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Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity

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Abstract

The exercise of brute force by militaries, though common, reflects professional incompetency. A well-trained military has an inherent interest in enhancing its operational effectiveness and constraining unnecessary brutality. The law of armed conflict, however, generally ignores the constraining effect of the necessity principle, originally intended to allow only the minimally necessary use of force on the battlefield. Consequently, the prevailing law places the burden of restricting the exercise of brute military force upon humanitarian considerations (and the specific norms derived from them). Humanity alone, however, cannot deliver the goods and substantially reduce war's hazards. This article challenges the current dichotomy between the two pillars – mistakenly assumed to be polar opposites – of the law of armed conflict: necessity and humanity. It calls for the transformation of the military's self-imposed professional constraining standards into a revised legal standard of necessity. Though the necessity principle justifies the mere use of lethal force, it should not only facilitate wielding the military sword but also function simultaneously as a shield, protecting combatants and non-combatants alike from excessive brutality. The suggested transformation would bind and restrain the prospective exercisers of excessive force, political and military alike, and restrict the potential damage that might be caused both intentionally (to combatants) and collaterally (to non-combatants). The combined effect of the current changes in war's pattern and the law of armed conflict, in the military and social thinking of recent decades, and the new strategies available due to the development of new military technologies have all created a new war environment – one that may be ready to leverage the constraining potential of military professionalism into a binding legal standard and norms.

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1 Introduction

International humanitarian law's (IHL)[1] mission is to humanize war's environment for both combatants and non-combatants.[2] In reality, however, this noble mission of the law of armed conflict has a mixed record, due either to the law's shortcomings or to the huge gap between the law's rhetoric and actual practice by belligerents.[3] In the face of a combat reality full of hazards, an important humanitarian challenge – to be dealt with in this article – is to substantially reduce the scope of brutality in both international and non-international armed conflicts.[4]

On the prevailing perception, the task of the law of armed conflict is to balance the demands of military necessity against humanitarian concerns.[5] This traditional agenda might have been efficacious had it not preferred to place all (or most) of the brutality-restricting burden upon the thin shoulders of humanitarian considerations and norms. The military necessity requirement is currently perceived as being entirely opposed to humanity, enabling, in fact, almost any belligerent activity. This perception explicitly ignores existing professional military standards that might also effectively restrict war's hazards. It will be argued that humanitarian considerations and the specific norms derived from them, per se, should not carry the burden of effectively restricting the exercise of brute military force alone.[6] The equilibrium is not currently

[1] Non-governmental organizations and most academic writers prefer the alternative name of international humanitarian law (IHL) over the law of armed conflict – the term usually referred to by militaries. See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, 2010), at 18–21.

[2] Early modern law of war focused on protecting combatants: dealing with the means and ways in which wars were to be fought between professional armies. However, the horrors surfacing after World War II proved that a change was required to protect civilians as well in the context of IHL, as reflected by the creation of the four Geneva Conventions. See generally G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983).

[3] See, e.g., Morrow, 'When Do States Follow the Laws of War?', 101 *American Political Science Review* (2007) 559, at 567.

[4] The law of armed conflict applies in every case of armed conflict, namely 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-I), Appeals Chamber, 2 October 1995, para. 70.

[5] E.g., the commentary on Additional Protocol I to the Geneva Conventions states: 'The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements.' C. Pilloud *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 683.

[6] Furthermore, the contemporary reinforcement they have received from the infusion of human rights into the humanitarian scale required in a battle-zone does not change the picture: '[H]umanitarian law has become less geared to military necessity and increasingly impregnated with human rights values … The most conspicuous developments of modern humanitarian law was that it had been strongly influenced by human rights doctrines.' A. Cassese, *International Law* (2nd edn, 2005), at 402. It should be noted, however, that even in a period in which the role of human rights law in wartime has become significant, it is the law of armed conflict that dominates the war arena: 'The [human rights] 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, 8 July 1996, ICJ Reports (1996) 226, at 240.

at its optimum, and the law of armed conflict cannot fully accomplish its mission in the international arena. For example, under the prevailing law, combatants' lives are the cheapest commodity on the battlefield,[7] and the 'treatment of civilians has the worst record' of compliance in the entire law of armed conflict.[8]

Theoretically, the necessity principle imposes a restraint upon the exercise of military power – forbidding the use of power unnecessary to attain the military goal – while the humanity principle forbids the use of means and methods of warfare that cause superfluous injury or unnecessary suffering.[9] Indeed necessity, in theory, has the dual legal function of being both an enabling and constraining principle,[10] as it permits only that degree of force required in order to achieve the legitimate military purpose of the conflict.[11] Legally, however, the necessity principle does not currently function as a substantial constraining standard, as originally expected. Its current impotency and the effects of its weakness will be at the focus of the coming discussion. Consequently, humanitarian considerations and specific positive norms derived from them (distinction, proportionality and the forbiddance of unnecessary suffering) must currently carry most, if not all, of the humanitarian weight. They actually function as the only substantial brake against war's hazards in general, but their capacity to limit the use of excessive military force in particular is restricted.

The principle of humanity was given prominent expression in modern times by the Martens Clause of the 1899 Hague Regulations.[12] The clause grants protection to 'populations and belligerents' by 'the principles of international law, as they result from the usage established between civilized nations, from the laws of humanity and the requirements of public conscience'.[13] Today, the principle of humanity in the

7 See, e.g., Blum, 'The Dispensable Lives of Soldiers', 2 *Journal of Legal Analysis* (2010) 115.

8 An empirical study exploring compliance with eight segments of the law of armed conflict through the 20th century concluded that the prohibition upon the use of chemical weapons has the best record of all eight. See Morrow, *supra* note 3, at 567. The other six components of the law of armed conflict compliance with which was examined are: aerial bombardment, armistice/ceasefire, protection of cultural property, conduct on the high seas, prisoners of war and treatment of wounded. *Ibid.*, at 562.

9 'The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary.' UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), at 23. Under Art. 23(e) of the 1907 Hague Regulations, it is forbidden 'to employ arms, projectiles, or material calculated to cause unnecessary suffering'. Hague Convention (IV) Respecting the Laws and Customs of War and its Annex: Regulations Concerning the Laws and Customs of War on Land (1907 Hague Regulations) 1907, 187 CTS 227.

10 See, e.g., Blum, 'The Laws of War and the "Lesser Evil"', 135 *Yale Journal of International Law* (*YJIL*) (2010) 1, at 3, n. 5.

11 Its modern roots were established in the Lieber Code, which stated in Art. 14: 'Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.' US War Department, General Order No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at avalon.law.yale.edu/19th_century/lieber.asp (last visited 23 February 2015).

12 See, e.g., Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *American Journal of International Law* (*AJIL*) (2000) 78.

13 Preamble to the Hague Convention (II) Convention with Respect to the Laws and Customs of War on Land 1899, 32 Stat. 1803. See also Art. 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3; Pictet, 'The Fundamental Principles of the Red Cross', 19 *International Review of the Red Cross* (*ICRC*) (1979) 130.

conduct of hostilities manifests itself, according to some, by independent substance.[14] Yoram Dinstein, by contrast, claims that humanity in the conduct of hostilities is not a positive law in the sense that it does not determine concrete operational obligations on the battlefield; rather, it is more of an abstract, 'meta-juridical' consideration triggering the legal norms to follow.[15] Whatever the status granted to humanity – independent principle or abstract considerations leading to concrete norms – it could be sustained by way of military necessity if the latter had any substantial constraining merit of its own. Unfortunately, currently (and paradoxically), it does not.

This article seeks to revisit the prevailing paradigm and challenge the current dichotomy between the two pillars – assumed to be polar opposites – of the law of armed conflict: necessity and humanity. Indeed, military necessity is used to vindicate war and the hazards deriving from it; however, it is not entirely an opposite force to humanity when it comes to restricting excessive military force. Rather, in many cases, if exercised professionally, military necessity could be a complementary force in fulfilling the humanitarian quest. Necessity, per se, can and should restrict brutality in the exercise of military force. Excessive use of force is not a professional requirement of a military; the mere fact that it happens in many wars does not mean that it has any military substance or basis. The opposite will be argued: the exercise of brute force by militaries, though common, derives from professional incompetency and external forces (for example, political, psychological and cultural or a combination thereof). It will also be argued that the inherent interest of a trained military is to constrain and contain these unnecessary – indeed, unprofessional – forces. Vitalizing the necessity principle, by infusing acceptable professional military standards into it, would create an additional level of restraints above the specific prohibiting norms of the law of armed conflict. Furthermore, it would challenge specific norms, regarding which compromise has currently been reached in light of the principles of humanity and military necessity,[16] and it would relieve the humanity principle of part of the burden of preventing unnecessary suffering to combatants.

This article proceeds in the following way. The first part introduces the self-interest of a military in constraining brute force and argues that the humanitarian requisite to prevent unnecessary suffering to an adversary's combatants and civilians might be derived, to a large extent, from justification of military (un)necessity. The second

[14] E.g., in the principles of human rights law, which they see serving as a sort of principle of humanity for IHL. See Mujezinović Larsen, 'A "Principle of Humanity" or a "Principle of Human-Rightism"?', in K. Mujezinović Larsen *et al.* (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (2013) 124.

[15] Dinstein, 'The Principle of Proportionality', in Mujezinović Larsen *et al.*, *supra* note 14, 72, at 72–74.

[16] Indeed, according to the view that the prevailing law reflects the current balance between the 'opposing' principles, humanity and military necessity and that necessity cannot operate as an extra general prohibiting layer, which applies above the present rules that have already infused it, this article represents a primarily normative discussion rather than a combination of positive and normative. See, e.g., Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', 50 *Virginia Journal of International Law* (2010) 795, at 798 (arguing that 'IHL represents a carefully thought out balance between the principles of military necessity and humanity. Every one of its rules constitutes a dialectical compromise between these two opposing forces').

part presents the prevailing legal necessity principle as a hollow rule and suggests strengthening it by infusing substantial professional military standards into it, as originally intended but currently lacking. The third part discusses both the institutional and substantive effects that follow from the transformation of professional military standards into legal norms. These relate to war's casualties, restricting the potential damage caused to combatants and non-combatants and to the exercisers of military force, leaders and 'old-school' soldiers, whose potential brutality would be restricted if professional standards became legal norms. Even if one is convinced the suggested transformation is desirable, it invites a timing question: has the time come for a revised military necessity? The discussion in the fourth part answers positively, arguing that the combined effects of the changes in the pattern of modern wars and in the social attitudes towards them, the development of the humanistic approach to the laws of war and the introduction of new weapons and intelligence technology can all lead currently to new constraining paradigms in military thinking. The fifth part of the article will offer concluding remarks related to the new suggested equilibrium between humanity and military necessity.

2 Military Professionalism: Constraining Brute Force Enhances Military Effectiveness

Constraining the brute force of a military is in its own self-interest and enhances its operational effectiveness. Effectiveness and efficiency in operation is a recognized professional military requirement. All belligerent activities ought to be professionally necessary or otherwise avoided. The military requirement of operational effectiveness, as demonstrated in the targeting process and priorities, will be used to demonstrate the inherent constraining effects of military professionalism. Indeed, this is a utilitarian requirement, not contingent upon reciprocity, as military resources will always be scarce. For example, the limited amount of ammunition in general, and of sophisticated precise ammunition – which is even scarcer due to its relatively high price – in particular, requires a trained soldier to choose his or her targets carefully. Professionally speaking, there is no room for 'wasted' shots. Only precise shooting, consistent with targeting priorities, can be considered professionally 'legitimate'. From a professional perspective, there is no room for carelessness in targeting or any other ineffective use of military resources. The adaption of ends to the means and the conservation of military energy for its designated purposes requires the exercise of military force in measured dosage so as not to waste it by using excessive force for unrelated (or secondary) purposes:

> 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.[17]

The effectiveness requirement applies at all levels of battle: tactical, operational and strategic. The US armed forces, for example, have nine professional principles of war,[18] requiring effective and coordinated military operations: *objective* stipulates 'direct[ing] every military operation toward a clearly defined, decisive, and attainable objective'; the *offensive* principle states that 'offensive action is the most effective and decisive way to achieve a clearly defined objective'; *mass* requires concentrating 'the effects of combat power at the decisive place and time' and the *economy of force* dictates employing all combat power available in the most effective way, noting that the '[e]ffective *Maneuver* keeps enemy forces off balance'.[19] Indeed, there are no universally agreed principles of war.[20] Since trained militaries are utilitarian and mission oriented, however, effectiveness and efficiency are essentially expected of them.[21]

The effectiveness requirement rationalizes, for example, the American military's effects-based operation doctrine. This doctrine calls for achieving the strategic goals of a military campaign by applying military levers not for the sake of destruction per se but, rather, to create (indirect and cascading) effects that break the 'enemy as a system'.[22] The desire for a coherent and effective operational approach has led the American military recently to subject itself to the self-imposed utilitarian effects-based restrictions of the counter-insurgency doctrine. This doctrine imposes unilateral professional constraints on counter-insurgency operations, aimed at minimizing civilian suffering and casualties: 'In a COIN [counter-insurgency doctrine] 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.'[23] This 'internal' self-imposed doctrine dictates greater constraints to American combatants than those 'externally' required by the laws of armed conflict. The doctrine 'requires Soldiers and Marines to be ready both to fight and to build'[24] and, from a purely professional military perspective, points at the following paradoxes: 'Sometimes, the more force is used, the less effective it is'[25] or '[s]ome of the

17 Keiler, 'The End of Proportionality', 39 *Parameters* (2009) 53, at 58–59.

18 US Department of the Army, Operations, US Army Field Manual 3-0, 27 February 2008, at A-1.

19 *Ibid.*, at A-1–A-2.

20 For a comparative view of the principles of war and the way they have diverged among various armies in modern times, see, e.g., Angstrom and Widen, 'Adopting a Recipe for Success: Modern Armed Forces and the Institutionalization of the Principles of War', 31 *Comparative Strategy* (2012) 263.

21 Keiler, *supra* note 17.

22 See, e.g., D. Adamsky, *The Culture of Military Innovation* (2010), at 106. Indeed, the effects-based operation doctrine, in general, and its application, in particular, are controversial (the US army and navy seem to have been much less enthusiastic about adopting it than the air force). See, e.g., Mattis, 'USJFCOM Commander's Guidance for Effects-based Operations', 38 *Parameters* (2008) 18; Ruby, 'Effects-based Operations: More Important Than Ever', 38 *Parameters* (2008) 26.

23 *The US Army – Marine Corps Counterinsurgency Field Manual* (University of Chicago Press edn, 2007) 37–39, 42–52, para. 1–142.

24 *Ibid.*, at 34.

25 *Ibid.*, at 48, para. 1–150.

best weapons against counterinsurgents do not shoot'.[26] The doctrine obliges soldiers and marines to accept greater risk to minimize harm to non-combatants: 'This risk taking is an essential part of the Warrior Ethos.'[27] Indeed, constraining brutality is in the self-interest of a professional trained military, and it is motivated not only by utilitarian concerns but also by moral and ethical ones. It demonstrates its competency and signals its high discipline; it represents a concern over domestic and international public opinion and an explicit wish to 'win hearts and minds'.[28] After all, it was Article 16 of the Lieber Code that stated a century and a half ago: 'Military necessity does not admit of cruelty … [it] does not include any act of hostility which makes the return to peace unnecessarily difficult.'[29]

From a legal perspective, however, restrictions stemming from moral or utilitarian professional considerations, which were not infused into the prevailing system as specific legal norms (or custom), are almost irrelevant. Currently, any shot in the battlefield aimed against a combatant is generally lawful and could be legally justified as necessary. The mere fact that the target has 'enough' formal military attributes usually justifies its targeting. In fact, it is currently lawful to shoot any combatant 'freely' in the battlefield, unless specifically forbidden by law (for example, wounded soldiers or prisoners of war), and proportional civilian collateral damage stemming from the targeting process is acceptable too. The paradox, then, is clear. While the military profession imposes its own internal constraints – requiring limited and precise shooting – the current legal requirement is less demanding. Targets legally approved by military lawyers might be considered irrelevant to, or ineffective for, the military campaign by the commanders in the field. Embarrassingly, economic considerations prevail over the legal ones in the taking and saving of lives.

This paradox is a direct consequence of the limits of the current law and, to a large extent, the impotency of the necessity principle. The following discussion will argue that although this principle is considered one of the pillars of the current construction of the law of armed conflict, its constraining effect is hollow and weak, substantially contributing to the instability of this regime.

3 The Prevailing Necessity Principle: A Hollow Rule and Its Effects

The necessity principle at the moment primarily pays lip service to the constraining function it was originally intended to fulfil, justifying, in fact, almost any belligerent activity. Historically, it did impose residual constraints upon the scope of lawful

[26] *Ibid.*, at 49, para. 1–153: 'Arguably, the decisive battle is for the people's minds; … Particularly after security has been achieved, dollars and ballots will have more important effects than bombs and bullets.'

[27] *Ibid.*, at para. 7–21.

[28] 'The phrase "hearts and minds" is generally associated with a less coercive approach to counter-insurgency which emphasizes the importance of using "minimum force" in order to win the "hearts and minds" of the people.' Dixon, '"Hearts and Minds"? British Counter-Insurgency from Malaya to Iraq', 32 *Journal of Strategic Studies* (2009) 353.

[29] Lieber Code, *supra* note 11.

destruction during wartime. Burrus Carnahan illustrates these precedential constraints using President Abraham Lincoln's general order not to destroy 'private property' in the latter stages of the Civil War and the fact that during most of the Korean War damaging the food supply by attacking irrigation dams in North Korea was not considered a military necessity.[30] Referring to this historic restrictive function, which 'seems to have been forgotten', he then concludes that 'military necessity is widely regarded today as an insidious doctrine invoked to justify almost any outrage. As a result, the principle has not been allowed to play the creative role that it is capable of playing.'[31] Indeed, when it comes to constraining brute military force, the necessity principle, as a legal rule, has almost no actual validity.

Currently, excessive force is restricted only by specific rules of the law, and the general principle seems to have lost its vitality and has not been applied independently. The International Committee of the Red Cross (ICRC) 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'.[32] Eyal Benvenisti, too, concludes that 'the 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'.[33] The current impotency of the necessity principle might be explained by its perception by militaries as a nuisance, an additional 'external' legal requirement, imposed upon soldiers. Militaries, like other bureaucratic organizations, are well trained to get rid of external annoyances.

Indeed, the current reality, in which the professional considerations and financial constraints experienced by an army dictate, as mentioned earlier, a higher threshold for 'justified killing' than the legal one, is quite embarrassing and seems unacceptable. The current legal rules appear to turn a blind eye to the same reality in which soldiers are required by their own profession to open their eyes wide. Furthermore, this embarrassment is aggravated by the prevailing rule that requires a higher legal threshold (in terms of effectiveness) for targeting objects than combatants. Article 52(2) of Additional Protocol I strictly legalizes the targeting of military objects 'which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances

[30] Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', 92 *AJIL* (1998) 213, at 229.

[31] *Ibid.*, at 230.

[32] International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) 80. The ICRC does note, however, that the principle's restraining function is still valid when a party to a conflict exercises effective territorial control in non-international armed conflict and has a 'duty to arrest' suspected belligerents unless circumstances do not allow it. *Ibid.*, at 80–81.

[33] Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare against Nonstate Actors', 34 *YJIL* (2009) 541, at 544. The modern laws of war are divided in two. The *ad bellum* ('the right to fight') rules determine whether the use of military force is legal. The law of armed conflict determines the prevailing *in bello* ('how to fight right') rules.

ruling at the time, offers a definite military advantage'.[34] While the 'effective contribution to military action' is a precondition for lawful targeting of an object, soldiers' lives are cheaper. Even ineffective soldiers, the taking of whose lives does not offer a 'definite military advantage', are currently considered, in practice, lawful targets.[35] The necessity of their being killed is taken for granted. No professional challenge, in terms of examining effectiveness, is required when it comes to killing them. Only the targeting of objects seems to pose such a challenge.

Substantiating the necessity requirement requires the use of tools taken from the military profession. Introducing professional military standards would strengthen this principle by infusing substantial constraining elements into it, as originally intended but currently lacking. The paradox that economic considerations are often much more restrictive of taking lives than the permissive legal considerations can be resolved by revisiting the necessity principle and imparting to this currently hollow concept a new vitality, based upon professional standards that are generally common to modern trained militaries (usually of liberal states). These inherent standards should serve as an important yardstick to be used when gauging the necessity of belligerent activities. Introducing it to the law of armed conflict would add another vital force, in the constraint of brute force and the reduction of war's hazards. Furthermore, vitalizing the necessity principle would affect the intrinsic balance of the prevailing legal norms and promote the judgment of law-abiding states' military activities.

4 The Effects of Transforming Professional Military Standards into Legal Norms

A *'If It Ain't Broke Don't Fix It': Why Transform Self-Imposed and Voluntarily Respected Professional Standards into Legal Norms?*

The call for the transformation of self-imposed professional constraining standards into legal norms invites a preliminary question. If professional standards have their own internal effect of constraining the exercise of military force, why transform them into legal rules? If, as suggested, trained militaries tend to respect this internal professional restraint, there should be no need or room, *prima facie*, for external legal intervention. There seems to be no reason to turn autonomously working and effective rules into mandatory norms. Furthermore, such a transformation is liable to have a counter-effect: the efficient self-observed professional standard might come to be perceived by soldiers as yet another external and ineffective nuisance that ought to, and can be, bypassed.

The suggested legal transformation would have a dual effect upon the law of armed conflict that could not be attained by professional or ethical standards alone. The first

[34] Additional Protocol I, *supra* note 13.

[35] Cf. the requirement in Additional Protocol I, *supra* note 13, Articles 51(5)(b) and 57(2)(a)(iii) to assess military advantage under the 'proportionality' assessment when collateral damage to civilians is considered.

effect, relating to war's casualties, would be to restrict the potential damage that might be caused both intentionally (to combatants and to military objectives) and unintentionally, collaterally (to non-combatants). It requires elevating the legal threshold for targeting by revisiting the necessity principle, introducing into it professional restraints against the use of excessive military force. The second relates to the potential injurers – the exercisers of military force – whose brutality could be restricted if professional standards were to be turned into legal norms. Indeed, there are relevant players in the battle zone who are either not obliged by the professional military standards or unwilling to accept and respect them. The first group consists of the civilian political echelon, which currently is not directly obliged by professional military standards, and the second consists of militaries (or parts of them), which still believe in the advantages of exercising brutal force to achieve their aims and advantages. Before introducing these two direct effects, a preliminary discussion is offered that relates to the institutional and substantive challenges of the suggested transformation.

B *The Institutional and Substantive Challenges*

Advancing military professionalism to the forefront of the war-related legal discourse would have both institutional and substantive aspects. Institutionally, under the current legal approach, as reflected through the prism of judicial decisions and academic writers, it is the 'outsiders' – the normative/judicial players such as non-governmental organizations (NGOs), judges and advocates – who are the main watchdogs of the war arena: 'If military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent states: *à la guerre comme à la guerre*.'[36] Under this common approach, the responsibility of the 'insiders' – the main players on the field, namely the soldiers and their commanders – has been minimized to their own criminal responsibility or their state's when such applies. Except for this important – yet, in many cases, residual – responsibility,[37] soldiers apparently cannot be relied upon to restrain their own activities, as far as the humanitarian issues are concerned. The checks and balances applying to wartime activities are apparently

[36] Dinstein, *supra* note 1, at 16. Cf. his later argument: 'Military commanders are often the first to understand that their duties can be discharged without causing pointless torment.' *Ibid.*, at 17.
The French proverb, loosely translated as 'in war as in war,' is often likened to the English phrase 'all is fair in love and war.' See, e.g., Reydams, 'A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges', 88 *ICRC* (2006) 729.

[37] Indeed, such an approach is well rooted in military culture. On the first page of his book, *On War*, von Clausewitz defines war as 'an act of force to compel our enemy to do our will. Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the means of war; to impose our will on the enemy is its object.' C. von Clausewitz, *On War*, translated by Michael Eliot Howard and Peter Paret (Princeton University Press indexed edn, 1984), at 75. Von Clausewitz's disdain for the ethical aspects and the effects of international law in wartime was inspired, *inter alia*, by Machiavelli's legacy holding that national self-interests are 'governed by considerations of *raison d'etat*, and are dominated by the direct and implied use of force.' A. Gat, *The Origins of Military Thought: From the Enlightenment to Clausewitz* (1989), at 240.

shaped in such a way that it is 'their' (the soldiers') responsibility to kill and damage in war and it is 'our' (the judicial player's or NGO's) duty to stop them, whenever appropriate. If in time of crisis, all means may be used to achieve military goals, soldiers may be portrayed, under such a common approach, as a bunch of potential criminals: murderers, plunderers or rapists. Since anything can be expected in wartime, it is only the legal system that brings them back to the path of humanity by establishing a legal threshold of constraint.

A weaker, softer version of such a paternalistic approach could be deduced from the Supreme Court of Israel's ruling with regard to the ban on the use of torture in security interrogations, stating that a democracy must sometimes fight its non-law-abiding adversary 'with one hand tied behind its back'.[38] Under the common perception, with which the ruling seems to be consistent, imposing restrictions on the inherent brutality of military force requires an external legal force. The tied hand reflects brute military force's intrinsic lack of self-constraint – it is therefore lawful to exercise military energy only partially, with the remaining hand.

Common to such approaches is their paternalistic attitude towards the military profession and behaviour. Indeed, one might be cautious in light of militaries' humanitarian record, which, in many cases, is very poor. The problematic thing, however, is the actual steps taken to address the danger, which are contrary to the prevailing moral and professional principles of responsibility and accountability from anyone who exercises force, of whatever kind. Any force holder is obliged, under well-rooted moral and professional rules, to constrain it. A truck driver is in charge of both the accelerator and the brake pedal, and this professional convention applies as well to any law enforcement officer. When it comes to belligerent activities, soldiers too should be morally and professionally accountable for the exercise and constraint of their force. The traditional legal approach does not seem to accept this convention (but for its criminal aspects). When it comes to military necessity, it assumes that no internal professional constraints – in fact, 'no limitation of any kind' – are imposed upon soldiers.[39] This approach – which leaves insufficient room and, in some cases, none at all for military professionalism and the soldier's own ethics – has its consequences. It renounces an important brake on aggression and transgression in wartime. It places all (or most) of the burden upon external, legal brakes, ignoring the internal – moral and professional – checks.

That there is excessive brutality in many (or most) military campaigns may be an established fact; but it would be a mistake, however, to attribute it to the military's inherent requirements and virtues. From a military perspective, the source of this brutality is mainly external. It may derive from the ideological, psychological, religious or cultural motives of soldiers (or a combination thereof); none of these, however, are inherent to the modern military profession. Certainly, though, these external sources of military brutality may be manipulated by some militaries by infusing them

[38] High Court of Justice (Israel) 5100/94, *Public Committee Against Torture v. Israel*, 53(4) PD 817, at para. 39.

[39] From this perspective, the duties of commanders, under Additional Protocol I, *supra* note 13, Arts 86–87 (to report, prevent and suppress breaches), are also perceived as an external legal brake.

into their soldiers' spirit and actual behaviour, but 'it is incompetence, above all, that breeds brutality. … well-trained and well-disciplined armies are less brutal – and their officers and soldiers are less likely to think that brutality is necessary for victory'.[40]

The assumption that militaries are brutal by their very nature is not limited to outside observers of the military establishment and apparatus. Indeed, there may be 'old fashioned militaries' – and there are soldiers probably in contemporary militaries – who even now believe in exercising excessive force and brutality. They are still following the legacy of total war as advocated by Carl von Clausewitz and Napoleon. One dimension of such total war, which advocates attacking civilians,[41] has been totally rejected by the prevailing law of armed conflict.[42] It will be argued here that its other dimension – the one aimed at, and calling for, the utilization of (almost) all means against combatants – though it may be currently legal, is not always perceived as professional or effective by the standards of well-trained militaries.

The intrinsic interest of a professionally trained military is to restrict these brutal forces – to voluntarily tie any brutal hands by way of self-imposed restrictions – and channel all of its force and energy into fulfilling its mission and objectives. The 'tied hand' belongs to the incompetent, the unprofessional or the psychopath; professional soldiers have both hands left free to fulfil their military mission. Indeed, a well-trained and disciplined military has, *prima facie*, only residual need for an external force (that is, the judicial system) to appropriate this inherent task of internalizing professional standards.

The following discussion will concentrate on the positive effects of transforming professional constraining standards into legal norms, which could not be attained by professional – yet voluntarily enforced – standards alone. (Though the current discussion is restricted to the effects of the suggested transformation upon the law of armed conflict, it might affect obviously international criminal law as well.) The first direct effect relates to war's casualties, restricting the potential damage caused to both intentional and unintentional-collateral targets. The second direct effect, to be discussed later, relates to the exercisers of military force – the civilian leaders or the militaries (or parts of them) who still believe in the advantages of exercising brutal force to achieve their aims – whose potential brutality would be restricted if professional standards were to become legal norms.

C *The Suggested Effect upon Combatants: Soldiers' Lives Should Matter*

Under the prevailing legal paradigm, all classes of soldiers (except medical personnel and chaplains) are considered to be lawful targets. Soldiers, as a collective, are

[40] Walzer, 'Coda: Can the Good Guys Win?', 24 *EJIL* (2013) 433, at 443.

[41] Attacking civilians is exemplified, e.g., by Moltke's bombardment of Paris in 1870 and General William Sherman's 'Atlanta campaign' and burning of the city during the American Civil War. See generally M. Howard, *The Franco-Prussian War* (2001), at 352; Best, *supra* note 2, at 208 (stating that 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').

[42] See the text accompanying notes 80–84 in this article.

considered legitimate targets so long as they are 'in the war game'. [43] The underlying rationale behind this classification is the notion that soldiers as a class (unless *hors de combat*) threaten their opponent's army, either actually or potentially. It is this assumption that in fact allows adversaries to circumvent the *de jure* necessity criterion with regard to combatants by designating all of them as necessary military targets. Indeed, '[i]n reliance on a status-based rule of distinction, soldiers need not engage in a costly and dangerous process of ascertaining the merits of each individual target'.[44] Military professionalism and practice does, however, require assessment of the 'merits' of a target in terms of targeting priorities, based mainly upon types of units and their function.

The classification of all soldiers as a collective lawful targeted group has its own unjust cost. Most soldiers in any military are not actual combatants.[45] Yet all non-combat soldiers working in support roles are considered, *prima facie*, a lawful (necessary) target in the eyes of their adversaries, so long as they are still in service. In this matter, regarding the subclassification of soldiers, the law of armed conflict has actually regressed. Historically, Article 3 of the 1907 Hague Regulations gave legal effect to this well-known phenomenon of subclasses of soldiers by stating that '[t]he armed forces of the belligerent parties may consist of combatants and non-combatants'. (Effectively, though, 'both have a right to be treated as prisoners of war'.)[46] Additional Protocol I's current approach differs from this one, with the ICRC's commentary presenting the prevailing rule, preferring to ignore the actual relevancy of the soldiers' class to their military war effort: 'In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons … All members of the armed forces are combatants, and only members of the armed forces are combatants.'[47]

For the sake of the current discussion, however, this classification – which allows the killing of all of the adversary's soldiers as a group, without reference to the level of personal threat they represent – is taken as a given. What it calls for though is introducing a targeting-constraining test, based upon the operational effectiveness of units, to the *in bello* necessity. In order to effectively subdue an adversary, there is absolutely no need to kill all of its soldiers. Indeed, this notion is the legacy of the St. Petersburg Declaration of 1868: 'That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for

[43] Additional Protocol I, *supra* note 13, Art. 43(2).

[44] Blum, *supra* note 7, at 120.

[45] A recent McKinsey report placed the 'tooth-to-tail' ratio (the number of combatant soldiers out of the total military force) in the US military at 23%, the United Kingdom standing at 38%, China at 34%, France at 24%, Russia at 28% and Germany at 28%. See McKinsey Incorporated, 'Special Issue: Defense – Lessons from around the world: Benchmarking performance in defense', 5 *McKinsey on Government* (2010), available at www.mckinsey.com/~/media/McKinsey/dotcom/client_service/Public%20Sector/PDFS/McK%20on%20Govt/Defense/MoG_benchmarking_v9.ashx (last visited 2 July 2015) at 3–4, specifically exhibit 3.

[46] 1907 Hague Regulations, *supra* note 9, Art. 3.

[47] Pilloud *et al.*, *supra* note 5, at 515, para. 1677.

this purpose it is sufficient to disable the greatest possible number of men.'[48] From this restrained perspective, the prevailing classification of combatants is challenged. The suggested necessity requirement would not suffice with the current *in bello* constraints upon bloodshed, which are limited mainly to the prohibition of intended – or 'excessive' collateral – killing of civilians. (Neither would it rely upon the *ad bellum* proportionality requirement – aimed at determining what is considered proportionate in response to an 'armed attack' – which might affect the operational scope of a military since in practice there does not seem to be any requirement of sequential proportionality in the countermeasures taken by a (self-)defensive army.)[49] Indeed, it would challenge the prevailing *in bello* distinction rule, classifying all soldiers as the 'legitimized dead'. Military force in general, targeting in particular, should be lawful only to the extent that it is effectively necessary for achieving a given military advantage. This means that the current *carte blanche* in regard to killing soldiers should be rejected. The killing of soldiers should not be allowed based simply upon their indiscriminate classification as legitimate targets. Instead, it should be limited in accordance with the merits of a given conflict and the specific attributes of the military adversaries involved and their doctrines, which, in fact, define the specific function of their units. These are the prevailing professional considerations underlying the exercise of military power in general, targeting policy and priorities in particular, by a skilled military in a given campaign. The gap between the legal paradigm's assignment of a socialist equality to all soldiers and military professionalism, which does not accept this axiom on utilitarian grounds and requires further classification, should be bridged. The law of armed conflict cannot continue to turn a blind eye to the inequality of soldiers in reality.

Exercising the suggested criterion of operational effectiveness would be dependent upon the relevancy and effectiveness of given military units in a specific campaign. It is not the soldiers' specific personal role, level of training or location that absolutely matters but, mainly, their unit's relevancy to the military operation. There might be cooks, 'naked soldiers' taking a bath or swimming in a pool[50] or even 'real fighters' who are ineffective or irrelevant in some campaign scenarios – for example, located in a distant border checkpoint that has no relevance to, or effect upon, the given campaign – whereas, in other cases, soldiers in similar roles, but in different units, may directly contribute to the success or failure of the campaign. The latter include the case of the chef of a combat battalion who prepares the 'last meal' before a battle or that of the

[48] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, 29 November–11 December 1868, available at www.icrc.org/IHL.nsf/FULL/130?OpenDocument (last visited 23 February 2015).

[49] '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.' Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, 2011), at 262; see also the remainder of his discussion at 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'. Powell, 'US Forces: Challenges Ahead', 71 *Foreign Affairs* (1992) 32, at 37. Cf. the conflicting view, according to which the requirement of proportionality in the exercise of self-defence sequentially regulates the choice of means and methods of warfare, holding that it affects war's conduct and scope as well. See, e.g., the discussion and references in J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 162–179.

[50] M. Walzer, *Just and Unjust Wars* (4th edn, 2006), at 138–143.

fighters (or military police) at a distant border crossing who are located there with their unit to allow and expedite the transfer of precious supplies, ammunition and reinforcements directly to the front. The prevailing rule ignores the functional factor and prefers to adopt the entire class's entitlement to use weapons as the decisive element. In actual fighting, distinction is a crucial function in targeting, based mainly upon the military's priorities and the function of its adversary's units, which are much more important than soldiers' abstract entitlements. It is this unit-based functional criterion that I suggest be incorporated into the law of armed conflict by revisiting the distinction rule. Indeed, this is a division into subclasses or a bifurcated rule of distinction, based upon distinguishing units within the soldiers' class, that depends upon their importance and classification in a given campaign's circumstances. Ineffective combatants' units should not be targeted; only effective ones should represent lawful targets.

The suggested unit-based distinction differs, to some extent, from Gabriella Blum's call for revising the distinction rule. She offers a reinterpretation of the principle of distinction, suggesting that the status-based classification be complemented by a test of threat. In her view, with which I totally agree, combatants who pose no real threat in their function should be spared from direct attack.[51] However, I cannot embrace her call for an individual-level inquiry based upon the assessment of the individual threat emanating from each particular combatant. She employs the term 'threat' in this context 'to denote something close to the "guilt" or "involvement" test that has been employed by governments in the war on terrorism'.[52] The subclassification of combatants suggested here differs from Blum's individual inquiry. The individual-level threat analysis of each combatant, however morally attractive, does not seem to be practical in wartime due to intelligence resource constraints.[53] Furthermore, the actual threat from an individual soldier derives, to a large extent, from the function of the military unit (subclass) he or she is affiliated with during a given campaign. In the usual case, it is not the soldier, per se, who creates the threat but, rather, the function of the soldier's unit. Actual fighting differs from what is portrayed in the Rambo movies – in the usual case, it is not dependent upon one man's performance.

Indeed, in a given military scenario, implementation of the suggested subclassification of soldiers by the relevancy and operational effectiveness of their units (and their targeting necessity) may pose a dilemma. The difficulties are mainly due to a shortage of intelligence and problems with its interpretation, which is a regular phenomenon in the battlefield, however, and does not change the utilitarian and morality-based, professional sub-distinction principle. Indeed, 'war is the realm of uncertainty', as

[51] Blum, *supra* note 7, at 120. 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 an alternative of capture or disabling of the enemy would be preferred to killing, whenever feasible.

[52] *Ibid.*, at 155. Three dimensions of the suggested 'threat analysis', derived from individual-level determination, are suggested by her: role (e.g., a military cook), time (a sleeping or bathing pilot) and geography (soldiers playing soccer in a civilian neighborhood). *Ibid.*, at 155–160.

[53] Indeed, the applicability of Blum's approach is more likely in asymmetric conflicts where many operations are of the law enforcement type.

suggested by von Clausewitz,[54] and the fog of war triggers inherent cases of doubt on the battlefield. In case of reasonable doubt, the traditional distinction rule should have a say. While the desire to spare non-combatants' lives, a substantial pole of the current system, dictates that in cases of doubt non-combatants should be protected,[55] military necessity might nonetheless enable the targeting of 'doubtful effective combatants'. Indeed, this reflects the difference between the absolute ban on killing non-combatants and the allowed, but unnecessary killing of irrelevant, ineffective soldiers.

The suggested revised distinction rule, based upon the bifurcation into subclasses of military units pursuant to their military effectiveness, will be demonstrated by the case of the air bombardment on Highway 80 during the First Gulf War of the retreating columns of Iraqi soldiers from Kuwait to Basra, mainly on the night of 26–27 February 1991. The objectives of the First Gulf War, as outlined by American National Security Directive 54, dated 15 January 1991, were to force Iraq to withdraw from Kuwait, restore Kuwaiti legitimate government and promote security and stability in the Gulf.[56] Taking this strategic aim as well as the operational and tactical 'military advantage' to be gained from the US military campaign, as given, was it necessary to bomb and kill these retreating soldiers? Under the suggested approach, the answer would be dependent on the extent to which these soldiers' units (in whole or in part) were relevant to the remaining Iraqi campaign and how effective they were after they withdrew. This was not an unresolvable problem. The coalition's intelligence knew the answers (at least, in substantial part) in real time; after all, this was one of its main tasks.

Indeed, in order to assess the necessity of targeting the retreating soldiers in the case of the 'Highway of Death', the role played by, and the effectiveness of, those retreating soldiers would have to be evaluated. Such an assessment could be made based upon, *inter alia*, the Iraqi army's military doctrine, in general, and its troops' actual deployment during the Gulf War, in particular. Traditional Soviet military doctrine might serve as a reference for this inquiry (indeed, the degree to which the Iraqi military adhered to Soviet military doctrine is a matter of controversy[57] and, therefore, serves here merely as a reference). The Russian defence doctrine espoused several lines of defence set up to meet advancing enemy forces. The first line consisted of several relatively small units and obstacles, followed by a somewhat stronger line of defensive strongholds. Behind this line lay the bulk of the defender's forces, constituting the

[54] Von Clausewitz, *supra* note 37, at 101.

[55] Additional Protocol I, *supra* note 13, Art. 50(1).

[56] See The White House, National Security Directive 54, 15 January 1991, available at bush41library.tamu.edu/files/nsd/nsd54.pdf (last visited 23 February 2015); see also President George H.W. Bush, Address to the Nation Announcing Allied Military Action in the Persian Gulf, 16 January 1991, available at www.presidency.ucsb.edu/ws/?pid=19222 (last visited 23 February 2015).

[57] The dilemma is what lesson can be derived from the reliance of the Iraqi army on Soviet arms and supplies regarding its military doctrine. Thus, e.g., some experts claim that Iraqi military doctrine was comprised of a combination of British and Soviet doctrines supplemented by Iraqi additions. See, e.g., Eisenstadt and Pollack, 'Armies of Snow and Armies of Sand: The Impact of Soviet Military Doctrine on Arab Armies', 55 *Middle East Journal* (2001) 549; K.M. Pollack, *Arabs at War: Military Effectiveness 1948–1991* (2002), at 148–357.

main defensive zone, followed by a rear defensive zone.[58] Testing this doctrine (as a reference) in the case of the Iraqi forces in the Gulf War would mean that the forward lines close to the border would have had to be manned by divisions of lower quality, which had been assigned some very limited military missions, mainly to provide real-time intelligence, weaken advancing enemy forces and absorb the initial shock of the attack and channel their units to areas prioritized by the Iraqi high command. This might actually have been the case, as indicated by the fact that the Iraqi army chose to deploy along the border with Kuwait most of its weaker and less effective divisions, which had only a 57 per cent manning rate.[59]

The necessity of targeting these forces retreating from the border on the 'Highway of Death' is therefore dependent on their actual role once bypassed. If these soldiers were only meant to serve as shock absorbers and delay advancing forces, they were cannon fodder – the cheapest cards in Saddam's pocket – and he was keeping his most trained and qualified soldiers, the Republican Guards, somewhere else in the rear.[60] If that was the case, once their job as shock absorbers was concluded, it was no longer necessary to target them from a military perspective, due to their future irrelevancy on the battlefield. However, if these soldiers were meant to retreat and reinforce the deeper lines of defence, then they were still an effective player in the battlefield and a viable and necessary target. An interesting – yet inconclusive – method to ascertain how the Allied forces saw these soldiers is by examining the ammunition used to target them. The use of precise and more expensive ammunition by Allied forces could indicate the importance of those forces in their eyes (of course, subject to the scattering and other attributes of the target and available ammunition). Indeed, this could be another example of the embarrassing phenomenon whereby tracking the economics of war leads to a much better moral result than that offered by the prevailing legal rules.

Morally speaking, and under the suggested reading of necessity, the killing of the retreating soldiers could be seen as doubtful (subject to the specific circumstances discussed earlier); yet under the prevailing rules, there seems to be no real doubt concerning its legality. The current rule is mechanical, based upon mere classification of combatants as targets: 'There can be no question that the column was a legitimate target. It comprised enemy soldiers who had not surrendered.'[61] However, the suggested rule, a qualitative-functional one, requires elevating the legal threshold for lawful killing by revisiting the necessity principle. It would mean confronting the Allied

[58] R.W. Harrison, *The Russian Way of War: Operational Art 1904–1940* (2001), at 193. In fact, this pattern of fighting was not an original one: 'The [Roman] legion was formed in three separate lines, with the veteran troops waiting calmly in the rear. Detached in this way, they were able to counter any adverse development in the front rather than be engulfed in it themselves.' A. Gat, *The Development of Military Thought: The Nineteenth Century* (1992), at 33.

[59] A.H. Cordesman and A.R. Wagner, *The Lessons of Modern War*, vol. 4: *The Gulf War* (1996), at 115.

[60] On Republican guard deployment, see *ibid.*, at 653. It should be noted, however, that the Republican guards, Iraq's elite forces originally meant to protect the capital and president, had grown in size and were also deployed to Kuwait, albeit in separate locations, allowing them better access to loot and supplies from Kuwait compared with the regular corps. *Ibid.*, at 115–124.

[61] A.P.V. Rogers, *Law on the Battlefield* (2nd edn, 2004), at 31.

forces with the crucial question – the answer to which was probably well known to their intelligence – which is not related to the retreating soldiers' formal classification but, rather, to their relevance: to what extent did their targeting serve their real military objectives?

D *The Suggested Effect upon Non-Combatants: Reducing the Lawful Collateral Damage*

Introducing professional military standards into the prevailing law of armed conflict would also substantially affect the scope of the lawful collateral damage caused to non-combatants. Currently, the intentional killing of civilians or targeting their objects is totally forbidden. However, the general prohibition is fine-tuned to allow the consequential, unintended (collateral) and proportional targeting of civilians. Additional Protocol I prohibits 'an attack which may be expected to cause incidental loss of civilian life … which would be excessive in relation to the concrete and direct military advantage anticipated'.[62]

Under the suggested approach, with the focus on the military advantage side of the equation, no military statement would be taken at its face value. Any ostensible military advantage would be challenged and scrutinized in accordance with professional considerations and would thus be more limited in its scope. The legal threshold for risking innocent lives or civilian objects would be elevated because the military advantage would have to be justified by professional military standards and, therefore, based upon a cost-benefit analysis of alternative missions, objectives and courses of action. Such a complementary rule, substantiating the 'military advantage' part of the proportionality requirement, would dictate the less harmful military course of action for any given 'military advantage'. This change could be either explicit or implicit by way of interpreting the current proportionality equation. Indeed, it would provide tools to substantiate the norm, currently codified under Article 57(2)(a)(ii) of Additional Protocol I, which requires the military planner to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[63]

Military planning is not a black box to be viewed solely in terms of its final products and results – for example, achieving a given military advantage – with no understanding or knowledge of its internal procedures and workings. In fact, the opposite is true. It is a professional system with its own manifest rules and procedures, most of which are in the public domain and well known in liberal democracies. To achieve a designated military aim or advantage, the military planning process requires the planner to develop and present a wide spectrum of alternatives. Out of these preliminary

[62] Additional Protocol I, *supra* note 13, Art. 51, para. 5(b).

[63] See also *ibid.*, Art. 57(3) (requiring that 'the objective to be selected shall be that where the attack is expected to cause the least danger to civilians' lives'). See also David Luban's argument that military necessity requires taking civilians' interest into account ('necessity as proportionality'). Luban, 'Military Necessity and the Cultures of Military Law', 26 *Leiden Journal of International Law* (2013) 315, at 339–347.

alternative courses of action, only one is selected in a professional due process. For example, the wartime decision-making model used in the US army consists of six steps,[64] including intelligence preparation and mission analysis,[65] the development of friendly courses of action[66] (COA),[67] the analysis of these COAs,[68] comparison of the relevant alternative courses and decisions,[69] the development of plans-orders[70] and transition.[71] It requires the commander in the field to develop and present several relevant alternatives and choose the best course of action. The 'operational estimate' is the British military's corresponding decision-making process.[72] Like the American manual, the British system requires the military planner to present several alternatives for a given mission.

The military planning process and the selection of a course of action out of the alternatives for achieving a designated military goal should be leveraged, by substantiating the prevailing norm requiring the minimizing of collateral damage to civilians. Once this noble objective is defined and compulsorily incorporated as an integral and important part of the planning process – requiring prioritization of the course of action expected to trigger the least collateral damage – it would be actually implemented and have better chances of being achieved. Indeed, here as before, in an environment that assumes '*à la guerre comme à la guerre*', there is no role or space for a constraining professional military humanitarian brake during wartime. So long as it remains the prevailing legal assumption that the legality of any 'concrete and direct military advantage' to an army, to be achieved while fighting (especially in populated areas), should be taken at its face value, the result will be unnecessary excessive collateral damage to civilians. This assumption puts all (or most) of the constraining weight of the proportionality equation on the scale of human suffering, while (almost) ignoring the constraining force of military necessity, as reflected in the military advantage requirement.

However, its fallacy can be demonstrated at all levels of operations. At the tactical level, for example, a professionally trained soldier does not use his (or her) weapon unless he has a 'concrete and direct' military target. He does not use military resources

[64] US Naval War College, Workbook on Joint Operations Planning Process, NWC 4111H, 21 January 2008, available at www.usnwc.edu/getattachment/Departments---Colleges/Joint-Military-Operations/NWC-4111H-21-Jan-08-Final.pdf.aspx (last visited 23 February 2015).

[65] *Ibid.*, at 1-1.

[66] *Ibid.*, at 2-1.

[67] '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.' *Ibid.*, at 2-1 (emphasis in the original).

[68] *Ibid.*, at 3-1.

[69] *Ibid.*, at 3-15–4-6.

[70] *Ibid.*, at 4-7–5-2.

[71] *Ibid.*, at 5-3.

[72] British Ministry of Defence, *The Developments, Concepts and Doctrine Centre, Campaign Planning*, Joint Doctrine Publication 5-00 (2nd edn, change 2, July 2013), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/239345/20130827_JDP_5_00_Web_Secure.pdf (last visited 23 February 2015), para. IV, 2–32.

unless they are aimed at such an authorized target. It is the soldier's professionalism that should prevent him or her from targeting non-military targets (though the possibility of mistakes in urban areas is greater). This professional requirement, if properly implemented, would reduce the unintended collateral damage. The transformation of this professional standard into a legal norm can dictate that a military – at all levels of operation – should adopt the least harmful course of action for any given military advantage.

The discussion thus far has dealt with the direct effect of the suggested transformation of professional standards into legal norms upon war's casualties, restricting the potential damage that might be caused both to combatants and to non-combatants. The following discussion will deal with the second, direct constraining effect, which relates to exercisers of military force.

E *Imposing Political Leaders'* in bello *Responsibility*

Political leaders who command militaries, either directly (as 'commander in chief')[73] or effectively (through the exercise of de facto authority over their state's military), are not currently obliged by their militaries' professional standards. Indeed, leaders are not usually connected to tactical and operational activities;[74] yet strategic decisions taken by leaders do affect, and are related to, such professional standards insofar as they directly affect military operations. Turning these standards into legal norms would compel leaders to obey them. Currently, a convenient bifurcation exists for leaders: the *ad bellum* sphere is perceived to be their responsibility,[75] whereas the *in bello* sphere is perceived to be the soldiers. The suggested transformation would mean that leaders would be responsible for part of the latter, taking into account the direct effects of their strategic decisions upon their militaries' way of fighting.

An example of this scenario would be the collateral damage caused in the 1999 Kosovo campaign,[76] due to the direct causal link between its grand strategy and the

[73] The president of the USA, e.g., is formally defined as the 'commander in chief' of its armed forces, US Constitution, Art. II, para. 2, cl. 1.

[74] Indeed, some activities of leaders that might be perceived as tactical – e.g., approval of targeted killings by drones or President Barack Obama's authorization of the Osama bin Laden raid – are, in fact, strategic, due to their strategic effects.

[75] Indeed, though the *ad bellum* sphere is perceived to be the responsibility of leaders, the crime of aggression, in relation to leaders who cross the legal *ad bellum* Rubicon, has not yet come into force. Although Art. 5(2) of the Rome Statute of the International Criminal Court, 1 July 2002, UN Doc A/CONF.183/9, grants the International Criminal Court (ICC), *inter alia*, jurisdiction over 'the crime of aggression', it suspends its actual operation, subject to a specific agreement on the definition of the crime. Indeed, agreement was reached in the 2010 ICC Review Conference in Kampala, yet it does not seem that it will be implemented in the near future. The Court's jurisdiction over this crime is only to begin after January 2017, pending a two-thirds majority of state parties, as is required by Art. 121. See ICC, Resolution RC\Res. 6 on Crime of Aggression, 11 June 2010, available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 1 March 2015), Annex I, para. 3, concerning Art. 15 bis (para. 3). Currently, only 23 states have ratified the amendments defining the crime. See https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-10&chapter=18&lang=en (last visited 1 March 2015).

[76] A Human Rights Watch report assessing the damage to civilians in the aftermath of Operation Allied Force in Kosovo concluded that between 489 and 528 civilians were killed as a result of aerial bombings during the operation. See Human Rights Watch, *The Crisis in Kosovo* (2000), available at http://www.hrw.org/reports/2000/nato/Natbm200-01.htm#P153_32943 (last visited 23 February 2015).

scope of the operational collateral damage caused by it. In this campaign, NATO's leaders dictated a 'zero military casualties' *in bello* paradigm to their militaries. They were motivated by a desire to limit their militaries' casualties by avoiding an attack using ground forces and, instead, conducting high-altitude bombings, thus evading Yugoslavian air defences as well. The price of this strategy was probably inflated collateral damage. Yet the committee established to review the NATO bombing campaign followed the traditional paradigm, leaving the *in bello* sphere and responsibility to the soldiers ('NATO air commanders').[77] However, the responsibility for the collateral damage caused in the Kosovo campaign lay primarily with the political leaders, who dictated a strategy directly affecting the tactics adopted. The responsibility lay not with the technicians but, rather, with the master engineers. Had those leaders been subjected, as is suggested, to the inherent military professional standards, including those that constrained the use of force, an inquiry would have been conducted to determine whether or not these political leaders breached their legal obligations. (Such an enquiry would probably have reached the conclusion that the prevailing legal rules do not explicitly require soldiers to risk themselves, or their subordinates, in order to prevent or minimize collateral damage; though morally, they do have such a duty.)[78]

Indeed, although 'NATO air commanders' should be responsible for their own operational and tactical decisions, accountability for the direct results of the 'zero military casualties' *in bello* paradigm lies squarely upon the leaders' shoulders. They demonstrated a lack of willingness to risk their own soldiers' lives, knowing the probable effect this decision would have upon collateral damage caused to innocent civilians. The potential *in bello* effects of this choice are currently missing from the legal equation, which is currently beyond actual legal scrutiny. Under the suggested approach, however, this strategy – and the actual course of action taken – would have been examined with reference to the law of armed conflict, in general, and to widely accepted military professional standards, in particular.

Furthermore, turning professional military standards into legal norms would neutralize popular – but very problematic – political pressures exerted upon leaders, especially democratically elected ones, in times of war. An important, if not the most important, responsibility of elected leaders is to defend their citizens. For example, the 2010 American National Security Strategy states: 'This Administration has no greater responsibility than the safety and security of the American people.'[79] In situations of national emergency, political leaders come under huge pressure from their constituents and domestic political circles to fulfil this obligation in a short time and by all means. The temptation to please constituencies by exercising brute force is always

[77] International Criminal Tribunal for Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (OTP Report), 13 June 2000, available at www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf, at para. 56 (last visited 23 February 2015).

[78] See, e.g., Benevenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', 39 *Israel Law Review* (2006) 81; Walzer, *supra* note 40, at 437.

[79] The White House, National Security Strategy, May 2010, available at www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, at 4 (last visited 23 February 2015).

there. This temptation is further inflated by the frustration of both military and political leaders that the substantial modern targeting capabilities of militaries are not matched by the usually limited number of lawful targets.

Popular public opinion is capable of 'legitimizing' the huge gap between capabilities and targets by reducing the legality threshold. Indeed, in national emergency circumstances, leaders face a substantial temptation to instruct their militaries to 'find targets' by all means in order to exercise all (or most) of their actual military capabilities.[80] This combination of popular demands, politicians' temptations and ambitions and the frustrations of militaries due to their inability to exercise their full capabilities might easily lead to excessive brutality. Introducing an *in bello* requirement of professionally limited targeting as a legal binding norm (or interpreting the prevailing rules in light of these professional standards) would offset those factors. It might prevent, or at least minimize, the effects of these external 'noises', leaving the arena to military professionalism, including the inherent self-constraining standards of well-trained militaries.

F *Constraining Brutal Militaries and Vicious Soldiers*

The second group of potential injurers that would be affected by the suggested transformation of professional military force-constraining standards into legal norms are those militaries (or parts of them) that are still unwilling to accept any force restrictions as professional standards. For example, those who still view inter-state wars as being between 'peoples' rather than rival militaries cannot accept the current restrictions *vis-à-vis* civilians as being desirable to militaries rather than imposed upon them. These 'old school' soldiers are still obsessed by the Clausewitzian legacy of achieving victory by breaking the rival's will,[81] and brutality against the 'enemy', including its civilians and objects, might often seem to satisfy this obsession.[82] However, the international law of armed conflict, which has developed since the Brussels Conference of 1874 and following the Hague Peace Conferences of 1899 and 1907, explicitly rejected the civilian dimension of total war as suggested by von Clausewitz. Between the contradictory definitions of the fighting adversaries – states or peoples – traditional law has explicitly chosen to limit the scope of war to the military in an attempt to limit the harm caused to civilians.[83]

[80] Furthermore, an existential threat might not only affect the political pressure but also have a legal affect upon the *in bello* rules. The International Court of Justice has admitted that it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 105.

[81] 'War is thus an act of force to compel our enemy to do our will.' Von Clausewitz, *supra* note 37, at 75. Furthermore, '[t]o induce the principle of moderation into the theory of war itself would always lead to logical absurdity'. *Ibid.*, at 76.

[82] Michael Howard points out, e.g., that '[s]trategists before 1914 were in fact increasingly hypnotized by the Clausewitzian and Napoleonic idea of the decisive battle for the overthrow of the enemy'. M. Howard, *Clausewitz* (1983), at 63.

[83] '[T]his 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 a life or death struggle involving the whole of the population of the contending states]. Being based on the assumption that wars are clashes between states' armies, it distinguished between combatants and civilians and sought to shield the latter as much as possible from armed violence.' Cassese, *supra* note 6, at 400.

Given the current illegality of exercising intentional force against non-combatants, those within military ranks who still believe that using excessive force against civilians is militarily desirable can currently still manipulate the rules to a limited extent but mainly within a specific niche – when targeting dual-purpose objects. Whenever objects serve both civilian and military purposes – for example, power grids and bridges – over-enthusiastic soldiers might inflate their military profile at the expense of their civilian functions in order to legitimize their targeting.[84] As described earlier, however, this school of military thinkers and practitioners unfortunately still possesses ample lawful manoeuvring space when it comes to brutality against combatants, so long as they are still in the war game. Here the law of armed conflict remains silent in a way that allows brutality, and, in some cases, wickedness and even psychopathy, to flourish in the military environment.

Revisiting the necessity principle, as suggested, by introducing professional restraints against the use of excessive military force and transforming them into a legal standard and norms, would force contemporary 'old school' militaries and soldiers to join the club of modern well-trained ones. The military culture supporting the exercise of brutality per se would have to defer and accept the suggested standard and norms imported primarily from the cultures of contemporary well-trained militaries. (Historically, however, the moderate school of fighting originated thousands of years ago in Oriental cultures. Sun Tzu's moderate approach to war with its 'emphasis on the use of force only as a last resort reflects Confucian idealism and the political culture that it spawned'.[85]) Furthermore, even in the case of rigid militaries and iron-fisted soldiers, who are still obsessed with the exercise of brute force, the challenge to contemporary commanders is to choose the optimal course of action from the available alternatives. Merely having the knowledge that the restricted-force option is an available one, professionally endorsed by leading militaries, may help persuade them to accept it as an imposed compulsory norm. The discussion thus far has presented the effects of the suggested transformation of professional standards into legal norms. It currently invites a timing question: why should strengthening the necessity principle, by infusing it with professional constraining standards, now work?

5 Why Now? Has the Time Come for Revised Military Necessity?

The traditional functional equation regarding the role of the law of armed conflict – to strike a balance between the demands of military necessity and concerns for humanity – is theoretically satisfying. The problem, however, lies with its current interpretation

[84] As to the legal rule, see Additional Protocol I, *supra* note 13, Art. 52(2). E.g., Normand and Jochnic have criticized the coalition's targeting of a substantial number of Iraqi power stations during the Gulf War (arguing that the military gains were negligible relative to the amount of civilian suffering caused). Normand and Jochnik, 'The Legitimization of Violence: A Critical Analysis of the Gulf War', 35 *Harvard International Law Journal* (1994) 387, at 403–405.

[85] M. Handel, *Masters of War: Classical Strategic Thought* (3rd rev. edn, 2001), at 136.

and implementation: the almost automatic validation of military necessity. A potential reply to this shortcoming – introducing new substance into the general principle of necessity and the norms derived from it, based upon professional standards – was offered in the previous discussion. But is there a real demand for such a reform? Taking the current hollowness of this principle as a given, the question is whether these dry bones can be brought to life again.[86] Indeed, the answer lies with the timing. Cultural, social, technological and military changes that are now taking place have prepared the ground for the evolution of a revived necessity: a new legal principle made up of military professional standards that constrain the use of excessive military force.

Despite the focus placed by the law on the protection of civilians after World War II,[87] its mixed record since then in fulfilling this noble mission invites revised legal thinking. This need is further intensified due to the new urban battlefields. Current changes in the pattern of war – specifically, the prevailing asymmetric conflicts taking place, to a large extent, in heavily populated urban areas – pose a challenge to the humanitarian mission of the law of armed conflict. Furthermore, the changes of recent decades in both military and social Western-liberal thinking have substantially reduced the willingness to sacrifice lives and wealth to wars – the latter are perceived, often enough, as the new Moloch. These liberal ideologies are augmented by the development of military technology enabling modern militaries to obtain real-time intelligence and achieve precision in targeting. Cumulatively, all of these changes, which are to be elaborated in the following paragraphs, have created a new environment – one that may be ready to absorb constraining professional military standards as a mandatory legal norm.

When the horrors and disastrous results following the two world wars became known, it triggered the assumption of a central role by the humanistic approach in the development of the prevailing rules of the law of armed conflict.[88] In actual effect, however, this approach has been less than successful. The problem stems partly from the limited scope of the legal rules in intra-state wars[89] and partly from poor compliance and lack of effective international enforcement. Empirically, in the 20th century, '[the] treatment of civilians has the worst record'.[90] Indeed, one of the reasons for this failure has been the change in the nature of war in the latter part of the 20th century, particularly in regard to urban warfare.

As the humanistic approach to the laws of war advanced, parties to conflicts that were less committed to it began taking advantage of its rules, mainly by using urban areas as shelters in the context of burgeoning asymmetric warfare. The urban theatre, once considered a death trap to non-state fighters, whose adversaries could burn them in it together with its local citizens, now came to be perceived as a safe haven for them.

[86] Ezekiel 37:1–14.

[87] See, e.g., Best, *supra* note 2.

[88] *Ibid.*, at 289–290.

[89] E.g., the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, is applicable primarily to conflicts of an international character; the results of Art. 3 of the Convention applicable to non-international armed conflict have been uncertain at best.

[90] Morrow, *supra* note 3.

It protects these fighters, while they assimilate into the civilian population, utilizing the prevailing principle of distinction.[91] The density of the urban arena and plurality of civilians in it have made it nearly impossible for the militaries of law-abiding states to avoid collateral damage when fighting in asymmetric wars. The weaker side may use this to its advantage and attack indiscriminately, while protecting its military assets in many cases by using civilians as human shields.[92] Indeed, this is a revolving trap: from a trap for non-state fighters, the urban arena has turned into a 'legal and moral trap' for the law-abiding state.

Add to this situation the change in social perceptions of heroism and killing in the modern period. The willingness of societies, primarily liberal ones, to sacrifice their own soldiers' lives and their acceptance of the need to kill the adversary's combatants, or especially 'enemy civilians' (albeit collaterally), can no longer be taken for granted as before. This post-heroic era[93] is characterized by a lessening tolerance of casualties on both adversarial sides.[94] These social changes, new liberal norms and public expectations, especially in Western democracies, have arrived together with relatively easy access by the different media to conflict zones, with all of the parties involved fighting for the public's 'hearts and minds', both domestically and internationally. Furthermore, in counter-insurgency operations, added emphasis is placed on reducing the amount of force used in order to win the 'hearts and minds' of the local population. How a war is perceived by public opinion and reflected in the media is becoming increasingly significant. The perceived narrative becomes crucial, in some cases even more than the actual deeds on the battlefield. Against this challenging background, new technologies have triggered developments in intelligence gathering and precise weaponry – the combination of both allows for many more surgical strikes than before.

The industrial revolution gave impetus to the development of the concept of total war and its industrialized mass killing,[95] which has been prominent in wars since the end of the 18th century. New intelligence-gathering capabilities and the precise weaponry reform have currently created new operational opportunities and challenging agendas for military strategists. The industrial approach to war has underlaid the design and use of traditional weapons. The typical operational targeting process was quantitatively oriented, aimed at covering large areas with a huge amount of fire in order to hurt as many 'enemies' as possible. Typically, the name of the game, from Napoleon's campaigns to Vietnam, was body count.[96] Whether it was World War I's

[91] A. Gat, *Victorious and Vulnerable: Why Democracy Won in the 20th Century and How It Is Still Imperiled* (2010), at 141–142.

[92] Concerning the use of human shields, see Schmitt, 'Human Shields in International Humanitarian Law', 47 *Columbia Journal of Transnational Law* (2008–2009) 292, at 292–294. A recent example of volunteers shielding potential military objectives occurred in the Kosovo conflict. Rogers, *supra* note 61, at 21.

[93] E.N. Luttwak, *Strategy: The Logic of War and Peace* (2001), at 68.

[94] *Ibid.*, at 72.

[95] Indeed, the impact of the industrial revolution on military power developed gradually and, in some cases, very slowly. See J.F.C. Fuller, *The Conduct of War, 1789–1961: A Study of the Impact of the French, Industrial and Russian Revolutions on War and Its Conduct* (1992), at 86–94.

[96] E.g., 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

artillery and machine gun slaughter in the trench warfare or World War II's atomic bomb, the targeting aim was to achieve the desired mass killing. Today's weapons are much more accurate, with pinpoint targeting allowing for surgical strikes with relatively minimal collateral damage. For example, joint direct attack munitions and global positioning system navigation, which have been added to existing free-falling bombs, has allowed them to achieve an accuracy of 20 feet from 15 miles away, with great potential for decreasing collateral damage.[97] With this development, we may see operational targeting abandon its quantitative orientation in favour of a qualitative and selective orientation.

All of the aforementioned factors combined have created a window of opportunity for the suggested evolution: the introduction of force-constraining legal norms and a revised necessity principle. Thus, the demand side for restricted use of force might currently meet the available supply, and a new equilibrium, internalizing the limitations of military power, should be created to actually balance the necessity and humanity principles. The potential for reform is there – all it requires is a conceptual and doctrinal reform to phrase it and the legal rules to establish it. Indeed, the combined effects of the changes in the nature of substantial parts of modern wars and in the social attitudes towards them, the development of the humanistic approach to the laws of war and the introduction of new weapons and intelligence technology can all lead to new paradigms in military thinking. Von Clausewitz's bloody and brutal vision of total war, though common in the wars of the last two hundred years, can now be replaced, at least in part, with a far less brutal paradigm based upon the precise and measured use of force to accomplish a military mission. Indeed, this is nothing strange to military thinkers, nor is it new.

Two thousand years ago, Sun Tzu described this approach, saying 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'.[98] A recent American example of a relatively moderate approach was offered by General Colin Powell, who argued against the complete destruction of the Iraqi army during the First Gulf War (1991), convincing President George H.W. Bush to end the ground war after one hundred hours.[99] The turning of the American doctrinal scale in favour of the moderate approach is not only reflected in traditional inter-state wars but was also actually demonstrated lately in its counter-insurgency doctrine.[100] Indeed, these new winds have opened a window

and Major General Ira A. Hunt in a study promoting the use of the body count and a counter-insurgency strategy based on attrition. "Once one decided to apply maximum force, the problem became a technical one of doing it efficiently with the resources available." Not entirely coincidentally General Ewell, commanding general of the 9th Division in the Mekong River delta, acquired the nickname "The Butcher of the Delta" for his obsession with the body count.' E.A. Cohen, *Supreme Command: Soldiers, Statesmen and Leadership in Wartime* (2002), at 184.

97 Schmitt, 'Precision Attack and International Humanitarian Law', 87 *ICRC* (2005) 445, at 449.

98 Sun Tzu, *The Art of War*, translated by Samuel B. Griffith, foreword by B.H. Liddell Hart (1963), at 79.

99 See, e.g., Cohen, *supra* note 96 at 194–198.

100 See text accompanying notes 22–23 in this article.

of opportunity for a re-substantiation of the necessity principle based on professional norms.

6 Concluding Remarks

The aim of this article is twofold: first, to say that there is an urgent need to substantiate the necessity principle and the prevailing legal norms with widely accepted professional military standards in a way that creates a new equilibrium between humanity and military necessity and, second, to demonstrate that the present may be the optimal time for such a reform. Though much effort has been devoted to convincing the reader that these professional constraining standards are currently well established in modern militaries (albeit, mainly in liberal democracies), the main argument presented here is valid even if one thinks that the present writer has failed in this mission. For those who believe that the brutal Clausewitzian legacy is still vibrant in modern contemporary militaries, this article should be read as a call – an open invitation to a normative discussion (without the suggested basis of positive professional standards). The suggested discussion could lead to either explicit reform – codification of the professional necessity standard and the specific norms deriving from it – or an indirect one, through interpretation of the prevailing criteria and their being based on substantive, qualitative, professional requirements.

Humanity alone should not, and in fact cannot, substantially reduce war's hazards. The recognition and promotion of internal, professional military constraints, meant to prevent an army from causing excessive damage to civilians or unnecessarily killing and inflicting suffering on its adversary's combatants, should be endorsed. The prevailing law seems to have internalized the importance of introducing professional military standards into the legal discourse. However, it currently accepts them in only a limited spectrum, though indeed in the very important niche of balancing the *in bello* proportionality equation. Thus, the legal assessment of an expected 'military advantage' *vis-à-vis* collateral damage is carried out through the eyes of the reasonable commander. As the Committee Established to Review the NATO Bombing in Kosovo has stated, '[i]t is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. … It is suggested that the determination of relative values must be that of the "reasonable military commander"'.[101] Indeed, the role assigned to the 'reasonable military commander' in this delicate niche of proportionality assessment should be extended, with professional standards introduced into the legal *in bello* discourse as obligatory force-restricting standard and norms as well. The determination of military necessity is, to a large extent, the commander's profession. It functions not as a justification for brutality but, rather, obliges them to exercise their forces competently, using their brains and professional skills when exercising force. Doing so will enable them to restrict unnecessary brutality while achieving their mission.

[101] ICTY, OTP Report, *supra* note 77, para. 50.

Based on both utilitarian and moral grounds, the time has come to revisit the necessity principle and challenge some prevailing norms, reflecting the current balance reached in light of the principles of humanity and military necessity. Such a reform's potential for success at present seems promising. The combined effect of the current changes in war's pattern and the law of armed conflict, in the military and social liberal thinking of recent decades, as well as the new strategies available due to developments in new military technologies, has been to create a new war environment – of a kind that might be ready to absorb and even welcome the suggested reform. From this perspective, the 'human rights lawyer' and the 'reasonable military commander' should not find themselves in permanent confrontation, as the current axiom assumes, but, rather, should join forces in limiting war's hazards.

While this article suggests a framework for substantiating the necessity principle and the legal norms derived from it, it leaves open, to a large extent, their specific concretization. Questions related to the precise contour of the suggested norms and how they are to be promulgated – for either professional or non-professional military forces (and armed groups) to follow them – will require further elaboration. Issues related to the burden of proof – for example, whether an apparent breach of professional standards might transfer (and to what extent) the burden of proof to the wrongdoer – and to the scope of doubt should also be discussed. Moreover, the mere existence of established military standards and norms, as suggested earlier, might affect the prevailing custom – another legal dimension that ought to be dealt with. Indeed, the discussion in this article presents an open invitation to a wider analysis that internalizes the limitations of military power by revisiting the prevailing equilibrium between humanity and necessity principles.

The constraining potential of the necessity principle is what lies at the heart of this article. However, its enabling function cannot be ignored either. In this context, it should be remembered that wars are not humanitarian projects. They are destructive by their very nature, with military necessity serving as the justification for militaries' devastative actions. Yet it does not and should not justify excessive use of force. Not all is fair in war but, rather, the opposite. Brutality in war is a product of incompetent and undisciplined militaries or a result of political, psychological and cultural pressures. True enough, the necessity principle justifies the mere use of lethal force to facilitate wielding the military sword. At the same time, however, it should also function as a shield, protecting combatants and non-combatants alike from excessive brutality. The constraining and enabling functions, as suggested in this article, are not mutually exclusive; on the contrary, the more successful a military is in containing unnecessary brutality, the more effective it is in achieving its mission. The scope of what is necessary, and which activities amount to excessive brutality, is primarily a professional matter to be scrutinized by professional standards. It affects both *ad bellum* (mainly leaders') decisions and *in bello* (mainly soldiers') operations. The military has a professional say in questions of given necessity, but it is not immune to external criticism or even punishment, if required, whenever such force is used unprofessionally. Here the role of military lawyers, judges, NGOs and public opinion is not to apply the brake to the military's destructive apparatus whenever appropriate – a task that is subject mainly to the professionals' responsibility and accountability – but, rather, to inspect its actual operation.