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475 Riverside Drive · Suite 1274 · New York, New York 10115-1274
(212) 870-2500 · FAX: (212) 870-2202 · aps@psqonline.org · http://www.psqonline.org

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Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East

MICHAEL L. GROSS

The principle of noncombatant immunity is undoubtedly the linchpin of humanitarian law during armed conflict. Recognizing that warfare takes the lives of civilians and other noncombatants, noncombatant immunity limits the harm that noncombatants will inevitably suffer by prohibiting intentional harm in all but perhaps the most extreme cases. At the same time, the rules of modern warfare permit adversaries to unintentionally take a reasonable or proportionate number of civilian lives when militarily necessary. This normative framework, however vague and undefined it may be, forms the basis for assessing the morality of killing civilians during war.

As they attack civilians, belligerents sometimes raise the claim that there are no noncombatants in modern war. It is certainly true that a number of ambiguous actors litter the field in the Mideast. These include reserve soldiers and armed settlers on the Israeli side, and ununiformed militias, "mature" minors, and civilian accessories to the fighting on the Palestinian side. Nevertheless, it is equally clear that many civilians have no role in the fighting. For the purposes of this article, I will limit the discussion to civilians and adopt the definition fixed by the 1949 Geneva Conventions. Civilians are "people who do not bear arms." They are a subset of noncombatants, that is, "persons taking no active part in the hostilities."[1] This definition, however, says nothing about innocence, and civilian leaders may bear far more responsibility for war

[1] Commentary and Article 3, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, accessed at http://www.icrc.org, 14 September 2005.

MICHAEL L. GROSS is senior lecturer in the Division of International Relations, The University of Haifa, Israel. He is the author of *Ethics and Activism: The Theory and Practice of Political Morality* (Cambridge, 1997) and the forthcoming, *Bioethics and Armed Conflict: Moral Dilemmas of Medicine and War* (MIT, 2006).

than do simple soldiers in the field. Here, however, I am concerned with the status of what may be called "ordinary" civilians, and although it is true that they may provide succor and support for combatants, they do not bear arms or take an active part in the hostilities. They are, for the most part, also innocent, that is, they are not responsible for prosecuting the war or for the harm befalling enemy soldiers and civilians. Ordinary civilians remain the intended beneficiaries of the principle of noncombatant immunity.

If ordinary citizens ever enjoyed protection from intentional harm, recent events in the Middle East are rapidly eroding this norm and testing the limits of noncombatant immunity. Beginning in 2000, fighting between Israel and the Palestinian Authority (PA) has witnessed the unprecedented use of terror: massive, lethal attacks against civilians for purposes ranging from breaking Israeli morale and wresting further political concessions to destroying the State of Israel. In response, Israel reoccupied the West Bank (and, until 2005, the Gaza Strip), severely curtailed Palestinian civil liberties, and undertook military action resulting in civilian deaths. Each side invokes self-defense and national interest. As Palestinians are repeatedly called upon to renounce the use of terror in their struggle for national self-determination, Israel is censured for indiscriminate and disproportionate harm to civilians. This discourse stands to radically affect the way in which the international community views the imperative to avoid intentional harm to civilians.

Intentionally Killing Civilians

When asked about the use of terror, Mohammed Dahlan, commander of Palestinian security forces in Gaza in 2002, warned Israel that "whoever harms civilians must expect similar responses."[2] Unpacked, Dahlan's argument reveals a multipronged, controversial claim:

1. *Intentionality and its corollary argument, the doctrine of double effect (the DDE), do not matter*. The standard Israeli and, indeed, Western response to Dahlan's argument draws on the DDE and asserts that civilian casualties resulting from Israeli attacks on the PA are foreseen but unintended side effects of a legitimate military operation that is both necessary and proportionate. As a result, civilian casualties do not merit moral condemnation. A reasonable counterargument of the type that might underlie Dahlan's assertion may move in one of two directions. First, it may push intentionality to the sidelines, suggesting that the consequences of an intended act, that is, the death of innocent civilians resulting from an intentional military operation, make Israel morally responsible for the deaths of Palestinian civilians. Alternatively, one may embrace intentionality but argue instead that Israel violates its conditions. In neither

[2] Serge Schmemann, "US Peace Envoy Arrives in Israel as Fighting Rages," *Ha'aretz*, 15 March 2002.

case are the arguments trivial, for they suggest that Israeli actions are morally blameworthy and may invite legitimate reprisals.

2. *Israeli citizens are the legitimate targets of reprisal.* Once established that there is no moral justification for Israeli attacks on Palestinian civilians, either because intentionality does not matter or because Israel has violated its conditions, Dahlan implies that Palestinian attacks are justified reprisals for morally unjustified Israeli actions. What could this justification be? Dahlan does not say, but if reprisal lies at the core of the argument, then it turns on punishment and deterrence. Although international law increasingly frowns on reprisals against civilians, there is a history of Israeli reprisal raids in response to Arab attacks on Israeli civilians. Why, the Palestinians seem to be asking, can they not undertake similar actions? Alternatively, Dahlan's position might suggest that asymmetry of arms or the prospect of imminent defeat justifies intentional attacks on civilians.
3. *Supreme emergencies justify attacks on civilians as a measure of last resort.* By attacking civilians, Palestinians may not only hope to deter future attacks by Israel but may also hope to break local morale and exert pressure on the Israeli government to acquiesce to Palestinian political demands. This is not a novel argument, but emerged conspicuously during WWII as military planners and civilian observers debated the relative virtues of area bombing. In this debate, any attempt to justify intentional civilian deaths was linked to dire necessity or supreme emergency. In the present context, terror is also tied to asymmetry of arms. Because the Palestinians lack a military capability similar to Israel's, terror bombings are a justified weapon of last resort. The argument complements those characterizing supreme emergency that allow self-defense to override entrenched moral principles and the laws of armed conflict.

The following discussion considers the DDE as it plays out in the Israeli–Palestinian conflict. The doctrine presents difficulties for Palestinians and Israelis alike. Palestinian terrorists intentionally target civilians, whereas Israelis push unintentional harm to its outer limits when they regularly acknowledge, and regret, killing civilians in the course of military operations. If *unintentional* harm drives the DDE, *intentional* harm remains the explicit and often acceptable goal of reprisals and actions taken during supreme emergencies. The extent to which reprisals and necessity justify the deaths of civilians in the current conflict is the subject of the final two sections.

Intentionality and the DDE

"Perhaps the most basic rule of the law of armed conflict is that civilians and civilian objects must not be made the object of direct attack, although

incidental injuries caused to such persons or objects in the course of a legitimate attack must be proportionate to the purpose of the attack."[3]

The moral intuition underlying this basic rule is enshrined in the DDE. If its original task was theological, the DDE quickly evolved into a secular principle of just war, allowing combatants to kill civilians as long as their cause is just and noncombatant deaths are an unintended, although foreseen, side effect of a necessary and proportionate military operation that produces less harm than one reasonably hopes to forestall. Armed with these provisions, belligerents feel morally insulated when they kill civilians in the name of military necessity and a just cause.

Although adversaries in a conventional war generally have no particular interest in killing civilians, the DDE allows them to do so under what appear to be carefully controlled circumstances. In reality, the DDE may be excessively lax, allowing the killing of civilians whenever their deaths accompany military action. Perhaps because it has been so lax, or perhaps because it has allowed each side to pursue roughly equivalent levels of civilian deaths with minimal moral consternation, conventional combatants have rarely questioned the DDE in the same way that terrorist and insurgent organizations are now doing.[4] For a long time, combatants on each side have used the DDE to justify the inevitable killing of civilians during wartime. The argument packs a powerful moral and practical punch. On one hand, a compelling moral principle linking intentionality with responsibility and liability stands behind the DDE. Lack of intention retains, as the early Christian theologians noted, a "pure heart" and attenuates moral responsibility, liability, and guilt because one's motives are good.[5] Practically speaking, the DDE offers a convenient argument for harming civilians when their welfare conflicts with military necessity and, at the same time, it sets the conditions for protecting noncombatants from indiscriminate harm.

The force of the DDE is often demonstrated by comparing the actions of two agents, a strategic bomber (SB) and a terror bomber (TB). SBs destroy military targets in order to hasten the end of the war. In doing so, they often kill

[3] Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester, UK: Manchester University Press, 2000), 124.

[4] I use the word "insurgents" to describe Palestinian forces engaged in armed combat against Israel. Defined by the Oxford English Dictionary as one who "rises in active revolt," "insurgent" also captures the meaning of the word "*Intifada*" (uprising) that the Palestinians use to describe their conflict. Insurgent forces include terrorists and members of the various Palestinian security forces and militias. The latter are lawful combatants, insofar as their military organizations maintain an "internal disciplinary system," enforce "compliance with the rules of international law applicable in armed conflict," and commit their soldiers to carrying their arms openly during military engagements, although not necessarily to wearing identifying uniforms or insignia (Protocol I, 1977, Articles 43, 44). Terrorists are those insurgents who indiscriminately and intentionally target civilians and wantonly violate the laws of armed combat.

[5] Robert L. Holmes, *On War and Morality* (Princeton, NJ: Princeton University Press, 1989), 193–200.

civilians, whose deaths are unintended but foreseen. TBs aim at population centers. Their purpose is to kill civilians, destroy their infrastructures, and weaken enemy morale in order to hasten the end of the war. They aim intentionally at civilians. The British bombing of Germany during WWII is the example commonly cited. The DDE explains why the unintentional harm that strategic bombing causes is permitted, whereas the intentional harm that terror bombing causes is not.

In the present Mideast context, however, strategic and terror bombing assume a different character. Strategic bombing represents any Israeli action to destroy a Palestinian military target. These targets are not large military installations but often include single individuals or groups of individuals, bomb-manufacturing plants, or police and military installations. In nearly all cases, these targets are nested in built-up, civilian areas. Terror bombing, by contrast, aims specifically at civilian targets and is carried out by suicide bombers, by cells planting explosive devices or car bombs, or by squads that attack civilians with small arms. Unlike the area bombers of WWII, they make no claim to destroy infrastructures of any kind.

By the simple logic of the DDE, TBs kill their victims intentionally and are therefore morally responsible and criminally liable for their deaths, whereas SBs do not and are therefore absolved of responsibility and liability. The DDE only holds sway, however, when each side accepts its logic and is more or less equally equipped to wage war with minimal involvement of noncombatants. Terrorists and insurgents, however, attack the logic of the principle. Intentionality does not matter or, perhaps more realistically, no one unintentionally kills civilians.

The DDE and Intentionality: Does Intentionality Matter?

In its original formulation, the DDE confronted a rather simple difficulty that adversaries faced during war: how could one justify killing civilians who were innocent but inevitably harmed during armed conflict? The answer turned on intentionality. It was permissible only insofar as one did not *intend* to harm them. Early Christian theologians believed that without intent, it was possible to allay responsibility. It was never entirely clear, however, what intentional harm meant or how one could determine whether one harmed another intentionally, particularly during war. If intentionality only meant *rens mea*, an evil mind, then the DDE would be particularly difficult to apply in practice. One could easily ask how anyone can know whether SBs act with good intentions or whether TBs, for that matter, act with evil ones.

Modern legal and moral theorists wrestle with similar difficulties and often limit the exculpatory power of good intentions. Good intentions may, at best, mitigate punishment; they do not necessarily redeem the badness of the act itself. "We may judge the [bomber] pilots differently," writes Robert Holmes, "if we believe that one acted with good intentions and the other with bad

intentions. But the fact of their different intentions would not affect the moral assessment of *what* they did."[6] If intentions are particularly difficult to ferret out in wartime and, at best, only mitigate punishment, it is not entirely clear what intentionality adds to the DDE and the general prohibition against killing civilians.

H. L. A. Hart, for example, describes the case of an Irish Nationalist (IN) who inadvertently kills civilian bystanders while blowing out a wall to free his friends from prison.[7] IN did not intend to kill anyone; the deaths he caused were not a means to his end but only an "undesirable byproduct" of his actions. Nevertheless, he was, in Hart's opinion, rightfully convicted of murder. Hart's view is intuitively appealing, for clearly, an agent should be liable for the harmful effects of an intended action, however unintended the effects may be. It is difficult to see, then, why SB should not be convicted of killing civilians and how he could turn to the DDE to not only mitigate his punishment but to erase the badness of the act itself. The only difference between SB and IN is, if anything, the good end that SB invokes; their intentions are equally pure. Because neither intends to kill civilians, we are left judging the act not by intention but by the goodness of goal. The DDE masks, in this case, an enlightened principle of "the ends justify the means," insofar as the ends are good, a condition usually augmented by two others: the good end must not be attained by evil means, and the accompanying harm, if any, must be proportionate to the good one seeks and minimized where possible.

Although all three conditions are commonly associated with the DDE, only the second, the obligation to avoid evil means, may distinguish between TB and SB. Just cause (that is, a good end) is reasonably claimed by most adversaries. This is certainly true in the Mideast conflict, inasmuch as Palestinians claim the right to national self-determination and Israelis claim the right to self-defense in response to terror. Each adversary also appropriates proportionality with equal zeal. Moreover, proportionality is most often a subjective determination, nothing more than "I know it when I see it," whereas the imperative to minimize harm is only uncontroversial when choosing between two equally effective actions.

Steering clear of evil means to attain one's end, on the other hand, is often identified—some scholars say confused—with intentionality. Supporters allow an agent to invoke the DDE if, among other things, he or she does not use evil means to attain a good end. Consider Hart's example. Why was IN convicted of murder? Hart does not say, but one reason might be that IN violated the DDE by pursuing a bad end, at least in the eyes of those who judged him. Another reason may be IN's failure to minimize harm. Each of these is a subjective

[6] Ibid., 199.

[7] H. L. A. Hart, *Punishment and Responsibility, Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), 119–120.

determination. IN's peers, for example, would most likely have exonerated him on the same counts. The same peers, however, might not have looked as kindly upon their fellow nationalist had he murdered the same civilians who were unintentionally killed in order to gain the release of their comrades. Murder would push IN across the line, even in the eyes of those who sympathized with his cause. Similarly, although TB might claim proportionality and a good end, he remains morally culpable, because he cannot claim that his means—killing civilians—are good.

Here we must ask whether intentionality plays any role at all. Consider again TB's dilemma. Although he thinks his ends are good and the harm he causes is proportionate, "he cannot claim that his means—killing civilians—are good." At this juncture, critics would argue that it simply makes no sense to talk of "*intentionally* killing civilians" in this context or, at least, that it adds nothing of moral significance to the conditions necessary to prohibit TB's or IN's actions. Their actions stand or fall on the goodness (or badness) of the end they adopt, the means they pursue, and the degree of harm they cause. The moral repugnance of TB's action, in this view, lies not in the agent's intention or malevolent state of mind but in the fact that he uses inherently evil means to realize his end. Intentionality, for all intents and purposes, does not matter and, for this reason, some observers regard the DDE as incoherent, superfluous, or otiose.[8]

The argument focusing on the actual means an agent employs is important, for it sidesteps the problem of subjectivity or determining the agent's state of mind before one can invoke the DDE, and directs one's attention to the act, as opposed to the agent. Rather than dispensing with the DDE entirely, however, it may be more fruitful to adopt a principle that condemns TB because he uses evil means to obtain his ostensibly good end. This, and not the agent's state of mind, offers a richer and more easily operationalized formulation of intentionality that allows observers to identify violations of the DDE.

The DDE and Intentionality: An Operational Definition

Whether we dispense with intentionality altogether or define it in terms of using evil means to obtain a good end, one is still left to determine criteria for identifying both "evil means" and "use." What means, in other words, are evil, and how do we know when SB or anyone else is using them?

Harming civilians constitutes the evil means addressed by the DDE. This includes not only death and injury directly caused by military action but also indirect effects of war: destitution, disease, lawlessness, and insecurity. Neither

[8] Alison MacIntyre, "Doing Away with Double Effect," *Ethics* 111 (January 2001): 219–255; Holmes, *On War*, 199.

type of harm can be a legitimate means to an end, however good. Although extreme harm—killing—remains the focus of the DDE, the evil is not in the killing itself but in using the death of civilians for another purpose. Observers frequently express their abhorrence of this type of exploitation. Hart, for example, suggests that actions similar to TB's elicit a "feeling that to use a man's death as a means to some further end is a defilement of the agent: his [a murderer's] will is thus identified with an evil aim that is somehow morally worse than the will of one who, in the pursuit of the same further end, does something which, the agent realizes, renders the man's death inevitable as a second effect."[9] Here is the underlying intuition of the "double" effect. The moral consequences of the "second effect" are cushioned, not so much because it is unintended but because it serves no purpose in the agent's plans.

Warren Quinn fleshes out the argument further. The critical question is whether "the victims are made to play a role in the service of the agent's goal that is not (or may not be) morally required of them and this aspect of direct agency adds its own negative moral force—a force over and above that provided by the fact of harming or failing to prevent harm."[10] Commenting on Quinn's view, Jeff McMahon suggests that "intention simply magnifies the wrongness of violating a pre-existing right."[11] This moral fact is decisive for Quinn, who readily points out that an SB "perhaps . . . cannot honestly say that this [harmful] effect will be 'unintentional' in any standard sense, or that he 'does not mean' to kill them. But he can honestly deny that their involvement . . . is anything to his purpose."[12]

These lines of thinking form the basis for a richer interpretation of intentionality that forms a firm criterion for distinguishing the actions of SB and TB. Intentionally killing civilians means using them without their consent or against their will to procure one's ends. Defining intentionality in this way allows one to search for violations of the DDE not in the agent's subjective intentions or motives but in his plans and the means he uses to achieve them. The "acid" test of intentionality is whether agents profit from the evil effect in any way.[13] Susan Uniacke calls this the test of failure: would the mission fail if the harmful effects were avoided? In the case of SB, the answer is no, but in the case of TB, the answer is yes: TB cannot succeed unless he kills innocent civilians.[14] As a result, TB intentionally causes harm and violates the DDE. TB is morally responsible for killing civilians, and his act is reprehensible.

[9] Hart, *Punishment and Responsibility*, 127.

[10] Warren S. Quinn, "Actions, Intentions and Consequences: The Doctrine of the Double Effect," *Philosophy and Public Affairs* 18 (Fall 1989): 334–351.

[11] Jeff, McMahon, "Revising the Doctrine of Double Effect," *Journal of Applied Philosophy* 11 (1994): 207.

[12] Quinn, "Actions," 342.

[13] A. J. Coates, *The Ethics of War* (Manchester, UK: Manchester University Press, 1997), 244.

[14] Susan Uniacke, "Double Effect, Principle of" in Edward Craig, ed., Routledge Encyclopedia of Philosophy (London: Routledge, 1989), 202. Some philosophers also have suggested that TB, like SB,

Understanding the DDE in this way also repudiates Mideast terror: if TBs force their victims to play a role that they have not consented to and which is not required of them and benefit directly from their victims' deaths, then their acts violate the DDE and are morally objectionable. Regardless of the justice of their cause, terrorists have used evil means to achieve their end. Although this easily condemns Palestinian TBs, it is doubtful that most terrorists sincerely claim that their means are good. Instead, their argument is more nuanced, asserting that the injunction against using an evil means—killing civilians—is not absolute and may be overridden when one is faced with supreme emergency or the need to reprise against similar actions. These claims are considered shortly. To make these claims, however, particularly the latter, Palestinian TBs must argue that Israeli SBs similarly violate the DDE. To do this, they must argue that SBs also benefit from civilian deaths.

Intentionality and Side Benefits

Establishing intentionality according to the benefits gained from unintentional civilian deaths raises serious and sometimes fatal difficulties for SBs. While versions of the DDE espoused by Quinn or Uniacke may serve to distinguish between a simple case of SB or TB, the situation on the ground in the Mideast is more complex. Rarely is it the case, particularly in limited wars in built-up areas, that civilian deaths do not carry benefits independent of those obtained when the target that civilians are unlucky enough to live near is destroyed. Counter-insurgency measures, including unintended but foreseen civilian deaths, are sometimes expected to unbalance the civilian population and drive a wedge between terrorists and their local base of support. Although one may not set out to harm civilians for this purpose, one may clearly benefit when civilians are killed as part of a military operation.

Moreover, Israelis readily acknowledge the benefits of collateral damage. Consider the following two cases of side benefits that result from the bad effect of an intended action.

1. "The deaths of women and children during IDF operations against wanted men has become routine . . . but this week a senior officer was

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does not actually need to cause civilian deaths in order to demoralize the enemy and hasten the end of the war. All TB requires is the *appearance* of their death. McMahon, "Revising the Doctrine," 202. "If, unbeknownst to the government, the civilians were to escape harm by hiding in deep shelters until after the surrender, this would not frustrate the terror bomber's plan." (The *Hizbollah*, for example, will often leave the impression of having killed their victims without ever confirming that this is so. They have created the appearance of death necessary to undermine enemy morale without necessarily having actually killed anyone. Something like this occurred when they kidnapped three Israeli soldiers in 2000. A year later, the Israeli army declared the soldiers dead but only recovered their bodies in 2004. While the *Hizbollah* sought to trade information about the soldiers for captives held by Israel, the action undoubtedly affected the morale of soldiers serving on the Lebanese border. Their morale was equally undermined regardless of the state of health of the those kidnapped earlier.

even quoted, in response to the civilian deaths in Al Bureij (fighting in the Al Bureij refugee camp killed 10 Palestinians and wounded 20), as saying that a 'large number of casualties has deterrent value.'"[15]

2. Following a period (9 November to 31 December 2000), during which Israeli forces assassinated nine Palestinian militants while killing six civilian bystanders and injuring two, one Israeli official remarked: "The liquidation of wanted persons is proving itself useful. . . . This activity paralyzes and frightens entire villages and as a result, there are areas where people are afraid to carry out hostile action."[16]

In each instance, there is a direct or indirect reference to deterrent benefits that civilian deaths bring. Do these admissions lend credence to the claim that Israeli actions are morally on a par with terror attacks? If benefit is the sole test of the DDE and the principle fails when there are side benefits to collateral damage, then the answer appears to be yes.

The question remains, however, whether intentionality is any richer than the criterion of side benefits implies. What if the side benefit is unintended or one takes steps to avoid collateral damage that nonetheless benefits SB? Can an unintended ex post benefit impugn the moral standing of SB? The DDE allows unintended harm; after all, that is its purpose, but does it allow unintended side benefits? One might be inclined to argue that it does not, for unintended side benefits are the very test of intentional harm and ferret out intentionality when it is not obvious or is disclaimed by the agent. When side benefits are present, SB cannot deny that civilian deaths were anything to his purpose.

Some readings seem to support this contention:

1. "The good effect must be produced directly by the action, not by the bad effect. Otherwise, the agent would be using a bad means to a good end, which is never allowed."
2. "The bad cannot be a means to the good."
3. "To arrive at a sound moral estimate . . . it is often useful to consider whether the evil effect *de facto* contributes to the ultimate good desired, even if not explicitly willed as a means."[17]

Each of these readings suggests that unintended side benefits violate the DDE. Quinn's analysis is also ex post: SB satisfies the DDE because he can honestly deny that civilian deaths are anything to his purpose. But what if he cannot deny this? What if civilian deaths contributed to his purpose? If so, he is then using a bad means, however unintended, to a good end.

[15] Ruevan Pedazur, "The Wrong Way to Fight Terrorism," *Ha'aretz*, 11 December 2002.

[16] Eldar Akiva, "Liquidation Sale for the Peace Process," *Ha'aretz*, 4 January 2001.

[17] McIntyre, "Doing Away," 229, citing the traditional DDE; Holmes, *On War*, 199; John C. Ford, "The Morality of Obliteration Bombing" in Richard A. Wasserstrom, ed., *War and Morality* (Belmont, CA: Wadsworth Publishing, 1970 [1944]), 27.

Unintended side benefits, therefore, violate the prohibition of intentionally harming civilians.

Yet, the issue is not so easy to resolve. Israeli soldiers who shelled Arab villages in 1948 were witness to a mass exodus that later brought clear political and strategic advantages. Yet their purpose was to capture a strategic position and win the war, not to expel local residents. Later, Israeli forces intentionally undertook and/or condoned isolated acts to encourage evacuation when it was understood that population displacement had clear strategic benefits.[18] Corresponding roughly to SB with unintended side benefits and TB, these seem to be distinct moral categories, yet both, according to the reading above, violate the DDE in the same way. One practical solution might be to sidestep the problem with the observation that unintended side benefits do not remain unintended for long. Once acknowledged, any action resulting in civilian deaths with known side benefits violates the DDE. Thus, if the observations noted above underlie a trend among Israeli policy makers, then they have violated the DDE despite the fact that civilian deaths do not contribute to the primary mission. One cannot acknowledge side benefits the first time and then claim the second time that they are unintended. By itself, this realization can go a long way toward limiting collateral damage.

But can we push further and argue, as the citations above suggest, that unintended benefits also violate the DDE? This certainly invokes the spirit of the DDE, which, it must be remembered, is a principle designed to protect civilians from harm. At its core, the DDE assumes that any harm to innocents is morally bad, and it therefore sets strict conditions where their welfare is concerned. To condemn unintended harm that brings unintended benefits limits permissible harm to "pure" cases of military necessity in which civilian casualties play absolutely no part. But these pure types, SB or TB, are illusory. Arthur Harris's bombing campaign during World War II was never called "terror" bombing but "area" or "saturation" bombing. Critics called it "obliteration" bombing: "*strategic* bombing of industrial centers of population, in which the target to be wiped out is not a definite factory, bridge or similar object, but a large section of a whole city, comprising one-third to two-thirds of its built-up area, and including by design the residential districts of workingmen and their families."[19] Area bombing was, in other words, SB with intended side benefits that included the destruction of civilian population centers and, was, therefore, prohibited by the DDE and contemporary international humanitarian law. "Precision bombing," on the other hand, characterized Allied attempts to destroy German military targets but, owing to the imprecision of their instruments or the difficulties posed by night-time bombing, it often brought significant civilian causalities.

[18] Benny Morris, *Righteous Victims: A History of the Zionist–Arab Conflict, 1881–1999* (New York: Knopf, 1999), 161–258.

[19] Ford, "The Morality of Obliteration Bombing," 24, emphasis added.

Just as area bombing has strategic value, precision bombing also has terror value. The situation is exacerbated in insurgency warfare, in which any attack on a strategic target may cause civilian casualties together with side benefits measured in broken morale, population displacement, and internal dissent. To rule out unintended harms that bring unintended side benefits would severely limit the scope of counterinsurgency warfare and conventional aerial bombardment. The DDE would effectively become a pacifist doctrine.

In one more sense, the idea of unintended side benefits is unworkable. In fact, the entire idea of side benefits deriving from harm to civilians is problematic. Throughout the entire discussion, we have assumed that harm to civilians has beneficial effects relative to the war aims of the bomber. Terror bombing makes this assumption, as did the Israeli officials cited above. However, as many observers repeatedly point out, this is usually not the case. Area bombing failed to affect, and may have even strengthened, German morale.[20] Thus, to invoke side benefits to test the DDE demands a test for efficacy, which is usually unavailable and, if history is any example, nearly always negative. Under these circumstances, there is no reason to assume that collateral harm to civilians has any long-term benefits whatsoever. If it has no benefit, then unintentional harm to civilians *cannot* violate the DDE. We now have no reasonable test of intentionality and the DDE collapses.

If it is impossible to evaluate the side benefits of strategic bombing, or if empirical data are so contradictory that the DDE is either so eviscerated or so fortified as to be rendered useless, then the test for the DDE can only be found in *intended* benefits or *expected* utility, that is, those benefits that the SB or his planners think or hope will accrue when civilians are unintentionally harmed during a mission to destroy a strategic target. In this regard, then, Quinn's caveat stands: one looks to the extent to which one *tries* to involve civilians in one's cause when they are not morally required to participate. Whether they ultimately help or hinder the cause is not a relevant test of the DDE.

Defining intention in this way may suggest that we have not come very far. Intended side benefits are as subjective and as difficult to determine as is intentional harm. In both cases, observers are dependent upon the admissions of the perpetrators. The fact remains, however, that the admissions are qualitatively different. Few officials or soldiers could admit to intentionally harming civilians without risking the acknowledgement of a grievous breach of humanitarian law and the violation of their own moral sensibilities. They are less reticent, however, about recognizing the deterrent benefits that come from the harm civilians suffer during legitimate military operations. Indeed, military

[20] Ibid.; Geoffrey Best, *Humanity in Warfare* (London: Methuen, 1980), 242–285; Biddle Tami Davis, "Air Power" in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994), 140–159; Frits Kalshoven, *Belligerent Reprisals* (Leyden: A. W. Sijthoff, 1971); George H. Quester, "The Psychological Effects of Bombing Civilian Populations: Wars of the Past" in Betty Glad, ed., *The Psychological Dimensions of War* (Newbury Park, CA: Sage Publications, 1990), 201–235.

planners may find it useful to quietly acknowledge side benefits by suggesting that civilian deaths are neither futile nor entirely unfortunate, both to allay guilt among the bombers and to enhance pacification of the enemy. Here the DDE is particularly important, for it prohibits this line of argument. Side benefits do not mitigate the harm unintentionally befalling civilians. Quite the opposite; when policy makers believe or expect that their strategic bombing has side benefits that come from harm to civilians, they can no longer say that they do not intend to harm civilians. It is then, time to invoke the DDE and prohibit strategic bombing of this sort.

At this juncture, then, there are grounds to argue that Israeli SBs violate the DDE. Israeli actions against Palestinian military targets kill civilians, and this may be inevitable, but once these attacks take notice of the benefits they produce, they violate the DDE and are subject to censure. Are they also subject to reprisal?

Intentionally Targeting Civilians: The Doctrine of Reprisal

As the Israeli case shows, it is often difficult to justify collateral harm to civilians that accompanies counterinsurgency warfare, particularly when this harm is beneficial to the counterinsurgent's cause. In this respect, terror bombing and strategic bombing with intended side effects are equally bad acts. Equally bad acts, in turn, open the door to retaliation and reprisals against civilians. By this argument, civilians retain their protected status but the unique logic of reprisals allows one side to override noncombatant immunity and deliberately target civilians. Reprisals are one of the rare instances in which belligerents are allowed to intentionally harm civilians. Supreme emergency, considered below, is another.

The Logic of Reprisal

Arguments that Palestinian terror attacks are reprisals for Israeli actions or that Israeli attacks on Palestinian terrorists are reprisals for terror are not easily disentangled. The Palestinians, for their part, make the explicit argument that terrorist attacks are reprisals for Israeli attacks on civilians. A nation would not have the right to reprise against attacks on civilians that are sanctioned by the DDE, but if the DDE fails to justify civilian deaths, as in some of the cases noted above, then belligerents may be vulnerable to reprisal.

The principle of "self-help" anchors reprisal and the right of a belligerent to violate the laws of war as a last-resort response to a prior violation by the other side.[21] Reprisals are not acts of ordinary self-defense, for they are an inherently

[21] Kalshoven, *Belligerent Reprisals*; Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 207–222; Burton M. Leiser, "The Morality of Reprisals," *Ethics* 85 (January 1975): 159–163; Andrew D. Mitchell, "Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law," *Military Law Review* 170 (December 2001): 155–177.

unlawful response to past, discrete, and unlawful acts. Nor is retribution or vengeance the primary purpose of reprisal. Rather, reprisals are forward looking; they aim to prevent similar, unlawful acts in the future and to restore compliance to international norms of behavior. The underlying logic is utilitarian: reprisals are a legitimate form of international law enforcement because they force violating states to comply with international law. Reprisals, therefore, form a carefully circumscribed form of warfare restrained by strict proportionality. They are guided by the magnitude of the initial infraction, not the goal of deterrence, which, admittedly, might demand far harsher measures than a proportionate response to an adversary's breach of law. This reinforces the one-shot nature of reprisals. Justified by an unlawful act of war, but unlawful acts themselves, reprisals cannot exceed the illegality of the initial infraction. To do otherwise only creates grounds for counterreprisals.

Reprisals against Civilians

Civilians have not always enjoyed protection from the strong urge to reprise against noncombatants. Although the 1949 Geneva Conventions safeguard the lives of civilians in occupied territories, only the 1977 Protocols to the Geneva Conventions, Articles 51–58, protect enemy civilians and civilian objects (property, cultural sites, and places of worship) in unoccupied territory from reprisal. With Protocol I, the international community prohibits reprisals absolutely. Yet some nations, particularly the powerful industrial nations of the West, have been slow to relinquish the right of reprisal. The United States, for example, refused to ratify Protocol I because, among other things, "the total elimination of the right of reprisal . . . would hamper the ability of the United States to respond to an enemy's intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I."[22] Although Britain, Italy, France, and Germany ratified Protocol I, each, to varying degrees, reserved the right take measures otherwise prohibited by Protocol I and retaliate against the civilian population of any nation egregiously violating noncombatant immunity.[23] Commenting upon these reservations, Frits Kalshoven cautions that they may set aside a nation's obligation to refrain from reprisals "when the situation turns really serious: a 'worse case reservation' so to speak." The same developments lead Christopher Greenwood to conclude that the "trend in international law against belligerent reprisals has now been taken further than the development of international society can really justify." Ultimately, he warns, the provisions regulating reprisals are "too restrictive

[22] Abraham Sofaer, "Agora: The US Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims (contd): The Rationale of the United States Decision," *American Journal of International Law* 4 (October 1988): 784–787.

[23] See "States, Parties and Signatories," accessed at http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52, 14 September 2005.

and likely to be ignored in a conflict marked by large-scale violations of the law by one or more parties."[24]

Reprisals remain attractive for several reasons. One is efficacy: military planners often assume that reprisals against civilians are an effective tool for forcing nations to observe international law. Another is the oft-repeated reference to *lex talonis*, retaliating with evil for evil. This is the simplest reading of Dahlan's warning cited earlier: you kill our civilians and we will kill yours. Although modern treatises on reprisal gloss over *lex talonis* on the assumption that it is but a remnant of primitive law, there is no doubt that targeting civilians in reprisal for unlawful acts of war, particularly those aimed at civilians to begin with, retain a certain appeal based not on vengeance but on simple justice. Civilian lives are precious assets and, if targeted, certainly invite reprisals in kind. Nevertheless, sound moral reasons remain to limit the scope of reprisals while nonetheless permitting recourse to certain forms of reprisal beyond those envisioned by Protocol I.

Limiting Reprisals against Civilians

Utilitarian and deontological arguments go a long way toward discrediting reprisals against civilians. Reprisals are subject to two basic principles of just war: the limited nature of war and the principle of noncombatant immunity. If modern wars are fought to disable rather than annihilate an enemy, they are, in principle, limited. Any practice, therefore, that unnecessarily extends a war or prevents its conclusion is morally objectionable. To meet the condition of limited warfare, reprisals must be effective and must not spiral into a bloody cycle of vengeance and retaliation that only serves to perpetuate hostilities. Unfortunately, reprisals often do just that. The psychological urge to pay back in kind, or worse, is difficult to overcome, and it is doubtful that reprisers would or could respect the rule of proportionality: "You don't understand the logic of vengeance," Claudio Monteverdi admonishes, in *The Coronation of Poppea*: "on every slight pay back in blood and slaughter."[25] Moreover, one cannot seize upon legal lacunae that fail to fully protect civilians from certain acts of war to make a moral argument. If civilian immunity is to have any meaning whatsoever, then ordinary civilians cannot be made to pay for the crimes of others, regardless of the actions of one's state (or quasi-state). Similarly, one

[24] Frits Kalshoven, "Belligerent Reprisals Revisited," *Netherlands Yearbook of International Law* 21 (1990): 67; C. Greenwood, "The Twilight of the Law of Belligerent Reprisals," *Netherlands Yearbook of International Law* 20 (1989): 61, 65.

[25] Less poetically: "The psychological reality prompting [reprisals] was often merely thirst for revenge, lust to hurt and punish, or simply self-indulgent desire to save trouble [that] unless carefully regulated tended to escalate into horrid spirals of cruelty and counter-cruelty"; see Best, *Humanity of War*, 167. See also Bryan Brophy-Baermann and John A. Conybeare, "Retaliating against Terrorism: Rational Expectations and the Optimality of Rules vs. Discretion," *American Journal of Political Science* 38 (February 1994): 196–210; and Kalshoven, *Belligerent Reprisals*, 214.

cannot look forward and justify killing one group of civilians to prevent the killing of another group in the future. In neither case has the targeted group lost its right to life. This is the single strongest argument against civilian reprisals and should thoroughly repudiate any attempt by Palestinians to target Israeli citizens in reprisal for Israel's violation of the DDE.

These considerations leave reprisers to target other assets of the offending state. Inasmuch as the military assets of the state are generally vulnerable during wartime and are subject to destruction without moral compunction, the only remaining targets are assets that belong to civilians: their property and their civil rights. Although Protocol I outlaws these targets, together with attacks on civilian lives, the destruction of civilian property and other forms of nonlethal harm remain the last refuge of legitimate reprisal if we take human rights seriously.

Legitimate Reprisal

Israel's policy in response to terror attacks in the Occupied Territories exemplifies some of the limits of legitimate reprisal. These encompass the destruction of property and periodic destruction of physical infrastructures of a nonmilitary nature, measures aimed against civilians short of killing and assassination. Although Israel has argued—unconvincingly, to many observers—that assassinations or targeted killings are legitimate acts of self-defense during wartime, it may be more fruitful to view them as a form of reprisal. Perfidious and treacherous, there are good reasons to conclude that assassination is unlawful.[26] Yet in response to attacks on Israeli civilians, it makes for a legitimate reprisal, even within the narrow parameters of Protocol I, which permits reprisals against military targets: assassination is an "in kind" response to an unlawful act, its aim is to deter future unlawful acts, and it is a proportionate act that aims, unlike most reprisals, at responsible parties operating within an adversary's armed forces. At the same time, there are reasonable efforts to minimize collateral damage.[27]

Acts against civilians that deny civil rather than human rights or aim at civilian property may also form the basis for legitimate reprisals. Human rights protect dignity, innocent life, and bodily integrity and are generally inviolable. Civil liberties, however, remain the purview of the state and include the right of assembly, movement, speech, and political participation. These are not inviolable but, rather, derogable rights and may be set aside or modified, particularly when human rights are at risk. Such is often the case during war.[28]

[26] Michael L. Gross, "Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy," *Political Studies* 51 (June 2003): 350–369.

[27] These efforts are not always successful. According to B'tselem, forty-two civilians were killed and eighty-six Palestinians were assassinated. "Fatalities in the al-Aqsa Intifada, 29 September 2000–15 February 2003," accessed at http://www.btselem.org/, 18 February 2003.

[28] See also John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 79–80 for a similar distinction. A liberal society upholds human and civil rights, whereas a decent society need only respect human rights. For Rawls, human rights roughly encompass articles 1–18 of the Universal

Unlawful acts by a state, as reprisals are, cannot deprive civilians of their human rights, but they can deprive them of their civil liberties and restrict their freedom of movement. In many ways, Israeli policies of expelling terrorists and their supporters (and families), destroying their homes, and, in general, restricting civilian movement to thwart and apprehend terrorists are reprisals against the citizens of a state that practices terror. Note, however, that reprisals against the civil liberties of civilians do not have the "one-shot" character of expulsions or property destruction pursued against specific individuals in response to specific acts of terror. Restricting the civil liberties of many civilians is continuous and, in this sense, may function as a measure of self-defense rather than reprisal. But this is not always easy to determine. The closure and encirclement of West Bank villages sometimes follow a specific terrorist act; in other instances, they are preventive and are undertaken in anticipation of terrorist activity. Moreover, reprisals against civil liberties are not strictly "in kind." If terrorists deprive their victims of basic human rights, that is, the right to life, reprisals deny civil and property rights, that is, the maximum harm civilians may suffer.

The Limits of Legitimate Reprisal

Reprisal theory has long been noted as a back-door justification for unlawful acts that cannot otherwise be defended. Nevertheless, it does offer legitimate recourse to unlawful action if reprisals are responses to unlawful acts, avoid targeting civilian lives, and are reasonably effective. In the context of Israeli policy, these conditions show just how far one might push reprisal theory. Although reprisals may restrict civil liberties but may not infringe upon human rights, there is no doubt that encircling Palestinian cities and restricting civilian movement creates economic hardship and distress. Reprisals, however, breach their limits when they cause avoidable civilian deaths, as they do, for example, when closures and other measures restricting free movement deny civilians access to medical care.[29] Moreover, reprisals may not directly risk the lives of

Declaration of Human Rights. The International Covenant on Civil and Political Rights (1976, Article 4) is less restrictive. The only nonderogable rights during war or public emergency include the right to life, freedom from torture, slavery, servitude, and retroactive legislation, freedom of conscience, the right to recognition before the law, and the right to not to be imprisoned for breach of contract.

[29] Human rights organizations document avoidable deaths due to delays at roadblocks as well as increased rates of infant mortality among Palestinians. See Physicians for Human Rights, "Targeting Medical Care: Israel's Recent Incursion into the West Bank Renews Attacks on Ambulances" 4 April 2002, accessed on the website of Physicians for Human Rights, Jerusalem, at http://www.phr.org.il/phr/article.asp?articleid=198&catid=41&pcat=5, 14 September 2005; B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, "Wounded in the Field: Impeding Medical Treatment and Firing at Ambulances by IDF Soldiers in the Occupied Territories," accessed on the website of B'Tselem at http://www.btselem.org/Download/200203_Medical_Treatment_Eng.pdf, 14 September 2005; B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, "No Way Out: Medical Implications of Israel's Siege Policy," accessed on the website of B'Tselem at http://www.btselem.org/Download/200106_No_Way_Out_Eng.doc, 14 September 2005.

civilians, and although civilians die when assassination attempts go awry, there is increasing concern that these military actions indirectly target civilians to achieve the side benefits described in the previous section. As belligerents cross these lines, it is increasingly difficult to justify reprisal.

However, the strictest limit imposed on reprisals of any kind is effectiveness, and, as many scholars have argued, reprisals are notoriously ineffective.[30] This is no less true in the Israeli case. Assassination, whether construed as self-defense or legitimate reprisal, often brings swift retaliation by Palestinian terrorists. On at least two occasions, in November 2001 and January 2002, assassinations shattered periods of relative quiet, escalated violence, and resulted in scores of dead on both sides. Moreover, the efficacy of reprisal measures against civilians, particularly closure, curfew, expulsions, and the destruction of homes, is open to conflicting interpretations. In early 2003, the Israel Defense Forces announced a turning point in the war against terror, citing a significant decline in the number of successful terror attacks since massive military intervention in April 2002 and, in particular, since the reoccupation of the West Bank in late June 2002.[31] Nonetheless, and in spite of a policy that severely restricts Palestinian civil liberties, civilian casualties on the Israeli side *increased* during that same period.[32] Although military planners claim that they blunted an upwardly moving trend that killed sixty-seven civilians in March 2002, the fact remains that reprisals against Palestinian civilians and militants have not stemmed the tide of Israeli civilian deaths that prompted the reprisals in the first place.

Utilitarian outcomes, particularly the ineffectiveness of reprisals, make it difficult for military planners in Israel to convincingly defend assassinations or restrictive actions against civilians. Ineffectiveness, of course, is not restricted to an evaluation of reprisals and, indeed, should be a factor for assessing any military action. Whether construed as reprisals or legitimate military actions, assassination, closure, curfews, and similar abridgements of civilian civil rights often fail the test of efficacy. Granted, this picture may change, but until there are firm indications that it will, Israeli actions remain unjustifiable. Deontological moral considerations on the other hand, most strikingly those

[30] Ford, "The Morality of Obliteration Bombing," 24, emphasis added.

[31] In the first quarter of 2002, before the operation, there were 40 suicide bombings inside the 1967 borders; in the second quarter, 23, in the third, 17, and in the fourth, 12, and in the first quarter of 2003, 5; see Amos Harel, "Uneasy Quiet on the Western Front, *Ha'aretz*, 24 April 2003; and Amos Harel, "Relative Success Fighting Terror" *Ha'aretz*, 9 February 2003 (Hebrew).

[32] For the twelve-month period (March 2001 through February 2002), 99 civilians were killed by terrorists within the pre-1967 borders (8.25 per month). In March, 2002, 67 civilians were killed, prompting Israeli military action. In the twelve months since March 2002 (April 2002 through March 2003), 159 were killed (13.25 per month). Civilian deaths since 21 June 2002, the date marking the complete reoccupation of the West Bank, total 96 (through March 2003), or 10.7 deaths per month. All figures from B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, accessed on the website of B'Tselem at http://www.btselem.org/english/statistics/Casualties.asp, 14 September 2005.

that protect civilians from grievous harm, repudiate any attempt by Palestinians to respond to Israeli injustices by targeting civilians. No degree of necessity, short of dire necessity, can justify intentionally killing civilians.

In contrast to the DDE, reprisals allow one to deliberately target civilians. Although the DDE cannot countenance using bad means to achieve good ends, reprisals do so explicitly and justify harm to civil rights in response to egregious violations of international law, insofar as reprisals are proportionate and effective. Dire necessity, often referred to as "supreme emergency," is different from both the DDE and reprisals. Like reprisals, supreme emergency allows combatants to violate the DDE and intentionally harm civilians. In contrast to reprisals, however, supreme emergency can excuse intentional killing of civilians in the face of an existential threat. In this way, supreme emergency overrides but does not entirely set aside the moral prohibition against killing civilians. As such, any agent invoking a supreme emergency must provide a vigorous defense of his actions.

Intentionally Killing Noncombatants: The Necessity Defense Writ Large

The argument from supreme emergency is perhaps the last that Palestinians and other insurgent groups may raise in defense of intentionally targeting civilians. It is tied to both asymmetry of arms and an imminent existential threat: lacking recourse to similarly lethal weapons, Palestinians have no option but to terrorize Israeli citizens with the hope of demoralizing the nation and forcing a change in Israeli policy, without which the Palestinian people face certain destruction.

The doctrine of supreme emergency, articulated most famously by Michael Walzer, remains exceptionally controversial and extraordinarily difficult to apply in practice.[33] In many regards, it is an extension of the "necessity defense" common to municipal law and anchored in utilitarianism. Necessity may *exempt* from criminal responsibility a person who violates the law in the face of imminent harm, if the individual acts "in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury [and] provided that he or she did no more harm than was reasonably necessary [nor] disproportionate to the harm avoided."[34] Necessity demands five conditions: the threat of (1) grievous and (2) unavoidable harm and a (3) proportionate, (4) effective, and (5) last-resort response. The term "exempt" is subject to conflicting interpretations. Most legal scholars agree that the necessity defense "excuses" rather than "justifies" one's action so that

[33] Walzer, *Just and Unjust Wars*, 251–268; see also Brian Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer," *Law and Philosophy* 20 (January 2000): 1–30.

[34] Israel's Penal Law, section 22, cited in Landau Commission (3,11 "Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity," *Israel Law Review* 2, 3 (Spring, Summer 1989): 146–188.

the law one overrides in the name of necessity retains some measure of force.[35] This force exerts itself in the form of either mitigated punishment or regret and restitution.

Supreme emergency carries this idea to the level of the nation-state or political community facing grievous harm in the form of an existential or genocidal threat that might only be blunted by harming innocents. However, it is important to emphasize that the necessity defense does not have the same legal basis at the international level that it has at the domestic level. International law does not recognize the necessity defense. On the contrary, many international instruments go out of their way to specifically prohibit a nation from violating human rights when facing war or the threat of war. Rather, supreme emergency is a moral argument that belligerents may invoke to convince the international community that their actions are excusable. In the context of the current conflict, the argument from supreme emergency makes three independent claims: First, belligerents may target civilians when their nation faces an existential threat; second, the Palestinians and/or the Israelis face an existential threat; and, third, killing civilians effectively forestalls that threat.

Targeting Innocent Civilians to Forestall Harm

The notion of supreme emergency turns, first and foremost, on the question of whether utility can ever allow one to intentionally kill combatants. Military necessity has always stood juxtaposed to noncombatant immunity, a debate that waged heatedly in the last half of the nineteenth century until decided largely in favor of human rights.[36] As the argument unfolded, the principle of noncombatant immunity assumed either an absolute, inviolable form, which many saw as a necessary bulwark against civilian harm, or a nonabsolutist form that allowed one to override the principle of noncombatant immunity in extreme cases.

Calculating or identifying cases of overriding necessity demands that one first assess simple utility, that is, determine whether an action will bring more good than harm. This requires two calculations that include both the magnitude of the harm one wishes to avoid and the probability that attacking a particular target will effectively forestall the unwanted outcome. If one's goal, for example, is to shorten a war and reduce overall casualties by targeting civilians, one must have an idea as to how many lives will be saved, their relative weights (for combatant and noncombatant lives are not necessarily commensurable), and an indication of the *increased* probability that killing civilians, apart from the other means one takes, will achieve this goal. If not impossible, it remains very difficult to make this calculation and even less likely that the calculation will lend any weight to the

[35] David Cohen, "The Development of the Modern Doctrine of Necessity: A Comparative Critique" in Albin Eser and George C. Fletcher, eds., *Justification and Excuse: Comparative Perspectives*, vol. 2 (Freiburg: Eigenverlag MPI, 1987, 1988), 973–1001.

[36] Best, *Humanity in Warfare*, 174–179.

utility of intentionally killing noncombatants. If WWII is any example, killing civilians does not significantly raise the chances that war will end any sooner or save a significant number of additional lives.[37]

Beyond this, one has to ask whether utility alone is sufficient justification for egregiously violating noncombatant immunity. Absolutists will deny, of course, that utility can ever justify intentionally killing civilians, but nonabsolutists, too, are wary of utility. Some scholars back off, arguing that the complex calculations just mentioned are impossible to make during wartime.[38] Others suggest that the test is not simple utility but overwhelming utility. Killing civilians must not only tip the scales in favor of marginally increased utility, it must decisively forestall a significantly more harmful outcome. Under these conditions, respect for innocent life may be put aside if a nation is faced with *substantial* harm, that is, genocide or the annihilation of its political community. Assuming that one can distinguish between simple and overwhelming utility, one must also contend with a workable definition of "substantial harm."

The Nature of Substantial Harm

For a nation to invoke the necessity defense, it must face a grievous and unavoidable threat, and target civilians only as a last resort and in a way that is proportionate and effectively meets the threat before it. What constitutes a threat of this magnitude? If confined to an existential threat, then the conditions of supreme emergency are not met unless a nation or ethnic group faces genocide. Yet, genocide constitutes nothing less than a massive war crime that either brings about the collapse of the entire war convention or, at the very least, allows the aggrieved party the right to retaliate in kind. This is certainly what Britain and the United States have in mind as they look askance at Protocol I's prohibition of reprisals against civilian populations. If, on the other hand, supreme emergency is interpreted to include any threat that war poses to a political community, then the prospect of defeat alone is sufficient to allow the threatened party to attack innocent civilians. This cannot be right, for it renders the war convention entirely superfluous. Yet, if one takes seriously the example many commentators use to illustrate supreme emergency, namely Britain's position vis-a-vis Germany in the early part of WWII, then it is hard to escape the impression that the mere prospect of defeat is sufficient to trigger a supreme emergency.

Imagine France prior to its surrender. Would the probability of defeat and occupation have constituted a supreme emergency? If so, it seems that losing sides everywhere might call upon supreme necessity to justify violations of noncombatant immunity. The bombing of Hiroshima is an even less-convincing

[37] See Quester, "The Psychological Effects," 201–235.

[38] C. Curran, *Themes in Fundamental Moral Theology* (Notre Dame, IN: University of Notre Dame Press, 1977) cited in Coates, *The Ethics of War*, 261.

example of supreme emergency. After abandoning its preference for precision bombing and cooperating with the British in the firebombing of Dresden in February 1945, the United States mounted similar raids of its own against Tokyo and other Japanese cities. Nuclear bombing—considered nothing more than a natural progression of strategic, incendiary bombing—followed in quick succession. The effects of both types of warfare, together with their underlying logic, are nearly identical. Killing tens of thousands in a single raid, military planners could only appeal to military necessity to justify these massive civilian casualties. The argument, however, remains intensely problematic. By 1945, military necessity could not mean supreme emergency, for neither the United States nor its allies faced an existential threat. Interpreting military necessity more narrowly to justify killing enemy civilians to save the lives of American soldiers entirely undermines the principle of noncombatant immunity. Assuming, for a moment, that one can ignore the controversy surrounding the last months of WWII and can suggest that area bombing breaks morale, that the course of events entirely justified Allied goals of unconditional surrender, and that destroying Tokyo, Hiroshima, and Nagasaki were necessary and proportionate means to attain this end, one is still left with the simple argument that any prospect of casualties or defeat justifies intentional harm to noncombatants. The argument may be tempting, but it leaves humanitarian law in tatters. Just as no nation may invoke supreme emergency when it faces any fate less than genocide, no army may appeal to the same principle to stave off defeat or expedite its war.

In the current Middle East conflict, neither party faces an existential threat, but each is subject instead to the relative disadvantages at which warring parties are apt to find themselves. The claim that the Palestinians went to war to wrest additional political concessions from Israel following the collapse of peace talks at Camp David is probably correct.[39] Nevertheless, the Palestinian refusal to accept Israel's offer of less than 100 percent of the West Bank and Gaza, together with the continued occupation that ensued, only serve, at best, as *casus belli*; they do not serve to legitimate attacks on Israeli civilians. Palestinians may claim that terror has brought them closer to political independence,[40] but this is not the test of supreme emergency. One invokes supreme emergency to prevent disaster, not to expedite war. The fact that Palestinians cannot formulate their gains in terms of preventing disaster points readily to the absence of any

[39] Yezid Sayigh, "Arafat and the Anatomy of a Revolt," *Survival* 43 (Autumn 2001): 47–60; Kirsten E. Schulze, "Camp David and the Al-Aqsa Intifada: An Assessment of the State of the Israeli-Palestinian Peace Process, July–December 2000," *Studies in Conflict and Terrorism* 24 (May–June, 2001): 215–233; Rema Hammami and Salim Tamari, "The Second Uprising: End or New Beginning?" *Journal of Palestine Studies* 30 (Winter 2001): 5–25; David Makovsky, "Taba Mischief," *The Public Interest* 151 (Spring 2003): 119–129.

[40] In a 2002 poll, 66 percent of Palestinians believed that armed confrontations have so far helped to achieve Palestinian rights in ways that negotiations could not. Palestinian Center for Policy and Survey Research, Public Opinion Poll # 6, 14–22 November 2002, accessed at http://www.pcpsr.org/survey/polls/2002/p6a.html, 11 February 2003.

existential threat. Any political arrangement, such as that outlined by Bill Clinton's peace plan, that preserves a measure of national autonomy, let alone a measure of sovereignty and independence, cannot be construed as a threat to the political community. Otherwise, any group denied political independence has grounds to claim supreme emergency and to slaughter its adversary's citizens. The fact that some groups make this claim only indicates that they misunderstand the rights of a political community. These rights cannot always entail national independence on one group's terms alone.

The Israeli case for supreme emergency is similarly confounded when sometimes raised to justify violations of humanitarian law or disregard for civilian life. Talk of supreme emergency surfaces frequently on the Israeli side, inasmuch as many observers describe terror as an existential threat to the Jewish state. But, if the conditions just described are correct, Israel no more faces an existential threat than do the Palestinians. Terror, however heinous, does not jeopardize the political integrity of Israel. As a result, there are no grounds for invoking supreme emergency to justify violating humanitarian law. As long as Israel violates the nonhumanitarian aspects of international law, that is, civil and not human rights, then their actions constitute legitimate reprisal. Embracing terror, the Palestinians do not have recourse to this claim. Once the claim of an existential threat is set aside, there is no place to evaluate the morality of the response. Because no response is warranted, any discussion of the other conditions of necessity—proportionality and last resort—is irrelevant in the context of the current Mideast conflict.

These arguments should also go a long way toward repudiating the claim that asymmetry of arms justifies terrorism as a "last-resort" form of warfare. In response to occupation, and to the counterinsurgency warfare it often entails, groups fighting for national self-determination sometimes suggest that their relative lack of arms coupled with the justice of their cause justifies deviating from the rules of war and humanitarian law. It is odd that the argument has surfaced with such regularity in recent times, when, in fact, material asymmetry is the rule rather than the exception in armed conflict. Were adversaries symmetrically armed, war would rarely begin and nearly never end. Instead, nations often go to war, justifiably or not, when they assume that they have a material edge. They demur when they sense a disadvantage. Nevertheless, a disadvantaged nation forced to defend itself is not released from its international and humanitarian obligations. "In ships we are inferior [and] in money we have a far greater deficiency," warns Archidamus as he counsels his countrymen to avoid war with Athens. Nevertheless, he continues, "if while still unprepared we are induced to lay waste have a care that we do not bring deep disgrace and deep perplexity upon Peloponnese." All this in spite of Athens's "open" aggression.[41]

[41] Thucydides, *The Peloponnesian War*, the Crawley translation, revised and edited with an introduction by T. E. Wick (New York: The Modern Library, 1982), I, 80–82. I admit to a rather liberal interpretation. Archidamus may simply be saying, "If you must go to war, make sure you don't lose."

Today the lesson resonates stronger still. A material disadvantage does not exempt an adversary from norms of conduct during armed conflict as long as the stronger nation respects humanitarian law and pursues a limited war rather than a total war of annihilation against the weaker nation. Should the stronger nation abuse civilians and pursue a genocidal war, then, and only then, might the weaker nation consider setting aside humanitarian law. There is nothing in the current conflict, however, to suggest that this is the case.

Conclusion: Terror, Counterterror, and Noncombatant Immunity

Arguments justifying terror fall before the principle of noncombatant immunity. But as they do, they redefine the very nature of the debate and bring to the fore a number of important theoretical and practical conclusions. First, they force a close reading of the doctrine of double effect, raising the DDE not so much to justify terror but to condemn counterinsurgency warfare that kills civilians. By prohibiting belligerents from intentionally killing civilians and by measuring intentionality by means of side benefits, the DDE casts a pall over what many think is legitimate collateral damage during battles with insurgents.

Second, a clear understanding of modern reprisals stymies any attempt to argue that terror is a legitimate form of reprisal when an adversary violates the DDE. The argument is not trivial, for enemy civilians have been, for the longest time, acceptable targets of reprisal. If this changed in 1977, it may not be of much concern to Israelis and Palestinians, who neither ratified Protocol I nor entirely removed themselves from the culture of blood feuds, vengeance, and retribution that characterizes the new-old Middle East. Nevertheless, reprisal theory has moved toward honoring the same combatant and noncombatant rights that Palestinians wish to claim for their own. This forbids reprisals against civilian lives. For Israelis, this limits counterinsurgency measures to those that effectively prevent terror, and, although these actions may abridge civil rights, they must preserve human rights. Closure, siege, expulsion, and property destruction sometimes meet these criteria. For Palestinians, their means are necessarily limited to attacks on military targets and civilian property or, should they be inclined to pursue it, nonviolent means of fighting occupation.

Third, the argument of supreme emergency points to the limits of the argument from material asymmetry. Material asymmetry is an ever-present feature of war, whether waged between state actors or between state and substate actors fighting for national self-determination. Yet neither asymmetry nor occupation offers sufficient cause for violating noncombatant immunity. On the contrary, they offer grounds for broadening the protection due combatants and noncombatants under humanitarian law. Protocol I addresses this concern directly, inasmuch as it extends combatant status to irregular, insurgent forces, ensuring that they will not be tortured or killed when captured and, at the same time, widens the range of noncombatant immunities to protect

civilians from the ravages of a war of national self-determination against an adversary determined to deny them their just rights.

There is nothing in this formulation, however, to protect the citizens and armed forces of an occupying power when insurgents violate humanitarian law. On the contrary, Protocol I deliberately hamstrings occupying forces who may find themselves unable to clearly identify combatants and severely constrains the actions they can take against civilians. This may tempt insurgents to abuse combatant and noncombatant protections and pursue terror. It further forces the occupying power to make a hard choice: either develop novel tactics that may infringe on civil liberties or dispense with humanitarian law altogether. Although it is unlikely that any Western nation will argue that terrorism justifies a reciprocal breach of international law, nations fighting insurgents that embrace terror should be free to make the weaker claim that self-defense allows certain measures that infringe upon civil rights or jeopardize civilian property.

Occupation and terror test the limits of humanitarian law and, in particular, the principle of noncombatant immunity. Each side often sees itself as significantly disadvantaged. Palestinians complain of their inability to respond to modern military technology in kind and Israelis of their inability to respond to terror in kind. Yet, in the context of modern warfare and humanitarian law, there is no doubt that Israel enjoys a clear advantage. Terror and reprisals against civilian lives have no place in the international order, whereas collateral damage and reprisals against civilian civil rights do. There is, it appears, a moral as well as material asymmetry relative to the means each side employs in the current conflict.

It is ironic that an occupying power should find itself in such a position, successfully pleading self-defense and military necessity against a far weaker adversary. Two points are, however, in order. First, Israel's advantages are limited, even as it fights terror. Neither the DDE nor reprisal theory can justify all aspects of current Israeli policy. The discussions above have shown this much. Second, the moral asymmetry currently in Israel's favor will reverse once terror is abandoned. Once the Palestinians or any other insurgent group renounces terror and restores the principle of noncombatant immunity, they may find it possible to reenter the community of nations and successfully press their claims for national self-determination.