

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?

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I. Introduction

“The essence of warfare is ‘the attack.’”¹ Today, however, “the legal norms regarding attacks are increasingly revealing themselves to be less than fully settled.”² A particularly contentious case in point concerns the legal norms applicable to lethally attacking (i.e., lethally targeting) civilians who directly participate in hostilities.³

In an effort to bring clarity and consistency of application to this area of international humanitarian law (IHL), the International Committee of the Red Cross (ICRC) published its *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Guidance)* in May 2009.⁴ The stated purpose behind the ICRC project was to “identify the defining elements of ‘direct participation in hostilities’ and to establish guidelines for the interpretation of that notion in both international and noninternational armed conflict.”⁵

While the *Guidance* did provide clarification as to some of the norms, it also brought to the fore yet another major schism. Midway through the five-year project, the ICRC inexplicably broadened its scope to address the question of whether international law placed restraints on the kind and degree of force permissible in attacks against civilians taking a direct part in hostilities.⁶ Specifically, the original debate

over restraints on the use of force began over the question of whether a “military necessity” to kill a civilian directly participating in hostilities must exist before that individual can be attacked with lethal force.⁷ The question soon morphed into the more colloquial form: Do the parties to an armed conflict have a legal obligation to attempt to capture rather than kill a civilian who has become a lawful target because he has taken direct part in hostilities? This discussion then highlighted the difference of opinion between those who believe and those who do not believe the general principles of humanity and military necessity require—as a matter of law—restraint in the kind and degree of force permissible when attacking civilians who are directly participating in hostilities.⁸

Some experts expressed their belief that IHL did impose such restraints on the use of force in direct attack.⁹ Other experts rejected the proposition stating “as long as the threshold of armed conflict was reached, there was no legal basis in IHL to claim parties had an obligation to capture rather than kill, to give an opportunity to surrender before an attack, or to operate against each other under a law enforcement paradigm.”¹⁰ After consideration of the competing arguments and interests, the ICRC ultimately concurred with the first set of experts stating that, under IHL, “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.”¹¹ In other words, the ICRC viewed IHL as requiring the application of the least amount of force necessary to accomplish the mission. Under this reading, commanders would now have to weigh the possibility of capture, or the application of other non-lethal means, before they could mount an attack with lethal force.¹²

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¹ Michael N. Schmitt, *Fault Lines in the Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 277 (Susan Breau & Agnieszka Jachec-Neale eds., Brit. Inst. of Int’l & Comp. Law, 2006), <http://www.michaelschmitt.org/images/FaultLinesintheLawofTargeting.pdf>.

² *Id.* at 277.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. According to AP I, article 51(3), civilians lose protection from attack for such time as they take direct part in hostilities. *Id.* art. 51(3).

⁴ NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter GUIDANCE].

⁵ NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 2 (2004) [hereinafter SECOND SUMMARY REPORT].

⁶ The term “international law” is being used intentionally here to denote reference to both international humanitarian law (IHL) and human rights law. Both areas of the law played greatly in the debate over restraint. See generally NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY

REPORT OF FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 75–79 (2006) [hereinafter FOURTH SUMMARY REPORT].

⁷ NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 45 (2005) [hereinafter THIRD SUMMARY REPORT].

⁸ MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

⁹ MELZER, THIRD SUMMARY REPORT, *supra* note 7, at 46; see also MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

¹⁰ MELZER, THIRD SUMMARY REPORT, *supra* note 7, at 46; see also MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

¹¹ MELZER, GUIDANCE, *supra* note 4, at 77 (emphasis added).

¹² *Id.* at 82. The ICRC concedes situations may exist in which capture would not be appropriate: “[O]perating forces can hardly be required to take additional risks for themselves or the civilian population.” *Id.*

In support of its view, the ICRC relied upon the general principles of humanity and military necessity “which underlie and inform the entire normative framework of IHL.”¹³ In stating the applicability of these general principles, the ICRC emphasized its opinion that IHL did not expressly regulate attacks against civilians directly participating in hostilities. That in this “absence of regulation,” the principle of humanity—first given prominence in the Martens Clause and later codified in article 1(2) of Additional Protocol I (API)—restrained the kind and degree of force belligerents could assert against civilians who had lost protection from attack because of their direct participation in hostilities.¹⁴ The ICRC went on to state that while its *Guidance* was not a “text of a legally binding nature,”¹⁵ it did “provide an interpretation of the notion of direct participation in hostilities within existing legal parameters.”¹⁶ At least in the ICRC’s view, such restraint on the use of force against civilians directly participating in hostilities was required as a matter of law.¹⁷ In crafting this paradigm, the ICRC effectively created the requirement that the principle of humanity be considered as part of any future targeting analysis.¹⁸

Whether military forces must first attempt to capture a civilian who is directly participating in hostilities is a highly relevant—and contentious—question for today’s military commanders and lawyers. This is because military operations, at least for the foreseeable future, will continue to involve the intentional, lethal targeting of civilians—whether they are labeled insurgents, terrorists, unlawful combatants, or unprivileged belligerents—who are taking direct part in hostilities.¹⁹ Moreover, the United States will

continue to operate with coalition partners who may adopt the new ICRC *Guidance*, thus limiting their employment of lethal force against directly participating civilians to those situations in which non-lethal force has been affirmatively ruled out.²⁰ The potential for divergent opinions between coalition partners about the lawfulness of lethally targeting civilians could result in questions being raised from a number of different sources. Consequently, U.S. military commanders and lawyers need to be familiar with the *Guidance* in order to effectively articulate that restraints on the kind and degree of force permissible in the attack are not a matter of law, as stated by the ICRC, but a matter of policy or practice best left to the discretion of the state.

This article evaluates the ICRC’s view and argues that contrary to the ICRC’s assertion, IHL does not demand consideration of “capture rather than wounds, and wounds rather than death”²¹ as part of the targeting analysis when planning attacks against civilians directly participating in hostilities. The first part provides an overview of the ICRC’s stated position and the rationale behind that position. The second part then evaluates the strength of the ICRC’s assertion that IHL restricts the kind and degree of force permissible in direct attack against civilians who are directly participating in hostilities. In conclusion, the article argues that the ICRC’s *Guidance* does not incorporate humanity into the targeting analysis as a matter of law.²²

II. Framing the ICRC’s View

A. The Need to Clarify the Notion of Civilian Direct Participation in Hostilities

The notion of civilian direct participation in hostilities is, at best, an opaque area of the law.²³ International humanitarian law experts generally agree that civilians who directly participate in hostilities lose protection from attack, but that seems to be the extent of their agreement.²⁴

¹³ *Id.* at 78.

¹⁴ Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899 32 Stat. 1803, 187 Consol. T.S. 429 (containing the original Martens Clause in the preamble); AP I *supra* note 3, art. 1(2).

¹⁵ MELZER, *GUIDANCE*, *supra* note 4, at 6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 5 (“The Interpretative Guidance provides a legal reading of the notion of ‘direct participation in hostilities’”); *id.* at 6 (“[T]he Guidance does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.”); *id.* at 9 (explaining that the Interpretative Guidance does “not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted”).

¹⁸ *Id.* at 80. The ICRC suggests the consideration of humanity would apply to the targeting of all military objectives, not just civilians taking direct part in hostilities, but that in “classic large scale confrontations . . . the principles . . . are unlikely to restrict the use of force beyond what is already required by specific provisions of IHL.” *Id.*

¹⁹ See generally Peter Baker, *Surgical Strikes Shape Afghanistan Debate*, N.Y. TIMES, Oct. 5 2009, available at <http://www.nytimes.com/2009/10/06/world/asia/06prexy.html>; Aislinn Simpson, *Pakistani Fury as Suspected US Drone Attack Kills 12*, Sept. 12, 2008, <http://www.telegraph.co.uk/news/asia/pakistan/2827257/Pakistani-fury-as-suspected-US-drone-attack-kills-12.html>; Phil Stewart & Robert Birsel, *Analysis—Under Obama, Drone Attacks on the Rise in Pakistan*, REUTERS, Oct. 12, 2009, <http://www.reuters.com/article/idUSN11520882>.

²⁰ MELZER, *GUIDANCE*, *supra* note 4, at 82 (stating that the ICRC concedes situations may exist in which capture would not be appropriate).

²¹ JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 32 (1975).

²² While incorporating humanity into the targeting analysis is not a matter of law, it may, depending on the circumstances, be a matter of best practice or policy, especially in counterinsurgency operations.

²³ See generally Daphne Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1022 (2006–2007) (“Efforts to clarify what is meant by ‘direct participation in hostilities’ have only highlighted the lack of consensus on the contours of the concept and the difficulty of applying the concept to modern warfare.”).

²⁴ See INT’L COMM. OF THE RED CROSS INFORMAL EXPERT SEMINAR SUMMARY REPORT ON DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2003); MELZER, SECOND SUMMARY REPORT, *supra* note 5; MELZER, FOURTH SUMMARY REPORT, *supra* note 6; NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF FIFTH EXPERT MEETING ON THE NOTION OF DIRECT

Opinions vary widely on what constitutes direct participation in hostilities; when protection from attack ends; and under what circumstances lethal force may be used against a civilian who is determined to be directly participating in hostilities.²⁵ Because of the lack of consensus in this important area of the law of war, the ICRC invited more than fifty experts from around the world to a series of meetings between 2003 and 2008 to help clarify the notion of civilian direct participation in hostilities.²⁶

During these discussions, international law experts debated the use of various methodologies for analyzing what constituted civilian direct participation in hostilities and when civilians lost protection from attack. The two primary methodologies they debated were the AP I approach,²⁷ which provides a very narrow definition of direct participation, and the functional approach,²⁸ which is significantly more expansive in scope.²⁹ As it became apparent that the expert panel was going to recommend an

PARTICIPATION IN HOSTILITIES (2008) [hereinafter FIFTH SUMMARY REPORT].

²⁵ See generally sources cited *supra* note 24.

²⁶ MELZER, GUIDANCE, *supra* note 4, at 9.

²⁷ The AP I “direct part” test is employed by the majority of the international community and requires a close temporal and physical proximity nexus to the harm. According to AP I, article 51(3), civilians enjoy protection from attack “unless and for such time as they take a direct part in hostilities.” AP I, *supra* note 3, art. 51(3). The commentary further defines direct participation as requiring actual harm to the personnel and equipment of the enemy forces and implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place. Consequently, the AP I test permits civilians to be targeted only for such time as they are involved in causing “actual harm” to enemy forces. This approach, if strictly followed, creates what is commonly referred to as the revolving door of targeting.

²⁸ The debate originally focused on the membership approach. However, the result seems to have been consensus on the functional approach. The functional approach is the broader “net” of the two approaches. Under this test, a civilian may be targeted based on the importance of the function he performs for the duration he performs the function. A civilian whose function remains critical at all times, such as a leader or highly skilled bomb maker, would remain a lawful target at all times. Conversely, a person whose function is critical only part of the time would be targetable only for such time as he is performing that function. The functional test used by the United States places less value on the causal connection to harm in favor of evaluating the importance of the function performed.

²⁹ See generally MELZER, SECOND SUMMARY REPORT *supra* note 5, at 22–23; MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 64–66; MELZER, FIFTH SUMMARY REPORT *supra* note 24, at 33–42. In discussing when civilians lose protection from attack, the expert panel debated the concepts of the “revolving door” approach and “continuous combat function” approach. The “revolving door” approach limits attacks to those times when a civilian is actually directly participating in hostilities. For example, a farmer by day and insurgent by night would only be targetable when involved in insurgent activities at night. He would not be targetable during the day. This “revolving door” concept is closely aligned with the AP I approach. The “continuous combat function” approach is much broader in that it permits attacks so long as the directly participating civilian continues to directly participate in hostilities. For example, under the “continuous combat function” approach, unless and until the farmer ceased to directly participate, he would be targetable at all times. This concept is aligned with the functional approach.

expansive approach for determining what constituted direct participation—which, concomitantly, would subject more civilians directly participating in hostilities to attack—the ICRC began searching for a “counterbalance to the adoption of the functional approach.”³⁰ In practical terms, the ICRC became concerned that the expansive notion of direct participation recommended by the expert panel would encourage states to increasingly attack (i.e., employ lethal force against) civilians directly participating in hostilities, and it decided it needed to find some other way to restrain this application of lethal force.³¹

The problem facing the ICRC in terms of finding a restraint on the use of force in the attack was twofold. First, conventional and customary IHL expressly regulates whom and what belligerents can attack. Second, conventional and customary IHL does not expressly restrict the kind and degree of force that can be applied against an individualized target so long as the attack is otherwise lawful under IHL.³² One can see this construct in the Geneva Conventions of 1949, the Additional Protocols of 1977, and customary international law. All three bodies of IHL expressly remove the protections against attack from civilians who directly participate in hostilities.³³ In law of war terms, these civilians become legitimate military objectives.³⁴ Once they

³⁰ MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 77.

³¹ In the author’s opinion, a couple of reasons explain the ICRC’s desire to limit the impact of the adoption of the functional approach. Foremost, the *Guidance* is the first ICRC document to ever define the circumstances under which a civilian loses protection and can lawfully be attacked. All other treaties and documents are prohibitive in nature. Second, the ICRC had to balance the competing interests between those arguing for the broad targeting scheme and those against it. As a compromise, the ICRC adopted the functional approach and continuous combat function paradigms for determining what constitutes direct participation in hostilities and when a directly participating civilian could be attacked, but then closed the barn door somewhat by placing kind and degree restraints on the attack itself.

³² See generally MELZER, GUIDANCE, *supra* note 4, at 78.

³³ Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field art. 3(1) Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (“Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . .”); Geneva Convention for the Protection of Civilian Persons in Time of War art. 15, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (providing for the establishment of neutral zones to protect “civilian persons who take no part in hostilities”); AP I, *supra* note 3, 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 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (“All persons who do not take a direct part or who have ceased to take direct part in hostilities . . . are entitled to respect for their person.”); *id.* art. 13(3) (“Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW II: PRACTICE 107–33 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE].

³⁴ See AP I, *supra* note 3, art. 52(2). This article defines military objectives as “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.”

are legitimate military objectives, the law of targeting then determines the lawfulness and, in some cases, the kind and degree of force permissible in the attack.³⁵ The purpose behind this targeting analysis is not to protect the intended target from lethal attack—in this case the civilian directly participating in hostilities—but to protect against excessive collateral injury, death, or damage to nearby civilians and civilian objects.³⁶ Moreover, while the laws pertaining to targeting may incidentally restrain the scope (i.e., kind and degree) of force allowable in the attack—in order to prevent excessive collateral harm—they do not expressly regulate the kind or degree of force a commander may employ against a specific target.³⁷ Consequently, the ICRC was faced with finding restraints on the use of lethal force in an IHL paradigm that quite simply permits belligerents to attack and kill combatants and civilians deemed to be directly participating in hostilities, without resort to lesser means of force.

Cognizant that black letter IHL provided no restraints on the use of deadly force against otherwise lawful military objectives, the ICRC crafted an interpretation of IHL that implicated the principles of humanity and military necessity as restraints on the kind and degree of force permissible in the attack against the military objective itself.³⁸ Under the ICRC view, in the absence of express regulation, the underlying principles of IHL—humanity and military necessity—“inform the entire normative [IHL] framework”³⁹

and require, as a matter of law, restraint on the kind and degree of force permissible in the attack. With its counterbalance decided upon, the ICRC set forth its view and supporting rationale.

B. The ICRC View and the Rationale Behind Its View

The ICRC articulated its “counterbalance” to the expansive approach recommended by the panel of experts in Section IX of its *Guidance*. It reads:

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.⁴⁰

The commentary to Section IX provides a roadmap to the thought process and rationale used by the ICRC in crafting this position.

As a starting point, the ICRC stated that all “direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.”⁴¹

Because the ICRC intended the *Guidance* to be an “analysis and interpretation of IHL only,” it imposed a restriction against reaching out to other branches of international law, such as human rights law, for support.⁴² Additionally, the ICRC could not find support for its view in positive IHL, which “simply refrain[ed] from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct ‘attacks’”⁴³ Nonetheless, the ICRC opined, “[T]he fact

³⁵ See generally Schmitt, *supra*, note 1, at 277.

The law governing attack is linear. First, the target must qualify as a ‘military objective’, . . . Second, the ‘means’ (weapon) and ‘method’ (tactics) employed must be lawful. Third, attacks with lawful methods and means against legitimate military objectives must still comply with the rule of proportionality, which prohibits attacks causing unintended but foreseeable damage to civilian objects (collateral damage) and harm to civilians (incidental injury) that is excessive relative to the concrete and direct military advantage anticipated. Fourth, LOIAC [Law of International Armed Conflict] requires attackers to take certain specified precautions. Only attacks meeting each of the four cumulative conditions are lawful.

³⁶ Combatants and civilians directly participating in hostilities may be lethally attacked because of their status as combatants or because of the loss of protection from attack based on direct participation in hostilities. See W. Hayes Parks, Memorandum of Law, Executive Order 12,333 and Assassination, ARMY LAW., Dec. 1989, at 4, 4–5 (“In wartime, the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in hostilities. . . . Combatants are liable to attack at any time or place regardless of their activity when attacked.”); see also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 17 (2004) (“To the extent civilians fulfill the same function as combatants . . . they are logically subject to targeting under the same provisions of international humanitarian law.”).

³⁷ Distinction, proportionality, and precaution can all affect the kind and degree of force a commander may use against an otherwise lawful target.

³⁸ See MELZER, GUIDANCE, *supra* note 4, at 77–82.

³⁹ *Id.* at 78.

⁴⁰ *Id.* at 77.

⁴¹ *Id.*

⁴² While the integration of human rights law (HRL) into IHL is not discussed in detail in this article, it is clear the ICRC relied heavily on HRL in drafting Section IX. The ICRC’s statement that HRL did not affect its viewpoint seems less than convincing. The only bodies of law that require restraints on the kinds and degrees of force a state actor can employ against another person are domestic law enforcement law and HRL; not IHL. By stating that states must only employ the amount of force “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances,” the ICRC has in fact mandated the use of a force continuum only known to law enforcement i.e., HRL.

⁴³ MELZER, GUIDANCE, *supra* note 4, at 78.

that a particular category of persons is not protected against offensive or defensive acts of violence, is not equivalent to a legal entitlement to kill such persons without further considerations.”⁴⁴ To determine what these “further considerations” should be, the ICRC turned to the general principles of humanity and military necessity.

According to the ICRC, “in the absence of express regulation,” belligerents are still bound by the principle of humanity as set forth in custom (the Martens Clause) and Treaty (AP I, article 1(2)). Humanity, states the ICRC, complements and is “implicit in the principle of military necessity.”⁴⁵ “Military necessity and humanity, which underlie and inform the entire normative framework of IHL . . . shape the context in which its rules must be interpreted.”⁴⁶ Humanity, on one hand, “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes,”⁴⁷ while military necessity permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve . . . the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”⁴⁸ When read together, these two principles “reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.”⁴⁹ Using this rationale, the ICRC concluded that the principle of humanity restrained the “kind and degree of force . . . permissible against persons not entitled to protection against direct attack” to that which was “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”⁵⁰

III. Analysis of the ICRC View

A. IHL Does Not Support the ICRC’s View

Turning to the principles underlying IHL for guidance in unclear situations is not a new concept. In war, unforeseen cases develop that fall outside the parameters of treaty or customary law. At these times, “the law on these subjects must be shaped—so far as it can be shaped at all—by reference *not to existing law but to more compelling*

considerations of humanity . . .”⁵¹ However, before turning to the general principles underlying IHL to inform the law, the written law must lack clarity. In other words, there must be a genuine need to interpret the law, such as an unforeseen case or vagueness in the law that rises to the level of an absence of regulation; not merely a desire to do so. Additionally, a compelling argument can be made that the general principles of humanity and military necessity take on a different quality depending on whether they are used at the macro or micro level of application. As such, the ICRC view has substantial hurdles to overcome both in terms of nesting its stated position and the rationale behind that position in IHL.

This section reviews the applicable positive and customary IHL to determine (1) whether there is a legitimate absence of regulation in the area of targeting civilians taking a direct part in hostilities and (2) whether the general principles of humanity and military necessity act to proscribe the kind and degree of force as the ICRC contends they do.

1. Civilians Taking Direct Part in Hostilities Forfeit Protection from Attack

The legality of lethally targeting a civilian directly participating in hostilities is a customary international law concept that was conventionalized in the Additional Protocols of 1977. Because the United States and a number of other countries are not parties to the Additional Protocols, customary international law retains its importance in this area of IHL. The recent ICRC Customary International Law (ICRC CIL) Study considers the legal norms pertaining to civilian direct participation to constitute customary international law.⁵² Additionally, article 51 of AP I and article 13 of AP II, which contain the treaty provisions expressing that civilians forfeit protection from attack “for such time as they take direct part in hostilities,” are considered, in pertinent part, customary international law by the United States.⁵³ Therefore, both treaty and customary

⁴⁴ *Id.*

⁴⁵ *Id.* at 79.

⁴⁶ *Id.* at 78.

⁴⁷ *Id.* at 79 (citing UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT sec. 2.4 (2004) [hereinafter MINISTRY OF DEFENSE MANUAL]).

⁴⁸ *Id.* (citing MINISTRY OF DEFENSE MANUAL, *supra* note 47, sec. 2.2.)

⁴⁹ *Id.* at 79.

⁵⁰ *Id.* at 82.

⁵¹ COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1394 (Yves Sandoz, Christoph Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS] (emphasis added); *see also* U.S. Dep’t of War, Gen. Order No. 100, art. 4 (Apr. 24, 1863) [hereinafter Lieber Code] (providing “Instructions for the Government of the Armies of the United States in the Field”), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (D. Schindler & J. Toman eds., 3d rev. ed. 1988); GC I, *supra* note 33, art. 45.

⁵² 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, RULES 20 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter RULES] (civilian direct participation in hostilities is a “norm of customary international law in both international and non-international armed conflict.”).

⁵³ AP I *supra* note 3, art. 51(3); AP II *supra* note 33, art. 13(3); *see also* Remarks of Michael J. Matheson, 2 AM. U.J. INT’L L. & POL’Y 419 (1987) [hereinafter Matheson Remarks]; Memorandum, W. Hayes Parks, Chief Int’l Law Branch, U.S. Army et al., to John H. McNeil, Assistant Gen.

IHL expressly permit belligerents to attack civilians who have been identified as directly participating in hostilities.

The treaty law on civilian direct participation is contained primarily in the Additional Protocols. Specifically, article 51(3), AP I, contains the provision applicable in international armed conflict while article 13(3), AP II, is the operative provision for noninternational armed conflict. The commentary to the Additional Protocols provides valuable insight on the intent of the various states' negotiators. Upon review, it is abundantly clear that states specifically intended for civilians taking direct part in hostilities to forfeit protection from attack. The commentary to article 51(3), AP I, states, in relevant part, that immunity from attack is "subject to an overriding condition . . . abstaining from all hostile acts."⁵⁴ Moreover, any civilian who takes part in armed combat "becomes a legitimate target, though only for as long as he takes part in hostilities."⁵⁵ Similar language is found in the commentary to AP II: civilians "lose their right to protection . . . if they take a direct part in hostilities and throughout the duration of such participation."⁵⁶ And, civilians, "it is clear, . . . will not enjoy any protection against attacks for as long as . . . participation lasts."⁵⁷ Based on the express provisions of the Additional Protocols and the accompanying commentary, it is clear the negotiators intended for civilians directly participating in hostilities to be subject to attack.

Customary law norms pertaining to civilian direct participation are equally clear. Based on a review of national practice, the ICRC concluded the loss of protection from attack was widely accepted as the norm.⁵⁸ Rule 6 of the ICRC CIL Study concluded that "State practice establishes . . . as a norm of customary international law applicable in both international and noninternational armed conflicts"⁵⁹ that "civilians are protected against attack unless and for such time as they take direct part in hostilities."⁶⁰ If civilians directly participate in hostilities, they "become legitimate military targets."⁶¹ Like its treaty based partner, customary international law also expressly suspends protection from attack for civilians directly participating in hostilities. Consequently, treaty and customary IHL

pertaining to civilian direct participation are consistent and unambiguous: Civilians who directly participate in hostilities lose protection from attack. Defining the treaty and customary understanding of the term "attack" now becomes an important factor in determining whether an absence of express regulation genuinely exists.

2. IHL Already Regulates Attacks on Civilians Directly Participating in Hostilities

The fact that civilians directly participating in hostilities forfeit protection from "attack" makes the definition of that term under treaty and customary IHL a critical factor in evaluating the "absence of regulation." The ICRC claims that the loss of protection from attack "is not equivalent to a legal entitlement to kill"⁶² and that "in the absence of express regulation" the principles of humanity and military necessity impliedly restrain the kind and degree of force a commander may lawfully employ against a civilian directly participating in hostilities. This view is not supported by contemporary IHL.⁶³

The customary law of attack developed as a means to restrain "violence and destruction . . . *superfluous* to actual military necessity."⁶⁴ Under the early "Just War Doctrine," protection from attack extended to clerics and civilians, including "harmless agricultural folk," and "the peaceable civilian population."⁶⁵ Later, the focus shifted from protecting civilians to protecting Armies, which had become exceedingly costly to train and equip.⁶⁶ In the mid-1800s, the focus again shifted and became protective of certain persons and property. The Lieber Code is demonstrative of the shift toward broader protections in the law of war.⁶⁷ It prohibited "any acts of hostility which makes the return to peace unnecessarily difficult."⁶⁸ The concept of providing broader protections from attack to certain persons and property was carried forward into today's conventional scheme through the negotiated balancing of the guiding principles of humanity and military necessity.⁶⁹

Counsel (Int'l) U.S. Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986) [hereinafter McNeil Memo].

⁵⁴ COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 51, ¶ 1942.

⁵⁵ *Id.* ¶ 1942.

⁵⁶ *Id.* ¶ 4787.

⁵⁷ *Id.* ¶ 4789.

⁵⁸ See generally PRACTICE, *supra* note 33, at 107–33.

⁵⁹ RULES, *supra* note 52, at 20.

⁶⁰ *Id.* at 19 (discussing customary law norms in international armed conflict).

⁶¹ *Id.* at 21 (discussing customary law norms in noninternational armed conflict).

⁶² MELZER, GUIDANCE, *supra* note 4, at 78.

⁶³ The Israeli Targeted Killings case is cited as an example of restraints on the kind and degree of force permissible in the attack. However, it was decided on grounds of Israeli domestic law not IHL. Pub. Comm. Against Torture in Israel v. Gov't of Israel, HJC 769/02 ¶ 40.

⁶⁴ Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U.J. INT'L L. & POL'Y 117, 117 (1986) (emphasis added).

⁶⁵ *Id.* at 119.

⁶⁶ *Id.* at 120.

⁶⁷ Lieber Code, *supra* note 51. The Lieber Code provided instructions on the laws of war to be followed by U.S. troops during the Civil War.

⁶⁸ See *id.*

⁶⁹ G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 193 (1979) ("Since the second half of the nineteenth century when codification of much of the customary law of war was undertaken, the

Under contemporary treaty law, attacks are defined as “acts of violence against the adversary, whether in offense or defense.”⁷⁰ The definition of attack is an expression of contrast to the general protections against “violence to life and person” afforded to certain civilians and combatants under other provisions of IHL.⁷¹ Numerous scholars agree that the plain meaning of attack is the application of lethal force against an enemy.⁷² According to Charles Garraway, under IHL an enemy forfeits his “inherent right to life . . . merely because of who he is” and “may be attacked at any time and in any place, including by lethal force.”⁷³ Professor Fritz Kalshoven has opined that an attack involves “the use of means of warfare (i.e. weapons) and does not include taking prisoners of war, even though that may involve the application of force.”⁷⁴ Another eminent scholar, Professor Michael Schmitt, has concluded that “the term ‘attack’ logically includes all acts that cause violent consequences, i.e., death or injury”⁷⁵ Additionally, he points to certain AP I provisions to support his conclusion that the term ‘attack’ means “acts causing death, injury, damage or destruction.”⁷⁶ Because the loss of protection from attack removes prohibitions against the application of lethal force, a great body of treaty and customary law has developed to govern the attack. Professor Michael N. Schmitt describes “the law governing attack” as being “linear.”

First, the target must qualify as a ‘military objective’, Second, the ‘means’ (weapon) and ‘method’ (tactics) employed must be lawful. Third, attacks with lawful methods and means against legitimate military objectives must still comply with the rule of proportionality, which prohibits attacks causing unintended but foreseeable

restraints imposed have been guided and informed by the principle of humanity, i.e. of compassion for human suffering.”); Solf, *supra* note 64, at 122 (“The rules of the 1907 Hague Regulations were negotiated with military necessity in mind, and cited necessity expressly to justify derogations from certain prohibitory rules.”).

⁷⁰ AP I, *supra* note 3, art. 49.

⁷¹ GC I, *supra* note 33, art. 3 (protecting “persons taking no active part in hostilities” against “violence to life and person”).

⁷² See MICHAEL BOTHE, DIRECT PARTICIPATION IN HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICT: EXPERT PAPER SUBMITTED TO THE ICRC SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES (Oct. 2004) (“Both fighters and unprotected civilians constitute legitimate military objectives.”); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 316 (1959) (“Enemy combatants may be killed”); PEARCE HIGGINS, WAR AND THE PRIVATE CITIZEN 42 (1912) (“The citizen who committed acts of hostility without belonging to a force . . . would find himself . . . put to death . . .”).

⁷³ CHARLES GARRAWAY, “THE WAR ON TERROR”: DO THE RULES NEED CHANGING? 9 (Chatham House 2006), http://www.chathamhouse.org.uk/files/3353_bpwaronterror.pdf.

⁷⁴ A.P.V. ROGERS, LAW ON THE BATTLEFIELD 24 (1996).

⁷⁵ Schmitt, *supra* note 1, at 291.

⁷⁶ *Id.*

damage to civilian objects (collateral damage) and harm to civilians (incidental injury) that is excessive relative to the concrete and direct military advantage anticipated. Fourth, LOIAC [Law of International Armed Conflict] requires attackers to take certain specified precautions. Only attacks meeting each of the four cumulative conditions are lawful.⁷⁷

As used above, military objective, lawful means and methods, proportionality, and precaution are all legal terms of art. Each derives from customary use and each is now a normative standard within the *lex scripta* of IHL.⁷⁸

Through the targeting paradigm outlined above, treaty and customary IHL act to constrain the application of force before and during the attack.⁷⁹ For example, IHL prohibits attacks against protected persons, such as civilians and combatants *hors de combat* through wounds or surrender. International humanitarian law also protects all non-military objectives, such as undefended places and civilian objects, from attack.⁸⁰ International humanitarian law further prohibits, through the regulation of means (weapons) and methods (tactics), the employment of any kind of force designed to cause unnecessary suffering.⁸¹ Finally, IHL expressly requires belligerents to take into consideration distinction, proportionality, and precaution whenever targeting a military objective that may result in foreseeable civilian casualties.⁸² Consequently, the ICRC’s claim that attacks against civilians directly participating in hostilities are unregulated is simply not a valid assertion.

3. Absence of Restraints in the Attack Do Not Amount to an Absence of Regulation

In the preceding paragraphs, the customary and treaty norms pertaining to loss of protection and the notion of attack were reviewed in order to demonstrate the pervasiveness of regulation in this area of the law. The loss

⁷⁷ *Id.* at 277–78.

⁷⁸ AP I, *supra* note 3, art. 52(2) (codifying military objective); art. 51(5)b (codifying proportionality); arts. 57 and 58 (codifying precaution); Convention (IV) Respecting the Laws and Customs of War on Land arts. 22 and 23, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539 [hereinafter Hague IV] (prohibiting certain means and methods).

⁷⁹ AP I, *supra* note 3, art. 49(1) (defining an attack as any act of “violence against the adversary, whether in offense or defence”); ROGERS, *supra* note 74, at 24 (“Kalshoven explains that ‘act of violence’ involves the use of means of warfare (i.e. weapons) and does not include taking prisoners of war, even though that may involve the application of force.”).

⁸⁰ Hague IV *supra* note 78, arts. 23c, 25, and 27; GC I, *supra* note 33, art. 12; GC IV *supra* note 33, art. 16.

⁸¹ Hague IV *supra* note 78, arts. 22 and 23.

⁸² See generally AP I, *supra* note 3, arts. 48, 51, 52, 57 and 58.

of protection from attack (i.e., becoming a military objective) is only the first step in the modern formulation of the law of targeting. Before an actual attack can occur, the belligerent must also ensure the lawful use of means and methods, the proportionality of the attack, and the consideration of precautions. These requirements evolved throughout the centuries as customary practice and have been memorialized as norms of modern warfare. Strikingly absent from this construct is any customary or conventional restraint on the kind and degree of force permissible in the direct attack.⁸³ According to one IHL expert, this was no mistake; “positive IHL essentially left it up to the parties to the conflict to decide what kind and degree of force was permissible against persons not entitled to protection against direct attack.”⁸⁴ As such, the absence of restraint should be viewed not as an absence of regulation, but as an intentional omission by the states which were concerned about being hobbled by escalation of force requirements.

4. The ICRC Position is Implausible at the Micro Level of Application

When attacks are viewed from the perspective of a macro or micro concept, it becomes questionable whether the general principles of humanity and military necessity transcend from the macro level—broad concepts used to negotiate treaties—to the micro level of battlefield application with the same meaning. At the macro level of treaty negotiation, the principles of humanity and military necessity most certainly place restraints on the kind and degree of force states may employ.⁸⁵ States knowingly permit this restraint on military action, likely in order to further some national objective, but the restraint on kind and degree of force is really just a byproduct of the decision to ban certain types of weapons because they cause unnecessary suffering (e.g., blinding lasers, non-detectable fragments, chemical weapons) or their effects cannot reasonably be limited to combatants (e.g., chemical weapons, dumb mines). Humanity and military necessity, as such, do limit the kind and degree of force permissible in the attack incidental to the limiting of certain means and methods of warfare.

⁸³ Jeffrey K. Walker, *Strategic Targeting and International Law: The Ambiguity of Law Meets the Reality of a Single-Superpower World*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 120, 127 (Richard B. Jaques ed., 2006) (“The agenda worked by the major powers . . . during the negotiation of all the major law of war conventions was to find a way to present a humane face to the world while avoiding any meaningful restrictions on the use of military force.”); Solf, *supra* note 64, at 121 (stating that humanitarian scholars intentionally “limited the text” of the Hague Conventions “to prohibitions without stating what was permitted . . . based on the belief . . . that a humanitarian instrument should provide what is to be spared, and should not explicitly authorize violence”).

⁸⁴ MELZER, FIFTH SUMMARY REPORT, *supra* note 24, at 23.

⁸⁵ See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.

However, humanity and military necessity take on decidedly different qualities at the micro level of application. Since the middle of the 20th century, the International Court of Justice (ICJ) has had a number of opportunities to add meaning to the “principles of humanity” within the construct of modern IHL. In the 1949 *Corfu Channel* and 1986 *Nicaragua* cases, the ICJ developed the concept that Common Article 3 to the Geneva Conventions of 1949 reflects “the elementary considerations of humanity applicable under customary international law to any armed conflict, whether it is of an internal or international character.”⁸⁶ Additionally, in 2006, the U.S. Supreme Court found that Common Article 3 was intended to provide “minimal protection” within a broad scope of armed conflict.⁸⁷ Consequently, Common Article 3 is, in all likelihood, the modern meaning for the “principles of humanity” at the micro level of application.⁸⁸

Military necessity likewise transcends from the macro level to the micro level with a different quality. At the

⁸⁶ See generally Dale Stephens, *Human Rights and Armed Conflict, The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Opinion*, 4 YALE HUM. RTS. & DEV. L. J. 1, 16 (2001); Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995).

⁸⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557 n.63 (2006) (citing “GCIII Commentary 35 (Common Article 3 “has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict”); COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 51 (“[N]obody in enemy hands can be outside the law.”)); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’” (quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27)); Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995) (stating that “the character of the conflict is irrelevant” in deciding whether Common Article 3 applies).

⁸⁸ GC I, *supra* note 33, art. 3. In relevant part, Common Article 3 sets forth the following ‘elementary considerations’ of humanity:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.

Id.

macro level, the general principle of military necessity acts as a balance to the general principle of humanity, thereby ensuring states have sufficient means and methods available to take necessary military action against an enemy. At the micro level of application, however, military necessity is a specifically enunciated provision in certain treaties that permits a derogation from an otherwise accepted norm.⁸⁹ Consequently, the general principles of humanity and military necessity do not transcend from the macro to micro level of application with the meanings the ICRC ascribed to them.

B. Restraint Is Not a Matter of Law

By taking the position that the principle of humanity now mandates consideration of the kind and degree of force used in an attack as part of the traditional targeting analysis, the ICRC is in effect attempting to legislate in an area in which the states have not consented to be encumbered by additional restraints. Contemporary IHL is a matter of

⁸⁹ See GC I, *supra* note 33, art. 33; GC IV, *supra* note 33, art. 147; AP I, *supra* note 3, arts. 54(5), 62(1) (“Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.”). Article 33 of GCI declares,

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

GC I, *supra* note 33, art. 33. Article 147 of GC IV explains,

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

GC IV, *supra* note 33, art. 147. Similarly, article 54(5) of API states,

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

AP I, *supra* note 3, arts. 54(5).

agreement and negotiation. Rules are agreed upon and followed out of a sense of legal obligation, or they are negotiated and placed in treaty form. In either respect, the sovereign intentionally forfeits a portion of its power to wage war. Conversely, whatever powers the sovereign does not relinquish it retains and can exercise within the accepted lawful boundaries of IHL.⁹⁰

Because states have a vested interest in how they wage war—based on national objectives—it is imperative they retain discretion over the kind and degree of force they can employ within the confines of contemporary IHL. As such, states have always retained the right to regulate the kind and degree of force used in the individualized attack based on policy determinations (typically enunciated in rules of engagement). Doing otherwise would seriously inhibit the state’s ability to formulate and carry out national goals. For this reason, states have not, either through custom or treaty, permitted the regulation of the kind and degree of force permissible in the direct attack outside of the current prohibitive IHL paradigm.

IV. Conclusion

Fritz Kalshoven once commented that a “situation of armed conflict does not provide a ‘license to kill’ On the contrary, the destruction of basic values, such as life, health, or property . . . remains prohibited in principle . . . but can be exceptionally justified.”⁹¹ When civilians choose to directly participate in hostilities, they forfeit protection from attack and become legitimate military objectives. Their destruction becomes an “exceptionally justified” act within the confines of IHL. The modern IHL paradigm provides a sound, comprehensive methodology upon which military commanders and lawyers can rely in determining whom to target, when to target, and how to target. States, by and large, have agreed to be bound by this scheme and to operate within its legal parameters. By asserting that attacks are now constrained by the additional consideration of humanity (i.e., kind and degree), the ICRC has lost sight of its role as trusted advisor and has assumed the position of international legislator. To remedy this situation, the ICRC should clarify its position and reassert that restraint on the use of force in direct attack is not a matter of the *lex lata* of IHL, but, rather, a notion of *lex ferenda* and matter of policy within the sound discretion of the state.

⁹⁰ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 238 (arguing that dicta in the Lotus case supported the contention that “restrictions upon the independence of States cannot . . . be presumed”).

⁹¹ Fritz Kalshoven, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L L. PROC 39, 41 (1992).