

ARTICLE

Military Strategy:
The Blind Spot of International Humanitarian Law

Yishai Beer*

* Professor of Law, Herzliya Interdisciplinary Center, Herzliya, Israel. The author would like to thank Eyal Benvenisti, Gabriella Blum, Moshe Halbertal, Eliav Lieblich, David Kretzmer, and Kenneth Watkin for their useful comments, and Ohad Abrahami for his research assistance.

Abstract

The stated agenda of international humanitarian law (IHL) is to humanize war's arena. Since it is the strategic level of war that primarily affects war's conduct, one might have expected that the law would focus upon it. Paradoxically, the current law generally ignores the strategic discourse and prefers to scrutinize the conduct of war through a tactical lens. This disregard of military strategy has a price that is demonstrated in the prevailing law of targeting.

This Article challenges the current blind spot of IHL: its disregard of the direct consequences of war strategy and the war aims deriving from it. It asks those who want to comprehensively reduce war's hazards to think strategically and to leverage military strategy as a constraining tool. The effect of the suggested approach is demonstrated through an analysis of targeting rules, where the restrictive attributes of military strategy, which could play a significant role in limiting targeting, have been overlooked.

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Introduction: Thinking Strategically to Reduce War's Hazards

It is the strategic level of war—not the operational or tactical—that most affects war's conduct.¹ A war strategy determines the concrete aims and, to a large extent, the scope and consequences of a war, and substantially shapes its targeting policy.² Yet the prevailing law of armed conflict does not deal directly with a belligerent's selection of a military strategy in general and the determination of a war's aims in particular.³ This disregard has a price. A natural assumption from this silence is that the law takes the wide spectrum of types of war between states as legitimate, including the worst-case strategic scenario. Thus, it accepts, albeit by default, the Clausewitzian all-out war strategy, aimed at the decisive and total destruction of the adversary's military and the extinction of its will to fight.⁴ This implicit acceptance of the total war prototype triggers a counter-effect: it damages the law's goal of humanizing war's arena, a vision specifically established following the trauma of the two world wars.⁵ The effect of this distortion of the law of armed conflict will be demonstrated in this Article by examining the targeting rules, where the restrictive attributes of military strategy, which could play a significant role in limiting targeting, seem to have been forgotten. The earlier sin of turning a blind eye to military strategy, especially its restrictive attributes, has its own consequences for the prevailing law of targeting. This distortion and its endorsed correction is the subject of this Article.

The targeting rules are derived, *inter alia*, from a fundamental rule of the law of armed conflict: the distinction rule, which requires that noncombatants be

¹ It is common practice for militaries to distinguish between three levels of war: strategic, operational, and tactical. *See* discussion *infra* notes 18–32.

² Targeting has been defined as “[t]he process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.” U.S. DEP’T OF DEF., JOINT PUBL’N 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 232 (Nov. 8, 2010, as amended through June 15, 2015), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (accessed Nov. 19, 2015) [hereinafter JOINT PUB. 1-02]; *see also, e.g.*, Kenneth Watkin, *Targeting in Air Warfare*, 44 ISR. Y.B. HUM. RTS 1, 17–19 (2014) (discussing the targeting process).

³ NGOs and most academic writers prefer the alternative name IHL (International Humanitarian Law) over the law of armed conflict, the term usually referred to by militaries. *See, e.g.*, YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 18–21 (2nd ed. 2010).

⁴ CARL VON CLAUSEWITZ, *ON WAR* 90 (Michael E. Howard & Peter Paret trans., Princeton University Press 1984).

⁵ This vision was primarily established by the four 1949 Geneva Conventions and their 1977 Additional Protocols. The Geneva Conventions are aimed at strengthening the basic rights of prisoners of war, protecting the wounded and the sick, and promoting the protection of civilians during wartime and in war zones. The 1949 Geneva Conventions updated the terms of the first Geneva treaties (1906, 1929)—concerned strictly with combatants—and added the fourth treaty “for the Protection of Civilian Persons in Time of War.” *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

kept out of harm's way in war and that their property should be spared.⁶ Only combatants and military objects represent lawful targets ("military objectives").⁷ Military objectives are limited to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁸

Although the rules favor civilian immunity, civilians may be hurt, both in body and in property, in a lawful military action. While the intentional targeting of civilians is absolutely prohibited, unintended (yet foreseen) harm to civilians might be legal if consistent with the proportionality criterion that applies in times of war. The proportionality requirement prohibits the initiation of a military attack, in which the harm caused to civilians might be "excessive" (disproportional) relative to the attack's "concrete and direct military advantage anticipated."⁹ Furthermore, though civilian property is not considered a lawful target, the intended targeting of dual-purpose objects—objects that serve both civilian and military purposes such as, for example, power grids and bridges—might be legal. These objects may be targeted if they are classified as "military objectives," subject to the proportionality rule.¹⁰ Thus, the adversaries' pursuit of "military advantage" is restricted by two contextually based legal barriers. The first barrier limits "military objects"¹¹ (which pass the attributes threshold) to only those whose "total or partial destruction, capture or neutralization" offers a "definite military advantage."¹² The second barrier—aimed at minimizing the damage caused to civilians, when a military objective is targeted—prohibits damage caused collaterally to noncombatants if it is not proportional (excessive) relative to the attack's "concrete and direct military advantage anticipated."¹³

From which military perspective—tactical, operational or strategic—should these two legal barriers be examined? Regarding both the definition of military objects and the proportionality equation, two different schools have developed. One is tactically oriented and restricts lawful targets to concrete military objectives. The other school is much broader and strategically concerned, and its acceptable target list includes, *inter alia*, infrastructure and state resources supporting the war effort. This Article argues that both schools are mistaken on

⁶ See, e.g., API, *supra* note 5, at art. 51.

⁷ *Id.* at art. 52(2).

⁸ *Id.*

⁹ *Id.* at art. 51(5)(b).

¹⁰ *Id.* at art. 52(1)–(2). The application of this targeting legality is, however, controversial. For example, Normand and Jochnick have criticized the Coalition's targeting of a substantial number of Iraqi power stations during the First Gulf War (arguing that the military gains were negligible and disproportional relative to the amount of civilian suffering caused thereby). See Roger Normand & Chris af Jochnick, *The Legitimization of Violence: A Critical Analysis of the Gulf War*, 35 HARV. J. INT'L L. 387, 403–05 (1994).

¹¹ "[T]hose objects which by their nature, location, purpose or use make an effective contribution to military action." API, *supra* note 5, at art. 52(2).

¹² *Id.*

¹³ *Id.* at art 51(5)(b).

theoretical and practical grounds. In reality, they do not attain the optimal equilibrium between the two perceived poles of the law of armed conflict: necessity and humanity.¹⁴ They neither promote the best interests of military necessity nor encourage, as might have been expected, the humanizing of war's arena.

Wars are fought strategically. The aims of a war and its scope are, above all, the product of an elective strategy. The tactically oriented targeting school's inclination to turn a blind eye to this reality is doomed to fail on *realpolitik* grounds and its disregard of preferences at the strategic level works against its agenda of minimizing civilian suffering.

On the other hand, the strategic school of targeting, though consistent with reality, has been applied in only a partial and manipulative way. This school uses strategy only as an enabler to widen the scope of a war and its lawful targets list, but ignores its constraining attributes. Many, if not most, contemporary wars are limited in their aims and are not total wars. Limited wars are constrained by their own definitions as such. Requiring adherence in targeting to strict and definite war aims, as strategically selected by a belligerent, might substantially affect the scope of lawful targets, especially in limited wars. Were the law to require states—for example, one fighting lawfully in self-defense—to publicly define their strategic war aims, it would dictate to their militaries a coherent targeting practice, consistent with the selected strategy.¹⁵ In every limited war, such a coherent targeting requirement would usually impose effective, substantial restrictions upon the scope of lawful targets. Strategy in war is not generic but is sensitive to context. However, the contemporary legal environment—which accepts the Clausewitzian total war as a lawful default—naturally creates a wide scope for a generic “targets bank” (including, for example, a belligerent state's infrastructure, which might relatively easily be considered a military object due to its dual purpose). In order to contend with the reality of limited wars, it is necessary to untie the apparent Gordian knot between any selected strategy (and its war aims) and the generic (usually excessively wide) lawful targets list. Every war is unique in its aims, and its specifically selected strategy determines, and might have the potential to limit, its targets list.

The suggested approach requires adding a new dimension to the nexus between a potential object and the military action, as demanded by treaty law. The current causality nexus requires that the military objects, characterized “by their nature, location, purpose or use,” should have “an effective contribution to

¹⁴ The necessity rule permits use of military force required in order to achieve the legitimate military purpose of the conflict. For a call to revisit the prevailing paradigm and challenge the current dichotomy between the two pillars—assumed to be polar opposites—of the law of armed conflict, necessity and humanity, see Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUR. J. INT'L L. 801 (2015).

¹⁵ U.N. Charter art. 2(4) prohibits the proactive use of military force in international relations and recognizes just two exceptions. See discussion *infra* note 96.

military action” and that a definite military advantage should be gained upon their destruction.¹⁶ These requirements will here be termed the “horizontal nexus”: a connection between the potential objective and the actual military action. In addition, this Article advocates introducing a legal requirement of a “vertical nexus”: a connection between the strategic aim of the war and its actual application, as reflected in the desired operational and tactical military advantages. The latter should always be within the scope of the former, and any lawful military target should reasonably be located within this contour. The vertical nexus—based upon a revised reading of the necessity principle—requires a concrete connection between all levels of war and the selected military objects. It should define—and in most cases, reduce—the potential lawful targets bank in a given war, from its opening and at every stage of it.

In assessing the vertical nexus, the strategic military selection is taken as a given (as long as it is lawful), but its application is scrutinized. Under the suggested approach, the law of armed conflict would require militaries to operate coherently by adhering to their own professional standards. Thus, where a strategy of limited war has been selected, there is usually no professional military request for a decisive victory, and this should have a moderating effect on the scope of the war and its lawful targets. In a limited war, for example, targeting the adversary’s entire dual-purpose infrastructure—even if it might be legally permissible—seems to be strategically unwise. Strategy, for legal purposes, should not be perceived as a wild horse, enabling a wide range of intended or collateral harms, but rather should be leveraged as a constraining tool. Legally, connecting strategy and actual targeting practice, as suggested, can be perceived as a call to introduce the prevailing *in bello* necessity principle into the *ad bellum* sphere.¹⁷

This Article proceeds as follows: Part I presents the important effect of military strategy on military operations and tactics. Part II demonstrates the pendulum movement of the pattern of wars and the current shift from the total war to the limited war prototype—a strategic change that reflects, to a large extent, the internalization (mainly by Western liberal democracies) of the limitations of force. The change in the contemporary strategic environment has not been fully backed by the prevailing law, which by default remains loyal to the total war legacy. Part III focuses upon this blind spot—the turning of a blind eye to the more crucial issue of war’s aims and strategic dimensions—and its effects. In the face of this contemporary strategic and legal reality, Part IV turns to the prevailing and the normatively desirable targeting rules. It presents the two mistaken dichotomist schools and suggests that lawful targeting be scrutinized through the strategic prism, while limiting the spectrum of military objectives by

¹⁶ API, *supra* note 5, at art. 52(2).

¹⁷ The *ad bellum* (“the right to fight”) rules determine whether the use of military force is legal. The law of armed conflict determines the prevailing *in bello* (“how to fight right”) rules. See discussion *infra* notes 108–14, (discussion linking the *ad bellum* principle of proportionality to the *in bello* conduct).

requiring coherency in targeting to definite war aims. Whereas the current discussion is focused on the horizontal axis, between the object and the military action, Part V introduces the suggested vertical nexus: connecting strategy to lawful targeting. Finally, Part VI offers concluding remarks relating to the suggested evolution of the law of armed conflict and its future potential.

I. Strategy Determines War's Patterns and Scope

A military campaign is conducted in light of a strategy, or what B.H. Liddell Hart calls its “grand strategy.” The higher level of strategy “is to coordinate and directs all the resources of a nation, or band of nations, towards the attainment of the political object of the war.”¹⁸ While the grand strategy deals with “policy”¹⁹—which is decided in liberal democracies by the civilian leadership—the military strategy deals with on-the-ground military activities, related to a concrete armed conflict and aimed at the fulfilment of governmental policy. At the level of military strategy, the political objectives of a state are transformed into military ones,²⁰ which in turn are exercised in the campaign theater, with the aim of meeting those policy goals. It is this military strategy that affects militaries’ operations and tactics.

Military activity is usually classified into three hierarchic levels: strategic, operational and tactical. Under common definitions, the strategic level of war “determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.”²¹ The operational level is the “level of war at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas.”²² And the tactical level is the “level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces.”²³

The classification of the operational as an independent level is relatively new. The classical distinction of military activity level was between strategy and

¹⁸ B.H. LIDDELL HART, *STRATEGY* 322 (2nd rev. ed., 1991). Cf. BRITISH ARMY DEVELOPMENTS, CONCEPTS AND DOCTRINE CENTRE, *ARMY DOCTRINE PUBLICATION: OPERATIONS 3–17* (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33695/ADPOperationsDec10.pdf (setting forth the British Army Doctrine definition of “National Strategy” that “sets out a path, using the diplomatic, economic and military instruments of power, to government policy goals”) [hereinafter DCDC, *ARMY DOCTRINE PUBLICATION: OPERATIONS*].

¹⁹ LIDDELL HART, *supra* note 18, at 322.

²⁰ DCDC, *ARMY DOCTRINE PUBLICATIONS: OPERATIONS*, *supra* note 18, at 3–17 (“The military contribution to strategy is the application of military resources to achieve national strategic objectives . . .”).

²¹ JOINT PUB. 1-02, *supra* note 2, at 224.

²² *Id.* at 176.

²³ *Id.* at 230. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS I-13–I-14 (Aug. 11, 2011), http://www.fas.org/irp/doddir/dod/jp3_0.pdf [hereinafter JOINT PUB. 3-0].

tactics only.²⁴ The operational level's introduction in the twentieth century came in response to the demand to bridge the gap between the strategic and tactical levels through the introduction of a middle level of action.²⁵ It includes each separate tactical maneuver capable of affecting any other and the theater as a whole.²⁶ It is the operational art of war that triggers "a higher combination that is more than the sum of its tactical parts."²⁷

The differentiation among different military levels is well rooted in the hierarchical construction of militaries:

The underlying principle was that at each level the objectives would be passed down from the higher. At the level of grand strategy, a conflict was anticipated, alliances forged, economies geared, people braced, resources allocated, and military roles defined. At the level of strategy, the political objectives were turned into military goals; priorities and specific objectives were agreed upon and allocations of men and equipment made accordingly. At the level of grand tactics or operations, judgments were made as to the most appropriate form of warfare to achieve the goals of that particular campaign in the light of the prevailing conditions. At the level of tactics, military units attempted to push forward the goals of the campaign in the specific circumstances in which they found themselves.²⁸

This model of hierarchical command structures can be challenged, especially when other disciplines (such as business practices) are motivated by the desire to flatter hierarchies. Furthermore, in limited wars, the lines between these different levels are blurred and the distinction may disappear. For example, this could occur when every "simple" soldier, usually connected through the hierarchy to the tactical level, might become a "strategic corporal," with a substantial effect upon the outcome of an entire military campaign.²⁹ Yet the strategic, operational, and tactical levels of war constitute fundamental aspects of applying and understanding modern warfare and its scope. (Not surprisingly, the hierarchical command structures are consistent with militaries' culture.) Indeed, "it is the interaction between the various levels of war that affects the scope of the conflict, impacts on what targets are struck . . . to degrade an enemy's ability to conduct military operations."³⁰ It is this interaction that determines, at all stages of a military campaign, the desired military advantages to be gained, at all levels of

²⁴ Von Clausewitz, for example, distinguished strategy, which involve "the use of engagements for the object of the war," from tactics, which involve "the use of armed forces in the engagement." VON CLAUSEWITZ, *supra* note 4, at 128.

²⁵ See JOINT PUB. 3-0, *supra* note 23, at I-13-I-14.

²⁶ EDWARD N. LUTWAK, STRATEGY: THE LOGIC OF WAR AND PEACE 113 (2nd prtg. 2003).

²⁷ *Id.* at 112.

²⁸ LAWRENCE FREEDMAN, STRATEGY: A HISTORY 206 (2013).

²⁹ *Id.* at 206-07.

³⁰ Kenneth Watkin, *Military Advantage: A Matter of "Value," Strategy and Tactics*, 17 Y.B. INT'L HUMANITARIAN L. 277, 320 (2014).

war, from a given course of action selected by a military.³¹ Indeed, the military advantages are different at each level, since the respective prisms used by the higher strategic command and the foot soldier to evaluate risks and opportunities on the battlefield are not the same. Yet it is the synchronization process that looks at a potential target within the context of the entire military campaign and therefore shapes the contours of the relevant potential targets bank for that specific campaign. The legality of exercising each target in this bank, by way of actual targeting, depends, *inter alia*, upon which of the conflicting schools, with their divergent normative lenses—either tactically or strategically oriented—ought to be used when it comes to interpreting the military advantage to be gained.³²

II. The Strategic Change: The Rise and Decline of Total War

In this section, I introduce historical observation of the pattern of war over the years, revealing a pendulum movement: from limited wars with limited, sometimes very modest, objectives to the evolution of total wars, then back to limited wars. The modern total war prototype is the combined military legacy of Napoleon and Clausewitz. In the following historical discussion, I will show that Napoleon's practice and Clausewitz's theory do not hold a monopoly on military thinking and practice, neither in the past nor in the present. Currently, in fact, the total war prototype is the exception rather than the rule. The strategic change towards the limited wars reflects, to a large extent, the internalization (mainly by Western liberal democracies) of the limitations of force. This current trend is substantiated by contemporary legal evolution favoring limited self-defensive measures. Nevertheless, this state of affairs has not prevented the modern law of armed conflict from ignoring substantial segments of this strategic development and to remain loyal to the total war legacy.

A. *A Pendulum Movement: The Evolution of "Total War"*

The pattern of wars, especially their scopes and durations, has changed dramatically over the years. The pendulum movement of this pattern derives from the dynamic political, economic, technological, social, and cultural context of war. For example, "in the Middle Ages, the political, economic, and social context of war had in various ways inhibited the raising and risking of large numbers of men for and in battle, to make the phenomenon of large-scale battle

³¹ To achieve a designated military aim or advantage, the military planning process requires the planner to develop and present a wide spectrum of alternatives. Indeed, a "COA [(Course of Action)] is any concept of operation open to a commander that, if adopted, would result in the accomplishment of the mission." U.S. NAVAL WAR COLLEGE JMO DEP'T, JOINT OPERATIONS PLANNING PROCESS WORKBOOK NWC4111H, 2-1 (Jan. 21, 2008), <https://usnwc.edu/getattachment/Departments---Colleges/Joint-Military-Operations/NWC-4111H-21-Jan-08-Final.pdf.aspx> [hereinafter NWC4111H].

³² For example, in *Gotovina*, reference was made to both operational and tactical level targets having been identified for artillery engagement. See *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1189 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

relatively rare.”³³ Towards the end of the eighteenth century, Napoleon’s “Grand Army” introduced the prosecution of war through grand-scale battles: “Napoleon’s system of warfare was based on decisive battles. Not for him were either bloodless maneuvers . . . or protracted struggles of attrition . . . he aimed at first pushing his opponent into a corner from which there was no escape, then battering him to pieces.”³⁴ Clausewitz echoed this pattern of war. As Azar Gat points out, “Clausewitz’s conceptions were clearly a particular reflection of Napoleonic warfare as perceived in its peak years.”³⁵ Clausewitz asserts: “Battle is the bloodiest solution. While it should not simply be considered as mutual murder . . . it is always true that the character of battle, like its name, is slaughter [*Schlacht*], and its price is blood.”³⁶ These words, which sound as if they might have been taken from Bram Stoker’s *Dracula*,³⁷ reflect Clausewitz’s focus on total war, the type of engagement involving masses of combatants. His vision of a direct and crushing operation from a central position has been conceived as the focal point of war, rather than any other less bloody alternative such as enveloping maneuvers.³⁸

The Clausewitzian vision of battle has two dimensions: military and civilian. An all-out war usually pertains to both the military and the people of both adversaries. It means not only a total war between mass armies (consisting of both adversaries’ combatants),³⁹ but also total war between the civilian populations of the rival states.⁴⁰ Two examples from the second half of the nineteenth century well demonstrate the classical conception of total war, especially with regard to its civilian dimension: Moltke’s bombardment of Paris in 1870 and General William Sherman’s “Atlanta campaign” during the American Civil War.⁴¹

Field Marshal Helmuth von Moltke, Prussian Chief of the General Staff (1857–1888),⁴² endorsed the total war vision. In his view, war was to be fought in an all-out manner by attacking “all the resources of the enemy government, his

³³ RUSSEL F. WEIGLEY, *THE AGE OF BATTLES* xii (1991).

³⁴ MARTIN VAN CREVELD, *COMMAND IN WAR* 90 (1985).

³⁵ AZAR GAT, *THE ORIGINS OF MILITARY THOUGHT: FROM THE ENLIGHTENMENT TO CLAUSEWITZ* 206 (1989).

³⁶ VON CLAUSEWITZ, *supra* note 4, at 259.

³⁷ BRAM STOKER, *DRACULA* (Penguin Books 1994) (1897).

³⁸ VON CLAUSEWITZ, *supra* note 4, at 97 (“Thus it is evident that destruction of enemy forces is always the superior, more effective means, with which others cannot compete.”).

³⁹ *See id.* at 258 (“The greatest successes are obtained where all engagements coalesce into one great battle.”).

⁴⁰ *See id.* at 592–93.

⁴¹ The Atlanta campaign refers to a series of battles in 1864 between Union general William T. Sherman and Confederate generals Joseph E. Johnston and John Bell Hood. *See, e.g.*, JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 719, 752–53 (2003).

⁴² The nickname “elder” differentiates Helmuth von Moltke from his nephew of the same name who was a field marshal with the German army at the start of World War I. On Moltke the Elder, *see generally* ARDEN BULCHOLZ, *HELMUTH VON MOLTKE: A MODERN BIOGRAPHY* (2007).

finances, his railroads, his supplies and even his prestige.”⁴³ He justified the intentional targeting of civilians in the context of war as a legitimate leverage for achieving its aim.⁴⁴ His decision to bombard Paris in 1870 was undertaken “not . . . to destroy Paris, but to exert a final pressure on the inhabitants.”⁴⁵

General Sherman reached Atlanta in 1864,⁴⁶ with two military objectives: to damage the war-related industries in the South and fight the large Confederate army around the Atlanta area.⁴⁷ When the Southern army got out of his way and invaded Tennessee, a decision was made by Sherman and Ulysses Grant, the commander of the Union military forces, not to pursue it but to drive through Confederate territory. In other words, rather than aim directly at the Southern army, they chose to damage the local Southern economy and the property of its civilian population.⁴⁸ This strategy change, and the new focus on the civilian dimension of the war, was approved by President Lincoln.⁴⁹ The Union leaders “were driven to this by a common realization that the war had become (in the ordinary sense of the words) a people’s war and that it could only be brought to conclusion by fighting it in (to use the Clausewitzian concept) an absolute style.”⁵⁰ Following this strategy, Sherman demanded the evacuation of all of Atlanta’s inhabitants and then ordered the city burnt.⁵¹

⁴³ GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 145 (1983). In 1890 the Field Marshal wrote in support of this notion: “The time of the cabinet wars is over, we will have only a people’s war.” HELMUTH VON MOLTKE, *THE RUSSO-TURKISH CAMPAIGN IN EUROPE 1828-1829*, quoted in Michael D. Krause, *Moltke and the Origins of the Operational Level of War*, in *HISTORICAL PERSPECTIVES OF THE OPERATIONAL ART* 113, 144 (Michael D. Krause and R. Cody Phillips eds., 2005). On Clausewitz’s influence on Moltke, see, e.g., GERHARD RITTER, *THE SWORD AND THE SCEPTER: THE PROBLEM OF MILITARISM IN GERMANY, VOL. I: THE PRUSSIAN TRADITION 1740-1890* 187–260 (1969).

⁴⁴ James J. Reid, *Total War, the Annihilation Ethic, and the Armenian Genocide, 1870–1918*, in *THE ARMENIAN GENOCIDE: HISTORY, POLITICS, AND ETHICS* 21, 30 (Richard G. Hovannisian ed., 1992).

⁴⁵ *Id.* Indeed, there is strong evidence indicating that on utilitarian grounds Moltke was not supportive of the bombardment, even though he made plans for it and carried it out. See MICHAEL HOWARD, *THE FRANCO PRUSSIAN WAR* 352 (2001).

⁴⁶ MCPHERSON, *supra* note 41, at 748.

⁴⁷ *Id.* at 751.

⁴⁸ As Sherman himself noted, his march through Confederate territory resulted in \$100 million worth of damage to property, of which \$80 million constituted “simple waste and destruction.” Sherman’s report of January 1, 1865, quoted in MARK GRIMSLEY, *THE HARD HAND OF WAR: UNION MILITARY POLICY TOWARDS SOUTHERN CIVILIANS 1861–1865* 200 (1995).

⁴⁹ BEST, *supra* note 43, at 208; see also GEN. ORDER 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 21 (Apr. 24, 1863), http://avalon.law.yale.edu/19th_century/lieber.asp#sec1 (“The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.”) [hereinafter *The Lieber Code*].

⁵⁰ BEST, *supra* note 43, at 208.

⁵¹ In his famous letter to the mayor and councilors of Atlanta from September 12, 1864, General Sherman wrote in reply to their request to revoke his order: “You cannot qualify war in harsher terms than I will. War is cruelty, and you cannot refine it; and those who brought war into our country deserve all the curses and maledictions a people can pour out . . .” *Id.* at 209. For a description of Sherman’s demand that all of Atlanta’s inhabitants be evacuated, see, e.g., MARC WORTMAN, *THE BONFIRE: THE SIEGE AND BURNING OF ATLANTA* 326–27 (2010).

Both these generals of the same generation, Moltke and Sherman, exhibited similar views and practices on both sides of the Atlantic, identifying the adversary as a “people,” including the entire civilian population. From their perspective, civilian suffering was a stated goal of the total war, not just its natural consequence. Furthermore, their military logistical necessities always prevailed over the adversary’s civilian interest. The only way in which the mass armies of the late eighteenth century (and to a lesser extent those of the nineteenth century) could supply themselves was by exploiting local resources. Their logistical support was obtained at the expense of the local civilian population. “An army marches on its stomach, said—or is reported to have said—Napoleon. He could better have said, armies march on civilian stomachs, for that is what really happened.”⁵²

The Clausewitzian concept of total war, as well as the effects deriving from it, was not the only conception available. By contrast, the following discussion will present alternative perceptions regarding the desired models of war.

B. Napoleon’s Practice and Clausewitz’s Theory Do Not Hold a Monopoly on Military Thinking and Practice

Before the era of the French Revolution, wars were usually fought along an entirely different pattern than Napoleon’s bloody version. From the middle of the seventeenth century to the end of the eighteenth century, civilians were not usually considered to be relevant players on the battlefield, at least not directly.⁵³ Furthermore, the wars fought by professionals were usually characterized by their limited scope. In some cases, they were contained in their physical dimensions—for example, restricted to a single daylong pitched battle⁵⁴—and in others they had limited objectives, such as seizing border provinces or securing overseas colonies. These relatively modest objectives were the result of the strategic military thinking of the time, which emphasized form, caution, and the sociopolitical composition of the armies as dynastic and hierarchical rather than national.⁵⁵ The moderate nature of eighteenth-century warfare was summed up by Alexander Hamilton: “The history of war, in that quarter of the globe [Europe], is no longer a history of nations subdued and empires overturned; but of towns taken and retaken—of battles that decide nothing—of retreats more beneficial than victories—of much effort and little acquisition.”⁵⁶ It may therefore be concluded

⁵² BEST, *supra* note 43, at 89.

⁵³ See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 400 (2d ed. 2005) (“[F]or a number of historical reasons between 1648 and 1789, wars tended to take the shape of contests between professionals, conducted as a sort of game and without any direct involvement of the civilian population”).

⁵⁴ For a description of a typical pitched battle, see, e.g., JAMES Q. WHITMAN, THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR 12–14 (2012).

⁵⁵ LARRY H. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY 7 (1994).

⁵⁶ THE FEDERALIST NO. 8 (Alexander Hamilton).

that “more humane rules were able to flourish in the period of limited wars from 1648 to 1792 but that they then came under pressure in the drift towards continental warfare, the concept of the nation in arms and the increasing destructiveness of weapons from 1792 to 1914.”⁵⁷

In fact, a leading theorist who endorsed this type of limited “light” war preceded Clausewitz by more than two thousand years. The Chinese strategist Sun Tzu emphasized the notion that the use of military force is justified only as a last resort, noting: “[t]hose skilled in war subdue the enemy’s army without battle. They capture his cities without assaulting them and overthrow his state without protracted operations . . . Your aim must be to take All-under-Heaven intact.”⁵⁸ In contrast to the bloody version of war as represented by Napoleon’s model and endorsed by the Clausewitzian approach, Sun Tzu preached the opposite: “For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.”⁵⁹ Clausewitz, who probably never read Sun Tzu,⁶⁰ ridicules this type of “bloodless war” approach, noting that “[r]ecent history has scattered such nonsense to the winds.”⁶¹

Furthermore, not all twentieth century strategists and theorists accepted Clausewitz’s bloody vision, nor did they all agree on its application. For example, J.F.C. Fuller and B.H. Liddell Hart, two prominent twentieth century theorists, contested it. Fuller’s analysis of World War I criticized the underlying assumption and perception of “the General Staffs of Europe,” on the eve of the war, “that policy is best enforced by destruction.” He argued that militaries and their commanders were “hypnotized” by total wars involving “unlimited slaughter,” which was the explanation for their futile activities and bloody operations in that war.⁶² Furthermore, Fuller based his criticism not only on professional military grounds, but on economic justifications as well. He followed Keynes in arguing that the war also had a counter-effect, from a utilitarian-economic perspective.⁶³ “[T]actically, it was based on a gigantic misconception of the true purpose of war, which is to enforce the policy of a nation *at the least cost to itself and enemy* and, consequently, to the world, for so intricately are the resources of civilized states interwoven that to destroy any one country is simultaneously to wound all other nations.”⁶⁴

⁵⁷ A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 1 (2004).

⁵⁸ SUN TZU, *THE ART OF WAR* 79 (S. B. Griffith trans.; forward by B.H. Liddell Hart, 1963).

⁵⁹ *Id.* at 77.

⁶⁰ Handel states this lack of knowledge of Clausewitz as a fact. *See* MICHAEL I. HANDEL, *MASTER OF WAR* 152 (2001).

⁶¹ VON CLAUSEWITZ, *supra* note 4, at 259 (“Laurels were to be reserved for those generals who know how to conduct a war without bloodshed”).

⁶² JOHN FREDERICK CHARLES FULLER, *THE REFORMATION OF WAR* 75 (1923). Indeed, Michael Howard points out that “[s]trategists before 1914 were in fact increasingly hypnotized by the Clausewitzian and Napoleonic idea of the decisive battle for the overthrow of the enemy.” MICHAEL HOWARD, *CLAUSEWITZ* 63 (1983).

⁶³ *See generally* JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920).

⁶⁴ FULLER, *supra* note 62, at 75 (emphasis in original).

Liddell Hart also argued in favor of a vision that limited war's aims while simultaneously reducing its heavy price. He thus defined the purpose of strategy as "the reduction of fighting to the slenderest possible proportions." He further argued against those "who are obsessed with the Clausewitzian saying that 'blood is the price of victory' . . . For even if a decisive battle be the goal, the aim of strategy must be to bring about this battle under the most advantageous circumstances."⁶⁵ Liddell Hart's theory stemmed largely from his recognition of the fallacy of the "grand battle" military doctrine, which so deleteriously affected military conduct during World War I. It was his "hardening conviction that the chief cause of the futile holocaust had been adherence to a false military doctrine, namely Clausewitz's interpretation of Napoleonic warfare."⁶⁶

Hart therefore argued that the function of grand strategy should be to identify the enemy's "Achilles heel" and then strike it, rather than fight the enemy at his strongest points.⁶⁷ This conception of military operations, known as "the strategy of indirect approach," was not an original creation of Hart's.⁶⁸ As mentioned above, it in fact appeared thousands of years ago in the writings of Sun Tzu, who wrote that "[h]e who knows the art of the direct and the indirect approach will be victorious. Such is the art of maneuvering."⁶⁹

The historic presentation thus far has demonstrated that when it comes to military doctrine and strategy, at the time of the UN's establishment in 1945 and the signing of the 1949 Geneva Conventions, Napoleon's bloody model of total war, as expressed by Clausewitz, did not enjoy a monopoly. Clausewitz's vision (in its extreme version⁷⁰)—despite being widespread and consistent with the buildup of mass armies in the nineteenth century and the industrialization of war, as reflected in the two World Wars—was not the only one extant. Indeed, as Luttwak points out, there is no one model of optimal war, and everything depends upon the specific circumstances of the military terrain and the adversaries.⁷¹ Whatever view one may hold, the Napoleonic model has never been accepted as the sole archetype of ultimate war between states.

⁶⁵ LIDDELL HART, *supra* note 18, at 338.

⁶⁶ BRIAN BOND, LIDDELL HART: A STUDY OF HIS MILITARY THOUGHT 37 (1977).

⁶⁷ B.H. LIDDELL HART, PARIS OR THE FUTURE OF WAR 21 (1972).

⁶⁸ It should be noted, however, that even in the framework of a Clausewitzian total war, a sophisticated military can still operate indirectly. For example, in executing the *Blitzkrieg*, German commanders operated indirectly while still fighting a total war. See, e.g., John Mearsheimer, *Hitler and the Blitzkrieg Strategy*, in THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS 138, 146 (Robert J. Art & Kenneth N. Waltz eds., 2004).

⁶⁹ TZU, *supra* note 58, at 106.

⁷⁰ Indeed, Bond and others have argued that "Liddell Hart was so emotionally involved in attacking the inept conduct of the First World War and its legacy, that he was unable to approach its more general causes with detachment. Instead he found a plausible scapegoat in what he mistakenly believed to be Clausewitz's notion of strategy." BOND, *supra* note 66, at 51. This debate among military historians is beyond the scope of this article. For the sake of our discussion, presenting the conflicting approaches will suffice.

⁷¹ See LUTTWAK, *supra* note 26, at 112–37.

*C. The Effectiveness of the Total Destruction of an Adversary's Military:
the American Lesson*

From a utilitarian military perspective, the critique of the Napoleonic total war model as the archetype of war concentrates primarily upon its lack of effectiveness. In this context, one may look at the experience of the two world wars from a critical perspective. The next example focuses upon the American military experience and the lessons it has learned from its wars' patterns, before and after the two world wars.

In its military preferences, American strategy has long leaned towards the use of overwhelming force, a choice influenced by the country's sheer size, wealth, and production capabilities. Dima Adamsky notes that the "strategy of attrition and annihilating the enemy with firepower was the best way to transform the [American] nation's material superiority into battlefield effectiveness. The translation of enormous resources into firepower, technology, and logistical ability and a consequent inclination for direct attack dates back to the military experience of the American Civil War."⁷² During later stages of that war, Abraham Lincoln insisted that the only way to victory was through the complete destruction of the Confederacy's forces, despite objection to the idea by some of his officers—which led to his dismissal of some of those whom he saw as excessively conciliatory toward the South.⁷³ Lincoln insisted that to achieve ultimate victory, the Union armies would have to crush their Confederate adversaries: "The strength of the rebellion is its military" ⁷⁴ He believed, as Eliot Cohen notes, that "[t]he war would not be won by maneuver but by hard fighting; it would not end with the fall of Richmond or any other geographical location, but with the collapse of the enemy's army."⁷⁵

The American military's strategic thinking continued along the same lines during the two World Wars and in the post-World War II era as well. In Vietnam, for example, "[s]ome of the early air-war concepts (for example, an extensive program of bombing of industrial targets in North Vietnam) reflected an unthinking application of World War II-era concepts to a very different enemy. The fundamental ground-war concept—attrition designed to grind the enemy into incapacity—was, as it turned out, impossible to achieve."⁷⁶ Indeed, the poor

⁷² DIMA ADAMSKY, *THE CULTURE OF MILITARY INNOVATION* 78–79 (2010). This choice of mass force by the Americans was also noted by Eliot Cohen: "World War II both shaped and revealed American strategic culture as no other war with the exception of the Civil War. Two dominant characteristics stand out: the preference for massing a vast array of men and machines and the predilection for direct and violent assault." Eliot A. Cohen, *The Strategy of Innocence? The US, 1920–1945*, in *THE MAKING OF STRATEGY* 428, 464 (Williamson Murray et al eds., 1994).

⁷³ ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 38–41 (2002).

⁷⁴ *Id.* at 31 (citations omitted).

⁷⁵ *Id.*

⁷⁶ *Id.* at 179.

strategic thinking in Vietnam reached one of its lowest levels in its obsession with the “body count”:

‘The best way to defeat the enemy and to protect the South Vietnamese people was to utilize maximum force against the entire Communist system,’ wrote Lieutenant General Julian J. Ewell and Major General Ira A. Hunt in a study promoting the use of the body count and a counterinsurgency strategy based on attrition. ‘Once one decided to apply maximum force, the problem became a technical one of doing it efficiently with the resources available.’ Not entirely coincidentally General Ewell, commanding general of the 9th Division in the Mekong River delta, acquired the nickname ‘The Butcher of the Delta’ for his obsession with the body count.⁷⁷

Not surprisingly, the body count—indeed, the quantified strategy—was not very effective in Vietnam. In many cases, it triggered a counter-effect. Its lack of success challenged the American military’s way of thinking. In new military theories introduced in the 1970s, the tendency of the American military was to move away from quantitative destruction, carried out by means of a linear confrontation of masses, to operational maneuvers.⁷⁸ This new approach was demonstrated in the First Gulf War. General Colin Powell’s argument against the complete destruction of the Iraqi army and in favor of ending the ground war after one hundred hours was grounded, *inter alia*, on utilitarian grounds: affording an “exit strategy” to an adversary affects its determination to continue fighting.⁷⁹

This strategic modification, fine-tuned to adversaries’ interests, draws further support from the current American strategy, which relates not to conventional inter-state wars but to the completely different challenge of counterinsurgency (COIN). The counterinsurgency doctrine imposes greater constraints upon American combatants than those “externally” required by the laws of armed conflict. It requires the military, as a professional matter, to minimize civilian casualties. “Combat in counterinsurgency often obligates leaders, Soldiers, and Marines to apply force in a precise manner to accomplish the mission without causing unnecessary loss of life or suffering.”⁸⁰ In the following discussion, I will present the argument that constraining military force reflects a contemporary trend, substantiated by both contemporary strategic reality and legal evolution, and then go on to present the paradox that the legal rules, in many cases, trail behind the strategic reality in humanizing the arena of war.

⁷⁷ *Id.* at 184 (citations omitted).

⁷⁸ See FREEDMAN, *supra* note 28, at 198–201; see also SHIMON NAVEH, IN PURSUIT OF MILITARY EXCELLENCE 251 (1997).

⁷⁹ COHEN, *supra* note 73, at 194–98.

⁸⁰ U.S. MARINE CORPS, WARFIGHTING PUBLICATION 333.5; U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-36 (May 13, 2014).

D. Internalization of the Limitations of Force by Law-Abiding States

The American COIN doctrine is not an isolated phenomenon and its constraining message is not limited to asymmetric wars. On the micro-level, it reflects the current military perception of what constitutes an effective counterinsurgency campaign. On the macro-level, however, it reflects the internalization of the limits of military power. This self-imposed doctrine exposes a new reality. It “requires Soldiers and Marines to be ready both to fight and to build”⁸¹ and, from a purely professional military perspective, points at some paradoxes. For example, “sometimes, the more force is used, the less effective it is,”⁸² or “[s]ome of the best weapons against counterinsurgents do not shoot.”⁸³ Indeed, the COIN doctrine dictates greater constraints upon American combatants than those externally required by traditional interpretations of the law of armed conflict. In this unique war environment, the belligerents are fighting not against the domestic civilians but for their “hearts and minds,” as well as to win over international public opinion.⁸⁴

In contemporary times, the traditional total war model, though still relevant, has become less prevalent even in wars between states. Totality in terms of unlimited scope of violence is absolutely forbidden currently, and totality related to the political objective of war is, in many cases, neither practical nor desired. Furthermore, totality in terms of the means used in a war might, in some cases, not be desirable due to reciprocal deterrence considerations.⁸⁵ In certain cases, it might be prohibited (as in the case of chemical weapons)⁸⁶ or unacceptable due to its devastating effects (as in the case of nuclear weapons).⁸⁷

⁸¹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-105 (2007).

⁸² *Id.* at 48, para. 1-150.

⁸³ *Id.* at 49, para. 1-153 (“Arguably, the decisive battle is for the people’s minds Particularly after security has been achieved, dollars and ballots will have more important effects than bombs and bullets.”).

⁸⁴ As to the U.K. “hearts and minds” strategy in Malaya, *see, e.g.*, Paul Dixon, “Hearts and Minds”? *British Counter-Insurgency from Malaya to Iraq*, 32 J. STRATEGIC STUD. 353 (2009).

⁸⁵ The Korean War demonstrated that even during a bloody war in which the superpowers are totally involved, military destructive power can be restricted to conventional means and precise, concrete channels. Indeed, the “Korean War was furiously ‘all-out’ in the fighting, not only on the peninsular battlefield but in the resources used by both sides. It was ‘all-out’ though, only within some dramatic restraints: no nuclear weapons, no Russians, no Chinese territory, no Japanese territory, no bombing of ships at sea or even airfields on the United Nations side of the line.” THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 31 (1976).

⁸⁶ *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. For earlier (prior to 1925) and later developments, *see, e.g.*, DINSTEIN, *supra* note 3, at 80–82. For Dinstein’s discussion on prohibited weapons in general, *see id.* at 62–88.

⁸⁷ Mutual deterrence probably prevented a nuclear war between the two superpowers during the Cold War. *See generally*, SCHELLING, *supra* note 85; LAWRENCE FREEDMAN, *DETERRENCE* 10–13 (2004). Regarding the legality of nuclear weapons, *see generally* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996).

The civilian dimension of total war—one people fighting against another—has been rejected by the prevailing rules. Historically, between the contradictory definitions of adversaries, as reflected in the two models of war—between states or between peoples—the law explicitly chose to limit the scope of war to the combatants, and to limit the damage caused to noncombatants.⁸⁸ Another dimension of total war—its absolute political aim of total surrender of the adversary (and often a regime change)—is, in many cases, neither attainable nor preferred.⁸⁹ Such a total political objective is usually contingent upon achieving the traditional military aim of a total war, namely a decisive victory.⁹⁰ Total and unconditional surrender—such as in the case of the Allies’ war aim against the Nazi regime in World War II—is the most extreme political aim of a self-defendant against aggression.⁹¹ A relatively less ambitious aim than regime change, but still total in its results, would be an absolute incapacitation of the aggressor’s military capabilities.⁹² Both total aims are counter to the current trend of limiting a self-defendant’s war aims. In the modern environment, governing an adversary’s land and people, once considered a desirable prize for the victor in war, has become a strategic burden and legal liability.⁹³ Incapacitation, too, has its own deterring price, both strategic and legal, for the winning law-abiding

⁸⁸ Indeed, though the law has accepted the Clausewitzian all-out war strategy as a lawful prototype, the legality of the other part of this war vision, dealing with war between the civil populations of the rival states, was rejected. “[T]his law ultimately upheld the ‘Rousseauesque’ [conception that war was not a relationship between man and man but between state and state], not the ‘Clausewitzian’ conception [the need for wars to be a life-or-death struggle involving the whole of the population of the contending states]. Being based on the assumption that wars are clashes between States’ armies, it distinguished between combatants and civilians and sought to shield the latter as much as possible from armed violence.” CASSESE, *supra* note 53, at 400.

⁸⁹ Limited wars can be limited in other dimensions, such as their timing. The timing variable, however, seems to be problematic in characterizing a war as limited. Indeed, short wars might be “limited” to a single daylong pitched battle, as was common before the French Revolution. See WHITMAN, *supra* note 54, at 12–14. On the other hand, even very short wars (especially currently)—for example, potential nuclear wars—can be devastating. See also The Lieber Code, *supra* note 49, at art. 29 (“The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”).

⁹⁰ Under the Clausewitzian legacy, war is aimed at preventing an adversary from carrying on the fight, by destroying its military capabilities and undermining its psychological will to continue it. See VON CLAUSEWITZ, *supra* note 4, at 90.

⁹¹ Due to the widespread legacy of the Nazi doctrine and beliefs within German society and the absence of a strong democratic tradition, the perception was that only the uprooting of the entire ruling system and the shakeup of the entire German society could be the desired end result of this war. Indeed, the building of a new Germany seems to have required the destruction of the old: “[t]he outer limit is the conquest and political reconstruction of the enemy state, and only against an enemy like Nazism can it possibly be right to reach that far.” MICHAEL WALZER, JUST AND UNJUST WARS 113, 116 (2006) (pointing out that “[i]n a sense, aggression was the least of Hitler’s crimes”).

⁹² The case of Japan in World War II serves as a possible example. In contrast to the German case, the Japanese circumstances are more disputed. Michael Walzer, for example, criticized the morality of the American “unconditional surrender” request from Japan, noting that “unconditional surrender [of Japan] should never have been asked. Japan’s rulers were engaged in a more ordinary sort of military expansion, and all that was morally required was that they be defeated, not that they be conquered and totally overthrown.” *Id.* at 267–68.

⁹³ See, e.g., EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 167–69 (2012).

belligerent.⁹⁴ Indeed, the currently inflated price of total and decisive victory, which is not offset by any tempting prize (except the promise of one's own self-defense), may explain why many contemporary wars are not total (nor, as noted earlier, were they such in the past).

The strategic trend of limited wars of self-defense is consistent with the UN Charter's aim and rules. Under the Charter, the unilateral proactive exercise of military force or threat of use of force is prohibited,⁹⁵ subject to two exceptions: in cases of individual or collective self-defense against an armed attack, or pursuant to a Security Council authorization.⁹⁶ The lawful self-defensive exercise of military force is subject to legal limitations and its natural aim would be a return to the status quo ante. For example, when territory is lost to an aggressor in an armed attack, a proportional military response by a self-defendant is expected to be aimed, according to the common view, at "halting and repelling" the ongoing attack and restoring the territorial status quo.⁹⁷ Though legally the "halt and repel" formula seems to represent an optimal generic self-defensive response, there are cases in which it is actually not practical. For example, where the attacker does not hold any territory, or if it is a repeat offender, as reflected by its actions and declarations, adopting the "halt and repel" strategy against such a raging bull may only drive it to further acts of aggression. The self-defendant is entitled to restore its security following any such armed attack. If the Security Council cannot deter the aggressor, as originally intended by the Charter, it may be expected that the lawful paradigm of self-defense would allow secondary deterring tools against it. The legal challenge—though it is indeed disputed—is to tailor the deterrent effect as integral to the lawful self-defense considerations, while rejecting any retroactive, illegal punitive measures.⁹⁸ For example, in an ongoing armed conflict, a self-defendant's response might aim at shortening the conflict's duration and reducing its scope in the short run, and at postponing (if not preventing) the eruption of the next round of belligerency in the long run.

Although the current strategic and legal preference is toward limited wars, there are circumstances in which both the "halt and repel" strategy and deterrence are impractical. In such cases, a decisive victory aimed at total incapacitation of an adversary, or even regime change in extreme cases, might be justified within

⁹⁴ A recent American example of avoiding incapacitation occurred in 1991 during the First Gulf War, where the ground war ended after 100 hours. *See* COHEN, *supra* note 73, at 194.

⁹⁵ U.N. Charter art. 2, para.4.

⁹⁶ *See* U.N. Charter ch. VII.

⁹⁷ *See, e.g.*, JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 156–57 (2004).

⁹⁸ Indeed, deterrence might be legally perceived as an inherent part of punitive measures, which are not considered compatible with the right to self-defense. *See, e.g.*, David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 247–57 (2013). The ICJ, while dealing with the legality of nuclear weapons, has nonetheless stated: "The Court does not intent [sic] to pronounce here upon the practice known as the 'policy of deterrence.'" *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 87, ¶ 67.

the self-defense paradigm. In cases of armed attack where deterrence cannot work—for example, in a dictatorship because of agency problems,⁹⁹ or due to religious jihadi motivation, or where an aggressor’s lack of assets makes him unafraid of losing any—a desirable end result, probably within the contours of lawful self-defense, may be to eliminate the aggressor’s substantial military capabilities. In other words, if a self-defendant cannot deter an aggressor from continuing its armed attack against it, an alternative—though legally disputed—might be to totally disable it. The most extreme and contentious scenario on the lawful self-defense scale involves regime change. If at all lawful, it should be applicable where only the uprooting of the entire ruling system and shakeup of the entire society, as in the Nazi case, can promote peace and security for the self-defendant. Though any of these potential war aims within the self-defense paradigm may be strategically desirable, legally, some are in dispute due to a lack of consensus on the legitimate ends of force in self-defense, whenever the generic “halt and repel” formula is inapplicable.¹⁰⁰ In sum, the current trend favoring limited self-defensive measures—over total incapacitation of an adversary (or even regime change), which has become a residual alternative, applicable only in extreme cases—is a combined product of the new strategic and legal environment.

Furthermore, the current trend is supported by the shift in modern perceptions of heroism and killing. The willingness of societies, primarily liberal ones, to face the consequences of wars and to pay their price is also limited. Neither the sacrifice of their own soldiers’ lives nor (to a limited extent) their acceptance of the need to kill the adversary’s combatants or civilians can any longer be taken for granted. Indeed, the current reality, dubbed by Luttwak the “post-heroic era,” is characterized by a lessening tolerance for casualties on both sides.¹⁰¹ Besides the combined effects of these social changes and public expectations, especially in Western democracies, the various media now have relatively easy access to conflict zones, and the images of carnage they transmit further escalate the moderating trend. Add to that counterinsurgency operations, where the struggle is to win the “hearts and minds” of the local population, and you get a reality in which how a war is perceived by public opinion and reflected in the media becomes very significant. The relative departure from the total war paradigm that now prevails also draws support from the development of new technologies. Though they have enhanced the lethality and devastating consequences of weapons of war, they have also triggered developments in intelligence gathering and precise weaponry, the combination of which allows much more surgical strikes than before. With the precise strike option, a window of opportunity has opened for accepting a strategy of limited war as the most effective one. Indeed, at a time when the strategic scales are turning towards

⁹⁹ In dictatorships, there is no correlation between the rewards and risks to an aggressor’s leaders. For example, dictators usually do not pay with their lives, but rather their citizens do.

¹⁰⁰ See Kretzmer, *supra* note 98, at 260–76. For the view that regime change should now be considered an unlawful political goal, see, e.g., Janina Dill, *The 21st-Century Belligerent’s Trilemma*, 26 EUR. J. INT’L L. 83, 90–91 (2015).

¹⁰¹ See LUTTWAK, *supra* note 26, at 68–74.

limited wars, new military capabilities make it possible to conduct such wars with limited (relatively speaking) hazards.

In sum, though the contemporary strategic and legal environment, especially in Western liberal democracies, tends to restrict the scope of military power and violence, the law of armed conflict ignores substantial segments of this strategic development. This blind spot and its effects will be the subject of the coming discussion.

III. Turning a Blind Eye to Military War Aims: The Silence of the Law Promotes the Roar of the Canons

The modern law of armed conflict—while adopting the distinction rule and rejecting the civilian dimension of total war—has tacitly accepted the *in bello* framework of total war between armies carried out in a bloody, industrial manner and aimed at the complete destruction of the adversary's armed forces. There is no formal prohibition of such warfare and it is actually considered a legitimate alternative in a lawful inter-state war of self-defense.¹⁰² Currently, the law does not deal with strategic issues and limits itself to an important, yet residual, role. Once war has begun, it seeks to reduce and contain its flames and limit its hazards. It usually takes the aims and pattern of modern wars as given, and only then steps in, *ex post*, with a limited *in bello*¹⁰³ goal: to reduce their damages—by limiting the use of marginal weapons—or the combatants' suffering to the bare minimum,¹⁰⁴ and to reduce the unintended, collateral damage caused to noncombatants. The formal *in bello* response is currently provided by the fundamental principles of the law of armed conflict: distinction, proportionality, necessity and humanity, and the specific norms derived from them. The humanity requirement forbids the use of means and methods of warfare that cause

¹⁰² Franck, for example, notes that “the great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized incursions of large military formations.” Thomas M. Franck, *Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 812 (1970). Therefore, Franck concludes, “[b]ecause it was so familiar to them, it was to aggression of this kind that the drafters of Article 51 [recognizing the right of self-defense] addressed themselves.” *Id.*

¹⁰³ Under the prevailing rules, the *jus ad bellum* and the *jus in bello* bodies of law do not intermix but rather are independent of each other. There are a few exceptions, however, such as the ICJ decision with regard to the legality of nuclear weapons. See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 87, ¶ 105. Under the current dichotomous paradigm, one might have expected that whereas the cause of “self-defense” legitimizes the defendant's war (an *ad bellum* consideration), the question of legitimizing nuclear weapons would be confined solely to the realm of *in bello* considerations, with equal rules applicable to both sides, aggressor and defendant alike. However, the Court's “extreme circumstances of self-defense” exception—which might affect, according to the majority view, the legality of the use of nuclear weapon—conflates the two types of considerations.

¹⁰⁴ For example, “[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” API, *supra* note 5, at art. 35(2). A similar rule was established in Article 23(e) of the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex, Regulations Concerning the Laws and Customs of War on Land, art 23(e), Oct. 18, 1907.

superfluous injury or unnecessary suffering. “The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary.”¹⁰⁵ The necessity rule is perceived as imposing a restraint upon the exercise of military power beyond what is necessary to attain the military goal.¹⁰⁶ Though the rhetoric of the necessity principle is impressive, its performance is not. It can be very easily manipulated and circumvented.¹⁰⁷

Facing a reality in which the *in bello* rules seem to deliver only partial restrictions, the prevailing law has preferred, nonetheless, not to deal with militaries’ doctrinal choices and their strategic and operational ways of fighting. Indeed, the prevailing legal rules turn a blind eye to the more crucial issue of a war’s aims and doctrinal dimensions, which actually determine how militaries fight and the brutal scope and effects of any given war. The current rules’ disregard of military strategic preferences related to the scope of war means that the law deals mainly with the two extremes: the *ad bellum* rejection of proactive wars on the one hand, and the mitigation of war’s consequential hazards at the tactical (*in bello*) micro-level on the other.

Theoretically, the *ad bellum* proportionality requirement might have served as a potential strategic constraint. A common view in the academic literature—which to some extent can be traced to the judgments of the International Court of Justice (ICJ)—is that the requirement of proportionality in the exercise of self-defense sequentially regulates the choice of means and methods of warfare, thereby affecting war’s conduct and scope. According to this view, the fact that a state’s initial use of military force was justified as lawful self-defense and that its conduct of the war was lawful according to the *in bello* rules is not enough from a legal standpoint; such a state should demonstrate that all military measures taken by it, during the war, were also *ad bellum* proportionate.¹⁰⁸ Such a proportionality requirement could restrict the operational scope of a military and affect its war aims.

¹⁰⁵ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 23 2.4.1 (2005).

¹⁰⁶ In theory, military necessity has the dual legal function of being both an enabling and a constraining principle. See Gabriella Blum, *The Laws of War and the “Lesser Evil”*, 35 YALE J. INT’L L. 1, 3 n.5 (2010) (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 280–84 (2d ed. 2008)).

¹⁰⁷ See Beer, *supra* note 14; see also Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 YALE J. INT’L L. 541, 544 (2009).

¹⁰⁸ See, e.g., the discussion and references in GARDAM, *supra* note 97, at 162–79 (arguing that “proportionality in *jus ad bellum* requires a consideration of such matters as the geographical and destructive scope of the response, the duration of the response, the selection of means and methods of warfare and targets and the effect on third states”); CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 148–55 (3d ed. 2008). Gray points out, however, that the ICJ’s judgments treat the limitation of necessity and proportionality as “marginal considerations”—they first declare that the use of military force is not legal (does not amount to a lawful self-defense) and then add that the actions were not proportionate. See *id.* at 151. Indeed, the ICJ, in *Congo v. Uganda*, held that in the absence of an armed attack, the preconditions for the exercise of self-defense do not exist. In an *obiter dicta*, however, the ICJ added that “[t]he taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be

In the actual practice of states, however, the application of this potential constraint seems to face substantial challenges. First, according to Dinstein's conflicting view, *ad bellum* proportionality is not a continuing requirement, but rather is limited to the moment of decision whether resort to war is justified in response to an armed attack. Relying, *inter alia*, on the (pre-UN Charter) examples of the 1941 Japanese attack on Pearl Harbor that triggered the Pacific War with the United States and the 1939 German invasion of Poland that sparked World War II, he argues, "There is no support in the practice of States for the notion that proportionality remains relevant—and has to be constantly assessed—throughout the hostilities in the course of war."¹⁰⁹ Second, even accepting the widespread view that the *ad bellum* proportionality requirement remains relevant during the entire conflict, the essence of this proportionality, a legal term that has multiple meanings, is disputed. It is commonly viewed as a sort of objective, quantitatively based "counter-force meter," as explained by Thomas Franck: "Put formulaically, most proportionality discourse occurs when A has done (or threatens to do) X to B, and B responds by doing Y to A. The issue then crystallizes as an inquest into whether countermeasure Y is 'equivalent' (i.e., *proportionate*) to X."¹¹⁰ However, there is no strategic reason to expect proportionality relating to the amount of force exercised by an aggressor in the military counter-response taken by a self-defending army in a full-scale war.

Nor should there be any realistic expectation of quantitatively proportionate use of means in such a war (as long as they are lawful under the law of armed conflict). For example, if one state mounts a full-scale military invasion of another state's territory, on *realpolitik* and military-professional grounds, the self-defendant should not be expected to restrict itself to a "tit for tat" response. The preferred military strategy of the self-defendant would likely be to exercise overwhelming force whenever possible, thus ensuring its victory.¹¹¹ Indeed, this

necessary to that end." See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 147 (Dec. 19, 2005).

¹⁰⁹ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 262 (5th ed. 2011); see also *id.* at 267.

¹¹⁰ Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 715 (2008) (emphasis in original) (explaining that in dealing with "categories of proportionality discourse that are paradigmatic . . . [t]he conflict may be one entailing a state's recourse to military force to retaliate against an actual or putative attacker").

¹¹¹ For example, one of nine professional principles of war of the U.S. Army is mass, which requires concentrating "the effects of combat power at the decisive place and time." U.S. DEP'T OF ARMY, *FIELD MANUAL 3.0, OPERATIONS, A-2* (Feb. 27, 2008). The British Army's manual addresses this issue as "concentration of force," defining it as an action that "involves the decisive, synchronised application of superior fighting power (physical, conceptual and moral) to realise intended effects, when and where required." U.K. MINISTRY OF DEFENCE, *ARMY DOCTRINE PUBLICATION – OPERATIONS 2A-4* (2010). Legally too, even the "halt and repel" formula does not oblige any equivalence between the force used and the self-defendant's response. See e.g., GARDAM, *supra* note 97, at 160–61.

was the American (Colin Powell's) doctrine, applied successfully in the First Gulf War, advocating the exercise of "overwhelming force quickly and decisively."¹¹²

The potential exists, however, for creating a legal-strategic constraint through a broad interpretation of the *ad bellum* proportionality requirement in relation to a war's aims. Indeed, David Kretzmer has argued that proportionality in the use of military force should be evaluated and judged against the legitimate ends of the self-defendant state exercising this force.¹¹³ Such "means-ends proportionality," substantially connecting strategy to tactics, could perhaps reach the desired legal result: limiting the scope and hazards of wars. The legal problem with this interpretation, however, is the uncertainty, relating to the legality of both its "ends" and "means" segments. "Even when it is accepted that the appropriate test of proportionality is a 'means-end' test, in the absence of agreement on these ends it is obviously impossible to agree on the necessary means to achieve them."¹¹⁴

In the absence of a consensus on the legitimate ends of exercising force in self-defense, the legal discourse's failure to address the predictable results of the choice of any given military strategy and the war aims deriving from it invites the question: was there any legal alternative? The suggested answer is an affirmative one. If the visionary prohibition on starting a war were to fail, a practical "second line" of legal defense might have been expected to moderate all dimensions of war. Indeed, the founders of the modern law relating to armed conflicts had a wide spectrum of theories of war to choose from. They had a model of a modest international arrangement: the 1868 St. Petersburg Declaration, which restricted the aim of war, stating that "the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."¹¹⁵

The previous discussion demonstrated that there is a broad spectrum between total wars and limited ones. Wars can be limited and the law of armed conflict should have a say about it. Within its stated agenda, it could exhibit a preference for channeling belligerent parties into limited rather than total wars and, within each type of war—with a given military aim—into the military course of action that may be expected to pose the least danger to human lives, of combatants and noncombatants alike. That expectation as a whole, however, has

¹¹² Colin Powell, *US Forces: Challenges Ahead*, 71 FOREIGN AFFAIRS 32, 37 (1992). It should also be noted that although the Allies' aim in the 1990–1991 Gulf War was to expel Iraq from Kuwait, the war was not restricted to the latter's territory. See also discussion *infra* notes 179–82.

¹¹³ See Kretzmer, *supra* note 98, at 238 (The "means-ends proportionality" is applicable in human rights law as well, where "proportionality judges the harm caused by restrictions on a protected liberty when weighed against the legitimate ends those restrictions are meant to serve.").

¹¹⁴ *Id.* at 282. For the alternate *ad bellum* necessity suggestion, see discussion *infra* notes 176–83.

¹¹⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, <http://www.icrc.org/ihl.nsf/WebART/130-60001?OpenDocument>.

not been fulfilled.¹¹⁶ An open question, which is beyond the scope of this Article, is: why? Do the prevailing rules represent a genuine legal failure (related to the very ability to regulate belligerents' strategic conduct)? Or do they rather, in a more forgiving view, reflect a *realpolitik* arrangement or compromise, internalizing the huge gap between rhetoric and practice in the international arena and aimed at the maximal attainable challenge: to partially mitigate the *in bello* consequences of war and help its victims?¹¹⁷

Whichever answer one prefers, the current law implicitly accepted and legitimized the Clausewitzian model of total war between militaries, with all its implications. The international community in the post-world wars era was decisive enough to dictate a legal prohibition on the proactive use of military force, yet at the same time chose not to deal with the most crucial *in bello* issue—the strategic, operational and tactical dimensions that derive from a war's aims and dictate the way wars are carried out in practice. Precisely on this point, the laws fall silent, allowing the cannons to roar and the blood to be spilled. Indeed, what obtains is a reversal of Cicero's famous saying: "In times of war, the law falls silent" (*inter arma enim silent leges*).¹¹⁸ Here, the silence of the law is antecedent to—and in fact allows—the most brutal type of war, with substantial implications for combatants and civilians alike. With regard to combatants, the acceptance and legitimization of total wars has its price in terms of soldiers' lives. Combatants on both sides simply become the most expendable commodity on the battlefield.¹¹⁹ With regard to civilians, the prevailing proportionality criterion is relative to the magnitude of military force actually exercised. The greater the scope of the war, the more collateral damage might be lawful. Indeed, the current acceptance of total war as a lawful prototype of war triggers, as a default, a wide range of lawful targets. This in turn legitimizes inflated collateral damage to civilians. This creates a vicious cycle: the killing of more soldiers—so long as

¹¹⁶ With regard to civilians, however, API article 57(3) determines that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." API, *supra* note 5, at art. 57(3).

¹¹⁷ Such explanations may relate to state sovereignty regarding the choice of strategy (and grand strategy): states want to shield their leaders—both civilian and military—from any third-party legal scrutiny of matters relating to the designation of a war's aims and their choice of strategy in a given campaign. Added to that is the interest of states' militaries in maintaining their independence in designating a war's aims and in adopting doctrines and strategies to be applied on the battlefield which are suitable to them, without external intervention. Another explanation does not concentrate on states' interest in immunity, per se. Instead it points out that states' behavior in general, that of their militaries in particular, to a large degree reflects their cultural background. Ultimately, it is the culture of a given society that largely dictates its military doctrine and strategy. The patterns of war, the way militaries fight and their doctrines, and even military tactics "are usually the product of social and economic factors rather than of purely military ones." VAN CREVELD, *supra* note 34, at 19.

¹¹⁸ Or, in a different translation: "For among [times of] arms, the laws fall mute." Cicero's actual wording was "*Silent enim leges inter arma.*" M.T. CICERO, PRO MILONE 5 § 11 (F.H. Colson ed., 1980).

¹¹⁹ Indeed, Napoleon's saying that "soldiers are made to be killed" reflected his attitude of treating them as an expendable in the battlefield. WALZER, *supra* note 91, at 136.

their killing is part of a stated “military advantage”—justifies, under the prevailing rules, the killing of a “proportional” number of innocent civilians as collateral damage.¹²⁰

To conclude, the implicit adoption of total war between militaries as an archetypal pattern of war invites a twofold criticism. First, from a moral perspective, the required mass killing is unacceptable. Second, and from a professional standpoint, as we have just seen, such killing is of dubious effectiveness. Ironically, it is only in legal thinking that one finds an apparent acceptance of this strategic prototype of bloody war. The legal regime, which should have been the first to reject this bloody paradigm, still holds it to be valid and untouchable. Instead of leveraging military strategic constraints, it merely tries to contain war’s hazards at the tactical level by limiting war’s consequential hazards and suffering, to a limited degree.

Having surveyed this contemporary strategic and legal reality, I will now turn to the prevailing, and later to the normatively desirable, targeting rules. The discussion will begin with the two conflicting schools regarding the lawful scope of military advantage which allows objects to be characterized as military targets. It will be argued that both schools are inconsistent with strategic reality. Through this analysis I will later suggest a tool—indeed, pour new substance into an existing tool—that has the potential to moderate all dimensions of war: the *ad bellum* necessity.

IV. Tactical “Military Advantage” or Strategic?

A. *The Two Dichotomist Schools*

In interpreting the concept of military advantage—a key component in the definition of both military objects and proportionality—two different schools have developed. First, the tactical school “applies a more restrictive interpretation with a goal of limiting lawful targets to those most directly linked to military personnel and material. This view puts particular emphasis on a temporal limitation on targeting and focuses on the ‘tactical’ level of war.”¹²¹ Second, and by contrast, the strategic school has a wider view. It “accepts a broader and more indirect connection between military forces and the resources of the State in supporting them.”¹²² The current fighting practice of law-abiding states and their targeting policy—which usually includes, for example, war industry and dual-purpose infrastructure—is consistent with the broader strategic approach. In fact, it is the strategic nature of warfare that dictates this practice.

¹²⁰ See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 85 (2010).

¹²¹ Watkin, *Targeting in Air Warfare*, *supra* note 2, at 65.

¹²² *Id.*

The military advantage, whether “concrete and direct” (in the proportionality equation) or “definite” (as required for military objectives), should be certain and substantial. The law requires a clear, definite nexus between the targets of an attack—whose destruction is intended—and the military advantages gained.¹²³ While the causality nexus—requiring a concrete rather than a hypothetical connection—is well accepted, the timing nexus—requiring a short-term advantage—is controversial. The International Committee of the Red Cross (ICRC) Commentary to Additional Protocol I, article 57(2)(a)(iii),¹²⁴ presents an extreme view of the tactical school, requiring that the connection be “relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”¹²⁵ Indeed, the last part of this statement is much disputed since “long-term effects may be both direct and concrete.”¹²⁶

Putting aside the timing nexus (if any), the geographical dimension and the level of war at which the military advantage should be examined are substantially disputed by the two schools. While some limit the military advantage that might justify collateral damage (if proportional) to the “on the spot” tactical advantage, others call for a wider-strategic perspective of the desired military goal: the entire operational picture.¹²⁷ The wider perspective in defining military advantage in targeting reflects states’ practice not only in theory but in their actual fighting. This is attested to by Western liberal democracies’ reservations upon signing the Additional Protocol I,¹²⁸ and by their targeting policy in contemporary wars.¹²⁹ Similarly, it was also the perspective adopted by the Rome Statute of the International Criminal Court, defining unacceptable

¹²³ In fact, there are two causality criteria required by API Article 52(2): (1) an “effective contribution to the military action”; and (2) the “definite military advantage.” API, *supra* note 5, at art. 52(2); *see also* discussion *infra* notes 162–63.

¹²⁴ API article 57(2)(a)(iii) requires as a precautionary measure that states “refrain from deciding to launch any 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.” API, *supra* note 5, at art. 57(2)(a)(iii).

¹²⁵ Jean Pictet and Claude Pilloud, *Commentary on Additional Protocol I art. 57*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 677, 684 at para. 2209 (Claude Pilloud et al. eds. 1987).

¹²⁶ DINSTEN, *supra* note 3, at 134.

¹²⁷ *See, e.g., id.* at 94, 133–34.

¹²⁸ *See* the Reservations and Declarations Made at the Time of Ratification of Protocol I by Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, and the United Kingdom,

https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470; *see also* INT’L AND OPERATION LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 13 (2014) (stating that “[m]ilitary advantage’ is not restricted to tactical gains, but is linked to the full context of one’s war strategy. Balancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives.”).

¹²⁹ *See* discussion *infra* notes 134–36.

collateral damage as “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹³⁰ (This preference, however, might be explained by the criminal law’s unique attributes and the higher threshold required by it.)

The conflicting views can be illustrated, for example, by way of their divergent interpretation of the “by nature” criterion of military objects, which are limited by API article 52(2), *inter alia*, to “those objects which by their nature, location, purpose or use make an effective contribution to military action.” The strategic approach to interpreting “military objectives” by their “nature” broadly also includes “[i]ndustrial plants (even when privately owned) engaged in the manufacture of armaments, munitions, military supplies and essential parts for military vehicles, warships and aircraft . . .”¹³¹ Similarly, the Humanitarian Policy and Conflict Research (HPCR) Manual on International Law includes, among the objects meeting this criterion, subject to the circumstance ruling at the time, *inter alia*, “factories, lines and means of communications (such as airfields, railway lines, roads, bridges and tunnels); energy producing facilities; oil storage depots; transmission facilities and equipment.”¹³² By comparison, the same “by nature” criterion is interpreted much more narrowly by the restrictive school. For example, the ICRC Commentary defines it as “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.”¹³³ The reality, however, is that the strategic approach prevails among states, as reflected in their actual practice of broadly interpreting the “by nature” criterion, as well as the other criteria of “location, purpose or use.” For example, in NATO’s 1999 Kosovo air campaign the targets included, *inter alia*, broadcasting stations, bridges, railways, oil storage depots, economic facilities, and civilian political leadership compounds, such as government ministries.¹³⁴ Similar targets were attacked in Afghanistan¹³⁵ and Iraq.¹³⁶

¹³⁰ Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

¹³¹ See DINSTEIN, *supra* note 3, at 97.

¹³² THE PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § 23 (2009), <http://www.ihlresearch.org/amw/manual/section-e-military-objectives/e-general-rules/rule-23> (referring to Rule 22(a) dealing with the “by nature” criterion) [hereinafter HPCR Manual]. As to targets that according to the HPCR should be classified as lawful, even though they do not directly take part in the actual fighting, see discussion *infra* notes 164–65.

¹³³ Jean Pictet & Claude Pilloud, *Commentary on Additional Protocol I Art. 52*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 629, 636 at para. 2020 (Claude Pilloud et al. eds. 1987).

¹³⁴ UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶¶ 45–46 (2000), <http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> [hereinafter ICTY NATO Bombing Report].

¹³⁵ In the Afghan case, Operation Enduring Freedom called for the bombing of three types of targets: (1) “infrastructure” (power plants, roads, etc.); (2) “industry”; and (3) a class of targets associated with the Taliban leadership said to have had “political implications.” See BENJAMIN S.

The controversy between the two schools does not stop at classifying military objects and is reflected in the interpretation of the phrase “direct military advantage” in the proportionality equation, as well. The limited approach was adopted, for example, in the ICRC Commentary, which states that the prohibition on “excessive” collateral damage¹³⁷ “is not concerned with strategic objectives but with the means to be used in a specific tactical operation,”¹³⁸ and that “[a] military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces.”¹³⁹ State practice in applying the proportionality requirement in contemporary war arenas is, however, much wider, following the strategic school.¹⁴⁰ In the following discussion, I will present each school’s mistake and suggest a novel, hybrid approach aimed at constraining the scope of lawful targets.

B. *The Prevailing Schools’ Mistakes and the Suggested Hybrid Approach*

States’ rejection of the tactical approach in their actual practice reflects reality, since strategy dictates how wars are fought. War aims and the targeting policies deriving from them—especially the “industrialized” ones, exercised primarily by modern air forces—are determined at the strategic level.¹⁴¹ Each war has its own course, an azimuth, determined by its strategy; it cannot be judged by strictly looking at every single step taken along this course on its own. The mistake of the tactical school lies in its effort to “tacticize” the battlefield. Such an effort, even for the sake of legality only, is doomed to fail on *realpolitik* grounds. Furthermore, the notion that focusing upon the tactical level can minimize civilian suffering¹⁴²—which is the rationale behind the current disregard of strategy in the targeting context—is mistaken, as well. Ignoring the fighting level that matters most in the conduct of war triggers a counter-effect. Those who want to humanize the arena of war, to the most feasible extent, cannot entrench themselves in the tactical zone; rather, they must face reality and think strategically.

LAMBETH, AIR POWER AGAINST TERROR: AMERICA’S CONDUCT OF OPERATION ENDURING FREEDOM 311–12 (2005).

¹³⁶ Barton Gellman, *Allied Air War Struck Broadly in Iraq: Officials Acknowledge Strategy Went Beyond Purely Military Targets*, WASH. POST (June 23, 1991), <https://www.globalpolicy.org/component/content/article/169/36375.html>.

¹³⁷ API, *supra* note 5, at art. 57(2)(a)(iii).

¹³⁸ Pictet & Pilloud, *supra* note 125, at para. 2207.

¹³⁹ *Id.* at para. 2218. It should be noted, however, that even this tactically oriented approach accepts that “an attack carried out in a concerted manner in numerous places can only be judged in its entirety.” *Id.*

¹⁴⁰ According to this approach, what need be taken into account is the entire military campaign, taking “an attack as a whole,” for the purpose of assessing the military advantage gained. Nonmilitary (e.g., political or economic) advantages are considered irrelevant. *See, e.g.*, DINSTEIN, *supra* note 3, at 95.

¹⁴¹ *See generally* Watkin, *Military Advantage*, *supra* note 30.

¹⁴² *See, e.g.*, Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 407 (1993).

The mistake—or one may say, the manipulation—of the strategic school is its disregard for the built-in constraining elements of a strategy. A war strategy will always be enabling in some aspects, but constraining in others. Indeed, due to the current blind spot of the law—its explicit disregard for the direct consequences of war strategy and the aims that derive from it—the prevailing strategic school leverages war strategy in a partial and biased way. It uses it strictly as an enabler, to widen the scope of a war and its lawful targets list, while ignoring its constraining attributes. A side effect of this disregard is the dehumanization of the war arena.

Familiarity with the constraining element of a given strategy, however, might be helpful in this regard. The focus upon concrete military advantages gained at the tactical level of war is aimed at restricting civilian damage at the local level; its wholesale restriction, however, can be achieved mainly through the limiting attributes of the strategic level. The main strategic constraint might be adherence to a war's aims, especially in limited wars. (The application of another potential strategic constraint, the *ad-bellum* proportionality requirement, is problematic and doubtful, as discussed earlier.)¹⁴³ The suggested hybrid approach requires adherence to strict and definite war aims in targeting, substantially affecting the scope of lawful targets. Currently, states can lawfully cross the legal *ad bellum* Rubicon only in their own (or collective) self-defense.¹⁴⁴ Were the law to require such ostensibly self-defensive states to publicly define their strategic war aims, at every stage of the conflict, their militaries' targeting practice would thereon derive from, and be evaluated in light of, this policy. Indeed, a war's strategy is dynamic, and its aims may mutate through its evolving stages. Therefore, the suggested requirement of defining a war's goals at each stage does not deny a belligerent state the freedom to define and change its goals evolutionarily, subject only to the prevailing law. It would dictate a coherent targeting practice consistent with the selected strategy. Since many, if not most, contemporary wars are limited rather than total, such a coherent targeting requirement would usually impose effective, substantial restrictions upon the scope of lawful targets. Although this coherency requirement, reflecting military professionalism, seems to be consistent with the interest of well-trained militaries, it will be elaborated below that mandatory declaration of a war's aims has to be externally imposed upon states, because of the ex-post disadvantages it entails from a grand strategy perspective.¹⁴⁵

The prevailing rule does not require the fighting states to declare their specific war aims, but is satisfied with popular rhetoric that pays lip service to self-defense. Even for a "real" self-defendant (setting aside a masquerading one), it allows militaries excessive discretion in their target selection for the sake of their own self-defense, especially when the war is a limited one. The current

¹⁴³ See discussion *supra* notes 108–14.

¹⁴⁴ See discussion *supra* note 96.

¹⁴⁵ For the advantages and disadvantages of strategic ambiguity, see discussion *infra* notes 191–202.

potential lawful targets bank is a natural product of the total war legacy. Put differently, by the same default that accepts total war as a lawful prototype, a wide spectrum of targets is considered as generically lawful military objectives “by their nature, location, purpose or use.” Indeed, the framework of a generic all-out war triggers a wide generic list of apparent military objects. If the model of lawful war is that of total warfare between mass armies, carried out in a bloody, industrial manner, the legal threshold—determining that lawful targets are such that make “an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”¹⁴⁶—is bound to reflect it and be very low.

Paradoxically, focusing upon the tactical level affords both the boots on the ground and their commanders, at all levels, a wide range of potential military advantages to pick and choose from. Furthermore, its dependency upon the subjective soldier’s perspective—including his or her perception of “the circumstances ruling at the time” (though this requirement has objective attributes, as well)¹⁴⁷—widens the scope of potential dual-purpose objects that surpass the legal threshold of military objective. The lawful targets are largely subject, currently, to the reasonable beholder’s perspective.¹⁴⁸ In a generic total-war strategic environment—and this is the legal world we live in, in light of the lack of a legal obligation to declare a self-defendant’s specific war aims—it is relatively easy to assume a clear, definite nexus between the potential targets of an attack, whose destruction is sought, and the generic military advantages to be gained. Due to this generality, the requirement of a causality nexus is a low threshold. Every tank or machine gun, each military bunker, might easily surpass

¹⁴⁶ API, *supra* note 5, art. 52(2).

¹⁴⁷ Indeed, one could argue that the contextual basis—“in the circumstances ruling at the time” —relates not only to the “nature, location, purpose or use” of the object, but should be interpreted broadly to include, in a given war, its strategic aims. Under this interpretation, a limited war is an important “circumstance” that will directly affect the target list and moderate its spectrum. *See, e.g.,* William Fenrick’s statement: “[t]he definition [of military objective, by API] is situation-dependent. A core of objects will be military objectives in virtually any conflict. Other objects may become military objectives in certain conflicts depending upon various factors, including the strategic objectives of the parties to the conflict and the degree to which the conflict approaches total war.” William J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 494 (2001). Though such an interpretation is welcome, it should be remembered that the “circumstances” requirement seems to relate to the attributes of the object: their nature, location, purpose, or use. While the criteria of location, purpose, or use are totally dependent on “circumstances,” even the by nature criterion depends upon them. For example, even a tank or warship, a military objective by nature, might not be considered so if it turns out to be a war museum piece. Furthermore, the specific aims of a war are currently not always public domain, and as argued above, the perception of circumstances is subjectively biased.

¹⁴⁸ In the legal assessment of the *in bello* proportionality—requiring that an expected “military advantage” be balanced vis-à-vis collateral damage—it has been accepted that the criterion of reasonableness should pertain to the reasonable commander. As the Committee Established to Review the NATO Bombing in Yugoslavia has stated: “It is suggested that the determination of relative values must be that of the ‘reasonable military commander.’” *See* ICTY NATO Bombing Report, *supra* note 134, at ¶ 50.

it due to its “nature”; many geographical points might be considered crucial due to their “location”; and the intended “purpose” or even actual “use” of a potential target might be either bona fide mistaken or easily manipulated. Furthermore, this overly broad scale of potential lawful military advantages in fact triggers a wider scope of lawful collateral damage, since the proportionality equation links the two by legalizing civilian damage not considered excessive. It is therefore necessary to adapt the potential generic lawful targets bank—which currently derives from the total war prototype—to the actual wars, which are generally limited.

C. Adapting Lawful Targets to Limited Wars: The Shrinking of the Potential Targets Bank

The suggested approach takes the doctrinal choices and war aims of a military as given, as long as they are lawful. It calls, however, for controlling the selected strategy and its effects, including collateral ones. It therefore advocates that states be required to publicly declare their concrete aims when engaging in a war, as well as to adjust the targeting rules of their war to its specific aims. If declaring war aims, adjusted at every stage of the belligerency, becomes mandatory, in many or most cases such statements will define the practical, attainable goals of a limited rather than total war. Any restricted strategic aim would naturally generate a war with a limited spectrum of objectives. This, in turn, would substantially reduce the potential number of lawful targets—especially dual-purpose objects—and might have the desired wholesale effect of reducing civilian damage.¹⁴⁹ Consider, for example, the United Kingdom’s military response to the Argentine conquest of the Falkland Islands in 1982. This conflict was mainly a dispute over the sovereignty of the Islands; it did not create an actual threat to the lives of British citizens. The explicit *ad-bellum* aim of the UK government was the expulsion of the invader.¹⁵⁰ Any *in-bello* military activity aimed directly at “halting and repelling” the invasion would have been lawful. However, bombing Argentinian homeland infrastructure not related (either actually or potentially) to the military action—such as bridges and railroads not used for the transfer of supplies and reinforcements to the front—would have been unlawful.

The expected diminution of the potential targets bank in limited wars, correlating a war’s aims with its lawful targeting list, is expressed in the 1994 San Remo Manual’s statement that “the legal rules should remain the same in both general and limited war situations but that the application of these rules to the facts should result in a more restrictive approach to targeting in limited

¹⁴⁹ In fact, due to the necessity principle it would reduce the killing of combatants as well. See Beer, *supra* note 14, at 820.

¹⁵⁰ The Falklands Campaign, which was the result of a 200-year long dispute between Argentina and the United Kingdom over the islands, began on April 2, 1982. The campaign lasted for approximately two months and resulted in over 1,000 casualties. See U.K. MINISTRY OF DEFENCE, *Falklands 25: Background Briefing*, <http://archive.today/grTy> (last visited May 17, 2017).

conflicts.”¹⁵¹ This process of adaptation, however, should not be perceived as imposed externally by a rigid legal formula; rather, under the suggested approach, it is a natural professional practice of adapting targeting rules to a changing strategic reality. It would reflect the internal-professional military process linking all levels of military activity, including targeting, in a coherent way toward a strategic directive.¹⁵² The suggested mandatory declaration by a self-defendant of its concrete war aims would facilitate this new legal expectation of a restrictive approach to targeting at all levels of war. In the following discussion, I will present that the demand for declaring the aims of war is not absolutely new.

D. Reasoned Declaration of War: Revisiting an Old Neglected Practice

The old practice of requiring public statements dealing with the reasons for war but not its aims has fallen into neglect.¹⁵³ In the era before World War II, the practice regarding reasoned declarations of war—or a conditional declaration of war in the form of an ultimatum that, if not met, would unleash hostilities¹⁵⁴—was enshrined in the Hague Convention (III) of 1907.¹⁵⁵ “The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.”¹⁵⁶

The benefit of this state of affairs was clear: a scenario was laid out regarding how to prevent hostilities without use of force, or at least how to

¹⁵¹ INT’L INST. ON HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 116, ¶ 40.8 (1995) [hereinafter SAN REMO MANUAL]. For a general call for adjusting the list of targets in a limited conflict, see Watkin, *Targeting in Air Warfare*, *supra* note 2, at 48–50 (arguing, *inter alia*, that “the scope of the conflict and the objectives being sought by its participants will act to set boundaries concerning the types and numbers of targets struck to obtain a legitimate strategic purpose. Given the relatively limited strategic objectives of most inter-State and non-State conflict in the 21st Century the scale of targets hit should also logically be reduced as both means and desired ends of the attacks must be linked to those objectives.”).

¹⁵² The SAN REMO MANUAL seems to reflect such a view regarding the imposition of an external legal formula, noting that “some participants had distinguished between general and limited war situations because they believed that in the latter case *more legal restrictions had to be applied* than in the former.” SAN REMO MANUAL, *supra* note 151 (emphasis added).

¹⁵³ For a description of the moral aspects of a declaration of war in a public, reasoned, and conditional statement, see Eric Grynawski, *The Bloodstained Spear: Public Reason and Declarations of War*, 5 INT’L THEORY 238, 240 (2013) (arguing that “in any reasonable interpretation of just war theory, an undeclared war is usually simply unjust”).

¹⁵⁴ See James Brown Scott, *The Work of the Second Hague Peace Conference*, 2 AM. J. INT’L L. 1, 15–16 (1908).

¹⁵⁵ Hague Convention (III) Opening of Hostilities, Oct. 18, 1907 [hereinafter Hague Convention (III)]. This feature was introduced by the Convention, following the Russo-Japanese war of 1905, to prevent cases of surprise attacks of bad faith. See James L. Tyron, *The Hague Conferences*, 20 YALE J. INT’L L. 470, 481 (1911); Edward G. Elliott, *The Development of International Law by the Second Hague Conference*, 8 COLUM. L. REV. 96, 103–04 (1908).

¹⁵⁶ Hague Convention (III), *supra* note 155, at art. 1.

minimize their scope.¹⁵⁷ The disadvantage was also clear: states could open hostilities for any reason.¹⁵⁸ In the aftermath of the two world wars, however, and in light of the UN Charter's prohibition on the proactive initiation of wars, this practice seems to have fallen into neglect. The Charter limits lawful belligerency to just two clear-cut justifications: self-defense in response to an armed attack,¹⁵⁹ or a Security Council resolution.¹⁶⁰ Given these new, limited justifications, the former practice of ex-ante explicit warning has come to be perceived as unnecessary and even counterproductive. The old practice is currently replaced in article 51 by an ex-post statement: "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council."¹⁶¹

What is called for is not the revival of the obsolete formal declaration, but a concrete and definite statement by belligerent states—arguing self-defense in all types of wars—which specifies their war aims right from the start. The mere argument of self-defense, though commonly employed by overt aggressors and innocent victims alike, should not suffice.

Though the discussion thus far has focused upon a demand for an explicit statement of the strategic goals in any belligerency, it should be emphasized that the public declaration is merely a means to transparency, while the more substantive and essential requirement is coherency in a military's activities, including targeting, across all levels of war. Indeed, the declaration of a war's aim is mainly a procedural requirement, a way of applying professional and legal constraints through the *ad bellum* necessity to moderate all dimensions of war. Thus this substantive demand remains relevant, though more difficult to prove, when the aims of war have not been publicly declared but are only implied (for example, through statements of politicians, actions actually taken, and other circumstantial evidence). Such a coherency requirement invites us to examine, in the coming discussion, what the desired nexus should be between a potential target and the military operation that legalizes it as a military objective.

¹⁵⁷ The idea behind the French proposition for the addition of reasons to the declaration of war was twofold. First, with regard to the would-be attacked country, said country would be able to know the reasons for the attack and thus decide in advance whether to lay down its arms and submit to the terms or it would know what was required of it to put an end to hostilities without force. Second, with regard to neutral countries, the statement of reasons in a declaration of war would allow those countries to consider their position with regard to the belligerent countries' conduct and act accordingly should they desire to. See DIV. OF INT'L L. OF THE CARNEGIE ENDOWMENT FOR INT'L PEACE, TRANSLATION OF OFFICIAL TEXTS OF THE HAGUE PEACE CONF., THE CONF. OF 1907, VOL I: PLENARY MEETINGS OF THE CONF., ANNEX B – OPENING OF HOSTILITIES, REP. TO THE CONF., 132 (1920); See generally Arthur Eyffinger, *A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference*, 54 NETH. L. REV. 197, 207 (2007).

¹⁵⁸ Charles G. Fenwick, *War Without a Declaration*, 31 AM. J. INT'L L. 694, 694 (1937).

¹⁵⁹ U.N. Charter art. 51.

¹⁶⁰ U.N. Charter ch. VII.

¹⁶¹ U.N. Charter art. 51.

V. The Required Nexus: Connecting Targeting to Strategy

A. *The Prevailing Nexus: “Effective Contribution to Military Action”*

In order to turn a potential target into a military objective, API article 52(2) requires a clear nexus between the objects—characterized “by their nature, location, purpose or use”—and the military action. A preliminary question concerns the relation between the two causality criteria required from the objects by API: the effective contribution to the military action and the definite military advantage to be gained upon the destruction of the military objects. On this point, “[m]any commentators simply assume that the two criteria logically presuppose each other,”¹⁶² and I will therefore follow this practical assumption.¹⁶³ The main question concerns the “closeness” of the connection between the ongoing military operations and the potential target. The simple case concerns objects that take part in the fighting (such as tanks or guns) or contribute to it (by supplying, for example, intelligence or logistics to the fighting forces)—these are clearly and directly connected to military operations.

It is commonly accepted, however, that even if the current connection between the target and the military action is not direct, it may be considered close enough due to its future potential use (“purpose”).¹⁶⁴ The HPCR Manual demonstrates this nexus threshold by way of the following examples of targets that are lawful even though they do not directly take part in the actual fighting: “storage depots or barracks far from the battlefield because such assets constitute reserves for further military action by the enemy . . . factories producing munitions and military equipment . . . a port, railroad, road or airport used in the transport of supplies necessary for the production by the factory of military items.”¹⁶⁵ An indirect connection, however, might be too remote to surpass this threshold if the object, though relevant to the fighting, does not actually have the potential to be used either at present or in a future belligerency. Thus, an object of a civilian nature might yield resources that enable future fighting, but itself is not part of the military action. The common approach is that it would be unlawful to target objects whose sole contribution to the fighting is the financial resources they produce, which may be used to finance the fighting.¹⁶⁶ Their indirect contribution, though effective, does not seem to be closely connected to the military action.

¹⁶² Dill, *supra* note 100, at 85 n.7; *see also* API, *supra* note 5, at art. 52(2).

¹⁶³ Dill further argues that “it is the connection of an object to the conduct of combat operations—those of the enemy belligerent (effective contribution) and one’s own (military advantage)—that puts an object into the category of military objectives.” Dill, *supra* note 100, at 85. This interpretation does not change the substance of our discussion with regard to connecting a military’s targeting to its strategy, but restricts it to the military advantage nexus requirement.

¹⁶⁴ HPCR Manual, *supra* note 132, r. 24 cmt. para. 1; DINSTEIN, *supra* note 3, at 95.

¹⁶⁵ HPCR Manual, *supra* note 132, at rule 24 cmt. para. 1.

¹⁶⁶ DINSTEIN, *supra* note 3, at 95–96.

By contrast, the American approach is to treat “war-sustaining” targets as lawful military objectives. The United States does not accept the widely accepted nexus, defined by API as “effective contribution to military action,” but rather widens it by replacing the “military action” with the expression “war fighting or war-sustaining capability.”¹⁶⁷ In the American view, the broadening of the nexus legalizes the targeting of objects whose proceeds would be used to fund the armed conflict.¹⁶⁸ This unique approach is rooted in the precedent set by the Union’s destruction of the Confederate states’ raw cotton, during the American Civil War.¹⁶⁹ It represents the extreme view and is usually by many states to posit a nexus that is “too remote.”¹⁷⁰ Indeed, economic warfare is no stranger to the prevailing law. If carried out through military blockade—the obstruction of approach to the enemy’s land for the purpose of preventing ingress and egress of vessels or aircraft¹⁷¹—it is lawful, in spite of the harsh “collateral” consequences there may be for civilians.¹⁷² Nonetheless, the intentional targeting of civilian objects on the grounds that their yields finance military activities is considered illegal under the common approach. According to this conventional wisdom, the distinction rule—the basic pillar of the law of armed conflict¹⁷³—should not be contingent on the use of the proceeds of civilian objects.¹⁷⁴

The current discussion is focused on the horizontal nexus between the object and the military action, as required by API article 52(2). There is agreement that the distance between the two—that is, the nexus between object and military action—should not be too remote; what “remote” means, however, is disputed. If the generic war prototype—total war—were the only one available, such a distance measurement might be sufficient. In each total war, it would

¹⁶⁷ See Military Commission Act of 2009, 10 U.S.C. § 950p(a)(1) (2009) (“The term ‘military objective’ means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.”); see also U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, IV-1 (2010), http://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions_2010.pdf.

¹⁶⁸ See Watkin, *Targeting in Air Warfare*, *supra* note 2, at 37.

¹⁶⁹ DINSTEIN, *supra* note 3, at 95. For a contemporary example of targeting the financial resources of an adversary, see the 2008 dispute over targeting the drug industry of the Taliban in Afghanistan. See generally Michael N. Schmitt, *Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law*, 12 Y.B. INT’L HUMAN. L. 301 (2009).

¹⁷⁰ HPCR Manual, *supra* note 132, r. 24 cmt. para 2. In support of the U.S. view, see, e.g., Ryan Goodman, *The Obama Administration and Targeting “War-Sustaining” Objects in Non-International Armed Conflict*, 110 AM. J. INT’L L. 663 (2016).

¹⁷¹ See, e.g., SAN REMO MANUAL, *supra* note 151, at 176–80.

¹⁷² According to the SAN REMO MANUAL, the declaration or establishment of a blockade is prohibited if “it has the sole purpose of starving the civilian population.” *Id.* at 179; see also API, *supra* note 5, at art. 54(1) (“Starvation of civilians as a method of warfare is prohibited.”).

¹⁷³ For example, the heading of article 48 of API—establishing the distinction rule—is a “Basic Rule.” API, *supra* note 5, art. 48.

¹⁷⁴ Practically, however, “there appears to be little difference in terms of scope between attacks directed at the war sustaining capacity of a State and a blockade.” Watkin, *Targeting in Air Warfare*, *supra* note 2, at 39.

suffice to ascertain which objects were “by their nature, location, purpose or use” making “an effective contribution to military action.” In limited wars, however, the potential horizontal “closeness” of the object to the military action should not be enough to turn it into a lawful military objective. The targeting of this object has to be relevant and effective—indeed, “close”—to the strategic goal as well. The suggested “vertical nexus” will be dealt with in the coming discussion.

B. *The Vertical Nexus*

The suggested approach would require states to select and publicly define their strategic aims—out of a wide spectrum of lawful strategic courses of action available to them—at every stage of the war, and to remain faithful to the professional corollaries of their preference, as long as the aims remain the same. The operational and tactical maneuvers and targeting practice would then have to be consistent and coherent with the strategy selected. (Although an explicit statement of the strategic goals in belligerency is preferable, the suggested approach is valid even when the aims of war are implied but have not been publicly declared.) Thus, in extreme cases, a decisive victory may be a self-defendant’s strategic choice, and if that is justified—as was the case with Nazi Germany¹⁷⁵—the entire spectrum of lawful targets should be available to it. However, in many or most cases, a limited strategic goal—for example, stopping an armed attack or deterring further acts of aggression as a matter of lawful self-defense—would require adjustment of the potential lawful targets bank. Here, though, a substantial constraint on targeting is strategic: not every potential lawful target would be relevant and effective in a given war with limited aims. For example, the destruction of dual-purpose objects or the killing of a large number of the adversary’s combatants, though possibly lawful, might be strategically useless and even counter-effective. At this point, law and strategy should meet: the law of armed conflict should contain and internalize constraining strategic considerations. The implicit paradox—why this manifest self-interest of a military should be codified and externally imposed upon it—will be dealt with next.

The legal ground justifying the vertical nexus is the necessity principle. Indeed, under the suggested approach, the necessity principle should be revised. This principle—one of the fundamental principles of the law of armed conflict—is theoretically perceived as imposing a restraint at the tactical level upon the exercise of military power beyond what is necessary to attain a military goal.¹⁷⁶ The suggested approach calls for upgrading the same *in bello* necessity constraint to the strategic level: to combine the tactical constraint with the suggested strategic one, through a revised reading of the *ad bellum* necessity. While *ad bellum* necessity is currently perceived as a precondition for the lawful exercise of military force in self-defense, as a matter of last resort,¹⁷⁷ under the suggested reading, it should also be crucial in defining the contours of the belligerency. The

¹⁷⁵ See discussion *supra* note 91.

¹⁷⁶ See *supra* note 106.

¹⁷⁷ See, e.g., DINSTEIN, *supra* note 109, at 231–32, 262; GARDAM, *supra* note 97, at 6, 148–53.

targeting of military objectives should be contingent upon, and consistent with, the strategic aims of a war. The *in bello* law of targeting cannot remain indifferent to the latter, even though strategy is decided first at the *ad bellum* level—before engaging in war, whenever the decisive echelon (in democracies, the civilian one) decides that it has no choice but to fight—and then adjusted *in bello*, during the entire belligerency. From this perspective, the suggested vertical nexus¹⁷⁸ connects the *ad bellum* and *in bello* discourses; to some extent it breaks down the wall currently standing between the two.¹⁷⁹ Indeed, the distortions caused by the choice made by the prevailing law—not to deal with the strategic issue of a war’s aims and to limit itself to the residual role of limiting the *in bello* hazards of war—should be revisited.

The expectation that a quantitatively-based *ad bellum* proportionality requirement might restrict the *in bello* operational scope of a military was presented above and rejected. I argued that quantitative proportionality has not been fulfilled in states’ practice, nor, on *realpolitik* grounds, could it be. Proportionality in relation to the amount of force or means exercised by an aggressor will not be accepted by self-defendant states on strategic grounds. The desire to ensure their victory will channel them to adopt the Powell doctrine of exercising “overwhelming force” whenever militarily possible¹⁸⁰ and permissible *in bello*. Furthermore, even the means-end reading of *ad bellum* proportionality, evaluating the use of military force against its legitimate ends, cannot accomplish the task of restricting the operational scope of a military, due to the inherent uncertainty relating to both its “ends” and “means” segments.¹⁸¹ Indeed, even if one accepts the argument that the means and methods of warfare should be *ad bellum* proportionate,¹⁸² how does one measure the *ad bellum* “excessiveness” or reasonableness of targeting?

By contrast, the suggested vertical nexus requirement, connecting strategy to tactics through the suggested reading of *ad bellum* necessity, is consistent with and to a large extent reflects reality. The fact is that wars are fought strategically. A law-abiding self-defendant selects its strategic war aims from the spectrum of lawful strategic courses of action available to it, at every stage of the war, and consequentially adapts—as a natural military professional exigency—its targeting rules to the changing strategic reality. Taking the current legal acceptance of a state’s selected strategy and the war aims deriving from it as a given, as long as it is within the lawful self-defence paradigm, invites the introduction of sequential necessity—imposing a restraint upon the exercise of military power beyond what is necessary to attain a military goal, at all levels of a military’s activities and during all stages of a belligerent conflict. The suggested vertical nexus would

¹⁷⁸ See discussion *supra* note 16.

¹⁷⁹ See *supra* note 103.

¹⁸⁰ See discussion *supra* notes 110–12.

¹⁸¹ See discussion *supra* notes 112–14.

¹⁸² See, e.g., GARDAM, *supra* note 97, at 169 (noting that “an electricity grid may meet the definition of a legitimate military target in IHL but its destruction in the particular circumstances pertaining at the time may be excessive in terms of achieving the aims of self-defence”).

constrain the scope of lawful targets; it reflects an internal professional military process, linking all levels of military activity in a coherent way toward a strategic directive. In contrast with the unrealistic requirement of quantitatively-based *ad bellum* proportionality, and the uncertainty related to the means-ends reading of *ad bellum* proportionality, sequential necessity derives from fine-tuned strategic thinking. Since it is qualitative and professionally based, it would probably be accepted by militaries if introduced legally.

How can these strategic constraining elements actually be exercised? The answer lies in military professionalism. Military planning is not a black box. It is a professional system, aimed at selecting the optimal courses of action in a due process, with its own manifest rules and procedures, most of which are in the public domain. For example, the wartime decision-making model used in the U.S. military consists of six steps, including “Intelligence Preparation” and “Mission Analysis.”¹⁸³ Preparing the targets bank in advance and updating it throughout the belligerency is an integral part of this professional process. Intelligence, from all available sources, is the main vehicle for validating military objectives and evaluating their relevance and effectiveness in the given battle (their “target value”).¹⁸⁴ Although “war is the realm of uncertainty,” as Clausewitz suggested,¹⁸⁵ and the “fog”¹⁸⁶ of war is a crucial factor in understanding military reality, intelligence gathering is the main tool used to clear it to the extent possible. A shortage of intelligence and problems in its interpretation are regular phenomena on the battlefield; nonetheless, it is a professional challenge to a military to study the culture and interests of its adversaries, their preferred patterns of war, and the way their militaries fight (their military doctrines). Militaries are required to maintain a quasi-industrial apparatus, aimed at producing an intelligence map of their adversary in general and validating their targets bank in particular.¹⁸⁷ This apparatus should be adjusted to the distinctions between total and limited wars and required to remove from the generic lawful targets bank irrelevant and ineffective targets vis-à-vis a given limited mission. This process of limiting targets should be carried out bona fide and in a professional and reasonable manner,¹⁸⁸ based upon the available data and an understanding of the adversary’s strengths¹⁸⁹ and weaknesses.¹⁹⁰ Indeed, it is this

¹⁸³ See NWC4111H, *supra* note 31, at 2.

¹⁸⁴ See Watkin, *Military Advantage*, *supra* note 30, at 289–96 (examining high-value targets).

¹⁸⁵ VON CLAUSEWITZ, *supra* note 4, at 101.

¹⁸⁶ *Id.*

¹⁸⁷ See generally Watkin, *Military Advantage*, *supra* note 30.

¹⁸⁸ The criterion of reasonableness (and the reasonable sphere more generally) is no stranger to the law of armed conflict. See discussion *supra* note 148.

¹⁸⁹ Though the Clausewitzian concept of “center of gravity” is disputed—since the military struggle is between dynamic maneuvering forces, while the physical concept relates to a static object—it may nonetheless demonstrate the militaries’ desire to attack their enemies’ sources of strength. See VON CLAUSEWITZ, *supra* note 4, at 258, 260, 391; see also JOINT PUB. 1-02, *supra* note 2, at 29 (setting forth the American definition of this concept as “[t]he source of power that provides moral or physical strength, freedom of action, or will to act”).

¹⁹⁰ For example, if the adversary is ruled by a dictator, striking “regular” military objectives might not deter it from its aggression, while economic sanctions aimed specifically against the ruler’s

apparatus's task to conduct an ongoing process, through trial and error, yet always professionally based. The reduction of targets should always be guided by the strategic considerations, as adjusted throughout a given war, and it should gain support from the current development of new technology, allowing both accurate intelligence and precise targeting.

C. Losing Strategic Ambiguity: Costs and Benefits

This Article has suggested introducing a mandatory statement of a belligerent state's concrete war aims—aimed at linking all levels of military activity in a coherent way toward a strategic directive—due to the humanitarian advantages gained from this clarity. In the following discussion, I will present the costs and benefits related to the suggested approach. In solving the paradox—why this professional self-interest of a military should be legally imposed upon it—the benefits of the strategic ambiguity will be introduced. Later, the counter advantages—favoring strategic clarity—will be presented. Though transparency in belligerency might be perceived as less popular, its moderating effect and long-term benefits should not be ignored.

If coherency in targeting is professionally requested by militaries, as suggested, why transform it into a legal rule? Since trained militaries tend to respect their own professional norms, ostensibly there should be no need to turn autonomously working and effective internal norms into mandatory ones. The answer to this perplexity lies in the tension between a state's grand strategy, dealing with its "policy," and its military strategy, relating to on-the-ground military activities.¹⁹¹ Indeed, the discussion thus far has focused upon the humanitarian advantage of the suggested requirement and its effect in reducing war's hazards, as well as its consistency with the military's interests. However, it has its disadvantages as well, mainly at the grand strategy level. Requiring self-defendant states to publicly define their war aims, at every stage of the war, comes at a cost. It damages the flexibility that strategic ambiguity affords.

Most grand-strategic relations are complex. Every message sent by a state is aimed at more than just its direct adversary. There are larger, multiple audiences, both domestically within the state's own national political system (constituents) and abroad (such as allies, friends and foes, and the international community as a whole). What's more, none of these groups is homogenous. For example, there are scenarios involving deterrence strategy in which ambiguity is

echelon, or striking specific military objectives which are important to it, in some cases might. Another example, though more controversial and legally much disputed, relates to targeting an adversary's morale. Military advantage might be physical, affecting actual military capabilities—e.g., by killing or injuring combatants or destroying or damaging military objectives—or mental, affecting an adversary's willingness to fight. Eroding the willingness of an enemy to continue fighting constitutes a military advantage. Objects whose targeting would definitely produce such an effect might constitute lawful military objectives. See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 506 (2012).

¹⁹¹ See discussion *supra* notes 18–21.

intentional. In some cases where secrecy is of the utmost importance, the party exercising deterrence does not want to disclose its strategy in full to the adversary being deterred (thus allowing it to intentionally circumvent it). In other cases, intentional ambiguity, expressed through vague demands, is aimed at inducing the recipient to comply without causing it undue embarrassment. *Realpolitik* considerations may dictate ambiguity as well, reflecting the deliverer's preferences regarding to whom among its multiple audiences it wants to be precise and clear. In many scenarios this is precisely the case, especially in open and democratic societies. Indeed, deterrence threats may primarily be issued to reassure allies rather than to affect actual opponents.¹⁹²

From this perspective, one could consider the transparency suggestion naïve, as was American General Stanley McChrystal's request for clarity as to what the American policy in Afghanistan was in 2010. While we enjoy the academic freedom to request transparency and coherency from fighting states, the highly decorated general was forced to submit his resignation after his criticism became public in a newspaper article.¹⁹³ Though he was formally relieved of his command due to what was perceived as a challenge to the constitutional norm of civilian control over the military,¹⁹⁴ the essence of his criticism concerned the President's probable desire to enjoy the benefits of ambiguity and maintain flexibility, hiding essential policy information related to the war's aims from his own leading commander, as well as from the American Congress and people.

Though there are cases in which grand-strategy clarity is preferred by leaders¹⁹⁵—for example, when conveying a deterrent message to either a potential or actual adversary—this Article has suggested introducing a mandatory statement of a belligerent state's concrete war aims even where such clarity is not the preferred course. The cost (if any) incurred by giving up grand-strategy ambiguity is residual to the humanitarian advantages gained.

Indeed, while the suggested clarity is motivated by humanitarian considerations, it has ex-post strategic advantages even when it is imposed upon states. It may reduce the anomaly of popular expectations associated with limited wars. It might help to bridge the gap between stark rhetoric—which is common in the case of a self-defendant state, reflecting domestic public opinion's desire for a

¹⁹² See Patrick M. Morgan, *Deterrence Now* 214 (2003); see also SCHELLING, *supra* note 85.

¹⁹³ See Scott Wilson & Michael D. Shear, *Gen. McChrystal is Dismissed as Top U.S. Commander in Afghanistan*, WASH. POST (June 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/23/AR2010062300689.html>.

¹⁹⁴ See HEW STRACHAN, *THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE* 210–11 (2013). As to the constitutional effects of this ambiguity, see discussion *infra* note 201.

¹⁹⁵ An analysis of the advantages incurring to a leader who “commits” herself to a specific course of action is beyond the scope of this Article. For the sake of the current discussion, however, such a commitment might reflect the leader's desire to influence third-party choices, or to be bound in the future by its current preferences. See generally THOMAS C. SCHELLING, *STRATEGIES OF COMMITMENT AND OTHER ESSAYS* (2006).

decisive victory in the old style, for example in the “war against terror”—and the strategic reality, which usually does not grant knock-out opportunities or decisive victories in such wars. By publicly stating its aims at every stage of a war, a law-abiding self-defendant would convey, in advance, a moderate message regarding the diminishing utility of its military force. The politician’s intuitive temptation to join the crowd in its preference for unnecessary brutality, in the futile search for knock-out opportunities, would be overridden by the strategist’s recognition of what is actually achievable.¹⁹⁶ Indeed, a transparent commitment by states’ leaders to be judged by (relatively) moderate war aims would force them to be more precise when declaring them to their constituents. Furthermore, this threat of public scrutiny minimizes the risk that leaders might manipulate their war aims just for the sake of expanding their actual target bank. The apparent benefit (if any) of inflated targets, due to the widening of a war’s aims, would be offset by the inflated expectations and frustration of their constituents.

In addition, requiring a country’s leaders to state their war aims and demonstrate the connection between these aims and their militaries’ actual targeting would help the self-defendant state face the legitimacy demand of both domestic and international public opinion. Indeed, many current wars are characterized by relatively easy media access to conflict zones, with all of the parties involved fighting for the public’s “hearts and minds,”¹⁹⁷ both domestically and internationally. Transparency as to the war’s declared aims and consistency between those aims and the actual fighting might help to reassure public opinion.

Furthermore, the requirement of strategic clarity is consistent with the prevailing trend toward transparency and accountability in the international arena. The transparency requirement may be motivated by both domestic and international pressures. For example, there may be a demand to compensate for the rising influence of intergovernmental institutions on national public policy or the increasing involvement by national governments in setting international law and criticism of governmental policy decisions, by both the public and NGOs, may require a response in the form of such transparency.¹⁹⁸ The demand for transparency is coupled with a demand for accountability, backed by international intervention in the decision-making processes of national governments.¹⁹⁹ In the

¹⁹⁶ Such clarity might prevent a potential slippery slope during wars when political leaders come under huge pressure from their constituents and domestic political circles to fulfill their obligation to defend their citizens in a short time and “by all means.” The temptation to please constituencies by targeting unnecessarily is always there. This temptation is further exacerbated by the frustration of both military and political leaders with the substantial gap between the modern targeting capabilities of militaries and the usually limited number of lawful targets.

¹⁹⁷ The phrase “hearts and minds” is generally associated with the importance of using “minimum force.” See, e.g., Dixon, *supra* note 84, at 353.

¹⁹⁸ Megan Donaldson and Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 ANN. REV. L. SOC. SCI. 119, 127–29 (2013).

¹⁹⁹ EYAL BENVENISTI, GLOBAL TRUST WORKING PAPER SERIES 6/2014, THE POTENTIAL AND LIMITS OF GLOBAL REGULATION OF SOVEREIGN DISCRETION 16–22. Intervention is carried out for various reasons, such as making sure that governments comply with what they agreed to,

law of armed conflict, this phenomenon is manifested by the “criminalization” of breaches of its core values.²⁰⁰ In light of these trends, it is perfectly fitting to require a belligerent state (even one that appears to be a self-defendant) to publicly declare its war aims.

The suggested approach might have domestic constitutional advantages, as well. For example, the American lesson demonstrates that the War on Terror, declared in reaction to the 9/11 attacks, can be perceived as having a perpetual life of its own. In the U.S. conflict in Iraq, “Congress self-consciously restricted the war’s aims to narrow purposes—expressly authorizing a limited war. But the Bush Administration evaded these constitutional limits and transformed a well-defined and limited war into an open-ended conflict operating beyond constitutional boundaries.”²⁰¹ Indeed, although clarity and transparency in one’s own fluctuating war aims do not really promise anything regarding one’s adversary (since it takes two to tango or make war), they may have, at least, their own domestic advantages.

Finally, a side effect of the suggested approach is a lifting of part of the veil from the popular, yet problematic, argument that the law ties Western liberal democracies’ hands when fighting limited wars, especially asymmetric ones.²⁰² An implicit message of this tied-hand argument is that it is the law that bears the blame for the mixed results of such wars, and that in a “free world” not subject to legal constraints, militaries would have the knowledge, skills, and capabilities to deliver a decisive victory. In reality, however, the problem of these wars is not legal, but rather is mainly strategic. The strategic ambiguity is rooted, in many cases, in strategic blindness and operational difficulties in fighting this type of wars. Rather than admit the inherent difficulties of fighting limited wars, leaders find a convenient scapegoat in the law that allegedly ties their hands. Requiring consistency between the strategic aims of a state, its actual military operations and its lawful targets list would oblige leaders to define these aims and not take shelter in the fog of strategic ambiguity. Probably, the more transparent the reality, the more the actual strategic difficulties will surface in both domestic and international public consciousness, and the less legal constraints will be perceived as an impediment to a self-defendant’s victory. A transparent process of public

promoting global welfare through cooperation, compensating for democratic failures, and more. *Id.* at 6–11.

²⁰⁰ See generally WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2007).

²⁰¹ See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 447 (2011); see also President Barack Obama, Remarks at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-President-national-defense-university> (noting that “[o]ur systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end”).

²⁰² See, e.g., HCJ 5100/94, *Public Committee Against Torture v. Israel* 53(4) PD 817, at para. 39 (1999) (Isr.). This was the Supreme Court of Israel’s ruling with regard to the ban on the use of torture in security interrogations, stating that a democracy must sometimes fight its non-law-abiding adversary “with one hand tied behind its back.” *Id.*

internalization of this type of war's special strategic attributes would create awareness of a reality in which neither the law nor lawyers should be blamed for its enduring unresolvedness.

VI. Concluding Remarks

The prevailing law rejects the strategic discourse when it comes to defining the contours of the law of armed conflict. However, when it comes to determining military advantages and potential lawful targets, reality prevails and states' practice demonstrates that their targets bank in a given war reflects, *inter alia*, their strategic war aims. Contrary to the common legal perception, this Article has called for the adoption of the strategic discourse and leveraging its constraining force in order to minimize both civilian and combatant suffering.

The suggested approach offers a new stage in the evolution of the law of armed conflict. The current phase is characterized by the distinction rule, which utterly rejects the civilian dimension of total war. War is no longer perceived—as it used to be, under Napoleon's legacy—as people fighting against people. The law explicitly chose to limit the scope of war and channel its hazards to the combatants, while prohibiting intentional damage to noncombatants. Despite that rejection, however, the same prevailing law chose total war between militaries, by way of default, as its prototype for an inter-state war. This Article calls for taking the legal evolution a step further and recognizing the legal implications of the strategic phenomenon of limited wars. The classification of a war as a limited one should have its own legal consequences, as demonstrated in this Article, through the law of targeting. It should affect all of war's dimensions with respect to both combatants and noncombatants.

Is the above discussion purely normative, or does it have some positive roots in the prevailing law? The suggested answer tends towards the latter. The demand for a vertical nexus—connecting strategy to tactics and requiring operational and tactical maneuvers and targeting practice to be consistent with the former—can be perceived as purely normative, or, as implied, as a call for connecting the *ad bellum* and the *in bello* discourses. Indeed, the suggested reading of vertical necessity may echo the call in the literature for a broad interpretation of *ad bellum* proportionality, evaluating the use of military force against its legitimate ends.²⁰³ We have deemed such a reading, though consistent with the effort to connect strategy to tactics, less preferable than this Article's suggested vertical necessity.²⁰⁴

Finally, the main theme of this Article surfaces an issue that requires further elaboration. The suggested call—for coherency between strategy and a military's operations and targeting—follows the current legal acceptance of a state's selected strategy and the war aims derived from it as given. The paradox is

²⁰³ See discussion *supra* notes 113–14.

²⁰⁴ See discussion *supra* notes 181–82.

that the implicit acceptance of the Napoleonic-Clausewitzian model as the archetype of war is inconsistent with the underlying humanizing rationale of the contemporary law of war. In the face of this paradox, I will offer only preliminary clues regarding two initial alternatives that might be considered in the future, in light of our discussion. The first and more ambitious, though less realistic, would be to challenge the implicit adoption of the Clausewitzian “killing madness” as a lawful archetype of war. Another, albeit less ambitious, legal alternative would be to accept the current reality and take the reluctance of the law to interfere with the macro issues of selecting military doctrine and strategy as a maxim. Even so, the micro affairs of actual fighting are not immune to legal intervention. The protection granted, under this maxim, to the military strategy selected should not cover the operational and tactical aspects of war. Under this approach, a new imperative would be added to the contemporary law of armed conflict, requiring a military to select the course of action that is least harmful to its adversary’s combatants and civilians while in pursuit of its given military aims within its selected strategy.²⁰⁵

²⁰⁵ Currently, with regard to military objectives, while obtaining a given “military advantage,” the least harmful alternative should be adopted, but only with respect to civilians. *See* API, *supra* note 5, at art. 57(3).