

## FEATURES

# Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance

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*Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.<sup>3</sup>*

### I. Introduction

The contemporary Law of Armed Conflict is predicated on the existence of a balance between the traditionally recognized principles of military necessity and humanity.<sup>4</sup> This equilibrium permeates the entirety of that field of law, thereby ensuring that force is applied on the battlefield in a manner allowing for the accomplishment of the mission while simultaneously taking appropriate humanitarian considerations into account.<sup>5</sup> The relationship between these

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<sup>3</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 1 (2004).

<sup>4</sup> *Id.* at 16 (“Law of International Armed Conflict in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.”). See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmbl., Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 [hereinafter 1868 St. Petersburg Declaration].

<sup>5</sup> See INTERNATIONAL COMMITTEE OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 78-79 (Nils Melzer ed., 2009),

competing principles is delicate. Danger ensues for the international community if either concept gains primacy. Overemphasis on military necessity has historically led to horrendous atrocities like those punished in war crimes tribunals after the Second World War and other more recent conflicts.<sup>6</sup> Conversely, when humanitarian concerns become dominant state military actions are unrealistically restricted by burdensome regulations diminishing the likelihood of compliance.<sup>7</sup> Ensuring these countervailing principles remain at equilibrium is therefore essential to maintaining the Law of Armed Conflict's effective regulation of warfare.<sup>8</sup>

States, as the primary developer of international law, created the current legal regime—an amalgamation of customary practices and treaty codification—and are responsible for ensuring that future laws of armed conflict maintain the proper balance between military necessity and humanity.<sup>9</sup> It is vital that states retain the flexibility to adjust the law as needed, both because they have undertaken this responsibility and because they are the international actors most adversely affected by an imbalance within the Law of Armed Conflict.<sup>10</sup> However, as some influential scholars have noted, there has been a “shift in emphasis toward humanitarian considerations” over the past few decades and external influences have begun hindering the ability of states to preserve the appropriate equilibrium.<sup>11</sup>

Three contemporary examples serve as cases in point and are endangering this longstanding equipoise. The first involves the recently revived claim that the Law of Armed

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available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE] (“Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.”); Major Shane Reeves & Lieutenant Colonel Jeremy Marsh, *Bin Laden and Awlaki: Lawful Targets*, HARV. INT’L REV., web perspectives, Oct. 26, 2011, available at <http://hir.harvard.edu/bin-laden-and-awlaki-lawful-targets> (last visited 4 March 2013) (noting the Law of Armed Conflict is a delicate balance between military necessity—“the wartime necessity of killing and destroying military objectives” — and humanity—“the wartime requirement of preventing unnecessary suffering and protecting the civilian population.”).

<sup>6</sup> For instance, several German officers in the post-WWII war crimes case known as *The Hostage Case* relied on military necessity to justify their killing of civilians. The tribunal ruled that military necessity does not allow targeting of civilians for “purposes of revenge or the satisfaction of a lust to kill. . . . [Destruction and death must be] imperatively demanded by the necessities of war. . . . There must be some reasonable connection between the destruction . . . and the overcoming of the enemy forces.” *United States v. List (The Hostage Case)*, Case No. 7 (Feb. 19, 1948), available at [http://www.worldcourts.com/ildc/eng/decisions/1948.02.19\\_United\\_States\\_v\\_List1.pdf](http://www.worldcourts.com/ildc/eng/decisions/1948.02.19_United_States_v_List1.pdf), at 1253-54. See also Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 797 (2010).

<sup>7</sup> See Major Shane Reeves & Major Rob Barnsby, *The New Griffin of International Law: Hybrid Armed Conflicts*, HARV. INT’L REV., 16, 17 (Winter 2012) (discussing the likelihood of states ignoring the legal imperatives embedded in the Law of Armed Conflict due to frustration with over-regulation). Often the overemphasis on humanity stems from a failure to properly appreciate the aims and realities of armed conflict.

<sup>8</sup> See Brian J. Bill, *The Rendulic “Rule”: Military Necessity, Commander’s Knowledge, and Methods of Warfare*, in 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 128 (2009) (stating “[h]uman life is no less valuable in war than in peace, but the need to resolve the contention between states through recourse to armed conflict has been permitted to outweigh that value in certain circumstances. In other circumstances . . . the balance remains tipped towards humanitarian concerns.”).

<sup>9</sup> States first articulated this relationship in the 1868 St. Petersburg Declaration which dealt with explosive projectiles. See 1868 St. Petersburg Declaration *supra* note 4. “The 1868 St. Petersburg Declaration, for example, explicitly recognized the need to strike such a balance.” Schmitt 50 VA. J. INT’L L., *supra* note 6, at 799.

<sup>10</sup> Schmitt 50 VA. J. INT’L L., *supra* note 6, at 838.

<sup>11</sup> *Id.* at 796.

Conflict imposes a strict obligation on a combatant to attempt to capture before employing deadly force against an enemy combatant under a “least-restrictive-means” of force construct, which is designed to ensure a belligerent uses the least harmful approach to incapacitate an enemy.<sup>12</sup> The second issue concerns the lawfulness of autonomous weapon systems and whether they should be preemptively banned, as has been suggested by some nongovernmental organizations (NGOs).<sup>13</sup> The third includes the backlash emanating from efforts to establish rules and ways to respond to attacks in the cyber context, including using lethal kinetic responses. The legal and public discourse stemming from these current debates represents a potential tipping point that could upend the historical framework by disproportionately favoring humanitarian considerations. States, particularly those who regularly engage in military operations, should be leery of such efforts and strive to maintain their control and flexibility over setting the appropriate balance.

## II. “Capture or Kill” Debate

The so-called “capture or kill” debate starkly highlights the extreme pressure states are presently under to shift the balance underpinning the law toward humanitarian concerns and away from the notion of military necessity.<sup>14</sup> Notwithstanding this current debate, a seemingly noncontroversial question, easily answered by the Law of Armed Conflict, is whether an affirmative legal duty exists which requires combatants to attempt to capture enemy belligerents before resorting to deadly force.<sup>15</sup> The prevailing view among legal scholars is that the law places no obligation on a state actor engaged in an armed conflict to consider capture before targeting an enemy.<sup>16</sup> Nevertheless, a vocal and determined group of legal commentators assert the opposite viewpoint, namely that the use of force should be regulated by a least-restrictive-means type of analysis.<sup>17</sup> Though this viewpoint is unsupported by treaty law or state *opinio juris*, proponents of the capture-rather-than-kill position continue to press states to adopt this unnecessary targeting methodology.

In 2009, the International Committee of the Red Cross (ICRC) issued its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Guidance)*. The *Guidance* was intended to be the culmination of a five-year examination

<sup>12</sup> Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2213960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213960).

<sup>13</sup> See, e.g., HUMAN RIGHTS WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (Nov. 2012), [http://www.hrw.org/sites/default/files/reports/arms1112ForUpload\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf) [hereinafter LOSING HUMANITY].

<sup>14</sup> Schmitt 50 VA. J. INT’L L., *supra* note 6, at 806.

<sup>15</sup> Goodman, *supra* note 12 (manuscript at 1). Certainly any enemy that becomes *hors de combat* is protected from attack and can only be captured. This section of the article focuses exclusively on situations in which the enemy belligerents have neither indicated their intention to surrender nor become incapacitated by injuries.

<sup>16</sup> Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the ‘Hot’ Conflict Zone*, 161 U. PENN L. REV. (manuscript at 36-37) (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2049532](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049532).

<sup>17</sup> Many attribute the origins of this interpretation of the law to Jean Pictet, former vice president of the ICRC, who once wrote, “If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.” Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1307 n.165 (2013) (quoting Jean Pictet, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75, 75-76 (1985)).

by a panel of legal scholars into the customary norm found in Article 51(3) of the 1977 Additional Protocol I to the Geneva Conventions (AP I), which describes the loss of targeting protections for civilians who take a “direct part in hostilities.”<sup>18</sup> These experts failed to reach a consensus about the norm, and the “capture or kill” issue was among the major causes of the breakdown. Many experts withdrew their support for the project when the ICRC insisted on adding a separate section about “restraints on the use of force in direct attack.”<sup>19</sup> It is particularly telling that the strongest opposition to the ICRC’s positions on the “capture or kill” related issues came from experts who represented specially affected states, or those states that are most heavily involved in military missions or hostilities around the world.<sup>20</sup> By contending that the law should require combatants to provide the enemy with an “opportunity to surrender,” the ICRC effectively established a least-restrictive-means analysis in “capture or kill” situations.<sup>21</sup>

The ICRC’s adoption and recommendation of the least-restrictive-means standard is problematic for several reasons. First, the ICRC mistakenly treats the principles of humanity and military necessity as distinct rules,<sup>22</sup> and the *Guidance* incorrectly implies that during a military operation a separate, stand-alone analysis of each principle is required. In actuality, these concepts are foundational and undergird the entirety of the Law of Armed Conflict,<sup>23</sup> such that both military necessity and humanity are already accounted for throughout subsidiary positive laws.<sup>24</sup> As an example, some legal scholars have described these principles in these terms: “Military necessity is a meta-principle of the law of war ... in the sense that it justifies

<sup>18</sup> Article 51 of Additional Protocol I states in part, “Civilians shall enjoy the protection afforded by [the section of the Protocol on general protection against the effects of hostilities], unless and for such time as they take a direct part in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. See W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 772 (2010); Schmitt 50 VA. J. INT’L L., *supra* note 6, at 831.

<sup>19</sup> Parks, *supra* note 18, at 783-85.

<sup>20</sup> This breakdown ultimately led the ICRC to take the unusual step of publishing the *Guidance* without listing the names of the experts who participated. See generally Bill Boothby, “*And for such time as*”: *The time dimension to direct participation in hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010); Parks, *supra* note 18.

<sup>21</sup> “[I]t 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.” ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 82. This controversial language was part of Section IX of the *Guidance*. That section demonstrated the ICRC’s belief in a legal requirement to capture before killing: “In addition to the restraints imposed by IHL 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.” *Id.*

<sup>22</sup> See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NATL. SEC. J. 5, 39-40 (2010); DINSTEIN, *supra* note 3, at 17 (noting that the Law of Armed Conflict “takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism).”).

<sup>23</sup> See 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. STUDIES 536, 542-43 (2013); Michael N. Schmitt & Jeffrey S. Thurnher, “*Out of the Loop*”: *Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NATL. SEC. J. 231, 258 (2013).

<sup>24</sup> See Schmitt 1 HARV. NATL. SEC. J. 5, *supra* note 22, at 41.

destruction in war. It permeates all subsidiary rules.”<sup>25</sup> Second, the ICRC approach greatly overreaches. The Law of Armed Conflict requires combatants to accept an effective and unambiguous surrender from an enemy and to then protect that surrendered individual from further attack as *hors de combat*.<sup>26</sup> However, contrary to the ICRC’s assertions, there is no further duty to offer an enemy belligerent the *opportunity* to surrender.<sup>27</sup> While such a requirement may exist in a law enforcement paradigm, it is misplaced in a discussion of the Law of Armed Conflict.<sup>28</sup> Third, if enforced, the ICRC’s interpretation would inappropriately shift the onus for surrendering to the capturing force.<sup>29</sup> Removing the requirement that a surrendering individual make his or her intentions clear is dangerous and unsupported in the law.<sup>30</sup> Despite the fact that numerous scholars have criticized the *Guidance* for these and other reasons, the ICRC continues to advocate its position and recommend that states adopt the position of the *Guidance*.

More recently, in February 2013, many of the ICRC’s “capture or kill” arguments were revived by Professor Ryan Goodman of New York University in his forthcoming work *The Power to Kill or Capture Enemy Combatants*. A proponent of the least-restrictive-means analysis, Professor Goodman claims to have uncovered previously overlooked or mischaracterized evidence which purportedly establishes this obligation.<sup>31</sup> He contends that the modern Law of Armed Conflict requires, at least in certain circumstances, that the use of force be regulated by a least-restrictive-means analysis.<sup>32</sup> Like the ICRC, Professor Goodman relies, in part, on the notion that the principles of humanity and military necessity impose separate restrictions on the Law of Armed Conflict. However, he also advocates an “alternative path” for establishing a requirement to capture before killing an adversary, and that path involves the definition of *hors de combat*. Professor Goodman asserts that an expanded characterization and understanding of the concept of *hors de combat*, and, in particular, the subset of individuals who are “in the power” of an adversary, properly represents the law.<sup>33</sup> After analyzing the various

<sup>25</sup> Bill, *supra* note 8, at 132.

<sup>26</sup> See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC IV]; FRANCIS LIEBER, WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 60 (1863), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=23DED6C2DDC2407BC12563CD00514D66>; AP I, *supra* note 18, art. 40-41.

<sup>27</sup> Ohlin, *supra* note 17, at 1271; Richard S. Taylor, *The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?*, THE ARMY LAWYER 103, 104 (June 2010).

<sup>28</sup> “[LOAC] already accounts for situations in which an opportunity to capture an enemy exists by prohibiting attacks on an individual who ‘clearly expresses an intention to surrender.’” Schmitt 1 HARV. NATL. SEC. J. 5, *supra* note 22, at 42.

<sup>29</sup> “The law provides this clarity through a presumption of hostility triggered by belligerent status, and by placing the burden on the enemy belligerent to rebut that presumption by surrender. The asserted [least-restrictive-means] constraint would dilute the permissible scope of this authority and inject potentially deadly hesitation into the targeting process.” Geoffrey S. Corn, Laurie R. Blank, Chris Jenks, & Eric Talbot Jensen, *Response to Ryan Goodman*, LAWFARE (Feb. 25, 2013, 4:52 PM), <http://www.lawfareblog.com/2013/02/corn-blank-jenks-and-jensen-respond-to-goodman-on-capture-instead-of-kill>. See also Corn et. al. 89 INT’L L. STUDIES 536, *supra* note 23 at 588-91; Schmitt 50 VA. J. INT’L L., *supra* note 6, at 835.

<sup>30</sup> Michael N. Schmitt, *Wound, Capture, Kill: The Humanitarian Law Framework*, 24 EUR. J. INT’L L. (forthcoming 2013) (manuscript at 3) (on file with authors).

<sup>31</sup> Goodman, *supra* note 12 (manuscript at 7); Corn et. al. 89 INT’L L. STUDIES 536, *supra* note 23, at 539.

<sup>32</sup> Goodman, *supra* note 12 (manuscript at 1).

<sup>33</sup> “Indeed, a broad definition of *hors de combat* could even place more limits on the use of force than [a least-restrictive-means analysis].” Goodman, *supra* note 12 (manuscript at 20).

commentaries and negotiations involved with the AP I, Professor Goodman claims that a defenseless person qualifies as *hors de combat* and must be captured rather than killed.

Although more detailed and nuanced than previous least-restrictive-means proposals, Professor Goodman's assertions are similarly flawed and unsupported by the law. His premise that the principles of humanity and military necessity constitute separate positive rules echoes the ICRC's *Guidance* and is, as noted above, incorrect.<sup>34</sup> Further, Professor Goodman's expansive view of *hors de combat* and his assertions that defenseless individuals are "in the power" of the adversary are belied by the final text, which does not include such language, and the official records of the proceeding, which fail to show a state consensus for the idea.<sup>35</sup> There is simply no existing legal authority reflecting "such a broad conception of 'in the power of'" promoted by Professor Goodman and his position is "at best an aspirational constraint on belligerent targeting derived from a tactically incoherent interpretation of a LOAC concept whose meaning has been settled for centuries."<sup>36</sup> Only by manipulating the long-resolved and universally recognized definition of *hors de combat* can Professor Goodman find an "alternative path" to the least-restrictive-means analysis.

While a state may develop a policy imposing a capture obligation on its forces, the law makes no such demands. When restrictions are applied for operational or political reasons, as was the case with various limits imposed during the United States' counterinsurgency efforts of the past decade or the targeted killing drone strikes in the fight against al Qaeda,<sup>37</sup> they do not make the norm customary. The arguments made by the proponents of the least-restrictive-means analysis in "capture or kill" scenarios are inconsistent with the Law of Armed Conflict and, no matter how well-intentioned, create uncertainty and ambiguity for those engaged in combat operations. States must therefore recognize the consequences of this misguided emphasis on the principle of humanity and resist any suggestion that the Law of Armed Conflict obligates state actors to capture those who choose to participate in warfare.

### III. Autonomous Weapon Systems

In the ongoing public dialogue concerning the Law of Armed Conflict, state actors face extreme pressure not only to restrict the contemporary means of warfare but also to limit the development of theoretical advanced weaponry. States conducting research on potential future

<sup>34</sup> "[H]is assertion that the general principles of military necessity and humanity impose this least-restrictive-means (LRM) limitation on the targeting of enemy belligerents is a fundamental misrepresentation of LOAC's principles and foundations...." Geoff Corn, et al., *LAWFARE*, *supra* note 29.

<sup>35</sup> Corn et. al. 89 INT'L L. STUDIES 536, *supra* note 23, at 587. See also Schmitt 24 EUR. J. INT'L L., *supra* note 30, (manuscript at 5) ("I do not accept the premise that defencelessness *sans plus* shields enemy forces or civilian direct participants from attack.")

<sup>36</sup> Corn et. al. 89 INT'L L. STUDIES 536, *supra* note 23, at 587-88.

<sup>37</sup> See, e.g., HEADQUARTERS, INT'L SEC. ASSISTANCE FORCE, TACTICAL DIR. (July 6, 2009) (unclassified version), available at [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf) (last visited 6 June 2013) (stating "[W]e must respect and protect the population from coercion and violence – and operate in a manner which will win their support."). The United States has imposed a requirement to examine the feasibility of capture prior to any lethal drone strikes outside of active combat zones. This has been established as a matter of policy. See, e.g., Remarks by President Barack Obama, National Defense University, May 23, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

weapon systems are increasingly asked to make definitive legal conclusions before fully assessing the benefits and drawbacks of a new technology.<sup>38</sup> The present debate over autonomous weapon systems is a stark example of this troubling tendency and illustrates the aggressive attempts to contravene the principle of military necessity by those who are singularly focused on humanitarian considerations.

Autonomous weapon systems are generally defined as weapons, which, “once activated, can select and engage targets without further intervention by a human operator.”<sup>39</sup> Although no fully autonomous weapons are currently in existence (or even designed), a variety of NGOs and other outside groups are mounting public campaigns to pressure states to abandon all research efforts that might lead to their future development.<sup>40</sup> The most significant effort is being organized by the influential human rights advocacy NGO, Human Rights Watch. It issued a critique of autonomous weapon systems in a November 2012 report provocatively entitled *Losing Humanity: The Case against Killer Robots*. In the report, Human Rights Watch asserts that fully autonomous weapons will be unable to comply with fundamental principles of the Law of Armed Conflict and thus should be banned.<sup>41</sup> In April 2013, Human Rights Watch joined a coalition of like-minded NGOs to form the “Campaign to Stop Killer Robots.”<sup>42</sup> This coalition began a lobbying effort to compel states to ban preemptively autonomous weapon systems research and development.<sup>43</sup>

Such prominent criticism recently garnered significant worldwide media attention.<sup>44</sup> While these groups can be credited with raising the profile and awareness of the important

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<sup>38</sup> States ultimately have an obligation to opine about the lawfulness of any weapon systems they intend to deploy. As codified in Article 36 of Additional Protocol I, states have an obligation to determine whether a new weapon would be prohibited by the protocol or other rules of international law. *See also* AP I, *supra* note 18, art. 36. Although controversy exists whether all aspects of Article 36 are reflective of customary international law, there is general consensus that reviews are needed of all new means of warfare prior to deployment. *See* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY (HPRC), COMMENTARY ON THE MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE ¶ 9 (2010); TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE ¶ 48 (Michael N. Schmitt gen. ed., 2013) [hereinafter TALLINN MANUAL]. Autonomous weapon systems would undoubtedly be considered a new means of warfare and thus subject to these legal review requirements. By policy, the United States has committed itself to conducting at least two separate reviews of autonomous weapons. Reviews are mandated before a decision is made to enter into formal development and again before the system is fielded. U.S. DEP’T OF DEF., Directive 3000.09, AUTONOMY IN WEAPON SYSTEMS 7 (Nov. 2, 2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf> [hereinafter DOD DIRECTIVE 3000.09].

<sup>39</sup> DOD DIRECTIVE 3000.09, *supra* note 38, at 13.

<sup>40</sup> *See, e.g.*, LOSING HUMANITY, *supra* note 13; Berlin Statement, International Committee for Robot Arms Control (Oct. 2010), <http://icrac.net/statements>; Autonomous Weapons, ARTICLE36.ORG, <http://www.article36.org/issue/weapons/autonomous-weapons/> (last visited June 6, 2013).

<sup>41</sup> LOSING HUMANITY, *supra* note 13, at 1-2. The group also makes a series of ethical and moral arguments against the development and use of such systems. *See id.* at 37-42. Although potentially worthy of further discussion, those arguments are outside the scope of this article. The authors focus solely on the legal arguments raised by the group.

<sup>42</sup> David Trifunov, *Stop killer robots before it’s too late, Human Rights Watch says*, GLOBALPOST.COM (Apr. 23, 2013, 6:54 PM), <http://www.globalpost.com/dispatch/news/war/military/130423/campaign-stop-killer-robots-human-rights-watch-says-video>.

<sup>43</sup> Stuart Hughes, *Campaigners call for international ban on ‘killer robots’*, BBC NEWS (Apr. 22, 2013, 9:37 PM), <http://www.bbc.co.uk/news/uk-22250664>.

<sup>44</sup> Reports critical of autonomous weapons are not only confined to NGOs. In April 2013, a United Nations Special Rapporteur issued a report to the UN Human Rights Council recommending a suspension of all AWS research and development until nations can agree on a legal and regulatory framework for their use. UNITED NATIONS, REPORT OF

questions concerning the lawfulness of autonomous weapons, their proposals to ban the systems fail to properly account for the element of military necessity. This omission may be attributable, in part, to the purpose and background of these groups. Unlike a state who must consider both of the fundamental factors, NGOs are, by their very nature, focused solely on humanitarian considerations.<sup>45</sup> This concentrated effort understandably limits these groups' "military expertise" and thus hinders their abilities to assess properly where the appropriate balance lies.<sup>46</sup>

These shortcomings of the NGOs are readily apparent in their various critiques of autonomous weapon systems. For example, in *Losing Humanity*, Human Rights Watch confuses the Law of Armed Conflict rules for when a weapon system is unlawful *per se* with the rules for when the use of a system would be unlawful.<sup>47</sup> Human Rights Watch incorrectly implies that all autonomous weapons would be unlawful *per se* because they would generally lack the ability to distinguish "between soldiers and civilians, especially in contemporary combat environments."<sup>48</sup> In making this charge, the group not only presupposes to know how autonomous technology will develop in the future,<sup>49</sup> but it ignores the military reality that some battlefields are devoid of civilians. There may be situations, such as battles that occur in remote regions like underwater, in deserts, in space, or even in the cyber domain where an autonomous weapon might be lawful despite having virtually no ability to distinguish between civilian and military objectives.<sup>50</sup> By failing to acknowledge this reality, the group reveals its inherent inclination to blindly support humanitarian principles.

The proposed ban on autonomous weapons is also exceedingly premature. Autonomous weapon systems have not yet been developed, and, although uncertain, the technology may ultimately prove more capable of distinguishing and protecting civilians than current weapon systems.<sup>51</sup> In such a case, a ban on autonomous weapons would have the unintended consequence of denying commanders a valuable tool for minimizing the risk to civilians and civilian objects in certain attack scenarios and consequently, subvert the overarching intent of the Law of Armed Conflict.<sup>52</sup> Although the likelihood of such a scenario cannot be predicted, states

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THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL SUMMARY OR ARBITRARY EXECUTIONS, Christof Heyns, A/HRC/23/47, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf); Nidhi Subbaraman, *Activists, UN put 'killer robots' in the crosshairs*, NBC NEWS.COM (Apr. 29, 2013, 6:30 PM), <http://www.nbcnews.com/technology/activists-un-put-killer-robots-crosshairs-6C9633925>.

<sup>45</sup> As an example, Human Rights Watch's mission statement states, in part, that the group "is dedicated to protecting the human rights of people around the world. ... [Human Rights Watch] challenges governments and those who hold power to ... respect international human rights law." About Us, HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited June 6, 2013). See also Schmitt 50 VA. J. INT'L L., *supra* note 6, at 822.

<sup>46</sup> Schmitt 50 VA. J. INT'L L., *supra* note 6, at 822.

<sup>47</sup> See Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT'L SEC. J. FEATURES (2013), <http://harvardnsj.org/wp-content/uploads/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf>, at 2.

<sup>48</sup> LOSING HUMANITY, *supra* note 13, at 30.

<sup>49</sup> "[T]here are serious humanitarian risks to prohibition, given the possibility that autonomous weapons systems could in the long run be more discriminating and ethically preferable to alternatives." Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can*, Am. U. Research Paper No. 2013-11, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250126](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250126), at 21.

<sup>50</sup> For a lengthier discussion of this issue, see Jeffrey S. Thurnher, *The Law that Applies to Autonomous Weapon Systems*, 17(4) ASIL INSIGHTS (Jan. 18, 2003), <http://www.asil.org/pdfs/insights/insight130118.pdf>.

<sup>51</sup> See Anderson & Waxman, *supra* note 49, at 12.

<sup>52</sup> "The protection of civilians is one of the main goals of international humanitarian law." ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 4.

should not be pressured into foreclosing such options without conducting a comprehensive review.

Moreover, states are keenly aware of these sensitive issues, and several nations began issuing autonomous weapons policy directives designed to ensure compliance with the Law of Armed Conflict.<sup>53</sup> For instance, in November 2012, the U.S. Department of Defense (DoD) released DoD Directive 3000.09, entitled “Autonomy in Weapon Systems,” which established guidelines for the development of autonomous functions in weapons. Taking a cautious approach in the directive, the U.S. mandated that all autonomous systems must be designed so as to provide appropriate levels of human judgment over every decision to use lethal force. The U.S. also indicated that it currently has no plans to develop fully autonomous weapons.<sup>54</sup> Thus, states recognize the unique legal implications associated with autonomous weapons and are implementing the measures they deem appropriate to manage this emerging technology. States are entitled to the time and flexibility necessary to fully examine these issues and establish responsible norms. External pressures, such as those being applied in the autonomous weapons debate, may jeopardize the ability of states to carefully and deliberately determine the appropriate balance between necessity and humanity, ultimately undercutting the effectiveness of the Law of Armed Conflict.

#### IV. Cyber War

The recent release of the *Tallinn Manual on the International Law Applicable to Cyber Warfare*—a document commissioned by the NATO Cooperative Cyber Defence Centre of Excellence and written by an independent group of experts to examine how extant international law norms apply to cyber warfare<sup>55</sup>—has generated significant debate.<sup>56</sup> Some of the more virulent discourse concerns Rule 29 of the *Tallinn Manual* which states: “[c]ivilians are not prohibited from directly participating in cyber operations amounting to hostilities, but forfeit their protection from attacks for such time as they so participate.”<sup>57</sup> Many in the media seem

<sup>53</sup> See Schmitt & Thurnher, *supra* note 23, at 269.

<sup>54</sup> See Aaron Mehta, *U.S. DoD’s Autonomous Weapons Directive Keeps Man in the Loop* (November 27, 2012) <http://www.defensenews.com/article/20121127/DEFREG02/311270005/U-S-DoD-8217-s-Autonomous-Weapons-Directive-Keeps-Man-Loop> (noting that “any autonomous and semi-autonomous weapon systems ‘shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force,’” and that “[h]umans still must play an oversight role, with the ability to activate or deactivate system functions should the need arise.”). See also U.S. DEP’T OF DEF., DIRECTIVE 3000.09: AUTONOMOUS WEAPON SYSTEMS: RESPONSE-TO-QUERY TALKING POINTS 1 (date unknown) (on file with authors). The United Kingdom has similarly declared it does not have plans to develop fully autonomous weapon systems. UK MINISTRY OF DEFENSE, JOINT DOCTRINE NOTE 2/11, THE UK APPROACH TO UNMANNED AIRCRAFT SYSTEMS 5-4 (March 30, 2011), *available at*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/33711/20110505JDN\\_211\\_UAS\\_v2\\_U.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33711/20110505JDN_211_UAS_v2_U.pdf) (last visited June 6, 2013) (“[The Ministry of Defense] currently has no intention to develop systems that operate without human intervention in the weapon command and control chain . . .”).

<sup>55</sup> See TALLINN MANUAL, *supra* note 38. The NATO Cooperative Cyber Defence Centre of Excellence is a body which is “part of a wider framework supporting NATO Command Arrangements” sponsored by “Estonia, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Spain, and the United States.” *Id.* at FN 1.

<sup>56</sup> See, e.g., Liis Vihul, *The Tallinn Manual on the International Law applicable to Cyber Warfare*, EJIL: TALK! (Apr. 15, 2013), <http://www.ejiltalk.org/the-tallinn-manual-on-the-international-law-applicable-to-cyber-warfare/> (outlining various contentious cyber issues raised by the Tallinn Manual).

<sup>57</sup> TALLINN MANUAL, *supra* note 38, at 104.

shocked by the notion that in both international and non-international armed conflict<sup>58</sup> civilian computer hackers could possibly be lethally targeted.<sup>59</sup> Other critics go further and claim the rule is a subterfuge intended to create new international law in order to justify the “tak[ing] out” of enemy hackers the same way the U.S. currently “takes out foreign terrorists abroad.”<sup>60</sup> In a recent interview, Michael Schmitt, chairman of the international law department at the U.S. Naval War College and director of the project that produced the *Tallinn Manual*, noted that he is “flooded with questions about whether NATO is now allowed to send drones to take out Anonymous hackers who they find annoying” and that Rule 29 is generating “a lot of blowback.”<sup>61</sup>

Yet the principles outlined in Rule 29 of the *Tallinn Manual* are far from novel concepts. As stated in the commentary to the Rule, no treaties or customary international laws exist which restrict civilians “from directly participating in hostilities during either international or non-international armed conflict.”<sup>62</sup> However, the choice to participate has consequences as states gain the prerogative to lethally target those participating civilians in both types of armed conflicts.<sup>63</sup> The Law of Armed Conflict is clear that a civilian participating in an armed conflict voluntarily waives protection from attack, absolves a state adversary of any concomitant responsibilities, and reconfigures the legal paradigm between these actors. Rule 29 is thus simply a restatement of the long settled legal precept that civilians forfeit their general protections from specific and intentional targeting when they choose to engage “in acts amounting to direct participation in hostilities” during an armed conflict.<sup>64</sup>

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<sup>58</sup> An international armed conflict is defined as declared war “or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognize by one of them.” See GC IV, *supra* note 26, art. 2. “Armed conflict not of an international character occurring in the territory of the High Contracting Parties” is defined as a non-international armed conflict. *Id.* at art. 3. The Tallinn Manual notes that its rules apply only in the context of an armed conflict and are not intended for use in cyber activities that fall below the level of a “use of force” (as this term is understood in the jus ad bellum). TALLINN MANUAL, *supra* note 38, at 4.

<sup>59</sup> See, e.g., *Cyberwar manual: Civilian hackers can be targets*, SALON (Mar. 19, 2013 10:10 AM), [http://www.salon.com/2013/03/19/nato\\_cyberwar\\_manual\\_civilian\\_hackers\\_can\\_be\\_targets/](http://www.salon.com/2013/03/19/nato_cyberwar_manual_civilian_hackers_can_be_targets/) (noting that “civilian ‘hacktivists’ can be targeted with conventional weapons if their cyber attacks seriously damage property or cause death); Gerry Smith, *Report for NATO Justifies Killing of Hackers in A Cyberwar*, HUFF. POST TECH (Mar. 22, 2013 1:40 PM), [http://www.huffingtonpost.com/2013/03/22/nato-hackers-cyber-war\\_n\\_2932531.html](http://www.huffingtonpost.com/2013/03/22/nato-hackers-cyber-war_n_2932531.html) (stating “a new report argues that a hacker who helps a hostile country commit computer sabotage could face a much a harsher penalty: death.”).

<sup>60</sup> See *Licence to Kill Hackers*, TURKISH CENTRAL NEWS STRINGS, <http://turkishcentralnews.com/2013/04/12/cyberwar-the-tallinn-manual-%E2%96%BClicence-to-kill-hackers/> (last visited May 24, 2013) (stating “The new Tallinn Manual . . . may end up being one of the most dangerous books ever written” as it gives nations “the right to use ‘kinetic force’ (real-world weapons like bombs or armed drones) to strike back against enemy hackers.”).

<sup>61</sup> See Asawin Suebsaeng, *Drone Strikes on Hackers?*, MOTHER JONES (Mar. 28, 2013, 3:00 PM), <http://www.motherjones.com/politics/2013/03/can-nato-drone-computer-hackers>.

<sup>62</sup> TALLINN MANUAL, *supra* note 38, at 104.

<sup>63</sup> See AP I, *supra* note 18, art. 51(3) (“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities”); Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 (“Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”).

<sup>64</sup> Schmitt 1 HARV. NATL. SEC. J. 5, *supra* note 22, at 13.

This is not to say that the possible lethal targeting of cyber hackers does not raise a host of legitimate concerns about the classification of armed conflicts in cyber space,<sup>65</sup> the definition of “civilian,”<sup>66</sup> and what constitutes “taking a direct part in hostilities.”<sup>67</sup> These are important questions whose answers, though difficult to discern, are critical to ensuring that the comprehensive protections afforded the civilian population by the Law of Armed Conflict remain inviolable in a cyber conflict.<sup>68</sup> But the outcry over the *Tallinn Manual’s* Rule 29 does not arise out of concern over the difficulties of implementing the principle of distinction in the “challenging and complex circumstances” of contemporary cyber warfare;<sup>69</sup> the backlash is instead a broader rejection of the idea that “a military solution justifies the relaxation of normal rules against violence.”<sup>70</sup>

Uncomfortable with the idea of ever killing computer hackers, regardless of their involvement in a conflict, critics have taken the “unexceptional statement” of Rule 29 “out of context in rather dramatic ways.”<sup>71</sup> The vehement protest against this specific portion of the *Tallinn Manual* is in actuality a manipulative tactic to suppress the lawful targeting of civilian cyber participants. The critics’ goal is to prohibit this method of operating in warfare and preclude, through the use of “lawfare,”<sup>72</sup> future state action. Though this is unlikely, the concerns about Rule 29 at a minimum are influencing ongoing legal discussions and are yet another illustrative example of the growing imbalance between military necessity and humanity in contemporary warfare practice.

## V. Conclusion

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<sup>65</sup> If an armed disturbance does not reach the level of a “conflict” it will be regulated by domestic law. When an internal disturbance reaches the level of internal, or non-international, armed conflict and triggers those relevant portions of the Law of Armed Conflict is much debated. The commentaries to the Geneva Conventions do offer a helpful list of criteria to help discern when a particular situation rises to the level of armed conflict. *See, e.g.*, OSCAR M. UHLER ET. AL., INT’L COMM. OF THE RED CROSS COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 35-36 (Jean S. Pictet ed., 1958).

<sup>66</sup> Additional Protocol I defines a civilian as “any person who does not belong to one of the categories referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol.” AP I, *supra* note 18, art. 50(1); ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 20-40.

<sup>67</sup> Compare ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 5-6 (“The Interpretive Guidance provides a legal reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle distinction.”) with Watkin, *supra* note 19 at 646 and Schmitt 1 HARV. NATL. SEC. J. 5, *supra* note 22, at 5 (criticizing the Interpretive Guidance recommendations).

<sup>68</sup> *See* AP I, *supra* note 18, art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . .”).

<sup>69</sup> *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 7 (discussing the increasing difficulties of implementing the principle of distinction in the “challenging and complex circumstances of contemporary warfare.”); *U.S. Cyber Command: Organizing for Cyber Space Operations: Hearings Before the H. Comm. on Armed Services*, 111<sup>th</sup> Cong. 1 (2010) (statement of Rep. Skelton, Chairman, H. Comm. on Armed Services) (noting the distinction difficulties in cyber warfare).

<sup>70</sup> Bill, *supra* note 8, at 128.

<sup>71</sup> *See* Suebsaeng, *supra* note 61 (interviewing Professor Schmitt who states “an unexceptional statement has been taken out of context in rather dramatic ways.”).

<sup>72</sup> “Lawfare” is the aggressive use of law to “significantly undermine powerful nations’ traditional methods of waging war.” Reeves & Barnsby, *supra* note 7, at 17.

Debates concerning “capture or kill,” the legality of autonomous weapon systems, and the targeting of cyber hackers, though seemingly disconnected discussions, act in concert to subvert the principle of military necessity and tip the scale in favor of humanity. This troubling trend is encouraging a myopic focus on developing new limitations in armed conflict without considering “military factors in setting the rules of warfare.”<sup>73</sup> If the Law of Armed Conflict becomes less about fixing “the technical limits at which the necessities of war yield to the requirements of humanity”<sup>74</sup> and more just about restricting military operations, conflict participants will increasingly view the law as an unrealistic body of theoretical norms. If it is dismissed as impractical, the Law of Armed Conflict will greatly diminish in importance, and consequently, becomes a less effective regulatory regime.

It is incumbent upon states to maintain the balance between military necessity and humanity, as the primacy of the Law of Armed Conflict is dependent upon this equilibrium. States must give equal consideration to both principles despite the growing pressure to emphasize humanitarian concerns and ignore the military necessities of warfare. Only states can “reject, revise, or supplement” the Law of Armed Conflict or “craft new norms” when “the perceived sufficiency of a particular balancing of military necessity and humanity may come into question.”<sup>75</sup> States must not yield this authority to unaccountable ideologues. It is undeniable that armed conflicts will continue,<sup>76</sup> what is questionable is whether the Law of Armed Conflict can ensure that warfare does not devolve into the brutality and savagery that historically has defined it.<sup>77</sup>

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<sup>73</sup> Schmitt, 50 VA. J. INT’L L., *supra* note 6, at 799.

<sup>74</sup> 1868 St. Petersburg Declaration, *supra* note 4, at 474.

<sup>75</sup> Schmitt, 50 VA. J. INT’L L. *supra* note 6, at 799.

<sup>76</sup> Bill, *supra* note 8, at 128 (discussing the necessity of military solutions to international disputes).

<sup>77</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 7-17 (2012) (noting the historical evolution of the Law of Armed Conflict).