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The Innocent Combatant: Preserving Their Jus In Bello Protections

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THE INNOCENT COMBATANT: PRESERVING THEIR *JUS IN BELLO* PROTECTIONS

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I. INTRODUCTION

On September 4th, 2014, Officer Sean Groubert of the South Carolina State Police pulled his police cruiser behind the vehicle driven by Levar Jones at a gas station in South Carolina. Officer Jones would later state the reason he pulled behind Jones was because he observed Jones was not wearing his seat belt. Jones would later state he removed his seat belt upon pulling into the gas station to exit his vehicle and enter the station. All of the following events were captured by the dash-cam in Officer Groubert's car.¹

Levar Jones exited his vehicle and, with his car door still open, noticed the police vehicle behind him. His face exhibited surprise and confusion.² Officer Groubert requested Jones' license in a controlled speaking voice.³ Jones pats his pocket, and realizing his wallet is not there, does a rapid shoulder shift from facing Groubert to facing the inside of his vehicle.⁴ He then leans into the vehicle as an ordinary place to secure his wallet, which he had left sitting on the front seat.⁵ However, Officer Groubert (apparently) viewed the rapid shoulder shift as an aggressive and hostile act. In the next three seconds of film, he shouts "Get out of the Car!" twice, runs to cover behind Jones' vehicle and fires four shots at Jones.⁶ The first shot hits Jones while he is turning around with the wallet in his hand. He drops the wallet and backs away from the officer while putting his hands up while three more shots hit him. In the same dash-cam video, Groubert later describes the events to his supervisor.⁷ Groubert describes Jones' surprise and confusion as an act of "staring him down"; Jones' leaning into his vehicle to secure his

¹ This video can be found in many places on the internet. The one we will reference is available at: The State Newspaper, *Sept 4 Groubert traffic stop*, YOUTUBE (Sept. 24, 2014), https://m.youtube.com/watch?v=RBUUO_VFYMs.

² *Id.* at time stamp :40.

³ *Id.* at time stamp :42.

⁴ *Id.* at time stamp :43 - :44.

⁵ *Id.* at time stamp :45.

⁶ *Id.* at time stamp :46 - :49.

⁷ This longer video can be found at: Tony Santaella and Steven Dial, *Trooper on Shooting: He Kept Coming Towards Me*, WLTX19 (Sept. 27, 2014), <http://www.wltx.com/story/news/local/2014/09/26/sean-groubert-gives-his-account-of-shooting-levar-jones/16295527/> (last visited Jan. 3, 2017).

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wallet as an act of “diving into his vehicle”; Jones’ acts of walking backwards while putting his hands up as “he kept coming at me”; and Jones’ wallet as a perceived weapon.⁸

On the one hand we could assume these to be self-serving and dishonest statements by Officer Groubert. This assumption is not necessary and it is far more probative to view them as the honest (mis)perception of a shooter in a perceived hostile environment. Under that lens, Groubert’s statements reflect a perception of an African American male as a potential hostile in an asymmetric battlefield-like environment,⁹ and give a rare insight into a shooter’s psyche – a rapid, stress-filled situation.

The landscape of modern asymmetric conflicts, such as the war in Afghanistan, is also murky. The Soldier, like the police officer, is burdened with the reality that he does not know who the bad guy is and who the innocent is. But the rules governing the Soldier are starkly different than those governing the police officer for sound and logical reasons. In a *New York Times* editorial, U.S. Marine Corps Captain Timothy Kudo discusses his own use of force in Afghanistan.¹⁰ While a commander, he was asked permission by his Marines to kill two Afghans: “The voice on the other end of the radio said: “There are two people digging by the side of the road. Can we shoot them?”” The presumption is the two were implanting an improvised explosion device – known as an IED – to kill or injure Afghan or coalition Soldiers. Captain Kudo gave permission and the two diggers were killed.¹¹ There was an ever-present possibility the diggers were merely irrigating their farm land and not sowing seeds of violence toward Captain Kudo, his Marines, and the Afghan State.

⁸ *Id.*

⁹ The attitude of police in the United States towards African American males has been the subject of much commentary and literature and is not the subject of this piece. We mention it as a basis of comparison to the view of Soldiers towards potential threats in the modern asymmetric battlefield.

¹⁰ Timothy Kudo, Editorial, *How We Learned to Kill*, N.Y. TIMES, Mar. 1, 2015, New York Edition at SR1.

¹¹ *Id.*

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How we assess the use of force and whether force is appropriate in any given situation is instrumental to how we function as a deliberative democracy. While we might all agree Officer Groubert's actions are reprehensible and probably criminal, Captain Kudo's are less open to clear judgment. Should the judgment depend on whether Captain Kudo was ultimately correct; that is, the diggers were, in fact, bad guys, rather than innocent farmers making a living? If Levar Jones had held up a gun rather than a wallet upon exiting his vehicle, the authorities would probably have viewed Officer Groubert's actions differently. But the true (rather than perceived) battlefield is a significantly different legal reality where far greater uses of force have been permitted, including knowingly causing the death of innocents.¹² Evaluating Captain Kudo's actions is made problematic by the blending of warfighting with peacekeeping and even battlefield law enforcement mandated by asymmetric warfare.

Among the volumes written on when force can be exercised by Soldiers during armed conflict in the name of the State, the trend over the last century has been to curtail a Soldier's use of force and rightfully so. The adoption by virtually every State¹³ of The Hague Conventions in 1907,¹⁴ the Geneva Conventions¹⁵ in the wake of World War II, along with their Protocols in 1977,¹⁶ has been with a

¹² Under the concept of proportionality, lawful combatants can knowingly cause the incidental death of innocent noncombatants if the military advantage gained exceeds their loss. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52, June 8, 1977, 1125 U.N.T.S. 3 [*hereinafter* Additional Protocol I].

¹³ The International Committee of the Red Cross [*hereinafter* "ICRC"] tracks the current signatories to the Geneva Conventions and their Additional Protocols at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> (The Geneva Conventions of 1949 have been ratified by every member state of the United Nations).

¹⁴ Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, October 18, 1907.

¹⁵ Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L. L. 462 (1951).

¹⁶ Additional Protocol I and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [*hereinafter* "Additional Protocol II"].

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singular purpose: to limit the devastation inflicted by armed conflict. Armed conflict, however, persists. Whether it is the war in Afghanistan or the crisis in the Ukraine, bloodshed of both innocent civilians and lawful combatants/privileged belligerents¹⁷ is a persistent reality. In the modern era, complicating the calculus of how to limit the destruction of war, many of these armed conflicts are fueled by actors who refuse to wear military uniforms, carry their arms openly, and become privileged belligerents; these actors lurk amongst civilians and never show their true intent until they strike.

In the last decade, the trajectory of some courts, academics, and even military leaders of States¹⁸ is to limit the force States' militaries can use during conflict. The intent of these limits on what force, including lethal force, militaries can use to accomplish the mission is quite noble. The logic is the less force used by a Soldier, the less death and destruction inflicted upon innocents. However, these limitations are tainted by misunderstandings and mistakes concerning the principles and goals of the Just War Theory, particularly in the evaluation of battlefield conduct: *jus in bello*.

Academics and jurists have extrapolated familiar concepts from criminal law jurisprudence, those used to evaluate Officer Groubert's conduct, such as intent, necessity, and proportionality, and attempted to apply them to evaluate the acts of the privileged belligerent.¹⁹ The attempt to make the dissimilar into the similar is understandable because man habitually tries to characterize the unfamiliar by extrapolating from a familiar paradigm. However, while the same terms may be used,²⁰ the meaning of those terms differ

¹⁷ "The term "privileged belligerent" means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. 10 U.S.C. § 948a(6).

¹⁸ Examples of each are discussed later in this chapter.

¹⁹ See GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY (Oxford: Oxford Univ. Press, 2008) [*hereinafter* "Defending Humanity"] for an extrapolation of criminal law concepts to *jus ad bellum*, an extrapolation that makes much more sense than to *jus in bello*.

²⁰ Both the criminal law and the *jus in bello* paradigms include common terms such as self-defense and necessity, but the meanings can vary significantly.

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significantly between law enforcement and war.²¹ This extrapolation manifests itself in applying human rights law norms and the universal reach of an individual's right to life. Criminal law exists to preserve the peace, whereas *jus in bello* works to end conflict.²²

Exacerbating the problem is the other half of the Just War Theory, *jus ad bellum*. *Jus ad bellum* is a set of international principles regulating when the State can initiate armed conflict. Extrapolating criminal law jurisprudence to evaluate *jus ad bellum* actions is rational because the goals and core concepts of the two paradigms are nearly identical:²³ In both systems, the “citizens” (individuals in criminal law, States in *jus ad bellum*) lose the ability to use violence to achieve their aims except in rare circumstances where the violence is legally authorized (law enforcement and U.N. Security Council Resolution) or justified (self-defense of the individual and the state). Further, both share a common fundamental goal: preserving the peace. Therefore, using criminal law concepts and jurisprudence to evaluate *jus ad bellum* action, as proposed by George Fletcher and Jens Ohlin in *Defending Humanity*, is proper.²⁴ The reason: the words and meaning are the same. What is not defensible, morally or legally, is using this similarity as a gateway to then apply criminal law concepts to *jus in bello* where these substantive and goal similarities do not exist. The words may be the same, but the meaning is different.

²¹ A good example of this divergence is the concept of self-defense. In the criminal law paradigm, the individual's right of self-defense is limited by, among other things, the responsibility to not cause the death of anyone but the aggressor, and the ability to use force in self-defense is limited to the timeframe of the aggression. In contrast, on the battlefield, a lawful combatant can knowingly cause the death of an innocent in self-defense, provided the death is incidental and that it is exceeded by the military advantage of staying alive. Further, the lawful combatant can engage in status rather than conduct based self-defense.

²² “The object of war has been understood to be the submission of the enemy as quickly and efficiently as possible.” The Department of DOD LAW OF WAR MANUAL, June 2015, [hereinafter “DOD LAW OF WAR MANUAL”] paragraph 1.4.1 citing 1940 RULES OF LAND WARFARE ¶22 (“The object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence.”); 1914 RULES OF LAND WARFARE ¶10 (same).

²³ *Id.*

²⁴ *Id.*

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This extrapolation of criminal law concepts to the battlefield is not defensible because in armed conflict a commander's calculus revolves around military necessity--defined as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."²⁵ The commander must balance, on one hand, the necessary precautions to protect civilians with, on the other hand, the commander's conclusion of military necessity. Imbedded in this conclusion is military judgment. This concept simply does not exist in domestic criminal law. And with any judgment, especially one which stems from whether necessary precautions were taken in light of the military action in the name of military necessity, there is the element of subjectivity. The modern trend has been to extend "the domestic law of negligence to the battle zone -- where civilian norms of duty of care" are applied to military decisions.²⁶ This means civilian criminal standards are being applied to decisions made in war. The manifestation of this trend is to focus on the results of the military decision after the fact (*e.g.*, were civilians killed?), rather than focus on the rationale of the military act under current International Humanitarian Law (IHL).²⁷

Conflating civilian criminal standards with the rationale of a military act under IHL comes at a high cost for democratic armies and has, in these authors' opinion, not been fully debated. The biggest cost is to the effectiveness of a State's military to bring an end to armed conflict. Efforts to protect the enemy belligerent and innocent civilians by limiting the Soldier's lethality acts to defeat a

²⁵ DOD LAW OF WAR MANUAL paragraph 2.2.1 citing, among multiple other sources, General Order No. 100, the Instructions for the Government of Armies of the United States in the Field, commonly known as the Lieber Code art. 14 ("Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.").

²⁶ Thomas Tugendhat & Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power*, Policy Exchange (2013) at 11, <https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf> (last visited Mar. 31, 2017).

²⁷ International Humanitarian Law is synonymous with the Law of War and the Law of Armed Conflict. This body of international law regulates the conduct of forces when engaged in war and armed conflict.

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fundamental goal of *jus in bello*, bringing about an end to the war; therefore causing an increase, rather than decrease, of violence.

Unrealistic limitations on the Soldier means there are rules he can never overcome. If the acid test is to kill no civilians, for example, then closing with and killing or capturing an amorphous enemy who looks and acts like a civilian is profoundly difficult, if not impossible. Placing limitations on the Soldier limits their ability to exercise the principle of military necessity and, therefore, defeats one of the core principles of the Just War Theory.

This article will argue the right of the Soldier to engage and destroy military objectives is inherent to warfare; efforts to stem or limit this force need to be fully understood and carefully considered within *jus in bello* instead of the criminal law paradigm. Failure to do so may actually increase violence rather than decrease it, as well as violate the State's sacred obligation to its designated belligerents: Soldiers.

Even though the Soldier is legally and morally blameless for his presence on the battlefield, he loses the protections of the civilian criminal law against violence. In exchange for this sacrifice, the Soldier gains the right to use violence to execute the mission and bring about an end to the war. Forcing the Soldier to waive his right to the protections of the law while simultaneously denying him the ability to effectively accomplish his mission reduces him to nothing more than a designated target for those who oppose his State.

This article will start with a brief introduction to the core principles of the Just War Theory and use these to identify its fundamental goals. This section will examine the differences between privileged belligerents and civilians and highlight why the rights of privileged belligerents cannot tether to the concepts or goals of domestic criminal law. The second part of the article will then examine five specific trends which are part and parcel to the pervasive wave against the use of force and the actual or potential cost to how Soldiers behave in conflict; that is, *jus in bello*. The authors will ultimately conclude that until war itself is fully eliminated from the human experience, the *lex specialis* of *jus in bello* within the Just War Theory is pragmatically justified and a morally mandated

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duty of the international community of States to privileged belligerents.

II. A BRIEF INTRODUCTION OF THE JUST WAR THEORY AND A COMPARISON TO TRADITIONAL CRIMINAL LAW

The Just War Theory has traditionally²⁸ been divided into the morality of a State or group's decision to engage in armed conflict, *jus ad bellum*, and the manner in which armed conflict is conducted, *jus in bello*.²⁹

Jus ad bellum has evolved from the right of states to use war to achieve political ends, enforce treaties, and in reprisal, to the far more restrictive modern approach of Article 2(4) of the United Nations Charter, which requires States to "...refrain from the threat or use of force against .. any state" in order to "...maintain international peace and security."³⁰ The only commonly recognized exceptions to this prohibition are the use of force authorized by the Security Council³¹ and the use of force in self-defense under Article 51³² of the same charter. In this regard, *jus ad bellum* mirrors the paradigm of civilian criminal law in both goal (preserving peace) and substance (the

²⁸ Modern academics have posited a third area of concern within the Just War Theory, that of *jus post bellum*, or the responsibility of belligerent states after the conclusion of armed conflict.

²⁹ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 21 (Basic Books, 3RD ed. 2000) [*hereinafter* "Walzer"]: "War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that a war is being fought justly or unjustly."

³⁰ Charter of the United Nations, Jun. 26, 1945, 59 Stat. 1031 article 2(4) [*hereinafter* "UN Charter"].

³¹ *Id.* at article 24(2) "The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." These powers include the ability to use force for Chapter VI peacekeeping, or Chapter VII peace enforcement.

³² *Id.* at article 51 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

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individual's ability to use force is limited to situations justified by an external imminent threat).

A. The Uniqueness of *Jus in bello*

Unlike *jus ad bellum*, which evolved almost entirely based on international agreement,³³ *jus in bello* is primarily the product of custom. Modern treaties, such as the four Geneva Conventions and its Protocols, have acted to codify rules evolved from core principles developed by the practice of professional warfighters over centuries.³⁴ These principles include Distinction, Military Necessity, and Proportionality.

1. *The Principle of Distinction.*³⁵

Any analysis of *jus in bello* should begin with the principle of distinction, because it is the springing condition for the *lex specialis*. Said another way, without the application of the principle of distinction, the substance of traditional criminal law is an entirely adequate tool to determine the legality of a given act. The principle subdivides into: A) the responsibility of combatants to distinguish themselves from civilians; and B) the responsibility to target only enemy combatants and military objectives with attacks.³⁶

³³ Prior to its conclusion in the U.N. Charter, the International Military Tribunal at Nuremberg identified the Kellogg-Briand Pact of 1929 as a source of restrictions on the power of *jus ad bellum* for signees.

³⁴ The Lieber Code is often cited as the first documentation of the modern laws of war. This code was not a creative work, but rather the result of Francis Lieber working on a committee of military professionals to codify existing customary practice that had been developed over centuries.

³⁵ DOD LAW OF WAR MANUAL paragraph 2.5.

³⁶ *Id.*

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(i) *The Responsibility of Combatants to Distinguish Themselves from Civilians.*

International law grants combatants the legal and moral authority to commit violent acts that would otherwise be abhorrent and punishable under traditional criminal law.³⁷ This privileged belligerency allows them to shoot and kill enemy Soldiers based on their mere status as members of the enemy military force.³⁸ Criminal law would only allow this attack if properly imposing a death sentence on the victim³⁹ or if the victim was posing an imminent threat to the shooter (or another) and the shot was a proportional response to that threat⁴⁰ (e.g., without a current imminent threat, Officer Groubert could not shoot Levar Jones even if Jones was the worst criminal in history).

Further, except in the case of a death sentence and in preventing the escape of an individual who poses a significant threat of death or serious bodily harm to the officer or others,⁴¹ law enforcement officers have no greater privilege to use deadly force than an ordinary citizen. The privileged belligerent does not suffer any of these limitations. She can kill her victim while he sleeps from one thousand miles away, facing no imminent threat whatsoever.⁴² For this privileged belligerent to gain this legal authority to target and do violence to others, however, she must first set herself out as a

³⁷ The specific language used denotes privileged belligerency as a ‘right.’ “Members of the armed forces...have a right to participate directly in hostilities.” Additional Protocol I, Art. 43(2).

³⁸ ICRC Commentary on the Additional Protocol I 1453 (¶4789) “Those who belong to armed forces or armed groups may be attacked at any time.”

³⁹ In *Gregg v. Georgia*, 428 U.S. 153 (1976) the United States Supreme Court overturned its decision of four years earlier in *Furman v. Georgia*, 408 U.S. 238 (1972), and held that capital punishment was a lawful use of force and not prohibited by the 8th Amendment to the U.S. Constitution.

⁴⁰ Model Penal Code [MPC] §3.04 “...the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person.” & 3.05 “...the use of force upon or toward the person of another is justifiable to protect a third person when...the actor would be justified under Section 3.04 in using such force to protect himself.”

⁴¹ *Tennessee v. Garner*, 471 U.S. 1, 2 (1985).

⁴² Tugendhat & Croft, *supra* note 26.

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lawful target,⁴³ such that she can also legally be killed while sleeping by an enemy she has never met, let alone threatened. Combatants that distinguish themselves from civilians are the only individuals authorized to commit these violent acts of war authorized by *jus in bello*;⁴⁴ all others must comply with the mandates of criminal law.

(ii) The Responsibility to Target only Enemy Combatants and Military Objectives.

Though it may seem counterintuitive, the restriction to limit attacks to enemy combatants and military objectives applies only to combatants – privileged belligerents. This does not mean civilians – noncombatants – can target other civilians at will. It means if they are not a combatant, a civilian cannot target anyone, except when their conduct would be justified by traditional criminal law. Only the privileged belligerent can step outside the constraints of traditional criminal law, but when they do so, they must limit the targets of their attacks to enemy combatants and military objectives.⁴⁵

B. The Principle of Military Necessity⁴⁶

In addition to the principle of distinction, the concept of privileged belligerency is inextricably linked to a second principle of *jus in bello*, military necessity. Distinction clarifies what one must do to qualify for the privilege, and military necessity identifies what violent powers one is granted. In simplest terms, the principle of military necessity authorizes the combatant to do acts of violence against the enemy military that are needed to bring about the complete submission of that enemy and an end to the war.⁴⁷ Once again,

⁴³ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 [*hereinafter* “Geneva III”] at Art. 4.

⁴⁴ DOD LAW OF WAR MANUAL, paragraph 5.5.8.

⁴⁵ It is this second part of the Principle of Distinction that prohibits indiscriminate attacks. Thus, it is often referred to as the Principle of Discrimination. The authors view this as a subset of Distinction rather than a separate Principle.

⁴⁶ See DOD LAW OF WAR MANUAL, *supra* note 25.

⁴⁷ *Id.*

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however, this does not apply to civilians or civilian law enforcement. Officer Groubert may have the mission to apprehend a violent felon, but without probable cause of a significant threat to the officer or others, he is authorized to only use ordinary force to make an arrest.⁴⁸ The principle of military necessity has both a permissive and a restrictive aspect, as well as providing the lawful combatant a moral foundation for his acts of violence.

1. *The Privilege of Strategic Justification for Acts of Violence.*

A civilian is authorized to do limited violence to rebuff an imminent threat. A civilian must justify each act of violence based on contemporaneous and proximate danger to themselves or others.⁴⁹ For the combatant, eliminating a threat to themselves is merely ancillary to their duty to win the war as rapidly as possible. Therefore, a combatant's acts must be evaluated in the much broader context of how they affect the war effort and not just the narrow frame of time and place the act occurred. A combatant can blow up a bridge built by farmers to get to their fields, not because of any threat posed by those farmers, but because she has reason to believe the enemy plans to use the bridge to transport troops across the river two weeks in the future.

2. *The Restrictive Side of Military Necessity.*

This principle is both permissive, allowing the combatant to do all acts necessary to win the war, and restrictive, prohibiting violent acts which would otherwise be lawful, if they are not needed for victory. On the restrictive side is the prohibition against attacks that cause unnecessary suffering.⁵⁰ Putting glass shrapnel in a grenade so subsequent surgery will be more difficult is an example of violence

⁴⁸ See generally *Gregg*, 428 U.S. (This is the rule of *Tennessee v. Garner*, 471 U.S. 1 (1985)).

⁴⁹ MPC §3.04 & 3.05.

⁵⁰ ICRC, Customary International Humanitarian Law, Rule 70.

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that goes beyond the principle of necessity.⁵¹ A second part of the restrictive side of military necessity (as well as the discrimination aspect of distinction) is the concept of humane treatment.⁵² Once Soldiers become *hors de combat* by being injured, surrendering, or evacuating a sinking boat or crashing plane, they are no longer lawful targets. Further, the capturing party has a plethora of responsibilities for their welfare.⁵³

3. *The Combatant's Raison d'Etre.*

Perhaps the most important aspect of military necessity is that it is inextricably linked to bringing about an end to hostilities. The lawful combatant is not a mercenary performing a service for a fee. Instead, she is the designated agent of the State sent to engage in and be the target of horrific violence. The lawful combatant loses the protections of the law and in exchange is offered immunity for their acts of combat. The moral individual would never stomach this loss merely so they can do greater acts of violence against strangers. They sacrifice, sometimes involuntarily,⁵⁴ the protections of the law for the higher purpose of bringing about an end to the armed conflict through victory over the enemy. The principle of military necessity protects their ability to achieve victory and thus provides the foundational explanation for the very existence of the military.

⁵¹ Unnecessary Suffering is often cited as a separate Principle of *jus in bello*, but since it is merely the negative corollary of Military Necessity (One can do only that violence which is necessary, so causing suffering that is not is prohibited) we prefer to view it as a subset.

⁵² Humanity or Humane Treatment is also often viewed as a totally separate Principle, but the authors view it as a subset of both Military Necessity and Distinction since its fundamental principles are again a limitation on unnecessary violence against noncombatants and the suffering thereof.

⁵³ Geneva III, *supra* note 43.

⁵⁴ The Selective Service Act, 50 U.S.C. §§ 201-214 (1917) required registration for a draft, or the governmental act of forcing an individual into the military.

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C. The Principle of Proportionality

The principle of proportionality requires the anticipated result of any attack to bring about a military advantage exceeding the collateral damage to civilians and civilian property.⁵⁵ Like military necessity, this principle is both permissive and restrictive.

As noted above, the lawful purpose of a combatant's acts of war is *not* to secure their personal safety, but to bring about the end of the conflict. The latter is much more difficult to achieve as well as significantly more important to the international community. As such, the combatants have been granted far greater leniency than civilians when the effects of their violent acts are legally analyzed. If a civilian knowingly brings about the death of a non-aggressing person, this is considered intentional homicide even if the actor did not desire death to occur.⁵⁶ If Officer Groubert, while chasing a group of fleeing violent felons, knowingly drives his vehicle over and kills a bystander civilian to avoid losing his targets, this is murder regardless of his benevolent motive to stop the violent felons from escaping.⁵⁷ However, if a combatant blows up the enemy commander's car, purposefully killing him and knowingly killing his three-year-old daughter who is riding with him, the attack would be perfectly legal under *jus in bello* if the concrete military advantage gained by the commander's death outweighed the death of the innocent girl. As noted in the discussion of the principle of distinction, above, the combatant could never target the little girl, but under the principle of proportionality, her collateral death could be legally acceptable under *jus in bello*. Like military necessity, this concept of legally acceptable collateral damage is limited to the privileged belligerent. The civilian is not authorized to attack the enemy commander even if the girl is not present.

⁵⁵ Additional Protocol I, art. 52.

⁵⁶ MPC §210.2.

⁵⁷ *Id.*

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1. *The Goals of the Just War Theory.*

The two sides of the Just War Theory, *jus ad bellum* and *jus in bello*, have significantly different, though sequential and convergent goals. Both strive to limit the costs of armed conflict. The former attempts to achieve this by the singular goal of preventing the occurrence and existence of armed conflict. If *jus ad bellum* fails and armed conflict begins, it falls to *jus in bello* to limit the violence through three goals: ending the conflict, limiting the cost to lawful combatants, and limiting the violence done to noncombatants.

The goal of *jus ad bellum* is overt – to maintain international peace and security by preventing armed conflict.⁵⁸ This parallels the civilian government’s law enforcement mission of maintaining peace and security by preventing violent (and nonviolent) crime.

The goals of *jus in bello*, though less obvious, can be gleaned from the three core principles discussed above. When viewed together, the requirement to distinguish oneself under the principle of distinction, the ability to do violence strategically motivated under military necessity, and the increased lenience towards collateral damage encapsulated within proportionality, coalesce into the purpose of bringing about a rapid end to the armed conflict. The concepts of privileged belligerency and humane treatment combine to evince a second purpose – limiting the cost of war paid by its participants. A third purpose, shown by the requirement of discrimination, is to limit the cost of war paid by the innocent civilian.

Each of these is a noble and laudable purpose integral to the Just War Theory. However, it appears that in the modern asymmetric environment, some want to prioritize the third goal to the detriment of the first two. Comments and decisions by leaders, academics, and jurists who desire to prevent military violence, while laudable, reflect a lack of appreciation of the first two purposes in the *jus in bello* paradigm as well as the core legal concepts within this *lex specialis*.

⁵⁸ Preamble to the UN Charter.

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2. *The Required Gap Between Civilians and Privileged Belligerents Under the Lex Specialis of Jus in bello.*

The foundation of all *jus in bello* is the concept of privileged belligerency. The legal gap between the privileged belligerent and the civilian is arguably greater than any other that could be drawn between two people. While the police officer may have more legal authority to use some force than the citizen, it pales in relation to the Soldier's license to kill. The death-row convict may have forfeited his fundamental right to life based on his prior acts, but he still stands closer to the ordinary citizen than the Soldier whose life becomes legally forfeit through no act of his own.⁵⁹ This gap is why the first and most important question of evaluating the legality of *any* act of combat is: was the actor a privileged belligerent?

If the answer to this antecedent question is no, there is no need to look to the *lex specialis* of IHL to evaluate their conduct; criminal law is fully capable of this adjudication. However, if the answer is yes, the actor was a privileged belligerent, then criminal law is irrelevant and *only* IHL should be used to evaluate their acts of combat.⁶⁰

If a person is unprivileged (*i.e.*, a civilian), he is prohibited from the use of violence against persons or property of another except when that conduct is legally justified or excused and a proportional response to an imminent threat. This prohibition is the product of the comparatively consistent jurisprudence of criminal law developed over millennia. In contrast, the privileged belligerent (*i.e.*, the Soldier) is permitted to use violence to destroy property and kill people. Further, these acts of violence can be grossly disproportional to a threat that is distant in both time and place. For example, a privileged belligerent controlling a piece of field artillery in an armed conflict can use the weapon to kill 1,000 enemy Soldiers 20 miles

⁵⁹ As stated above, even involuntary membership in the armed forces makes you a lawful target of the enemy privileged belligerent.

⁶⁰ The legal maxim is "*lex specialis derogat legi generali*" so the *lex specialis* of IHL takes precedence over the more general criminal law.

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away even if they are sitting down to dinner and have no plans to attack him.⁶¹

For the civilian, the battlefield, in and of itself, does not grant him any additional legal authority to use force. Legally, a citizen on the battlefield operates under the same restrictions as one caught in a gunfight between police and a group of bank robbers. The situation may give rise to the legal ability to use violence based on justification (self-defense) or excuse (necessity), but this will be factually dependent and temporarily linked to the existence of a given imminent threat.⁶²

The Soldier goes through a dramatic legal conversion once armed conflict begins. The Soldier morphs from a civilian legally indistinguishable from any other concerning the use of force, to a new type of legal entity authorized by the world community to use deadly force. As noted above, the Soldier is even authorized to knowingly kill innocent civilians, provided their deaths are outweighed by the concrete military advantage gained.

Criminal law prohibits a civilian from using force or violence except in narrow circumstances such as self-defense. Therefore, the principles embedded in *jus in bello* – military necessity, proportionality, and distinction – do not provide any additional legal guidance with which to evaluate their acts. A civilian is not allowed to use violence to achieve his goals, military or otherwise, so the principle of military necessity never applies. A civilian is prohibited from knowingly or recklessly causing the deaths of innocent civilians, or damage to their property, so any argument that the loss was proportional to what he hoped to gain will fall on deaf ears. Concerning distinction, a civilian is not authorized to use unjustified violence against any target,

⁶¹ The concept of proportionality limit collateral damage to civilians and civilian property, it does not limit damage to lawful targets. Members of the enemy military are lawful targets at all times unless they become *hors d'combat* by surrendering, being wounded to the point they can no longer fight, becoming unconscious, entering the water after their warship is sunk, or parachuting from a destroyed aircraft for safety.

⁶² MPC §3.

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whether it be military or civilian, so limiting his strikes to military targets is legally insignificant.⁶³

A Soldier can be killed on the battlefield, but she is immune from prosecution or punishment for her lawful acts of combat, (*i.e.*, as long as her battlefield acts do not violate *jus in bello* she cannot be criminally judged even if her side loses the war). The rationale is Soldiers have no control over if or when they will be sent to armed conflict; therefore, it is patently unjust both to punish them for that collective decision (*jus ad bellum*) and to use rules which are applicable domestically (criminal law instead of *jus in bello*).

III. PART II – CONFLATION & MISUNDERSTANDING ERRORS IN THE TREND AGAINST THE USE OF MILITARY FORCE

The errors in the trend against the use of military force fall into five general categories: 1) a conflation of *jus in bello* with *jus ad bellum*; 2) a morphing of the military mission away from traditional war-fighting responsibilities, thereby frustrating the *jus in bello* goals of a rapid end to the conflict and limiting the cost to the warfighter; 3) a conflation of *jus in bello* concepts with similar terms in the traditional criminal law paradigm; 4) an attempt by some academics to revise time-tested principles in IHL that are the product of centuries of customary practice, and, 5) a general lack of military deference in modern courts by jurists with no military experience or valid frame of reference.

The costs of these errors are high: an ineffective military prolongs armed conflict through impotence and indecision, and victimizes the modern warfighter by leaving her outside the protections of the law; denying her the higher purpose of ending the armed conflict; and, reducing her to the legal peer of the criminals⁶⁴ she is forced to oppose.

⁶³ *Id.*

⁶⁴ This refers to the enemy combatants that disregard the principles of *jus in bello* by failing to distinguish themselves by wearing a uniform and carrying arms openly, among other violations. They can be labeled as criminals because they do

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A. Trend 1: the *Jus ad bellum*'s Veneer Over *Jus ad bello*

As already outlined and discussed throughout this article, *jus ad bellum* and *jus in bello* are separable concepts. The public is comfortable and familiar with evaluating the merits of a given side in an armed conflict; it is a regular part of the political discourse and the fundamentals of *jus ad bellum* are similar to the restrictions on the use of force they face in everyday life. Public discourse is a good thing and the decision to enter an armed conflict should be widely and publicly debated. However, politicians, commentators, jurists, and academics then allow this *jus ad bellum* decision to enter an armed conflict to color and affect how they discuss and evaluate the legality of the combatant's acts in *jus in bello*. The conflation of *jus ad bellum* and *jus in bello* is both legally and morally problematic.⁶⁵ The two concepts are distinct but can become blurred when the reasons behind why a State entered an armed conflict are suspect or without merit.

World War II is a perfect example to compare one State's Soldier with another: the German Soldier and his American counterpart. The German Soldier was a product of an evil State. But the rules governing the German Soldier in combat are identical to the rules that govern the U.S. Soldier in combat. The validity of a *jus ad bellum* claim that a war is unjust is totally irrelevant to the legality of a given warlike act of a Soldier. As the Just War Theorist Professor Michael Walzer notes, just wars can be fought unjustly and unjust

not possess privileged belligerency and therefore all of their acts of violence, to include the killing of uniformed enemy, are subject to criminal prosecution.

⁶⁵ This issue has been identified in the DOD LAW OF WAR MANUAL:

"As a general matter, *jus in bello* and *jus ad bellum* address different legal issues and should not be conflated. Conflating *jus in bello* and *jus ad bellum* risks misunderstanding and misapplying these concepts. For example, in *jus ad bellum*, proportionality refers to the principle that the overall goal of the State in resorting to war should not be outweighed by the harm that the war is expected to produce. However, proportionality in *jus in bello* generally refers to the standard that the expected incidental harm to the civilian population and civilian objects should not be disproportionate to the anticipated military advantage from an attack. Therefore, although a *jus ad bellum* proportionality analysis might consider the harm suffered by enemy military forces in the fighting, a *jus in bello* proportionality analysis would not." *Id.* at 3.5.1.

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wars can be fought justly.⁶⁶ While politics are a necessary part of *jus ad bellum*,⁶⁷ we should be careful to keep politics from affecting any *jus in bello* legal determinations and adjudication just like we try to keep politics out of our domestic criminal law decisions.

This task is difficult enough without being linked to the modern international criminal tribunal whose jurists do not share a common polity with the defendant or even with each other. While these same conditions existed at Nuremberg, many of those judges were military officers fully aware that the decisions they made would affect their profession. Conversely, few judges at the international tribunals have any military experience.⁶⁸ This lack of military experience is evident in many of our politicians, commentators, jurists, and academics; the result is that they tend to be far more familiar with and accepting of the criminal law and *jus ad bellum* goals of maintaining the peace rather than the *jus in bello* mission of rapidly ending the war.

B. Trend 2: The Current Mindset for War: From the Management of Violence to the Management of Governance

The role of the modern military is changing and today's militaries face great uncertainty. New technologies and capabilities to inflict harm are not only held by States but are in the hands of non-State actors.⁶⁹ In *War From the Ground Up*, Emily Simpson divides modern conflict into two categories: war fought "to establish military

⁶⁶ WALZER *supra* note 29, at 21.

⁶⁷ For example, the Article 1, section 8 of the U.S. Constitution give the power to declare war to the most political of the three branches of the Federal Government: Congress.

⁶⁸ For a discussion of the cost of a lack of military experience among Tribunal judges, see Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals as Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. OF INT'L CRIM. JUST. 43 (2009).

⁶⁹ A byproduct of the post-industrial information age is that the raw materials and the knowledge to manufacture or develop potent weapons are both readily available to the general populace.

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conditions for a political solution;”⁷⁰ and war fought to “directly seek political, as opposed to military, outcomes.”⁷¹ The Gulf War from 1990 to 1991 is a modern example of the first type while Afghanistan is an example of the second. The reality of having a strategy that needs “to consider military actions in terms of their likely political interpretations”⁷² will persist. As Simpson correctly notes, General Stanley McChrystal, the Commander of the International Security Assistance Force (ISAF) in Afghanistan in 2009, restricted the use of both indirect fires and air-delivered bombs not because “they are . . . effective in military terms; they are. However, their political effect is often more harmful than their military value.”⁷³ McChrystal put it in more general terms in his tactical directive: “the carefully controlled and disciplined employment of force entails risk to our troops – and we must mitigate that risk wherever possible. But excessive use of force resulting in an alienated population will produce far greater risk.”⁷⁴ The political and the military become blurred: “A policy decision only to fight wars with clear military solutions would mean to decline involvement in several situations in which enemies, especially non-state actors, refuse to engage in conventional battle against Western military forces.”⁷⁵

In 1957, Professor Samuel Huntington wrote *The Soldier and the State*, in which he outlined what constituted a professional Soldier.⁷⁶ Professor Huntington opined the Soldier’s purpose was “the management of violence.”⁷⁷ But the modern Soldier is asked to do much more. Today’s Soldier is asked to manage governance: Soldiers build schools, teach judges, manage power plants, grow

⁷⁰ Sir Michael Howard, *TIMES LITERARY SUPPLEMENT* (Apr. 13, 2013) (reviewing ERNIE SIMPSON, *WAR FROM THE GROUND UP: TWENTY-FIRST-CENTURY COMBAT AS POLITICS* (2013 [*hereinafter* “Simpson”])).

⁷¹ *Id.*

⁷² *Id.* at 4.

⁷³ *Id.* at 234.

⁷⁴ Declassified excerpt from NATO’s Tactical Directive, 2 July 2009, released by NATO ISAF Headquarters, 6 July 2009.

⁷⁵ Howard, *supra* note 70, at 11

⁷⁶ SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE* (1957).

⁷⁷ *Id.* at 16.

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crops.⁷⁸ Even in non-permissive environments, Soldiers are expected to mitigate violence. In concept, mitigating violence is attractive, but in practice, the asymmetric enemy is unlikely to give the Soldier any indication that he or she is a belligerent.

One example of this thinking is the U.S. Army and the U.S. Marine Corps manual for counterinsurgency (COIN).⁷⁹ Understanding the asymmetric reality of both Iraq and Afghanistan, the military decided in the mid-2000s to redraft the COIN manual. In particular, the situation in Iraq had deteriorated and the insurgency was gaining momentum. The manual, published in June 2006, acknowledged “[a]t its core, counterinsurgency warfare is a struggle for the support of the population. Their protection and welfare is the center of gravity for friendly fire.”⁸⁰ One of the enumerated ‘unsuccessful practices’ in the counterinsurgency manual was the warning not to place a “priority on killing and capturing the enemy. . .”⁸¹ The goal instead is to engage and protect the population.

Counterinsurgency is an example of the second form of warfare discussed by Simpson; Counterinsurgency’s core mission is to make a political reality happen. This means political factors are primary. In the case of Afghanistan, it was the popular legitimacy of the government. In the words of Ambassador Karl Eikenberry, “[b]roadly stated, modern COIN doctrine stresses the need to protect civilian populations, eliminate insurgent leaders and infrastructure, and help establish a legitimate and accountable host-nation government able to deliver essential human services.”⁸²

The COIN doctrine allows the use of force, to include lethal force, but the entire narrative of the manual is to constrain the use of force:

⁷⁸ Dominic Tierney, Op-Ed., *Jefferson’s Army of Nation Builders*, N.Y. TIMES, Nov. 10, 2010.

⁷⁹ Counterinsurgency, Field Manual 3-24/Marine Corps Warfighting Publication 3-33.5, December 2006 [*hereinafter* “COIN Manual”], at Preface.

⁸⁰ *Id.* at 1.1.

⁸¹ *Id.*

⁸² Karl W. Eikenberry, *The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN*, FOREIGN AFFAIRS, Sept./Oct. 2013, at 59, 63.

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[a]ny use of force generates a series of reactions. . . the type and amount of force to be applied, and who wields it, should be carefully calculated by a counterinsurgent for any operation. An operation that kills five insurgents is counterproductive if the collateral damage or the creation of blood feuds leads to the recruitment of fifty more.⁸³

This rationale and logic was clear in the 2011 tactical directive of the Commander of ISAF, General John R. Allen, which stated:

[c]onsider all use of force carefully. Ensure that the use of force is necessary and proportionate to the threat faced, and when applied it is precisely delivered. We must never forget the center of gravity in this campaign is the Afghan people; the citizens of Afghanistan will ultimately determine the future of their country.⁸⁴

During the same time frame the COIN concept was being developed within the Department of Defense, the Office of the Chairman of the Joint Chiefs of Staff enacted a breathtaking change to the Standing Rules of Engagement (SROE): individual Soldiers no longer enjoyed the personal right of self-defense.⁸⁵ Individual self-defense became a subset of unit self-defense and exercised by the unit commander: “unit commanders may limit individual self-defense by members of their unit.”⁸⁶ The theoretical foundation of individual self-defense is premised on three pillars: the force used is necessary; the amount of force used is proportional; and the threat is imminent. In the previous editions of the SROE, the U.S. recognized each

⁸³ COIN Manual, paragraph 1-141

⁸⁴ ISAF Tactical Directive, 30 November 2011, found at [http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r.pdf](http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf).

⁸⁵ Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement, 13 June 2005 at para. E.2.a.

⁸⁶ *Id.*

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Soldier possessed the “inherent right to use all necessary means available and to take appropriate actions to defend oneself. . . .”⁸⁷

The suspension of an individual Soldier’s right of self-defense and the ascent of the COIN doctrine are inextricably related; the concept of limiting the use of force is woven throughout the counterinsurgency manual.⁸⁸ The suspension and ascent are related by time, effect, and circumstances on the ground in both Afghanistan and Iraq in 2004 and 2005. There was a conclusion that military commanders could not use violence to win the conflict. And the COIN doctrine, by its very nature, and the suspension of self-defense, limits the use of force.

The COIN doctrine during an insurgency is not ill-advised; this doctrine is a legitimate means to execute a war. But the desire to limit force has a profound effect on a State’s military. The management of violence by the Soldier under COIN is the exception; now, under Simpson’s second paradigm, the Soldier is focused on managing governance. The military activity is no longer clearly distinguishable from the political activity by the Soldier on behalf of State. This means we enter a conflict where military violence is eschewed. Conditions allowing the use of force to be confined and constrained is, however, a policy decision. Counterinsurgency policy does not change the law that applies to combatants in conflict. It does, however, change the public’s mindset of what war constitutes. The public begins to think we can produce results with limited force. It then becomes the expectation – especially from the public, via the press – that any force which results in a death of an innocent is the exception. It drives the public to believe the resultant damage or death is the salient factor in considering if a force was justified to begin with.

In other words, civilian criminal law standards start to apply to privileged belligerents on the battlefield. Terms like self-defense, necessity, and proportionality exist both within criminal law and *jus in bello*. This leads some to think the *jus in bello* standards imbedded in

⁸⁷ Joint Chiefs of Staff Instruction 3121.01A, Standing Rules of Engagement, 15 January 2000 at Enclosure A, para. 5.a.

⁸⁸ COIN Manual, *supra* note 79.

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IHL are the same language: the same concepts and meaning extrapolated from civilian criminal law. The media, commentators, and even jurists are guilty of this mistake. The fact is, although the vocabulary may be similar, the meaning of these terms is tectonically different. This category of conflation error has recently arisen within the decisions of the international tribunals.

C. Trend 3: Criminalization of the Use of Force by International Courts

Military objectives are central to the use of violence by a military commander. Military objectives are “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁸⁹ The sad reality is that civilians, who are protected by IHL, will inevitably be in areas of armed conflict and exposed to harm. It is therefore universally recognized, in the words of Professor Geoffrey Corn, “that the principle of military objective is insufficient to provide adequate protection for civilians from the harmful effects of hostilities.”⁹⁰ With this reality in mind, military professionals, through customary practice, developed the *jus in bello* principles of distinction and proportionality. These were recorded by the drafters of the Geneva Conventions Additional Protocol, which prohibits 1) attacks that are intentionally against civilians and 2) attacks that produce excessive civilian casualties in relation to the concrete military objective.⁹¹

The first prohibition is intent based; the second is a balancing of military objectives and the civilian casualties and determining if the latter was excessive. The first violates the principle of distinction, while the second violates the principle of proportionality. Distinction, as noted earlier, is the obligation of military personnel to delineate

⁸⁹ Additional Protocol I, 52(2).

⁹⁰ Expert Report of Professor Geoffrey Corn to the ICTY for the case of *The Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac*, IT-06-90, at 12.

⁹¹ Additional Protocol I, 48 & 51(5)(b).

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between combatants and civilians. Proportionality is a much more ambiguous concept because it is subjective; proportionality is violated, in essence, when it is determined that the harm to civilians was excessive to the concrete and direct military advantage anticipated from attacking a lawful military objective. Professor Jens David Ohlin of Cornell University concludes, “that there are almost no examples of [proportionality-based] prosecutions before international tribunals that might provide guiding precedent on the nature of proportionality.”⁹² Professor Ohlin maintains that proportionality “has so rarely been applied by international tribunals” because prosecutors “squeeze almost all of the targeting cases into the first [prong], thus accusing the commander in question of directly targeting civilians. . . .”⁹³

Outlining a series of cases with the International Tribunal of the Former Yugoslavia (ICTY), Professor Ohlin concludes the common law concept of intent—acting with purpose or knowledge—required under the first prong of intentionally attacking civilians within the ICTY has morphed to the lower standard of recklessness. In other words, the court never has to grapple with the murky world of proportionality found in the second prong. The case that crystallizes this lower standard is *The Prosecutor v. Pavle Strugar*.⁹⁴

In *Strugar*, the defendant, Lieutenant General Strugar, was a leader in the then Yugoslav Peoples’ Army.⁹⁵ The Yugoslav government, in an attempt to hold Yugoslavia together, was attempting to suppress the Croatian people from breaking away.⁹⁶ As part of this suppression, General Strugar shelled areas of Dubrovnik, Croatia in late 1991.⁹⁷ These artillery attacks killed several civilians

⁹² Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79 at 86 [*hereinafter* “Ohlin”].

⁹³ *Id.*

⁹⁴ *Id.* citing *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, Int’l Crim. Trib. for the Former Yugoslavia (Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>. [*hereinafter* “Strugar”].

⁹⁵ *Id.* at 1.

⁹⁶ *Id.*

⁹⁷ *Id.*

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and destroyed many historic buildings.⁹⁸ The defendant was charged with murder and the intentional attacks on civilians. He was found guilty and sentenced to eight years.⁹⁹ The Trial Chamber held:

. . . where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterized as murder, when the perpetrators *had knowledge of the probability* that the attack would cause death.¹⁰⁰

The mere probability the attack would cause death is enough to trigger a charge of an intentional harming of civilians. The concept of intent—acting with either purpose or knowledge—under *Strugar* expanded to recklessness. This lower standard means a commander who launches an attack where there is a probability civilians might be injured or killed is violating IHL; in other words, the commander launching the attack is a war criminal because of mere probability and the accompanying result that the harm occurred. In war, it would be hard to fathom a situation where harm might not befall the civilian population, especially in an age of asymmetric warfare where the enemy refuses to distinguish himself from the civilian population.

What is occurring is that the law is being driven by the results, not the intent. War causes death and destruction and some of those harmed will be civilians. To minimize those losses is of paramount import, but to make the standard of culpability one of recklessness subject to an after-the-fact review is to impose an unrealistic limitation on the military. And conceptually, it flips IHL on its head. Professor Ohlin states the conceptual underpinnings of IHL: “envisioning the killing of civilians and coming to some conclusion as to whether the number of deaths will be proportionate or not disproportionate – does not violate the principle of distinction. Simply envisioning the deaths of civilians does not mean the commander has directed the attack against the civilians.”¹⁰¹ If that

⁹⁸ *Id.*

⁹⁹ *Id.* at 198.

¹⁰⁰ *Id.* at 110.

¹⁰¹ Ohlin, *supra* note 92, at 113.

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were the case, no Soldier would be immune from the reality that in war civilians will be killed and thereby making Soldiers criminally liable to this reality.

Even the mental element in Article 30 of the Rome Statute of 1998—the Statute that established the International Criminal Court (ICC)—states “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court [ICC] only in the material elements are committed with intent and knowledge.”¹⁰² A plain reading of Article 30 seems to suggest the defendant must act with purpose or knowledge to be culpable. In fact, recklessness as a standard to meet culpability was considered by the drafters of the Rome Statute and squarely rejected: the mental element of recklessness was banished from the Statute.¹⁰³ Put differently, even if an accused foresees the *possibility* of his or her act causing death and still persists, regardless of the possible consequences, the person is *not* guilty of a war crime unless the accused had knowledge civilians would be killed and he or she meant to kill those civilians.

But some judges and commentators cite Article 30 and the “unless otherwise provided” clause to conclude recklessness is enough to find culpability. Recklessness, they argue, is a level of intent that is an acceptable standard under customary international law and therefore, otherwise provided; that is, it is an acceptable mental state for war crimes.¹⁰⁴ Professor Ohlin notes, however, “it is not clear how customary international law could provide a basis to support a lower mental element.”¹⁰⁵ This revisionist interpretation of what Article 30 means is critical because it changes the focus from what the Soldier thinks *will* happen to what an objective person thinks *might* happen. Those are two starkly different perspectives. The former is a mental state possessed by the Soldier when he uses force, while the latter is about the degree of risk the Soldier takes. Any military mission will have risks that the Soldier’s acts could cause the

¹⁰² Rome Statute of the International Criminal Court, (entered into force July 1, 2002) at Article 30 [*hereinafter* “Rome Statute”].

¹⁰³ *Id.*; Ohlin *supra* note 92, at 101.

¹⁰⁴ Strugar, *supra* note 94, at 110.

¹⁰⁵ Ohlin, *supra* note 92, at 108.

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death of a civilian – if that is the acid test, however, then any mission will be judged under the first prong of willfully targeting civilians. Under this analysis, the courts approach a strict liability: the dead civilian is presumptively a war crime.

The courts' decisions and even the far better justified opinion of Professor Ohlin both make the same conflation error; attempting to use traditional criminal law concepts to explain terms in *jus in bello*. Professor Ohlin falls for the trap of using the common law definition of intentional (including purpose and knowledge) to define the term within the Protocol and opening this door invites the subsequent step down to recklessness. This first prong actually has two parts: A) who or what was targeted, and B) were they or it a legitimate military target?

Part A is entirely subjective. Who were you targeting? Combatants are prohibited from conducting indiscriminate attacks. Instead, each attack must have a specific legitimate military target. Thus, for the first prong, the standard is that of motivated purpose. As the then Chief Prosecutor of the International Criminal Court noted, "International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives even when it is known that some civilian deaths or injuries will occur."¹⁰⁶ To use any other standard would be to completely eliminate the principle of proportionality. That principle forces the attacker to balance the military advantage with the collateral damage, meaning the attacker has knowledge a civilian target will be damaged and yet can still strike if the military advantage outweighs the collateral cost. The crux is who or what did they plan for the projectile to hit?

For part B, if the target was a valid military target, this part has not been violated even if the strike (knowingly) killed dozens of innocent civilians collaterally, though this would probably violate the second prong of proportionality. More problematic is if the shooter

¹⁰⁶ Luis Moreno-Ocampo, letter concerning the situation in Iraq, Office of the Prosecutor, International Criminal Court, February 9, 2006, p. 5, available at http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

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subjectively believed the target to be a valid military target, but in fact it was not. For example, Captain Kudo shot the two diggers on the side of the road in Afghanistan believing they were planting a bomb, but afterwards we determine they were only digging an irrigation canal. It is in this second prong that a level of intent less than purpose might be appropriate. On a static battlefield (*e.g.*, trench warfare) segregated from the civilian population, it might be justifiable to issue an order to shoot anything moving in the no man's land between the trenches since there is little or no chance it is a civilian and taking the time to verify it is an enemy may place the Soldier at risk. This would be in contrast to a modern asymmetric nonlinear global battlefield. Given these opposite poles of possibility and correlative responsibility, the sliding scales of recklessness or negligence seem to provide the best vehicle to balance the myriad of factors and concerns. However, post hoc evaluation of any such decision must give full credence to the factual situation for that belligerent: would a reasonable privileged belligerent with the knowledge, training, time, resources, and experience of the defendant have *believed* the target was lawful? Note this does not open the door to question if the attack was tactically required at that time under this prong, but only if the belief of the shooter that the target was a military target was reasonable under the circumstances.

On at least one occasion, the ICTY grappled with the second prong: attacks that produce excessive civilian casualties in relation to the concrete military objective. In the case of *The Prosecutor v. Ante Gotovina, et al.*¹⁰⁷, Colonel General Ante Gotovina, a Croatian commander, was indicted for ordering an illegal artillery attack against four towns—Knin, Obrovac, Gracic and Benkovac.¹⁰⁸ Each city was in the Croatian Serb break-away region of Krajina. Croatia launched an offensive—Operation Storm—in 1995 to bring this region back under Croatian control. The Croatian forces commenced to put the towns of Knin, Obrovac, Gracic and Benkovac under fire.¹⁰⁹ The objective of Operation Storm was to expel Serbian forces from the region. The Croatian forces succeeded under General

¹⁰⁷ *The Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac*, IT-06-90 [*hereinafter* “Gotovina”].

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.* at 601.

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Gotovina; they seized Knin, the capital of Krajina, on August 5, 1995.¹¹⁰

The Tribunal’s indictment of General Gotovina for violations of the laws and customs of war hinged on his shelling of the four towns. The Trial Chamber found General Gotovina guilty of violating these laws and customs. As one academic concluded, “Gotovina’s conviction turns on the lawfulness vel non of the artillery fires against targets in the[se] Krajina towns. . . .”¹¹¹

The Trial Court’s judgment of Gotovina appears to be premised on both prongs of liability: the attacks were intentional (i.e., deliberately toward civilians), and the attacks were indiscriminate (i.e., an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated).¹¹² As Major General Walter B. Huffman, the former Judge Advocate General of the U.S. Army, noted, “the court apparently embraced a hybrid theory of both deliberate and indiscriminate targeting in violation of Protocol I, Articles 51(2) and 51(5)(a).¹¹³ Under Article 51(2), the first prong—“civilians [] shall not be the object of attack”—Gotovina “deliberately targeted civilian areas.”¹¹⁴ Under Article 51(5), the second prong—the balancing of the military advantage gained to the amount and severity of civilian casualties —Gotovina’s shelling “constituted an indiscriminate attack on these towns. . . .”¹¹⁵

Both prongs are premised on an inference that shells that landed more than 200 meters from a known military objective were deemed unlawful (deliberate or indiscriminate) attacks on civilian

¹¹⁰ *Id.*

¹¹¹ Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in the Prosecutor v. Ante Gotovina*, 211 MIL. L. REV. 1, 13 (2012) [*hereinafter* “Huffman”].

¹¹² ICRC, Customary International Humanitarian Law, Rule 12; Additional Protocol I, Art. 51(5)(b).

¹¹³ Huffman, *supra* note 111, at 28.

¹¹⁴ Gotovina, *supra* note 107, at 973

¹¹⁵ Huffman, *supra* note 111, at 28.

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areas.¹¹⁶ With little evidentiary support, the Trial Chamber concluded “a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meters of identified artillery targets were deliberately fired at that artillery target.”¹¹⁷ The court then extrapolated from this norm that any projectile falling outside the 200-meter range was disproportionate.¹¹⁸

The Trial Chamber’s decree of a 200-meter rule—without receiving any evidence on this point—is deeply troubling: “the court had to make broad assumptions, treat the absence of evidence as evidence of absence, and resolve ambiguities in favor of the prosecution to be able to apply its 200 meter standard.”¹¹⁹ The logic in the *Gotovina* case extends the trend outlined by Professor Olin that the threshold of liability is lowered, but in this case, it goes to the second prong. International Tribunals’ attempt to shoehorn all civilian deaths into an intentional act, even if reckless, under the first prong (the military commander knew there would be civilians casualties), is driven by the prosecutor’s theory of the case. Opening the aperture to recklessness is concerning and fraught with dangers. In essence, the court’s focus is on the post-hoc effects of the military’s attack instead of what is required by IHL; that commanders act in good faith to do all within their capabilities and limitations to minimize civilian casualties while accomplishing their mission.¹²⁰ The *Gotovina* Court, however, introduces a *per se* rule into the subjectivity of proportionality. The court dictates that since the commander exceeded the 200-meter rule, he is *per se* excessive under the second prong.

When triggering a *per se* rule, an international tribunal never has to contend with the commander’s intent and examine his good-faith precautions to spare innocence. Like reducing intentionality to mere recklessness, the court sidestepped the rigorous balancing

¹¹⁶ *Gotovina*, *supra* note 107 (Summary at http://www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Huffman, *supra* note 111, at 36.

¹²⁰ ICRC Commentary on International Humanitarian Law, note 22 at para. 2215.

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analysis required under the principle of proportionality. Instead, the *Gotovina* Court relied on a strict liability of violating some abstract rule of distance to find liability. To abandon this balancing test is problematic to say the least.

As General Huffman concludes, “[a] hallmark of international humanitarian law is its consistency with the actual practice of warfare by civilized nations.”¹²¹ The court’s per se 200-meter rule, made out of whole cloth, alters the timeframe to be examined; in other words, the moment in time for consideration is shifted from the time of attack to the time the collateral damage occurs. This is contrary to IHL in that the question of whether the commander killed or injured civilians becomes the locus of judgment instead of examining the commander’s military necessity at the time of attack. Even the commentary to the Additional Protocols acknowledges that under the second prong, when determining if the harm to civilians is excessive to the concrete and direct military advantage anticipated from an attack of a lawful military objective, the perspective to be examined is the military commander’s before the attack.¹²² It is the prosecution’s obligation under the customs and laws of war to show there was a criminal intent by the commander when he ordered the attack. The destructive results are evidence but nothing in the law requires, nor should it, the results be the driver. It is the commander’s intent at the time.

The Appeals Chamber reversed the Trial Chamber’s conviction and found the 200-meter rule to be arbitrary; it further concluded the civilian casualties were not excessive compared to the military advantage from shelling the four towns.¹²³ As one military and artillery expert opined, “I can state unequivocally that a circle of 200 m[eters] around a target could never serve as a realistic or proper

¹²¹ Huffman, *supra* note 111, at 45.

¹²² Commentary to the Additional Protocols to the Geneva Conventions at pp. 683,684.

¹²³ Prosecutor v. Gotovina et al., Case No. IT-06-90-A, Appeals Chamber Judgment, (Int’l Crim. Trib. for the Former Yugoslavia (Nov. 16, 2012) at http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf at pp. 19-21.

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standard for a sound assessment of cannon and rocket fire. . . .”¹²⁴ Although set aside, the *Gotovina* Trial Court opened the door for international tribunals to stitch new rules out of whole cloth that impose criminal liability on commanders. As General Gotovina’s appeal correctly asserts the judgment “has far-reaching significance beyond [his] case. . . . The Judgment is an unreasonable and unrealistic precedent that undermines that credibility and relevance of [international] humanitarian law. It imposes a standard so exacting that it renders lawful warfare impossible for military commanders.”¹²⁵

Professor Corn submitted an expert report before the trial court and in subsequent writings opined that the Tribunal was left with differing opinions on the reasonableness of General Gotovina’s judgment.¹²⁶ Professor Corn’s concern is that the International Tribunal seemed to base its reasonableness of Gotovina’s actions on an assessment of whether a commander considered evidence in support of his decision.¹²⁷ But this should not be the standard in a criminal proceeding for reasonableness. Instead, the gravamen of the proceedings should be “on the quality of the evidence that supported the [commander’s] decision.”¹²⁸ In a nutshell, Professor Corn makes the point that, “[i]nstead of focusing on the question of whether the commander reasonably believed the object of attack was a military objective, the Tribunal has focused on the question of whether the commander knew the object of attack was a civilian or civilian property.”¹²⁹

The reality is that any criminal judgment of a Soldier using force will be after the fact—post hoc. The test must be one of

¹²⁴ Huffman citing Comments and Conclusions by GenMaj (ret.) Rolf Th. Ocken, German Army, on the Subject “Croatian Army use of Artillery in KNIN, CROATIA on 4-5 August 1995,” (Nov. 19, 2011).

¹²⁵ Notice of Appeal of Ante Gotovina, Case No. IT-06-90-A, May 16, 2011, found at <http://www.icty.org/x/cases/gotovina/custom6/en/110516.pdf> at pp 4-5.

¹²⁶ Geoffrey S. Corn, *Targeting, Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 Brook. L. Rev. 437, 456-457.

¹²⁷ *Id.* at 458.

¹²⁸ *Id.*

¹²⁹ *Id.*

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reasonableness, but the analysis should start with what information did the commander have at the time? Professor Corn was “struck by the inherent arbitrariness of [the court’s] assessment.”¹³⁰ Professor Corn writes, “[w]hile it seemed relatively apparent that the Presiding Judge was determined to critique the reasonableness of General Gotovina’s judgments by carefully considering all the facts and circumstances prevailing at the time, there was never any discussion of the amount of proof required to render those judgments reasonable.”¹³¹

This lack of standard will inevitably drive a judicial appraisal to make determinations on what occurred after the fact vice the considerations and deliberations of the Soldier before the fact. The real question is: do the military actions have a reasonable basis in military necessity? The presumption must be yes. To presume otherwise would lead to the post hoc critiquing of a commander’s actions based on what occurred, instead of the commander’s intent as expressed by his orders.

D. Trend 4: Revising *Jus in bello* Without Considering the Effect on the Innocent Warfighter

Jus in bello is the evolved product of centuries of customary practice. Professional warfighters with battlefield experience have balanced humanitarian goals with the moral and legal mandate to end the conflict as quickly as possible and the rights and respect owed the individual warfighter to create the principles of *jus in bello*. By developing through customary practice, these principles were able to evolve without threatening the military mission or unjustly victimizing the warfighter. The battlefield is so dissimilar to everyday life because its denizens operate outside the protections of the law. The battlefield is not the place for external academic, untested, new-idea-driven change. Sadly, this has not dissuaded some from attempting exactly that.

¹³⁰ *Id.* at 457.

¹³¹ *Id.*

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In 2009, the International Committee of the Red Cross (ICRC) sent a shock wave across the international legal community. The ICRC published its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. In this Interpretive Guidance, written by Nils Melzer, the following recommendation was proposed:

Restraint on the use of force in direct attack

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, 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.¹³²

It was the phrase “must not exceed what is actually necessary”¹³³ that caused the firestorm. The ICRC recommended a use-of-force continuum theory, or as some academics refer to it, the ‘least harmful means rule.’ In the Interpretive Guidance, the ICRC goes on to explain what it meant by necessary:

[i]n sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.¹³⁴

¹³² ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted February 26, 2009. at 996.

¹³³ *Id.*

¹³⁴ *Id.* at 1043.

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The footnote substantiating this claim quotes the writings of Jean Pictet, once the President of the ICRC and the lead editor of the authoritative commentary of the 1949 Geneva Conventions. Pictet opined: “[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. . . .”¹³⁵

Other academics have also advanced a ‘least harmful means rule.’ Professor Goodman of New York University used the ICRC Interpretive Guidance as a springboard to argue a ‘least harmful means rule,’ “should be understood to have a solid foundation in the structure, rules, and practices of modern warfare.”¹³⁶ His argument is grounded in Article 41(2) of the 1977 Additional Protocol I, which mandates the safeguarding of *hors de combat*—those combatants outside the fight.¹³⁷ Goodman argues, like the Interpretive Guidance, “a Soldier who is rendered defenseless or incapable of resistance should not be subject to attack.”¹³⁸ He expands the conceptual definition of *hors de combat* and argues an enemy combatant should be treated like a *hors de combat* when “there is clearly no military benefit (including any risk to one’s own forces) to be gained from killing rather than capturing an individual.”¹³⁹ This includes situations where the enemy combatant could still physically engage in hostilities but does not. Like the Interpretive Guidance, Professor Goodman suggests that considerations of military necessity and humanity should guide the determination of how to conduct an engagement.¹⁴⁰ His theoretical basis for abandoning the well-entrenched rule that members of an enemy belligerency qualify as lawful objects of attack at all times and all places for as long as they remain under the operational command and control of enemy leadership and are physically capable of acting on that authority¹⁴¹ is to limit the scope of

¹³⁵ *Id.* at 1044

¹³⁶ Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. 819 (2013) [*hereinafter* “Goodman”].

¹³⁷ *Id.* & Additional Protocol 1, Art. 85(3).

¹³⁸ Goodman, *supra* note 136, at 830.

¹³⁹ *Id.* at 839.

¹⁴⁰ *Id.*

¹⁴¹ Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 538 (2013) [*hereinafter* “Corn et al.”].

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military necessity.¹⁴² In other words, an enemy belligerent who would do no harm; that is, defenseless, is not militarily necessary to kill.

Other academics echo this conclusion:

[T]he current interpretation of ‘necessary’ as including what is less costly or less risky or even merely convenient allows too broad a discretion for forces to attack available—rather than clearly ‘necessary’—targets. To bring the term ‘necessary’ closer to its literal meaning, it should include a least-harmful means component; it is entirely possible to conceive of ‘necessary’ as the least measure of harm by which to achieve a desired end.¹⁴³

The challenges with the ICRC’s rationale, along with the scholarship of Professor Goodman, are fourfold. First, there is absolutely no requirement under state practice or international law, namely the 1977 Additional Protocol of the Geneva Conventions, for a combatant to do a ‘military necessity’ analysis of an enemy belligerent; the Soldier need not to look to a ‘least harmful means rule’ as to whether the Soldier should capture the enemy belligerent or kill him. Given that military necessity “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible,”¹⁴⁴ killing an enemy belligerent is *per se* permissible. The enemy belligerent takes a status under IHL of being a military target. The rationale is simple: “military necessity admits of all destruction of life or limb of armed enemies.”¹⁴⁵ As noted Law of War expert Hays Parks concluded, “[t]here is no ‘military necessity’ determination requirement for an individual Soldier to engage an enemy combatant or a civilian

¹⁴² Goodman, *supra* note 136, at 830.

¹⁴³ Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 161 (2011).

¹⁴⁴ See Note 25.

¹⁴⁵ W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 804 (2010) [*hereinafter* “Parks”].

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determined to be taking a direct part in hostilities, any more than there is for a Soldier to attack an enemy tank.”¹⁴⁶

The second challenge is one of shifting burdens. Under current international law, the burden is on the enemy belligerent to indicate his surrender affirmatively. This assumes the enemy belligerent is not a *hors de combat*—“rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.”¹⁴⁷ Professor Michael Schmitt of the Naval War College makes the point, “[a] rule that prohibits an attack whenever the individual can be captured would shift the burden from the fighter to the attacker in a way that warfighting states would have been, and remain, unlikely to countenance.”¹⁴⁸ These States would not adhere to such a shift in burden because it would add a layer of complexity to military operations—training, implementation, accountability—that is simply unsustainable. The reality is, “the historic consequence of combat is that combatants lawfully may kill their enemies and are at constant risk of being killed by them.”¹⁴⁹

Related to the shifting burden States would eschew, the third troubling point about the ICRC’s proposal is its lack of practicality. In the words of Professors Geoffrey Corn, Laurie Blank, Chris Jenks, and Eric Talbot Jensen:

once the law requires that Soldiers assess the actual threat an enemy combatant poses, the inevitable consequence of a rule that requires less harmful means based on the absence of an actual threat, the effectiveness of combat capability risks dilution, and tactical clarity will be degraded. . . . [and] [d]iluting tactical clarity will inevitably dilute . . . moral clarity.¹⁵⁰

¹⁴⁶ *Id.*

¹⁴⁷ Additional Protocol 1, Art. 41.

¹⁴⁸ Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’*, 24 EUR. J. INT’L L. 855, 858 (2013).

¹⁴⁹ Parks, *supra* note 145, at 829.

¹⁵⁰ Corn et al., *supra* note 141, at 567-568.

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Once the element of subjectivity enters the equation, moral clarity—whether it is at the tactical, operational, or strategic level—exists. Professors Corn, Blank, Jenks, and Jensen make a compelling case that not giving the Soldier the clarity of whether he can engage and shoot an enemy belligerent will result in hesitation, confusion, or create a chilling effect on what the Soldier is asked to do: engage with and destroy the enemy. The second-guessing with the benefit of 20/20 hindsight will cripple a Soldier’s certainty that when he engages with the enemy, his mission, as has been the mission of Soldiers for centuries before him, is to kill the enemy. And “the assurance and knowledge that the always difficult decision to take another human life was legally and operationally justified. . . .”¹⁵¹ is critical to a Soldier’s mental and moral compass. The authors of this article go one step further: the ‘least harmful means rule’ would eviscerate moral clarity in the fog of war.

The fourth concern is that the ‘least harmful means rule’ is actually the conflation of two legal regimes: IHL and domestic law norms outlined within human rights law (HRL). Under HRL, known as the law enforcement regime, the use of lethal force is one of last resort. When a law enforcement officer has reasonable alternatives, he or she must exercise them. The criminal suspect in a domestic context never takes a status of a military target; in laymen’s speak, the criminal cannot be killed merely because of what he is suspected of having done criminally. The compact in the law enforcement paradigm is “to protect individuals from abuse by their State”¹⁵² of which the suspect is a member. And when lethal force is used in the domestic setting, it must be necessary, proportional, and imminent; that is, the officer triggers a right of self-defense for himself or others in the vicinity.

In the U.S. context, the Supreme Court has held that the use of deadly force is reasonable under the Constitution and therefore authorized when the officer has probable cause to believe the suspect

¹⁵¹ *Id.* at 620.

¹⁵² ICRC, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* at 7, found at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf> [*hereinafter* “Interplay”].

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is dangerous and can escape and a verbal warning, if feasible, is given.¹⁵³ On the other side of the equation, the Court has held that “[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”¹⁵⁴ It is the criminal’s conduct that will drive the actions of the police officer. The moral compact of the officer with the society they serve is the basis for their authority: “human rights law regulates the resort to force by State authorities in order to maintain or restore public security, law and order.”¹⁵⁵ Minimum force or a ‘least harmful means rule’ in this context makes sense—lethal force is a measure of last resort because of what the police officer is entrusted to accomplish.

This is not the logic behind IHL. The driving force behind IHL is not to ensure public security, although that could be one the military’s tasks; the main goal is to set parameters for Soldiers as agents of the State on how to destroy the enemy. The cardinal rule of the combatant is distinction—“parties to an armed conflict must at all times distinguish between civilians and civilian objects on the one hand, and combatants and military objectives on the other hand and direct their attacks only against the latter.”¹⁵⁶ Given this limitation on the use of force, the Soldier, as an agent of the State, is told by the State how to accomplish the goal of destroying the combatants and military objectives. The use of force to accomplish the mission is driven by the State. This collective action by the State uses the Soldier to effectuate this goal because the State tells the Soldier what are the policy limits of ‘military necessity’ to accomplish the mission. The role and purpose of the police officer is fundamentally different, and it is why the law enforcement paradigm is troubling in an armed conflict scenario.

¹⁵³ *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

¹⁵⁴ *Id.*

¹⁵⁵ *Interplay*, *supra* note 152, at 7.

¹⁵⁶ *See* note 33.

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E. Trend 5: Challenging the Use of Force by the Military in Civil Courts that Lack Subject Matter Competence

Scholars and international organizations that would make it more difficult for Soldiers to engage the enemy are but one prong of the trend against the use of military force. The other prongs stem from the legal profession: one of those prongs is the access litigants have to the courtroom to challenge decisions made by military personnel. The civil litigation exposure prong is best evidenced by a string of recent cases emerging from the United Kingdom.

Article 1 of the European Convention on Human Rights (ECHR), drafted in 1950, states signatories “shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.”¹⁵⁷ The Convention, in its first substantive article, Article 2, outlines a central pillar of human rights law: the right to life.¹⁵⁸ The Convention mandates that “[e]veryone’s right to life shall be protected by law.”¹⁵⁹ It does, however, give its signatories a caveat: “[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary. . . .”¹⁶⁰ To judicially enforce these rights and freedoms, the convention established a court: the European Court of Human Rights (ECtHR).¹⁶¹ This court, which virtually all European countries have ratified, to include the UK, can and has trumped the rulings of domestic courts.

The real battle line of when States have violated one’s right to life has been the elasticity of the concept of jurisdiction; in other words, does the right to life provision contained in Article 2—or any other provision within the Convention, for that matter—have extraterritorial application outside Europe? Of particular import is whether this human rights norm applies to conflict areas like Afghanistan and Iraq. In late 2001, the case of *Bankovic et al. v. Belgium et al* was brought before the ECtHR by six citizens from the Federal

¹⁵⁷ Article 1, European Convention on Human Rights (2010).

¹⁵⁸ *Id.* at Article 2.

¹⁵⁹ *Id.* at Art. 2(1).

¹⁶⁰ *Id.* at Art. 2(2).

¹⁶¹ *Id.* at Art. 19-51.

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Republic of Yugoslavia against 17 European members of the North Atlantic Treaty Organization (NATO).¹⁶² The claim flowed from NATO's Operation Allied Force. This operation was an air campaign directed at Yugoslavia in an effort to force Yugoslavia to remove its forces from Kosovo.¹⁶³ In the morning raid of April 23, 1999, NATO bombs killed and injured scores of Yugoslavians.¹⁶⁴ The claimants, whose relatives died, alleged a violation of the right to life under Article 2.¹⁶⁵ The question for the ECtHR was whether there was jurisdiction to allow the case to go forward. The ECtHR said individuals killed by missiles or bombs fired from an aircraft outside an area under the effective control of a State were not within the State's jurisdiction.¹⁶⁶

The defendants in the *Bankovic* Case, the 17 NATO States, argued that the term "jurisdiction" meant an "assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control."¹⁶⁷ The ECtHR seemed to agree. It proclaimed that "the jurisdictional competence of a State is primarily territorial."¹⁶⁸ The Court went on to articulate that "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."¹⁶⁹ If extra-territorial jurisdiction was to exist, then the State must militarily occupy or exercise all or some of the public powers normally to be exercised by that territory's government.¹⁷⁰

¹⁶² *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, App. No. 52207/99, Eur. Ct. H.R. (2001), available at 41 I.L.M. 517 [*hereinafter* "Bankovic v. Belgium"].

¹⁶³ *Id.* at pp 518-519.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 522.

¹⁶⁶ *Id.* at pp. 523-524.

¹⁶⁷ *Id.* at 522.

¹⁶⁸ *Id.* at 526.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 528.

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In other words, a fair reading of *Bankovic* is that the Convention's extraterritorial jurisdiction must be exceptional. Professor Marko Milanovic of the University of Nottingham, however, traces the ECtHR's slow abandonment of this norm.¹⁷¹ In 2007, for example, the ECtHR in *Pad and others v. Turkey* found jurisdiction when an Iranian family living near the Turkish-Iranian border was killed by a missile.¹⁷² It was disputed where the attack occurred but "the Court clearly thought that it would have been entirely arbitrary for the application of the [European Court of Human Rights] to hinge on the applicants' location within a few hundred metres."¹⁷³

Ten years after *Bankovic*, the ECtHR heard the case of *Al-Skeini v. United Kingdom*.¹⁷⁴ In *Al-Skeini*, six Iraqis brought suit against the United Kingdom. The six claimants asserted the British failed to conduct a full and thorough investigation into the deaths of their family members; this, they maintained, was a procedural violation of Article 2, the right to life.¹⁷⁵ Five of the dead Iraqis died in fire fights with the British troops. According to the British Government, British troops were patrolling the streets of Basra one evening in August 2003 when they heard gunfire. As the Soldiers approached the gunfire, the patrol leader saw several Iraqi men, including Mr. Al-Skeini, with weapons; one of the Iraqi men pointed his weapon at him and his unit. In self-defense, the British Soldier shot and killed the Iraqi men. A subsequent investigation found that the Soldiers' actions were a valid exercise of self-defense.¹⁷⁶ The Iraqi testimony is starkly different: the British Soldiers killed the Iraqis without provocation and the reason one of the deceased Iraqis had a weapon was because he was walking to a funeral and discharge of weapons at

¹⁷¹ Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L .L. 121 (2012) [*hereinafter* "Milanovic Al-Skeini"].

¹⁷² *Id.* at 124.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 121.

¹⁷⁵ *Id.* at 125.

¹⁷⁶ ECtHR, *Al-Skeini et al. v. UK*, *App. No. 55721/07*, 7 July 2011 at para. 34-62.

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funerals is common.¹⁷⁷ In other words, the Iraqis maintained that those killed never threatened the British Soldiers.

The sixth claimant in *Al-Skeini* drew the most scrutiny. Like the other claimants, Mr. Baha Mousa's father, on behalf of his son, claimed that there had been an inadequate investigation. For Mr. Mousa, however, it was for the asphyxiation death of Mr. Mousa in a British detainment facility in Basra.¹⁷⁸

The British House of Lords dismissed the claims of the five Iraqis involved in the firefight.¹⁷⁹ The majority applied an "effective control" test. The United Kingdom never exercised effective control over Basra, even though the British were an occupying power in Basra and southern Iraq. The insurgency and the limited number of British troops made effective control in Basra not possible. The Law Lords cited *Bankovic* for the notion that the mere killing of an individual does not trigger extraterritorial jurisdiction.¹⁸⁰ The House of Lords did find jurisdiction regarding the death of Baha Mousa, but on the grounds that a British prison was like an embassy and jurisdiction attached.¹⁸¹

The question before the ECtHR was what does "within their jurisdiction" mean: when and where do the obligations outlined in the ECHR—specifically the right to life under Article 2—apply? The ECtHR, in essence, expanded *Bankovic* and opened the jurisdictional aperture as follows:

. . . following the removal from power of the Ba'ath regime and under the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public power normally to be exercised by a sovereign government. In particular, the United

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at paras. 63-71.

¹⁷⁹ R (on the application of Al-Skeini and others) v. Secretary of State for Defense (2007) UKHL (2008) AC 153.

¹⁸⁰ *Id.* at para. 83.

¹⁸¹ *Id.* at paras. 97 & 132.

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Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its Soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.¹⁸²

This holding is extraordinarily expansive and can be read to mean that when there are boots-on-the-ground Soldiers conducting security operations, the reach of the ECTHR will extend to that battlefield. Every army has “public power.” One principle mission of a Soldier is to engage in security operations, especially in light of COIN operations. The *Al-Skeini* Case extends jurisdiction, allowing individual claimants to challenge the conduct of how the military conducts its operations. This ability to second-guess a military’s operations will have profound impact on how a nation’s military conducts its operations worldwide. But there are second and third order effects, as well. The United Kingdom felt the brunt of *Al-Skeini* in two ways: one tactical and one strategic. The claims were allowed to go forward, costing the British Government a handsome sum of money. But more fundamentally, it opened the floodgate of claimants that would challenge how the British Army does business on the battlefield. This second point was acutely realized with the case of *Smith (No. 2) v. The Ministry of Defence*.¹⁸³

The facts of *Smith* are chilling both factually and legally—in large measure because the claimants are members of the British military.¹⁸⁴ The claimants alleged a violation of Article 2—right to life. They claimed the equipment they were provided while deployed to Iraq was not suitable.¹⁸⁵ On 15 July 2005, a British squad-sized unit

¹⁸² Note 171 at paras. 143-148.

¹⁸³ *R (on the application of Smith and others) v. Secretary of State for Defense* (2013) UKSC 41.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at paras. 9-12.

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patrolled Al Amarah in Iraq. The vehicle used by the patrol was a “Snatch Land Rover.” This vehicle had not been fitted with an electronic countermeasure to protect it from improvised explosive devices, known as IEDs. While on patrol, the Snatch Land Rover hit an IED; three Soldiers died and two were injured. Seven months later, in the same town, another Snatch Land Rover hit an IED and two more Soldiers lost their lives. The second vehicle had been outfitted with an electronic countermeasure, but there was a part missing to the system and therefore it did not work.¹⁸⁶

The families of the fallen Soldiers sued Her Majesty’s Government, asserting that the Ministry of Defence breached the right to life under the ECtHR because the government neglected its duty for care. The government’s legal defense centered on combat immunity.¹⁸⁷ This legal concept, developed through case law, stands for the proposition that “while the armed forces are in the course of actually operating against the enemy, they are under no ‘actionable’ duty of care as defined by common law to avoid causing loss or damage to their fellow Soldiers, or indeed to anyone who may be affected by what they do.”¹⁸⁸

The UK Supreme Court did not agree. The salient issue before the Court was whether the European Convention on Human Rights applies extraterritorially to protect British troops abroad, to include in combat areas of operation like Iraq.¹⁸⁹ The Court had already answered this question in the negative. But in light of the ECtHR ruling in *Al-Skeini*, the British High Court reversed itself and made a marked departure from its precedence. The Court, in a 4-to-3 decision, allowed the claim to proceed under Article 2 of the ECtHR as its basis. The majority opinion, written by Lord Hope, took great efforts to make its legal trepidations known:

[the battlefield] is a field of human activity which the law should enter into with great caution . . . [i]t risks undermining the ability of a state to defend itself, or

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at para.13.

¹⁸⁸ Tugendhat, *supra* note 26, at 31.

¹⁸⁹ *Supra* note 178.

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its interest, at home or abroad. The world is a dangerous place, and states cannot disable themselves from meeting its challenges. Ultimately democracy itself may be at risk.¹⁹⁰

The Court, however, held that the claims may go forward and granted jurisdiction to the families of the fallen Soldiers to pursue their Article 2 claims. The Court found jurisdiction under these facts, but it limited jurisdiction “in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate.”¹⁹¹ In other words, the egregious facts of this case drove the result. This ‘middle ground,’ a word choice of Lord Hope,¹⁹² was a direct extension of the expansive scope of *Al-Skeini*.

Lord Hope’s sentiment that “operations conducted in the face of the enemy are inherently unpredictable”¹⁹³ is a truism. This judgment allows individuals, Soldiers in this case, to question and challenge the decisions of the military’s leadership. The middle ground is no ground at all. The reality must be clear: legal mission creep will occur. The law and its profession is a product of examining events after the fact—ex post facto. The profession of arms and the law that supports it under IHL are not; International Humanitarian Law is a product of using judgment before force is used. This is why Soldiers train and prepare for conflict knowing the moment they see conflict, all plans will morph once there is contact with the enemy. As Lord Hope acknowledges:

[t]hings tend to look and feel very different on the battlefield from the way they look on such charts and images as those behind the lines may have available to them. A court should be very slow indeed to question

¹⁹⁰ *Id.* at para. 66.

¹⁹¹ *Id.* at para. 76.

¹⁹² *Id.*

¹⁹³ *Id.* at para. 64.

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operational decisions made on the ground by commanders, whatever their rank or level seniority.¹⁹⁴

However, the door has been opened and with it, an inevitable breed of military officer who is hesitant and timid. War is foggy and unpredictable. If courts, through litigants, are allowed to second-guess military decisions that ultimately lead men and women to their deaths, then conservatism and restraint will descend upon military decisions. Both concepts are and should be an anathema to the warrior ethos.

IV. CONCLUSION

International Humanitarian Law was created so that Soldiers did not bear the responsibility of the actions of the public; it allows the Soldier to commit acts on behalf of the State that would be illegal otherwise. When we narrow what the Soldier can do, we eliminate their ability to effectuate the end of the war. The five trends discussed, if brought to fruition and taken collectively, suffocate the Soldier. They leave a Soldier virtually helpless. The advantage goes to the actor who fails to follow the rules and is asymmetric in his infliction of violence. Instead of probing how to hold the hostile civilian accountable, the trend is to impose rules on the lawful combatant that mirror what would be imposed on a police officer. The trend is pushing jurisprudence in the wrong direction. The asymmetric fighter will not change tactics, and, in fact, limiting the Soldier will embolden these fighters. Giving such a profound advantage to the enemy, limits a Soldier's ability to determine what is militarily necessary and in the process, prolongs the war and prolongs the Soldiers' exposure to harm.

Jus in bello is the evolved product of centuries of customary practice by countless military professionals. Its core principles of distinction, military necessity, and proportionality provide the proper balance between mission and humanity in an armed conflict. They are entirely separate and morally and legally distinct from the concept of

¹⁹⁴ *Id.*

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jus ad bellum. If properly applied, they protect the warfighter from the blending of the management of governance and the management of violence. They do not require supplement by the very dissimilar jurisprudence of traditional criminal law to properly analyze actions on the battlefield. They continually evolve, but in a careful, deliberate manner as the cost of error is too great for not only the warfighter but also the community of international States. However, because the principles are concepts rooted in the totally unique human experience, they should only be adjudicated by courts with a level of military competence and experience, not any criminal court that extends its jurisdiction in order to make a public statement about a given conflict.

Returning to our two incidents from the introduction – one in South Carolina, one in Afghanistan -- the rules that govern the two are profoundly different. In armed conflict, the three core principles of *jus in bello* in the Just War Theory are effective in analyzing the legality of Captain Kudo's decision; these principles are simply irrelevant for judging Officer Groubert's actions. For Captain Kudo's scenario, his subjective belief was that the two diggers were either Taliban or civilians directly engaged in armed conflict because they were actively planting an IED in the road. If the belief is true, they are lawful military targets and the attack would also comply with military necessity and proportionality since there is no evidence of any collateral damage to civilians. Even if it turns that Captain Kudo was incorrect and the diggers were civilian farmers, the attack would still be lawful if his belief was objectively reasonable when viewed through the eyes of a professional warfighter in a same or similar situation.

In armed conflict, unlike the law enforcement situation in South Carolina, when the attacks are done by members of uniformed military as part of an armed conflict, privileged belligerency would apply to those acts. Those privileged belligerents are authorized by the principle of military necessity to make attacks based on the status of the targeted victim as a military target. As members of a force engaged in armed conflict with the coalition, the diggers would qualify as lawful military targets. The elimination of enemy forces is an integral part of the mandate from military necessity to secure "the

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complete submission of the enemy as soon as possible”¹⁹⁵ and thereby end the conflict. Therefore, an attack would turn on a question of proportionality: did the concrete military advantage exceed the collateral cost in terms of damage to civilian lives and property? However, it is important to limit the proportionality analysis to the facts known by the attackers at the time of the attack. Any *post hoc* judgment based upon the results of the attack is unjust. The principle of proportionality is based upon the expected concrete military advantage gained and the expected collateral damage, not the result. Even if the attackers knew that civilians would die in the attack, the attack would still be lawful if the expected military advantage outweighed the expected collateral damage to civilians.

These protection under IHL have no relevancy for Officer Groubert; his situation requires a self-defense analysis under common criminal law. Captain Kudo’s situation is not nor should it be subject to the same analysis.

War is arguably the vilest practice of mankind and all of humanity should work to prevent any and all future wars. Until that day arrives, however, we must be careful to preserve and enforce all three goals of *jus in bello*. The goals of bringing about a rapid end to the conflict and limiting the cost to the belligerents are every bit as important as the goal of avoiding civilian deaths and property damage.

¹⁹⁵ See GARY SOLIS, THE LAW OF ARMED CONFLICT, 277 (2010) (citing U.S. Army Field Manual 27-10, *The Law of Land Warfare*, (Washington, DC: GPO, 1956) para. 3. a. at 4).