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Collateral Immunity in War and Terrorism

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The world will not help us; we must help ourselves. We must kill as many of the Hamas and Islamic Jihad leaders as possible, as quickly possible, while minimizing collateral damage, but not letting that damage stop us.

Jerusalem Post, 11 September 2003

I recognized beforehand that someone might be ... bringing their kid to work ... However, if I had known there was an entire day-centre, it might have given me pause to switch targets. That's a large amount of collateral damage.

Timothy McVeigh

The phrase 'collateral damage' is one of those euphemistic phrases that help to sanitize the horrible reality of war and other employments of political violence. It has taken its place along with 'surgical strike', 'revisiting the area' (i.e., renewed bombing), and 'neutralizing assets' as part of the linguistic camouflage that contemporary war-fighters use to disguise the human and moral costs of what they do. Perhaps the most astonishing military euphemism is that recently coined to describe a bomb that missed its ostensible target and hit a residential area: 'seduction off the target'!¹

¹ This occurred in a report by John Davison, published in the British newspaper *The Independent*, on 10 April 1999. Davison was reporting a NATO admission (correcting an earlier denial) that their bombing in the Kosovo capital, Priština, had killed civilians and badly damaged homes in the context of the NATO bombing of Serbia. The admission was made by Air Commodore David Wilby, who said that the attack was aimed at the main telephone exchange in Priština, which he claimed to be a legitimate target because it was being used for communications between Serbian forces in Kosovo and

This delightful touch not only helps the speaker disclaim responsibility, but manages to shift the blame on to the victims who have somehow managed to 'seduce' the bomb into killing them.

This extreme case illustrates something that is nonetheless present less idiotically in other military euphemisms. So it is that many uses of the term 'collateral damage' suggest both an excuse and a belittling. The excuse: these deaths and maimings are not really what we want to happen. The belittling: these sufferings and killings are a very small part of a big picture. The *Jerusalem Post* editorial that serves as the first epigraph to this chapter appeals to both with its talk of minimizing the damage and its resolute plea for desperate measures of self-help in an emergency. In what follows I want to examine the legitimacy of the excuse and the significance of the belittling.

Targets and Terrorism

The excuse is essentially connected with the idea that there are legitimate and illegitimate targets in war or in other instances of political violence, and, in particular, that non-combatants (or 'innocents' in a slightly technical sense of the term) have some form of immunity from direct attack. This is a key element in traditional just war theory, and has become increasingly embodied in international law. It is an important ingredient in the popular understanding of terrorism and the moral condemnation of it that usually follows. Indeed, the idea of attacking the innocent has been crucial to various definitions of terrorism in the scholarly literature, including my own writings. I have argued for what I call a tactical definition of terrorism, as opposed to a political status definition, and in consequence have viewed terrorism as a tactic that can be used by governments and their agencies as well as by non-government groups. This thus provides an important link between terrorism and inter-state or revolutionary war, even if terrorism doesn't always take place in the context of all-out conventional warfare. My definition is 'the organized use of violence to attack non-combatants

Belgrade. The full quote from Wilby is: 'One bomb appeared to be seduced off the target at the final moment. Close inspection of imagery indicates that it landed some 200 to 300 metres away in what seems to be a small residential area' (*The Independent*, 10 April 1999, 2).

(“innocents” in a special sense) for political purposes’. This is a pared-down version of a more complex account that addresses such things as the inclusion in the definition of the threat of such violence and of the property of non-combatants. There is the further question of the precise intermediate purposes for which the violence is deployed and the place in the definition of such purposes. My preference is to exclude any reference to such purposes, even the very plausible purpose of inducing fear, since I would rather leave the determination of these matters to empirical investigation. If it were discovered that the agents of attacks upon non-combatants were interested in gaining their ultimate political ends by inspiring anger rather than fear (in order, for example, to provoke over-reactions that would gain their group further supporters), then I doubt that we would want to refuse their deeds the title ‘terrorism’ simply because they did not aim at producing fear. But for our present purposes this definitional debate does not matter greatly. Somewhat broader tactical definitions will still link terrorism to the just war principle of discrimination that disallows attacks upon non-combatants as immoral. It is perhaps worth repeating what I have said in a number of places: namely, that my account does not make terrorism immoral by definition. You have to take the further step of accepting the just war principle of discrimination (in particular, the immunity of non-combatants) to reach the moral conclusion. There is also the further issue of whether that principle should be treated as exceptionless. Nonetheless, given the widespread acceptance of the discrimination principle (at least notionally), the tactical definition helps explain why there is such widespread condemnation of terrorism—at least, the terrorism of sub-state agents. I have argued elsewhere that the tactical definition has two other consequences that are not readily accepted. The first is that states can engage in terrorism both against each other and against sub-state groups or individuals, and the second is that not all resorts to violence by sub-state agents need be terrorist.²

A final cautionary point. I do not use the terms ‘combatant’ and ‘non-combatant’ as equivalent to ‘soldier’ (or ‘member of the armed forces’) and ‘civilian’. This can be a source of considerable confusion. Jeff McMahan, for instance, has cogently criticized the idea that non-combatants, understood

as civilians, are immune from direct attack, and takes himself to be criticizing the ‘traditional’ just war theory.³ It is perhaps debatable whether the tradition is as unambiguous on this as McMahan believes, but in any case his argument mostly proceeds by showing that there are civilians who are as responsible, or more responsible, for the wrongdoing that legitimates violent response as the front line soldiers, many of whom may have been coerced to fight or be non-culpably ignorant of the injustice of their cause. I can accept this conclusion with equanimity, since my use of ‘non-combatant’ does not produce the thesis that McMahan criticizes. What is true, as he admits, is that, pragmatically, there will often be great difficulties in determining which enemy civilians are (in my sense) combatants. Moreover, there may be considerable utility in adhering to a ban on attacking civilians when that has gained a wide degree of acceptance and leads to some containment of the worst effects of war. Nonetheless, especially in the context of a discussion of terrorism, we need to be aware that there can be perpetrators of great wrongs who are not in uniform or bearing arms themselves, though they use and provide direct, significant support to the enterprise of those who do. Insurgents who attack and kill ‘civilian contractors’ whose contracting promotes the evil that the insurgency is aimed at preventing are not thereby terrorists. They may, of course, be wrongdoers, nevertheless, if the cause they pursue is unjust and the evil they fight against is non-existent or insufficient to justify resort to arms.

Some acknowledgement of the immunity is clearly present in both of the comments that serve as epigraphs to this chapter. There are of course those who reject the significance of the distinction between combatants and non-combatants and who argue that, once you decide to employ political violence in what you see as a just cause, you do what you need to do in order to win. This is essentially a cost-benefit, utilitarian or consequentialist approach (though a particularly narrow one, since the good outcomes factored in to the calculations tend to favour only the benefits to one side in the conflict and also tend to have a relatively short-term focus).⁴ Thus

³ Jeff McMahan, ‘The Ethics of Killing in War’, *Ethics*, 114 (2003), 693–733.

⁴ Consequentialism is a very elastic doctrine, and there are forms of it that can attribute moral significance to a combatant/non-combatant distinction. It can, for instance, be argued that granting non-combatant immunity makes for better outcomes in war (less suffering all round, etc.), or that such respect for the innocent is part of what the best moral code for human beings would be (in terms of

² For further elaboration of my approach to the definitional issues, see my ‘Terrorism and Innocence’, *Journal of Ethics*, 8 (2004), 37–58, and ‘Defining Terrorism’, in Igor Primoratz (ed.), *Terrorism: The Philosophical Issues* (Basingstoke and New York: Palgrave Macmillan, 2004).

a great deal of the Allied city bombing in World War II was justified, at least in private counsels and sometimes in the public arena, as a deliberate attack upon civilian populations with the purpose of destroying popular and political morale so that the war would end more quickly in an Allied victory. As Hendrik Hertzberg put it recently, 'the damage inflicted upon London and Dresden, Rotterdam and Tokyo, Leningrad and Hiroshima was anything but collateral. It was the whole point.'⁵

So some of the argument in defence of the bombing simply ignored military tradition and just war theory, in a single-minded pursuit of victory. It was a simplistic utilitarian argument to the effect that the costs were worth it for the benefit of victory. This thinking has hardly gone away. It was chillingly echoed by the then US Ambassador to the UN, Madeleine Albright, when she was interviewed by the US television programme, *Sixty Minutes*, on 12 May 1996, about the effects of the US-inspired UN sanctions in Iraq. The programme segment, called 'Punishing Saddam', covered a visit to Iraq by presenter Leslie Stahl and her crew. It showed dying children in damaged hospitals, open sewage, and ambulance graveyards, and featured interviews with doctors and international aid workers, as well as Madeleine Albright. The video of the segment has been shown repeatedly throughout the world, though seldom in the USA. Here is Albright's key comment:

Stahl (brow deeply furrowed): We have heard that half a million children have died. Why, that's more children than died at ... Hiroshima. And, and ... is the price worth it?

Albright (calmly): I think this is a very difficult decision. But the price, we think the price is worth it.

Yet, if the World War II justification for the city bombing was often of this kind, it sometimes paid implicit, if back-handed, tribute to non-combatant immunity by arguing that the civilians attacked were not really innocent. The idea was that modern war had made all civilians combatants, so imposing a sort of 'collective guilt' on all of them. This seems to me deeply misguided. It is sufficiently refuted as a wholesale doctrine by the fact that it counts babies and small children who have the misfortune to be born in enemy territory as combatants. Hence the bombing of a day

outcomes of adherence). Consequentialists might, I suppose, also find some use in this connection for the doctrine of double effect (discussed below), but typically they reject it.

⁵ Hendrik Hertzberg, 'Collateral Damage (Iraq)', *New Yorker*, 7 April 2003, 33.

care centre has no different moral status from the bombing of an attacking army. But I shall say no more about this position, though I have discussed it elsewhere, since my interest is in those who think that there *are* enemy non-combatants whose immunity should be respected in some way.⁶ The primary interest of the talk of collateral damage arises only for those who accept the significance of the combatant/non-combatant distinction and the immunity it brings.

Two Types of Collateral Damage

The idea of collateral damage encompasses two quite different things. One is that of damage to property and life that is caused accidentally. The other is that of destruction or injury or death that is not accidental, but is nonetheless unintended. This latter category has puzzled many people, including philosophers, because it requires the idea that an agent can know that his action will have a particular consequence, but can still go ahead with the action not intending that consequence. (The verb 'know' should be interpreted flexibly here to include the strong, reasonably grounded belief that the consequence will follow.) Some philosophers, such as Jeremy Bentham, and some legal systems hold that the agent must be held to intend the known consequences of his or her action. Even here, it is noteworthy that Bentham acknowledges some need for a distinction by talking of 'oblique intention', whereas those he opposes want to talk of 'foreseen but unintended consequences'.⁷ There is an extensive literature on this topic that we cannot explore here, but it is clearly connected with such issues as the validity of the doctrine of 'double effect', the scope and significance of 'negative responsibility', and the relative importance of the character of an act and an agent compared to good or bad outcomes. In certain cases, at least, it seems that there is both point and moral relevance to the idea that certain outcomes can be foreseen but not intended. I may know with practical certainty that if I refuse a gangster's invitation to murder a colleague, the gangster will murder two other people who stand

⁶ For the discussion and defence of the importance of the non-combatant/combatant distinction, see my 'The Morality of Terrorism', *Philosophy*, 60 (1985), 47-70, and 'Terrorism and Innocence'.

⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (London and New York: Methuen, 1982), ch. 8, §6.

in his way; but it would surely be very strange to describe me as intending, by my refusal, the deaths of the other two. Here there is the will of another involved in the outcome, and perhaps that is enough to vitiate the idea that it is even 'a consequence' of my action of refusal. But this is at least disputable, and, in any case, there are other examples that do not involve the mediation of another's will. For example, suppose I am walking along a footpath and am aware of another pedestrian walking behind me. A runaway truck comes into view and is careering at me with the driver dead in the cabin. In the instant I have left, I leap aside in the full knowledge that the person behind me will be hit and probably killed. Surely it is clear that I did not intend by my self-preserving action to inflict injury and death on that person, even though I could reasonably foresee that outcome?⁸ Or consider my plight as a surgeon in a war zone who must choose who amongst the wounded to aid with scarce life-saving drugs. In choosing to save Brown and Smith with the foreseeable consequence that Black, Jones, and Grey will die, it surely makes sense to describe me as intending to save Brown and Smith with the foreseen but unintended consequence that the latter three die, rather than as intending to save Brown and Smith but intending to kill Black, Jones, and Grey.

For my purposes, we need not assume that this defence of the category is unequivocally successful. The point of the discussion above is principally to explain the initial appeal of the category and thereby to make comparative sense of the way in which it might be explicitly employed, or implicitly relied upon, in discussions of the morality of 'collateral damage'. As we shall see, there are ways in which this initial plausibility can be stretched and even eroded in those discussions.

Let us call the form of collateral damage that requires the idea of foreseen but unintended damage 'incidental damage', to contrast with the other form of 'accidental damage'. First let us consider the moral problems associated with accidental damage. Demonstrating that some effect of one's actions is 'accidental' does not automatically excuse or eliminate the need to justify it. It shows that the effect was not intended: it was not aimed at under any description available to the agent at the time. As far as your

⁸ If it is urged as a defect in the example that the person behind will be killed whether I jump aside or not, we could amend the example so that my staying put will save the other's life. Instead of a truck, it is a maniac with a spear whose spear throw will kill only me if I don't move and only the other person if I do.

intentional control is concerned, the effect was the product of chance. As J. L. Austin pointed out long ago, there is a distinction between 'mistake' and 'accident'. Like all distinctions, this has blurred edges, and Austin doesn't bother to give an account of it, but it is, roughly speaking, the distinction between going astray because of something wrong with one's thought processes or perceptions and getting it wrong because of some mishap in the 'outside world'.⁹ But, for ease of exposition, I will collapse this distinction and treat mistaken damage under the same heading as genuinely accidental damage. In both cases, for different sorts of reasons, the agent does not know that the damaging effect will occur, at least under the relevant description. If the American authorities are to be believed, the bombing of the Chinese Embassy in Belgrade during the NATO attack upon Serbia was a mistake—they meant to hit that building, but didn't mean to hit the Chinese Embassy because they didn't think it was the Chinese Embassy. On my last trip to China, I could find no Chinese who believed the American claim of mistake, and my European colleagues sneered at my naiveté in accepting it. (By contrast, I was surprised that they were all convinced that the CIA would have reliable maps of Belgrade.) But, if the mistake story were true, it would provide the beginnings of an acceptable excuse for the deaths and damage that ensued. Similarly, with the bomb that went off target in Kosovo. Unless the residents of the Priština suburb exercised some magical powers to bring about their own destruction ('seduced off target'), then the NATO explanation aims to provide the excuse of accidental deaths and damage. In the embassy case the question that needs to be answered to render the attackers blameless is whether the mistake was the result of negligence; in the Kosovo case, whether the accident was due to recklessness. Although a primary interest in moral assessment is a concern for intentional actions, that concern does not exhaust the scope of moral assessment. People who do not intend the deaths of others but who do not take reasonable steps to guard against accident or mistake are morally culpable, even if the culpability will often be of a different order to that borne by those who set out to kill and maim. Incidental deaths, injuries, and damage are to be avoided if they can be. If the American military could have known, by taking reasonable steps

⁹ See J. L. Austin, 'A Plea for Excuses', in *Philosophical Papers* (Oxford: Oxford University Press, 1961), 133 n. 1.

to discover it, that the building they planned to attack was the Chinese Embassy, then they are guilty of the deaths and damage. If the NATO bomber command, or some relevant figures in the chain of command, could have known that they were using defective weapons, then the same applies to them. In both cases, if they couldn't have known at the time, then the episodes may provide grounds for more care in the future about targeting and weapon reliability.

The general point behind the morality of accidental damage is that actions that accidentally or mistakenly kill people whom you are not entitled to kill have done a great harm to those people (and a real but lesser wrong when it is not a matter of killing but of damaging their property). This harm becomes a wrong when the accident or mistake could reasonably have been avoided. Hence we have a place for the moral and legal categories of negligence, recklessness, and due care. It is incumbent upon people not to put themselves in positions such that accident and mistake are liable to eventuate in the death or injury of others or damage to their property. This point can be obscured, especially in war, by the otherwise perfectly legitimate concentration upon preventing intentional killing of the innocent. Murder is a dreadful thing, but we cannot congratulate ourselves on avoiding it if we are casual about manslaughter and negligent homicide.

Of course, it would be too much to insist that war may proceed only when all possibilities of accident or mistake have been eliminated. Any large-scale undertaking will involve unavoidable accidents and mistakes, or accidents and mistakes that could have been avoided only at too great a cost to the enterprise. If we assume that there are some just wars, then some such accidents or mistakes will be a regrettable accompaniment to their successful prosecution. Even here, however, the just war requirement of proportionality may be in play. If in the course of a war it becomes clear that the weapon systems are heavily prone to accident or mistake, then the verdict may have to be that the harm done may well outweigh the good that the war is expected to achieve. But at this point the awareness so created moves us into the category of incidental, rather than accidental, damage.

I should say that the points made above do not incline me to include the morally reprehensible infliction of collateral damage (accidental or incidental) within the definition of terrorism. Here I depart from my friend

and colleague, David Rodin. Rodin has argued for a sense of the term 'terrorism' that includes such infliction within its scope.¹⁰ Our difference is to some degree simply terminological, inasmuch as we are agreed on the moral case against such damage. Indeed, I was at one stage inclined to take the same path as Rodin, at least to the extent of calling such infliction 'neo-terrorism'. It is tempting to venture down that path just because the negligent and reckless infliction of harm on the innocent displays a similar spirit to that involved in intentional infliction. Similar, yes, but not the same. The reckless and negligent do not have *enough* respect for the safety of non-combatants, but they are not positively aiming at their destruction. It seems to me important to mark this difference, and the term 'terrorism' is at hand to do it, with sufficient backing in the popular understanding of the word. This is not to deny that in some circumstances the reckless and negligent may present a greater threat to the well-being of non-combatants, and hence be responsible for a greater crime in those circumstances. I don't think that these remarks are enough to settle the matter of appropriate language, though they have, I hope, some persuasive force. In general, I tend to favour narrower definitions of contentious political terms because I think that what wide definitions gain by emphasizing similarities between what seem initially diverse things, they lose by obscuring important differences. The very breadth of such definitions also tends to lessen the utility of the relevant concepts in political debate. Elsewhere, I have argued this case in connection with wide definitions of 'violence', such as that involved in the idea of 'structural violence', and I think something similar can be argued here.¹¹

Incidental Damage and 'Double Effect'

This brings us to the category of incidental damage. This is where agents proceed with an attack, intending to damage a legitimate target but reasonably believing that their attack will kill innocent bystanders or

¹⁰ David Rodin, 'Terrorism without Intention', *Ethics*, 114 (2004). Rodin does not distinguish between accidental and incidental collateral damage, and seems to use the terms 'reckless' and 'negligent' in ways that could apply in both categories. I have been using the terms principally to apply to the accidental, but incidental damage that violates the restrictions of the doctrine of double effect, especially proportionality, might well qualify as reckless.

¹¹ C. A. J. Coady, 'The Idea of Violence', *Journal of Applied Philosophy*, 3 (1986), 3-19.

neighbours (and/or damage their property). Here the attackers tend to justify their bringing about of deaths and damage to the bystanders by resort to the doctrine of double effect (DDE) or some related maxim. The DDE holds that the foreseen but unintended consequences of an action are morally acceptable when certain conditions are fulfilled. It does not hold that incidental damage is acceptable merely because it is incidental to intent. The usual conditions are:

1. The action at issue must not itself be morally bad; nor should any intended effect of it be morally bad.
2. The anticipated bad effect must be genuinely unintended, and not merely secondarily intended (e.g., intended as a means to a further end).
3. The harm involved in the unintended outcome is not disproportionate to the benefit aimed at in the act.¹²

There is another condition (or, as I would prefer, pre-condition) that I will discuss later. For now I want to say a little about these three conditions. The first simply specifies that the moral utility of the DDE arises only when what is intended by the agent (the action that has the unintended but foreseen bad consequence) is a benefit that is either morally neutral or morally good. The second condition is aimed at precluding what Elizabeth Anscombe once called 'double think about double effect'.¹³ As we saw earlier, people faced with the difficult choices about what tactics to use in their war efforts will often adopt a simple utilitarian or consequentialist stance about the means they will employ. But where they don't adopt such a stance, there is a strong temptation to stretch the DDE in order to gain maximum tactical advantage in the deployment of violence. So, it may be argued that the real intention in attacking a day care centre is to win the war, not to kill the children and their carers. Admittedly, this is an extreme in sophistry, since it blatantly ignores the fact that having an ultimate purpose for some action does not exclude the having of an intermediate purpose that requires fulfilment in order to achieve the ultimate objective. Generally speaking, someone who intends an end also intends the means

¹² These conditions are expressed differently by different authors. This list is my distillation of the sense of those treatments I have read.

¹³ G. E. M. Anscombe, 'War and Murder', in Richard A. Wasserstrom (ed.), *War and Morality* (Belmont, Calif.: Wadsworth Publishing Co., 1970), 50.

chosen to that end. But there are philosophical manoeuvres that seek to complicate this.

Consider one propounded by David Lewis in connection with arguments about nuclear deterrence. A political leader, call her Jones, who has suffered from a nuclear attack on one of her cities, considers launching a nuclear attack on an enemy city as a response, in order to dissuade the enemy commander-in-chief from further attacks. Lewis argues that she need not intend the massive civilian deaths and casualties, that 'result' from her action. How so? Well, according to Lewis, Jones does not intend the deaths and casualties, since she needs only to affect the reasoning of the enemy commander and so needs only the flight path of the missile and the flash of light as the city explodes to figure as premisses in the reasoning that the commander will engage in. The commander will reason from the detected flight and subsequent fireball to the conclusion that the city has been destroyed and be persuaded to desist from further attacks. He does not need the later, more direct information about deaths and devastation to come to his conclusion. So Jones intends the flight and flash, but the massacre is an unintended though foreseen consequence.

Quite apart from the fact that such 'persuasion' has a somewhat tenuous hold on probability of success, this argument of Lewis's shows the way in which double-think about double effect can lead even so humane and intelligent a man as David Lewis into what is surely sophistry. Of course, Lewis himself does not endorse the DDE, for he has a largely consequentialist approach to the problem of collateral damage. He is merely arguing that an attack to obliterate a city, if that is the only way to prevent massive nuclear devastation, does in fact comply with the DDE. (Lewis in fact opposes such attacks because they are more disproportionate than his preferred option of finite counterforce.) To this extent, his argument is a sort of *reductio*: if the DDE will let you get away with this, we might as well forget about it.¹⁴ But the problem surely resides in Lewis's treatment of Jones's intention, rather than in the defects of the DDE. A philosophical account of intention is fraught with complexities; but whatever account we give, it must respect plain thinking about what someone does and what they mean to do. And the idea that Jones doesn't intend to devastate

¹⁴ See David Lewis, 'Finite Counterforce', in Henry Shue (ed.), *Nuclear Deterrence and Moral Restraint* (Cambridge: Cambridge University Press, 1989), 112-13 n. 45.

the city when she carefully plans the missile's trajectory and explosive capacity to that very end, and wants that destruction and death to figure in the enemy commander's reasoning and response, is just dotty. It is simply irrelevant to this attribution that the enemy commander can reason from certain features of the action other than direct observation of the devastation to the fact of the devastation. Perhaps Lewis thinks that the fact that Jones might be happy were a 'miracle' to occur, such that the flight and flash occurred without the devastation, but the enemy commander was nonetheless persuaded, shows that Jones does not intend the devastation. But again this is simply confused. There are many things that we intend as means to some good end that we don't feel pleased about, but we intend them nonetheless. The 'miracle' device could be cheerfully and absurdly employed in every case to show that we don't intend them. In the case of the city's destruction, Jones can infer that the enemy commander will come to his conclusions on the basis of reports (or direct observation) of flight and flash; but she needs the deaths as well, since a later report that the flight and the flash were, say, cunning visual deceptions will mean that the commander's reasoning will not go through.

Further Complexities in the DDE

The DDE requires that we think in common-sense ways about what people intend and foresee. This means that there are various disentanglements of parts of action that we cannot really allow. Consider someone who has a great hatred of flies. To his horror, he finds a fly in his apartment, and the only swatting implement to hand is a big, heavy hammer. The fly is very hard to keep up with, but it eventually settles on the bald head of his best friend, where it is clearly visible against the bald surface. If he smashes the hammer down upon the fly and the head it rests on, fully aware that he will thereby kill or severely injure his friend, it would surely be absurd of him to plead that he did not intend his friend's death or injury. The remark 'I only intended to kill the fly; my friend's death was a foreseen but unintended side-effect of my action' just doesn't make sense. (Of course, if it did make sense, it would still be no excuse under the DDE, because of the proportionality requirement, but the more important point is that here we cannot take apart the smashing of the fly and the smashing of the head.)

Grossman gives a good, real-life military example of this double-thinking evasive mind-set. It concerns illegitimate attacks upon combatants rather than non-combatants, but the mode of thinking is similar. He records a conversation he heard amongst US troops who had just completed a training exercise about treatment of prisoners of war. Several of the soldiers held straightforwardly barbaric views, such as that prisoners of war should be marched through an area saturated with persistent nerve gas or just killed outright. Another suggested using them for minefield clearance. The chaplain intervened to cite the Geneva Conventions, and one of the soldiers reported that in training school they had told him that the Geneva Conventions forbade firing white phosphorus at troops, 'so you call it in on their equipment'.¹⁵ Here is convenient double-think with a vengeance. The equipment happens to be attached to the people (or nearby), so attacking it achieves your real objective of attacking them, but you can disavow this with a verbal device.

I am not suggesting that the DDE is immune from defects, merely that these evasive devices will not work. I think, for instance, that the notion of 'means' that the doctrine employs needs more attention, and that the DDE is much more plausible where the foreseen effect is risk to non-combatants rather than certain death; but this is not the place to engage further in the very extensive debate about the doctrine.¹⁶ It is worth remarking, however, that unless the DDE, or some other principle that serves a similar purpose, is allowed, then the possibility of waging a modern war that respects the immunity of non-combatants is vastly reduced. This is because there will be many situations in which non-combatant deaths and injuries can be foreseen as a result of attacking important military objectives, and without something like the DDE these attacks will be ruled out by the immunity of non-combatants. This consequence has been taken by at least one critic as a powerful argument for pacifism.¹⁷

I have so far said nothing directly to elucidate the third condition of the DDE to do with proportionality, though its importance will

¹⁵ Lieutenant-Colonel Dave Grossman, *On Killing: The Psychological Costs of Learning to Kill in War and Society* (Boston: Little, Brown and Co., 1995), 203.

¹⁶ See P. A. Woodward (ed.), *The Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle* (Notre Dame, Ind.: University of Notre Dame Press, 2001), and Alison McIntyre, 'Doing Away with Double Effect', *Ethics*, 111 (2001), 219-55.

¹⁷ See Robert L. Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), esp. 193-203.

have emerged in the above discussion. The notion of proportionality is employed extensively in just war theory, both in the context of the resort to war in the first place and in the context of the legitimacy of incidental collateral damage and the DDE. Yet its employment is often a curious combination of the natural and the theoretically opaque. It seems natural in that there is obvious intuitive sense to the requirement that we should rule out the use of violence that is disproportionate to the ends that supposedly legitimate it. Yet what is it to be disproportionate or proportionate? Certainly, there are few developed accounts of what such proportionality amounts to, and it is impossible to settle the problems that surround this notion here; but some brief comment on the complexities is necessary.¹⁸

It is tempting to think that there is a simple utilitarian or consequentialist construal of the concept available: the violence is proportional if it brings about more overall benefits than harms, disproportionate if not. But this seems false to both the just war tradition and to our intuitions about particular cases. For any but the most dedicated utilitarian, it cannot be that the concept invokes the quest for answers to the question of whether this action here will more likely bring about the optimal state of the world, all things considered, than any of the available alternatives. But, if not, what can it be doing? We cannot solve this vexed question here, but some pointers may be developed. Any answer must lie in the direction of what might be called middle-range assessment. What we need to ask is broader than the question 'Will this offensive drive the enemy back and allow us to occupy the ground he now occupies?' But it is also narrower than the question: 'Will this offensive make the world safe for democracy?' Of course, the first question is absurdly local, and should be inadequate by strategic military canons as much as by moral standards; and the second is ridiculously lofty. Nonetheless, both have played their parts in disproportionate military campaigns, ranging from some of the battles of World War I through to the follies of Vietnam. The idea of proportionality calls upon us to assess the proclaimed necessities of military means to military ends against the tragic human certainties of death and injury to combatants and

¹⁸ For the best recent discussion of proportionality as a tool of just war analysis, see Thomas Hurka, 'Proportionality and the Morality of War', *Philosophy and Public Affairs*, 33 (2005), 34–66. Hurka's subtle analysis still leaves, as he acknowledges, many questions unanswered.

non-combatants (on both sides) and the moral and political purposes of the conflict.

Assuming, for instance, that the First Gulf War was a morally legitimate undertaking for the purpose of decisively removing an aggressive force from Kuwait—about which assumption doubts may well be raised—we may nonetheless judge that the killing of so many routed Iraqi soldiers, as they fled the battlefield weaponless, was disproportionate.¹⁹ To claim this is to judge those deaths to have been recognizably excessive for achieving that aim, but it is not of course thereby to assert that they would have been unnecessary for some other aim, such as the toppling of Saddam Hussein's government and the establishment of an independent Kurdish state. The problem with these further calculations is, first, that the war was not publicly justified and endorsed on such grounds in the first place, and very likely could not have been so justified morally, given the sort of valuations thereby involved; and second, that the prospects for establishing such outcomes by such methods (even were the outcomes, in all their complexity, morally desirable) are far too remote and uncertain to be worth the deaths of so many people. Nor is this simply a matter of epistemic uncertainty, important as that is. There are some good outcomes that may be highly probable but seem nonetheless irrelevant to the judgement about appropriate violence. In the context of the DDE, for instance, it may be that our killing of a large number of non-combatants in the course of bombing a military target is likely to be perceived as an atrocity committed by the enemy, and this could result in recruiting a powerful ally to our good cause. The many non-combatant deaths may be unintentional, but I would argue that this prospective good outcome, no matter how important, cannot make them proportional. Similarly, for the role of proportionality in the *jus ad bellum*: the fact that a war against some minor offender (over, say, a border incursion) would increase international economic activity in a way that would bring considerable benefits to the world cannot make resort to war proportional.²⁰ It would seem that proportionality cannot be invoked where the beneficial outcomes are merely possible or speculative (as against the certain or highly probable harms foreseen), or where the benefits are too unrelated to the justifying

¹⁹ There is serious room for dispute about the numbers killed in this way, or indeed more generally in the war itself.

²⁰ This point is made by Hurka, 'Proportionality'.

conditions for the resort to war in the first place. Clearly more needs to be said about proportionality; but whatever is said, it seems certain that the determination of what is proportional will leave a great deal to concrete, circumstantial judgement rather than the application of some hard-and-fast rule.²¹

Instead of pursuing the critique of the DDE's viability further, I want to emphasize an aspect of the DDE that is easily overlooked. It is related in spirit to a direct qualification to the usual statements of the DDE that has been suggested by Michael Walzer. I shall look at Walzer shortly, but the aspect I want to stress is more a pre-condition for the application of the DDE. This pre-condition is that where there are other feasible ways of achieving the good end that do not involve the harmful side-effects or involve fewer or less grave such effects, the agent should choose them. And this holds even where the alternatives involve somewhat more costs to the agent. I call this a pre-condition because the spirit of the DDE remains restrictive, even where it has a permissive form. In the case of war, or political violence more generally, the protection of the innocent remains a primary value of the *jus in bello*, and hence dictates that incidental injury or killing of the innocent be entirely avoided where possible. Of course, the 'where possible' needs unpacking in the particular setting; it will include such things as the degree of risk to one's troops and to one's prospects of success, but a serious commitment to the protection of innocent people requires giving their safety a high priority. Michael Walzer treats something like it as part of the condition specifying that the bad effect be not really a means to the intended goal. Walzer's version goes as follows: 'aware of the evil involved, he seeks to minimize it, accepting costs to himself'.²² This is in the same spirit, but it seems to ignore the possibility that means might be available, and should be sought (other things being equal), that avoid the incidental damage altogether. Perhaps Walzer means his talk of 'minimizing' to include the limit of

²¹ There is a further problem with allowing the proportionality test of the DDE to those who are waging an unjust war. It is not at all clear that those whose cause is unjust can invoke the idea that their unintended but foreseen killing is proportional in any sense to their military and political objectives where these are unjust. This point is made by Hurka, 'Proportionality', 45, and a similar line is taken by Jeff McMahan in several places, notably in 'Innocence, Self-defence and Killing in War', *Journal of Political Philosophy*, 2 (1994), 193-221. There are many complexities raised by this point that I cannot address here.

²² Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn. (New York: Basic Books, 2000), 155.

zero evil, or perhaps he thinks the pre-condition too obvious to need attention.

The Moral Background to Restricting Collateral Damage

Certainly the moral point of the DDE should mandate such a pre-condition; but it is nonetheless worth explicit emphasis, since strategic resort to the DDE can obscure its deeper moral significance. The pre-condition is thus important in reinstating the value of avoiding the deaths of innocent people, a value that can be obscured by casual employment of the DDE. It can be obscured because, if the legitimate goal is important enough, the innocent casualties can be too lightly discounted by the idea of necessity or even proportionality. This comes out very clearly in the tone of the first epigraph from the *Jerusalem Post*. There is the breezy reference to minimizing collateral damage, but this is immediately followed by the assertion that such damage must never stand in the way of killing the leaders of Hamas and Islamic Jihad. This looks like trying to have your cake and eat it. It suggests that the talk of minimizing is simply a ritual gesture to morality or world opinion. There is no suggestion that the intentional killing may have to be abandoned altogether if the minimizing is not sufficient. There is no sense that alternative ways of killing the enemy should be sought that might have no incidental damage. Here, the understanding of what the DDE might license is remote from the spirit of such just war theorists as Vitoria, who says: 'It is never lawful to kill innocent people, even accidentally and unintentionally, except when it advances a just war *which cannot be won in any other way*'.²³ As I read Vitoria, he is saying that the killing of the innocent in war can be licit only when it is done either accidentally or unintentionally (i.e., foreseen but not intended); but even then, it is only licit where there is no alternative to it. Thus put, the pre-condition expresses an idea that is somewhat parallel to the last resort condition of the *jus ad bellum*.²⁴ Other ways of

²³ Francesco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge and New York: Cambridge University Press, 1991), 316; my emphasis.

²⁴ I owe the suggestion of this parallel to Igor Primoratz. My thanks to him also for pointing out the reference to Vitoria.

achieving the military objective without the high risk of injury or death to non-combatants should be the first priority. And this applies not merely to the war at large, as the quote from Vitoria might seem to say, but to particular campaigns, battles, etc. within it.

The trouble with the DDE expressed without the pre-condition can be seen if we imagine a scenario in which clearly identified enemy troops (or terrorists) are moving in a crowd of people, a procession perhaps, and they can be shot while in the crowd with the foreseen result that some few of the innocent civilians will be injured or killed. As long as their deaths are unintended and the need to kill the terrorists is grave enough, the DDE (without the pre-condition) will allow the shooting. But suppose we know or have good reason to believe that the terrorists are going to part company with the crowd at the next intersection, where our troops will have a clear shot at them without the risk of any civilian deaths. The troops who ignore this option and shoot into the crowd have done a grave wrong, and the DDE would be defective if it could justify them. And even if the army authorities don't know precisely when else they can get a shot at enemy soldiers or terrorists, surely a genuine respect for non-combatants would counsel the seeking of alternatives to attacking them when they are surrounded by non-combatants and not engaged at that time in armed offensive. The Israeli army was clearly in horrible violation of this counsel when it used a 1 tonne bomb to blow up a block of flats in order to kill a solitary Hamas leader, Sheikh Salah Mustafa Shehada, with the result that fifteen non-combatants, eight of them children (one of whom was two months old), were killed in the bombing. Indeed, not only is this action in probable violation of the pre-condition, but it has distinct similarities to the hammer example used above. Like that example, it is hard to see how the action could be so disentangled as to claim with any plausibility that the bombers intended to kill *only* the Hamas leader; and, even were this plausible, the considerations of proportionality would also very likely defeat the excuse.

Is the pre-condition the same as Walzer's additional sub-condition? Walzer makes the intention that the agent minimize the harm to non-combatants, accepting costs to himself or herself, a part of his third condition of the DDE (in effect, my second condition). But the intention to minimize the evil of non-combatant deaths and injuries is itself a consequence of the pre-condition that requires avoidance, where possible, of even incidental

non-combatant deaths, etc. If we are enjoined to avoid, wherever we can, getting into a situation where we cause collateral damage of the incidental kind, then it seems to follow that when we cannot avoid it, we should take positive steps to minimize the casualties.

There are other ways in which the idea of 'collateral damage' can be abused in either its accidental or incidental forms. Curiously enough, one is by loudly proclaiming a commitment to non-combatant immunity as a way of disguising one's contempt, or marginal respect, for it in practice. This form of insincerity is a particularly common political device as the case of torture also illustrates: those who authorize and instigate forms of torture and extreme interrogation are often loudest in their public denials of complicity. Another abuse is the expansion of the permissible scope of the category of collateral damage by expansion of the scope of legitimate military targets. This is the strategy of targeting 'dual-purpose' facilities, a practice that has become increasingly familiar in recent US military practice, though it has a more ancient lineage. The war against Serbia over Kosovo provides many examples, as also does the recent attack upon Iraq. The case of the Priština telephone exchange, mentioned earlier, provides one such example, since, even if the bomb had not been 'seduced', the destruction of a central telephone exchange is, in the modern age, a massive blow to civilian well-being, given all the services in a contemporary city that depend upon modern communications. There may indeed be many cases in which an institution or facility principally serving non-combatant purposes may also serve some subsidiary military purpose. I do not want to deny that sometimes a grave enough case may exist to treat that subsidiary purpose as sufficient to allow an attack. But the mere existence of a dual purpose is not itself enough to legitimate an attack and treat the damage to non-combatants as permissible 'incidental' injury. Enemy soldiers often use the same water supply as civilians, but this will hardly license the destruction of water supplies and the subsequent deaths from thirst and disease that will ensue. The casual attitude to the destruction of power supplies, oil reserves, bridges, communications networks, and media facilities also needs more careful scrutiny, lest it really display a disregard for the rights and protections that should be accorded non-combatants.

This point is connected with the fact that, whether we are dealing with war or terrorism, much discussion of collateral damage has, understandably,

focused upon the *killing* of non-combatants. But there are many other harms, damages, and sufferings that can be inflicted that do not result in immediate death. The dual-purpose strategy tends to involve viewing the infrastructural features of an enemy population as connected with short-term military gains and short-term civilian discomforts; but the moral gaze needs to be broader than that, because, especially in modern societies, the infrastructures are increasingly crucial to well-being and even sometimes to life itself. Something like this point can be extended to the problems raised by direct or incidental damage to the natural and human environment of the enemy's country. Forests, rivers, architectural and artistic creations, and the like can be viewed both as valuable in themselves or as part of the significant life of the enemy's civilian population, or indeed as part of the broader human heritage (hence the outrage at the Taliban's destruction of ancient statues of another faith).

More broadly, whatever the problems with DDE, there are moral attitudes underlying the different approaches to collateral damage that are reflected in the application of the DDE that are themselves of clear significance in the prosecution of war. These fall into (at least) four camps:

1. Sadistic contempt for non-combatants' lives and well-being, leading to the intentional killing of them.
2. Instrumental disdain for them, leading again to the intentional killing of them.
3. Indifference to their lives and well-being, leading to a casual attitude to collateral damage.
4. Concern for their lives and well-being, leading to attempts to avoid or limit the collateral damage.

However we work out the formula that allows for some foreseen but unintentional killing of non-combatants, it is the moral superiority of (4) over (1), (2), and (3) that gives significance to the attempt. Decisions about proportionality that can justify some collateral damage to non-combatants will, I think, always involve an element of concrete judgement in situations of uncertain outcome and the pursuit of debatable goods. The difficulty in making these decisions, and the costs involved, are reasons for not resorting to war, revolution, or insurgency in the first place. But assuming that wars and other resorts to political violence can sometimes be justified, and that politicians and peoples will continue to make that

judgement, no matter how mistakenly, we need to allow for the feasible prosecution of a just war, or one believed to be just, while giving a moral priority to protecting the lives of non-combatants. Disallowing intentional targeting of them is an important step forward. Producing a frame of mind that will limit collateral damage is a good next step.



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