
Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'

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Abstract

This article examines two issues raised by Professor Goodman's article published in this volume of EJIL: (1) a purported obligation under international humanitarian law (IHL) to minimize harm to enemy fighters; and (2) a purported IHL duty to capture rather than kill when doing so is feasible in the circumstances. It notes that situations in which it is possible to wound rather than kill enemy fighters are rare on the battlefield. However, even when such circumstances do present themselves, there is no obligation under the extant IHL to do so. Similarly, there is no duty to capture rather than kill under the existing law. Nevertheless, the article offers an analysis that would extend hors de combat status to enemy fighters who have been effectively captured, thereby shielding them from attack. Accordingly, the approach would often arrive at the same conclusion as that proposed by Professor Goodman, albeit through a different legal lens. The article concludes by noting that although there is no 'capture-kill' rule in IHL, for operational and policy reasons, capture is usually preferred.

The posting of a draft version of Professor Ryan Goodman's article appearing in this journal sparked a lively exchange in the academy.¹ While I share some of the concerns that his critics have expressed, I equally find Professor Goodman's analysis thoughtful, thorough, and valuable. Indeed, he raises points that merit careful consideration in light of contemporary conflicts and the evolving values of the international community.

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¹ Goodman, 'The Power to Kill or Capture Enemy Combatants', this vol. at 819. See especially the exchange between Prof. Goodman and Profs. Corn, Blank, Jensen, and Jenks on *Lawfare*, available at: www.lawfareblog.com. The latter four have comprehensively set forth their views in 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule', 89 *Int'l L Studies* (2013) 536. See also Ohlin, 'The Duty to Capture', 97 *Minnesota L Rev* (2013) 1268.

Two central questions that are often conflated lie at the heart of the matter: (1) is there is any obligation under international humanitarian law (IHL) to minimize harm to enemy fighters; and (2) is there is an IHL obligation to capture rather than kill enemy fighters in certain circumstances?² These two issues surface in very different contexts on the battlefield.³ The first is typically framed in terms of wounding rather than killing during battle (the ‘Pictet’ theory), whereas the latter involves situations in which friendly forces can feasibly capture an enemy fighter in lieu of attacking him.

1. Wounding in Lieu of Killing?

Professor Goodman looks in part to Article 35(2) of the 1977 Additional Protocol I (AP I), which prohibits ‘methods or means of warfare of a nature to cause superfluous injury or unnecessary suffering’ as one basis for a purported duty sometimes to wound rather than kill (his ‘least restrictive means analysis’). The prohibition of such ‘means of warfare’ (a reference to weapons) is a longstanding element of treaty and customary law.⁴ However, with respect to any obligation to minimize harm while using lawful weaponry, it is AP I’s prohibition on ‘methods of warfare’ that is at issue. The reference to methods first appeared in that instrument.⁵

Methods of warfare, as noted in the ICRC’s *Guidance on Weapons Reviews*, generally refers to ‘the way in which [weapons] are used’.⁶ The recently released *Tallinn Manual* similarly explains that the term ‘refers to how ... operations are mounted, as distinct from the instruments used to conduct them’.⁷ Typical examples include beyond visual range engagements, high altitude bombing, and indiscriminate attacks. Even when a weapon *per se* is not employed, the concept is often framed in terms of weapons usage. Thus, for example, the ICRC commentary to Article 54 styles starvation as a method in which depriving the civilian population of food and other essentials is used ‘as a weapon to annihilate the population’.⁸ In lay terms, methods of warfare are particular ‘tactics’ used to employ weapons.

There is no indication that the states present at the Diplomatic Conference concurred in treating Article 35(2) as applying to any act involving the ‘conduct of hostilities’. On the contrary, a rule of this nature would be problematic in the heat and confusion of the battlefield. Professor Goodman readily acknowledges the practical

² I use the term ‘fighters’ in order to encompass both combatants and civilians that directly participate in the hostilities.

³ My analysis is without prejudice to any international human rights restrictions that might apply, particularly outside the context of an international armed conflict.

⁴ 1868 St. Petersburg Declaration, 1 *AJIL* (Supp., 1907) 95; 1899 Hague Declaration concerning Asphyxiating Gases, 1 *AJIL* (Supp., 1907) 157; 1899 Hague Declaration concerning Expanding Bullets, 1 *AJIL* (Supp., 1907) 155; 1899 & 1907 Hague Regs, 32 Stat. 1803 and 36 Stat. 2277, Art. 23(e).

⁵ I take the position that all of the AP I provisions cited by Prof. Goodman reflect customary law and therefore are binding on non-party states, including the US.

⁶ ICRC, ‘A Guide to the Legal Review of New Weapons, Means and Methods of Warfare’, 88 *Int’l Rev Red Cross* (2006) 931, at 937 (emphasis added).

⁷ M.N. Schmitt (gen. ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013) 142.

⁸ ICRC, *Commentary on the Additional Protocols* (1987), at para. 2090.

problems associated with a 'wound-kill' rule and proposes a number of carefully crafted limitations on its implementation and interpretation that could mitigate those obstacles. However, the very fact that he has done so adds weight to the argument that no such rule has yet crystallized.

Moreover, situations presenting a viable possibility of wounding instead of killing are so rare that it is counter-intuitive to conclude that states intended the 'method' language to extend to such circumstances.⁹ Today most states, non-state organizations dealing with IHL, and scholars do not interpret the provision in this manner. For them, neither killing nor capture constitutes a specific method of warfare, although certain tactics designed to kill or capture do.

Professor Goodman offers a second (albeit associated), and stronger, basis for a wound-kill rule, one focusing on the IHL principles of humanity and military necessity. The ICRC took a similar stance in its *Interpretive Guidance on Direct Participation in Hostilities*.¹⁰ In the absence of an express norm, the *Guidance* suggests that considerations of military necessity and humanity should guide the determination of how to conduct an engagement. Such determinations would necessarily be highly contextual. For instance, the *Guidance* notes that '[i]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL'. It also emphasizes that '[t]he aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse ...'.¹¹ Perhaps most significantly, the ICRC cautions that it is merely proffering an interpretation of 'one of the most *unresolved* issues of international humanitarian law'.¹²

Military necessity and humanity constitute IHL's foundational principles; every IHL rule represents an attempt by states to craft a fair balance between the need to be effective in battle and the desire to humanize it. The military necessity–humanity balance also infuses the progressive development of IHL, and informs its interpretation and application. But it is not in itself a separate prescriptive norm with independent valence.¹³

There is no denying that the 'wound-kill' rule advocated by Professor Goodman is viscerally appealing. Why, after all, would the law allow killing an enemy fighter who could be rendered *hors de combat* through wounding? But practical challenges aside, it would be wrong to assume that IHL – the product of either negotiation between states or pervasive state practice influenced by national interests – is seamless, logical in every circumstance, or necessarily reflective of the optimal contemporary balance

⁹ Note that possibilities do exist, as in employing non-lethal weapons. However, such options are seldom viable when involved in classic combat or when enemy forces are themselves employing lethal force.

¹⁰ ICRC (Nils Melzer), *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (2009), at ch. IX.

¹¹ *Ibid.*, at 80.

¹² *Ibid.*, at 6 (emphasis added).

¹³ For my views on the subject see Schmitt, 'Military Necessity and Humanitarian Law', 50 *Virginia J Int'l L* (2010) 795.

between the principles of military necessity and humanity. Such a *chapeau* rule is simply not, for better or worse, a component of the extant IHL.

2. Capture in Lieu of Killing?

The so-called ‘capture-kill’ issue is imbued with greater normative substance. It is here that Professor Goodman makes his most compelling argument. For the reasons set forth above, I reject the premise that military necessity–humanity balancing mandates any such obligation, even when operationally feasible. My opposition to a capture-kill rule is also based on the fact that the enemy fighter generally has the means to achieve the same result by surrendering, since those who surrender are *hors de combat* and cannot be attacked; in other words, IHL already addresses the situation.¹⁴ A rule that prohibits an attack *whenever* the individual can be captured would shift the burden from the fighter to the attacker in a way that warfighting states would have been, and remain, unlikely to countenance.

However, reflection on Professor Goodman’s analysis regarding the prohibition on attacking those who are *hors de combat* has caused me to refine my position by re-examining that concept.¹⁵ Pursuant to Article 41(2), a person *hors de combat* is one who (a) ‘is in the power of an Adverse Party’; (b) ‘clearly expresses an intention to surrender’; or (c) ‘has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself’. If he engages in hostile acts or tries to escape, protection under the rule is forfeited.

The second of the three alternatives is inapplicable to the question at hand; a surrendering fighter is already protected from attack. Some attention in the capture-kill context has been paid to the third criterion because of the ‘incapable of defending himself’ text. However, appearance of the phrase only in the subparagraph dealing with the wounded augurs against interpreting it as applicable when the fighter is not wounded. Additionally, its inclusion served a specific purpose – making clear that an individual must be wounded in a manner that renders him incapable of fighting before the belligerent right to attack is extinguished.

A similar phrase had appeared in Article 23(c) of the 1899/1907 Hague Regulations, which prohibited killing or wounding an enemy ‘who having laid down his arms, or having no longer means of defence, has surrendered at discretion’. But that clause merely articulated one reason combatants might surrender.¹⁶ As with Article 41(2)(c) of AP I, there is no indication that it was intended to characterize defencelessness as an independent *hors de combat* basis.

This leaves the ‘in the power’ criterion as the single possible Article 41(2) source of a capture-kill norm. The crux of the matter is the definition of ‘in the power’ of the enemy. It is irrefutable that anyone who has become a prisoner of war is protected

¹⁴ AP I, Art. 41.

¹⁵ I do not discuss the notion of *hors de combat* with respect to the wound-kill issue because a person who is *hors de combat* is immune from attack.

¹⁶ Additional Protocols Commentary, *supra* note 8, at 480, fn. 1.

from attack. Although this was the case well before AP I's adoption,¹⁷ the precise textual formula has evolved. By the Hague Regulations and the 1929 Geneva Prisoner of War Convention, a person acquired protection once 'captured'.¹⁸ The 1949 Third Geneva Convention on Prisoners of War, by contrast, adopts the phrase 'fallen into the power' of the enemy.¹⁹ However, the Convention's commentary explains that the text was merely a clarification that the reference to capture in the earlier conventions did not exclude from prisoner of war status those who surrendered without having fought, as in the case of mass surrender.²⁰

AP I's Article 41(2)(a) slightly modified the operative phrase. Interestingly, the Article's commentary suggests that the change to 'in the power' was meant to encompass those who are defenceless, as in the case of an aircraft 'which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender'.²¹ Many experts have rejected this and similar commentary as overbroad. For instance, the majority of the Group of Experts that drafted the *Harvard Air and Missile Warfare Manual* 'decided not to retain the separate category of Art. 41(2)(a) of AP/I, i.e. persons "in the power of an adverse Party", in view of the fact that such category is irrelevant in aerial warfare'.²²

As noted by Professor Goodman, the notion of defencelessness was express in the original 1973 ICRC Draft Protocol. The proposed text to Draft Article 38 provided:

1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:
 - (a) is unable to express himself, or
 - (b) has surrendered or has clearly expressed an intention to surrender
 - (c) and abstains from any hostile act and does not attempt to escape.²³

Textually, the reference to no 'means of defence' applied only to those who had '*laid down their arms*'. The accompanying commentary explained that '[t]he reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting, or when a serious casualty is incapable of expressing himself'.²⁴ The draft Article's subparagraphs confirm that the relevant phrase related primarily to a situation in which combatants were unable to communicate their desire to surrender, but capture had nonetheless been effectuated. It was not a catch-all rule

¹⁷ Hague Regs, Art. 4; 1929 Geneva Convention on Prisoners of War, Art. 2; 1949 Geneva Convention (III) on Prisoners of War, Art. 13.

¹⁸ Hague Regs, Art. 3; 1929 Geneva Convention, Art. 1.

¹⁹ Geneva Convention III, Art. 4.

²⁰ ICRC (J. Pictet (ed.)), *Geneva Convention III Commentary* (1960), at 50.

²¹ Additional Protocols Commentary, *supra* note 8, at para. 1612.

²² Harvard Program on Conflict Research, *Commentary on the HPCR Manual on the International Law Applicable to Air and Missile Warfare* (2010), at para. 3 of commentary to rule 15(b).

²³ ICRC, *Draft Additional Protocols Commentary* (1973), at 44.

²⁴ *Ibid.*

pertaining to anyone who might be defenceless. In any event, the draft's reference to defencelessness survived only *vis-à-vis* wounded fighters.

The better interpretation of Article 41(2)(a) is that the revision was meant to clarify that the notion of *hors de combat* included the category of civilians, who enjoy various protections under the 1949 Fourth Geneva Convention. Use of the term 'person' throughout Article 41 supports this position. When civilians participate directly in the hostilities they become targetable for such time as they so participate.²⁵ In the ICRC's view (and mine), these civilians fall within the parameters of the latter convention. This being so, it was necessary to address their protection with respect to being *hors de combat*. Accordingly, Article 41 employs a phrase ('in the power') drawn almost verbatim from the scope provision of the Fourth Convention.²⁶ The Bothe, Partsch, and Solf unofficial but authoritative commentary confirms that Article 41(2)(a) was meant to protect individuals encompassed by both the Third and Fourth Geneva Conventions.²⁷ Reference in Common Article 3 of the four 1949 Geneva Conventions to those rendered *hors de combat* through 'detention' supports this interpretation.²⁸ It illustrates the drafters' desire to ensure that the protection covered anyone detained by a party to the conflict. As with the Third Geneva Convention's text, Article 41(2)(a) simply clarifies, rather than modifies, the existing rule; 'in the power' refers, in the context of the present analysis, to individuals who have been captured or otherwise detained.²⁹

The central question is accordingly when has an individual been 'captured'? It is here that I find common ground with Professor Goodman. I do not accept the premise that defencelessness alone shields enemy forces or civilian direct participants from attack. But capture (and detention) does not necessarily require taking the fighters into 'custody'. In some circumstances, an individual has effectively been captured without an affirmative act on either the captor's or prisoner's part, a point made, as Professor Goodman notes, by Professor Howard Levie decades ago.³⁰ The crucial question is whether an individual is unambiguously in the captors' control, such that he poses no risk to the captors or civilians (e.g., a risk of suicide bombing) and taking custody would be operationally feasible in the attendant circumstances.³¹ In other words, the *hors de combat* rule prohibits an attack that is nothing but an execution because the individual concerned has already been captured.

Professor Goodman's examples are illustrative. In the showering commander hypothetical, killing would be permissible if the Special Forces were moving quickly

²⁵ API, Art. 51(3); 1977 AP II, Art. 13(3). Technically, some civilians who directly participate in hostilities may not be encompassed in the scope of the Fourth Geneva Convention until they have been captured. However, this fine point has no bearing on my analysis.

²⁶ 1949 Geneva Convention (IV) on Civilians, Art. 4.

²⁷ M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflict* (1982), at 221.

²⁸ 1949 Geneva Conventions I–IV, Art. 3. See the discussion in ICRC (J. Pictet (ed.)), *Geneva Convention I Commentary* (1952), at 56, which states that the protection of Common Art. 3 was designed to reach 'every man taking no part in hostilities or placed hors de combat'.

²⁹ The phrase has a broader meaning in other contexts: J. Pictet (ed.), *ICRC, Geneva Convention IV Commentary* (1958), at 47.

³⁰ H.S. Levie, *Prisoners of War in International Armed Conflict* (1978), at 35.

³¹ On the issue of risk see ICRC, *supra* note 10, at 82.

through the building in a rapidly unfolding attack. However, if the house and the area in which it was located were under full control of friendly forces, and apprehension could be easily effected without risk to the team or civilians, the commander is 'in their power'. In the case of the weaponless surrounded fighter, the fact that he is unwilling affirmatively to surrender does not preclude his having been captured.

But a person who appears capable and ready to resist has not been captured; he may be killed even if resistance would be completely futile. Thus, killing is permissible in Professor Goodman's scenarios involving the armed fighter in the well since the individual is not defenceless and has conveyed no desire to surrender. Similarly, the unarmed fighter who is unwilling to give up without a fight has not been captured; there being no wound-kill rule in IHL, his killing would be lawful.

Finally, the high-level leaders' killings to avoid the diplomatic blowback of capture are likewise lawful. The individuals are combatants (or direct participants), their capture has not been effectuated, and they have not expressed an intention to surrender. They are lawful targets under the law, although one might question the motivation for executing the strike on moral grounds.

The last scenario illustrates an important point. The fact that a killing is lawful when capture might be feasible does not mean that killing is sensible operationally or from a policy perspective, or even that it is ethical. On the contrary, capture is usually preferable, whether to acquire a possible source of intelligence, avoid alienating the local population or emboldening the enemy, or maintain the high ground in the lawfare battlespace. Real-world rules of engagement and other operational or policy guidance sometimes mandate exactly that result. Indeed, controversy over suggestions that kill operations are sometimes mounted to avoid onerous and complicated detention regimes highlight the extent to which a lawful decision to conduct lethal strikes can prove counterproductive to the ultimate objective of winning the war. President Obama's recent statement that 'America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute' reflects precisely such concerns.³²

3. Conclusion

As is clear, I am not in agreement with Professor Goodman on the wound-kill issue. In my view, no such rule presently exists in IHL, and it would be highly problematic to implement on the battlefield. I also disagree with his analysis on the capture-kill issue, although his possible restrictions as to the scope of the purported rule and my understanding of capture would lead us to the same results in most cases. Rather, my position is simple. No treaty establishes such rules, nor has there been sufficient state practice combined with *opinio juris* for them to comprise customary law. That said, I commend my friend for both energizing the debate over this important issue and raising it to a highly sophisticated level. I look forward to its development.

³² Remarks by President Barak Obama, National Defense University, 23 May 2013, available at: www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.