INFORMATION PAPER SERIES

Presented by the International Law Department, U.S. Naval War College

SERIES NUMBER 13-3 (2013)

Subject: Belligerent Targeting and the Invalidity of a Least Harmful Means Rule

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Date: 28 May 2013

1. **Purpose**. The authors are providing an executive summary of their article, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, which appears in Volume 89 of *International Law Studies* and explores the controversial capture-or-kill debate.[2]

2. **Background**. Targeting of belligerents during armed conflict rests on two core foundations: the authority to attack enemy belligerents with lethal combat power based exclusively on their status and the protection from attack for persons *hors de combat*. Recently, some have asserted that the law of armed conflict (LOAC) includes an obligation to capture in lieu of employing deadly force whenever it presents no meaningful risk to attacking forces, even when the enemy belligerent is neither physically disabled nor manifesting surrender (the so-called "least harmful means rule" [LHM rule]). Focusing on the LOAC's fundamental principles, the positive law, and the synchronization of the law with operational realities, this article (as summarized briefly here) presents our comprehensive explanation of why this LHM rule is both legally invalid and operationally untenable.

3. **LOAC Principles of Military Necessity and Humanity Do Not Mandate an LHM Rule.** Military necessity provides a much broader scope of authority than peacetime necessity and authorizes the use of lethal combat power against any belligerent opponent to bring the enemy into submission as quickly as possible. Necessity in peacetime permits the use of force against individuals only as a last resort when required to prevent unlawful conduct presenting an imminent threat of death or grievous bodily harm to government actors or other members of society. In armed conflict,

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[2] The full article is published at 89 INT'L L. STUD. 536 (2013) and is available under Volume 89 at www.usnwc.edu/ils.

the collective nature of the enemy belligerent forces justifies a conclusive presumption that all individuals with that status represent a threat justifying attack. The authority to use all measures not otherwise prohibited by international law to compel the prompt submission of the enemy is not based on an individualized assessment of threat. Attacking enemy operatives who might otherwise be captured contributes to this collective objective military necessity, thus justifying attacks against individual members of an enemy force.

Extending an LHM rule into belligerent targeting — by asserting that the soldier has an obligation to ensure actual conduct justifies attacking the belligerent even when the enemy belligerent is still physically functional and has not surrendered — is therefore inconsistent with the underlying presumptions upon which attack authority is based.

4. **The Positive Law**. Neither the Lieber Code, the St. Petersburg Declaration, the 1899 and 1907 Hague Conventions and Regulations, nor the Geneva Conventions provides any support for an LHM rule applicable to pre-submission belligerents. Additional Protocol I to the Geneva Conventions (AP I) establishes the most comprehensive positive rules on the authority to attack lawful targets and the limitations on that authority. Given AP I's specific and heavily emphasized humanitarian focus (noted in the extensive protections for civilians), the absence of an LHM rule is significant. AP I sets forth several express prohibitions on the use of force against enemy belligerents: protection for those *hors de combat*, limitations on the means and methods of warfare, the prohibition of the denial of quarter, and constraints on the use of force against escaping prisoners. None of these prohibitions include or support a broad LHM rule in targeting enemy belligerents.

First, arguing that an LHM rule falls within a broad conception of "in the power of" — as found in AP I, article 41 — demonstrates that it does not exist as an accepted LOAC rule, but rather at best as an aspirational constraint. The slight expansion from Hague IV's "surrender" to AP I's "in the power of" does not create an infinite expansion of "in the power" to require a soldier to constantly assess whether an enemy belligerent who is not actively firing or preparing to fire should no longer be considered capable of acting pursuant to the dictates of enemy belligerent leadership. Second, AP I does not prohibit employing combat power as a first resort that is highly likely to kill an opponent, but rather only prohibits means or methods of a nature to cause unnecessary suffering. Third, the denial of quarter provision only addresses treatment of captured adversaries, not the determination of who is *hors de combat* or the use of combat power against enemy belligerents pre-capture. Finally, the more restricted use of force ("if circumstances require it") authorized against escaping prisoners is not the general rule with regard to belligerents, because before they actually escape, such prisoners are *hors de combat* and entitled to all the protections of such status.

Some proponents of an LHM rule argue that the proportionality protections applicable to law enforcement activities apply to the treatment of belligerents during armed conflict. But human rights law proportionality focuses on the object of state violence while the LOAC's proportionality rule focuses on the unintended victims of the use of force that is directed at legitimate targets of attack. The exclusion of the pre-submission belligerent from the LOAC's proportionality protection demonstrates that there is no analogous limitation imposed on lawful attack authority.

5. **Synchronizing Law, Policy, and Operational Practice**. Operational practice may sometimes make applying an LHM rule beneficial as a matter of policy. Commanders can make such a rule through rules of engagement (ROE) and then provide appropriate training. However, identifying a common ROE constraint is not probative regarding the existence of a legal rule imposing a similar constraint. Furthermore, if an LHM rule did exist in the LOAC, or if such a rule were to be imposed, it would present significant and potentially crippling impediments in its implementation, in

four areas: training, operational complexities, investigation and accountability, and the LOAC's role in protecting soldiers' morality.

First, translating an LHM legal obligation into training and the ROE applicable to a declared hostile force would be extraordinarily difficult, especially in the wide range of tactical environments with very different considerations and imperatives. Second, unlike in the traditional execution of combat operations, belligerents would be adversely influenced by a de facto (if not de jure) presumption that every use of force could be assessed as potentially unjustified and excessive, and every "shoot/don't shoot" decision would be subject to critique requiring justification of the decision to attack on an individual basis. If an LHM rule were law, every use of deadly force against an enemy belligerent would need to be justified by the individual threat that enemy operative posed at the time. Third, the human rights use of force paradigm that an LHM rule injects into the use of force equation means that every attack on an enemy belligerent would trigger an investigatory requirement, creating a chilling effect on the warrior spirit and effectiveness of armed forces. Soldiers would become increasingly risk averse, hesitating to attack an enemy in order to avoid the potential consequences of investigatory second-guessing.

Fourth, the LOAC protects belligerents not only physically but morally as well. The LHM rule's proponents do not seem to appreciate the intense challenge of making the decision to take another human life, even when that decision is made in combat and the life taken is that of a positively identified enemy belligerent. The assurance that this always difficult decision was legally and operationally justified thus plays an important role in safeguarding and bolstering a soldier's moral well-being. The moral confidence that the deadly consequences of executing a duty were tactically justified and lawful, without having to question whether the harm inflicted in battle was "really necessary" is essential to protecting the moral integrity of combatants.

**The views expressed are those solely of the authors and should not be understood as necessarily representing those of the U.S. Department of Defense or any other government entity.