

THE JBI HUMAN RIGHTS LECTURE

Preserving Humanity:
Moral Challenges
in Asymmetric Conflicts

Moshe Halbertal

Inaugural Lecture, December 9, 2014

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The Jacob Blaustein Institute lecture series on international recognition and protection of human rights was funded by Robert S. Rifkind.

Founded in 1971 under the aegis of the American Jewish Committee, the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) continues in that capacity to strengthen human rights through the United Nations and other intergovernmental bodies. JBI strives to narrow the gap between the promise of the Universal Declaration of Human Rights and other international human rights agreements and the realization of those rights in practice.

Jerry H. Biederman is Chairman of the JBI Administrative Council, and Felice D. Gaer is the Director of the Institute.

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Introduction

ON DECEMBER 9, 2014, legal scholars, diplomats, human rights advocates, and friends of the Jacob Blaustein Institute for the Advancement of Human Rights (“JBI”) gathered in New York City on the eve of international human rights day to reflect on the issue of how to preserve humanity and uphold law in asymmetric conflicts. JBI sponsored this lecture as the first in a series of Jacob Blaustein Human Rights Lectures on international human rights topics. As readers will see, Professor Moshe Halbertal offered a stimulating presentation that explored the matter in a philosophical context, examining the moral challenges faced by leaders and ordinary soldiers alike.

We are grateful to Robert S. Rifkind for his vision and generosity in establishing this lecture series. Mr. Rifkind, a distinguished attorney and civic leader, served as Chair of the Institute’s Administrative Council from 2000 to 2007, and remains an active member of its Steering Committee. His steadfast belief in the efficacy of law and indispensable need to guarantee and protect the human rights of every person has been an inspiration to all the members of the Institute’s Administrative Council and staff. We welcome his ongoing involvement and advice.

Since it was established in 1971 under the aegis of the American Jewish Committee, the Jacob Blaustein Institute has worked with human rights defenders, lawyers and diplomats to generate ideas and clarify human rights concepts, to strengthen international human rights norms and institutions, and to develop means to realize these ideals and proposals. Through research, advocacy, constituency building, and collaboration, the Jacob Blaustein Institute has pursued goals that are at the heart of this lecture.

In past years, we at JBI have successfully called for strengthening the international norms that protect human rights. For example, we have carried out programs to enhance the content of obligations to prevent genocide and torture. We have called on the United Nations and individual Member States to insist on the protection of the rights of human rights defenders, members of religious minority communities, women, and others under threat.

We have also encouraged the development and strengthening of institutions and mechanisms to enforce human rights obligations at both the national and international levels. For example, we have successfully pressed for the creation of UN mechanisms to defend human rights, such as the post of UN High Commissioner for Human Rights, the International Criminal Tribunal for the Former Yugoslavia, and the Special Adviser to the UN Secretary-General on the Prevention of Genocide.

In many respects, these efforts have been successful—over the last decades, the substance of human rights law has been enhanced enormously and the institutional mechanisms in place to promote human rights and the protection of civilians affected by armed conflict have grown much stronger.

At the same time, particularly in the last two decades, we have witnessed the emergence of fundamental challenges to the efficacy of human rights law and international humanitarian law rules that protect civilians in times of conflict. This lecture addresses one of the most pressing of these challenges—one that goes to the heart of the protective legal and institutional architecture that we at JBI have dedicated ourselves to building.

The question we face is: how can governments and societies be persuaded to demand that their military forces adhere to the requirements of international human rights law and international humanitarian law, even when they find themselves battling non-state adversaries that gain tactical advantages when they deliberately violate the rights and protections those legal regimes require? How can we insist upon armies' adherence to the law, even in the face of exploitation of it by powerful armed groups that hide among civilians and have no qualms about putting their lives at risk? This is not a new question, but it arises in a host of contemporary conflicts: from Iraq, to Syria, to Afghanistan, to Ukraine and to the Middle East conflict. It is a question that features more prominently in our discourse today than ever before. It is all the more pressing in a context in which the accountability architecture we have created to enforce international norms remains overwhelmingly state-centric, making it difficult to apply to non-state actors.

In short, how can we maintain the value of the international law and institutions we have built up over decades in order to protect human life and rights, even in the context of often one-sided adherence and enforcement?

Moshe Halbertal, who delivered the inaugural Jacob Blaustein Human Rights Lecture, is a distinguished scholar and intellectual leader on precisely these complex issues. Professor Halbertal is Gruss Professor at NYU

Law School, Professor of Jewish Thought and Philosophy at the Hebrew University, and a fellow at the Shalom Hartman Institute. He was a fellow at the Society of Fellows at Harvard University and a visiting Professor at Harvard, Yale, and the University of Pennsylvania law schools. Moshe Halbertal is the recipient of the Bruno Award of the Rothschild Foundation and the Goren Goldstein award for the best book in Jewish thought in the years 1997–2000. He received the 2013 National Jewish Book Award for his book, *Maimonides: Life and Thought*.

While Professor Halbertal employs this inaugural lecture to explore the preservation of humanity in armed conflict from a philosophical and moral perspective, other lectures in this series will examine key human rights issues from other perspectives, such as through the lens of human rights law and practice, as well as in a historical or policy context.

—*Felice D. Gaer*
DIRECTOR

Preserving Humanity: Moral Challenges in Asymmetric Conflicts

THE PROTECTION of civilian noncombatants in asymmetrical warfare has been a concern in much of contemporary human rights discourse, so I welcome the opportunity to examine this issue and present my views on the moral challenges faced in such circumstances. It is indeed an honor to have been invited to explore this issue on this occasion, the inaugural Jacob Blaustein Institute Human Rights Lecture. I thank the Jacob Blaustein Institute for the Advancement of Human Rights for convening this program and for its continuing concern about this topic and other human rights matters.

The philosophical and legal attempts to shape the norms that constitute just conduct in war were constructed against the backdrop of a particular kind of war. These sets of norms are supposed to govern the conduct of soldiers during wars in which armies—which are more or less distinguished from their civilian environment—clash with one another on a more or less defined front. However, in the decades that have elapsed since these norms were developed, the nature of warfare has been transformed. My own recent experiences have caused me to realize that difficulties can emerge while trying to apply just war principles molded in the context of symmetric conflicts to a reality which is so profoundly different—that of asymmetric warfare.¹

Asymmetric warfare is typified by the attempt of one of the sides to nullify two key elements of symmetric warfare: the uniform and the front.² Symmetric warfare is conducted by two forces that distinguish themselves from their environment by means of uniforms, in most instances within a defined space termed the “front.” The Yom Kippur War of 1973, for example, was waged as a relatively massive clash of discrete armies within defined fronts. Since the 1990s Israel has faced a new kind of struggle in which the adversary not only does not distinguish himself from the civilian population by wearing a uniform, but also makes every effort to blur the distinction between combatants and non-combatants by locating bases of operation in the heart of the

cities and villages in which he operates. By the same token, the enemy applies this blurring of the soldier-civilian distinction toward the adversary, aiming indiscriminately and deliberately at quintessentially civilian targets. Moreover, asymmetrical warfare has no demarcated front; its perpetrators are sent anywhere and everywhere that carnage can be inflicted: buses, restaurants, campuses, clubs, shopping centers and even hospitals. This attempt to blur the distinction between combatants and non-combatants on both sides of the divide and to abrogate the delimited front is meant to generate a war of all against all and everywhere. Such warfare thrusts the other side from a state of containable fear into a state of anxiety and panic. Thus any stranger becomes a threat, and an attack can occur anywhere.

Asymmetric warfare is also micro-warfare. The side attempting to dictate asymmetry is interested in guaranteeing that in combat the relative advantages of its enemy do not come into play. It is oriented therefore to violent clashes at local and restricted contexts—squad versus squad. This attribute of asymmetric warfare places moral responsibility on the shoulders of the lower ranks to a much greater extent than in symmetric warfare. The decisions to bomb Dresden or drop an atomic bomb on Hiroshima were entrusted to a very small group of people in the high command and political leadership. In a clash between armored formations in the Golan Heights or Sinai in 1973 ordinary soldiers encountered rather limited ethical issues, such as handling of prisoners of war; questions of which strategic or other targets to hit during the war concerned, in most cases, only a limited number of people of the highest ranks in the military and government. By contrast, in asymmetric warfare, which as aforesaid is micro-warfare, regular soldiers face at any given moment fateful ethical questions. The soldier, sergeant or platoon commander must determine, for example, whether a figure observing him from the window of a house is a combatant on a scouting mission or a frightened civilian. In asymmetrical micro-warfare, ethical responsibility permeates the lowest ranks of military activity, and this fact presents a significant educational and professional challenge. In addition to the difficulties in formulating the proper norms for this profoundly different context, a further no less daunting challenge emerges. Lower-ranking soldiers are being called upon to exercise an immense degree of judgment while fighting. How can this sort of practical wisdom, which the Greeks called *phronesis*, be properly taught? After all, *phronesis* has to be practiced during the heat and fog of battle.

The scope of this lecture is inadequate to deal with such broad challenges. Among other issues that I am not going to touch upon are those related to the question to what degree asymmetrical conflicts present a particular challenge to the decision to engage in war altogether. I will focus in this presentation on problems that emerge in relation to *jus in bello* rather than *jus ad bellum*. The problems that emerge in relation to the *jus in bello* are vast as well; therefore, after a rather general mapping of the problematic domains, I will focus on what might be the main moral challenge in the application of just war principles to asymmetrical warfare: protecting the civilian population. In this particular area of protecting civilians I would like to address issues that from my experience are crucial and yet are not adequately addressed in the existing legal framework. It would be worthwhile to start by outlining four general principles of just war theory to serve as the background for further analysis.

Four Principles of Just War

The first principle is the *principle of necessity*. This principle holds that the use of force must be targeted exclusively for the purpose of the military mission. Thus, for example, in battle there may be a need to blow up a wall or door to penetrate a structure harboring an enemy combatant. Exploding the door or wall does not necessitate deliberately shattering the television in the room. Such an act is not essential to fulfilling the military objective and comprises nothing but wanton vandalism. In addition to its clear ethical value, the principle of necessity has a professional dimension because it ensures that the use of force and attention are focused on the mission. A platoon engaged in pillage and demolition that bears no relation to the military objective at hand, or that fires at solar water-heaters on rooftops, is not only corrupt but unprofessional. Its destructive fire-delivering force is unfocused and inefficient.

The second principle is the *principle of distinction*. This principle holds that enemy belligerents alone may be deliberately targeted. Intentionally harming civilians comprises murder and slaughter, and even where such harm may facilitate the fulfillment of a military mission, it is strictly forbidden. Accordingly, soldiers are obliged to defy an order to fire deliberately upon helpless children or non-combatants. Honoring the principle of distinction is what separates a soldier from a terrorist: a soldier aims his weapon and force exclusively at combatants, whose lives, given the threat they pose,

legitimately may be taken; a terrorist, on the other hand, murders innocents as a premeditated strategy.

The third and fourth principles are meant to guide military conduct in cases where collateral harm involving innocent civilians is anticipated. Such harm occurs when the target of the attack is legitimate and meets the criteria of necessity and distinction, but beyond its intended result, the operation has the collateral effect of killing innocent civilians. The third principle, which I term the *principle of responsibility*, holds that when collateral harm is anticipated, one should attempt to minimize such harm as much as possible. In other words, not intending to harm civilians is insufficient; one must also have the positive intention and make the effort to avoid harming them.³ This principle determines that a military force that directs its weapons at legitimate targets is also responsible for the collateral outcomes of its operations. This responsibility falls upon it even when the adversary positions its bases deliberately in the midst of civilian populations for the strategic sake of enlarging the scope of civilian casualties. Such a strategy does not exempt the force from its duty to minimize as much as possible harm caused to these civilians.

The fourth principle is also meant to reduce the scope of collateral damage by way of proportional considerations. The *principle of proportionality* holds that anticipated collateral damage must be proportional to the military advantage to be achieved by a given operation. Thus, for example, if the only way to eliminate a sniper on the rooftop of a multi-story building is to blow up the building and kill dozens of civilians within, then there is a disproportionate relation between the military advantage to be achieved and the collateral damage that would ensue. The military advantage entailed in killing the sniper does not justify such extensive collateral harm to innocent civilians. On the other hand, if the rooftop houses the enemy's operational headquarters, for instance, then the military advantage to be gained from its elimination may indeed justify wider-scale collateral damage such as this.

It is important to note that to justify collateral damage two principles must be incorporated: responsibility and proportionality. Let us suppose that proportionality considerations justify the killing of an enemy combatant at the cost of the collateral death of two innocent civilian casualties. In this situation, were it possible to carry out the operation using more precise munitions, which would ensure the two innocent civilians would not be harmed, the principle of responsibility would oblige the use of the more

precise weaponry. The fact that such an attack without precise munitions is proportional is not sufficient to justify it, because justifying collateral damage hinges on an effort to limit it as much as possible independent of the question of proportionality. The principle of proportionality is meant to impose an additional limitation after all the obligatory efforts have been made to meet the principle of responsibility.

In the particular context of working with officers and soldiers the aim is to provide them with accessible principles with which they can work. War is not a seminar and orders have to be given in such a way that they can be implemented and used. The moral principles have to be boiled down to four straightforward questions that soldiers have to ask themselves if they wish to distinguish between a decent warrior and a war criminal:

1. Did I use force only for the purpose of the mission? (Necessity)
2. Did I aim my fire only toward combatants? (Distinction)
3. In the event that I anticipated collateral harm, did I do everything in my capacity to minimize it? (Responsibility)
4. Is the collateral harm proportionate to the military advantage that was achieved? (Proportionality)

(The fourth question is generally aimed at higher levels of the command structure because ordinary soldiers are not aware of the military importance of the mission in the larger scheme of the war.)

Each of the four basic principles of just war—necessity, distinction, responsibility and proportionality—raise questions that necessitate far more detailed clarification and definition: How is proportionality measured? What are the limits of responsibility? Who is a combatant? And so on. A preliminary survey such as this undoubtedly fails to provide answers to such complex questions. I will focus on what seems to me the most difficult challenge: implementation of the principle of responsibility. However, before addressing this complicated and painful question, some attention should be devoted to the challenge that the asymmetric situation presents for implementing the principles of necessity and distinction.

Asymmetric Warfare and the Principles of Necessity and Distinction

In symmetric warfare the breaking point of the opposing army can be rather clear. Events such as a corps withdrawing in a flurry, command systems failing to communicate, etc., ostensibly mark the decisive point in a war; that is, the stage where continuous killing and injury become a meaningless hunt

unrelated to the military mission. The American air squadron commanders who were sent in to bomb the Iraqi forces withdrawing from Kuwait in the Gulf War appealed to their superiors to cease the operation, because they saw clearly that the bombing had no military value, that the Iraqi army had already been resoundingly defeated. In asymmetric warfare, on the other hand, the decisive point is ambiguous, as is the question of victory. A complex and hierarchical division of labor does not mediate the activity of guerilla forces, and such forces can function durably in small and independent units for extended periods of time. Implementing the principle of necessity is no simple task, therefore, particularly in an asymmetric context: Is victory in such a war achieved only when the last band of combatants is killed? Notwithstanding the strategic difficulties involved in implementing the principle of necessity in the context of asymmetric warfare, it should be emphasized that at the local tactical level, officers and troops know very well when a certain mission is accomplished and what type of force must be applied to execute it.

Questions no less difficult arise regarding the principle of distinction in asymmetric warfare. In symmetric warfare, where the military distinguishes itself by means of uniforms, there is ostensibly a primary institutional definition of the combatant. One can aim one's weapon at any person belonging to a military body, and any person wearing a uniform identifies himself as belonging to this body.⁴ In asymmetric warfare the question of who comprises a combatant demands a much more specific and individualized discussion. We move from a wholesale definition to a retail one. In such a war threats are produced by a causal chain made up of the planner, the recruiter, the bomb maker, the person who drives the suicide bomber to his target and the one who actually blows him or herself up. In this context the definition of a combatant who constitutes a legitimate target would be any person whose deliberate actions qualify him as part of this operational causal chain, which produces a threat to his opponent's soldiers and civilians. This definition is valid also regarding persons who are not "full-time" combatants. This type of combatant is fairly common in asymmetric warfare, where the other side in effect takes pains not to establish full institutional affiliation. Thus if a person is assigned a mission to fire Katyusha rockets in the afternoon while the rest of the time he tills the soil, one could legitimately strike him in the morning, and not precisely during those hours he is actually engaged in launching Katyushas. The fact that this person lacks full institutional affiliation with

the body that generates the threat does not grant him immunity, because in the asymmetric context institutional affiliation is non-existent anyway, and the activities in which he takes an active and deliberate part pose a direct threat to civilians and soldiers.

However, it is important to isolate the causal chain that directly manufactures the threat, and which comprises a legitimate target, from the rest of its environment. Civilians who lend public and moral support to the war effort—for instance, by writing newspaper editorials or banging drums, dancing in the streets and handing out candies and flowers after a ‘successful’ attack—are not part of the threat itself. The same applies to parents and teachers who educate their children to the holy task of war, families and relatives who erect funeral tents following the death of various “martyrs” or even those with a closer relationship to armed bodies: a cook who prepares food for combatants is not a legitimate target because he or she would make such food anyway without any connection to warfare. None of these take an active and direct part in the causal mechanism that manufactures and actuates the threat. One must remember that a generalized and imprecise definition, which fails to strictly limit itself to the bodies that actually generate the threat, and which therefore encompasses all political and moral supporters of warfare, allows for too broad a spectrum of targets for attack. Such overly inclusive and generalized definitions might include, for example, all adults who voted in the elections or those who enable the proper economic functioning of the state. Such generalizations serve to justify virtually indiscriminate fire upon population centers, and indeed various terrorist bodies actually voice such justifications on occasion.⁵

Civilians who volunteer to serve as human shields for targets are not considered combatants. It may very well be that there would be justification for collateral harm to them as the result of an attack on a target they are attempting to defend. However, human shields are not combatants, as their only function is to impose moral limitations on the attacking side. These civilians use their innocence to prevent attacks on targets, based on their knowledge that the opposing side is morally deterred by the possibility of killing innocents. A person is not divested of his innocence simply because he uses his innocence as an impediment to another’s actions. For example, a person who lays mines or creates physical obstacles to a military action becomes in effect, by virtue of his deeds, a combatant. The human shield, by contrast, attempts to impose a moral limitation, and hence does not shed

his moral status. Accordingly, unlike combatants, who can be deliberately attacked even after the target has been eliminated, the human shield does not constitute a target himself, and even when he is in the act of serving as a human shield, we have the duty to attempt to minimize harm to him.⁶

Implementation of both the principle of necessity and the principle of distinction in asymmetric contexts, therefore, demands a more complex discussion than in symmetric contexts. However, the most difficult and complicated challenge relates to two other principles of the ethics of warfare: responsibility and proportionality.

Asymmetric Warfare and the Principle of Responsibility

(a) *The Principle of Responsibility and Justification of Collateral Harm*

Asymmetrical warfare, by its very essence, creates a tragic reality of collateral killings. Generating collateral deaths is part of the strategy of the side dictating the character of this warfare, because harm to its civilian population serves to recruit the population into the struggle, to which it is not always originally a partner. Likewise, harm—even incidental—caused to innocents brings international and moral pressure to bear on the other side. How then can these principles be implemented in an environment where the potential for collateral harm becomes an essential part of the warfare?

The fact that civilian collateral harm is anticipated does not necessarily tie the hands of the opposing side when it comes to fulfilling its right to defend its soldiers and citizens. It is permissible to attempt to defend oneself by attacking legitimate targets, even if it entails collateral harm to innocent persons. However, such collateral damage would be justified subject to the principle of responsibility, that is, on the condition that the soldiers have done everything in their power to minimize it as much as possible.

The scope of the responsibility imperative may be the most significant question with the broadest ramifications for the outcomes of warfare and the ethics of warfare in an asymmetric context. Does the responsibility principle oblige soldiers to take risks in order to minimize collateral killing of civilians? And if such a duty is imposed on soldiers, what is its scope?⁷ The responsibility imperative includes the selection of higher precision munitions that limit collateral damage, as well as the choice of timing of attacks, so as to ensure that targets are as distant and isolated from civilian environments as possible. The principle of responsibility also obliges employing active means of warning civilians and evacuating them from target environments whenever

possible. However, sometimes none of these are sufficient to ensure maximal reduction of collateral killing, and such a reduction can only be achieved by putting soldiers in harm's way. Low altitude bombing, for example, ensures more accurate strikes on targets, thus saving civilian lives, but endangers the pilot. Is a pilot obliged to fly at a lower altitude and put himself at risk in order to minimize the collateral damage expected to be caused by higher altitude bombing?

Such situations are a routine matter in asymmetric warfare. In Operation Cast Lead in Gaza, Hamas, which avoided direct confrontation with the Israel Defense Forces (IDF), fired mortars on IDF forces from within highly populated areas. Because mortar launchers can be moved within minutes to new positions, it is nearly impossible in most cases to carry out strikes upon them in a timely manner with guided precision weapons, which are rarely immediately available. Likewise, the rapid movement of mortar squads from location to location does not allow sufficient time for alerting and evacuating civilians. Through various spotting techniques the precise locations from which mortars are being fired can be identified, but the only viable means of striking the targets in the short timeframe available before the next launch or before the present position is abandoned is to mortar shell the sources of enemy mortar fire. Mortar shells are imprecise munitions—with a striking radius of fifty meters—and they might miss their targets. Moreover, commanders who order mortar shelling usually do not know how many civilians may be present within that radius, but it is generally clear that such shelling will involve collateral damage, which is liable to be rather extensive. Should commanders risk the lives of their soldiers and abstain from attacking sources of mortar fire until such time as guided precision strikes are possible? Such questions arise abundantly in asymmetric warfare, in which use of massive firepower protects soldiers but endangers civilian populations.

In the public and philosophical literature dissenting positions have been expressed on this matter. The most well-known among them is Asa Kasher and Amos Yadlin's stance that the principle of responsibility does not necessitate endangering soldiers' lives. Moreover, soldiers' "right to life" precisely forbids such endangerment. Soldiers' blood is not cheap, especially in a society where compulsory conscription is the norm, that is, soldiers do not volunteer to assume the risks entailed in military service.⁸ This position is supported mainly by two arguments. The first holds that there is indeed an obligation to alert civilians to an anticipated attack and to allow them to

vacate the premises, but that if they are given due warning and choose not to evacuate, combat forces can no longer be held responsible for their lives.

This argument seems expressly flawed. Among civilians who remain in their homes are many ill and aged persons, as well as infants, who cannot easily move about or be moved. Added to these are frightened civilians concerned that any place they flee to will be vulnerable to danger as well, and that the very act of exiting their homes into the street will expose them to fatal crossfire, as indeed occurs quite often. Such persons tend to freeze in place and cling to familiar spaces. The obligation to alert civilians is not meant to absolve combat forces of their responsibility toward those who may have remained on the premises; it serves rather as another important measure to minimize harm to them during combat. After such a warning is given, care still must be taken to avoid harm to civilians as much as possible, even if they are liable to come to harm by virtue of their very presence in a combat zone.

The second argument made by Kasher and Yadlin is that soldiers are supposed to risk their lives to save citizens of their own countries but not those of other countries or simply people as fellow human beings. Other than extreme situations necessitating humanitarian intervention, such as genocide or ethnic cleansing, soldiers are neither sent off to fight on behalf of citizens of other countries nor given a mission to defend the lives of universal human beings. This statement may be correct in itself, but it is irrelevant to the issue in question. The principle of responsibility does not ask soldiers to risk their lives to save enemy civilians; what they are asked to do is endanger themselves to avoid the collateral killing of such civilians.⁹ This demand is not made of them out of a sense of solidarity between them and enemy civilians or the human race in general, but rather because they are agents of the deaths of these civilians.

Likewise, the question at hand is not whether soldiers have a right to life. Obviously they do. However, this claim, like the previous one, does not thoroughly clarify the most important point. The demand that soldiers risk their lives emanates from the fact that they cause the threat of collateral death of civilians. The arguments Kasher and Yaldin raise are built upon a conflation of the demand to risk one's life to save lives and the demand to do so to prevent killing.

However, this does not address the positive arguments for encompassing risk in the principle of responsibility. We must go back, then, and rephrase

the question more clearly: Does the principle of responsibility in fact include risk, and if so, what type of risk? Elucidating this issue requires shedding light on the very justification of collateral damage.

(b) *Preferring one's Life and Killing*

There is a certain weakness in the justification of collateral damage. The argument against it is typically constructed as: if we accept the principle of distinction—that is, that it is forbidden to deliberately kill innocent civilians, even if it helps to protect soldiers and civilians—then how can collateral damage be justified? Why does a difference in the mental state of the person inflicting the damage comprise a moral difference? How does the fact that he did not intend to cause harm impact our appraisal of the outcomes of his actions? After all, such harm is predictable, and in many cases even inevitable. Likewise, in most instances involving collateral harm there is an equal probability of striking a legitimate target and an innocent civilian. If collateral damage is a necessary product of an operation, then how can one say it is not part of the operation's intent? For example, if a helicopter fires a missile into a vehicle in which a legitimate target is traveling but also in which there are innocent civilians to whom harm will inevitably come, what moral difference does the pilot's lack of intent to hurt innocent civilians make, even if we assume that efforts were made in advance to prevent such harm?

Some will argue accordingly that the justification for collateral damage is utter hypocrisy. It is better to allow deliberate harm of civilians in cases where there is no alternative and relax the principle of distinction; and if we forbid, and rightly so, harming civilians, then collateral damage has no moral justification.¹⁰ This conclusion is difficult because it implies that the hands of a military that accepts the principle of distinction will be completely tied when faced with an enemy firing from within highly populated areas. It is implausible because if the rules of justice in war do not enable legitimate defense of civilians and soldiers, then they can be fundamentally questioned. Yet, there is still a need to grapple with this argument, and doing so in an in-depth manner will help us to define when collateral damage is justified.

In order to grasp the entire picture, we should deal with an earlier distinction. The objection to collateral damage's justifiability is undergirded by the consensus that it is impermissible to deliberately kill an innocent person to save one's own life. However, another acknowledged thesis holds that a person may give precedence to his own life over the life of another. A person

may, for example, drink the last amount of water he has to save himself from dying of thirst, even if doing so leaves his dying comrade no possibility of survival. On the other hand, one is forbidden from saving one's own life by intentionally killing an innocent person. Where does collateral damage fall between the poles of this distinction? Is it more akin to a situation where it would be justified for a person to give preference to his life over another's or to a situation where a person would be forbidden from taking another's life to save himself? Where collateral damage falls along this range hinges on the factors that make up the moral distinction between the case of preference and the case of killing. By better understanding these factors we can begin pinpointing the location.

There are three possible arguments distinguishing between allowing preferring one's life even at the expense of another's and forbidding the intentional killing of an innocent person to save one's life. The first is related to the fact that in the case of limited resources such as water, the person who prioritizes his own life does not render the other a tool or means to an end. The other's death is not essential to saving the life of the one who happens to have water. He would remain alive even if the other were to miraculously survive. The death of the other serves him in no regard whatsoever. In the case of deliberate killing, on the other hand, the person's life depends on the other's death, such that in killing the other he turns him into a tool and means to an end. The second argument relates to causal responsibility. The person who prefers his life over the other's is not the cause of the other's death: notwithstanding his being in the picture, the other still dies of thirst. By contrast, the person who kills the other to save his own life is in fact the cause of the other's death. It is permissible, then, for a person to prefer his own life and save himself by means of the limited resources in his possession, but impermissible for him to cause the death of an innocent person to save his own skin. The third argument ascribes the distinction between the two cases to the gravity of the deliberate act of killing an innocent person, an act so terrible that it would be preferable to die rather than commit it. Murder is strictly forbidden, and one must even sacrifice one's own life to avoid it. However, a person who prioritizes his life over another's is not involved in a deliberate act of murder.

(c) Collateral Damage – Preferring Life or Killing?

We return now to an examination of where collateral damage falls relative to

the arguments that provide the distinction between preferring one's life and killing to save one's life. If the first argument is the determinant one, then in the case of collateral damage those harmed are not a means by which lives are saved. Those responsible for collateral damage would remain alive even if the victims survived.¹¹ One could say, of course, that in terms of the victims of collateral killing the question of whether or not they were used as a tool is ridiculous and seems moot when what is being considered is their lives. There is no solace in the fact that they were not killed as a means to an end. However, such an argument ignores the fact that amongst the background assumptions against which the justification of collateral damage is examined is the determination that preferring one's own life over another's is permissible. One could certainly argue that collateral harm is more akin to giving preference to one's life than killing innocents to save lives.

If the decisive argument in distinguishing between giving preference to one's life and killing is the second one, which relates to the causal responsibility, things become more complicated. Ostensibly, in collateral killing, as in deliberate killing of innocent persons, were it not for the actions of those responsible, the victims would remain alive. In both instances the person acting to save lives is the causal source of the innocent civilians' deaths. However, one could say that in a case where the opponent deliberately establishes bases in the heart of the civilian population there is a distribution of causal responsibility. The opponent who deliberately positions himself in densely populated areas also carries causal responsibility for the deaths of civilians, and so, if a genuine and serious effort is made to avoid such damage, then causal responsibility falls as well on the enemy who places himself in proximity to innocent civilians. According to this perspective, collateral damage is only possible when the enemy intentionally positions its bases in the middle of civilian population centers. Thus, an attack on a bridge when a civilian vehicle is crossing it or on a military column as it happens to be passing a civilian area would be forbidden, because in such situations causal responsibility falls on the attacker alone.

Regarding the third argument, where what distinguishes between preferring life and life-saving killing is the unacceptable act of deliberate murder of innocent persons, the question becomes more difficult to answer. One could say in this context that collateral killing is akin to preferring life because it is devoid of the intent to kill, which renders the act so terrible a crime. Applying such an argument in the context of unavoidable collateral

damage is complicated, and I question its strength, but it is important to note that if it has a certain weight, then it lies in the fact that the difference between deliberate injury and collateral damage doesn't reside in the mental contents of the perpetrator. The principle of responsibility determines the need for an actual effort to minimize as much as possible the likelihood of collateral damage; the mere fact of lack of intention is thus insufficient to justify collateral damage.

Collateral Damage and Risk-Taking

Collateral damage can be likened to a situation of permissible preferring of life only if an effort is made to minimize the damage as much as possible. However, the case of collateral damage is unlike that of preferring life in that the perpetrator carries at least part of the responsibility for the victim's death, as the former's actions are effectively what caused it. Accordingly, while we do not obligate a person to risk his life to save the life of another, we may very well obligate him to risk his life to avoid causing another collateral harm.

An example from the context of self-defense may help to illuminate this demand. Let us suppose that a person under attack is about to defend himself against his attacker in the street. He has in his possession a hand grenade and a pistol. If he tosses the grenade, he would surely cause harm to some innocent passerby, but would ensure the attacker was killed. On the other hand, because he happens to be not a very skilled marksman, if he fires his pistol instead of throwing the grenade, while he may avoid harming innocent pedestrians, he might miss the attacker. In this case it seems we would expect the person under attack to assume risk in order to avoid collateral damage, and to try to defend himself by firing his pistol rather than tossing the grenade. This demand would be made of him notwithstanding the fact that opting to use his pistol would put him in danger, as the chances of hitting the attacker would be far less. According to this perspective, the very fact that the soldiers are the causal agents responsible for collateral killing obliges them to take risks in order to avoid such killing.

Moral intuitions are elusive. Some will respond to the pistol and grenade scenario entirely differently, and argue that the person under attack in this situation need not endanger himself. He may toss the grenade to defend himself, even if it is clear to him that it would collaterally cause the death of innocent persons. Likewise, some will claim that in a case where the

attacker situates himself in proximity to innocent persons to shield himself, the person under attack has no obligation to assume risk, as responsibility for the death of the innocent person falls squarely on the attacker who puts them in danger. These arguments seem to be misguided. Why should the attacker's greater responsibility free the defender of all responsibility when he unquestionably causes the death of the innocent person? It seems that in cases of collateral damage responsibility also includes risk-taking, which is obligatory based on the fact that the soldiers are the ones who cause the innocent civilians' deaths, and this causal responsibility imposes upon them the duty to minimize the killing as much as possible.

A second argument, no less important, for supporting the duty of risk-taking in the principle of responsibility should convince even those who do not concur with the moral premise that the soldier's very status as causal factor or agent obliges him to assume risk. The most prevalent assumption among those dealing with the issue of risk is that there is a fixed sum of risk, with the question being how this sum is allocated between civilians and soldiers. For example, soldiers who identify an enemy combatant hiding in a civilian-occupied house have two options: the first is to ask for aerial assistance and level the structure with its occupants inside, while the second is to attempt to infiltrate the house on foot. In the first scenario the soldiers avoid risk at the cost of transferring it to the innocent civilians occupying the house, while in the second they minimize the risk of harming civilians by assuming the risk involved in entering the house on foot. Such a scenario presents a zero sum of risk—if risk is placed on the civilians, then the soldiers' situation is more secure, and vice versa.¹²

However, military and human experience teaches us something else entirely. In many cases the duty of risk-taking yields more creative solutions in which the overall sum of risk is reduced (war is not a system that has reached a Pareto efficiency rule). A directive such as that which Kasher and Yaldin suggest for commanders—"Do not put your soldiers' lives in danger but for the purpose of executing the mission"—often enables them to opt for the easiest route without raising more interesting possible solutions. Calling for or even forbidding risk-taking fosters negligence and amateurism. In another context, if an interrogator is prohibited from beating and torturing interrogees, then he is forced, *inter alia*, to conceive of other creative means of extracting information from them. More sophisticated methods of interrogation would not be developed were the interrogator to have at his

disposal the simple option of beating and torturing. This is true of military units as well. A relationship exists between brutality and unprofessionalism: the less professional the unit is, the less risk it will assume and the more collateral damage it will inflict. For example, if an inexperienced and frightened unit is moving exposed through an area, the amount of fire needed to cover it will be much greater than would be needed to cover an experienced unit whose commanders know how to navigate well and whose movement in the field is incremental and cautious. The demand to enter the house on foot instead of dropping a bomb on it, so as to avoid civilian collateral damage, may entail certain risk to the soldiers. However, this risk can be minimized by refining the technique of entry, enhancing speed of response, and many other means developed to handle such situations. Had wide-scale bombing not been ruled out in such instances as a favored option, such methods would never have been developed. Units who regard the duty of risk-taking as part of the principle of responsibility do not necessarily suffer more casualties than other units. When easy and decisive solutions are ruled out, such units may actually develop a higher level of operational performance and sophistication. The directive to not take risks inadvertently encourages wanton behavior on the part of commanders and soldiers.

Moreover, consistent implementation of the directive to not take risks, which assumes the precedence of soldiers' lives over those of civilians, would lead to civilian deaths on a scale so massive as to also deter supporters of non-risk-taking. In asymmetric warfare, in which there is no defined and delimited front, identifying the enemy combatants is highly complicated. For example, a person is being observed on a video screen by unmanned aerial vehicle operators. He is carrying an object, but the blurry image on the screen does not allow them to determine whether he is carrying a long pipe or a rifle. Another figure is observed on the roof of a building with a box in his hands; is he holding a pair of binoculars or another device? If the directive is to avoid risk, then any chance—however minute—of this person being a combatant necessitates fire. Likewise, the duty to avoid risk would legitimize and oblige fire on any person who crosses a line on the map deemed too close to the fighters' base. Such a person comprises a danger; hence, even without positive identification, he must be killed. It should be noted that fire of this kind, whose repercussions are the gravest, is not deliberate fire on innocent civilians but rather fire in the name of defending against a potential danger. If it is impermissible to put soldiers at risk beyond

the degree to which they endanger themselves for the sake of carrying out their mission, then we should allow and even oblige such fire.

Consistent exercise of a position that forbids risk-taking whose purpose is to prevent unintentional harm to innocent persons effectively leads to a wanton policy of use of force, the results of which may send shockwaves even through the ranks of those who back this position. The principle of responsibility, in which the justification of collateral damage originates, necessitates, therefore, risk-taking whose aim is to minimize collateral harm to innocent civilians.

Another important rationale in obligating soldiers to assume risk is based on the following observation. Very often by assuming what constitutes a small risk soldiers can thereby greatly reduce the amount of danger posed to civilians. In order to better understand this asymmetry in risk distribution between soldiers and civilians let us examine again a common occurrence in warfare. A unit moves within a battlefield saturated with civilians and calls for artillery fire to cover its movement. The amount of firepower released and its proximity to civilian residences will define the total amount of risk under which civilians are placed. By employing greater firepower and within a wider range the soldiers are more secure, while a greater number of civilians are put at risk. A reduction of both firepower and its range will increase the risk to the soldiers to a certain degree but it will minimize dramatically the the risk posed to civilians. If we can put it numerically, with a certain reduction of firepower and its range the soldiers might increase by a factor of 5% the probability of their being harmed, while with that same amount of increase to their risk they might decrease the probability of harm to civilians by a factor of 50%.

The Degree of Risk Required in the Framework of Implementing the Principle of Responsibility

What is the degree of risk required in the framework of implementing the principle of responsibility? Avishai Margalit and Michael Walzer formulated a position diametrically opposed to that of Kasher and Yadlin, suggesting the following measure: in a case where collateral damage is anticipated, the degree of risk soldiers are required to assume in order to minimize it is the same they would assume if the incidental victims were citizens of their own country.¹³ Let us suppose that soldiers are sent on a mission to rescue fellow countrymen being held as hostages by terrorists. Let us also suppose,

for the sake of discussion, that these civilians are in a location over which the state does not have effective control—for instance, the plane the terrorists hijacked has landed at a foreign airport in another country. The soldiers must assume the same degree of risk to protect these hostages from harm in the effort to rescue them when those whose lives they are entrusted to save are not citizens of their own country. According to this viewpoint, the principle of responsibility obliges risk-taking, and the degree of such risk-taking must be equal to that which the soldiers would be required to assume were these citizens of their own country.

It seems to me that a certain element of this position is correct but that it might be misinterpreted in a way that conflates the two kinds of risk soldiers are supposed to assume. A failure to distinguish between them is what, in my view, misled Kasher and Yadin. The first type of risk is that which soldiers assume based on the fact that they are the agents of collateral killing. We shall term this kind of risk “agency risk.” Alongside this, soldiers take risks in defense of citizens of their own country. This type of risk we shall term “associational risk,” which derives from the very function of soldiers as defenders of those civilians who belong to their own political framework. In a case where soldiers act to rescue hostages who are citizens of their own country, they are supposed to assume both types of risk: the first—agency risk—emanates from the fact that they are liable to cause incidental killing of hostages in their attempt to neutralize the terrorists holding them; while the second—associational risk—emanates from their duty to save the hostages based on their being citizens of their own country.

In everything concerning the degree of risk derived from agency risk, no distinction should be made between citizens of the soldiers’ country and citizens of an enemy or other country. The limitation that necessitates risk-taking in the name of minimizing collateral damage emanates from the victim’s right to life, and this right applies to all equally. Every person has an inherent right to life; hence the degree of risk derived from the fact of the soldier’s agency in collateral killing is universal and independent of citizenship. The degree of risk soldiers are asked to assume by virtue of such agency, therefore, will be equal, whether we are talking about citizens of their own country or an enemy country.

On the other hand, the risk soldiers assume to save citizens of their own country has to do with the relations of solidarity that exist between citizens of a given country. In this framework soldiers’ special function is to defend citi-

zens of their state by risking their own lives. The associational risk demanded of soldiers goes far beyond the duty each of us has to help save any other person—a duty that does not oblige risk-taking, and certainly not self-sacrifice.¹⁴ The duty of associational risk, which emanates from their specific function as soldiers, is toward citizens of their own country exclusively, and in this sense they are different from doctors, for example, who might be obliged to save any human being simply by virtue of their being a human being, sometimes even when it means risking their own lives (for example, doctors may risk infection with a fatal disease in order to save a patient). Margalit and Walzer are right on everything concerning agency risk, in which no distinction need be drawn between civilians, yet this type of risk is incomparable to the general risk that soldiers assume in situations where these civilians are citizens of their own country. In the case of hostages who are citizens of their own country, soldiers are vested with the duty of associational risk in addition to the duty of agency risk.

The degree of risk incumbent upon soldiers in the context of the principle of responsibility is calculated risk. This is a lesser degree of risk than the associational risk they are required to assume in the case of citizens of their own country, yet, because they are the agents of collateral death of innocent civilians, it demands of soldiers much more than Kasher and Yadlin allow. Such risk is not clearly or immediately quantifiable, but it has far-reaching repercussions for soldiers' conduct on the battlefield and the scope of civilian collateral damage. A fundamental policy of non-risk-taking is not only ethically wrong, but it also results in wide-scale collateral damage, because it encourages soldiers to fire instantly and with no further consideration of what appears to them suspicious, and to use lethal amounts of fire to cover themselves while moving through areas where the enemy lurks amongst civilians.

The precise degree of risk warranted by the principle of responsibility, as aforesaid, is not clearly definable; it is subject to the discretion of the local commander. However, military units whose training process includes serious internalization of these values, and which diligently seek out professional solutions to situations that necessitate risk-taking, are likely to conduct themselves in a fundamentally different manner in combat than units operating on the view that they should not take any risk at all to protect civilians from collateral harm. Units acting on the principle of responsibility tend to harm a much smaller number of civilians, and sometimes the necessity of

taking risks leads them to find creative solutions that may even reduce the anticipated number of casualties among their troops as a result of the risks involved.

Practical Wisdom

In discussions with officers and cadets, after articulating the principles of just war and applying them to asymmetric conditions, the following serious question is often raised: “Does it mean that each time, before I open fire I have to subject myself to three principles—necessity, distinction and responsibility? I would be completely paralyzed if I had to do that, and would fail in what I am there to accomplish, which is to complete the mission and to protect my soldiers.” In symmetric war no such paralysis would emerge; a soldier fights without second thoughts. It is only this particular burden of the asymmetrical micro-war condition that gives rise to such a grievance.

The answer to such serious concerns has to be the following: “Let us leave aside the question of morals and values and address pure professional tactical issues. In the heat of battle you have to make many professional decisions under the immense pressure of fear, chaos and disinformation. Where do I locate my snipers? From which direction is the fire aimed at me coming? Do I move laterally or attack from the front? And so on. Complex issues have to be addressed at the spur of the moment and mistaken judgments can yield grave consequences. Why don’t you get paralyzed from the burden of such decisions? The answer is training. You are trained in such a way that these situations are simulated so that when you confront them you will know how to react without deliberating yourself into a state of paralysis.”

The same has to be enacted in the sphere of values that should guide the actions of soldiers. These moral dilemmas should be simulated again and again so that the obligation to fulfill what decency demands does not cause paralysis and confusion but becomes something like second nature in action. Practical wisdom includes, among other things, a reserve of cases and experiences that can be immediately accessed. The new condition of asymmetry deserves a great deal of normative principled thinking, but given the way such war is conducted it calls for a new type of training: training that prepares troops for the sorts of issues that previous generations of soldiers never confronted.

NOTES

I would like to thank Shraga Bar-On, Yishai Beer and Gabriella Blum for their comments on the paper, and Stephen Holmes, Sam Issacharoff and Rick Pildes for many conversations on the subjects addressed in the paper.

- 1 I was thrust into the midst of dealing with such grave matters when asked to help formulate the ethics code of the Israel Defense Forces, and to teach it to officers and soldiers.
- 2 In the literature there are two other ways to describe asymmetrical warfare. The first describes asymmetrical warfare in terms of asymmetry of power; it is a war conducted between a powerful army and a weak guerilla organization. The second describes asymmetrical warfare as a war between a state and non-state actors. These two distinctions are valuable for different analytic purposes but they will not be the focus of my analysis.
- 3 See Michael Walzer's formulation: Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 151 (4th ed., New York 1977).
- 4 On the complex questions related to defining the combatant in the military system itself, see: Gabriella Blum, "The Dispensable Lives of Soldiers," 2(1) *J. Legal Analysis*, 115, 115–124 (2010).
- 5 The definition of the combatant I present is antithetical to the attempt to expand it in such a way as to include persons who in my view are not connected to the causal chain that manufactures the threat. On such an expansion, see: Michael Gross, *Moral Dilemmas in Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict* (New York, Cambridge University Press, 2010).
- 6 The human shield could, as aforesaid, come to harm incidentally, and one could argue perhaps that even though he is not defined as a combatant the fact that he positions himself as a human shield renders his value less than that of another innocent person who does not serve as a human shield. An example from the context of the Israeli operation in Gaza will help to elucidate the matter. The IDF in certain cases employs a practice of phoning the families in whose home a legitimate military target is harbored to ask that they vacate the home before it is bombed. This appeal is meant to minimize incidental harm to innocent persons. In certain cases, following such phone notifications Palestinians have gathered on the rooftops of the buildings in question to serve as human shields and prevent attacks on targets. Now let us assume that in a certain home there are two parents and two children who are innocent and whom the phone notification would save from harm. Let us also assume that as a result of the phone notification ten people assemble on the roof to serve as human shields. Assuming the military target is sufficiently important, is it better to refrain from notifying the family altogether, and thus endanger the lives of four innocent people, so as not to endanger the ten innocent people who are about to climb onto the roof? One could say in this case that even if human shields are not regarded as combatants who inherently comprise legitimate targets, they are nevertheless attributed less weight when bringing proportionality to bear

- than innocent persons who do not position themselves as human shields. Thus it is preferable in this situation to make the phone call and give the four innocent family members a chance to evacuate the home, even if it is obvious it will only result in human shields climbing up on the roof, and hence greater loss of human life. This consideration, which must be taken into account, rests on the fact that although human shields are non-combatants, their moral weight is less than innocents who do not serve as human shields.
- 7 On this question in international law, see: Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Civilians," 39 *Isr. L. Rev.*, 81 (2006); Eyal Benvenisti, "The Law on Asymmetric Warfare," in *Looking to the Future: Essays on International Law in Honor of W. Michael Riesman*, 931-950 (Mahmounsh Arsanjani, Jacob Katz Cogan, Robert D. Sloan & Siegfried Wiessner eds., 2010).
 - 8 Asa Kasher & Amos Yadlin, "Assassination and Preventive Killing," 25(1) *SAIS Rev.* 41 (2005).
 - 9 On this flaw in Kasher and Yadlin's argument, see: Jeff McMahan, "The Just Distribution of Harm Between Combatants and Noncombatants," 38(4) *Philosophy and Public Affairs*, 369-371 (Fall 2010); David Luban, "Risk Taking and Force Protection," Georgetown Law Sch. Pub. *Law & Legal Theory*, Working Paper No. 11-72, 38 (2011).
 - 10 For a clear and well-argued example of opposition to the justification of collateral damage, see: David Lefkowitz, "Collateral Damage," in *War: Essays in Political Philosophy*, 145-164 (Larry May, ed., Cambridge 2008).
 - 11 For such a position see: Warren Quinn, "Actions, Intentions and Consequences: The Doctrine of Double Effect," 18(4) *Phil & Pub Aff*, 334 (1989).
 - 12 For an account of such a state of affairs see, for example, Luban, *supra* note 9 at 8-13.
 - 13 Avishai Margalit & Michael Walzer, "Israel: Civilians & Combatants," *New York Review of Books*, May 14, 2009, available at www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/. For a shorter version, see Avishai Margalit & Michael Walzer, "*Kach lo menahelim milchama tzodeket*" ["That's Not How You Wage a Just War"], *Haaretz Online*, April 8, 2009, available at www.haaretz.co.il/opinions/1.1254834. A similar argument is raised by Luban, *supra* note 9.
 - 14 This argument is elucidated well in Iddo Porat's article: Iddo Porat, "Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More than They Would Endanger Their Own Civilians?" 18-19, University of San Diego Pub. *Law & Legal Theory*, Working Paper Series (2009).

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