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**The Blind Spot of the Law of Armed Conflict**

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**THE BLIND SPOT OF THE LAW OF ARMED CONFLICT**

By Yishai Beer\*

**Abstract**

The modern law of war prohibits the unilateral-proactive exercise of military force in the international arena. Nevertheless, once war occurs, the law of armed conflict does not address its core effects, but deals only with reducing its consequential-residual hazards. It requires minimizing collateral damage to civilians and restricting “excessive suffering” to combatants, or limits the use of marginal weapons. However, the law turns a blind eye to the more crucial issue of the pattern of war and its doctrinal – strategic, operational, and tactical – dimensions, which actually determine how militaries fight and the brutal scope and effects of any given war.

Post-World War II law of armed conflict's original sin lies in its passive acceptance of the Clausewitzian-Napoleonic prototype of war. It adopts – or, at least, does not reject – the mass killing-oriented type of total war, aimed at the “all-out” destruction of the adversary’s entire army, as a given. This explicit or implicit legal adoption of the bloodiest version of war gives rise to three paradoxes. First, a legal system aimed at introducing moderating effects during wartime and attempting to humanize it seems to have embraced an extreme bloody vision that contradicts its core agenda and values. Second, this most brutal model of war, with its Grand Battle legacy, is accustomed to seeing human beings, on both sides of a conflict, as merely instrumental and it rejects the mere notion that human rights exist. Third, the UN Charter's prohibition of the use of military force prefers, and usually dictates, the preservation of the status quo in the international order. The grand vision of war is aimed at precisely the opposite outcome: changing the existing state of international affairs and the world order.

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This article demonstrates that there was indeed an alternative vision to war, for the purposes of the law of armed conflict, in the aftermath of World War II. The military alternatives to the grand battle prototype – well rooted in the thinking and writing of military strategists, followed by centuries of military fighting history – were there, and a moderate legal alternative, featuring restricted war aims and patterns, had already been suggested, for example, under the 1868 St. Petersburg Declaration. In retrospect, three explanations, based upon states' and militaries' sovereignty and culture, are offered for the adoption of the grand battle type of war as a given, in the framework of the legal discourse, in what might seem, *prima facie*, as a counterproductive legal arrangement.

The gap between the humanitarian goals of the modern law of armed conflict and its actual counter-effective substance is the focus of this article. If that gap is to be bridged, this article points to one of the potential places from where to start. Towards that end, it concludes by offering preliminary clues regarding future alternatives.

## Introduction

What should have been expected of a legal system, which was established following the trauma of two world wars by “the people of the United Nations”, in the hope of “sav[ing] succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights...”? Reading only these lines, taken from the UN Charter preamble, one might expect the post-World War II international law of war – combining both the Charter and the Geneva Conventions – to have considered two possible strategies. The first, minimalistic in nature, would be to take the mere existence of war as given, and try to humanize it and reduce all aspects and dimensions of its hazards, as much as possible. The second, maximalist strategy would be to try to outlaw war altogether *ex ante*, but in cases when war has already started (whether legally, as an exception to the rule, or not), to humanize it and reduce all dimensions and aspects of its hazards, *ex post*, to the greatest possible degree. In any case, it is reasonable to expect that the rules of armed conflict would have been changed dramatically, both in theory and practice, and in all dimensions, after the trauma of two world wars.

Indeed, legal changes were instigated in the 1940s by the Charter and the four 1949 Geneva Conventions. The Charter imposed the *ad bellum* (“the right to fight”) <sup>1</sup> prohibition concerning the proactive use of military force in international relations under Article 2(4).<sup>2</sup> It recognized two exceptions, allowing the use of reactive military force in cases of individual or collective self-defense against an armed attack, or pursuant to a Security Council authorization.<sup>3</sup> The Geneva Conventions, on the other

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<sup>1</sup> The traditional distinction, under the prevailing just war discourse, is between the rules of *jus ad bellum* (dealing with “the right to fight”) and those related to the *jus in bello* (“how to fight right”).

<sup>2</sup> Article 2(4) of the UN Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para 4. This prohibition follows a former proscription by the 1928 Kellogg-Briand Pact. Under Article 1 of the Treaty, the Contracting Parties have stated that “they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”. General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 94 L.N.T.S 57. Under the Treaty, “The High Contracting Parties” further agree “that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means”. *Id* art. 2.

<sup>3</sup> See ch. VII of the UN Charter. (e.g., Article 51 states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the

hand, reflect the *in bello* ("how to fight right") response to the trauma of the world wars, but are very limited in scope, primarily concentrating on the consequences and victims of belligerent activities. They 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.<sup>4</sup>

The rhetoric of the prevailing law, banning one UN member from threatening or using force against another, may be very impressive; its effectiveness, however, definitely is not. An interim balance of the performance of the UN and the effect of Article 2(4), conducted 55 years after the San Francisco Conference, has been presented by Glennon:

[I]nternational "rules" concerning use of force are no longer regarded as obligatory by states. Between 1945 and 1999, two-thirds of the members of the United Nations--126 states out of 189--fought 291 interstate conflicts in which over 22 million people were killed. This series of conflicts was capped by the Kosovo campaign in which nineteen NATO democracies representing 780 million people flagrantly violated the Charter. The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*.<sup>5</sup>

However, this newly established *de jure* universe – a new legal world, which does not exist in reality<sup>6</sup> – nevertheless must elicit wonder at its lack of coherency. Of the two

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United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”). For a summary of these rules and later development, see e.g., W Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 83 (2003).

<sup>4</sup> The 1949 Geneva Conventions updated the terms of the first three treaties (1864, 1906, 1929), and added a fourth treaty. The Geneva Conventions adopted before 1949 were concerned strictly with combatants, not civilians.

<sup>5</sup> Michael J Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the The United Nations Charter*, 25 HARV. J.L. & PUB POL’Y 539, 540 (2001-2002). Earlier, Thomas Franck pointed to the fact that “[i]n the twenty-five years since the San Francisco Conference [the establishment of the UN in 1945], there have been some one hundred separate outbreaks of hostility between states”. 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, 810-11 (1970) (hereinafter *Who Killed Article 2(4)*). Franck notes that “[t]he prohibition against the use of force in relations between states has been eroded beyond recognition”, due to three main factors: “1, the rise of wars of ‘national liberation’; 2, the rising threat of wars of total destruction; 3, the increase of regional systems dominated by a Superpower.” *Id.*, 835. Other commentators focus on other main causes, including warfare’s changing nature from inter-state to intra-state (which in some cases might be consistent with Franck’s first factor of ‘national liberation’), or the rise in the demand for humanitarian interventions.

<sup>6</sup> To put it differently, as Michael Walzer does: “[t]he lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.” Michael Walzer, *JUST AND UNJUST WARS*, XXI (4th ed. 2006).

optional strategies one might have expected the new legal order of the international community (“the people of the UN”) to adopt – neither has been fully embraced. Purportedly, the maximalist strategy – outlawing war altogether – has been adopted. All states excel in paying lip service to the sublime notion of banning wars. But, once the *ad bellum* Rubicon has been crossed by an aggressor and a war has started, the scope of the prevailing *in bello* rules is limited. The challenge of humanizing the patterns of war by substantially reducing its main hazards to all relevant players, civilians and combatants alike, has not (at least, not fully) been met. This, as will be demonstrated, is a substantial failure: it does not relate to implantation problems (and the gap between rhetoric and actual practice), but rather points at **a substantial legal lapse: the lack of specific *in bello* rules dealing with the actual patterns and practices of war.** The prevailing law does not deal with doctrinal choices or with the military’s strategic and operational decisions.

Let us begin with an analysis of the scope of protections currently allotted to civilians and combatants. With regard to civilians, the *in bello* rules have been substantially extended by the 1977 Additional Protocols to the Conventions that grant, *inter alia*, the civilian population “general protection against dangers arising from military operations.”<sup>7</sup> The scope and effect of this “general protection” will be dealt with at a later stage of this article. What can be said at this stage, however, is that it reflects a substantial step towards its declared aim. When it comes to the protection of combatants, though, the scope of the *in bello* rules is very limited. They deal strictly with reducing war’s residual hazards (the “excessive suffering” type of restriction<sup>8</sup> or

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<sup>7</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51 para. 1 relating to the “Protection of the civilian population”, Jun. 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 Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S 609 (hereinafter APII).

Among other protections, API Article 51 allots civilians protections against deliberate attacks meant to spread terror within the population; protection against indiscriminate attacks; protection against attacks by way of reprisal, and more.

<sup>8</sup> Thus, “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” API, *supra* n 7, art. 35(2). A similar rule was established in 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 para. e, Oct. 18, 1907 (hereinafter the Hague Regulations of 1907).

limitation of the use of marginal weapons<sup>9</sup>). Indeed, **in practice the prevailing legal rules turn a blind eye to the more crucial issue of war's aims and its doctrinal – strategic, operational, and tactical – dimensions, which actually determine how militaries fight and the brutal scope and effects of any given war.**<sup>10</sup>

If the international community really wanted “to save succeeding generations from the scourge of war,” this lacuna should have been filled. **The scourges of war endured by both combatants and civilians derive, to a large extent, from its aims and the strategic and operational military aspects of its execution; those aims and aspects are the source of the consequential bloodshed, among soldiers and, to a lesser extent, civilians** (which might be considered lawful as collateral damage). In some circumstances, however, the prevailing rules are too permissive toward civilian collateral damage, and they do not put a substantial constraint on the

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<sup>9</sup> See API, *supra* n 7, art. 35.

<sup>10</sup> For the sake of the current discussion, the common distinction between the three levels of war is taken as a given. For example, the US Joint Operations manual defines the strategic level or strategy as the development of “an idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national and/or multinational objectives”; the operational level as linking “the tactical employment of forces to national and military strategic objectives” through the use of operational art, defined as “the employment of military forces to attain strategic goals through the design, organization, integration, and execution of battles and engagements into campaigns and major operations”; and the tactical level or tactics as “the employment and ordered arrangement of forces in relation to each other.” See definitions at Joint Chiefs of Staff, *JP 3-0: Joint Operations* (11 August 2011), p I-13 through I-14, available at: [http://www.fas.org/irp/doddir/dod/jp3\\_0.pdf](http://www.fas.org/irp/doddir/dod/jp3_0.pdf). The Australian Army defines the strategic level of war as being 'concerned with the art and science of employing national power'; the operational level as being 'concerned with the planning and conduct of campaigns'; and the tactical level as being 'concerned with the planning and conduct of battle... characterized by the application of concentrated force and offensive action to gain objectives'. ADFP101, quoted in Martin Dunn 'Levels of War: Just a Set of Labels?' (1996) Research and Analysis: Newsletter of the Directorate of Army Research and Analysis No. 10. <http://www.clausewitz.com/readings/Dunn.htm> (last visited Nov. 7, 2012). The American ambivalence towards the operational level of war is explained by Luttwak who notes that “... the absence of the term referring to the operational level reflects an towards the whole conception of war associated with it [the operational level]... It is not merely that officers do not *speak* the word but rather that they do not *think* or practice war in operational terms, or do so only in vague or ephemeral ways” [emphasis in the original]. Luttwak goes on to pin this absence on the U.S.'s military experience in the two World Wars. The aforementioned lack of a precise terminology for the operational level also emanates from various methodological difficulties, as explained by Naveh, who notes, *inter alia*: “The methodological difficulty derives first and foremost from the fact that no serious effort has ever been made in the West to provide a coherent historical framework for the evolution of operational cognition. [...] The methodological difficulties mentioned above are compounded by the lack of precise terminology and definitions for the specific laws and phenomena within the operational level of war.” See, Edward N Luttwak, *The Operational Level of War* 5 INT'L SECURITY 61, 61 (1980/1981); Shimon Naveh, IN PURSUIT OF MILITARY EXCELLENCE 2, 8-13 and the discussion therein (1997) (hereinafter IN PURSUIT).



“legitimate bloodshed” among combatants in any given war, nor do they have an effective say about it. Nevertheless, they pay lip service to the latter. The formal *in bello* response to this challenge is provided by the fundamental principles of the laws of war: necessity and humanity. The necessity rule is perceived as imposing a restraint on the exercise of military power unnecessary to attain the military goal.<sup>11</sup> The humanity requirement forbids the use of means and methods of warfare that cause superfluous injury or unnecessary suffering.<sup>12</sup> “The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary.”<sup>13</sup>

**Though the rhetoric of the necessity principle is impressive, its performance is not. It can be very easily manipulated and circumvented. In practice, it simply does not seem to deliver any actual restrictions.** Thus, Benvenisti concludes: “[T]he traditional *in bello* proportionality analysis never required the attacker to explain the necessity of attaining the military objective; the necessity of such actions was taken for granted.”<sup>14</sup> The ICRC, too, admits that “[i]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL.”<sup>15</sup>

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<sup>11</sup> In theory, military necessity has the dual legal function of being both an enabling and a constraining principle. “It allows parties in conflict to inflict direct and intentional damage onto the military personnel and targets of the counterparty. But it also restricts permissible damage to that which is legal under the laws of war, and more importantly, to that which is actually necessary to attain the military goal.” Gabriella Blum, *The Laws of War and the “Lesser Evil”*, 135 YALE J. INT’L L. 1, 3 (n. 5) (2010) (referring to Antonio Cassese, INTERNATIONAL CRIMINAL LAW 280-284 (2nd ed. 2008)).

<sup>12</sup> See the prevailing rule, *supra* n 8

<sup>13</sup> UK Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT 23 (2005).

<sup>14</sup> 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, at 544 (2009).

<sup>15</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 80 (2009). Available at: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. Indeed, “[v]ery few scholars pay careful attention to the requirement of necessity, even though it is a universal requirement of self-defense...”. George P Fletcher and Jens David Ohlin, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 93 (2008). This approach has been echoed by Carnahan: “Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.” Burrus M Carnahan,

**This article will try to analyze what might be perceived as a bipolar legal disorder: a system that outlaws war altogether, but does not interfere with the actual-substantial dimensions of its conduct once it has started. The chosen legal regime deals only with the two extremes: the *ad bellum* rejection of wars on the one hand, and the mitigation of war's consequential hazards at the tactical-micro (*in bello*) level on the other. It does not deal with the strategic, operational and tactical levels, which derive from a war's aims and determine its pattern and scope. These are the most important issues, regarding how wars are or ought to be fought and their actual effects.** In case the visionary prohibition on starting war were to fail, a practical "second line" of legal defense – designed "to save succeeding generations from the scourge of war" – might have been expected to interfere with all dimensions of war. There is a broad spectrum between total wars – the scope of whose destruction and slaughter relates to both civilians and combatants – and "limited wars". Wars can be limited in all dimensions. They can be contained in their aims and limited, for example, in their physical dimensions to a single battle, restricted in its duration, terrain and participants.<sup>16</sup> The law of armed conflict should have a say about these things. Within its stated agenda, it should show 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, however, has not been fulfilled. **In light of this glaring lacuna, it is necessary to examine the law's**

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*Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 231 (1998).

<sup>16</sup> At this stage of the discussion, a pitched one day battle, very common till the middle of the nineteenth century, might serve as an example of a limited war. "Two armed groups meet in pitched battle. There is a chaotic struggle. Many of the combatants are killed. At the end of a conflict lasting a few hours or perhaps an entire day, one group flees, or perhaps both do. One group, usually the one that manages to hold its ground amid the terror and killing, is deemed the victor. ... Despite its horror and savagery, a pitched battle is what social scientists call a 'conflict resolution mechanism.' It is a contained and economical way of resolving a dispute between two warring groups or countries. It may be true that the direct participants in a battle are exposed to a form of nightmarish violence, but the fact remains that the result of fighting a pitched battle is to limit violence in the community at large: if a conflict can be decided by a day of concentrated killing on the battlefield, then violence can be prevented from spilling over to the rest of society. Staging a pitched battle, savage though it is, is a way of limiting war, of sparing society the horrors of worse forms of warfare." James Q Whitman, VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR, 12, 14 respectively (2012).

**"all or (almost) nothing approach" – either a total ban or a too minimal intervention in the scope of wars – which seems to be a manic-depressive type of legal behavior.** The question arises: Do the prevailing rules represent a genuine legal failure or, rather, a *real politic* arrangement or compromise, internalizing the huge gap between rhetoric and practice in the international arena? Formally speaking, the target of our wonder and discussion is not the UN Charter's effective failure, but rather the comprehensive legal approach adopted by the international community in response to the World Wars, in both the Charter and the 1949 Geneva Conventions (and additional 1977 Protocols). The Conventions concluded the *in bello* reaction to the atrocities of World War II and are only aimed at mitigating war's consequences and helping its victims.<sup>17</sup>

The article will proceed as follows. I will begin in Part I with a brief historical presentation of the changing pattern of war over the years. The pendulum movement of this pattern has ranged from limited wars with limited, sometimes very modest, objectives to the combined military legacy of Napoleon and Clausewitz and the evolution of their grand battle prototype of war. As I will show, the Clausewitzian all-out war was aimed at the decisive and total destruction of the adversary's military and the extinction of its will to fight. In the historical discussion that follows, I will show that **Napoleon's bloody practice and Clausewitz's theory do not hold a monopoly on military thinking and practice.** This introduction will be followed by Part II, in which I will demonstrate that the modern law of armed conflict nonetheless granted that view undeserving privilege. **The contemporary law explicitly adopted (or, at least, did not reject) the Napoleonic model of total warfare between armies, carried out in a bloody, industrial manner and aimed at the destruction of the adversary's entire enemy. Indeed, the bloodiest Clausewitzian vision – or, more precisely, the part of it dealing with an "all-out" war between mass armies – was taken as a legitimate prototype of war.** (The legality of the other part of the total war vision, dealing with war between the civil populations of the rival

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<sup>17</sup> The Geneva Conventions were preceded by the earlier Hague Conventions addressing methods of warfare and prohibiting the use of specific weapons. See the "institutional remark" *infra* notes 98-102 and accompanying text.

states, was, however, rejected). This discussion will conclude with the factual assertion that the modern law of armed conflict has turned a blind eye to military strategy and its operational effects. It will argue, furthermore, that this silence of the law has had a counter-effect: promoting the roar of the cannons and the hazards endured by combatants and civilians alike.

The aforementioned explicit or implicit legal adoption of the bloodiest version of war gives rise to the three paradoxes that will be discussed in Part III. The first paradox is that a legal system aimed at introducing moderating effects during wartime and attempting to humanize it has adopted – or, at least, not rejected – the mass killing-oriented type of war, the bloody Clausewitzian vision, as its prototype of war. The type of war envisaged by it – an absolute life-or-death struggle between armed nations and their mass militaries – contradicts that body of laws' core agenda and humanitarian values. The second paradox is that this most brutal model of war, with its Grand Battle legacy, is accustomed to seeing human beings, on both sides of a conflict, as merely instrumental, and rejects the mere notion that human rights have substantive meaning. The third paradox is that the UN Charter's prohibition of the use of military force prefers, and usually dictates, the preservation of the *status quo* in the international order. The grand war vision is aimed at precisely the opposite outcome: changing the existing state of affairs and world order. Furthermore, this article will demonstrate that, professionally speaking, the military effectiveness of such mass killing-oriented war is doubtful. Paradoxically, a dehumanizing practice that is neither moral nor fully effective is still lawful. In contemporary times, only in the applicable legal regime – the law of armed conflict – do we still find acquiescence to this Clausewitzian type of bloody war.

Confronting these paradoxes and the more humane military alternatives that were not adopted as legally binding, in Part IV of this article I will try to offer explanations for the puzzle, ranging from *real politic* rationalizations based upon militaries' and states' sovereignty to culturally based ones. The former suggest that the current contour of the legal paradigm reflects the red lines imposed by the superpowers. The founders of the prevailing law were not about to tolerate any international interference in their internal affairs, including their military strategies and operational practices. The latter, culturally

oriented type of explanation actually undermines the paradigm of the law of armed conflict, challenging the very notion that war can be (fully) effectively regulated. In the long run, however, it might offer hope – naïve, perhaps – of a paradigmatic, culturally based change in the pattern of war. The article will conclude by offering preliminary clues regarding future alternatives. The modest recommendations, all within the prevailing legal paradigm, are aimed at bridging the gap between the humanitarian goals of the modern law of war – as expressed, for example, in the desire “to save succeeding generations from the scourge of war” – and its actual counter-effective substance.

### I. The Changing Pattern of War

#### *The Evolution of the “Great Battle”*

This study focuses on the substantial effect of the combined military legacy of Napoleon and Clausewitz on the prevailing legal rules, and the perception of their great battle as the prototype of war by the modern law of armed conflict. It should be noted, however, that the pattern of war has changed dramatically over the years. The pendulum movement of this pattern – as derived from the dynamic political, economic, technological, social and cultural context of war – affects the scope of war and its duration. For example, as noted by Weigley, “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 relatively rare.”<sup>18</sup> 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.”<sup>19</sup> This pattern of war was echoed by Clausewitz. As Azar Gat points out, “Clausewitz’s conceptions were clearly a

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<sup>18</sup> Russell F Weigley, *THE AGE OF BATTLES*, XII (1991) (Explaining the pendulum swing of the pattern of war starting from the medieval ages).

<sup>19</sup> Martin Van Creveld, *COMMAND IN WAR*, 90 (1985).

particular reflection of Napoleonic warfare as perceived in its peak years.”<sup>20</sup> 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.”**<sup>21</sup> These words, which sound as if they might have been taken from Bram Stoker's 1897 novel 'Dracula',<sup>22</sup> reflect Clausewitz's focus on the great battle, 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: “Thus it is evident that destruction of enemy forces is always the superior, more effective means, with which others cannot compete.”<sup>23</sup>

Indeed, according to Clausewitz:

No matter how a particular war is conducted.... the very concept of war will permit us to make the following unequivocal statements: 1. Destruction of the enemy forces is the overriding principle of war .... the principal way to achieve our object. 2. Such destruction of forces can *usually* be accomplished only by fighting. 3. Only major engagements involving all forces lead to major success. 4. The greatest successes are obtained where all engagements coalesce into one great battle.<sup>24</sup>

The Clausewitzian vision of battle has two dimensions: military and civilian. An all-out war usually pertains to the military and the people of both adversaries. It will include not only a great battle between mass armies (namely, both adversaries' combatants), but also total war between the civilian populations (noncombatants) of the rival states. By contrast, from the middle of the seventeenth century to the end of the eighteenth century – when the French mass army changed the pattern of war – civilians were not usually considered to be relevant players on the battlefield, at least not directly. This phenomenon has been presented by Antonio Cassese: "For a number of historical reasons between 1648 and 1789, wars tended to take the shape of contests between

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<sup>20</sup> Azar Gat, THE ORIGINS OF MILITARY THOUGHT: FROM THE ENLIGHTENMENT TO CLAUSEWITZ, 206 (1989).

<sup>21</sup> Carl Von Clausewitz: ON WAR, 259 (Michael Eliot Howard and Peter Paret trans., Princeton University Press indexed ed. 1984) [emphasis added].

<sup>22</sup> Bram Stoker, DRACULA (Penguin Books, 1994) (1897).

<sup>23</sup> ON WAR, *supra* n 21, at p. 97.

<sup>24</sup> *Id.*, at p. 258 [emphasis in the original].

professionals, conducted as a sort of game and without any direct involvement of the civilian population."<sup>25</sup>

Clausewitz's writing ridiculed the notion that war can be restricted to belligerency between states and not between rival peoples. Such a restriction, as just mentioned, prevailed in Europe in the century preceding the French Revolution. The practice of those days was described and criticized by Clausewitz:

[T]o plunder and lay waste the enemy's land, which had played such an important role in antiquity, in Tartar days and indeed in mediaeval times ... was rightly held to be unnecessarily barbarous, an invitation to reprisals, and a practice that hurt the enemy's subjects rather than their government – one therefore that was ineffective and only served permanently to impede the advance of general civilization. Not only in its means, therefore, but also in its aims, war increasingly became limited to the fighting force itself. Armies, with their fortresses and prepared positions, came to form a state within a state, in which violence gradually faded away.

All Europe rejoiced at this development. It was seen as a logical outcome of enlightenment. This was a misconception. Enlightenment can never lead to inconsistency: as we have said before and shall have to say again, it can never make two and two equal five. Nevertheless this development benefited the peoples of Europe, although there is no denying that it turned war even more into the exclusive concern of governments and estranged it still further from the interest of the people. In those days, an aggressor's usual plan of war was to seize an enemy province or two. The defender's plan was simply to prevent him doing so. The plan for a given campaign was to take an enemy fortress or prevent the capture of one's own. No battle was ever sought, or fought, unless it were indispensable for that purpose. Anyone who fought a battle that was not strictly necessary, simply out of innate desire for victory, was considered reckless. A campaign was usually spent on a single siege, or two at the most. Winter quarters were assumed to be necessary for everyone. The poor condition of one side did not constitute an advantage to the other, and contact almost

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<sup>25</sup> Cassese further explains: "[t]his was due to many factors: reaction to the sanguinary and drawn-out wars of the early seventeenth century; the development of costly armies consisting of highly trained professionals, whose death in war would be a great loss for States; the lack of national allegiance in military men and the consequent marked reluctance to fight unto the bitter end in defence of the State; the fact that the military profession was almost everywhere an apanage of the nobility, with the consequent feeling of belonging to the same social class common to the officers of all countries; the influence of aristocratic principles of chivalry." Antonio Cassese, *INTERNATIONAL LAW*, 400 (2nd ed., 2005).

ceased between both. Winter quarters set strict limits to the operation of a campaign.<sup>26</sup>

In contrast to this moderate type of war, the Clausewitzian conception of total war required total dedication and sacrifice from soldiers and noncombatants alike. This conception would be demonstrated by two examples of total war, especially their civilian dimension, from the second half of the nineteenth century: Moltke's bombardment of Paris in 1870 and General William Sherman's "Atlanta campaign" during the American Civil War.<sup>27</sup> Both cases, which are well rooted in the Clausewitzian legacy, would be unlawful under prevailing law.

Field-marshal Helmuth von Moltke, Prussian Chief of the General Staff (1857-1888), known as Moltke the elder,<sup>28</sup> 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 finances, his railroads, his supplies and even his prestige."<sup>29</sup> He justified the intentional targeting of civilians in the context of war as a legitimate leverage for achieving its aim.<sup>30</sup>

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<sup>26</sup> ON WAR, *supra* n 21, at pp. 590-591.

<sup>27</sup> The Atlanta campaign refers to a series of battles held in 1864 between Union Gen. William T Sherman and Confederate Gens. Joseph E. Johnston and John Bell Hood who later replaced him. See e.g., James M McPherson, BATTLE CRY OF FREEDOM 683 (2003). Indeed, "[t]he two wars that marked the unmistakable turning point were the American Civil War and the Franco-Prussian War. In those great mid-nineteenth-century conflicts, even pitched battles that wore all the trappings of decisiveness failed to decide the issue, and the conflict spread far from the field of battle... a war of devastation, spilling far off the battlefield, was necessary to secure victory." VERDICT OF BATTLE, *supra* note 16, at pp.7-8.

<sup>28</sup> The nickname "elder" differentiates him from his nephew, Moltke the younger, who was a field-marshal with the German army at the start of WWI. On Moltke the elder, see e.g. Arden Bucholz, HELMUTH VON MOLTKE: A MODERN BIOGRAPHY (2007); Arden Bucholz, MOLTKE AND THE GERMAN WARS, 1864-1871 (2001).

<sup>29</sup> 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'. HKB Graf von Moltke, THE RUSSO-TURKISH CAMPAIGN IN EUROPE 1828-1829 published in *Gesammelte Schriften und Denkwürdigkeiten* vol. 7, 139 (1891-1893). Quoted in Michael D Krause, *Moltke and the Origins of the Operational Level of War* (1988). Available at <http://www.history.army.mil/books/OpArt/germany1.htm> (a reduced version of this manuscript was reproduced in Michael D Krause, *Moltke and the Origins of Operational Art*, 70 MIL. REV. 28 (1990)). On Clausewitz's effect on Moltke the elder, see Gerhard Ritter, THE SWORD AND SCEPTRE: THE PROBLEM OF MILITARISM IN GERMANY, Vol. I: THE PRUSSIAN TRADITION 1740-1890, 187-263 (1973); Stig Förster, *The Prussian Triangle of Leadership in the Face of a People's War: A Reassessment of the Conflict between Bismarck and Moltke 1870-1871*, in ON THE ROAD TO TOTAL WAR: THE AMERICAN CIVIL WAR AND THE GERMAN WARS OF UNIFICATION 1861-1871 115 (Stig Förster and Jörg Nagler eds., 1997). Förster notes that Moltke was indeed influenced by Clausewitz in terms of military strategy, but did not share his view that in times of war a clear hierarchy should be defined, placing the civilian leadership above the military. *Id.*, 135.

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



His decision to bombard Paris in 1870 was undertaken "not... to destroy Paris, but to exert a final pressure on the inhabitants."<sup>31</sup>

General Sherman reached Atlanta in mid to late 1864,<sup>32</sup> with two military objectives: to damage the war-related industries in the South and fight the large Confederate army around the Atlanta area.<sup>33</sup> 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. Rather than aim directly at the Southern Army, they chose to damage the local Southern economy and the property of its civilian population.<sup>34</sup> This strategy change, and the new focus on the civilian dimension of the war, was approved by President Lincoln.<sup>35</sup> 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."<sup>36</sup> In his famous letter to the Mayor and councilors of Atlanta from 12 September 1864, General Sherman wrote in reply to their request to revoke his order to evacuate the civilians from the city: "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 ..."<sup>37</sup>

Both generals, then, Moltke and Sherman, exhibited similar views and practices from both sides of the Atlantic, identifying the adversary as a "people", including the entire civilian population. From their perspective, their military necessities and desire for

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<sup>31</sup> *Id.* 30 [footnotes omitted]. 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). Other sources support that notion as well. See e.g., *Moltke and the Origins of the Operational Level of War*, *supra* n 29.

<sup>32</sup> *BATTLE CRY OF FREEDOM*, *supra* n 27, at p. 653.

<sup>33</sup> As McPherson puts it, "Sherman received orders to destroy Johnston's army and inflict all possible damage on the enemy's resources for making war". *Id.* at p. 627.

<sup>34</sup> As Sherman himself noted, his march through Confederate territory resulted in \$100 million worth of damage to property, of which \$80 million were "simple waste and destruction". Sherman's report of 1 January 1865, quoted in Mark Grimsley, *THE HARD HAND OF WAR*, 200 (1995).

<sup>35</sup> *HUMANITY IN WARFARE*, *supra* n 29, at p. 208.

<sup>36</sup> *Id.*

<sup>37</sup> Sherman's letter to the Mayor of Atlanta, 12 September 1864, quoted in *HUMANITY IN WARFARE*, *id.*, at p. 209. Sherman demanded the evacuation of all of Atlanta's inhabitants before ordering it to be burnt. See Marc Wortman, *THE BONFIRE: THE SIEGE AND BURNING OF ATLANTA*, 326-327 (2010).

victory prevailed over the adversary's civilian interest. Furthermore, the civilians' suffering was not only a stated goal of the absolute war, but its natural consequence as well. The only way in which the mass armies of the end of the eighteenth century (and to a lesser extent those of the nineteenth century, as well) 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."<sup>38</sup>

Indeed, this "people's war" notion has been totally rejected by the prevailing law of armed conflict. The civilian dimension of the absolute war conception is in complete contradiction to the Charter and Geneva Conventions rules. We shall now turn to its military dimension.

*Napoleon's Practice and Clausewitz's Theory Do Not Hold a Monopoly on Military Thinking and Practice*

Before the French Revolution period, as previously mentioned, wars were usually fought along a totally different pattern than Napoleon's bloody version. The wars fought by professionals were usually characterized by their limited scope. In some cases, they were contained by their physical dimensions – for example, to a single daylong pitched battle<sup>39</sup> – 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 and caution and the socio-political composition of the armies as dynastic and hierarchical rather than national.<sup>40</sup> The moderate style of the 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

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<sup>38</sup> HUMANITY IN WARFARE, *supra* n 29, at p. 89.

<sup>39</sup> See, for example, the description of a typical pitched battle, by James Whitman, VERDICT OF BATTLE, *supra* note 16.

<sup>40</sup> Larry H Addington, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY, 7 (2nd ed., 1994). See too the view expressed by Clausewitz ("A campaign was usually spent on a single siege, or two at the most"), *supra* n 26.

much effort and little acquisition.”<sup>41</sup> By contrast, Napoleon's all-out style of national war and the totality of its goals reflect, *inter alia*, a combination of nationalism and the capabilities of the industrial revolution, resulting in mass armies and the total dimensions of war. Indeed, this nuanced spectrum of war prototypes, including its limited versions, was not unfamiliar to Clausewitz, who wrote: “We can now see that in war many roads lead to success, and... they do not all involve the opponent’s outright defeat. They range from *the destruction of the enemy’s forces, the conquest of his territory, to a temporary occupation or invasion, to projects with an immediate political purpose, and finally to passively awaiting the enemy’s attack.*”<sup>42</sup> It may therefore be concluded 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.”<sup>43</sup>

In fact, the leading theorist to endorse this type of limited “light” war preceded Clausewitz by more than two thousand years. The well-known Chinese strategist Sun Tzu emphasized the notion that the use of military force is justified only as a last resort, noting that: “...Those 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.” 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.”<sup>44</sup> Clausewitz, who probably never read Sun Tzu,<sup>45</sup> ridicules

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<sup>41</sup>Alexander Hamilton, *Effects of Internal Wars in Producing Standing Armies and Other Institutions unfriendly to Liberty*, in Alexander Hamilton, John Jay and James Madison eds., THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS [No. 8] 43, 43-44 (E.H. Scott, ed., 1898), ed.)

<sup>42</sup> ON WAR, *supra* n 21, at p. 94 [emphasis in the original].

<sup>43</sup> Anthony Peter Vernon Rogers, LAW ON THE BATTLEFIELD, 1 (2nd ed., 2004).

<sup>44</sup> Sun Tzu, THE ART OF WAR, 79, 77 respectively (Samuel B. Griffith trans.; forward by BH Liddell Hart, 1963).

<sup>45</sup> Handel states this lack of knowledge of Clausewitz as a fact. See Michael I Handel, MASTER OF WAR, 152 (3rd ed., 2001).

this type of "bloodless war" approach: "[r]ecent history has scattered such nonsense to the winds."<sup>46</sup>

For the sake of our discussion, however, the importance of this historic presentation is to demonstrate the argument that when it comes to military doctrine and strategy, at the time of the UN's establishment and the signing of the Geneva Conventions, **Napoleon's type of bloody war model, as expressed by Clausewitz, did not then or before enjoy a monopoly. Clausewitz's vision (in its extreme version<sup>47</sup>), albeit widespread and consistent with the mass armies phenomenon of the two World Wars, was not the only one extant.** It should be emphasized that in the period preceding the establishment of the UN and drafting of its Charter, not all twentieth century strategists and theorists accepted Clausewitz's bloody vision, nor did they all agree on its actual application. For example, Fuller and his follower Liddell Hart contested it. Fuller's analysis of the 'Great War' (known today as 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 "great battles" involving "unlimited slaughter," which was the explanation for their futile activities and bloody operations in that war.<sup>48</sup> Furthermore, Fuller based his arguments not only on professional military grounds, but on economic grounds as well. He followed Keynes in arguing that the war also had a

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<sup>46</sup> ON WAR *supra* n 21, at p.259. After stating that "[b]attle is the bloodiest solution," Clausewitz rejects the more peaceful solutions:

"[G]overnments and commanders have always tried to find ways of avoiding a decisive battle and of reaching their goal by other means or of quietly abandoning it. Historians and theorists have taken great pains, when describing such campaigns and conflicts, to point out that other means not only served the purpose as well as a battle that was never fought, but were indeed evidence of higher skill. This line of thought had brought us almost to the point of regarding, in the economy of war, battle as a kind of evil brought about by mistake – a morbid manifestation to which an orthodox, correctly managed war should never have to resort. Laurels were to be reserved for those generals who know how to conduct a war without bloodshed; and it was to be the specific purpose of the theory of war to teach this kind of warfare". Id.

<sup>47</sup> Indeed, there are moderate statements in Clausewitz's writing (see *supra* n 41), as well as "softer" interpretations of his intent (see *infra* n 59).

<sup>48</sup> John Frederick Charles Fuller, THE REFORMATION OF WAR, 75 (1923). Indeed, Michael Howard points out that 'Strategists 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).

counter-effect, from a utilitarian-economic perspective.<sup>49</sup> “[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.”<sup>50</sup>

Liddell Hart also suggested a limited vision of war and its aims. He argued in favor of a vision that limits war's aims while simultaneously reducing its heavy price.<sup>51</sup> He thus defined the purpose of strategy as “the reduction of fighting to the slenderest possible proportions.” He further argued:

This statement may be disputed by those who conceive the destruction of the enemy's armed force as the only sound aim in war, who hold that the only goal of strategy is battle, and who are obsessed with the Clausewitzian saying that ‘blood is the price of victory’. Yet if one should concede this point and meet its advocates on their own ground, the statement would remain unshaken. 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. And the more advantageous the circumstances, the less, proportionately, will be the fighting.<sup>52</sup>

In fact, Liddell Hart's theory stemmed largely from his recognition of the fallacy of the “grand battle” military doctrine, which so badly 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

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<sup>49</sup> See generally, John Maynard Keynes, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920).

<sup>50</sup> *THE REFORMATION OF WAR*, *supra* n 48 [emphasis in the original].

<sup>51</sup> The advantages of limited wars, discussed above, pertain to all levels of war and are not limited to the strategic level. Thus, at the operational and tactical levels, the economy of force, as a constraining factor, is an integral part of well-known militaries' combat doctrines.

Rational and effective military organizations recognize proportionality not only as part of the laws of war, but also as part of their own combat doctrine—except it is called [and defined in US Army Field Manual 3-0, *Operations*] economy of force. ... The British and Commonwealth armies call this principle economy of effort. The Soviet Union defined it as adapting the end to the means. However identified, the principle holds that military forces should concentrate effort in the most rational, economic, and limited way, to free up resources for other undertakings. As such, it makes little military sense to use force or effort out of proportion to the objective sought, or beyond military necessity. Jonathan F Keiler, *The End of Proportionality*, *PARAMETERS* 53, 58-59 (Spring 2009) <http://www.carlisle.army.mil/USAWC/PARAMETERS/Articles/09spring/keiler.pdf> (last accessed Nov. 8, 2012).

<sup>52</sup> BH Liddell Hart, *STRATEGY*, 338 (2nd rev. ed., 1968).

Napoleonic warfare.”<sup>53</sup> He 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.<sup>54</sup> It should be noted, however, that even in the framework of a Clausewitzian total war, a sophisticated military can still operate indirectly. Thus, for example, in executing *Blitzkrieg*, German commanders operated indirectly while still fighting a total war.<sup>55</sup>

This conception of military operations, known as “the strategy of indirect approach,” was not an original creation of Liddell Hart’s. As mentioned above, it in fact appeared thousands of years ago in the writings of Sun Tzu, who wrote that “He who knows the art of the direct and the indirect approach will be victorious. Such is the art of maneuvering.”<sup>56</sup> In modern literature, this indirect approach was summarized by Liddell Hart in his *Memoirs*:

More and more clearly has the fact emerged that a direct approach to one’s mental object, or physical objective, along the ‘line of natural expectations’ for the opponent, has ever tended to, and usually produced, negative results. ... Victory by such a method can only be possible through an immense margin of superior strength in some form, and even so tends to lose decisiveness. In contrast, an examination of military history ... points to the fact that in all the decisive campaigns the dislocation of the enemy’s psychological and physical balance has been the vital prelude to a successful attempt at his overthrow. This dislocation has been produced by a strategic indirect approach, intentional or fortuitous...<sup>57</sup>

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<sup>53</sup> Brian Bond, LIDDELL HART: A STUDY OF HIS MILITARY THOUGHT, 37 (1977).

<sup>54</sup> BH Liddell Hart, PARIS, OR THE FUTURE OF WAR, 22 (1972).

<sup>55</sup> A good description of the indirect manner in which German forces operated during *Blitzkrieg* is provided by John Mearsheimer. To summarize briefly, it was the Germans' plan to preoccupy the bulk of the Allies' forces in Belgium using their own weaker Army Group B, thus allowing the stronger Army Group A to break through into France; this instead of concentrating the entire force for an all-out clash with the Allies. See John J Mearsheimer, *Hitler and the Blitzkrieg Strategy*, in THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS 138, 146 et sq. and the illustrations therein (Robert J Art and Kenneth Neal Waltz eds., 6th ed., 2004).

<sup>56</sup> THE ART OF WAR, *supra* n 43, at p.106.

<sup>57</sup> LIDDELL HART: A STUDY OF HIS MILITARY THOUGHT, *supra* n 53, at pp. 54-55 (citing BH Liddell Hart, MEMOIRS, 162-164 (1965))

In short, Napoleon's model of bloody total war was not and is not the only model in existence. Indeed, as Luttwak points out, there is no one model of optimal war,<sup>58</sup> and everything depends upon the specific circumstances of the military terrain and the adversaries. So, **whatever view one may hold, the Napoleonic model should be rejected as the sole archetype of ultimate war.**<sup>59</sup>

From a military perspective, the critique of the Napoleonic model as the archetype of war concentrates primarily upon its lack of effectiveness. This criticism of reliance solely upon the exercise of mass forces in decisive, knockout types of battle holds at the tactical level and is gaining strength at the operational level as well. Indeed, in this context one may look, as suggested, at the experience of the two World Wars from a critical perspective. The next example, however, focuses upon the American military experience before and after the two World Wars.

In its military preferences American strategy has long leaned towards grand total war executed through the use of overwhelming force, a choice influenced by the country's sheer size, wealth and production capabilities.

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 date back to the military experience of the American Civil War. This 'annihilation by fire' approach has been largely successful throughout American military history.<sup>60</sup>

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<sup>58</sup> See the discussion in Edward N Luttwak, *STRATEGY: THE LOGIC OF WAR AND PEACE*, ch. 7 (2001) (hereinafter Luttwak, *STRATEGY*).

<sup>59</sup> It should be noted that 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". LIDDELL HART: A STUDY OF HIS MILITARY THOUGHT, *supra* n 53, at p. 51. This discussion among military theorists goes beyond the scope of this article. For the sake of our discussion, presenting the conflicting approaches will suffice.

<sup>60</sup> 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: RULERS, STATES AND WAR* 428, 464 (Williamson Murray, MacGregor Knox and Alvin Bernstein eds., 1994). See also Thomas G Mahnken, *United States Strategic Culture*, 3 (Def. Threat Reduction Agency, Advanced Systems and Concepts Office, 2006)

Indeed, this quantitative approach – based upon clashes between masses of combatants – is well rooted in the American military. During the American Civil War Abraham Lincoln insisted that the only way to win the war 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 them whom he saw as conciliatory.<sup>61</sup> Lincoln insisted that in order to achieve ultimate victory, the Union armies would have to crush their Confederate adversaries.

‘The strength of the rebellion is its military – its army’, Lincoln wrote – and not, he implied, its capital, its territory, or even its population. Lincoln adhered to this view consistently, beginning with his insistence on operations against the Confederate army around Manassas in the summer of 1861 and continuing to the end of the war. ‘I think Lee's army and not Richmond, is your true objective point.’ The 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.<sup>62</sup>

The American military's strategic thinking continued along the same lines in the post-Charter 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.”<sup>63</sup> Indeed, the poor strategic thinking in Vietnam reached one of its lowest levels in its obsession with the “body count” industry.

‘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

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<http://www.dtic.mil/dtic/tr/fulltext/u2/a521171.pdf> (last accessed Nov. 9, 2012) (arguing that “A nation's strategic culture flows from its geography and resources, history and experience, and society and political structure”).

<sup>61</sup> Eliot A Cohen, SUPREME COMMAND: SOLDIERS, STATESMEN AND LEADERSHIP IN WARTIME, 38-41 (2002).

<sup>62</sup> *Id.*, at p. 31 [citations omitted], and see General Sherman's strategy regarding the “Atlanta campaign”, *supra* n 37.

<sup>63</sup> SUPREME COMMAND, *supra* n 61, at p. 179.



Mekong River delta, acquired the nickname 'The Butcher of the Delta' for his obsession with the body count.<sup>64</sup>

Not surprisingly, the body count industry – indeed, the quantified strategy – was not very effective; in many cases, it triggered a counter-effect.<sup>65</sup> Its lack of success finally challenged the American military's way of thinking. "The Clausewitzian idea of destruction is, therefore, totally incompatible with the operational conception of war".<sup>66</sup> In the transformation of the American military, starting from the mid-1970s, the tendency was to move away from tactical destruction, carried out by means of a linear confrontation of masses and resources, to operational maneuvers. As Shimon Naveh puts it, "The transition from the traditional paradigm of attrition by means of superior technology and tactics to one of advanced operational maneuver compromises the essence of the evolutionary process in the US armed forces and the community of military theoreticians."<sup>67</sup> Ultimately, then, the American military's post-World War II experience in applying the quantitative approach as an integral part of its war strategy provides ample proof of the failure of that approach.<sup>68</sup>

To conclude, the implicit (or even explicit) adoption by the UN Charter and the Geneva Conventions of the grand battle as the archetypal pattern of war invites a threefold criticism. **From a moral perspective, the required mass killing is unacceptable. Professionally, 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 prototype of bloody war** by the law of war, even though the natural expectation might have been that both normative and utilitarian

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<sup>64</sup> *Id.*, at p. 184 [citations omitted].

<sup>65</sup> For example, on utilitarian grounds, affording an "exit strategy" to an adversary affects its determination to continue fighting. See, for example, General Powell's argument against the complete destruction of the Iraqi army in the First Gulf War and in favor of ending the ground war after one hundred hours. *Id.*, at pp. 194-198.

<sup>66</sup> IN PURSUIT, *supra* n 10, at p. 42.

<sup>67</sup> *Id.*, at p. 251.

<sup>68</sup> This argument draws further support from the current American strategy, related to the different challenge of counterinsurgency. The "internal" Counterinsurgency Doctrine (COIN) 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. "In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering." U.S. MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5 / U.S. ARMY FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-142 (Dec. 15, 2006).

considerations would prevail over the adoption of this type of war. **Only the legal regime, which should have been the first to reject this bloody paradigm, still holds it as valid and untouchable**, and merely tries to contain it by limiting its consequential hazards and suffering to a limited scope. This irony stands at the center of the next chapter.

## II. The Modern Law of Armed Conflict: Why It Has Turned a Blind Eye to Military Strategy and Its Operational Effects

*The type of war envisaged by the law of armed conflict contradicts its agenda and represents an antithesis to its very foundations*

The modern law of armed conflict, as it developed in the post-Charter period, explicitly adopted (or, at least, did not reject) the Napoleonic model of total warfare between armies carried out in a bloody, industrial manner and aimed at the complete destruction of the adversary's armed forces. Indeed, the bloody Clausewitzian vision of war was taken as its prototype. "[T]he great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized incursions of large military formations..."<sup>69</sup> Therefore, Franck concludes: "**[b]ecause it was so familiar to them, it was to aggression of this kind that the drafters of Article 51 addressed themselves.**"<sup>70</sup> It is because of this frame of reference, for example, that the prohibition on "employ[ing] arms, projectiles, or material calculated to cause unnecessary suffering"<sup>71</sup> seems to take this type of war as a given. The scope of war and the legality of combatants' bloodshed and collateral damage to civilians stemming from it are taken for granted. Law limits itself to a consequential and residual role once war has begun in reducing and containing its flames and limiting the combatants' suffering (in this case, by prohibiting specific weapons) to the bare minimum.

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<sup>69</sup> See *Who Killed Article 2(4)*, *supra* n 5, at p. 812. It should be noted, however, that Franck only dealt with the pattern of wars carried out by "large formations" and not by their typical aim or pattern.

<sup>70</sup> *Id.*, at p. 812 [emphasis added].

<sup>71</sup> Hague Regulations of 1907, *supra* n 8, art. 23 para. e. A modern version of this rule states; "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." API, *supra* n 7, art. 35 para. 2. See e.g., Judith Gardam, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 67-75 (2004).

This perception is consistent with the Clausewitzian legacy of war's pattern: "Battle is the bloodiest solution. ... it is always true that the character of battle, like its name, is slaughter [*Schlacht*], and its price is blood."<sup>72</sup> That **vision of the desired grand battle between large masses of soldiers and glorious victory amidst rivers of blood is, *in fact*, the prototype of war adopted by the contemporary law of armed conflict. The legal system takes the aims and pattern of modern wars as given and only then steps in, *ex post*, with a very limited goal: to reduce their marginal damages. It thus not only limits itself to a residual role, but paradoxically may even produce a counter-effect. Although it explicitly aims at minimizing the suffering of victims in the battlefield, it might to the contrary actively contribute to maximizing it by accepting the bloodiest prototype of war as a given, granting a measure of "legitimacy", or at least acceptability, to the Clausewitzian vision of the grand battle.**

So we can point to the apparent paradox: a legal system that purports (in its *ad bellum* part) "to save succeeding generations from the scourge of war ... to reaffirm faith in fundamental human rights" has adopted, or, at least, not rejected, the bloody Clausewitzian vision as the (*in bello*) prototype of war. The Charter – meant to "maintain international peace and security"<sup>73</sup> – is paradoxically based upon this perception of a bloody grand war between masses. It is almost tantamount to introducing a self-destruct mechanism into the modern law of war. This poison pill to "international peace and security" is, indeed, the type of war envisaged by the law's drafters. Our previous discussion demonstrated that even though the founders of the UN and the drafters of the Geneva Conventions may have been more familiar with this model of "all-out" war, as reflected in the ashes of the two World Wars, they nevertheless had a wide spectrum and selection of conceptions and theories of war from which to choose. They also had an alternative legal agenda to select from.

Furthermore, though the Clausewitzian vision of the grand battle has been accepted as a "legitimate" war prototype, its dire consequences have been mainly channeled, even

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<sup>72</sup> See *supra* text accompanying n 21.

<sup>73</sup> U.N. Charter, art. 1.

explicitly restricted, to combatants. **The international law of armed conflict, as developed at the Brussels Conference of 1874 and at The Hague Peace Conferences of 1899 and 1907,<sup>74</sup> was not indifferent to the protection of civilians and explicitly rejected the civilian dimension of total war suggested by Clausewitz.** Between the contradictory definitions of adversaries, as reflected in the two models of war – between states or between peoples – traditional law explicitly chose to limit the scope of the war to the military, and to try to limit the collateral damage caused to civilians. “Interestingly, this law ultimately upheld the 'Rousseauesque' [maxim 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 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.”<sup>75</sup>

Therefore, the founders of the UN and the drafters of the Geneva Conventions not only had a spectrum of military alternatives to choose from while designating (explicitly or implicitly) the “legitimate” war prototype, but also a legal precedent: the direct civilian aspects of Clausewitz's grand vision of total war had been legally rejected by the distinction principle, already at an early stage of formation of the modern law of armed conflict (1874-1907). Why, then, in the later stages, especially in the post-World Wars period, did the law choose to accept this bloody norm as given when it comes to the combatants (and collateral damage to civilians)?<sup>76</sup> Moreover, the rejection of the civilian devastation aspects of Clausewitz's grand vision of total war functions as a dual mechanism. In addition to the total prohibition on direct targeting of civilians, when it

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<sup>74</sup> See, e.g., Cassese, *INTERNATIONAL LAW*, *supra* n 25, at p. 400.

<sup>75</sup> *Id.* It should be noted, however, that when it comes to civilians, the gap between the rhetoric and application of the newly developed international law of armed conflict at the start of the twentieth century still remained after 1907. Thus, the starvation of the Belgians during World War I was “legal”, in the sense that the Germans contended that there was no provision in the 1907 Hague Convention obliging an occupier army to feed the occupant civilians. “The war, professed by international continental jurists to be 'between states and not between peoples', was actually being fought at the (would-be natural) Belgian people's expense and over their dying bodies.” *HUMANITY IN WARFARE*, *supra* n 29, at p. 228.

<sup>76</sup> Indeed, the acceptance of this vision *vis-à-vis* combatants affects the scope of lawful collateral hazards endured by civilians, as well.

comes to collateral damage caused to them, cost-benefit considerations are mandatory.<sup>77</sup> Furthermore, as regards military objectives, the least harmful to civilians with reference to a given military advantage should be adopted. "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be the attack which may be expected to cause the least danger to civilian lives and to civilian objects."<sup>78</sup> One may wonder why this sensitivity towards the least dangerous alternative does not apply to combatants. Why is there no such positive rule imposing – or, at least, giving preference to – a more humanitarian strategy, or operational or tactical military course of action, for a given military advantage, which poses the least danger to combatants' lives as well?<sup>79</sup>

This question invites us to take a deeper look at the development of the modern law of armed conflict from a historical perspective. In its early stages, this law did not deal with the *ad bellum* restriction and restricted itself to *in bello* constraints related to the conduct of wars. It was only later, upon the founding of the League of Nations, that some procedural constraints were imposed upon wars, with the aim of finding peaceful resolutions to conflicts.<sup>80</sup> Banning war as an instrument of national policy was stated in the General Treaty for the Renunciation of War of 1928<sup>81</sup> and restated, more strongly, in the Charter of the United Nations Organization.<sup>82</sup> During the formative years of the modern rules, the *in bello* constraints related to both combatants and noncombatants. For example, the Martens Clause, which has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II)<sup>83</sup> with

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<sup>77</sup> With regard to civilians, the proportionality criterion prohibits the initiation of a military attack, in which the harm caused to civilians might be excessive (disproportional) when compared with the attack's expected direct military advantage. API, *supra* n 7, art. 51(5) (b).

<sup>78</sup> *Id.*, art. 57(3).

<sup>79</sup> As to the necessity requirement – which might have delivered the goods – and its ineffectiveness, see the discussion *supra* text accompanying notes 11-15.

<sup>80</sup> See *supra* n 2.

<sup>81</sup> See *infra* text accompanying n 153.

<sup>82</sup> See *supra* notes 2-3 and accompanying text.

<sup>83</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land preamble, Jul. 29, 1899 (hereinafter Hague Convention II of 1899). The clause is named after Russian diplomat Friedrich Martens who proposed inserting it in order to prevent a deadlock in the conference between several smaller states and the Great Powers. See Jochen von Bernstorff, *Martens Clause*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL (R Wolfrum ed., 2008, online addition, last updated December 2009)

respect to the laws and customs of war on land, states: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, **populations and belligerents remain under the protection and empire of the principles of international law**, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”<sup>84</sup> However, the trauma of the two World Wars sparked disillusionment with the naive expectation that reliance could be made on the “civilized nations”. Indeed, it is understandable why “in the aftermath of World War II’s devastation, a consensus emerged among the community of nations that law had to take a more active role in preventing the outbreak of war, rather than simply regulating its conduct.”<sup>85</sup> Yet, this same intuition, which inclined towards regulating the *ad bellum* prohibition, should have led to an *in bello* reform and the conclusion that soldiers are not and should not be a cheap commodity, merely an expendable means in the battlefield. The fact they were butchered in the two World Wars by the millions,<sup>86</sup> and the trauma caused by these wars’ slaughter (of both combatants and civilians), should have triggered a substantial *in bello* transformation.

**Indeed, one could argue that the *ad bellum* prohibition on proactively exercising military force reflects an “indirect” *in bello* legal reform as well.**

In the aftermath of World War II, with the adoption of a strategy aimed at preventing wars in general, a focus was placed on avoiding total wars in particular, then still fresh in memory. Furthermore, the introduction of nuclear weapons in 1945 had increased the totality profile of wars. Therefore any policy aimed at preventing wars meant avoiding total wars. However, merely the preservation of the right of self-defense in the Charter

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[http://www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e327&recno=1&searchType=Quick&query=martens+clause](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e327&recno=1&searchType=Quick&query=martens+clause) (last accessed Nov. 9, 2012).

<sup>84</sup> Hague Convention II of 1899, *supra* n 83 [emphasis added].

<sup>85</sup> Michael N Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 645 (1992).

<sup>86</sup>See Napoleon’s saying: “soldiers are made to be killed”, in JUST AND UNJUST WARS, *supra* n 6, at p. 136. When it comes to soldiers’ death toll, the effect of the two World Wars was devastating. The total number of casualties in WWI is estimated at around 9.5 million; the total number of soldier casualties in WWII is estimated at around 16.8 million. See, Colin S Gray, WAR, PEACE AND INTERNATIONAL RELATIONS: AN INTRODUCTION TO STRATEGIC HISTORY, 124 et sq. and specifically Table 10.1 on page 125 (2007). For WWI casualties, see *Id.*, Table 6.1 on p 83.

and the knowledge that aggressor states would not disappear from the globe should have required the drafters of the modern law of armed conflict to address the doctrinal and operational military issues regarding how wars are fought, and the consequences stemming from them, mainly in terms of human lives, both combatants' and noncombatants', and to place them on the new legal agenda. Indeed, one could further argue that the *ad bellum* proportionality requirement – aimed at determining what is considered proportionate in response to an “armed attack” – might affect the operational scope of a military. In practice, however, there does not seem to be any requirement of sequential proportionality in the countermeasures taken by a (self) defensive army. “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.”<sup>87</sup>

Historically, the founders of the modern law of armed conflict at the end of the nineteenth century firmly believed that “the humanizing of war – could end only in its abolition.”<sup>88</sup> That is the final effect they expected to see from imposing constraints on the *in bello* conduct of war. When their expectation was fulfilled, at least formally, through the abolishment of the *ad bellum* privilege of proactive recourse to war by the UN Charter, the law of armed conflict might have been expected to deal simultaneously with strengthening the *in bello* constraints as well, aimed at 'the humanizing of war' in all of its dimensions. By establishing a better balance between all sides and interests involved, such a strategy might have been more effective. “[T]he law of war in the later nineteenth and early twentieth centuries became preoccupied with what happened to the fighters, and the interests of non-combatants were tragically neglected for too long. Since 1945, the tide has to some extent turned.”<sup>89</sup> Nonetheless, the post-World Wars law

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<sup>87</sup> Yoram Dinstein, *War, Aggression and Self-Defence*, 262 (5th ed., 2011). See also the remainder of his discussion on pp. 262-267. The (Colin) Powell Doctrine – exercised, successfully in the First Gulf War – can serve as an example of this practice by states. It advocates exercising “overwhelming force quickly and decisively.” CL Powell ‘U.S. Forces: Challenges Ahead’, (Winter 1992/1993) *Foreign Affairs*. Available at: [http://www.cfr.org/publication/7508/us\\_forces.html](http://www.cfr.org/publication/7508/us_forces.html). Cf. the conflicting view, according to which the requirement of proportionality in the exercise of self-defense sequentially regulates the “choice of means and methods of warfare,” and holding that it affects war’s conduct and scope, as well. See, e.g., the discussion and references in Judith Gardam, *Necessity, Proportionality and The Use of Force by States*, 162-179 (2004).

<sup>88</sup> HUMANITY IN WARFARE, *supra* n 29, at p. 10 (citing Gustav Moynier).

<sup>89</sup> *Id.*, at p. 60.

of armed conflict – which turns a blind eye to substantial strategic and operational issues related to actual fighting and to their consequences – currently seems to be out of balance.

*The Silence of the Law Promotes the Roar of the Cannons*

So, then, the founders of the modern law of armed conflict had a wide spectrum of theories of war to choose from, and a vision “to save succeeding generations from the scourge of war”. They had the experience and practice of two traumatic World Wars in the background, and they also had a model of a modest international arrangement: the 1868 St. Petersburg Declaration,<sup>90</sup> 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.”<sup>91</sup> Nonetheless, the founders chose the Clausewitzian model of war, with all its implications. The international community in the post-World Wars era was decisive enough to dictate a legal prohibition on the 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 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*).<sup>92</sup> Here, **the silence of the law is antecedent to – in fact, it allows and actually promotes – the scope of war, with substantial implications for combatants and civilians alike.** With regard to civilians, the prevailing proportionality criterion, for example, prohibits the initiation of a military attack in which the harm done to civilians is excessive and disproportionate

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<sup>90</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, Dec. 11, 1868. Available at: <http://www.icrc.org/ihl.nsf/WebART/130-60001?OpenDocument> (last accessed Nov. 9, 2012).

<sup>91</sup> The declaration further states: “That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;...”

<sup>92</sup> Or in a different translation: “For among [times of] arms, the laws fall mute.” The above is one of the more frequently used translations of the expression. Cicero’s actual wording in his published oration *Pro Milone*, was “*Silent enim leges inter arma.*” Marcus Tullius Cicero, *PRO MILONE* (FH Colson ed., 1980), 5, §11.



to the expected direct military advantage derived from it.<sup>93</sup> However, **under the traditional reading of proportionality, the lawful spectrum of legitimate “military advantages” is to be decided solely by the fighting parties. They have sole discretion and in fact a monopoly over it. Shouldn't the law of armed conflict have a say about potential or actual legitimate military advantages?** Furthermore, this passiveness of the law regarding the scope of "military advantage" is aggravated by the Rome Statute of The International Criminal Court, which defines unacceptable collateral damage as “clearly excessive in relation to the concrete and direct **overall military advantage** anticipated.”<sup>94</sup> This wording broadens the discretion of the targeting belligerent even further; as long as it acts *bona fide*, it grants it in fact a monopoly on deciding whether the overall military advantages justify the collateral damage caused by its attack.

With regard to combatants, the adoption and legitimization of Clausewitz’s “great battle” legacy has its price in terms of soldiers’ lives. Combatants on both sides simply become the most expendable commodity in the battlefield. With regard to civilians, as just mentioned, it affects the legality of the scope of collateral damage caused to them. Furthermore, this dual effect distorts both sides of the proportionality equation.<sup>95</sup> Gabriella Blum, who argues against excessive killing of combatants (relying on her suggested new reading of the distinction and necessity rules),<sup>96</sup> states the case accurately: “In fact, the killing of more enemy combatants has been generally understood as a central component of ‘military advantage,’ against which harm to civilians must be measured.”<sup>97</sup> That only intensifies the paradox: the unnecessary killing

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<sup>93</sup> API Article 51(5) (b) prohibits: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be **excessive** in relation to the concrete and **direct military advantage** anticipated” API, *supra* n 7, art. 51(5) (b) [emphasis added].

<sup>94</sup> Rome Statute of the ICC art. 8 2.(b) (iv), Jul. 17, 1998, UN Doc A/CONF.183/9, [emphasis added].

<sup>95</sup> API, *supra* n 7, art. 51(5)b.

<sup>96</sup> Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115 (2010). Blum offers a reinterpretation of the principle of distinction, suggesting that the status-based classification be complemented by a test of threat. Combatants who pose no real threat in their function would be spared from direct attack. The reinterpretation of the principle of distinction would be followed, on her recommendation, by a reinterpretation of the principle of military necessity, introducing a least-harmful-means test, under which the alternative of capture or disabling of the enemy would be preferred to killing, whenever feasible.

<sup>97</sup> *Id.*, at p. 131.

of non-effective soldiers – so long as their killing is part of a stated “military advantage” – justifies, under the prevailing rules, the unnecessary killing of innocent civilians as collateral damage!

### *A Concluding Institutional Remark*

Formally speaking, one could refer to the traditional role distribution within the law of armed conflict and argue that while the Charter (and, to a lesser extent, its predecessor, the League of Nations Covenant<sup>98</sup>) deals with the *ad bellum* prohibition of war, it is the Geneva and Hague Conventions that should be expected to deal with the *in bello* issues related to how wars are actually conducted.<sup>99</sup> Indeed, the object of our wonder and discussion is not the UN Charter’s failure, but rather the comprehensive approach adopted by international law, as a whole, in both the Charter and the 1949 Geneva Conventions (and additional 1977 Protocols). The Conventions concluded the *in bello* reaction to the atrocities of World War II and are aimed at strengthening the basic rights of prisoners of war; protecting the wounded and the sick; and promoting the protections for civilians during wartime and in war zones.<sup>100</sup> They concentrate on war’s victims and on mitigating its consequences, but they are not proactive with regard to the doctrinal – strategic, operational and tactical – aspects of war. They do not deal with the targets of wars or with how militaries actually fight.

The essential questions, then, remain: **Why did the law of armed conflict take**

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<sup>98</sup> See supra text accompanying n 80.

<sup>99</sup> Historically, there was a differentiation between the Geneva and Hague laws. While the Geneva Conventions relate to war’s victims – prisoners and wounded soldiers as well as civilians – its articles do not address methods of warfare and the use of specific weapons, which is the domain of the Hague Conventions (First Hague Conference, 1899; Second Hague Conference 1907) and the biochemical warfare Geneva Protocol (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 1929). But as noted, for example, by Richard John Erickson: "In Protocols I and II the traditionally separate bodies of Hague and Geneva law are merged, a reflection of the fact that the mode of armed conflict directly affects the conditions of its victims." Richard John Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 VA. J. INT’L L. 557, 559 (1978).

<sup>100</sup> The 1949 Geneva Conventions updated the terms of the first three treaties (1864, 1906, 1929), and added a fourth treaty. That is because, as noted by the ICRC, the Geneva Conventions adopted before 1949 were concerned with combatants only, not with civilians. See e.g. the Introduction by the ICRC to Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at: <http://www.icrc.org/ihl.nsf/INTRO/380?OpenDocument> (last accessed Jun. 18, 2012).

**the Clausewitzian archetype of war as a given, and not try to influence war proactively *ex ante*? To put it differently, why did the Charter and the Geneva and Hague Conventions adopt such a passive approach towards the strategic, operational and tactical dimensions of wars – those that dictate war’s aims and how it is actually conducted? What was the source of this passiveness? Why would a legal system prohibit, in general, an act of aggression, but when it occurs not face – in fact, turn a blind eye to – its core effects,<sup>101</sup> dealing only with reducing its consequential-residual hazards (the “excessive suffering” type of restriction or limitation of the use of marginal weapons<sup>102</sup>)? What explanation is there for what seems to be a counterproductive way of thinking and operating under current international law?**

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<sup>101</sup> Indeed, one may be paying lip service by pointing to the necessity principle while arguing that its traditional role is to prevent unnecessary bloodshed, including that of combatants. See *supra* text accompanying notes 11-15.

<sup>102</sup> See, API, *supra* n 7, Art. 35. A critical perspective of this residual mission, dealing with prohibited weapons, and its effects was offered by Stone, back in 1955: "States only come to a common view on regulating or prohibiting new weapons after the potentialities of those weapons are thoroughly explored, and when no one of them can rely on obtaining or maintaining the lead in their use. Broadly, therefore, the rules that grow up are rules touching the old and more marginal weapons, not weapons which by their novelty and efficiency are more likely to be decisive." Julius Stone, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR-LAW*, 551 (1954). Indeed, from a contemporary perspective towards Stone’s argument, more than fifty years later, one might reach a different conclusion. Cluster munitions, for instance, face increasing pressure to have them banned by the CCW due to concerns about their humanitarian effect. See e.g., John Borrie, *The Road from Oslo: Emerging International Efforts on Cluster Munitions*, 85 *DISARMAMENT DIPLOMACY* 1 (2007). Available at: <http://www.acronym.org.uk/dd/dd85/85olso.htm> (last accessed 18 June 2012); See also Eitan Barak, *DEADLY METAL RAIN: THE LEGALITY OF FLECHETTE WEAPONS IN INTERNATIONAL LAW: A REAPPRAISAL FOLLOWING ISRAEL'S USE OF FLECHETTES IN THE GAZA STRIP (2001-2009)* (2011).

Another category of weapons deemed to be effective, yet banned from use, is blinding laser weapons. These weapons were presumed to be effective even before any such weapon was officially produced or developed, for their ability to temporarily blind electro-optical vision systems or the enemies' personnel. Yet despite this the Fourth protocol of the CCW prohibited the use of such weapons due to concerns about their causing permanent and unnecessary suffering. See e.g. Burrus M Carnahan and Marjorie Robertson, *The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law*, 90 *AM J. INT'L L.* 484, particularly at 486 (1996) (concerning US Army JAG insistence that even if such weapon were to be developed, it would still meet the unnecessary suffering criteria) Available at: <http://www.jstor.org/stable/pdfplus/2204074.pdf> (last accessed Jun. 18, 2012).

Indeed, these last examples of modern and effective – yet banned – weapons might challenge, to some extent, Stone’s argument. Yet, they do not affect the main argument of this article that the prevailing legal strategy and agenda deal only with the residual hazards of war – aiming at minimizing “excessive suffering” – and ignore its main ones.

### III. The puzzle – the three paradoxes deriving from the adoption of the most brutal archetype of war by the modern law of armed conflict

The first paradox has already been mentioned: the passive adoption by the post-World Wars law of the grand battle as the archetypal pattern of war, and thus the implicit (or explicit) acceptance of the most brutal war aims – the Clausewitzian – as a given. The irony is that the underlying assumptions of this Clausewitzian legacy are antithetical to the humanitarian foundations of the UN Charter, namely to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person.’<sup>103</sup> This irony leads us to the second paradox: this most brutal model of war which has been adopted rejects the mere notion of human rights, or any need to respect them in particular. The Prussian military system of the eighteenth century and early nineteenth century, with its grand battle legacy, cared nothing for individual human rights; it was accustomed to seeing human beings as merely instrumental. It did not even treat its own soldiers as decent human beings, entitled to the most basic of human rights. It denied them their human dignity, not to mention that of its adversary’s soldiers. In “Frederick’s bureaucratic, machine-like state” of Prussia, the military system “was based on brutal discipline, inhuman drill, and automatic performance on the battle field.”<sup>104</sup> Soldiers, Prussian or French, were treated as an expendable commodity: Napoleon not only said “soldiers are made to be killed”,<sup>105</sup> but practiced it. This entire legacy stands in stark contradiction to the contemporary human rights agenda, which has been cultivated so assiduously by the same legal system that seems to take this type of war as given (or, at least, acceptable).

There is yet a third paradox: What the UN Charter is precisely oriented towards is the preservation of the *status quo* in the international order. That is the reasoning behind the prohibition on the use of military force aimed at changing the current order, even for the sake of “just causes”.<sup>106</sup> This same reasoning limits the scope of lawful self-defense,

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<sup>103</sup> See the second sentence of the UN Charter’s preamble.

<sup>104</sup> Azar Gat, *THE DEVELOPMENT OF MILITARY THOUGHT: THE NINETEENTH CENTURY*, 13 (1992). (hereinafter Gat, *THE NINETEENTH CENTURY*).

<sup>105</sup> *JUST AND UNJUST WARS*, *supra* n 6, at p. 136.

<sup>106</sup> Thus, even in “justified” territorial disputes, there is at present no right to use force to rectify an “old” wrong. The aggrieved claimant finds that “justice” has been sacrificed for the sake of “peace” even when

as well. If an armed attack actually occurs, the Charter allows the defendant state to use military force in its own self-defense only as an interim measure, until the Security Council has taken measures to restore peace and security. The Charter's underlying assumption – “preservation of the *status quo*” – stands in sharp contrast to the vision of grand war,<sup>107</sup> a type of war aimed at precisely the opposite: changing the world order and the existing state of affairs.

As mentioned above, as opposed to the “grand battle” legacy, which aimed at destroying the enemy's army and breaking its will to resist its opponent, there was a moderate model with restricted war aims available to the international community for the purposes of law: the 1886 St. Petersburg Declaration. Indeed, this type of offer had been put on the table almost eighty years prior to the establishment of the UN and drafting of the Geneva Conventions, but the accumulated experience, and trauma, of the two World Wars should only have strengthened its appeal.<sup>108</sup> What's more, this type of less bloody alternative was not rhetoric, *per se*; it was not detached from the military thinking of its time and, in fact, represented a well-known and reputable military and strategic-political historic experience. Merely the fact that an alternative legal vision was available in the aftermath of World War II invites us to inquire into its actual rejection.

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peaceful means of resolving the territorial issues have been exhausted or proven futile. See e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628 (1984).

<sup>107</sup> The validity of this “preservation of the *status quo*” assumption will be challenged *infra* (notes 152-154 and accompanying text), where I shall present a culturally based explanation reconciling this apparent paradox. While the Americans in 1945 really meant to preserve the *status quo* as an absolute requirement by the Charter, the Russian perspective was totally different, depending on which *status quo* was being considered. In their opinion, in some cases it should have been kept; in others, it should have been overturned.

<sup>108</sup> World War I's death toll viewed through contemporary eyes seems almost inconceivable, estimated at around eight million. See, e.g., Michael Howard, *THE FIRST WORLD WAR: A VERY SHORT INTRODUCTION* (2007), specifically the table on p. 122. Another estimate puts the number of dead at 9.5 million. See *WAR, PEACE AND INTERNATIONAL RELATIONS*, *supra* n 87, at table 6.1 on p. 83. Furthermore, as Gat claims, it was not only the inconceivable death toll that prompted countries' aversion to war after World War I, but also the transformation in liberal opinion, which had come to see war as being out of sync with the concept of modernity. Azar Gat, *WAR IN HUMAN CIVILIZATION*, 595 (2006). World War II's death toll is even more startling, with civilian deaths exceeding military casualties, putting the total at around 53 million people, out of which 16.8 million belonged to militaries. See e.g. *WAR, PEACE AND INTERNATIONAL RELATIONS*, *supra* n 87, at p. 124 et sq. and specifically Table 10.1 on p. 125.

*Can and should the law of armed conflict regulate a military's strategy and doctrine?*

Can the prevailing legal system, which has chosen the extreme policy of *ad bellum* prohibition of the use of military force as a proactive unilateral tool, regulate, as its default option, war's aims and operational scope through the *in bello* branch of law?<sup>109</sup>

Can or should it impose constraints upon the bloodiest effects of military doctrine or strategy chosen by an aggressor, transgressor, or victim states?

Merely asking such questions may point to the unpleasant reality that the international law of war has its limits. The apparently unnatural adoption, or at least acceptance, of the Napoleonic type of bloody war by the law of armed conflict might be justified on practical grounds if there is an implicit assumption that the law cannot, and could not, dictate to a military what strategy or operational activities to adopt. In such a case, it is an acceptable – perhaps even smart – policy to take the worst case scenario, the grand battle, as war's prototype and only then face it, *ex post*, while trying to regulate and minimize its *in bello* effects.

Yet, even if one accepts this “welcome to the real world” explanation – namely, that the current law of armed conflict squarely faces reality and takes the worst case scenario, the grand war, as given – crucial questions remain. Grand wars do have the potential to kill many lives on both adversaries' sides. From the winning side's perspective, should the law of armed conflict – and for simplicity's sake, I ignore here the role of human rights law in wartime<sup>110</sup> – be relevant to and protect only the enemy's civilians or

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<sup>109</sup> Indeed, our discussion is limited to the *in bello* sphere of law. See the discussion *supra*, text accompanying notes 86-7, regarding a potential argument that the *ad bellum* proportionality requirement might affect the operational scope of a military.

<sup>110</sup> Discussing the role of human rights law in wartime in general and its relationship with the law of armed conflict in particular goes beyond the scope of this article. It should be noted, however, that the ICJ in its Advisory Opinion in the nuclear weapons case has stated: "The test of what is an arbitrary deprivation of life however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, [25]. (hereinafter *Nuclear Weapons Advisory Opinion*).

Furthermore, it should be noted that the distinction between the two legal regimes is no longer binary. See, e.g., Benvenisti, *Rethinking the Divide*, *supra* n 14, at pp. 541-542 (arguing that “[t]he significance of the distinction between international and non-international armed conflicts has also been muted by the recognition that both humanitarian and human rights obligations are relevant to both types of conflicts”). This new trend has been dealt with also by Cassese, who points out that

soldiers, disregarding one's "sovereign" soldiers and civilians? If it does disregard the latter,<sup>111</sup> does it not prove the argument that under the prevailing law of armed conflict, there is no correlation between the risks and rewards of initiating wars?<sup>112</sup> Such a miscorrelation occurs when the (civilian and military) leadership of a state disproportionately enjoys the benefits of a grand war, while its "subjects", the state's main sectors and actors (civilians and soldiers alike), bear the burdens and risks. In reality, it is the latter that disproportionately pay the price, even when their side wins. Napoleon could say that his own soldiers were "made to be killed", yet nonetheless assert that "it was not the legions which crossed the Rubicon, but Caesar."<sup>113</sup> Is it acceptable, then, as has all too often happened, that leaders should claim their dubious glory, regardless of the price paid by their own soldiers and civilians?

**Indeed, the adoption, back in the 1940s, of a moderate war model with restricted war aims, as the "legitimate prototype" of war, might have enabled the gradual creation of a cluster of humanitarian rights, deriving from the notion of human dignity, and established directly as an integral part of the law of armed conflict.** Such a strong base of humanitarian rights, aimed at relieving human suffering and limiting the amount of damage that could be inflicted during wartime, would have applied to all relevant victims, from all sides, affected by the belligerency. It might have been grown and developed naturally and gradually within the legal paradigm related to war. The difference between gradually developed

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"[h]umanitarian law has become less geared to military necessity and increasingly impregnated with human rights values. The ICTY in *Tadic (Decision on Interlocutory Appeal)* rightly emphasized this new trend. When dealing with the distinction between the law regulating international and that governing internal armed conflicts, the Appeals Chamber pointed out that one of the most conspicuous developments of modern humanitarian law was that it had been strongly influenced by human rights doctrines." Cassese, *International Law*, above n 74, 402 (footnotes omitted)

See generally, Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004).

<sup>111</sup> Indeed, soldiers and civilians enjoy the protection of their own domestic human rights law: they are not left without legal safeguards. "Today the human rights doctrine forces States to give account of how they treat their nationals, administer justice, run prisons, and so on." Cassese, *INTERNATIONAL LAW*, *supra* n 25, at p. 375.

<sup>112</sup> Indeed, there is room for such an argument in the inter-state arena and at the individual state level as well when comparing the aggressor state's potential (and actual) risks and rewards with those of the defendant. Here, however, the argument reflects an intra-state reality: the relationships between the leadership echelon of a state, even a "winning" one whose leaders follow the grand battle legacy while its subjects pay the price.

<sup>113</sup> See *supra* n 86 and see *COMMAND IN WAR*, *supra* n 19, at p. xi, respectively.

internal (humanitarian) rights and external ones, imported from a different branch of law (“human rights”), is crucial to their effect. A natural organ of a body – in this case, a body of law – does not suffer from the rejection a transplanted one faces. Currently, for example, when peacetime human rights are derogated in wartime, the minimum rights are vested in the law of armed conflict.<sup>114</sup> **A moderate prototype of war is consistent with a robust cluster of humanitarian rights, applicable in wartime, as part of the law of armed conflict. It would give these rights a wider scope and make them more substantive, requiring all belligerent parties to consider the humanitarian rights of all participants, on both adversaries' sides, soldiers and civilians alike.**

In confronting these questions and challenges, one must take into account the fact that **the military doctrine of any army is its anchor, usually deeply rooted in its culture and based upon many years of prewar training and operational planning. It is firmly implanted among its rank and file, long before any belligerence has taken place. That doctrine cannot be transformed overnight, not even by an “external” international legal norm.** Such a transformation may take years and even generations to occur. Nonetheless, even such a military and cultural conservatism, *per se*, neither explains nor justifies why the “killing madness” became the only archetype of war for the sake of legal discussion, especially after the traumatizing lessons from the two World Wars.<sup>115</sup> The fact that Clausewitz was the self-proclaimed prophet of this model does not make it a sacred principle. Why, then, was it awarded a monopoly, and why has the legal discussion remained so passive on the crucial question of how wars are actually to be conducted?

In some cases, the choices made by the military to achieve a given war’s aim, within a given doctrine and strategy, might be consistent with Fuller’s assertion that soldiers and their commanders have been “hypnotized” by the notion of “great battles”.<sup>116</sup> In reality

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<sup>114</sup> See *supra* n 110 and see, e.g., Yoram Dinstein, *The Conduct of Hostilities under the Law of Internal Armed Conflict* 19-23 (2<sup>nd</sup> ed. 2010).

<sup>115</sup> See *supra* n 87.

<sup>116</sup> See the discussion *supra* text accompanying n 48 and see generally, Gat, *THE NINETEENTH CENTURY*, *supra* n 104. It might be interesting to contrast the “hypnosis” idea with the current reality in which modern states and armies are not willing to sacrifice their soldiers on war's altar. Luttwak argues



however, it is sometimes the generals rather than the civilian leadership who constitute the mitigating factor in war.<sup>117</sup> In any event, as we have just demonstrated, the military-professional doctrinal and strategic alternatives are always there. Leading twentieth century strategic theorists thought that the grand-battle archetype of war is an obsolete legacy of the Napoleonic era, whereas future wars would follow earlier patterns of war (not to mention Sun-Tzu's legacy), i.e., be limited in their objectives, and not aimed at the total destruction of the adversary.<sup>118</sup> In the post-World War II period such views were not legally endorsed; in fact, they seem to have been simply ignored. Bearing in mind the purpose of the modern law of armed conflict, this conscious, and indeed willful ignorance, raises a serious question.

**One of the ironies of this state of affairs is the self-imposed restrictions on the use of nuclear weapons by the superpowers.** Following the use of the atomic bomb in 1945, nuclear weapons that might allow the implementation of the vision of "total destruction of the adversary" – indeed, not by face-to-face engagement as

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that this phenomenon is common to both democracies and totalitarian regimes in what he calls the 'postheroic era'. Luttwak, *STRATEGY*, *supra* n 58, at pp. 68-80.

<sup>117</sup> As mentioned above, some Union generals were considered too moderate during the American Civil War and dismissed by Abraham Lincoln, who insisted that the only way to win the war was through the complete destruction of the Confederate forces. During the First Gulf War, as well, it was General Powell who argued against the complete destruction of the Iraqi army and was in favor of ending the ground war after one hundred hours. *SUPREME COMMAND*, *supra* n 61, at pp. 31 and 38 (on Lincoln), pp. 194-198 (on Powell). Powell's preference for negotiations can also be discerned in Colin L Powell, *A Strategy for Partnerships*, 83 *FOREIGN AFFAIRS* 22 (2004). In Israel, for example, there have been several generals who turned to politics and, especially upon assuming office, became adamant pursuers of peace as a strategic choice. The late Prime Minister Yitzhak Rabin, for example, confessed to the change he had undergone in his address to the US Congress, on 26 July 1994:

Allow me to make a personal note. I, military I.D. number three-zero-seven-four-three, retired general in the Israel Defense Forces in the past, consider myself to be a soldier in the army of peace today. I, who served my country for 27 years as a soldier, I say to you, Your Majesty, the King of Jordan, and I say to you, American friends: Today we are embarking on a battle which has no dead and no wounded, no blood and no anguish. This is the only battle which is a pleasure to wage: the battle for peace.

Address by PM Rabin to the US Congress (Jul. 26, 1994), Available at, <http://www.mfa.gov.il/MFA/Archive/Speeches/ADDRESS+BY+PM+RABIN+TO+THE+US+CONGRESS+-+26-Jul-94.htm> (last accessed Jun. 10, 2012)

Similarly, the unilateral disengagement from the Gaza Strip was carried out in 2005 by Ariel Sharon, then Israeli Prime Minister (and formerly a renowned general in the Israel Defense Forces), who upon announcing the disengagement plan declared: "Like all Israeli citizens, I [Ariel Sharon] yearn for peace. I attach supreme importance to taking all steps, which will enable progress towards resolution of the conflict with the Palestinians." Address by Prime Minister Ariel Sharon at the Fourth Herzliya Conference (Dec. 18, 2003). Available at: <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2003/Address+by+PM+Ariel+Sharon+at+the+Fourth+Herzliya.htm> (last accessed Jun. 10, 2012).

<sup>118</sup> See the discussion *supra* notes 39-57 and accompanying text.

envisaged by Clausewitz, but from long range – were made available to the superpowers (and subsequently to lesser regional “powers”). Their actual use was rejected by them soon afterwards; however, the modern notion of containment of mass conflicts and mass destruction capabilities<sup>119</sup> was based upon neither moral nor legal grounds,<sup>120</sup> as one might have wished, but rather on practical ones. The superpowers' behavior – their denial of the use of weapons of mass destruction – was guided by neither moral nor legal compass, but based rather on a reciprocal threat. One could call it a moral and legal failure; others might argue that this is what *real politic* is all about. In any event, **in strategic matters utilitarianism triumphed and deterrence prevailed over legal and moral argumentation.**

**Even if facing reality means that some stages of the military planning and actual fighting – i.e., the doctrine and strategy selected – must be accepted as given and immune to legal interference, such interference in the operational and tactical aspects of war might still be practical.** Indeed, less ambitious intervention could be entertained, for example, directing that the course of action actually taken to achieve a given military goal – within the framework of the strategy selected – be the least harmful to the adversary's combatants and noncombatants. Such proactive legal interference will be discussed in the next section.

*The law of armed conflict can regulate the military's choices of course of action!*

The previous discussion has dealt with the macro issues related to legal interventions in warfare: the legitimacy of the legal adoption of the grand battle model of war as given and the reluctance of the law of armed conflict to interfere with a given military doctrine or strategy. In fact, this reluctance seems, at the moment, to be an axiom. But even if this maxim be accepted, if not normatively desired, at least as the positive rule, it is now

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<sup>119</sup> See, e.g., Kennan's approach as reflected in his writing, while instituting in 1945-47 the notion of the containment of the Soviet Union, in Azar Gat, *A HISTORY OF MILITARY THOUGHT: FROM THE ENLIGHTENMENT TO THE COLD WAR*, 809-816 (2001). Speaking of Kennan's views about the horrors of nuclear weapons and the impracticality of their use, Gat quoted Kennan, who wrote at the start of the nuclear age that “If weapons were to be used at all, they would have to be employed to temper the ambitions of an adversary, or to make good limited objectives against his will—not to destroy his power, or his government, or disarm him entirely...” *Id.* 810.

<sup>120</sup> See Nuclear Weapons Advisory Opinion, *supra* n 110, at [105] and see the discussion *infra*, text accompanying notes 146-147.

time to deal with the micro issues: **the scope of the normative legal intervention, if any, in alternative military courses of action to achieve a given military aim within a certain strategy.** The military planner ordinarily knows in advance which operational and tactical alternative, out of the available courses of action, may be expected to inflict the least harmful consequences. Indeed, when it comes to collateral damage caused to civilians, this *ex ante* professional knowledge expected of the military stands behind the prevailing rule, imposing mandatory proportionality considerations.<sup>121</sup>

Military planning is not a black box,<sup>122</sup> to be viewed solely in terms of its final products and results, with no understanding or knowledge of its internal procedures and workings. The opposite is true: it is a professional system with its own manifest rules and procedures, most of which are known to the public in liberal democracies. To achieve a designated military aim or advantage, the military planning process requires the planner to develop a wide spectrum of alternatives. Out of these preliminary alternative courses of action, only one is selected in a professional due process. For example, the wartime decision-making model used in the U.S. Army consists of six steps,<sup>123</sup> including: intelligence Preparation and Mission Analysis,<sup>124</sup> Development of Friendly Courses of Action<sup>125</sup> [CoA]<sup>126</sup>, Analysis of these CoAs,<sup>127</sup> Comparison between the Relevant Alternative Courses and Decision,<sup>128</sup> Development of Plans-Orders<sup>129</sup> and Transition.<sup>130</sup> It requires the commander in the field to develop and present several

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<sup>121</sup> See *supra* n 77.

<sup>122</sup> The Oxford Dictionary of British and World English defines 'Black Box' as "a complex system or device whose internal workings are hidden or not readily understood" See: <http://oxforddictionaries.com/definition/english/black+box>.

<sup>123</sup> US Naval War College, *Workbook on Joint Operation Planning Process* (2008), available at: <http://www.usnwc.edu/getattachment/Departments---Colleges/Joint-Military-Operations/NWC-4111H-21-Jan-08-Final.pdf.aspx>

<sup>124</sup> *Id.*, at p. 1-1.

<sup>125</sup> *Id.*, at p. 2-1.

<sup>126</sup> "A COA is any concept of operation open to a commander that, if adopted, would result in the accomplishment of the mission. For each COA, the commander must envision the employment of his forces and assets *as a whole—normally two levels down*—taking into account externally imposed limitations, the factual situation in the area of operations, and the conclusions previously drawn up... ". *Id.*, at p. 2-1.

<sup>127</sup> *Id.*, at p. 3-1

<sup>128</sup> *Id.*, pp. 3-15 to 4-6.

<sup>129</sup> *Id.*, pp. 4-7 to 5-2.

<sup>130</sup> *Id.*, p. 5-3.

relevant alternatives and choose the best course of action. The 'Operational Estimate' is the British military's counterpart decision-making process.<sup>131</sup> Like the American manual, the British requires the military planner to present several alternatives for a given mission.<sup>132</sup>

In light of the military planning process and the selection of a course of action out of the alternatives for achieving a designated military goal, the passiveness of the law of armed conflict regarding the humanitarian effects of these alternatives does not seem to be professionally justified, even from a military perspective. Why does the law not have a say with regard to the bloodiest effects of these alternatives? **Even if it be accepted that a chosen military strategy and doctrine is, *de facto*, immune to legal intervention, this immunity of the strategic level should not protect the chosen course of action for any given military aim.** It might still impose constraints upon direct or collateral damage caused by it, by requiring the choice of the least harmful military alternative. Such a step could only find support from the internal requirement of militaries – mainly, those of liberal democracies – that the chosen course of action be consistent with the law of armed conflict. For example, British campaign planning requires the scope of analysis to be considered in the process to include national and international law to which British forces are subject, such as the Geneva Conventions and the law of armed conflict.<sup>133</sup> If there were a legal rule requiring the choice of the least harmful military alternative, it would likely be implemented by law-abiding militaries.

Indeed, the discussion thus far presents this article's main argument: that the prevailing *in bello* rules have turned a blind eye to the crucial issues relating to legitimate war's aims and how wars ought to be fought at the strategic, operational and tactical levels. At

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<sup>131</sup> BRITISH MINISTRY OF DEFENSE, THE DEVELOPMENTS, CONCEPTS AND DOCTRINE CENTRE, CAMPAIGN PLANNING (Joint Doctrine Publication 5-00, 2nd edn, 2008), Section IV, p 2-24. Available at: <http://www.mod.uk/NR/rdonlyres/56AAAE6B-0728-4D10-A6AB-DBBE30B957B8/0/JDP5002ndEdCh1web.pdf>

<sup>132</sup> Noting that: "Unless a JFC [Joint Force Commander] decides there is only one solution to achieving his mission, he is likely to develop a number of potential outline CoAs based on different combinations or sequencing of decisive conditions." *Id.*, at p. 2-34, para. 268.

<sup>133</sup> *Id.* Appendix 1A, 'Scope of Analysis', p 1A-4, para. 1A10, and see footnote 8 therein. See also the US Naval Manual requirement of consistency of CoA with the rules of engagement. US Naval War College, WORKBOOK ON JOINT OPERATION PLANNING PROCESS, appendix F (2008).

that juncture, the laws fall silent, allowing the military *carte blanche* with only a residual and limited intervention. Why?

#### IV. One Puzzle and Three Possible Answers

What seems, *prima facie*, to be a counterproductive legal arrangement requires an explanation. One potential justification for the enthusiastic adoption of the grand battle model of war – namely, the belief that one decisive battle is the most efficient and humanitarian solution to any belligerent conflict – may be rejected upfront. The three explanations I suggest will therefore be compromise-based.

Indeed, it seems that wholeheartedly advocating the grand battle vision due to its “efficient and humanitarian” dimensions is no longer a valid option. Such an approach prevailed in embattled Europe after the medieval ages and was promoted as well by some strategists in the post-medieval period. It evolved – since the battle of Breitenfeld, in 1631, which represented the Protestants’ first major victory of the Thirty Years War – primarily due to efficiency considerations.

In medieval war, large-scale battles had sometimes occurred, but they were a rarity. Gustavus Adolphus placed a new emphasis on the waging of battle to impose a new decisiveness upon warfare. War in the Middle Ages had tended toward prolonged indecision, but the Swedish King wished to push it toward prompt, emphatic resolution, so that it might better serve his purpose of enhancing the power of his emerging nation-state without undermining its very object by disastrously draining the resources of the state – decidedly limited resources in the case of Gustavus Adolphus's Sweden. In a successful battle, the enemy army might be drastically depleted or even effectively destroyed in a single day, and the enemy might thus be rendered nearly or completely helpless to prolong the war. From Gustavus Adolphus to Napoleon, military strategy tended to be a quest for the destruction of the enemy army with the battle as the means for the rapid and efficacious accomplishment of that destruction. ...

The quest for decisive battle was the educated soldier's rationalist effort to make war cost-effective, the promptness of the decision through battle promising to prevent an inordinate drain upon the resources of the state.<sup>134</sup>

From a cost-effectiveness perspective, the supporters of the grand battle vision went even further by humanizing it, arguing that in order to minimize human suffering in times of war, the desired goal should be to shorten its duration. The most efficient way to conclude a war in a short time and thereby minimize the human suffering caused by it is, according to this approach, through a decisive battle. This rationale was accepted by the Lieber's Code statement that: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief."<sup>135</sup>

Field-Marshal Moltke, the elder, for example, disregarded efforts at the time (towards the end of the nineteenth century) to regulate the conduct of war through law. He endorsed a pattern of all-out war<sup>136</sup> and believed that the imposition of restrictive laws on war would do very little to control it, war being so unpredictable, and with no sovereign to enforce the law.<sup>137</sup> Moltke's view was shared by Prussian General Julius von Hartmann who insisted, in a somewhat Clausewitzian manner, that the conduct of war required the breaking of all humanitarian boundaries; for a short war ultimately would minimize the violation of humanity.<sup>138</sup> This line of thinking persisted into the twentieth century, and its cynical manipulation can still be found, sixty years later, in the rhetoric of Nazi Germany.<sup>139</sup>

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<sup>134</sup> THE AGE OF BATTLES, *supra* n 18, at p. 536. Indeed, within the cost-effectiveness formula, the cost of lives is still an economic factor (as a means) but does not stand, *per se*, as a humanitarian, independent consideration (an end). As to the one-day pitched battle, very common in the past, see *supra* note 16.

<sup>135</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 29. Available at: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>

<sup>136</sup> See the discussion *supra* notes 28-31 and accompanying text. According to Moltke, war was a phenomenon of divine order which could only be limited through a general change in the moral sensibilities of societies at large; and an imposition on war of a strict and detailed code of law would only lead to the frequent violation of the latter. HUMANITY IN WARFARE, *supra* n 29, at p. 145.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*, at p. 146 (citing Hartman: "short wars ... were the most humane").

<sup>139</sup> For example, in 1943 after Paulus' capitulation in Stalingrad, it was Goebbels who delivered a speech blaming the defeat on the Jews and therefore calling for their extermination as the cause of it under the slogan: 'Total War = Shortest War'. Andrew Roberts, THE STORM OF WAR: A NEW HISTORY OF THE SECOND WORLD WAR, 249 (2009).

However, after the World Wars the adoption of the grand battle vision as a humanitarian and civilized, not to say effective, tool for solving international conflicts was no longer plausible. Even the most cynical and aggressive states would have found it difficult to endorse it. It therefore seems reasonable to assume that the post-World Wars rules of the law of armed conflict were a realistic compromise. Unfortunately, it can be seen as a bad compromise. Nonetheless, it can be explained in three ways, or a combination of them, either in whole or in part.

The first explanation is primarily based on the interest of the superpowers' militaries in maintaining their independence in designating war's aim and in adopting doctrines and strategies to be applied on the battlefield which are suitable to them, without external intervention. They exerted their power to preserve their "military sovereignty" in the aftermath of World War II. The rationale was operative. Their militaries wanted to limit any third-party intervention in their own "internal" military practice at all levels of warfare: strategic, operational and tactical.

The second explanation is similar to the first, except that it relates to "state sovereignty" rather than to the military. As such, it relates primarily to the choice of strategy: the highest level of warfare. Along this line of argumentation, the superpowers dictated their will in order not only to preserve their militaries' autonomy, but also to shield their leaders – both civilian and military – from any third-party legal scrutiny of matters relating to the designation of war's aims and the choice of strategy selected by them in a given campaign. They left no legal room for debating the issue of at whose discretion, and under what circumstances, war's aims or a given military strategy should be decided upon. The doctrinal and strategic choices therefore remain the internal affair of any state, to be decided by its own civil and military leaders.

Both of these explanations – based upon the superpowers' desire to maintain the sovereignty and flexibility to exercise (or threaten to use) their militaries' power without third-party intervention – seem to be consistent with the circumstances attending the establishment of the UN and the drafting of its Charter. Through the Charter, the stronger nations to a large extent preserved their dominance. As mentioned above, the

rules prevailing under the Charter are aimed at preserving the *status quo* and framed in a way that protects the interests of stronger nations. Thus, for example, the veto rights of the five “permanent members” of the Security Council reflect this extra protection. They are valid not only in matters concerning third-party activities, but in cases relating to the five permanent members’ own disputed activities as well. Their being able to veto a decision relating to their own actions exposes their conflict of interest. One cannot be an observer, let alone a judge, of one’s own actions. The five “permanent members” (and, to a lesser extent, their proxy states) enjoy *de facto* immunity from any legal intervention in their military activity.<sup>140</sup> This bias in favor of the superpowers was stated publicly in the negotiations pursuant to the establishment of the UN: “Stalin’s interest ... was focused on the preservation of the independent Great Power position of the Soviet Union, free from restrictions on her sovereignty, protected against intervention and supervision by any international authority, shielded against majority votes of the ‘capitalist’ states and equipped with a sufficiently strong voting potential.”<sup>141</sup> The superpowers did agree, as did all other states, not to use their military force “aggressively,” but were unwilling to take the additional necessary step: to agree upon the definition of this general prohibition under the Charter. In fact, they did not even agree upon the essence of the prohibition's exception of self-defense.<sup>142</sup>

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<sup>140</sup> Indeed, the Charter’s regime, despite its bias in favor of the “big five”, cannot be simply dismissed as totally one-sided. Weaker nations, too, enjoy the peaceful world vision in general, as well as particular rules aimed at safeguarding their own sovereignty and right to self-defense in particular. However, at the end of the day, this arrangement – favoring the stronger states – suffers from a lack of equilibrium, at both the substantial and the procedural level. Indeed, the participants at the San Francisco Conference were well aware that the victory over the Axis “had been achieved primarily by the effort of the Big Powers. Presented with a draft prepared by those nations’ leaders and diplomats, representatives of less-powerful states were little inclined to challenge its fundamentals. ... [T]hey realized that such participation [of the Powers] had a price.” Thomas M Franck, *RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS*, 45 (2002).

<sup>141</sup> Bruno Simma et al. eds., *THE CHARTER OF THE UNITED NATIONS*, 6 (2nd edn., 2002).

<sup>142</sup> On this point, however, Stalin does not seem to have been the main culprit, but rather the United States. At the San Francisco conference, the United States took the position that “a definition of aggression cannot be so comprehensive as to include all cases of aggression and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case.” vol. 5, Marjorie M Whiteman 1965 DIGEST § 22, at 740. It might be interesting to compare this statement, in retrospect, with the recent attempt to define aggression at the Rome Statute’s Kampala review conference. Its participants did not take into account the growing presence of asymmetric conflicts in the world between state and non-state actors, and defined aggression in much the same way as it was defined in G.A. Res. 3314 of 14 December 1974: as an armed attack of various sorts committed by the armed forces of a state or representatives thereof. See e.g. Rome Statute Review Conference 13<sup>th</sup> plenary meeting, Resolution RC/Res 6, Annex I: ‘Amendments to the Rome Statute of the International Criminal



Through their position as permanent members of the Security Council, the superpowers wanted, so it seems, to enjoy both worlds: preserve their relatively strong position as legal and perhaps even moral observers in charge of keeping world peace, while at the same time playing an active role on the ground militarily. In this latter capacity, they primarily sought to shield their activities from any substantial legal scrutiny.<sup>143</sup> They wanted to have the freedom to exercise their right to self-defense, with minimal obligations (allowing the *in bello* restrictions – adopted in the Geneva Conventions – strictly at the current modest level) and no doctrinal restrictions whatsoever. According to the above two explanations, then, **the superpowers (who also maintain mass armies) intentionally preserved the Clausewitzian archetype of conventional war (primarily suited to such armies) as a legitimate model in order to preserve their freedom of operation on the battlefield**, despite the fact that, as mentioned earlier, this type of grand war might not have been the most effective way for them to use their huge military capabilities.<sup>144</sup> For a fact, the superpowers did not agree on the definition of aggression, nor did they define self-defense in the Charter, and the contemporary law of armed conflict was shaped in favor of the strong militaries:

The laws of war inherently favor the stronger army which is capable of striking the military assets of its weaker adversary, while the adversary is unable to reciprocate in kind. The weaker party is expected to play by the rules that predetermine its defeat. The burden of obeying the law rests on the shoulders of

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Court on the Crime of Aggression, art. 8 (Jun. 11, 2010) Available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/resolutions/rc-res.6-eng.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/resolutions/rc-res.6-eng.pdf) (last accessed Nov. 9, 2012)

<sup>143</sup> A discussion of the tension between the jurisdictions of the Security Council and the International Court of Justice (which might be applicable to the five “permanent members” as well) is beyond the scope of this article. See, e.g., Dapo Akande, *The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?*, 46 INT’L & COMP. L.Q 309 (1997); Jose E Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1 (1996)

<sup>144</sup> Utilizing their superior firepower and material strength, the superpowers can use industrial methods of targeting (“attrition” war) in their military campaigns. Alternatively, they can take advantage of their strength (including in technology and intelligence gathering) to aim at incapacitating (some of) the enemy’s strengths and not (mainly) destroying its physical assets. For example, Edward Luttwak describes the advantages of such action, noting that: “... relational maneuver offers the possibility of obtaining results disproportionately greater than the resources applied to the effort”. However, Luttwak notes that the success of such a strategy depends on the success of the force applied in its task, and on its not being surprised by the enemy’s strength at the point of expected weakness due to misinformation. Considering these two conditions, it seems plausible that the superpowers would opt for overwhelming force to assure victory. Luttwak, *STRATEGY*, *supra* n 58, at p. 115.

the weaker side, who is likely to find such law morally questionable and certainly not worthy of compliance...<sup>145</sup>

A less cynical version of such explanations might argue that the superpowers back in 1945 intended, *bona fide*, to stop aggression of any kind and any transgression of the *in bello* rules, including their own. Alongside this desire, however, they wanted to keep their flexibility to use their military forces as a deterrent tool against any attack aimed against them (in their own self-defense) or any of their proxy states, in the context of the collective self-defense exception. The compromise agreed upon was to pay tribute in the Charter to the principle of prohibition of the use of force with its self-defense exception, and to agree in the Geneva Conventions to minor restraints on their methods of warfare, as reflected by contemporary *in bello* rules. The superpowers were able, however, to achieve their main interest: keeping their full military capabilities and actual operations, in the context of their preferred military doctrine, free from any major constraints. Whether in the wild or inside a china shop, went the thinking, this kind of elephant could exert its full deterrent effect only if it were allowed to move about freely without chains. It was true then with regard to the superpowers' conventional capabilities, and seems even truer now in light of their nuclear arsenal.

Surprisingly, **this 'freedom to use devastating military force' approach received its legal backing from the International Court of Justice in its advisory opinion regarding the *Legality of the Threat or Use of Nuclear Weapons*.**<sup>146</sup> There the Court recognized what could be perceived as an exception to the prevailing *in bello* rules, which applies only in an extreme scenario, declaring that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival

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<sup>145</sup> Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 342 (2010). In a different article he further argues that the onus of obeying the law of armed conflict, and especially the burden of insulating the *jus in bello* from *ad bellum* considerations, falls mainly on the shoulders of the weaker side. “The laws of war are inherently biased in favor of the stronger armies that can translate their relative economic power into military gains. The weaker party that fights for a just cause must nevertheless play by the rules that portend its defeat. ...Small wonder that the constituency of the weak finds the insulated *jus in bello* morally corrupt. Weaker communities might be more inclined to subscribe to a law that also takes into account the justness of the cause.” Benvenisti, *Rethinking the Divide*, *supra* n 14, 547.

<sup>146</sup> Nuclear Weapons Advisory Opinion, *supra* n 110.

of a State would be at stake.”<sup>147</sup> Indeed, the Court neither addressed nor upheld the magnitude of the superpowers’ military might, but dealt solely with a special type of destructive “ammunition” over which they had an almost exclusive monopoly. Thus, the superpowers’ ambition, dating back to the 1940s, of keeping the option of using their destructive military capabilities to the fullest extent – apparently, in self-defense – without any substantial external restrictions on their operational exercise of force, was approved by the ICJ more than fifty years later!

Contrary to the previous explanations, which were based upon the sovereignty of states (and militaries), a third explanation for what might seem, *prima facie*, to be a counterproductive arrangement legalizing bloodshed, does not concentrate on the superpowers’ interest in immunity, *per se*. Instead it reflects their limitations. It internalizes the fact that, in practice, states’ behavior in general, that of their militaries in particular, to a large degree reflects their cultural background. Whoever would like to understand different military practices must first look at the cultural dimensions of their respective societies. The drafters of the modern law of war, after the two World Wars, simply yielded to the cultural reality of their time and place (and, from this perspective, to the superpowers’ interest, as well as that of any other state).

Ultimately, it is the culture of a given society that largely dictates its military doctrine and strategy.<sup>148</sup> Legal rules cannot serve as the main trigger to change a military’s behavior, for this sphere is controlled primarily through the cultural domain. The patterns of war, the way militaries fight and their doctrines, are generally speaking beyond the direct scope of the legal arrangement. Even military tactics “are usually the product of social and economic factors rather than of purely military ones.”<sup>149</sup> War practices can only change when there is a change in the culture of the relevant society.<sup>150</sup> Underlying this explanation is an explicit or implicit acknowledgement by the law of its own limits and its deferral to external, culturally based considerations.

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<sup>147</sup> *Id.*, at [105].

<sup>148</sup> For a general discussion of the effect of cultural attributes upon strategic behavior and the way they shape military doctrines, see, e.g., THE CULTURE OF MILITARY INNOVATION, *supra* n 60.

<sup>149</sup> COMMAND IN WAR, *supra* n 19, at p. 19.

<sup>150</sup> See, for example, Moltke’s view, *supra* n 137, that war could only be limited through a general cultural change in the moral sensibilities of societies at large.

This culturally based explanation would seem to be challenged, however, by the prohibition imposed by the Charter on the proactive unilateral use of military force, which ostensibly undermines the very notion that patterns of war are beyond the direct scope of the legal arrangement. To the contrary, one might argue, this prohibition demonstrates, *prima facie*, the supremacy of the legal rules over any culturally based bias. But of course, this formal legal argument is easily countered by the reality of very poor abidance by this proscription.

The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system.<sup>151</sup>

Furthermore, the cultural explanation would point to – and challenge – the widely accepted prior assumption that the UN Charter is oriented towards the preservation of the worldwide *status quo*.<sup>152</sup> From a historic perspective, the Americans may really have meant to preserve the *status quo* unconditionally upon the foundation of the UN. The Russian outlook, however, was entirely different; it all depended on which *status quo* was being discussed.

**The *jus ad bellum* was reintroduced to the highest levels of international thought and action in the nineteen-twenties and thirties, principally by Americans.** No country involved in the first world war attained or sustained as high a sense of disinterested moral fervor as the United States; no national leader cared more or talked more about the establishment of justice in international affairs than President Wilson ... The League of Nations, the establishment of which was more Wilson's work than anyone else's, was meant to promote justice between nations as well as to secure peace between them. The League's particular purpose of banning war 'as an instrument of national policy' received its most notable fillip in the General Treaty for the Renunciation of War of 1928 .... [T]he League's peace-securing and justice-asserting purposes were reborn in the United Nations Organization. .. The wars which Wilson, Kellogg and their like expected to bless as just, were

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<sup>151</sup> *Fog of Law*, *supra* n 5, at p. 540. See also, *Who Killed Article 2(4)*, *supra* n 5, at pp. 810-811.

<sup>152</sup> See *supra* n 106 and accompanying text.

those aiming to maintain the international *status quo* or, in cases where it absolutely had to be changed, to enforce a change which the League had by due process pronounced to be just. ... **How different was the Marxist view of all this! The international *status quo* after Versailles, for the Marxist, was by definition a bourgeois imperialist one, wherein justice was all on the side of those who sought to overturn it.** Oppressed lower classes within capitalist or still surviving quasi-feudal countries had every right to rebel if they profitably could; and as for national self-determination, that was nowhere more just a cause than for the oppressed and exploited peoples of the capitalists' colonial empires.<sup>153</sup>

This culturally based distinction between the “Capitalist” and Marxist approaches reflects, in fact, an unbridged gap relating to one of the Charter’s pillars. While the Americans believed that the *status quo* is a blessing that should be promoted unconditionally worldwide, the Soviets saw it, in some instances, as an imperialist tool, a curse to be removed through actual military rebellion by the oppressed nations of the world fighting for their own self-determination. They did endorse the *status quo*, though, in the socialist states. From their perspective, where a desired equilibrium had been reached after the class revolution, the newly established *status quo* should be preserved. “[T]he Soviet Union announced, in effect, that it did not accept Article 2(4): ‘Wars of national liberation,’ an open-textured conception essentially meaning wars the Soviets supported, were not, in the Soviet conception, violations of Article 2(4).”<sup>154</sup> In this light, the paradox mentioned above – concerning how the tension between the Charter, which was built and oriented towards the preservation of the *status quo* in the international order, and the grand wars that are, by their very nature, aimed at challenging it, can be reconciled – emerges as no paradox at all. It merely reflects not only cultural differences, but also a double standard, all of it part and parcel of the political reality on which the UN was built.

Such an explanation may find some support from the fact that the original Marxist view of war was oriented towards the Clausewitzian. “Clausewitz’s ideas and Marxist thinking

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<sup>153</sup> HUMANITY IN WARFARE, *supra* n 29, at pp. 309-310 [emphasis added].

<sup>154</sup> W Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 280 (1984). *Criteria for the Lawful Use of Force in International Law*

were linked by threads which ran deep into a common intellectual matrix.”<sup>155</sup> In fact, Lenin admired the vision of total war.<sup>156</sup> "Lenin studied *On War* carefully and approvingly, used it repeatedly in his political pamphlets, and recommended it to Party functionaries."<sup>157</sup> Admittedly, in 1946 Stalin wrote that “we are obliged to criticize ... Clausewitz” due to his irrelevancy, because he had become “obsolete as a military authority.”<sup>158</sup> Despite Stalin’s rejection, however, there remains the common cultural environment of Clausewitz’s ideas and Marxist thinking. This cultural connection – which is, unsurprisingly, to a large extent consistent with America’s strategic cultural preference for overwhelming force and attrition<sup>159</sup> – might lend additional support to the idea of an implicit (or even explicit) renaissance of the Clausewitzian vision in the prevailing law of armed conflict.

**Indeed, the culturally oriented type of explanation for the legal adoption of the Clausewitzian vision might offer hope of a long-run, paradigmatic change in the pattern of war.** The earlier presentation of the changing pattern of war over the years demonstrated its pendulum motion.<sup>160</sup> It showed that the bloody Napoleonic archetype of wars may be the exception rather than the rule and, in any case, Napoleon’s bloody practice and Clausewitz’s theory do not hold a monopoly on military thinking and practice in the West. Furthermore, Oriental war-making was traditionally characterized by its own limited aims and particular traits: “Foremost among these are

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<sup>155</sup> Azar Gat, *Clausewitz and the Marxists: Yet Another Look*, 27 J. CONTEMP. HIST. 363, 364 (1992) (“Clausewitz’s work and Marxism were thus presented as distant cousins”. *Id.*, 372). Gat further argues that the Marxist adoption of Clausewitz was focused, *inter alia*, on the formula regarding the relationship between politics and war.

<sup>156</sup> HUMANITY IN WARFARE, *supra* n 29, at p. 308.

<sup>157</sup> Gat, *Clausewitz and the Marxists*, *supra* n 155, 363 (“Lenin read Clausewitz for a purpose and put him to immediate use.” *Id.* 371).

<sup>158</sup> *Ibid.*, 377. Is it possible that Stalin's disregard for Clausewitz was inspired at least in part by Hitler's admiration for Clausewitz? In his political will, issued on 29 April, 1945, Hitler wrote: “That from the bottom of my heart I express my thanks to you all, is just as self-evident as my wish that you should, because of that, on no account give up the struggle but rather continue it against the enemies of the Fatherland, no matter where, true to the creed of a great Clausewitz.” Adolf Hitler, My Political Statement, in OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, vol. 6, 259-263 (Government Printing Office, 1946-1948) Doc. No. 3569-PS. Available at: [http://en.wikisource.org/wiki/My\\_Political\\_Testament](http://en.wikisource.org/wiki/My_Political_Testament) (last accessed Nov. 29, 2012).

<sup>159</sup> See the discussion *supra* notes 60-68 and accompanying text.

<sup>160</sup> See the discussion *supra* Part I.

evasion, delay and indirectness.”<sup>161</sup> These were culturally based traits. Thus, Michael Handel traces the source of Sun Tzu’s moderate approach to Confucius’ idea of attaining ends without violence: “Sun Tzu’s emphasis on the use of force only as a last resort reflects Confucian idealism and the political culture that it spawned.”<sup>162</sup> **Even Clausewitz himself, the West's prophet of bloodshed, agreed that the most important factors in evaluating changes in war’s pattern are social and cultural** and, as such, subject to change: “Very few of the new manifestations in war can be ascribed to new inventions or new departures in ideas. They result mainly from the transformation of society and new social conditions.”<sup>163</sup>

Putting aside for the present our hopes for a paradigmatic cultural change in the pattern of war, this article will conclude by offering preliminary clues regarding short-term legal alternatives within the current culture and the prevailing legal paradigm.

#### V. Concluding Remarks: Suggested Alternative Legal Directions

The acceptance of the Napoleonic-Clausewitzian grand battle model as the archetype of war, for the sake of the legal discussion, is inconsistent with the underlying rationale of the contemporary law of war. Whatever the explanation of the puzzle is, the fact remains that the prevailing *in bello* rules impose minimal obligations regarding the way militaries fight, with no substantial doctrinal – strategic, operational and tactical – restrictions. The expectation that actual steps should have been implemented after the two World Wars to create a more humanitarian war environment has been frustrated, at least partially. Currently, there is no legal interference at the strategic level selected by a military, even though it might very well be the bloodiest, nor is there substantial intervention in its operational and tactical decisions. Thus, there is no "strong" military proportionality requirement: an effective, mandatory, cost-effective dictation favoring the less harmful military course of action, for a given military advantage, in a purely military context.<sup>164</sup> The weakness of the very low threshold currently applied to the risks and hazards of combatants is due to its intentionally limited scope. As mentioned

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<sup>161</sup> John Keegan, *A History of Warfare*, 387 (1994).

<sup>162</sup> Handel, *Master of War*, *supra* n 45, at p. 136.

<sup>163</sup> Clausewitz, *On War*, *supra* n 21, at p. 515.

<sup>164</sup> With regard to the proportionality criterion in reference to civilians, see *supra* n 77.

earlier, it generally prohibits the use of means and methods of warfare that cause superfluous injury or unnecessary suffering.<sup>165</sup> The softness of this requirement can be demonstrated by the targeting paradox: Whereas “effective contribution to military action” is a precondition for the lawful targeting of property (firing at a “military objective”),<sup>166</sup> nothing such applies to soldiers’ lives; so much so that even ineffective soldiers – namely, soldiers that do not directly contribute to the fighting – currently constitute, in practice, lawful targets. Furthermore, even the more developed branch of the law of armed conflict – the one protecting civilians – suffers from a similar syndrome with its deferral of the *in bello* rules. The traditional proportionality equation allows military commanders full discretion to define their own spectrum of the direct military advantages that might legally justify collateral damage caused by their military to civilians. The deferral of the rules has its own price: the premium paid by innocent civilians.

The rejection of a moderate model with restricted war aims as a “legitimate” prototype of war is responsible for another lacuna. It has prevented the gradual creation of a stronger base of humanitarian rights established directly as an integral part of the law of armed conflict; rights which would be applicable to both adversaries' civilians and combatants.

The gap between the humanitarian goals of the modern law of armed conflict and its actual substance has been at the focus of this article. The paradoxes arising from it undermine the very foundations of the post-Charter legal regime. If that gap between the rhetoric and practice of the laws of war is to be bridged, it must first be internalized, inviting later studies to deal with optional solutions. Here, we will suffice with offering only preliminary clues regarding future alternatives.

What actual steps might be taken in general, and within the prevailing paradigm in particular? Two initial alternatives could be considered. **The first and more ambitious would be to challenge the adoption of the Clausewitzian-**

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<sup>165</sup> See *supra* n 71.

<sup>166</sup> API, *supra* n 7, art. 52(2) (“military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action...”).



**Napoleonic “killing madness” as not only an acceptable but an exclusive archetype of war for the sake of legal discussion.** It is this monopoly that induces the absolute passivity of the legal discussion on the crucial question regarding how wars are actually conducted. This would not be a purely theoretical challenge. It is a practical matter, well rooted in the thinking and writing of strategists, followed by centuries of relatively modest military fighting history. Furthermore, it is consistent with the rationale of the Charter. The spirit and essence of the St. Petersburg Declaration might be reconsidered. In fact, it should be if there is any real intention “to save succeeding generations from the scourge of war” and its hazards. A rejection of the "Clausewitzian madness" as an acceptable archetype of war would bring common patterns of limited war back to the forefront, allowing the development and growth of a more robust and wider cluster of humanitarian rights, applicable in wartime, as an integral part of the law of armed conflict.

Another, indeed less ambitious legal strategy would be to accept the current reality and take the reluctance of the law of armed conflict to interfere with the macro issues of selecting military doctrine or 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 doctrine and strategy selected, should not cover the operational and tactical aspects of war. Interference in the selection of a course of military action – within the strategy selected to achieve a given military gain – would require that it be the least harmful to the adversary’s combatants and civilians.** Taking the selected strategy and the military gain as given ensures that such interference will not impair the ability of the “restricted” military to subdue its opponent and win the war. A new imperative would be added to the law of armed conflict, under this approach, requiring the selection of the least harmful course of action to achieve a given military aim within a certain strategy.

Within the framework of this less ambitious legal interference, what are the positive *in bello* rules that, if accepted, might create a more humanitarian war environment at the

operational and tactical levels?<sup>167</sup> Here, again, a full discussion of such a challenge lies beyond the scope of this study. Nonetheless, new, professionally based constraining attributes might be considered, at least as preliminary suggestions. For example, the *in bello* proportionality requirement could be expanded to all dimensions of devastation and killing caused in the course of fighting, including to combatants. It would focus not only on collateral damage caused to civilians, but require military proportionality as well. Building upon the wording of the current proportionality equation, it would prohibit any attack which may be expected to cause loss of life to combatants ... which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>168</sup> Furthermore, a complementary rule would apply to the "military advantage" part of the proportionality requirement (in both the prevailing civilian and suggested military contexts), not leaving it to the sole discretion of the attacking military commander, but requiring a critical-objective examination using professional tools and standards of liberal states' militaries. **It would require the application of cost-benefit considerations dictating the less harmful military course of action for any given "military advantage"**, even in a purely military context. Accordingly, a rule similar to the one currently codified under API, Art 57(3) would determine that: When a choice is possible between several military alternatives for obtaining a similar military advantage, the course of action to be selected shall be that where the attack is expected to cause the least danger to combatants' lives.

It seems necessary, then, to strengthen the prevailing proportionality (or its unsuccessful corollary, necessity<sup>169</sup>) criterion. Taking the military's goals in a specific

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<sup>167</sup> Our discussion is limited to the law of armed conflict. Indeed, one could argue that the *ad bellum* proportionality requirement might affect the *in bello* operational scope of a military. See the discussion *supra* n 109.

<sup>168</sup> Indeed, such an expansion of the proportionality rule might face, and challenge, the prevailing targeting paradox: the fact that soldiers' lives are the cheapest commodity in the warzone, valued less than property. See *supra* note 162. Furthermore, it might require fine-tuning of the distinction rule to distinguish between groups of soldiers, based upon their military effectiveness. Cf., Blum, *The Dispensable Lives of Soldiers*, *supra* n 96.

<sup>169</sup> See the discussion *supra* notes 11-15 and accompanying text, regarding the impotency of the *in bello* necessity criterion. Gabriella Blum calls similarly for a reduction of combatants' bloodshed during wartime by reinterpreting, in fact reviving, the principle of military necessity, "introducing a least-harmful-means test, under which an alternative of capture or disabling of the enemy would be preferred to killing whenever feasible". Blum, *The Dispensable Lives of Soldiers*, *supra* n 96, 115. She further challenges the prevailing status-based distinction rule, which legitimizes the targeting of almost all enemy soldiers. She argues "that the changing nature of wars and militaries casts doubts on the necessity of

campaign as given, any military would be required to do whatever it can, at all stages of the campaign (including prewar preparations), to reduce the bloodshed caused to its adversary's military and civilians by its activities within its stated goals. The ICJ's statement that "[s]tates do not have unlimited freedom of choice of means in the weapons they use"<sup>170</sup> should be extended to restrict the "unlimited freedom" states enjoy regarding how they fight and their militaries' courses of action. An extended proportionality requirement with substantial, professionally based attributes, as suggested, can meet such an expectation, by extending the scope of the *in bello* rules to include either the macro or at least the micro issues dictating the way wars are really fought. The lessons and trauma of the two World Wars should predispose towards substantial changes in the way adversaries fight each other. This can be done within the prevailing legal paradigm, either directly through an explicit reform – that deals with “purely” strategic and operational doctrines and military tactics and methods – or indirectly, by extending the proportionality criterion and basing it on substantial, qualitative, professional requirements. Under the suggested approach, expansion of the *in bello* proportionality requirement together with professional scrutiny of the stated “military advantage” would return the legal burden and responsibility back where it belongs. It could be effective as a professional internal constraint on the military in real time, and it would apply directly both to those who decide a war's aims and select military strategy and operational activities in the war theater, and to the soldiers on the ground employing their tactics.

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killing all enemy combatants indiscriminately” and suggests “that the status-based classification be complemented by a test of threat”. *Id.*

<sup>170</sup> Nuclear Weapons Advisory Opinion, *supra* n 110, at [78]. Similarly, article 22 of the Hague Convention declares that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” Hague Convention II of 1899, *supra* n 83.