

# Article

## The Laws of War and the “Lesser Evil”

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## I. INTRODUCTION

At Agincourt in 1415, Henry V ordered a *coup de grâce* for severely wounded French soldiers. Today, this would be a war crime: the laws of war mandate caring for the wounded and prohibit mercy killing.<sup>1</sup> Defenders of the atomic bombings of Hiroshima and Nagasaki in August 1945 claim that for all their disastrous effects, these bombings were necessary to conclude the war and put an end to great suffering on both sides. Whatever one makes of these claims on their factual merits, the laws of war categorically forbid the intentional killing of civilians; Hiroshima and Nagasaki were indisputably war crimes.<sup>2</sup> In 1990, some believed that Saddam Hussein should be assassinated so that the Iraqi and Kuwaiti people could be liberated from his oppressive rule without the need for a military invasion that would visit devastation on numerous people.<sup>3</sup> Under the laws of war, the lawfulness of targeting a foreign leader outside of an ongoing armed conflict is dubious. Humanitarian interventions like the one undertaken by the United States and its allies in 1999 to stop the genocide in Kosovo are, by definition, designed to save lives. Humanitarian objectives make no difference under the laws of war, which generally forbid armed aggression across borders no matter what the reason. Thus, the Independent International Commission on Kosovo, established to review Operation “Allied Force” in 1999, deemed the humanitarian intervention to stop the genocide in Kosovo “illegal”—albeit also “legitimate.”<sup>4</sup> Switching the political valence, some have argued that torture should be permissible in the war on terrorism under extreme circumstances, such as the “ticking bomb” scenario in which harm to many innocent victims could be prevented. Yet the legal prohibition on torture is absolute and leaves no room for exceptions.

Widely differing moral and political intuitions apply to each of these cases, making them the subject of heated debates among lawyers, policymakers, and the public at large. But international law as it stands echoes nothing of this disagreement. Instead, it takes an absolutist stance, rejecting any justification that might exculpate states or individuals from liability for violating its rules. The claim that certain war crimes might actually lead to the saving of innocent lives—even many thousands of innocent lives—is

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1. See Additional Protocol Relating to the Protection of Victims of International Armed Conflicts arts. 10(1), 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. In 2005, a U.S. military court found a U.S. Army Captain guilty of charges related to the shooting to death of a wounded paramilitary combatant Iraqi. The Captain’s claim that the death was a mercy killing was overruled by the court in deference to the Rules of Engagement which prohibit the shooting of an injured and unarmed man. See Melissa Eddy, *U.S. Soldier Convicted in Iraqi Shooting Death*, WASH. POST, Apr. 1, 2005, at A21; Melissa Eddy, *U.S. Soldier Tells Court He Shot Iraqi Out of Mercy*, WASH. POST, Mar. 31, 2005, at A10.

2. See *infra* Section III.C.

3. Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1. In 2003, the suggestion was raised once again. See Anne-Marie Slaughter, *Mercy Killings*, FOREIGN POL’Y, May-June 2003, at 72.

4. See INDEPENDENT INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 185-98 (2000) (labeling the Kosovo intervention as illegal, but legitimate); see also *id.* at 186. This report was prepared by the Expert Commission, also known as the “Goldstone Commission,” not to be confused with the recent Goldstone Report on the Gaza Conflict.

categorically rejected by the laws of war. Put bluntly, in many cases, the laws of war demand an excessive sacrifice of lives.

Why this should be so is hardly self-evident. Evolving through centuries of wars and destruction, the laws of war—or, as they are otherwise known, “international humanitarian law” (IHL)—were designed to protect combatants and civilians from the scourge of war, even while accepting the inevitability of war as a human evil. IHL’s rules reflect a compromise between effective prosecution of war and the ideal of protecting the lives and human rights of those endangered by it. To safeguard these compromises, the field of IHL was designed as a closed legal system, immune from the general justifications for breach of obligations that apply in other spheres of international law. In particular, no state or individual may violate the laws of war in the name of military necessity—i.e., in the name of promoting the effectiveness of the military operation—since that necessity has already been incorporated into the balance struck by the legal rules.<sup>5</sup>

But if IHL is designed to minimize humanitarian suffering within the constraints of war, then it is not at all clear why measures intended to further minimize suffering—as opposed to measures intended to promote the effectiveness of the war at the cost of more suffering—cannot serve as a justification for violation of IHL rules. The puzzle, in other words, is not why IHL rejects military necessity but why it rejects *humanitarian necessity*—a choice of a lesser evil—as a justification for breaking the laws of war.<sup>6</sup> If the use of nonlethal chemical weapons (such as tear gas), the torture of an individual in a “ticking bomb” scenario, clandestine operations carried out by commando soldiers disguised as civilians, or even the intentional targeting of some civilians could save more innocent lives than they cost, why would IHL not embrace these tactics as furthering its humanitarian mission, rather than, as it does, making all of them war crimes?

The developments of the past decade or so in the field of international criminal law (ICL) have made this question particularly pressing. ICL translates states’ obligations under IHL into individual duties, making grave breaches of IHL indictable and punishable as war crimes. The establishment and operation of the International Criminal Court (ICC) marks the worldwide effort to internationalize the enforcement of ICL so as to fight impunity and ensure individual criminal accountability for war crimes. This development has a direct bearing on the normative implications of the rejection of a humanitarian necessity justification: for any particular actor, the denial of a lesser-evil justification as a matter of international law can make the difference between innocence and guilt in the ICC or in any other court of law

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5. Military necessity is both an enabling and a constraining principle. It allows parties in conflict to inflict direct and intentional damage onto the military personnel and targets of the counterparty. But it also restricts permissible damage to that which is legal under the laws of war, and more importantly, to that which is actually necessary to attain the military goal. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 280-84 (2d ed. 2008); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY NORMS* 215-17 (1989); Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 215-19 (1998).

6. I limit my discussion to international humanitarian law of international armed conflict, leaving aside the laws of noninternational armed conflicts.

that adjudicates war-related activities. Should a defendant who violated IHL in order to save, or with the effect of saving, lives be convicted of war crimes? Ironically, the Rome Statute of the ICC recognizes a variation of the self-serving military necessity claim as justifying exemption from liability, but not any form of a humanitarian necessity claim.<sup>7</sup>

These questions have gone surprisingly unaddressed in existing legal scholarship, which has been highly deferential to and accepting of the current, absolutist system of IHL. Existing legal scholarship has paid much attention to the possible justification for breaching *jus ad bellum*—the laws pertaining to the initial use of force against another state (in the contexts of humanitarian interventions in Kosovo, Liberia, Somalia;<sup>8</sup> and in a different setting, debating the 2003 invasion of Iraq). It has also paid much attention to the possible justifications for breaching some individual rules of *jus in bello*—the laws regulating the use of force within an armed conflict (such as torture,<sup>9</sup> assassination of rogue leaders,<sup>10</sup> or the use of prohibited weapons<sup>11</sup>). But the broader question of whether the existing structures of IHL—its premises, fundamental principles, distinctions, and application—actually promote humanitarian goals or hinder them has remained largely within the domain of philosophical literature, eluding the lawyers.<sup>12</sup>

This Article addresses the issue of humanitarian necessity head-on. It explores possible reasons why IHL and its supporters have refused to countenance the possibility of humanitarian necessity as a justification for violating its rules. Three possible explanations of IHL's absolutist stance are developed. The first is based on deontological moral reasoning. The second follows from traditional rule-consequentialist arguments, including concerns about uncertainty, slippery slopes, and spillover effects. The third, also

7. Rome Statute of the International Criminal Court art. 31(1)(d), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

8. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 174-91 (2002), which argues that there is no need to formally change the law, but instead suggests accommodating cases of humanitarian intervention through interpretive “mitigation”; Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337 (2005); and Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006), which discusses the case for a welfarist-based reform of international law.

9. I refer to this literature *infra* Section III.B.

10. See Turner, *supra* note 3.

11. See, e.g., JEFFREY W. LEGRO, *COOPERATION UNDER FIRE: ANGLO-GERMAN RESTRAINT DURING WORLD WAR II* 153 (1995); RICHARD M. PRICE, *THE CHEMICAL WEAPONS TABOO* (1997); WARD THOMAS, *THE ETHICS OF DESTRUCTION: NORMS AND FORCE IN INTERNATIONAL RELATIONS* (2001); Richard Price & Nina Tannenwald, *Norms and Deterrence: The Nuclear and Chemical Weapons Taboos*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 114 (Peter J. Katzenstein ed., 1996). Note, however, that the discussion of prohibited weapons, for the most part, focused on the underlying rationale of various prohibitions more than on the possible necessity to breach them in any particular situation.

12. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2d ed. 1992); G.E.M. Anscombe, *War and Murder*, in *NUCLEAR WEAPONS: A CATHOLIC RESPONSE* 45-62 (1961); R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145 (1972); R.M. Hare, *Rules of War and Moral Reasoning*, 1 PHIL. & PUB. AFF. 166 (1972); Anthony E. Hartle, *Humanitarianism and the Laws of War*, 61 PHIL. 109 (1986); George I. Mavrodes, *Conventions and the Morality of War*, 4 PHIL. & PUB. AFF. 117 (1975); Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123 (1972); Paul Woodruff, *Justification or Excuse: Saving Soldiers at the Expense of Civilians*, 8 CANADIAN J. PHIL. 159 (Supp. 1982).

broadly rule-consequentialist in orientation, focuses on institutional considerations, including the process of lawmaking, adjudication, and enforcement of IHL rules. The Article argues that none of these accounts can convincingly explain IHL’s wholesale exclusion of humanitarian necessity as a justification for violating its first-order rules.

Consequently, the Article argues that international law would do well to move away from its absolutist stance and incorporate a humanitarian necessity justification. The constructive ambition of the Article is to help design an effective and workable legal standard for implementing such a justification. In doing so, the Article begins with the obvious analogy of the necessity defense in domestic criminal law, which takes seriously the possibility of justifying violence in contexts where it is the lesser evil.<sup>13</sup> While the differences between regulating ordinary violence among citizens and regulating the state’s use of force against enemies prevent the direct transposition of legal rules and strategies from one context to the other, the comparison is nonetheless an illuminating starting point. Building on that comparison, and on the critical exploration of IHL’s preference for absolute rules, the Article develops a blueprint for defining a humanitarian justification for prima facie violations of the laws of war.

In doing so, and to demonstrate what might be at stake in recognizing or excluding a humanitarian necessity justification, I rely on three case studies. Each involves a claim that a state’s armed forces violated the laws of war in order to avoid greater humanitarian suffering. In the “Early Warning Procedure,” the Israel Defense Forces (IDF) employed local residents to aid in the arrest of suspected Palestinian militants in the West Bank, claiming this practice minimized the risk of collateral damage to nearby civilians if the need to perform a violent arrest arose. The second case is the paradigmatic example of torturing an individual to retrieve information that would avert an imminent attack. The third case is the atomic bombings of Hiroshima and Nagasaki at the end of World War II, which then-Secretary of War Henry Stimson described as “deliberate, premeditated destruction [which] was our least abhorrent choice.”<sup>14</sup> I use the atomic bombings as an extreme metonymy for all deliberate infliction of civilian casualties in the effort to spare a greater number of casualties.

These cases make vivid the challenge of tempering the laws of war with a humanitarian justification. The entire project of IHL is premised on the idea that some cruelty must be curbed, even at the expense of prolonging lawful violence and suffering. That project would collapse if a state could claim to reduce suffering by carpet-bombing the enemy’s capital just to finish the war more quickly—and only in part because a long history of much cruelty refutes the correlation between superfluous ruthlessness and speedy victory. The goal here is to find a place for a humanitarian necessity justification that would

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13. Other fields of law, such as torts, antitrust, and regulation, pose similar questions with regard to structures of rules and exceptions, utilitarianism and moral absolutes. I choose to focus the comparison on criminal law as the most immediately analogous field in terms of its subject matter and content.

14. Robert C. Batchelder, *Dropping the Atomic Bomb: Right or Wrong?*, in *HIROSHIMA: THE DECISION TO USE THE A-BOMB* 106, 109 (Edwin Fogelman ed., 1964).

allow parties in conflict to engage in welfare-increasing actions without collapsing the entire project of IHL. Whatever its concrete pay-off, this effort reveals and casts in a new light some of the deepest premises of the laws of war and invites further inquiry into their humanitarian achievements.

The last Part of the Article is devoted to the prescriptive design of a humanitarian necessity justification in IHL. Building on the analysis and case studies offered earlier, I suggest a blueprint for the definition of the humanitarian justification, which would enable us to distinguish the “right” case from all the wrong ones. Under this definition, an actor would be exempt from criminal liability if the conduct which is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant’s compatriots, the person could reasonably expect that his action would be effective as the direct cause of minimizing the harm, and there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.

Some methodological clarifications are in order: the Article assumes a general obligation to obey IHL rules. It does not ask when it would be right to ignore the law, but instead why the law is such that it does not allow for its violation under circumstances that may seem just. The pros and cons of amending international law as opposed to accepting certain acts that are “outside” the law as legitimate have already been discussed in the contexts of humanitarian interventions and torture.<sup>15</sup> Avoiding repetition of these arguments, the Article works within the legal framework of IHL. The Article does not aspire to test the appropriateness or sensibility of particular IHL rules or offer any amendment to them. For this reason, the humanitarian necessity paradigm is limited to a justification, rather than an amendment of primary obligations.<sup>16</sup> In this respect as well, I accept the basic framework of IHL, along with its core principles, such as distinction and proportionality.<sup>17</sup> Finally, and in a similar spirit, I follow the well-recognized distinction between *jus ad bellum* and *jus in bello*, and limit my discussion to justified circumstances for breach of the latter, independently of the question of whether the war was just or worthwhile to begin with.

15. See, e.g., Paul Butler, Supreme Court Review, *Foreword: Terrorism and Utilitarianism: Lessons from, and for, Criminal Law*, 93 J. CRIM. L. & CRIMINOLOGY 1 (2002); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Alon Harel & Assaf Sharon, *What Is Really Wrong with Torture?*, 6 J. INT’L CRIM. JUST. 241 (2008).

16. There is an extensive debate in the literature on whether necessity should be considered a justification or excuse, both in criminal law and in international law. For the purposes of this Article, I leave aside this debate, choosing the justification paradigm so as to emphasize that in the relevant cases, it is the act itself that is not wrong, rather than the attribution of responsibility to the actor. On the distinction between justification and excuse, see J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC’Y 1 (1957). See also George P. Fletcher, *The Individualization of Excusing Conditions*, in CRIMES AND PUNISHMENTS 137 (Jules L. Coleman ed., 1994); Anthea Roberts, *Legality Verses [sic] Legitimacy: Can Uses of Force Be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179 (Philip Alston & Euan MacDonald eds., 2008) (stating that many Western lawyers believe that NATO’s actions in Kosovo should be excused despite their apparent illegality).

17. For a general critique of existing dogmatism in human rights or IHL, one which overlooks or excludes other strategies for bringing about emancipation, peace and justice, see DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004). Kennedy’s suggestions for alternative strategies include social welfare and redistributive economics, as ways of reallocating status and power. *Id.* at 11.

Finally, the Article proceeds in full recognition that most violations of IHL are not motivated by the wish to cause *less* humanitarian harm. Indeed, if human nature were prone to this kind of calculation, and more so in wartime, much of IHL would be redundant. The Article also recognizes the possible dangers of malevolent exploitation that any exemption from liability for war crimes might harbor. Nonetheless, the fact remains that some violations of the laws of war could actually cause less suffering overall. If the absolutist stance of IHL inhibits states from committing such violations, then this absolutist stance and its rejection of any humanitarian exemption does a disservice to the goals of IHL.

The Article is organized as follows. Part II offers a rough primer on the features of IHL and on the current state of affairs with regard to necessity in IHL and in ICL. Part III describes three real cases in which actors sought to invoke some kind of a humanitarian necessity justification for breaking IHL rules. Part IV lays out the various components of the necessity defense in domestic criminal law and explains why their transposition to the international level would require adaptation. Part V develops and tests the most plausible explanations for rejecting a lesser-evil paradigm, including deontological, consequentialist, and institutional arguments. Part VI develops a workable definition for a humanitarian necessity justification. The Article concludes by pointing to a set of further questions that this study raises about IHL and international law more generally, namely the tension between consequentialist and deontological drives, the possibilities and constraints of transposing domestic legal notions onto the international plane, and our assumptions with regard to individuals’ and states’ decisionmaking processes.

## II. IHL, ICL, AND NECESSITY

### A. *The General Framework of IHL and ICL*

The stated goal of IHL is minimizing humanitarian suffering of both combatants and civilians during the conduct of hostilities.<sup>18</sup> It accepts as a regrettable reality the failure to eradicate the use of force in international relations altogether, and seeks, as second best, to place effective limits on the scope of destruction and suffering that such force may lawfully inflict. One articulation of its purposes may be found in the 1868 St. Petersburg Declaration, which states:

[T]he progress of civilization should have the effect of alleviating as much as possible the calamities of war: That the only legitimate object which States should endeavour to

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18. The International Committee of the Red Cross explains that “[i]nternational humanitarian law is a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.” ADVISORY SERV. ON INT’L HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What\\_is\\_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf); see also William J. Fenrick, *International Humanitarian Law and Combat Casualties*, 21 EUR. J. POPULATION 167, 168 (2005) (noting that the fundamental purpose of IHL is “to reduce net human suffering and net damage to civilian objects in armed conflict”).

accomplish during war is to weaken the military forces of the enemy; . . . [and that the parties agree on the need] to conciliate the necessities of war with the laws of humanity.<sup>19</sup>

“International Humanitarian Law” is a term of the past century alone even though the notion of regulating and limiting warfare is almost as ancient as wars themselves. The Bible, the codes of ancient Greece, the Indian law of Manu—all contained some prohibitions on warfare, the violation of which was an offense to divine order.<sup>20</sup> Subsequent centuries have witnessed the evolution of additional rules of war, deriving from notions of honor and chivalry (which applied only among knights), Catholic notions of Just War (which applied only to Catholics), or reciprocal exchanges of commitments (which applied only to those who have assumed similar commitments).<sup>21</sup>

The more recent emphasis on humanitarian law signifies a shift from the traditional motivations of reciprocity in rules of engagement, notions of honor or chivalry, and religious teachings and natural law, toward laws that are more absolute, unconditioned by reciprocity, and unlimited to any one class, religion, or race. This change marked the move from the sovereign or state as the bearer of rights to a more enlightened human society which identifies the welfare of individuals as its subject of concern. This is how the humanitarian value came to replace war in explaining what the *jus* was about.<sup>22</sup>

As a sociological observation, while the terms “laws of war” and “international humanitarian law” are widely considered interchangeable in translating the original Latin term of *jus in bello*, the choice of which translation to use is not devoid of political or symbolic inclination.<sup>23</sup> The International Committee of the Red Cross publishes guidebooks on International Humanitarian Law just as the Army Field Manual refers to the Laws of Armed Conflict. The content of both is not very different.<sup>24</sup>

With the shift toward absolute and unconditional obligations, many of the earlier prescriptions have survived, sometimes under a new rationale, and other obligations, partly building on human rights law, have been added. In balancing between the necessities of war and humanitarian considerations, the historical evolution of the laws of war has been to ratchet humanitarian obligations up, never down. As new treaties were negotiated against the

19. Declaration of St. Petersburg, Nov. 29-Dec. 11, 1868, *reprinted in* CONVENTIONS AND DECLARATIONS BETWEEN THE POWERS CONCERNING WAR, ARBITRATION AND NEUTRALITY 6 (1915) (renouncing the use, in time of war, of explosive projectiles weighing less than four hundred grams). The Declaration is widely accepted as customary international law.

20. On the perspectives of various traditions on just wars, see generally THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS (Richard Sorabji & David Rodin eds., 2006).

21. For a general history of the laws of war, see THE LAW OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994); and STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005).

22. See DAVID KENNEDY, OF WAR AND LAW 83-84 (2006).

23. *Id.* at 83.

24. Compare U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE at Appendix A-1 (1956) (“The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.”), with INT'L COMM. OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 1 (1988), [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0365/\\$File/ICRC\\_002\\_0365.PDF](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0365/$File/ICRC_002_0365.PDF) (“It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.”).



collapse of the humanitarian order in previous conflicts, their terms enhanced the protections for individuals and objects and expanded the prohibitions on means and methods of permissible warfare.

Like most other fields of international law, IHL operates in what is still largely an anarchical international society, lacking any central legislative, mandatory adjudication, or enforcement mechanisms. Its rules are the result of either interstate political negotiations (conventional IHL) or else the longstanding practice of some states, which other states grew to recognize as binding customary international law.

Many IHL norms are articulated in terms of relative standards; it is unlawful to conduct attacks that are “expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>25</sup> The use of weapons which cause superfluous injury or unnecessary suffering is prohibited. The destruction of private property is allowed only “where such destruction is rendered absolutely necessary by military operations,”<sup>26</sup> and prisoners of war (POWs) are to be evacuated to safe zones “as soon as possible.”<sup>27</sup> Many others norms, however, are articulated as concrete and absolute rules: the use of chemical or biological weapons is absolutely prohibited.<sup>28</sup> The torture of prisoners of wars or civilians is never lawful.<sup>29</sup> The carrying out of attacks while posing as a civilian is illegal perfidy.<sup>30</sup> The intentional (as distinguished from foreseen-yet-unintended) killing of a civilian is always a war crime.<sup>31</sup> Both the standards and rules of IHL do not tolerate deviations or derogations.<sup>32</sup>

The delicate compromises struck and articulated as IHL rules were to be protected under a closed system, immune to any and all justifications for breaking the law.<sup>33</sup> Specifically, the need to prosecute the war effectively

25. Additional Protocol I, *supra* note 1, art. 51(5)(b).

26. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

27. Geneva Convention Relative to the Treatment of Prisoners of War art. 19, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

28. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

29. Geneva Convention III, *supra* note 27, art. 17; Geneva Convention IV, *supra* note 26, art. 32.

30. Additional Protocol I, *supra* note 1, art. 37.

31. Geneva Convention IV, *supra* note 26, art. 32.

32. See INT’L COMM. OF THE RED CROSS, *supra* note 24, at 3-4.

33. The International Law Commission’s Draft Articles on State Responsibility recognize general defenses that allow states to escape some international obligations under unusual conditions, including force majeure, duress, and necessity. U.N. Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 25, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR, 53d Sess., Supp. No. 10, at 31, 80, U.N. Doc. A/56/20 (2001) [hereinafter *Draft Articles*]. Article 26 of the Draft Articles, however, precludes these general defenses from applying where peremptory norms are concerned, and Article 55 notes that the Draft Articles are inapplicable “where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.” *Id.* art. 55. Most commentators agree that IHL is a sphere governed by special rules for the purposes of Article 55. See Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT’L REV. RED CROSS 401, 402 (2002).

could not be raised as a justification for any violation, since it has already been incorporated into the principle of military necessity.<sup>34</sup> At once an enabling and a constraining principle, military necessity allows “those measures that are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>35</sup> Parties are thus allowed to inflict intentional damage on the military personnel and targets of their enemies; but they are allowed to do so only insofar as the damage is actually necessary for attaining military goals. As the Lieber Code explains, “military necessary does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge.”<sup>36</sup>

Unlike the body of ICL, which developed later in time, laws of war obligations were not assumed with the purpose of entailing direct responsibilities for individuals, but only for states, as representing their polity. Although as a matter of legal principle, a state that breaches the laws of war is required to make reparations,<sup>37</sup> the strict legal responsibility of states has been generally unenforceable on the international plane.<sup>38</sup> Absent external mandatory mechanisms, violations of the laws of war at the state level were left to international diplomacy, or its Clausewitzian extension<sup>39</sup>—namely, coercive power. As a result, the enforcement of IHL has traditionally been the province of victors’ justice, such as in the Peace Treaty of Versailles or the Potsdam Agreement.<sup>40</sup>

As for individuals committing breaches of the laws of war, especially those offenses that are considered “grave breaches,”<sup>41</sup> enforcement was

34. In comment 19 to Article 25 of the Draft Articles, the ILC stated that “certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.” *Draft Articles*, *supra* note 33, art. 25, cmt. 19.

35. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 14, at 7 (Gov’t Printing Office 1898) (1863) (officially published as U.S. War Dep’t, General Orders No. 100 (Apr. 24, 1863)).

36. *Id.* art. 16, at 8.

37. 1 COMMENTARY ON THE 1949 GENEVA CONVENTIONS 373 (Jean S. Pictet ed., 1952); 2 *id.* at 270 (1960); 3 *id.* at 629 (1960); 4 *id.* at 602 (1958).

38. Although in several notable cases, in most of which one of the parties contested the jurisdiction of the Court, the ICJ did address violations of IHL in armed conflicts. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Regional courts, too, attempted to adjudicate the military conduct of states—particularly the European Court of Human Rights, which has in recent years addressed human rights violations in the conflict between Russia and Chechnya. Nonetheless, the source of the court’s jurisdiction as well as reasoning was the European Convention on Human Rights rather than any traditional IHL instrument. *See Isayeva v. Russia*, 41 Eur. Ct. H.R. 847, paras. 208, 226, 230, 236 (2005).

39. CARL VON CLAUSEWITZ, ON WAR 87 (M. Howard & P. Paret eds. & trans., 1976) (“[W]ar is not a mere an act of policy but a true political instrument, a continuation of political activity by other means. What remains peculiar to war is simply the peculiar nature of its means . . . . The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.”).

40. *See* Paul Betts, *Germany, International Justice and the Twentieth Century*, HIST. & MEMORY, Spring/Summer 2005, at 45, 63-65.

41. *See* Additional Protocol I, *supra* note 1, arts. 11, 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of

largely considered a domestic matter, to be dealt with individually by each state vis-à-vis its own agents. Naturally, this system of domestic enforcement worked, if at all, only in those cases where violations were committed without the state’s instruction or acquiescence. Outside their own states, individuals have faced trial almost exclusively in ad hoc tribunals—in Nuremberg and Tokyo for crimes related to World War II, in The Hague for crimes related to the conflicts in the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia<sup>42</sup> (ICTY)), and in Arusha for crimes related to the conflict in Rwanda (the International Criminal Tribunal for Rwanda<sup>43</sup> (ICTR)). In select instances, states have tried their own soldiers for crimes committed in the context of hostilities.<sup>44</sup> Others, like Belgium, famously (and mostly unsuccessfully) attempted to invoke universal jurisdiction over war criminals at large.<sup>45</sup>

In 1998, the internationally negotiated Rome Statute<sup>46</sup> sought to fight impunity by effectively breaking the division of labor between the international level, where rules were negotiated and articulated, and the domestic level, where rules were to be adjudicated and enforced. The ICC subsequently established in 2002 now has the power to judge individuals for genocide, war crimes, and crimes against humanity<sup>47</sup> in cases where states either fail or refuse to prosecute the offender.<sup>48</sup> Although the ICC has not yet successfully completed a prosecution of any offender,<sup>49</sup> in aspiration, it is the world’s first international (ideally, universal) mechanism to adjudicate and enforce individuals’ responsibility for grave breaches of IHL everywhere.

Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III, *supra* note 27, art. 130; Geneva Convention IV, *supra* note 26, art. 147.

42. The ICTY has operated since 1993 to try individuals charged with the commission of war crimes during the conflicts in the Balkans in the 1990s. More than sixty defendants have been convicted to date. For more information, see About the ICTY, <http://www.icty.org/sid/3> (last visited Nov. 6, 2009). See also S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY).

43. The ICTR was established by U.N. Security Council resolution in 1994, and is charged with prosecuting individuals for genocide and other serious violations of IHL. For further information, see Welcome to the International Criminal Tribunal for Rwanda, <http://www.ictt.org> (last visited Nov. 6, 2009). See also S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR).

44. The most commonly referenced are the “hybrid courts” in Kosovo, East Timor, Sierra Leone, and Cambodia—all established in the context of intrastate armed conflicts. See Office of the U.N. High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, at 3-4, U.N. Doc. HR/PUB/08/2 (2008).

45. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT’L L. 927, 933-35 (2009).

46. Rome Statute, *supra* note 7. As of July 2009, 110 states are members of the Court. Int’l Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties> (last visited Nov. 6, 2009).

47. Rome Statute, *supra* note 7, arts. 6-8. Article 5 enumerates the crime of aggression, but this crime has not yet been defined. The Statute mandates that it be defined “consistent with the relevant provisions of the Charter of the United Nations.” *Id.* art. 5(2).

48. Rome Statute, *supra* note 7, art. 17(1)(a).

49. The court has opened investigations into four situations: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. For more information, see International Criminal Court: All Situations, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations> (last visited Nov. 30, 2009). It has issued public arrest warrants for twelve people; six of them remain free, two have died, and four are in custody. The first trial, that of Congolese militia leader Thomas Lubanga, began on January 26, 2009. See International Criminal Court: Democratic Republic of the Congo, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (last visited Nov. 30, 2009).

### B. *Necessity in IHL and ICL*

As mentioned earlier, IHL was designed as a closed system, immune to any and all justifications for breaking the law, including necessity, duress, or force majeure<sup>50</sup>—all applicable in other contexts of international law.

The question of whether a similarly closed system applies to individuals under ICL is somewhat more complex. Until the adoption of the Rome Statute, the possible defenses for a defendant facing criminal charges for violation of IHL rules were determined in a patchwork of decisions rendered separately by the dedicated international tribunals and domestic courts. For the most part, necessity claims invoked by defendants related to military necessity or a variation on a claim of duress, as was the case in the German industrialist trials in Nuremberg (accused of using slave labor)<sup>51</sup> or the *Erdemovic* case in the ICTY (where a soldier was threatened with death if he were to maintain his refusal to execute civilians).<sup>52</sup> The somewhat-related claim of good motive was rejected by courts, as were claims of troubled conscience or kind gestures. In the famous case of Ernst von Weizsaecker, the German State Secretary who claimed he had secretly resisted Hitler, the court required that the defendant demonstrate that “he did all that lay in his power to frustrate a policy which outwardly he appeared to support.”<sup>53</sup> As he had failed to make this showing, he was found guilty. Where trials were conducted by ordinary domestic courts, the latter similarly applied their own general criminal paradigms of necessity or duress to determine culpability of individual offenders.<sup>54</sup>

The negotiation of the Rome Statute required a comprehensive decision as to which exemptions from responsibility for war crimes (or crimes against humanity) should be legally recognized. The list of possible defenses that the Statute ultimately incorporated is more limited than that offered by most national penal codes. This was in part a reflection of the notion that the crimes that the ICC was meant to adjudicate were the most egregious and indefensible of crimes, and that any attempt to justify or excuse them was

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50. *Draft Articles*, *supra* note 33.

51. The defendants argued that they were under orders from the Nazi regime. *United States v. Krauch* (The I.G. Farben Case), in 7-8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, at 1 (1942); *see 8 id.* at 1055-56. The *Farben* decision clarified that the defense of necessity was not available in those instances in which “the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.” *Id.* at 1179. However, in the case of *United States v. Flick*, two defendants were acquitted from a similar offense as the Tribunal accepted their claims that they had lived in a “reign of terror” that compelled them to follow orders and meet specific quotas. *See United States v. Flick* (The Flick Case), in 6 TRIALS OF WAR CRIMINALS, *supra*, at 1187, 1199-1202.

52. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgement, para. 19 (Oct. 7, 1997) (finding that “duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings”).

53. *United States v. Weizsaecker* (The Ministries Case), in 12-14 TRIALS OF WAR CRIMINALS, *supra* note 51, at 1 (1950); *see 14 id.* at 356.

54. Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT’L L. 1, 92-93 (1996).

morally dubious.<sup>55</sup> Another reason was the difficulty in reconciling conceptual differences existing in various legal systems with regard to exemptions or excuses from criminal responsibility.<sup>56</sup>

A necessity defense parallel to one recognized by most domestic systems of law was considered during the Rome Statute negotiations but was left out of the final text.<sup>57</sup> Instead, Article 31(1)(d) of the Statute<sup>58</sup> included what is understood to be a tortuous combination of duress and necessity (with some elements of self-defense), much to the dismay of several scholars.<sup>59</sup> Despite contrary earlier drafts, the combined defense was ultimately made available even for murder charges in wartime.<sup>60</sup>

Although interpreted by scholars as granting more exemption to defendants than the classic necessity defense,<sup>61</sup> Article 31(1)(d) certainly does not include a choice-of-evils justification of the type I am interested in here.

55. Albin Eser, *Article 31: Grounds for Excluding Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 863, 869 (Otto Triffterer ed., 2d ed. 2008).

56. Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 206 (Roy S. Lee ed., 1999).

57. Note that I refer here to the necessity defense in its traditional, domestic-law meaning. A general defense of military necessity was predictably left out of the Statute. Military necessity was recognized only where its absence was already incorporated into the elements of crime, such as in the case of the war crime of “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Rome Statute, *supra* note 7, art. 8(2)(a)(iv); *see* Eser, *supra* note 55, at 870.

58. The text of the Article is as follows:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

....

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be[:]

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person’s control.

Rome Statute, *supra* note 7, art. 31(1).

59. ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 135 (2d ed. 2003). Eser described Article 31(1)(d) as an “ill-guided and lastly failed attempt . . . to combine two different concepts: (justifying) ‘necessity’ and (merely excusing) ‘duress.’” Eser, *supra* note 55, at 883. A different kind of criticism also arose with regard to the choice of making necessity grounds for exoneration instead of mitigating circumstances for criminal responsibility, *see* Enrico Mezzetti, *Grounds for Excluding Criminal Responsibility*, in 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 143, 167 (Flavia Lattanzi & William A. Schabas eds., 2004).

60. Saland, *supra* note 56, at 189, 208.

61. As Albin Eser describes it:

[T]his subjective conception of the “lesser evil”-principle is an integral element of this defence: different from classical “necessity” which justifies actions that save the greater good at the cost of the minor, and different from classical “duress” which would grant an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat, this phrase could well be understood as drawing a line in-between: on the one hand requiring less than justifying “necessity” would afford, and on the other hand requiring more than excusing “duress” would be satisfied with. Thus, only applying a subjective proportionality test to the accused’s conduct would pursue the unprecedented historic attempt to reconcile necessity and duress in one provision.

Eser, *supra* note 55, at 887 (citations omitted).

Specifically, there is a requirement that the defendant acted in response to circumstances that were imposed upon him or her (implying also that there was no reasonable alternative to causing the harm). These actions must be either brought about by other persons or constituted by circumstances beyond the defendant's control. Article 31(1)(d) explicitly rules out the possibility of successfully invoking a humanitarian necessity justification in other cases. In particular, most commentators' understanding is that the necessity discussed in Article 31(1)(d) is military necessity,<sup>62</sup> i.e., situations where the laws of war are violated in order to promote the violator's own interests in prosecuting the war. This is not the pure humanitarian necessity that is the subject of this study.

There is some theoretical possibility that broader arguments of necessity could be made under Article 31(3) of the Statute, which authorizes the court to "consider a ground for excluding criminal responsibility other than those referred to in paragraph I where such a ground is derived from applicable law as set forth in article 21."<sup>63</sup> Article 31(3) was originally designed to leave the door open for other defenses that were considered during the negotiations, but were ultimately neither incorporated nor explicitly rejected, especially reprisals and military necessity (the latter not being explicitly incorporated into the Statute, but possibly recognized under Article 31(1)(d) as discussed above).<sup>64</sup> It is therefore highly unlikely that any notion of a choice of evils not recognized in any of the sources of law enumerated in Article 21, which are to guide the court in its work, will be recognized by the court.

Under the Rome Statute, the ICC prosecutor enjoys some prosecutorial discretion,<sup>65</sup> which he ostensibly could exercise if circumstances of humanitarian justification do arise, but this is outside the contours of what IHL dictates or accepts. Moreover, assuming that necessity considerations will be taken into account by the prosecutor anyway, an official doctrine of humanitarian necessity would make such considerations clear and transparent, rather than opaque. In addition, unlike in domestic systems of law, no pardon is possible if the prosecutor decides to pursue the case.

To summarize, the humanitarian necessity justification I propose differs from the defenses currently available in ICL in that it contemplates an exemption from criminal responsibility where the actor, faced with a choice of evils, voluntarily commits a violation of IHL to minimize humanitarian suffering. The actor need not be facing an imminent threat to himself or another (as with duress or self-defense), nor is he allowed any concessions for acts taken in furtherance of his own interests (as with military necessity). Rather, the humanitarian necessity justification would offer grounds for exoneration when an actor selects an illegal course of action because, in the circumstances, the prohibited approach would do *less* damage to the values IHL seeks to protect than would any licit alternative. In other words, it would defend the commission of the lesser evil as judged by IHL's own standards.

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62. Mezzetti, *supra* note 59, at 151-54.

63. Rome Statute, *supra* note 7, art. 31(3).

64. GERHARD WERLE ET AL., PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 163 (2005); Eser, *supra* note 55, at 891-93.

65. Rome Statute, *supra* note 7, art. 53.

### III. THREE CASE STUDIES

Before suggesting and evaluating possible motivations for the rejection of a choice-of-evils justification in IHL and ICL, I turn to a demonstration of the possible workings of such a justification in practice. I choose three examples in which an actor—a state or individual—violated an absolute prohibition under the laws of war. In all three cases, an actor could have chosen not to violate the prohibition and pursue a lawful course of action instead. The lawful course of action, so the actors believed, would have been expected to cause greater harm than the unlawful one.

In the first case—the Early Warning Procedure—the Israeli High Court of Justice upheld the legal prohibition against the employment of civilians in an occupied territory by the occupation forces. The second case—torture for interrogational purposes—has been the subject of a heated debate among scholars, policymakers, and politicians. Other than the Israeli HCJ,<sup>66</sup> which was ready to recognize a post facto necessity justification under domestic criminal law for the use of “moderate physical pressure” (considered by most human rights organizations as a euphemism for torture), no other court has officially recognized the legality of torture under any circumstances.<sup>67</sup> And finally, the bombings of Hiroshima and Nagasaki, one of the most notorious acts of war ever committed and still the subject of much moral, political, and legal controversy: although the attacks were never judged by an international tribunal, in 1963 a Japanese court found them to be in clear violation of IHL, even if the claimants could not succeed in their claim against the Japanese government for lack of a cause of action, or against the United States for lack of jurisdiction.

#### A. *The “Early Warning Procedure”*

In the course of the second *Intifada* in the occupied Palestinian Territories, the Israel Defense Forces (IDF) issued the Early Warning Procedure, colloquially known as the “Neighbor Procedure.” The rationale for the procedure was laid out in an IDF directive:

“‘Early Warning’ is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident’s assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves (allowing their arrest without bloodshed). Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow the innocent to

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66. HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel (Sept. 6, 1999), *reprinted in* 38 I.L.M. 1471, 1486-88 (1999), *available at* [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf).

67. See, for instance, *Gäfgen v. Germany*, a recently delivered decision by the European Court of Human Rights, which addressed the conduct of German police officers who threatened to torture a suspect if he did not disclose the whereabouts of a boy he had kidnapped. The Court underlined the absolute nature of the prohibition on torture or ill treatment, irrespective of the conduct of the person concerned and even if the purpose of the ill treatment was to extract information in order to save a person’s life. *Gäfgen v. Germany*, App. No. 22978/05, 2008 WL 5485767 (Eur. Ct. H.R. June 30, 2008).

leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life.”<sup>68</sup>

The Procedure’s guidelines emphasized that Palestinians could not be coerced to assist the IDF in an arrest (including an express emphasis to the soldiers that the civilian population had no obligation to assist the IDF in warning civilians of attack), and that no Palestinian was to be asked for assistance in circumstances that were likely to endanger his life. The assistance of women, children, the elderly or the disabled was not to be solicited under any circumstances. In addition, Early Warning was not to be employed where there was another effective way to achieve the objective.<sup>69</sup>

The Early Warning Procedure replaced a set of earlier practices that were much more sweeping in their reliance on the local population for military purposes. A group of human rights organizations in Israel challenged the legality of these practices before the Israeli High Court of Justice (HCJ),<sup>70</sup> claiming that IDF practices had entailed the use of Palestinian civilians as human shields and hostages, and that these practices were in violation of IHL rules on the protection of civilians in war and in occupied territories. The petitioners described cases in which Palestinian residents were forced to scan buildings suspected of being booby-trapped, or walk through certain areas ahead of the security forces in order to find suspected persons. The petitioners alleged the IDF interrogated local residents about the presence of wanted persons and weapons under threat of bodily injury or death should the residents fail to answer. They also cited reports that the IDF used local residents as shields against attacks on forces and took relatives of suspected Palestinians hostage in order to ensure the suspects’ arrest.

Following the submission of the original petition, the state attorney declared that the IDF had issued an unequivocal order strictly forbidding all forces from using civilians as human shields or hostages, or otherwise in any situation that might expose civilians to physical danger. However, the response also indicated that the state did not rule out the possibility of requesting the local population to assist in situations where this would help to avoid greater harm to local residents, soldiers, and property,<sup>71</sup> including the Early Warning Procedure, as detailed above. The petitioners then revised their original petition in order to challenge this new procedure,<sup>72</sup> which they claimed still violated IHL.

The petitioners pointed to Articles 3, 8, 27, 28, 47 and 51 of the Fourth Geneva Convention,<sup>73</sup> as well as to Article 51(7) of Additional Protocol I,<sup>74</sup> which forbid the taking of civilians as hostages, employing violence against civilians or threatening civilians with violence, using civilians as a protective shield, and forcing civilians to serve in the occupying power’s armed forces.

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68. HCJ 3799/02 *Adalah v. GOC Central Command, IDF* para. 5 (June 23, 2005), available at [http://elyon1.court.gov.il/files\\_eng/02/990/037/a32/02037990.a32.pdf](http://elyon1.court.gov.il/files_eng/02/990/037/a32/02037990.a32.pdf) (quoting Israeli Defense Forces, Operational Directive, Early Warning (Nov. 26, 2002)).

69. *Id.* paras. 6-7.

70. The original *Adalah* petition was submitted on May 5, 2002.

71. HCJ 3799/02 *Adalah*, para. 3.

72. *Id.* para. 4.

73. Geneva Convention IV, *supra* note 26, arts. 3, 8, 27, 28, 47, 51.

74. Additional Protocol I, *supra* note 1, art. 51.



Specifically, the petitioners argued that the Early Warning Procedure put the uninvolved civilian in real danger; that there was no way to ensure that the consent given by him was a true and free one; that regardless of the genuine nature of the consent, civilians could not waive their rights under IHL,<sup>75</sup> including the right not to be used for the military needs of the occupying army; that the Procedure violated the protected civilian’s dignity, as it forced him to be used against the side to which he belonged; and finally, that the Procedure violated the principle of proportionality, as the same objective could be reached by using a simple audio amplification.<sup>76</sup>

Responding to the petitioners, the IDF emphasized the benefits arising from the use of the Procedure. It argued that the Procedure increased the probability of a quiet and peaceful arrest, thereby greatly reducing the risk for the arresting forces as well as for the suspects, their families and neighbors. When the forces believe that a loudspeaker or any other alternative would be as effective as the Procedure, they must use these alternatives. But these alternatives are not always viable; the use of loudspeakers, for instance, runs the risk of drawing wide attention to the arrest from the adjacent streets, thus increasing the probability of escalation and the need to use force.<sup>77</sup> The IDF also argued that “in hundreds of . . . cases in which the procedure was used, no complaints whatsoever were made regarding its use.”<sup>78</sup> In only one exceptional incident was a resident killed (by the suspect who had mistakenly believed him to be an Israeli security official).<sup>79</sup> On the whole, according to the IDF, the Procedure was in fact perfectly compatible with the fundamental principles of IHL, which required that every precaution be taken during the planning and execution of a military operation to minimize collateral damage to innocent civilians.<sup>80</sup>

A panel of three justices unanimously accepted the petitioners’ arguments under international law and Israeli constitutional and administrative law. President Barak delivered the opinion, in which Vice President Cheshin and Justice Beinisch concurred. President Barak reiterated the IHL prohibition on using the civilian population for the military needs of the occupying army, and also the obligation to distance innocent civilians from the zone of hostilities.<sup>81</sup> It was therefore clearly unlawful to force a local resident to relay an early warning to a suspected person.

As for consenting residents, even though the law was less clear, in balancing the consideration for the lives of innocent civilians and the safety of the security forces on the one hand against the life and dignity of the consenting resident on the other hand,<sup>82</sup> President Barak found that the scales

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75. Geneva Convention IV states: “Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention . . . .” Geneva Convention IV, *supra* note 26, art. 8.

76. H CJ 3799/02 *Adalah*, paras. 13-15.

77. *Id.* para. 18.

78. *Id.* para. 19.

79. Press Release, B’Tselem, IDF is Responsible for Death of “Human Shield” (Aug. 14, 2002), [http://www.btselem.org/english/Press\\_Releases/20020814.asp](http://www.btselem.org/english/Press_Releases/20020814.asp).

80. H CJ 3799/02 *Adalah*, para. 17.

81. *Id.* para 24.

82. This balancing test was drawn from Barak’s own jurisprudence of Israeli constitutional and administrative law; it is unclear that IHL itself would accommodate such a balancing test. Amichai

tipped against the Procedure. He emphasized the legal prohibitions on using the civilian population for the military needs of the occupying army and on using local residents as human shields.<sup>83</sup> President Barak added that given the power disparity between the parties, there was never a way of telling whether consent was free or not.<sup>84</sup> President Barak also found that it could not be ensured in advance that the relaying of a warning would not in fact endanger the local resident: “The ability to properly estimate the existence of danger is difficult in combat conditions, and a procedure should not be based on the need to assume lack of danger . . . .”<sup>85</sup> Ultimately, President Barak concluded, the procedure “comes too close to the normative ‘nucleus’ of the forbidden, and is found in the relatively grey area (the penumbra) of the improper.”<sup>86</sup>

Vice President Cheshin opened his concurring decision with much agonizing:

The subject is a difficult one. Most difficult. So difficult is it, that a judge might ask himself why he chose the calling of the judiciary, and not of another profession, to be busy with. Woe is me, for I answer to my creator; woe is me, with my conflicting inclinations . . . . No matter which solution I choose, the time will come that I will regret my choice. Indeed, there is no clear legal rule to show us the way, and I shall decide according to my own way of legal reasoning.<sup>87</sup>

Vice President Cheshin expressed concern about the “temptation to slide” and the finding of justification to use this Procedure too early. He added that the element of routine erodes the sensitivity and caution that are required for the lawful performance of this Procedure. At the very end of his decision, Vice President Cheshin mentioned the 1999 HCJ decision on coercive interrogations, which, while deeming torture unlawful, nevertheless left some room for it under a post facto necessity defense for the interrogators: “Yet it is the *ex ante* and *ex post* formula, limited as it may be, which is likely to assist us, even if only partially.”<sup>88</sup> By this admission, Vice President Cheshin effectively opened the door to a post facto necessity exception to the general prohibition on conscripting civilians to the armed forces of the occupier.

The Court never addressed the question of whether a mixed concern for the wellbeing of Palestinian civilians and the safety of the Israeli security forces was a valid one, or whether the only valid concern could be for Palestinians. From the tone of the Court’s reasoning it might, in fact, seem that the former possibility troubled the Court—that the security forces would articulate their concern as one for the well-being of the Palestinian residents, while in fact they were concerned only or predominantly with their own safety.

The Israeli government later petitioned the HCJ requesting a further hearing, claiming that the full effect of President Barak’s decision would

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Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT’L CRIM. JUST. 310 (2007).

83. HCJ 3799/02 *Adalah*, para. 24.

84. *Id.* Justice Beinisch, in her concurring opinion, also stressed that both the consent and lack of danger requirements were simply unrealistic. *Id.* para. 5 (Beinisch, J., concurring).

85. *Id.* para. 24 (judgment).

86. *Id.* para. 25.

87. *Id.* para. 1 (Cheshin, Vice President, concurring).

88. *Id.* para. 8.

prohibit requesting civilians’ assistance in negotiating between wanted persons and the security forces,<sup>89</sup> helping intelligence operations, or even helping to serve humanitarian aid in a combat zone. The request was denied.<sup>90</sup>

According to *B’Tselem*, an Israeli human rights NGO, in the course of arrest operations carried out in the West Bank in 2007—that is, after the Early Warning Procedure had been abandoned for illegality—fifty Palestinians were killed, nineteen of whom were not the intended target of arrest.<sup>91</sup> Although it is impossible to assess how many of the nineteen could have been spared had the Early Warning Procedure been applied, it is conceivable that some might have been.

## B. *Torture*

A 2008 *New York Times* article on the CIA interrogation program told the story of Deuce Martinez, a CIA interrogator who was successful in extracting confessions and intelligence from captured al-Qaeda mastermind, Khalid Shaikh Mohammed. Martinez did not employ any violent means or threats against Mohammad, but instead managed to build a personal relationship with him. Before being interrogated by Martinez, Mohammed had been subjected to violence and harsh internment conditions, including a hundred instances of waterboarding over a period of two weeks, by other CIA agents. Scott Shane, the *New York Times* correspondent, accurately summed up the question:

Mr. Martinez’s success at building a rapport with the most ruthless of terrorists goes to the heart of the interrogation debate. Did it suggest that traditional methods alone might have obtained the same information or more? Or did Mr. Mohammed talk so expansively because he feared more of the brutal treatment he had already endured?<sup>92</sup>

### Torture under international law is

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>93</sup>

There is debate about what types of physical or mental abuse amount to torture, but there is agreement that at least some means that have been

89. As was the case when a group of Palestinian militants took refuge in the Church of Nativity in Bethlehem, and local priests served as mediators, going between the IDF forces laying siege and the besieged militants. See Moty Cristal, *Negotiating Under the Cross: The Story of the Forty Day Siege of the Church of Nativity*, 8 INT’L NEGOTIATION 549 (2003).

90. HCJFH 10739/05 Minister of Defense v. Adalah (Feb. 27, 2006), available at <http://www.adalah.org/features/humshields/diyun-nosaf-d.pdf> (translated from Hebrew to English by author).

91. B’Tselem, Use of Firearms: Data Report, <http://www.btselem.org/English/Firearms> (last visited Nov. 5, 2009).

92. Scott Shane, *Inside a 9/11 Mastermind’s Interrogation*, N.Y. TIMES, June 22, 2008, at A1.

93. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113.

employed by state agents cannot be regarded as anything but torture: brutal beating, sexual attacks and humiliations, burning with hot iron or cigarettes, electric shocking, biting or tearing by dogs, force-feeding human excrement and urine, or the injection of pain-inducing chemicals into the body.<sup>94</sup>

The prohibition on torture under international law is absolute. Article 2(2) of the Convention Against Torture specifically prohibits any derogation from it, under any and all circumstances.<sup>95</sup> Corresponding prohibitions on torture are found in the Fourth Geneva Convention (in relation to civilians) and in the Third Geneva Convention (in relation to POWs), as well as in the 1977 Additional Protocols. The prohibition on torture is considered *jus cogens*—a peremptory norm that cannot be overridden or derogated from by any other norm of international law.

Extensive literature has been dedicated to the origins of the prohibition on torture (as on some of the inherent value-contradictions the prohibition contains); the justification for accepting execution, but not torture; the justification for permitting the death of innocent civilians but not the torture of a person who is actively engaged in harming the innocent, sometimes in great numbers.<sup>96</sup> A deep moral aversion, a normative and aesthetic revulsion, as well as a number of institutional concerns (the type of which I address in the next Section), all work together to make the torturer an outcast of the normative international community.

Nevertheless, in the prolific debates on torture since 9/11, there seems to be some agreement (although by no means a consensus<sup>97</sup>) that under one unique circumstance—the “ticking bomb” scenario—torture may be justified if it is conducted for the sole purpose of obtaining information essential for stopping an imminent deadly attack and unavailable through other channels.<sup>98</sup> There also seems to be wide support, however, for the concern that this justifiable exception might be dangerously exploited and employed in numerous cases that are not true situations of “ticking bombs.” Indeed, these

94. Matthew Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, UNIVERSAL HUM. RTS., Oct.-Dec. 1979, at 25, 33-35.

95. The full text is: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Convention Against Torture, *supra* note 93, art. 2(2). The U.N. Committee Against Torture emphasized that countries (in that context, Israel) were “precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention.” Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Israel*, ¶ 258, U.N. Doc. A/52/44 (Sept. 10, 1997).

96. See, e.g., Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427 (2003).

97. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714-15 (2005) (submitting that even in a scenario of a nuclear “ticking-bomb,” torture would be unjustified). Jeff McMahan argues that even though torture may be morally justified under some circumstances, the rarity of those circumstances coupled by concerns for abuse in different circumstances warrant not recognizing any exception under the law. Jeff McMahan, *Torture, Morality, and Law*, 37 CASE W. RES. J. INT’L L. 241 (2006).

98. Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003); see also Alan Dershowitz, Opinion, *Democrats and Waterboarding*, WALL ST. J., Nov. 7, 2007, <http://www.opinionjournal.com/editorial/feature.html?id=110010832> (noting the statements of Bill Clinton and John McCain on the use of torture in a “ticking bomb” scenario).

fears were borne out with the revelation of the “torture memos” promulgated by Department of Justice legal advisers during the early years of the Bush Administration. The memos’ authorization of various harsh interrogation techniques, including simulated drowning and confinement with insects, extended the use of physical coercion well beyond the paradigmatic case of extreme necessity.<sup>99</sup>

Among those supporting a narrow legal exception for torture, debates arose as to the proper legal means for its allowance. Alan Dershowitz suggested empowering judges to issue torture warrants in the name of transparency and accountability.<sup>100</sup> Richard Posner, conversely, preferred to know that some torture was being practiced unofficially, without giving it the imprimatur of lawfulness.<sup>101</sup> Oren Gross argued for an “official disobedience” model, by which the prohibition on torture would be absolute but officials (and the general public) would depart from it in the necessary case and face the consequences.<sup>102</sup> Eric Posner and Adrian Vermeule rejected the “official disobedience” model and argued instead for *ex ante* regulation that would provide the right set of incentives for officials.<sup>103</sup> The Israeli HCJ ruled that a torturer may enjoy a *post facto* necessity justification that would protect him from criminal liability in the right case,<sup>104</sup> while others challenged the applicability of the necessity paradigm and argued that if at all, self-defense was a more accurate framework for thinking about this problem.<sup>105</sup> None of these suggestions would exonerate the torturing state or agent under IHL, and it is questionable whether a torturer could successfully invoke the existing justifications under the Rome Statute to escape criminal liability if on trial before the ICC.

The humanitarian necessity justification encounters several difficulties when one tries to apply it to the act of torture, as torture is conceptually different on several counts from the two other cases I discuss here. Most fundamentally, in the Early Warning Procedure case, a concern, however mixed, was demonstrated for the well-being of the enemy’s people. The same

99. See, e.g., Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1.

100. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 141, 158-63 (2002) [hereinafter DERSHOWITZ, WHY TERRORISM WORKS]; Alan M. Dershowitz, *Is It Necessary To Apply “Physical Pressure” to Terrorists—and To Lie About It?*, 23 ISR. L. REV. 192, 198 (1989) [hereinafter Dershowitz, *Is It Necessary*]. Sanford Levinson has also expressed support for this idea. Sanford Levinson, *The Debate on Torture*, DISSENT, Summer 2003, at 79, 86-88.

101. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291, 291-98 (Sanford Levinson ed., 2004); cf. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 124 (1978) (describing, but ultimately rejecting, the argument that debates about the permissibility of torture should not be discussed publicly).

102. Gross, *supra* note 15, at 1519-26.

103. Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 699-704 (2006).

104. HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel para. 40 (Sept. 6, 1999), reprinted in 38 I.L.M. 1471, 1486-88 (1999), available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf). Henry Shue also seems to accept the necessity defense as appropriate. See Shue, *supra* note 101, at 143.

105. McMahan, *supra* note 97, at 244 (supporting the self-defense justification); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 323 (1989) (supporting the self-defense justification); Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE, *supra* note 101, at 281 (challenging the necessity paradigm).

may be said, to a different degree, about the singular case of the atomic bomb on Hiroshima. The classic case of torture of a suspected terrorist or POW, conversely, is intended to benefit the torturer's own people, be they military or civilian.

Another fundamental difference between the case of torture and the other cases discussed here has to do with the identity of the victim. The Early Warning Procedure concerns an uninvolved civilian who is asked to assist the occupying forces. In Hiroshima and Nagasaki, hundreds of thousands of innocent civilians were targeted. When scholars address the possibility of torturing for informational purposes, the assumption is that the torture is inflicted not on an innocent civilian, but rather on someone who possesses the information due to a direct involvement in hostile actions. Almost no one approves of the idea of torturing the child of a terrorist in order to gain leverage over the child's parent,<sup>106</sup> and only some wrestle with the possibility of torturing a terrorist's wife, who is otherwise innocent but happens to possess the information necessary to avert an imminent attack.<sup>107</sup> In other words, the torture under consideration is that of a person who is to some degree "culpable," and this culpability is what seems to be a key argument for those willing to uphold torture under some circumstances.<sup>108</sup> In this sense, the torture of a terrorist resembles more the assassination of a rogue leader, itself illegal under international law. In fact, argues Miriam Gur-Arye, the emphasis on the culpability of the torture victim is why any justification of torture is more accurately made under a self-defense paradigm than a necessity one, as the focus of any justifiable act of torture would be to protect citizens from an attack.<sup>109</sup>

Further agreement seems to instruct that while torture may be narrowly legitimate for interrogational purposes, it is never legitimate for any other purpose, as when used to make a person act or refrain from acting in a certain way.<sup>110</sup>

Still, if torture can, however narrowly, be justified for the obtainment of otherwise unavailable information that would save the lives of innocent people, why would it be *unjustified*, if it leads to the same result—the saving of innocent people—by different means? Consider the hypothetical of torturing Saddam Hussein's two sons (who were heavily involved in his dark regime, and notorious torturers themselves), or his wife (who was not), as a

106. Some came very close to it: CIA expert Ron Suskind described how the CIA kidnapped the two young children, aged seven and nine, of al-Qaeda senior operative, Khalid Shaikh Mohammed, and threatened Mohammed with grievous injury to his children if he did not cooperate. Khalid Shaikh Mohammed seemed to have been unimpressed by the threat. *See The President Knows More Than He Lets On: Interview with Terror Expert Ron Suskind*, SPIEGEL ONLINE, Oct. 27, 2006, <http://www.spiegel.de/international/0,1518,445117,00.html>. And John Yoo reportedly argued that if the President deemed it was necessary to crush the testicles of a child of a suspect in custody, then there was no law to stop him. Philip Watts, *John Yoo—Presidential Powers Extend to Ordering Torture of Suspect's Child*, REVOLUTION, Dec. 30, 2005, <http://revcom.us/a/028/john-yoo.html>.

107. *See* Moore, *supra* note 105, at 292, 324.

108. *See* Tibor R. Machan, *Exploring Extreme Violence (Torture)*, 21 J. SOC. PHIL. 92, 94 (1990) (arguing that torture might be justified only when "some measure of moral guilt is present or highly probable on the part of the party about to experience the violence").

109. Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, in TORTURE, *supra* note 101, at 183, 191-95.

110. *See* Shue, *supra* note 101, at 141.

means of inducing Hussein to withdraw Iraqi troops from Kuwait in the fall of 1990, after exhausting sanctions and other less violent alternatives. The overriding impetus for such a deed would be protecting the lives of *Iraqi and Kuwaiti* civilians and combatants, not just coalition forces. International law would absolutely prohibit such a course of action, while allowing Operation Desert Storm to continue under the authorization of Security Council Resolution 678, inflicting thousands of Iraqi casualties.

It is interesting to note that anecdotal evidence (as it appears in scholarship or political statements) shows that more people are willing to publicly justify the bombings of Hiroshima or Nagasaki than the torture of someone other than a suspected terrorist in a ticking-bomb scenario or any torture conducted for noninformational purposes.<sup>111</sup> This means that for some deep-seated, opaque reason, torture is perceived as an even greater outrage against an absolute moral imperative than the intentional killing of a great number of innocent people. In most people’s moral intuition, torture is perceived as an even more dehumanizing act than killing; perhaps because killing is a common, accepted reality on the battlefield and torture is not or should not be, even though injuries suffered on the battlefield may carry far more devastating long-term physical and mental effects than those inflicted by any kind of torture. It might also be because even more than the act of killing, torture implies using a person as a means rather than an end. Torture is a more personal act, an outrage performed on a known, identified person who is in our hands, not the impersonal act of dropping a bomb on unnamed victims. This last point is related to a concern that torture is harmful not only to the victim but also to the perpetrator: torture debases, soils the very soul of the torturer, whereas dropping a bomb is a “clean,” necessary, banal act of war.<sup>112</sup>

It is also possible, however, that the reason for some, albeit limited approval for Hiroshima but not for torture has less to do with any general consistent moral position and more with the post facto practical calculation: Hiroshima worked, while the empirical evidence on the effectiveness of torture is, at best, mixed.<sup>113</sup>

Later in the Article, I identify possible reasons for prohibiting torture altogether. To those who view the absolute objection to torture as a moral imperative, no humanitarian benefit would ever warrant the use of such means and no humanitarian necessity justification could ever exempt the torturer. The humanitarian necessity justification is essentially a utilitarian framework. It could apply to cases of torture only if we were willing to examine such cases through a utilitarian prism, assessing their practical feasibility, expected value, direct and indirect costs, and foreseen or unforeseen risks. If we do, it is

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111. For a recent collection of essays refuting what the writers call the “Hiroshima revisionist” view of history—namely, that the atomic bombings were unnecessary—see generally *HIROSHIMA IN HISTORY: THE MYTHS OF REVISIONISM* (Robert James Maddox ed., 2007).

112. See David Sussman, *What’s Wrong with Torture?*, 33 *PHIL. & PUB. AFF.* 1, 13-14 (2005) (discussing the harms of war, which we accept as a given, against the harms of torture, to which we object).

113. On the empirics of torture’s effectiveness, see Jeannine Bell, *Behind this Mortal Bone: The (In)Effectiveness of Torture*, 83 *IND. L.J.* 339 (2008). See also Anne Applebaum, *The Torture Myth*, *WASH. POST*, Jan. 12, 2005, at A21 (examining some of the “overwhelmingly negative evidence” regarding the usefulness of torture for extracting accurate information).

not impossible to conceive of a rare hypothetical where torture would be justifiable provided its humanitarian benefit could be proved. I later explain why it would be difficult, if not impossible, to prove such benefit, but the theoretical possibility remains.

In contrast to more common accounts of torture and necessity, however, I argue that it is not the identity of the victim of torture (guilty or innocent) nor the immediate purpose of the torture (interrogational or noninterrogational), but the identity of the potential victims of the attack we seek to avert that should form our judgment of the permissibility of torture in any particular case.

### C. *Hiroshima and Nagasaki*

Around 8:15 a.m. on August 6, 1945, a B-29 bomber piloted by Colonel Tibbetts, U.S. Army Air Forces, dropped a uranium bomb on Hiroshima under the orders of U.S. President H.S. Truman, and around 11:02 a.m. on the 9th of the same month, a B-29 bomber piloted by Major Sweeney, U.S. Army Air Forces, dropped a plutonium bomb on Nagasaki under the orders of U.S. President Truman. These bombs . . . exploded in the air. A furious bomb-shell blast with a flash, and both in Hiroshima and in Nagasaki almost all buildings in the cities collapsed. Simultaneously, fire broke out everywhere; and all people who were within a radius of some four kilometers of the epicenter were killed in an instant without distinction of age or sex. A large number of people elsewhere were burned on the skin by the flash, and others, bathed with the radiant rays, suffered from so-called atomic bomb injury. The number of killed and wounded, to say the least, amounted to more than 70,000 and 50,000 respectively, in Hiroshima, and to more than 20,000 and 40,000 respectively, in Nagasaki.

....  
We must say that the atomic bomb is really cruel weapon [sic].<sup>114</sup>

In December 1963, the District Court of Tokyo delivered its decision in a suit filed by five individuals against the Japanese government. The plaintiffs and their relatives suffered direct injuries from the bombings. They were barred from suing the U.S. government for various reasons, including the terms of the San Francisco Treaty of Peace,<sup>115</sup> and therefore named their own government as the respondent. The district court found that the bombings were in violation of the laws of war at the time, especially the prohibitions on the use of poisonous weapons and on conducting indiscriminate attacks but ruled that the plaintiffs could not recover damages from the Japanese government.<sup>116</sup> Neither side appealed the decision.

The protracted devastation that was brought about by the nuclear bombings of Hiroshima and Nagasaki has long stood as a symbol for everything heinous in war. The historical debate over the morality, legitimacy, and necessity of the bombings is still as contentious today as global nuclear politics. As recently as June 2007, it sparked a political flare-up when Japan's

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114. *Shimoda v. State*, 355 HANREI JIHŌ 17 (Tokyo Dist. Ct. Dec. 7, 1963), translation available at <http://www.icrc.org/ihl-nat.nsf/WebCASE!OpenView&Start=1&Count=300&Expand=23>. For a thorough review and analysis of the *Shimoda* judgment, see Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965).

115. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

116. It is interesting to note, however, that several officials in the Japanese Foreign Ministry questioned the court's finding that the atomic bombing was illegal, on grounds that there was no directly applicable positive rule of international law that would have prohibited the act. 2 ANTHONY A. D'AMATO, INTERNATIONAL LAW STUDIES 374-75 (1997).



First Defense Minister Fumio Kyuma declared that the nuclear attacks were an inevitable way to end World War II. Japan’s then-Prime Minister, Shinzo Abe, apologized to Hiroshima survivors over Kyuma’s remark, and Kyuma himself resigned shortly afterwards. The instincts on both sides of this debate are very strong. The strict mathematical calculation of the number of lives spared by the bombings leads to the perception of the bombings as inevitable. On the other hand, there is a deep revulsion against the callousness of a strict mathematical calculation that leads to the killing and maiming of tens of thousands of civilians, and three days later, of tens of thousands of civilians more.

Estimates of the casualties inflicted by the bombings vary greatly—partly due to the lingering radiation and its long-term effects—and range from one hundred thirty thousand to more than three hundred fifty thousand. The plaintiffs in *Shimoda* listed two hundred sixty thousand killed in Hiroshima and 73,884 in Nagasaki, but the court preferred, instead, the Japanese government’s more moderate estimates. There is no disagreement that the vast majority of casualties were civilians.

Present-day IHL prohibits the intentional targeting of civilians, indiscriminate attacks on mixed civilian-military targets that result in disproportionate harm to civilians, and the use of poisonous weapons.<sup>117</sup> Still, in an ambiguous and convoluted advisory opinion rendered in 1996, the International Court of Justice stopped short of declaring the use of nuclear weapons illegal at all times. Instead, it left the door open to the use of atom bombs by a state facing destruction if that state deemed it essential for its self-preservation.<sup>118</sup> Debates continue as to whether the 1945 attacks would have been considered lawful then, or today.<sup>119</sup> In any case, much less debate surrounds the carpet bombings of Dresden or Tokyo which resulted in even more civilian casualties than those suffered in Hiroshima and Nagasaki.<sup>120</sup>

117. Additional Protocol I, *supra* note 1, art. 51; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *supra* note 28; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *supra* note 28.

118. The question of the legality of the use of nuclear weapons was addressed by the ICJ in its advisory opinion on the legality of the use of nuclear weapons. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263 (July 8).

119. John Bolton raised the possibility of being found guilty under the Rome Statute for the atomic bombings as a justification for not joining the ICC. John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 L. & CONTEMP. PROBS. 167, 170 (2001).

120. Although as a general matter, the carpet-bombing of cities is clearly unlawful today, Francisco Javier Guisández Gómez argues that

[i]n examining [the bombings of cities in World War II] in the light of international humanitarian law, it should be borne in mind that during the Second World War there was no agreement, treaty, convention or any other instrument governing the protection of the civilian population or civilian property, as the Conventions then in force dealt only with the protection of the wounded and the sick on the battlefield and in naval warfare, hospital ships, the laws and customs of war and the protection of prisoners of war.

Francisco Javier Guisández Gómez, *The Law of Air Warfare*, 323 INT’L REV. RED CROSS 347, 360 (1998). Note that upon ratifying Additional Protocol I, the United Kingdom added a reservation with regard to reprisals against civilian targets, which might, under some circumstances, excuse the deliberate retaliatory attack on civilians. *See Ratification of the Additional Protocols by the United Kingdom of Great Britain and Northern Ireland*, 322 INT’L REV. RED CROSS 186, 189-90 (1998).

The planned alternative to the atomic bombs was Operation Downfall<sup>121</sup>—a land invasion of Japan that the American military would have pursued had the bombs not been dropped and Japan not surrendered. Such a land invasion would have been deemed lawful (provided the invading forces observed the laws of war throughout the offensive). In a memorandum solicited by the Secretary of War on estimated casualties in an invasion of Japan, notable physicist W.B. Shockley predicted:

[T]he Japanese dead and ineffectives at the time of defeat will exceed the corresponding number for the Germans. In other words, we shall probably have to kill at least 5 to 10 million Japanese. This might cost us between 1.7 and 4 million casualties including 400,000 to 800,000 killed.<sup>122</sup>

An American land invasion of Okinawa a few months earlier, between March and June of 1945, left over one hundred fifty thousand Japanese civilians, about half of the civilian population of Okinawa, dead.<sup>123</sup> The Emperor remained adamant in his refusal to surrender.

Note that there may have been a host of other, less destructive alternatives to the two bombs as well as to Operation Downfall. These ranged from a demonstration of an explosion somewhere in the desert, to an early warning to the inhabitants of Hiroshima calling on them to evacuate, to even peace negotiations to end the war. Deliberating the feasibility and workability of these options exceeds the scope of this work, and I bracket them as possible but theoretical alternatives that at the time had been debated to a lesser extent.<sup>124</sup>

In addition, other than winning the war in the Pacific, recent studies have argued that the growing suspicion within the Truman Administration toward the Soviet Union and the concern about a Soviet bomb was a strong motivator in dropping the atomic bombs on Japan and demonstrating American supremacy, possibly as leverage for inducing Moscow's acquiescence in postwar American objectives.<sup>125</sup> Indeed, there is considerable

121. For a detailed description and analysis of Operation Downfall, see REPORTS OF GENERAL MACARTHUR: THE CAMPAIGNS OF MACARTHUR IN THE PACIFIC 395-430 (facsimile reprint 1994) (1966).

122. Memorandum from W.B. Shockley, Expert Consultant, Office of the Sec'y of War, to Edward L. Bowles on the Estimated Casualties in an Invasion of Japan (July 21, 1945), reprinted in MICHAEL KORT, THE COLUMBIA GUIDE TO HIROSHIMA AND THE BOMB 223 (2007). Critics claim these numbers were excessively high and contrived by those who supported the bombings as an alternative to the invasion. See Rufus E. Miles, Jr., *Hiroshima: The Strange Myth of Half a Million American Lives Saved*, INT'L SECURITY, Autumn 1985, at 121.

123. HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN 485 (2000). Okinawa casualties also totaled more than 12,000 American soldiers killed or missing, 38,000 wounded and more than 107,000 Japanese and Okinawan conscripts killed. See *id.*; Hanson W. Baldwin, *America at War: Victory in the Pacific*, FOREIGN AFF., Oct. 1945, at 26, 29. Thousands of soldiers and commanders died in mass suicides encouraged by the Japanese military. See Norimitsu Onishi, *Japan Rewrites History, but Can't Erase Memories*, INT'L HERALD TRIB., Oct. 9, 2007, at 2.

124. See *President Truman Did Not Understand*, U.S. NEWS & WORLD REP., Aug. 15, 1960, at 68 (providing a transcript of an interview with physicist Leo Szilard, who was involved in the Manhattan project but then opposed the use of the bomb in Japan).

125. See, e.g., GAR ALPEROVITZ, THE DECISION TO USE THE BOMB AND THE ARCHITECTURE OF AN AMERICAN MYTH 147 (1995); ROBERT JAMES MADDOX, WEAPONS FOR VICTORY: THE HIROSHIMA DECISION FIFTY YEARS LATER (1995).

evidence that the Soviets themselves viewed this as the primary American motivation for using the atomic bomb.<sup>126</sup>

Discussing the atomic bombings of Hiroshima and Nagasaki in the context of a “humanitarian justification” may very well appear an oxymoronic undertaking. Any nuclear explosion, even in an empty space, touches on humanity’s most ancient fears of Armageddon and the end of days. The use of nuclear weapons—extreme, indiscriminate, horrifically destructive weapons—seems to stand in direct opposition to the most fundamental moral principles, not only of the laws of war but of human discrimination and judgment essential to our ideas of a “civilized” or even “acceptable” war. It is perhaps for this reason that the attacks on Hiroshima and Nagasaki have attracted more attention and debate than the carpet bombings of Tokyo or the siege on Leningrad, both of which caused more civilian casualties than those brought upon by the nuclear attacks,<sup>127</sup> indeed, more than any other wartime act in history. Many reasons support the exclusion of nuclear attacks from the scope of what is considered human: the magnitude of annihilation wreaked by such small physical effort over less than a minute; the defenselessness of those attacked; the inability of the international community effectively to frustrate a willing party from inflicting a nuclear holocaust; and the concern that a repetition of Hiroshima and Nagasaki—or worse—would mark the beginning of the end of the world. Neither the destruction brought upon Tokyo or Dresden nor the siege on Leningrad was enough to amount to such intense and timeless symbolism.

Certainly, the idea that the devastation wreaked upon the two Japanese cities was a good thing, or even a necessary evil, is hard to digest. To claim that it was requires us to engage in a gruesome and at least half-hypothetical body count—to compare the actual devastation to the potential one of Operation Downfall and ignore what we know of individual suffering. Such an exercise requires us to accept the objectification—the instrumentalization—of people, a treatment of humans as means to an end, contrary to any humane moral instinct.

But the taboo surrounding any mathematical calculation of deliberate killings necessarily detracts our attention from the would-be casualties of Operation Downfall. Real victims are the only ones we can see and count. Their tragedy is visible and certain. Imaginary victims are, by definition, imaginary. The absolute rules of IHL exclude calculations that would allow us to prefer the welfare of would-be victims. Consideration for the latter would require us to accept, to some extent, the legitimacy of a deliberate infliction of

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126. Soviet Foreign Minister Viacheslav Molotov allegedly thought “that the bomb dropped on Hiroshima was aimed not at Japan, but . . . at the Soviet Union”; several prominent Soviet physicists were apparently of the same opinion. Pub. Broad. Serv., Vladislav Zubok on: The Soviet Reaction to Hiroshima, *available at* <http://www.pbs.org/wgbh/amex/bomb/filmmore/reference/interview/zubok1.html> (last visited Nov. 15, 2009) (transcribing a documentary called *Race for the Superbomb*, filmed in 1999).

127. On a single day, March 10, 1945, three hundred B-29s dropped incendiary bombs (Operation Meetinghouse), destroying twenty-five percent of Tokyo and killing between 80,000 and 100,000 civilians. *See* JAMES CARROLL, *A HOUSE OF WAR* 94-95 (2007); Robert A. Pape, *Why Japan Surrendered*, *INT’L SECURITY*, Autumn 1993, at 164. One estimate put the number of civilians perishing in the course of the siege of Leningrad at around 1.2 million. *See* LISA A. KIRSCHENBAUM, *THE LEGACY OF THE SIEGE OF LENINGRAD, 1941-1995*, at 122 (2006).

harm on innocent people in order to avoid the infliction—deliberate or foreseen—of harm on still many more. We would have to accept, to some extent, the instrumentalization of innocent people.

If we were to attempt to construct a lesser-evil justification for the attacks more concretely, it might run something like this: more Japanese civilians would have lost their lives in an American land invasion into Japan—a lawful course of action in the midst of an armed conflict (and provided other laws of war were also observed)—than in the nuclear bombings. If this is so, then breaking the laws of war—that is, intentionally targeting civilians—was likely to result in fewer Japanese civilian casualties than following the laws of war; and it should therefore be upheld as lawful under a humanitarian necessity justification.<sup>128</sup> This calculation most certainly works if we add into it the lives of Japanese soldiers, even without taking into account American soldiers. This type of justification resonates in the judgment of Philippine justice Delfin Jaranilla, member of the Tokyo Tribunal:

If a means is justified by an end, the use of the atomic bomb was justified for it brought Japan to her knees and ended the horrible war. If the war had gone on longer, without the use of the atomic bomb, how many more thousands and thousands of helpless men, women and children would have needlessly died and suffered . . . ?<sup>129</sup>

Whether or not a concern for Japanese lives—as opposed to a strict military advantage and the sparing of American lives—was genuinely counted among the motivations of the U.S. decisionmakers is under much debate and varies in different narratives. Most historical reports of the deliberations in the U.S. military and political quarters over Operation Downfall document the primary concern for American lives.<sup>130</sup> But there is anecdotal evidence suggesting that the decisionmakers were not oblivious to the effect of the invasion and its alternatives on the Japanese. Secretary of Defense Stimson, in an article in *Harper's Magazine* in February 1947, claimed that:

I felt that to extract a genuine surrender from the Emperor and his military advisers, they must be administered a tremendous shock which would carry convincing proof of our power to destroy the Empire. Such an effective shock would save many times the number of lives, both American and Japanese, that it would cost.<sup>131</sup>

In the same article, he added:

The decision to use the atomic bomb was a decision that brought death to over a hundred thousand Japanese. No explanation can change that fact and I do not wish to gloss it over. But this deliberate, premeditated destruction was our least abhorrent choice. The

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128. This exact argument has been made by R. John Pritchard. See R. John Pritchard, *Truman on Trial: Not Guilty*, HIST. NEWS NETWORK, Aug. 3, 2001, <http://hnn.us/articles/176.html> (arguing that in finding Truman not guilty, “[t]he decisive point that does tip the balance for me is that these terrible deeds which led to what has proved to be a durable peace were efficacious in doing so at far less cost in human suffering on BOTH sides than would have been any policy that would not have involved conduct generally prohibited in international law,” thus suggesting that the atomic bombings were not illegal).

129. JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 473 (1999).

130. See, e.g., DENNIS D. WAINSTOCK, *THE DECISION TO DROP THE ATOMIC BOMB* 67 (1996).

131. Henry L. Stimson, *The Decision To Use the Atomic Bomb*, HARPER'S MAG., Feb. 1947, at 97, 101.

destruction of Hiroshima and Nagasaki put an end to the Japanese war. It stopped the fire raids, and the strangling blockade; it ended the ghastly specter of a clash of great land armies.<sup>132</sup>

In a similar tone, then-Secretary of State, James Francis Byrnes, claimed: “In these two raids there were many casualties but not nearly so many as there would have been had our air force continued to drop incendiary bombs on Japan’s cities.”<sup>133</sup>

President Truman himself, in a letter to Senator Richard B. Russell of August 9, 1945 (after the bombing of Hiroshima), stated:

I know that Japan is a terribly cruel and uncivilized nation in warfare but I can’t bring myself to believe that, because they are beasts, we should ourselves act in the same manner. . . . My object is to save as many American lives as possible but I also have a humane feeling for the women and children in Japan.<sup>134</sup>

Oddly, from an entry in his personal diary, it seems that President Truman believed Hiroshima to be a military target:

This weapon is to be used against Japan between now and August 10th. I have told the Sec. of War, Mr. Stimson, to use it so that military objectives and soldiers and sailors are the target and not women and children. Even if the Japs are savages, ruthless, merciless and fanatic, we as the leader of the world for the common welfare cannot drop this terrible bomb on the old capital or the new. He & I are in accord. The target will be a purely military one and we will issue a warning statement asking the Japs to surrender and save lives. I’m sure they will not do that, but we will have given them the chance.<sup>135</sup>

And as a matter of historical anecdote, the B-29 Superfortress responsible for the photographing mission in the attack on Hiroshima was named by its senders *Necessary Evil*.<sup>136</sup>

With hindsight, however, historian J. Samuel Walker argues that:

The sparing of forty-six thousand or twenty thousand or many fewer lives might well have provided ample justification for using the bomb, but Truman and other high-level officials did not choose to make a case on those grounds. Indeed, as James G. Hershberg and Bernstein demonstrated, former government authorities consciously and artfully constructed the history of the decision to discourage questions about it.<sup>137</sup>

Moreover, reports of the target-selection discussions reveal the reasons for choosing Hiroshima, claiming it was a key military staging area with

132. *Id.* at 107.

133. James Francis Byrnes, *Control of Atomic Energy*, in *SPEAKING FRANKLY* 257, 264 (1947). Obviously, relying on the number of casualties that would have been incurred through a sustained campaign of incendiary bombings of Japanese cities is invalid for our present discussion of a humanitarian justification, as such a campaign would clearly be unlawful today under IHL.

134. Letter from President Harry S. Truman to Senator Richard B. Russell (Aug. 9, 1945), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents/pdfs/9.pdf](http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/pdfs/9.pdf).

135. *OFF THE RECORD: THE PRIVATE PAPERS OF HARRY S. TRUMAN* 55-56 (Robert H. Ferrell ed., 1980).

136. Dennis McLellan, *George Marquardt, 84; Pilot of Plane Flying With Enola Gay on Mission To Bomb Hiroshima*, *L.A. TIMES*, Aug. 23, 2003, at B21.

137. J. Samuel Walker, *The Decision To Use the Bomb: A Historiographical Update*, in *HIROSHIMA IN HISTORY AND MEMORY* 11, 23 (Michael J. Hogan ed., 1996).

geographical features that favored use of an atomic weapon over conventional incendiary bombs.<sup>138</sup>

The options of dropping the bomb on the Emperor's palace or on strict "military targets" were debated and rejected for lack of sufficient strategic effect.<sup>139</sup> And the Official Bombing Order of July 25, 1945, made no mention of aiming at military targets or of attempting to avoid civilian casualties.<sup>140</sup>

A key question with regard to the true motivations behind the decision to use the bomb is why Nagasaki was bombed only three days after Hiroshima. On August 9, President Truman made a radio public address, stating the following:

The world will note that the first atomic bomb was dropped on Hiroshima, a military base. That was because we wished in this first attack to avoid, insofar as possible, the killing of civilians. But that attack is only a warning of things to come. If Japan does not surrender, bombs will have to be dropped on her war industries and, unfortunately, thousands of civilian lives will be lost. I urge Japanese civilians to leave industrial cities immediately, and save themselves from destruction.<sup>141</sup>

President Truman delivered his speech from the White House at 10 p.m. Eastern Standard Time. By then, a second bomb had already been dropped on Nagasaki.

There are some indications that the three-day delay was not intended to give the Emperor time to consider his surrender, but was simply the time needed to gather the additional amounts of plutonium necessary for the second bomb and the next good weather break after August 6.<sup>142</sup> Some commentators, however, claim that radio messages and leaflets dropped by American planes after the first bombing, warning of additional attacks, were ignored by the Japanese government, which remained adamant in its refusal to accept the Potsdam conditions for surrender.<sup>143</sup> It was only after hearing about the second bomb on Nagasaki that Emperor Hirohito gave up demands for a conditional surrender, with the exception of retaining the prerogatives of His Majesty as a sovereign ruler.

It is thus extremely difficult to assess whether anything like the humanitarian justification I suggest could in fact be applied in retrospect to Hiroshima and Nagasaki. Contradictory data and interpretations require us to choose between various estimates of probable outcomes of different courses

138. See Memorandum from Major J. A. Derry & Dr. N.F. Ramsey to Major Gen. L.R. Groves (May 12, 1945), available at <http://www.dannen.com/decision/targets.html>.

139. *Id.*

140. Gen. Thos. T. Handy, Official Bombing Order (July 25, 1945), available at <http://www.dannen.com/decision/handy.html>.

141. Radio Report to the American People on the Potsdam Conference, 1 PUB. PAPERS 203, 212 (Aug. 9, 1945).

142. The Official Bombing Order of July 25, 1945, stipulated that the Air Force shall "deliver its first special bomb as soon as weather will permit visual bombing after about 3 August 1945 . . . . Additional bombs will be delivered on the above targets as soon as made ready by the project staff." Handy, *supra* note 140; see also Office of History & Heritage Resources, U.S. Dep't of Energy, The Atomic Bombing of Nagasaki, <http://www.cfo.doe.gov/me70/manhattan/nagasaki.htm> (last visited Nov. 30, 2009).

143. See Hubertus Hoffman, *Hiroshima: Hubertus Hoffmann Meets the Only U.S. Officer on Both A-Missions and One of His Victims*, WORLD SECURITY NETWORK, Nov. 2, 2007, [http://www.worldsecuritynetwork.com/showArticle3.cfm?article\\_id=15045](http://www.worldsecuritynetwork.com/showArticle3.cfm?article_id=15045).

of action. Indeed, the inherent difficulty in any assessment of this kind may very well be an arguable cause for excluding such calculations from the battlefield, a point to which I return in the following Sections. The United States knew neither the consequences of a land invasion nor the consequences of an atomic explosion. Before the first nuclear test in New Mexico, scientists took bets among them on the effects of the bomb, ranging from zero to the destruction of New Mexico.<sup>144</sup> Some even predicted the incineration of Planet Earth altogether (and were still willing to go through with the experiment!).<sup>145</sup> No one knew for sure what the weapon might actually do to a city or a country.

Even though these developments could not offer definitive support for the view that the bombings were indeed a lesser evil, it is interesting—even surprising—to note that in the *Shimoda* case, the Japanese government was ready to acknowledge that the bombings hastened the end of the war, thereby reducing the number of casualties on both sides and achieving the belligerent objective of unconditional surrender. In that case, the Japanese government essentially adopted the official U.S. justification for the bombings, claiming that “with the atomic bombing of Hiroshima and Nagasaki, *as a direct result*, Japan ceased further resistance and accepted the Potsdam Declaration.”<sup>146</sup>

For all their immediate cruelty, it is highly possible that any demonstrated willingness to justify the atomic attacks on the two Japanese cities stems from their view as *sui generis*, highly contingent on the historical and political circumstances existing at their time. Nonetheless, they present an extreme case of a more general dilemma: could there ever be circumstances in which the deliberate killing of civilians, in violation of IHL, should be upheld as morally and legally justified? The current laws of war exclude this possibility, preferring, instead, an absolutist prohibition on murder. And yet, the lack of consensus around the condemnation of the bombing speaks to a broader intuition that perhaps the laws of war should make room for such cases, even if the room allowed is so narrow that ultimately it would preclude the future use of nuclear weapons altogether.

#### IV. COMPARING DOMESTIC NECESSITY AND HUMANITARIAN NECESSITY

A close analogy to the humanitarian necessity paradigm in IHL may be found in the necessity defense in domestic criminal law, which offers exemption from criminal liability in exceptional cases where violating the law caused a lesser harm than following it would have. As the following Section demonstrates, the analogy is an imperfect one; and while it is useful for comparison’s sake, the domestic defense cannot be transposed onto the international level without important modifications.

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144. Office of History & Heritage Resources, U.S. Dep’t of Energy, The Trinity Test, <http://www.cfo.doe.gov/me70/manhattan/trinity.htm> (last visited Nov. 30, 2009).

145. The Nobel Prize-winning physicist Enrico Fermi offered to make a wager as to “whether or not the bomb would ignite the atmosphere, and if so, whether it would merely destroy New Mexico or destroy the world.” *Id.*

146. Falk, *supra* note 114, at 765 (quoting *Shimoda v. State*, 355 HANREI JIHŌ 17 (Tokyo Dist. Ct. Dec. 7, 1963), *translation available at* <http://www.icrc.org/ihl-nat.nsf/WebCASE!OpenView&Start=1&Count=300&Expand=23>).

### A. *The Necessity Defense in Criminal Law*

In his treatise on defenses in criminal law, Paul Robinson refers to necessity as “the lesser evils defense,” and states that it “*always* involves a claim that *application* of the law defining the offense *in the particular situation* would be inadvisable or even immoral.”<sup>147</sup>

The concept of necessity is well recognized in both common and civil law traditions,<sup>148</sup> although there are important variances in its promulgation and application. In some traditions, such as English common law, necessity can never provide a defense to intentional homicide; in others, such as France or Israel, the defense theoretically can be applied to any crime.<sup>149</sup> Jurists also differ on whether necessity is better classified as an excuse or as a justification. In Canada, for example, necessity is considered an excuse, while the German penal code in fact includes two variations of necessity, one an excuse and the other a justification.<sup>150</sup> Under the law of some U.S. states, it is considered a justification—a classification that carries the normative message that society does not only forgive the offender in the particular case, but actually believes her actions are warranted.

In what follows, I offer an overview of the formal conditions of the necessity justification in U.S. law, leaving aside prosecutorial discretion or pardoning power, both of which affect how society actually treats necessity justifications in practice. As this overview makes clear, the domestic paradigm of necessity offers a much narrower exemption from criminal culpability than the lesser-evil justification that is the subject of my study here.

Although there are important variations in the promulgation of the necessity defense among various jurisdictions—indeed, only nineteen U.S. states formally recognize the necessity justification,<sup>151</sup> it is nonetheless possible to sum up its components as follows: (1) the defendant was faced with a choice of evils and chose the lesser evil; (2) the defendant acted to prevent imminent harm; (3) the defendant reasonably anticipated a causal connection between his actions and preventing the harm; (4) there were no legal alternatives by which to avoid the harm;<sup>152</sup> (5) a legislative purpose to exclude the justification does not plainly appear; and (6) the situation that

147. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 53 (1984); *see also* MODEL PENAL CODE § 3.02 (1985).

148. *See* CRIMES AND PUNISHMENTS, *supra* note 16, at 141-42; Johnstone, *supra* note 8, at 349.

149. For England, see C.M.V. CLARKSON, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2005). Note, however, that there may be a very narrow exception for medical necessity. For France, see CODE PÉNAL [C. PÉN.] art. 122-7; and CATHERINE ELLIOT, FRENCH CRIMINAL LAW 114 (2001). For Israel, see PENAL LAW § 34k.

150. For Canada, see *Perka v. The Queen*, [1984] 2 S.C.R. 232, 259. For Germany, see Strafgesetzbuch [StGB] [Penal Code] §§ 34, 35. In Israel, necessity is a justification; on the implications of necessity as a justification or excuse in the case of torture, see Mordechai Kremnitzer & Re'em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509 (2000).

151. Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 244-46 (2007).

152. Requirements 2 through 4 are not explicit in the Model Penal Code but are part of the jurisprudence on necessity. *See, e.g.*, 720 ILL. COMP. STAT. 5/7-13 (1993).



necessitated the choice of evils was not caused by the defendant’s own negligence or recklessness.<sup>153</sup>

In some articulations of necessity, the harm prevented has to be “significant,” and the means used to prevent it not disproportionate in relation to it.<sup>154</sup>

The necessity justification is thus an act-utilitarian framework,<sup>155</sup> applied within the conditions stipulated by law. Its contours would exclude a premeditated violation of the law in the name of a greater good, where the danger is not imminent and where there were obvious (and mandated) legal alternatives that could be pursued. This latter type of behavior is more commonly thought of as vigilantism.

Moreover, although some jurisdictions recognize the validity in principle of a plea of necessity even in cases of intentional homicide, rarely is this plea successful in practice. Ever since the landmark U.K. case of *Regina v. Dudley & Stephens*,<sup>156</sup> courts and juries have been hesitant to believe that the claim of necessity is an honest one, that the defendant truly had no alternative, and that the killing of an innocent human being was, in fact, “necessary.” Usually, the only justification accepted for intentional homicide is in the context of self-defense, where the culpability of the victim, rather than his or her innocence, is a key consideration.

Although Robinson states that this hesitation is consistent with Kantian notions that value innocent human life as an absolute that cannot be sacrificed, even for the purpose of saving a greater number of lives,<sup>157</sup> the commentary to the Model Penal Code appears to permit the net saving of lives.<sup>158</sup> Robinson himself acknowledges that a greater number of potential victims would make a stronger case for killing an innocent individual,<sup>159</sup> ultimately leaving it to different societies to make the value judgment about the weighing of innocent lives. The reluctance of states to accept the necessity plea in cases of homicide, even when resulting in the net saving of lives—the ultimate lesser

153. The Model Penal Code is narrower in its scope:

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 (1985).

154. See, e.g., ALASKA STAT. § 11.81.320 note (2008) (citing these requirements as part of the “three essential elements to the defense of necessity”).

155. See Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1532 (2005) (arguing that the necessity defense is grounded upon the act-utilitarian view that certain post hoc exceptions to general rules best advance social welfare).

156. (1884) 14 Q.B.D. 273 (Eng.). The case addressed the criminal culpability of two sailors stranded on a lifeboat with another sailor and a young cabin boy; after several days at sea, they decided to kill and feed on the flesh of the cabin boy. They were charged with murder and pleaded necessity. *Id.*

157. ROBINSON, *supra* note 147, at 65.

158. MODEL PENAL CODE § 3.02 cmt. 1 (1985).

159. ROBINSON, *supra* note 147, at 68.

evil—must therefore derive not from any strict moral aversion but from broader societal considerations.

These societal considerations are fairly straightforward in the domestic criminal law context: laws are made to guide the behavior of those subject to them. Any exemption from their reach, such as a necessity plea (or duress or self-defense), must be read narrowly. We are suspicious of disingenuous claims, especially as most pleas of necessity are attempted where the actor violates the law in order to promote her own interests, not those of others. And even if we judge these claims to be genuine, we do not judge it best to create systems in which people are trusted to make individual determinations about which is the lesser or greater evil.

Domestic law reflects numerous compromises among competing interests, claims, and values. We entrust the government, through its various branches, to strike these compromises and make lesser-evil choices. In determining to which issues it should allocate its time, attention, and resources, the government often sacrifices some values or goods to promote the guarantee of others. In fact, it is its business to make such choices. The tendency to leave it to the government to make choice-of-evils determinations is particularly strong in matters of life and death. We believe it is a basic tenet of an orderly society that the government has a monopoly on force.<sup>160</sup> But we expect the government to use this power to protect the social order, even where we would strongly object to it if it were exercised by ordinary citizens. And it is up to the government to send soldiers to fight, kill, and be killed in a war that is thought of as necessary to protect the lives of other citizens.

To sum up, the reasons for which domestic law would allow for only a narrow space for a plea of necessity can be grouped into the following: a distinction between individuals and governments (by which we trust the latter but not the former to make lesser-evil determinations), an interest in preserving the state's monopoly over the use of power, and the rare incidence of cases where people actually have to break the law in order to prevent a greater harm, especially in the case of intentional homicide.

### B. *The Analogy to IHL*

None of the three reasons for limiting the necessity defense in criminal law applies to the context of armed conflict. First, in the domestic system there is a clear dividing line between the powers of governments and the powers of individuals, but this line is blurred in the world of war. Combatants act not as individuals, but as agents of a government (or another entity). For this reason, we are allowed to intentionally kill soldiers on the battlefield; we kill them not as individuals but as agents of their own government (or by reason of some other political association).

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160. Posner, *supra* note 8, at 502; see also Jessica Conaway, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action To Curb Vigilante Activity on the United States/Mexico Border*, 56 MERCER L. REV. 1419, 1428 (2005) (examining the dangers, both to illegal immigrants and to American values, of border vigilantism in the Southwestern United States).

When lesser-evil choices are concerned, the government sends its soldiers to violate IHL in its name, for the purpose of a greater good. If soldiers make this type of determination out of their volition, the government can then either approve (explicitly or implicitly) the action after the fact or prosecute the soldiers for breaking the law. If the government either orders the soldier to act or approves of the act post factum, which are the two cases I am interested in here, the action of the soldier is an action of a government agent, not an individual. As the distinction between state action and individual action dissolves, so does the difference in our attitudes toward the “dirtying of hands”—the choosing between evils—by governments as opposed to individuals.

Second, we believe it is a fundamental tenet of an orderly society that the government has a monopoly over the use of force and we therefore allow private citizens to use deadly force only under extremely limited circumstances. But we employ soldiers for exactly the purpose of using deadly force against other individuals. When soldiers do use deadly force against other individuals, this is not considered a threat to the social order, but part of the social order. The government’s monopoly over power is allocated to the individuals who operate on its behalf and who use deadly force as a matter of course. This is another facet of the blurred lines between government action and individual action in the context of war.

From this perspective, perhaps a better analogy to the humanitarian necessity defense would not be the domestic necessity defense but the regulation of police powers in domestic criminal law—the conditions under which the police, as government agents, are allowed to use deadly force or engage in search and seizure operations.<sup>161</sup> Still, to emphasize its exceptional nature, the general ex post necessity justification makes for a better comparison for the humanitarian necessity justification than the ex ante regulation of standard police powers.

Third, in the domestic setting we do not expect people to encounter many cases in which they would have to choose between evils, let alone cause the death of an innocent person in the process. A true situation of necessity is extraordinary. It therefore makes sense to be instinctively suspicious of claims about necessity, the more so when the claim involves the killing of an innocent person. But war itself is all about choosing between evils. Acts that are outrageous and abhorrent in daily life are commonplace in war. Choices of who to kill or how to destroy are routine, unlike the extraordinary rescue operation or the trolley gone astray which make the more common hypothetical subjects for philosophical conundrums about lesser evils. No wars are fought without causing the deaths of innocent people. Wars are a series of determinations about who is going to live and who is going to die, and certain actions are carried out—lawfully—with the prior knowledge that innocent people are about to die.

It is for this reason that IHL makes the distinction between intentionally targeting the innocent, which is unlawful, and harming civilians as the

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161. This analogy is employed by Posner and Vermeule in their discussion of the ex ante regulation of torture. See Posner & Vermeule, *supra* note 103, at 699-704.

reasonable collateral consequences of an otherwise legitimate targeting of combatants, which is lawful. This is in essence the proportionality principle, which underlies much of the laws of war.<sup>162</sup> Thus, while domestic law draws the line between choosing a lesser evil that does not involve the killing of another human being (which may be excused) and choosing a lesser evil that would involve the killing of another human being (which is almost never excused), the laws of war draw the line between the intentional killing of a civilian (which is absolutely forbidden) and the unintentional, even if foreseen, killing of a civilian (which is allowed).

Finally, and most importantly, we must look at the different rationales of these two systems of law, domestic law and IHL: while domestic law reflects a compromise among competing ideologies, interests, preferences and resources, IHL very clearly states its own goal as maximizing humanitarian protections from harms of inevitable wars. In other words, IHL, as it stands, is the epitome of the principle of lesser evil: the taming of warfare at the price of granting a legal imprimatur for all actions not strictly forbidden.

For all these reasons, too, an attempt to imagine any particular state as a single citizen in an international country of states and transpose the domestic necessity defense onto the international one is bound to fail. Even if we were to treat the state's action as an action taken by an individual, thereby reinstating the individual-government dichotomy, we would be left with the absence of a corresponding "government" to the individual-state. There is no international entity with a monopoly over state power, no international entity whose business it is to make lesser-evil choices for states, and states still face the need to make such choices, especially at wartime, much more frequently than individuals do in any domestic system.

Thus, the necessity defense has been narrowed in the domestic sphere for reasons that do not apply to the international arena. In designing a humanitarian necessity justification, we might well imagine a less constraining, more strictly utilitarian paradigm.

On the other hand, fully imagining states as citizens in an international country highlights other substantial differences between the social daily-life interaction among citizens and the conduct of states at war, differences that warrant narrowing the domestic necessity defense rather than broadening it, when we contemplate the operation of a humanitarian justification. First, while in the domestic system we expect impartial law enforcement agencies and courts to administer the laws and to be arbiters of competing claims, no such system exists in the international sphere. The enforcement of IHL rules is still, to a large degree, a self-regulated process. There is no central adjudicatory or enforcement mechanism to which all nations and combatants are subject and consequently no reliable check against abuses or misuses of the exemption from liability.

Second, and more important, the domestic necessity defense is neutral with regard to whether the significant harm averted was one facing the

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162. See Additional Protocol I, *supra* note 1, art. 51(5) ("Among others, the following types of attacks are to be considered as indiscriminate: . . . (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

defendant or facing others. Textbook hypotheticals offer examples of both cases, although real-life cases tend to be more of the former than the latter. It is difficult to estimate the real incidence of each type of case, given prosecutorial discretion or plea bargains that dispense with both types of cases, leaving only the difficult or dubious ones to stand trial. Conceptually, however, as long as the net benefit to society is greater, the lesser-harm requirement is satisfied.

This neutrality about the recipient of the benefit is understood if we assume that all citizens are similarly situated with regard to one another. Even if we assume that individuals have a greater interest in preventing harm to themselves than to others, the legal system assumes that they generally do not have an interest in intentionally harming others, especially where there are no preexisting relationships that would create such a bias. Where courts have believed that a decision of whom to sacrifice and whom to save was tainted by less-than-objective considerations, they have been reluctant to uphold the necessity defense.<sup>163</sup>

But for states at war we can make no such assumptions. In war, a state not only prefers its own interests to those of its enemy but also has an interest in deliberately harming its enemy. Harming the enemy is another way of promoting one's own self-interest. The most obvious demonstration of this interest is the lawful intentional killing of enemy combatants. Whether states also have an inherent interest in harming enemy civilians is a question that exceeds the boundaries of this work, but history tells us that, at the very least, states care far less about the well-being of civilians belonging to the enemy (or any other) state than about their own.

IHL rules are primarily intended for the safeguarding of the interests of a state's sworn enemies; rightly or wrongly, the construct of war makes the well-being of the state and the well-being of its enemies appear diametrically opposed. As IHL moved from a reciprocity-based exchange to unconditional obligations, its effort to accord civilians (and, to some extent, combatants) certain protections from the scourge of war may be viewed as an effort to correct against the biases that states at war have with regard to their enemies.

To be true to the goals of IHL, a humanitarian necessity justification must therefore be designed in a way that would consider these biases and the efforts of IHL to tame them. If so, the contours of the domestic necessity defense, which assumes no interest in harming others, would seem *broader* than what we should allow within the world of armed conflict.

To sum up, domestic criminal law and the laws of war operate in very different contexts in terms of their immediate addressees (individuals versus states), the type of violence they regulate (exceptional violence versus routine violence), and the type of interests they must take into account (a complex web of interests versus balancing military necessity and humanitarian considerations). All of these would suggest that the domestic necessity defense is unduly narrow when applied to the IHL field. But the two bodies of

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163. See *United States v. Holmes*, 26 F. Cas. 360, 366-67 (C.C.E.D. Pa. 1842) (No. 15,383), where, in a case involving the throwing of fourteen individuals overboard to save a sinking lifeboat, the court instructed the jury that necessity was no defense to murder because the fourteen victims were not selected by lot.

law are also different in their institutional environment (domestic law enforcement versus anarchy) and in the type of social interaction which sets the stage for choice-of-evils situations (citizens within the state versus enemy states). This suggests, in contrast, that the necessity defense is overly permissive as applied to the IHL world.

It follows that the domestic necessity paradigm is a useful subject for comparison but not for direct transposition onto the international level, and that relevant differences between the two bodies of law must be taken into account in adapting the domestic defense to operate as a humanitarian necessity justification in IHL.<sup>164</sup>

## V. CONVENTIONAL EXPLANATIONS FOR THE EXCLUSION OF A CHOICE-OF-EVILS JUSTIFICATION IN IHL

In this Part, I outline and evaluate various possible explanations for the rejection of a lesser-evil justification by IHL. My line of investigation centers, at first, on deontological reasoning,<sup>165</sup> then moves on to consider a host of consequentialist arguments,<sup>166</sup> including uncertainty, slippery slope arguments, and spill-over effects. In both cases, I largely ignore the many shades and variations that each of these moral theories assumes, and instead discuss their most basic, widely accepted tenets. Finally, I address, as a subset of a consequentialist framework, the institutional features of IHL, including its lawmaking process, adjudication and enforcement, and the effects of these features on the possible recognition of a humanitarian necessity justification.

Some of these conventional explanations have been advanced explicitly in the literature, while others are imagined on the basis of accounts offered in other contexts. The purpose of this Section is not to duplicate existing scholarship on the relative strengths and weaknesses of different moral perspectives. Instead, I limit the discussion to the operation of these various perspectives in relation to the humanitarian justification paradigm I suggest here. My aim is to explore whether these various explanations could account for the rejection of the paradigm of humanitarian necessity in IHL, while accepting the necessity defense in domestic criminal law. This inquiry is less pertinent to deontological reasoning, which poses a similar challenge to the recognition of a necessity justification in domestic criminal law, and more to

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164. On the exercise of borrowing from the principles of domestic criminal law in devising international criminal law, the U.N. Special Rapporteur stated that “transferring [such principles] from the field of relations between individuals to that of relations between States is a dubious undertaking.” Special Rapporteur, *Addendum to the Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318/Add.5-7 (Feb. 29, June 10, June 19, 1980) (prepared by Robert Ago), reprinted in [1980] 2 Y.B. INT’L L. COMM’N 13, U.N. Doc. A/CN.4/SER.A/1980/Add.1.

165. Deontologists hold that the rightness of a choice is determined by its conformity with a moral norm. Accordingly, from a deontological perspective, certain choices are inherently evil and can never be justified, even if they would bring about a good outcome. See, e.g., STEPHEN DARWALL, *DEONTOLOGY* (2003).

166. Consequentialists maintain that choices are not morally “good” or “bad” in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences. See, e.g., STEPHEN DARWALL, *CONSEQUENTIALISM* (2003). The paradigmatic strand of consequentialism is utilitarianism, which generally holds that the morally right action is the one that produces the most good. I use the terms “consequentialist” and “utilitarian” interchangeably in this piece.

the consequentialist and institutional explanations. In the context of the latter two, I ask whether there are features unique to the world of war that make any necessity exemption wholly incongruous, even though we accept its operation in the domestic world.

### A. *Deontological Justifications*

From a deontological stance, the actions proscribed by strict IHL rules—torture, the conscription of enemy civilians to one’s own armed forces, the direct targeting of civilians, rape as an act of war, depriving the civilian population of supplies essential to its survival, the taking of hostages, and many others—are inherently repugnant, a violation of a moral imperative in the Kantian sense, independent of any cost-benefit calculation in any particular instance. A pure deontological paradigm, which deems certain evils absolutely and forever prohibited, must therefore accord greater credence to the specific prohibitions than to the overall effort of IHL as a body of law. This is particularly so because the underlying ideology of IHL is banning certain cruelties even if it means prolonging the less cruel war.

Pure deontologists would find little appeal in the recognition of a humanitarian necessity justification let alone consider the possibility that such recognition would help promote humanitarian welfare in particular circumstances. Conceding this point, I nonetheless find it useful to question the strengths of deontological reasoning as applied to the world of IHL, especially because the absolutism of IHL is often identified as originating in deontological motivations. But deontology and IHL are hard to square: first, because war makes an uneasy fit for deontology; second, because it cannot account for all IHL rules; third, because the degree to which deontology could ever be assigned as a moral paradigm to governments, as opposed to individuals, is under much debate; and fourth, because all but the very pure deontologists recognize that in extreme cases of weighing harms, absolute principles must make way for some consequentialist calculations.

Deontologists face their greatest challenge in war. War is about committing evils and choosing between evils. No war can be fought without causing death, long-term injury, suffering, degradation, and despair. Any war is a violation of numerous human rights, including the right to life, self-dignity, health, access to food and water, education, and more. The individual experience of war may be no less grave and traumatic than any known form of torture. A true commitment to moral imperatives is hard to reconcile with war. But if deontologists are willing to endorse any practical system of laws of war other than pacifism, they must resign to some degree of evil, even if they would be loath to accept it in any other setting.<sup>167</sup>

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167. A commitment to deontological ethics may require the collapse of the distinction between *jus ad bellum* and *jus in bello* in the sense that to justify any evil committed during the war, it would have to be shown that the prosecution of the war was just to begin with. On the degree to which this distinction should be upheld, compare WALZER, *supra* note 12, arguing to uphold it, with Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004), arguing that the distinction was unsustainable.

Under the current laws of war, some moral absolutes are already compromised: the absolute ban on the intentional targeting of civilians<sup>168</sup> gives way to the principle of double effect which does not preclude the foreseen-yet-unintended proportional killing of civilians.<sup>169</sup> Paradoxically, it is the military attack on the enemy that is considered the inherently good action which the collateral killing of civilians serves.

A corollary moral principle to that of the double effect is never to use people as instruments.<sup>170</sup> Accordingly, many philosophers believe that the saving of lives could never justify the taking of lives, even if the lives saved outnumber the lives taken.<sup>171</sup> Some argue that even in clear situations of self-defense, the intentional killing of civilians would be morally wrong.<sup>172</sup> But the deontological objection against using people as means rather than ends seems, perhaps counter-intuitively, particularly weak in the context of war, where soldiers are used precisely as that: means for winning the war, defending the country, etc. As Napoleon callously remarked, “soldiers are made to be killed.”<sup>173</sup> If the laws of war already make the concession that killing individuals who are soldiers is a means rather than an end, the deontological prohibition when it comes to civilians seems much weaker than at first glance.

Even more broadly than its relevance to war, scholars question the applicability of deontological reasoning to state action in general. Deontology is premised on the notion of individuals as rational actors. But the degree to which a state can be personified is questionable, and so is the degree to which we can or should assign to a state moral prescriptions.<sup>174</sup> If this is so, one could hold that even though deontology is a sound moral theory for

168. Michael Walzer explains the moral absolutist view against targeting civilians in the following manner: “Morality is not negotiable. Innocence is inviolable . . . . To protect the innocent or, at least, to exclude them from deliberate attack, is to act justly. And we must act justly whatever the consequences: *fiat justitia, ruat caelum* (do justice even if the heavens fall).” MICHAEL WALZER, ARGUING ABOUT WAR 36 (2004).

169. See Additional Protocol I, *supra* note 1, art. 51(5). The Catholic principle of double effect posits, in short, that an inherently good act which inescapably entails negative consequences is morally justified as long as the actor does not intend the negative effects (though he may foresee them) and the good effects outweigh the bad. See Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 528 (1980).

170. Thomas Nagel has explained this principle as prescribing that the “hostile treatment of any person must be justified in terms of something *about that person* which makes the treatment appropriate.” Nagel, *supra* note 12, at 133. A related principle is that of the separateness of persons, according to which actions that violate fundamental rights of any particular person ought not to be permissible on account of the aggregation of the interests of others. See, e.g., Thomas Nagel, *Equality*, in MORTAL QUESTIONS 106, 115 (1979); John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977).

171. See, e.g., Taurek, *supra* note 170 (objecting to the idea that in rescue cases, when one chooses to let one die in order to save several others, one is choosing the lesser evil). *But cf.* David Cummiskey, *Kant’s Consequentialism*, 100 ETHICS 586 (1990) (arguing that Kantian moral theory does not preclude the sacrifice of the innocent).

172. “Soldiers who kill intentionally civilians in war can usually invoke only the excuse of self-preservation, and claim that they killed civilians to save their own lives from a threat that did not emanate from the civilians. Such self-preservative killing of an innocent non-attacker fails to treat the person justly.” COLM MCKEOGH, INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR 156-57 (2002).

173. WALZER, *supra* note 12, at 136.

174. Russel Hardin, *International Deontology*, 9 ETHICS & INT’L AFF. 133, 135-36 (1995) (arguing that states are not rationalist actors and thus cannot be subject to Kantian theory).



individuals, government morality should be nonetheless outcome-based.<sup>175</sup> This is the position taken by Cass Sunstein and Adrian Vermeule, who identify the longstanding distinctions between acts and omissions and (indirectly) between intended and foreseen consequences as serving to strike a moral balance between personal autonomy and impersonal obligations to the collective good.<sup>176</sup> This purpose, they argue, is irrelevant for the government, which should be concerned only with the collective good.

Beyond the difficulties in reconciling some broad principles of IHL with deontological reasoning, specific IHL rules are also difficult to account for under a deontological paradigm. Consider, for example, the earlier mentioned prohibition on perfidy, which forbids acts such as feigning the status of a civilian as a ruse of war.<sup>177</sup> Is trying to conceal oneself in combat by pretending to be a civilian inherently evil or dehumanizing? There is no prohibition on soldiers wearing civilian clothes per se—only on the feigning of civilian status during combat as a way of gaining military advantage. Although the official commentary to the Geneva Conventions notes that the central element of perfidy is “the deliberate claim to legal protection for hostile purposes,” historically, the origins of the prohibition on perfidy are rooted in medieval ideals of chivalry and honor on the battlefield—ideals concerning warriors’ dignity more than any universal moral imperatives.<sup>178</sup> These are in fact the opposite of today’s ideals of equality and universalism. The modern rationale for the prohibition has changed to suit the desire to safeguard the combatant-civilian distinction and thus enhance protection for civilians, a principle that resonates of consequentialist calculations more than deontological reasoning.<sup>179</sup> The same is true for the present-day prohibition on treacherously attacking the enemy while using the U.N. flag or insignia or feigning surrender.<sup>180</sup> Unlike the Kantian imperative, dishonesty on the battlefield, including by ruses of war, is not unlawful per se; any attempt to

175. Nagel, *supra* note 170, at 83-84.

176. Cass R. Sunstein & Adrian Vermeule, *Ethics and Empirics of Capital Punishment: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 719-24 (2005). A broad philosophical literature questions whether the concept of “intention” can be accurately assigned to governments as it is to individuals. *See, e.g.*, CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000) (questioning the applicability of the idea of culpability for intentional wrongdoing when it comes to governments); *see also* JEREMY WALDRON, *LAW AND DISAGREEMENT* 10 (1999) (commenting that legislation is a result of a process that brings together “a large bunch of people who do not share a view about anything . . . .”); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982) (describing the difficulties of determining intent and the inability to divorce intent from authorship).

177. Additional Protocol I, *supra* note 1, art. 37(1)(c).

178. CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 435 (Yves Sandoz et al. eds., 1987). Accordingly, the ICRC Commentary also observes that a “sense of honour, which was nourished during the Middle Ages of Europe by chivalry . . . has contributed to the establishment of the rules which finally became assimilated into the customs and practices of war. . . . Perfidy was considered a dishonour . . . .” *Id.* at 434.

179. The commentary notes, “[t]o reject [this rule] would have meant compromising the fundamental distinction between civilians and combatants, which forms the basis for the law of armed conflict.” *Id.* at 438.

180. *Id.* at 439.

justify the perfidy prohibition on deontological grounds would therefore require defining the “immoral act” very narrowly indeed.<sup>181</sup>

The prohibition on treacherously assassinating rogue leaders<sup>182</sup> or putting a price on their heads<sup>183</sup> is similarly difficult to justify on any deontological grounds. Since the act of killing per se is not a violation of a moral imperative under the laws of war, what is it about going after a leader—who is by definition more responsible for evil than any soldier on the battlefield—that is morally repugnant?<sup>184</sup> As a historical matter, the prohibition was devised by kings and sovereigns out of a mutual desire to protect themselves during wars of aggression embarked on as a matter of course, rather than as part of the Catholic moral tenets of Just War.<sup>185</sup>

Even the banning of certain types of weapons<sup>186</sup> raises debates on whether it reflects a real moral aversion to especially heinous weapons, a concern about the lack of effective distinction between combatants and civilians, or a much more cynical political calculation of comparative and absolute advantage on the battlefield. One way of testing the strength of deontological objections to unconventional weapons is to imagine the case of nonlethal biological or chemical weapons, which are absolutely prohibited under international law—would we still feel the same kind of aversion to using a poisonous gas if the gas would only put combatants to sleep? If the answer is no, the absolute prohibition on the use of poisonous gas cannot be purely deontological.

Moreover, many IHL provisions include explicit exceptions for military necessity, thereby significantly constricting the prohibition in ways that could not be accounted for under moral absolutism: the obligation of combatants to distinguish themselves from civilians is eliminated where combatants cannot do so “owing to the nature of hostilities.”<sup>187</sup> If it is a moral imperative to maintain the distinction at all times, on what basis are concessions made for situations in which distinguishing oneself as a combatant would be too dangerous? Advance warning must be given before launching attacks which

181. *Id.* at 439-44.

182. The extent of the prohibition is under debate. See Michael Rubin, *An Arrow in Our Quiver: Why the U.S. Government Should Consider Assassination*, NAT'L REV., Aug. 28, 2006, at 33, 34 (“Even during open hostilities, U.S. military doctrine prohibits targeting an opposing political leader unless, according to the U.S. Army’s 1996 *Operational Law Handbook*, his death is ‘indispensable for securing the complete submission of the enemy.’”).

183. See JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., INT’L & OPERATIONAL LAW DEP’T, OPERATIONAL LAW HANDBOOK 17 (Maj. Joseph B. Berger III, Maj. Derek I. Grimes, & Maj. Eric T. Jensen eds., 2004), available at <http://www.fas.org/irp/doddir/army/law2004.pdf> (“Hiring assassins, putting a price on the enemy’s head, and offering rewards for an enemy ‘dead or alive’ is prohibited.”).

184. See Catherine Lotrionte, *When To Target Leaders*, WASH. Q., Summer 2003, at 73, 75 (arguing that the ban on assassination encourages a policy of military strikes, which claims innocent lives); Turner, *supra* note 3 (arguing that the proportionality principle supports the idea that it is wrong to allow the killing of ten thousand relatively innocent soldiers and civilians if the underlying aggression can be brought to an end by the elimination of one guilty individual).

185. See Ward Thomas, *Norms and Security: The Case of International Assassination*, INT’L SECURITY, Summer 2000, at 105, 116.

186. Specific bans on particular types of weapons are part of the distinct legal field of arms control; nonetheless, general provisions on weapons which cause superfluous injury or unnecessary suffering are part of IHL. See, e.g., Additional Protocol I, *supra* note 1, art. 35.

187. Additional Protocol I, *supra* note 1, art. 44(3).

may affect the civilian population, “*unless circumstances do not permit.*”<sup>188</sup> Not only does the protection of civilians fade in the face of military needs, but this provision also seems to significantly narrow the distance between intentional and foreseen harm.

Finally, there are important debates among deontologists themselves about the extent to which Kant’s writings actually proscribe the sacrificing of the innocent for a greater good.<sup>189</sup> Moreover, an important school of deontology, known as “threshold deontology,” acknowledges that at some extreme points, one cannot avoid some consequentialist analysis that would require a departure from the absolute prescription. Threshold deontology responds to the accusation that pure deontology would allow catastrophic outcomes for the sake of moral narcissism. For this school, the debate is no longer about the permissibility of lesser-evil calculations, only about the terms and conditions for its application: for Walzer, a departure from absolutes is permissible only where a country is facing the danger of annihilation.<sup>190</sup> Others accept some degree of a cost-benefit calculation even in less extreme scenarios. Tom Stacy, for instance, argues that Kantian moral philosophy actually supports necessity killing. He claims that where it is inevitable that an innocent will die, killing the innocent where this killing results in a net savings of lives “is more faithful to the respect for the rational life of each individual person.”<sup>191</sup> War, we must remember, inevitably entails choosing which people to kill.

Threshold deontology has been especially debated in the context of torture. Against Jeremy Waldron’s absolute rejection of torture<sup>192</sup> under any and all conditions, a majority of writers seem to agree that under some extreme conditions (“extreme” being a subjective determination), torture could be excused, justified, and even necessary.<sup>193</sup> In fact, most commentators on torture concede that it would be impossible to discuss its immorality in a decontextualized manner, not only on practical grounds but on moral grounds, too, without taking account of lives it might save. This does not mean that the prohibition on torture is not driven by deontological considerations, but only that in practice, consequentialist calculations complement the deontological analysis when the prohibition is tested in particular cases.

To sum up, a humanitarian necessity justification is impossible to square with a commitment to deontology, and true deontologists would likely find such an exemption objectionable and dangerous. Yet the extent to which deontology is an appropriate moral paradigm for government action is debatable, much more so, perhaps, in the world of war, where much killing and injury is inflicted intentionally and commonly and where members of an entire class of people—soldiers—are stripped of most of their fundamental

188. *Id.* art. 57(2)(c) (emphasis added).

189. See Cumiskey, *supra* note 171, at 586.

190. In his terms, “supreme emergency.” WALZER, *supra* note 12, at 251; see also CHARLES FRIED, *RIGHT AND WRONG* 10 (1978) (arguing that “extreme cases” may justify deviations from absolute norms).

191. Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 511 (2002).

192. Waldron, *supra* note 97.

193. See *supra* notes 107-110 and accompanying text.

rights to begin with. In comparison with domestic criminal law, to the extent deontologists are willing to accept a necessity defense there, the distinguishing characteristics of armed conflicts—where situations requiring killing are more likely to emerge—would suggest they should be more willing to recognize it in the context of IHL, not less.

In addition, deontology cannot account for all IHL rules, nor can it account for the compromises in which absolute prohibitions yield to military necessity. Deontology itself does not offer us a sound way of distinguishing the absolute rules from the qualified ones. And finally, a significant portion of deontologists are threshold deontologists, who accept some element of consequentialist cost-benefit calculation in extreme cases. Once susceptible to such qualifications, it is no longer inevitable for threshold-deontological morality to exclude all forms of a humanitarian necessity justification.

### B. *Consequentialist Justifications*

A pure consequentialist framework judges actions exclusively on the basis of their outcomes in terms of the “good” they promote.<sup>194</sup> Naturally, defining what “good” outcomes are requires some preceding normative determination, especially one that would define the “good” independently from specific prohibitions or prescriptions. This is true in any consequentialist analysis, whether we apply it to the necessity defense in domestic criminal law or to the humanitarian necessity paradigm in IHL. Domestic law reflects a compromise among competing ideologies, interests, preferences and resources. In contrast, IHL seems to lend itself more easily to a utilitarian, teleological analysis on the basis of its normative *grundnorm*: the maximization of humanitarian protections from harms of inevitable wars—the quintessential lesser evil.

If we accept the domestic necessity defense under a consequentialist framework, why should we then reject it in IHL? In the following analysis, I suggest three possible considerations for the rejection of a cost-benefit analysis, or at least for suspicion of it, and ask whether these considerations are more pertinent in the world of armed conflict than in domestic interactions. These considerations are uncertainty, a concern about slippery slopes, and spillover effects.

A few clarifications are in order. First, the analysis generally ignores the problem of incommensurability of values,<sup>195</sup> assuming, instead, that we can determine what a lesser evil is in much the same way we determine it in domestic law. It is nonetheless limited to harms and benefits which IHL seeks

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194. *But see* WALZER, *supra* note 168, at 38 (“Utilitarianism, which was supposed to be the most precise and hard-headed of moral arguments, turns out to be the most speculative and arbitrary. For we have to assign values where there is no agreed valuation, no recognized hierarchy of value, no market mechanism for determining the positive or negative worth of different acts and outcomes.”).

195. On incommensurable evils and deontological evils, see generally Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 26 L. & PHIL. 611 (2005). Note that Kenneth Simons argues that the incommensurability problem should not trouble us too much, as we regularly engage in a similar type of balancing of harms in the determination of reckless or negligent behavior when these are part of the definition of the crime. See Kenneth W. Simons, *Exploring the Intricacies of the Lesser Evils Defense*, 26 L. & PHIL. 645, 650 (2005).

to minimize and maximize, correspondingly, rather than any self-interest of the party violating the rule. Still, the caveat remains that where consequences cannot be weighed along a definite and agreed measurement, a utilitarian analysis should be rejected.

In addition, I follow the distinction between act-consequentialism and rule-consequentialism. The former assesses the outcomes of every particular act; the necessity defense in criminal law is believed to be act-consequentialist. The latter weighs the effects of having a particular rule in place (and therefore the average outcome of acts that follow the rule). In our context, it is the difference between weighing the particular effects of any lesser-evil act and weighing the overall impact of introducing a rule that would recognize a lesser-evil justification. This current analysis focuses on the latter.

At first glance, a pure consequentialist analysis would justify, by definition, a lesser-evil act, as defined here. This might even be true in the case of the torture or the killing of one innocent person intended to save two others. But as we move toward a rule-consequentialist paradigm, the average assessment of any instance that depends on the recognition of a humanitarian necessity justification requires the inclusion of indirect costs and benefits in addition to those of the immediate outcome. As the benefits of a humanitarian necessity justification are relatively clear, I focus here on the risks of recognizing the justification as a rule.

### 1. *Uncertainty*

A humanitarian necessity justification, like the domestic necessity justification, operates in two time-zones: the *ex ante* determination that following the law would cause greater humanitarian harm than deviating from it, and the *ex post* examination of concrete outcomes (which are then compared with counterfactual outcomes).

The great difficulty in the *ex ante* assessment in the IHL context lies in the fact that any operation on the battlefield is necessarily mired in uncertainty, or what Clausewitz termed “the fog” of war.<sup>196</sup> Anything from a change in weather conditions, faulty munitions, an unforeseen change on the ground, the collapse of lines of communication, to simple human errors could lead to an outcome very different from the one intended. The IDF soldiers who rely on a local resident to call on a suspect to surrender can never be certain that the resident will remain unharmed, or that the suspect will in fact surrender, or whether they would end up needing, instead, to employ more force and endanger more people by executing the arrest themselves. Torturing a terrorist may or may not be effective—he or she may or may not provide information. Once obtained, information may be useful, even sufficient to avert the danger, or altogether irrelevant. The direct attack on civilians may induce a change in the government’s behavior—in Japan’s case, induce the

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196. VON CLAUSEWITZ, *supra* note 39, at 140 (“[T]he general unreliability of all information presents a special problem in war: all action takes place, so to speak, in a kind of twilight, which, like fog or moonlight, often tends to make things seem grotesque and larger than they really are.”).

Emperor to surrender—but it is also possible, as in the case of the *Blitzkrieg* on London, that it would backfire and cause the population and the leadership to dig in their heels and form a stronger, more entrenched national unity. Given the uncertainty factor, the determination of lesser evil is bound to be speculative and often inaccurate.

IHL rules, it may well be argued, have been devised with the problem of uncertainty in mind. Like any other rules, they were installed precisely in order to eliminate the need to assess consequences in any particular case. In alternating between specific rules, such as an absolute prohibition on the intentional targeting of civilians, and standards, such as the prohibition on the destruction of civilian property where not absolutely necessary, IHL was designed to produce the best humanitarian outcome on average.

But whether IHL produces the best humanitarian outcome is questionable. The hundreds of instances in which the Early Warning Procedure was implemented resulted in only one civilian casualty. Although it is impossible to assert how many Palestinians have been spared as a direct consequence of the procedure, the 2007 casualty reports—nineteen people who were not the intended target of arrest—suggest that in this case, uncertainty should not have warranted absolutism.

The domestic world is not immune to uncertainty either. Dudley and Stephens could have been picked up by a boat a minute before they chose to eat the young cabin boy, or left afloat to die, or as it turned out, saved on the following day. Their ability to foresee possible outcomes was not better—and probably worse—than many decisions taken on the battlefield.

Even conceding that uncertainty is probably greater in war, and that adversarial interaction on the battlefield makes the unknown more common, often more harmful and more dominant, it is unclear why transferring the risk of uncertainty onto the actor would not offer a sufficient response to this concern; as uncertainty grows, so does the risk assumed by the attacker. Shifting the costs of uncertainty onto the potential attacker would encourage the attacker to be more careful in pursuing only those cases in which the humanitarian tradeoff is more certain.

Moreover, it is possible that introducing uncertainty as a risk to be weighed rather than act as an absolute bar might even encourage attackers to assess the consequences of their operations more carefully than if the justification is barred altogether. IHL orders combatants to take all feasible precautions to minimize incidental loss of civilian life and refrain from disproportionate attacks that may cause excessive incidental loss to civilians.<sup>197</sup> Even if the attacker follows the law, both these provisions leave ample room to shift the costs of uncertainty onto enemy civilians. If, however, the attacker were ready to assume the risk of operating under the humanitarian necessity justification, he would have to absorb the cost of uncertainty without the ability to shift it onto the target. To demonstrate this last point, consider again the case of arrests in the West Bank. If the humanitarian necessity justification is recognized, the IDF has an incentive to design and execute the Procedure in a way that would mitigate the risks to civilians much more than

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197. Additional Protocol I, *supra* note 1, arts. 51(1), 57.

under the general rules on precautions in attack. The IHL formula of the “excessive incidental loss of life” is measured against the military advantage to be gained from the attack, not against the lives of other Palestinians who might be hurt or spared.

Naturally, the benefits of mitigating the problem of uncertainty by placing a higher risk on the invoker of the justification would have to be weighed against the chilling effects such higher risk is likely to have on those who might contemplate breaking the law to increase humanitarian welfare. I return to this discussion later in the Article.

## 2. *The Slippery Slope Argument*

In the context of a humanitarian necessity justification, the slippery slope argument can be summarized as follows: even though the justification may be appropriate in a particular case, allowing it as a rule might open the floodgates to inappropriate actions (or, what Fred Schauer terms the movement from the “instance case” to the “danger case”<sup>198</sup>). Left to their own devices, actors will interpret every exception in the broadest possible manner, quickly leading to abuse.

Although extensively debated in the literature,<sup>199</sup> the slippery slope argument has often been voiced as a general rationale for absolute rather than qualified rules: rules are narrower than standards and are easier to limit to the right instance case with less concern that they would also cover the danger case. This is especially true if we believe the incidence of justifiable instances is low.

The slippery slope concern undoubtedly played a part in the Israeli HCJ ruling against the Neighbor Procedure. Lurking in the background was evidence of widespread use by IDF units in the Occupied Territories of Palestinian civilians as human shields, which was a precursor to the petition against the amended Procedure. Although the judges never addressed this concern explicitly, their allusion to the difficulty in ascertaining “consent” or in guaranteeing the civilians’ safety resonate of the deeply troubling past practices of the security forces on the field with regards to Palestinian civilians.

Most commonly in our present context, the slippery slope concern has been invoked to justify a blanket prohibition on torture under the argument that any exception, including for a “ticking bomb” scenario, is going to result in excessive torture.<sup>200</sup> More difficult to monitor than the Early Warning Procedure or deliberate attacks on civilians (acts of torture are easier to hide

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198. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); cf. Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 541 (2003) (claiming that slippery slopes are foremost slopes of arguments, not acts).

199. David Enoch, *Once You Start Using Slippery Slope Arguments, You’re on a Very Slippery Slope*, 21 OXFORD J. LEG. STUD. 629 (2001); Rizzo & Whitman, *supra* note 198; Schauer, *supra* note 198; Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

200. See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1445 (2005) (arguing that the authorization of torture establishes a culture of torture that then leads to excessive and unjustifiable use of torture); Shue, *supra* note 101, at 139-42; Waldron, *supra* note 97, at 1714-15.

under the radar than the dropping of bombs), any exception to the prohibition on torture runs a greater risk of being malevolently exploited.

And still, despite its undoubtable force, the slippery slope argument should not fully exclude a humanitarian justification paradigm. First, because IHL is already comprised of both rules and standards, the latter particularly inviting slippery slope concerns. Whether this mixture actually produces the best outcome on average, or whether humanitarian welfare might, in fact, increase if some rules should become standards or vice versa is an empirical question. Moreover, the moment that killing civilians was made permissible to some degree on the basis of the intended/foreseen distinction, the dangers of the slippery slope have already entered into the system.

But more important, in order to accept the lack of a necessity justification in IHL on the basis of the slippery slope concern, while allowing necessity in domestic law, we would have to find the two systems of law sufficiently different in relevant ways. In particular, we would have to be able to make two kinds of determinations. First, we would need to determine that the incidence of justifiable exceptions is lower in war than outside of it. Such a determination is impossible to make, and in fact, I would argue the opposite. War being what it is, the incidence of justifiable violations would seem potentially much higher than in daily life. The death and destruction that are dealt as a matter of course in war are what distinguishes killing in war from the norms of domestic affairs, and are also what brings about the need to save people. The prevalence of life-life tradeoffs—perhaps the most important choice-of-evils scenario—is thus much greater in war than in the domestic sphere.

Second, we would have to determine that the fundamental differences in the motivations driving individuals to break the law as opposed to those driving states at war make the dangers of exploitation greater in the latter context. Individuals may have an inherent interest in promoting their own welfare even at the expense of others. But harming others does not necessarily promote one's own welfare. In war, inflicting harm on the enemy by definition increases the benefit to the actor-state. Given this assumed *mens rea*, I acknowledge that the risk of exploitation in the world of war may be higher than in the domestic sphere, and that it is possible that states would try to interpret or apply a necessity justification in ways that would tend to promote their own welfare at the expense of their enemies. Nonetheless, and without being able to prove my argument empirically at this time, I hold that this danger may be mitigated by designing the justification in a way that would substantially weaken this inherent bias of the state.

Most importantly, the choice to reject the justification because of the slippery slope concern is not cost-free. A frequently voiced critique of the concern is that it often deters us from making tough but necessary choices. This critique seems particularly apt in the context of armed conflicts. If we believe that in the right case, a humanitarian necessity justification could in fact save lives and minimize suffering, then rejecting it altogether because of the concern that it might be badly exploited in “danger cases” would be just as immoral as exploiting it.



### 3. *Spillover Effects*

Another challenge to the consequentialist framework is related to the slippery slope concern but is different in focus. Whereas the former deals with potential abuses in applying the practice or rule in “hard” or unsuitable cases, the concern over spillover effects is directed at the potential effects of a particular practice or rule beyond its immediate intended consequences.

This concern has often been voiced in the context of torture: beyond the fear of excessive torture and the revulsion against the intentional physical abuse of another human being, accepting torture as a legitimate tool for the government to use whenever it deems fit is worrying to citizens at large. Entrusting the government with the right to use torture might be understood or misunderstood by the government as authorization for coercive and excessive methods in other areas of security or law enforcement. It might also instill a degree of fear and suspicion among citizens toward their government—a government that is willing and capable of engaging in torture—more generally. All in all, the introduction of torture as a legitimate means of compelling an actor to do or abstain from doing something, coupled with the slippery slope concern, is dangerous not only to potential victims of torture but also to the trust in and trustworthiness of the torturing government.<sup>201</sup> When former Italian Prime Minister Aldo Moro was kidnapped by the Red Brigades in 1978, one of the kidnappers was captured by the police. The kidnapper did not reveal where Moro was taken, and by the time the police found Moro hidden in a car trunk, he was already dead. When asked why he would not order the torturing of the kidnapper for information, General Carlo Alberto Dalla Chiesa reportedly responded, “Italy can survive the loss of Aldo Moro. It would not survive the introduction of torture.”<sup>202</sup>

But like the slippery slope or uncertainty concerns, the gravity of spillover effects is an empirical estimate. To the extent they can be estimated, spillover effects can be introduced into the lesser-evil calculus, just as they may be introduced into any domestic necessity calculation. Their introduction, rather than excluding the justification, simply raises the bar for upholding it in any particular case. If anything, when comparing the two contexts, it would seem that governments, whose business it is to make choice-of-evils decisions domestically, are better at considering spillover effects than individuals are. This is particularly true for cases in which the humanitarian violation is decided upon at higher levels and not by individual soldiers on the ground. Furthermore, alongside the risks of adverse effects, one could also think of positive spillover effects of the humanitarian necessity paradigm, as when the paradigm is used to amplify the normative message of humanitarian considerations.

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201. See, e.g., William Twining & Barrie Paskins, *Torture and Philosophy*, 52 PROC. ARISTOTELIAN SOC’Y 143, 165-94 (Supp. 1978).

202. See DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 100, at 134 (internal quotation marks omitted).

C. *Institutional Considerations*<sup>203</sup>

Although I argue above that the uncertainty, slippery slope, and spillover effects concerns should not be sufficient reasons to preclude a humanitarian necessity justification in IHL, it must be acknowledged that the institutional environment of the international sphere is different from the domestic context. The differences between the two systems give rise to an additional set of concerns that must be addressed—in particular, about whether the introduction of exceptions into the international criminal system might undermine the entire project of IHL.

As earlier noted, IHL, like much of international law, operates in an anarchical system, which is devoid of any central legislative, mandatory adjudication, or enforcement mechanisms.<sup>204</sup> This gap is particularly significant given the core values of IHL and the tense environment in which it operates: as a system of laws designed to minimize the amount of harm one may inflict on one's enemies in the midst of an armed conflict, IHL is often perceived as constraining the military effectiveness of the combating forces, thereby creating strong short-term incentives to defect from it. Violations by the enemy, in turn, invite reciprocal (even if illegal) violations, and a cycle forms.

Avoiding a cycle of violations and the gradual erosion of all of IHL requires an agreement or authoritative determination of what the law actually prescribes, what qualifications are allowed, and what retaliation, if at all, is permissible. It also demands an institutional framework that would make these determinations binding and effective. But IHL still relies predominantly on domestic courts adjudicating war crimes committed by their own agents. Self-regulation through adjudication is presumably less trustworthy than external judgment by an independent international body. Domestic enforcement, for the most part, takes place only where the state has an interest in the prosecution, that is, where the state distances itself from the act of the agent. But most violations of the laws of war are committed under the instruction of the state, or with its approval after the fact; rarely are war crimes acknowledged by the state, let alone prosecuted by it.

The inherent institutional weakness of the international system makes the dangers of recognizing any exception to the laws of war more substantial than in its corresponding domestic system. Law that cannot rely on effective institutions to uphold it, and for which reason would hardly qualify as “law” in any Austinian sense,<sup>205</sup> must instead fall back predominantly on its expressive force or normative pull. The instructive force of IHL norms rests on their moral authority rather than on any concrete sanction. By according preference to strict rules and eliminating exceptions, the normative message is

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203. Institutional features are often considered second-order principles. I address them here as a separate subset of rule-consequentialism analysis.

204. On the challenges of dispute settlement mechanisms in an anarchical society, see generally Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

205. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 35 (Isaiah Berlin, Stuart Hampshire & Richard Wollheim eds., Humanities Press 1965) (1832).

kept clear and unqualified: “Do not ever kill civilians” is a plainer prescription than “Do not kill civilians unless it is to save the lives of more civilians.” Absolutism makes it idiomatic that killing civilians is evil, rather than a conditional evil, dependent on the circumstances of the killing. When the message is blurred, “just” and “unjust” conduct is harder to evaluate. This all means that adding exclusions, however justifiable, to IHL runs the risk of weakening the law’s single source of strength—its expressive force.<sup>206</sup>

If so, the integration of anything like a humanitarian necessity justification into IHL may require a prior material change in the institutional environment of the laws of war. Such change may have to incorporate an independent, credible, and professional judicial institution, capable of putting the claim under close scrutiny.

Nonetheless, concerns regarding the recognition of a humanitarian necessity paradigm in the absence of such institutional reform may not be as significant as they appear at first glance. First, it is unclear that recognizing the justification would necessarily lead to more ambiguity with regard to what constitutes compliant or noncompliant behavior. Most ambiguities rest on how to interpret existing exceptions or tradeoffs that are designed to protect military interests. For instance, when civilians die in attacks, debates arise as to whether their death was proportionate collateral damage or excessive and unjustified. Similarly, when certain types of weapons are employed on the battlefield, disputes arise as to whether these weapons cause “superfluous injury or unnecessary suffering.”<sup>207</sup> “Superfluous” and “unnecessary” are terms weighed in the balance against the military need for using that particular type of weapon at a given moment. A humanitarian justification, in contrast, would center only on humanitarian needs, ignoring any consideration of military necessity. There is no reason to expect that the weighing of humanitarian considerations alone would be likely to cause any greater ambiguity for the decisionmakers on the battlefield.

Second, concerning the expressive force of the law, the effects of formal exceptions on the symbolic power of prohibitions have been debated in the literature on torture.<sup>208</sup> Different positions on whether, when, and how torture should be allowed rest, in part, on different predictions about the impact of any exception—formal or informal—on the strength of the message that torture is taboo. Without repeating these debates, and while acknowledging that this point is a matter of concern, conditioning the successful invocation of the humanitarian necessity justification on an actual showing of lesser humanitarian harm is likely to amplify the humanitarian message, not silence it.<sup>209</sup> “Do not kill civilians unless it is to save the lives of more civilians” is a less clear message than “Do not ever kill civilians,” but it can, at the same time, reinforce and magnify the value of civilian lives.

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206. On the symbolic force of the absolute ban on torture, for instance, see Gross, *supra* note 15, at 1504; and Waldron, *supra* note 97, at 1723-26.

207. Additional Protocol I, *supra* note 1, art. 35.

208. See Gross, *supra* note 15, at 1487, 1501-03.

209. See also FRANCK, *supra* note 8, at 190 (“Indeed, a law with an eye to mitigating circumstances is likely to be seen as more legitimate than one that brooks no exceptions.”).

Moreover, it is not inconceivable to imagine that the message of the absolute nature of current IHL prescriptions has been indoctrinated so well among the fighting forces and policymakers of some countries that it has prohibited them from considering courses of action that might have spared suffering and damage among the populations at war. If this is so, the expressive power of the law has potentially turned extreme. For example, if the possibility of assassinating rogue leaders is not discussed among some circles due to the concern that it might be in violation of international law, the ramifications of this avoidance must also be considered by those who care about international law.

Third, a closer look at the enforcement of IHL reveals a more optimistic prospect for allowing a humanitarian justification paradigm. On a very basic level, reciprocity undoubtedly offers a strong political and practical motivation for compliance, even if it is no longer a legal condition. The laws of war were originally developed not out of any humanitarian concern for “the other,” but out of a self-interested concern for one’s own soldiers and nationals. The concern for others was merely the reciprocal price to pay. To the extent states today have an interest in preserving the laws of war, the self-regulation system should operate no differently in the context of a humanitarian necessity than it does with regard to any IHL rule.

In terms of adjudication, some domestic courts enjoy a high reputation as credible, legitimate, and professional institutions. They have shown themselves able to rule against domestic stakeholders or even their own government, upholding the rule of international law. The Israeli HCJ ruling against the use of the Early Warning Procedure is a case in point. Although still far from perfectly credible, it is not immediately clear why such courts should not ever be trusted to apply the humanitarian necessity justification.

For less trustworthy systems, the implications of recognizing a humanitarian necessity justification would seem to be of little importance. The chances that anyone could successfully challenge a government’s actions or policies as contrary to IHL are slim to begin with, and whether the government wins on the basis of the justification or because the action is approved on different grounds makes no real difference.<sup>210</sup>

On the international level, the justification makes a greater difference, especially when the operation of the ICC is concerned. Although young, the ICC set out, at least in aspiration, to serve as exactly the kind of judicial institution that is legitimate, objective, professional, and independent of the interests of any particular state. If we support this effort by the ICC, there is less reason for not trusting it with a lesser-evil justification. To recall, the Rome Statute already incorporates some justifications for war crimes (such as self-defense or the combined necessity/duress claim) and if its claim to professionalism and objectivity is to be taken seriously, it is unclear why it

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210. Where an individual soldier wishes to invoke the justification against his or her government’s position, for instance, in domestic criminal proceedings, the implications of recognizing such a justification would again depend on the credibility of the domestic judicial system. In countries with a strong domestic judicial system, the soldier may or may not be successful in relying on the justification. In those without a credible judicial system, it would make no difference, as the court is unlikely to rule against the government.

would be inappropriate, on institutional grounds, to recognize a humanitarian justification as well.

More importantly, as I have earlier noted, the ICC may be viewed as an effective judge not only of individuals’ actions, but also of states’ actions. By operating under the rule of complementarity and trying individuals only where their own domestic courts have been unable or unwilling to prosecute them, the ICC, in effect, tries the state’s actions through the prism of the individual’s actions. The “state” is even more likely to stand trial given the specific provisions of the ICC that eliminate any immunity for heads of state and other officials<sup>211</sup> and impose criminal liability on commanders and other superiors for actions committed by their subordinates.<sup>212</sup> Deterring state officials may prove an effective check against “state violations” of IHL.

It is a lamentable feature of IHL that most of its violations go unpunished. It is not clear, however, that recognizing a humanitarian necessity justification as an exception to IHL would increase the incidence of unjustifiable violations. The rhetoric of accounting for unjustified violations may change (from “we committed no breach of the law” to “we breached the law in reliance on a humanitarian necessity justification”), but there is no proof that allowing justifications on humanitarian necessity grounds would also motivate more unjustified violations. And to the extent any exclusion or qualification obscures the normative message of particular rules, such a danger should be countered by upholding the justification only when a violation is found to further IHL’s overall goal of humanitarian welfare, thereby working to reinforce the humanitarian message, not weaken it.

As the ICC gains experience and credibility, and as the incidence of domestic judicial review of war-related activity increases, resistance to the recognition of the humanitarian necessity justification on institutional grounds should subside.

## VI. DESIGNING A HUMANITARIAN NECESSITY JUSTIFICATION

An examination of the case studies and the analysis of the conventional explanations for rejecting a lesser-evil paradigm while allowing it in the domestic law sphere suggests, to my mind, that despite IHL’s absolutist stance, a humanitarian necessity justification is warranted.

Designing a workable definition of the justification that would take stock of the real dangers that such a paradigm may harbor is a complicated task. The actual incidence of justified violations is undoubtedly small. For the most part, parties violate the laws of war because they have a military interest in doing so or because they are indifferent or just plain cruel toward the enemy.

It is nonetheless possible that the rarity of humanitarian-driven violations is partly a derivative of the absolutist stance of international law: if one must assume the risk of being labeled a “war criminal,” the incentives for

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211. Rome Statute, *supra* note 7, art. 27.

212. *Id.* art. 28.

caring for the enemy are substantially reduced. This is one reason to allow for a justification.

If this assumption is correct, when we come to design a humanitarian necessity justification we must balance the aspiration to encourage states to promote humanitarian welfare and the risks of unjustified exploitations of any exemption from liability.

In so doing, we must keep in mind that IHL, like most legal systems, is neither purely deontological nor purely consequentialist in nature. Violations that are intended to promote a speedy victory are prohibited, even if the end of the war would also bring an end to suffering; in the words of Michael Walzer, “there is no right to commit crimes in order to shorten a war.”<sup>213</sup> If there are reasons to question the entire underlying rationale of the IHL project, and strive instead toward a pure utilitarian framework which seeks to maximize global welfare, these reasons invite the rewriting of IHL in its entirety—an effort which is external to my project. As I seek to locate the paradigm of the humanitarian necessity justification within IHL, not outside it, the justification must be designed in a way that would justify some violations that cause less humanitarian harm, while not opening the floodgates to all transgressions. In other words, it must be designed in such a way that would enable us to distinguish the right cases from the wrong ones, even bearing in mind that all rules are ultimately bound to be over and underinclusive.<sup>214</sup>

Even accepting my arguments against the absolutist stance of IHL, one may well conceive of a variety of other mechanisms applicable to unlawful-but-justified violations both in domestic law and IHL. One such mechanism is a civil disobedience model where the actors violate the law in the name of a greater good but also willingly assume the punishment for their acts. Actors could also rely on a system of prosecutorial discretion and/or pardons that would immunize violators from punishment after the fact. Alternatively, a system could utilize prior judicial warrants to authorize the violation *ex ante*. Without engaging in a full discussion of the merits and drawbacks of each of these possible mechanisms, which have already been advanced in relevant scholarship,<sup>215</sup> I choose here a paradigm of a *post facto* necessity justification, by way of analogy (however incomplete) to domestic criminal law. Such a system offers the best balance of incentives, preservation of the IHL system and its normative force, and practical considerations.

In what follows, I sketch out some of the elements which I believe should inform the design of a workable definition of the justification, including: (1) measuring “lesser evil”; (2) timing of the assessment; (3) motivations; (4) imminence and fault; (5) legislative intent; (6) causal connection; (7) less harmful alternatives; and (8) burden and standard of

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213. WALZER, *supra* note 12, at 210.

214. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976); see also Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1022 (1995) (commenting that by their *ex ante* nature rules will be both over and underinclusive).

215. See, e.g., Dershowitz, *Is It Necessary*, *supra* note 100, at 197-98 (arguing against a necessity defense); Gross, *supra* note 15, at 1486-87 (supporting a categorical ban on torture with an understanding that circumstances may call for officials to disregard the ban); Posner & Vermeule, *supra* note 103, at 674 (arguing for *ex ante* provisions justifying coercive interrogation under limited circumstances).

proof. Some of the elements are expounded in greater detail, while others I leave as questions that need to be further thought through and weighed under various options. The elements I suggest reflect what I find to be the best incorporation of normative, consequentialist, and institutional considerations, but undoubtedly, there may be legitimate debates over each one of the balance points I select. Where relevant, I return to the necessity defense in domestic criminal law as a touchstone for the model I propose here.

### A. *A Lesser Evil*

The cost-benefit calculation that is the essence of the justification depends on two cumulative elements: 1) who or what should be taken into account in making the calculation; 2) how much less is “lesser.” I address these questions separately.

#### 1. *Who Counts?*

The analysis of “who should count” and “how many should count” in the determination of what constitutes a lesser evil requires a more typological analysis of lesser evil than under the necessity defense in criminal law. The latter makes no explicit distinction between acts designed to protect the interests of the actor and acts designed to protect the interests of others.<sup>216</sup> This is because in the domestic sphere, individuals are presumed to be similarly situated vis-à-vis each other and vis-à-vis the state.

Operating in the theater of war, IHL, in contrast, assumes no such equilibrium; it must assign different rights and protections to different categories of individuals, in part to correct the biases that fighting states have toward each other’s nationals. The legal rules are designed to create incentives for certain behavior where none would otherwise exist. Consequently, special protection is accorded to those people and objects that fighting states have no preexisting interest in protecting.

To fit within the IHL framework, a pure lesser-evil justification would operate when a party commits a violation of the laws of war in furtherance of the welfare of IHL’s most protected categories alone, without any additional benefit for the acting party itself. Much more commonly, however, parties will operate out of a mixed concern for both protected and unprotected or less protected interests.<sup>217</sup> Still, to be upheld as justified, the illegal behavior would have to be compatible with the rationale of allocating different rights and obligations to different categories of persons. I discuss these various categories in what follows.

In order not to complicate things further, I limit the analysis to human lives and well-being, and leave aside categories of protected objects, such as civilian property, places of worship, cultural objects, and the environment. For

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216. See Martin, *supra* note 155, at 1530, who argues that the real distinction in obtaining successful versus unsuccessful pleas of necessity is the one between actions that uphold the existing social order and actions that challenge it.

217. See FRANCK, *supra* note 8, at 189 (describing the view that humanitarian intervention missions are always motivated by the self-interest of the intervener as well as by altruism, and that this mixed motivation should not matter in judging the intervener’s actions).

similar reasons, I largely leave aside certain types of the less readily quantifiable effects of war discussed earlier in the context of spillover effects.

### 1. *Enemy Civilians*

The protection of enemy civilians is first among the priorities of IHL as evident in the numerous provisions designed to protect this category of people. The rationale of these protections is straightforward: state *A* has a natural interest to protect its own people; it has no such interest with regard to the civilians of state *B*. State *A* might wish to harm state *B*'s civilians or simply be indifferent to their welfare and, in any case, even in the most benevolent cases of humanitarian intervention, would prefer the interests of its own civilians over the interests of state *B*'s civilians. It then follows that the law must create incentives for states to protect their enemy's civilians.

Notwithstanding the clear prohibitions on attacking or harming civilians intentionally, or the general duties to take precautions to minimize harm to civilians or minimize the dangers to civilians from hostilities, the exact scope of the protection accorded to civilians under IHL is unclear. In particular, the degree to which state *A* must sacrifice some of its soldiers in order to minimize harm to state *B*'s civilians is debatable.<sup>218</sup> The tradeoff between the government's duty of care for its own civilians in comparison to its care for enemy civilians is similarly unclear. Nonetheless, the protection of enemy civilians is uncontested as a value which IHL is designed to promote.

It follows, then, that we can weigh the consequences of two actions on the basis of how many enemy civilians would be harmed. Returning to the attacks on Hiroshima and Nagasaki, as compared to Operation Downfall, if the latter would have resulted in more Japanese civilian casualties (again, assuming that the laws of war were observed and that the casualties would have been inflicted in the course of legitimate warfare), then on these grounds and absent additional conditions, the atomic attacks could have been justified under a humanitarian necessity justification.

A similar evaluation applies to the Early Warning Procedure. If following the procedure resulted in fewer Palestinian casualties than would have been expected had arrests been conducted without the Procedure, then the interest in minimizing harm to these civilians should have warranted the upholding of the justification.

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218. See INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY): FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (2000), reprinted in 39 I.L.M. 1257, 1273 (2000) (stating that this question was unresolved); cf. DEP'T OF THE ARMY & DEP'T OF THE NAVY, COUNTERINSURGENCY MANUAL (2006) (implying that such a sacrifice is strategically wise, even if not required by law). The Additional Protocol provides that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Additional Protocol I, *supra* note 1, art. 57(3). The interpretive debate relies on the term "similar military advantage" and the question whether an operation which results in more casualties among one's own forces should still count as "similar military advantage." See also Eyal Benvenisti, *Human Dignity in Combat: The Duty To Spare Enemy Civilians*, 39 ISR. L. REV. 81, 89-90 (2006) (arguing that there is no such duty).



## 2. *Enemy Soldiers*

Enemy soldiers are legitimate targets in war. They are protected only when they no longer pose a threat because they have become *hors de combat* (by surrender, capture, or injury).<sup>219</sup> A natural interest of any state is to incapacitate the greatest number of enemy soldiers possible.

IHL affords few specific protections to enemy combatants on the field, which include some limitations on types of weapons or the prohibition on certain ruses of war. Still, the general principles of military necessity and humanity suggest that some respect for the well-being of combatants, even when they are actively engaged in the war effort, is warranted. The famous Martens Clause, which opens the 1899 Hague Convention on the Laws and Customs of War on Land states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience . . . .<sup>220</sup>

The exact interpretation of this clause is under much debate, but some writers suggest that it implies that not everything prohibited under the laws of war is *ipso facto* prohibited, and that general principles of humanity must instruct each action.<sup>221</sup> Specific provisions of IHL may also seem to suggest that the interest in harming enemy soldiers is not without limits: the Protocol provides that “[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”<sup>222</sup> This provision could be read as mere reinforcement of the protection for *hors de combat*, but may also be read as a positive instruction to use only such force as is actually necessary to achieve a particular military advantage.

If we read IHL as a lesser-evil bargain, one that accepts the killing of enemy soldiers as inevitable, but not as a goal to be promoted, then we should give credence to human life in general and include the lives of enemy soldiers in the harms-benefits calculation. This inclusion seems particularly apt given that it operates against a state’s own self interest in the strongest possible way. If so, the use of a prohibited weapon—for instance, poisonous gas that would put combatants to sleep, rather than kill them—might benefit from the humanitarian necessity justification.

Some situations would require a life-life tradeoff between enemy civilians and enemy combatants. To be true to the goals of IHL, the lives of enemy civilians must be held more sacred, despite the state having a weaker interest in harming them than their compatriot combatants. Under this analysis, if the attacks on Hiroshima and Nagasaki left more civilians dead but

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219. See Additional Protocol I, *supra* note 1, art. 41.

220. Hague Convention (II) with Respect to the Laws and Customs of War on Land *publ.*, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429.

221. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 250 (2000).

222. Additional Protocol I, *supra* note 1, art. 40.

fewer Japanese soldiers dead than Operation Downfall would have, the bombings could not be justified under a humanitarian necessity paradigm.

### 3. *One's Own Civilians*

IHL does not make an explicit distinction between one's own civilians and enemy civilians, and instead uses the generic term "civilian" throughout. There are a few specific provisions that instruct a warring state to ensure protection for its own civilians, such as by refraining from locating military targets within densely populated areas,<sup>223</sup> on the assumption that a state has a natural interest in protecting its own civilians and does not require additional incentives through the prescriptions of the laws of war to do so.<sup>224</sup> Most of the law's provisions are therefore more relevant to the relationship between the attacking state and the enemy's civilians. Absent the laws of war, any state would be quick to sacrifice the interest of the enemy's nationals, civilians and combatants, for the presumed sake of its own. The provisions dealing with civilians were thus intended to induce states to take into account the welfare of enemy civilians.

If we believe the state is already going to take action to protect its own civilians, it then becomes doubtful whether those civilians should benefit further from a humanitarian necessity justification. In other words, the question is whether a state should be allowed to breach an IHL norm, originally designed to protect enemy civilians or enemy combatants, for the better protection of its own civilians.

A pertinent instance is the paradigmatic case of interrogational torture. To avoid the problem of comparing between different values, let us assume for the present discussion that torture is as harmful as killing.<sup>225</sup> We can then frame the question as whether we should be allowed to deliberately kill an enemy combatant who is in our hands or an enemy civilian in order to save our own civilians. Given the incentives system of IHL, I believe the answer must be an unequivocal "no." Unless it could be shown that a breach of an IHL rule resulted in greater net benefit for the enemy, a greater benefit for a state's own nationals at the expense of the enemy should not be allowed.

This conclusion is not without difficulty. As it shifts the common justifications for torture from reliance on the interrogational purpose and the culpability of the victim to reliance on the identity of those we wish to protect by engaging in torture, it closes the door to the most common instances of torture but opens up the theoretical possibility of justifying other instances, including torture for noninterrogational purposes. Consider the earlier mentioned hypothetical of torturing Saddam Hussein's two sons as a means of inducing Hussein to withdraw Iraqi troops from Kuwait in the fall of 1990.

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223. *Id.* art. 58(b).

224. The field of human rights law, which has developed since the second half of the twentieth century, governs the relationship between a government and its own citizens.

225. Note that for Henry Shue, for instance, torture is worse than killing, because torture "fail[s] to satisfy even [the] weak constraint of being a 'fair fight.'" Shue, *supra* note 101, at 130. For Posner and Vermeule, it's less harmful, because "killing, unlike torture, utterly extinguishes the victim and forever denies him any future possibility of exercising autonomy or enjoying human dignity." Posner & Vermeule, *supra* note 103, at 678.

Under the humanitarian necessity paradigm, and assuming the U.S. government has no special interest (at least, nothing resembling its care for American citizens) in the well-being of Iraqi or Kuwaiti civilians, such torture would not necessarily be excluded from the parameters of the humanitarian justification. This is in opposition, for instance, to the torturing of suspected terrorists even in a “ticking-bomb” scenario, if the immediate beneficiaries from this torture are American nationals.

It is possible that actions taken to protect one’s own civilians—or soldiers—might enjoy the justification of self-defense under Article 31(1)(c) or the joint necessity-duress defense under Article 31(1)(d) of the Rome Statute.<sup>226</sup> Since there is no case law on either of these articles and the commentaries on their desired interpretation are divergent,<sup>227</sup> we cannot determine at this time whether or not such pleas will be successful. In any case, these pleas would not be part of the humanitarian necessity claim I suggest here.

#### 4. *One’s Own Soldiers*

For any country at war, protecting soldiers<sup>228</sup> is as strong—sometimes even immediately stronger—an interest as protecting its civilians. Soldiers are the war machines of the government. Their success in their mission would determine the fate of the government and country.

The minimization of harm to one’s own soldiers should thus not form the basis for any calculus under the humanitarian necessity justification. This does not mean that in any case in which the interest of a state in the well-being of its own soldiers came into consideration it would foil the humanitarian necessity justification. I am willing to expand the humanitarian motivation to a mixed concern for the enemy as well as one’s own nationals but exclude a sole or overriding concern for one’s own combatants or civilians.<sup>229</sup>

Accordingly, if the attacks on Hiroshima and Nagasaki spared the lives of American soldiers that would have otherwise been killed in further combat, but increased the number of Japanese civilian casualties, they could not be covered by the humanitarian justification. And, in a different context, if it were proven that the Early Warning Procedure endangered Palestinian civilians to a greater degree than traditional arrests, it should have been struck down on similar grounds even if it were shown that soldiers were better protected by it.

To sum up, since states already have an inherent interest in protecting their own nationals, both civilian and military, and since this interest is already incorporated into the laws of war through the military necessity part of the bargain, the humanitarian necessity justification should not be allowed to

226. See Rome Statute, *supra* note 7, art. (31)(1)(c)-(d); *supra* Section II.B.

227. Specifically on self-defense under Article 31(1)(c), see Hannah Tonkin, *Defensive Force Under the Rome Statute*, 6 MELB. J. INT’L L. 86 (2005).

228. I ignore, for present purposes, the difference between conscripted soldiers and volunteers, a difference that features in some philosophical debates around Just War or the principle of distinction in the laws of war, but nowhere in the laws of war themselves.

229. In fact, when actions benefit both the enemy and the state’s own nationals, the state would have a greater incentive in carrying them out.

operate in furtherance of these interests alone. Instead, the justification should operate only where, following the laws of war, the action resulted in greater welfare for the enemy. Any additional net benefit for the state's own soldiers and civilians is an advantage, but is neither necessary nor sufficient for a valid claim.

A final word on the potential for spillover: some acts constitute more than one violation. Killing a civilian intentionally is simultaneously a violation of the absolute ban on killing civilians and of the derivative duty to take precautions in order to minimize harm to civilians. Even more so, the use of any prohibited weapon implies the development, production, and stockpiling of the weapon—all violations of arms control agreements. In fact, it is difficult to conceive of a scenario in which employing a prohibited weapon—one that is also prohibited domestically (unlike tear gas, for instance)—would ever meet the conditions set forth for a necessary humanitarian act.

## 5. *Others*

The typology of “one’s own civilians and combatants” and “the enemy’s civilians and combatants” fits the traditional war model, but might not apply perfectly to all theaters of modern war. In humanitarian interventions, peace enforcement missions, counterinsurgency operations, or the war on terror, the classification of “enemy combatants” is easier to contemplate than the designation of civilians as “enemy civilians.”

Nonetheless, the rationale that restricts humanitarian necessity calculations to include only those who the acting government has no immediate and direct incentives to protect—namely, its own civilians or combatants—endures in these more complex environments as well. If so, the calculation should include civilians and combatants who do not belong to the acting power or its allies or coalition partners, and should prefer the welfare of civilians to that of combatants in accordance with the spirit of the laws of war.

## 2. *How Many Count?*

A related but separate question is not only who should count but also how many should count in justifying a violation of the laws of war, or, in other words, how much “lesser” should the lesser evil be in order to justify humanitarian necessity.

The standard account of the domestic necessity defense is that the defendant has acted to prevent a significant evil and that the remedy she chose was not disproportionate to the harm averted.<sup>230</sup> Proportionality is nowhere defined. The commentary to the Model Penal Code suggests that necessity is applicable even where the defendant killed one person in order to save the

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230. See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right To Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 294 (1974); Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 82 (1989).

lives of two or more.<sup>231</sup> This test would seem to suggest a strict utilitarian calculus, by which any increase in the net benefit to society would meet the proportionality test.

A strict utilitarian approach is compatible with an act-utilitarian framework that seeks to increase the net benefit of society. A utilitarian standard that would require a “significant” benefit would in contrast be more appropriate if we were inherently suspicious of the decisionmaker’s ability to make lesser-harm determinations and prefer to avoid borderline cases.

Because, under the argument I present here, the lesser evil is already conditioned on a net benefit for the enemy, rather than on a state’s own benefit alone, the lesser-harm formula might seem to be justifiable under a strict utilitarian calculus. It may be that, as a practical matter, it would be easier to demonstrate the justifiability of the violation where the net benefit is substantial, especially where there is net benefit for a state’s own nationals as well or where the transgression is especially egregious. But this is a practical and evidentiary consideration, not a conceptual one.

Under this analysis, accepting the IDF’s argument that out of hundreds of cases in which the Early Warning Procedure was employed only one Palestinian civilian has been killed, a strict utilitarian analysis would uphold a lesser-evil calculus if it could be shown that as a result of the procedure, at least two Palestinian civilians were spared. Nonetheless, indirect costs of harming hundreds of individuals’ dignity in coercing them to cooperate with the occupying forces would have to be incorporated into the calculus as well.

Despite the fact that a strict utilitarian analysis is theoretically acceptable on some levels, there may be important reasons to demand a higher standard. I would contend that the “significant” requirement better protects the humanitarian message of IHL and signals that violations are justified only in the extreme case; this is one compelling reason to adopt the more restrictive test. In addition, the “significant” test is more appropriate if one believes, as I do, that the dangers of uncertainty and slippery slope exploitations as well as the spillover costs are substantially greater in the context of war than in domestic interactions. It also stands to reason that a “significant benefit” test would protect against moral hazard, by which actors might engage in harmful and unjustified violations of IHL believing they would be protected under the humanitarian necessity defense. Raising the benefit-calculation bar would also diminish the similar moral hazard concern that states, counting on the humanitarian necessity argument, might have greater propensity to engage in wars in the first place. Of course, the interest in reinforcing the humanitarian message or countering the risks of misapplication would have to be weighed against the interest in exercising the humanitarian justification in cases where the net benefit is positive, even if not significant. Nevertheless, for the reasons stated here, the strict utilitarian framework ultimately seems too risky.

If, despite the foregoing analysis, we were to accept that the saving of a state’s own civilians justifies a humanitarian necessity exemption even where the net benefit to the enemy was negative, the strict utilitarian calculus would be even less appropriate. Rather, it would have to shift significantly to correct

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231. MODEL PENAL CODE § 3.02 cmt. 1 (1985).

against the inherent bias of governments in favor of their own nationals. In such cases, therefore, we should certainly demand a substantial benefit for the national civilians in comparison with the harm caused. This corresponds to scholars' intuitions about justifying (or excusing) torture in catastrophic scenarios, but not otherwise.<sup>232</sup>

### B. *Timing of Assessment*

Any choice with regard to the timing of the assessment of the humanitarian impact of the transgression has to balance the fears of underdetering "bad" violations against the risks of overdetering justified ones.

The domestic criminal law does not require a post hoc factual showing that the defendant had in fact chosen the lesser harm; all it requires is that the defendant reasonably believed she was choosing the lesser-evil path when she made her choice.<sup>233</sup> Thus, it is possible for an actor to enjoy the protection of the necessity defense even if her acts ultimately resulted in greater harm.

There are good reasons not to follow the same test in the IHL context. As noted in the preceding discussion of the consequentialist accounts, a post hoc determination which would demand an actual showing of a lesser harm could offer important safeguards against the risks related to uncertainty, slippery slopes and spillover costs—risks which may be even higher in the war context than in the domestic context. Having to bear the onus of proving a lesser-evil outcome, international actors would be more hesitant to engage in dangerous experiments in war crimes and instead follow only those cases in which the net benefit to the enemy could be well ascertained in advance.

But there are also good reasons to depart from the post hoc test, and follow, instead, the domestic law test. One is that making the determination dependent on the ability to prove "success" might drive actors to intensify their transgressions if milder ones did not in fact produce lesser harm.

Another concern is that the ex post determination runs the risk of overdetering justified violations. By already requiring that the justification operate only where there is a net benefit to the enemy, and especially if we were to adopt a "significant" lesser-harm formula, the risks of underdetering malevolent exploitations are diminished.

The choice between these two options—between the risk of underdeterrence and of overdeterrence—depends on some prior judgment about decisionmaking in wartime. In particular, the question is whether we believe that individuals facing lesser-evil choices are better or worse than professional decisionmakers (commanders or politicians) in evaluating risks and probabilities in the face of emergencies.

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232. See, e.g., Sanford H. Kadish, *Torture, the State and the Individual*, 23 *ISR. L. REV.* 345, 346 (1989) (stating that torture is such a significant human rights violation that only the saving of a large number of innocents can justify it).

233. See CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 785 (2005). Note, however, that Robinson seems to prefer an actual post factum showing of a lesser harm. ROBINSON, *supra* note 147, at 46, 60.

### C. *Intentions*

While requiring a post hoc showing of success, the domestic necessity defense requires that ex ante, the defendant reasonably anticipated a causal connection between his actions and prevention of the harm.

One can imagine certain actions that would result in a net benefit for the enemy but that were carried out without the intention of producing such a benefit. To protect IHL from unjustified transgressions and to genuinely realize its goals, as well as emphasize its humanitarian message, we must require those who wish to violate its provisions to demonstrate that a genuine humanitarian intention had driven their actions. Ensuring the element of good intentions alongside the estimate of good outcomes is intended to guarantee that the humanitarian necessity justification would always be understood as an exception to the rule that could be justified only as means of furthering humanitarian goals.

It then follows that if Samuel Walker is correct and the humanitarian motivations behind the atomic bombings of Japan were contrived in retrospect, meaning American decisionmakers had little regard for Japanese lives when the decision to use the bomb was made, then those decisionmakers should not have been able to benefit from a humanitarian justification.<sup>234</sup>

The evidentiary question of how to assess the real motivations behind an individual’s choice of action is no different in this context than in any other case that requires proof of mens rea to find a defendant guilty or innocent. As in such other cases, one can imagine a post hoc judgment relying on confidential communications within the government or operational briefings to the forces on the ground as a way of ascertaining motivations, at least to some degree.

### D. *Imminence and Fault*

Despite much criticism,<sup>235</sup> the imminence of harm is a requirement of the domestic necessity defense. The requirement of imminence stands for an urgent need to break the law rather than leisurely pursuing alternative lawful means to avert the harm. Imminence also implies that the individual’s decision had to be made quickly, under a sense of looming threat, not necessarily in consideration of all possible alternatives for action. This last narrowing requirement is intended to encourage people to pursue lawful means when they seek to prevent harm and allow them to break the law only when absolutely necessary.

But in war, all action has a sense of imminence and urgency to it. Emergency is not a rarity, but a common occurrence. It then makes little sense to add the domestic requirement of imminence.

Furthermore, when the government does make a decision to break the law in war, it is not usually a hasty decision in reaction to an emergency, but a thoroughly deliberated one. Cases of the type presented by the Early Warning Procedure or the attacks on Japan are not the result of decisions made on the

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234. See *supra* note 137 and accompanying text.

235. See Martin, *supra* note 155, at 1567-79; ROBINSON, *supra* note 147, at 56-58.

spur of the moment. At least as a conceptual matter, they involve a careful assessment and the weighing of possible courses of action by experts. This is especially the case where a policy of breaking the law (as in the Early Warning Procedure case), rather than a single violation at a particular moment, is concerned.

The requirement that the defendant did not contribute to the choice-of-evils situation—a requirement which is absent from many iterations of the necessity defense but appears in the Model Penal Code<sup>236</sup>—is similarly irrelevant to a state at war.<sup>237</sup> Any battlefield situation is the result of the strategic interaction between the parties to the conflict, making every action the result of the parties’ “contributory fault.” The concept of contributory fault makes sense only where we fear emergencies would be contrived to exploit the defense. In war, emergencies are not normally contrived; they are simply part of war.

Moreover, as a matter of law, IHL binds all parties to the conflict regardless of the *jus ad bellum* aspects of the conflict; in other words, the laws of war apply to conduct independently of the question of who is to blame for the war in the first place. In this sense, IHL rejects the concept of “fault” as affecting the application of its provisions in much the same way that it rejects reciprocity as a condition for compliance. It would then seem incongruent to make contributory fault a reason not to allow a party to engage in humanitarian-driven actions.

For all these reasons, to the extent domestic criminal law actually demands the showing of imminence and the lack of contributory fault, these requirements are overly restrictive when applied to the humanitarian necessity justification.

### E. *Causal Connection*

In the domestic law context, the element of causality is often defined as demanding that “the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger.”<sup>238</sup> This test is understood as adding an objective element to the subjective good-intentions requirement.

Shaun Martin has argued that even though the causation requirement is consistent with the structure and object of the necessity defense, as well as compatible with its utilitarian function, it has been unduly restricting as applied by courts.<sup>239</sup> Martin claims that “the social preference for at least some types of illegal conduct (for example, a trespass to save a drowning child) even when almost assuredly futile also casts doubt on the legitimacy of

236. MODEL PENAL CODE § 3.02(2) (1985).

237. But see Rome Statute, *supra* note 7, art. 31(1)(d), requiring that the threat either emanated from someone other than the defendant or else was “constituted by other circumstances beyond that person’s control.”

238. See, e.g., *Commonwealth v. McCambridge*, 690 N.E.2d 470, 474 (Mass. App. Ct. 1998); *State v. Hage*, No. C2-99-1051, 1999 WL 1256357, at \*1 (Minn. Ct. App. Dec. 28, 1999) (necessity defense available only when “there was a direct causal connection between breaking the law and preventing the harm”).

239. Martin, *supra* note 155, at 1579-84.



the causation requirement as a categorical prerequisite.”<sup>240</sup> Instead, Martin argues, causation—like imminence—should be made a consideration in the weighing of necessity, not a condition.

In the context of a humanitarian necessity justification, requiring a “direct” causal connection between the violation and the harm abated would seem right as a way of distinguishing between true necessity cases and other violations of IHL, especially those intended to gain victory (with or without the justification that with an end to war, suffering too is abated).

Accordingly, torturing an enemy POW to gain military information that would assist the fighting forces in gaining a decisive advantage would not be protected under the humanitarian necessity justification, even if the decisive advantage turned into a military victory and put an end to the suffering of enemy combatants and civilians. The “direct” beneficiaries of this information are the torturer’s own soldiers, which under my proposal would not be able to account for a lesser-evil justification. The causal connection between the information obtained and the lesser harm to enemy civilians and combatants is too remote to be justified without defying any limitations on warfare.

The “direct” formula offers a far from perfect test. Consider, for instance, a claim by the torturing party in the above hypothetical that the information obtained from the POW was instrumental in containing the war effort to a particular front, thereby sparing enemy combatants in all other regions. This hypothetical would seem to meet the “direct causal connection” test, but at the same time veer too close to the “military victory” argument. Uncovering the true motivations behind the torture might also assist in distinguishing among justified and unjustified transgression. Still, the causal connection offered here would not be able to offer clear guidance in all cases and some case-by-case judgment on the merits would be required.

In eliminating the “military victory” argument, the judgment of the attacks on Hiroshima and Nagasaki immediately presents itself for reevaluation. Undoubtedly designed to achieve victory and end the war, the attacks might nonetheless be justified if we were to determine that under the prevailing political and military circumstances, winning the war was the only thing left to do. Continuing well after Germany’s surrender, the final active front of a six-year-old world conflict had withstood the fire-bombings of Tokyo and the invasion of Okinawa and the hundreds of thousands of casualties that it had left behind. Perhaps this is the *sui generis* case in which a military victory that ends the war is a warranted exception. Still, many questions that depend on which historical account we choose to accept are left unanswered: was the insistence on Japan’s unconditional surrender, as opposed to a conditional one, justified? Was the attack on Nagasaki, only three days after Hiroshima, necessary to get the Emperor to surrender or was it superfluous and wantonly excessive? And finally, were there no less harmful means that could have yielded a similar result?

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240. *Id.* at 1583.

### F. *Less Harmful Alternatives*

To be truly justified, a net utilitarian calculation is insufficient; the actor, instead, must be able to show that she had chosen the least possible harmful means that could avert the greater evil, without jeopardizing the success of the military mission. This further condition is intended to supplement the causal connection between the violation and the aversion of harm and to ensure that the lesser-evil justification is not used to mask unnecessary atrocities.

The domestic necessity defense does not require this condition; instead, it offers only a vague proportionality test. The joint necessity-duress clause in the ICC's Rome Statute includes a similarly broad test, namely that "the person acts necessarily and reasonably to avoid this threat."<sup>241</sup> Both domestic necessity and ICC necessity operate only when the defendant has acted against an imminent threat. But where a government chooses in a nonimminent, premeditated decision to break the law, it supposedly can and should assess the full ramifications of the violation, including by considering less harmful means, whether legal or illegal themselves.

In the *Early Warning* case, the High Court of Justice addressed the possible use of loudspeakers as an alternative to reliance on civilians. The IDF's position was that the use of loudspeakers would call attention to the forces operating, thereby increasing the risk of all-round escalation. It is unclear to what extent this alternative affected the final decision of the judges, and whether the Court ultimately struck down the Procedure despite deferring to the IDF's judgment on this particular issue.

Those who are willing to accept the use of torture commonly agree that it must be restricted to those cases where a similar outcome could not be achieved by any other means. Consequently, if any less harmful measure (for instance, detention, the taking of hostages, or even the threat of using torture) would have had a similar probability of success, torture would be unjustifiable. The combination of the least harmful means and the motivation of alleviating the suffering of the enemy make the justifiable use of torture—or other wartime atrocities, such as rape—highly unlikely.

The less harmful means requirement casts the largest shadow over the attacks on Hiroshima, and more so, on Nagasaki. Was it indeed impossible to avert Operation Downfall by using less disastrous means? Or were scientists who argued for inviting U.N. representatives to a live demonstration of the explosion in the desert correct that this option had to be tried out first before dropping the bomb on densely populated cities? Does the insistence of the Emperor on conditional surrender even after the widespread firebombing of Tokyo and the invasion of Okinawa prove that there were no other options? Did the conditions set by the Emperor warrant the continuation of the war? Could the use of nuclear weapons ever be justified under the "least harmful requirement" condition? Hindsight may lead us to ask these questions, but it does not, unfortunately, provide answers. And still, while it is possible to imagine a no-real-alternative argument for the bombing of Hiroshima, the

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241. Rome Statute, *supra* note 7, art. 31(1)(d).

case for Nagasaki—bombed only three days after Hiroshima and without any serious attempt to pursue alternative measures—seems implausible.

### G. *Burden of Proof*

Operating as a justification, rather than a source of obligation, the burden of proof of the various elements of the necessity justification should be placed on the actor seeking to invoke it.<sup>242</sup> This allocation of responsibility should guard not only against disingenuous claims, but would also place the problem of uncertainty on the shoulders of the actor. In case of doubt, the rule should be upheld against the justification.

### H. *Summary*

A workable definition of a humanitarian necessity justification might read as follows:

A person shall not be criminally responsible if, at the time of that person’s conduct:

. . . .

The conduct that is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant’s compatriots, the person could reasonably expect that his or her action would be effective as the direct cause of minimizing the harm, and there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.

Among the examples offered throughout this Article, humanitarian interventions, assassinations of rogue leaders, the Early Warning Procedure, and, in some extreme cases, even the deliberate killing of civilians or combatants who are *hors de combat*, might be justified under a humanitarian necessity justification, provided they meet all the relevant conditions. In contrast, interrogational torture designed to prevent attacks on our own nationals would, under this paradigm, remain unjustifiable.

The blueprint for a humanitarian necessity justification offered here is tentative and debatable. Weighing the pros and cons of every possible articulation of every relevant element requires a careful balancing between over and underdeterrence, and depends not only on sound legal judgment but also on how one views the world of war and its effects on human judgment. Adapting the domestic necessity defense to fit a humanitarian necessity justification in war depends, in particular, on our relative trust in individuals—or governments—in making lesser-evil determinations in times of emergency.

## VII. CONCLUSION

Wars do not suffer from excessive humanitarian zeal. The tragedy of one side is the other’s triumph. Often the more demonstrable a tragedy is, the

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242. See also FRANCK, *supra* note 8, at 190 (arguing that since humanitarian interventions are a departure from the general prohibition on the use of force, it “leaves the onus of proof squarely with those seeking a dispensation from the general rule”).

greater the sense of triumph of the ascendant party. Such zero-sum strategic interaction, fueled by aggression, fear, and hate, breeds what we dub both “necessary” and “unnecessary” evils. The effort of IHL to keep these evils at bay should be well-guarded. However, the law as it stands does not necessarily enable us to distinguish the inevitable evil from the superfluous one as much as we need. In fact, the system currently accustoms us so much to notions of suffering as a “necessary” evil of war that we have been largely benumbed to this suffering as a moral matter. Since it is legally acceptable, we do not quarrel with its morality.

Quarreling with the morality of what is legally unacceptable is always a delicate task. Nonetheless, I argue that the law’s current absolutist stance prevents parties in conflict from lawfully pursuing actions that might lessen the harms of war. Specifically, I argue that it is possible to conceive of a humanitarian necessity justification, a variation on the necessity defense in domestic criminal law, which would exempt those who pursue such actions from criminal liability. Such an exemption, I hope and expect, could further the humanitarian goals of IHL without eroding its rules and status. What is required for such an exemption to work is a willingness on our part to shift the focus of care from the immediate, visible victims to would-be, invisible ones who are nonetheless just as real. We must not inertly accept certain victims as the necessary collateral damage of war, but instead make a positive and genuine choice to protect many by harming the few.

The analysis I offer in this Article raises much broader questions than can be answered here about the current system of IHL and its future development. One such comprehensive question is the degree to which utilitarianism, on the one hand, or deontology, on the other, can and should inform the design of the laws of war. As this Article shows, the current system of IHL is neither purely deontological—for it makes numerous concessions in allowing wars to be fought in the first place—nor purely consequentialist—for it prohibits certain actions even when those might produce less suffering in totality. This Article follows the basic premises of IHL and locates the humanitarian necessity justification within them. But if IHL is an amalgamation of rules stemming from different moral intuitions, political compromises, and historical contingencies, it should not be an impossible or prohibited task to imagine amending the laws of war in a way that would better protect humanitarian interests.

The fact that the inquiry into the moral drive of IHL and its various provisions has heretofore largely remained within the province of philosophical studies is particularly surprising given the ongoing deliberations about utilitarianism versus absolutism in other fields of law.<sup>243</sup> This question seems especially relevant given current debates about the suitability or unsuitability of existing rules in the context of the war on terrorism and possible adaptations to new kinds of conflicts, actors, and technologies. Many of these debates can be understood in terms of the tension between absolute moral prescriptions and utilitarian design. Whatever the right balance between

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243. For a thorough survey on the topic, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VS. WELFARE* (2002).

these competing drives is, I suggest that the quality of practical mercy, so to speak, and a constant remembrance of the value of individual human life should remain our lodestar.