

# **Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians?**

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**Abstract:** How much risk must soldiers take in order to reduce civilian harm? Does it vary depending on whether the civilians are foreigners or from the soldiers' state? These questions are passionately debated in moral discourse, as well as in international law. One strongly advocated view asserts that soldiers must shoulder most (if not all) risks, since they pose a threat to civilians and not the other way around. This Article, however, challenges that position. It focuses on the permission all have to defend themselves against threats they are not responsible for—rather than misguidedly attempting to ascertain who threatens whom. When soldiers are not culpable for placing theirs and civilians' safety at odds (e.g., when the enemy uses the civilians as human shields), it is hard to see why they must shoulder all risks; neither they nor the civilians are responsible for the choice needed to be made between their lives. In such tragic choices, furthermore, when one's life hangs at the balance, complete impartiality cannot be demanded. This understanding, regarding the legitimacy of partiality, also impacts the question of giving greater weight to the lives of the soldiers' state civilians than to foreign civilian lives. Legitimate partiality is, however, limited. Accordingly, the Article concludes that soldiers must abide by the following moderately demanding standard: they must shoulder at least a non-trivial risk in order to reduce harm to civilians, even if foreigners. This, we argue, is also the proper interpretation of *jus in bello* proportionality in international law.

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## INTRODUCTION

Imagine that a Taliban unit has set up base in Pakistan and is routinely launching attacks against American forces across the border in Afghanistan. Anticipating that their base will be

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discovered and attacked, the Taliban unit abducts a group of civilians and uses them as human shields. Consider two alternatives regarding the identity of these civilians: (a) they are local Pakistani civilians, or (b) they are American tourists, kidnapped from Islamabad and taken to the Taliban base. The American force commander discovers the location of the base and the use of the civilians as human shields. She can either use drones to bombard the base from the air or deploy a ground unit to take the base in face-to-face combat. The first option will minimize the risk to the American soldiers, but be much more dangerous for the abducted civilians. What is the right decision (from either a moral or legal perspective) and is it permissible for the national identity of the civilians to influence the commander's decision regarding the extent to which she will put her soldiers in harm's way?<sup>1</sup>

This scenario demonstrates the following general dilemma: In armed conflicts, to what extent is a state permitted to value the lives of its citizens and other civilians under its control (hereinafter the "state's civilians") more than it values the lives of other civilians, including civilians on the enemy's side (hereinafter "foreign civilians")? And moreover, since the value attributed to civilian lives often affects the degree of risk soldiers will have to endure in carrying out military actions, are they duty-bound to risk their own lives in order to reduce risk to foreign civilians to the same degree that they are duty-bound to do so to minimize the risk to their state's civilians? To what degree are they duty-bound to risk their lives in either case? These questions are the focus of this Article.

There is an impassioned debate over the right legal and moral way to resolve these issues, with an extremely wide range of positions taken. On the one end of the spectrum are those who assert that soldiers must always be willing to increase their own risk to reduce the risk to any and all civilians (irrespective of the civilians' identity).<sup>2</sup> On the other end of the spectrum are those who argue that soldiers must take on additional risk only to decrease the risk to civilians on their

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<sup>1</sup> See Avishai Margalit and Michael Walzer, *Israel: Civilians and Combatants*, 56(8) N.Y. REV. OF BOOKS 21, 22 (May 14, 2009) (discussing a somewhat similar example).

<sup>2</sup> E.g., Walzer & Margalit, *supra* note 1, at 21-22; Thomas W. Smith, *Protecting Civilians... or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT'L STUD. PERSPECTIVES 144, 146-47 (2008).

side of the conflict.<sup>3</sup> Between these two extremes are several intermediate positions that ascribe varying degrees of risk taking duties on soldiers depending on the identity of the civilian.<sup>4</sup>

This moral and legal debate (often referred to as the debate on “force protection”) has, in fact, intensified in recent years, as the public in Western states has become increasingly weary with the horrors of war and averse to the overwhelming civilian casualties, on all sides, that have been witnessed over the last century.<sup>5</sup> At the same time, the Western public has also become increasingly averse to military casualties on its own side.<sup>6</sup>

While the aspiration to protect these different categories of individuals has strengthened, new practical obstacles to achieving this have emerged. Developments in combative technologies, the long range of today’s weapons, increased urbanization, and the growth in human population have all made it harder and harder to detach civilians from the battlefield.<sup>7</sup> Moreover, some belligerents deliberately increase the risk to civilians on both sides:<sup>8</sup> they indiscriminately attack soldiers and civilians on the other side,<sup>9</sup> while interspersing their fighters among civilians on their side (mainly, by setting-up their bases in civilian residential areas and using the civilians as human shields).<sup>10</sup> Often, whether for “objective” reasons (such as technological innovations) or due to the intentional actions of a belligerent, civilians on both sides of the conflict are simultaneously at risk. In such situations, ordering soldiers to act so as to eliminate a combat-related threat to their state’s civilians many times requires action that shifts the risk not only to the soldiers (and to the enemy combatants) but also to the foreign citizens.<sup>11</sup>

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<sup>3</sup> E.g., Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4(1) J. MIL. ETHICS 3, 17-21 (2005); Asa Kasher, *The Principle of Distinction*, 6(2) J. MIL. ETHICS 152, 166 (2007); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 88-89 (2006).

<sup>4</sup> A popular intermediate approach claims that, since the value of all innocent lives is equal, soldiers must maintain a one-to-one risk-transfer ratio between their lives and the lives of civilians. Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 63-64 (2005); David Luban, *Risk Taking and Force Protection 27* (Georgetown Public Law and Legal Theory Research Paper No. 11-72, 2011).

<sup>5</sup> ROBERT MANDEL, *SECURITY, STRATEGY, AND THE QUEST FOR BLOODLESS WAR* 10-11, 27-30 (2004).

<sup>6</sup> *Id.*, at 10-11, 27-30.

<sup>7</sup> JUDITH GAIL GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF IHL* 12, 21 (1993).

<sup>8</sup> Kasher & Yadlin, *supra* note 3, at 6-7.

<sup>9</sup> *Id.* at 6; Daniel Byman & Matthew Waxman, *Defeating US Coercion*, 41 SURVIVAL 107, 114-16 (1999)

<sup>10</sup> Kasher & Yadlin, *supra* note 3, at 7. See also GARDAM, *supra* note 7, at 56-58.

<sup>11</sup> Michael N. Schmitt, “*Change Direction*” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT’L L. 127, 154-55 (2007) (discussing an actual event in which the need to choose between the safety of each of these categories of civilians was the result of intentional actions of a belligerent); STEPHEN J. CIMBALA, *THROUGH A GLASS DARKLY: LOOKING AT CONFLICT PREVENTION, MANAGEMENT, AND TERMINATION* 31-32 (2001) (implicitly discussing this dilemma’s existence when belligerents have long range weapons capabilities).

In other words, an irreconcilable tension has been created between the different elements of the aspiration to protect human lives during war.<sup>12</sup>

This Article offers a moral account that can help elucidate these dilemmas, and interprets the relevant international law given this moral analysis. It identifies two principles that are often jointly advanced by participants in the debate: the “Altruism Principle,” under which soldiers must bear all the risk and not impose risk on any civilians, and the “Equality Principle” which holds that the extent of risk soldiers must bear is independent of the identity of the civilians.

It first examines and rejects the applicability of these principles in the context of individual self-defense. Under the accepted view of individual self-defense, individuals have the right to kill a person who would otherwise kill them even if that person is not responsible for his actions (hereinafter “innocent aggressor”).<sup>13</sup> The Article argues that when attackers use an innocent person as a human shield (for example, when they launch an attack from within a civilian area), the defenders may kill the human shield in order to save their own lives, because the human shield is *morally* equivalent to an innocent aggressor. However, if the human shield is someone with whom the defenders have special relations, such as their child, spouse, or, possibly, countryman, they may choose to risk their lives more than what they would be required to risk when the human shield is a stranger; which means that there can be a limited preference of the lives of one’s state civilians over the lives of foreign civilians. The conclusions reached in the examination of the individualistic scenarios are then adapted to the legal context of *jus in bello* proportionality, to conclude that, to a limited degree, both morally and legally, the lives of a state’s civilians can be accorded greater value than the lives of foreign civilians. However, it is maintained that both morality considerations and international law obligate soldiers, at a minimum, to assume a non-trivial level of risk so as to decrease the risk to the lives of even foreign civilians.

The Article proceeds as follows: Part I describes the connection between morality in individualistic self-defense scenarios and the international law norm of *jus in bello* proportionality. Part II presents the Altruism Principle and Equality Principle, as they are

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<sup>12</sup> See MANDEL, *supra* note 5, at 16. See also Marc W. Herold, *The Obama/Pentagon War Narrative, the Real War and Where Afghan Civilian Deaths Do Matter*, 5 REVISTAS DE PAZ Y CONFLICTOS 44, 45, 52-53 (2012).

<sup>13</sup> See *infra* Section III.

commonly propounded in the moral and legal discourse regarding force protection, while Part III is devoted to countering these two supposed principles in individualistic self-defense scenarios. Some raise claims that even if the Altruism and Equality Principles do not apply generally, they do have specific application with regard to soldiers. Part IV examines these claims and demonstrates that neither the role of soldiers nor the attributes of their actions affect the conclusion that the Altruism and Equality Principles must be rejected. It is, however, shown that there is a particular situation in which the permission given to innocent individuals to give preference for their own lives over the lives of other is even more restricted than in the general case and that such a scenario may, at times, apply to soldierly activities. Finally, Part V shifts from the discussion of morality to interpreting international law. It presents the current interpretational dispute over *jus in bello* proportionality and proposes a fitting interpretation to this legal norm, based on the moral analysis conducted here.

#### I. INTERNATIONAL LAW VERSUS INDIVIDUAL SELF-DEFENSE

The prohibition on purposefully harming other human beings is a core moral prohibition endorsed by all moral schools of thought.<sup>14</sup> One of the very few accepted exceptions to this prohibition is the permission to physically harm someone in self-defense (or in the defense of others): i.e., in defense of one's life, bodily integrity, or core autonomy.<sup>15</sup> Moral and legal accounts of self-defense usually share the following traits and restrictions: First, one is only allowed to use force in order to defend oneself, or an (innocent) third party, against another person if the use of force is *necessary* as an *immediate* response to a *violent threat* posed by that "aggressor."<sup>16</sup> Furthermore, the intensity of force used must be *proportional* to the violence

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<sup>14</sup> See Richard J. Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 663, 668 (2006) ("Morality surely prescribes a strong generic presumption against killing people. Powerful reasons are needed to overcome this presumption."); Re'em Segev, *Well-Being and Fairness*, 131 PHIL. STUD. 369, 372 (2006) ("everyone would agree that there is a (pro tanto, agent-neutral) reason, to protect (sufficiently important) basic interests, such as life and bodily integrity...").

<sup>15</sup> Kai Draper, *Defense*, 145 J. PHIL. STUD. 69, 69 (2009) (terming it "...perhaps the most widely recognized justification for inflicting harm."); 1 GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 22-25 (2007).

<sup>16</sup> See GEORGE P. FLETCHER AND JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 86-87 (2008); DAVID RODIN, *WAR AND SELF-DEFENSE* 40-43 (2002).

responded to; i.e., it cannot exceed that which is needed in order to contend with the violent threat.<sup>17</sup>

Armed conflicts are violent social interactions that are much less temporal, larger in scale, and less individualistic in comparison to the prototypical individual self-defense scenarios.<sup>18</sup> Accordingly, there is considerable dispute over whether, to what extent, and under what conditions one can apply the principles of individual self-defense to depict and justify armed conflict-related acts.<sup>19</sup> This moral dispute notwithstanding, it must be acknowledged that the norms of international law rest on the premise that, to a considerable degree and with certain modifications, an analogy can be drawn between the norms of individual self-defense and the norms of armed conflict.<sup>20</sup>

In international law, notions of self-defense are incorporated into *jus in bello* and *jus ad bellum* and the idea of proportionality is applied in both.<sup>21</sup> First, in *jus ad bellum*, states are

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<sup>17</sup> Proportionality in individual self-defense is often used to describe two different things: (a) proportionality between the force used and the threat posed; i.e., that the force used must not exceed that which is needed in order to deal with the violent threat; and (b) proportionality between the harm expected to be caused if the defender will not employ counter force and the harm expected to be caused by the defender's counter force. Jeffrey Blustein, *Proportionality and the Problem of the Psychiatric Aggressor: A Moral Analysis*, 10 OTTAWA L. REV. 88, 92-94 (1978). It is disputed whether (and in response to what categories of aggressors) the later kind of proportionality is demanded; we therefore, referred in the text only to the former one, when describing the moral and legal consensus. This (former) proportionality demand is sometimes viewed as part of the necessity demand; i.e., viewing the necessity demand as not only requiring that the use of force will be necessary but also that no more force than that which is necessary will be used; Blustein, *id.*, at 96; McMahan, *supra* note 14, at 259-260, 262.

<sup>18</sup> RODIN, *supra* note 16, at 115 (stating that once an armed conflict begins "the scale of force is intrinsically open-ended on both sides and open to escalation"); Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE J. INT'L L. 1, 35 (2010).

<sup>19</sup> For a brief critical discussion of the positions on the subject in the philosophical discourse, see David Rodin, *War and Self-Defense*, 18(1) ETHICS & INT'L AFFAIRS 63, 63-67 (2004) (Rodin holds that an analogy cannot be drawn between the two situations). One should not assume that once people accept the ability to draw an analogy between these two scenarios all moral differences between them are resolved. In fact, when attempting to extend individual self-defense morality to the morality governing soldiers in war two main approaches have been taken in moral philosophy. One views the state as analogous to an individual, in the sense that it can act in self-defense when attacked, and draw analogies from individual self-defense to action taken by the state. The leading scholar associated with this "Collectivist Approach" is Michel Walzer; see generally MICHAEL WALZER, *JUST AND UNJUST WAR* (4th ed. 2006). The other approach, the "Individualist Approach," views each soldier and civilian as an individual, and talks about their personal right for self-defense during war. The leading scholar associated with this approach is Jeff McMahan; see, e.g., McMahan, *supra* note 14; Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004). Each approach reaches of course different conclusions with regard to extent in which violent acts are justified during war.

<sup>20</sup> RODIN, *supra* note 16, at 110; Rodin, *supra* note 19, at 63. See also McMahan, *supra* note 14, at 257.

<sup>21</sup> Valerie Epps, *The Death of the Collateral Damage Rule in Modern Warfare* 24 (Suffolk Uni.-Law School, Legal Studies Research Paper Series, Research Paper 11-39, 09/16/2011). See also, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 392-94 (1993).

prohibited from recourse to force<sup>22</sup> except as “self-defense” against an enemy armed attack;<sup>23</sup> and the aggressed state’s resort to force must be an *immediate* and *necessary* response to the enemy’s *attack*.<sup>24</sup> *Jus ad bellum* proportionality then requires that the aggressed state restrict the scale of violence in its response to the enemy’s aggressive armed attack solely to what is necessary to overcome the threat posed by enemy attack.<sup>25</sup> Second, once armed conflict has begun, an additional type of proportionality requirement comes into force:<sup>26</sup> In light of the fact that civilians are often present in combat zones, *jus in bello* proportionality allows soldiers (i.e., the states’ representatives) to harm them, but only incidentally<sup>27</sup> to an attack on a military target and not excessively relative to the military advantage anticipated from attacking the military target.<sup>28</sup>

From a legal perspective, the issue at the center of this Article—whether in an armed conflict, a state is permitted to value the lives of its civilians more than the lives of foreign civilians—must, therefore, be resolved in light of the *in bello* proportionality norm.<sup>29</sup> The same is true regarding the question of soldiers’ duty to risk their lives in order to diminish the risk to foreign civilians, relative to their duty to do so to reduce the risk to their state’s civilians and the degree to which they are duty-bound to risk their lives in either case. The *jus in bello*

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<sup>22</sup> Art. 2(3)-(4) of Charter of the United Nations, 59 Stat. 1031 (June 26, 1945).

<sup>23</sup> *Id.* Art. 51.

<sup>24</sup> Schmitt, *supra* note 11, at 151. See also the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, ¶ 176.

<sup>25</sup> David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Ius Ad Bellum*, 24 EURO. J. INT’L L. 236, 237 (2013) (surveying the different positions regarding the interpretation of the *jus ad bellum* proportionality norm and reaching the conclusion that this is the majority opinion).

<sup>26</sup> The *jus in bello* proportionality norm equally applies to both sides, since once an armed conflict has begun, international law does not distinguish between aggressors and aggressed. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 48, 49-50 (2009). See also *infra* Section V.B.

<sup>27</sup> For the prohibition against intentionally attacking civilians, see Art. 48 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. I-17512; Art. 8(2)(a)(i) & 8(2)(b)(i) of the Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.T.N.S. 90.

<sup>28</sup> See Additional Protocol I, *supra* note 27, Art. 51(5)(b) & 57(2); Rome Statute, *supra* note 27, Art. 8(2)(a)(iv) & 8(2)(b)(iv). See also Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT’L CRIM. JUSTICE 258, 311-312 (2007). The prohibition against disproportional attacks applies also to damage to civilian property.

<sup>29</sup> See Joseph Raz, *Postema on Law’s Authority and Public Practical Reasons*, 4 LEGAL THEORY 1, 14 (1998) (stating that the nature of the law of any legal system is to claim finality; which means to claim “to have settled moral and other social issues”).

proportionality requirement is extremely vague, however,<sup>30</sup> and thus leaves considerable leeway in interpreting it in the most morally appropriate light.<sup>31</sup> The latter is one of the central aims of this Article. We thus begin by discussing moral philosophy considerations based on self-defense as it applies to individuals. Gradually, however, the Article shifts to a discussion of the modifications that must be made when we move from the sphere of morality to the legal sphere<sup>32</sup> and from an analysis of individual self-defense scenarios to analyzing soldiers' actions during armed conflicts.<sup>33</sup>

## II. THE EQUALITY PRINCIPLE AND ALTRUISM PRINCIPLE

The Equality Principle and Altruism Principle can be elucidated using an example devised by two leading scholars, which they presented in the aftermath of Israel's Cast Lead Operation in Gaza (Dec. 2008-Jan. 2009). Michael Walzer and Avishai Margalit describe an armed-conflict scenario in which an enemy unit holds hostage a group of civilians and uses them as human shields, intermingling with them so that it is impossible to harm the combatants without harming the civilians.<sup>34</sup> Walzer and Margalit argue that when attacking such an enemy, a state's soldiers must put themselves at risk to reduce civilian harm to the same degree regardless of whether the civilians are: (1) compatriots; (2) of the same nationality as the enemy combatants (and even supportive of the enemy cause); or (3) citizens of a third country (regardless of whether they support the enemy's cause or the state's cause).<sup>35</sup> We will call this claim the "Equality Principle."

The equality principle is based on the notion that all civilians are equally innocent.<sup>36</sup> The inherent value of all human life mandates that we must not treat people's lives with less respect simply because they are not members of our own community or country.<sup>37</sup> Furthermore, true

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<sup>30</sup> See Cohen & Shany, *supra* note 28, at 316; Blum, *supra* note 18, at 56; Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEXAS INT'L L. J. 453, 487 (2008).

<sup>31</sup> Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUMANITARIAN L. 79, 100-01 (2004).

<sup>32</sup> See *infra* Section V.

<sup>33</sup> See *infra* Sections IV-V.

<sup>34</sup> See Margalit & Walzer, *supra* note 1, at 22.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 21-22.

<sup>37</sup> Roy Confino and Mordechai Kremnitzer, *The Legitimacy of Harming the Innocent in the Last War in Gaza—A Comment on Moral Priority, Risk, and 'IDF's Spirit'*, (07/27/2009), (Heb.) at <http://www.idi.org.il/BreakingNews/Pages/128.aspx> (expressing support for Margalit and Walzer's position, stating:



regard for human life can only be expressed when the subject we contemplate is a member of our community so that we can reasonably identify with her and put ourselves in her shoes.<sup>38</sup> When we ask a soldier to treat foreign civilians as though they were civilians from her own country, we impose on her a Rawlsian veil of ignorance regarding the identity of the civilians she might hurt, which will make her decisions just and fair rather than biased.<sup>39</sup>

But what degree of risk must soldiers bear in the attempt to reduce civilians' risk level? Walzer and Margalit, as well as many others, assert that soldiers should "not shift... risk onto those who haven't been trained, who lack the capacity to injure; whether they are brothers or others."<sup>40</sup> That is, soldiers should always be willing to risk themselves when a choice has to be made between an option that is less risky to civilians but more risky to soldiers and an option with the reverse conditions. The reason for this, Walzer and Margalit claim, is that soldiers, unlike civilians, are engaged in taking risks, as well as in imposing risks on others: "[b]y wearing a uniform [soldiers agree to take on themselves] a risk that is borne only by those who have been trained to injure others (and to protect themselves)."<sup>41</sup> This is what we term the "Altruism Principle."

Many proponents of the Altruism Principle seem to qualify it so that it does not apply to the military advantage in preserving soldiers' lives but only to the inherent value of soldiers' lives. Obviously, there is a significant military advantage, for each side, to preserving soldiers' lives, in the effort to accomplish their current military mission.<sup>42</sup> Even scholars such as Walzer

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"it is doubtful whether the duty of the state not to harm the right to life of those who are not its citizens is weaker from its duty not to harm the right to life of its citizens. ... The Right to life must be universally recognized irrespective of a person's citizenship"; trans. Z.B.). See also Avishai Margalit and Michael Walzer, 'Israel & the Rules of War': *An Exchange*, 56(10) N.Y. REV. OF BOOKS 77, 77 (June 11, 2009); Margalit & Walzer, *supra* note 1, at 22.

<sup>38</sup> Margalit & Walzer, *supra* note 1, at 22 ("This is the guideline we advocate: Conduct your war in the presence of noncombatants on the other side with the same care *as if* your citizens were the noncombatants. A guideline like that should not seem strange to people who are guided by the counterfactual line from the Passover Haggadah, 'In every generation, a man must regard himself as if he had come out of Egypt.'").

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 21. See also PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 155 (3rd. edn., 2004); *infra* Section IV.B.

<sup>41</sup> Margalit & Walzer, *supra* note 1, at 21.

<sup>42</sup> 1 JEAN-MARIE HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL LAW—RULES 31 (2005). Due to this soldierly value, it cannot be denied that some consideration of protecting soldiers' lives must usually be taken into account when making a *jus in bello* proportionality assessment, as a consideration that allows putting the civilian population at some risk. Otherwise forces would have been prohibited from responding to enemy fire once there was a chance that even one civilian will be harmed. Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical*

acknowledge that this kind of soldierly significance can be taken into account and, therefore, accept that “the degree of risk that is permissible [for soldiers to shift from themselves to civilians] is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on.”<sup>43</sup> Yet Walzer and others hold that whenever the preservation of soldiers’ lives would not assist in the accomplishment of the military mission, this aim cannot serve as a justification for an increase in civilian risk.<sup>44</sup>

Some scholars express uneasiness with the implications of their reasoning. Thus although they still maintain that soldiers have an obligation to put their own lives at risk more than the lives of civilians, they require of soldiers a less demanding degree of self-risk than a complete ban on risk-shifting.<sup>45</sup> Yet, a sufficient explanation for this limit on soldiers’ duty of self-risk has not been provided. This lack of an adequate explanation has led to considerable variances among scholars who support both the Equality Principle and Altruism Principle, with regard to the exact degree of self-risk soldiers are duty-bound to assume.<sup>46</sup> In fact, even Walzer and Margalit have been inconsistent in the benchmark they have suggested.<sup>47</sup>

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*Commentary*, 12 Y.B. Int’l Humanitarian L. 347, 370 (2009) (“[s]topping mortar fire endangering one’s own troops offers a clear military advantage. After all, no military force can engage in any military operations if the law does not permit it to take defensive action.”).

<sup>43</sup> WALZER, *supra* note 19, at 156.

<sup>44</sup> See, e.g., Smith, *supra* note 2, at 146-47; Colm McKeogh, *Civilian Immunity in War: From Augustine to Vattel*, in CIVILIAN IMMUNITY IN WAR 62, 80 (Igor Primoratz ed., 2007); Report: Expert Meeting ‘Targeting Military Objectives’ 17 (Organized by the University Centre for International Humanitarian Law Geneva, May 12, 2005) (“the protection of one’s own forces must never be conducted at the cost of the civilian population.”). Some, such as Walzer, argue that the moral justification of the altruism principal is that soldiers forfeit their rights for life and liberty “simply by fighting” and by imposing risks on others; e.g., WALZER, *supra* note 19, at 136. Others have argued that the fact that soldiers are engaged in taking and imposing risks on others does not lead to the negation of their right to life; but still assert that these risk related issues lead to the conclusion that civilian lives should be given priority over soldiers’ lives; e.g., Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants*, 38 PHIL. & PUB. AFF. 342, 347, 353-55 (2010).

<sup>45</sup> Cf. Avery Plaw, *Upholding the Principle of Distinction in Counter-Terrorists Operations: A Dialogue*, 9 J. MIL. ETHICS 3, 15 (2010) (“we are required to design missions, where possible, so that the majority of risk is borne by soldiers where this substantially reduces risk to civilians and does not render the operation unviable (for example, by making it suicidal or impossible).”); Smith, *supra* note 2, at 146-47 (“Harm to non-combatants is permissible, if it is the unintended or indirect result of a proportionate attack against a lawful military objective. Risk transfer, however, is indefensible. The lives of combatants may never be set against the lives of non-combatants. Soldiers and civilians are distinct: there is no rate of exchange between them.”); Christopher, *supra* note 40, at 155; Daniel Statman, *Morality in War and ‘Cast Lead’*, 38 TCHELET 3, 8 (2010) (Heb.) (“...soldiers [must] exert all efforts in order not to harm civilians, even at the price of giving up certain missions (...) and even at the price of a certain risk to our forces”; trans. Z.B.); Confino & Kremnitzer, *supra* note 38 (“...it is inappropriate to place civilians at an equal risk to that of soldiers, and *ipso facto* not at a greater risk.”; trans. Z.B.).

<sup>46</sup> The lack of an explanation for the variation is most apparent in Confino & Kremnitzer, *supra* note 38, who argue that they base their conclusion on “Margalit and Walzer’s argument”; yet reach a conclusion that is somewhat

It is important to note also that the Equality Principle and Altruism Principle are not necessarily interconnected.<sup>48</sup> However, as the above discussion demonstrates, they are often asserted in conjunction. For the purposes of the position advanced in this Article, this conjunction is helpful.

### III. INDIVIDUAL SELF-DEFENSE AGAINST INNOCENT AGGRESSORS AND THREATS

#### A. Innocent Aggressors and the Rejection of the Altruism Principle

The Altruism Principle requires, at a minimum, that when confronted with a choice between their right to life and (state or foreign) civilians' right to life, soldiers should give preference to the latter.<sup>49</sup> In particular, in a situation such as that envisioned by Margalit and Walzer, where civilians are used as human shields and soldiers are required to risk their lives in order not to harm them, the altruistic principle mandates that the soldiers prefer the lives of the civilians over their own. Does this principle apply in the general morality of self-defense? Our consideration of this question begins with what is commonly referred to as the "innocent aggressor" scenario and then proceed to the case of human shields in the next section.

Can I (a private person) kill someone who attacks me but has no control over, or responsibility for, his actions (e.g., a lunatic in a homicidal rage, an epileptic having a seizure with a gun in his hand)? In such cases, termed in the self-defense literature "innocent aggressor

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different than that presented by Margalit and Walzer in some of their writings. This is, however, not Confino and Kremnitzer's fault as Margalit and Walzer are inconsistent in their conclusions.

<sup>47</sup> Cf. Avishai Margalit & Michael Walzer, *This Is Not the Way to Manage a Just War*, HAARETZ.CO.IL (Apr. 8, 2009) (Heb.), <http://www.haaretz.co.il/opinions/1.1254834> ("Israeli soldiers [must] take upon themselves higher risks than the risk that their actions impose on civilians."); Trans. I.P.); Margalit & Walzer, *supra* note 1, at 22 ("What degree of risk should Israeli soldiers assume in the first scenario? We can't answer that question with any precision. They don't have to take suicidal risks, certainly; nor do they have to take risks that make the [accomplishment of the mission] impossibly difficult."); Michael Walzer, *The Triumph of Just War Theory (and the Dangers of Success)*, 69 SOCIAL RESEARCH 925, 937-38 (2002) (presenting an intermediate position between the two just cited). Lastly *see*, WALZER, *supra* note 19, at 156-57 (there Walzer argues that the degree of risk transfer permissible varies depending on the significance of the mission; but further states that: "[t]he limits of risk are fixed, then, roughly, at that point were any further risk taking would almost certainly doom the military venture or make it so costly that it could not be repeated" and that "[e]ven if the target is very important, and the number of innocent people threatened relatively small, they must risk soldiers before they kill civilians"). *See also* Robert Nozick, *Hard Thoughts About Warfare: Total War, Nuclear Deterrence, Terrorism, Reprisals—Drawing Some Moral Lines*, 20 REASON 18, 19 (Dec. 1978) (Review of MICHAEL WALZER, JUST AND UNJUST WAR) (stating: "Walzer finds it hard to say how far you must go in accepting additional risks. Often, however, it is useful to speculate on what the ideal precise rule would be, for that helps us to uncover all its components and think about how they fit together.").

<sup>48</sup> *See, e.g.*, Luban, *supra* note 4, at 8, 11, 27-28, 32-33 (accepting the equality principle but not the altruism principle).

<sup>49</sup> *See supra* notes 40-44 and accompanying text.

cases,” our moral intuition seems most clear as to the permissibility of killing an innocent person in order to save our own lives.<sup>50</sup> It is in these cases, too, where the law in most legal systems permits killing an innocent person.<sup>51</sup> We therefore start our analysis of the scope of the moral permission to take the life of an innocent person by examining the basis for this permission vis-à-vis the innocent aggressor.<sup>52</sup>

The law permits killing innocent aggressors in the circumstances described above since they are all instances of self-defense and do not violate the requirements of imminence and proportionality.<sup>53</sup> Our moral intuition also seems to support this outcome, although our moral reasoning justification for it may vary.<sup>54</sup> Many hold this to be part of individuals’ right not to have their bodily integrity, or autonomy, violated by another person, no matter how innocent that person may be.<sup>55</sup> Another, closely related, intuition stems from the basic right to self-preservation that at least Hobbes would view as something individuals never forego, regardless of what they have agreed to.<sup>56</sup>

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<sup>50</sup> McMahan, *supra* note 14, at 263-64.

<sup>51</sup> Larry Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1177 (1987) (discussing all Western legal systems).

<sup>52</sup> There are several additional categories of innocent aggressors. One such additional category, commonly mentioned in the philosophical and legal literature, consists of cases in which someone who reasonably believes that she has a justification for attacking you but is mistaken about that belief (e.g., she has every reason to believe that you are about to kill 10 people without any justification but is wrong about that belief). For the purposes of this Article, however, there is only a need to discuss innocent aggressors of the kind discussed in the text; i.e., someone who attacks another person, but is no way culpable or responsible for that attack. See JEFF MCMAHAN, *KILLING IN WAR*, 167-73 (2009); McMahan, *supra* note 14, at 263 (discussing different categories of innocent aggressors, and using the term “innocent attackers”). McMahan, in the works just cited, uses the term “non-responsible threats.” His definition of this term is similar to our definition of “innocent aggressors,” but further includes instances of what shall be referred later herein (*infra* note 81 and accompanying text) as “innocent threats,” as well as some other categories of scenarios. We do agree that the term “non-responsible threats” is more accurate than the term “innocent aggressors” and that the distinction between innocent threats and innocent aggressors (in the manner in which these terms are defined in this Article) is unnecessary; but we nevertheless use the terminology more commonly used in the literature in order to review more easily some of the positions in the current legal and philosophical discourse.

<sup>53</sup> See, e.g., Model Penal Code, § 3.04(2)(a)(i). See also *supra* notes 15, 17, 51 and accompanying text (when read together).

<sup>54</sup> See McMahan, *supra* note 14 (surveying and critically examining the different moral views presented in an attempt to justify the use of force against innocent aggressors).

<sup>55</sup> For a “rights-based” account of self-defense see, e.g., JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 366-377 (1990); see also McMahan, *supra* note 14, at 275; Russell Christopher, *Self-Defense and Defense of Others*, 27 PHIL. & PUB. AFF. 123, 125-26 (1998) (discussing the rights-based accounts of self-defense). For an “autonomy-based” account of self-defense see, e.g., George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 378, 380, 387-89 (1973).

<sup>56</sup> THOMAS HOBBS, *LEVIATHAN* ch.14 ¶ 8 (Edwin Curley ed., Hackett Pub. Co. 1994) (1668).

A different question on which there is less consensus pertains to the *status* of this permission to kill an innocent aggressor; that is, whether one is *justified* in doing so or only *excused*.<sup>57</sup> This question is relevant to determining: (a) whether third parties are permitted to help a defender kill the innocent aggressor or not<sup>58</sup> and (b) whether the defender is held to be doing the right thing when killing the innocent aggressor.<sup>59</sup>

Some argue that the defender is justified in using self-defense against the innocent aggressor, and this means that third parties may help her and, furthermore, that she is doing the right thing when she is resisting.<sup>60</sup> Others maintain that the defender is only excused in such cases.<sup>61</sup> Accordingly, third parties may not help her kill the innocent aggressor;<sup>62</sup> and rather than holding that she is doing the right thing, we think only that she should not be held accountable for her actions, since it is unreasonable to expect people's will to be so strong as to not protect their own lives.<sup>63</sup>

A better position, we hold, is that what applies to the case of innocent aggressors is neither justification in the regular sense nor excuse. Rather, the defender has an "agent-relative permission" to kill an innocent aggressor.<sup>64</sup> Permission is a form of justification rather than

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<sup>57</sup> RODIN, *supra* note 16, at 79-101; Alexander, *supra* note 51, at 1177; McMahan, *supra* note 14, at 285-87.

<sup>58</sup> Alexander, *supra* note 51, at 1178; McMahan, *supra* note 14, at 286-87.

<sup>59</sup> Fletcher, *supra* note 55, at 376-77; Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 283, 285 (1991). *See also*, Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203, 213, 221 (1982) (generally discussing the difference between justifications and excuses).

<sup>60</sup> *See, e.g.*, Fletcher, *supra* note 55, at 375-76; David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 357 (1987) ("[t]his article examines the singular strength of self-defense as a justification for taking life.").

<sup>61</sup> *See, e.g.*, RODIN, *supra* note 16, at 79-101; Heidi Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2307 (1992).

<sup>62</sup> *See, e.g.*, BOAZ SANGERO, *SELF DEFENSE IN CRIMINAL LAW* 49-60 (2006); Hurd, *supra* note 61, at 2307-18. *But see* Claire Oakes Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 645-46 (1996) (stating that the issue remain unclear irrespective of the classification of the defense as an excuse or justification).

<sup>63</sup> SANGERO, *supra* note 16, at 49-60; Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 25-26 (1986).

<sup>64</sup> *See* Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175, 192-93 (1984); Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PENN. L. REV. 1361, 1394-95 (1999) (discussing such views). *See also*, Alexander, *supra* note 51, at 1187-89. Alexander uses the term "limited justification" but in term of its application it is equivalent to "agent-relative permission". The issue of agent-relative permissions in the context of self-defense is related to the moral discussions on agent-relative norms, agent-centered options and Supererogation. In the philosophical literature such positions are sometimes referred to as "agent-relative" positions. They are usually identified with a deontological framework. *See* Hurd, *supra* note 61, at 2313. However, as several commentators have argued such positions can also be defended from a consequentialist perspective; *see, e.g.*, Alexander, *id.*, at 1184-89; Douglas Portmore, *Position-Relative Consequentialism, Agent Centered Options, and Supererogation*, 113 ETHICS 303, passim (2003).

excuse, since if the defender is permitted to do something, there is nothing to be excused for.<sup>65</sup> Yet an agent-relative permission shares with excuse the agent-relative perspective and that in both third parties are prohibited from helping the defender.<sup>66</sup> Third parties may not help because the defender and aggressor are equally innocent.<sup>67</sup> From a third-party perspective, the defender and innocent aggressor are both caught in a tragic conflict in which, despite the innocence of both, only one can survive.<sup>68</sup> This is similar to a situation in which two strangers are trapped on a bridge that only one can cross safely while the other will fall to her death. From a bystander's perspective, there is no reason to prefer one life over the other or to intervene in the way things will play out.<sup>69</sup>

The reason this is permission and not excuse stems from the morality of permitting some measure of partiality,<sup>70</sup> or, in Larry Alexander's words,<sup>71</sup>

[morality permits] persons to prefer their own lives, and perhaps the lives of persons with whom they have special relationships, over the more numerous and equal innocent lives of others when those lives are directly threatened, even if the general balancing of interests would not authorize that preference.

Note that this equal innocence does not arise in the case of a culpable aggressor; in such a case, there is no symmetry between the aggressor and defender.<sup>72</sup> Culpable aggressors intentionally create a situation in which the defenders have to choose between their own lives and that of the aggressors; they thus forfeit their own right to life.<sup>73</sup> In such circumstances,

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<sup>65</sup>Alexander, *supra* note 51, at 1189 ("This limited justification... is unlike an excuse in not denying responsibility...").

<sup>66</sup>Alexander, *supra* note 51, at 1189 ("This limited justification ... does not extend to third parties. It is similar to an excuse in being personal to the one invoking it,..."); Davis, *supra* note 64, at 194. More accurately one should say that third parties may not help you because of the mere fact that the other side is an aggressor. According to some consequentialist accounts at least, third parties may be permitted to help you if, for example, you hold the cure for cancer and the innocent aggressor does not. See Alexander, *supra* note 51, at 1184-89. See also McMahan, *supra* note 14, at 261-62 (discussing the implications of adopting a consequentialist account in the context of culpable aggressors).

<sup>67</sup>Davis, *supra* note 64, at 194-96.

<sup>68</sup>See McMahan, *supra* note 14, at 254; Davis, *supra* note 64, at 194-96.

<sup>69</sup>Some claim that there is even a moral presumption against intervention; see McMahan, *supra* note 14, at 252-53, 284. *But see*, Davis, *supra* note 64, at 196 ("this is not to suggest that morality requires that a disinterested third party refrain from intervention altogether; ... third party might be obliged to decide whom to help by [for example] tossing a coin.").

<sup>70</sup>See McMahan, *supra* note 14, at 254, 268; Yitzhak Benbaji, *A Defense of the Traditional War Convention*, 118 ETHICS 464, 478-79 (2008).

<sup>71</sup>Alexander, *supra* note 51, at 1189.

<sup>72</sup>Rodin, *supra* note 20, at 64.

<sup>73</sup>RODIN, *supra* note 16, at 77-79; Rodin, *supra* note 20, at 64. See also McMahan, *supra* note 14, at 257.

therefore, it is fully justified for a defender to kill the aggressor, and third parties are also permitted to aid the defender and prohibited from aiding the aggressor.<sup>74</sup> Put differently, if self-defense has to do with the just distribution of risk, then from a third-party perspective, it seems that in the case of an innocent aggressor, the risk should be distributed equally—since neither the aggressor nor the defender is responsible for creating the risk.<sup>75</sup> In the case of a culpable aggressor, in contrast, since the aggressor has intentionally created the risk to the defender, he should bear all the risk, and both the defender and third parties are justified in shifting the risk back to the aggressor.<sup>76</sup>

### B. Innocent Aggressors and Human Shields

The previous section argued that a defender has an agent-relative permission to kill an innocent aggressor if this is the only way for her to escape certain death. This section demonstrates that human shields are, in fact, morally equivalent to innocent aggressors. The following chain of scenarios illustrates this point:

- 1) A person is strapped into the driver's seat of a car in a straitjacket that controls her movements and will cause her to steer the car at you and run you over unless you shoot her first. You shoot the driver and save your own life.
- 2) A person is strapped into the backseat of a car headed without control toward you, about to run you over unless you blow up the car. You fire a missile that blows up the car and save your own life.
- 3) A person is sitting in the backseat of car steered by your enemy driving toward you and about to run you over, unless you blow up the car. You fire a missile that blows up the car, and you save your own life.
- 4) A person is being held by your enemy, who is pointing a gun at you, and the only way you can save your life is by shooting at your enemy through the person he is holding. You shoot at your enemy, through the hostage, saving your own life.

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<sup>74</sup> McMahan, *supra* note 14, at 260.

<sup>75</sup> George P. Fletcher, *The Psychotic Aggressor—A Generation Later*, 27 *ISR. L. REV.* 227, 230-31 (1993).

<sup>76</sup> McMahan, *supra* note 14, at 259, 282; Kimberly Ferzan, *Justifying Self Defense*, 24 *L. & PHIL.* 711, 734 (2005).

The first scenario is a clear example of an innocent aggressor.<sup>77</sup> The fourth scenario is a clear example of a human shield. Let us examine whether something is lost—in terms of the moral criteria for justifying taking the life of another—in the progression from the first scenario through the subsequent three.

The crucial stage seems to be the move from the first scenario to the second. In both cases, the person is innocent and has no culpability for the threat or control over it. In the first scenario, however, the threat derives directly from the person (she is driving the car in your direction), whereas in the second scenario, she is only sitting in the car and poses no direct threat to you at all. Should this not make any difference?

Many view the existence of a threat, or the possibility of an invasion of one's autonomy—rather than culpability on the part of the aggressor—as the determinative moral factor in self-defense.<sup>78</sup> According to many such accounts, which can be termed “rights-based” or “autonomy-based” accounts of self-defense, the rationale for self-defense is the protection of the individual's autonomy or right to life. Since each of us has a right not to be killed by others, when another person becomes a threat to our lives, he loses his right not to be killed by us.<sup>79</sup> Therefore, any aggressor (whether innocent or culpable) loses his right not to be killed.<sup>80</sup>

This leads to the conclusion that one loses one's right not to be killed not only by being an innocent aggressor, but also by being what is termed in the self-defense literature an “innocent threat.”<sup>81</sup> The following is considered the classic example of a scenario in which a person becomes an innocent threat: A person is hurled at you while you are at the bottom of a deep well and will kill you as soon as she lands on you. Can you fire your vaporizing ray-gun and kill her

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<sup>77</sup> See *supra* note 52 and accompanying text (definition of an “innocent aggressor”).

<sup>78</sup> See *supra* notes 55-56 and accompanying text (discussing “rights-based”/“autonomy-based” accounts of self-defense). See also, McMahan, *supra* note 14, at 264. We are aware that there are differences between “rights-based” and “autonomy-based” accounts of self-defense. Mainly, with regard to the strictness of the proportionality demand required in cases of innocent aggressors/threats. Our aim here is only to distinguish such positions from positions that view the culpability of the aggressor as the basis for justificatory self-defense; for “culpability-based” accounts of self-defense; see, e.g., RODIN, *supra* note 16, at 79-101.

<sup>79</sup> See sources cited *id.* See also, McMahan, *supra* note 14, at 256-57, 264, 275; Christopher, *supra* note 55, at 125-26, 130-31.

<sup>80</sup> THOMSON, *supra* note 55, at 368-69; Fletcher, *supra* note 55, at 378-81, 387-89; McMahan, *supra* note 14, at 264, 276.

<sup>81</sup> McMahan, *supra* note 14, at 264 (“Let us define a Threat as a person who is causally involved in a threat of harm to another though not through his agency. An example of an Innocent Threat is the Innocent Projectile whose body is, through no fault of his own, hurled against another person.”).



(assuming that she will otherwise survive the fall and kill you)?<sup>82</sup> Under rights-based/autonomy-based accounts of self-defense, you can.<sup>83</sup> Although unlike a homicidal lunatic (i.e., unlike an innocent aggressor), the falling person cannot be said to be “acting” in any way so as to attack you, she nevertheless poses a threat to you simply by falling towards you; therefore you have a right not to be killed by her, while she loses her right not to be killed by you.<sup>84</sup> As will become clear, this understanding is crucial in assessing the moral status of soldiers who are not culpable for the threat they pose to civilians.

Some supporters of rights-based accounts of self-defense further assert that, unlike the innocent aggressor and falling person scenarios, it is *not* morally permissible to blow up an advancing vehicle to save one’s own life if this would result in killing a person standing near the vehicle, or found inside it.<sup>85</sup> Unlike the homicidal lunatic or falling person, the person trapped in the car (or standing next to it) poses no threat to you; it is the advancing car that is the threat. Thus, argues Judith Jarvis Thomson, a leading advocate of the rights-based account of self-defense, you may not kill such a person, not even in order to save your own life.<sup>86</sup>

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<sup>82</sup> This example was first introduced in ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 34-35 (1974).

<sup>83</sup> McMahan, *supra* note 14, at 264; Davis, *supra* note 64, at 190-194; THOMSON, *supra* note 55, at 369-70.

<sup>84</sup> THOMSON, *supra* note 55, at 368-71; Thomson, *supra* note 59, at 287-89, 301-02. McMahan, *supra* note 14, at 264 (“[M]ost people believe that it would be permissible to kill [an innocent threat such as an innocent projectile]. There is at least a strong presumption that the justification, if there is one, for the self-defensive killing of an IA[innocent attacker] should be the same as that for the self-preservative killing of an Innocent Projectile.”); Finkelstein, *supra* note 64, at 1370 (stating that “[m]ost philosophers who have considered the example agree that it would be permissible” to kill the falling man).

<sup>85</sup> In Thomson, *supra* note 59, at 296 the following example is given: “Consider a variant on Trolley, which I will call Trolley-Preemption. In this case you cannot deflect the trolley at all, you can only fire your antitank gun at it. But there is a bystander standing next to the trolley track, and if you fire your antitank gun, you will blow up the bystander along with the trolley. Can anyone plausibly think it impermissible to deflect the trolley in Trolley but permissible to blow it up in Trolley-Preemption? Hardly”. Based on this analysis many assume that Thompson will reach a similar conclusion when the person is found inside the advancing vehicle; *see, e.g.*, Thomas Michael Scanlon, *Thomson on Self-Defense, in* FACT AND VALUE 199, 210-11 (Alex Byrne et al. eds. 2001). They reach this conclusion despite the fact in THOMSON, *supra* note 55, at 370-371 (which was published a year before Thomson, *supra* note 59), Thomson has argued that killing a human-shield strapped to an advancing tank is permitted, as it is equivalent to the case of an innocent threat. The contradiction between Thomson’s conclusion in the trolley scenario and in the tanks scenario has been pointed out by many; *see, e.g.*, Larry Alexander, *Self-Defense, Justification and Excuse*, 22 PHIL. & PUB. AFF. 53, 59 (1993). Yet, in Thomson, *supra* note 59, at 310, Thomson further states that “I now think I was mistaken about some of the cases discussed in” THOMSON, *supra* note 55. Many assume that she had the human-shield scenario in mind when making that statement; as it is mentioned in the book but not in the later article; *see, e.g.*, Tyler Doggett, *Recent Work on the Ethics of Self-Defense*, 6 PHIL. COMPASS 220, 232 n.36-37 (2011).

<sup>86</sup> Thomson, *supra* note 59, at 287-89, 296, 301-03. *See also* Scanlon, *supra* note 85, at 210-11; Alexander, *supra* note 85, at 59.

This conclusion, however, is hard to justify and seems, in fact, to highlight the failings of the rights-based position.<sup>87</sup> The difficulties can be demonstrated through a small modification of the falling person scenario: the falling person is enclosed in a metal frame so that the frame, rather than her body, will hit and kill you when the person lands.<sup>88</sup> This modification seems inconsequential, but it makes this scenario very similar to that of the person trapped in the car. The latter can also be regarded as enclosed in a metal frame that will hit and kill you. Could the metal frame enclosing the falling person's body make all the moral difference? This seems to place a strange amount of emphasis on the human body qua physical object.<sup>89</sup> After all, the falling person's body will most likely be clothed, so that it will be not her body but her clothes that will directly hit you.<sup>90</sup>

In situations where the threat to one's life is imminent, rather than the direct source of the threat posed, we argue, it is the choice between an innocent person's life and one's own life that is of moral significance.<sup>91</sup> This is present no less in the human shield scenario than in the cases of a person sitting in a car and the innocent aggressor. They should therefore all be judged according to a similar standard.<sup>92</sup>

### C. The Innocent Bystander Case

The moral standard advanced in the previous section was that you are allowed to kill an innocent person when facing an imminent choice between her life and yours. Yet, as explained in this section, one objection should be made to this moral standard. The objection is that such

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<sup>87</sup> See Wasserman, *supra* note 60, at 363-64 (criticizing Kadish for making a similar distinction).

<sup>88</sup> See Scanlon, *supra* note 85, at 210-11; Alexander, *supra* note 85, at 59.

<sup>89</sup> Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74, 85-86 (1994); Scanlon, *supra* note 85, at 211.

<sup>90</sup> Otsuka, *supra* note 89, at 86.

<sup>91</sup> McMahan, *supra* note 14, at 276; Davis, *supra* note 64, at 193; Lawrence A. Alexander, *Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider*, 5 PHIL. & PUB. AFF. 408, 415 (1976). *But see*, JEFF MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 405-11 (2004); Otsuka, *supra* note 89, at 76-84 (both arguing that there is no difference between the person in the vehicle and the falling person; but based on this conclusion claim that in both cases self-defense is not justified).

<sup>92</sup> See Scanlon, *supra* note 85, at 210-12. *See also*, Finkelstein, *supra* note 64, at 1382 ("The philosophers who have considered this example all appear to agree that it is permissible [to kill a human shield]. I think, moreover, that they are correct. ... I see no reason why a person under attack should be obligated to forego an otherwise permissible act of self-defense in order to avoid killing an uninvolved bystander who happens to be in the way.").

permission would allow you to “initiate a sequence of events that you know will kill” an innocent bystander.<sup>93</sup>

Many argue that it would be obviously wrong to initiate such a sequence of events, even if you know that your survival may depend on it.<sup>94</sup> For example, it would be obviously wrong for you to grab an innocent person standing beside you and put her between you and a javelin flying at you, so that she will get killed instead of you.<sup>95</sup> Based on this moral rationale, Michael Otsuka argues that it would also be obviously wrong<sup>96</sup> for you to fire a missile at the javelin, if you know that by so doing, you will kill an innocent bystander who just happened to be nearby.<sup>97</sup>

The case of grabbing an innocent person is analogous to a scenario in which you hide behind a human shield in order to defend yourself from a threat from an aggressor.<sup>98</sup> Yet the scenario in which you fire a missile at an oncoming javelin and knowingly kill an innocent bystander is the equivalent of the scenario in which you shoot a missile at an advancing car, knowing that an innocent person is trapped inside the vehicle; or alternatively a scenario in which your aggressor is using a human shield.<sup>99</sup> The only differences are the kind of threatening object advancing towards you and the physical proximity of the innocent person (whose life you must take) to the advancing, life-threatening object. Thus, if Otsuka is right, in the case of the advancing car and, certainly in the case of your aggressor using a human shield, you cannot defend your own life at the price of the life of the innocent third party.<sup>100</sup>

We hold Otsuka to be wrong, however, and a common version of the Doctrine of Double Effect can demonstrate why. This doctrine can be illustrated through its frequent use to explain

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<sup>93</sup> Otsuka, *supra* note 89, at 77.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, at 76. *See also*, MCMAHAN, *supra* note 91, at 410.

<sup>96</sup> Although it may not be as wrong as grabbing the person; *see* Otsuka, *supra* note 89, at 93-94.

<sup>97</sup> *Id.* at 76-77. We altered Otsuka’s second example slightly. He contemplates hurling a bomb at a projectile headed at you that will kill a bystander. Like us, Otsuka criticizes Thomson’s distinction based on threat rather than innocence, and argues that innocent aggressors and innocent threats are morally equivalent to innocent bystanders; but he draws an opposite conclusion than ours, namely that Thomson is wrong about allowing the killing of innocent threats and innocent aggressors, rather than being wrong about not allowing the killing of innocent bystanders. *Id.*, at 76-84

<sup>98</sup> For the wrongfulness of intentionally using an innocent bystander in such a manner see, Otsuka, *supra* note 89, at 76; MCMAHAN, *supra* note 91, at 410; McMahan, *supra* note 14, at 254-55, 271; Thomson, *supra* note 59, at 290.

<sup>99</sup> *See supra* Section III.B.

<sup>100</sup> *See* Otsuka, *supra* note 89, at 85 (“[c]hanging the location of the person should not make any moral difference.”); Scanlon, *supra* note 85, at 211-12.

one of the most persistent conundrums in moral theory: our conflicting moral intuitions in the scenarios commonly referred to as the “Trolley Scenario” and the “Surgeon’s Scenario.”<sup>101</sup>

In the Trolley Scenario,<sup>102</sup> five railway workers are working on one track, and a single worker is working on another track. A runaway trolley is headed towards the five workers and will kill them unless you, a Bystander at the Switch, pull the switch that would divert the trolley to the other track, in which case it will kill the single worker and save the lives of the five others. Most would argue you are permitted to intervene and pull the switch.<sup>103</sup>

However, this permission to kill one person to save the lives of five does not apply in the Surgeon’s Scenario.<sup>104</sup> In that scenario, a healthy person enters a clinic where five patients are waiting for organ transplants (together, they need a heart, two lungs, and two kidneys) and will all die soon unless they receive the transplants. Can the surgeon seize the opportunity and kill the healthy person in order to save the five dying patients? The answer is universally no.<sup>105</sup>

What accounts for the different conclusions in these two scenarios? The Doctrine of Double Effect is often resorted to provide a solution. Under this doctrine, a justification that is adequate for causing a certain harm as a side-effect might not be adequate for causing that harm as a means to an end (i.e., intentionally) under the same circumstances.<sup>106</sup> This means that one would generally be barred from killing another person intentionally, even if this would be justified on consequentialist grounds, although one might be justified in doing so only foreseeably or as a byproduct of one’s actions, if one’s action is justified on consequentialist grounds, and the killing is an unavoidable byproduct of that action.<sup>107</sup>

In the Trolley Scenario, the bystander, by pulling the switch, does not intend the death of the single worker toward whom she diverts the trolley, but only foresees it as a side-effect of

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<sup>101</sup> For a contrast between these two scenarios in the context of Doctrine of Double Effect see, Michael J. Costa, *The Trolley Problem Revisited*, 24 SOUTHERN J. PHIL. 437, 442-443 (1986); Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1063-64 (1993).

<sup>102</sup> Rakowski, *supra* note 101, at 1063-64.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at 1064.

<sup>105</sup> *Id.*

<sup>106</sup> Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 334-35 (1989). *See also*, McMahan, *supra* note 14, at 271.

<sup>107</sup> *See also*, McMahan, *supra* note 14, at 254; Nozick, *supra* note 47, at 19.

saving the five endangered workers.<sup>108</sup> In the Surgeon’s Scenario, in contrast, the surgeon would have to kill the healthy person intentionally and not only as a foreseen side-effect of saving five patients.<sup>109</sup> The Doctrine of Double Effect would thus bar grabbing another person as a shield against an oncoming javelin, as this would be intending that person’s death.<sup>110</sup> The doctrine would not, however, bar firing a missile at the javelin, even if this would also kill a bystander; nor would it would bar bombing an oncoming car, even though this would kill an innocent person trapped inside.<sup>111</sup> The doctrine would not bar these actions since they would constitute only foreseeing (and not intending) the innocent bystander’s death as a byproduct.<sup>112</sup>

What about killing a human shield? Can we shoot through someone without intending her death? While some advocates of the Double Effect may find this conclusion problematic, we think that comparing this scenario to the advancing car scenario leads to the conclusion that such an action, too, could be permissible under logic of the Doctrine of Double Effect, at least if it is rightly interpreted.<sup>113</sup> There is no reason to attribute any moral significance to the temporal sequence which seems to distinguish between advancing car, javelin, and the human shield: why should it matter if the innocent person is harmed slightly after the danger is diverted (javelin) in the exact same time (advancing car) or slightly before (human shield).<sup>114</sup>

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<sup>108</sup> Costa, *supra* note 101, at 442-43.

<sup>109</sup> *Id.*

<sup>110</sup> Helen Frowe, *Equating Innocent Threats and Bystanders*, 25 J. APPLIED PHIL. 277, 279 (2008).

<sup>111</sup> Some acknowledge that the doctrine of double effect does allow blowing up the advancing threat even if a person nearby will be killed, but argue that this fact indicates a flaw in the doctrine of double effect, and necessitates its revision; since moral intuition does not support doing so; *see*, Rakowski, *supra* note 101, at 1076; Ingmar Persson, *Double Effect Troubles*, in PHILOSOPHICAL COMMUNICATIONS 123, 134-35 (Felix Larsson ed., 2005); II FRANCES MYRNA KAMM, MORALITY, MORTALITY 151 (1993). We dispute the existence of such a consensual moral intuition, as it clearly does not exist in the closely related scenario of the tactical bomber; *see* McMahan, *supra* note 14, at 271 (discussing the tactical bomber scenario).

<sup>112</sup> Persson, *supra* note 111, at 135 (“the blowing up of the bystander is not a means to the saving” of the defended).

<sup>113</sup> Otsuka, *supra* note 89, at 87, claims that “the relation between her body and her is sufficiently intimate that one could not intend to destroy her body as a means to save one’s own life without intending to destroy her as well” he further argues that “[c]hanging the location of the person should not make any moral difference”, *id.*, at 85. Thus he concludes that in both cases the killing of the individual is not justified. While we agree with the claim that the location does not make a difference we think his former claim is false; *see* Quinn, *supra* note 106, at 345 (“[a]nother problematic kind of case involves innocent hostages or other persons who physically get in the way of our otherwise legitimate targets or projects. Does our shooting through or running over them involve a direct intention to affect them? I think not. It is to our purpose, in the kind of case I am imagining, that a bullet or car move through a certain space, but it is not to our purpose that it in fact move through or over someone occupying that space.”)

<sup>114</sup> *See* Otsuka, *supra* note 89, at 85 (similarly to our claim that the temporal sequence should not make a difference Otsuka argues that “the location of the [innocent] person should not make any moral difference”).

This conclusion gains additional force when we examine another common version of the Doctrine of Double Effect, known as the principle against appropriation.<sup>115</sup> Under this principle, there is a morally significant distinction between using someone harmfully as a means to our ends and not using her in the same way.<sup>116</sup> Another, similar distinction is between viewing the bystander's presence as an opportunity or as an obstacle.<sup>117</sup> In the case of grabbing a person and putting her between you and the javelin, you are appropriating an innocent bystander, since you are using her harmfully as a means for your survival and her presence is an opportunity for you.<sup>118</sup> The same holds true for harvesting the organs of a healthy patient for transplant. In the case of firing at the oncoming javelin (as well as at the advancing car or at the aggressor holding a human shield), the innocent person is of no use to you, and her presence there is not an opportunity for you.<sup>119</sup> In fact, in the human shield case, the fact that she is being held hostage by your aggressor may even be an obstacle for you, since it might have been easier for you to defend yourself had she not been there. Killing a human shield, therefore, is not a case of appropriation.

An additional moral intuition that is presented as the basis for the prohibition on killing human shields is the distinction between causing harm (which is often morally prohibited) and not preventing harm (which is more likely to be morally permitted). This is commonly referred to as the distinction between killing and letting die.<sup>120</sup> The agent-relative permission to prefer one's own life, it is argued, extends to cases of letting another person die but not to cases of killing. Yet this distinction, as it will now be demonstrated, is fraught with difficulties and, we would argue, should not affect our conclusion regarding the human shield scenario.

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<sup>115</sup> See Larry Alexander, 'With Me, It's All er Nuthin': Formalism in Law and Morality, 66 U. CHICAGO L. REV. 530, 559 (1999).

<sup>116</sup> Alexander, *supra* note 117, at 559-60. See also, McMahan, *supra* note 14, at 273.

<sup>117</sup> Quinn, *supra* note 106, at 348.

<sup>118</sup> McMahan, *supra* note 14, at 254-55, 271.

<sup>119</sup> Quinn, *supra* note 106, at 342, 345; Finkelstein, *supra* note 64, at 1382 n.51.

<sup>120</sup> McMahan, *supra* note 44, at 369-70. See also, Luban, *supra* note 4, at 32-33; Margalit & Walzer, *supra* note 37, at 77; Confino & Kremnitzer, *supra* note 38 (these scholars make this argument in the context of soldierly actions).

One problem with the killing and letting die distinction is that it ignores the fact that there are situations in which inaction has moral implications. As Huebner and Hauser explain (while criticizing attempts to apply this distinction in the context of the Trolley Scenario),<sup>121</sup>

[the] argument that there are no morally sufficient reasons that tell in favor of turning the trolley thus presumes that the bystander is responsible for the outcome if she flips the switch, but that she is not responsible for the outcome if she just lets the trolley continue along the main track. However, ... [p]hilosophers and nonphilosophers alike tend to see the bystander as faced with a tragic choice between two unappealing options. ... When the actor is completely aware of all of the choices and outcomes, her refusal to intervene is plausibly treated as... something that the actor does (...).

Moreover, it is commonly accepted that there are categories of situations in which the killing and letting die distinction does not determine the moral outcome, and in these instances, the Doctrine of Double Effect is the moral intuition that should guide us. One such category includes situations analogous to the Trolley Scenario.<sup>122</sup> The common attribute of the situations falling into this category is that an existing risk is simply redirected in order to save lives; i.e., one's life-saving action does not involve creating a new risk and directing it at another person.<sup>123</sup> To be clear, this is not to state that in all scenarios in which one only redirects an existing risk killing is permitted, nor does it mean that killing will always be prohibited in cases in which one creates a new risk. The accept moral position only holds that the moral outcome in redirection scenarios should not be guided by the killing and letting die distinction; instead it should be determined based on the Doctrine of Double Effect.<sup>124</sup>

The redirection attribute, however, is not present in the javelin and human-shield scenarios. In these scenarios, the defender does, in fact, create a new risk and directs it at a third party. This feature, Otsuka argues, is of moral significance, in that it distinguishes the javelin example, which he maintains is a forbidden case of killing a bystander, from the trolley example, which he maintains is a permitted action.<sup>125</sup> But to take redirection of risk as the only benchmark for identifying situations in which the killing and letting die distinction does not determine the

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<sup>121</sup> Bryce Huebner & Marc D. Hauser, *Moral Judgments about Altruistic Self-Sacrifice: When Philosophical and Folk Intuitions Clash*, 24 PHIL. PSYCH. 73, 79 (2011).

<sup>122</sup> Philippa Foot, *Killing and Letting Die*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 177, 183 (Jay Garfield & Patricia Hennessey ed., 1984).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Otsuka, *supra* note 89, at 77.

moral outcome would commit Otysuka to the following strange position: a person would be allowed to turn the switch that will divert the trolley from a track where five people are working, even if she knows that there is someone on the track to which the trolley is diverted, but would not be allowed to fire a missile at a trolley headed towards five people if she knows that even one person standing next to the tracks would die from the resulting explosion. This example thus uncovers a flaw in Otysuka's reasoning.

In fact, there is another category of situations in which the relevant moral criteria is not the distinction between causing harm and not preventing it.<sup>126</sup> The situations in this category, as Hurka points out, are analogues to a scenario in which "a victim is being attacked by an aggressor and... the only way [to save] the victim's life is by throwing a grenade that will kill the attacker and also, unavoidably, an innocent bystander."<sup>127</sup> As one can easily notice, Otysuka's scenario of firing a missile at an oncoming javelin while knowing that a bystander will be harmed from the explosion clearly belongs to this category.<sup>128</sup> In such scenarios, as Hurka explains,<sup>129</sup>

[it] is not the distinction between causing harm and failing to prevent it [that aids in identifying the situations belonging to this category and determining their proper moral outcomes]; it is the distinction between targeting people for harm and harming them collaterally, which is a distinction within the category of causing. This latter distinction is usually understood using the doctrine of double effect, so it becomes the distinction between intending harm as an end or means and merely foreseeing that harm will result.

Since, as discussed earlier, there is no reason to attribute any moral significance to the temporal sequence which seems to distinguish between advancing car, javelin, and the human shield scenarios, all three scenarios equally belong to this category of "collateral damage scenarios."<sup>130</sup> Thus, in all three scenarios, since the prohibition against appropriation is not violated, the lives of the many can be preferred over the lives of the few. Further, in such

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<sup>126</sup> See Hurka, *supra* note 4, at 60-62 (discussing this issue with regard to a defense of others scenario).

<sup>127</sup> *Id.* at 61.

<sup>128</sup> See *supra* note 97 and accompanying text.

<sup>129</sup> Hurka, *supra* note 4, at 60-61.

<sup>130</sup> See *supra* note 114 and accompanying text.



scenarios, a person is permitted to try to save her own life even if she knows that the inevitable result will be the death of another individual.<sup>131</sup>

To summarize, the moral principle elaborated earlier should be somewhat reformulated: you are allowed to kill an innocent person when you are confronted with an imminent choice between her life and your own life, *unless in so doing, you are appropriating that other person*. This formulation, however, does not alter the conclusion that one has an agent-relative permission to kill a human shield in some self-defense situations.

#### D. Human Shields You Strongly Care For: Rejection of the Equality Principle

Thus far, the discussion has argued for the rejection of the Altruism Principle as applied to human shields. We have sought to establish that, contrary to this claimed principle, defenders, in individual self-defense scenarios, have an agent-relative permission to kill a human shield, without appropriation, if this is the only way in which they can save their own lives. We will now consider the Equality Principle, according to which one is morally required to apply the same standard of self-risk, regardless of the identity of the human shield.<sup>132</sup>

In this context, the following question arises: since in the case of an innocent human shield, the minimal moral standard applying to a defender is permission to kill the human shield, may a defender apply a different, higher moral standard if the human shield is someone close to her, such as her son, lover, friend, or countryman, rather than a stranger? That is, could she, for example, choose not to defend herself against an aggressor who would certainly kill her, so as to avoid killing her son, who is being used as a human shield by the aggressor, even though the defender would be acting in self-defense were the human shield another person?

Three alternative lines of reasoning support an affirmative response to this question. One line of reasoning is that, no matter for what reason, a person is always permitted to abide by a higher moral standard than what is required by the minimal moral threshold.<sup>133</sup> Since a defender

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<sup>131</sup> Hurka, *supra* note 4, at 60-62 (discussing the permission to take partiality into account in collateral damage scenarios).

<sup>132</sup> See *supra* notes 35-37 and accompanying text.

<sup>133</sup> DAVID HEYD, SUPEREROGATION: ITS STATUS IN ETHICAL THEORY 97-98 (1982) (arguing the if a person chooses to accord more than the minimal standard to one individual and not to another that is not an immoral act of discrimination as long as the decision not to accord the same treatment to both was not made due to malevolent attitude or contempt towards the person that was not accorded the higher standard of treatment); John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POLI. SCI.

is not required to sacrifice her life for the sake of a human shield, if she chooses to do so, she could do so for any reason and for any type of person.<sup>134</sup>

The second line of reasoning applies specifically to people you hold dear, such as family members. This reasoning rests on the same premise that gave rise to the agent-relative permission in the first place, i.e., personal partiality.<sup>135</sup> We argued for an agent-relative permission to kill an innocent person, even if the balance of reasons is neutral, because we allow people to prefer their own lives or “the lives of persons with whom they have special relationships” over the lives of others, when those lives are directly threatened.<sup>136</sup> Therefore, the same reason for which we would allow a person to prefer her own life over that of an equally innocent stranger would apply in a similar hypothetical scenario where the person chooses to prefer her son’s life, but not a stranger’s life, over her own life.<sup>137</sup>

How far can the scope of this justification be extended? Should it apply also to second-degree relatives, friends, countrymen? And as such, does it apply to the relationship between soldiers and their state’s civilians?<sup>138</sup> There seems to be an intuitive pull towards the view that preferring one’s co-civilians is not simply discriminating at whim.<sup>139</sup> Thomas Hurka argues, for example, that

[t]he relations among citizens of a nation are not as close as between parents and children, and the partiality they justify is not as strong. But common sense still calls for some partiality toward fellow citizens and certainly demands that partiality of governments.<sup>140</sup>

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REV. 594, 601, 604 (1975) (adopting a consequentialist view that also supports allowing individuals (and even state-representatives) such liberty).

<sup>134</sup> See HEYD, *supra* note 133, at 2, 97-98 (when read jointly); John Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293, 301-01 (1977) (discussing a scenario in which a person is considering whether to give up a drug that can save herself/a third party when doing so will result in the death of five individuals who also need the drug). See also, Finkelstein, *supra* note 64, at 642 (“A person who would rather die than kill is surely permitted to do so, ... even if we are inclined to regard suicide as morally prohibited.”).

<sup>135</sup> See *supra* notes 70-71 and accompanying text.

<sup>136</sup> Alexander, *supra* note 51, at 1189. See also, Shelly Kagan, *Does Consequentialism Demand too Much? Recent Work on the Limits of Obligation*, 13 PHIL. & PUB. AFF. 239, 254 (1984) (stating generally that morality must allow individuals to give weight to their commitments and personal ties).

<sup>137</sup> Finkelstein *in fact* argues that in such a case the moral reasons supportive of such an action are stronger than those that exist in cases in which we act in order to save our own lives. See Finkelstein, *supra* note 62, at 646-47.

<sup>138</sup> Finkelstein, *supra* note 62, at 647; Hurd, *supra* note 61, at 2314.

<sup>139</sup> E.g., Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 301-02 (1988); Uwe Steinhoff, *Debate: Jeff McMahan on the Moral Inequality of Combatants*, 16 J. POLI. PHIL. 220, 223 (2008).

<sup>140</sup> Hurka, *supra* note 4, at 59-60.

Seeing the relationship between compatriots as partially analogous to familial ties is not, however, impediment-free.<sup>141</sup> Yet as an argument that is only needed for justifying a person's decision to risk her life (in order to reduce the risk to another person) further than what is generally required of her, it can suffice.<sup>142</sup>

A third line of reasoning would apply only to circumstances in which the defender bears a duty of care towards the human shield or in which she acts as that person's agent,<sup>143</sup> as in the cases of a mother and son<sup>144</sup> or a bodyguard and her client.<sup>145</sup> Such a duty of care may supply another reason for partiality, i.e., for why one may follow a rule that distinguishes between different hypothetical human shields for whom one can sacrifice oneself.<sup>146</sup>

If someone has a duty to protect another person and is confronted with the choice between her own life and the life of that other person, should she be obliged to prefer the latter? It is disputed whether this person is morally bound to sacrifice her life in such a situation,<sup>147</sup> although there might be valid legal or professional obligation to that effect.<sup>148</sup> Yet it seems to follow that, at the least, a person may choose to sacrifice her life, despite an available permission

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<sup>141</sup> E.g., Hurd, *supra* note 61, at 2314; Jeff McMahan, *Debate: Justification and Liability in War*, 16 J. POLI. PHIL. 227, 237 (2008).

<sup>142</sup> See HEYD, *supra* note 133, at 2, 97-98 (when read jointly); Luban, *supra* note 4, at 11 ("Of course our soldiers can take greater risks for our own people than for the enemy's. Anyone who thinks otherwise is living in a fantasy world where loyalties no longer matter"; Luban, however, thinks that the minimal standard that soldiers should accord to all is different than the one that will be advanced herein).

<sup>143</sup> Benbaji, *supra* note 70, at 476 ("In some circumstances, these obligations imply that X ought to bring about an outcome that involves more evil. For example, it is widely believed that firefighters ought to save those who pay for their service. They ought to do so, even in circumstances in which they can save a larger group of people to whom they bear no contractual duty. Similarly, it is widely believed that X ought to save his children from the fire, even if he could save many others, who are unrelated to him."); D. A. Lloyd Thomas, *Why Should I Be Moral?*, 45 PHIL. 128, 136-37 (1970).

<sup>144</sup> RODIN, *supra* note 16, at 37; Finkelstein, *supra* note 62, at 646-47.

<sup>145</sup> McMahan, *supra* note 141, at 237-38; GREGORY S. KAVKA, HOBBSIAN MORAL AND POLITICAL THEORY 316 (1986).

<sup>146</sup> RODIN, *supra* note 16, at 37; Finkelstein, *supra* note 62, at 646-47; McMahan, *supra* note 141, at 237-38; Thomas, *supra* note 143, at 136-37.

<sup>147</sup> See *supra* note 134 and accompanying text. See Huebner & Hauser, *supra* note 121, at 74 (discussing the dispute regarding the way in which morality should treat self-sacrifice); RODIN, *supra* note 16, at 36-39 (stating that only a permission to come to the aid of the other exists, and that that permission becomes a duty when one does not need place herself at risk as part of coming to the other person's rescue).

<sup>148</sup> Finkelstein, *supra* note 62, at 642 ("Killing performed for the sake of others' welfare presents a possible fulfillment of obligation: although the law usually recognizes no duty to rescue, it would not be antithetical to the nature of moral obligation to impose such a duty. Cases of justified public necessity are ones in which such a duty would apply"). See also, RICHARD A. GABRIEL, TO SERVE WITH HONOR 181 (1982) (stating that in military culture a strong convention is embedded that views soldiers as "a group of [individuals] who... live a life that demands special sacrifice and hardship and the subordination of their interests to the pursuit of the common good").

for not doing so, only for the sake of a person whose protection she is responsible for and not for the sake of other people.<sup>149</sup>

Think of a bodyguard—say, Kevin—and the person under his protection, say, Whitney. Suppose Kevin faces a situation in which Whitney and another woman are at peril, and he can save only one of them, but either way will lose his own life in the process. Kevin may have no moral obligation to save either of the women in this situation,<sup>150</sup> but would it not be reasonable to argue that if he does choose to save one of them, it should be Whitney?<sup>151</sup> In particular, it seems obvious that it would be morally unobjectionable if Kevin adopts a rule by which he will sacrifice his life to protect Whitney but not to protect a stranger.<sup>152</sup>

Taken together, the three lines of reasoning discussed here seem to make a good case for rejecting the Equality Principle with regard to individuals acting in self-defense.

#### E. The Altruism and Equality Principles and the Defense of Others

Up till now, we have focused on self-defense scenarios in which the defender has to choose between her life and that of an innocent person, as in the human shield case. We now

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<sup>149</sup> See Steinhoff, *supra* note 139, at 223 (discussing situation in which an unrelated third party is not allowed to intervene and arguing that that third parties are permitted to “intervene in such a situation on behalf of their spouses, lovers, friends and, most importantly in this context, compatriots”). See also, Benbaji, *supra* note 70, at 476, 486 (discussing parents’ and firefighters’ duty to be partial in a burning house scenario, and implicitly equating soldiers’ predicament to the predicament faced by such parents and firefighters).

<sup>150</sup> See *supra* notes 133-134, 147 and accompanying text.

<sup>151</sup> McMahan, *supra* note 141, at 237-38 (discussing the moral duty of a bodyguard). See also, KAVKA, *supra* note 145, at 316; Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 563-564 (1991) (both Kavka and Stier argue that a bodyguard has a moral duty to risk her life in order to protect her client, and does not have such a duty with regard to other individuals); Jane English, *Abortion and the Concept of a Person*, 5 CAN. J. PHIL. 233, 238 (1975) (arguing that a bodyguard is permitted to prefer the life of her client over the life of an innocent attacker).

<sup>152</sup> See, *id.*, as well as *supra* notes 137-149 and accompanying text. Some may find this conclusion in the context of the bodyguard example problematic because of the financial basis of the protection duty; see, e.g., Hurd, *supra* note 61, at 2314; Davis, *supra* note 64, at 196. This criticism is, however, much weaker in the context of the kind of relationship which is the true focus of this Article, i.e. the relationship between soldiers and their state’s civilians. In that context, as discussed later herein, the moral basis for the special duty is much stronger; see *infra* Section IV.A. See also, Taurek, *supra* note 134, at 298 (arguing that promises, contract and quasi-contractual relationship do create a duty for a third party to prefer the life of the person she has such a relationship with over the lives of even several other individuals, while the emotionally based relations (such as friendship) only create a permission to prefer the life of that person over the lives of others).

proceed to the possible implications of this discussion in the context of defense of others,<sup>153</sup> which will be pertinent to our discussion of the moral status of soldiers during armed conflict.<sup>154</sup>

Recall that when rejecting the application of the Altruism Principle, we noted that this rejection applies only to the defender and not to third parties, as the permission to prefer one's own life is agent-relative and derives from the partiality one is allowed to have towards one's own life.<sup>155</sup> Therefore, in a human-shield situation, for example, the defender is allowed to kill the human shield in order to save her own life (for example, if the only way to stop the aggressor is to shoot at him through the human shield). A third party, on the other hand, witnessing the situation a bystander, is not thus permitted, since she has no reason to prefer one innocent life (that of the defender) over another (that of the human shield).

But what if the third party has special relations with the defender, if, for example, he is her child? In such a case, many would concede, unlike in the case of an uninvolved third party, the third party would be permitted to kill the human shield if this was the only way to save her child.<sup>156</sup> The reason for this is that she should enjoy the same agent-relative permission to act to protect her child as defenders have to protect their own lives.<sup>157</sup> The partiality, in other words, that warrants the agent-relative permission to prefer one's own life can be extended also to the lives of those one holds dear.<sup>158</sup> We should note, however, that this permission is qualified and seems to be most justified with regard to those for whom we would be willing to risk our own lives because they are so close to us as to be an extension of our own selves—as we may feel towards our children or spouses. The further away we move from that degree of closeness, the harder it could be to justify extending the agent-relative permission to third parties.<sup>159</sup>

The second reason for partiality that was offered in the discussion of the Equality Principle—the existence of a special duty of care/protection or the status of being someone's agent—seems also to apply in cases of defense of others. In the latter cases, the third party may

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<sup>153</sup> See McMahan, *supra* note 14, at 253 (defining acts of defense of others; McMahan distinguishes between “other-defense” and “other-preservation” this distinction is unnecessary for the discussion made herein).

<sup>154</sup> See, e.g., Davis, *supra* note 64, at 190n.35.

<sup>155</sup> See *supra* notes 66-69 and accompanying text.

<sup>156</sup> For now we discuss situations where partiality allows a choice in cases of equal number. For the case where the number of people on the tracks is not equal, see the next Section.

<sup>157</sup> See Finkelstein, *supra* note 64, at 1374, 1382-83 (when read together).

<sup>158</sup> See *supra* notes 135-137 and accompanying text.

<sup>159</sup> See *supra* notes 139-142 and accompanying text.

even have a duty to intervene on behalf of the person under her protection.<sup>160</sup> In the human-shield scenario, for example, if the third party has a duty to protect the defender—e.g., as the defender’s bodyguard—many would argue that she is, in fact, obligated to prefer the defender’s life over that of the human shield.<sup>161</sup>

The idea that a bodyguard may have a duty to prefer the life of the person under her protection stems from the idea of agency. In cases of this type, the third party is an agent of the person being aimed at with a gun but not an agent of the human shield. If the person being threatened is able to defend herself against the aggressor at the price of killing the innocent human shield, she could still choose not to kill the human shield and die instead.<sup>162</sup> However, a third party who is that person’s agent cannot make that choice of sacrifice for her; that third party is required to act by the most protective available moral norm for the benefit of the person on whose behalf she is acting as an agent.<sup>163</sup>

To sum up, think of the Trolley Scenario again. If there were one person standing on each track, most of us would agree that the third party, at the switch, should not intervene;<sup>164</sup> and some would assert that person is equally permitted to intervene in order to aid either of the two individuals.<sup>165</sup> But if the third party has special relations with the individual on one of the tracks, or bears a special duty of care towards her, most would agree that she would be permitted, or perhaps even duty-bound, to divert the trolley from that track, even at the expense of the life of the person on the other track.<sup>166</sup>

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<sup>160</sup> See Benbaji, *supra* note 70, at 476, 486 (discussing the duties of soldiers, parents and firefighters); Davis, *supra* note 64, at 190n.35 (stating in the context of “innocent threats”: “If we have a special obligation or stand in a special relation to one of the parties, then we may be permitted or even obligated not to act as a purely disinterested bystander would be obliged to act”). See also, McMahan, *supra* note 141, at 237-38 (discussing a trolley scenario); McMahan, *supra* note 14, at 266 (discussing innocent attackers). But see, Thomson, *supra* note 59, at 308-09 (arguing against partiality).

<sup>161</sup> See *supra* notes 143-152 and accompanying text.

<sup>162</sup> See *supra* notes 133-134, 147 and accompanying text.

<sup>163</sup> ANDREW LIGHT, MORAL AND POLITICAL REASONING IN ENVIRONMENTAL PRACTICE 137-38 (2003) (discussing in a different context the moral duties of agents; duties that limit their discretion and obligate them to act in their principals’ best interest).

<sup>164</sup> See McMahan, *supra* note 14, at 252-54 (discussing the moral presumption against intervention and stating that it can be overcome only when it reduces the overall harm). See also, Finkelstein, *supra* note 64, at 1373-74 (discussing none interference in a falling person scenario).

<sup>165</sup> Alexander, *supra* note 91, at 411n.7. See also, Davis, *supra* note 64, at 194-96 (discussing the different positions on this subject).

<sup>166</sup> McMahan, *supra* note 141, at 237-38. See also, McMahan, *supra* note 14, at 252-54; Davis, *supra* note 64, at 190 n.35 (discussing “innocent threats”); Hurka, *supra* note 4, at 61 (discussing collateral damage scenarios).

#### F. How Many May Be Killed in Self-Defense and in Defense of Others?

As described earlier, a clear divide exists between self-defense situations involving culpable aggressors and self-defense situations in which the individuals whose wellbeing clashes with that of the defender are innocent.<sup>167</sup> With regard to culpable aggressors, since they unjustly create the risk to the defender, they forego their right to life, and the defender can shift the risk back to them.<sup>168</sup> Therefore, in such cases, one can defend one's own life even at the expense of killing an abundance of such aggressors; one can cause greater harm to the culpable aggressor than the harm expected to be caused by that aggressor's attack (if causing that greater harm is necessary to repel the attack); and one can cause certain harm to the culpable aggressor even when the risk from that aggressor is only probable.<sup>169</sup> The same applies to third parties who act in defense of victims of culpable aggressors—i.e., in cases of defense of others where the aggressor is culpable.

In the case of innocent aggressors, innocent threats, or human shields, however, the defender and other innocent person share equal responsibility for the risk: neither is responsible.<sup>170</sup> In such cases, it is not even certain that a defender can kill more than one innocent person in order to avert the risk of death, and at any rate, it is obvious that there must be a limit to the number of people that can be killed. Put differently, in such cases, a limit must be placed on the ratio between the harm averted by the defender (both the harm's severity and the probability of its occurrence) and the harm caused by the defender to innocent others.<sup>171</sup>

The question of what limit to place on this ratio is a very difficult one to answer, and it is one that we have not addressed thus far. We have only claimed that in such cases, a person may prefer her own life over that of one other innocent person (without appropriation). But can she cause the death of more than one person in order to save her own life, or the life of someone she

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<sup>167</sup> See McMahan, *supra* note 14, at 257-59.

<sup>168</sup> See *supra* note 76 and accompanying text.

<sup>169</sup> Alexander, *supra* note 51, at 1181. It should be noted, however, that many argue that morality does somewhat further restricts the permission to use force in self-defense even when the aggressor is culpable; most significantly, many argue that the harm inflicted cannot be grossly more grave than the harm expected to be inflicted by the culpable aggressor; see McMahan, *supra* note 14, at 259 n.11, 261-62.

<sup>170</sup> See *supra* note 67 and accompanying text. See also, Davis, *supra* note 64, at 190-94; McMahan, *supra* note 14, at 267; Alexander, *supra* note 51, at 1179.

<sup>171</sup> See Ferzan, *supra* note 76, at 734-35; Alexander, *supra* note 85, at 64; McMahan, *supra* note 14, at 265-66; Blustein, *supra* note 17, at 95, 97; Finkelstein, *supra* note 64, at 1379 ("Philosophers often assert the comparative weakness of the right to self-defense against innocents").

holds dear, or bears a special duty of protection towards? Furthermore, can she *kill* an innocent threat/aggressor/human-shield when she (or the person she has special relations with) is only expected to be *injured*? And can she cause *certain* harm to such an innocent threat/aggressor/human-shield when there is *only some probability* (but not certainty) that she (or the person she has special relations with) will be harmed?

From an objective perspective, since all innocent lives are of equal intrinsic value, proportionality would not allow more than a one-to-one transfer ratio of risk probability or severity of harm from defenders to innocent aggressors/threats/human-shields.<sup>172</sup> That is, defenders would not be allowed to take steps that would reduce the severity of expected harm to themselves (or its occurrence probability) by increasing, in greater measure, the severity of harm (or its occurrence probability) to innocent aggressors/threats/human-shields.<sup>173</sup> This proportionality demand would mean, for example, that in life-or-death situations, a defender would be allowed only to save the life of X aggressed individuals by means foreseeably causing the deaths of no more than that same X amount of innocent aggressors/threats/human-shields.<sup>174</sup>

Accordingly, in the Trolley Scenario, a third party with no special relations with any of the individuals on either track should divert the trolley from the track on which two individuals are working to the track on which only a single person is working.<sup>175</sup> Yet most would further insist that this third party would not be permitted to divert the trolley in the opposite scenario: to save one life at the expense of several lives.<sup>176</sup>

But what if the third party's perspective is not objective? In the trolley example, would we arrive at the same conclusions if the person with the ability to divert the trolley were the parent of the single person on the track?<sup>177</sup> Or if the person with the ability to divert the trolley

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<sup>172</sup> Alexander, *supra* note 51, at 1179; Davis, *supra* note 64, at 190-94 (discussing the equal value of the lives on both sides in "innocent threats" situations).

<sup>173</sup> Alexander, *supra* note 51, at 1179. *See also*, Luban, *supra* note 4, at 20-21, 44.

<sup>174</sup> Alexander, *supra* note 51, at 1179. *See also*, Luban, *supra* note 4, at 24, 27, 35.

<sup>175</sup> *See supra* note 103 and accompanying text. *See also*, McMahan, *supra* note 14, at 252-54 (discussing the moral presumption against intervention and stating that it can be overcome when doing so will reduce the overall harm).

<sup>176</sup> *See* Shelly Kagan, *The Additive Fallacy*, 99 ETHICS 5, 25-26 (1988). *But see*, Taurek, *supra* note 134, at 300-05 (arguing that uninvolved third parties can choose to save the life of one individual at the expense of the death of five).

<sup>177</sup> McMahan, *supra* note 141, at 237-38; Kimberly Kessler Ferzan, *Self-Defense, Permissions, and the Means Principle: A Reply to Quong*, 8 OHIO ST. J. CRIM. L. 503, 511 (2010-11).



were the same lone person on the track who will be killed if the trolley is not diverted to the track where two people are working?<sup>178</sup>

Despite the equality in terms of innocence and responsibility for the risk, many argue that in scenarios of innocent aggressor/threat, the ratio between harm caused and harm averted often does not need to be one-to-one ratio, since at least to a limited degree,<sup>179</sup> partiality towards ourselves, those we hold dear, and those we are under a special duty to protect can (or even must) be taken into account.<sup>180</sup> We therefore espouse the view that the ratio between the harm's severity/probability of occurrence for the defender (and those she has special relations with) and the harm's severity/probability of occurrence for the innocent aggressors/threats/human-shields must be,<sup>181</sup> in many of these cases, on the one hand, more restrictive than it is in cases of culpable aggressors but, on the other hand, less restrictive than a one-to-one ratio.<sup>182</sup> That is to say that, for example, a defender usually will be allowed to kill more than one innocent aggressor/threat/human-shield in order to protect her own life or that of a person she has special relations with; but unlike in cases of culpable aggressors, a limit must be set on the number of innocent aggressors'/threats'/human-shield's lives a defender may be allowed to take in so doing.<sup>183</sup>

The extent to which partiality allows individuals to diverge from a one-to-one risk-transfer ratio varies across the different innocent threats/aggressors scenarios.<sup>184</sup> As McMahan states with regard to this variance:<sup>185</sup>

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<sup>178</sup> McMahan, *supra* note 141, at 237-38. *See also*, McMahan, *supra* note 14, at 254. *But see*, Thomson, *supra* note 59, at 289-90, 308-09 (arguing against partiality in the trolley scenario).

<sup>179</sup> *See* McMahan, *supra* note 14, at 268-69; Hurka, *supra* note 4, at 59-60; Kagan *supra* note 134, at 255 (discussing the fact that our permission to take partiality into account is limited).

<sup>180</sup> *See supra* Section III.D. *See also*, Alexander, *supra* note 51, at 1188-89; McMahan, *supra* note 14, at 254, 268-70; Davis, *supra* note 64, at 190-94.

<sup>181</sup> Self-defense does not only deals with situations in which expected harm on both sides is death and the probability of its occurrence for the defender (if she does not use counter force) and for the attacker (if defender does uses counter force) is one of complete certainty. *See* Blustein, *supra* note 17, at 90, 97; Alexander, *supra* note 91, at 412-14; Ferzan, *supra* note 76, at 714-17, 726-27.

<sup>182</sup> McMahan, *supra* note 14, at 254, 265-66, 270; Alexander, *supra* note 85, at 64-66. *See also*, Thomson, *supra* note 59, at 286 (leaving this issue open).

<sup>183</sup> McMahan, *supra* note 14, at 254, 270,284; Alexander, *supra* note 51, at 1188-89.

<sup>184</sup> *See* Blustein, *supra* note 17, at 97; Alexander, *supra* note 85, at 64-66. It even varies between different innocent sides to the same conflict; *see* McMahan, *supra* note 14, at 284-85, 288-89; Alexander, *supra* note 51, at 1184, 1188-89; Finkelstein, *supra* note 64, at 1377-78.

<sup>185</sup> McMahan, *supra* note 14, at 270 n.28.

The degree of permissible partiality is probably not fixed or invariant but varies with the nature of the case. It may be, for example, that a greater degree is allowed in distributing benefits when not all can be benefited than in determining whom to save from harm and whom to allow to suffer harm when not all can be spared. And a greater degree may be allowed in the latter case than in cases involving the redirection of a threat. And so on.

Collateral damage scenarios may even warrant taking partiality into account only to a very limited extent. Hurka explains,<sup>186</sup>

The fact that [in collateral damage scenarios a person] is killing rather than failing to save is not irrelevant; it still plays a significant moral role, and in particular reduces the degree of partiality he may show below what would be permitted if he were merely distributing benefits. To put it a little technically, there is some number such that he would be permitted to save his daughter rather than save that number of strangers but may not kill that number of strangers as a side effect of saving his daughter. Given that limit, however, he is permitted to show some partiality toward his daughter even when he does kill bystanders.

Yet, beyond such broad brush strokes, most concede that it is hard to determine *ex ante* the specific limit to be put on the extent to which partiality can be taken into account in each category of cases.<sup>187</sup> At the same time, there will be cases in which it is clear to all that the person has exceeded the permitted degree to which partiality can be taken into account.<sup>188</sup> Some may argue that the vagueness regarding these limits is necessary, as they should be determined on a case-by-case basis.<sup>189</sup> Certainly, many would agree that this vagueness is, to a considerable degree, due to the existence of a diversity of views regarding the exact point of these limits.<sup>190</sup> In practice, the fact that only vague limits can be set means that individuals have broad discretion to

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<sup>186</sup> Hurka, *supra* note 4, at 61-62. As we mentioned earlier, we view the human-shields cases as analogous to cases of collateral damage, rather than cases of intended harm, since they do not involve appropriation.

<sup>187</sup> McMahan, *supra* note 14, at 254n.4; Davis, *supra* note 64, at 193n.42 (“It is difficult to determine the boundaries of our agent-relative permissions, and more difficult still to produce compelling explanations of the boundaries that one finds intuitively plausible.”).

<sup>188</sup> Jeff McMahan and Robert McKim, *The Just War and the Gulf War*, 23 CANADIAN J. PHIL. 501, 516 (1993) (stating that even “[w]ithout being able to say precisely where the limits to permissible partiality lie,” clear cases in which the action was overly influenced by it can be recognized). *See also*, McMahan, *supra* note 14, at 268-69; Alexander, *supra* note 51, at 11.

<sup>189</sup> Implicit in Alexander, *supra* note 85, at 65-66; though Alexander acknowledges that there may be benefits to the use of bright line rules instead of case-by-case regulation.

<sup>190</sup> McMahan, *supra* note 14, at 254n.4.

determine the extent to which they allow themselves to take considerations of partiality into account,<sup>191</sup> even though clear abuses of this discretion might still be recognized as wrongful.<sup>192</sup>

#### IV. HUMAN SHIELDS AND INDIVIDUAL SELF-DEFENSE BY SOLDIERS

##### A. Soldiers Risking Their Lives to Protect Their State's Civilians

We now move to discuss self-defense morality as it applies specifically to soldiers. Let us change the human-shield scenario, accordingly, so that it now relates specifically to soldiers and civilians: an enemy combatant is shooting at a state's soldier while using a civilian from that state as a human shield. Does this move make a difference? May the soldier kill the human shield in order to save himself from certain death (i.e. violate the claimed Altruism Principle)? Does the fact that the human shield and soldier belong to the same state bear any moral significance? May the soldier, for example, choose not to defend himself against an aggressor who would certainly kill him, so as to avoid killing the state civilian, even though he would be acting in self-defense were the human shield a foreign civilian (i.e. violate the claimed Equality Principle)? These are the issues we now turn to.

We begin our discussion with the Equality Principle. Recall that there were three possible rationales for rejecting this principle and permitting partiality: as a matter of whim, the existence of personal relations, and the existence of a special duty of care.<sup>193</sup>

Can discrimination at whim justify an agent's actions when we move from discussing private individuals to discussing soldiers? A private individual can discriminate at whim and give no reason for preferring one person over another in circumstances in which she is acting beyond the minimal requirement set by morality (e.g., if she is permitted to protect herself but chooses not to so as to save person X but not to save person Y). State representatives, such as soldiers, in contrast, bear certain public law obligations, such as abstention from any form of discrimination, and, therefore, cannot discriminate in the same manner as the private individual,

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<sup>191</sup> See Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 685–89 (1991) (generally discussing the fact that when brightly-line rules are not used in norms, extensive discretion is left in the hands of the agents to whom the norms are addressed).

<sup>192</sup> See McMahan & McKim, *supra* note 183, at 516.

<sup>193</sup> See *supra* Section IV.B.III.D.

even when they would be acting beyond the required minimal moral standard.<sup>194</sup> The shift to the perspective of soldiers could thus alter our assessments in this context. But is giving preference to state civilians' lives over your own life, while not doing the same with regard to the lives of foreign civilians, truly discrimination at whim? The two other, previously presented, rationales for partiality imply otherwise.

The second reasoning against applying the Equality Principle is the permission to prefer the lives of those one holds dear. Can this apply to the relations between soldiers and compatriots? As alluded to earlier, there seems to be an intuitive pull to the view that preferring one's co-civilians is not simply discriminating at whim;<sup>195</sup> and in some situations, such as war, or in some societies more than others, relations between compatriots may be especially strong.<sup>196</sup> Yet viewing the relationship between compatriots as analogous to familial ties is definitely overstating the closeness of the former, and however tied we may feel to our compatriots, it will still not be the same as our feelings towards our immediate family members.<sup>197</sup> This second line of reasoning is, therefore, only partially extendable to the context of soldiers and their co-civilians.

The third line of reasoning for rejecting the Equality Principle, however, is particularly applicable to the relationship between soldiers and their state civilians. This justification is grounded on the duties one bears towards individuals under one's protection, as in the case of a bodyguard and her client. This applies to the relationship between soldiers and their state civilians based on the idea of a social contract.

Indeed, a state's duty, implemented through its armed forces, to provide its civilians with protection from external violent threats is the cornerstone of any acceptable social contract notion.<sup>198</sup> Thus, soldiers, even more so than bodyguards, can be seen as both contractually and morally duty-bound to protect their state civilians, whereas no such contractually-based moral

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<sup>194</sup> See JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION* xix (2011) (generally discussing the need for state agents to be impartial).

<sup>195</sup> See *supra* note 139-140 and accompanying text. See also, Luban, *supra* note 4, at 11 (“[o]f course our soldiers can take greater risks for our own people than for the enemy’s. Anyone who thinks otherwise is living in a fantasy world where loyalties no longer matter”); McMahan & McKim, *supra* note 183, at 516; Hurka, *supra* note 4, at 59-62.

<sup>196</sup> See Leslie Green, *Law, Legitimacy and Consent*, 62 S. CAL. L. REV. 795, 818-25 (1989).

<sup>197</sup> See *supra* note 141 and accompanying text.

<sup>198</sup> Benvenisti, *supra* note 3, at 89-90; Steinhoff, *supra* note 139, at 223; Finkelstein, *supra* note 62, at 636.

obligation exists towards foreign civilians.<sup>199</sup> With regard to a soldier's state civilians, the relationship may, therefore, even give rise to a *duty* to give preference to these civilians' lives over her own life (i.e., the Altruism Principle does apply), despite not giving such preference to other individuals.<sup>200</sup>

A duty to serve in the military and protect one's state civilians is necessary to overcome defense-related "collective action problems" in a fair manner.<sup>201</sup> In a collective action situation, two main kinds of interrelated problems can arise that could impair the collective action's efficiency and even derail it altogether—i.e., in our case, prevent a group of individuals from jointly protecting themselves from violent external attacks. The first kind of problem is coordination, and the second is the free-rider problem.<sup>202</sup>

In collective action, a coordination problem occurs when even if all the members of the collective seek the performance of the same action, they will participate only if the other members of the collective participate as well;<sup>203</sup> otherwise their efforts will go to waste, making it preferable to refrain from performing the action.<sup>204</sup> Such coordination problems are basic obstacles that must be dealt with in order to form and maintain military forces, for otherwise, it will be better for each individual to either surrender or flee when her state is attacked.<sup>205</sup>

As for free-rider problems: In the context of the military, such problems may arise due to the mixed interests of every individual member of the collective. In other words, each individual

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<sup>199</sup> For the existence of such a duty between compatriots, see, Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427, 427 (1997) ("Many political philosophers believe that we have a range of special obligations to our compatriots... prominent among these are an obligation to give priority to each other's needs..."); Robert E. Goodin, *What Is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 663 (1988); Uwe Steinhoff, *Debate: Jeff McMahan on the Moral Inequality of Combatants*, 16 J. POLI. PHIL. 220, 223 (2008). For the existence of a duty for state agents to be preferential towards those under the state's control, see, Gewirth, *supra* note 139, at 301-02. For the duty placed on soldiers as state agents, see, RUTH GRANT, JOHN LOCKE'S LIBERALISM: A STUDY OF POLITICAL THOUGHT IN ITS INTELLECTUAL SETTING 94 (1987); James M. Thunder, *The Jurisprudence of Conscription: Social Contract, Moral Obligation, and Proposals*, 23 CATH. LAW. 255, 257-60 (1977-78); Asa Kasher, *Operation Cast Lead and the Ethics of Just War Theory*, 37 AZURA 43, 53-57, 66 (2009); Benbaji, *supra* note 70, at 486.

<sup>200</sup> See *id.* (most sources cited there speak of a duty and not only a permission). See also, Taurek, *supra* note 134, at 298.

<sup>201</sup> Josiah Ober, *From Epistemic Diversity to Common Knowledge: Rational Rituals and Cooperation in Democratic Athens*, 3 EPISTEME 214, 217 (2006); RUSSELL HARDIN, COLLECTIVE ACTION 4-10, 21-28. (1982).

<sup>202</sup> For a discussion of the differences between free riding and coordination problems see, MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL 15-16 (2001).

<sup>203</sup> Ober, *supra* note 201, at 217-19.

<sup>204</sup> CHWE, *supra* note 202, at 7.

<sup>205</sup> Ober, *supra* note 201, at 217.

desires the successful performance of the collective action of defending her society from external attack; however, each individual also prefers not to risk her own life. Therefore, if she knows enough people have joined the military, she may prefer to avoid joining.<sup>206</sup>

Given these problems, it is clear why members of society cannot be required to become soldiers and risk their lives to defend other members of society when called upon, unless the latter are also required to do the same.<sup>207</sup> Thus, a person's refusal to become a soldier and risk her life to defend other members of her society, when called upon, is, on these grounds, immoral: such a person takes advantage of the readiness of others to set aside their most fundamental interests (autonomy, life, liberty) for the sake of protecting the group's members, including the person refusing to do so herself.<sup>208</sup> Therefore, a person (at least in a society that is generally considered just) has a duty, all other things being equal, to join the military when called up and even risk her life in combat if needed, in order to defend the lives of the other members of her society (who are duty-bound to do the same when called upon).<sup>209</sup>

#### B. Soldiers Risking Their Lives to Protect Foreign Civilians

The reasons just presented for permitting, or even obligating, soldiers to risk their lives to protect the lives of their state's civilians do not apply in the framework of the relations between soldiers and foreign civilians. Is there, however, a different moral rationale that obligates soldiers to prefer civilian lives over their own, even when these civilians are foreigners?<sup>210</sup> This question, too, will lead us to consider the Altruism Principle as it applies to soldiers.

Consider a scenario in which an enemy combatant is hiding inside a residential home where a foreign civilian is also present and being used as a human shield. The enemy combatant is shooting at a soldier from inside the house. The soldier has two options for defending himself. The first is to summon aerial support to bomb the house. Since a fighter jet is already nearby, choosing this alternative will mean that the risk to the soldier's life will be immediately removed, but both the enemy combatant and the foreign civilian will certainly be killed. The second

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<sup>206</sup> ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 261 (E. Camman ed., 1896)(1763); HARDIN, *supra* note 201, at 4-10, 21-28.

<sup>207</sup> Ober, *supra* note 201, at 217.

<sup>208</sup> See Asa Kasher, *Refusals: Neglected Aspects*, 36 ISR. L. REV. 171, 178 (2002).

<sup>209</sup> *Id.* 173, 178.

<sup>210</sup> See Plaw, *supra* note 45, at 17 (stating that a state has both "internal obligations (such as the safety of the state's own citizens, especially noncombatants)" and "external obligations (to respect the immunity of foreign civilians)").

option is to enter the house and fight the enemy combatant face-to-face. This option would mean that the foreign civilian will most likely be saved, but the risk to the soldier's life will remain high, as there is a chance that the enemy will prevail and kill the soldier rather than the other way around. Which option should the soldier choose?<sup>211</sup>

Two main rationales for distinguishing soldiers from private individuals are generally advanced, and both involve a notion of risk. A relevant difference between soldiers and other people is claimed to derive from the fact that soldiers, unlike others, are involved in an activity that (a) inherently poses risks to them or (b) inherently poses risks to others. Do these risk-related attributes truly make a difference?

*Soldiers Risking Themselves:* Some assert that the fact that soldiers regularly put their lives at risk obligates them to prefer civilian lives to their own.<sup>212</sup> For example, Paul Christopher argues,<sup>213</sup>

[t]he risk to lives of combatants should not be weighed equally against the risk to the lives of non-combatants, because it is in the nature of the soldier to take risks—risking one's life is part of what it means to be a soldier. Taking the position that minimizing the risks to soldiers is the basis of choosing among alternatives undermines the very notion of distinguishing between combatant and non-combatant. An analogous domestic example might be to hire a police officer to prevent crime and limit her duty to times or places where there was little crime so that she would not be put at risk.

The mere fact that someone's activity involves risk to her life does not account for any special obligations she might bear to prefer other people's lives over her own. A racecar driver is regularly involved in a life-threatening activity, but this does not mean that if she happens to be faced with a choice between her own life and the life of another innocent person in a human-shield situation, she should act any differently than, say, an accountant.<sup>214</sup>

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<sup>211</sup> For a discussion of similar examples see, Kasher & Yadlin, *supra* note 3, at 18 (arguing that the option affording better protection to soldiers should always be preferred); Margalit & Walzer, *supra* note 1, at 22 (arguing that the option affording better protection to civilians should almost always be preferred); Luban, *supra* note 4, at 6, 8-10, 19-21, 25-29, 34-35 (arguing that, whenever the risk-transfer ratio between the two options is greater than one, the action offering greater civilian protection should be preferred).

<sup>212</sup> See, e.g., Margalit & Walzer, *supra* note 1, at 22.

<sup>213</sup> Christopher, *supra* note 40, at 155.

<sup>214</sup> See McMahan, *supra* note 19, at 723 (making the analogy between soldiers and a racecar drivers while they are driving not while they are performing other tasks during the course of their lives; it should be noted that McMahan views soldiers and drivers as being involved in a risk-imposing activity and not only as individuals involved in an activity that is risky to themselves).

Suppose the racecar driver has to make choice between her life and another person's life, but in a scenario resulting from her own risky behavior. Suppose, e.g., her brakes fail and she can steer her car either to where she will kill another person but survive herself or to where she will not kill anyone but will certainly die. Should she have an agent-relative permission to prefer her own life? The answer depends on the previous issue we addressed, that of imposing risks on others and on the justifiability of imposing risks, and is not contingent on the fact that the driver is regularly involved in an activity that puts her life at risk.<sup>215</sup>

What Christopher must mean, therefore, is something different. He seems to refer to the fact that soldiers take risks “for the sake” of civilians.<sup>216</sup> This is what the analogy of a police officer seems to convey.<sup>217</sup> Police officers also risk their lives, but unlike racecar drivers, they do so in order to protect civilians.<sup>218</sup> If a police officer arrives at a crime scene and faces a choice between her own life and the life of a human shield being held by a criminal, should it not follow from the fact that her job involves risking her life to protect civilians that she should *not* have an agent-relative permission to prefer her own life? This is not an easy question.<sup>219</sup> But the crucial point in terms of the analogy to soldiers is that they, as discussed in the previous section, are required to go to war and risk their lives in order to protect their own state's civilians, not in order to protect civilians of other states.<sup>220</sup> This leads to the conclusion that soldiers' job is not to

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<sup>215</sup> For different criticisms of the claim that the driver should be burdened with all potential harm, see Ferzan, *supra* note 76, at 727n.41, 735; Benbaji, *supra* note 70, at 485. See also, *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 350 (1914) (stating, in the context of tort law that “[o]peration [of a railroad] is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it,...”). Further see Asa Kasher, *A Combatant's Life and Human Dignity: A Plea for a Major Change 7* (Draft Article, 2011), available at [www.leavenworthethicssymposium.org/resource/.../11-Kasher.docx](http://www.leavenworthethicssymposium.org/resource/.../11-Kasher.docx) (arguing that even if soldiers agreed to shoulder some risk due to the attributes of the activity they are involved in: “there is a huge conceptual and moral gap between undertaking risk and forfeiting right to life”).

<sup>216</sup> For claims that explicitly state that such a duty exists, see Plaw, *supra* note 45, at 14; Margalit & Walzer, *supra* note 1, at 22.

<sup>217</sup> For a similar analogy see McMahan, *supra* note 44, at 366-67 (“[combatant are] like other paid professional defenders or rescuers, such as police, firefighters, bodyguards, and lifeguards. All such people have professional role-based duties to take risks and even on occasion to allow themselves to be harmed when that is necessary to fulfill the functions of their role”).

<sup>218</sup> JOYCELYN M. POLLOCK, *ETHICAL DILEMMAS AND DECISIONS IN CRIMINAL JUSTICE* 9 (2011) (discussing the professional, moral duty of police officers, as public servants, to risk their lives in order to save the lives of others); TONY L. MOYERS, *WANDERINGS: EXPLORING MORAL LANDSCAPES PAST AND PRESENT* 34 (1996) (“There may be some obligation for professionals such as police officers to engage in some risky behavior on behalf of others...”).

<sup>219</sup> Andrew Heard, *Human Rights: Chimeras in Sheep's Clothing?*, Simon Fraser Uni. Online (1997), <http://www.sfu.ca/~aheard/intro.html>.

<sup>220</sup> See *supra* Section IV.A.



protect any civilian, qua civilian, but only to protect their state's civilians.<sup>221</sup> Therefore, it appears that there is no protection-related reason for soldiers, to give preference to the lives of civilians, qua civilians, over their own lives. At most, such a reason can arise in relation to co-civilians or other civilians under the protection of the soldiers' state.<sup>222</sup>

*Soldiers Risking Others:* Suppose one has a habit of walking on high ledges when people are standing below her, because she likes the excitement. Say she trips and can either fall to her right, in which case she will die, or fall to her left, in which case she will fall on a person standing below her and kill him but save her own life. Should it not follow from the fact that she chose to engage in an activity that puts others at risk that she should not be morally permitted to fall to her left? Should soldiers not be analogized to people who walk on high ledges, since they also choose to engage in an activity that puts others at risk?

It is crucial to note that the main factor at work in this example is culpability, not risk. The "ledge walker" was culpable for creating the situation in which a choice had to be made between her own life and that of an innocent person's life, because she chose, unjustifiably, to create the risk for that person. Therefore, the risk should shift back to the ledge-walker.<sup>223</sup> In contrast, in the scenario where a soldier must choose between her life and that of a foreign

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<sup>221</sup> See Kasher, *supra* note 199, at 53-57, 66; Kasher & Yadlin, *supra* note 3, at 8-9.

<sup>222</sup> Two main counter arguments are made. First it is claimed that soldiers have agreed (by way of becoming soldiers) to accept such a risk in order to reduce the risk to civilians (no matter the civilians nationality). Second, it is argued that soldiers have a moral duty to shoulder risk in order to reduce the risk to civilians because doing so is needed in order to limit the scope of violence; for both arguments see sources cited *supra* note 216; see also McMahan, *supra* note 44, at 366-68. Yet both claims are unconvincing. First of all, not all soldiers volunteer many are conscripts. Second, the right to life is a fundamental human right, one that we do not easily devalue, even when the soldier has voluntarily assumed this role. Third, as discussed in the Article, individuals are morally permitted to attribute greater significance to their lives than to the lives of others. In light of these reasons, allowing individuals to voluntarily take upon themselves a duty to risk their lives in order to protect the lives of others, and certainly obligating them to do so when they do not volunteer, might be morally justified when in return to the protection the soldiers afford to the other individual they can expect to be defended by these individuals (when they are no longer soldiers and the protected individuals are)—as it is the case when the protected individuals are of the soldiers' state. It is much more difficult to justify such a duty, on the other hand, simply based on an abstract aspiration of limiting the scope of violence. In the latter case, the soldiers are used only as means for the protection of others, while in the former their lives' intrinsic value is acknowledged and promised future protection. See Kasher, *supra* note 3, at 164; Kasher, *supra* note 199, at 53-57, 66; Kasher, *supra* note 215, at 11-15.

<sup>223</sup> Some have argued that culpability does not matter and risk should be shifted back to the risk imposer even if the activity is justified (or unlikely to materialize); see, McMahan, *supra* note 19, at 723. But such an argument runs against our core moral intuition that there is a difference between justified, necessary risky activities and unnecessary risky activities. For a discussion of this difference, see Stephen E. Schmid, *Jokers on the Mountain: In Defense of Gratuitous Risk*, in CLIMBING: PHILOSOPHY FOR EVERYONE: BECAUSE IT'S THERE 49, 49-51 (Stephen E. Schmid eds., 2011).

civilian being held hostage by an enemy combatant, it is hard to see why the soldier, qua soldier, is more culpable than the foreign civilian for the situation in which only one of them can survive. Neither seems culpable for this situation. Rather, it is the enemy combatant who is the culpable party, in using the civilian as a human shield.<sup>224</sup>

Those who advance the Altruism Principle, however, rely solely on the notion of risk; they argue that risk alone, even if it is justified, can account for a moral obligation for soldiers.<sup>225</sup> Walzer, for example, states that<sup>226</sup>

when it is our action that puts innocent people at risk, even if the action is justified, we are bound to do what we can to reduce those risks, even if this involves risks to our own soldiers.

However, as the human-shield scenario sharply demonstrates, it is hard to clearly decide which person is imposing the risk on the innocent civilian. Is it the enemy combatant holding her against her will or the state's soldier shooting at her? The most accurate answer is both, at least to a certain degree. Furthermore, as the initial parts of this Article showed, risk (or threat) alone cannot account for a moral distinction between similarly situated persons in cases of self-defense.<sup>227</sup> The person falling down a deep well is morally equivalent to the human shield;<sup>228</sup> both are equally innocent, and both are as innocent as the defenders who have to choose between the life of the innocent human-shield/threat and their own lives.<sup>229</sup> Accordingly, the reliance on risk alone as the rationale for distinguishing between soldiers and civilians should be rejected.<sup>230</sup>

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<sup>224</sup> See Kasher, *supra* note 3, at 166.

<sup>225</sup> See, e.g., McMahan, *supra* note 19, at 723; Robert K. Fullinwider, *War and Innocence*, 5 PHIL. & PUB. AFF. 90, 94 (1975). See also, Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 133-35 (2010) (discussing these positions).

<sup>226</sup> MICHAEL WALZER, ARGUING ABOUT WAR 17 (2004). Walzer similarly criticizes the fact that in NATO's Kosovo Campaign "we imposed risks on others and refused to accept them for ourselves"; Walzer, *supra* note 19, at 938.

<sup>227</sup> See *supra* notes 91-92 and accompanying text.

<sup>228</sup> See *supra* Section III.B.

<sup>229</sup> See *supra* notes 67, 170-177 and accompanying text.

<sup>230</sup> Sometimes it is argued that the difference is not based on the fact that the soldiers are the ones that impose the risk; but on the fact that civilians unlike soldiers lack the training and equipment to defend their own lives, and thus they are more likely to be harmed if risk is shifted to them; see, Walzer & Margalit, *supra* note 1, at 22; Luban, *supra* note 4, at 28-29. But questions of likelihood and training should be calculated at the outset of our problem. The state soldier has already taken into account the fact that she wears a protective vest and is trained in combat, when she arrived at the conclusion that unless she kills stranger civilian, she will be killed by enemy soldier. Taking all these considerations into account, the question remains if she is allowed to kill stranger civilian in order to save her own life. For a discussion of additional problems with this "defenselessness argument" see, Ziv Bohrer and Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers*, 46 VANDERBILT J. TRAN'L L. 747, 764-65 (2013).

Note that the risk rationale is also related to the Equality Principle, as the supporters of the this rationale use it to justify not only why soldiers should risk their lives beyond the risk they impose on civilians, but also why they are obligated to do this to the same extent towards foreign civilians as towards their own state's civilians. They claim that while soldiers may have special duties to protect their state's civilians from risk imposed by others, they bear an equal duty to protect any civilians—foreign or state—from risks they themselves impose; the inequality that may be justified regarding external threats is not justified with regarding threats and risks soldiers impose themselves.<sup>231</sup> But, as previously discussed, the relevant distinction in this kind of scenario is not between causing harm and failing to prevent it, but between targeting people for harm and harming them collaterally; and in collateral damage scenarios (unlike scenarios of intentional killing) partiality is allowed.<sup>232</sup> Moreover, if the risk rationale is rejected, it seems that we must also reject the Equality Principle on which it is based.

*A Qualification—Uncertainty Regarding Innocence:* Our analysis thus far would seem to suggest that (a) since a state's soldiers do not have a special moral duty to defend the lives of foreign civilians (a duty they have only vis-à-vis their state's civilians) and (b) assuming that soldiers are not responsible for foreign civilians being forced to serve as human shields, it follows that (c) soldiers are allowed to protect their own lives even at the expense of a greater amount of foreign civilian lives.<sup>233</sup> This conclusion, we contend, should *not* in fact be accepted.

The reason for our claim can be illustrated using the following example. Suppose a person suddenly finds herself being shot at by another person from across the street. She also has a rifle and must decide whether she is morally permitted to shoot back. But she is faced with the following problem: Due to the excitement and stress of the situation, she has lost her memory and cannot remember whether she is a culpable aggressor or an innocent defender. Let us assume that there are no clues to provide her information as to the identity of the culpable party, and therefore from her perspective, there is an equal probability that it is either she or the person shooting from across the street. In these circumstances, in the relationship between her and the

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<sup>231</sup> See Luban, *supra* note 4, at 32-33; Margalit & Walzer, *supra* note 37, at 77; Confino & Kremnitzer, *supra* note 38. See also, McMahan, *supra* note 44, at 369-70. McMahan, in fact reaches the conclusion that soldiers are allowed to shift even less risk to foreign civilians than they are allowed to shift to civilians of their own state, but even he admits “that most people are likely to find [his conclusion] profoundly counterintuitive”; *id.* at 377.

<sup>232</sup> See Hurka, *supra* note 4, at 60-62. See also *supra* notes 126-131, 186 and accompanying text.

<sup>233</sup> See *supra* note 3 (citing sources supportive of such a view).

person shooting at her, we should probably allow her to assume that she is an innocent defender.<sup>234</sup> This conclusion follows from the commonly accepted moral position that under conditions of informational uncertainty, the determination of whether an act was justified should be made on the basis of whether the actor's actions were conducted based on reasonable assumptions (even if in retrospect, these assumptions turn out to be mistaken),<sup>235</sup> and further assuming that we accept as reasonable, under conditions of informational uncertainty of the kind just described, a person's default presumption that she is the innocent party.

Two reasons support concluding such a default presumption of innocence to be reasonable. First, individuals have a strong psychological tendency to view others as responsible for a wrongful event when responsibility can be placed either on them or on another party, especially when the latter is present on the scene and the outcome is grave.<sup>236</sup> Thus, it seems unfair to demand of a person that she act contrary to this natural tendency, in the absence of sufficient information in support of the opposite premise. Second, partiality is commonly allowed when all else is equal;<sup>237</sup> and here, as we described the scenario, all other things are equal culpability-wise. Accordingly, the person in this scenario, in the framework of the relationship between her and the person shooting at her, should be allowed to assume that she is an innocent defender and view her violent response as justified. However, it may be appropriate

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<sup>234</sup> See Ferzan's analysis, *supra* note 76. Ferzan rightly points out that self-defense is a predictive action as there is uncertainty as to whether the risk expected to be caused by the aggressor will actually materialize (even with regard to a culpable aggressor the use of force, might turn out to be unjustified, if the defender has mistakenly assessed the severity or probability of harm); *id.* at 714-16. As she states: "Self-defense is a human endeavor. Like gambling, one must play the cards one is dealt, but one can never know what awaits her. ... The defender's epistemic position is all the more important from the perspective of drafting legal rules. [Since the] law must not only tell people what to do when they are certain of the result, but what to do when they face risks." As such, "[g]iven that self-defense distributes risk between the defender and the aggressor, the point of view must be one of these two parties. Moreover, the appropriate point of view is the defender's. The implication of selecting the defender's point of view is that the defender must be acting on the prediction of forthcoming harm to be said to be acting in self-defense." *id.* at 744. "Moreover, where one actor unknowingly kills another, both have satisfied the triggering conditions for self-defense. Thus, it is difficult to see how we can view one person as the aggressor and one as the defender without resulting to subjective criteria"; *id.* at 743. See also, Heidi M. Hurd, *Nonreciprocal Risk Imposition, Unjust Enrichment, and the Foundations of Tort Law: A Critical Celebration of George Fletcher's Theory of Tort Law*, 78 NOTRE DAME L. REV. 711, 722-23 (2003) (stating in the context of torts that "it is... impossible to find any moral culpability in such risk-taking, [if] the epistemic vantage point from which the risks are assessed is not the defendant's").

<sup>235</sup> Re'em Segev, *Justification, Rationality and Mistake: Mistake of Law Is No Excuse? It Might Be a Justification!*, 25 L. & PHIL. 31, 51 n.21 (2006) (citing the leading scholars holding this position).

<sup>236</sup> SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY* 25 (1999).

<sup>237</sup> Sara Stroud, *Moral Overridingness and Moral Theory*, 79 PACIFIC PHIL. Q. 170, 183 (1998); Brad Hooker, *Impartiality Predictability and Indirect Consequentialism*, in *WELL-BEING AND MORALITY: ESSAYS IN HONOUR OF JAMES GRIFFIN* 129, 136 (Brad Hooker ed., 2000).

to place slightly more stringent proportionality-related limitations on the extent to which she is permitted to harm the other person beyond what would have been imposed had it been certain that the other person is the culpable aggressor.<sup>238</sup>

Assume further that in the shoot-out between her and the other person, each constantly ducks and moves (in an attempt to dodge the other's bullets and increase the chances of hitting the other person). However, this occasionally leads to innocent (i.e., uninvolved) individuals' crossing the amnesiac's line of fire. Harming these individuals is a known but unintended consequence of attempting to stop the threat directed at her. The more she tries to avoid shooting when such individuals are in her line of fire, the greater the risk to her own life. How strict should the proportionally requirements be for her in these circumstances? That is, how limited should her moral permission to impose risk on these individuals, in order to reduce her own level of risk, be?

If she is innocent, her actions are justified, and it would be unfair to require of her that she completely prefer the safety of these innocent individuals over her own.<sup>239</sup> In fact, due to legitimate partiality, we should even allow her to prefer her own safety somewhat more than the safety of these individuals.<sup>240</sup> If, however, she is a culpable aggressor, she is not allowed to shoot at all; and certainly she is not allowed to reduce her risk to any extent if so doing would come at the expense of increasing the risk level of innocent, uninvolved individuals.<sup>241</sup>

Yet she does not know to which of the two categories she belongs. Thus, it would be unfair to demand that she shoulder all the risk, as it would be unfair to treat her as culpable; she should be allowed to assume that she is innocent.<sup>242</sup> She does know, however, that there is a chance that she is culpable, as well as being certain that the individuals crossing her line of fire are innocent. It would be unfair to treat both sides equally, therefore; i.e., it would be

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<sup>238</sup> We agree in this regard with Draper, *supra* note 15, at 81. Draper stated in the context of a different self-defense scenario that "the demands of proportionality will vary depending on the respective degrees of responsibility of the aggressor and his potential victim".

<sup>239</sup> See Quinn, *supra* note 106, at 345 (explaining why the killing of "innocent ... persons who physically get in the way of our otherwise legitimate targets or projects" is justified according to the doctrine of double effect). See also, Frowe, *supra* note 110, at 285-86 (Frowe acknowledges that a rights-based account of self-defense permits killing such innocent individuals who find themselves caught in the crossfire, but argues that such a conclusion contradicts moral intuition; we respectfully disagree with her intuition).

<sup>240</sup> See *supra* Section III.F.

<sup>241</sup> See *supra* notes 72-76, 167-169 and accompanying text.

<sup>242</sup> See *supra* notes 234-237 and accompanying text.

appropriate to require that she give partial priority to the lives of the uninvolved individuals over her own life.<sup>243</sup> Accordingly, it would be appropriate to demand of her that she bear at least some (non-trivial) level of risk to reduce the risk to these individuals.<sup>244</sup>

For reasons that will be elaborated later on, international laws assumes soldiers to be individuals functioning under a similar kind of informational uncertainty and views civilians to be innocent, uninvolved individuals.<sup>245</sup> Once these premises are accepted, it is morally appropriate to adopt a policy of instructing soldiers to always shoulder at least some (non-trivial) level of risk in order to reduce the risk to (even foreign) civilians.

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<sup>243</sup> As previously stated, we agree in this regard with Draper, *supra* note 15, at 81. Draper stated in the context of a different self-defense scenario that “the demands of proportionality will vary depending on the respective degrees of responsibility of the aggressor and his potential victim.” Since in the scenario discussed in the text both sides are innocent, their degree of responsibility is similar and the risk should be divided accordingly. *See also*, Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 PHIL. ISSUES 386, 394 (2005). McMahan deals with situations in which the two sides are also innocent, but there is a difference “of comparatively slight moral significance” between them with regard to their potential responsibility to the risky event. He argues that because the even the person more responsible for the event “is not culpable for the threat of unjust harm he poses, it might be reasonable to demand that the [other person] share the costs with him if that were possible.”

<sup>244</sup> As discussed *supra* note 234, we follow here in part Ferzan’s (*supra* note 76) analysis. Ferzan states, *id.* at 744, that “[g]iven that self-defense distributes risk between the defender and the aggressor, the point of view must be one of these two parties. Moreover, the appropriate point of view is the defender’s.”; and that “where one actor unknowingly kills another, both have satisfied the triggering conditions for self-defense. Thus, it is difficult to see how we can view one person as the aggressor and one as the defender without resulting to subjective criteria.”; *id.* at 743. She also states that “[b]ecause risk is an epistemic concept, the redistribution of risk makes sense only among the participants” and that culpability should strongly affect the distribution of risk; *id.* at 743. Furthermore, Ferzan asserts that cases of innocent aggressors/threats should be treated differently from cases of culpable aggressors, since in the former category, both sides are innocent; *id.* at 730-35. We do, however, diverge from Ferzan’s analysis on the following issues: she does not apply her analysis to uncertainty regarding what she refers to as “self-defense’s triggering conditions”; i.e., she does not apply it to uncertainty regarding whether the aggressor is culpable or not. She only applies her analysis to uncertainty regarding what she refers to as “the limitations” on the use of self-defense—i.e., uncertainty regarding the severity and occurrence-probability of the harm expected to be caused by a culpable aggressor. As to uncertainty regarding triggering conditions, she thinks that killing a person under such conditions is not justified but excusable; *id.* at 747n.85. We disagree with this claim; as previously discussed, our position is that in such situations, an agent-relative permission (i.e., a form of justification) applies; *see supra* notes 64-65 and accompanying text. Accordingly, it is our position that Ferzan’s analysis (which she applies to uncertainty regarding the limitations on the use of self-defense) applies to uncertainty regarding triggering conditions as well. Therefore, on the one hand, the amnesiac person, under such a kind of uncertainty, should also be allowed to adopt a subjective view, i.e., to view herself as a defender and not an aggressor (which means she should not be forced to shoulder all the risk). Yet, on the other hand, the asymmetry in potential culpability that exists in such cases must affect the redistribution of risk. Thus, since one person is certainly innocent (the bystander) and the other has only a certain probability of being innocent (the amnesiac), the latter must shoulder greater risk; i.e., that person must take on at least some, non-trivial level of risk in order to reduce the risk to those who are clearly innocent.

<sup>245</sup> *See infra* Section V.

### C. The Lives of Foreign Civilians versus the Lives of the State's Civilians

Consider a scenario in which a group of enemy combatants is launching missiles at a town in the soldier's state from a neighborhood on the enemy side that is populated with foreign civilians (thereby turning these civilians into human shields). Assume further that a commander in the army of the attacked state has only one option for stopping this enemy attack, which is to bomb the neighborhood from which the missiles are being launched. Such a counterattack would result not only in the death of all the enemy combatants but also in the death of all the (foreign) civilian residents of the neighborhood. The commander has to determine whether such a counterattack is morally justified. She, along with her subordinates, is not currently at risk, nor will they be put at risk during the counter-bombing; as such, they are a third party, analogous (to some degree) to the person able to pull the switch in the Trolley Scenario.<sup>246</sup> The enemy combatants are culpable aggressors and, many would agree, their lives can therefore be discounted irrespective of their number.<sup>247</sup>

But may the commander prefer the lives of her state's civilians over the lives of the foreign civilians, and if so, to what extent? In a scenario in which there is a choice to be made between soldiers' lives and the lives of foreign civilians, as discussed in the preceding section, the latter group is assumed to be clearly innocent, whereas there is some uncertainty with regard to the former, as we argued. This difference justifies attributing different values to the desire to protect the lives of the individuals in each of the two groups. In the scenario we are now considering, however, both groups of civilians are equally innocent.<sup>248</sup> Bombing the enemy neighborhood is an act that will remove the threat to the lives of the state's civilians; yet it would come at the expense of creating a life-threatening risk for the foreign civilians. The difference between the two groups of innocent civilians is that the commander in the attacked state has special relations only with one of them (the state civilians) and, as previously discussed, even bears a duty to actively protect them from the acts of aggressors.<sup>249</sup> Does this duty permit the commander to be partial and attribute greater value to protecting her state's civilians, even if this

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<sup>246</sup> See *supra* Sections III.D.

<sup>247</sup> See *supra* notes 167-169 and accompanying text.

<sup>248</sup> We are proceeding here under the premise that the civilians on the enemy side have not acted in any way that would render them culpable in any degree.

<sup>249</sup> See *supra* Sections IV.A-IV.B.

increases the risk to foreign civilians? Our analysis in the previous sections suggests that it does give rise to such permission. We reached the conclusion that (limited) partiality extends to third parties who bear a duty of protection toward the attacked, and the discussion thus far offers no reason to deviate from this conclusion in the context of soldiers acting as third parties.<sup>250</sup>

Moreover, there is one attribute of armed conflicts that further justifies increasing the risk-transfer ratio in favor of the state's civilians: Most individual self-defense scenarios are small-scale, temporal events, whereas an armed conflict is a protracted chain of violent interactions.<sup>251</sup> This feature of armed conflicts turns all those involved into a type of repeat player, which (as will now be explained) makes a considerable moral difference.<sup>252</sup>

Consider the following variation on the above bombing scenario: Let us assume that every enemy missile has a 1 out of 50 probability of killing the attacked state's civilians. The attacked state's bombs, in contrast, have stronger firepower and greater accuracy. Therefore, the

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<sup>250</sup> Some scholars rely on the distinction between causing harm and preventing harm and claim that, even though soldiers bear a special duty to protect *only* their state's civilians from risks created by the enemy, they have a duty to protect *all* civilians, regardless of nationality, from dangers these soldiers themselves inflict; *see, e.g.*, Luban, *supra* note 4, at 32-33; Margalit & Walzer, *supra* note 37, at 77. These scholars, however, are faced with a difficulty when attempting to determine the relationship between these two soldierly duties in situations in which they clash (such as in the rocket attack scenario). The reliance on the causing versus preventing harm distinction should lead to the conclusion the soldiers' duty not to harm civilians (foreigners in the rocket scenario) takes precedence over their duty to prevent harm from being caused to civilians (their state's civilians in the rocket scenario). Thus, this reasoning, in scenarios such as the rocket scenario, seems to lead to a result that runs counter to accepted moral intuition a conclusion, as it seems to support the cancellation of the attack even when less foreign civilians are expected to be harmed by the counterattack than state civilians expected to be harmed by the enemy attack; *see*, McMahan, *supra* note 44, at 369-70 (supporting this result while admitting "that most people are likely to find [it] profoundly counterintuitive"; *id.* at 377; *see, also id.* at 369-70). Moreover, it is hard to reconcile this result even with most of these scholars' own acknowledgment that a state bears a greater responsibility of protection toward its own civilians than toward foreigners. Therefore, following criticism which pointed out this issue (*e.g.*, Shlomo Avineri, 'Israel & the Rules of War': *An Exchange*, 56(13) N.Y. REV. OF BOOKS (Aug. 13, 2009)), some of these scholars have modified (or clarified) their argumentation, claiming that the two soldierly duties should be balanced and, further, that, to a limited degree, the soldiers' duty to protect their own civilians carries more weight; *see* Michael Walzer, *Responsibility and Proportionality in State and Nonstate Wars*, 39(1) PARAMETERS 40, 45-51 (Spring 2009); *see also*, Michael Walzer and Avishai Margalit, 'Israel & the Rules of War': *An Exchange*, 56(13) N.Y. REV. OF BOOKS (Aug. 13, 2009) (admitting that that is a common criticism of their argument and implying they have been misunderstood). Yet, such an augmented reasoning (though it arrives at a result similar to that advanced in this Article) is still flawed. It fails to explain why the soldiers' duty to protect their state's civilians carries more weight than the moral duty not to cause harm, since, if the distinction between causing harm and preventing harm is the proper guiding moral rationale in such scenarios, then it seems that it should have been the other way around; *see* McMahan, *supra* note 44, at 377. All this thus serves as further support for the conclusion that the distinction between causing harm and preventing harm should not be the guiding moral rationale in these scenarios; *see supra* notes 120-131 and accompanying text, as well as *supra* Section IV.B (discussing an array of reasons leading to this conclusion).

<sup>251</sup> *See supra* note 18 and accompanying text.

<sup>252</sup> Thomson, *supra* note 59, at 297-98. *See also*, Blum, *supra* note 18, at 56; Alexander, *supra* note 91, at 412-13.



state bombs will certainly kill both enemy combatants and foreign civilians. Assume the same number of civilians is at risk on both sides, may the commander order the bombing of the enemy neighborhood? The answer is not obvious, but the more we decrease the enemy's odds of causing harm, the clearer it becomes that at a certain point, the attacked state's action will become undisputedly immoral (i.e., morally disproportional). To simplify things, let us assume that morality allows one-to-five risk-transfer ratio. Given this, the commander would be barred from ordering the bombardment of the enemy neighborhood if this will result in five times more foreign civilian lives lost than state civilian lives saved.

But what if the enemy combatants are continuously firing missiles at the state's civilians, thereby increasing the probability of the latter being harmed, while using the civilians on their own side as human shields? It seems this consideration (at least partially and depending on how many enemy missiles are likely to be launched) counters the issue of the accuracy of the enemy missiles.<sup>253</sup> Certainly, assuming the morally permitted risk-transfer ratio to be one-to-five would mean that if more than ten enemy missiles are expected to be fired, the state's commander would be permitted to order the bombing of the enemy neighborhood, already from the firing of the first enemy missile.

## V. FROM MORAL PHILOSOPHY TO INTERNATIONAL LAW

The proportionality norms of international law have their roots in moral philosophy.<sup>254</sup> This fact strongly points to the conclusion that ambiguity in these norms should be interpreted in light of moral philosophy.<sup>255</sup> Yet in no way does it mean that the norms of international law fully reflect the precepts of morality.<sup>256</sup> Many in the moral discourse, for example, feel uneasy with the fact that international law allows attacking all enemy soldiers—even those who pose no threat, are fighting in a just war, or are not culpable for their state's aggression.<sup>257</sup> This permission to use force is much more extensive than the permission anyone would view as

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<sup>253</sup> See JOHN P. REEDER, *KILLING AND SAVING: ABORTION, HUNGER, AND WAR* 79 (1995) (discussing a situation of continuous attacks).

<sup>254</sup> Neuman, *supra* note 31, at 100-01.

<sup>255</sup> *Id.*

<sup>256</sup> See, e.g., *id.* See also, Hurd, *supra* note 61, at 2222 (generally stating, that due to unavoidable reasons, the "content of law fails to cohere with the content of morality even in legal systems, like our own, that make real efforts to pass laws that accord with the demands of morality").

<sup>257</sup> Blum, *supra* note 225, at 132-39; Larry May, *Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants*, 19 *ETHICS & INT'L AFF.* 39, 41-46 (2005).

morally appropriate in individual self-defense scenarios.<sup>258</sup> Similarly, international law forbids intentionally using force against civilians<sup>259</sup> for as long as they are not actively taking part in the hostilities.<sup>260</sup> Such a legal limitation, some maintain, is more restrictive than the restriction that would have been placed by international law had it completely followed the dictates of individual self-defense morality, since it does not allow intentionally targeting such civilians even when they can be viewed as morally culpable for their state's aggression.<sup>261</sup>

The fact, however, that the norms of international law are not mirror images of the requirements of morality (whatever they maybe) does not mean that these norms are morally repugnant or that efforts should be made to replace them.<sup>262</sup> International law prescribes categories of individuals who should be viewed as aggressors (enemy soldiers) and categories of individuals who should be viewed as innocent individuals (e.g., civilians, *hors de combat*, etc.), which are proxies for moral categories.<sup>263</sup> Many scholars of moral philosophy regard reliance on international law and the proxies it sets as morally legitimate in light of second-order considerations, such as the aspiration to limit the escalation of violence and the fact that these norms have already been widely adopted (taking into account the fact that it is unlikely that if these norms are voided, states will be able to agree on morally preferable norms).<sup>264</sup>

Thus for the practical reasons just stated, this Part does not seek to challenge the proxies set by international law in light of moral considerations. Rather its aim is to clarify the current considerable legal ambiguity of *jus in bello* proportionality in the most morally appropriate way. Our objective, in other words, is to interpret intentional law in view of moral considerations, rather than call it into question.

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<sup>258</sup> RODIN, *supra* note 16, at 127-28. *See also*, McMahan, *supra* note 14, at 257; NOZICK, *supra* note 82, at 100.

<sup>259</sup> *See* Additional Protocol I, *supra* note 27, Art. 48.

<sup>260</sup> *See* Additional Protocol I, *supra* note 27, Art. 51(3).

<sup>261</sup> *E.g.*, Alexander, *supra* note 91, at 412-15.

<sup>262</sup> Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 J. POLI. PHIL. 193, 208-09 (1994).

<sup>263</sup> *See, e.g.*, George I. Mavrodes, *Conventions and the Morality of War*, 4 PHIL. & PUB. AFF. 117, 227 (1975) ("The immunity of noncombatants is best thought of as a convention-dependent obligation related to a convention which substitutes for warfare a certain form of limited combat.").

<sup>264</sup> *See, e.g.*, Fullinwider, *supra* not 225, at 96-97; McMahan, *supra* not 262, at 208-09; Benbaji, *supra* note 70, at 487-492; Mavrodes, *supra* note 263, at 227.

As previously discussed, the *jus in bello* proportionality requirement comes into force once an armed conflict has begun.<sup>265</sup> During such a conflict, international law allows each side to target all soldiers from the other side, even those who, at the moment of the relevant attack, pose no threat to the attacking forces or their state (killing them is considered a potential military advantage).<sup>266</sup> As for civilians, in light of the fact that they are often present in combat zones, *jus in bello* proportionality allows soldiers on both sides to harm civilians, but only incidentally to an attack on a military target (i.e., the intentional targeting of civilians is forbidden) and not excessively in relation to the military advantage anticipated from the attack.<sup>267</sup> This norm is vague,<sup>268</sup> and this vagueness has been exploited by proponents of the different moral stances (regarding the value of soldiers' and civilians' lives) to claim that theirs is necessarily the correct interpretation of the norm.<sup>269</sup> We shall now present these interpretational disputes and offer the interpretation most appropriate in light of the moral analysis conducted in this Article.

#### A. The Lives of Foreign Civilians versus the Lives of the State's Civilians

Does *jus in bello* proportionality permit a state, during armed conflict, to value the lives of its own civilians more than it values the lives of foreign civilians? That is, in the example previously discussed,<sup>270</sup> of an enemy launching missiles from a civilian neighborhood on its side at a civilian town on the other side, is the attacked state allowed to bombard the enemy neighborhood even if more civilian lives will be lost on the enemy side than civilian lives saved on the state's side?<sup>271</sup>

Supporters of the Equality Principle, who wish states and their soldiers to accord equal treatment to all civilians (state and foreign alike), respond to this question in the negative.<sup>272</sup> They base their interpretation of international law on the fact that the legal norm of *jus in bello*

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<sup>265</sup> See *supra* Section I.

<sup>266</sup> See Yoram Dinstein, *The System of Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN THE HONOUR OF KNUT IPSEN 145, 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

<sup>267</sup> See *supra* note 27 and accompanying text.

<sup>268</sup> See *supra* note 30 and accompanying text.

<sup>269</sup> Cohen & Shany, *supra* note 28, at 316; Blum, *supra* note 18, at 56.

<sup>270</sup> See *supra* Section IV.C.

<sup>271</sup> That is the case even when disregarding the issue of repeat players. See Kasher, *supra* note 199, at 61-66 (supporting such a position).

<sup>272</sup> For our definition of the Equality Principle, see *supra* Part II. For claims that *in bello* law incorporates this principle, see Luban, *supra* note 4, at 8; Confino & Kremnitzer, *supra* note 37 (arguing that Walzer & Margalit's position is supported by international law).

proportionality explicitly takes into account only two factors: the military advantage derived from the attack, on the one hand, and civilian harm resulting from the attack, on the other. They therefore assert that “nothing in the laws of war distinguishes non-combatant civilians into different classes based on nationality, and to give the same legal words different meanings based on a nationality distinction the law does not recognize is dishonest interpretation.”<sup>273</sup> Yet this claim is false. *Jus in bello* proportionality does not need to explicitly distinguish between the weight that should be accorded to the protection of each category of civilian. The duty to take into account the harm that will be inflicted on civilians irrespective of their nationality is reflected in the “civilian harm” element of the proportionality norm. However, the permission to give added weight to the unique aim of protecting a state’s own civilians is incorporated into that legal norm through its “military advantage” element.

One should not forget there are many actual situations in which civilians from both sides are, in fact, put at risk by a military engagement. For example, there are real-life cases of an enemy that launches missiles from a civilian neighborhood on its side at a civilian town on the other side.<sup>274</sup> In such scenarios, for a commander contemplating how to respond to the enemy attack, it cannot be disputed that the actual operational “military advantage” sought through the planned counterattack is the protection of the state’s civilians.<sup>275</sup> And nothing in the terms of *jus in bello* proportionality prevents such a commander from attributing more value to protecting her state’s civilians’ lives than to the value of protecting foreign civilian lives, when comparing the anticipated military advantage with the anticipated civilian collateral damage.

Note also that this *jus in bello* proportionality norm grants military commanders extensive discretion, allowing the result to vary depending on the assessor’s viewpoint and in light of the case-specific circumstances.<sup>276</sup> Yet, at the same time, this is not unlimited discretion, and some acts will be considered clearly disproportional and, therefore, illegal.<sup>277</sup> As discussed, this is precisely what self-defense morality usually dictates in scenarios in which one has to

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<sup>273</sup> E.g., Luban, *supra* note 4, at 8.

<sup>274</sup> See *supra* notes 7-12 and accompanying text.

<sup>275</sup> See Schmitt, *supra* note 11, at 154-55.

<sup>276</sup> See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13 June 2000, ¶¶ 49-50, available at [http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf) (hereinafter NATO Bombing Report); Fellmeth, *supra* note 30, at 487.

<sup>277</sup> See NATO Bombing Report, *id.* at ¶¶ 49-50.

decide whether, and to what degree, to defend one group of innocent individuals (with whom one has special relations) at the expense of conferring risk onto another group of innocent individuals (with whom one does not have special relations).<sup>278</sup>

### B. Soldiers' Lives versus the Lives of Foreign Civilians

Supporters of the equal value position also assert that positive international law (i.e., *jus in bello* proportionality) supports the Altruism Principle, and moreover, they base this on a rationale similar to what they advance with regard to the Equality Principle.<sup>279</sup> That is, they argue that since the consideration of protecting soldiers' lives is not explicitly specified in the *jus in bello* proportionality norm, it cannot be taken into account when making a proportionality assessment.<sup>280</sup> In other words, soldiers' lives cannot be accorded more value than the mission-specific military advantage that will be attained by keeping them alive during the course of that specific mission.<sup>281</sup>

The implications of such an interpretation of the *jus in bello* proportionality norm are illustrated by the following hypothetical scenario.<sup>282</sup> A ground force is under mortar-attack from enemy forces hiding in a civilian residential area. The ground force calls for aerial support. The pilots summoned to give this support can decide to bomb the enemy forces from a low altitude or high altitude, where both options are equally likely to attain the mission's aim. Bombing from a low altitude, however, will be more risky for the pilots, but will also be more accurate (and thus will entail a smaller bomb); it will therefore lead to less civilian casualties on the enemy side. According to proponents of this interpretation of the *jus in bello* proportionality norm, when determining whether the high-altitude option is proportional (and, therefore, legal and moral), "the lives of the pilots who conduct the attack may not be factored into the proportionality evaluation of the attack. What determines proportionality is the balance between the expected incidental civilian losses and [the military advantage in] the own or friendly forces that are

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<sup>278</sup> See *supra* notes 188-192 and accompanying text.

<sup>279</sup> Few other positive law claims in support of the Altruism Principle have been presented in addition to the one discussed in the text; yet, as explained by one of us elsewhere, these claims are false as well; see Bohrer & Osiel, *supra* note 230, at 771-86.

<sup>280</sup> IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 203-04 (2009); Report: Expert Meeting, *supra* note 44, at 17-19; Smith, *supra* note 2, at 146-47.

<sup>281</sup> Report: Expert Meeting, *supra* note 44, at 17-19; DAVID RODIN & HENRY SHUE, *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 250 (2008).

<sup>282</sup> Report: Expert Meeting, *supra* note 44, at 18-19 (discussing a similar scenario).

expected to be saved by the attack”<sup>283</sup> (certainly if we assume that the relevant military does not have a shortage of pilots and airplanes).

This position, as will be explained, is morally wrong. But before discussing this, it should be noted that contrary to what supporters of this interpretation claim, it is not supported by positive law either. In fact, the claim that this is the “true” interpretation of the *jus in bello* proportionality norm is completely baseless. In addition to civilian harm and military advantage, a further element is essential for *jus in bello* proportionality: the minimum level of protection that soldiers owe to foreign civilians must be determined.<sup>284</sup> There is no doctrinal basis to the view that soldiers owe such civilians the extensive duties the supporters of the Altruism Principle would impose.<sup>285</sup>

There is strong evidence indicating that the following is a fair description of prevailing customary law on this subject:<sup>286</sup>

In taking care to protect civilians, soldiers must accept some element of risk to themselves. The rule [of proportionality] is unclear as to what degree of care is required of a soldier and what degree of risk he must take. Everything depends on the target, the urgency of the moment, the available technology and so on.

This customary law explicitly sets a minimally acceptable risk-taking duty to be borne by soldiers in order protect even foreign civilians, no matter how significant the military advantage of their mission. As such, it refutes the claim that “[t]he proportionality principle does not itself require the attacker” to accept any measure of risk in order to reduce civilian danger.<sup>287</sup> At the same time, this standard is less demanding than placing soldiers under a duty to always take on additional risk whenever so doing will enhance civilian protection. Therefore, it does not

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<sup>283</sup> *Id.*, at 19.

<sup>284</sup> Benvenisti, *supra* note 3, at 82 (“But what is the meaning of ‘excessive’ damage? More concretely, is the army required to expose its combatants to life-threatening risks in order to spare enemy civilians?”).

<sup>285</sup> In fact, some leading authorities assert the precisely opposite position, namely, that “[t]he proportionality principle does not itself require the attacker” to accept the measure of risk necessary to “minimize” civilian danger; MANUAL OF THE LAW OF ARMED CONFLICT 25-26 (U.K., 2004); *see also* Dale Stephens and Michael W. Lewis, *The Law of Armed Conflict-A Contemporary Critique*, 6 MELB. J. INT’L L. 55, 72 (2005).

<sup>286</sup> A. P. V. Rogers, *Conduct of Combat and Risks Run by the Civilian Population*, 21 MIL. L. & L. OF WAR REV. 293, 310 (1982). *See also*, Alexandra Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare* 45 (UCHL Research Paper Series No. 2/2006); William J. Fenrick, *The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside*, 3 Y.B. INT’L HUMANITARIAN L. 53, 78 (2001).

<sup>287</sup> MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 285, at 25-26.

support a strict Altruism Principle; and the remaining leeway allows a more demanding risk-taking duty to be imposed on soldiers *only* with regard to protecting their own state's civilians.<sup>288</sup>

This common interpretation of the *jus in bello* proportionality norm, as manifested in state practice, is also, as explained hereinafter, the one most morally appropriate, in light of the moral analysis made here.<sup>289</sup> It is undisputed that international law instructs belligerents to view civilians as innocent, uninvolved individuals.<sup>290</sup> It is also commonly accepted that the (almost) unrestricted permission given to soldiers to kill enemy soldiers<sup>291</sup> is based on the premise that they can view the other side as culpable aggressors.<sup>292</sup> It is likely to remain in dispute whether these premises are: morally right, erroneous but morally appropriate as proxies due to second-order considerations, or morally wrong. Yet it is generally accepted that these are the premises by which international law instructs belligerents to function.<sup>293</sup>

However, if a soldier on one side is allowed to view the soldiers on the other side as culpable aggressors, why is the former duty-bound to respect the limits placed on her by the laws of war with regard to her *in bello* treatment of the former? It seems that affording such benefits to the aggressor contradicts the core moral and legal principle of *ex injuria jus non oritur* (i.e., legal privileges cannot arise out of the commission of an unlawful act).<sup>294</sup> Moreover, why are both sides given equal permission to intentionally kill the other side's soldiers?<sup>295</sup>

The main rationale advanced throughout the ages in international law discourse for these two core elements of the distinction between *ad bellum* law (that distinguishes between the duties of the aggressor and the aggressed) and *in bello* law (which does not) is the informational uncertainty with regard to who is the aggressor.<sup>296</sup> That is to say, it is often in dispute as to who

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<sup>288</sup> For a further discussion of this issue, see Bohrer & Osiel, *supra* note 230, at 771-86.

<sup>289</sup> See *supra* notes 234-244 and accompanying text.

<sup>290</sup> E.g., Fullinwider, *supra* note 225, at 93 (stating that "we most commonly speak... of innocent victims of war").

<sup>291</sup> See *supra* note 266 and accompanying text.

<sup>292</sup> See, e.g., THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL, Sec. 204.3 (Canadian J.A.G, 2001) ("...one side may label the other an aggressor...").

<sup>293</sup> See *supra* notes 257-264 and accompanying text.

<sup>294</sup> Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 10-11 (Dieter Fleck and Michael Bothe ed., 2nd Ed., 2008).

<sup>295</sup> See McMahan, *supra* note 14, at 257.

<sup>296</sup> See Greenwood, *supra* note 294, at 10-11; ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 799 (4th Ed., 2011); CANADIAN LOAC-MANUAL, *supra* note 292, at Sec. 204.3 ("[T]he LOAC [law of armed conflict] binds both sides in a conflict. Although one side may label the other an aggressor, it is not entitled to apply the law in a different way because of that assertion."). For historical support for this legal position see, e.g., 2 HUGO GROTIUS,

has violated *ad bellum* law, and history proves that both sides usually view themselves as fighting a just war (and view the other side as the culpable aggressor).<sup>297</sup> Due to this uncertainty, each side is allowed to assume that the other side is the culpable aggressor and is therefore permitted to intentionally target its soldiers.<sup>298</sup> At the same time, each side is required to acknowledge that the assumption of innocence is not completely unambiguous, and therefore it is not allowed to act based on the *ex injurta jus non oritur* principle, nor is it allowed to treat the limits set by *jus in bello* as inapplicable to its relations with its enemy.<sup>299</sup> Such relatively broad permission for each side to target the other—only a slightly more limited than the permission that would have been afforded had international law allowed one of the sides to view itself as clearly innocent—is morally appropriate based on the analysis made in this Article.<sup>300</sup>

As for the relations between civilians and soldiers: the discussion here has shown that international law encourages soldiers of each side to acknowledge the possibility that they are not innocent, while clearly instructing them to view all civilians (including those under the enemy’s control) as innocent, uninvolved individuals. In such cases—when both sides to a self-defense conflict are innocent, but one is clearly so while the other must acknowledge the existence of some uncertainty as to her innocence—the proper course of action (discussed earlier in the Article<sup>301</sup>) is precisely what has been adopted as state practice:<sup>302</sup> to obligate the uncertain side to always accept some non-trivial level of risk in order to reduce the risk to the clearly innocent side.

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DE JURE BELLI AC PACIS LIBRI TRES 643-44 (1625) (W. Kelsey trans., 1925). See also, FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 305-07 (1979). Russell argues that history has proven that if each side is permitted to assume that the other side is undoubtedly the unjust side, total wars are commonly waged. That is, the *in bello* laws of war are never actually applied by belligerents and the result is horrific, unrestrained carnage of combatants and civilians alike. He, therefore, asserts that “[f]or the just war [theory] to be incorporated within international law, some injustice on both sides must be assumed and the rules of conduct must be enforced impartially on both sides. Either both sides must be at fault, or neither sides...”; *id.* at 305. In other words, Russell states, that historical experience has led international law to adopt, as the basis for its *in bello* norms, the premise that uncertainty must be assumed with regard to the culpability of all sides.

<sup>297</sup> See sourced cited *Id.*

<sup>298</sup> See sourced cited *Id.*

<sup>299</sup> See sourced cited *Id.*

<sup>300</sup> See *supra* note 238 and accompanying text.

<sup>301</sup> See *supra* notes 242-244 and accompanying text.

<sup>302</sup> See *supra* notes 286 and accompanying text.



## CONCLUSION

The Article sought to draw the moral parameters for discussing the matter of whether soldiers may prefer their own lives and the lives of their state's civilians over the lives of foreign civilians. The moral discussion set aside the notion of risk and threat as the determinative factor in this issue. Instead, the Article focused on the notion of innocence or culpability. Assuming that the relevant soldier is not culpable for the situation in which a civilian is at risk (for example, where the enemy has purposefully used the civilians as human shields), the soldier and civilian are on similar moral footing, and a tragic choice has to be made between their lives. In such circumstances, some room for partiality is allowed towards preserving one's own life. This understanding is also applicable to the matter of weighing state civilian lives against foreign civilian lives. As such, when confronted with the difficult choice between protecting one's own civilians and protecting foreign civilians, some partiality is allowed towards the former.

However, two substantial limits are set on partiality in such war related circumstances. First, this partiality is bounded by the recognition that the situation is still one of equality in terms of culpability, and so an exaggerated reliance in partiality is wrongful. Second, in terms of international law, it is further limited by the existence of a presumption of uncertainty regarding the innocence of soldiers, since we usually cannot know for certain that the causes of a particular side in a given war are just. The result of these limits is a level of nontrivial risk that soldiers must shoulder to prevent harming foreign civilians, which, we maintain, is also the proper interpretation of existing international law doctrine.