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The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt

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I wrote the article, 'The Power to Kill or Capture Enemy Combatants', to correct an oversight in recent law of armed conflict (LOAC) scholarship and practice. In the article, two of the leading LOAC experts with whom I disagree are Colonel Hays Parks and Professor Michael Schmitt. In his Reply to my article, Professor Schmitt thoughtfully engages with my analysis. His representation of my argument is fair, and he interrogates the merit of my position squarely. In addition, he shows a willingness to modify his earlier positions in light of my research,[1] another feature of his writing that demonstrates an extraordinary quality of mind and intellectual character. I am honoured to engage with his ideas in this Rejoinder.

First, I discuss Professor Schmitt and my points of agreement and the significance of our shared understanding for the kill-or-capture debate. Secondly, I examine the content and importance of our remaining disagreement.

1 Points of Agreement

Professor Schmitt correctly identifies considerable 'common ground'[2] between the position he adopts in his Reply and the position I advance in my article. Most importantly, Professor Schmitt accepts that *hors de combat* status is not limited to fighters who (1) become defenceless due to wounds or sickness or (2) surrender. He accepts that a third category independently provides *hors de combat* status: if a fighter is in a situation that is tantamount to capture, or being at the complete mercy of the enemy, but not in the enemy's custody. Most significantly, as Professor Schmitt notes, his 'understanding

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1 Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', this issue, 855 ('reflection on Professor Goodman's analysis regarding the prohibition on attacking those who are *hors de combat* has caused me to refine my position by re-examining that concept' (at 858)). In the article, I also explain that targets of attack may have the burden of proving that lethal force was manifestly unnecessary.

2 *Ibid*., at 860.

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of capture would lead [his approach and my approach] to the same results in most cases'.[3]

This overlap in our approaches has two important implications. First, the notion that the unnecessary killing rule imposes excessive burdens on military forces is misplaced or overstated. The *hors de combat* rule, as conceived by Professor Schmitt for example, would yield the same results in most cases. Secondly, the overlap resolves some concerns about whether state practice is consistent with the unnecessary killing rule. If states accept a broad definition of *hors de combat* – e.g., precluding attacks against an individual in the enemy's complete control – it is not as crucial to identify state practice that explicitly includes an unnecessary killing rule. State actions that comply with the *hors de combat* rule will perform the same function as the unnecessary killing rule in most cases.

2 Points of Disagreement

I naturally disagree with Professor Schmitt on two points in his analysis. First, he contends that there is 'no indication'[4] that states understood Article 35 to encompass the choice to kill instead of wound or capture. As my article shows, his account is contradicted by the ICRC Commentaries to multiple articles of the Protocol;[5] documents submitted for intergovernmental negotiations,[6] the views expressed by negotiating states;[7] an important experts' group the majority of whose membership included state officials;[8] a leading contemporary expert on Article 35, Henri Meyrowitz;[9] and other scholars including Curtis Bradley and Jack Goldsmith.[10] Moreover, Professor Schmitt's vision of Article 35 would produce an odd result: Article 35 could prohibit the use of a lethal weapon (e.g., a firearm) instead of a baton to subdue a fighter when the latter would clearly suffice,[11] but it would not prohibit choosing to kill a fighter instead of capturing or injuring him with lesser force.

Secondly, although Professor Schmitt concedes significant ground in his analysis of *hors de combat* protections, his vision of the relevant provisions is still too limited.

3 *Ibid.*, at 861 (explaining that his 'approach would often arrive at the same conclusion as that proposed by Professor Goodman, albeit through a different legal lens').

4 *Ibid.*, at 856.

5 Goodman, 'The Power to Kill or Capture Enemy Combatants', this issue, 819, text to notes 133, 134, 136; cf. also text to notes 138 and 142.

6 *Ibid.*, text to notes 92–95.

7 *Ibid.*, text to note 101.

8 *Ibid.*, text to notes 107, 123.

9 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, at 116 (explaining that Art. 35 precludes killing combatants who are 'completely defeated' and 'practically defenseless').

10 Bradley and Goldsmith, 'Congressional Authorization and the War on Terrorism', 118 *Harvard L Rev* (2005) 2047, at 2120–2121, n. 325; ICRC, Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report (2008), at 11 (according to 'several other experts ... the interpretation provided in Section IX accurately reflected contemporary IHL').

11 Schmitt, *supra* note 1, at n. 10.

Specifically, he argues that there is 'no indication'[12] that defencelessness constitutes an independent basis for *hors de combat* status. One of the US Navy's own handbooks on the laws of war, however, belies his analysis.[13] And that handbook is consistent with the law of war manuals of many states including other major military powers.[14] Furthermore, Professor Schmitt invokes the 'Bothe, Partsch, and Solf unofficial but authoritative commentary' to contend that Article 41 simply extends *hors de combat* status to individuals in the Fourth Convention. But his account overlooks the fact that Bothe, Partsch, and Solf's analysis of Article 41 confirms, in accord with my interpretation, that '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'.[15]

Finally, perhaps the most important revelation in my exchange with Professor Schmitt is the normative implications of our competing conceptions of the restraints on the use of force. My position permits a belligerent to kill enemy fighters when that action is necessitated by military need, for example, to protect the lives of the attacking force. Professor Schmitt's position, however, permits the use of force to kill enemy fighters when there is *no military reason for doing so*. On his view, military commanders can plan to kill an enemy fighter – even if it is less dangerous to themselves to capture the individual – when they believe that diplomatic payoffs would be greater if the individual were dead rather than taken into custody. Indeed, I stipulate those parameters in a hypothetical scenario presented in my article.[16] And Professor Schmitt fully embraces that scenario:

> [T]he high-level leaders' killings to avoid the diplomatic blowback of capture are likewise lawful. The individuals are combatants (or direct participants), their capture has not been effectuated, and they have not expressed an intention to surrender. They are lawful targets under the law, although one might question the motivation for executing the strike on moral grounds.

Professor Schmitt's position is, indeed, the logical result of a legal regime that fails to require any military need for killing combatants. If there is no legal constraint on the decision to kill or capture – such as military necessity – belligerents can resort to any reason to kill, including political convenience.

Professor Schmitt's position would be on firmer ground were he to argue that diplomatic considerations are a component of military necessity in waging and winning war. That is not his position, however. The political fallout from apprehending an individual constitutes a factor extraneous to military necessity. And the view that he supports is, more fundamentally, that no military necessity, superfluous injury, or unnecessary suffering test applies to the decision to kill or capture combatants.

[12] *Ibid*., at 858.

[13] US Navy, *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') (emphasis added).

[14] Goodman, *supra* note 5, at n. 74.

[15] M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflict* (1982), at 219.

[16] Goodman, *supra* note 5, at 822.

If parties to an armed conflict are not legally constrained to kill only when there is some military justification for doing so, it is easy to imagine a horrifying set of circumstances in which belligerents would have unfettered legal discretion to choose to kill their opponents. There is a heavy burden to show that states accepted such a regime in 1977. On the contrary, the history that I trace, and is analysed by others,[17] shows that the turning point at Saint Petersburg culminated in a normatively sound vision of warfare in the Protocols to the Geneva Conventions. Indeed, that modern vision of LOAC strikes a delicate balance between military necessity and humanity. It is those factors that govern the decision to kill or capture.

[17] Meyrowitz, *supra* note 9.