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JUST WAR IN INTERNATIONAL LAW:
AN ARGUMENT FOR A DEONTOLOGICAL
APPROACH TO HUMANITARIAN LAW

Ryan Dreveskracht*

I. INTRODUCTION

A. Generally

The Just War doctrine, the theoretical justification of how and when wars are fought, is no longer working. The doctrine has not yet been properly implemented because one cannot, with any of the tools in existing humanitarian law, bring the military necessity and proportionality principles in line with their natural law foundation. Instead of utilizing a utilitarian consequentialist approach, a deontological approach is necessary to bring the Just War doctrine back in line with its original natural law foundation.

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1 The pieces of the jus in bello branch of the Just War doctrine codified in international law are sometimes referred to as “international humanitarian law.” See Larry May, War Crimes and Just War 8 (2007). Ultimately no unanimity exists among commentators as to the definitions and divisions in the law of armed conflict, or humanitarian law, as it is increasingly referred to. See generally Jean S. Pictet, The Principles of International Humanitarian Law (1966). For the purposes of this Article, the terms “humanitarian law” and the “international law” will be used interchangeably.

2 “Natural law” is a “philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action . . . .” Black’s Law Dictionary 1055 (8th ed. 2004).

3 See The Cambridge Dictionary of Philosophy 176-77 (2d ed. 2001) (defining consequentialism as “[t]he doctrine that the . . . rightness of an act is determined solely by goodness of the act’s consequences,” and that “[u]tilitarian versions [of consequentialism] hold that the only consequences of an act relevant to its goodness are effects on . . . sentient beings.”). J.S. Mill characterizes utilitarian consequentialism as the view that “actions are right in proportion as they tend to promote happiness; wrong as they produce the reverse of happiness.” J.S. Mill, Utilitarianism, in Utilitarianism and Other Essays 278 (J.S. Mill et al., eds.,
The Just War doctrine takes the pragmatic view that war does not take place in a vacuum, and that “accidental” factors should not only be considered, but that rules of engagement\(^5\) should restrain actions that affect civilians, noncombatants, prisoners of war, the wounded and the helpless.\(^6\) War has always been contemplated in terms of morality, whether a war is just or unjust, right or wrong;\(^7\) the rules of war have developed in response to this reality, recognizing “the inevitability of war while speaking of the demands of peace.”\(^8\) At the same time, moral theorists have always insisted that war is intrinsically wrong, that basic ideals of humanity are lost when nations are at war.\(^9\)

\(^{1987}\). See also Michael J. Perry, Some Notes on Absolutism, Consequentialism, and Incommensurability, 79 NW. U. L. REV. 967, 972-73 (1984). In this Article, the use of “consequentialism” will refer to the utilitarian branch of this theory.

\(^4\) Deontologists hold that the wrongness of an act does not lay in the consequences of the act, but of something in the quality of the act, intrinsically. See Heidi M. Hurd, Justifiably Punishing the Justified, 90 MICH. L. REV. 2203, 2210-11 (1992). Thus, deontologists would oppose an action where the outcome was beneficial, but the act was intrinsically wrong.

\(^5\) “Rules of engagement” refer to “directives issued by a military authority that outline the circumstances and limitations under which troops will initiate or continue armed combat with opposing forces.” Zachory Myers, Fighting Terrorism: Assessing Israel’s Use of Force in Response to Hezbollah, 45 SAN DIEGO L. REV. 305, n.43 (2008) (citing Michael C. Bonafede, Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks, 88 CORNELL L. REV. 155, 163-64 (2002)).

\(^6\) This is in contrast to, for example, the Roman Empire’s destruction in 146 BC of the entire Carthaginian civilization without regard for civilian/combatant distinction, leading to the expression “Carthaginian solution.” See JOHN PREVAS, HANNIBAL CROSSES THE ALPS: THE ENIGMA RE-EXAMINED 1 (1998); see also Thomas Nagel, War and Massacre, 1 PHIL. & PUB. AFF. 123, 127 (1972) (discussing civilian casualties during World War II). As recently as 1997, the U.S. has endorsed the practice of targeting dual-use facilities in order to lower civilian morale. See Lea Brilmayer & Geoffrey Chepiga, Ownership or Use? Civilian Property Interests in International Humanitarian Law, 49 HARV. INT’L L.J. 413, 419 (2008).


\(^8\) Debra B. Bergoffen, The Just War Tradition: Translating the Ethics of Human Dignity Into Political Practices, 23 HYPATIA 72, 72 (April-June 2008).

The Just War doctrine seeks to address moral dilemmas of war, while denying the pacifist assertion that war is intrinsically wrong. Setting out to accomplish a practical result, the Just War doctrine is a theory establishing when it is appropriate to use force, and proper conduct while using force. These two branches are referred to as *jus ad bellum* and *jus in bello*, respectively.

B. Structure of Article

This Article will analyze the Just War doctrine of civilian immunity. Section II will give a detailed account of the Just War doctrine, particularly the application of two aspects of *jus in bello*: proportionality and military necessity. Section III will critique a commonly flawed implementation of the proportionality and military necessity principles in international law and domestic military policies. This analysis concludes that the Just War doctrine has yet to be properly implemented. In response to this flaw, Section IV will interject an empiricist consequentialist approach that the doctrines currently only partially utilize. Specifically, this Article will apply Carl G. Hempel's Deductive-Nomological and Inductive-Statistical models of prediction to the principles to attempt to rectify the misgivings of current international law and domestic military regulation. In Section V, 

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10 See Bergoffen, * supra* note 8, at 72 (pointing out an internal contradiction within the Just War doctrine, in that it assumes a "single human community bounded by universal moral laws," while simultaneously "legitimat[ing] the division of that community into enemy factions in violation of those [same universal] laws.").


Hempel explored the need for usable definitions whereby concepts are operationalized into measurable units that may be used to support or reject hypotheses and conclusions. The more tests done well, the more likely it is that generalizations may be made from the growing body of research, and thereby result in theory. He defines operationalism as "the demand that concepts or terms used in the description of experience be framed in operations of experience which can be unequivocally performed." Much of Hempel's discussion involves how to operationalize, measure, and classify concepts. (Internal citations omitted.)
concluding that the "Hempelian fix" does help, but does not fully solve the
shortcoming, this Article will suggest a deontological approach that aims to
bypass a consequentialist approach altogether: a blanket prohibition on ci-
vilian casualties and a backward-looking internal review system. In the
end, having analyzed both the consequentialist and deontological ap-
proaches, the Article will conclude that, not only is the deontological ap-
proach more compatible with natural law jurisprudence, it is also a more
practical and easily implemented approach to humanitarian law.

II. THE JUST WAR DOCTRINE

This Section will give a detailed account of the development of the
Just War doctrine and its codification into international law.13 The first
large-scale international attempt to formally document pieces of the Just
War doctrine came in 1864, when twelve nations signed the Geneva Red
Cross Convention to provide protection for "medical personnel on the bat-
tlefield."14 Four years later, the St. Petersburg Declaration, while drafted to
"regulate modern weaponry," also promoted a soldier/civilian distinc-
tion.15 Over time,16 the Hague Conventions of 1907,17 the Geneva Conventions of

13 See R. George Wright, Noncombatant Immunity: A Case Study in the Relation
Between International Law and Morality, 67 NOTRE DAME L. REV. 335, 339 (1991)
("To understand, let alone evaluate, the current law of noncombatant immunity,
one must look to history and philosophy.").

14 Thomas J. Herthel, On the Chopping Block: Cluster Munitions and the Law of
War, 51 A.F. L. REV. 229, 245-46 (2001). This is not to say that individual nations
did not codify their own internal rules of engagement. The Second Lateran Council
of 1139 had banned "the use of crossbows, bows and arrows, and siege machines
against Christians" in order to prevent unnecessary combatant suffering. FREDER-
ICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 156 (1975). The U.S. had
codified rules of engagement as early as 1863. See generally Theodor Meron,
Francis Leiber's Code and Principles of Humanity, 36 COLUM. J. TRANSNAT'L L.
269 (1997) (Lieber wrote field instructions for the U.S. Army in 1863).

15 Herthel, supra note 14, at 246.

16 See Jefferson D. Reynolds, Collateral Damage on the 21st Century Battlefield:
Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral
High Ground, 56 A.F. L. REV. 1, 9 (2005) (discussing how advancements in mili-
tary technology lead to developments in international law).

17 Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259,
1 Bevans 619; Convention Respecting the Laws and Customs of War on Land, Oct.
18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention Concerning Bombardment by
Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681 (collect-
tively, hereinafter, "the Hague Conventions").

Despite these advances in international law, combatant to civilian death ratios continue to reflect a long-term trend of increasing civilian casualties. For example, Israel’s 2006 attacks on Hezbollah in Lebanon resulted in an estimated 1,183 casualties, with those casualties being mostly


24 Aaron Xavier Fellmeth, Questioning Civilian Immunity, 43 Tex. Int’l L.J. 453, 454 (2008). “The ratio of civilian to combatant casualties was between 5% and 10% in the First World War and then dramatically leapt to 50% in the Second World War. By the 1990s, 75% of all casualties resulting from armed conflicts were civilian, and in some cases the rate has allegedly reached as high as 90%.” Id. at 455 (internal citations omitted).
civilians and about one-third children. Even more recently, as of November 11, 2009, an estimated 94,048 to 102,621 civilian casualties have been recorded, compared to 4,362 Iraq Military Coalition combatant casualties, in the U.S.-led occupation in Iraq. These numbers reflect exactly what humanitarian law aims to prevent.

Moreover, these figures are not transparent. International humanitarian interest groups and the legal community increasingly are pressuring governments to revise humanitarian law to entirely exempt certain targets from attack. A large consensus agrees that the Just War doctrine, as currently applied by international law, does not work.

28 These rates are complicated, however, by the lack of a clear civilian/combatant distinction. See Susan W. Brenner, “At Light’s Speed”: Attribution and Response to Cybercrime/Terrorism/Warfare, 97 J. Crim. L. & Criminology 379, 453 (2007); William H. Ferrell, III, No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict, 178 Mil. L. Rev. 94 (2003); Adam Sherman, Forward unto the Digital Breach: Exploring the Legal Status of Tomorrow’s High-Tech Warriors, 5 Chi. J. Int’l L. 335, 340 (2004). For the purposes of this Article, the distinction between combatants and non-combatants will not be equivalent to a distinction between innocence and guilt, as argued for by various philosophers, see, e.g., Richard Wasserstrom, On the Morality of War: A Preliminary Inquiry, in WAR, MORALITY AND THE MILITARY PROFESSION 299 (Malham M. Wakin ed., 1979), but upon soldiers in the accepted sense, comparable to soldiers of the democratic state, see, e.g., Christopher J. Schmidt, Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq or North Korea?, 48 St. Louis U. L.J. 587, 596 (2004).
30 See generally Sarah Clark, Counting Civilian Casualties, 27 Am. Journalism Rev. 12 (2005) (discussing how the body counts are established).
31 Reynolds, supra note 16, at 4; see also, e.g., Brilmayer, supra note 6.
Humanitarian law’s shortcomings can be attributed to various factors, but chief among them is its inability to address the complex issues that arise in the battlefield. The unfortunate result is that “the more broadly accepted treaty law that binds nearly all nations and is widely recognized as reflecting customary international law... does not always provide clear or definitive answers to present-day operational challenges.” This result questions the efficacy of a law that purports to protect civilians.

A. The Just War Tradition

The development of the Just War doctrine is intricate, shaped over more than 1,500 years. Initially, Christian theologians, emphasizing the non-violent, non-resistant and non-retaliatory teachings of Jesus Christ, developed the formal doctrine as a theory of pacifism. However, around the fifth century A.D. a fundamental change in the doctrine’s foundations occurred, for two primary reasons. First, due to an emerging Christian-Muslim conflict, Constantine’s Crusades in the East, the Reconquista in Spain, and the Ottoman invasion of southern and central Europe, theologians began to develop a theoretical structure for the ethics of warfare in order to make way for national development and a secured land base. Second, the Christian Church finished its canonization of the scriptures of the Bible at the Council of Carthage in 397 A.D. The Church could then look to the

36 Kenny, supra note 35.
38 Linn, supra note 37, at 621.
scriptures for God-ordained justifications for war, as the traditional teachings of Jesus Christ faded into the background. The Emperor Constantine also made Christianity the official religion of the Roman Empire, advocating Augustine’s proposal that “God ordained wars against evil,” and that the Roman Empire was to carry out God’s will. By the fifth century A.D., Augustine’s view that “under certain conditions, war was just, even obligatory” had replaced the early Church’s pacifism. For Augustine, “‘natural law’ was man’s intellectual grasp of God’s eternal law, and justice was ‘not the product of man’s personal opinion, but something implanted by a certain innate power.’”

Under Augustine’s punitive model, no distinction existed between combatants and civilians; this “moral emphasis on the guilt of an enemy population could justify violence against it.” In fact, for the most part, none of the early Christian thinkers paid a great deal of attention to the matter of civilian immunity, as most were occupied with defining Just War and determining the conditions of a morally permissible attack. Although it did lay the foundation for what would eventually become jus in bello law, overall, early Christian theorists stayed within jus ad bellum, and remained concerned primarily with declarations of war.

The early Christian Just War doctrine influenced a Spanish Dominican named Francisco de Vitoria, who broke from his early Christian pred-

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39 Id. at 621-22.
40 Id. at 626.
41 Id.
42 Id. at 626-27. In his most pivotal work, Questions in Heptateuchum, Augustine wrote:

> Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God Himself ordains.

Id. at 627 (quoting Augustine) (citation omitted).
43 Reynolds, supra note 16, at n.12; see also CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 3, at 458-59 (defining “just war theory”).
45 Linn, supra note 37, at 621; CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 3, at 458-59 (defining “just war theory”).
ecessors. For Vitoria, only those people bearing arms or engaged in fighting were to be presumed guilty, in the absence of evidence to the contrary. However, Vitoria also realized that war necessarily involves civilian causalities:

Sometimes it is right, in virtue of collateral circumstances to slay the innocent even knowingly, as when a fortress or city is stormed in a just war . . . although cannon and other engines of war cannot be discharged or fire applied to buildings without destroying innocent together with guilty.

With this, Vitoria introduced two ideas to the Just War doctrine: 1) slaughter of the innocent is prohibited by “primary intent,” and 2) guilt or innocence is a “material, objective fact, determined by the bearing or nonbearing of arms.” These ideas were crucial in establishing a humanitarian base, “distinguish[ing] unlawful motives of war from just limits in war,” thus introducing a dichotomy between jus ad bellum and jus in bello that allowed for all conflicts to be fought humanely, irrespective of the root of violence.

Vitoria died in 1546; war during the sixteenth century claimed approximately 1.6 million lives. By the nineteenth century, that number had risen to 19.4 million, and the rate of civilian causalities was at its highest yet. But this did not mean that Vitoria’s work was in vain. Vitoria’s ideas – that military targets should be distinguished from civilian targets and that “forces must not strike military objectives unless they will achieve a definite military advantage by doing so” – eventually found refuge in

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48 Id. at 85 (quoting Francisco de Vitoria, De Indis De Jure Belli, 37.448).
49 Id. at 84.
53 See Hartigan, supra note 47, at 90-91.
contemporary international law, under the principles of proportionality and military necessity.54

B. The Just War Doctrine in International Law

No international bodies are charged with unilaterally codifying and enforcing international law.55 Instead, international law arises from customary international law, "general and consistent practice" that is "followed by [States] from a sense of legal obligation," treaties among sovereign nations, and "general principles of law."56 Today, it is indisputable that many of the principles of jus ad bellum constitute customary international law.57 The acceptance of jus in bello as international law is seen by the acceptance of jus in bello norms, and efforts to codify it in international treaties and declarations.58

The Geneva Red Cross Convention of 1864 ("Red Cross Convention") was the "first multilateral treaty governing land warfare," and laid the groundwork for the codification of jus in bello law.59 Then, in 1868, the St. Petersburg Declaration further promoted Vitoria's principle of "military distinction" by prescribing "the immunity of the innocent from direct attack."60 However, although this "Declaration was an important advance-

54 Myers, supra note 5, at 330.
55 Herthel, supra note 14, at 244.
56 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986); see also Martha F. Davis, The Spirit of Our Times: State Constitutions and International Human Rights, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 364 (2006) ("While nation-states do not specifically assent to customary international law as they do with treaties, it is nevertheless binding . . . as the law of nations."); see also MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 166 (1999).
58 Myers, supra note 5, at 318.
60 Herthel, supra note 14, at 246; Solf, supra note 35, at 119. The St. Petersburg Declaration states: "[I]t is sufficient to disable the greatest possible number of men . . . this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . the employment of such arms would, therefore, be contrary to the laws of humanity
Building upon the *jus in bello* foundations in the Red Cross Convention and the St. Petersburg Declaration, the Hague Conventions of 1899 and 1907 further regulated the methods of combat, particularly the weapons used, and provided additional civilian protections by: 1) requiring a warning before an attack, so that civilians might take shelter from bombardment; 2) prohibiting the bombardment of undefended places; 3) prohibiting pillage; and 4) taking precautions when bombarding defended towns, so that educational, scientific, religious, and cultural objects not be targeted if properly marked. But the Hague Conventions were also severely limited in scope, omitting established *jus in bello* principles (Vitoria's appeal to natural law), as well as confining the text to negative law. In consequence, the intelligibility of the Hague Conventions was sacrificed. As Professor Solf noted, "military men tended to consider permissible any measure not expressly prohibited. This was in error, for customary law remained in full force, except to the extent modified by conventional law." The status of the Hague Conventions changed in 1945, when the International Military Tribunal held that the general principles of the Con-

\[\text{\ldots}\text{.}\] The Declaration of St. Petersburg, 1868, 1 Am. J. Int'l L. Supp. 95, 95 (1907).

61 Myers, *supra* note 5, at 319.

62 Solf, *supra* note 35, at 126; see also Brilmayer, *supra* note 6, at 420.

63 Solf, *supra* note 35, at 121; see also Benjamin J. Ehrhart, Note, *The Role of U.S. Foreign Policy in Establishing Jurisdiction: Should Foreign Policy be an Exclusively Federal Concern?*, 28 HASTINGS INT'L & COMP. L. REV. 229, 233 (2005) (defining "negative law" as "what states could not do," and "positive law" as "a doctrine that states must follow."). The appeal of this model was based upon the belief of humanitarian scholars at the time, "that a humanitarian instrument \ldots should not explicitly authorize violence." Solf, *supra* note 35, at 121.

64 Solf, *supra* note 35, at 121-22. The Preamble to the Hague Convention No. IV of 1907 makes this clear enough: "[T]he High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." Hague Convention, *supra* note 17, at Preamble. In other words, where no guidance was provided, military leaders were to follow natural law. Further complicating the status of customary international *jus in bello* law, the 1907 Hague Convention included a general participation clause providing that the Hague Conventions were binding if and only if all participants to a war were parties to the Conventions. Hague Convention, *supra* note 17, at art. 2. Consequentially, the Hague Conventions, as treaties, were not applicable in either World War, because not all warring states were parties to the Conventions. Solf, *supra* note 35, at 123.
ventions had passed into customary international law and were therefore binding upon non-signatory states. More meticulous provisions of the Hague Conventions, specifically those pertaining to civilian immunity and the treatment of prisoners of war, however, are not necessarily customary international law. In United States v. Von Leeb, the International Military Tribunal held that "certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated [as to constitute customary international law]. Such details it is believed could be binding only by international agreement."67

All subsequent jus in bello instruments, including the 1949 Geneva Conventions and its Protocols, must operate in consideration of Von Leeb, which requires concrete rules for the protection of civilians, while assuring that those rules are expansive enough to constitute customary international law.68


67 Von Leeb, supra note 66, at 535. In essence, Von Leeb declared that international humanitarian instruments must be both broad (in order to evoke customary international law) and narrow (in order to have any tangible guiding effect.). However, customary international jus in bello law continues to grow as a direct result of at least one human rights activist’s urging states to adopt, or at least adhere, to the principles of these instruments. Solf, supra note 35, at 124.

68 Solf, supra note 35, at 126. Currently, 161 states are party to the 1949 Geneva Conventions. Id. at 124. See also Frédéric Bostedt & Joakim Dungel, The International Criminal Tribunal for the Former Yugoslavia in 2007: Key Developments in International Humanitarian and Criminal Law, 7 Chinese J. Int’l. L. 389, 392 (2008) (noting one major development from this tribunal is the statement that the Geneva Conventions “may be largely viewed as reflecting customary international law.”); Emanuel Gross, Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?, 16 Emory Int’l. L. Rev. 445, 449 (2002).
C. Civilian Immunity

Most rules protecting civilians are set out in Protocol I of the 1977 Geneva Conventions.\(^6\) The foundation of Protocol I is Rule 22 of the Hague Convention of 1907, which simply said that the right of military agents to injure the enemy was “not unlimited.”\(^7\) However, a “fundamental conceptual [distinction]” of international law is that all persons are either combatants or civilians.\(^7\) Protocol I sought to add positive law to the aim of “protect[ing] civilians and wounded prisoners,” by “includ[ing] the basic principles of proportionality [and] military necessity” as an enforceable humanitarian instrument.\(^7\)

1. Military Necessity

As defined in the International Military Tribunal’s 1948 decision, *United States v. List*:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money . . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.\(^7\)


\(^7\) Gross, *supra* note 68, at 448.

\(^7\) Myers, *supra* note 5, at 320.

Military necessity means that "armies should not attack targets unless they gain a military advantage by doing so, and even then, they may attack only military objectives." Although "military advantage" is not defined within international law, it has been likened to the German "reason of war" concept that the target must be so beneficial to an enemy as to be "necessary to compel the submission of the enemy . . . ." Only military objectives are acceptable targets. Before an attack, a military commander must assure that a prospective target has the potential to "make an effective contribution to military action," and discriminate between those targets that are military in nature and those that are not, attacking only the former. However, the principle does not require that a military commander anticipate the actual use or advantage that a target will produce, in favor of either party, only that a target is military in type. Whether an attack complies with the principle of discrimination (i.e. military necessity) is evaluated on

74 Herthel, supra note 14, at 248.


76 This part of the military necessity principle is sometimes referred to as the principle of "distinction." See Protocol I, supra note 19, at arts. 48-51. It may seem that only targets that are military in nature have the potential to effect a military advantage. However, this is often not the case, as a plant manufacturing medical supplies, a civilian radio tower, or a merchant ship carrying military equipment all have the potential to effect a military advantage. See WALZER, supra note 75, at 146-51.

77 Protocol I, supra note 19, at art. 52; see also James D. Fry, Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law, 44 COLUM. J. TRANSNAT'L L. 453, 513 (2006) (quoting Protocol I, supra note 19, at art. 54(2)); WALZER, supra note 75, at 146 ("When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. The former are [partially] assimilated to the class of soldiers . . . so they can be attacked only in their factory (not in their homes), when they are actually engaged in activities threatening and harmful to their enemies.").

78 See Fritz Kalshoven, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity, 86 AM. SOC'Y INT'L L. PROC. 39, 41 (1992) ("[T]he question is whether the selected object may actually figure as an object of attack. There can only be one argument for a positive answer, and this must be found in the military necessity of the attack. Targets that may be so attacked are referred to as 'military objectives.'").
the “circumstances and intent before the attack.” As a general rule, the military necessity analysis takes into account “the proximity to civilian life, the potential to cause civilian damage, the military importance of the target, and the vulnerability of the object to the military attack.” Overall, this principle of military necessity is regarded as “longstanding, cardinal customary [international] law.”

2. Proportionality

The principle of military necessity is supplemented by the principle of proportionality. Like military necessity, proportionality is widely re-


80 Myers, supra note 5, at 330-31. Protocol I outlines two factors to consider: 1) that attacks are “limited to those objects which by their nature, location, purpose or effect make an effective contribution to military action and [2)] whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Protocol I, supra note 19, at art. 52(2).

81 Matthew C. Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists, 108 COLUM. L. REV. 1365, 1386 (2008) (citing Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), 1996 I.C.J. 226, 257 (July 8)). This does not mean that the entirety of Protocol I, or the other documents encapsulating the military necessity principle, constitute customary international law. For example, Protocol I states that, where the military uses “a place of worship, a house or other dwelling or a school . . . to make an effective contribution to military action, it shall be presumed not to be so used.” Protocol I, supra note 19, at art. 52. “This aspirational presumption not only differs from customary international law, but it actually encourages combatants to intentionally camouflage military objectives to look like civilian objects.” Myers, supra note 5, at 332.

82 See Kalshoven, supra note 78, at 41; Reynolds, supra note 16, at 24. Jus in bello proportionality is distinct from jus ad bellum proportionality. For a discussion of the latter see Georg Meggle, Terror & Counter-Terror: Initial Ethical Reflections, in ETHICS OF TERRORISM & COUNTER-TERRORISM 161, 166 (Georg Meggle ed., 2005) (“The condition of macro-proportionality demands that before war starts, the action’s anticipated overall gain . . . must be compared with the anticipated overall harm caused by the war.”); see also Myers, supra note 5, at 323-30. The majority of the times, though, the separate principles are violated simultaneously. See generally Aaron Schwabach, Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts, 15 COLO. J. INT’L ENVTL. L. & POL’Y 1, 18 (2004) (analyzing Iraqi actions that simultaneously violated the principles of chivalry, proportionality and military necessity).
garded as a basic tenet of customary international law. Proportionality counters the tendency to place an undue focus upon the military objective by “foresee[ing] the possibility that civilians and civilian objects might be damaged during an attack, and requir[ing] that they not be injured or damaged in excess of the military gains.” Military necessity will not always offset the import of other principles at stake. “The cut off line beyond which the collateral damage is no longer regarded as acceptable may be found with the aid of the principle of proportionality.” First Additional Protocol Article 51(5)(b) best summarizes the principle as applying to “[a]n 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.” Although Protocol I gives no guidance as to what would be “excessive in relation,” clearly under no circumstances are civilians to be targeted indiscriminately. Rather, proportionality requires that a military commander: 1) gather information about a target specifically, the pro-

83 Waxman, supra note 81, at 1386; but see William J. Fenrick, Attacking the Enemy Civilian as a Punishable Offense, 7 DUKE J. COMP. & INT’L L. 539, 545 (1997) (noting debate about its existence as a principle in customary law, but also that equivalent language is used in Protocol I).
84 Fry, supra note 79, at 342; see also Fenrick, supra note 83.
85 Kalshoven, supra note 78, at 41.
86 Id. (emphasis removed).
87 Protocol I, supra note 19, at art. 51(5)(b). See also id. at art. 57(2)(iii).
88 See id. at art. 51(5). The principle that civilians are not to be targeted indiscriminately is also known as the “double effect” rule. In essence, the double effect rule is that “one may pursue a military operation against enemy forces with the knowledge that noncombatants will be killed so long one does not intend or will the deaths of the noncombatants.” Joseph L. Falvey, Jr., Reflections on Just Wars and Just Warriors, 47 J. CATH. LEGAL STUD. 343, 353 (2008). However, the literal principle of double effect does not add much to the analysis of international law under a consequentialist model: “[I]nternational humanitarian law is based on moral neutrality with respect to the reasons for which an armed conflict is waged. It is impossible to judge the proportionality of the number of unintended deaths to a morally neutral goal, because only a greater moral good proceeding from the act can justify harm caused by the act under the doctrine of double effect.” Fellmeth, supra note 24, at n.170.
89 See Kalshoven, supra note 78, at 44 (Under the principle of proportionality an attacker “cannot simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to take into account all available information. Negligence in this respect makes him responsible . . . . [T]hese rules apply . . . . at all stages of the planning and execution of attacks.”).
jected amount of civilian casualties, or “collateral damage”;⁹⁰ 2) weigh anticipated civilian casualties against the expected military advantage;⁹¹ and 3) decide “whether the collateral damage from destruction of the target is proportionate to the military advantage of destroying it.”⁹² At a minimum, an “honest and reasonable bona fide appraisal of the information available to the responsible person at the relevant time . . .” is required.⁹³

In essence, the principle of proportionality does not forbid civilian casualties, but requires that “any loss [be] well justified.”⁹⁴ Nonetheless, uncertainties will exist in any military situation.⁹⁵ In such situations, the principle of proportionality will dictate the scope of the duty to avoid civilian casualties; the requirement is to avoid collateral damage, not as far as might be ideologically enviable, but as far as practically possible.⁹⁶

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⁹⁰ See Ben Kiernan, “Collateral Damage” from Cambodia to Iraq, 35 ANTIPODE 846, 847 (2003) (defining “collateral damage” as “unintentional civilian casualties.”).


⁹² Reynolds, supra note 16, at 25. Although Protocol I does not specifically command such a test, “do everything feasible” and “take all feasible precautions” are generally interpreted to mean that “[a]n attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces.” Waxman, supra note 81, at 1388 (quoting DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR 615 (2002)); see also Kalshoven, supra note 78, at 44.


⁹⁴ Reynolds, supra note 16, at 25.

⁹⁵ See Kalshoven, supra note 78, at 42 (“[P]rotection never means 100-percent immunity . . . . Indeed, it could hardly be otherwise: even the best gunner cannot guarantee that his first round will hit the target, any more than that each further round will hit nothing but the target.”).

⁹⁶ Id. Assuming as much, in the case that a military leader is guilty of a misappraisal, the attack must be canceled or suspended. Protocol I, supra note 19, at art. 57(2)(b).
III. FLAWED IMPLEMENTATION OF THE PROPORTIONALITY AND MILITARY NECESSITY PRINCIPLES

A. Human Rights Perspective

The right to life is the most basic principle of human rights.\textsuperscript{97} The right to life was first discussed in terms of natural law,\textsuperscript{98} and continued to develop in those terms through the late nineteenth century.\textsuperscript{99} After a short hiatus, natural law resurged in the wake of the atrocities committed by the Nazi regime.\textsuperscript{100} This reemergence was named "human rights,"\textsuperscript{101} and has since become a primary international concern.\textsuperscript{102} Although human rights have developed as an offshoot of the right to life, the universality of the natural law foundation is important to keep in mind and will help to inform a decision should positive law fail.\textsuperscript{103} Assuming as much, the human rights framework takes the perspective that "any decision to take a life [be it military or domestic,] should be subjected to a clear normative framework and, where appropriate, the strictest scrutiny."\textsuperscript{104} To fulfill this goal, humanita-
rrian law (specifically, the doctrine of civilian immunity) became a schema by which human rights groups monitor state activity,\textsuperscript{105} including ambiguous situations that modern militaries are more frequently encountering.\textsuperscript{106}

On the other hand, although the human rights framework often leaves the impression that the right to life is absolute,\textsuperscript{107} it is not so. The right to life is limited by other social values, including “the right to self-defense, acting to defend others, the prevention of serious crimes [likely to endanger others], . . . prevent[ing] the escape of persons presenting such threats,”\textsuperscript{108} incurring deaths consequent to lawful war acts,\textsuperscript{109} and supplying “conditions that will enable [a state’s citizens] to implement their rights, i.e., national security.”\textsuperscript{110} However, where these exceptions arise, the human rights framework utilizes an unyielding review process aimed at the strictest control of intentional deaths and unintended outcomes involving death.\textsuperscript{111} The human rights framework’s focus on the protection of individuals, regardless of their status, leads to it to question any use of deadly force, and limits such force to “situations of absolute necessity.”\textsuperscript{112} Under this framework, governments must provide their forces with adequate training, and establish effective review and reporting procedures.\textsuperscript{113} In contrast


\textsuperscript{109} The Secretary-General, \textit{Report of the Secretary-General on Respect for Human Rights in Armed Conflicts}, ¶ 45-46, delivered to the Security Council and the General Assembly, UN Doc. A/8052 (Sept. 18, 1970). Even the Biblical mandate “thou shalt not kill” was not interpreted to include the killing of animals, criminals and opposing military troops.

\textsuperscript{110} Gross, \textit{supra} note 68, at 460.

\textsuperscript{111} Watkin, \textit{supra} note 104, at 17-18.

\textsuperscript{112} Id. at 18.


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to humanitarian law, the backward-looking human rights framework requires that "a stricter and more compelling test of necessity must be [implemented] . . . when determining whether state action is [necessary] . . .".114

The Just War doctrine, like the human rights framework, is based upon the natural law foundation that human values, dignity of human persons, and the right to life should be respected.115 However, the right to life is sometimes challenged by the need to maintain order in society, which may require deadly force.116 The Just War doctrine has developed in concert with the secular power of the state, giving the state the ability to protect and secure its citizens, although this power has limits; state actions are still subject to natural law.117

Despite similarities, the Just War doctrine and the human rights framework have matured as separate realms, the former a set of normative principles, and the latter a complex system of positive law.118 Such matura-

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115 MAY, supra note 1, at 8 ("Just war theory was intimately connected to natural law theory, with its central idea that there were universally binding moral obligations that transcended culture, historical epoch, and circumstance."); see also, e.g., Abella v. Argentina, Case No. 11.137, Inter-Am C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev.113, ¶ 158 (1997), available at http://www1.umn.edu/humanrts/cases/1997/argentina55-97a.html (International humanitarian law and human rights norms "share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity."); Prosecutor v. Delalic, Appeals Judgment, Case No. IT-96-21-A, ¶ 149 (Feb. 20, 2001) available at http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (Human rights and the Just War doctrine share as a starting point "a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.").
116 Watkin, supra note 104, at 9.
117 Id.
tion was said to be inevitable due to the certain threat to that shared principle that is evoked during war, and which is not present during peace. Proponents of this argument believe that, because the human rights framework was not developed as a specific response to the war environment, expression in positive terms was unnecessary for it to be an enforceable instrument. Consequently, while humanitarian law focuses on specific hostile conditions, the human rights framework "casts its net far broader and in an unrestricted way." This theoretical dichotomy is a mistake.

B. The Need For a New Model

The setback of the human rights/humanitarian law dichotomy is that while human rights law has retained its original aspiration of protecting human life, humanitarian law has lost sight of this principle by way of positivistic tinkering, and is in result largely ineffective. However helpful it may be in laying down right to life principles, humanitarian law has no teeth in either interpretation or enforcement. Some humanitarian law is set forth in non-universally ratified treaties, such as Protocols I and II; thus


119 A strict application of the humanitarian law necessarily applies only in the limited circumstance of active war, and only then to warring agents. Protocol I, supra note 19, at art. 53(1); but see generally D'Avolio, supra note 106.
120 May, supra note 1, at 87; see Meron, supra note 118, at 590.
121 See Meron, supra note 118, at 591 (noting that the human rights framework applies to "day-to-day life," whereas the humanitarian law applies only to "exceptional situations"). See also id. at 603 (stating that the application of humanitarian law only in certain specific conflict situations makes the gap between human rights and humanitarian laws "particularly dangerous. It is thus necessary to recognize that an irreducible core of human rights should apply, at minimum, in this twilight zone.").
122 May, supra note 1, at 89; see also Michael Bothe, International Human Rights and Humanitarian Law by Rene Provost, 98 AM. J. INT'L L. 383, 383 (2004) (book review) (Human rights law addresses the conflict between the state and the individual, while humanitarian law addresses conflicts between two entities.).
124 See infra. Section II.
125 See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Minimum Humanitarian Standards, ¶ 41,
non-signatory states (most likely those states most prone to human rights
violations) are held subject only to the vaguest interpretations of customary
international law. In addition, an effective enforcement mechanism is
lacking for all states because the humanitarian legal instruments do not ad-
dress such procedural issues as judicial remedies.

Because of the insufficiency of humanitarian law on its own, current
trends indicate a tendency to evoke humanitarian law and the human
rights framework simultaneously. Both are manifestations of the same
natural law, the protection of human life; their merger makes sense. Accord-
ingly, the next two sections will analyze the principles of military ne-
cessity and proportionality with the belief that human life should be spared
where at all possible. This “interpretative complementary approach” will
use the human rights rules and principles in order to “inform and humanize”

law... there is a question of the adequacy of existing rules...”).

126 Jean-Marie Henckaerts, Study on Customary International Humanitarian Law:
A Contribution to the Understanding and Respect for the Rule of Law in Armed
Conflict, 857 INT’L REV. RED CROSS 175, 177 (2005).

127 Brilmayer, supra note 6, at 416. Moreover, little scholarly work fills this void.
Id. See also generally Xavier Philippe, Sanctions for Violations of International
Humanitarian Law: The Problem of the Division of Competences Between National
Authorities and Between National and International Authorities, 90 INT’L REV.
RED CROSS 359 (2008) (discussing the difficulties in enforcing humanitarian law
and questions that must be addressed to remedy this problem).

128 See Theodor Meron, The Humanization of Humanitarian Law, 94 AM. J. INT’L
L. 239, 243-44 (2000); see also Meron, supra note 118, at 593-94 (“[T]rends point
to an ever greater reliance on the shared idea of humanity.”).

129 See infra note 115 and accompanying text. See also Meron, supra note 128, at
267 (Courts have justified the dual application of humanitarian and human rights
law by recognizing an “overlap between norms” of human rights and humanitarian
law). See also U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights,
Civil and Political Rights, Including the Questions of Disappearances and Sum-
tion of humanitarian law to... armed conflict does not exclude the application
of human rights law. The two bodies of law are in fact complementary and not mu-
tually exclusive.”).

130 See D’Avolio, supra note 106, at 323-24 (Current conditions make it “difficult
to justify a strict separation between [humanitarian law] and [human rights law],
prompting a move towards the ‘human rights law of armed conflict.’”).
humanitarian law, by exposing where the implementation of humanitarian law conflicts with the human rights framework and natural law.131

1. Military Necessity

For an attack to affect a military advantage, and thus meet military necessity’s legal threshold, a target must be military in nature, able to “make an effective contribution to military action.” 132 For instance, an apartment building’s use as a military headquarters allows it to be an attackable military facility. 133 Proportionality would govern any collateral damage or incidental injury caused during the attack.

However, the principles of military necessity and proportionality inevitably collide where proportionality limits the acceptable use of force. 134 Military necessity in humanitarian law necessarily evokes a consequentialist analysis, at least in the soft sense. 135 In order to gauge whether a target has the capability to “make an effective contribution to military action,” a military leader must estimate the amount of military advantage that a target has the potential to effect, and advantage gained by the destruction of that target. 136 However, “without another legal principle to balance against it, [military necessity] essentially allows blanket justification for violations provided a case can be made that the action taken was necessary to win.” 137

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131 Human Rights, Intervention and the Use of Force, supra note 71, at 25. Bhuta argues that many international courts, most recently the ICJ, have adopted such approach, using human rights law to fill in the gaps that humanitarian law has left untouched. Id.

132 Protocol I, supra note 19, at art. 52.

133 However, if intelligence revealed that the military headquarters were populating some of the apartment buildings with civilians – using civilians as a “human shield” – although the target may otherwise be a legitimate target, it does not relieve the attacker of its obligations toward civilians. See W. Hayes Parks, Air War and the Law of War, 32 A.F. L. REV. 1, 160-68 (1990).


135 In the “hard sense” a military commander would have to anticipate the actual use or advantage that a target will produce. However, here, in the “soft sense,” a military commander is only required to anticipate the potential use or advantage that a target may generate.

136 Protocol I, supra note 19, at art. 52(2).

137 Rizer, supra note 11; see also Brilmayer, supra note 6, at 420; see also Klabbers, supra note 134, at 67.
The principles also collide when legitimate attacks cause devastation to the civilian infrastructure. During the 1991 Gulf War, the majority of civilian casualties did not transpire as a result of actual attacks, but as the result of damage to Iraqi infrastructure, which was a legitimate military target. Thus, the "military in nature," provision alone failed to uphold the human rights framework.

The principle of proportionality has been accepted as a balance against military necessity. Today, military necessity is commonly only acceptable where it is contemplated by existing rules of humanitarian law, including the principle of proportionality.

2. Proportionality

It was one thing to recognize the need to protect civilians from attack when compliance with the principle of proportionality did not significantly impede with military success, i.e. man on man combat and the like. However, "the requirement that civilian [casualties] be in some way propor-

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138 Judith Gail Gardam, Proportionality and Force in International Law, 87 Am. J. Int'l L. 391, 408-9 (1993). However, while "[t]he United States tends to adhere to the principle of military necessity as superior to humanitarian concerns," the general trend is moving toward humanitarian concerns. Krauss, supra note 105, at 83.

139 In these situations, some military scholars argue for a "compelling military advantage" standard for dual-use targets. Henry Shue & David Wippman, Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions, 35 Cornell Int'l L.J. 559, 574 (2002). Others suggest altering the definition of military objective to "require the likely cumulative effect on the civilian population of attacks against such targets to be taken into account . . . ." Fenrick, supra note 83, at 544 (internal citations omitted). The International Criminal Tribunal for the former Yugoslavia noted that "in the case of repeated attacks . . . it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law." Prosecutor v. Kupre, Case No. IT-95-16-T, Judgment, ¶ 526 (Jan. 14, 2000).


141 See, e.g., Protocol I, supra note 19, at art. 54(5) (stating that derogations from Protocol I are acceptable only "where required by imperative military necessity"). However, defenses raised on the military necessity principle alone were explicitly rejected in several war crimes trials after World War II. See N.C.H. Dunbar, Note, Military Necessity in War Crimes Trials, 29 Br. Y.B. Int'l L. 442, 442 (1952).
tionate to the military advantage decreased the effectiveness of [newer] means and methods of attack, such as aerial bombardment.\textsuperscript{142}

As the former prosecutor with the International Criminal Tribunal for the Former Yugoslavia, William Fenrick, observed:

It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects . . . . Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. How do you assess the value of innocent human lives as opposed to capturing a particular military objective?\textsuperscript{143}

Fenrick thus suggests that before any balancing can be done, a standard of comparison between civilian lives and “military advantage” must be established. However, because “no accepted value ratio or relation [exists], such calculations are objectively impossible.”\textsuperscript{144} Nonetheless, “it is by no means easy to [violate the principle of proportionality] since the values against which destruction and suffering have to be measured are so readily inflated.”\textsuperscript{145} Because there is no commensurability, and there cannot reasonably be any, unless one redefines (or unanimously agrees upon a definition of) “military advantage,” military leaders will never agree on which actions can be considered militarily necessary.\textsuperscript{146} This lack of commensurability is dangerous because “[o]nce the door is open to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.”\textsuperscript{147}

Second, a military commander’s inability to predict accurately the consequences of an attack is inherently problematic in any practical application of the principle of proportionality. The United States’ current expe-

\textsuperscript{142} Gardam, \textit{supra} note 138, at 400.
\textsuperscript{143} Fenrick, \textit{supra} note 83, at 545-46.
\textsuperscript{144} Fellmeth, \textit{supra} note 24, at 489.
\textsuperscript{145} \textsc{Walzer, supra} note 75, at 192.
\textsuperscript{146} See Klabbers, \textit{supra} note 134, at 73.
\textsuperscript{147} Nagel, \textit{supra} note 6, at 129.
rience in Afghanistan illustrates this dilemma.148 In Afghanistan, U.S. intelligence routinely endeavors to evaluate in advance the civilian risks that a particular military attack will yield.149 An array of technologies now enables discrimination between military targets and civilians, thereby diminishing to some degree unintentional deaths.150 Despite these advances (or alongside them), a number of indeterminacies have sullied the United States’ calculations of proportionality in Afghanistan.151 Reports of civilian casualties are commonplace, including a bomb missing its target by more than two miles (destroying a civilian village, killing 15 and destroying 35 homes).152 The result is a high rate of civilian casualties in Afghanistan, and the numbers continue to rise.153 While some civilian casualties can be attributed to technological blunders,154 others can only be attributed to military strategy, a lack of self-restraint in the heat of the moment,155 and the lack of opportunity to engage an objective legal analysis and to consider and evaluate tactical decisions.156

A third predicament is the “subjective nature of assessing proportionality.”157 Proportionality entails balancing the swift attainment of the military objective with minimum loss of military agents and the safety of civilians.158 However, military agents are often “unwilling to see the balance shift from the emphasis on the [achievement of the military objec-

150 Wright, supra note 91, at 140.
151 Id.
152 Id. at 140-41.
154 Wright, supra note 91, at 140-42.
155 Id.; see also GEOFFREY BEST, LAW AND WAR SINCE 1945 327 (1994) (“in the heat and haste of battle reliable information may be [hard to get]”).
156 Fellmeth, supra note 24, at 464.
157 Gardam, supra note 138, at 409; see also Solf, supra note 35, at 132; Fellmeth, supra note 24, at 489 (“One common explanation for the lackluster performance of this legal rule in protecting civilians is that proportionality calculations are unavoidably subjective.”).
158 Gardam, supra note 138, at 409.
In consequence, when faced with snap judgments on the field, military commanders tend to, even if subconsciously, discount the lives of civilians in favor of the war effort. Thus, yielding discretion to military commanders is “unlikely to be conducive to a conscientious application of the rule.”

Finally, “[w]hat is the standard of measurement in time or space?” This question of general proportionality raises a dispute in the distinction of jus in bello from jus ad bellum. An illustration of this dilemma was demonstrated in the 1986 U.S. attack on Libya aimed at eliminating Mohammar Qadaffi:

The [proposed target was] surrounded by large numbers of civilian homes, offices, shops, etc. To launch a large-scale bombing operation . . . only could have resulted in the large-scale loss of innocent human lives . . . . The Reagan Administration was fully prepared to sacrifice a fairly large number of innocent Libyan civilians. In this type of operation . . . the United States demonstrated a consequential approach . . . .

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159 Id.; see also Wright, supra note 91, at n.41 (“[A]ssessments of military ‘value’ by interested parties would seem, for various reasons, often readily contestable.”).
160 See LeSHAN, supra note 9, at 43-58. The bombing of Hiroshima shows that even the most good intentioned and able of military leaders are disposed to “kill and . . . bomb civilian centers, in the service of peace and the general good of mankind.” Id. at 47-48; Klabbers, supra note 134, at 79-80.
161 Fellmeth, supra note 24, at 489.
162 Fenrick, supra note 83, at 546.
164 See also Gardam, supra note 140, at 366 (“[D]ue to an assessment of the military advantage on a cumulative basis rather than on a case by case basis as required by [Protocol I]”, the Coalition forces in the Persian Gulf conflict “place[d] considerable weight on military necessity . . . while placing considerably less emphasis on civilians than the international community had in mind when they negotiated Protocol I.”); Helen Fein, Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined, 22 DENV. J. INT’L L. & POL’Y 29, 50 (1993) (discussing the scope of time problem as applied to the Vietnam War).
165 Francis A. Boyle, Military Responses to Terrorism, 81 AM. SOC’Y INT’L L. PROC. 287, 296 (1987). In other words, assuming that the benefit to be gained by
However, Qadaffi was not killed, and attacks continued to mount against the U.S. from Libya. The record has shown that the cost to Libyan civilians was unjustified, and should have been avoided. But the U.S. was arguably within the range of allowed civilian casualties provided by the principle of proportionality, if its assessment of the lives saved by the death of Qadaffi was accurate. Under this rationale, the U.S. could attack a plethora of civilian centers, as long as its targets were military in type, to balance a regime’s anticipated attacks upon U.S. targets that would result in a projected number of U.S. civilian deaths. This rationale is obviously attenuated, and removes the calculation from that of a specific attack (jus in bello calculation) to that of the effects of overall war (jus ad bellum calculation). Nonetheless, such attenuated calculations are allowed under the current interpretation of the proportionality principle. The dilemma is clear: the further attenuated the calculation, the more doubtful it is that “all anticipated advantages [could] also be more objectively said to be realistically anticipated . . . .”

eliminating Qadaffi (i.e. protection of U.S. citizens) would exceed the damage that might be caused by that act (i.e. loss of innocent Libyans), the U.S. preferred the duty of protecting its own citizens to its duty to avoid inflicting harm upon the innocent.


Based on subsequent attacks and U.S. civilian deaths, the assessment may well have been accurate, although it cannot be said whether the 1986 attacks upon Libya triggered subsequent attacks by Qadaffi, or if Qadaffi would have ordered the attacks in any case. See generally Brittain P. Mallow, Terror v. Terror: Effects of Military Retaliation on Terrorism (National Defense University Executive Research Project, April 1997), available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA331529&Location=U2&doc=pdf.


See Fenrick, supra note 83, at 547-48.

Wright, supra note 91, at n.44; see also John Janzkev, The Use of Force in Humanitarian Intervention: Morality and Practicalities 52-53 (2006); Fellmeth, supra note 24, at 489 (“The calculus becomes still less feasible when the military values are abstract, such as potential superiority or advance occupation.”).
These four problems raise significant concerns about the state of humanitarian law. Until these difficulties are fully addressed, countless innocent lives will be lost at the expense of convenience.172 “With international adjudication on the rise . . . these questions cannot be deferred indefinitely.”173

IV. THE CONSEQUENTIALIST APPROACH

The current interpretation of the proportionality principle is a consequentialist approach.174 Consequentialism is the theory that “the right action (rule, disposition, motive) brings about the best overall consequences (outcome, state of affairs) and that all other actions are morally prohibited.”175 Hypothetically, the consequentialist’s right action may be barred, however, by moral considerations of human rights principles or natural law.176 In true consequentialist sense, though, another “right” course of action may exist,177 because the consequentialist approach limits the determination of standards to “outcome given” considerations, which are necessarily detached from any other considerations.178 In other words, consequentialism is a “theory of moral standards,” but not “of the rational authority of such standards.”179

172 See generally Elizabeth Salm6n, Reflections on International Humanitarian Law and Transitional Justice: Lessons to be Learnt from the Latin American Experience, 88 INT’L REV. RED CROSS 327 (2006) (arguing that until humanitarian law is revamped, serious breaches of human rights will continue).
173 Brilmayer, supra note 6, at 416.
174 See Wright, supra note 91, at 155-56; see also Fry, supra note 79, at 343 (“compliance with proportionality relies more on the results of [the] attack.”).
176 Id. at 684.
177 See id. For example, “it has yet been shown that it is always absolutely wrong, whatever the consequences, to kill innocent babies.” Jeffrie G. Murphy, The Killing of the Innocent, in War, Morality and the Military Profession 343, 357 (Malham M. Wakin ed., 1979).
178 See Hurley, supra note 175, at 684.
179 Id. at 687. For instance, many people would agree with the consequentialist approach in certain extreme situations, such as where killing one would save millions. Wright, supra note 91, at 155. However, many people “can offer no real account of when [they] should become so dissatisfied with the disastrous outcomes of deontological approaches that [they] should switch to consequentialism . . . .” Id.
A commander’s reasonability can be judged on the adequacy of information collected and his actions in light of the collected information. Sophisticated weaponry and intelligence equipment now used by most militaries have led scholars to assume that an accurate estimate of the number of lives to be lost in a particular attack is possible. More accurate estimates would include the likely loss of military personnel, civilians, and any combination thereof. However, such assumptions can be mistaken. A commander cannot accurately predict the benefits of a particular attack without hindsight, abstract calculations cannot be determined in real-time operations, and broad assessments cannot be made before each combat strike. These problems are not necessarily fatal, though. As one commentator has noted, although “[r]igorously demonstrative certainty may be unattainable . . . one value may [still] outweigh another [given a] reasonable calculus” or theorem. All the consequentialist approach may be missing, then, is such a predictive device.

A. Carl G. Hempel

This section will attempt to circumvent the shortcomings of the consequentialist approach by applying Carl G. Hempel’s Deductive-Nomological and Inductive-Statistical models of prediction to the military necessity and proportionality principles. The purpose of the Hempelian fix is to deduce a formula for the proportionality principle that repairs the blunders of the consequentialist approach, as discussed above, by applying a logical empiricist criterion of prediction. The dilemma is that “[t]hings just

181 Mirko Bagaric & John R. Morss, Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative, 30 BROOK. J. INT’L L. 421, 445 (2005). Bagaric & Morss also note the “supreme military advantage enjoyed by [certain States] over those States who are likely to be objects of humanitarian intervention” as another factor leading to more accurate estimates. Id. (citations omitted).
182 Id.
183 Myers, supra note 5, at 335-36.
184 Wright, supra note 91, at 143.
185 Id.
186 Logical empiricism is the theory that if one started with a firm foundation of atomic propositions directly verified in observation, one could reach true laws by combining these atomic propositions according to the rules of logic, which preserve truth. According to the logical empiricist, the edifice of scientific knowledge was
never seem to happen the same way twice . . . . No two people are built the exact same way, . . . and verifiable evidence would be deficient and any experiment would be flawed because we are not dealing with the same circumstances."  

How, then, is one to use evidence gained about the past to accurately predict the future? Hempel’s solution is that the precise nature of past situations forces an analysis of that situation to be positioned upon generalizations that we may take as laws. That is, scientists, historians, philosophers, and others create laws when they generalize past situations and find relationships that create like states of affairs. By synthesizing as much of the information available about the past as possible into a law that covers an entire topic, a more accurate law will result. Models of inquiry adapted from the natural sciences may, thus, replace the need for the consequentialist calculation, and in doing so may overcome the concerns associated with that approach. This Hempelian fix will hopefully generate to be built on the firm foundations of observation according to the proven blueprints provided by logic. Thus, the logical empiricist criterion is the most “scientific” criterion applicable to a consequentialist (or any) model of prediction. See generally MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE: ORIGINS OF LOGICAL EMPIRICISM (Vol. XVI) (Ronald N. Giere & Alan W. Richardson eds., 1996) (outlining the general development of logical empiricist thought).


189 In this section, the term “law” is meant to refer to a “scientific law,” “a true universal statement that expresses necessary connection among variables and has explanatory and predictive power on its own account.” Mihailo Markovic, The Concept of Scientific Law, in SCIENCE, POLITICS AND SOCIAL PRACTICE: ESSAYS ON MARXISM AND SCIENCE, PHILOSOPHY OF CULTURE AND THE SOCIAL SCIENCES 129, 129 (Kostas Gavroglu et al. eds., 1995).


certain clear rules that will bind the consequentialist approach to comport with a human rights framework and the natural law foundation.193

1. The Deductive-Nomological Model

Hempel's Deductive-Nomological ("DN") model is essentially a deductive proof consisting of nomological laws (uniformities that can be expressed by generalized universal laws) and a set of antecedent conditions (particular facts about a given situation).194 Two elements are necessary to the DN model. First, the general laws must be universal – they must be applicable and true regardless of time, circumstance, or situation.195 Second, and most important, a deductive-nomological explanation must be an unquestionable "universally deductive" argument; the conclusion must be a necessary and logically implied truth.196 Thus, there must be no possible way that, given the premises, the conclusion be anything other than what is gathered.197 The problem is, however, that not all general laws are universal; therefore not all laws fit into the DN model.198 This is particularly damaging to an application to the proportionality principle because the type of laws that such an application seeks (a law that states that if a civilian is killed in a particular situation x, an overall net benefit will result) cannot be universal.199 The DN model will not reveal whether situation x will result in a net benefit because there is no law to apply, only facts.200 As a general

195 See id. at 97.
196 See id. at 97-100.
197 See id.

If we explain, for example, the first division of Poland in 1772 by pointing out that it could not possibly resist the combined power of Russia, Prussia, and Austria, then we are tacitly using some trivial universal law such as: "If of two armies which are about equally well armed and led, one has tremendous superiority in men, then the other never wins."

Id. Such a law may be true in most instances, but it is not universal in the same way as laws of nature, i.e. mathematics, physics, and so forth.

200 For example, the statement "when water is heated to 212 degrees Fahrenheit, it will boil" fits the DN model because it is a universal general law that water will
principle, situations do not, in and of themselves, independently reveal anything that can be articulated in a universalized general law. Nonetheless, the general principles of the Hempelian model may also apply outside of the area of physical sciences.

2. The Inductive-Statistical Model

Because, in the military context, no general laws can be extrapolated or applied by the DN approach, a military commander cannot know the results of an inquiry with absolute certainty. But could he know the results with a very high likelihood? Where innocent civilian lives are concerned, the interpretative complementary approach would not accept a predictive model that does not produce an extremely high standard of certainty.

An inquiry of this type cannot fit in the DN framework because general laws in this context (where universality is unattainable because one is establishing reasons for a given outcome, among a range of facts and conditions, not causes for that outcome) are unavoidably statistical. In other words, “any statement that has been modified from the universal to the specific . . . automatically transforms that law into a statistical description.” The only way to extrapolate a predictive law in such case is “to apply inductive logic to [a] previously acquired body of evidence.” This type of inquiry “would state certain initial conditions, and certain probability hypotheses, such that [the outcome] is made highly probable by the initial conditions . . . .”

Thus, Hempel’s second model of prediction, the Inductive-Statistical (‘IS”) model, expresses a similar structure as that of the DN model in

boil at 212 degrees Fahrenheit. The presence of water and heat (facts/conditions) will not explain the boiling; one needs a law. Water always boils at 212 degrees Fahrenheit, so the statement can be used in the DN model as a general law. Water boiling can be explained only by the existence of water, heat, and the general law.

201 See, e.g., Hempel, supra note 188.
204 See Hempel, supra note 188, at n.7.
205 Jefferson, supra note 187, at 51.
207 Hempel, supra note 188, at 42; see also Franz Huber, Hempel’s Logic of Confirmation, 139 PHIL. STUD. 181, 186-89 (2008) (discussing of the logical consistency of probability hypotheses).
that it consists of a set of particular facts about a given situation and a
descriptive statement which is itself the conclusion of the proof. The IS
model differs, however, in that the antecedent conditions will include uni-
formities expressed by statistical laws.\textsuperscript{208} Furthermore, whereas the DN
model is deductive in that the conclusion is necessary, the IS model is in-
ductive in that the conclusion refers to a generalization from its premises,
not a universalized general law.\textsuperscript{209} Thus, the IS model admits only degrees
of support in regard to an outcome, which are correlishingly dependent upon
the statistical law the proof employs.\textsuperscript{210}

Applied to the proportionality principle, the IS model would look
something like this: “given experience target bombing in situation x, 75
percent of the time the result is an overall net benefit of human lives
spared.” Since “[p]roportionality is a mathematical relation,”\textsuperscript{211} in this
sense, the principle of proportionality fits perfectly into Hempel’s IS model.
Essentially, the IS model “seeks a ‘scientific’ history in which, despite
war’s intrinsic messiness, officers can reduce its essentials to unambiguous
and reliable guides to action.”\textsuperscript{212} Military leaders would identify condition-
ing factors to account for a \textit{jus in bello} civilian casualty rate, and assume
that, given the repetition of those conditions, the result is universal.\textsuperscript{213} If the
result is not universal (i.e. similar conditions do not lead to an analogous
civilian casualty rate, which is almost always the case), the conditioning
factors are to blame. However, if enough data is collected about the condi-
tioning factors of individual attacks, a predictive algorithm can be fashioned
to create statistical models of prediction: plug in conditioning factors and,
based upon past experiences, an analytical civilian casualty rate will
emerge.\textsuperscript{214} Because the Hempelian fix lays stress on the positive instances

\textsuperscript{208} Daniel Little, \textit{Varieties of Social Explanation: An Introduction to

\textsuperscript{209} Id. at 5-6.

\textsuperscript{210} See, e.g., Jeanne Peijnenburg, Acting Against One’s Best Judgment: An En-
quiry Into Practical Reasoning, Dispositions and Weakness of Will 193 (1996)
rug.nl/FILES/faculties/fil/1996/a.j.m.peijnenburg/thesis.pdf (last visited Dec. 15,
2009).

\textsuperscript{211} Rizer, \textit{supra} note 11.

\textsuperscript{212} Richard Heart Sinnreich, \textit{Awkward Partners: Military History and American
Military Education, in The Past as Prologue: The Importance of History to
the Military Profession} 55, 67 (Williamson Murray & Richard Heart Sinnreich
eds., 2006).

\textsuperscript{213} See Cranor, \textit{supra} note 206, at 175.

\textsuperscript{214} Dupuy, \textit{supra} note 203, at 4.
from which inferences can be drawn, in hopes of building the reliability of the conclusions of those inferences, the strength of such a model – whether the algorithm must be revamped to account for entirely new modes of warfare\textsuperscript{215} – will depend upon the corroboration of the prediction within future conflicts.\textsuperscript{216}

This model would necessitate a “time-consuming, frustrating, tedious, and expensive” investigation of past military attacks, including an inquiry by a wide range of interdisciplinary sources necessary to uncovering all the facts of a particular situation.\textsuperscript{217} However, because a gap in intelligence may result in collateral damage, as intelligence decreases, the likelihood of collateral damage grows.\textsuperscript{218} Nonetheless, “[t]he greater the potential military advantage offered by an attack, the more they will be willing to mount it in the face of weak intelligence – and vice versa.”\textsuperscript{219} Relevant conditioning factors are factors that have any impact on the result of an attack.\textsuperscript{220} In order to apply these conditioning factors to the IS model, these data would be reduced to two categories of “mathematical variables”: “variable elements” and “variable parameters.”\textsuperscript{221}

This model also requires military advantage to be redefined to account only for \textit{jus in bello} lives saved.\textsuperscript{222} First, due to the nature of the

\textsuperscript{215} Some military operations research analysts have asserted that changes in weapons and technology have made military history prior to World War II irrelevant. \textit{Id.} at 5.


\textsuperscript{217} \textit{Dupuy}, supra note 203, at 4; \textit{Jefferson}, supra note 187, at 51.


\textsuperscript{219} \textit{Id.}

\textsuperscript{220} See \textit{Cranor}, supra note 206, at 176.

\textsuperscript{221} \textit{Dupuy}, supra note 202, at 32.

\textsuperscript{222} See \textit{Watkin}, supra note 33, at 306.
Hempelian fix, in order to accurately create such an algorithm, a generalization from the premises (conditioning factors), must be defined in terms of those premises, quantifiable in terms of a fixed number of civilians dead or injured. Second, this definition makes pragmatic sense: where the inquiry involved is replete with references of individuals and the ultimate deciding factor as to whether a violation of humanitarian law has occurred is made in reference to the individual, the individual should be the ultimate reference point.\textsuperscript{223} Based upon this definition of “military advantage,” one could analyze a potential target by saying, “based upon the algorithm created from past instances, where situation \( x \) exists (an attack using a particular strategy), \( n \) civilians will be killed. Similarly based upon the algorithm created from past instances, where situation \( y \) exists (an attack using a particular strategy), \( n \) civilians will be killed. After making the calculation, where \( n \) is lesser than \( n \), the strategy employed in situation \( x \) should be utilized.”

In fact, militaries frequently use this type of analysis.\textsuperscript{224} In the United States, a military think-tank, the Dupuy Institute, is often employed to predict casualty scenarios.\textsuperscript{225} The Dupuy Institute uses the “Tactical Numerical Deterministic Model.”\textsuperscript{226} This model is a “collaboration between computer programmers, mathematicians, weapons experts, military historians, retired generals and combat veterans,” that uses “the largest historical combat database in the world.”\textsuperscript{227} It is comprised of variable elements and parameters in order to employ a mathematical formula (usually “\( y = ax + b \),” where “\( x \) and \( y \) are the variable elements,” and “\( a \) and \( b \) are variable parameters”)\textsuperscript{228} to reveal “relationships between the circumstances of an engagement and its outcome.”\textsuperscript{229} “[A]rmed forces, government agencies and defense contractors” in “America, Australia, Britain, France and Germany” have developed similar systems.\textsuperscript{230}

\textsuperscript{223} \textit{See} Prosecutor v. Kupreski, Case No. IT-95-16-T, Judgment, ¶ 518 (Jan. 14, 2000) (“[N]orms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals [as] human beings.”).
\textsuperscript{224} \textit{See}, \textit{e.g.}, Gross, \textit{supra} note 68, at 508-11. People have calculated an attack’s success by assessing statistics on past wars as many as 2,500 years ago. \textit{See} DuPuy, \textit{supra} note 203, at 3.
\textsuperscript{225} \textit{And Now, the War Forecast}, \textit{ECONOMIST}, Sept. 17, 2005, at 22-23.
\textsuperscript{226} \textit{See generally} The Dupuy Institute, \textit{The Tactical, Numerical, Deterministic Model}, http://www.dupuyinstitute.org/tndm.htm (last visited Nov. 12, 2009).
\textsuperscript{227} \textit{And Now, the War Forecast}, \textit{supra} note 225, at 22-23.
\textsuperscript{228} DuPuy, \textit{supra} note 203, at 32.
\textsuperscript{229} \textit{And Now, the War Forecast}, \textit{supra} note 225, at 22-23.
\textsuperscript{230} \textit{Id.}
B. Analysis

First, the Hempelian fix overcomes the incommensurability argument. Granted, one cannot mathematically express the future military benefits of particular targets as weighed against human lives, because they are "unlike quantities and values." However, the Hempelian fix allows the values to be commensurable; the value given to civilians is equal where the outcome determinative fact, military advantage, is measured in civilian lives rather than in what is necessary to compel the enemy's submission.

Second, the Hempelian fix does not repair the problem of inaccurate military predictions. Under the IS model, considerations must be evaluated before the attack, in the heat of the battle, utilizing imperfect information. Under this model, if an attacking military knew in advance that 100,000 civilians could die because of an attack, the proportionality principle might prove useful. However, while one can analyze past events in order to better predict the unintended effects of attacks in the future, direct comparisons are difficult at best, since "all relevant information must be considered in drawing a conclusion about which explanation or conditioning property is most likely." Of course, because there are not enough resources to analyze every conditioning aspect of every jus in bello attack, such investigation will always be subject to intervening factors. Because Hempelian causal understanding focuses mainly on "how much more probable an effect is without a cause or conditioning property, than without a cause or conditioning property," the proportionality principle becomes little more than a general guide for extreme cases where some

231 See Rizer, supra note 11.


233 See id. at 94-95, 102.

234 Id. In many current circumstances the only supply of such vulnerabilities prior to the fact is the enemy, whose goal is to conceal rather than divulge weakness. Id.

235 Cranor, supra note 206, at 175-76. It is relevant information in the sense that the conditioning aspects are limited to "a specific spatio-temporal location . . . and not to all . . . that goes on in that space-time region." Hempel, supra note 203, at 142.

236 See Dupuy, supra note 203, at 18 ("[T]here is so little data – relative to the potentially available volume – in analyzable form . . . [because the] task of digging it out is too great, and the obvious utility of the result too questionable to warrant the effort . . . "). Moreover, military barriers often result in difficulties obtaining information. Id. at 118.

237 Cranor, supra note 206, at 177.

238 Fenrick, supra note 232, at 94-95.
factors are so outweighed by others that proper analysis is near impossi-
ble. As Professor Wright asserted:

[Each case of incidental civilian casualties, and each set of expected direct and concrete military advantages accruing therefrom, is likely to be unique in significant respects. The remarkable complexities of battlefield assessments would be matched by the complexities of re-evaluation at trial . . . . In particular, to try to predict even the direct military advantage to be gained only by exposing a civilian population to some additional hazard is to risk drowning in unknown contingencies, unexplored alternatives, and disputable assessments of the value of the advantages in question.]

Third, the Hempelian fix does not repair the problem of the subjective nature of assessment. Scientists are apt “to make the ‘facts’ fit an explanatory theory by conjoining the theory with new auxiliary hypotheses,” in an attempt to “preserve theories in the face of conflicting observation[s] . . . .” Hempel acknowledges the argument that “the establishment of scientific generalizations . . . for human behavior is impossible because the reactions of an individual in a given situation depend not only upon that situation, but also upon the previous history of the individual.” Further, even where algorithmic systems produce objective, numerical, and comparable predictions, such systems still require human input in the form of conditioning properties and the numerical value to give to those values. The inductive systems of prediction assume that relevant conditioning factors be collected prior to the formulation of a hypothesis, and that “data can be said

239 See Dupuy, supra note 203, at 18.
240 Wright, supra note 91, at 146.
242 Hempel, supra note 202, at 142. Hempel claimed that this argument is logically flawed because there is an explanation, even for those synapses that fire in an individual’s brain that cause manifest action; the error is in the inability to gather enough information to repeat the circumstance, not the model of explanation itself. Id. For the purpose of this Article, however, Hempel’s claim is irrelevant.
243 Moreover, “the effects of our actions often help, within limits, to shape or concretize the intentions behind the actions that led to those very consequences.” Wright, supra note 13, at 345. Thus, military leaders may not fully understand their own intentions until seeing the consequences of an attack.
to be relevant or irrelevant only with respect to a given hypothesis,” which
would here leave it up to an investigator (a military agent) to select what
conditioning factors are relevant and proper, and what value to give to those
factors. In this sense, no objectivity in general rules of induction can
exist because “the demand for them rests on a confusion of logical and
psychological issues.”

Finally, where the definition of “military advantage” is established
to indicate a precise number of deaths calculated as a direct result of the
specific attack, rather than some abstract idea of the overall *jus ad bellum*
war effort, the argument against attenuation can be eliminated. According
to Hempel, “the question whether a given characteristic of a ‘whole,’ *w*,
is emergent or not cannot be significantly raised until it has been stated
what is to be understood by the parts or constituents of *w*.” Military
advantage” can accomplish this by setting the parameters of *w*’s measure-
ment to that of individual attacks.

Although the Hempelian fix lessens the proportionality principle’s
consequentialist shortcomings (specifically, the problems of incommensura-
bility and attenuation), it does not fully rectify the method as analyzed
under the interpretative complementary approach. Questions of subjec-
tivity and accuracy of prediction remain. Moreover, because the Hempelian
fix requires an extremely particularized law to have any predictive value at
all, by no means could it become general enough to attain the status of
customary international law.

Fixed rules in law are said to supply better objectivity and predict-
ability, although at some cost to flexibility and responsiveness to circum-

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245 *Id.* at 4.
248 See Dupuy, *supra* note 203, at 4 (“[E]ach front has to be considered as a sepa-
rate campaign, with individual characteristics.”).
249 This does not mean, though, that such a model cannot be used in other areas of
the Just War doctrine. For example, the IS model has recently been used in an
analysis of *jus ad bellum* proportionality. See generally Paul K. Huth & Todd L.
Allee, *The Democratic Peace and Territorial Conflict in the Twentieth
Century* (2002).
250 See Von Leeb, *supra* note 66.
251 See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of
Constitutional Balancing Tests*, 81 Iowa L. Rev. 261 (1995); Theodor Meron, *The
L. 678, 685 (1994).
stances and context. These costs, however, are negligible when scrutinized under the interpretative complementary approach. Indeed, "even the groups thought to be most amenable to international law should adhere to flat, absolute rules, rather than attempt direct interest balancing in the special context of the intentional killing of civilians." When innocent lives are on the line, the human rights framework and its natural law foundation do not make room for mechanical conveniences.

V. A Deontological Approach

It has been suggested that, "the only way in which human plurality, or human existence itself, can be rescued, so to speak, would be by disconnecting the ends from the means and discarding the ends." Under a deontological approach, the enforcement of the right to life principle requires "a categorical imperative in a (at least quasi-) Kantian sense: the rule must be such that in willing it, we must will it as universal." From this would follow a blanket rule against civilian casualties. Adherence to the deontological approach does not bestow legitimacy upon the taking of a human life by way of beneficial results; considerations of outcome may be extraneous and "certainly are not sufficiently strong to

252 See Alfred C. Aman, Jr., Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 DUKE L.J. 277, 278; but see Perry, supra note 3, at 980.
253 See Richard B. Miller, 14 J.L. & RELIGION 1013, 1016-17 (2001) (reviewing MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (2000)) (stating that the consequentialist approach "may easily erode the principle of noncombatant immunity.").
254 Wright, supra note 91, at 133.
255 See Kent Greenawalt, Natural Law and Political Choice: The General Justification Defense – Criteria for Political Action and the Duty to Obey the Law, 36 CATH. U. L. REV. 1, 2 (1986) ("Natural law . . . stands as a competitor to a persuasively utilitarian approach . . . "). For example, consequentialist approaches have been utilized as a justification for torture, torture being a necessary evil "to prevent . . . the deliberate killing of innocent civilians through terrorism." MARK R. AMSTUTZ, INTERNATIONAL ETHICS: CONCEPTS, THEORIES, AND CASES IN GLOBAL POLITICS 143 (3d. ed. 2008).
256 Klabbers, supra note 134, at 77 (citing Dana Villa).
257 Bagaric, supra note 181, at 424. "Immanuel Kant argued that true moral imperatives are 'categorical'; that is they are demands upon individuals and entities that would be accepted by all as universally applicable, irrespective of preferences, convenience or cost-benefit analyses on any particular occasion." Id. at n.14 (citing H. J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 127-32 (1948)).
negate a strict moral prohibition against harming innocent persons.\textsuperscript{258} However, strict adherence to the right to life principle, which assumes that "human beings are equal in value, and every person must be treated as having his own value and being an end in himself,"\textsuperscript{259} would not be effective in situations of combat. Obviously, soldiers, although human beings, are not afforded the same class protection as civilians, and, thus, are not granted immunity.\textsuperscript{260} Accordingly, a categorical imperative granting absolute immunity (i.e. a right to life) \textit{only to civilians} will retain the deontological approach, while allowing the natural law foundation to flourish.\textsuperscript{261} This rule characterizes a practical and progressive implementation of the Just War doctrine, one that represents a compromise between what we recognize as a supreme value (natural law) and the demands of warfare and state protection.\textsuperscript{262}

\textbf{A. Practical Implementation}

This section will extrapolate a way in which, even under a purely deontological approach,\textsuperscript{263} a backward-looking court system and legal rationalization may allow for a workable model of humanitarian jurisprudence within the \textit{jus in bello} context of military operations. The goal of this model is not to hold all individuals responsible for decisions made in armed conflict, but to limit as much as possible the harm caused to civilians, given the political constraints (i.e. the protection of the state) on limiting military discretion by: "1) making the content of [humanitarian law] more definite and protective; 2) improving enforcement mechanisms and institutions; and 3) supplementing [military] necessity and proportionality with alternative concepts and rules."\textsuperscript{264} As human rights and humanitarian values displace military values as deontological principles, "the balance may shift toward

\textsuperscript{258} Gross, \textit{supra} note 68, at 465-66.
\textsuperscript{259} \textit{Id.} at 463.
\textsuperscript{260} See \textit{id}.
\textsuperscript{261} See \textit{id.} ("[I]f we succeed in proving not all human beings are equal in value, then we shall be able to chose which persons to protect . . . "); \textit{see also} Watkin, \textit{supra} note 33, at 309-10 ("While the right to life is a deeply valued concept . . . international humanitarian law recognizes the non-culpable homicide of members of an opposing force during armed conflict.").
\textsuperscript{262} Fellmeth, \textit{supra} note 24, at 501.
\textsuperscript{263} Of course, humanitarian law could credibly include a combination of consequentialist and deontological components, hoping for the benefits of both and the downfall of neither. However, "mixed rules would presumably have even more unpredictable and judicially debatable effects." Wright, \textit{supra} note 91, at 153.
\textsuperscript{264} Fellmeth, \textit{supra} note 24, at 497.
the increased protection of civilians through legal reforms defining [military] necessity and proportionality in greater detail, more systematic enforcement of these [rules], [and] alternative approaches [of liability] . . . 265

For the most part, states are left to employ rules of engagement that not only comply with the minimum standards of humanitarian law, but also comply with a human rights framework and the natural law foundation.266 Rules of engagement can fill in the gaps that international humanitarian law has failed to supply, particularly by developing a blanket rule against civilian causalities,267 provided that an internal review system determines responsibility for those casualties that do occur. It is the interpretation of humanitarian law promulgated in national rules of engagement manuals that serves as “direct guidance for the troops,” “not customary international law or the texts of treaties.”268 Complicating the implementation of humanitarian law makes no sense. A clear and concise deontological principle to

265 Id. at 501.

266 In fact, states may be required to do so. The Preamble to 1907 Hague Conventions states that “[u]ntil a more complete code of the laws of war has been issued . . . inhabitants and belligerents remain under [natural laws] as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Hague Convention, supra note 17, at Preamble. The Hague Convention of 1899 also contains similar wording in its Preamble. Supra note 17. The disinclination to state what is required by natural law, however, “made it necessary for military manuals to fill in the lacunae, including a statement as to the meaning and limitations of military necessity.” Solf, supra note 35, at 122; see also Meron, supra note 128, at 253; see also generally Robert D. Sloane, Prologue to a Voluntarist War Convention, 106 Mich. L. Rev. 443, 464 (2007).

267 See Klabbers, supra note 134, at 74 (“[W]arfare is a highly organized and restrained activity; it is just that the restraints do not easily stem from detailed legal instructions. Indeed . . . the highly detailed law of armed conflict we have at present could easily be replaced by a single commandment . . . .”); Wright, supra note 13, at 357 (“[N]oncombatant immunity . . . seeks, when appropriate, to reduce intended and unintended noncombatant casualties now and in the future, regardless of who might be to blame for such casualties,” which “more fully realize[s] [humanitarian] law’s underlying purposes . . . .”).

268 George H. Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 Am. J. Int’l L. 1, 18 (1991). In fact, allowing states to interpret international law for themselves, filling in the gaps in national military manuals, would allow more freedom to ensure that the implementation of international law is practicable, while assuring state sovereignty. Id.
guide all military actions will accomplish much more than an on-the-field balancing analysis.  

Aside from lacking clear rules, international law lacks proper enforcement. Protocol I leaves the international tribunals, national prosecution, court marshals, and ad-hoc tribunals as the only effective means of deterrence. Even today, as the human rights model gathers greater support, international and domestic prosecutions for the violation of proportionality are virtually unheard of. This lack of enforcement also likely explains the absence of proper limits, since no international judicial authority can bind the international community. However, many states have opted to initiate civil-like proceedings against their own military members, demanding accountability and requiring effective remedies for violations of humanitarian law and internal rules of engagement. Indeed, because humanitarian law today is largely ineffective, respect for humanitarian and human rights principles can unlikely have much force at all. Still, such accountability mechanisms must be specifically tailored for active duty troops, meeting exclusive *jus in bello* criteria.

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269 Criticisms of Protocol I have been aimed at its complexity, and active troops’ inability to comprehend the complex law therein. See id. at n.50. However, this setback could be alleviated were states to translate Protocol I into “military manuals that would be both practicable and comprehensible to military officers.” Id.

270 See Klabbers, supra note 134, at 62; Reynolds, supra note 16, at 66-74.

271 Fellmeth, supra note 24, at 498.

272 Id. at 489; Sloane, supra note 266, at n.54 (Humanitarian law violations are rarely brought to light, and “so far as anecdotal evidence suggests,” prosecutions by international institutions are a “distinctly modern development, and their efficacy as a means of directly enforcing [international humanitarian law are] marginal.”).


275 See Aisling Reidy, The Approach of the European Commission and Court of Human Rights to International Humanitarian Law, 324 INT’L REV. RED CROSS 513, 519-20 (1990) (“Demanding accountability and requiring effective remedies . . . is the key to domestic implementation of human rights and humanitarian law.”).
Because each military is likely to characterize the situation differently, this system would work best with an independent judiciary not privy to the conflict.\textsuperscript{276} Such a system would likely include international dialogues regarding the applicability of humanitarian law to specific situations, and be judged accordingly. The international community generally allows third parties to intervene in humanitarian law proceedings.\textsuperscript{277} A domestic review system should utilize this method by allowing members of the international community to assist in national proceedings, on the implementing state’s soil and bound by the implementing state’s laws.

Also important is the question of who should be liable for violations. Currently, human rights conventions and institutions do not impose liability upon individual state actors,\textsuperscript{278} while violations of international humanitarian law follow a “respondeat superior” model of liability,\textsuperscript{279} treating violations of individual agents as violations by the state.\textsuperscript{280} Some have proposed a “consensus building” approach, which may be a useful alternative to unilateral characterization of humanitarian law;\textsuperscript{281} “the totality of opinions as to the legal character of a situation would be taken into consideration” when deciding who is ultimately liable.\textsuperscript{282} A state shield of liability will no longer exist based upon whether the incident is painted as a viola-

\textsuperscript{276} See generally International Committee of the Red Cross, \textit{The International Humanitarian Fact-Finding Commission} (2001), available at, http://www.icrc.org/WebEng/siteeng0.nsf/htmlall/57JNWE/$File/Fact\_finding\_Commission.pdf; but see Fry, supra note 79, at 327 (noting that ad-hoc tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, “actually undermine Article 90 of [Protocol I]”). However, suggestions have been made that non-governmental organizations, media, and humanitarian interest groups may act as fact-finding commissions without legal provocation. See Reynolds, supra note 16, at 101-106.


\textsuperscript{278} Id. at 288; see also Keith A. Petty, \textit{Sixty Years in the Making: The Definition of Aggression for the International Criminal Court}, 31 Hastings Int’l & Comp. L. Rev. 531, 546-47 (2008); but see Stahn, supra note 50, at 940 (“[T]here is a move from collective to individual responsibility.”).

\textsuperscript{279} “Respondeat superior” is defined as “[t]he doctrine holding an employer or principle liable for the employee’s or agent’s wrongful acts committed within the scope of employment or agency.” \textit{Black’s Law Dictionary} 1138 (8th ed. 2004).

\textsuperscript{280} Forden, supra note 277, at 288.


\textsuperscript{282} Id. at 341.
tion of humanitarian law or a human rights infringement. Others have suggested a system of compensation, where states found grossly negligent “must compensate injured noncombatants or their survivors promptly, in proportion to the degree to which each caused the injuries suffered,” and/or face international sanctions. Humanitarian law should be revised to follow one or several of these suggested models of liability.

It is also a “straightforward feature of every system of law, and of morality in general, that some actions call for justification.” The Just War doctrine should not be an exception to the rule. Moreover, justification can bring the Just War doctrine back to its natural law foundation. Justification would likely evoke the above principles of proportionality and necessity, with the addition of one necessary element, vindication; the reason for an attack must be legal in fact. The addition of the vindication element would necessarily evade the consequentialist approach by focusing upon the objective sufficiency of the act, rather than the subjective motivation, for “[i]t is not only our intentions that matter, in international law or


285 Robert Cryer & A.P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 THEORETICAL INQ. L. 9, 28 (2006). Note, however, that a justification is not an “excuse,” a defense that will not likely apply to the deontological approach. An excuse in the criminal law context is a “defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal.” BLACK’S LAW DICTIONARY 608 (8th ed. 2004). Traditional excuses include duress, entrapment, and insanity. Using the defense of excuse, a defendant is claiming that he has not committed a crime because he did not have the correct mental state. The excuse defense is unlikely applicable to the Just War doctrine because: 1) insane persons should not be making military decisions in the first place; 2) a civilian who tricks a military agent into thinking that he is a member of the opposition no longer qualifies as a civilian; and 3) it is unlikely that a military agent will be actively forced to kill a civilian.

286 See generally Greenawalt, *supra* note 255 (arguing that the justification defense is a necessary development of natural law).

287 Cryer, *supra* note 285, at n.92. This is not normally a requirement for a justification defense under domestic law or internal rules of engagement. *Id.* However, Cryer and Simester argue “for institutional reasons . . . such a condition should exist in international law.” *Id.*
elsewhere: it also matters what we do.” Thus, a combatant may evoke a justification defense after the violation if and only if his action was reasonable in fact. The reasonableness of an attack should be evaluated by the principle of “double effect,” which means that “actions with the same consequences, such as the death of a noncombatant, may be judged differently depending upon whether that consequence was intended . . . or was merely unforeseen.” When the bombs hit the ground, any number of things may occur. It has been argued that “[t]o know which, if any, of these possible results fulfilled, or failed to fulfill, the attacker’s intent, we obviously must know something about the advance state of mind of the attacker.” However, this argument can be surmounted by basing the assessment not upon the actor’s actual intentions, instead basing it exclusively on actions and the reasonableness of those actions within the particular situation, presuming that an actor intended the “expected, natural, and probable consequences” of those actions. Such regulation is required by double effect, which sees “little . . . difference between sincerely regretted but intended deaths and foreseen but unintended deaths.”

In this way, double effect provides a rationale for the blanket rule against civilian casualties, by balancing: 1) the use of as much military intelligence as possible; 2) the need to hold militaries liable for all attacks; and 3) military flexibility. Backward-looking assessment can place liability on the military actor (usually acting under the scope of employment) based

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288 Id. at 32, 40; but see Greenawalt, supra note 255, at 5 (discussing the differences between a consequentialist and a natural law approach to the justification defense).
289 Cryer, supra note 285, at 34. “[T]he question whether it is reasonable (and not reckless) to behave in a given fashion, and thereby risk the bad side-effect at issue, may be affected . . . by any of the outcomes it has potential to bring about . . . and whether in fact intended by the agent.” Id. at 34-35.
290 Wright, supra note 13, at 341; see also Fein, supra note 164, at 32. The principle of double effect may seem to invite a consequentialist weighing of the intended consequences against bad consequences foreseen but not intended, such as civilian deaths. However, the principle of double effect only requires that an objective motive for risking unintended deaths be offered, and that that motive be reasonable in light of the conditioning factors, not that a balancing or weighing of effects be objectively performed. See Germain Grisez, Against Consequentialism, 23 AM. J. JURIS. 21, 54-55 (1978).
291 Wright, supra note 13, at 346.
292 Id. at 348. Of course, this type of assessment runs the risk of finding that an actor is responsible for deaths that they admittedly did not intend. R.G. Frey, Some Aspects to the Doctrine of Double Effect, 5 CANADIAN J. PHIL. 259, 265 (1975).
293 Wright, supra note 13, at 349.
on the reasonableness of his actions considering all the information available to him when such action was taken. Such backward-looking evaluation would include the availability of various means of attack, and the side effects thereof (i.e. collateral damage).

This kind of review system would force states to empirically assess their actions by asserting responsibility for civilian casualties. The state would need to say to the international community: “[Y]es, I did this, and I did it for good reasons. Those reasons have to do with the other effects, intended and foreseen, of my conduct [and they were, in fact,] pressingly good ones.”

Finally, states implementing an internal system of accountability may facilitate a solid understanding of current interpretative gaps in customary international law. First, many states recognize that the current interpretation of humanitarian law has allowed states justification for giving deference to any position, rather than limiting state behavior. However, a strong internal review system would not only attain international respect, avoiding attacks on state sovereignty, but would also “influence both the shape and universality of the law of war” by setting international stan-

\[294\] See Kalshoven, supra note 78, at 44 (An attacker “cannot simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to take into account all available information. Negligence in this respect makes him responsible.”).

\[295\] For example, the Foreign Affairs Select Committee, Fourth Report, 2000, HC 28-I/II, § 150, states that the “use [of cluster bombs] in an urban environment where civilians live might well fall foul of the prohibition on indiscriminate weapons.”

\[296\] Cryer, supra note 285, at 34-35. “Side-effects are relevant to blame since, irrespective of their role in the agent’s own practical reasoning, they supply reasons why her behavior is reasonable or unreasonable . . . .” Id. at 39.

\[297\] See id. at 40 (“[S]tates are likely to be profligate, rather than parsimonious, with their justifications.”).

\[298\] Id.

\[299\] However, these gaps may have been intentional. See Wright, supra note 91, at 139.


\[301\] See Angela R. Riley, Good (Native) Governance, 107 COLUM. L. REV. 1049, 1059 (2007) (“[R]espect for individual human rights is now considered a necessary counterpart to sovereignty.”).
Second, no common interpretation of the provisions of the proportionality principle exists in international humanitarian law, instilling conflict rather than conflict resolution. However, one state’s implementation of the deontological review system would produce a body of case law giving more solidarity to the interpretation of the Just War doctrine in common law. Other states would likely follow an implementing state’s interpretation in applying international law to their own systems. Moreover, international enforcement agencies could refer to this body of law when prosecuting war crimes.

B. Analysis

First, such a system will defeat any claim against incommensurability. The deontological approach claims, “not that killing can never be justified, but that murder can never be justified . . .” Rather than lives being weighed against some abstract idea of “military advantage,” they are not weighed at all. Under the deontological approach, the value of civilian life is absolute. Thus, there is nothing to weigh the loss of life against, only determining whether to classify the death as a murder. An aspect of natural law called the principle of double effect presumes that militaries are not

302 Meron, supra note 251, at 686 (using this argument to support the U.S. ratification of Protocol I).
303 Jouannet, supra note 300, at 818.
304 Indeed, some commentators have suggested that the greatest instrumental value of post-conflict trials resides in their writing (or rewriting) of history. See, e.g., Lawrence Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust (2005). However, it should be noted that this type of “common law” differs significantly from, and is in some opposition to, the idea of “natural law.” Cf Jamin Soderstrom, Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency, 35 Pepp. L. Rev. 967, n.18 (2008).
305 After all, not every state sought the rules that were adopted in Protocol I. “Sweden [, for example,] suggested that proportionality could only justify civilian deaths where civilians were located in the ‘immediate vicinity’ of the military objective.” Fellmeth, supra note 24, at 490.
306 Perry, supra note 3, at n.4 (quoting Anne Stubbs, The Pros and Cons of Consequentialism, 56 Phil. 497, 509 (1981)); see also Mark Timmons, Moral Theory: An Introduction 80 (2002) (“Many versions of natural law ethics embrace moral absolutism. . . . [The principle of double effect] helps the natural law absolutist make clear that it is the intentional taking of human life that is ultimately prohibited.”).
capable of comparing the lives of combatants with the moral goods that may be spared through the combatants' sacrifice of life.\footnote{308} This requires that the deontologist "investigate the details of a particular case; indeed it is only through such an investigation that [the deontologist] can be in a position to decide whether or not the action in question is properly classifiable as 'murder.'"\footnote{309} Ultimately, civilians will be spared under the deontological approach because the approach makes it impossible for militaries to argue that their excessively dangerous strategies fall within the vague language of humanitarian law.\footnote{310}

Second, the deontological approach also defeats any claim against inaccurate military predictions. Actions, not outcomes, are the principal object of evaluations.\footnote{311} In other words, the deontological approach does not allege to predict the future. Rather, the deontological approach categorically prohibits certain actions, then judges those actions with twenty-twenty hindsight should they occur. The principle of double effect sidesteps the hitch by realizing that "all people trade off more of one basic, intrinsic good for less of another every day. However, [they] do so each day without objectively rational grounds . . . or based on [their] own prior value choices and commitments."\footnote{312} As such, (re-) applying a deontological principle to the Just War doctrine is, in comparison to predicting consequences, a far more pragmatic and realistically applicable standard of defining a legal threshold.\footnote{313} Moreover, this interpretation of the proportionality principle is more in line with its natural law foundation,\footnote{314} while remaining consistent with customary international law. Third, a deontological approach offers "a distinctive family of internalist accounts of the relationship of practical rea-

\footnote{308} Wright, supra note 13, at 343; see also Timmons, supra note 306, at 77 ("[I]t is characteristic of natural law thinking that such values are incommensurable . . . .").

\footnote{309} Perry, supra note 3, at n.4 (quoting Anne Stubbs, The Pros and Cons of Consequentialism, 56 Phil. 497, 509 (1981)).

\footnote{310} See Fellmeth, supra note 24, at 497; Ministry of Foreign Affairs, Responding to Hamas Attacks from Gaza-Issues of Proportionality, 37 J. Palestine Stud., Summer 2008, at 167, 168 ("[T]he presence of civilians in an area does not stop a military objective from being a legitimate target. This is not just the law . . . but the practice of states . . . .") (internal citations omitted).

\footnote{311} Cf. Jouannet, supra note 300, at 818 (stating that modern substantive international law focuses on the morality of state actions while eschewing the goal of resolving international conflicts, which was the focus of formal international law in the past).

\footnote{312} Wright, supra note 13, at 343-44.

\footnote{313} But see Perry, supra note 3, at 982.

\footnote{314} See Timmons, supra note 306, at 77-80.
son to moral standards such that agents have decisive reasons to avoid wrongdoing." The deontological approach also offers theories of reasons that establish grounds for action, while the consequentialist approach offers standards, but no theory of decisive reasons to act in a neutral way. In other words, rather than relying on peripheral calculations, influenced by a "mythic psychological state," categorical standards give reasons to act certain ways, not just tangential standards. It is enough that actions are right (i.e. no civilians are killed), even if they are motivated by sheer self-interest. Where actions are wrong (i.e. civilians are killed), an objective inquiry into the reasonableness of an agent’s action, informed by the principle of double effect, may be necessary, post attack, out of the theater of war, and by a detached adjudicator. Finally, because the deontological approach does not allege to predict the future, neither the immediate future of a particular attack nor the result of the long-term war effort, no possibility for problems of attenuation are presented.

VI. Conclusion

As Just War theory is currently implemented, the proportionality principle requires military leaders to predict the future, and, rightly, does not rebuke them when they get it wrong; such errors, it seems, are the norm rather than the exception. The Hempelian fix furnishes military leaders with an algorithmic tool to assist in predicting the future, but ultimately falls short of the level of prediction required under the human rights framework and the natural law foundation. The deontological approach, on the other hand, escapes problems associated with the consequentialist models by bypassing the proportionality principle altogether, while remaining in sync with a human rights framework and bringing humanitarian law back to its natural law foundations.

315 Hurley, supra note 175, at 690.
316 See id. at 697.
317 See LeShan, supra note 9, at 48-49 ("According to the unspoken but comprehended view of reality defined by the mythic mode, the good people (us) are supposed to kill the bad people (them), not the other way around.").
318 See Hurley, supra note 175, at 691-92 ("If entire classes of ordinary judgments concerning moral wrongness are jettisoned, as they are by the consequentialist, the intuitive link between wrongness and decisive reasons is itself undermined.").
319 See Hempel, supra note 244, at 4-5 ("What determines the soundness of a hypothesis is not the way it is arrived at (it may even have been suggested by a dream or a hallucination), but the way it stands up . . . when confronted with relevant observational data.").
Throughout history, the military, claiming that its consequentialist ethics were necessary to meet its duty of ensuring the survival of the state, overrode the protests of humanitarians, who objected to the military’s consequentialist development of the laws of war. However, the tide is changing. Although a number of influential figures continue to deny that the law of war (and even international law) exists, there can be little doubt of the diminishing influence of these figures in relation to international consensus. Ethicists are coming to realize that “we must stubbornly stick to our deontological principles and recognize as well that very frequently... actions done to prevent still greater evils will turn out to be unnecessary.” Rather, “bans against killing the innocent [should] not be called into question in any practical manner by consequentialist reasoning.” At the very least, an international conference to discuss these issues is necessary.

The conflict between consequentialist policymakers and those who choose the deontological approach to humanitarian law will decide the future of the Just War doctrine. Ultimately, the success of their stand will require more than an enactment of positive law. The military elite must pay heed to humanitarian interests and transform assumptions about the demands of national security and military necessity. As civilian casualty rates continue to rise—a result of the dominant consequentialist viewpoint in recent decades—the voice of humanitarians, now represented by a


322 Krauss, supra note 105, at 74.

323 Kai Nielsen, Against Moral Conservatism, 82 ETHICS 219, 230 (1972); see also Perry, supra note 3, at 974.

324 Nielsen, supra note 323, at 230.

325 The odds of this happening right now, however, are low. See David Wippman, Introduction: Do New Wars Call for New Laws?, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 1, 6, 11-13 (David Wippman & Matthew Evangelista eds., 2005) (explaining that leading military powers would prefer to conduct further research in order to clarify international law rather than participate in an international conference to revise international law because such revisions could limit their individual sovereignty).

326 Krauss, supra note 105, at 84.

327 See Gardam, supra note 140, at 370.
greater part of the international community, becomes louder.\textsuperscript{328} If current trends in civilian casualties continue, it is for the sake of humankind that their voice shall soon be heard.

\textsuperscript{328} Krauss, \textit{supra} note 105, at 83.