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Use of Civilians as Human Shields

ONE OF THE most difficult and complex questions, from both a moral and a legal point of view, arising out of the battle between democratic states and guerilla terrorist organizations concerns the treatment of innocent civilians on both sides when they voluntarily or involuntarily become human shields used to protect the lives and prevent the capture of terrorists. Whereas the state complies with the law when it fights and employs only those measures falling within the rule of law, terrorist organizations violate the law in their fight and are not deterred from any methods that, in their view, can contribute to the effective advancement of their goals, including the use of civilians as human shields. This is done in two primary ways: First, terrorists hide among their own civilians, who are volunteered willingly or unwillingly to preserve the terrorists' safety. Second, the terrorists seize the civilians of the state against which they are fighting as hostages either to assist their safe escape from the scene of an attack or to be used for negotiation purposes. What, therefore, is the scope of the protection which the state is obliged to afford to those civilians who are used as human covers for terrorists?

International Law Regarding the Protection of Civilians in Times of Hostilities

In chapter 2, I considered the problems involved in classifying terrorist attacks as armed attacks vesting the state under attack with the inherent right to protect itself and make use of force. I concluded that in view of

the unique characteristics of the terrorist act, it is possible and even proper to categorize it in this way. I then turned to the issue of the choice of law that applies to the way the attacked state implements its defensive powers in these circumstances, and here too I concluded that while in the majority of cases there is insufficient evidence to attribute the activities of nonstate terrorist organizations to sovereign states supporting their actions, and consequently apply all the international laws of war regulating the conduct of international armed conflicts, it is still right to regard terrorist attacks as amounting to armed conflicts not of an international character. Consequently, it would be right to apply Article 3 common to all the Geneva Conventions of 1949, which establishes minimum humanitarian norms binding on all parties to a conflict, and indirectly—by way of analogy—all the *jus in bello* applicable to the conduct of international armed conflicts, which restrict the freedoms of the parties when waging war and prevent them from making use of some of the means at their disposal.

While it is true that all these laws are based on the principle of reciprocity, according to which both parties to the dispute take upon themselves the duty to comply with the restrictions on the use of force, and in the war against terrorist organizations only one party—the targeted democratic state—agrees to comply with these restrictions, the democratic nature of the state and the rule of law to which it is committed impose on it an absolute obligation to abide by these restraints. In other words, the fact that its opponent sees itself as unfettered by these restrictions does not allow the state to also see itself as free of restraints, as this would be incompatible with its character and values.

The restrictions on the freedoms of the combatant parties are principally set out in the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols to the Geneva Conventions of 1977. Some of these laws have also obtained the status of customary law over the years. As stated in chapter 2, the guiding principle underlying these laws is the distinction between combatants and noncombatants: warfare must be conducted solely between combatants, who are required to refrain from causing each other unnecessary suffering and to treat captured combatants as prisoners of war, and who are also required to refrain as far as possible from harming the civilian population and civilian property of the opposing side as well as to safeguard the rights of the civilian population which finds itself under enemy occupation.

Below I shall consider in more detail the norms of the laws of war relevant to the issue of using civilians as human shields.

Protecting Civilians against Enemy Attacks

Article 3(1) common to the four Geneva Conventions of 1949 provides:

Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹

Article 48 of Protocol I Additional to the Geneva Conventions 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."² Article 51(2) emphasizes that an attack whose primary purpose is to spread terror among the civilian population is prohibited.

Terrorist organizations by definition operate in a manner completely contrary to this basic rule, since their acts of murderous violence are in fact aimed at harming innocent civilians in order to provoke dread and panic.

In contrast, the democratic state by definition acts to foil terror attacks while remaining subject to moral and legal norms that require it to distinguish between harm to innocent civilians and harm to terrorists operating from the center of civilian populations. Accordingly, it is precluded from dropping aerial bombs onto civilian centers where terrorists have found cover, since doing so would violate the basic prohibition referred to above, as well as the provisions of Article 51(4) of Protocol I regarding the prohibition on indiscriminate attacks, that is,

attacks that are not directed at a specific military objective or that employ a method or means of combat which cannot, or whose effects cannot, be directed at a specific military objective. Article 51(5)(b) expands the protection given to civilians and defines as indiscriminate and therefore prohibited even an attack directed at a specific military objective if that attack may be expected to cause incidental loss of life or injuries to civilians or damage to civilian property that would be excessive in relation to the concrete and direct anticipated military advantage. At the same time, we should note that Article 51(5)(a) defines as indiscriminate and therefore prohibits an attack by bombardment by any method or means that treats as a single military objective a number of clearly separated and distinct objectives located in an area containing a concentration of civilians or civilian property. 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. Such an interpretation erodes the protection given to civilians and may justify causing them harm during the course of an attempted assault on terrorists deliberately merging with them.

Article 23 of the Second and Fourth Hague Conventions of 1907 prohibits the destruction of enemy property unless such destruction be imperatively demanded by the necessities of war. Article 54(2) and (3) 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: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

Article 51(6) of Protocol I provides that attacks against the civilian population as acts of reprisal are prohibited. The analogy that can be drawn from this paragraph in relation to the state's war against terrorist organizations is particularly relevant, since prima facie it shows that the fact that the terrorist enemy harms civilians cannot justify the state's 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 injury is caused to civilians whose presence in the same location as the terrorists is unknown to the democratic state, to civilians who freely choose to support the terrorists by providing them shelter in

their own homes in order to deliberately blur the distinction between civilian and terrorist objectives, and in some circumstances to innocent civilians who are being held against their will by the terrorists.

Article 26 of the Second and Fourth Hague Conventions provides that the commander of an attacking force must, before commencing a bombardment, do all in his power to warn the local authorities.

This obligation is designed to prevent undue suffering to the civilian population, to enable them to find shelter and protect themselves.³ Nonetheless, the duty to give effective advance warning, as it has developed in customary international law, is not an absolute duty. A state may depart from it if "the circumstances do not permit advance warning."⁴

This review of the various provisions clearly highlights the differences between the parties in a war being waged between a democratic state and terrorists. The democratic state regards itself as subject to these provisions on both a legal and a moral level, whereas the other side does not.

Protecting Civilians against Being Turned into Human Shields by Combatants from the Same Side

Article 28 of the Fourth Geneva Convention provides: "The presence of a protected person may not be used to render certain points or areas immune from military operations."⁵

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 as far as possible locating military objectives within or near densely populated areas. Article 44(3) 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 in which he is to participate."

A violation by one side of these prohibitions does not entitle the other side to cause harm to the civilians of the other side.

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. Accordingly, Article 51(8) emphasizes that even if one party takes shelter behind civilians, this does not release the other party from its legal obligations with respect to the civilian population.

Terrorists situate themselves among the civilian population with the improper sole purpose of using those civilians as a means of achieving immunity from attack by the democratic state. Terrorists are not directly committed to Protocol I, but the prohibition on the use of civilians is not only a legal prohibition. First and foremost, it is a moral prohibition. A man is never just a means; he is always an end in himself.⁶ Turning civilians from their own people and religion into human shields is an immoral act that frustrates the efforts of the democratic state to leave this population outside the arena of war. Thus, the terrorists violate an additional prohibition of international law, set out in Article 34 of the Fourth Geneva Convention and of the International Convention against the Taking of Hostages of 1979, which prohibits civilians being taken as hostages.

The situation under discussion here—terrorists' use of their own people as *involuntary* human shields—should be distinguished from the situation where the civilians of their *own will* participate in the fighting effort, and as part of that process shelter the terrorists and introduce into their territory legitimate targets for attack, such as weapons factories. In the latter case, as we shall see below, the civilians may lose their immunity to attack and become legitimate targets.

The cynical use made by the terrorists of civilians—at times even of children, who are incapable of understanding how they are being used—presents the democratic law-abiding state with an extremely difficult legal and moral dilemma, requiring it to choose between its duty to protect its own citizens by engaging in military operations against terrorist strongholds located in the heart of population centers where every attack will entail harm to those civilians, and its duty not to harm innocent civilians who are used against their will to shield terrorists. On occasion, refraining from harming civilian shields during the course of pursuing terrorists will lead to the deaths of soldiers which might otherwise have been avoided. Such incidents introduce a new element into the moral equation, namely, the right of soldiers to defend their own lives. Is it right to ask them to sacrifice their right to self-defense in favor of protecting the lives of enemy civilians?

Should, therefore, the duty of the state to protect its citizens by engaging in military operations in the course of which soldiers are entitled to perform essential actions to protect themselves retreat before the moral and legal imperative that seeks to distinguish between civilians and combatants, or should the legal and moral duty of the state to do everything in its power to protect its citizens supersede?

The Moral Dilemmas

A democratic state is required to fight terrorism in accordance with principles and values that are derived from its democratic nature, first among which are the preservation of the rule of law and respect for human rights. Notwithstanding their importance, an individual's rights are not a springboard for national destruction, and an individual is therefore required to sacrifice those rights to the extent necessary to ensure the proper existence of his state, since that existence is an essential precondition to his ability to implement those rights. It follows that we are dealing with a *moral duty* on the part of the democratic state to protect its citizens by using the means necessary to frustrate activities endangering their security in general, and their lives in particular.

Before turning to an examination of the specific moral dilemmas at issue in this chapter, it is necessary to provide a brief general explanation of the nature and characteristics of a moral dilemma and the ways of resolving it.

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. In this case, we are speaking of a situation in which a person (or state) is obliged to choose between performing a particular act (protecting the lives of the citizens of the state and those of its soldiers) which entails a bad outcome (harm to innocent civilians of the adverse party), and performing a different act (refraining from causing harm to the civilians of the adverse party) which also entails a bad outcome (endangering the security and safety of the citizens and soldiers of the state).

In a situation with two clashing obligations, there are those who believe that only one of them, depending on the circumstances, is real and the other is imaginary.⁷ However, this would be too easy an answer, since moral obligations often clash, and if we were to believe that in every such situation one of the obligations is imaginary, most moral obligations would lack any effect. Consequently, the solution must be more complex, and it is difficult to guarantee that it will be moral per se.

This conclusion receives added force when we speak of the moral dilemma confronting a state under attack which is required to choose between the lives of its citizens and soldiers, on the one hand, and the lives of the compatriots of the attacking terrorists, on the other.

Kant was of the opinion that dilemmas of this type are insoluble, since there is a moral imperative that human beings are equal in value and

every person must be treated as having his own value and being an end in himself.⁸ But I think that the absolute character of Kant's approach makes it overly extreme. History has shown that the maintenance of a regular and orderly life requires that we refrain from the absolute and replace it with realistic considerations, which often lead to human life being superseded as a value by other values. If this were not the case we would not be able to explain why a state does not allocate all the budget necessary to ensure that its health services are able to grant every patient the best possible treatment, and all the budget necessary for maximum security, education, and efforts to reduce road traffic fatalities.

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. Having this sense indicates to us that even though the choice is "correct," it involves undesirable results that are regrettable. The sense of moral guilt reflects moral character. It does not reflect the absolute nature of a moral duty.

In a clash between the state's duty to protect its citizens and soldiers and the duty to avoid harm to innocent civilians held against their will, the former is likely to prevail. True, the killing of innocent persons is an act that 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 killing of innocent persons is always absolutely prohibited."⁹ As we shall see below, moral and legal justification may be found for the killing of innocent persons within the context of military operations.

If we agree that there are no absolute moral obligations, we might ask on what basis we ought to determine the prevailing moral obligation. In this chapter I shall focus on two primary moral theories: the utilitarian-consequential doctrine and the deontological doctrine.

According to the utilitarian doctrine, the moral value of an act is determined in accordance with its impact on aggregate world happiness. Therefore, the moral action is the one that brings about the greatest happiness.¹⁰ It follows that if harming the human shield is an essential precondition to harming the terrorists, and consequently to causing real damage to their ability to carry out their destructive missions, the measure of the positive outcome (preventing terrorist attacks) will be greater than the negative outcome (harming the innocent persons used

as human shields); social happiness will increase and consequently also the moral justification for the act. In contrast, according to the deontological approach, the moral value of an act is determined by its internal nature and not by its outcome. An anticipated positive outcome is not relevant to assessing its moral value, and therefore does not justify harming innocent persons.

These two doctrines will assist us in resolving the moral dilemmas that inherently arise when innocent civilians are being used by terrorists as human shields.

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. Terrorism is not a onetime passing phenomenon. It consists of a series of prolonged, numerous, and brutal attacks that threaten the existence of states of the free world and thereby afford these states the legal and moral right to self-defense.

As noted, I am of the opinion that not every war is wrong from a moral point of view, and there are occasions when the state is under an obligation to fight those seeking to destroy it. However, this moral duty, like all moral duties, is not absolute in the sense that it is not morally justified to use all means in order to fulfill it, and there may well be circumstances where this moral duty will retreat before other, more important moral obligations.

The dilemmas with which we are concerned here arise within the context of a war against an enemy inspired by uncompromising radical ideologies. The price paid by the citizens of the state under attack from terrorism is unbearable. Thus, it would not be moral to demand that the state refrain completely from military activities against the attacker. The dilemma, therefore, is not whether or not to go to war, but which military measures are moral.

Since the current laws of war do not delineate a normative framework for the state's battle against a terrorist organization, it follows that even if we were to agree with Herbert L. A. Hart's approach whereby the law is a microcosm of prevailing social and public morality,¹¹ we would not be able to find a positive objective solution to the moral dilemmas arising within the framework of this war. The solution to every dilemma is a subjective solution which must be adjusted to a varying reality and its diverse situations.

In my view we should completely reject the assertion that soldiers fighting a just war are entitled to do everything that might prove useful in that war on the grounds that it is the enemy who is responsible for the war. Such unrestricted freedom of action is dangerous, for it trans-

fers responsibility entirely onto the shoulders of the enemy, and it improperly regards the rights of the just as unqualified.¹² In no war, however just, can the adverse party bear responsibility for the moral wrongdoings of the first party.

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 combatants and civilians, and only the former may be harmed. According to Michael Walzer, civilians who are not combatants are in a certain sense innocent and therefore entitled to a moral immunity to which combatants are not entitled.¹³ This distinction between civilians and combatants is a basic rule of the laws of war and has special importance in a war being waged by a democratic state against terror.

However, there are those who believe that there is no moral basis for the distinction between civilians and combatants but 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 on the civilian population.¹⁴ According to this approach, if one of the parties deviates from the principle of mutuality, the other party will also be released from his duty to abide by the distinction. I do not agree with this approach. We have seen that according to the laws of war and in particular according to moral imperatives, a democratic state is not discharged from its duty to avoid inflicting harm on the civilian population merely because the adverse party, the terrorists, deliberately targets civilians.

Moral Dilemmas in the War against Terror

DILEMMA I

As noted above, terrorists tend to protect themselves by burying themselves among members of their own people who are not active participants in the fighting, a practice that makes it very difficult for the state's security forces to operate, and makes it impossible for them to respect the rules of war except by acting in a way that poses a real danger to their own lives. Is it really right to ask them to pay this price?

Certainly, a state's repudiation of moral values—and at their heart, respect for the life of every person—is incompatible with its obligation to preserve the fundamental principles of democracy and is therefore not legitimate. Consequently, it is not inconceivable for it to ask its soldiers to risk their lives because of the moral imperative prohibiting causing harm to the innocent. This is a justified risk: "[T]he 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 in order to save human life."¹⁵

However, is it right to draw a parallel between (a) the situation where terrorists create a dangerous circumstance that poses a risk to the lives of the citizens of the state, thereby requiring the state to protect them and consequently put soldiers lives at risk, and (b) a situation where the terrorists create a dangerous situation that poses a risk to the lives of the citizens of their own group, which compels the democratic state to protect the citizens of the enemy and to this end put its own soldiers' lives at risk? In my opinion, the two situations are not fully analogous.

In the first case, the soldiers risk their lives in order to protect the citizens of their own state, whereas in the second they risk their lives to protect the citizens of the enemy against a danger which the enemy itself has created. If the state were to endanger its soldiers in order to avoid harming enemy civilians, and as a result make it easier for the terrorists to fight and thereafter to flee, the state would soon find itself locked in a circle where its forces would be injured and its citizens continue to be threatened—that is, it would not be able to effectively pursue its just war. In circumstances of combat against an enemy operating out of a civilian population which supports it, it may be argued that "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?"¹⁶

As explained, there are no absolute duties. There is no absolute duty not to endanger the lives of our soldiers in order to protect the citizens of the enemy, and there is no absolute duty not to injure those citizens. The moral thing to do depends on finding the correct balance in accordance with the circumstances of each case. In my opinion, as a rule, it is not proportional to aurally bombard places that are known to house terrorists alongside innocent civilians. It is necessary to choose less lethal means, even if they are less certain and may endanger the state's military forces. The operation must be precise, rigorous, and surgical, in order to create the greatest possible distinction between the terrorists and the civilians among whom they are concealed.

Thus, for example, during the coalition war led by the United States and Great Britain to bring down the regime of Saddam Hussein in 2003, many precautions were taken to protect the Iraqi civilian population during the aerial bombardment of targets located in or near population centers. Precision guided munitions were used, much of the bombardment was carried out at night when most civilians were at home, penetrating

munitions and delayed fuses were used to ensure that most blast and fragmentation damage was kept within the impact area, and attack angles took into account the locations of civilian facilities such as schools and hospitals. Despite all this, a number of the air attacks did cause damage to the civilian population that far exceeded what was necessary in order to achieve essential military objectives, since it was known in advance that both the proximity of the targets to civilian concentrations and the munitions chosen to increase the likelihood of success (such as air-delivered cluster bombs) would amount in practice to indiscriminate attacks.¹⁷

Guilty Civilians versus Innocent Civilians. The classic approach entails a distinction between combatants and noncombatants, from which it follows that protection of "innocents" is actually protection of all those who are not called "combatants." A more correct approach from a legal, and particularly a moral, point of view distinguishes between the guilty and the innocent, so that there may be soldiers who are innocent and civilians who are guilty.¹⁸ Since in the case of terrorists we are not referring to soldiers in the accepted sense of the word who are comparable to soldiers of a state, there can be no terrorist who is not guilty. Accordingly, we need only distinguish between civilians who are guilty and civilians who are innocent, and only the latter merit protection.

The effort must thus be directed at distinguishing between civilians who have lost their rights by virtue of their involvement in the warfare and those who have not. The distinction that interests us is not between the participants in the war effort and those who have not contributed to it, but between those who supply the combatants with whatever is needed to fight and those who supply them with whatever is needed to live, in effect all the rest. The innocent are those do nothing that would lead them to be deprived of their rights.

On the other hand, "What 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."¹⁹ This is the case with civilians who freely choose to provide shelter to terrorists, allow them to operate from their homes, and provide them with protection. These civilians are none other than collaborators with the terrorists and as such lose their immunity from harm. Is it conceivable to demand that a soldier risk his own life to avoid injuring civilians who have supplied shelter and protection to terrorists and permitted them to shoot at and otherwise operate against the soldiers from their homes? This serves the policy of terror. Accordingly, in my opinion, it would be improper to demand that such civilians be protected merely because they take cover under the formal

title "civilian." The title "civilian" is not an empty phrase, and even though the protection of enemy civilians is a valuable moral and legal rule, it does not apply when the civilians collaborate and assist in bringing about the terrorists' objectives. By doing so, these civilians become participants in the actual fighting and pose a danger to the military forces of the state and indirectly to that state's citizens.

In practice, civilians who assist terrorists to carry out their missions must be regarded as guiltier than the terrorists themselves. Guilty civilians are not entitled to the protection to which innocent civilians are entitled.

The purpose of recognizing a state's right to self-defense is to enable it to defend itself against those who pose a threat to it or attack it—such as the terrorists and the civilians who collaborate with them. Nonetheless, I do not argue that it is necessary to deliberately attack civilians involved in combat with the aim of killing them if it is possible to bring their activities to a halt in another way without creating great risk to our forces. Only when such an option does not exist will the obligation of a democratic state to avoid harm to these civilians be canceled.

We should note that Article 52 of Protocol I Additional to the Geneva Conventions 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, would offer a definite military advantage. The definition is flexible and highly relative. The same objective may at one and the same time be regarded as civilian and military. Consequently, the article provides that in cases where doubt exists whether an object that is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it should continue to be regarded as a civilian object. This presumption may be rebutted if contrary evidence is adduced.

My comments in this discussion apply solely to those cases where the security forces have a credible evidentiary basis for concluding that the civilian object has indeed undergone a change of character and has become a military objective. In such a situation, the object attacked is not civilian, legal authorization exists for striking at it, and the killing of civilians located there is not a moral wrong, since they are no longer "innocent."

When fighting is conducted on a house-to-house basis in an urban area and the civilians have been warned before the attack to vacate the area but have nonetheless chosen to remain, it becomes necessary for us to distinguish between two situations. In the first situation, the civilians

freely choose to remain in their homes with the aim of enabling the terrorists to conceal themselves among them, since they know that the moral and legal fetters binding the state prohibit civilians from being harmed, and consequently also the terrorists to whom they have provided shelter.

Civilians who provide shelter to terrorists are differentiated in only one way from civilians who are physically involved with the terrorists in fighting from their homes. Whereas the former are passively involved, the latter are actively involved; however, their involvement exists, and it causes them to lose their moral immunity from harm. When they choose not to escape from the battle arena (assuming that they were warned in advance and could have escaped) and prefer to supply the terrorists with shelter, they incur moral blame. Their deaths will not be the deaths of innocents, and the moral duty to protect the lives of the soldiers will take priority.

In the second situation, in contrast, the terrorists hold the civilians against their will as hostages, and make use of their homes and property for their fighting purposes. It follows that these civilians are innocent and free of any moral wrongdoing. This is sufficient, in my view, to give rise to a moral justification for not harming them, even at the price of endangering the state's soldiers. As Walzer puts it:

It is forbidden to kill any person for trivial reasons. Civilians have rights which supersede even this. And 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.²⁰

DILEMMA II

In the situation under consideration, when terrorists are using innocent persons as human shields, the right to self-defense will not provide moral and legal justification for injuring these civilians. The relevant legal defense here is the defense of necessity. Yet, the defense of necessity only discharges a person from criminal liability, it will not necessarily transform his action into a moral one. Our purpose is not to identify the legal defense for an action whose outcome was injury to innocents, but rather to focus on the moral justification (if one can speak of such

justification at all) for the end result of harm to innocents in situations analogous to situations of necessity in criminal law, that is, in situations where clear danger to the lives of the soldiers and civilians of the state cannot be avoided save by harming innocent people.

The central concept that may assist us to draw a proper balance between the duty to fight the terrorist enemy and the duty to avoid causing harm to innocent civilians is the principle of *Tobar Haneshek*, a Hebrew term which loosely translates as "use of weapons in a virtuous manner" or "moral warfare," and which refers to scrupulously abiding by an appropriate moral system of values during the course of fighting.²¹ *Tobar Haneshek* requires the security forces to restrain themselves and avoid using their military might beyond what is necessary. The fact that the adverse party does not regard itself as bound to comply with similar principles does not release the democratic state from respecting such moral values.

Accordingly, it is clear that security forces are absolutely prohibited from using the compatriots of the terrorists as human shields for the purpose of safeguarding soldiers' lives during the course of their military operations. This point—although fairly obvious—is worth emphasizing, since events in the field have proven that the principle is not always adhered to. For example, until recently, Israeli forces that operated in the Gaza Strip and in Judea and Samaria with the mission of catching terrorists who had gone into hiding in highly populated civilian Palestinian centers on occasion seized civilian passersby who were not suspected of any terrorist involvement and forced them to carry out a range of dangerous tasks, such as removing from the roads items suspected of being booby-trapped to clear traffic routes, entering abandoned buildings suspected of being booby-trapped, and marching in front of soldiers or sitting on the hoods of their vehicles in order to protect them from snipers. In other cases, after the army had encircled homes in which wanted terrorists were hiding, the soldiers carried out what they termed the "neighbor routine": one of the Palestinian residents living close to the encircled house would be taken from his home, dressed in a protective vest, and forced to march toward the targeted house to warn its residents, those who were not wanted, of the risks to them if they did not leave immediately and to ask the wanted men to surrender without bloodshed. The reason given for employing this practice was that whereas the wanted terrorist would not hesitate to shoot at soldiers, he would avoid harming one of his own people. Many times this presumption was proved wrong, and terrorists in fact did not hesitate to shoot and kill their neighbors.²²

These methods, which reflect the cheapness of the lives of Palestinian civilians in the eyes of the army, are not only wrong morally but also clearly contrary to domestic law, in that they seriously violate the constitutional rights to human dignity, freedom, and life of these civilians, and to international humanitarian law, in that they contravene Article 27 of the Fourth Geneva Convention, which provides that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour. . . . They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Further, the exception set out in the article to the effect that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war" cannot permit use of innocent civilians as human shields against terrorists, since this does not comply with the precondition of necessity. The army can achieve the objectives for which it uses civilians by alternative, less harmful means, such as bringing demolition experts to deal with suspected booby traps and using loudspeakers to warn the residents of encircled houses. Even in cases where there are no less-harmful methods or it is impossible to use them, and the choice is between endangering the lives of the soldiers and endangering the lives of the local innocent civilians, the army is not entitled to prefer the lives of its soldiers over the lives of persons unconnected with terrorism who merely happen to pass by.

In addition, use of civilians as human shields violates Article 51 of the convention, which provides that "[t]he Occupying Power may not compel protected persons to serve in its armed or auxiliary forces," since by turning civilians into human shields, the soldiers are in effect forcing them to participate against their will in military missions against their own people. In response to a petition filed with the High Court of Justice by several human rights organizations,²³ the army has issued an operational directive that strictly forbids assigning protected persons to military operations (such as opening traffic routes or entering abandoned buildings suspected of being booby-trapped) or using them as human shields.²⁴ However, the directive does allow the army to be aided by protected persons during military operations aimed at apprehending suspected terrorists if such persons voluntarily agree to provide the requested assistance, and if the force operating in the area reasonably believes that their personal safety will not be endangered by providing such assistance.

Even though this new procedure is undoubtedly an improvement over the previous situation, many difficulties still remain, the most

prominent of which concerns the element of free will. According to the directive, the local civilian must express willingness to provide the occupying power with the requested assistance, and the army has an absolute obligation to refrain from "encouraging" him to consent with threats, violence, detention, and so on. In other words, the directive is based on the premise that if the army requests assistance from a protected person and that person agrees to perform the task without undue influence, his willingness is sincere, and therefore it is legally and morally justified to use him for the task, unless his personal safety would be endangered in the process.

This assumption, in my opinion, is inherently incorrect. Interactions between an occupying power and the civilian population of a conquered territory are highly delicate, since the local population is not bound to the occupying power by duty of allegiance but rather perceives it as the "enemy." Hence, when armed soldiers of the occupying power appear at the doorstep of a local civilian during an ongoing military operation and request his assistance in capturing one of his own people, the likelihood is that he would agree to provide it, but not out of free will, rather out of fear, since he knows that the occupying power has complete control over every facet of his daily life. Only in the rarest of circumstances would a local civilian truly desire to assist the occupying power, and that situation is when he has a significant *personal* interest in reducing the danger of injury to innocent civilians and to the wanted persons—that is, when close family members of his are in the targeted house. Indeed, this was also the opinion of the Supreme Court in concluding that this procedure was illegal.

However, what is the law when the state army does not initiate the use of the local population as human shields but is faced with the situation where it cannot overcome the terrorists save by killing civilians in circumstances where it is extremely difficult to distinguish them from the wanted men? In such a situation, does *Tohar Haneshek* permit killing them?

Francisco de Vitoria is of the opinion that it is forbidden to deliberately kill innocents. However, killing them is permitted as a military necessity—that is, when there is no other way to vanquish the guilty.²⁵ Richard Wasserstrom thinks that military necessity is a concept with a central role to play in the implementation of the laws of war and offers general justification for the breach of the prohibitions that form the basis of these laws.²⁶ In his view, the doctrine of military necessity transforms the laws of war into a general moral precept but enables them to be circumvented.

The doctrine of military necessity is similar to Walzer's description

of the emergency situation as a time when it is possible to trample the right to life even of innocents.²⁷ Even John Rawls, who thought that "there is never a time when we are free from all moral and political principles and restraints,"²⁸ recognized emergency situations as an exception to that rule. Accordingly, "Rawls, following Walzer, argues that '[civilians] can never be attacked directly except in times of extreme crisis.' Therefore, we can violate human rights—we can directly attack civilians—if we are sure that 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."²⁹

There is no doubt that terror is a cruel and dangerous enemy, and conceivably the decision to fight against it without harming the innocent means sacrificing the lives of the citizens of the fighting state. In such situations, the sense of moral urgency to avoid harm to innocents may retreat in the face of the sense of moral urgency to defend the citizens of the state. In exceptional circumstances, such a retreat may be legally and morally justified. Take, for example, the situation where senior wanted terrorists, who plan, send, and carry out horrendous terrorist attacks, hide among innocent civilians, and it is not possible to capture them except 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.

When the danger posed by these terrorists is unusual and imminent, the weight of the moral duty to protect the citizens of the state is increased, so as to supersede the moral duty to refrain from harming the innocent, in accordance with the requirement of proportionality—that is, the benefit from the action (saving the lives of the many civilians who would have been injured in the future by the terrorists) exceeds the damage caused by it (harming a limited number of innocent persons held by the terrorists, as well as the political damage and damage to the image of the state).

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

The presumption that there are no absolute moral obligations, and consequently there is also no absolute duty not to kill the innocent, may assist us in removing the moral taint that has adhered to the killing of innocent persons. Every duty may be construed in at least two ways: as an absolute duty, on the one hand, or as a *prima facie* universal duty—one that may be breached in the event of exceptional circumstances—

on the other.³⁰ An absolute duty is a duty that will never clash with other duties because there are no circumstances in which it does not exist. In contrast, a *prima facie* universal duty may fall into conflict with other duties in certain situations.³¹

In cases where a just war is being waged, 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, in my view, with the case of a *prima facie* duty, which in exceptional circumstances—such as may be created during the war against terrorism—may be breached even though we are aware that our activities will lead to the death of innocents who are located in the vicinity of the terrorists.

However, 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 that 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 that has superior status in the specific circumstances.

This approach to resolving the dilemma is close to the consequential doctrine to the effect that soldiers are entitled to kill innocent civilians if the consequence of this act is to achieve the primary goal of killing terrorists and saving the lives of many other innocent persons. However, permission to deprive innocent civilians held by terrorists of their right to life is not an all-encompassing permission; rather it is one that is subject to the principle of proportionality, which requires that harm be done to the least possible number of civilians and that the harm be essential in order to frustrate the acts of the terrorists hiding in their midst.

Terrorism challenges principles of freedom and thereby forces on the liberal state a "regime of necessity" whereby it is compelled to put aside certain guiding moral principles in favor of a moral duty to protect the lives and well-being of its citizens. The significance of the refusal to concede to this moral shunting is a *de facto* surrender to the brutal evil of terrorism and a life lived in constant fear of it.

Nonetheless, the deontological doctrine will find it difficult to justify the killing of innocent persons, irrespective of the purpose of such action, and will tend to see it as a repudiation of the highest moral obligations. This philosophical doctrine, at the heart of which are rights, dignity, and liberty, will adhere to the absolute prohibition against killing innocent persons. But those who criticize that reasoning would argue: "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?"³²

A principle that may help us bridge the two doctrines—the utilitarian-consequential doctrine and the deontological-Kantian doctrine—is the principle of double effect. According to this principle, as outlined by Michael Walzer,³³ it is permissible to do an act whose consequences it is reasonably assumed will be bad (e.g., the killing of innocent civilians) under four conditions:

1. The act itself is good, or at least is not bad; that is, it serves the state's legitimate military needs.
2. The direct effect is acceptable from a moral point of view—the killing of terrorists.
3. The intention of the perpetrator of the act is good; that is, 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 toward 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).

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

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 product of a dual intention is it possible to defend the principle of double effect. In other words, on the one hand there must be an intention to achieve only the "good," and on the other hand if the person performing the act is aware of the bad outcome entailed by his act, he must limit it as much as possible.³⁴

I agree that 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: a person is aware of the bad of his actions and therefore he must limit it as much as possible. This approach is also compatible with the law of war. We have seen that it is a duty to give the civilian population an effective advance

warning before taking military actions that may affect it. 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 necessary to warn the civilians before attack and thereby enable them to take precautionary measures. The state is 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. 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 doctrine), and the harm does not ensue from disregard for the right of the innocent to live (so that this principle does not contradict the Kantian doctrine). It is rather a by-product under which, by virtue of the recognition of the innocents' right to life, the state acts to limit harm to them to the greatest extent possible. It is harm from which the sense of moral guilt can be removed.

Notwithstanding that deontological-Kantian doctrines will find it difficult to justify the killing of the innocent, there are those who believe it possible to interpret Kant's theory as giving central importance not to the outcome of the act but rather to the purpose behind it, a purpose that is compatible with the Kantian categorical imperative: "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) having the proper intention for action, namely, respect for the categorical imperative; and 2) conscientiously making serious efforts to realize this intention through action."³⁵

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 the action; however, Kant's theory 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 acted accordingly, and in addition it embodies respect for the rational person. The right to self-defense is an inherent right that is universally recognized, and certainly every rational person would act in accordance with it in order to defend himself against those 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, writes Brian Orend, "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 credibly threatened to seriously injure its body politic."³⁶ 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 in order to save the life of that person or anyone else. At the same time, 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 in order to save his own life, no punishment should be imposed on the perpetrator of the harm.³⁷

Since history has shown that there is no war in which innocent civilians are not injured, and Kant was certainly aware of this, two points may explain why it is nonetheless possible to fight a just war according to Kant:

1. As Orend puts it, "[W]hile 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."³⁸
2. Kant would have supported the doctrine of double effect. In other words, a state is entitled to go to war and even to make use of measures that may injure innocent civilians only if the war and the measures used are for a just purpose and if the injury to the civilians is not a means to that purpose. In such circumstances, the blame for the injury to the civilians is placed on the shoulders of those who have breached the rights of the state and who by their acts have caused the injured state to implement its right and duty to defend itself against them.³⁹

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

DILEMMA III

Unlike the two dilemmas discussed above, there are incidents in which innocent civilians are taken hostage by terrorists. The dilemma arising

here is whether to meet the demands of the terrorists—for example, to release imprisoned terrorists—or to refuse to surrender to them in order not to encourage future kidnappings, and instead deploy a military force to rescue the hostages. The outcome cannot be certain in either case. If the state concedes to the terrorists' demands, there is no guarantee that they will not harm the hostages nonetheless. On the other hand, deploying a military force against the terrorists entails a grave risk to the lives of the soldiers involved, as well to the lives of the civilians themselves, whom the terrorists would not hesitate to kill once they understood that the state had chosen not to meet their demands.

I have 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 in order to save human life. "Within the framework of the fair arrangements of a democratic state there is moral justification for military operations that entail risk and for the deployment of soldiers in circumstances in which there is a risk, where the risk the soldier takes upon himself and the risk he causes his soldiers to take upon themselves are necessary in the circumstances."⁴⁰ In a case that involves saving citizens from the hands of the terrorist enemy, the two situations merge. It is true that a state succumbing to the demands of terrorists instead of carrying out military operations to vanquish them by force does so after concluding that this is the best possible way of protecting the lives of the civilians held by them. Nonetheless, the choice to meet demands directed solely at strengthening the terrorist organization in order to enable it to continue to attack the state's citizens in the future sends a signal to all other terrorist organizations that they can make gains by engaging in similar operations. In effect, the result is that the state compromises the safety of all its citizens. Accordingly, it would seem that, in most cases, the consequential doctrine as well as the principle of double effect would lead us to conclude that the proper course of action is to reject the terrorists' demands and engage in military action to defeat them. The International Convention against the Taking of Hostages also imposes an express obligation on a signatory state to 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."⁴¹

At the same time, one cannot deny the possibility of exceptional circumstances that would dictate a different solution. An example is the murderous attack that took place in the Israeli town of Ma'alot in May 1974, the shocking results of which earned it the name of the "Ma'alot schoolhouse massacre." A terrorist unit made up of three members of

the Democratic Front for the Liberation of Palestine, headed by Naif Hawatmeh, succeeded in infiltrating Israel from Lebanon and reached the area of western Galilee. On May 15 the terrorists entered a home in Ma'alot, murdered a couple and their son, and injured their daughter. Afterward they moved toward the school, Nativ Meir, where there were a group of children and their teachers, who had been touring the area. The terrorists took the group hostage, threatening to kill them within a few hours unless Israel freed imprisoned members of their organization. Israel decided to conduct negotiations with the kidnappers, but when the latter refused a request to extend the deadline, the Israeli authorities decided to break into the building and take them by force. All the members of the terrorist unit were killed in the operation, but before dying they managed to set off explosions and shoot the hostages, causing the death of more than twenty schoolchildren and injuring many others.

In the beginning of the crisis, the supreme need to ensure the safety of the kidnappees, most of whom were children, combined with the conclusion that a military operation would create a real danger to the lives of the kidnappees and the lives of the military rescue forces, led the State of Israel to acknowledge its moral and legal obligation to negotiate with the terrorists, notwithstanding the shortcomings of this course of action. However, as the deadline neared without any indication that the kidnappers would fulfill their side of the bargain, Israel decided to exercise military force, despite the concomitant dangers. The result was disastrous, and many of the children paid with their lives. What would have happened to them had Israel submitted to the demands of the kidnappers? We will never know, since the uncertainty of "what might have been" is inherent to every dilemma. But in the light of what we know, the decisions reached by Israel—to initially try the path of negotiations and thereafter to use force—were correct under the special circumstances of this incident.

There is no doubt that ideals and fundamental moral principles clash with the need to fight effectively against an enemy eager to kill innocent citizens and willing to endanger the lives of its own innocent compatriots "on whose behalf" it has taken to arms. I have sought to show that this clash does not make the commitment to norms and moral values impossible or unreal. The democratic state's commitment to human life—any human life—is profound and entrenched, and therefore the state is obliged to ensure that its acts are the outcome of a proper balance between the moral obligations derived from this value, as expressed in the special circumstances of every case.

Conclusion

In a world where international terrorism aspires to destroy the countries of the free world by mass murder, democratic states have been forced to turn to military measures to combat terror. The immunity of civilians from harm, and the moral dilemmas this principle gives rise to, is a matter for discussion by those who abide by moral principles; terrorists themselves do not grant any immunity whatsoever but are prepared to harm or kill anyone in order to advance their national or fundamental goals.

The attempts to justify terrorism by presenting it as the weapon of the weak fighting for their freedom, who make use of it not out of choice but as the only weapon available to them, cannot stand up against the phenomenon of modern terrorism. The terrorist attacks the entity which he perceives as his enemy, not because he does not possess legitimate alternative means for promoting his goals, but because he perceives the terrorist mode of action as the most effective to advance his radical ideological vision.

The war being waged by the countries of the free world against world terrorism must be based on a coherent morality in terms of which nothing can justify terrorism. Terrorism is the deliberate harming of the innocent and is always a crime. Accordingly, we must recognize the inherent moral and legal duty of democratic liberal states to fight against the terror dispatched against them. In this war they should do everything possible to adhere to moral principles, at whose core lies respect for human life. Retreating from these principles without the legal and moral justifications that were presented in this chapter 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 attached to such an action. Accordingly, in unpreventable cases where we have caused harm to innocent civilians, we must admit that we have so acted and investigate whether such harm accorded 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.

In times of war, there is always a danger that "the moral resources of those fighting may be eroded and at times overwhelmed."⁴² In war against terrorism, since terrorists do not see themselves as subject to any moral or legal restraints, the democratic states must take special care not to be caught in a moral slide, and to keep in mind at all times that their

moral backbone is the recognition of the values of human life and human dignity. In the eyes of democracy, man is the object. In the eyes of terrorists, man is merely 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. According to the Israeli High Court of Justice:

What distinguishes war conducted by a state from war conducted by its enemies—one fights in accordance with the law, and the other fights in contravention of the law. The moral strength and substantive justification for the authorities' war depend completely on compliance with the laws of the state: in waiving this strength and this justification for its war, the authorities serve the purposes of the enemy. The moral weapon is no less important than any other weapon, and perhaps even surpasses it—and there is no more effective moral weapon than the rule of law.⁴³