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USE OF CIVILIANS AS HUMAN SHIELDS: WHAT LEGAL AND MORAL RESTRICTIONS PERTAIN TO A WAR WAGED BY A DEMOCRATIC STATE AGAINST TERRORISM?

Emanuel Gross*

INTRODUCTION

Terrorism is not only the use of violence against innocent persons, it is also incitement, and when it is employed continuously for lengthy periods of time, it creates the atmosphere necessary to de-legitimize the enemy, and then it paves the way to act violently against it, indiscriminately.¹

Since its establishment, the State of Israel has been embroiled in a harsh war against terrorism. The development of international terrorism has now led other countries to face persistent terrorist threats. On September 11, 2001 one of these threats was carried out in brutal magnitude in the United States. In Israel, the threat is executed in daily terrorist operations involving the murder of scores of civilians. Do these facts pave “the way to act violently against it [the enemy], *indiscriminately*”?² The purpose of this Article is to present a negative answer to this question on two levels: the legal statutory level and the more complex moral level. These two dimensions are always subject to the reality that the war against terrorism is a war being waged by a democratic state and that the democratic state, believing in law, pursues its war against terrorism within the framework of that law. In so doing, democratic states set themselves apart from the terrorists

* Professor of Law, Haifa University, Israel. Thanks are due to my research assistant Karin Meridor, whose diligence and dedicated work enabled this Article, as well as to Mr. Ranan Hartman of the Academic Center, Kiryat Ono, who assisted in financing the Article.

¹ R. Yisraeli, *Islamikaze—Terror ha-Metavdim [Islamikaze—The Terror of Suicide]*, NATIV – A JOURNAL OF POLITICS AND THE ARTS 69, 74 (1997).

² *Id.*

who pursue their fight by trampling the law. Battling terrorism "within the framework" of the law reflects a central moral tenet.

The moral might and substantive justice of the authorities' fight are all dependent on compliance with the laws of the state: by putting aside the might and the justice of its fight, the authorities serve the goals of the enemy. The moral weapon is no less important than any other weapon, and perhaps supersedes it—and there is no moral weapon more effective than the rule of law.³

The integration of the moral and legal aspects, however, does not resolve a central dilemma that may be seen in all its gravity in a democratic state's war against terrorism in relation to using and causing injury to civilians. War is not a sterile surgical operation and, notwithstanding that, international law prohibits causing injury to civilians. Ultimately though, there is no war that leaves only combatant casualties: "War has always involved large-scale suffering and destruction."⁴

Yet, in the war against terrorism, the democratic state faces a dual problem. The principal measure used by a terrorist enemy in its war against the democratic state is the deliberate infliction of harm on innocent civilians. From the point of view of the terrorist, the need to fight justifies prohibited actions. In response, there are those who would say a democratic state, which is obligated to defend its citizens and ensure their security, is entitled to attack the terrorists. Such attacks would prevent terrorists' future activities by demanding that the terrorists pay a heavy price for their actions, as should those people

³ H.C. 320/80, *Kawasme v. Minister of Defence*, 35(3) P.D. 113, 132 (Isr).

⁴ Frederick R. Struckmeyer, *The "Just War" and the Right of Self-Defense*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 273, 275 (Malham M. Wakin ed., 1979).

surrounding them. In other words, only if the terrorists understand that their actions will lead to ruin and destruction for themselves and their population, will they be ready to reconsider their actions.⁵ This Article explains why this stance is problematic from both a legal and moral perspective. The goal of war against terror, however important, cannot justify the use of all means. Even in circumstances of war against terrorism, all measures must be taken to preclude injury to the civilian population. However, what if the civilian population is being used by the terrorists as a human shield? This is the second problem which arises in the war against terror. The terrorists not only inflict harm upon the civilians of the "enemy" state but also make use of the civilians of the host country in which they are located as human shields. The terrorists act on the assumption that a democratic state fighting in accordance with the laws of war will refrain from causing harm to those civilians and, consequently, will also refrain from causing harm to the terrorists themselves.

The modes of operation of the terrorists place the democratic state before an ungrateful and complex moral dilemma. On one hand, it is subject to a moral duty to defend its citizens. On the other hand, fulfilling this obligation may lead to injury to innocent civilians, thereby infringing the legal and moral prohibition against causing such harm. This Article does not seek to identify the one and only just solution to this moral and legal dilemma since justice is not a concept having a fixed and objective significance. The principal aim of this Article is to consider the dilemmas which arise within the framework of a war waged by a democratic state, which sanctifies the values of human life and human rights against an enemy which does not recognize human rights but, on the contrary, brutally and callously tramples the principal human right, namely, the right to life. Such a war, even if it is a just war, does

⁵ Yisraeli, *supra* note 1, at 69, 75.

not necessarily entail just means of handling it. Part I of this Article presents the rules of international law which relate to the protection of civilians in times of war. Part II deals with the legally reprehensible use of civilians as a human shield in the battle arena and will analyze the moral impropriety of such use. Part III seeks to identify the appropriate balancing formula for the moral dilemmas in relation to the protection of civilians versus refusal to surrender to terrorism and soldiers' right to self-defense. Part IV presents the Israeli experience in the war against terror and the way in which Israel has coped with the dilemmas pointed to in this Article in relation to the experience of other countries, such as the United States. The final part summarizes the conclusions to be drawn from the legal and moral review insofar as they pertain to a democratic state's war against terrorism.

I. INTERNATIONAL LAW CONCERNING THE PROTECTION OF CIVILIANS IN TIMES OF WAR

Within the framework of the laws of war, there are rules which restrict the conduct permitted to combatants, including rules that are designed to protect civilian lives in times of war. As we shall see below, these rules do not completely prohibit harm to civilians but demand that such harm be prevented and civilians be protected as much as possible.

The majority of the rules are set out in Protocol 1 of 1977 to the Geneva Conventions. The source of these rules is Rule 22 of the Hague Regulations of 1907: "The right of belligerents to adopt means of injuring the enemy is not unlimited."⁶ Article 35(1) of the Protocol Additional to the Geneva Conventions reiterates: "In any armed conflict, the

⁶ Hague Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, 1 U.S.T. 647 [hereinafter Hague Regulations].

right of the Parties to the conflict to choose methods or means of warfare is not unlimited."⁷

In other words, not all means may be used to achieve the final goal of military victory.⁸ In a war waged by a democratic state against a terrorist organization, the opponent is not necessarily a state in which the terrorist organization has found shelter; rather, it may be a terrorist organization having an independent status. The fact that the organizations are not signatories to the Geneva Conventions and the Additional Protocols does not discharge them (or the democratic state, in the event that it too is not a party to the conventions or protocols) from compliance with these norms, which prohibit the infliction of harm upon civilians. These facts are universally accepted principles which have become part of customary international law, particularly in the light of the fact that the Hague Conventions, which, as noted, comprise the source of these principles, form part of customary international law.⁹ It is usual to speak of three central principles in customary law.

1. "In addition to the prohibitions provided by Special Conventions, it is especially forbidden . . . [t]o employ arms, projectiles, or materials calculated to cause unnecessary suffering."¹⁰
2. There is a prohibition against unnecessary suffering, killing, and destruction of property of the enemy.¹¹
3. Proportionality: "The two principles of military necessity and unnecessary suffering are reconciled by

⁷ Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 35, June 8, 1977, 1125 U.N.T.S. 21 [hereinafter Protocol I].

⁸ YORAM DINSTEIN, DINEI MILCHAMA [THE LAWS OF WAR] 132 (1983).

⁹ Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in HENRY DUNANT INSTITUTE, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 97 (1988).

¹⁰ Hague Regulations, *supra* note 6, art. 23(e).

¹¹ *Id.* art. 22, 23.

yet another highly subjective principle—that of proportionality. It requires that the loss of life and damage to property not be out of proportion to the expected military advantage.”¹²

The factor common to these three principles is the requirement that protection be afforded to the civilian population in times of war. It demands that a distinction be drawn between combatants and non-combatants: “Discrimination is a general principle of the law of armed conflict that requires an attacker to distinguish between civilians and civilian objects on the one hand and military objectives (combatants or objects) on the other hand and to use weapons capable of discrimination between them.”¹³

Next, I will discuss the relevant express norms for the protection of civilians as set out in international law.

1. *Persons Taking No Active Part in the Hostilities*

Article 3 of the Second, Third and Fourth Geneva Conventions respectively, provides the basic protection for:

Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth, or wealth or any other similar criteria.¹⁴

¹² Maj. John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 47 (1991).

¹³ Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1075 (1998).

¹⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3116, 75 U.N.T.S.

Article 48 of the Protocol Additional to the Geneva Convention provides: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Article 51(2) emphasizes that an attack with the primary purpose of spreading terror among the civilian population is prohibited. Likewise, it explains that a bombardment against a military objective which may spread terror among the civilian population is still legitimate but that a bombardment which is intended to create terror is prohibited.

By definition, terrorist organizations operate in a manner completely contrary to this basic rule. Factors common to the various definitions of terror are its aspiration to spread terror and instill fear among the civilian population and the design of its activities to cause injury and destruction to the property of the citizens of the democratic state.¹⁵ In contrast, the democratic state does not implement its goal of eradicating terrorism at all costs. It is subject to legal norms that require a distinction to be drawn between injury to innocent civilians and injury to terrorists operating from the midst of population centers. Accordingly, a democratic state is prohibited from dropping aerial bombs on population centers in which the terrorists are located. Such an act would infringe the basic prohibition mentioned above, as well as the second central prohibition.

31. See Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3220, 75 U.N.T.S. 86; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3318, 75 U.N.T.S. 136; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3518, 75 U.N.T.S. 289.

¹⁵ Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97-101 (2001).

2. *Prohibition on Indiscriminate Attacks*

Article 51(4) of Protocol I prohibits attacks that are not directed at a specific military objective or which employ a method or means of combat which cannot be directed at a specific military objective. Article 51(5)(b) expands the protection given to civilians, and defines an attack (even if directed at a specific military objective) as indiscriminate, and therefore prohibited, where that attack may be expected to cause injury to civilians in excess to the concrete and direct anticipated military advantage. At the same time, we should note that Article 51 prohibits an attack by way of bombardment by any methods or means which would treat as a single military objective a number of clearly separated and distinct military objectives located in an area containing a concentration of civilian objects. In other words, if the military objectives are not distinct and the civilian objects are not concentrated as required, the area may be treated as a single large military objective.¹⁶ Such an interpretation erodes the protection given to civilians and may justify the democratic state causing injury to civilians when it seeks to target terrorists who deliberately merge into the civilian population. We shall return to this point in Part IV.

3. *The Duty to Refrain from Attacking Civilian Objectives*

Article 23(g) of the Hague Convention of 1907 prohibits the destruction of enemy property unless such destruction be imperatively demanded by the necessities of war. Article 54 of Protocol I further prohibits attacking, destroying, or rendering useless objects indispensable to the survival of the civilian population which are not clearly used for the military purposes of the adverse party. Article 57(1) demands that: "In the conduct of military operations,

¹⁶ See DINSTEIN, *supra* note 8, at 132.

constant care shall be taken to spare the civilian population, civilians, and civilian objects.”

4. *Prohibitions on Reprisals against the Civilian Population*

Article 51(6) of Protocol I provides that attacks against the civilian population or civilians by way of reprisals are prohibited. This Article is particularly relevant to a war being waged by a democratic state against terror. According to this Article, the fact that the terrorists harm civilians cannot justify the acts of a democratic state if its counterattack entails the killing of civilians surrounding the terrorists. As I shall show below, the proper construction of this Article is that it prohibits a deliberate and knowing attack against the civilian population of the adverse party as an act of reprisal for the killing of the state's own civilians. The Article does not prohibit an attack against the killers themselves even though, in consequence thereof, injury is caused to civilians who are present in the same location as the terrorists. Location of civilians and terrorists is often unknown to the democratic state, but the democratic state can plan the timing of the attack so as to avoid injury to civilians.

5. *Duty to Warn*

Article 26 of the Hague Regulations provides: “The officer in command of an attacking force, before commencing a bombardment, except in cases of assault, should do all in his power to warn the authorities”¹⁷ This obligation is designed to enable private individuals to find shelter for themselves and their personal property.¹⁸ Further, the duty to warn, as it has developed in customary international law,

¹⁷ Hague Regulations, *supra* note 6, art. 26.

¹⁸ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 420 (H. Lauterpacht ed., 7th ed. 1952).

is not absolute. A state may depart from the duty if circumstances prevent warning or the necessities of war dictate a bombardment without warning.¹⁹ Protocol I adopts this approach in Article 57(2)(c): "With respect to attacks, the following precautions shall be taken: . . . (c) effective advance warning shall be given of attacks which may affect the civilian populations, *unless circumstances do not permit.*"²⁰

This review of the various provisions clearly highlights the differing status of the parties in a war being waged between a democratic state and terrorists. The democratic state regards itself as subject to these provisions on the legal level and, more particularly, on the moral level. By its nature, the other side is the polar opposite. The tactics followed by terrorists are to attack indiscriminately and without giving prior warning in the hope of injuring as many civilians as possible while instilling fear and dread of future harm on the survivors.

The following part discusses the second aspect of harm inflicted upon civilians by terrorists. I will focus this time not on the civilians of the democratic state, but on the civilians of the host state from which the terrorists operate and receive sanctuary.

II. USE OF CIVILIANS AS A HUMAN SHIELD WITHIN THE FRAMEWORK OF A WAR

The preceding part discussed the democratic state's position with regards to civilians in a country containing terrorists. An additional group of rules, however, prohibits an adverse party from making use of the civilian population as a shelter against attack by the armed forces of the democratic state.

¹⁹ *Id.*

²⁰ Protocol I, *supra* note 7, art. 57(2)(c) (emphasis added).

Article 28 of the Geneva Convention Relative to the Protection of Civilian Persons provides that: "The presence of a protected person may not be used to render certain points or areas immune from military operations."²¹

Article 51(7) of Protocol I prohibits the parties from using the civilian population as a human shield or as a means of achieving immunity from military attack. Accordingly, Article 58(b) requires the parties to the conflict to avoid, insofar as possible, locating military objectives within or near densely populated areas.²² Article 44 of Protocol I recognizes an exception in circumstances where, "owing to the nature of the hostilities an armed combatant cannot so distinguish himself" from the civilian population. In such cases, a combatant need only carry his arms openly "during each military engagement" and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack"²³

In circumstances where one party breaches these prohibitions, the breach does not entitle the adverse party to kill civilians. Article 50(3) of Protocol I provides that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.²⁴ Accordingly, Article 51(8) emphasizes that even if one party does take shelter behind civilians, this does not release the other party to the conflict from its legal obligations with respect to the civilian population and it will be responsible for any harm caused to it.²⁵

²¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 28, 6 U.S.T. 3538, 75 U.N.T.S. 308.

²² Protocol I, *supra* note 7, art. 58. Parties to Protocol I are also obligated to "endeavor to remove the civilian population, including civilians and civilian objects under their control from the vicinity of military objectives." *Id.*

²³ *Id.* art. 44.

²⁴ *Id.* art. 50(3).

²⁵ *Id.* art. 51(8)

Terrorists, as we shall see in this part, not only situate themselves and operate among the civilian population, but they do so with the improper purpose of using those civilians as a means of achieving immunity from attack by the democratic state. Indeed, terrorists are not bound by Protocol I. The prohibition on exploiting civilians, however, is not only a legal prohibition, it is first and foremost a moral prohibition. Man is not a means, he is an end.²⁶ By their actions, the terrorists show a severe moral deficiency that exceeds the boundaries of injury to citizens of the free world and results in harm to members of their own people and religion. The various obligations imposed on a democratic state, which require it to avoid harming the civilian population, do not release the adverse party from its duty to protect its own citizens: "The emphasis in Protocol I on the duties of the commander who is planning or executing an attack does not mean that the defending party is not obliged to take precautions to protect the civilian populations from war's effects."²⁷

Thus, instead of constructing bulwarks around the civilian population near them, the terrorists use these civilians as a human shield. Thereby the terrorists completely expose civilians to the ramifications of the conflict, while at the same time undermining the efforts of the democratic state to avoid inflicting harm upon civilians. However extensive the efforts on the part of the state, they cannot achieve the desired results—namely, confining the injury solely to the terrorists.

In such cases, the civilians are basically hostages in the hands of the terrorists who seek to avoid injury to themselves, and have no interest in preserving the lives of their civilian-hostages. In this way, the terrorists infringe

²⁶ Immanuel Kant, *Groundwork of the Metaphysic of Morals*, in *ETHICAL PHILOSOPHY* 20, 36 (J. Ellington trans., Hackett Publishing 1993). "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means." *Id.*

²⁷ Parkerson, *supra* note 12, at 60.

an additional prohibition of international law. Article 34 of the Geneva Convention Relative to the Protection of Civilian Persons prohibits the use of civilians as hostages.²⁸ A more striking example of the use of civilians as hostages concerns cases where terrorists kidnap and hold citizens of the democratic state as hostages to achieve a variety of objectives. Illustrations of this are given in Part IV, below.

The legal and moral flaw in the acts of the terrorists follows from the fact that enmeshing civilians in legitimate military objectives is not an innocent entanglement. For example, civilians may be innocently entangled by giving support to the war effort through work at an armaments factory. In such cases, as will be discussed below, the civilians may lose their immunity from attack and comprise a legitimate target for military operations.²⁹ Moreover, in these cases, the contribution made by civilians to the war effort is a contribution made of their own free will. In contrast, the cynical use of civilians by terrorists is a use which, from the point of view of the civilians, comprises an act that is forced upon them. Furthermore, civilians are required to risk their lives to protect terrorists who are indifferent to them and interested solely in causing maximum harm to the other side.

The strategy of using civilians as a human shield is one that may be seen in all its gravity in the war being waged by the State of Israel against the terrorism sponsored by the Palestinian Authority.³⁰ However, this use of civilians

²⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 14, art. 34. See also The International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, U.N. GAOR, 34th Sess., 105th plen. mtg., Annex 1, at 245, 1316 U.N.T.S. 205 (1979).

²⁹ See *infra* Part III. Part III discusses the distinction between civilians and combatants and shall offer a more appropriate distinction from a legal and moral point of view, namely, a distinction between the "guilty" and the "innocent" under which civilians who contribute to the war effort are "guilty" and therefore have no immunity from attack.

³⁰ See *infra* Part IV. Part IV describes some of the evidence of the Palestinian Authority's role as a sponsor and financier of terrorist activities against Israel.

is not a new phenomenon—as was recently revealed by the Israeli Operation “Defensive Shield.” During the course of the Gulf War, Iraqi President Saddam Hussein used the same tactics and exploited Iraqi civilians by deliberately placing them in the line of fire, as a shield against United States attacks upon military objectives.³¹

The gravity of the phenomenon in the context of the Israeli Operation Defensive Shield ensues from the use of Palestinian children as a shield against Israeli attacks.

The participation of Palestinian children in these riots is not accidental. The Palestinian Authority has intentionally mobilized Palestinian children to man the front line in its struggle against Israel; frequently using them as shields to protect Palestinian gunmen Since the Palestinian public knows that Israeli soldiers are ordered not to shoot live ammunition at children, the rioting children act as shields to protect Palestinian snipers in ambush positions on rooftops and in alleys, who shoot to kill any exposed members of the IDF.³²

The use of juveniles and innocent children, who do not understand the nature of their acts and the nature of the use being made of them, is abhorrent from a moral point of view. The international community has made known its repugnance at the exploitation of children in general and in armed conflicts in particular. For example, Article 38 of the U.N. Convention on the Rights of the Child prohibits the involvement of children under the age of 15 in hostilities and in armed conflicts.³³ Moreover, Resolution 1261 of the

³¹ Schmitt, *supra* note 13, at 1077-78.

³² Justus R. Weiner, *Co-Existence without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT'L L. 591, 679 (2000).

³³ United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Supp. (No. 49), at 167, art. 38, U.N. Doc. A/Res/44/25(1989), *reprinted in* 28 I.L.M. 1457 (1989). Article 38 states “[s]tate

U.N. Security Council expressly states that the use of children as soldiers is a breach of international law.³⁴ International law is interested in protecting children and keeping them outside the battle zone, thereby sheltering them from the impact of the war and physical and mental harm. Accordingly, the prohibition on the exploitation of children is not limited to their use as soldiers. For example, as was discussed above, Article 28 of the Fourth Geneva Convention expressly prohibits the use of civilians as a human shield or obstacle to the enemy conducting a military operation. The Red Cross has interpreted this Article to mean that the use of civilians of any age as a shield is cruel and barbaric and must be condemned.³⁵

The exploitation of civilians and children by terrorists to defend themselves against a democratic state's efforts to fight terrorism places the decision-makers in the democratic state in general, and the military forces in particular, before a difficult legal and moral dilemma. They must choose between fulfilling their duty to protect the citizens of their own state by engaging in military actions against terrorists and the need to avoid harming civilians among whom the terrorists are hiding. On occasion, the precautions taken to avoid harming civilians, accompanied by the desire to pursue terrorists, will lead to the death of soldiers themselves. This possibility introduces a new element into the moral dilemma, namely, the soldiers' need to engage in self-defense. Is it right to demand these soldiers' deaths? To demand that they die for the benefit of the enemy citizens, because of the moral values of the

Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities." *Id.*

³⁴ U.N. SCOR, 55th Sess., 4037th mtg., U.N. Doc. S/Res/1261, art. 3, 8, 13 (1999).

³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 14, art. 28. In addition, Article 36 of the Convention on the Rights of the Child asserts that "State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare." Convention on the Rights of the Child, *supra* note 33, art. 36. Logically, this even includes their voluntary recruitment to participate in a conflict.

democratic state, such as respect for the value of human life?

Should the state's duty to protect its citizens retreat before the legal rule which seeks to distinguish between civilians and combatants and moral rules which guide soldiers in a democratic state in its war against terror; or, does the legal and moral duty of the soldiers of a democratic state to do everything possible to protect the state's citizens override? What is the right course of action for the democratic state in the cruel situation brought about by terrorists? Is it at all possible to talk about any right answer? We should recall that these questions are only asked by one party to the conflict, the democratic state, for which human life is a supreme value in shaping its image. The other party is not only indifferent to human life, but believes it to be moral and legitimate to sacrifice it to achieve its hostile goals. In the following part, we shall seek to identify the balancing formula which will address these moral dilemmas.

III. THE MORAL DILEMMA—
PROTECTION OF CIVILIANS VERSUS REFUSAL TO SURRENDER
TO TERRORISTS AND THE SOLDIERS' RIGHT TO SELF-DEFENSE:
WHAT IS THE BALANCING FORMULA?

A democratic state fighting terrorism is required to conduct this process in accordance with principles and values which derive from its democratic nature. Respect for human rights, the right to life, and the right to dignity are the principle characteristics of a democratic state. At the same time, human rights are not a staging post for national destruction. The state must supply its citizens with the conditions that will enable them to implement their rights, i.e., national security. The purpose of the democratic state's duty to provide security for its citizens is to protect the most basic right and value, namely, human life. It follows that the concern here is with the moral duty of a democratic

state to protect its citizens and to make use of appropriate measures to preempt dangers to their security: "The moral duty of the democratic state is therefore to fight, to exercise force, to overcome the enemy, so long as it is not possible to properly protect the lives of citizens in another way, without the exercise of force."³⁶

In circumstances where the enemy of the democratic state is terrorism—an enemy which, as noted, violates the rules of war—there is a strong likelihood that the duty of a democratic state to vanquish the enemy to meet its moral duty to protect its citizens will clash with other legal obligations and moral concepts of the democratic state and its soldiers. In particular, we may identify a clash with two obligations: The obligation to avoid, as much as possible, harm to citizens of the enemy, and the obligation to protect the lives of the state's soldiers during the course of the conflict. This clash exposes moral dilemmas which shall be discussed in this part. First, however, I shall explain, in general terms, what constitutes a "moral dilemma," and how one is resolved. Thereafter, I shall apply these principles to the circumstances under discussion here.

A. *Moral Dilemmas*

In practice, a moral dilemma consists of a clash of values that makes it difficult to act, since choosing any of the alternatives will be inconsistent with the decision-maker's obligations and values. "Dilemmas are not situations in which a person must do something which he is forbidden to do, but where he must do something bad."³⁷ In other words, it refers to a situation in which a person is required to perform a particular act (to protect the lives of the citizens of his state) and must also refrain from doing it (because if

³⁶ ASSA CASHER, *ETIKA TZAVIT [MILITARY ETHICS]* 37-38 (1996).

³⁷ DANIEL STATMAN, *DILMUT MUSRIUT [MORAL DILEMMAS]* 175 (Hebrew University Jerusalem, 1996).

he protects the lives of his citizens he will be required to harm innocent civilians of the adverse party). In a situation in which two clashing obligations occur, there are those who believe that one of the options—which one depends on the circumstances—is not a duty.³⁸

However, this type of solution is too comfortable. Clashes between moral obligations occur frequently. If it is agreed that in every such case one of the duties does not apply, then most of the moral obligations shall be deprived of their effect. Accordingly, the solution must be more complex and it is difficult to guarantee that the solution to a moral dilemma will be a moral solution *per se*. Each of the possible avenues of action entails the doing of something bad.

Most, if not all, the cases used as examples of moral dilemmas are cases of a choice between evils. They are cases of being in a situation in which whatever one does either one will wrong people, or one will fail in some binding duty. . . . [I]t is of the essence of dilemmas that those facing them have no morally acceptable option.³⁹

These remarks possess added weight in the types of dilemmas with which we are concerned here: moral dilemmas that require us to choose between the lives of different groups—the citizens of the defending state and the citizens of the enemy and soldiers. The value of human life is a commonly held value which is expressed in the clash between the duty of a democratic state to protect the lives of its citizens and soldiers versus its duty to avoid injuring

³⁸ R.M. HARE, *MORAL THINKING: ITS LEVELS, METHODS, AND POINT* 26-27 (Clarendon Press, 1981). Hare distinguishes between the intuitive level and the critical level in relation to moral dilemmas. The intuitive level characterizes those who believe a clash between two moral obligations is insoluble. On the critical level, the situation is regarded as one which can be resolved. According to this view: "If you have conflicting duties, one of them isn't your duty." *Id.* at 26.

³⁹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 359-60 (Clarendon Press, 1986).

civilians of the enemy. Immanuel Kant opined that dilemmas of this type are insoluble as there is a moral imperative stating that human beings are equal in value, and every person must be treated as having his own value and being an end in himself.⁴⁰ Accordingly, if we succeed in proving not all human beings are equal in value, then we shall be able to choose which persons to protect and thereby achieve the solution to the dilemma.

Moreover, Kant's approach is an absolute one, and as such, is problematic. If the value of human life always prevailed in any clash, doctors would be able to save all their patients and people would not die in road accidents because the state would provide authorities with the entire budget necessary to minimize traffic accident fatalities. Reality urges us to refrain from absolute concepts and exercise discretion within the decision making process. On occasion, other considerations outweigh the value of human life.⁴¹

True, the argument that human life is not an absolute value and that, in particular circumstances, it is possible to prefer the life of one person to that of another does not necessarily release us from a sense of moral guilt. This sense may be a sign of having committed a wrongful act which one may regret. Alternatively, the feeling of regret and guilt may relate not to the violation of a duty in circumstances where the act was the only proper act from a moral point of view, but rather to the undesirable results of that violation.⁴² The sense of moral guilt reflects moral

⁴⁰ IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF ETHICS* 108-09 (M. Shefi trans., Magnes Press, 1973).

⁴¹ See *infra*, notes 99-113 and accompanying text. There are those who believe that Kant had his own view about war in which the value of human life is not absolute. The emphasis is on the dominant purposes and values underlying the activities performed during the course of war.

⁴² STATMAN, *supra* note 37, at 164-65. For example, one may think of a doctor on a battlefield forced to choose whom to save, where the equipment and drugs do not suffice to save all. The doctor is faced with the dilemma of whose life to save and how to make that choice.

character, but it does not reflect the absolute nature of a moral duty.

To say that act X is in the nature of a moral obligation is not to say that the validity of this obligation is not dependent on competing moral considerations. The reason for this is that on occasion moral obligations clash and in a particular situation two opposing obligations are imposed on the actor. If we had assumed that all the moral obligations are absolute in the sense that they override all competing considerations, including competing moral considerations, then in cases of conflict each of the obligations would have overridden the other, something which of course is impossible . . . the validity of a moral obligation is contingent upon the validity and force of other obligations which clash with it.⁴³

In our case, in a clash between the duty to protect the citizens of the state from terrorist attacks as well as to protect soldiers' lives and the duty to avoid harm to innocent civilians themselves held by the terrorists, the former is likely to prevail. It is true that the killing of innocent persons is an act which is legally prohibited and morally reprehensible.

However, it would seem that only a few would be willing to accept in simple terms the duty never to kill innocent persons. Someone who is not a pacifist and who is not blind to the modern reality of war which inevitably entails injury to the innocent, will find it difficult to argue in favor of the principle that the

⁴³ Daniel Statman, *She'elot ha-Mochlatot ha-Mosrit shel ha-Isur le-Anot* [*The Question of Absolute Morality Regarding the Prohibition on Torture*], 4 LAW & GOV'T 161-62 (1997) [hereinafter *She'elot*].

killing of innocent persons is always absolutely prohibited.⁴⁴

As shall be seen below, moral and legal justification may be found for the killing of innocent persons within the context of military operations.⁴⁵ If we agree there are no absolute moral obligations, we might ask which approach we ought to use to determine which moral obligation prevails. This Article focuses on two primary moral approaches: the utilitarian-consequential approach versus the deontological approach.

According to the utilitarian approach, the moral value of an act is determined in accordance with its impact on happiness in the world. If the actor's actions brought about the greatest happiness, he fulfilled his one and only obligation, and all is proper from a moral point of view.⁴⁶ It follows that if injury to civilians who provide a human shield will lead to injury to the terrorists and comprise an essential measure in the war against terror, significantly eroding the force and capabilities of the terrorists, the injury to the innocent civilians will, in effect, lead to better results than avoiding harm to them. The latter course of action (avoiding harm) will lead to continued terror and further harm the state's citizens. This alone is justification for causing harm to the innocent civilians.

In contrast, adherence to the deontological approach does not confer moral legitimacy upon a wrongful act by reason of the beneficial results which derive from it. According to this approach, there is a certain threshold up to which considerations of outcome are irrelevant⁴⁷ and certainly are

⁴⁴ *Id.* at 168.

⁴⁵ For example, the doctrine of double effect dictates that the killing of innocent persons is not absolutely prohibited; only the deliberate killing of innocent persons is prohibited. Furthermore, the killing of innocent persons, which is the unavoidable and undesired corollary of combat, is not prohibited.

⁴⁶ STATMAN, *supra* note 37, at 168.

⁴⁷ *She'elot*, *supra* note 43, at 187-88.

not sufficiently strong to negate a strict moral prohibition against harming innocent persons. These two approaches to resolving moral dilemmas will assist us to resolve the dilemma we shall consider in this part, and analyze in the context of the circumstances relevant to a democratic state's war against terror.

However, it should first be clarified that the starting point for the discussion on the moral dilemmas arising in this type of war rejects the argument that war is *per se* morally reprehensible. "(1) Murder is the intentional and uncoerced killing of the innocent. (2) Murder is by definition morally wrong. (3) Modern war by its very nature involves the intentional killing of innocent people. Therefore, modern war is morally wrong."⁴⁸

We are concerned with a war that is consistent with the "theory of just war" by virtue of the fact that it is a war of self-defense.⁴⁹ The terror which we seek to fight is not a one-time passing phenomenon. It consists of a series of prolonged, numerous and brutal attacks which threaten the existence of states of the free world, and thereby affords these states the legal and moral right to self-defense.⁵⁰

⁴⁸ Jeffrie G. Murphy, *The Killing of the Innocent*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 343 (Malham M. Wakin ed., 1979). Professor Murphy does not take a stand on this issue; his argument is that you can kill in warfare, but only those trying to kill you. *Id.* See also Donald A. Wells, *How Much Can the 'Just War' Justify*, in *WAR, MORALITY AND THE MILITARY PROFESSION* (Malham M. Wakin ed., 1979).

⁴⁹ MICHAEL WALZER, *JUST AND UNJUST WARS* 133 (1984). See also Darrell Cole, *09.11.01: Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 *NOTRE DAME J.L. ETHICS & PUB POLY* 81, 86 (2002). The rules of international law in which the primary principle prohibits the use of force as a mode of dispute resolution, recognizes the right of a state to launch a war in one situation only: When the use of force is the outcome of the right to self-defense. See *UNITED NATIONS CHARTER*, art. 51.

⁵⁰ For further clarification, see Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 *TEMP. INT'L & COMP. L. J.* 195 (2001). See also Emanuel Gross, *The Laws of War Between Democratic States and Terrorist Organizations*, *FLA. J. INT'L L.* (forthcoming) [hereinafter *The Laws of War*].

I reject the argument justifying terrorism and presenting it as the weapon of the weak fighting for their freedom, using terrorism not out of choice, but out of a lack of choice, as the only weapon available to them.⁵¹ The terrorism against which we fight is not the only means available to the weak. Rather, it is the objective of a strong enemy that threatens the entire world; an enemy which does not fight for freedom but against it. Terrorists kill solely for the sake of killing.

The determination of the moral dilemmas to which we shall now turn is likely to equalize the balance of power and confer an advantage to terrorism over democracy. If a democratic state decides that its obligation to protect the lives of its citizens and soldiers overrides its moral obligation not to injure innocent persons among whom the terrorists operate, there is a great likelihood that this decision will attract a heavy international political price from the defending state.

As noted, I believe war is not a morally reprehensible state of affairs. On the contrary, it is the duty of a democratic state to go to war if such war is the only possible way to protect its citizens. "Governments have moral responsibilities to act in self-defense, in protection of innocents, in protection of the common good, and in protection of *tranquillitas ordinis*, the safety and civic peace which allows citizens to go about their daily lives."⁵² The fact that this duty exists does not testify to its nature. The moral duty of the state to protect its citizens is not an absolute duty.⁵³ The hesitation shown by a democratic state regarding the means that should appropriately be taken to

⁵¹ See Jenny Teichman, *How to Define Terrorism*, 64 PHIL. 505, 515 (1989).

⁵² Maryann Custimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME J.L. ETHICS & PUB POL'Y 65, 69-70 (2002).

⁵³ This is contrary to those who believe in the absolute right of self-defense available to a state defending itself against attack. See MOSHE GILBOA, *MASA LA-EGOISM SHEL HA-ANOSHUT [JOURNEY TO THE EGOISM OF HUMANKIND]* 102-05 (1990).

fulfill this duty proves the duty is not conclusive and unqualified. It is conceivable that we shall be required to choose means which express the balance between this duty and another moral duty.

The dilemmas with which we are dealing arise within the framework of war against an enemy, which is motivated by profound hatred, possessing a religious, cultural and national character. Terrorism is characterized by the threat to engage in the daily mass killing of civilians and the refusal to resolve disputes in other manners, such as negotiation or compromise. To suggest to a state whose citizens are victims of this terror, that it refrain from taking combative action, is immoral.

Can a nation be asked, on moral grounds, to sacrifice itself—or one of its allies—rather than engage in hostilities which will produce an unpredictable (though certainly great) amount of bloodshed on both sides? The possibility that surrender would be more moral than war is not even conceded a probability.⁵⁴

In our opinion, it would be even more morally reprehensible if the state were to choose to remain indifferent to the risks posed to its citizens.⁵⁵ The dilemma, therefore, does not concern whether one should or should not go to war. The dilemma relates to the means chosen within the framework of the war. The principal question is, therefore, that even on the assumption that the moral force and binding nature of the moral duty of a democratic state

⁵⁴ Struckmeyer, *supra* note 4, at 276.

⁵⁵ In the dilemma whether to die or to kill, a distinction must be drawn between the right of an individual to his life and his decision to not kill and die and the duty of the state and its leaders to protect the state's citizens; that duty negates the possibility of the state deciding to "die," *i.e.*, to sacrifice the lives of its citizens in order to avoid the decision to "kill." "While I clearly have the prerogative of taking my own life, or of allowing someone else to take it, I do not have the same prerogative where the lives of others are concerned. I cannot compel another man to sacrifice himself if he wishes to defend his life . . ." *Id.* at 278.

to exercise force against terrorists to protect its citizens causes it to override other moral duties, are all acts which fall within that moral duty permissible?

Currently, the laws of war do not supply an answer to this question or to the moral dilemmas derived from it, as such laws are constructed on the principle of reciprocity, whereby the adverse parties respect and abide by these principles. The laws of war are not designed for wars conducted against terrorist organizations.⁵⁶ Accordingly, even were one to agree that the law is the binding expression of social and public morality,⁵⁷ one would not be able to find a positive objective solution to the moral dilemmas which arise within the context of this war. The solution, therefore, to every dilemma is a subjective solution, which is adjusted to a varying reality and to the diverse situations which comprise this reality.

In the aftermath of the events of September 11, 2001, and President Bush's declaration of war against terror,⁵⁸ many observers emphasized the just and essential objectives of this war concurrently with the importance of abiding by the legal rules of war and the moral principles guiding a democratic state. "We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law."⁵⁹

Below, we shall explain why not every action taken in the name of protecting one's citizens is permitted, but that some action may nevertheless be taken without being

⁵⁶ See *The Laws of War*, *supra* note 50.

⁵⁷ See also L. A. HART, CHOK, CHIRUT, VE-MUSAR [LAWS AND MORALITY], 25-37 (1981) (stating the law reflects the morality prevailing in society).

⁵⁸ President Bush's Declaration of War Following the Attack of September 11th, 2001, at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited March 5, 2003).

⁵⁹ Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 39 (2002).

tainted by allegations of legal and moral impropriety. The rules of war are not absolute inflexible prohibitions which can never justifiably be violated.

In our view, one must reject the approach asserting that soldiers fighting a just war are entitled to do everything useful in that war, on the ground that it is the enemy which is responsible for the war. Such unrestricted freedom of action is dangerous and morally improper. Its purpose is the absolute transfer of responsibility onto the shoulders of the enemy, and improperly regards as unqualified the rights of the just so that any resulting wrongdoing is the sole responsibility of the adverse party.⁶⁰ Even when the enemy is terrorism and the war against it is a just war, not every wrongdoing performed by the democracy is the responsibility of the terrorist opponent.

As a rule, killing during the course of a war is permitted when it is an essential means of self-defense. Legal and moral principles require us to distinguish between soldiers and civilians where only the former may be harmed. According to theorist Michael Walzer, civilians who are not combatants are in a certain sense innocent and therefore entitled to a moral immunity to which soldiers are not.⁶¹ This distinction between civilians and soldiers is a basic rule of the laws of war and has special importance in a war being waged by a democratic state against terror.

There must be no resort to general indiscriminate repression. The government must show that its measures against terrorism are solely directed at quelling the terrorists and their active collaborators and at defending society against the terrorists. A slide into general repression would destroy individual liberties and political democracy and may indeed bring about a ruthless dictatorship even more implacable

⁶⁰ WALZER, *supra* note 49, at 270.

⁶¹ *Id.* at 165.

than the terrorism the repression was supposed to destroy.⁶²

In contrast, there are those who believe there is no moral basis for the distinction between civilians and soldiers, only a consensual basis. In other words, the distinction reflects the common desire of the parties to limit the destructive consequences of the war. It expresses mutual consent to avoid inflicting harm upon the civilian population.⁶³ According to this approach, if one of the parties deviates from the principle of mutuality, the other party will also be released from the duty to abide by the distinction. I do not agree with this approach where the circumstances involve a war in which one of the parties is a democratic state. We have seen that according to international law⁶⁴ and, in particular, according to moral imperatives, a democratic state is not discharged from its duty to avoid inflicting harm upon the civilian population merely because the adverse party—the terrorists—deliberately target civilians.

B. Moral Dilemmas in the War Against Terror

Dilemma I: We have seen that terrorists use civilians as a human shield for their own protection; operating out of civilian population centers and against them. The military forces of the democratic state, which are required to defend the citizens of the state, are forced to contend with very difficult battle conditions requiring them, in the name of moral and practical concepts, to adhere to the laws of just war and pay the price at a very real risk to their own lives. Is it proper to require them to pay this price?

Perhaps we should rather say, for example, in the case of the State of Israel, which faces an existential risk from

⁶² WILLIAM GUTTERIDGE, *THE NEW TERRORISM* 17 (1986).

⁶³ See George I. Mavrodes, *Conventions and the Morality of War*, 4 *PHIL. & PUB. AFF.* 117 (1975).

⁶⁴ Protocol I, *supra* note 7, art. 51.

terrorist acts directed at it, as part of the declared and open plan of the terrorist leaders to destroy it, that:

A nation fighting a just war, which is in a desperate situation and whose very existence is in danger, will necessarily have to have recourse to soldiers who do not have moral inhibitions or an understanding of morals; and when it will no longer need them, it must repudiate them.⁶⁵

It would be impossible for the State of Israel, a Jewish and democratic state, to repudiate moral values based on respect for human life, because such action would be contrary to its nature. Accordingly, it is not inconceivable that soldiers be required to risk their lives for a moral imperative which directs them to avoid harm to the innocent. This is a justified risk, "a risk which is required to preempt an existing risk . . . the army of a democratic state recognizes two types of situations in which a soldier is permitted to risk his own life and the lives of his soldiers: in the face of the enemy and to save human life."⁶⁶ Is there a parallel between terrorism posing a risk to the citizens of the democratic state, which requires the state's protection, putting soldiers' lives at risk, and terrorism posing a risk to the citizens of their own state, which also compels the democratic state to risk its soldiers' lives, this time to protect the citizens of the enemy? Can one speak of a justified risk in both these cases?

The two situations are not fully analogous. A democratic state must exercise the force needed to overcome the military might of the enemy, even when this poses a risk to its forces attempting to vanquish the enemy. Remember,

⁶⁵ WALZER, *supra* note 49, at 380 (describing the cruel policy of Arthur Harris, commander of the strategic aerial bombardment of Germany from February 1942 until the end of the war that claimed the lives of 3,000,000 Germans and injured another 780,000).

⁶⁶ CASHER, *supra* note 36, at 47.

the harm suffered by the citizens of the enemy has been generated by the terrorists themselves. Endangering our own forces to avoid injury to civilians, but consequently failing to harm the terrorists, allows the sinners to reap the benefit of their sins. The military forces of the democratic state would be injured; the threat to its citizens would continue. The moral duty to avoid injury to civilians would absolutely override the duty to protect the democracy's own citizens and the lives of its soldiers. In other words, the state would not be able to conduct effectively, if at all, the just war it set out to pursue: "In principle, it is possible for a nation to avoid killing noncombatants, but such a policy would seriously weaken its military position, not to mention the advantage it would give to a less morally scrupulous adversary."⁶⁷

There are those who contend that "we are not subject to any moral duty to endanger the lives of our soldiers within the framework of military action to defend against the enemy, the attacker or potential attacker, merely to save the attacker from fatalities or property damage."⁶⁸

In combat against an enemy operating from a civilian population which supports it, it may be argued: "If the guerrilla fighters and the population that supports them do not keep the distinction between combatants and noncombatants, why should the enemy be committed to this distinction?"⁶⁹

As explained, there are no absolute duties: No duty not to endanger the lives of our soldiers to protect the citizens of the enemy, and no duty to refrain from injuring those citizens. There is a correct balance within the circumstances of each case. As a rule, aerial bombardment

⁶⁷ Daniel Statman, *Jus in Bello and the Intifada*, in PHILOSOPHICAL PERSPECTIVES ON THE ISRAELI-PALESTINIAN CONFLICT, 133, 152 (Tomis Kapitan ed., 1997) [hereinafter *Jus in Bello*].

⁶⁸ CASHER, *supra* note 36, at 158.

⁶⁹ *Jus in Bello*, *supra* note 67, at 133, 134.

is too destructive a tactic to use against places housing terrorists alongside innocent civilians. It is necessary to choose less lethal means, even if these are less certain and may endanger the state's military forces. The operation must aspire to pinpoint accuracy to distinguish between civilians and terrorists; more precisely, between innocent civilians and terrorists.⁷⁰

Guilty Civilians versus Innocent Civilians

The classic approach entails a distinction between combatants and non-combatants. Protection of "innocents" is actually protection of all those who are not called "combatants." A more accurate approach, legally and morally, distinguishes between the guilty and the innocent.⁷¹ According to this approach, in some cases civilians may be deemed guilty. The effort must be directed at distinguishing between civilians who have lost their rights by their involvement in the war, and those who have not. The relevant distinction for this Article is not between those who do and do not contribute to the war effort, but between those who supply the soldiers with tools to fight

⁷⁰ The distinction between combatants and non-combatants is not equivalent to a distinction between innocence and guilt. Various philosophers have argued that from a moral point of view the more accurate distinction lies between "the guilty" and "the innocent," in which there may be soldiers who are innocent and civilians who are guilty. See, e.g., Richard Wasserstrom, *On the Morality of War: A Preliminary Inquiry*, in WAR, MORALITY AND THE MILITARY PROFESSION, *supra* note 4, at 299, 316-17. In the case of the war against terror, reference is not to soldiers in the accepted sense, comparable to soldiers of the democratic state. There can be no terrorist who is not guilty. Accordingly, it is necessary to be satisfied distinguishing civilians who are guilty from civilians who are innocent—only the latter merit protection.

⁷¹ Murphy, *supra* note 48, at 344, 346-47, 353. "Why, then, should we worry about killing noncombatants and think it wrong to do so—especially when we realize that among the noncombatants there will be some, at any rate, who are morally and/or legally guilty of various things and that among the combatants there will be those who are morally and/or legally innocent?" *Id.* See also Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 3(3) J. PHIL. 193, 199 (1994).

and those who supply them with provisions to live.⁷² The innocent are those who have done nothing which would deprive them of their rights. On the other hand, “[w]hat is required for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern.”⁷³

This occurs when civilians freely choose to provide shelter and protection to terrorists and allow them to operate from their homes. These civilians are collaborators with the terrorists and, as such, lose their immunity from harm. Is it conceivable to demand the soldiers of the democratic state to risk their own lives to avoid injuring civilians who have sheltered and protected terrorists, even permitting them to shoot at and operate against the soldiers from their homes? This pattern of civilian behavior serves the policy of terror. Accordingly, it would be improper to demand the protection of such civilians, merely because they hide under the title “civilian,” and are not officially active in any particular terrorist organization.

The title “civilian” is not an empty phrase. Though protection of enemy civilians is a legal rule with moral weight deriving from the respect due human life, the rule is subject to an exception. The exception applies when civilians collaborate and assist in bringing about the objectives of the terrorists who pose an imminent danger to the democratic state. As such, the civilians become participants in the actual fighting and are a danger to the forces of the democratic state and, indirectly, to that state’s citizens. “Thus: combatants may be viewed as all those in the territory or allied territory of the enemy of whom it is

⁷² WALZER, *supra* note 49, at 173-74.

⁷³ Elizabeth Anscombe, *War and Murder*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 285, 288 (Malham M. Wakin ed., 1979).

reasonable to believe that they are engaged in an attempt to destroy you.”⁷⁴

In practice, this is merely a *prima facie* exception, because civilians assisting terrorists are manifestly not innocent, “in fact, they [are] more ‘guilty’ than ordinary soldiers. And if indiscriminatory attacks against civilians are wrong because they express a lack of respect for human life, then no such lack of respect is expressed when civilians themselves are the main perpetrators of these acts.”⁷⁵ The concern is not with civilians who are not entitled to protection, but rather from whom it is necessary to seek protection. Recognition of a state’s right to self-defense enables it to defend itself against those who threaten or attack it—those such as the terrorists and civilians who collaborate in achieving terrorist objectives.

Nonetheless, it is not necessary to attack the involved civilians if it is possible to stop their activities without creating great risk to our forces. Only when such an option does not exist, and the civilians pose a risk, will the obligation of a democratic state to avoid harm to these civilians be cancelled and these civilians will lose their rights.

Article 52 of the Additional Protocol to the Geneva Convention defines military objectives, which are legal objectives for attack, as objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The definition is flexible and highly relative.⁷⁶ The same

⁷⁴ Murphy, *supra* note 48, at 344, 350.

⁷⁵ *Jus in Bello*, *supra* note 67, at 133, 143. These comments were directed at Palestinian children who threw stones at IDF soldiers during the first *intifada*, who, according to this argument, lost their immunity.

⁷⁶ See Jeanne M. Meyer, *Tearing Down The Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F.L. REV. 143, 164-68, 177-78 (2001).

objective may be regarded as both civilian and military. Accordingly, the Article provides that in case of doubt whether an object normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed to remain civilian. However, this is a rebuttable presumption that only arises in cases of doubt. In the situation under discussion here, it is assumed the military forces have well-founded and reliable information proving a civilian home is being used by terrorists; they together with the "civilians" are operating from that location. In such a case, the home becomes a military target. In this situation, the civilians are not innocent but are tainted by moral guilt. It would not be morally wrong to kill them; the target is not civilian and no legal blame would be attached to an attack upon it.

Two situations occur in war against terror where fighting is conducted on a house-by-house basis in an urban area and the civilians are warned before the attack to leave their homes and vacate the area but chose to remain. In the first, civilians have freely chosen to remain in their homes to make it more difficult for the democratic state to target the terrorists, knowing the democracy is fettered by legal and moral principles which prohibit causing them harm.

In such fighting, which is conducted from house to house in a built-up area, there is no practical means of distinguishing between combatants and civilians. Accordingly, the assault force need not conduct detailed checks: first one shoots and afterwards one investigates who has been hit. The place of civilians is outside the battle arena. If they stay there and are hit—their blood is on their own heads.⁷⁷

⁷⁷ Yoram Dinstein, *Tohar ha-Nashek ba-Dinei ha-Milchama* [*The Theory of Arms in the Laws of War*], in TOHAR HA-NASHEK [THE THEORY OF ARMS] (Seminar Issues of Israel's Security) 25, 27 (Yad Tebenkin, 1991).

Civilians who shelter terrorists to furnish them with a military advantage over the democratic state, are differentiated in only one way from civilians who are physically involved with the terrorists fighting from their homes. The former are passively involved; the latter are actively involved. However, both their involvement causes loss of their moral immunity from harm. When they choose not to escape from the danger of the battle arena, assuming they had been warned in advance and could have escaped, and yet prefer to supply the terrorists with shelter, they choose a side; moral blame must therefore be attached. Consequently, they risk treatment as combatants under the laws of war, where their death will not be the death of innocents and protecting the lives of the soldiers of the democratic state is more important.

A person may be *liable* to suffer harm if, through his own culpable action, he has made it inevitable that *someone* must suffer harm. In such a case, it is permissible, and sometimes even obligatory, to harm the morally guilty person rather than to allow his morally culpable action to cause harm to the morally innocent. The interests of the innocent have priority as a matter of justice.⁷⁸

In contrast, when civilians are made hostages by the terrorists—used to shelter terrorists from attack, and their houses used as a staging post to attack the democracy's soldiers—the civilians are innocent persons not posing a threat to the forces of the democracy. Such a case is sufficient to provide moral justification for the democracy's soldiers' risk of their own lives on behalf of the civilians. It is in this context, Walzer comments:

It is forbidden to kill any person for trivial reasons. Civilians have rights which supersede even this. And

⁷⁸ McMahan, *supra* note 71, at 193, 204.

if the saving of civilian life means the risking of soldiers' lives, such a risk must be accepted. Nonetheless, there is a limit to the risks which we demand. We are talking, after all, of death caused by mistake and by legitimate military action and the absolute rule against attacking civilians does not apply here. War necessarily endangers civilians; that is another aspect of the inferno. We can only demand of the soldiers that they limit the risks which they impose.⁷⁹

Dilemma II: In the context of this dilemma, I shall consider the moral duty to avoid inflicting harm upon enemy civilians who are innocent as defined above. When terrorists use innocent persons as human shields, the right to self-defense does not provide moral and legal justification for injuring these civilians. The relevant legal defense is the defense of necessity. However, though it will discharge us from criminal liability, it will not necessarily transform the action into a moral action. Our purpose is not to identify the legal defense for an action resulting in injury to innocents. Our purpose, instead, is to focus on moral justification (if one can speak of such justification at all) for harm to innocents in situations that pose a clear danger to the lives of the soldiers and civilians of the democratic state which cannot be avoided, save by harming innocent people. These situations are analogous to those of necessity in criminal law.

A central concept useful in balancing the duty to use one's weapons when necessary to vanquish an enemy of its citizens with the avoidance of injury to civilians, is *Tohar Haneshek*. This Hebrew term, loosely translated as "use of weapons in a virtuous manner" or "moral warfare," focuses

⁷⁹ WALZER, *supra* note 49, at 186. The status of these "captive" civilians is equivalent to that of innocent hostages, and therefore it is proper to demand that the soldiers risk their lives on their behalf. As in the case of hostages though, there can be no guarantee that they will never be harmed; the outcome depends on the particular circumstances of the case.

on ensuring a moral regime within the battle arena.⁸⁰ It recognizes that armed force should not be a supreme value. *Tohar Haneshek* requires the self-restraint of military forces in refraining from the use of more force than necessary. Even when the enemy does not recognize "moral warfare," the democratic state has a duty to limit the blood bath created in its war with terrorism.

It is a duty to understand and recall that the enemy too is a man, however, hostile, evil and malicious. The moral man will defend himself against the enemy appropriately. He will not concede to him. The democratic state will defend itself against him, by means of its army, as it must, in a moral manner, as is necessary, and not beyond what is necessary. This is one way of explaining the duty to restrain oneself, in the manner of "*Tohar Haneshek*" [moral warfare], the moral duty of the democratic state, with all its structures, and among them the army.⁸¹

When it is impossible to vanquish the enemy without killing civilians, because distinguishing between civilians and terrorists is difficult or impossible, does use of necessary force include killing civilians? Vitoria, in his book *De jure bellic*,⁸² asserts that it is forbidden to deliberately kill innocent civilians, except when there is no other way to vanquish the guilty. This is necessary in the battle now underway. Wasserstrom believes that military necessity is a central concept in the implementation of the

⁸⁰ Me'ir Pa'il, *Marekhet Mosrit ba-Maaseh Hilchima* [A Moral Regime Within Warfare, *Tohar Haneshek*], in TOHAR HA-NASHEK [THE THEORY OF ARMS], *supra* note 77, at 9.

⁸¹ CASHER, *supra* note 36, at 57.

⁸² Ronit A. Peleg & Irit M. Tamir, *Ha-Tzeley ha-Adom ve-ha-She'elot ha-Mosriut SHEMEORERAT ha-MILCHAMA* [The Red Cross and the Moral Questions Raised by War], in INTERNATIONAL PROBLEMS: SOCIETY AND STATE 26 (Marian Mushkat ed., 1987) (quoting FRANCISCO DE VITORIA, *DE JURE BELLIC* 15.430 (John Pawley Bate trans., Scott ed.)).

laws of war.⁸³ He offers general justification for the breach of the prohibitions at the basis of these laws. In his view, the doctrine of military necessity transforms the laws of war into a general moral precept, but enables them to be circumvented.⁸⁴

The doctrine of military necessity is similar to the emergency situation Walzer describes as a time in which it is acceptable to trample the right to life—even of innocents.⁸⁵ Even John Rawls, who thought “there is never a time when we are free from all moral and political principles and restraints,”⁸⁶ recognized emergency situations as an exception to that rule.

Rawls, following Walzer, argues that “[civilians] can never be attacked directly except in times of extreme crisis.”⁸⁷ Therefore, we can violate human rights—we can directly attack civilians—if we are sure we can do some “substantial good” by so doing, and if the enemy is so evil that it is better for all well-ordered societies that human rights be violated on this occasion.⁸⁸

There is no doubt terrorism is a brutal and dangerous enemy. A decision during battle, which calls upon soldiers to avoid harming innocents, will have the *de facto* consequence of sacrificing the lives of the soldiers’ fellow citizens.⁸⁹ In such situations, the sense of moral urgency the soldiers may feel in terms of avoiding harm to innocents

⁸³ Richard Wasserstrom, *The Responsibility of the Individual for War Crimes*, in *PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS* 47, 62 (Virginia Held, Sidney Morgenbessen, & Tomas Nagel eds., 1974).

⁸⁴ Peleg & Tamir, *supra* note 82, at 13.

⁸⁵ WALZER, *supra* note 49, at 294.

⁸⁶ JOHN RAWLS, *Fifty Years After Hiroshima*, in *COLLECTED PAPERS* 565, 572 (Samuel Freeman ed., 1999).

⁸⁷ Cole, *supra* note 49, at 91 (quoting Rawls, *supra* note 86).

⁸⁸ Cole, *supra* note 49, at 91.

⁸⁹ Walzer offers an example of the threat of destruction of a nation in the name of which it is possible to quash the rights of innocents. WALZER, *supra* note 49, at 297.

may retreat in the face of moral urgency to defend their fellow citizens. In exceptional circumstances, such a retreat may be legally and morally justified. For example, when the most senior wanted terrorists, who plan, send, and carry out horrendous terrorist attacks, hide among innocent civilians and it is not possible to capture or attack them, save by engaging in a collective attack against the entire house and all its occupants. Must we refrain from such an attack? The question is not easy and I tend to think it should be answered in the negative. If indeed the risk posed by the terrorists is unusual, imminent, and has the power to augment the weight and authority of the moral duty to protect the citizens of the state, then the latter duty will prevail in accordance with the principle of proportionality, whereby the benefit of the action (saving the lives of many innocent persons who are threatened by the terrorists) exceeds the damage ensuing from it (harm to innocent persons who are held by the terrorists and damage to the state's image).

This is what distinguishes us from terrorists: The latter's actions are designed to harm the innocent, whereas the democratic state intends to strike at the guilty. Injury to the innocent, even if unavoidable, is certainly not deliberate.

Thus, if a country engages in acts of war with the intention of bringing about the death of children, perhaps to weaken the will of the enemy, it would be more immoral than if it were to engage in acts of war aimed at killing combatants but which through error also kill children.⁹⁰

The presumption that there are no absolute moral obligations, and as part of this, that there is also no absolute duty not to kill the innocent,⁹¹ may assist us in

⁹⁰ Wasserstrom, *supra* note 70, at 318.

⁹¹ Murphy, *supra* note 48, at 357. "Thus I do not think that it has yet been

removing the moral taint which has adhered to the killing of innocent persons. Every duty may be construed in at least two ways: As an absolute duty or as a *prima facie* or universal duty (one which, in the event of exceptional circumstances, may be breached).⁹² The difference between them is that an absolute duty is a duty which will never clash with other duties. The characteristic of a duty as being absolute shows there are no circumstances in which it does not exist. In contrast, a *prima facie* or universal duty may fall into conflict with other duties in certain situations.⁹³

In cases where a just war is being waged, such as a war against terrorism, and the duty to avoid harming the innocent and the duty to protect the citizens of the state cannot be implemented simultaneously, the moral duty not to kill the innocent is more compatible with the case of a *prima facie* duty.⁹⁴ In exceptional circumstances—such as may be created during the war against terrorism—a *prima facie* duty may be breached, even though we are aware our activities will lead to the death of innocents who are located in the vicinity of the terrorists.

However, our decision to prefer the democratic state's duty to protect its own citizens over its moral and legal duty to avoid causing harm to the innocent does not mean the latter duty should be abandoned. The prohibition on harming the innocent remains a universal moral duty that retreats in the face of another universal moral duty, which has superior status in the specific circumstances precluding

shown that it is always absolutely wrong, whatever the consequences, to kill innocent babies. And thus it has not yet been shown that it is absolutely wrong to kill those innocent in a less rich sense of the term, *i.e.* noncombatant." *Id.*

⁹² W. DAVID ROSS, *THE RIGHT AND THE GOOD* 18-19 (1930). See also DANIEL STATMAN, *MORAL DILEMMAS* (1996).

⁹³ MALHAM M. WAKIN, *INTEGRITY FIRST, REFLECTION OF A MILITARY PHILOSOPHER* 24 (2000).

⁹⁴ In contrast, there are those who believe that the prohibition on killing innocents is an absolute moral duty to which there are no exceptions. See Elizabeth Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1-11 (1958).

us from regarding the duty not to harm the innocent as an absolute duty: "It seems to misunderstand the character of our moral life to claim that, no matter what the consequences, the intentional killing of an innocent person could never be justifiable—even, for example, if a failure to do so would bring about the death of many more innocent persons."⁹⁵

This approach to resolving the dilemma is close to the consequential approach, as soldiers are entitled to kill innocent civilians if the consequence of this act is to achieve the primary goal of killing the terrorists and saving the lives of an entire nation. However, permission to violate the right to life of civilians held by terrorists is not an all-encompassing permission. The decision must be subject to the principle of proportionality: The right to harm civilians is a defined, specific, and limited right, which must refer to the smallest possible number of people, whose sacrifice, to save the lives of many others, is proportional, and thereby dulls the sense of moral guilt which attaches to the action.

Whether it can be permissible to kill everyone in a group knowing that the group contains both guilty and innocent people. The standard response is to claim that it is permissible provided that killing the guilty alone would be justified and that the killing of the innocent is both unintended and not disproportionate to the good that is to be achieved by killing the guilty.⁹⁶

Terrorism, which challenges principles of freedom and democracy, endangers all the nations of the free world. It thereby forces upon us a "regime of necessity" whereby we are compelled to put aside guiding moral principles in favor of a moral duty to protect the lives of the citizens of the free world. The significance of the refusal to concede to this

⁹⁵ Wasserstrom, *supra* note 70, at 318.

⁹⁶ McMahan, *supra* note 71, at 215.

moral shunting is to surrender to the evil of terrorism and a life lived in fear of it taking control.

Notwithstanding this, the deontological approach, which recognizes rights and refrains from mathematical calculations as to the outcome, will find it difficult to justify the killing of innocent persons—a repudiation of the highest moral obligations—irrespective of the purpose of such action. Philosophical approaches at the heart of which stand rights, dignity, and freedom will apparently support the absolute prohibition against killing innocent persons.

Yet, there are still those who believe:

For a practical maxim I am much in favor of the slogan “Never trade a certain evil for a possible good.” However, this does not solve the issue of the principle. If the good is certain and not just possible, is it anything more than dogmatism to assert that it would never be right to bring about this good through evil means?⁹⁷ . . . [O]ne can accept the principle, ‘never kill the innocent’ without thereby necessarily being an authoritarian or a dogmatic moral fanatic.⁹⁸

There are those who see the laws of war, in general, as being based upon two principles. First, individual persons deserve respect as such. Second, human suffering ought to be minimized.⁹⁹

The first principle is consistent with the Kantian approach, whereas the second is consistent with the “consequential approach.” It would be difficult to prove these are cumulative principles. At the moment we recognize a war of self-defense to be a just war—which it is

⁹⁷ Murphy, *supra* note 48, at 357.

⁹⁸ *Id.* at 363.

⁹⁹ ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 71, (University Press of Kansas, 1989). In the author’s view, the Geneva Conventions are based on the first principle whereas the second principle is what underlies the Hague Conventions. *Id.* at 73.

a state's duty to fight—then the first principle is significantly undermined. When the purpose is to kill the enemy, that is sufficient to negate the enemy's right to be treated with respect. The inevitable conclusion is that the second moral principle has a more dominant effect in determining moral dilemmas. A principle which may assist us in bridging the two approaches to resolve the dilemma, the consequential approach versus the deontological-Kantian approach, is the principle of double effect.¹⁰⁰ According to this argument, it is permissible to do an act, the consequences of which may reasonably be assumed to be bad (e.g., the killing of innocent civilians), upon four conditions:

- 1) The act itself is good, or at least is not bad, *i.e.*, it serves our needs as a legitimate act of war.
- 2) The direct effect is acceptable from a moral point of view, *i.e.*, the killing of terrorists.
- 3) The intention of the perpetrator of the act is good, *i.e.*, he only seeks an acceptable outcome (protection of the citizens of the state in whose name he acts); the bad outcome is not one of his objectives, and it is also not a means towards his objectives.
- 4) The good outcome is sufficient to compensate for causing the bad outcome, and must be justifiable in accordance with the principle of proportionality (more civilians should not be killed than is necessary from a military point of view).¹⁰¹

According to this approach, the purpose underlying the act is important. It is possible to defend the killing of civilians located in the vicinity of terrorists if the intention is to achieve the positive outcome of harming the terrorists.

¹⁰⁰ Anscombe, *supra* note 73, at 285 (explaining how the principle of double effect offers help in distinguishing when killing the innocent is or is not murder).

¹⁰¹ WALZER, *supra* note 49, at 153.

“Now if intention is all important—as it is—in determining the goodness or badness of an action, then, on this theory of what intention is, a marvelous way offered itself of making any action lawful. You only had to ‘direct your intention’ in a suitable way.”¹⁰²

Walzer is of the opinion that the third condition in the double effect principle requires modification. In his view, only when both good and bad outcomes are the products of a dual intention, is it possible to defend the principle of double effect. In other words, on one hand, there must be an intention to achieve the “good” while the “bad” is not an objective, and on the other hand, where the person performing the act is aware of the bad outcome entailed by his act, he must limit it as much as possible.¹⁰³

There is indeed something problematic about a situation where a person declares that he did not intend the bad outcome of his act, even though he uses lethal measures whose bad outcome is known in advance. Accordingly, Walzer’s view is persuasive: You are aware of the bad of your actions and therefore, you must limit it as much as possible. This approach is also compatible with the legal conditions of the law of war. We have seen the duty to give a warning before taking military action.¹⁰⁴ In cases where terrorists are dispersed among the civilian population and the military objective is to harm the terrorists (and not the civilians), it is appropriate to warn the civilians prior to attacking, thereby enabling them to take precautionary measures. We are subject to a duty to limit harm to innocent civilians within the framework of the war against terror, even if it is not possible to avoid such harm absolutely.

¹⁰² Anscombe, *supra* note 73, at 285.

¹⁰³ WALZER, *supra* note 49, at 155.

¹⁰⁴ See Hague Regulations, *supra* note 6, art. 26; Protocol I, *supra* note 7, art. 57(c).

In other words, according to the principle of double effect, harm to civilians is not the means for achieving the objective of harming the terrorists (and accordingly this principle is not compatible with the consequential approach), and the harm does not ensue from disregarding the right of the innocent to live (thus, this principle does not contradict the Kantian approach). We are referring to a by-product which, by virtue of our recognition of the right to life, we act to limit to the greatest extent possible. We are talking of harm from which we may remove the sense of moral guilt.

If we are reasonably sure that we know where they [terrorist organizations] are hiding, then we may possibly target them, even if they are hiding out in an area populated by innocent civilians. In such a case, it is the terrorists who are targeted and not the civilians, and it is the terrorists who are to blame for the deaths of innocent people they hide among.¹⁰⁵

Notwithstanding the fact that deontological-Kantian approaches will find it difficult to justify the killing of the innocent, there are those who believe it possible to interpret Kant's approach as one which gives central importance not to the outcome of the act, but rather to the purpose behind it—a purpose which is compatible with the categorical imperative of Kant.

Kant seems to mean that, fundamentally, moral goodness is not a matter of maximizing best consequences in the world; rather, it is a matter of: 1) [the] having the proper intention for action, namely, respect for the categorical imperative; and 2)

¹⁰⁵ Cole, *supra* note 49, at 98.

conscientiously making serious efforts to realize this intention through action.¹⁰⁶

Such an interpretation is very close to the principle of double effect described above. In both, the moral standard for action is determined in accordance with the purpose behind it; however, Kant's approach limits the range of objectives that are legitimate from a moral point of view and confines them to categorical imperatives. Accordingly, an action will be deemed to be morally permissible only if, from a universal point of view, every rational person would have permitted it, and it embodies respect for the rational person.¹⁰⁷ The right to self-defense is a right which is universally recognized and accepted. Every rational person would act in accordance with this right and would defend himself against one seeking to kill him. There are those who hold the opinion that Kant's categorical imperative does not contradict the theory of a just war based on the right to self-defense, for which Kant himself expressed support.

[According to Kant,] one may justly kill another human being in self-defense, though one is to be praised if one is able to repel the attacker in such a way as to spare his life. The most relevant conclusion to draw from this passage is that a state, *qua* moral person, would seem to possess quite similar rights to violent response in the case of an armed attack by another state which

¹⁰⁶ Brian Orend, *Kant on International Law and Armed Conflict*, 11 CAN. J.L. & JURIS. 329, 333 (1998).

¹⁰⁷ Kant's categorical imperative takes four possible forms; at their center lies the requirement of rationality and the requirement that an act be universally accepted. See KANT, *supra* note 26, at 30. Kant stated, "1) Act only according to that maxim whereby you can at the same time will that it should become a universal law; 2) Act as if the maxim of your action were to become through your will a universal law of nature." *Id.*

credibly threatened to seriously injure [sic] its body politic.¹⁰⁸

Yet, Kant's recognition of the need to protect a person's life does not afford moral permission to harm an innocent man who does not threaten that person's life, even if harm to the innocent person is required to save the life of the first person or another. Notwithstanding that harm to the innocent is not moral even in circumstances where a person fully believes that causing harm to the innocent is required to save his own life, no punishment should be imposed upon the perpetrator of the harm.¹⁰⁹

History has shown there is no war in which innocent civilians are not injured. Kant certainly was aware of this, thus, the argument that Kant supported the theory of a just war seems strange. It is even more difficult to explain the positions of those who view that Kant would have permitted a response entailing violence and force against a terrorist threat,¹¹⁰ since it is possible such a response would involve harm to innocent persons to save other innocent lives. Two points may be mentioned which explain why, nonetheless, it is possible to fight a just war consistent with Kant's position.

- 1) "While the killing of civilians is not justified (because it is a violation of their human rights), it is nevertheless excusable in times of war, given that it is simply not reasonable to expect a state and its people simply to succumb to an armed invasion."¹¹¹
- 2) Kant would have supported the doctrine of double effect. In other words, a state is entitled to go to war, even to make use of measures that may injure

¹⁰⁸ Orend, *supra* note 106, at 361.

¹⁰⁹ KANT, *supra* note 26, at 26-28.

¹¹⁰ Thomas E. Hill, Jr., *Making Exceptions without Abandoning the Principle: or How a Kantian Might Think about Terrorism*, in *VIOLENCE, TERRORISM AND JUSTICE* 196, 220-24 (R.G. Frey & C.W. Morris eds., 1991).

¹¹¹ Orend, *supra* note 106, at 372.

innocent civilians, only if the war and the measures used are for a just purpose and injury to the civilians is not a means to that purpose. In such circumstances, the blame for injury to the civilians is placed on those who breached the rights of the state, and who caused the injured state to implement its right and duty to defend itself against those violators of rights by engaging in war against them.¹¹²

The battle against terrorism is a just battle waged by a democratic state with the intention of striking at terrorists and protecting innocent civilians on both sides. In circumstances in which civilians are nonetheless harmed, it is necessary to examine whether the harm to them has been used by the democracy as a means of injuring the terrorists. According to the Kantian approach, this is the moral standard for examining the injury to the innocent. It follows that even the Kantian approach does not necessarily assert that the prohibition on harming these civilians is absolute.¹¹³

There is no doubt that war against an enemy who is interested in destroying every member of the group against which he is fighting (i.e., the citizens of the democratic state) and to achieve this goal, he causes, directly or indirectly, the death of the members of the group from amongst whom he himself operates, is a reality which clashes with theory and ideals. This part seeks to show that this clash does not mean a commitment towards norms and values is either impossible or other than genuine. The commitment of the democratic state to the primary value of respect for human life with its various components is profound; accordingly, it is the state's duty to act in

¹¹² Hill, *supra* note 110.

¹¹³ Kant's answer to such a situation is unknown, because he did not offer an express statement on the matter. Commentators draw such conclusions based on an interpretation of Kant's theory and writings.

accordance with the proper balance between the moral duties derived from this value, as expressed in the circumstances of each case.

IV. THE ISRAELI EXPERIENCE (SAVING HOSTAGES IN MA'ALOT, THE 'BLOOD BUS', THE SAVOY HOTEL INCIDENT IN TEL AVIV, THE LEBANON WAR, AND JENIN) VERSUS THE EXPERIENCE OF THE UNITED STATES IN ITS WAR AGAINST TERROR

A. *The Israeli Experience*

Israel is a state frequently struck by terrorists who have sought to destroy it since—and by reason of—its establishment. Thus, for example, the *Hamas* has declared:

The Last Hour would not come until the Muslims fight against the Jews and the Muslims would kill the Jews, and until the Jews would hide themselves behind a stone or a tree and a stone or a tree would say: Muslim or Servant of Allah, there is a Jew behind me; come and kill him; but the tree of Gharqad would not say it, for it is tree of the Jews.¹¹⁴

The terrorism directed at Israel has never ceased in its efforts and had many successes on the road to achieving its goal of harming large numbers of innocent Israeli citizens. In this part, I shall mention only a few examples of terrorist operations and review the experience of the State of Israel in its fight against terrorist attacks launched from the territory of Lebanon, as well as the territory of the Palestinian Authority.

The initial examples will deal with terrorism and the taking of hostages.

¹¹⁴ *Jus in Bello*, supra note 67, at 153 (citing the *Hamas* Charter, ch. 1, art. 7).

1. *Ma'alot*

On the night of May 12, 1974, a squad of terrorists belonging to the Democratic Front for the Liberation of Palestine, headed by Nayef Hawatmeh crossed the border from Lebanon to Israel and infiltrated Western Galilee. The terrorists arrived at Ma'alot at 3:30a.m. On May 15, 1974, they entered a home and murdered a father, mother, and child, and injured another child. En route to the school of Nativ Me'ir, they injured another person. Next, they entered the school, occupied by a number of children and adults who had been on a field trip in the area. They overcame the group of holidaymakers and commenced negotiations with the government for the release of twenty fellow terrorists incarcerated in Israel. The negotiations failed, and the Chief of the General Staff ordered a military operation. The terrorists opened fire on the students. As a result, twenty-four students and one soldier were killed and sixty-two students and seven soldiers were injured. The three terrorists were killed.

2. *The Savoy Hotel Operation*

On March 5, 1975, at 11:15 p.m., a squad comprised of eight terrorists belonging to the *Fatah* organization landed a rubber dinghy on the beach close to the Savoy Hotel. They ran onto the road firing weapons and broke into the hotel. The reception clerk and a woman were killed and eleven people were taken hostage. The terrorists exited the hotel to seek further hostages; however, a soldier in the area stopped them and opened fire on them. The soldier was killed. The terrorists then held the hostages in a room packed with explosives. They commenced negotiations for the release of ten fellow terrorists. The Israeli Defense Force (IDF) surrounded the hotel. Upon the entry of the first soldiers into the hotel, some of the terrorists opened fire upon them, while another set off the explosives with the

result that the terrorist and the hostages with him in the room were all killed. In this attack, three soldiers and eight civilians were killed, nine soldiers and eleven civilians were injured. Seven terrorists were killed and one was captured.

3. *The "Blood Bus"*

On March 11, 1979, eleven terrorists arrived on a rubber dinghy at the Kibbutz Ma'agan Michael Beach. They encountered a nature photographer and killed her. They reached the Haifa-Tel Aviv coastal road, took control of a taxi, and thereafter gained control of a bus of holidaymakers and forced the bus driver to drive them to Tel Aviv. On the way, they stopped another bus, murdered a number of its occupants and forced the remainder to climb on board the hijacked bus. They continued towards Tel Aviv until they were stopped by gunfire at the Glilot intersection. In the ensuing shooting, the bus caught fire and the explosives inside detonated. In this attack, thirty-five civilians were killed and seven were injured.

The incidents described above involved situations in which Israeli civilians were taken hostage by terrorists. These situations differ from the moral dilemmas which were discussed above. The dilemma arising here was whether to meet the demands of the terrorists (i.e., to release additional terrorists) or to refuse to surrender them and deploy a military force to rescue the hostages. The outcome could not be certain in either case. Even if Israel conceded to the terrorists' demands, there was no guarantee the terrorists would not injure the innocent civilian hostages. Deploying the military force against the terrorists entailed a grave risk to the lives of the soldiers performing this task, and to the civilians themselves, whom the terrorists would not hesitate to kill once they determined that the state would not meet their demands.

We explained that from a moral point of view it is acceptable to place soldiers' lives at risk in two situations, when facing the enemy and to save human life, because:

At the heart of every military action to save human life, there is a given danger against which the soldiers come to operate Within the framework of the fair arrangements of a democratic state there is moral justification for military operations which entail risk and for the deployment of soldiers in circumstances in which there is a risk, where the risk which the soldier takes upon himself and the risk which he causes his soldiers to take upon themselves are necessary in the circumstances.¹¹⁵

The two situations merge in a case involving saving the citizens of the state from the hands of the terrorist enemy, and we will therefore choose to launch a military operation and not surrender to the demands of the terrorists.

Moreover, the International Convention Against the Taking of Hostages expressly allows: "The State Party in the territory of which the hostage is held by the offender shall take *all measures* it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure."¹¹⁶ It should be noted that the situations described here indeed involved the taking of hostages within the territory of the State of Israel. However, there have been cases where civilians were taken hostage by terrorists outside Israel's borders. The rescue operations in such cases are more problematic on the international level as they require violation of the sovereignty of the foreign state in which the incident took place. It is the duty of a state to protect the lives of citizens who are exposed to real

¹¹⁵ CASHER, *supra* note 36, at 215.

¹¹⁶ International Convention Against the Taking of Hostages, *supra* note 28, art. 3(1) (emphasis added).

and growing risk, and its rescue activities in this regard will be legally and certainly morally justified, because:¹¹⁷

In some situations, however, such as the Israelis held in Entebbe Airport or the American hostages held in Tehran, when lives are in imminent danger, a good case exists for an exercise of self-defense through a rescue attempt. Such attempts must be limited to the rescue and must not serve as a basis for political pressure or reprisal.¹¹⁸

B. Two Examples Taken from Israel's Experience in Warfare Against Terrorism Conducted from Population Centers

Lebanon: As the terrorists continued launching multiple and varied attacks against Israeli citizens, Israel decided to go to war against the terrorist infrastructure in Lebanon. The *causus belli* was the attempted assassination of Israel's Ambassador to Great Britain, Shlomo Argov, who was critically wounded on March 3, 1982. The government of Israel decided to use the Israeli Air Force to bomb the terrorist bases near Beirut. The terrorists immediately reacted by firing Katyusha rockets at the settlements of Northern Israel. On June 5, 1982, Operation "Peace for Galilee" was initiated to protect the citizens of Israel and remove them from the range of terrorists' fire. By the middle of August, the IDF gained control of a large part of Beirut, but had refrained from entering the refugee camps. On September 16, 1982, the IDF permitted members of the Christian Phalange militia to enter the Palestinian refugee camps of Sabra and Shatilla and remove the remaining terrorists to deport them from Beirut. The members of the

¹¹⁷ Walzer mentions the example of the rescue of Israeli hostages from the territory of another state as an admirable feat from both a military and moral point of view. WALZER, *supra* note 49, at 219.

¹¹⁸ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 139 (1986) (footnote omitted).

Phalange militia carried out a brutal massacre within an area under the control of the IDF, killing hundreds of Palestinians, including women and children. Thus, Israel found itself in a war started with the intention of protecting its citizens and operating against PLO bases in Lebanon, but in the ensuing conflict, had become entangled in complex moral questions.

After this operation, the terrorists continued to attack Israeli soldiers and civilians. The *Hizbullah* fired hundreds of Katyusha rockets against northern towns. The State of Israel refrained from declaring war; instead, Israel engaged in pin-point military operations, such as Operation "Accountability," on July 25, 1993, and Operation "Grapes of Wrath," on April 14, 1996, both in an effort to strike targets under which terrorists were taking cover. However, even these focused operations failed to prevent attacks upon the innocent.¹¹⁹ For example, in Operation Accountability—withstanding that IDF commanders claimed that the prohibition against firing at civilians was conscientiously maintained throughout the operation—many civilians were killed and injured. It should be noted that the State of Israel complied with the duty to provide a warning, whereby an attacking force must give advance warning to the civilian population which may be harmed by the attack, unless circumstances do not permit.¹²⁰ Throughout the first day of the operation, residents of certain villages were warned via "The Voice of South Lebanon" Radio (operated by the South Lebanese Army) to leave their homes to avoid injury. During the course of the operation, *Hizbullah* fired hundreds of Katyusha rockets against Israel with the declared purpose of causing as many fatalities and as much damage as possible to Israel.

¹¹⁹ Yehezkel Lein, *Israeli Violations of Human Rights of Lebanese Citizens*, The Israeli Information Center for Human Rights in the Occupied Territories (Jan. 2000), at <http://www.betselem.org/Download/eLebanon.rtf> (last visited March 5, 2003).

¹²⁰ Protocol I, *supra* note 7, art. 57(2)(c).

During Operation "Grapes of Wrath," the number of civilians killed on both sides grew. The *Hizbullah*, in the manner characteristic of terrorists, did not attempt to avoid injury to Israeli civilians; instead, it sought primarily to injure civilians as a means of exerting political pressure on the government of Israel. The Secretary-General of the *Hizbullah*, Hassan Nasrallah, expressly declared:

I call upon the residents of the north, if they do not wish to be hurt, to demonstrate and demand from the government of the enemy that it cease its attacks against civilians in Southern Lebanon and in the western valley. Engaging in military action will only bring further injury, killing and destruction on north Palestine [T]here is no other way.¹²¹

During this operation, Israel did not succeed in avoiding civilian casualties. The well-known incident of the attack on the UN camp in Kfar Kana caused the death of 102 Lebanese refugees and injury to hundreds. Military experts investigating the incident, including the Military Advisor to the UN Secretary-General, and military personnel acting on behalf of Amnesty International and Human Rights Watch, confirmed that *Hizbullah* fighters fired mortar shells from an area very close to the UN camp in Kana (less than 300 meters) and endangered an IDF force operating north of the area. Accordingly, the location from which the *Hizbullah* fired was not a legitimate target for attack as a matter of the laws of war. Moreover, the *Hizbullah* blatantly and deliberately breached the prohibition on using the civilian population as a human shield against attack by the adverse party. Some believe this breach placed the liability for the deaths of the civilians on the *Hizbullah*, stating: "The recent harms to civilian refugees in Lebanon caused by Israeli shelling are tragic and regrettable, but the legal

¹²¹ Remarks made during the course of a press conference in Beirut on Apr. 10, 1996. HA'ARETZ, Apr. 11, 1996.

responsibility for the tragedy lies with those whose perfidious conduct brought about such shelling."¹²²

One party's breach of the laws of war does not permit the other party to disregard them. It follows that it is not the legal responsibility which rests on the shoulders of the *Hizbullah*, but moral responsibility. Israel continues to bear the duty to distinguish between combatants and civilians, and is obliged to preserve a proper balance between the military advantage to be gained by the attack and the damage which may be caused to civilians. It would seem such a balance was not maintained and, indeed, sufficient precautions were not taken to avoid injury to civilians.¹²³

Jenin: The example of Jenin is brought within the context of Operation "Defensive Shield," which Israel launched on March 29, 2002, following daily brutal terrorist attacks directed against innocent Israeli civilians. For months, terrorist organizations (such as *Islamic Jihad*, *Hamas* and the *Tanzim*) operating out of the territory of the Palestinian Authority (including Jenin) engaged in massacres of Israeli civilians within their homes, on buses, in places of entertainment such as restaurants and shopping malls, and hotels.

The purpose of the operation was to eradicate the Palestinian terrorist infrastructure and prevent further terrorist attacks against Israel. On April 3, 2002, IDF forces entered the Jenin area and the adjoining refugee camp, based on information gathered from Israel's security forces to infiltrate the terrorist infrastructure in Jenin and the neighboring refugee camp. Evidence of this may be

¹²² Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 148 (1997).

¹²³ An IDF inquiry revealed that the shooting directed against the camp resulted from flaws in tactical aids in the control center. The calibration defects caused the U.N. camp to appear further away. See Eitan Rabin, *IDF Inquiry: Measuring Errors Caused Injuries in Kfar Kana*, HA'ARETZ, June 6, 1996.

seen in an internal report of the *Fatah* dated September 25, 2001, which stated:

Among all the districts the Jenin district is the district which abounds with fighters of great quality and quantity, who belong to the *Fatah* movement and to all the nationalist and Islamic factions. The Jenin refugee camp is regarded, justly, as the center of affairs, and as the hub of field headquarters of all the factions in the Jenin district, the 'hornet's nest' as it is termed by the other side. The Jenin refugee camp is characterized by the out of the ordinary presence of fighting men and men with initiative for the benefit of nationalist activity. Nothing will vanquish them, and nothing worries them. Therefore they are ready for sacrifice by every means. And therefore it is not strange that Jenin is called the capital of the suicides.¹²⁴

The fighting in the Jenin refugee camp, aimed at capturing terrorists, was complex and embodied all the moral dilemmas previously mentioned. The terrorists, as the *Fatah* declared, were prepared for sacrifice by any means, including sacrificing innocent Palestinian civilians to fight the "enemy," Israel.

As it was clear the battle zone contained civilians, immediately upon their arrival, the IDF forces issued a general call to the residents to leave their homes. Searching for wanted terrorists, weapons and explosives, yet at the same time seeking to avoid massive civilian casualties, IDF forces began fighting on a house-to-house

¹²⁴ Ronen Bergman, *The Ra's Will Sign and Authorize*, YEDIOTH AHRONOT, July 12, 2002. This report was seized along with thousands of other documents during an IDF assault against the headquarters of the Palestinian Authority in Operation Defensive Shield. Some of the seized documents were published as part of a comprehensive article concerning the cooperation between the Palestinian Authority and the terrorist organizations. *See id.*

basis. A firefight developed, and it soon became clear that many empty houses had been booby trapped.¹²⁵

In many cases, the terrorists used innocent civilians as human shields. In other cases, the civilians cooperated with the terrorists; thus, exploiting the fact that Israel was refraining from firing from the air, even though this tactic would have significantly reduced the risk to Israeli soldiers. Knowing Israel is morally committed to the principle prohibiting inflicting harm upon the innocent and therefore conducts its battles in a way which greatly endangers its soldiers, some of the civilians helped to prepare and conceal explosives in the streets of the camp. The difficulty in distinguishing civilians and terrorists was aggravated in those circumstances, not only because the terrorists hid themselves among the civilians, but also because today, young children and Palestinian girls offer themselves to the terrorist organizations and are admitted to their ranks.¹²⁶ In so doing, these civilians lose—from a moral point of view—their immunity from attack.

In an effort to distinguish between the innocent and terrorists, twenty-three IDF soldiers lost their lives. In effect, they sacrificed their lives for the sake of Israel's justified maintenance of high moral standards and its care that these moral standards not be eroded or modified, particularly in times of emergency. Nonetheless, Palestinian civilians were injured during the course of the fighting. In petitions to the Supreme Court of Israel, it was argued that a massacre had taken place in the Jenin refugee camp. The security authorities in Israel explained that one could not talk of a massacre in a situation where

¹²⁵ H.C. 3114/02, Barake v. Minister of Defence and others (Isr.) (as yet unpublished).

¹²⁶ Interview with Khaled Mashal, at http://www.aljazeera.net/programs/open_dialog/articles/2 (available only in Hebrew) (last visited July 15, 2002). Khaled Mashal was a senior figure in the *Hamas* movement. During the interview, he referred to the participation of Palestinian children in suicide attacks and suggested children be trained for these activities. *Id.*

Israel had engaged its best efforts to avoid causing harm to the innocent by choosing to fight from house-to-house and not by way of aerial bombardment. Indeed, the Court held that a “massacre is one thing. A difficult battle is another.”¹²⁷

Indeed, a difficult battle took place in Jenin, but it was an unavoidable battle. Had Israel refrained from entering Jenin, it would have breached its moral duty to protect the lives of its citizens and, in effect, would have collaborated with the aim of the terrorists to bring about the destruction of Israel.

I have explained that inflicting injury upon the innocent is prohibited; however, the duty to avoid such harm is not absolute. In special situations where such harm is not deliberate and is a by-product of a deliberate attack against terrorists, it is possible to justify the supremacy of the moral duty to protect the citizens of the democratic state over the moral duty to avoid harm to innocents. This is particularly the case when the enemy exploits the innocent to shield itself. By so doing, it chooses to defend itself—and thereby enable it to continue its attacks against, in this case, the Israeli enemy—at the expense of protecting the lives of its own civilians.

Let’s make this clear: Palestinian terrorists turned [Jenin] into a deathtrap—not to protect the local population (after all, if the terrorists weren’t there neither would the IDF) but to be protected by the local population. It was immoral for the terrorists to use the local population for cover. It was immoral for those in the local population to intentionally supply their families to the terrorist[s] as cover. The only thing immoral Israel did is that it didn’t fight American style—disintegrating buildings from the air instead of

¹²⁷ HC 3114/02, Barake v. Minister of Defence and others (Isr.) (as yet unpublished).

in house-to-house fighting. The terrorists claimed they were willing to fight to the death—but in truth they were only willing to fight if there was a chance to t[a]ke Israelis with them.¹²⁸

The Israeli Human Rights Association has referred to the violation of human rights in the territories during the course of IDF activities since the start of Operation Defensive Shield.

A national struggle cannot justify the terrorist attacks by Palestinian organizations against Israeli citizens and the mass killing of Israeli citizens. Terrorist attacks cannot justify acts of retribution and do not discharge Israel, as a democratic state, from the duty to preserve human rights. The struggle to protect human rights is the struggle over the moral image of the state and society in Israel. Both in times of emergency and in times of war a duty is imposed on the parties to the dispute to protect and avoid in every way harm to civilians.¹²⁹

The fighting in Jenin again proved that in situations where terrorism is the enemy, only one party to the dispute recognizes its duty to avoid harming civilians. Amnesty International issued a report expressly stating that the suicide attacks and shooting at Israeli civilians by terrorists met the definition of crimes against humanity.¹³⁰ In the same report, the organization reiterated the declaration of the International Committee of the Red Cross that,

¹²⁸ *Imra's Weekly Commentary on Israel National Radio*, MIDDLE EAST NEWS ONLINE, Apr. 12, 2002, available at LEXIS, Global News Wire File.

¹²⁹ Na'ama Yashuvi, *Human Rights in Israel, the Situation: 2002*, Association for Human Rights in Israel, available at <http://www.acri.org.il/english-acri/engine/story.asp?id=56> (last visited March 5, 2003).

¹³⁰ Amnesty International, *Israel and the Occupied Territories and the Palestinian Authority: Without Distinction—Attacks on Civilians by Palestinian Armed Groups* (July 11, 2002), available at <http://web.amnesty.org/ai.nsf/recent/MDE020032002!Open> (last visited March 5, 2003).

notwithstanding that the terrorist organizations were not parties to the Geneva Conventions prohibiting infliction of harm upon innocent civilians, these prohibitions are universal rules which are undermined by the activities of the Palestinian terrorist organizations. For example:

Palestinian armed groups operating within or outside the occupied territories are bound by the principles of international humanitarian law. Apart from the Fourth Geneva Convention, which relates to the protection of the civilian population, there are other universally accepted rules and principles of international humanitarian law that deal with the conduct of military operations. They stipulate in particular that only military objectives may be attacked. Thus, indiscriminate attacks, such as bomb attacks by Palestinian individuals or armed groups against Israeli civilians, and acts intended to spread terror among the civilian population are absolutely and unconditionally prohibited.¹³¹

The Geneva Conventions prohibit the use of civilians and children as a human shield,¹³² thus, the Palestinians deliberately breached this prohibition. Indeed, the Palestinian Authority is not a party to the Geneva Conventions.¹³³

However, it is nothing less than hypocrisy for this autonomous entity to continuously pressure [sic] the

¹³¹ Press Release, Statement by the International Committee of the Red Cross, Geneva, (Dec. 5, 2001), *available at* <http://www.icrc.org> (last visited March 5, 2003).

¹³² *See supra* Part II.

¹³³ This is not a precise statement. Resolution 1397 of the UN Security Council provides that: "The Security Council . . . affirming a vision of a region where two states, Israel and Palestine, live side by side within secure and recognized borders . . ." Res.1397, U.N. SCOR, 4489th mtg. (2002), *available at* <http://www.un.org/Docs/scres/2002/sc2002.htm> (last visited March 5, 2003). This statement indicates that the Palestinian Authority is regarded as a state; therefore, its obligation to abide by the rules of international law cannot be doubted.

international community to condemn Israel for violating human rights while the [Palestinian Authority] orchestrates the massing of children in the front lines of the conflict Moreover, their misuse of children should set off an alarm for the world community raising doubt whether the [Palestinian Authority] intends, if it obtains recognition as a state, to be a law-abiding entity in the international community.¹³⁴

As mentioned, a breach of these rules by one party does not discharge the democratic state from its legal and moral duties. The State of Israel has not sought to be discharged from these obligations; rather, Israel explained that its commitment to the principles of morality led it to deploy foot soldiers and not bomb targets from the air. In so doing, Israel chose to place its soldiers at risk—many of them indeed paid with their lives for this moral commitment. Nathan Alterman, an Israeli author, who has written much about moral warfare, told of an incident in which IDF soldiers fell during a chase, because they had taken care not to injure a nursing mother behind whom terrorists were hiding in a cave in the Jordan Valley. His narrative, which concerned events that took place thirty-three years ago, is particularly relevant to the circumstances of today's fighting between the IDF and the terrorists.

There is no doubt that even if we strain our imagination to the very end, we could not envision a possibility where the opposite of what happened in that chase is conceivable. In other words, a situation in which IDF fighters would hide behind Jewish women and children and would take a nursing Jewish woman into a refuge and shelter them against members of the *Fatah*. IDF soldiers could not do such a thing—even if we put aside all other reasons—first because of the simple reason that a Jewish woman

¹³⁴ Weiner, *supra* note 32, at 682-83.

with her infant is not a deterrent for the Arab fighters.¹³⁵

Yet, the State of Israel was not free of error in its war against terrorism in Jenin. Neither the IDF—nor any other army in the world—is so efficient as to be able to eradicate terrorism without harming the innocent.¹³⁶ This fact does not permit Israel to injure the innocent, but it may help to prove the techniques employed by the terrorists may lead the democratic state to face a tragic dilemma: whether to attack terrorists and possibly injure the innocent who, with their bodies (albeit unwillingly) protect the terrorists, or to refrain from such action, (i.e., sacrifice the lives of Israeli citizens in attacks which may be perpetrated by the same terrorists in the near future). This is the same situation of necessity with which we dealt previously: A state has no alternative way of protecting its citizens save by injuring the innocent. In so saying, I wish to emphasize I am referring to exceptional situations in which the danger posed by the terrorists is real and significant, and the number of innocent civilians who will be harmed as a result of the action taken against the terrorists is much lower than the number of lives which will be saved by that action. Every action must satisfy the principle of proportionality, *a fortiori* an action which violates a value which occupies the top of the moral hierarchy—the value of human life.

The criticism directed against the IDF has not been confined to situations in which innocent persons have been injured by consequence of attacks against terrorists. The Betsalem organization received reports that the IDF itself has used Palestinian civilians as human shields, when these people were forced to march in front of soldiers during

¹³⁵ Shragai Nadar, *Alterman's Scales*, HA'ARETZ, May 14, 2002.

¹³⁶ For example, in May 2002, a mother and her two children were killed by tank fire in Jenin. Following an investigation into the incident, it was decided to place the soldiers and commander of the tank unit on disciplinary trial; they were tried and reprimanded. Amos Harel, *The IDF Reprimanded Soldiers Who Shot to Death Palestinian Children in Jenin*, HA'ARETZ, July 3, 2002.

military operations in the area.¹³⁷ Such a phenomenon should be condemned and cannot be justified from a moral point of view. It is one thing for the terrorist enemy to use his own civilians as human shields, and another for a democratic state to deviate so sharply from the proper moral standards and make use of the same civilians. Such use cannot be permitted and cannot be justified—the place of civilians is outside the battle arena. They must not be brought within the circle surrounding the forces of democracy merely because the forces of terror are not interested in removing them from their circle. There are those who believe that Israel's actions in the battle in Jenin failed to meet proper and reasonable standards in the fight against terrorism: "While condemning suicide bombers and standing fast for Israel's right to exist in security, we must also show more balance in our efforts to broker peace."¹³⁸

The use of force against terrorism that threatens the existence of an entire nation is an important aspiration and necessary goal, although the state must first exhaust every other process of negotiation and compromise prior to turning to fighting. Israel sought to do so and it must continue to pursue similar efforts.

We didn't want this war. Israelis know war too intimately to seek or glorify it. Hence, for 18 months—most of that time under the premiership of Ariel Sharon—a reluctant Israeli nation held back from full scale attacks on Palestinian cities despite the goading terror, seeking every other alternative. We berate ourselves for making deals with a partner who turned out to be demonic. We shouldn't. Our bitter losses and

¹³⁷ Press Release, The Israeli Information Center for Human Rights in the Occupied Territories, "*Defensive Shield*": *IDF Uses Palestinian Civilians as Human Shields* (Apr. 8, 2002), available at http://www.btselem.org/English/Press_Releases/2002/020408.asp (last visited March 5, 2003).

¹³⁸ Douglass W. Cassel, Jr., *Chasing Terrorists, Punishing Citizens*, CHIC. DAILY L. BULL., Apr. 11, 2002, at 6.

the grim images of the innocent killed in the pursuit of our enemies remind us why we have tried so hard to avoid war and were willing to take risks to pursue peace. They explain why we still must explore every avenue of peace, even as our soldiers endanger themselves to hunt down terrorists who use their children as human shields and ours as targets for slaughter.¹³⁹

However, even on the path to compromise and settlement, if the state is faced with clear danger to the lives of its citizens, it must continue to protect them by the necessary means. On the night of July 22, 2002, Israel killed Salah Shehade, one of Palestine's most dangerous terrorists. Shehade was the head of the military arm of the *Hamas* responsible for hundreds of attacks against Israel in the last two years. Shehade was targeted for elimination due to the clear evidence of his deep and prolonged involvement in terrorist attacks. The information pointed to his activities in Gaza, Judea, and Samaria in initiating, planning, financing and dispatching attack forces and suicide bombers. He commanded the organizational structure covering the entire Gaza Strip. Shehade continued to steer the wide-ranging terrorist attacks from his various hiding places and was responsible for the death and injury of hundreds of Israeli citizens.¹⁴⁰ On the night of his elimination, he was preparing a number of attacks against Israeli citizens.¹⁴¹

¹³⁹ Barbara Sofer, *Jenin in Ruins*, THE JERUSALEM POST, Apr. 26, 2002, at 9B.

¹⁴⁰ For biographical notes about Shehade, see *Salah Shehade - Portrait of a Hamas Leader*, available at <http://www.idf.il/newsite/hebrew/salah.stm> (also available in English at <http://www.idf.il/newsite/english/salah.stm>) (last visited Nov. 2, 2002).

¹⁴¹ H. Broida et al., *Shehade Planned a Wave of Attacks*, YEDIOTH AHRONOT, July 24, 2002, at 6. "According to information, Shehade planned to operate an explosives van filled with 600 kg of explosives, with the intention of blowing up the Gush Katif bridge. Further, he planned to perform a massacre during a festive event of the settlers in Gush Katif and kidnap soldiers and civilians." *Id.*

The targeted killing was conducted from the air by an F-16 jet launching a smart bomb weighing one ton at a house Shehade owned. Shehade, however, was accompanied by his wife and children. The outcome of the IDF operation was harsh: The goal of eliminating Shehade was achieved; however, fifteen civilians were also killed, among them nine children.¹⁴² The IDF Spokesman explained:

The objective is to thwart future and upcoming terror activities by attacking the source itself, namely Shehade. There was no intention of harming members of his family or other civilians. The IDF is sorry for any harm that befalls innocent people. Regretfully, this is what can happen when a terrorist uses civilians as a human shield and their homes for places of refuge.¹⁴³

The elimination of a mass murderer, such as Shehade, is a clear example of the difficult dilemma with which we have been concerned in this Article. Should one attack a terrorist who is responsible for the deaths of hundreds of citizens when an attack against him entails the risk of harm to innocent persons among whom he is hiding?

The answer is in the affirmative in exceptional cases when the benefit arising from the action (saving many innocent civilians) exceeds the damage caused by it (harm to civilians in the vicinity of the terrorist). In this case, notwithstanding the grave outcome, Israel made its decision in accordance with the principle of the double effect.¹⁴⁴

¹⁴² Amost Harel, *How the Assassination of the Most Senior Terrorist in the Territories Was Transformed into the Mass Killing of Civilians*, HA'ARETZ, July 24, 2002.

¹⁴³ IDF Spokesman, *IDF Operation in the Gaza Strip Last Night*, available at <http://www.idf.il/english/announcements/2002/july/23.stm> (last visited March 5, 2003).

¹⁴⁴ See *supra* Part III.

- 1) The act was good *per se*: the purpose was not to harm civilians but only the terrorist himself. It follows that the direct outcome, which achieved this objective, was acceptable from a moral point of view. The intention of the IDF was good and only sought an acceptable outcome; the bad outcome was not intended.
- 2) The injury to the civilians was not a measure employed by the IDF in order to strike at the terrorists. On a number of occasions, the IDF had cancelled operations against Shehade following intelligence to the effect that he was surrounded by civilians. Aware of the use made by terrorists of civilians as a human shield, Israel attempted to minimize the "bad" outcome as much as possible;¹⁴⁵ the operation was authorized on the basis of intelligence that the likelihood of injury to civilians was not high.¹⁴⁶
- 3) Accordingly, Israel anticipated that the act's benefit would greatly exceed the damage and would be justified in accordance with the principle of proportionality. The lives of many Israeli civilians would be saved. If innocent citizens would be harmed during the operation, that harm would be a minor and unavoidable price to pay to save Israeli lives.

The outcome of fifteen civilians killed was not an outcome anticipated by Israel.

Beyond the serious damage caused to innocent Palestinian civilians, equally serious damage was caused to the State of Israel. Apart from the damage to its image in the international arena, the harm to the innocent significantly increased the motivation of the terrorist

¹⁴⁵ See *supra* text accompanying note 97. See also WALZER, *supra* note 49, at 185-86.

¹⁴⁶ *Low Likelihood of Harm to Civilians*, HA'ARETZ, July 24, 2002.

organizations to engage in revenge attacks, thereby increasing the danger for many Israeli citizens. Nonetheless, it is not inconceivable that even if the outcome had been different and confined to eliminating Shehade, his role as a venerated leader of the terrorists would have increased the motivation to seek revenge. In the long-term, only unfolding events will reveal whether the benefit from the operation exceeds the damage it generated. In the short-term, it seems that the opposite is true: the damage exceeds the benefit.

Concurrently with an examination of the balance of “profit versus loss” ensuing from the actual operation, we must also consider what the situation would have been had Israel chosen to use a measure other than an air strike, such as a large land operation, to seek out wanted terrorists in Gaza. Would the outcome have been more proportional? In my opinion, the answer to this question is negative. To dispatch a unit of soldiers into the Gaza area to attack a wanted terrorist, hiding among the civilian population, would have entailed significant risk to the lives of Israeli soldiers. It would also pose a significant risk of injury to innocent civilians embroiled within the circle of fire which would have developed immediately upon the entry of the Israeli force into the target area; furthermore, the goal of capturing the wanted man would have been by no means certain. Accordingly, some observers believe that: “Israel must help the dispatchers, the candidates for suicide attacks and the entire Palestinian society reach a negative total on the profit and loss balance sheet. The determination to strike at murderers and their collaborators, despite the deplorable injury to children, must be regarded as such help.”¹⁴⁷

I am not sure that injury to a large number of innocent children to capture a single terrorist, however senior, justifies Israel’s operation when examined in the light of

¹⁴⁷ Amir Oren, *Striking the Extreme Helps the Moderate*, HA’ARETZ, July 24, 2002.

the rule of proportionality. Israeli leaders expressly stated that had it foreseen such a result, it would not have carried out the operation.¹⁴⁸

Accordingly, I do not seek to justify the operation. My purpose is to show the decisionmaking process in Israel was compatible with moral norms—a central consideration in making the decision was the harm to be caused to civilians. In the past, Israel was ready on a number of occasions to delay a targeted strike at the terrorists when the attack would lead to disproportional collateral damage or indeed any collateral damage to innocent persons in the vicinity,¹⁴⁹ knowing that this decision would prolong the danger to its citizens from attacks being initiated by these very terrorists.

Yet, the grave result is evidence of defects in the decision-making process causing the decision-makers to believe the operation did not violate the moral standards Israel demands of itself. The failure was twofold: an intelligence failure entailing the erroneous belief that the likelihood of harm to innocents was low, and a failure in the choice of means, notwithstanding the location of the target in the heart of a population center.¹⁵⁰ The security authorities must examine these failures to prevent their recurrence.¹⁵¹

We must recall that the IDF code of fighting not to harm civilians is completely contrary to the Palestinians' code of

¹⁴⁸ Nahum Barnea, *Untargeted Preemptive Strike*, YEDIOTH AHRONOT, July 24, 2002.

¹⁴⁹ Shimon Shifer, *The Elimination of the Arch-terrorist—Thus was the Decision Reached*, YEDIOTH AHRONOTH, July 24, 2002, at 2. Less than a week before the operation, F-16 planes were dispatched to strike at Shehade; however, when the planes neared their target, it was learned that one of Shehade's family members was with him, and accordingly the operation was deferred. See Amost Harel, *The GSS Assessed: There is a Low Likelihood of Injuring Civilians in the House in which Shehade is Hiding*, HA'ARETZ, July 24, 2002.

¹⁵⁰ Harel, *supra* note 149.

¹⁵¹ And indeed the IDF and GSS have initiated an inquiry into the operation in view of the gravity of the outcome. See Amost Harel, *The IDF Will Examine the Reasons for the Failure of the Operation in Gaza*, HA'ARETZ, July 24, 2002.

conduct. The IDF is not immune from mistakes, but it seeks to limit them as much as possible. The code of fighting of the Palestinians, whereby civilians and children are used as human shields, increases the margin of error of the IDF and creates technological mistakes which the Palestinians could prevent.

There is no doubt that the threat of terror hanging over the State of Israel is an existential threat. It is Israel's moral duty to respond by way of self-defense to this threat.

Would it really be better if the Israelis were to lay down their arms or accede to the Arab demands, even if this meant the eventual destruction of Israel as a nation? If "better" here is taken to mean "productive of less evil than any alternative action," then it is not at all clear that surrender would—in the case of Israel, at least—actually be better.¹⁵²

Israel's moral duty is not exhausted by the defense of its citizens. By going to war against terrorism, it must choose means compatible with the moral standards required of a democratic state. The State of Israel should not congratulate itself and present itself as the guardian angel of its citizens because it has strictly adhered to moral norms. It must admit there have been occasions on which the adherence faltered and draw the necessary lessons from them. The ability to admit mistakes and examine the reasons for the flaws in its actions is itself, in my opinion, an expression of moral values. On the other hand, the fact that Israel must justify its actions against terrorism is outrageous, particularly when this terrorism continues to extract a high price in blood from a country that persistently seeks to abide by high moral standards and norms of conduct compatible with the democratic character

¹⁵² Struckmeyer, *supra* note 4, at 281.

of the state, and which requires it to endanger its soldiers and civilians and sacrifice them for the sake of these norms.

C. The United States

Terrorism based on religious ideology and fundamentalist Islamic belief does not exclusively threaten the State of Israel. In the same way as the terrorists preach a “holy” war to the end against Israel and the Jews, so too does it preach war against the United States.

[T]he killing of Americans and their civilian and military allies is a religious duty for each and every Muslim to be carried out in whichever country they are until al Asque mosque has been liberated from their grasp and until their armies have left Muslim lands We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill Americans and plunder their money whenever and wherever they find it.¹⁵³

The terrorist attack of September 11, 2001 was not the first terrorist attack launched against the United States. The United States has been forced in the past to deal with and respond to terrorism originating from states sponsoring terrorism, such as Libya and Iraq. Currently, the United States is focusing on terrorism instigated from Afghanistan under the direction of Osama bin Laden.

This part examines the manner in which the United States has dealt with the dilemmas posed by the strategy of terror. How has the United States chosen to draw the balance between its moral duty to protect its citizens and

¹⁵³ Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 237, 239-40 (2002) (citing U.K. Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States (Oct. 4, 2001)) [hereinafter *Contemporary Practice*].

its moral duty to avoid harming innocent civilians who have become enmeshed in the circle of terror against their will?

During the Gulf War, Iraq deliberately placed civilians near legitimate military objectives of the United States to form a living shield. In that war, “[t]he perfidious practice of ‘human shields’ was widely engaged in by the state of Iraq during the 1991 Gulf War, both in its abuse of U.S. civilians around Iraqi military targets and its abuse of Iraqi civilians around Iraqi military command centers.”¹⁵⁴

We have seen that the use made by terrorists of civilians places the democratic state before a moral dilemma. For the United States, this has posed a challenge to the moral values it symbolizes and seeks to teach. In Iraq, the activities of the United States were not confined to air strikes. In necessary and appropriate cases, numerous ground forces were deployed. In other cases, as a matter of necessity, it was not possible to fight other than by aerial bombing. In cases in which Iraq knew this was the sole method available to the United States, Iraq continued to use civilians to protect targets. The harm caused to those civilians had to be put squarely at the door of the Iraqis.¹⁵⁵ The United States did not attack civilian targets or military targets located at the heart of population centers. Its targets were legitimate military objectives. Harm to civilians was not deliberate and it may be assumed that the majority of civilian injuries did not occur during the actual attack, but as a result of damage caused by the American attacks to Iraqi infrastructure.

Most of the civilian casualties, however, appear to have resulted from the targeting of objectives that, while

¹⁵⁴ Beres, *supra* note 122, at 147 n.39.

¹⁵⁵ Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 465-67 (1991) (describing the difficulty encountered in making a distinction between civilian and military targets during the air campaign and coalition charges that Iraq bore responsibility for civilian casualties due to their intentional placement of civilians near military targets).

apparently serving a military purpose, and thus being a legitimate military objective, were also essential to the survival of the civilian population. Among the facilities destroyed by coalition bombing were all power plants, oil refineries, the main oil storage facilities and water-related chemical plants. It appears, therefore, that it is not so much the direct casualties suffered during the attack that are the most problematic, but the longer-term casualties.¹⁵⁶

Moreover, assuming the United States knew its attacks would lead to the death of innocent persons being used by Saddam Hussein as human shields, application of the consequential approach to the United States' response to this moral dilemma leaves no doubt that the benefit from the action was much more extensive than the damage from it. Therefore, the action met the proportionality test. The United States' combat activities during the Gulf War destroyed Iraqi capacity to initiate terrorist activities against the United States (save for the attempted assassination on former U.S. President George H.W. Bush, Iraq has not executed terrorist activities against the United States since the war): "[T]he 1991 war against Iraq had the residual effect of devastating Baghdad's terrorist centers of gravity, or key terrorist nodes. It damaged the intelligence structure that supported terrorist operations, wiped out personnel, virtually repealed Iraq's safe haven status, and disrupted financial and logistics networks."¹⁵⁷

By its actions, the United States deliberately saved numerous innocent civilians—many more than it harmed unintentionally. The situation involving the 1986 U.S.

¹⁵⁶ Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 409 (1993) (citations omitted). *But see* Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 831-33 (articulating that the responsibility for the death of Iraqi civilians in consequence of the Gulf War lay with the attacking forces and not with Iraq itself).

¹⁵⁷ Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 25 (2002).

attack against Libya (Tripoli) aimed at eliminating Qaddafi was different. While the target of the strike was Qaddafi, the site of the target in the midst of a civilian urban area, paved the way for the inevitable result.

The compound itself is located right in the heart of metropolitan Tripoli surrounded by large numbers of civilian homes, offices, shops, etc. The Reagan Administration must have known that to launch a large-scale bombing operation on the compound in the middle of the night when visibility would have been diminished significantly only could have resulted in the large-scale loss of innocent human lives [T]he Reagan Administration was fully prepared to sacrifice a fairly large number of innocent Libyan civilians.¹⁵⁸

Thus, in this type of operation—also against a top terrorist wanted by the United States for a long period of time by reason of the threat he posed to the safety of American citizens—the United States demonstrated a consequential approach to the resolution of the moral dilemma. In other words, assuming that the benefit to be gained by eliminating Qaddafi (i.e. protection of U.S. citizens), would exceed the damage that might be caused by that act (i.e., loss of innocent Libyans paying with their lives for Qaddafi's deeds), the United States preferred the duty of protecting its own citizens to its duty to avoid inflicting harm upon the innocent.

Qaddafi, however, was not killed, and new terrorist attacks were launched against the United States from Libya, including the bombing of flight Pan Am 103. History has shown that the price for harming the innocent in the case of Libya was an unjustified price, which should have been avoided. The U.S. operation did not remove the threat of Libyan sponsored terrorism against U.S. citizens. Thus,

¹⁵⁸ Francis A. Boyle, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 296 (1987).

while the United States decided in terms of the moral dilemma that the duty to avoid harming the innocent would retreat, in fact, the duty to protect the citizens of the United States was not met.¹⁵⁹

Afghanistan was the United States' next target in the war against terrorism. The attempt to capture Osama bin Laden and strike at his terrorist network was precipitated by the attacks of September 11, 2001. The United States decided to engage in military action to eradicate the terrorists' capabilities as early as 1998, in response to the terrorist attack against the U.S. embassies in Nairobi and in Kenya.¹⁶⁰ The citizens of the United States found their lives further threatened following the attack of September 11th, which exposed the enormous capabilities of the terrorist organizations under the leadership of bin Laden.

The United States was not interested in fighting in Afghanistan. The President of the United States attempted to prevent the war when he sought the extradition of bin Laden and his accomplices to the United States. When this effort failed, the United States had no choice but to comply with its moral and legal duty towards its citizens—to engage in a military operation as a matter of self-defense.

More than two weeks ago, I gave Taliban leaders a series of clear and specific demands [N]one of these demands were met. And now the Taliban will pay the price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate

¹⁵⁹ Malvesti, *supra* note 157, at 20. "Thus, with respect to the question of whether the strikes achieved the goal of preventing further Libyan acts of anti-U.S. terrorism, the answer appears to be 'no.'" *Id.*

¹⁶⁰ Remarks on Martha's Vineyard, Massachusetts, on Military Action against Terrorist Sites in Afghanistan and Sudan, PUB. PAPERS 1460, vol. 2 (Aug. 20, 1998).

their evil plans We did not ask for this mission, but we will fulfill it.¹⁶¹

The United States embodies a two-fold symbolism: First, it is the symbol of the war being waged by the democratic power that heads the countries of the free world being threatened by terrorism. Second, it is the symbol of war on the basis of moral values and norms espoused by a democratic state, which prohibit inflicting harm upon the innocent. It follows that the moral duty borne by the United States is a particularly onerous duty.

[I]f the United States invokes human rights to justify forceful action, it must necessarily accept human rights as a binding constraint on its own use of force. If the United States chooses to treat this as a "war," it is strictly bound to observe the international laws of war, which terrorists scorn, but responsible democracies must obey. That means American and British military exercises must scrupulously avoid targeting civilians, using indiscriminate weapons, or carelessly striking civilian targets or humanitarian aid centers. As this conflict unfolds, the United States and its coalition partners can only rebut a claim of double standards by demonstrating that they have genuinely internalized international legal commitments to respect human rights.¹⁶²

In my opinion, no doubt at all can be cast on the contention that the objectives of the United States in its war in Afghanistan were purely military objectives: "The use of force in Afghanistan was limited and targeted against combatants, with efforts taken to reduce the suffering and

¹⁶¹ Address to the Nation Announcing Strikes against al Qaida Training Camps and Taliban Military Installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432, 1433 (Oct. 7. 2001).

¹⁶² Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 29 (2002) (citation omitted).

harm caused to Afghan civilians by increasing refugee and relief aid to the country.”¹⁶³

Nonetheless, during the course of the war, many innocent civilians were killed and injured due to the measures used by the United States to fight terrorism in the region. The dominant method consisted of air strikes. Use of this type in circumstances in which the terrorists were hiding behind the civilian population entailed danger to the lives of innocent civilians. It should be noted that, in a number of cases, the civilians died as a result of errors committed by U.S. forces.¹⁶⁴ In other cases, their deaths were the outcome of the fighting techniques of the terrorists themselves, which made it difficult for the democratic state to distinguish, from the air, civilians from terrorists.

Thus, on October 13, a Navy jet mistakenly dropped a 2,000-pound bomb on a residential neighborhood of Kabul, reportedly killing four persons and wounding another eight [O]n October 20-21, U.S. Navy jets dropped a 1,000-pound bomb near a senior-citizens home in the western city of Herat, and two 500-pound bombs in a residential area of Kabul In perhaps the most notorious event, U.S. planes mistakenly bombed a Red Cross complex in Kabul on October 16, and then mistakenly returned ten days later to destroy the same complex. The complex—the only one of the Red Cross in Kabul—had supplied food and blankets for fifty-five thousand disabled Afghans.¹⁶⁵

As noted, the United States did not intend to harm these civilians.

The examples mentioned above make it difficult to morally justify the United States' activities, even in

¹⁶³ Love, *supra* note 51, at 70.

¹⁶⁴ See Elizabeth Becker & Eric Schmitt, *U.S. Planes Bomb a Red Cross Site*, N.Y. TIMES, Oct. 27, 2001, at A1.

¹⁶⁵ *Contemporary Practice*, *supra* note 153, at 247 (citations omitted).

accordance with the principle of the double effect. This is because one of the essential elements of this principle is that the harm to the innocent must be a by-product. To be acceptable, the aggressor must reduce as much as possible the "bad" ensuing from his actions. In most of the examples mentioned, the harm to the innocent was not a by-product of a just attack against terrorists. The cases involved a single outcome of harm to the innocent as a result of mistakes. The dropping of bombs in places where only civilians were located testifies to intelligence errors in identifying the legitimate target for attack. The United States bears the onus of proving it did everything possible to prevent such mistakes. In so doing, the United States will prove, at the least, that it sought to minimize the element of "bad" in the operation, the motivation of which was the just and proper goal of killing terrorists.

Notwithstanding the tragic mistakes that neither the United States nor Israel have successfully warded against, no comparison can be drawn between injury to civilians by virtue of the activities of democratic states in their war against terror, and the deliberate injury to civilians perpetrated by terrorists.

[S]ome ways of waging war are worse than others. Some forms of warfare are indiscriminate and totally dehumanizing [terrorism]. Others may at least pay some minimal respect to the humanity of the enemy, if only by directing the war against those on the other side who are themselves doing the fighting.¹⁶⁶

The American Air Force, like the Israeli Air Force, is not an automated device. Behind the operation of dropping a bomb on a particular target are pilots with feelings and values, the like of which are not understood by the terrorists. The authorities who authorize the operations of

¹⁶⁶ RICHARD NORMAN, *ETHICS, KILLING AND WAR* 206 (1995).

these pilots are not interested in targeting civilians. Every case of injury to civilians entails a severe blow to the values and fighting code in which the soldiers subscribe. It would be proper to recall this at times when we censure Israel or the United States. Neither country aspires to an outcome which entails harm to civilians. However, equally, neither they nor, indeed, any other democratic state, is willing to sacrifice the lives of its citizens on the altar of a morality which *prima facie* prevents it from injuring civilians among whom terrorists find shelter. The operative result of the latter scenario would be that the principles of morality would require us to acknowledge the legitimacy of the terrorists defending themselves by using human shields to shelter and thereby save themselves. Terrorism and morality are two contrary concepts. It follows that there can be no moral principle which would require the democratic state, even if only indirectly, to protect the lives of terrorists.

CONCLUSION

In a reality in which international terrorism has developed with the aspiration to destroy the countries of the free world, by such brutal methods, democratic states have been forced to turn to military measures against terror. This war requires us to contend with an enemy that breaches all possible moral boundaries and rejects all moral and legal values.

The immunity of civilians from harm and its ramifications for moral dilemmas, is a matter for discussion by those who abide by moral principles, as terrorists do not argue that any immunity whatsoever exists: They are prepared to kill everyone, including civilians who are not citizens of their enemy—the democratic state.

The attempts to justify terrorism by arguing it is the weapon of the weak, the weapon of those for whom it is the

only measure available to bring down an oppressive regime, cannot stand up against the phenomenon of modern terrorism. Palestinian terrorism is not the only weapon possessed by the Palestinians. They could have and still can achieve their aspirations by means of compromise and peace. Islamic terrorism, as expressed in the attack of September 11, 2001, is not the terrorism of those who suffer under an oppressive regime, but the terrorism of those who are interested in introducing oppression and suffering to the free world.

We are concerned with terrorism that is motivated not by war for the sake of freedom, but war spurred by religious Islamic fundamentalism. As such, it is characterized by a totalitarian mentality which threatens all the countries of the free world. It is not a local phenomenon unique to the State of Israel. We have seen that the State of Israel, in its war against terror within the framework of Operation Defensive Shield, chose to risk the lives of its soldiers to protect the lives of its citizens, as well as to save the lives of Palestinian civilians held hostage by the terrorists. There is no doubt that the willingness to act, despite the danger to protect civilians, manifests the supreme importance accorded to the value of human life—values which are foreign to the terrorists who subscribe to no moral tenets and who mock the value of human life with brutal consequences.

The war being waged by the countries of the free world against terrorism must be based on a coherent morality that can never justify terrorism. Terrorism is the deliberate harming of the innocent and is always a crime. Accordingly, we must recognize the moral duty of the United States to fight against the terror dispatched against it from a distance of thousands of kilometers, and the duty of the State of Israel to fight against the terror dispatched against it from a distance of only a few meters.

In their respective wars, both countries should do everything possible to adhere to moral principles, at the core of which lies respect for human life; retreating from these principles, without the legal and moral justification presented in this Article, will lead to nothing less than the victory of terrorism. Attacking an appropriate target, at the cost of the lives surrounding that target, is generally prohibited. Yet, in exceptional cases complying with the test of proportionality, it is possible to neutralize the moral flaw attaching to such an action. Accordingly, in unpreventable cases, where innocent civilians have been harmed, we must admit we have so acted and investigate whether such harm was in accord with the balancing formula or whether it was a prohibited and wrongful act for which a legal price must be paid in accordance with the rules of international law.

The moral backbone of democracy and the free world is the recognition of the value of human life. In the eyes of democracy, man is the object. In the eyes of terrorism, man is the means. In the conflict between democracy and terrorism, only he who accords importance to the value of human life and who is willing to conduct his war, while protecting human life, will triumph.