emphasis on effective territorial control is another substantial restriction on the application of the rule. Thirdly, the *Guidance* does not suggest that a violation of the rule is a war crime. And the principal author of the *Guidance* has stated that the rule does not incur

⁴¹ The *Interpretive Guidance* states that 'the kind and degree of force ... must not exceed what is *actually* necessary to accomplish a legitimate military purpose': ICRC, *Interpretive Guidance*, *supra* note 4, at 17 (emphasis added). And commentators have been critical of this element. See, e.g., Schmitt, *supra* note 8, at 40 n. 113 ('Use of the term "actually" is problematic for it introduces an objective test that would not account for situations in which such force reasonably appeared necessary in the circumstances, but which later proved unnecessary.'): see also Garraway, 'The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"', 87 *Int'l L Studies* (2011) 177, at 181.

⁴² See *supra* text at note 31 (discussing Israel); see Colombia, *Comando General Fuerzas Militares, Manual de Derecho Operacional*, FE.MM 3–41 (2009), quoted in Melzer, *supra* note 29, at 910 (referring to 'unacceptable risks and without losing operational effectiveness').

criminal liability.⁴³ An obvious implication of this third point is that the *Interpretive Guidance*, once again, supports a relatively moderate version of RUF. Another (less obvious) implication is that by foreclosing criminal liability the *Guidance* has a stronger basis for being more ambitious along other dimensions. For example, if the violation of RUF does not incur criminal liability, it is perhaps more acceptable to proscribe not only *purposeful* but also reckless and grossly negligent use of excessive force. Accordingly, dimensions along which the *Interpretive Guidance* might appear to be more liberal should be considered in relation to other, more conservative conditions that affect the *Guidance's* framework.

The conditions identified above also help us to assess the degree of historical acceptance of RUF. The discussion in section 3 highlights disputes that are ultimately not about the viability of RUF in principle; rather the point of disagreement often boils down to more minor disputes about conditions on the application of the rule. Understanding the relationship between these conditions and the rule thus also helps us to assess the level of acceptance and disagreement concerning RUF.

3 The Case for Restraints on the Use of Force

A *An Alternate Path: The Scope of Hors de Combat*

Before discussing the direct support for RUF itself, it is important to analyse another area of LOAC that has, over time, given rise to some of the very same constraints that an RUF regime would produce.

Perhaps the most important line drawn by RUF is between the use of force to kill versus the use of force to capture. According to the *Interpretive Guidance*, for instance, a soldier who is rendered defenceless or incapable of resistance should not be subject to attack. Importantly, the application of another set of rules – the definition and protection of *hors de combat* – can effectuate the same result. That is, once a combatant becomes *hors de combat*, he cannot be subject to attack but can be apprehended and detained.

The rules governing *hors de combat* can thus perform much of the same work as the legal boundaries set by RUF. The most important question is how expansively the definition of *hors de combat* is drawn. Indeed, a very broad definition of *hors de combat* could place even more limits on the use of force than RUF. That is, when an individual becomes *hors de combat*, he is completely immune from attack – from being either killed or injured. Such a categorical bar and fixed effect on the use of force can be more restrictive than the context-specific calibration of LRM against a changing enemy target. In addition, wilfully killing or seriously injuring an *hors de combat* is a war crime.⁴⁴ Violation of RUF may or may not incur criminal liability.⁴⁵

⁴³ Melzer, 'Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity', 9 *Yrbk Int'l Humanitarian L* (2006) 87, at 111 and n. 113.

⁴⁴ API, Art. 85(3). See also ICRC Commentary to API, Art. 85, at 998, paras 3491–3493 (discussing the required *mens rea*); CDDH/III/SR.29 Vol. XIV, at 281 para. 60; at 282, para. 62 (Netherlands).

⁴⁵ See text at note 43.

The important point is that the *hors de combat* framework has the potential to effectuate the same results as RUF in many cases involving the decision to kill or capture an adversary. The more the *hors de combat* regime provides the same (or greater) protection as RUF, the more conventional and acceptable RUF itself becomes. This overlap also potentially addresses some questions about state practice concerning RUF. If states accept a broad definition of *hors de combat* – e.g., precluding any attack against a defenceless soldier – it is not as crucial to identify state practice that explicitly includes an RUF rule. State actions that comply with the *hors de combat* protections will accomplish many of the same effects.

Contemporary LOAC includes a relatively broad definition of *hors de combat*. Prior to 1977, the safeguard from attack arguably applied only to combatants who surrendered or were wounded and sick. In the march to codify a new set of protocols, an important and influential report by the UN Secretary-General in 1970 called for the expansion of the class of protected actors.⁴⁶ After referring generally to ‘imperfections, inadequacies and gaps’⁴⁷ in the Geneva Conventions of 1949, the Secretary-General’s report suggested the need for a conference to draft ‘protocols additional to the existing conventions’.⁴⁸ In identifying specific deficiencies in the law, the report stated that consideration might be given to ‘elaborating or supplementing the existing rules on the basis of the following ... principle[]’:

It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.⁴⁹

Three years later, in 1973, the ICRC submitted Draft Additional Protocols to the Geneva Conventions, which adopted a similar position. The text for draft Article 38 mirrored, in the most important respects, the Secretary-General’s report. In addition to combatants who had surrendered, the draft included a separate class of protected actors: an enemy who ‘no longer has any means of defence’.⁵⁰ The accompanying Commentary explained that ‘this cardinal rule’ is based on the following principle:

⁴⁶ UN Secretary-General, Report on Respect for Human Rights in Armed Conflict, UN Doc. A/8052, 18 Sept. 1970 (hereinafter Secretary-General 1970 Report).

⁴⁷ *Ibid.*, at 10, para. 15.

⁴⁸ *Ibid.*, at 11, para. 18.

⁴⁹ *Ibid.*, at 35–36, para. 107.

⁵⁰ The draft text provided in relevant part:

Article 38

1. ... An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:

- (a) is unable to express himself, or
 - (b) has surrendered or has clearly expressed an intention to surrender
 - (c) and abstains from any hostile act and does not attempt to escape.
- ...

ICRC, Draft Additional Protocols to the Geneva Conventions of 12 Aug. 1949: Commentary (Oct. 1973), at 44 (hereinafter ICRC, 1973 Draft Protocols with Commentary).

[The] underlying principle is that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance, that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting ...⁵¹

At the final treaty conference in Geneva, the states agreed to a broad definition of *hors de combat* that went far beyond the condition of combatants who have surrendered.⁵² Draft Article 38 was codified as Article 41 in the final text. Article 41(2) of the Protocol provides:

A person is *hors de combat* if:

- (a) he is in the power of an adverse Party;
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

The key element is the protection of individuals who are 'in the power of an adverse party'. Most obviously, that provision includes a class of actors independent of individuals who have surrendered. Indeed, the latter are covered by the separate provision of Article 41(2)(b). A few states at the treaty conference had proposed restricting the definition to provide only for combatants who have surrendered, or are wounded or sick. Those formulations, however, failed to obtain sufficient support. Instead, the drafters understood that such restrictions would exclude, for example, members of several militaries that prohibit any form of surrender.⁵³ And the three categories in the final text of Protocol I – Article 41(2)(a), (b), and (c) – thus provide separate and sufficient conditions for *hors de combat* status.⁵⁴

Several aspects of Article 41(2)(a) and its negotiating history indicate that the scope of this category is relatively broad. First, the terminology was specifically chosen to apply to individuals prior to the point of capture. In contrast, the Hague Conventions of 1899 and 1907 had both extended protections to members of the armed forces 'in the case of capture by the enemy'.⁵⁵ And the 1929 POW Convention also extended protections

⁵¹ *Ibid.*, at 44.

⁵² It perhaps should be noted that the Art. covers unlawful and irregular combatants: see, e.g., ICRC Commentary to API, Art. 41, at 483, para. 1606 ('The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions ...'); cf. also CDDH/III/SR.29 Vol. XIV, at 281, para. 59 (Netherlands) ('the term "enemy" should have the broadest possible interpretation, namely anyone taking part in hostilities, whether lawful combatant or not').

⁵³ ICRC Commentary to Protocol I, Art. 41, at 1612 ('A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted.').

⁵⁴ *Ibid.*, at para. 1610.

⁵⁵ Regs attached to the Second Hague Convention of 1899, Art. 3; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), Art 3.

to individuals who were 'captured' by the adverse party.⁵⁶ That terminology, according to the *ICRC Commentaries*, 'might have led to the belief that they first should have been taken into custody in order to be protected'.⁵⁷ The 1949 Geneva Conventions expanded the protected class further. That is, the POW Convention of 1949 accorded protection to individuals who had 'fallen into the power' of the adverse party – an expression that had 'a wider significance'⁵⁸ than the term used in the 1929 Convention. As Howard Levie explained, 'Rhetorically, "capture" implies some affirmative act by the military forces of the capturing power. On the other hand, an individual can have 'fallen into the power of the enemy' by means other than capture ...'.⁵⁹

The 1977 Additional Protocol involved a further expansion by discarding the terminology of the 1949 Convention ('fallen into the power') and replacing it with 'is in the power'. As the *Commentary* to the Protocol explains, 'Although the distinction may seem subtle, there could be a significant difference between "being" in the power and having "fallen" into the power'.⁶⁰ The former, according to the *Commentary*, is intended to safeguard individuals who have not even been 'apprehended'.⁶¹

Most important for our discussion of RUE, the class under Article 41(2)(a) potentially includes the types of actors contemplated in the Secretary-General's 1970 report and in the Draft Protocol of 1973.⁶² That is, the drafters of Article 41 appear to have opted for a more general category – 'in the power of an adverse Party' – with the potential to include the more specific situations identified in the Secretary-General's Report (a combatant 'who has obviously no longer any weapons, without need for any expression of surrender on his part') and in the Draft Protocol (an individual who 'no longer has any means of defence'). In particular, the ICRC Commentary to Article 41 explains that the broader category of individuals in the power of an adverse

⁵⁶ Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 1.

⁵⁷ ICRC Commentary to Protocol I, Art. 41, at para. 1602.

⁵⁸ ICRC Commentary to 1949 Geneva Convention III, Art. 4, at 50; ICRC Commentary to Protocol I, Art. 41, at 1602 ('The expression adopted in 1949, "fallen into the power," seems to have a wider scope [than "captured"], but it remains subject to interpretation as regards the precise moment that this event takes place.'): Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at 237 ('At the invitation of the Chairman, Mr. Wilhelm (International Committee of the Red Cross) explained that at the Conference of Government Experts held at Geneva in 1947, it had been suggested that the words "fallen into enemy hands" had a wider significance than the word "captured" which appeared in the 1929 Convention, the first expression also covering the case of soldiers who had surrendered without resistance or who had been in enemy territory at the outbreak of hostilities. This suggestion had been accepted.'): Secretary-General Report 1970, *supra* note 46, at para. 105.

⁵⁹ H.S. Levie, *Prisoners of War in International Armed Conflict* (1978), at 35.

⁶⁰ ICRC Commentary to Protocol I, Art. 41, at para. 1612.

⁶¹ *Ibid.*, at para. 1612. See also Secretary-General Report, *supra* note 46, at para. 105 ('There may still be some doubts, however, whether the article [of the 1949 POW Convention] becomes operative in all cases from the moment a disabled combatant is surrounded or otherwise within the range of the weapons of the enemy or whether it requires actual apprehension by the enemy.'): ICRC Commentary to Protocol I, Art. 41, at para. 1612 ('[O]thers considered that the Third Convention only applies from the moment of the actual capture of the combatant, and that therefore the present provision constitutes the only safeguard in the interim.').

⁶² For an extended analysis that complements my own see Römer, *supra* note 19, at 78–83; cf. Bart, *supra* note 19.

party includes ‘cases [in which] land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat’.⁶³ The decision to kill an adversary in such a vulnerable position is thus prohibited. Moreover, the Commentary explains that the protection applies as long as the individual is defenceless or all his means of defence have been exhausted. The Commentary states, ‘A defenceless adversary is “hors de combat” whether or not he has laid down arms’.⁶⁴ That statement generally comports with the understanding expressed during the treaty negotiations. That is, it corresponds with the framework used by Jean de Preux, on behalf of the ICRC, in formally introducing the draft text.⁶⁵ And it corresponds with statements made by various delegations in support of that framework.⁶⁶ Furthermore, the leading treatise on Protocol I by Bothe, Partsch, and Solf agrees: ‘under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless’.⁶⁷

One of the few commentators to study the record closely, Ian Henderson, reaches a different conclusion about the treaty negotiations.⁶⁸ His analysis, however, depends on a misunderstanding of a proposal made by Brazil during the proceedings. Henderson bases his argument on the following contention: Brazil proposed an amendment to Article 38 (which included the phrase ‘no longer has any possibility of defence or has surrendered’⁶⁹), and that proposal was rejected by the conference. However, that

⁶³ ICRC Commentary to Protocol I, Art. 41, at 1612; *Cf. ibid.*, at 1614 (stating in another context, ‘when they fall into the power of the adverse Party, i.e., when the latter is able to impose its will upon them’).

⁶⁴ *Ibid.*, at 1612; *cf. ibid.*, at 1614.

⁶⁵ De Preux explained that the Art. ‘was concerned with the safeguard of an enemy *hors de combat*, whether or not he was actually a prisoner. ... The determining factor was abstention from hostile acts of any kind, either because the means of combat were lacking or because the person in question had laid down his arms. It was therefore necessary that there should be an objective cause, the destruction of means of combat, or a subjective cause, surrender’: CDDH/III/SR.29 Vol. XIV, at 276, para. 30.

⁶⁶ During the treaty negotiations, the USSR stated that ‘the various amendments submitted ... were in line with the ICRC text and could be moulded without too much difficulty into a single text, even though, on some points, they differed’: CDDH/III/SR.29 Vol. XIV, at 279, para. 52; see also CDDH/III/SR.29 Vol. XIV, at 284, para. 74 (Czechoslovakia) (stating ‘that on the whole he supported the ICRC text of article 38. He noted that the amendments submitted were not in contradiction with that text.’); CDDH/III/SR.29 Vol. XIV, at 281–282, paras 60 and 62 (Netherlands); CDDH/III/SR.29 Vol. XIV, at 283, para. 68 (USSR); *cf. ibid.*, at 283, para. 69 (Finland). The US delegate, George Aldrich, in his capacity as Rapporteur, reported to the conference that although drafting the Art. ‘had required considerable effort owing to the difficulty of defining the concept of a person *hors de combat*’, it was possible to ‘draft a text which commanded general approval and on the subject of which no reservation had been made’: CDDH/III/SB.47 Vol. XV, at 86.

⁶⁷ M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (1982), at 219; see also K. Dörmann, L. Doswald-Beck, and R. Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), at 190.

⁶⁸ I. Henderson, *The Contemporary Law of Targeting* (2009), at 84.

⁶⁹ The proposed amendment stated: ‘An enemy “hors de combat” is one who has no longer any possibility of defence or has surrendered. An enemy is considered as having surrendered when, having laid down his arms, has clearly expressed an intention to surrender and abstaining from any hostile act does not attempt to escape.’

phrase was already part of the 1973 Draft Protocol.⁷⁰ It was neither novel nor a particular contribution of the Brazilian proposal. The principal contribution of the Brazilian proposal instead involved the idea that, in the words of the Brazilian delegate, ‘It was necessary to stipulate the conditions that an enemy had to fulfil in order to be deemed to have surrendered. Those conditions were laid down in the Brazilian amendment. ... The effect of the Brazilian amendment would be to improve paragraph 1 of article 38, by making it more precise and easier to understand and apply.’⁷¹ Thus the Brazilian proposal does not shed much light on the fate of safeguards that apply to individuals independently of the situation of surrender, including combatants rendered defenceless.

Although Henderson does not mention it, admittedly a few states explicitly disagreed with the Draft Protocol’s phrase ‘no longer has any means of defence’.⁷² And, as already mentioned, some states proposed draft language that would have limited the class of *hors de combat* to only the wounded, the sick, and those who surrender. However, the general support for the 1973 Draft Protocol was significant. And the drafters finally opted for a broad, independent class of combatants who are ‘in the power of an adverse Party’ in addition to the class of combatants who are wounded, sick, or surrender. If anything, the negotiations alerted the drafters to the substantial support for the idea that defencelessness might independently render an individual *hors de combat* – which could be covered under the breadth of Article 41(2)(a). It is in this light that the Commentary, as discussed above, states that ‘a defenceless adversary is “hors de combat”’⁷³ and that the Bothe, Partsch, and Solf treatise concurs. This understanding is also notably reflected in subsequent state practice.⁷⁴

* * *

In the final analysis, the rules defining *hors de combat* share much in common with RUF. And early on, the UN Secretary-General and ICRC recognized this commonality.

⁷⁰ There is one immaterial difference: The 1973 Draft Protocol used the term ‘any means of defence’ rather than any ‘possibility of defence’: ICRC, 1973 Draft Protocols with Commentary, *supra* note 50, at 44.

⁷¹ CDDH/III/SR.29 Vol. XIV, at 277, paras 35–36.

⁷² See CDDH/III/7 Vol. III, at 169 (amendment proposed by Uruguay to delete ‘no longer has any means of defence’); CDDH/III/SR.29 Vol. XIV, at 276, para. 33 (Uruguay) (‘introducing amendment CDDH/III/7, said ... it was clear that if an enemy was hors de combat, it was because he had laid down his arms and had thereby lost his status as a combatant. He should therefore be regarded from that moment as a non-combatant’); CDDH/III/SR.29 Vol. XIV, at 284, para. 72 (Spain) (‘He would like the present paragraph 1 to reproduce the wording of Article 23 c) of The Hague Regulations of 1907 and the words “no longer has any means of defence” to be replaced by the words “or having no longer means of defence,” the comma implying a condition. Otherwise he would rather the phrase was deleted.’); CDDH/III/SR.29 Vol. XIV, at 280, para. 55 (Venezuela) (endorsing the Uruguayan amendment).

⁷³ ICRC Commentary to Protocol I, Art. 41, at 1612; see also *supra* text at notes 62–65.

⁷⁴ See, e.g., *Commander’s Handbook on the Law of Naval Operations* (1987), at 118 (‘Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured.’); Ecuador (‘Combatants cease to be subject to attack when they have individually laid down their arms to surrender [or] when they are no longer capable of resistance’) quoted in ICRC, ‘Customary International Humanitarian Law: Practice Relating to Rule 47’, available at: www.icrc.org/customary-ihl/eng/docs/v2_rul_rule47; *ibid.* (excerpting similar provisions of military manuals and national legislation of Australia, Cameroon, Croatia, Egypt, Ethiopia, Georgia, India, Kenya, Nicaragua, Peru, Rwanda, Slovenia, South Korea, Spain, Sweden, and the UK).

RUF regulates the kind and degree of violence that can be employed against individuals who are legitimate military targets. That analysis is obviated, however, if the relevant individual should not be considered a legitimate military target in the first place. Thus, a threshold question is whether the targeted individual is *hors de combat*. The understanding reached in the 1970s codification effort was that combatants who no longer have the means to defend themselves – who are at the mercy of their adversary – are, indeed, covered by this more direct and, in some cases, more protective framework. It would fit within this general structure if LOAC also imposed restraints on the kind and degree of force when a fighter clearly posed no threat and could be easily apprehended without grave violence. We now turn to that part of the legal regime.

B Direct Support for a Least-Restrictive-Means Analysis

It is important to locate RUF in the general structure of the legal regime. The most direct source of support for RUF can be traced back to the reconstitution of LOAC in 1868. At a meeting hosted by Russia in Saint Petersburg, an international military commission produced a declaration that generally circumscribed the use of force during combat, and more specifically achieved the first international agreement prohibiting the use of a particular weapon. The declaration's preamble provides that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'. According to the declaration, it is therefore perfectly legitimate to use military violence to overcome and incapacitate the enemy, that is, 'to disable the greatest possible number of men'; however, 'this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'. This modern understanding of the limits of force was reaffirmed at the Hague Conferences of 1899 and 1907,⁷⁵ and in more recent times by the International Court of Justice.⁷⁶

The 1868 Saint Petersburg declaration thus constituted a turning point. And it is important to reflect on how fundamental a challenge this new understanding posed to notions of an unfettered right to kill.⁷⁷ For example, if a lawful objective is to disable as many combatants as possible to remove them from the battlefield, presumably the law would permit military means that ensure that those fighters would not return to battle

⁷⁵ The preambular language of the St Petersburg declaration was later embodied in operative provisions of the Hague Regs relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907 (Hague IV), Arts 22 and 23. See also 'Project of an International Declaration concerning the Laws and Customs of War', Brussels, 26 Aug. 1874, Arts 12 and 13; Oxford Manual, *supra* note 38, Arts 8 and 9.

⁷⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep. 66, at paras 77–78 (describing the prohibition on 'unnecessary suffering to combatants' as one of two 'cardinal principles' of LOAC).

⁷⁷ J.M. Spaight, *War Rights on Land* (1911), at 74–75 (explaining that this turning point enshrined the 'great principle[.]' that 'no engine of war may be used which is (if one may use the term) *supererogatory* in its effect. ... The military commander, intent on victory, seeks to employ such instruments as will best achieve the end of war – the disabling of the greatest possible number of the enemy. Death, agony, mutilation these he would avoid if he could: they are not ends in themselves.').

ever again. So why not allow weapons deliberately designed to render their deaths inevitable? If enemy fighters never get off the operating table, is that not optimal in terms of military objectives?

Part of the answer is the principle of humanity (and another part is the definition of necessity). Even if a weapon offers some military advantage, its use could be considered inhumane. Rendering death inevitable has been deemed inhumane by the international community, and so have particular forms of dying and suffering such as by poison. In a few instances, states have thus agreed to outlaw a form of weaponry even though its use might have offered military benefits under particular conditions.⁷⁸ Implicit in such decisions is the determination that the inhumane effects of a weapon are categorically unacceptable (regardless of the military benefits) or that the inhumane effects are generally disproportionate to the potential military advantage. In many other cases, however, the international community has lacked the consensus needed to prohibit a weapon because a number of states have wanted to preserve the option of employing it in some situations.

However, even in the latter case, a particular use of the weapon may be prohibited. That is, states may preserve the option to use the weapon to achieve military objectives. States do not, however, retain the prerogative to use the weapon when there is clearly no military benefit. It is in this sense that the prohibition on superfluous injury and unnecessary suffering operates. That is, either as a result of a general principle of necessity or as a more specific prohibition on *unnecessary* suffering,⁷⁹ LOAC forbids the use of methods and means of combat that are neither able nor intended to achieve a military benefit. The use of force in such situations is generally considered cruel,⁸⁰ wanton,⁸¹ or 'useless suffering'.⁸²

LOAC may include an additional restriction – a principle of proportionality directed at the protection of combatants. According to several states' practices and studies by leading experts, this proportionality constraint can be derived from various sources including the rule protecting combatants from 'superfluous injury',⁸³ the rule

⁷⁸ Greenwood, 'The Law of Weaponry at the Start of the New Millennium', 71 *Int'l L. Studies* (1998) 185, at 190–191.

⁷⁹ Bothe *et al.*, *supra* note 67, at 194–195; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (1961), at 524; Greenwood, 'Command and the Laws of Armed Conflict', 4 *The Occasional* (1993) 23 ('what this principle [of unnecessary suffering] seeks to prohibit is the infliction of injuries or suffering which serve no useful military purpose'). Cf. *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, ii (1974) CE/COM III/C 3, at 51 (Proposal by Federal Republic of Germany) ('It is forbidden to use means of combat in a way calculated to cause unnecessary suffering. This prohibition covers the use of means of combat which offer no greater military advantage than other available means of combat, while causing substantially greater suffering. Those who use or give orders for the use of means of combat are bound to weigh the concrete military advantages pursued against the suffering caused thereby to the adversary').

⁸⁰ See, e.g., *Report of the ICRC to the XX1st International Conference of the Red Cross, Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts*, Istanbul, 1969.

⁸¹ W.E. Hall, *A Treatise on International Law* (8th edn, 1924), at 635; Greenwood, *supra* note 78, at 194.

⁸² See, e.g., *Report of the ICRC, supra* note 80.

⁸³ See, e.g., Bothe *et al.*, *supra* note 67, at 195; Greenwood, *supra* note 79, at 23 ('[W]hat this principle [of unnecessary suffering] seeks to prohibit is the infliction of injuries or suffering which serve no useful

protecting combatants from ‘unnecessary suffering’,⁸⁴ a combination of those two rules,⁸⁵ the principle of ‘necessity’,⁸⁶ or a stand-alone principle of proportionality.⁸⁷ Accordingly, the particular use of a method or means of combat may be unlawful if

military purpose. It therefore requires a *balance* to be struck between the military advantage which a weapon or a particular method of warfare may be expected to achieve and *the degree* of injury or suffering which it is likely to cause.’) (emphasis added).

⁸⁴ US Dep’t of State, *Report of the United States’ Delegation to the Conference of Government Experts on Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects*, Lucerne, Switzerland 24 Sept.–18 Oct. 1974 (1974) (hereinafter Dep’t of State, Lucerne Report) (‘It is the U.S. view that the “necessity” of the suffering must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon.’); see *infra* note 126 (discussing the US position at Lucerne Conference); US, Judge Advocate General, *Operational Law Handbook* (2012), at 14 (‘A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused thereby is considered by governments as disproportionate to the military necessity for that effect, that is, the military advantage to be gained from use.’); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep. 66, at 586, paras 14–15 (Higgins J. dissenting) (‘It is thus unlawful to cause suffering and devastation which is in excess of what is required to achieve these legitimate aims. Application of this proposition requires a balancing of necessity and humanity. ... Subsequent diplomatic practice confirms this understanding of “unnecessary suffering”.’); Written Statement of the Government of the Netherlands, *ibid.*, at paras 20–21 (‘[S]uffering may be called “unnecessary” when its infliction ... greatly exceeds what could reasonably have been considered necessary to attain that military advantage. ... [T]he causing of suffering out of proportion to the military advantage to be gained therefore appear to be the essential yardstick for determining whether the use of certain weapons must be deemed to cause “unnecessary” suffering. This approach has governed the development of rules with regard to means and methods of warfare since 1868.’). See also provisions of several military manuals – Australia’s Defence Force Manual (1994); Australia’s LOAC Manual (2006); Canada’s LOAC Manual (1999); Canada’s LOAC Manual (2001); Ecuador’s Naval Manual (1989); Germany’s Military Manual (1992); New Zealand’s Military Manual (1992); South Africa’s LOAC Manual (1996); Socialist Federal Republic of Yugoslavia’s Military Manual (1988) – quoted in ICRC, ‘Customary International Humanitarian Law: Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering’, available at: www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter20_rule70 (hereinafter ICRC, Practice Rule 70).

⁸⁵ *US Operational Law Handbook*, *supra* note 84, at 14 (‘The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to the military advantage realized as a result of the weapon’s use.’); Written Statement of Government of UK, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep. 66, at para. 3.65 (‘The principle ... requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. The more effective the weapon is from the military point of view, the less likely that the suffering which its use causes will be characterized as unnecessary.’); cf. *ibid.*, at 50 (stating that in scenarios in which nuclear weapon is the only way to defeat an enemy ‘it cannot be said that the use of such a weapon causes unnecessary suffering however great the casualties which it produces among enemy combatants.’); see also Ecuador’s Naval Manual (1989); Germany’s Military Manual (1992) quoted in ICRC, Practice Rule 70, *supra* note 84.

⁸⁶ See, e.g., Bothe *et al.*, *supra* note 67, at 196, para. 2.3.3 (‘“Necessity, like its components of relevance and proportionality, is a relational concept”.’); *ibid.*, at 194–195, paras 2.2.2–2.2.3 and 2.3.1; McDougal and Feliciano, *supra* note 79, at 524 (‘Proportionality is commonly taken to refer to the relation between the amount of destruction effected and the military value of the objective sought in the operation being appraised. Disproportionate destruction is thus, almost by definition, unnecessary destruction.’). For a historical source see Hall, *supra* note 81, at 635 (‘But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportionate to the object to be obtained.’).

⁸⁷ Cf. Huber, ‘Quelques Considérations sur une Revision Éventuelle des Conventions de La Haye relatives à la Guerre’, 37 *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*

the magnitude of harm to enemy fighters far outweighs the military benefit. That calculus obviously informs some of the prohibitions on specific weapons – for example, the ban on undetectable glass fragments, poison, and bacteriological devices. It is more questionable whether this calculus more generally regulates methods and means of delivering force during battle.

In sum, there are three potential restrictions on methods and means of combat:

Category 1: some weapons are categorically outlawed – by treaty or by custom – in all situations even if their use could provide a military benefit;

Category 2: some methods and means are prohibited in situations in which their use would (clearly) not provide a (definite) military benefit; and

Category 3: some methods and means may be prohibited in situations in which their use would (clearly) result in suffering that is (grossly) disproportionate to the military benefit.

The foundation for RUF could be based on either category 2 (no military benefit), category 3 (disproportionate suffering), or both. As discussed in section 2, the conditions placed on the application of RUF may restrict it to category 2. That is, RUF may apply only in those situations in which there is clearly no military benefit (including any risk to one's own forces) to be gained from killing rather than capturing an individual. Alternatively, RUF may also be based in part on category 3. For example, the rule would prohibit killing rather than capturing when the military benefit is very modest compared with the deaths involved. It is important to keep these distinctions in mind in the discussion that follows. It would be mistaken to assume that expressions of support for RUF by international authorities over the years have necessarily assumed a category 3 approach. If one worked with that assumption, the degree and strength of support for RUF would be more doubtful.

Although it is important to ground RUF in an understanding of these possible foundations of the rule, our discussion need not deduce RUF from these more abstract formulations. Instead, the historical record includes more direct and specific evidence supporting an RUF framework. And this support adds up to a strong case that the specific rule on superfluous injury and unnecessary suffering includes a prohibition on unnecessary killing. Indeed, the following discussion shows support for RUF by states, UN bodies, and independent experts in the lead up to the codification of the 1977 Protocols to the Geneva Conventions. When governments finally drafted the Additional Protocols, voluminous support for RUF had been expressed. As the following analysis demonstrates, those conceptions of the rules are now a part of the LOAC regime, and are reflected in multiple provisions of Additional Protocol I.

1 *The UN-Secretary General and the ICRC (1970–1973)*

Support for LRM occurred in the early part of the codification process that would eventually culminate in the 1977 Protocols to the Geneva Conventions. As discussed

(1955) 417, at 423; Hall, *supra* note 81, at 635 (explaining recourse to 'general limitation forbidding wanton or disproportionate violence'); cf. ICRC Commentary on Protocol I, Art. 40, at 477 n. 23.

in the previous section concerning draft Article 38 (final Article 41) of Protocol I,⁸⁸ the UN Secretary-General's report of 1970 stated, 'It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons Only such force as is strictly necessary in the circumstances to capture him should be applied.'⁸⁹ And the ICRC's Commentary on the 1973 Draft Protocol explained a similar understanding of the 'underlying principle ... that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance, that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further'.⁹⁰ That support for RUF, however, is indirect.

The period of heightened attention to the rules of combat also included more direct support for RUF. In the early run up to the diplomatic conferences for drafting the protocols, the ICRC submitted a report to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. And that document (published in January 1971) contained a more direct reference to RUF using a two-pronged approach. The first prong involved a reiteration and elaboration of the Saint Petersburg principle. In a section entitled 'Limitation as to the choice of means of harming the enemy', the 1971 Report reiterated the principle that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'.⁹¹ And the report elaborated an understanding of that principle in accordance with an LRM formula:

[R]ecourse to force must never be an end in itself. It will consist in employing the constraint necessary to obtain that result. Any violence reaching beyond this aim would prove useless and cruel. The principle of humanity enjoins that capture is to be preferred to wounding, and wounding to killing; that the wounding should be effectuated in the least serious manner – so that the wounded person may be treated and may recover – and in the least painful manner; that the captivity should be as bearable as possible, etc.⁹²

The 1971 report concluded that these propositions were part of the principles of existing Hague law that 'should be maintained or reaffirmed'.⁹³

As a second prong, the report turned to more specific Hague rules, and here the report called for updating the law. That is, the report referred to the prohibition on particular *means* of warfare, and suggested expanding the scope of the prohibition to include *methods* of warfare: '[t]he Hague rule should be retained. But since it covers explicitly only arms, projectiles or material, might it not be given a more general scope by extending it to take in all means *or methods* calculated to cause unnecessary suffering?'⁹⁴

The 1973 Draft Protocol reflected the 'two-prong approach'; outlined in the ICRC's 1971 report. That is, draft Article 33 (entitled 'Prohibition of Unnecessary Injury'),

⁸⁸ See *supra* sect. 3B.

⁸⁹ Secretary-General Report 1970, *supra* note 46, at 35–36, para. 107.

⁹⁰ ICRC Commentary, *supra* note 4, at 44.

⁹¹ ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. IV, *Rules Relative to Behaviour of Combatants* (CE/4b) (1971), at 5.

⁹² *Ibid.*, at 5.

⁹³ *Ibid.*, at 6.

⁹⁴ *Ibid.* (emphasis added).

included two provisions. The first stated (in accordance with the first prong), ‘The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited.’ And the second provision stated (in accordance with the other prong), ‘It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances.’⁹⁵ As discussed below (in section 5), the final text of Additional Protocol I would be consistent with these background documents and deliberations.

2 Expert Group Meeting in Geneva (1973)

Another significant event occurred in 1973: the meeting of a highly respected expert group in Geneva. The group included a mixed membership of governmental officials and non-governmental experts. There are two important points about this meeting, one small and the other one much larger. The first involves an error of misattribution made by Hays Parks, the leading and influential critic of the ICRC *Guidance*. Parks states that Pictet made a second statement in the course of the 1974–1977 conferences specifically elaborating on and endorsing the LRM model – and that this statement was likewise repudiated by other experts. However, Parks mistakenly attributes the statement to Pictet.⁹⁶ The original text is actually from the meeting held more than a year before, in 1973, in Geneva,⁹⁷ and the actual source of the quotation is not Pictet (and thus does not provide an expression of Pictet’s ‘personal view’⁹⁸) or any individual. Instead the words are from the expert group’s final report, which presents its collective views on international law.⁹⁹

⁹⁵ *Ibid.*, at 41.

⁹⁶ Parks states:

Pictet offered similar arguments in the experts’ meetings on the law of war related to conventional weapons hosted by the ICRC during the 1974–1977 Diplomatic Conference. First, “if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action, grave injury should be avoided”.

Parks, *supra* note 7, at 786. Parks thus attributes the statement to Pictet himself and to the 1974–1977 proceedings. Notably, Parks’ article properly cites the 1973 report in the adjoining footnote, even though in the body of the text he refers to Pictet and the ‘1974–77 Diplomatic Conferences’.

⁹⁷ ICRC, *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts* 13 (1973) (hereinafter 1973 Expert Group Report).

⁹⁸ Parks, *supra* note 7, at 786 n. 58.

⁹⁹ The Report explains the procedures for drafting the report and including the views of the experts:

[D]rafting assignments for the individual chapters of the report were distributed among the experts. The drafts that were subsequently submitted were edited at the ICRC and then considered by the working group during the second session. The amendments and revisions recommended by the experts at the second session were subsequently incorporated by the ICRC during their editing of the final report. ...

The present report is purely documentary in character.

1973 Expert Group Report, *supra* note 97, at 8, paras 10–11.

The larger point is more momentous: the relevant text supporting LRM is properly attributed to a report of an expert group considering ‘existing legal limitations’¹⁰⁰ issued once the codification process was underway. Indeed, the analysis in the 1973 report (which includes the line that Parks quotes) elaborates the LRM principle in a fulsome manner. It states:

What suffering must be deemed ‘unnecessary’ or what injury must be deemed ‘superfluous’ is not easy to define. Clearly the authors of the ban on dum-dum bullets felt that the hit of an ordinary rifle bullet was enough to put a man out of action and that infliction of a more severe wound by a bullet which flattened would be to cause ‘unnecessary suffering’ or ‘superfluous injury’. The circumstance that a more severe wound is likely to put a soldier out of action for a longer period was evidently not considered a justification for permitting the use of bullets achieving such results. The concepts discussed must be taken to cover at any rate all weapons that do not offer greater military advantages than other available weapons while causing greater suffering/injury. This interpretation is in line with the philosophy that if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided.¹⁰¹

Notably, the expert group included Dr Hans Blix and Frits Kalshoven among its prominent members.¹⁰² As will become evident shortly, they would both continue to serve as important proponents of the LRM in future intergovernmental meetings. More importantly, the 1973 meeting had been convened due to a proposal by a group of government experts;¹⁰³ and, in addition to UN representatives, *government* experts composed a majority of the 1973 expert group. This may have been one of the reasons that the group’s report would become an important statement of the law in discussions among states.

3 *Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference (1974)*

A few months later, in early 1974, a first meeting was held of the intergovernmental Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference. After a substantive discussion on legal issues, the Ad Hoc Committee approved a proposal to convene the conference in Lucerne. Importantly, discussions during the Ad Hoc Committee meetings and in its final report evidenced additional direct support for a LRM model. According to the summary record, Sweden’s Head of Delegation, Dr Hans Blix, made a statement remarkably similar to the one attributed to Pictet at Lucerne. Indeed, Blix may have gone further in applying a proportionality constraint to the use of force. He stated:

The philosophy which underlay the concept ‘unnecessary suffering’ was that, if two means of weakening the adversary’s military forces were roughly equivalent for the purpose of placing an adversary hors de combat; the less injurious must be chosen. Again, the less injurious means must be chosen where the additional suffering inflicted by the more injurious means

¹⁰⁰ *Ibid.*, at 9, para. 13.

¹⁰¹ *Ibid.*, at 13, para. 23.

¹⁰² *Ibid.*, at 5.

¹⁰³ *Ibid.*, at 1.

was out of proportion to the advantage to be gained by it. The rule was stated in the ICRC report more generally to be that the concepts of 'unnecessary suffering' and 'superfluous injury' called for weighing the military advantages of any given weapon against humanitarian considerations. ... It was not, on the other hand, legitimate military advantage that a weapon caused more or more severe injuries than were needed to disable a combatant.¹⁰⁴

Other governments concurred with Blix. Switzerland (represented by Professor Rudolf Bindschedler), for example, immediately followed with a statement that it 'entirely agreed with the Swedish representative'.¹⁰⁵ And the Australian representative called on the Ad Hoc Committee not to lose sight of the original basis for LRM:

His delegation felt that there might have been a tendency in recent studies to place undue emphasis on unnecessary suffering as manifested in wounds of a complex or serious nature, and perhaps in that way to lose sight of the initial and basic St. Petersburg principle that it was better to wound than to kill an enemy combatant. The Committee should consider whether, from the point of view of the soldier involved, it was doing him a service if it fell into the error of giving preference to weapons that tended to kill cleanly, rather than to weapons that wounded, but did not kill. That would seem to be false humanitarianism.¹⁰⁶

The Ad Hoc Committee issued a final report agreeing to the establishment of the Lucerne Conference, and elaborating on the statements of various representatives. The final report included a further reference to Blix's position, this time adding a line that 'if the choice was between killing the adversary or injuring him; then he should be injured; and a light injury should be preferred to a grave one'.¹⁰⁷ Notably, Frits Kalshoven was well aware of these positions. He notably served as a part of the Netherlands delegation and rapporteur for the Ad Hoc Committee meeting.¹⁰⁸

4 The Lucerne Conference (1974)

A few months later, governments met at the conference in Lucerne. Pictet made the following statement during the conference:

According to some experts, the element of military necessity consisted solely in the capacity of a weapon to put an enemy hors de combat, this in conformity with the preamble to the St. Petersburg Declaration of 1868 ... An expert [Jean Pictet], elaborating this idea, felt that *the subjective element* it contained could be reduced, e.g. *by a formulation which would require that, if two or more weapons would be available which would offer equal capacity to overcome (rather than 'disable') an adversary, the weapon which could be expected to inflict the least injury ought to be employed.*¹⁰⁹

¹⁰⁴ CDDH/IV/SR.1, at 11, paras 18–19 (13 Mar. 1974) (summary record); see also CDDH/IV/SR.7, at 54.

¹⁰⁵ *Ibid.*, at 12, para. 24.

¹⁰⁶ *Ibid.*, at 15, para. 42. Notably, the final Report of the Ad Hoc Committee refers to this statement as reflective of the views of multiple delegations: Report of the Ad Hoc Committee on Conventional Weapons, CDDH/47/Rev. I (1st Session, 1974), at 458, para. 28; cf. CDDH/IV/SR.2, at 18, para. 5 (New Zealand) ('One should not fall into the error of giving preference to weapons that killed cleanly rather than to weapons that wounded but did not kill.').

¹⁰⁷ Report of the Ad Hoc Committee on Conventional Weapons, CDDH/47/Rev. I (1st Session, 1974), at 458, para. 27.

¹⁰⁸ *Ibid.*, at 453.

¹⁰⁹ ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons*, Lucerne, 24 Sept.–18 Oct. 1974 (1975), at 9, para. 25.

As ostensibly strong evidence of the repudiation of Pictet's view, Hays Parks, Michael Schmitt, and other critics rely on an essay by Frits Kalshoven – entitled 'The Soldier and His Golf Clubs'¹¹⁰ – which discusses the Lucerne Conference and apparently exposes the rejection of Pictet's view.¹¹¹ Reliance on Kalshoven's work for such a purpose is, at the least, a significant oversimplification. To help set the stage for the following analysis, it is notable that Kalshoven originally published 'The Soldier and His Golf Clubs' as part of a *Festschrift* to honour Pictet. It would be curious, indeed, if Kalshoven used that opportunity simply to critique Pictet or set out to prove his lack of influence. Also, Pictet was not just a participant at Lucerne. He was President of the meeting, Kalshoven served as the conference's principal rapporteur, and his essay draws directly from the official record. The critics seize upon Kalshoven's statements that Pictet used the conference as an opportunity to advance his conceptualization of an LRM model; that the record shows that other experts criticized aspects of Pictet's claim; and that Kalshoven expounded upon those criticisms. That account contains considerable flaws.

First, the critics' account that Pictet's view was resoundingly rejected proves too much. Especially in the context of the conventional weapons conference, Pictet's analysis also directly relates to questions about which weapons states should refrain from using. That set of issues is not the same as the choice of weapons a soldier might select on the battlefield. As one of the most influential experts of his time, Pictet's work was important for the general application of humanity and necessity principles to weapons prohibitions. Indeed, the understanding that these general principles can restrict states' use of a weapon if human suffering cannot be justified by a military benefit was shared by leading IHL experts in that period¹¹² and more recently.¹¹³ It would thus

¹¹⁰ Kalshoven, 'The Soldier and His Golf Clubs', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet* (1984), at 369, also reprinted in F. Kalshoven, *Reflections on the Law of War* (2007), at 359.

¹¹¹ Parks, *supra* note 7, at 787 n. 61 ('Pictet's argument and the quoted response prompted Professor Kalshoven's *The Soldier and His Golf Clubs*, which facetiously suggested that to comply with Pictet's interpretation each soldier would be legally obligated to go into combat with a bag of weapons and to select the weapon that enabled compliance under the circumstances, much as a golfer selects a golf club for each individual stroke.'). Schmitt, *supra* note 14, at 835 (referring to only Kalshoven's 'The Soldier and His Golf Clubs' as authority for claim that 'attempts to impose a continuum of force on the battlefield, the most notable being Jean Pictet's famous dictum that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him" have been rejected by states and scholars alike'); Hayashi, 'Military Necessity and the Process of Norm-Creation in International Humanitarian Law', available at: http://works.bepress.com/nobuo_hayashi/1/, at n. 321.

¹¹² Cassese, 'Weapons Causing Unnecessary Suffering: Are They Prohibited?', 58 *Rivista di Diritto Internazionale* (1975) 12, at n. 49 (explaining that '[t]he gross imbalance between the military result (or the military necessity for the use of a weapon) and the injury caused is regarded as the decisive test ... by a number of authors' and citing a dozen scholars); cf. Aldrich, 'Remarks on Human Rights and Armed Conflict', 67 *Am Soc Int'l L Proc* (1973) 141, at 148.

¹¹³ See, e.g., Greenwood, *supra* note 79 ('In deciding whether the use of a particular weapon or method of warfare contravenes the unnecessary suffering principle, the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury.'). Greenwood, *supra* note 78, at 195 and 197; Meron, 'International Law in the Age of Human Rights', 301 *Recueil des Cours* (2003) 9, at 97–98 (arguing for proportionality as a basis for such restrictions); Bothe *et al.*, *supra* note 67, at 196, para. 2.3.3; see also Dep't of State, Lucerne Report, *supra* note 84.

be odd if Pictet's analysis – at least in its application to such weapons prohibitions – would have been entirely or resoundingly rejected.

Secondly, the two concerns that Kalshoven (and the official record) discusses might result only in qualifying Pictet's proposition, not discarding it. The first concern is that Pictet failed to articulate a sufficiently broad definition of military necessity. Immediately following Pictet's proposal, the official record summarizes the opposing view along these lines:

Other experts held, in contrast, that the element of military necessity in the choice of weapons included, besides their capacity to disable enemy combatants, such other requirements as the destruction or neutralization of enemy materiel, restriction of movement, interdiction of lines of communication, weakening of resources and, last but not least, enhancement of the security of friendly forces.¹¹⁴

This objection, it could be said, even implicitly embraces Pictet's formula; it simply calls for more factors to be considered on one side of the equation: the scope of military necessity.¹¹⁵ Academic commentary immediately following Lucerne also suggested that the conference had reached this broader consensus.¹¹⁶ For present purposes it is worth noting that the more expansive definition of military necessity is consistent with the 2009 *Interpretive Guidance*, as well as with variations of LRM that I described in section 2. This 'objection' can thus be easily incorporated and synthesized with the LRM model.

The other objection, raised at the conference as well as by Kalshoven, essentially concerns whether it is realistic for the rule to be implemented by individual soldiers on the battlefield. Even in that regard, the conference record reflects a muted criticism: the concern expressed was that the capacity of an individual soldier to avoid 'even

¹¹⁴ ICRC, *supra* note 109, at 9, para. 25. This interpretation is consistent with the US Delegation's report of the Lucerne conference. See Dep't of State, Lucerne Report, *supra* note 84, at 5 ('There was a general agreement that the basic test of whether a weapon causes "unnecessary suffering" requires comparing the suffering caused with the military utility of the weapon. However, there was considerable divergence as to the relative weight to be given to the military considerations as opposed to what factors should be considered as components of military utility.').

¹¹⁵ Consider as well Kalshoven's statement of explanation in introducing the Lucerne Report to the Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference in 1975. CDDH/IV/SR.8, 5 Feb. 1975, at 69–70, para. 15 ('On the question of unnecessary suffering, the matters discussed had included ... the elements to be taken into account in assessing what suffering should be considered unnecessary. Some had held that the element of military necessity in that equation consisted solely of the capacity of a weapon to put an enemy hors de combat; even then, however, the question how much injury was required to disable an enemy combatant would remain open. Other experts had held that military necessity as an element of choice of weapon included completely different requirements, ranging from the destruction or neutralization of enemy materiel to the enhancement of the security of friendly forces.'). See also Kalshoven, 'The Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974', 6 *Netherlands Yrbk Int'l L* (1975) 77, at 90 (summarizing this part of the conference debate as a difference over definitions and assessments of military necessity).

¹¹⁶ See, e.g., Robblee, 'The Legitimacy of Modern Conventional Weaponry', 71 *Military L Rev* (1976) 95, at 119 ('[T]here was general agreement at the Lucerne Weapons Conference that the correct legal test for "unnecessary suffering" requires a comparison between the suffering or damage caused by the weapon and the weapon's anticipated military advantage. Specifically, if the former is excessive when compared to the latter, then the weapon's use is unlawful.'). *ibid.*, at 119 n. 144.

much graver injury than the minimum *strictly required* in a given situation could *not always* be avoided'.¹¹⁷ As we discussed in section 2, such concerns can be largely, if not completely, resolved by conditions placed on the application of the rule. The objection, for example, suggests that soldiers may have a duty to ensure that the injuries they inflict are 'strictly required'. And the objection relates specifically to cases in which a soldier's resort to a highly injurious weapon 'could not be avoided'. The rule, however, could be formulated to avoid such concerns – for example, by modifying the mental requirement or the threshold of justification. That is, the rule may impose a duty on soldiers not to inflict injuries deliberately for the purpose of creating unnecessary suffering. And the rule may require a soldier to forego military measures that will cause clearly unnecessary suffering when he knows that an equally or more effective alternative is obviously and readily available.

More fundamentally, the objection can be resolved by restricting the application of RUF to high levels of military command or decision-making authority. Perhaps the most glaring oversight of the critics is their failure to acknowledge that Kalshoven makes this very point. That is, as part of his contribution to the *Festschrift*, Kalshoven could not have been clearer that Pictet's view was unassailable – when restricted to a higher level of command. In his concluding passage, Kalshoven provides the following summary:

In conclusion, the question may be asked what became of the principles of St. Petersburg, and in particular of Jean Pictet's view of these principles. ...

... It seems fairly evident that Jean Pictet's statement, taken literally, was untenable; a combatant simply cannot be equipped with a wide array of weapons for all kinds of situations, as the golf player is with his bag of golf clubs. In certain situations, therefore, the individual combatant cannot avoid inflicting graver suffering than would have been strictly necessary to put his enemy hors de combat; in other situations, for that matter, the weapons at his disposal will be insufficient to achieve that legitimate object. But taken less literally, *Pictet's argument appears to carry full weight*; that is, if it is understood as addressed to the authorities who decide on the armament of the armed forces and, even, the military commanders who do have a choice of weapons at their disposal. Considerations of military efficacy will again tend to preponderate in the deliberations of these authorities; at the same time, they will fail in their duty if they lose sight of the humanitarian requirement of minimization of human suffering.¹¹⁸

Of course Kalshoven's account rejects the full extension of Pictet's formula. But that difference amounts to a relatively modest discrepancy in the larger debate over RUF. Indeed, the disagreement explicitly concerns only one condition on the application of RUF (the level of decision-making authority). As described in section 2, a modification of that condition has no devastating effect on the viability of LRM. It may simply make the operation of the rule more feasible and more acceptable. Indeed, with that adjustment, 'Pictet's argument appears to carry full weight'.

¹¹⁷ ICRC, *supra* note 109, at 9, para. 27 (emphasis added). In the final summary of his essay, Kalshoven expresses the objection in the following manner: '[i]n certain situations, therefore, the individual combatant cannot avoid inflicting graver suffering than would have been strictly necessary to put his enemy hors de combat ...': Kalshoven, *supra* note 110, at 385.

¹¹⁸ Emphasis added.

Additional evidence suggests that Pictet's statement resonated with governmental experts at Lucerne. First, eight experts who were members of the 1973 group also participated at Lucerne.¹¹⁹ Two of those experts held special positions of leadership in Lucerne: Blix served as a Vice President of the Lucerne Conference, and Kalshoven was appointed the principal rapporteur. Secondly, the 1973 expert group report was one of the most important background documents for Lucerne. Indeed, in 1975, Kalshoven reported to the Ad Hoc Committee that '[a] fair amount of work had been accomplished, in part thanks to the documentation submitted to [the Lucerne] Conference', at which point he specifically credited two reports – the 1973 expert group report and a UN report on incendiary weapons.¹²⁰ Hans Blix also reported to the 1975 Ad Hoc Committee meeting in highly favourable terms about the significance of the 1973 expert group report for the Lucerne Conference.¹²¹ Thirdly, statements by the Australian delegation at Lucerne reflected broad support for Pictet's position. The Australian government made '[a]n attempt to do Dr. Pictet's idea maximum justice while at the same time putting it in its proper perspective ... suggesting a formulation which closely followed the idea expressed by Dr. Pictet'.¹²² And, in an accompanying comment, the Australian Ambassador, Frederick Blakeney, stated that any formulation of this idea 'obviously needs to be looked at in respect of the enemy as an individual, and as a group. There *already seems a wide measure of agreement* that as few as possible should be killed, no more than necessary should be wounded and those lightly rather than gravely.'¹²³

Finally, we should address an argument made by Hays Parks, namely, that the US delegation's report on the Lucerne Conference provides evidence of the failure of Pictet's position. In particular, Parks asserts that 'the highly-detailed, 126-page U.S. Delegation report on the Lucerne conference mentioned neither of Pictet's points, suggesting the lack of serious regard given them by the participants'.¹²⁴ First, Parks has apparently confused the 1973 (Geneva) expert group meeting and the 1974 intergovernmental conference in Lucerne. The 126-page report concerned only the US government's participation in the latter. And the primary articulation of LRM that Parks

¹¹⁹ The eight experts included representatives from Austria, Egypt, Germany, the Netherlands; Norway, and Sweden.

¹²⁰ CDDH/IV/SR.2, at 68–69.

¹²¹ CDDH/IV/SR.8, at 77, para. 49 ('Mr. Blix (Sweden) drew attention to paragraph 10 of the Introduction to the report of the [Lucerne] Conference of Government Experts, which said that the statements made at the Conference, which amounted to a confirmation or an endorsement of earlier documents, were rendered in the report in a somewhat summarized form. For that reason, the Lucerne report suggested that it should be supplemented by a reading of earlier documents, inter alia the ICRC report of 1973 entitled *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects* and the reports of the United Nation's Secretary-General on *Napalm and other incendiary weapons and all aspects of their possible use*.')

¹²² This quotation appears in another essay by Kalshoven, which Parks and the other critics do not cite or discuss: Kalshoven, 'Conventional Weaponry: The Law from St. Petersburg to Lucerne and Beyond', in M.A. Meyer (ed.), *Armed Conflict and the New Law* (1989), and reprinted in Kalshoven, *Reflections*, *supra* note 110, at 377, 386.

¹²³ Kalshoven, *supra* note 122, at 386–87 (quoting Ambassador Blakeney) (emphasis added).

¹²⁴ Parks, *supra* note 7, at 786 n. 59.

identifies as one of ‘Pictet’s points’ was made in 1973 at Geneva (and, as discussed above, not by Pictet). Secondly, the failure of the US delegation to mention Pictet’s (actual) statement¹²⁵ at Lucerne might suggest, on the contrary, that Pictet’s point was not highly controversial. Indeed, the US delegation’s report includes statements that are generally consistent with Pictet’s analysis.¹²⁶ And, as a reflection of broader agreement with US legal perspectives, it is notable that US military law reviews published around that time were also consistent with Pictet’s formulation.¹²⁷

5 *The Codification of Additional Protocol I*

These various meetings and documents served as the backdrop to the 1977 treaty conference on the Additional Protocols to the Geneva Conventions. The most important reference was the Draft Protocol of 1973 (discussed above in subsection 1). Article 33 of the Draft Protocol would become finalized as Article 35. And, indeed, its wording – and its two-pronged framework – would hardly change. The first provision of Article 35 repeats the principle derived from the precedent set at Saint Petersburg. It states: ‘In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.’¹²⁸ And the second provision of Article 35 states: ‘It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.’¹²⁹

Article 35 of Protocol I is consistent with the ICRC’s explanation of LRM presented in its commentary accompanying the 1973 Draft Protocol and in its 1971 report to the Conference of Government Experts. It must be admitted, however, that Protocol I does not expressly codify such an understanding. Nevertheless, two important sources provide further evidence that the Protocol contemplates the LRM model – the

¹²⁵ See *supra* text at note 109.

¹²⁶ See, e.g., Dep’t of State, Lucerne Report, *supra* note 84, at 5 (‘There was a general agreement that the basic test of whether a weapon causes “unnecessary suffering” requires comparing the suffering caused with the military utility of the weapon. However, there was considerable divergence as to the relative weight to be given to the military considerations as opposed to what factors should be considered as components of military utility.’). These statements notably comported with rules of LOAC drafted by the US military around the same time: see US, Air Force Pamphlet (1976), at sect. 1–3(1) (defining military necessity to include ‘the force used is no greater in effect on the enemy’s personnel or property than needed to achieve his prompt submission’); *ibid.*, at sect. 6-3(b)(2) (‘This prohibition against unnecessary suffering is a concrete expression of the general principles of proportionality and humanity. ... The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon...’); US, Judge Advocate General, Air Force Pamphlet 110–34 (1980) quoted in ICRC, Practice Rule 70, *supra* note 84 (‘the true test is whether the suffering is needless or disproportionate to the military advantage expected from the use of the weapon’).

¹²⁷ See, e.g., Suter, ‘An Enquiry into the Meaning of the Phrase “Human Rights in Armed Conflicts”’, 15 *Military L & L of War Rev* (1976) 393, at 406 (‘[T]he “Law of the Hague” contains the general prohibition on unnecessary suffering so that the aim is to use only sufficient force to put a person out of combat, if this can be done by only inflicting a wound then this is preferable to killing him ...’); Robblee, *supra* note 116, at 112.

¹²⁸ API, Art. 35(1).

¹²⁹ *Ibid.*

Commentary to Protocol I and the leading treatise on Protocol I by Bothe, Partsch, and Solf.¹³⁰

Before turning to the Commentary, first consider the Bothe, Partsh, and Solf treatise. In an important passage concerning Article 35, the treatise appears to synthesize Pictet's position at the 1974 Lucerne conference with the opposing views on the scope of military necessity. (Recall that Solf was also a participant at Lucerne.) The treatise explains (1) that Article 35 requires belligerents to use a weapon that causes less injury when an alternative, equally effective weapon is available; (2) that Article 35 allows for a broad definition of military necessity; and (3) that the resulting application of the rule will be difficult to apply in many circumstances. The treatise states:

In applying para. 2 of Art. 35, the suffering or injury caused by a weapon must be judged in relation to the military utility of the weapon. ... All such comparative judgments logically lead to an inquiry into how much suffering various weapons cause and whether available alternate weapons can achieve the same military advantage effectively but cause less suffering. The comparison of, and balancing between, suffering and military effectiveness is difficult in practice because neither side of the equation is easy to quantify. Inevitably, the assessment will be subjective The problem cannot be simplified by restating the preamble of the 1968 St. Petersburg Declaration that to weaken the enemy's military forces it is sufficient to disable the greatest possible number of men [Examples of] military requirements other than merely disabling enemy combatants ... include the destruction or neutralization of military material, restriction of military movement, the interdiction of military lines of communications, the weakening of the enemy's war making resources and capabilities, and the enhancement of the security of friendly forces.¹³¹

In addition, to resolve the difficulty in making these 'subjective' assessments, the treatise refers to devices that we discussed in section 2 as part of the conditions on the application of the rule. Specifically, Bothe, Partsh, and Solf state, 'Because of the impossibility of quantifying either side of the equation it is important that military advantage be qualified by such words as "definite", and also that the disproportionate suffering be "manifest" or "clear"'.¹³²

The Commentary to Protocol I provides strong evidence to support this interpretation of Article 35. First, recall that a combatant who becomes *hors de combat* forfeits that status if he engages in a hostile act or resumes combat. At that point, he can be lawfully attacked. The right to use lethal force against him, however, is not unlimited. The Commentary explains that an LRM formula under Article 35 applies. Specifically, the Commentary states that the force should be proportionate to the threat:

A man who is in the power of his adversary may be tempted to resume combat if the occasion arises. Another may be tempted to feign a surrender in order to gain an advantage Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is

¹³⁰ Notably, Hays Parks praises both texts as important sources of authority on the question of RUE. Parks, however, does not consider the following content of these sources which I discuss. This observation might be read as a criticism of Parks' analysis. However, it also qualifies any criticism, because Parks has not yet had occasion to explain how these parts of the record might integrate with his interpretation of the law. In addition, it is an important attribute of Parks' article that he credits the contribution of the *Commentaries*, since he understands that Pictet played a significant role in drafting the *Commentaries*.

¹³¹ Bothe *et al.*, *supra* note 67, at 196, para. 2.3.3 (emphasis added).

¹³² *Ibid.*

self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be ‘hors de combat’ once again. Obviously the remarks made above with regard to Article 35 (‘Basic Rules’), paragraph 2, concerning the prohibition of superfluous injury or unnecessary suffering, continues to apply in full. The retort should be proportional to the measure of danger. It should not amount to a refusal to give quarter.¹³³

It should be noted that the phrase ‘proportional to the measure of danger’ appears to apply a necessity test (Category 2 above) rather than a standard proportionality test (Category 3). That is, the Commentary suggests that the use or degree of force should not exceed what is necessary to achieve the military objective. The Commentary does not state that the military advantage should be balanced against the extent of suffering.

The Commentary contains a similar explanation with respect to the use of force against individuals who are in the course of escaping the power of an adverse party. It states, ‘An escape, or an attempt at escape, by a prisoner or any other person considered to be “hors de combat,” justifies the use of arms for the purpose of stopping him. However, once more, the use of force is only lawful to the extent that the circumstances require it. It is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances.’¹³⁴

The Commentary applies a similar principle to combatants in other contexts. This analysis occurs with respect to unarmed non-state combatants whose participation in military operations remains indirect. Examples of such actions include ‘carrying out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla fighters’.¹³⁵ The Commentary states: ‘As a general rule, combatants of this category, whose activity may indicate their status, should be taken under fire only if there is no other way of neutralizing them.’¹³⁶ In other words, this framework applies the maxim that if such combatants can be put out of action by capturing or injuring them, they should not be killed.

This understanding is demonstrated further by a related rule – the prohibition on the denial of quarter (Article 40). That prohibition is similar to RUF at a general level. That is, both rules regulate the kind or degree of violence that can be used against enemy fighters.¹³⁷ More fundamentally, the Commentary draws connections between the two sets of rules in a manner that assists in the proper interpretation of RUF under

¹³³ ICRC Commentary to Protocol I, Art. 41, at para. 1621.

¹³⁴ *Ibid.*, at 1623.

¹³⁵ *Ibid.*, Art. 44, at 528 n. 35.

¹³⁶ *Ibid.*, Art. 35, at para. 1428.

¹³⁷ The prohibition on denial of quarter might appear to protect combatants only after they are *hors de combat*. LOAC, however, prohibits not only the act of denying quarter once the fight is over. It also prohibits a declaration or threat to deny quarter to enemy combatants who are engaged in hostilities. The broader rule is designed to protect combatants from terrorization communicated by such threats. See, e.g., *ibid.*, Art. 40, at paras 1591 and 1594.

Article 35. That is, the Commentary explains that a principle prohibiting the needless use of force against combatants unites the rule on quarter and Article 35 on RUF. The Commentary states:

[T]he rule of proportionality also applies with regard to the combatants, up to a point. The deliberate and pointless extermination of the defending enemy constitutes disproportionate damage as compared with the concrete and direct advantage that the attacker has the right to achieve. It is sufficient to render the adversary 'hors de combat.' The prohibition of refusing quarter therefore complements the principle expressed in Article 35 '(Basic rules),' paragraph 2, which prohibits methods of warfare of a nature to cause superfluous injury or unnecessary suffering.¹³⁸

Notably, in the above passage, the Commentary suggests that the two sets of rules reflect a principle of 'proportionality'. However, the Commentary's exposition appears, more accurately, to rely on a narrower ground: necessity (Category 2). That is, the Commentary refers to 'pointless extermination', which is surely the same as *unnecessary* deaths.¹³⁹ Importantly, this more conservative basis for the denial of quarter – the principle of necessity – still unites the two sets of rules, but on a firmer legal foundation.

Finally, the Commentary's explanation of Article 35 is consistent with our analysis of the full span of the negotiation process. That is, the Commentary explains that the Article reflects the initial position that the ICRC had set forth early in the process. As the Commentary explains, the Rapporteur of the treaty conference wrote that 'several representatives wished to have it recorded that they understood the injuries covered by that phrase to be limited to those which were more severe than would be necessary to render an adversary *hors de combat*;¹⁴⁰ and the Commentary explains that this entry in the record 'corresponds to the position of the ICRC and to the intent of the original rule'.¹⁴¹ Moreover, the Commentary states that the concept of necessity under Article 35 entails 'the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money. ... [I]t should be quite clear that the requirement as to the minimum loss of life ... refers not only to the assailant, but also to the party attacked. If this were not

¹³⁸ *Ibid.*, Art. 40, at para. 1598.

¹³⁹ The Commentary also suggests that the denial of quarter does not constitute a 'concrete and direct advantage that the attacker has the right to achieve'. That statement is consistent with the St Petersburg principle, which holds that there is no right to cause the inevitable death of enemy fighters (e.g., to deny them quarter). However, as discussed above, that principle is consistent with either proportionality, necessity, or a strict humanity test.

¹⁴⁰ *Ibid.*, at para. 1417 (quoting OR XV, at 267, CDDH/215/Rev. 1, at para. 21).

¹⁴¹ *Ibid.*, at para. 1417; *ibid.*, at para. 431 ('Despite the difficulties encountered by the Ad Hoc Committee in its task, the reaffirmation of the prohibition on unnecessary suffering and superfluous injury corresponds to the ICRC's own proposals.'). *Cp. ibid.*, at 1411 ('The object of combat is to disarm the enemy. Therefore it is prohibited to use any means or methods which exceed what is necessary for rendering the enemy "hors de combat" ... Neither the combatants nor the Parties to the conflict are free to inflict unnecessary damage or injury, or to use violence in an irrational way. All in all, this is the position adopted by the ICRC.'). For additional analysis of this part of the Commentary see <http://opiniojuris.org/2013/04/01/guest-post-goodman-responds-to-heller-on-capture-v-kill/>.

the case, the description would be completely inadequate.¹⁴² This understanding of minimizing the loss of life is also consistent with a leading essay on Article 35 by Henri Meyrowitz, which explains that states specifically intended to use the term ‘superfluous injury’ to include the concept of ‘superfluous death’.¹⁴³ Finally, the Commentary also includes language suggesting that the test involves a proportionality analysis (Category 3). It states: ‘In principle it is necessary to weigh up the nature of the injury or the intensity of suffering on the one hand, against the “military necessity”, on the other hand, before deciding whether there is a case of superfluous injury or unnecessary suffering as this term is understood in war.’¹⁴⁴

* * *

In summary, the application of an LRM model to the use of force against combatants has a long and distinguished career in the laws of war. Pictet’s promotion of such a model was consistent with the positions adopted by several important legal authorities. Indeed, the LRM model is precisely what the ICRC informed states was the meaning of draft Article 35 of the Protocol, and it is what states negotiating the Protocol understood when they codified the rule. The best reading of Additional Protocol I is that it maintained this understanding in Article 35. Indeed, a mountain of evidence strongly supports that conclusion. It is less clear whether the rule entails a proportionality test. Nevertheless, the analysis in this section provides a compelling case that RUF – and LRM in particular – constitutes a well-established part of modern LOAC.

4 Conclusion

[I]f a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided.

ICRC, *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects*:

Report on the Work of Experts (1973)

The right to kill and injure in war is not unlimited. The limitations on that right, however, are themselves not unconditional. This article discusses two tracks that govern the decision to kill, injure, or capture an adversary – the definition of *hors de combat* and the restraints on the use of force. We have also examined several conditions that could limit the application of the latter and help in its more precise formulation. One of the principal insights of this article is the identification of a unified system that emerged out of the codification of both sets of rules in the 1970s. An important lesson from this study is, with respect to the line between killing and capturing, that the scope of *hors de combat* may effectuate the same result as RUF in many cases. And

¹⁴² ICRC Commentary to AP I, Art. 35, at para. 1397 (internal quotation marks and citation omitted).

¹⁴³ Meyrowitz, *supra* note 19, at 99–104; *ibid.*, at 116 (explaining that Art. 35 precludes killing combatants who are ‘completely defeated’ and ‘practically defenseless’ without giving them an opportunity to surrender); Melzer, *supra* note 43, at 97 n. 54.

¹⁴⁴ ICRC Commentary to AP I, Art. 35, at para. 1428.

this understanding apparently was not lost on the ICRC, the UN Secretary-General, or leading governmental and non-governmental experts participating in the deliberations at the time.

In its 2009 Interpretive Guidance, the ICRC invoked Pictet's 'famous statement' in support of RUF. In retort, Parks contended that this 'characteriz[ation] as "famous," is dubious', because the idea failed to be recognized by Pictet's contemporaries or gain any further traction. Neither the ICRC nor Parks' account is wholly accurate. Pictet's statement was not as famous as the ICRC hagiography may suggest. But that is not because the idea was isolated and discarded. Instead, Pictet's views were largely consistent with the UN Secretary-General; the ICRC between 1971 and 1977 (including the ICRC Commentary on the 1973 Draft Protocol); the collective judgement of a group of governmental and non-governmental experts in 1973; the report of the 1974 Ad Hoc Committee of the Diplomatic Conference; and government delegations involved in drafting the protocols to the Geneva Conventions.

In short, LOAC forbids, in some circumstances, killing an enemy fighter when doing so is manifestly unnecessary – for instance, when capture is equally effective and does not endanger the attacking party's armed forces. That prohibition (at least) is the Law of the Protocol. The balance of the record favours this straightforward interpretation including: the plain text of the Protocol; the Commentary; the leading treatise on the Protocol; and a considerable number of historical sources, including intergovernmental meetings, in the 1970s leading up to final codification. In the final analysis, this body of evidence most clearly indicates that RUF – and the LRM approach in particular – is well grounded in international law and institutional practice.