

9-22-2008

# THE LAWS OF WAR AND THE “LESSER EVIL”

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## Recommended Citation

Blum, Gabriella, "THE LAWS OF WAR AND THE “LESSER EVIL”" (2008). *Harvard Law School Faculty Scholarship Series*. Paper 24.  
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## THE LAWS OF WAR AND THE "LESSER EVIL"

*Gabriella Blum\**

*Why is it that the laws of war, or international humanitarian law (IHL), allow no justification for breaking the law even if where such conduct would actually produce less humanitarian harm than following the law? In introducing the concept of a **humanitarian necessity justification**, this paper suggests that it should. It first addresses the puzzle of IHL's existing absolutist stance through three historical case studies in which actors broke the law under a claim of necessity, or a mixed concern for self and others: The "Early Warning Procedure" employed by the IDF in the West Bank, the generic case of torture, and the atomic bombings of Hiroshima and Nagasaki. It then examines whether the domestic necessity defense in criminal law might be transposed onto the international level, ultimately finding that such transposition is impossible. In further searching for an account for IHL's absolutist stance, the paper turns to first-order accounts – deontological, consequential, and institutional – only to demonstrate that none of these accounts offers a convincing explanation for the exclusion of a humanitarian necessity paradigm. Ultimately, the paper offers a blueprint for a definition for a humanitarian necessity justification that would exculpate an actor who violated the laws of war in the name of a greater humanitarian good. The central component of the definition is a requirement that the greater humanitarian good would be for the benefit of the enemy, rather than for oneself. Under such paradigm, the Early Warning Procedure and perhaps even the atomic bombing of Hiroshima might be justified, while the paradigmatic case of interrogational torture could not.*

*It is still however true, that war contains so much folly, as well as wickedness, that much is to be hoped from the progress of reason; and if any thing is to be hoped, every thing ought to be tried.*

(James Madison, "Universal Peace," National Gazette, February 2, 1792).

## I. INTRODUCTION

At Agincourt in 1415, Henry V ordered a coup de grace for severely wounded French soldiers. Today, 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 end the war and put an end to great suffering on both sides. The intentional killing of civilians is a war crime. 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>2</sup> The lawfulness of targeting a foreign leader outside of an ongoing armed conflict is dubious. The Independent International Experts Commission on Kosovo, established to review Operation "Allied Force" in 1999, deemed the humanitarian intervention to stop the genocide in Kosovo "illegal but legitimate."<sup>3</sup> The Operation was carried out without a United Nations Security Council authorization. Some have argued in favor of

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I am grateful to Lucian Bebchuk, Glenn Cohen, Jack Goldsmith, Richard Goldstone, Ryan Goodman, Duncan Kennedy, Adriaan Lanni, Daryl Levinson, Dan Meltzer, Martha Minow, Gerald Neuman, Benjamin Roin, Benjamin Sachs, Jed Shugerman, Matthew Stephenson, Bill Stuntz, Adrian Vermeule, and the participants of the Harvard Law School faculty workshop for comments and suggestions on earlier drafts. I am also indebted to Alyssa Saunders and Noga Firsenberg for excellent research assistance. Any errors are mine.

<sup>1</sup> See Additional Protocol Relating to the Protection of Victims of International Armed Conflicts art. 10(1), 41(c), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. 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 it 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.

<sup>2</sup> Robert F. Turner, *Killing Saddam: Would it Be a Crime?* WASHINGTON POST, Oct. 7, 1990 at D 1. In 2003, the suggestion was raised once again: see Anne-Marie Slaughter, *Mercy Killings*, FOREIGN POL'Y, No. 136 (May - Jun. 2003), at 72-73.

<sup>3</sup> See The Expert Commission with R Falk and others (Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York, Oxford UP, 2000) at 185-198, esp. at 186) (also known as the "Goldstone Commission," which labeled the Kosovo-intervention as illegal, but legitimate).

torture in the war on terrorism if it were proved that it was necessary to prevent additional acts of terrorism and the harming of innocent victims. 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 historians, lawyers, public intellectuals, policy makers, and the public at large. But international law as it stands echoes nothing of this diversity. Instead, it takes an absolutist stance, rejecting any justification that might exculpate states from liability for violating its rules. Most notably, the claim that certain war crimes might actually spare the lives of many thousands of people would find no audience in the legal judgment of international law.

This paper explores why this is so and suggests that international law should move away from its absolutist stand and include what I term a "humanitarian necessity justification" as an exemption from liability in the appropriate case. The term *humanitarian* denotes those interests that are protected under existing IHL.

Existing legal scholarship has paid much attention to the possible justification of breaching *jus ad bellum* – the laws pertaining to the initial use of force against another state – when deliberating the legitimacy of the humanitarian interventions in Kosovo, Liberia, Somalia, and elsewhere;<sup>4</sup> and, in a different context, when debating the 2003 invasion of Iraq. It has also paid much attention to the possible justifications for breaching individual rules of *jus in bello* – the laws of war, or as they are otherwise known, international humanitarian law (IHL); for the most part, attention has been given to the prohibition on torture,<sup>5</sup> to the assassination of rogue leaders,<sup>6</sup> and to the use of prohibited weapons.<sup>7</sup> Interestingly, however,

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<sup>4</sup> See in particular Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006), where Posner uses the discussion of humanitarian intervention to argue the case for a welfarist-based reform of international law; Ian Johnston, *Essay in Honor of Oscar Schachter: The Plea of "Necessity" in International Legal Discourse; Humanitarian Intervention and Counterterrorism*, 43 COLUM. J. TRANSNAT'L L. 337 (2005); and THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS, 174-191, 183-185 (2002) (arguing there is no need to formally change the law, but instead, accommodate cases of humanitarian intervention through interpretive "mitigation").

<sup>5</sup> I refer to this literature in Section II(b) below.

<sup>6</sup> See *supra* note 2.

<sup>7</sup> 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 79 (Peter J. Katzenstein ed., 1996); JEFFREY W. LEGRO, COOPERATION UNDER FIRE: ANGLO-GERMAN RESTRAINT DURING WORLD WAR II 153 (1995); RICHARD M. PRICE, THE CHEMICAL WEAPONS TABOO (1997); note, however, that the discussion of prohibited weapons,

despite being the subject of much debate among philosophers,<sup>8</sup> the broader question of whether existing structures of the laws of war actually promote humanitarian welfare has largely been ignored by legal scholars. The latter, for the most part, have been generally deferential to and accepting of the current system of IHL. In this work, I set out to offer a general paradigm of a humanitarian necessity justification that is unlimited to any specific rule of IHL.

Evolving through centuries of wars and destruction, IHL set out to protect combatants and civilians from the scourge of war, while accepting the inevitability of war as a human evil. Its rules reflect a compromise between the need to allow for an effective prosecution of the war and the ideal of protecting those touched 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., of promoting the effectiveness of the military operation – since that necessity has already been incorporated into the balance struck by the legal rules.<sup>9</sup>

Nonetheless, upon close scrutiny of IHL, one may find many examples for absolute prohibitions, which if violated could actually result in less humanitarian suffering: The use of non-lethal chemical weapons (such as tear-gas); the torture of an individual in a “ticking bomb” scenario; the clandestine operation carried out by commando soldiers disguised as civilians; even the intentional targeting of some civilians in an effort to spare more civilian lives. And yet, all of these would amount to war crimes.

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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.

<sup>8</sup> See, e.g., G. E. M. Anscombe, *War and Murder*, in NUCLEAR WEAPONS: A CATHOLIC RESPONSE 45-62 (Walter Stein ed., 1961); George I. Mavrodes, *Conventions and the Morality of War*, 4(2) PHIL. & PUB. AFF., 117-131 (1975); Thomas Nagel, *War and Massacre*, 1(2) PHIL. & PUB. AFF., 123-144 (1972); Richard B. Brandt, *Utilitarianism and the Rules of War*, 1(2) PHIL. & PUB. AFF., 145-165 (1972); R. M. Hare, *Rules of War and Moral Reasoning*, 1(2) PHIL. & PUB. AFF., 166-181 (1972); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2d ed. 1992); Paul Woodruff, *Justification or Excuse: Saving Soldiers and the Expense of Civilians*, CANADIAN J. PHIL. Supp. Vol. VIII 159-176 (1982); Anthony E. Hartle, *Humanitarianism and the Laws of War*, 61 PHIL. 109-115 (1986).

<sup>9</sup> 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 Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 A.J.I.L. 213, 215-219 (1998); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY NORMS* 215-217 (1989); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 219-220 (2003).

If we take it for granted that IHL was designed to minimize humanitarian suffering, 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>10</sup>

The developments of the past decade or so in the field of international criminal law (ICL) make this question particularly important. 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 that adjudicates war-related activities.

To demonstrate what might be at stake in recognizing or excluding a humanitarian necessity justification, I present three real-life cases in which a state's armed forces violated the laws of war in the claim that pursuing a lawful strategy instead would have resulted in greater humanitarian suffering. In the "Early Warning Procedure," the Israel Defense Forces 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 generic case 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 the then Secretary of War Henry Stimson described as "deliberate, premeditated destruction [which] was our least abhorrent choice."<sup>11</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.

An immediate analogy to the humanitarian necessity paradigm is suggested by the necessity defense in domestic criminal law.<sup>12</sup> Both systems

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<sup>10</sup> I limit my discussion to IHL of international armed conflict, leaving aside the laws of non-international armed conflicts.

<sup>11</sup> Cited in HIROSHIMA: THE DECISION TO USE THE A-BOMB 633 (Edwin Fogelman ed., 1964).

<sup>12</sup> 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

of law – domestic criminal law and ICL regulate violence and make it a criminal offense, under certain conditions. But this analogy works only to a limited degree. To conceptualize the idea of a humanitarian necessity justification, I compare the approaches of both ICL and domestic criminal law to the necessity defense, and show how the different contexts of regulation – that of ordinary violence among citizens and that of state's use of force against enemies – pose different challenges and are based on different premises, making the direct transposition from one to the other impossible.

As the comparison between the international and domestic levels fails to account for the rejection of a humanitarian necessity justification in IHL, I turn to three conventional accounts of first-order principles of rules and legal institutions, inquiring whether an explanation for the absolutist nature of IHL may be found in them. The first account is that of deontological reasoning. The second is a layout of traditional rule-consequential arguments, including concerns about uncertainty, slippery slopes, and spillover effects. Lastly, I address institutional considerations, as a distinct subset of consequentialist arguments, which include the process of lawmaking, adjudication and enforcement of IHL rules. Testing these various accounts in the context of IHL, I conclude that although cautioning against the potential abuses of a humanitarian necessity paradigm, none of these accounts is sufficiently convincing to explain its wholesale exclusion.

The last part of the paper is then devoted to the prescriptive design of a humanitarian necessity justification in IHL. Building on the three case-studies offered earlier, on the comparison between the domestic criminal context and the international one, and on the critical examination of first-order explanations for a preference for absolute rules, I offer a blueprint for the definition of the humanitarian justification. Ultimately, the blueprint must be such that would allow us to distinguish the "right" case from all the wrong ones. This is a particularly challenging task, given that the project of IHL is premised on the idea that some cruelty must be curbed, even at the expense of prolonging lawful violence and suffering. One cannot claim to reduce suffering by carpet bombing the enemy's capital just to finish the war more quickly. I accept this premise, in part because a long history of much cruelty refutes the correlation between superfluous ruthlessness and speedy victory. My effort here then is to find a place for a humanitarian necessity justification, which would allow parties in conflict to engage in welfare-increasing actions, without collapsing the entire project of IHL.

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comparison on criminal law as the most immediately analogous field in terms of its subject-matter and content.

The blueprint definition I suggest is informed by an analysis of various interrelated elements, including the measurement of "lesser-evil," the motivations of the actor, the required causal connection between the violation and the aversion of harm, the weighing of alternatives, the conditions of imminence and fault, legislative intent and bargaining outcomes, and the burden and standard of proof of the various elements of the justification. Much, I concede, ultimately remains within the private scope of judgment and assessment of probabilities and realities.

Under the definition I suggest, the type of IHL violations committed under the Early Warning Procedure and atomic bombings of Hiroshima and Nagasaki could be covered under a humanitarian necessity justification. The paradigmatic case of interrogational torture, however, could not.

Some methodological clarifications are in order: I assume a general obligation to obey IHL rules. I do 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>13</sup> Avoiding repetition of existing arguments, I choose to work within IHL, even though parts of the analysis hark back to these previous discussions. I also do not seek to test the appropriateness or sensibility of individual IHL rules or offer any amendment to them. For this reason, I limit the humanitarian necessity paradigm to a justification, rather than a source of obligation.<sup>14</sup> Accordingly, I accept the fundamental paradigms of IHL (such as distinction and proportionality) and work within them.<sup>15</sup> I similarly follow

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<sup>13</sup> See, e.g., Alon Harel and Assaf Sharon, *What is Really Wrong with Torture*, 6 J. INT'L CRIM. JUST. 241-259 (2008); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Paul Butler, *Supreme Court Review Foreword: Terrorism and Utilitarianism: Lessons From, and For, Criminal Law*, 93 J. CRIM. L. & CRIMINOLOGY 1 (2002).

<sup>14</sup> 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 paper, 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, not the attribution of responsibility to the actor. On the distinction between justification and excuse see John L. Austin, *A Plea for Excuses*, 57 Proc. Of the Aristotelian Soc'y 1 (1957); see also George P. Fletcher, "The Individualization of Excusing Conditions, in JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES (Albin Eser & George P. Fletcher eds., 1987); Anthea Roberts, "Can Uses of Force be Illegal but Justified, in HUMAN RIGHTS: THE INTERNATIONAL LEGAL CONTEXT (Philip Alston ed., 2005).

<sup>15</sup> 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 SIDE 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; p. 11.

the well-recognized distinction between the *jus ad bellum* and the *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 being with.

Finally, I fully recognize 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. In addition, I note the possible dangers of malevolent exploitation that any exemption from liability for war crimes might harbor. Nonetheless, some violations of the laws of war, under particular circumstances, 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 paper 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 international criminal law (ICL). In part III, I describe three real cases in which actors sought to invoke some kind of a humanitarian necessity justification for breaking IHL rules. In Part IV, I lay out the various components of the necessity defense in domestic criminal law and explain why their transposition to the international level would require adaptation. In Part V, I test the conventional explanations for the reluctance to recognize a lesser-evil paradigm, including deontological, consequential, and institutional explanations. In Part VI, I suggest a workable definition for a humanitarian necessity justification. I conclude with the further questions that his study suggests with regard to IHL and ICL as well as to international law more generally.

## 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>16</sup> It accepts as a

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<sup>16</sup> The International Committee of the Red Cross explains that "International 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." <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet> (italics in the original). See also William J. Fenrick, *International Humanitarian Law and Combat Casualties*, 21 EUR. J. OF POPULATION 167, 168 (2005).

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:

“the 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 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>17</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 are. The Bible, the codes of ancient Greek, the Indian law of Manu – all contained some prohibitions on warfare, the violation of which was an offense to divine order.<sup>18</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>19</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, religious teachings and natural law, towards 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 bearing of rights to a more enlightened human society which places the welfare of individuals as its subject of concern. This is how *humanitarian* came to replace *war* in explaining what the *jus* was about.

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>20</sup> The International Committee of the Red Cross publishes guidebooks on

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<sup>17</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868. The Declaration is widely accepted as customary international law,

<sup>18</sup> On the perspectives of various traditions on just wars, see generally THE ETHICS OF WAR: SHJARED PROBLEMS IN DIFFERENT TRADITIONS (Richard Sorabji & David Rodin eds., 2006).

<sup>19</sup> For a general history of the laws of war see, STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005); THE LAW OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard, George J. Andreopoulos, & Mark R. Shulman eds., 1994).

<sup>20</sup> See DAVID KENNEDY, OF WAR AND LAW 83 (2005).

International Humanitarian Law just as the Army Field Manual refers to the Laws of Armed Conflict. The content of both is not very different.

With the shift towards absolute and unconditional obligations many of the earlier prescriptions have survived, sometimes under a new rationale,<sup>21</sup> 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 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 mechanism. 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 relative standards terms: 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 related;"<sup>22</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>23</sup> and POWs are to be evacuated to safe zones "as soon as possible."<sup>24</sup> Many others norms, however, are articulated as concrete and absolute rules: The use of chemical or biological weapons is absolutely prohibited. The torture of prisoners of wars or civilians is never lawful. The carrying out of attacks while posing as a civilian is illegal perfidy. The intentional (as distinguished from foreseen-yet-unintended) killing of a civilian is always a war crime. Both the standards and rules of IHL cannot be deviated or derogated from.

The delicate compromises struck and articulated as IHL rules were to be protected under a closed system, immune to any and all justifications for

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<sup>21</sup> See, *infra*, the discussion of the rule on perfidy.

<sup>22</sup> API art. 51(5)(b)

<sup>23</sup> Geneva Convention Relative to the 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 GCIV].

<sup>24</sup> 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 GCIII].

breaking the law.<sup>25</sup> Specifically, the need to prosecute the war effectively could not be raised as a justification for any violation, since it has already been incorporated into the principle of military necessity.<sup>26</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>27</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 in so far as the damage is actually necessary for attaining military goals. As the Lieber Code explains, “military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge.”<sup>28</sup>

Unlike the body of international criminal law, 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>29</sup> the strict legal responsibility of states has been generally unenforceable on the international plane.<sup>30</sup> Absent external mandatory mechanisms, violations of the laws of

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<sup>25</sup> The International Law Commission’s Draft Articles on State Responsibility (United Nations, 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*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/20 [hereinafter *Draft Articles*]) recognize general defenses that allow states to escape some international obligations under unusual conditions, including force majeure, duress, and necessity. 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.” Most commentators agree that IHL is a sphere governed by special rules for the purposes of art. 55 – see Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT. REV. RED CROSS, 401, 402 (2002).

<sup>26</sup> In comment 19 on art. 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 for the object and purpose of the rule.”

<sup>27</sup> U.S. War Department, *Instruction for the Government of Armies in the Field*, Special Order No. 100, April 24, 1863 (Lieber Code), art. 14.

<sup>28</sup> *Id.* art. 16.

<sup>29</sup> COMMENTARY ON THE 1949 GENEVA CONVENTIONS 373, 270, 630, and 603 (Jean S. Pictet ed., vol. 1-4 1952-1960).

<sup>30</sup> 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., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, P 34 (June 27); *Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6); *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, 2005 I.C.J. 116 (Dec. 19). Regional courts, too, attempted to adjudicate the military conduct of states – particularly the European Court of Human Rights,

war at the state level were left to international diplomacy, or its Clausewitzian extension<sup>31</sup> – 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 in the Potsdam Agreement.

As for individuals committing breaches of the laws of war, especially those offenses that are considered "grave breaches,"<sup>32</sup> enforcement was largely considered a domestic matter, to be dealt with individually by each state vis-à-vis its own agents. This system of domestic enforcement naturally worked, if at all, only in those cases where violations were committed without the state's instruction or acquiescence. Outside their own states, individuals stood trial almost exclusively when dedicated tribunals were established – 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 ICTY) and in Arusha for crimes related to the conflict in Rwanda (the ICTR). In other (select) instances countries have tried their own soldiers for crimes committed in the context of hostilities (mostly, in the recently established "hybrid courts" in Kosovo, East Timor, Sierra Leone, and Cambodia – all in the context of intrastate armed conflicts); while others, like Belgium, famously (and mostly unsuccessfully) attempted to invoke universal jurisdiction over war criminals at large.

In 1998, the internationally-negotiated Rome Statute<sup>33</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 International Criminal Court subsequently established in 2002 now has the power to judge individuals for genocide, war crimes, and crimes against

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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.

<sup>31</sup> CARL VON CLAUSEWITZ, ON WAR, 87 (M. Howard, & P. Paret, trans. & eds., 1976) ("war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with 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").

<sup>32</sup> See 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 [hereinafter GCI]; Geneva Convention for the Amelioration of 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 [hereinafter GCII]; GCIII art. 130; GCIV art. 147; API arts. 11, 85.

<sup>33</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]. As of July 2008, 106 states are members of the Court (<http://www.icc-cpi.int/statesparties.html>).

humanity,<sup>34</sup> in cases where their own state either fails or refuses to prosecute the offender.<sup>35</sup> Although the ICC has not yet successfully prosecuted any offender,<sup>36</sup> in aspiration, it is the world's first international (ideally, universal) mechanism to adjudicate and enforce individuals' responsibility for the grave breaches of IHL everywhere.

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

As earlier mentioned, IHL was designed as a closed system, immune to any and all justifications for breaking the law, including necessity, duress, or force majeure – all applicable in other contexts of international law.<sup>37</sup>

The state of affairs that applies to individuals under international criminal law 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 or domestic courts. For the most part, necessity claims invoked by defendants tended to be about 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>38</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>39</sup> The

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<sup>34</sup> See Rome Statute arts. 6-8. Art. 5 enumerates the crime of aggression, but this crime has not yet been defined and it shall remain undefined until June 2009, at which time it will be defined "consistent with the relevant provisions of the United Nations Charter."

<sup>35</sup> Rome Statute art. 17(1).

<sup>36</sup> The Court has opened investigations into four situations: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. 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, was due to begin in June 2008, but was halted when the ICC judges ruled that the Prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to a fair trial.

<sup>37</sup> Draft Articles on State Responsibility, *supra* note 22.

<sup>38</sup> The defendants argued that they were under orders from the Nazi regime: Karuch and Others, *reprinted in* VIII Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council No. 10 1081 (1942). The defendants' necessity claims were denied because their actions "were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant at capacity as possible." However, in the case of Flick and Others, 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 Flick and Others, *reprinted in* VI Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council No 10 1187, 1199-1202 (1942)..

<sup>39</sup> Prosecutor v. Erdemovic, No. IT-96-22-A Appeals Judgment, Joint Separate Opinion of Judges McDonald, Li, and Vohrah, ¶ 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.")

somewhat related claim of good motive was been rejected by courts, as so 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>40</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.

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 morally dubious.<sup>41</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>42</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>43</sup> Instead, art. 31(1)(d) of the Statute<sup>44</sup> included

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<sup>40</sup> Lippman, *supra* note XX, at 92.

<sup>41</sup> 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 537, 542 (Otto Triffterer ed., 1999).

<sup>42</sup> 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).

<sup>43</sup> 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 "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; themselves included necessity." Rome Statute art. 8(2)(a)(iv). Eser, *supra* note XX, at 543-544 (check page).

<sup>44</sup> The text of the Article is as follows:

31(1). 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,

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>45</sup> Despite contrary earlier drafts, the combined defense was ultimately made available even in murder charges in wartime.<sup>46</sup>

Although interpreted by scholars as granting more exemption to defendants than the classic necessity defense,<sup>47</sup> art. 31(1)(d) certainly does not include a choice-of-evils justification of the type I am interested in here: Specifically, the 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), and that were either made by other persons or constituted by circumstances beyond the defendant's control explicitly rules out the possibility of successfully invoking a humanitarian necessity justification in other cases. Particularly, most commentators' understanding is that the necessity discussed in art. 31(1)(d) is *military* necessity,<sup>48</sup> i.e., situations where the law is violated in order to promote the violator's own interests in prosecuting the war. This is not the pure humanitarian necessity which is the subject of this study.

There is some theoretical possibility that broader arguments of necessity could be made under art. 31(3) of the Statute, which authorizes the Court to "consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable

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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.

<sup>45</sup> INTERNATIONAL CRIMINAL LAW 135 (Ilias Bantekas & Susan Nash eds., 2003); Eser described art. 31(1)(d) as an "ill-guided and lastly failed attempt... to combine two difference concepts: (justifying) necessity and (merely excusing) duress." Eser, *supra* note XX, at 550. 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 142, 167 (Flavia Lattanzi & William A. Schabas eds., 2004).

<sup>46</sup> Saland, *supra* note XX, at 189, 208.

<sup>47</sup> As Albin Eser describes it:

"This subjective conception of the 'lesser evil'-principle is the crucial point of this difference: different from classical 'necessity' on the one hand, which would require a balancing of conflicting interests and offer justification if the person objectively rescued the greater good at the cost of the minor, and different from classical 'duress' on the other hand, providing an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat, this provision attempts to find a line in-between... Thus, this defence requires less than justifying 'necessity' would afford, and on the other side requires more than excusing 'duress' would be satisfied with. Therefore, it is up to the Court to find an adequate solution for the individual case according to paragraph 2." Eser, *supra* note XX, at 552.

<sup>48</sup> Mezzetti, *supra* note XX, at 151-154.

law as set forth in article 21." Article 31(3) was originally designed to leave the door open to 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 art. 31(1)(d) as discussed above).<sup>49</sup> It is therefore highly unlikely that any notion of a choice-of-evils, which is not recognized in any of the sources of law enumerated in article 21, which are to guide the Court in its work.

The ICC prosecutor, under the Rome Statute, enjoys some prosecutorial discretion,<sup>50</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 consideration will be taken into account by the prosecutor anyhow, an official doctrine of humanitarian necessity would make such consideration 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.

### III. THREE CASE-STUDIES

Before suggesting and evaluating possible motivations for the rejection of a choice-of-evil justification in IHL and ICL, I turn to a demonstration of the possible workings of such a justification in practice. I choose three real-life 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, policy makers, and politicians. Other than the Israeli Supreme Court,<sup>51</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 euphemism for torture),

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<sup>49</sup> Eser, *supra* note XX, at 543-544. GERHARD WERLE ET AL., PRINCIPLES OF INTERNATIONAL CRIMINAL LAW, 163 (2005).

<sup>50</sup> Rome Statute art. 53, .

<sup>51</sup> HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel [1999] IsrSC 46(2) 150, *reprinted in* 38 I.L.M. 1471, 1486-1488 (1999) (S. Ct. Isr.)

no other court was ever ready to officially recognize the legality of torture under any circumstances.<sup>52</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 has found them to be in clear violation of IHL, even if the claimants could not succeed in their claim against the Japanese government for cause of action or the U.S. 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:

"General '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 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>53</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

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<sup>52</sup> See, for instance, the recently delivered decision by the European Court of Human Rights, which, in addressing the conduct of German police officers who threatened to torture a suspect if the latter did not disclose the whereabouts of a boy he had kidnapped, underlined the absolute nature of the prohibition on torture or ill-treatment, irrespective of the conduct of the person concerned and even if the ill-treatment was to extract information in order to save a person's life. Application 22978/05, *Gäfgen v. Germany* (not yet published).

<sup>53</sup> Quoted by the Court in its decision in HCJ 3799/02, *Adalah – The Legal Center for Arab Minority Rights in Israel and Others v. General Officer Commanding Central Command, IDF* [hereinafter *Adalah v. IDF*], Judgment of June 23, 2005, ¶ 5 (available on [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)).

be employed where there was another effective way to achieve the objective.<sup>54</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>55</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 there. There were allegations that the IDF had interrogated local residents about the presence of wanted persons and weapons under threat of bodily injury or death should the residents fail to answer. And there were even reports that the IDF used local resident as shields against attacks on forces or 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 a live shields or hostages, or otherwise in any situation that might expose civilians to danger to life or limb. 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>56</sup> including the "Early Warning Procedure," as detailed above. The original petition was then revised to challenge this new Procedure,<sup>57</sup> which, so petitioners argued, was still in violation of IHL.

The petitioners pointed to articles 3, 8, 27, 28, 47 and 51 of the Fourth Geneva Convention,<sup>58</sup> as well as to article 51(7) of Additional Protocol I,<sup>59</sup> forbidding 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. Specifically, the petitioners argued that the Procedure put the uninvolved civilian in real and tangible danger; that there was no way to

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<sup>54</sup> *Id.* at ¶ 6-7.

<sup>55</sup> The original petition was submitted on May 5, 2002.

<sup>56</sup> *Adalah v. IDF*, ¶ 3.

<sup>57</sup> *Id.*

<sup>58</sup> GCIV arts. 3, 8, 27, 28, 47, 51.

<sup>59</sup> API art. 51.

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>60</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.

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 loud speaker 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 loud-speakers, 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>61</sup> The IDF also argued that in the hundreds of instances in which the procedure was used, no complaints were made regarding its use; in only one exceptional incident was a resident killed (by the suspect who had mistakenly believed him to be an Israeli security official).<sup>62</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>63</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. 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. It was therefore clearly unlawful, in his opinion, 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

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<sup>60</sup> GCIV art. 8 states that "Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention...".

<sup>61</sup> *Adalah v. IDF*. ¶18.

<sup>62</sup> *Id.*, at ¶ 19; *Adalah v. IDF*, Petition for Interlocutory Order.

<sup>63</sup> *Id.*, at, ¶17.

consenting resident on the other hand,<sup>64</sup> Barak found that the scales 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>65</sup> Barak added that given the power disparity between the parties, there was never a way of telling whether consent was free or not.<sup>66</sup> 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. Since the ability to estimate danger properly in combat situations is limited, a procedure could not be based on the need to assume lack of danger.<sup>67</sup> Ultimately, 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>68</sup>

Vice-President Cheshin opened his concurring decision with much agonizing:

“The subject is a difficult one. Most difficult. So difficult it is, 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>69</sup>

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 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. “It is inevitable”, writes Cheshin, “that the ‘ex-ante’ and ‘ex-post’ formula, even if of limited force, may be helpful, even if only partly so.”<sup>70</sup> By this admission, Cheshin

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<sup>64</sup> 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.

<sup>65</sup> Barak’s decision, *Id.* at ¶ 24.

<sup>66</sup> *Id.* Justice Beinisch, in her concurring opinion, also stressed that both the consent and lack of danger requirements were simply unrealistic (add cite).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at ¶ 25.

<sup>69</sup> *Id.* at Cheshin’s opinion, ¶ 1.

<sup>70</sup> Check translation.

effectively opens 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 well-being 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 High Court of Justice, requesting a further hearing, claiming that the full effect of Barak's decision would prohibit requesting civilians' assistance in negotiating between wanted persons and the security forces,<sup>71</sup> helping intelligence operations, or even helping to serve humanitarian aid in a combat zone. The request was denied.<sup>72</sup>

According to *B'Tselem*, an Israeli human rights NGO, in the course of arrest operations carried out in 2007 in the West Bank, fifty Palestinians were killed, nineteen of whom were not the intended target of arrest.<sup>73</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 recent 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 Mohammad. 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, Mohammad had been subjected to violence and harsh internment conditions, including a hundred instances of waterboarding over a period of

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<sup>71</sup> As was the case when a group of Islamic Jihad members took refuge in the Church of Nativity in Bethlehem, and Palestinian residents served as mediators, going between the IDF forces laying siege and the besieged insurgents

<sup>72</sup> HCJFH 10739/05 Minister of Defense v. Adalah – The Legal Center for Arab Minority Rights in Israel (decision of February 27, 2006).

<sup>73</sup> B'Tselem, "Use of Firearms: Data Report," available at <http://www.btselem.org/English/Firearms/>.

two weeks, by other CIA agents. As Scott Shane, the NYT 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>74</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>75</sup> There are many debates as to what types of physical or mental abuse amount to torture, but there is agreement that at least some means that have been 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.

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>76</sup> Corresponding prohibitions on torture are to be 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.

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<sup>74</sup> Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. TIMES, June 22, 2008, at A1.

<sup>75</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, art. 2, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>76</sup> 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." The UN Committee Against Torture emphasized that countries (in that context, Israel) were "precluded from raising before this Committee exceptional circumstance as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention." United Nations, Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 258, U.N. Doc. A/52/44 (Sept. 10, 1997).

Vast literature has been dedicated to the origins of the prohibition on torture (as on some of the inherent value-contradictions the prohibition contains); why we allow executing people, but not torturing them; why we allow innocent civilians to die but not the torture of a person who is actively engaged in harming the innocent, sometimes at great numbers. 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>77</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 which is unavailable through other channels.<sup>78</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.”

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>79</sup> Richard Posner, conversely, preferred to know that some torture was being practiced unofficially, without giving it the imprimatur of lawfulness.<sup>80</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>81</sup> Eric Posner and Adrian Vermeule

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<sup>77</sup> See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714-1715 (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 to recognize any exception under the law; Jeff McMahan, *Torture, Morality, and Law*, 37 CASE W. RES. J. INT’L L. 241 (2005-2006).

<sup>78</sup> Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003).

<sup>79</sup> Alan M. Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists - and to Lie About It?*, 23 ISR. L. REV. 192, 198 (1989); ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 141, 158-163 (2002). Sanford Levinson has also expressed support of this idea, Sanford Levinson, *The Debate on Torture*, DISSENT 79, 86-88 (Summer 2003).

<sup>80</sup> Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291-298 (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).

<sup>81</sup> Gross, *supra* note 11, at 1519-1526.

rejected the "official disobedience" model and argued instead for ex-ante regulation that would provide the right set of incentives for officials.<sup>82</sup> The Israeli Supreme Court ruled that a torturer may enjoy a post-facto necessity justification that would protect him from criminal liability in the right case,<sup>83</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>84</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 the latter 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 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 civilians.

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 agrees to torture the child of a terrorist by way of applying leverage on its parent,<sup>85</sup> and only some wrestle with the possibility of

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<sup>82</sup> Eric A. Posner and Adrian Vermeule, *Should Coercive Interrogation be Legal?*, 104 MICH. L. REV. 671 699-704 (2006).

<sup>83</sup> HCJ 5100/94, *supra* note 50; Henry Shue also seems to accept the necessity defense as appropriate; *see* Shue, *supra* note XX, at 143.

<sup>84</sup> Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE: A COLLECTION 281-290 (Sanford Levinson ed., 2004). McMahan, *supra* note XX, at 244. Michael Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 323 (1989).

Add note from Charles Fried on torture.

<sup>85</sup> Some came very close to it: CIA expert Ron Suskind described how the CIA kidnapped the two young children, aged 7 and 9, of Al Qaeda senior operative, Khalid Shaikh Mohammed, and threatened Mohammed with grievous injury to his children if he did not cooperate. Kalid 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, available at [www.spiegel.de/international/0,1518,445117,00.html](http://www.spiegel.de/international/0,1518,445117,00.html)). And John Yoo reportedly argued that if the

torturing a terrorist's wife, who is otherwise innocent but happens to possess the information necessary to avert an imminent attack.<sup>86</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>87</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 Elaine Scarry, 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.<sup>88</sup>

Further agreement seems to instruct that while torture may be narrowly legitimate for interrogational purposes, it is never legitimate for any other purposes, as when used to make a person act or refrain from acting in a certain way.<sup>89</sup> This is despite the fact that torture has, in some cases proved effective for coercive purposes<sup>90</sup> (although the instances in which it was effective have been few and far between in comparison with the number of times it was actually employed by state agents).

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 **un**justified, if it leads to the same result – the saving of innocent people – by different means? Consider the hypothetical possibility 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 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

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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. (revcom.us, August 1, 2006).

<sup>86</sup> See Moore, *supra* note 81, at 292, 323-324.

<sup>87</sup> Note that this "culpability" element would meet even Thomas Nagel's moral absolutism paradigm by fulfilling the requirement for a direct relationship between the harm inflicted and the target's wrongdoing. Nagel, however, objects to torture under any circumstances (add cites).

<sup>88</sup> Scarry, *supra* note XX.

<sup>89</sup> A distinction made by Daniel Statman. Shue, *supra* note XX.

<sup>90</sup> One published story about the torture of a family member pertains to the way in which the Soviets handled a wave of kidnappings in Lebanon: Between 1982 and 1992, 96 citizens of 21 foreign nationalities, mostly diplomats, journalists, or teachers were kidnapped in Lebanon by various armed factions (mostly believed to be related to the Hezbollah Shiite armed group); at least 10 were killed by their captors or died from poor captivity conditions. On September 30, 1985, four Soviet diplomats were kidnapped, one was killed two days later. The KGB kidnapped a family member of one of the group's leaders, castrated him, killed him, and sent his testicles to the leader. The three other Soviet hostages were released shortly thereafter.

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 non-informational purposes. This means that for some deep-seated, hard to pinpoint reason, the prohibition on torture is perceived as even a 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.

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>91</sup>

Later in the paper I identify possible reasons for prohibiting torture altogether. For those for whom the absolute objection to torture is 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, foreseen or unforeseen risks. If we do, it is not impossible to conceive of a rare hypothetical where torture would be justifiable provided its humanitarian benefit could be

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<sup>91</sup> 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," Wednesday, January 12, 2005, at A21.

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 non-interrogational), 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.

...

The first effect comes from the bomb-shell blast... In Nagasaki, houses within 1.4 miles from the epicenter collapsed, those within 1.6 miles suffered rather heavy damage, and even those at the point of 1.7 miles had their roofs and walls damaged.

The second effect comes from the heat rays... The heat rays reach the earth at the same speed as light, set fire to inflammable things on the earth, burn the skin, and cause man's death according to the conditions. In Hiroshima and Nagasaki, 20% to 30% of those killed are presumed killed by burns ...

The third and most peculiar effect comes from the first stage of nuclear radial rays and residual nuclear radioactivity... they destroy or injure the cells and cause atomic disease... [which] weakens the whole

human body, and causes man's death several hours or weeks later; and if he fortunately saves his life a long term is required before his recovery. Also, the radiation of the first stage of nuclear radial rays causes leukaemia, cataract, and abortion of child, has various bad influences on various organs of the human body, and causes hereditarily bad influences.

The radial rays which are radiated chiefly from splinters of the bomb one minute after the explosion... cause a radioactive rainfall by sticking to water drops, and flutter down to the earth in the form of the so-called ashes of death...

...

We must say that the atomic bomb is really cruel weapon [sic].<sup>92</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 (Shimoda et al.) 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>93</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. 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 lively today as global nuclear politics. As recently as June 2007, it sparked a political flare-up when Japan's 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, which leads to the perception of the bombings as inevitable, as opposed to the deep revulsion against the callousness of the strict mathematical calculation that leads to

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<sup>92</sup> Ryuichi Shimoda et al. v. The State, 355 Hanrei Jiho 17, reprinted in 8 JAP. ANN. INT'L L. 212 (1964). See also Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 759 (1965).

<sup>93</sup> Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169.

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 130,000 to more than 350,000. The plaintiffs in Shimoda listed 260,000 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>94</sup> Still, in an ambiguous and convoluted advisory opinion rendered in 1996, the International Court of Justice stopped short from declaring the use of nuclear weapons illegal at all times. Instead, it left the door open to the use of atom bombs by a nation facing destruction if that nation deemed it essential for its self-preservation.<sup>95</sup> There are still copious debates as to whether the 1945 attacks would have been considered lawful then, and today, or not.<sup>96</sup> In any case, in public imagination much less debate and sense of taboo surrounds the carpet bombings of Dresden or Tokyo which resulted in even more civilian casualties than those suffered in Hiroshima and Nagasaki.<sup>97</sup>

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<sup>94</sup> API, Customary International Law; the U.S. emphasized that there were legitimate military targets in both cities. There is little disagreement, however, that the number of civilians who died was disproportionate to the immediate military advantage to be derived from the destruction of those military targets.

<sup>95</sup> 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. The Advisory Opinion left open the possibility of using nuclear weapons as a last resort for a country's own defense.

<sup>96</sup> See, for instance, John Bolton, who 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. PROB. 167, 170 (2001).

<sup>97</sup> Although as a general matter, the carpet bombings of cities is clearly unlawful today, *Francisco Javier Guisández Gómez*, argues that "In examining [the bombings of cities in world war II - G.B.] 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" (*The Law of Air Warfare*, 323 INT. REV. RED CROSS 347 (1998)). Note that upon ratifying API, 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.

The planned alternative to the atomic bombs was Operation Downfall<sup>98</sup> – a land invasion of Japan that the American military would have pursued had the bombs not been dropped and Japan not surrendered. Such 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 from the notable physicist W.B. Shockley on Estimated Casualties in an Invasion of Japan, Shockley predicted that:

“[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>99</sup>

An American land invasion of Okinawa a few months earlier, between March and June 1945, left over 150,000 Japanese civilians, about half of the civilian population of Okinawa, dead.<sup>100</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 between a demonstration of the bomb somewhere in the desert, an early warning to the inhabitants of Hiroshima calling on them to evacuate, or 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>101</sup>

In addition, other than winning the war in the Pacific, recent studies have argued that the growing suspicion within the Truman administration towards the Soviet Union and the concern about a Soviet bomb has been a strong motivator in dropping the atomic bombs on Japan and demonstrating

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<sup>98</sup> 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).

<sup>99</sup> Quoted in THE COLUMBIA GUIDE TO HIROSHIMA AND THE BOMB 223 (Michael Kort ed., 2007); critics claim these numbers were excessively high and contrived by those who supported the bombings as an alternative to the invasion. See XXX

<sup>100</sup> 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. 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*, INTERNATIONAL HERALD TRIBUNE, Oct. 9, 2007, at 2. [add cites]

<sup>101</sup> See interview with physicist Leo Szilard, who was involved in the Manhattan project but then opposed the use of the bomb in Japan, *President Truman Did Not Understand*, U.S. News & World Report, Aug.15, 1960, at 68-71.

American supremacy, possibly as a leverage for inducing Moscow's acquiescence in post-war American objectives.<sup>102</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>103</sup> indeed, more than any other wartime act in history. A combination of elements collides to exclude the nuclear attacks from the scope of what is 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, to a treatment of humans as means to an end, contrary to any humane moral instinct.

But the Taboo surrounding any mathematical calculations of deliberate killings, necessarily constricts our vision 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,

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<sup>102</sup> See, for instance, GAR ALPEROVITZ, *THE DECISION TO USE THE BOMB AND THE ARCHITECTURE OF AN AMERICAN MYTH* 147 (1995). (add notes).

<sup>103</sup> On a single day, March 10, 1945, 279 B-29s dropped incendiary bombs (Operation Meetinghouse), destroying about 25% of Tokyo and killing around 100,000 civilians. Estimates put the number of civilians perishing in the course of the siege of Leningrad at around 1.2 million.

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 harm on innocent people in order to avoid the infliction – deliberate or foreseen – harm on still many more; 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>104</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 thousands and thousands of helpless men, women and children would have needlessly died and suffer...?"<sup>105</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 American decision-makers, 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>106</sup> But there is anecdotal evidence suggesting that the decision-makers were not oblivious to the effect of the invasion and its alternatives on the Japanese. Secretary of

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<sup>104</sup> This exact arguments has been forwarded by R. John Pritchard, *Truman on Trial: Not Guilty*, History News Network, August 3, 2001, available on <http://hnn.us/articles/176.html> (who, in finding Truman "not guilty," argues that "The 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 suggesting that the atomic bombings were not illegal").

<sup>105</sup> *Quoted in* JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR* 473 (1999).

<sup>106</sup> Dennis D. Wainstock, *THE DECISION TO DROP THE ATOMIC BOMB* (1996).

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, there 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."

In that same interview, 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 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."

In a similar tone, James Francis Byrnes, the special representative on the Interim Committee which discussed and recommended the use of the bomb, stated:

"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>107</sup>

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>108</sup>

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

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<sup>107</sup> James Francis Byrnes, *Control of Atomic Energy*, in *SPEAKING FRANKLY* 264 (1947) (check citation). 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.

<sup>108</sup> Letter from President Harry S. Truman to Senator Richard B. Russell, August 9, 1945, available on [http://www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents/fulltext.php?fulltextid=22](http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/fulltext.php?fulltextid=22).

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 that terrible bomb on the old capital or the new. He and 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>109</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>110</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>111</sup>

Moreover, reports of the target-selection discussions reveal that Hiroshima was chosen because

“This is an important army depot and port of embarkation in the middle of an urban industrial area. It is a good radar target and it is such a size that a large part of the city could be extensively damaged. There are adjacent hills which are likely to produce a focussing [sic] effect which would considerably increase the blast damage. Due to rivers it is not a good incendiary target.”

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>112</sup> And the Official Bombing Order of July 25, 1945 made no

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<sup>109</sup> Harry S. Truman, Diary, July 25, 1945, *quoted in* ROBERT H. FERRELL, *OFF THE RECORD: THE PRIVATE PAPERS OF HARRY S. TRUMAN* 55-56 (New York: Harper and Row, 1980).

<sup>110</sup> The photographing B-29 on the Nagasaki mission was named “Big Stink.” Add cite.

<sup>111</sup> 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).

<sup>112</sup> Minutes of the second meeting of the Target Committee, Los Alamos, May 10-11, 1945, *available at* <http://www.dannen.com/decision/targets.html>.

mention of aiming at military targets or of attempting to avoid civilian casualties.<sup>113</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>114</sup>

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.

Some commentators argue 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. Others 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>115</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.

All of this makes it 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

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<sup>113</sup> U.S. National Archives, Record Group 77, Records of the Office of the Chief of Engineers, Manhattan Engineer District, TS Manhattan Project File '42 to '46, Folder 5B "(Directives, Memos, Etc. to and from C/S, S/W, etc.)."

<sup>114</sup> *Public Papers of the Presidents of the United States: Harry S. Truman, Containing the Public Messages, Speeches and Statements of the President April 12 to December 31, 1945* (Washington D.C.: United States Government Printing Office, 1961) page 212. [Radio Public Address, PUB. PAPERS 212 (Aug. 9, 1945)]

<sup>115</sup> 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, available at [http://www.worldsecuritynetwork.com/showArticle3.cfm?article\\_id=15045](http://www.worldsecuritynetwork.com/showArticle3.cfm?article_id=15045).

courses 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. Note that it was not only the consequences of a land invasion that were unknown. The consequences of the atomic bombings too were uncertain. 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>116</sup> Some even predicted the incineration of Planet Earth altogether (and were still willing to go through with the experiment!)<sup>117</sup> No one knew for sure what the weapon might actually do to a city or a country by the time they got to it just a few weeks later.

Even though this could not offer a 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, 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>118</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 (in)justifiability of the bombings resonates of a broader intuition that perhaps the laws of war should make room for such cases, even if a very narrow and generally blocked room, even one that precludes the use of nuclear weapons at all times.

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<sup>116</sup> Reported by the Trinity [Atomic Test] Site of the National Atomic Museum, <http://www.fullbooks.com/Trinity-Atomic-Test-Site.html>.

<sup>117</sup> The 1938 Nobel Laureate physicist Enrico Fermi was willing to bet anyone that the test would wipe out all life on Earth, with special odds on the mere destruction of the State of New Mexico. *Id.*

<sup>118</sup> JAP. ANN. OF INT'L L., 226; *quoted by* Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AJIL 759, 765 (1963)

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

An immediate 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 this 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.

##### 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>119</sup>

The concept of necessity is well recognized in both common and civil law traditions.<sup>120</sup> There are important variances in its promulgation and application, and in particular, on whether necessity is better classified as an excuse or else as a justification. Under U.S. law, 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 welcomes her actions as 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 about half of U.S. states formally recognize the necessity justification – 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

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<sup>119</sup> Robinson, *supra* note XX, at 53. MODEL PENAL CODE § 3.02 that addressed necessity is entitled "Justification Generally: Choice of Evils."

<sup>120</sup> See Johnstone, *supra* note XX, at 349; and Justification and Excuse: Comparative Perspectives, *supra* note XX.

connection between his actions and preventing the harm; (4) there were no legal alternatives by which to avoid the harm;<sup>121</sup> (5) a legislative purpose to exclude the justification does not plainly appear; (6) The situation that necessitated the choice of evils was not caused by the defendant's own negligence or recklessness.<sup>122</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.

The necessity justification is thus an act-utilitarian framework,<sup>123</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 British case of *Regina v. Dudley and Stephens*,<sup>124</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." 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

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<sup>121</sup> Requirements 2-4 are not explicit in the Model Penal Code but are part of the jurisprudence on necessity.

<sup>122</sup> The Model Penal Code is narrower in its scope: Section 3.02 reads as follows: "(1) Conduct which the actor believes to be necessary to avoid an evil to himself or another is justifiable, provided that: (a) the 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 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."

<sup>123</sup> 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).

<sup>124</sup> [1884] 14 QBD 273 DC. The case addressed the criminal culpability of two sailors stranded on a life boat 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.

sacrificed, even for the purpose of saving a greater number of lives,<sup>125</sup> the commentary to the Model Penal Code actually seems to permit the net saving of lives. Robinson himself acknowledges that a greater number of potential victims would make a stronger case for killing an innocent individual,<sup>126</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 where resulting in the net-saving of lives – the ultimate lesser-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. It regulates almost every aspect of ordinary life. 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,

Leaving 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 monopoly on force.<sup>127</sup> Any use of this force by one citizen against others is threatening to the social order. But we expect the government to use this power to protect the social order. We welcome the use of force by the police 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.

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<sup>125</sup> Robinson, *supra* note XX, at 65.

<sup>126</sup> *Id.* at 68.

<sup>127</sup> Posner, A Welfarist Approach, *supra* note XX, 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 (2004-2005).

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 of another person.

### *B. The Analogy to IHL*

None of the three broad reasons for limiting the necessity defense in criminal law applies to the context of an 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). This is essentially why 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) which is at war with us.

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 a 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 actions dissolves, so does the difference in our attitudes towards 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 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 individual this is not considered a threat to the social order, but as *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 be not 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>128</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 whom 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 death 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 reasonable collateral consequences of an otherwise lawful targeting of combatants, which is lawful. This is in essence the proportionality principle, which underlies much of the laws of war.<sup>129</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 *unintended, 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, the domestic law and IHL: While domestic law reflects a compromise among competing ideologies, interests, preferences

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<sup>128</sup> This analogy is employed by Posner and Vermeule in their discussion of the ex-ante regulation of torture – see Posner and Vermeule, *supra* note XX, at 699-704.

<sup>129</sup> See API art. 51(5)(b): “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.”

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.

It would thus seem that the necessity defense was narrowed in the domestic sphere for reasons that do not apply to the international arena, and that 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 down 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, to be the arbiter of competing claims, no such system obtains in the international sphere. The enforcement of IHL rules is still, to a large degree, a self-regulation 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.

Secondly, and more importantly, the domestic necessity defense is neutral with regard to whether the significant harm averted was one facing the defendant or facing others. Textbook hypotheticals offer examples of both cases, although real-life cases tend to be more of the first kind 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 did believe that a decision of whom to sacrifice and whom to save was tainted by less-than-objective considerations they were reluctant to uphold the necessity defense.<sup>130</sup>

But for states at war we can make no such assumptions. In war, a state does not only prefer its own interests over those of its enemy but it also has an interest in deliberately harming the 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 or not states also have an inherent interest in harming enemy civilians is a question that exceeds the boundaries of this work, but past as well as present history tell us that at the very least, they care far less about the wellbeing 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 wellbeing of the state and the wellbeing 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 vs. states), the type of violence they regulate (exceptional violence vs. routine violence), and the type of interests they must take account of (a complex web of interests vs. balancing military necessity and humanitarian

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<sup>130</sup> See *United States v. Holmes*, 26 F. Cas. 366, 367 (C.C.E.D. Pa. 1842) (No. 15,583), 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.

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 law are also different in their institutional environment (domestic law enforcement vs. anarchy) and in the type of social interaction which sets the stage for choice-of-evils situations (citizens within the state vs. 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>131</sup>

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

In this section 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, then moves on to consider a host of consequentialist arguments, 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, 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

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<sup>131</sup> On the exercise of borrowing from the principles domestic criminal law in devising international criminal law, the U.S. Special Rapporteur stated that "transferring [such principles] from the field of relations between individuals to that of relations between States is a dubious undertaking." See Robert Ago, Addendum to the Eighth Report on State Responsibility [1980] 2 Y. B. INT'L L. COMM'N 18, U.N. Doc. A/CN.4/318/Add.5-7.

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 the consequential and institutional explanations. In the context of the latter two, I ask whether there are unique features 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 it means prolonging the less-cruel war.

Pure deontologists would find little appeal in the suggestion to recognize a humanitarian necessity justification, and the possibility that such recognition would help promote humanitarian welfare in particular circumstances would find no audience among them.

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 are amongst the first casualties of 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 loath to accept it in any other setting.<sup>132</sup>

Under the current laws of war, some moral absolutes are already compromised: The absolute ban on the intentional targeting of civilians<sup>133</sup> gives way to the principle of double-effect which does not preclude the foreseen-yet-unintended proportional killing of civilians.<sup>134</sup> Paradoxically, it is the military attack on the enemy which is considered "the inherently good action" which the collateral killing of civilians services.

A corollary moral principle to that of the double effect is never to use people as instruments.<sup>135</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>136</sup> Some argue that even in clear situations of self-defense, the intentional killing of civilians would be morally wrong.<sup>137</sup> But the deontological objection against using people as means rather than

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<sup>132</sup> It may be that a deontological commitment would require the collapse of the distinction between *jus ad bellum* and *jus in bello*, in the sense that to commit any evil 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 see the divergent views of WALZER, *JUST AND UNJUST WARS* (arguing to uphold it), and the critique by Jeff McMahan, *The Ethics of Killing in War*, 113 *ETHICS* 693-733(2004) (arguing that the distinction was unsustainable).

<sup>133</sup> 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).

<sup>134</sup> *Supra* note 126.

<sup>135</sup> 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, *War and Massacre*, 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.*, John Taurek, *Should the Numbers Count*, 6 *PHIL. & PUB. AFF.* 293-396 (1977); Thomas Nagel, *Equality*, in *MORAL QUESTIONS* 23 (1979).

<sup>136</sup> *See*, for instance, Taurek, *Should the Numbers Count* (objecting to the idea that in rescue cases, when one chooses to let one die in order to save several others is choosing the lesser evil). *But cf.* David Cumminskey, *Kant's Consequentialism*, 100 *ETHICS* 586-615 (1990) (arguing that Kantian moral theory does not preclude the sacrifice of the innocent).

<sup>137</sup> "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." McKeogh, *supra* note XX, at 156-157.

ends seems, perhaps counter-intuitively, particularly weak in the context of war, where a whole class of people – soldiers – are used precisely as that: Means for winning the war, defending the country, etc.. Or, as Napoleon callously remarked, “soldiers are made to be killed.”<sup>138</sup> If the laws of war already make the concession of killing individuals who are soldiers a means rather than ends, 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 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>139</sup> If this is so, one could hold that even though deontology is a sound moral theory for individuals, government morality should nonetheless be outcome-based.<sup>140</sup> This is essentially 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>141</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, meaning feigning the status of a civilian as a ruse of war.<sup>142</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. Historically, the origins of the prohibition on perfidy are rooted in medieval ideals of

<sup>138</sup> Quoted by WALZER, *JUST AND UNJUST WARS*, *supra* note XX, at 37.

<sup>139</sup> Russel Hardin, *International Deontology*, 9 *ETHICS AND INT. AFF.* 133, 135-136 (1995) (Arguing that states are not rationalist actors and thus cannot be subject to Kantian theory).

<sup>140</sup> THOMAS NAGEL, *MORTAL QUESTIONS*, 83-84 [1979]; Compare Williams, who argues that a society with this separation between individual deontological morality and a utilitarian public morality will inevitably be manipulative and undemocratic. (Williams, *supra* note XX, at 138-139).

<sup>141</sup> Cass R. Sunstein and Adrian Vermeule, *Ethics and Empirics of Capital Punishment: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703, 719-724 (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* (1999); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 *CRITICAL INQUIRY* 723 (1982).

<sup>142</sup> API art. 37(1) (c).

chivalry and honor on the battlefield, ideals concerning warriors' dignity more than any universal moral imperatives. These are in fact the opposite of today's ideals of equality and universalism. Present day 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. The same is true for the present-day prohibition on treacherously attacking the enemy while using the UN flag or insignia or feigning surrender.<sup>143</sup> Unlike the Kantian imperative, lying on the battlefield, including by ruses of war, is not unlawful per se.<sup>144</sup>

The prohibition on treacherously assassinating rogue leaders<sup>145</sup> or putting a price on their head<sup>146</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>147</sup> As a historical matter, the prohibition was devised by kings and sovereigns out of 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.

Even the banning of certain types of weapons<sup>148</sup> raises debates on whether they reflect a real moral aversion to especially heinous weapons or else a concern about lack of effective distinction between combatants and civilians, or even 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 non-lethal biological or chemical weapons, which are absolutely prohibited under international law – would we still feel the same kind of

<sup>143</sup> *Id.* at art. 37(1)(d).

<sup>144</sup> *Id.* at art. 37(2).

<sup>145</sup> The extent of the prohibition is under debate. The U.S. Army's 1996 *Operational Law Handbook* stipulates that even during open hostilities, the targeting of an opposing political leader is unlawful unless, his death is "indispensable for securing the complete submission of the enemy." (find full cite)

<sup>146</sup> See U.S. Army's 2004 *Operational Law Handbook*: "Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy 'dead or alive' is prohibited." (p.17).

<sup>147</sup> See Robert F. Turner, *Killing Saddam: Would it Be a Crime?*, WASHINGTON POST, Oct. 7, 1990 at D 1 (arguing that the proportionality principle supports the idea that it is wrong to allow the killing of 10,000 relatively innocent soldiers and civilians if the underlying aggression can be brought to an end by the elimination of one guilty individual); and Catherine Lotrionte, *When to Target Leaders*, THE WASH. Q. 73, 75 (Summer 2003) (arguing that the ban on assassination encourages a policy of military strikes, which claims innocent lives.)

<sup>148</sup> 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.

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 on combatants to distinguish themselves from civilians is virtually eliminated where combatants cannot do so "owing to the nature of hostilities."<sup>149</sup> If it is a moral imperative to maintain 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 may affect the civilian population, "*unless circumstances do not permit.*"<sup>150</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>151</sup> Moreover, an important school of deontologists, known as "threshold deontology," acknowledges that at some extreme points, one cannot avoid some consequential analysis that would require a departure from the absolute prescription. Threshold deontology, or what Walzer terms "consequentialism-in-extreme,"<sup>152</sup> 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>153</sup> Others accept some degree of a cost-benefit calculation even at 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>154</sup> War, we must remember, inevitably entails choosing which people to kill.

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<sup>149</sup> API art. 44(3).

<sup>150</sup> *Id.* at art. 57(2)(c) (italics added).

<sup>151</sup> See Cumminskey, *supra* note XX.

<sup>152</sup> WALZER, JUST AND UNJUST WARS, *supra* note XX.

<sup>153</sup> WALZER, *supra* note XX; see also CHARLES FRIED, RIGHT AND WRONG 10 (1978).

<sup>154</sup> Stacy, *supra* note XX, at 511.

Threshold deontology has been especially debated in the context of torture. Against Jeremy Waldron's absolute rejection of torture under any and all conditions, a majority of writers seems to agree that under some extreme conditions ("extreme" being a subjective determination), torture could be excused, justified, even necessary. 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, consequential 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 an entire class of people – soldiers – is stripped of most of its fundamental 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 would suggest they should be *more* willing to recognize it in the context of IHL, not less.

In addition, it is evident that 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 consequential 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. Consequential justifications*

A pure consequentialist framework judges actions exclusively on the basis of their outcomes in terms of the "good" they promote.<sup>155</sup> Naturally,

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<sup>155</sup> *But see* Walzer, writing about war: "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

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. But while domestic law reflects a compromise among competing ideologies, interests, preferences and resources, 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>156</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 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 would 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 to the weighing of the overall impact of introducing a rule that would recognize a lesser-evil justification. This current analysis focuses on the latter.

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market mechanism for determining the positive or negative worth of different acts and outcomes." (WALZER, *supra* note XX, at 38).

<sup>156</sup> On incommensurable evils and deontological evils, see Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 26 L. AND PHIL. 611 (2005). Note that 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. AND PHIL. 645, 650 (2005).

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 towards 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.

a). *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 that any operation on the battlefield is necessarily mired in uncertainty. 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, 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 provide information, or they might not; once gotten, 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 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 involved in what Clausewitz had termed "the fog of war," 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 or not IHL as it currently stands does produce 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 - 19 people who were not the intended target of arrest - suggest that in this case, uncertainty should not have warranted absolutism.

The domestic world too is not immune to uncertainty. Dudley and Stephens<sup>157</sup> might be picked up by a boat a minute before they choose 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 is not better – and probably worse – than many decisions taken on the battlefield. The domestic law deals with the problem of uncertainty by requiring a post-facto showing that breaking the law under the necessity defense resulted in a lesser-evil harm. It thus transfers the risk of uncertainty onto the actor.

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 following the domestic formula 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 even possible that introducing uncertainty as a risk to be weighed instead of as an absolute bar might even encourage attackers to assess the consequences of their operations more carefully than if the justification is barred altogether. Current IHL orders combatant to take all feasible precautions to minimize incidental loss of civilian life<sup>158</sup> and refrain from disproportionate attacks that may cause excessive incidental loss to civilians. Even if the attacker follows the law, both these provisions leave ample room to shift the costs of uncertainty onto the enemy civilians. If, however, the attacker is 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

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<sup>157</sup> *Supra* note 119.

<sup>158</sup> API arts. 51(1), 57.

to design and execute the Procedure in a way that would mitigate the risks to civilians much more than under the general rules on precautions in attack. Note that the standing 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 paper.

b). *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>159</sup> Left to their own devices, actors will interpret every exception in the broadest possible manner, quickly leading to its abuse.

Although extensively debated in the literature,<sup>160</sup> the slippery slope argument has often been voiced as a general rationale for absolute rather than qualified rules:<sup>161</sup> 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 court's 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 civilian's safety resonate of the deeply troubling past practices of the security forces on the field.

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<sup>159</sup> Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); cf. Mario J. Rizzo and Douglas Glen Whitman, *The Camel's Nose in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 541 (2003) (who claim that slippery slopes are foremost slopes of arguments, not acts).

<sup>160</sup> Schauer, *supra* note XX; Rizzo and Whitman, *supra* note XX; Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. (2003); David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 OXFORD J. LEG. STUD. 629 (2001).

<sup>161</sup> Donagan, *supra* note XX.

Most commonly in our present context, the slippery slope concern has been invoked to justify a blanket-ban prohibition on torture under the argument that any exception, including for a “ticking bomb” scenario, is going to result in excessive torture.<sup>162</sup> More difficult to monitor than the “Early Warning Procedure” or deliberate attacks on civilians (acts of torture are easier to hide 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 or not 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 pertinently, 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, 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 and homicide in 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

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<sup>162</sup> 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); Jeremy Waldron, *Torture and Positive Law*, *supra* note XX; Henry Shue, *Torture*, *supra* note XX, at 139-142.

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.

c). *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. Most of us would, for example, have a sharp and intuitive objection to a physician killing a healthy person to harvest her organs with the purpose of saving five critical patients who are in need of life-saving organ transplant. The objection lies not only in our repugnance from using a human being as a divisible property but also in our fear of the broader effects such an acceptable practice might have on our society: What it might do to physicians, to people who are sick, to people who are healthy, to how we treat people more generally, and to the entire fabric of our society.

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 when 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 towards their government – a government which is willing and

capable of engaging in torture – more generally. All in all, the introduction of torture as a legitimate mean 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 to the trust in and trustworthiness of the torturing government.<sup>163</sup> When former Italian prime minister Aldo Moro was kidnapped by the Red Brigades in 1978, one of the hijackers was captured by the police. The hijacker did not reveal where Moro was taken to, 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 the hijacker 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>164</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, 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.

The uncertainty, slippery-slope, and spillover effects concerns may all be greater in the international sphere than in the domestic context due to the different institutional environment which characterizes both systems of law.

### *C. Institutional Considerations*<sup>165</sup>

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. This hiatus is particularly significant given the core values of IHL and the tense environment in which

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<sup>163</sup> See, for instance, B. Paskins, *Torture and Philosophy*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 165-194 (1978, supp. vol. 52).

<sup>164</sup> Add note. Chiesa himself was later assassinated by the Mafia in Palermo.

<sup>165</sup> Institutional features are oftentimes considered second-order principles. I address them here as a separate subset of rule-consequentialism analysis.

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, 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 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>166</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

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<sup>166</sup> On the symbolic force of the absolute ban on torture, for instance, see Gross, *supra* note XX, at 1504; and Waldron, *Torture and Positive Law*, *supra* note XX, at 1723-1726.

independent, credible, and professional judicial institution, capable of putting the claim under close scrutiny.

Nonetheless, I would argue that the dangers of recognizing a humanitarian necessity paradigm in the absence of such institutional reform may not be as critical as they appear at first glance. First, because 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 this 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." 'Superfluous' or '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 decision-makers 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>167</sup> Different positions on whether, when, and how torture should be allowed to 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, it seems to me that 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>168</sup> "Do not kill civilians unless it is to save the lives of more civilians" is perhaps 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.

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 policy makers of some countries, that it has prohibited them from considering courses of action that might have well

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<sup>167</sup> Gross, *supra* note XX.

<sup>168</sup> See also Franck, *Recourse to Force*, *supra* note XX, 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.")

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 current enforcement of IHL reveals a more optimistic prospect for allowing a humanitarian justification paradigm even within the current environment. On a very basic level, even though reciprocity is no longer a legal condition for compliance, it is undoubtedly a strong political and practical force for it. The laws of war were originally developed not out of any humanitarian concern for "the other," but for 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 government, upholding the rule of international law. The Israeli Supreme Court's 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 are slim to begin with, and whether the government wins on the basis of the justification or the action is approved on different grounds makes no real difference.<sup>169</sup>

On the international level, the justification makes a greater difference, especially when the operation of the ICC is concerned. Although young and heretofore inexperienced, 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

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<sup>169</sup> 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.

support this effort by the ICC, there seems 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 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 indirectly, also of states. 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 essentially tries the state's actions through the prism of the individual's. 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>170</sup> and impose criminal liability on commanders and other superiors for actions committed by their subordinates.<sup>171</sup> Deterring state officials may prove an effective check against "state violations" of IHL.

To sum up, 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 the recognition would also motivate more violations of this kind. 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

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<sup>170</sup> Rome Statute art. 27.

<sup>171</sup> Rome Statute art. 28.

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, room should be made for a humanitarian necessity justification.

Designing a workable definition of the justification, which 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 towards the enemy.

It is nonetheless possible that the rarity of incidence 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 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 between the wish 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 consequential 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>172</sup> If there are reasons to question the entire underlying rationale of the IHL project and strive, instead, towards 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 under-inclusive.<sup>173</sup>

As I have acknowledged in the introduction, even accepting my arguments against the absolutist stance of IHL, one may well conceive of a

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<sup>172</sup> WALZER, *Just and Unjust Wars*, *supra* note XX, at 158, 210.

<sup>173</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1022 (1995).

variety of other mechanisms applicable to unlawful-but-justified violations both in domestic law and IHL; from civil disobedience models, where the actors violate the law in the name of a greater good but also willingly assume the punishment for their acts; relying on a system of prosecutorial discretion and/or pardons that would immunize violators from punishment after the fact; all the way to prior judicial warrants authorizing 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>174</sup> I choose here a paradigm of a post-facto necessity justification, by way of analogy (however incomplete) from domestic criminal law, as offering 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 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, consequential 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.

### 1) *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.

#### a). 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, as earlier noted, makes no explicit distinction between acts designed to protect the interests of the individual acting and

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<sup>174</sup> See, e.g., Gross, *supra* note XX; Posner and Vermeule, *supra* note XX; Dershowitz *supra* note XX.

acts designed to protect the interests of others.<sup>175</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 towards 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 countries 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>176</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 wellbeing, and leave aside categories of protected objects, such as civilian property, places of worship, cultural objects, the environment, etc.. For similar reasons, I largely leave aside, less readily-quantifiable effects of the action of the kind I 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 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 that State B. It then follows that the law must create incentives for states to protect their enemy's civilians.

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<sup>175</sup> See Shaun Martin, who argues that the real distinction in obtaining successful vs. unsuccessful pleas of necessity is the one between actions that uphold the existing social order and actions that challenge it. Martin, *supra* note XX.

<sup>176</sup> See Franck, *Recourse to Force*, *supra* note XX, 189 (claiming that humanitarian intervention missions are always motivated by the self-interest of the intervener as well as by altruism, and that this mix motivation should not matter in judging the intervener's actions).

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 B's civilians is debatable.<sup>177</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, as a value which IHL is designed to promote, the protection of enemy civilians is uncontested.

It follows, then, that we can weigh the consequences of two actions on the basis of how many enemy civilians would be harmed by them. 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.

## 2. *Enemy Soldiers*

Enemy soldiers are a legitimate target 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>178</sup> A natural interest of any state is to incapacitate the greatest number of enemy soldiers possible.

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<sup>177</sup> See INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, vol. 39(5) (Sep., 2000); 39 I.L.M. 1257 (2000), stating this question was unresolved. Cf. also the Counter Insurgency Manual (2006), which implies 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." (API 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(2) ISR. L. REV. 89-90 (2006) (arguing there is no such duty).

<sup>178</sup> See API art. 41.

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 wellbeing 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 stipulates that "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." 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 permitted, and that general principles of humanity must instruct each action. Specific provisions of IHL may also seem to suggest that the interest in harming enemy soldiers is not without limits: the Protocol provides that "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis." 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 fighting country'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 acting 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 fewer Japanese soldiers dead than Operation Downfall would have done, 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 fighting state to ensure protection for its own civilians, for instance by refraining from locating military targets within densely populated areas, 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>179</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>180</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 non-interrogational purposes. Consider

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<sup>179</sup> 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.

<sup>180</sup> Note that for Henry Shue, for instance, torture is worse than killing, because torture "fails to satisfy even [the] weak constraint of being a "fair fight." Shue, *supra* note XX, 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 and Vermeule, *supra* note XX, at 678.

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. 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 wellbeing 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.

Note that it is possible that actions taken to protect one's own civilians – or soldiers – might enjoy the justification of self-defense under art. 31(1)(c) or the joint necessity-duress defense under art. 31(1)(s) of the Rome Statute.<sup>181</sup> Since there is no case law on both articles and since commentaries on their desired interpretation is divergent,<sup>182</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>183</sup> is as strong – sometimes even immediately stronger – an interest as protecting its civilians. Soldiers are the war machine 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 wellbeing 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 (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) but exclude a sole or overriding concern for one's own combatants or civilians.

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

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<sup>181</sup> See discussion *supra* part 1(2).

<sup>182</sup> Specifically on self-defense under art. 31(1)(C), see Hannah Tomkin, *Defensive Force under the Rome Statute*, 6 MELB. J. OF INT'L. L. (2005).

<sup>183</sup> 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.

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. Once again, whether such instances could be justified under different justifications, already existing under ICL, is beyond the current analysis.

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 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 spillover effects: Some type of violations will be associated with additional violations. Killing a civilian intentionally is at once a violation of the absolute ban on killing civilians but also 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 teargas, for instance) – would ever meet the conditions set forth for a necessary humanitarian act.

b). How many Count?

A related but separate question is not only who should count but 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>184</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

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<sup>184</sup> See Edward Arnolds & Norman Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 294 (1974) ; Laura Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 82 (1989).

to save the lives of two or more.<sup>185</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 decision-maker's ability to make lesser-harm determinations and prefer to avoid borderline cases.

Since in the current suggestion, the lesser-evil is already conditioned on a net benefit for the enemy, rather than on a country's own benefit alone, the lesser-harm formula would 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.

It may be argued that the "significant" requirement better protects the humanitarian message of IHL and signals that violations are justified only in the extreme case. If this is true it may be a reason to adopt the more restrictive test. In addition, the "significant" test might be more appropriate if we believe that the dangers of uncertainty and slippery-slopes exploitations as well as the spillover costs are substantially greater in the context of war than in domestic interactions. The interest in reinforcing the humanitarian message or countering the risks of misapplication, however, 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.

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

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<sup>185</sup> MODEL PENAL CODE § 3.02 cmt. at 9-10 (1985).

calculus would have to change to correct against the inherent bias of governments in favor of their own nationals. In such cases, we should therefore 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>186</sup>

## 2) *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 under-detering "bad" violations against the risks of over-detering justified ones.

The domestic criminal law requires a post-hoc factual showing that the defendant had in fact chosen the lesser-harm. The post-factum analysis places the risks of success or failure on the actor. This allocation of risk makes sense in the domestic sphere, in which we do not generally trust individuals to make choice-of-evils determinations and defy the domestic order.

There are good reasons to follow the same test in the IHL context. As I have noted in my discussion of the consequentialist accounts, a post-hoc determination offers 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 domestic life. 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. 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.

A more conceptual danger is that the ex-post determination runs the risk of over-detering 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 under-detering malevolent exploitations are diminished.

Moreover, as a general rule, it would seem that governments (as aggregate of relevant decision-makers) are better situated to evaluate

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<sup>186</sup> See, e.g., Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 346 (1989).

probabilities and risks, simply because it is the business of governments to do so. From this perspective, we should be able to trust governmental assessments more than those of individuals.

If we believe in the goal of promoting humanitarian welfare, it is possible that we should want to avoid over-deterrence of governments and replace the post-hoc analysis of the domestic law with an ex-ante probabilistic assessment that would consider the state of affairs known to the state before it had violated the law.

### 3) *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 preventing 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 benefit. To protect IHL from unjustified transgressions and 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.

From the motivational viewpoint, it then follows that if Samuel Walker is correct and the humanitarian motivations behind the atomic bombings of Japan were contrived in retrospect, meaning the American decision-makers had little regard for Japanese lives when the decision to use the bomb was made, then those decision-makers should not have been able to benefit from a humanitarian justification.

The evidentiary question of how to assess the real motivations behind an individual actor's choice of action is no different in this context than in any other case which requires proof of mens rea to find a defendant guilty or innocent. The intentionality of states is more difficult to assess, for reasons discussed above in the context of deontological reasoning. Still, as a factual matter, governments often introduce their ex-ante intentions into discussions of problematic wartime activities. To the extent these intentions correspond to the "state's" intentions, one can imagine reliance 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.

#### 4) *Imminence and Fault*

Despite much criticism<sup>187</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, thereby 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 where absolutely necessary.

But in war, all action has a sense of imminence and urgency to it. Emergency is not a rarity, but the 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 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 – is similarly irrelevant to a state at war.<sup>188</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 every conduct independently of the question of who is to blame for the war in the first place. In this sense, IHL rejects the concept

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<sup>187</sup> See Robinson, *supra* note XX, at 56-58; Shaun Martin, *supra* note XX, at 1567-1579.

<sup>188</sup> *But see* Rome Statute 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.

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.

##### 5) *Legislative Purpose and Bargaining*

The Model Penal Code's promulgation of necessity includes the condition that no legislative purpose to exclude the justification is clearly apparent;<sup>189</sup> the rationale being that the necessity defense should apply in cases which were unforeseen by the legislature, and which, had they been foreseen, would not have been deemed criminal. In fact, as applied in practice, the necessity defense can be viewed as a democratic check on both the legislature and the executive, as juries may uphold the necessity defense even against the legislator's promulgation of the offense and the prosecutor's decision to pursue the case.<sup>190</sup>

The transposition of this rationale onto the international arena is complicated, especially because the lack of any central legislative body makes it impossible to imagine any hypothetical "legislative intent." The laws of war are for the most part the outcome of multilateral bargaining among the various members of the international community.

Furthermore, if we attempt to follow the rationale of the domestic condition, and imagine an ex-ante assessment of the action, we might try to replace the notion of "legislative intent" with an imagined outcome of a bargaining process. To put this more boldly, we might ask ourselves whether our enemies, had we consulted them, would have wanted us to pursue the act that is the subject of the justification.

Despite its theoretical attractiveness, such an exercise would be impossible to engage in practically. The notion of bargaining with one's enemies raises numerous problems which need not be addressed here. For present purposes, suffice it to say that it is a sad reality that not all governments care about the welfare of their own people, at least not to

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<sup>189</sup> MODEL PENAL CODE § 3.02.

<sup>190</sup> See Martin, *supra* note XX, at 1544-1545; Arnolds & Garland, *supra* note XX, at 293 (noting that the relevant determinations of all elements of the necessity defense were traditionally made by the jury, not the judge).

similar degrees as others. Cases calling for humanitarian interventions, in which foreign governments display care for local civilians which the latter's own government lacks, aptly prove this point. Imagining a "legislative intent" or a bargaining outcome that assumes mutual concern for humanitarian welfare is thus impossible and should be left outside the scope of the blueprint definition of a humanitarian necessity justification.

#### 6) *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>191</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>192</sup> Among other things, 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 the causation requirement as a categorical prerequisite."<sup>193</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, the torture of an enemy POW for gaining 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,

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<sup>191</sup> 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").

<sup>192</sup> Martin, *supra* note XX, at 1579-1584.

<sup>193</sup> *Id.* at 1583.

which, under the present stipulation of the justification cannot account for a "lesser-evil." 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, by which 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 veers 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. Undoubtedly designed to 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, related to the following element – were there no less harmful means that could have yielded a similar result?

#### 7) *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 mean 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 Rome Statute includes a similarly broader test, namely that "the person acts necessarily and reasonably to avoid this threat." Both the domestic necessity and the ICC necessity operate only when the defendant has acted against an imminent threat. But where a government chooses in a non-imminent, 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 the reliance on civilians. The IDF's position, to recall, 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.

The use of torture, so it is commonly agreed by those who are willing to accept it as necessary under certain circumstances, 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.

This requirement would also exclude certain atrocities from consideration under the humanitarian necessity paradigm altogether. Consider, for instance, the crime of rape: It is impossible to imagine any scenario in which the raping of an individual would be the least harmful way to achieve a certain goal. If anything less than killing is possible, there must be a range of less harmful means to avert the harm the infliction of which is allowed under the law.

The less harmful means requirement casts the largest shadow over the attacks on Hiroshima, and particularly, Nagasaki. Was it indeed impossible to avert Operation Downfall by using less disastrous means? Or were some scientists, who argued that inviting UN representatives for a live demonstration of the explosion in the desert, correct in arguing 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?

### 8) *Burden and Standard 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>194</sup> This is the requirement of the ICC Rome Statute as well, with regard to all claims for excluding culpability. 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.

A more complicated question is the standard of proof. If we condition the justification upon a post-facto determination of lesser-evil, this determination would be subject to an empirical test. The same empirical test should be applied to the determination of ex-ante good intentions. The determination of a causal connection and even more so, the weighing of less harmful alternatives, in contrast, would be impossible to put to a concrete empirical test. Instead, both would have to rely on the weighing of probabilities and be put to a test of reasonableness. In case of doubt, the rule should be upheld against the justification.

### 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 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*

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<sup>194</sup> See also Franck, *Recourse to Force*, supra note XX, 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.")

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*alternatives under the circumstances to produce a similar humanitarian outcome.*

As a conceptual matter, among the examples offered throughout this paper, 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 under-deterrence, and depends not only on sound legal judgment but also on how one views the world of war and its effects on human judgment. Each of the articulations I have suggested here calls to be challenged. As long as my overall claim that IHL should move away from its absolutist position to make way for a humanitarian necessity justification is accepted in principle, the specific design of the justification becomes a second-order question.

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## VII. CONCLUSIONS

Wars do not suffer from excessive humanitarian zeal. The tragedy of one side is the other's triumph, and often the more demonstrable tragedy is the greater the sense of triumph of the ascendant party. Such [zero-sum] strategic interaction, fuelled 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 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; from inertly accepting certain victims as the necessary collateral damage of war to taking action, a positive and genuine choice to protect many by harming the few

The analysis I offer in this paper 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 paper 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. In the current paper I followed the basic premises of IHL and located the humanitarian necessity justification within them. But if IHL is an amalgamation of rules stemming from different moral intuitions, political compromises, and historical contingencies, is it

not possible to go further and imagine rewriting the laws of war in a way that would better protect humanitarian interests and still be practical in application? For instance, is the intended/foreseen distinction, which is endemic to much of IHL, a truly essential foundation for any conceivable body of law seeking to balance humanitarian interests against military exigencies, or is it merely a lingering remnant of Catholic theology?

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 vs. absolutism in other fields of law.<sup>195</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 answer, 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.

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<sup>195</sup> See the thorough survey offered by LOUIS KAPLOW AND STEVEN SHAVELL, *FAIRNESS VS. WELFARE* (2002).