

STATE UNDER ATTACK: THE STORY OF PREFERENCE FOR  
RELATIVES IN PRE-EMPTIVE COUNTERTERRORISM  
OPERATIONS

*Eyal Gruner<sup>†</sup> & Doron Menashe<sup>††</sup>*

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<sup>†</sup> Research Student stage B, Faculty of Law, University of Haifa

<sup>††</sup> Professor Doron Menashe, J.S.D. is an associate professor of law, in the Faculty of Law at the University of Haifa, and Editor-in-Chief of the *Haifa Law Review*, one of the leading law reviews in Israel, He is a mediator and arbitrator in the Institute of Commercial Arbitration and in the Israeli Arbitration Federation and head of the master's program in adjudication and criminal procedure in the Faculty of Law at the University of Haifa. His field of expertise is Theory of Evidence Law, and he is considered one of the leading experts in this area. He has published three books on Theory of Evidence and more than fifty articles in refereed journals.

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## I. INTRODUCTION

When a state is subjected to terror attacks, it may choose to engage in targeted killings in pre-emptive operations to combat them, i.e., eliminating those attempting to commit acts of terrors before they can do so. At times, there is no choice but to kill noncombatants who happen to be in physical proximity to the target. One of the possible justifications for carrying out such an operation is the state's duty to protect its citizens, which overwhelms the duty to avoid harming civilians of another nation.

The argument is that because the state has a relationship of belonging and relation with its citizens, or because such a relationship exists among the citizens, the duty to protect from terror overwhelms the duty to avoid harming those civilians who are uninvolved in terror, as the latter—who are foreigners—do not have a relationship of belonging and relation.

## II. ASSUMPTIONS OF THE ANALYSIS

### *A. Definition of Terrorism*

To define terror, this Article relies mostly, but not entirely, on the definition proposed by Asa Kasher and Amos Yadlin:

an act carried out by individuals or organizations, not on the behalf of any state, for the purpose of killing or otherwise injuring persons insofar as they are members of a particular population in order to instill fear among the members of that population . . . so as to cause them to change the nature of the related regime or of the related government or of policies implemented by related institutions, whether for political or ideological (including religious reasons or for expressive reasons such as revenge).<sup>1</sup>

There are a number of points about this definition. First, we must distinguish between our definition and the definition by Kasher and Yadlin by using the term “operation,” not “violent operation.” We concur with Gross that that an act of terrorism may not necessarily be violent. For example, an attack on computerized or technological systems may be defined as terror as long as the goal is to sow fear among the population in order to change its policy.<sup>2</sup> Second, we accept Perry’s point that terrorism is not necessarily instrumentalist—sowing fear, changing the regime or the policy—but it may be expressive as well, for example to

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<sup>1</sup> Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS, 3, 4 (2005) (we add to definition of Kasher and Yadlin “or for expressive reasons such as revenge”) [hereinafter Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*].

<sup>2</sup> EMANUEL GROSS, MA’AVAKAH SHEL DEMOKRATYAH BA-TEROR: HEBETIM MISHPATIYIM VE-MUSARIYIM [THE STRUGGLE OF A DEMOCRACY AGAINST TERRORISM: LEGAL AND MORAL PERSPECTIVES] 35, 41 (2004).

avenge a military operation or to express hatred without any aim in mind.<sup>3</sup> Kasher and Yadlin claim in response to Perry that it would be illogical for an act of revenge to be personal without an organized infrastructure,<sup>4</sup> but we find this insufficient, as Perry argues not for personal vengeance, but for collective vengeance, and it is not inconceivable that an act based on an organized infrastructure may have an expressive impetus.

Perry objects to the idea of “affiliated with a certain population” by citing two examples: (1) a suicide bomber attacks a restaurant containing members of the target population but also others; and (2) a sniper shoots a soldier because the latter humiliated his wife during a search of his home.<sup>5</sup> In our view, the first case is indeed terror, as it is enough for the targeted population to be harmed, even if others are collateral damage. In the second case, it is not terrorism but rather assassination. Terrorism is by definition collective, not individualistic, while assassination is individualistic.

This definition relates to non-state terrorism, in order to focus on terror as carried out by individuals or organizations.<sup>6</sup> In addition, we seek to draw a distinction between terrorists and guerillas; terrorism aims to harm people generally, in order to change their policy out of fear. On the other hand, a guerilla seeks to disrupt military activity. The distinction does not relate to the result (whether civilians or soldiers are harmed) but rather to the aim: is it generally to terrorize the population or to disrupt military activity? If the aim is to terrorize the population in order to change its policy, this is terrorism, even if only combatants are injured.<sup>7</sup> Terrorism is also defined by a certain type of tools used to achieve goals, and these goals do not necessarily conform to a certain type. This is why the notion that “one man’s terrorist is another man’s freedom fighter” is fallacious, because being a freedom fighter relates to the aims, not the means. There is no contradiction between someone’s being a freedom fighting individual or part of an organization and a terrorist, as the first characterizes aims while the latter characterizes means.<sup>8</sup>

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3 David L. Perry, *Ambiguities in the ‘War on Terror’*, 4 J. MIL. ETHICS 44, 44-45 (2005).

4 Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: Response*, 4 J. MIL. ETHICS 60, 62-63 (2005) [hereinafter Kasher & Yadlin, *Military Ethics of Fighting Terror: Response*].

5 Perry, *supra* note 3, at 45.

6 Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1.

7 *Id.* at 5.

8 *Id.* at 6.

*B. Serious Harm and the Creation of Serious Risk*

In this chapter, we will deal with serious harm such as death or critical injury and the risk of such serious harm, as it effects either populations which defend themselves from terror (citizens) or noncombatants among whom the terrorists operate (civilians). We will not address light bodily injury or property damage, nor the risks of such harm. This is because serious bodily harm carries the greatest moral weight to justify the counterargument.<sup>9</sup>

*C. Justifications for Harming the Civilians Due to Relationships of Belonging and Relation, as Opposed to Other Justifications*

In the first part of this Article, we will focus on the argument arising from belonging and its relation to the justification of harming civilians. There are other justifications based on other considerations—for example, that giving a terrorist immunity to strike from among innocents will allow the terrorist to attack disproportionately. This is not based on belonging and relation, and it applies equally when the terrorist belongs to the population he attacks. Those arguments, which justify attacking a terrorist while harming innocents without their being based on belonging and relation, apply also in situations in which the competing sides are citizens of the same state. For example, if a state is defending itself from terrorism even though innocents may be harmed, and its justification is not based on belonging and relation, this means that the innocents may be harmed even if they too are citizens of the state under attack, as long as this is the only way to neutralize the terrorist.

The second portion of this Article will address general considerations of the justification for harming civilians as well as whether or how these justifications interact with considerations of belonging and relation.

*D. The Presumption of Justification to Attack Terrorists*

In this discussion, we take for granted that it is justified to neutralize terrorists who are trying to carry out an attack. This justification is based on the concept of self-defense. We assume that a justification exists for self-defense, as the terrorist is a culpable aggressor, not an innocent

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9 DAVID ENOCH, IDDO PORAT, RE'EM SEGEV & MORDECHAI KREMNITZER, BELI KAVANAH: PEGI'AH BE-CHAPIM MI-PESHA BI-ZEMAN MILCHAMAH BA-TEROR [COLLATERAL DAMAGE: THE HARMING OF INNOCENTS IN THE WAR AGAINST TERROR] 20-22 (2007).

aggressor or someone engaged in self-defense. We will not raise the issue of whether terrorism itself is just or not; whether it is never morally justifiable<sup>10</sup> or sometimes justifiable,<sup>11</sup> our discussion will assume that there is culpability, and since a terrorist is a culpable aggressor, self-defense is justified to counter his attack.<sup>12</sup>

*E. Justification for Harming Civilians as Opposed to Justification for Harming Terrorists*

This chapter will address only the justification of harming those uninvolved in terror, i.e. those not responsible for terrorism or not suspected of such activity. In other words, they are innocents. This includes anyone not involved or suspected of involvement in planning or executing acts of terrorism.<sup>13</sup>

This means that those who may have voted for a political party which supports terror but who are not involved in planning or executing acts of terror do not bear this responsibility; attacking them serves no pre-emptive purpose, since someone who votes this way is not necessarily an active participant in planning or carrying out acts of terror, nor even suspected of such activity. This discussion assumes that attacking those who are trying to carry out acts of terror or are suspected of doing so entails other considerations, namely of self-defense and pre-empting future attacks.<sup>14</sup>

In this chapter, we will focus on the civilians who have something in common with the citizens of the population engaged in self-defense: neither group poses a threat. Thus, self-defense or any other justification emanating from bad behavior is not relevant.

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<sup>10</sup> See Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 6.

<sup>11</sup> ENOCH ET AL., *supra* note 9, at 24-25.

<sup>12</sup> See Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More than They Would Endanger Their State's Civilians*, 47 GEO. WASH. INT'L L. REV. 99, 103-105 (2015). Self-defense is one of the exceptions to the prohibition for an agent to cause damage to another, including death, based on the other attacking the agent or threatening to do so. See *id.* This applies both on the individual plane (an aggressor versus an agent) and the international plane (a state and a terrorist organization). See *id.* On the individual level, criminal law recognizes a right to self-defense; in international law, this is known as *jus ad bellum* (justification of military action) and *jus in bello* (justification of tactics in war or armed conflict). See Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 8-9 (describing the duty of a state to defend its citizens as an ethical principle of fighting terror).

<sup>13</sup> ENOCH ET AL., *supra* note 9, at 19.

<sup>14</sup> *Id.* at 19-20.

Another question is whether the population responsible for the conflict should be expanded to include those who do not take an active part in acts of terror but still pose a problem by their very presence amongst those who are involved in terror. For example, what responsibility do civilians bear if they are told to evacuate their homes but refuse to do so? In this case, they may be willfully posing a risk, and it may be unfeasible to say that they do not bear responsibility within the conflict.

However, this chapter is not the forum to ask these questions. We are talking about those who bear no responsibility, regardless of what the questions of responsibility may be. Those who regard a failure to evacuate as engendering culpability would exclude such people for this discussion, while those who do not would consider this chapter applicable for such a population.

#### *F. Pre-Emptying Terror, Not Reprisals*

The current discussion only deals with pre-emptive operations, those designed to prevent an act of terror from being successfully carried out (from the terrorists' viewpoint). This does not relate to reprisals after the act has been committed, with the goal being deterrence or some other aim of punishment.

Pre-emption and deterrence fundamentally differ in that the former is undertaken when there is clear evidence of an attempt to commit an act of terror, while deterrence exists even whether there is no concrete indication of an attempt to commit an act of terror, but the goal is generally to dissuade potential terrorists from carrying out such acts in the future. As stated, we will deal only with pre-emption.

#### *G. Type of Belonging and Relation*

We are speaking of belonging and relation based on citizenship, i.e. belonging to a certain polity. According to one formulation, the duty devolves upon the state or upon its government to protect its citizens, a duty which is not applicable to civilians who are not its citizens and for whose security the state is not responsible.

When we consider the state's duty, we relate to those who hold the government offices which require them to make decisions and to give orders which will fulfill the state's responsibility to protect its citizens and safeguard their security. Here the emphasis is on duties and not on rights, since those who fill these offices are elected or appointed to their positions in order to fulfill the state's duties to its citizens. If these



officeholders have rights, they do not emanate from these positions, but from their citizenship, as we will elaborate upon below.

According to the second formulation, the duty is upon the citizens, the members of the polity to ensure that the officeholders take care of their countrymen who are in danger, a concern which does not apply to foreign civilians. Every citizen, thus, has a duty to every other citizen who is in peril, and this duty is expressed by demanding that the officeholders do their duty. In this formulation, an argument may be made as to rights. Each citizen has the right to express concern for the security of other citizens by making demands of the officeholders, because it is in each citizen's interest to stand up when their fellow members of the polity are in danger.

Another possible type of relation is that based on nationality, as the government officeholders are linked to the citizens under attack by nationality; moreover, the state realizes the right to national self-determination of the people under attack by terrorists.

### III. MORAL DISCUSSION

#### *A. Examining the Application of General Justifications in Favor of Preference for Reasons of Belonging and Relation to a Situation of Harming Civilians in Pre-Emptive Operations*

##### 1. The Argument of Supplementary Allegiances

Sen proposes that the first allegiance is to humanity in general, and additional allegiances may be added for relatives.<sup>15</sup> Kasher and Yadlin work off of this assumption, in order to support the distinction between citizens and non-citizens to justify harming foreign civilians.<sup>16</sup>

Sen argues that the allegiance to humanity in general and the allegiance to relatives are not mutually exclusive, and these may be reconciled.<sup>17</sup> We agree that on the abstract level, all share in these rights; but when it comes to concrete balance, relatives will be preferred, even if this does not mean that every decision will be to their benefit.

However, in another sense, these additional allegiances must be at the cost of general allegiance. If cosmopolitanism means that no person

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<sup>15</sup> Amartya Sen, *Humanity and Citizenship*, in *FOR LOVE OF COUNTRY?* 114 (Joshua Cohen ed., 1996).

<sup>16</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 20.

<sup>17</sup> See Sen, *supra* note 15, at 114.

may be preferred based on relation, this means that any additional allegiance creates a situation in which someone is not entitled to that allegiance. In other words, when we must decide between a situation in which allegiance to A means harming B or one in which allegiance to B means harming A, this allegiance is not merely supplemental, but harmful as well. This situation exists when the choice is either to harm civilians or to avoid doing so and allow terrorists to harm the citizens of the state defending itself. In this sense, any additional allegiance detracts from the interest of those who are not included in this additional or special allegiance. Therefore, we must discuss whether it is just to exhibit allegiances beyond cosmopolitanism, to allow harming civilians.

## 2. Utilitarian Justifications

Utilitarian justifications for harming civilians based on reasons of belonging and relation argue that such a choice yields better, or less bad, results as avoiding such harm. The good or bad results are judged by the utility versus the harm, whether considering pleasure versus suffering or satisfaction versus dissatisfaction.<sup>18</sup>

There are two situations in which there is no utilitarian justification for harming civilians not based on reasons of belonging and relation. One is when ignoring belonging and relation means gross equivalence of the sides in the conflict. This is a situation in which the damage to the civilians will be more or less equal to the damage caused by failing to act, i.e., “*ceteris paribus*.” In other words, the expected disutility (the magnitude of the damage weighing the probability of its occurrence) of harm to these civilians is more or less equal to the expected disutility (the magnitude of the damage weighing the probability of its occurrence) of choosing not to harm them. In this situation, utilitarian considerations, setting aside belonging and relation, neither support nor oppose harming civilians. The question is whether the utilitarian consideration supporting belonging and relation can militate towards justifying such harm.

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<sup>18</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–7 (Clarendon Press 1907) (1823) (based on the formulations by Bentham and Mill, the utilitarian approach means that, among all options, the one action (or lack thereof) to be preferred is that of the greatest utility. Utility is measured in terms of happiness, and happiness has been conceptualized in terms of pleasure, while the undesirable alternatives reduce the utility and increase the pain). Compare JOHN STUART MILL, UTILITARIANISM 9–10 (London, Longmans, Green & Co., 10th ed. 1888) (later formulations of utilitarianism conceptualize it as maximum satisfaction of preferences) with R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT 91–95 (1981) (expresses formulation of utilitarianism as maximum satisfaction of preferences).

A second situation is one in which the utilitarian considerations, which are not related to belonging and relation support avoiding harming civilians (i.e., the expected disutility of harming civilians) is higher than the expected disutility of avoiding doing so. Here, the question is whether considerations of belonging and relation can support a 180-degree turn, justifying harming the civilians even though the utilitarian considerations other than those of belonging and relation would reject such harm.

The utilitarian approach is aggregative. This means that a good result is the one which represents the highest sum or average of potential utility, satisfaction or welfare. Not every writer is careful about using the term “utilitarian” in the aggregative sense. Walzer uses the utilitarian view to describe Sidgwick’s claim, according to which there are two forbidden aspects in hostilities: (1) no act of malice should be executed which does not serve the purpose of victory; and (2) no act of malice should be executed which has a minor or slight utility relative to the damage it causes.<sup>19</sup> This approach is based on the outcome, but it is not utilitarian. A utilitarian approach does not suffice with a contribution which is greater than slight; it will reject a process which significantly contributes to victory but cumulatively causes more damage than will result from abandoning it.

### 2.1 Human Interest in Protecting Relatives Due to Emotional Need

This argument points to the utility of helping one’s relatives and the damage caused by avoiding doing so, though this may be feasible. In terms of our discussion, human beings have a psychological need to help their imperiled relatives, whether the relation is based on nationality or citizenship. For members of the nationality or citizens of the state, this relation is an essential element of their identity. Therefore, coming to the defense of relatives who are in danger is part of defending the elements of their identity, demanded by their conscience. Failing to help a relative in crisis is likely to impinge on their integrity. These are harms caused to the moral agent, and, therefore, from a utilitarian viewpoint, helping relatives by nationality or citizenship should be allowed, even if this means harming civilians, since these civilians do not have the same relation, and thus killing them will not engender the bad results of damaging integrity. An analogy may be made between the strong

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<sup>19</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 130 (1977).

psychological interest of parents to protect their children and that of the state to protect its citizens.<sup>20</sup>

This argument is based on the psychological view of relative relationships, in order to make a claim of moral permissibility and not a claim of duty — that it is legitimate for a person to save his relative by harming civilians in order to defend his emotional status. However, this argument does not compel people to protect their relatives. If a person believes in utter impartiality when considering relatives versus foreigners and does not intend to give special weight to the former when imperiled if it comes at the cost of harming civilians, this argument allows him not to give special status to relatives. Applied to our situation, if the state does not wish to afford special consideration to its citizens, then the current claim does not require them to show any bias. Therefore, this argument does not morally criticize a state or national entity which does not show bias for its citizens or nationals when it comes to harming civilians in the fight against terror. The argument only tries to support the conclusion that such an entity has the right or allowance to demonstrate such bias.

The argument of emotional interest in protecting relatives may be understood in one of two ways: it may be seen as a claim excusing the agent from moral responsibility for the act due to emotional considerations, even though the act is not justifiable. Alternatively, it may be seen as a claim of justification, establishing that such behavior is just.

Before we evaluate the latter, let us consider two arguments raised by Segev. The first is based on the fact that government officeholders, unlike private individuals, are expected to act in an unbiased, impartial manner.<sup>21</sup> Segev does not explain what normative basis officeholders are “supposed” to employ: moral or legal? If this is a legal duty, it is irrelevant to our moral discussion. If this is a moral duty, this is begging the question. When we want to investigate whether states and officeholders are morally required to show no bias when considering their citizens versus other civilians or are morally required, or at least allowed to show preference to their citizens, we cannot presume that they must act impartially. This is the question which we are analyzing morally. In addition, in the framework of utilitarian thinking, we are dealing with the idea that government officeholders must be impartial in the context we are discussing must itself be justified by utilitarian criteria. Another

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<sup>20</sup> See HENRY SIDGWICK, *THE METHODS OF ETHICS* 433, 439 (Macmillan & Co. Ltd. 1962) (1874) (presenting the general utilitarian argument, unconnected to pre-emption of terror).

<sup>21</sup> ENOCH ET AL., *supra* note 9, at 93.

argument by Segev is that criteria such as citizenship, residency, birthplace, and parentage do not seem to have any moral relevance.<sup>22</sup>

If we continue with the rationale of Segev, we may also ask why the genetic connection of biological parents has moral significance. Moral significance does not emerge from simply pointing to facts; it is about the psychological significance which people give to certain facts. Familial relationships have moral significance because of the emotional resonance given by people to blood relations. Similarly, it is not difficult to give moral weight to human communities in which the members attribute significance to empirical facts such as birthplace and parentage. The facts themselves are not important, but rather the psychological aspects of identity, integrity and conscience which give them moral significance.

On the utilitarian plane we are addressing, these facts have weight in terms of what they contribute to human welfare and happiness or how they reduce suffering. In terms of this, every fact which counts towards these goals has moral significance.

Now let us consider the utilitarian justification. This argument may be evaluated in terms of two potential situations. The first is one in which there is gross equivalence in terms of all other considerations. Now the question arises: is the fact that we are talking about fellow citizens or nationals decisive? The second is one in which the utilitarian considerations ignoring relation militate towards avoiding harming civilians; here, the question which arises is whether the utilitarian argument suffices to reverse the conclusion and justify harming civilians.

Let us consider the second option, in which unbiased utilitarian considerations support avoiding such harm to civilians. In our view, in such a case, harming civilians is not justifiable, and therefore the integrity argument supported by the utilitarian argument should be rejected. On the one hand, let us consider a person whose family member has been killed or people whose lives are endangered as civilians, as opposed to people whose moral outlook justifies killing civilians to protect their fellow citizens. We may say that on the average the suffering of those who have love lost a close relative, who fear for their lives as civilians, or who sustain serious injuries as civilians outweighs the suffering of a person whose moral outlook of harming civilians to protect citizens goes unrealized. The latter may be disappointed, but this is not equivalent to the pain of losing a son who had the misfortune to be near a terrorist. The emotional link to one's family or the emotional trauma of living in mortal peril overwhelms the emotional impact of a moral yearning to protect

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22 *Id.*

citizens whom one does not personally know or have intimate relations with. Ultimately, the pain of one's ideology going unrealized is common and dealt with every day, wholly unlike the pain of a death in the family.

Now, would the answer be different if unbiased considerations of civilians versus citizens yields a justification for harming the latter, but only to a very small degree? In our view, in this case as well, the consideration of bias should not be dispositive. This is because as long as we have not identified that the utilitarian considerations change everything and as long as the consideration to avoid harming civilians is a matter of human life, then even if there is only a step between the decision to avoid impinging on human life and gross equivalence, the consideration of human life should overwhelm the consideration of being partial to one's fellow citizens and nationals. The consideration of human life is superior to being partial to one's citizens and nationals, and in our view this hierarchy must be expressed in our situation.

Segev argues that government officeholders who espouse an unbiased position concerning harm to civilians normally do not pay a personal price for it.<sup>23</sup> His reasoning is that, sometimes, an unbiased position puts a burden on the agent to accept greater danger, but on the other hand, rejecting the operation can make things easier for the agent.<sup>24</sup> We concur. If the policy is partiality directed towards citizens, this increases, relatively speaking, the number of military actions, including ones which endanger soldiers. This may impose a burden on the decision-makers, because of the peril into which they send their troops. However, for the sake of this discussion, let us address difficulty. Let us assume that it is easy for the decision-makers to send soldiers to carry out pre-emptive terror attacks but declining to do so is hard. We believe that even assuming this is true, the utilitarian argument fails. We have given one reason for this above.

Another reason is that a moral principle of impinging on human life every time those who support it declare that their integrity would be harmed by rejecting such an impingement is likely to lead to horrific consequences of mass casualties simply because the holders of this ideology of justification have identified a threat to their integrity. These consequences are awful, in terms of the deaths, and in terms of the impingement on the personal security of human beings. Therefore, utilitarian considerations demand a principle that does not allow killing people on the basis of a claim of integrity.

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

<sup>24</sup> *Id.*

In the end, the argument of integrity based on utilitarianism to justify killing civilians may be challenged by a claim of integrity based on utilitarianism on the part of the terrorists themselves. If a terrorist declares that he must commit an act of terrorism to maintain his integrity and claims of integrity based on utilitarianism must be honored, then the act of terror should be just, creating a conflict with the argument of integrity for pre-empting the act, even at the cost of harming civilians. Indeed, these justifications may at times be in conflict; however, although we should not reject in a sweeping manner such a situation, it is less desirable than these justifications not being in conflict. Rejecting a claim of integrity based on utilitarianism to kill civilians is a situation in which these justifications are not in conflict and, as such, is preferable.<sup>25</sup>

Now let us turn to a situation in which the unbiased utilitarian considerations are in gross equivalence, on one side supporting harming civilians and on the other leaving the population engaged in self-defense in harm's way. In our view, if we only take into account utilitarian considerations, if such a consideration points to only the advantage of harming civilians and not every advantage of avoiding such an act, then we will come down on the side of the lone advantage: achieving the emotional satisfaction of defending citizens or the homeland and avoiding the negative feelings of missing the chance to assist them.

To summarize, the argument succeeds in a situation in which utilitarian considerations not based on relation are more or less equal, while it fails when the number of anticipated casualties among the foreign civilians outnumbers the number of anticipated casualties in the population under attack. As for the argument based on excuse, we believe it is unjustified, not just because if every time a person claims an excuse when he wants to kill people in the name of ideology he adheres to, as otherwise he will suffer an impingement on his integrity, this will lead to vast attacks on human life and health, under the aegis of ideology justifying such harm due to a claim of integrity. People must defend their security and lives from those adhering to an ideology which justifies their death. If anyone nevertheless causes their death due to some ideology, protecting human life requires a punitive response, not an excuse based on that ideology.

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25 An example of a situation in which these justifications are in conflict is a case in which both A and B have justification to seize an integral resource to save their lives, but only one of them can possibly acquire the resource.



## 2.2 The Duty to Respond to Expectations of Greater Weight for Relatives

This utilitarian claim is also based on the emotional need produced by a relationship. However, unlike the previous claim which relates to the right of helping relatives, this argument is about the moral duty of responding to the expectations of associates and giving them more weight than strangers.

In the context of our discussion, we are talking about the duty upon the leaders of the country to harm civilians in order to fulfill their duty to protect their relatives. In addition, we may speak of the duty of the citizens to support a policy which gives more weight to protecting citizens or the homeland, than harming foreign civilians. Unlike the previous argument, this is based on the emotional need of those in danger to have others come to their aid, based on expectations about their relationship to their fellow citizens, not the emotional need of whoever comes to their assistance.

We note that the applicability of this argument is limited to situations in which the attacked populace believes that avoiding hurting civilians is based on giving greater weight to the interest of the civilians than their interest. This reservation is important in utilitarian thinking, as the factor which determines the moral loss is not what takes place in reality but rather awareness of the event, as only this awareness allows a consciousness of frustration. Unless one knows that their expectations are being frustrated, they will not suffer. Therefore, the application of this argument is limited to situations in which the population which anticipates a different policy is aware of its hopes being dashed. In the utilitarian framework, there is significance to willfully concealing the policy from a population which may thwart it due to the population's immoral views.

It is not uncommon for such situations to take place when the population is not aware of the policy. If there is no official declaration of the policy of avoiding harming civilians for moral reasons, many times the public is not aware that such an opportunity arose and was not taken. Even when this is publicized, answers may be provided to satisfy the public. Nevertheless, the ability to conceal such a policy for a long period of time will likely encounter difficulties, as some of those who know the truth will inevitably disagree and will likely leak the information about the motivations for the policy.

Assuming that the argument holds water, we may distinguish between a situation in which utilitarian considerations are grossly



equivalent if considerations of relation are ignored and a situation in which utilitarian considerations other than those of relation support avoiding harming civilians. Considering the former, in our view, we may say here too what we said above. When the considerations are grossly equivalent, the scales are tipped to harming civilians, since the consideration of realizing the anticipation of relatives is the only advantage to be pointed to from among the options.

There is another consideration. If a given person or his family member is injured after being “let down” by their government, their suffering is greater than that of someone who is injured or whose family is injured without any such expectation. In addition to the suffering of injury or bereavement, there is the suffering of being disappointed, which is worse than the experience of such injuries without such frustration. Thus, if the utilitarian scales are even, aside from a consideration of relation, this consideration tips the balance to justify harming civilians.

There are situations in which there is a utilitarian reason not to harm civilians. It is important to distinguish between two situations: one in which those who are disappointed are not personally injured and one in which they are. In the latter case, we believe that the argument for harming civilians based on expectations should be rejected for similar reasons as the right to act on behalf of one’s relatives by harming civilians. In our view, the three arguments for rejecting this right also support rejecting the duty to act on the basis of expectations.

A second situation is one in which those whose expectations are frustrated are themselves, or their family members, injured. Here exists a utilitarian argument, as one who is injured while being “let down” by his government experiences a deeper trauma, and this damage offsets the significance of the fact that the number of casualties among the civilians is higher. For example, the injury of one person with expectations dashed causes greater suffering than the injury of two persons with no such expectations.

We reject this argument as well. First, as already noted, the expectation of assistance for relatives is offset by the expectation of the civilians not to be harmed because of their view of justice. Second, for utilitarian calculations, the harm to those under attack is not that of death or serious injury plus the frustration of not being helped; rather, the frustration must be isolated and evaluated independently. In other words, the additional harm is that of frustrated expectations; on the other side we have additional harm among civilians of another death or serious injury. The weight of loss of life and serious injury in terms of the suffering inherent in them, including mourning and bereavement, and physical and

emotional suffering, on average exceeds the suffering engendered by frustrated expectations, which does not come with harsh outcomes of death or serious injury. It is reasonable to think that the connection of human beings to their loved ones is more significant and intimate than their connection to the value based on the anticipation of receiving assistance. The people whom we look to for help are not as close as those beloved family members, and therefore it is logical that the loss of faith in people from whom we expect assistance is weaker than the loss of beloved family members.

Indeed, when we are talking about the people who are themselves harmed, we may say that the frustration of expectations becomes relevant when the disappointed people are *ab initio* in a desperate emotional state due to the death of a loved one. In such a situation, does the frustration of expectations not offset the suffering of loss of loved ones by the civilians? In our view, for these to be equal, we must assume a mechanism of psychological disruption in which the lesser harm of frustrated expectations is raised to the level of the higher harm of losing loved ones. Even if we assume that such disruption sometimes occurs, it is logical to assume that it is rare, and the incidents of disruption are fewer than those without disruption. Therefore, on average, it makes sense that the loss of loved ones will cause greater suffering than frustrated expectations of receiving assistance, even among those people who lose loved ones. Since bereavement is not an emotional pathology, there are grounds to assume that generally no disruption occurs.

In this situation as well, in our view, the answer we propose will not change if, due to considerations of maintaining balance between foreign civilians and fellow citizens or soldiers, the justification for avoiding harming civilians is greater, but only to a minimal extent. In such a case too, it is not appropriate to make bias the dispositive factor. As long as we have not identified that the utilitarian consideration in fact reverses the picture, and as long as the consideration to avoid harm to civilians is a consideration of human life, then even if there is just a step between the decision to avoid harm and gross equivalence, it is appropriate that considerations of human life overpower the consideration of expecting aid from related nationals or citizens. Since human life belongs in the category of highest consideration, outweighing the expectation of aid, in our view, this hierarchy must be expressed in this case.

To summarize, the argument succeeds when the considerations not based on relation are more or less equal, and it fails when the number of civilian casualties expected is greater than the number of citizen casualties.

### 2.3 The Argument for the Interest of Maintaining Relationships and Communal Frameworks

An additional utilitarian argument is based on the human need to maintain relationships and the societal interest of protecting institutions of relationship and affiliation. This interest requires responding to the expectation of relatives with bias. To fail to do so means endangering the relationship: these relatives are expected to express anger and disappointment at this betrayal and breach of trust. Bias in favor of belonging and relation prevents such situations.<sup>26</sup> In the political-national context, the argument is that if no preference is given to citizens, the relationships of trust necessary for societal integrity will be damaged, along with the required cooperation for society to function.<sup>27</sup>

First, we must analyze the nature of the argument, namely a second-order moral argument. It assumes that if foreigners (in our case, those not involved in terror) are preferred, then the public will demur, leading to bad results. However, the question is whether it is morally just for that portion of the public to oppose such preference. If this is a first-order consideration, it is appropriate to give equal initial weight to the civilians and the citizens under attack; in a world in which everyone is moral, such opposition would ab initio never occur.

If morality justifies the public's opposition to equal weight for civilians and citizens, then the reasons which justify preference for citizens do not emanate from the very opposition, but rather from the reasons which justify opposition. If morality does not justify the public's opposition, the very opposition is already a moral error. This raises a second-order question: how to act in light of the immoral opposition of a segment of the public.

This is correct concerning any political morality. Let us assume that we arrive at a conclusion which adopts a left-wing policy rather than a right-wing policy. Now a counterargument is raised: if a left-wing policy is implemented, the public will oppose it and undermine proper societal life. Therefore, pragmatic considerations make a policy which is the reverse of what we find just desirable, simply because of the practical considerations of societal stability.

As mentioned above, this argument becomes practically relevant only if we assume that morality demands we avoid harming civilians,

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<sup>26</sup> CHAIM GANS, *THE LIMITS OF NATIONALISM* 157 (2003).

<sup>27</sup> Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, in *PATRIOTISM* 167, 174 (Igor Primoratz ed., 2002).

while relationships of trust and social cohesion demand harming civilians.

Some may seek to reject this argument summarily: how could it be that we would prevaricate for our friends or family when they expect it, in order to avoid harming trust-based relationships? How could we misappropriate public funds for this purpose? How could we kill people when morality forbids it, simply in order to avoid the ramifications of public opposition?

However, first of all, duties based on belonging and relation are not dependent on the relationship being itself moral. The duties arise from the relationships of affiliation and not from the moral character of the relationships of affiliation. If the duties depended on the morality of the connection, then they would be morally justified, ignoring the weight of the connection itself. If the connection has an independent weight, the morality of the connection is irrelevant. If the connection is not moral and demands performing immoral acts, then a balance must be struck between the weight of the connection and the weight of the impingement on morality if the act demanded by the connection were to be carried out.<sup>28</sup> It appears that a utilitarian would not reject the argument summarily and at least initially would address it seriously, because if the public opposition yields bad results, in utilitarian thinking, any bad result must be part of the general calculation.

In our view, even in a utilitarian frame of thinking, the current argument fails as long as we are talking about justifying harming civilians, assuming that first-order moral considerations forbid this. First, this argument has limitations on its application much like those we pointed to in our discussion above about the duty to respond to the expectation of relatives to receive greater weight. This is a limitation in situations in which the public believes the policy gives greater weight to civilians.<sup>29</sup> Second, assuming that the country under attack is democratic, this means that if there is public opposition, it will be expressed electorally. If enough citizens oppose the anti-terror policy, a party which believes this will come into power and reverse the policy. Third, if the assumption is that first-order morality forbids killing people, then from a utilitarian perspective, in order to justify killing people for pragmatic

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<sup>28</sup> Yael Tamir, *LIBERAL NATIONALISM* 101-03 (1993). For example, Tamir claims that there is no clear answer to the question of whether Palestinians are required to turn over other Palestinians who have committed crimes, or whether a student must report another student's cheating on a test. *Id.* at 103.

<sup>29</sup> See *infra* Section II(A)(2)(i) for further discussion.

considerations, they have to show that these bad societal results are worse than the unjust killing of human beings. The negative influence on society has different levels: murmurs and criticism in the salons, lawful protests, unlawful protests and civil disobedience, civil unrest expressed in the refusal (in various ways) to serve in the army or (in various ways) to pay taxes, mass violence and civil war.

It appears that only lethal violence and civil wars could neutralize the consideration of harming civilians. This is problematic because these are unlikely and illogical events, even if a segment of the public does not approve of a policy which seems anemic in the fight against terror. Here, the probabilistic difference is decisive. Death and serious injury of civilians is a certainty or near-certainty, and such outcomes are extremely difficult from a psychological perspective. On the other hand, similar harm as the result of death or serious injury when civilians are not put to death is a distant possibility. It is not appropriate to execute a process which has a high probability of causing psychologically difficult outcomes, based on the assumption that this will prevent worse outcomes which are unlikely. If such a policy is adopted for a long time, the number of dead and injured in such a world would be greater than the number of dead and injured in a world in which civilians are not killed for such considerations. Therefore, a world in which the policy which the current argument supports is applied is a worse world, in terms of utilitarianism.

Unrest on the level of a tax revolt or refusal to enlist may in extreme cases lead to the collapse of a state or society, causing fatalities, but it is unlikely for this to happen because of a disagreement about counterterrorism policy. These actions may instead be limited in scope. As stated above, if the opposition is so great, the next elections will bring about a policy change. As Segev notes, there are social and legal restraints which make the extreme event unreasonable.<sup>30</sup> The social restraint is the human desire to live in a flourishing society which deals with security threats, and therefore it is reasonable that there would be enough motivation to pay taxes and serve in the military. Similarly, there are legal restraints, such as sanctions for nonpayment of taxes and draft-dodging.<sup>31</sup>

Fourth, another advantage to the consideration of avoiding harming civilians is that it allows a reversal if we see that the results are worse. In other words, if refusing to harm civilians leads to bad outcomes, the policy can be altered. It allows more time and critical thinking than harming civilians, which is immediate and irreversible.

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<sup>30</sup> ENOCH ET AL., *supra* note 9, at 94.

<sup>31</sup> *Id.*

Fifth, as with every pragmatic argument, even if we assume it is successful, it is tentative by its very nature. It is successful as long as the factual circumstances are those which create outcomes which are unacceptably bad for a morally just policy, based on first-order considerations. As soon as we identify a change in the facts, we must abandon the current policy and adopt what appears just. Moreover, it is appropriate to aspire to the situation in which the pragmatic argument which succeeds will be as short as possible.

#### 2.4 The Argument for the Efficient Division of Labor

According to this argument, the utilitarian justification for bias in favor of relatives emanates from the efficient division of labor. A person may adopt the concerns of a limited number of other people. Thus, the most efficient method is for a person to concern himself with a minimal number of others—those to whom he is closest.<sup>32</sup>

Concerning the international system, the argument is that the best approach is for every state to take care of its citizens, not citizens of other states. This allows for the effective division of labor on the international plane. This assumes a division of labor by nation. Different human populations belong to different countries, and every sovereign nation is responsible for a certain portion of the world population. Thus, every state must first and foremost worry about its own citizens. This principle is based on division of labor. If a state is concerned first with citizens of other states, *de facto* it will function as a global state, violating the division of labor. Assuming that national division of labor is the most desirable and efficient method of global order, each state must concern itself with its issues. This justifies bias in favor of a state's own citizens.<sup>33</sup>

The effective division of labor argument may be broadened to international non-state bodies, organizations including terror groups which effectively rule over people. The reason for division of labor shows the limitations of the argument. As long as the reason is based on the power of the state or the organization to take care of certain people due

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32 Gans, *supra* note 26, at 150; Sidgwick, *supra* note 20, at 241-42, 434; Idit Shafran Gittleman, Magenim Enoshim ve'Chovot Meyuchadut [Human Shields and Special Duties] 16 (n.d.) (unpublished manuscript), [https://law.huji.ac.il/sites/default/files/law/files/mgnym\\_nvshyym\\_vkhvbt\\_myvkhvbt\\_drpt\\_my.pdf](https://law.huji.ac.il/sites/default/files/law/files/mgnym_nvshyym_vkhvbt_myvkhvbt_drpt_my.pdf).

33 Enoch et al., *supra* note 9, at 90-91; Robert E. Goodin, What Is So Special about Our Fellow Countrymen?, in *Patriotism* 141, 151-57 (Igor Primoratz ed., 2002); Miller, *supra* note 27, at 181; Michael Walzer, After 9/11: Five Questions About Terrorism, in *Arguing About War* 130, 139 (2004).

to their effective control of certain territory, and it is not appropriate to demand that a state or organization worry about people in territories outside their effective control, the division of labor is based on the rationale of effective control and not relationships such as citizenship or nationality. The division of labor argument does not justify each state's worrying about its citizens or the nation whose self-determination it embodies, or that each organization worry about those who belong to it or the nation it claims to represent; the concern is based on effective control. If the citizens of Country A are effectively ruled by Country B or Organization B, or the members of Organization A are under the effective control of Country B, then there is no reason to demand that a state or organization or those who belong to that nation exhibit concern for citizens or those who belong to a nation which is not under their effective control. Demanding concern for people who are under the effective control of others is inconsistent with efficiency, due to the very lack of effective control.

However, even if we understand the argument as a functional one of effective control and not as based on duties of citizenship or nationality, we are still talking about an argument of special duties towards certain people. When effective control exists, then according to the current argument, any state or organization must express concern first and foremost for those under its effective control, not those under the effective control of another state or organization. These special duties are not based on belonging and relation in the sense of emotional closeness or identification, but rather functional ability. A state or organization has specific duties towards those who are under its effective control, even foreigners, even if they are citizens of other states, but they do not have any specific duties towards those who are not under its effective control, even if they are related by citizenship or nationality.

If we apply the argument to harming civilians, then terror organizations have effective control to keep such people away from terrorists. The state defending itself does not have effective control, and therefore the entity responsible for keeping the civilians away from terrorists must be the terror organizations who maintain effective control of that territory. The difficulty with the division of labor argument based on effective control is that it is not an all-or-nothing proposition; it is a matter of degree. Sometimes one may identify one entity as holding the greatest effective control, while other entities have lesser effective control, but not zero. Those entities may help, but less effectively, with lower odds of success and a greater cost for those offering assistance. Still, assistance from such an entity is not utterly ineffective.



Indeed, it is justified to argue that the entity with the greatest effective control is responsible for taking care of those people, but what if, for whatever reason, this entity fails to do so? Should a second-order consideration come into play, i.e. should the entity with the second-most effective control act because the one with the most fails to do so? Or is it appropriate to conclude that if the entity with the most effective control refuses to act, no other entity is required to fill its shoes, regardless of the (lower) effective control it holds?

#### 2.4.1 The Argument of Inability to Act

One possibility is to examine why the entity with the greatest effective control does not act. Is this entity responsible for inaction? It may be that this entity is unable to act. Here, we must distinguish between general effective control and effective control in the specific event. The entity which has the greatest effective control of the territory generally speaking may not have effective control for this event.

This is what Shafran Gittleman describes as the “trapped citizen.”<sup>34</sup> This is a person who finds himself in a combat zone, near a military target, without any direct manipulation; in addition, the state or organization which generally maintains effective control of the scene is not in control of the citizen’s arrival at the location, nor can it remove him.<sup>35</sup> On the other hand, the anti-terror military force has effective but lesser control in the sense that it can choose to avoid harming civilians if it gives up the military target.<sup>36</sup> In the case of a “trapped citizen,” the argument is that the entity which generally holds effective control is not and cannot be responsible for this situation, and thus the “trapped citizen” becomes the responsibility of the entity with the greatest effective control of the situation, namely the military or the state it represents.<sup>37</sup>

The question which then arises is under what conditions responsibility cannot be placed upon the entity which generally exercises effective control.<sup>38</sup> Miller distinguishes between outcome responsibility and remedial responsibility.<sup>39</sup> The classic example of a lack of responsibility is a situation in which the entity which generally holds effective control bears neither outcome responsibility nor remedial

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<sup>34</sup> Shafran Gittleman, *supra* note 32, at 4.

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

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 20.

<sup>39</sup> David Miller, *National Responsibility and Global Justice* 81-109 (2007).



responsibility for the trapped citizen. This is a case in which the one who generally holds effective control does not initiate an unjust military operation, nor violate principles of war, nor manipulate the trapped citizen, nor use him as a human shield; in addition, the entity has no capacity to help him.

However, Shafran Gittleman argues that such a condition is too harsh.<sup>40</sup> She maintains that it is sufficient that the entity which generally holds effective control has no remedial responsibility, and it is not necessary for it to have no outcome responsibility.<sup>41</sup> This means that even if the entity is responsible for initiating an unjust military operation (e.g., an act of terror) or for an unjust tactic (e.g., using a human shield), if it cannot physically remove the trapped citizen from danger, it does not bear responsibility for his fate, which still rests with the military power.<sup>42</sup>

Is it justifiable to impose outcome responsibility even if there is no ability to repair it? This argument for imposing outcome responsibility is the argument of transferring responsibility. According to the argument, an entity which must bear the responsibility for the bad fate that may befall civilians is the one which exposes them to this risk, e.g., an entity engaging in a military operation, such as an act of terror, which is unjust, causing civilians to be in a dangerous area and exposing them to danger by using them as human shields.<sup>43</sup>

We agree with Shafran Gittleman that this argument should be rejected.<sup>44</sup> First, it is illogical to shrug off responsibility when someone is presented with two options and then chooses one and rejects the other. Whoever pulls the trigger bears the responsibility for his action. Even if he is not the one to create the danger initially, he controls his response to it. Second, transferring responsibility after the danger has been created does not mean that the entity responding to the danger is no longer responsible. Responsibility is not exclusive, and more than one entity may bear it.

Shafran Gittleman presents a good example of a situation in which intuition says that responsibility should not be transferred: if a father prepares dinner for his child and a thief steals the food, the father still must feed his child, even though it is someone else's fault that they have

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40 Shafran Gittleman, *supra* note 32.

41 *See id.*

42 *Id.* at 19-20.

43 *See* Michael Walzer, *Coda: Can the Good Guys Win?* 24 EUR. J. INT. LAW 437 (2013); Shafran Gittleman, *supra* note 32, at 7-8.

44 Shafran Gittleman, *supra* note 32, at 8.

nothing to eat.<sup>45</sup> The father cannot shrug off his responsibility for feeding his child by blaming the thief.<sup>46</sup>

Let us summarize what we have seen so far:

The division of labor argument, which states that the entity which must help people is the entity which has the greatest effective control, does not apply when the entity which generally has the greatest effective control does not have it in a specific event. Its lack of effective control must be examined according to its ability to act to remedy the damage which has already occurred, not its ability to prevent this damage. Even if this entity has responsibility for the infliction of this damage, it should not bear the responsibility if it does not have the ability to repair this damage.

In the context of harming civilians, this means that the state defending itself from terror is not allowed to transfer the responsibility for harming civilians to the terror organizations if the terrorists are responsible for the civilians' presence but are not capable of removing them or warning them to clear out, and their blood will be on their own hands should they fail to do so. In the end, the terror organization does not act without justification by initiating an act of terror, i.e., it is not unjust based on *jus ad bellum* considerations.

If the terror organization can cause civilians to leave the dangerous area or warn them to do so, or if the terror organization does not act in a just manner so that the very act of terror is unjust and the terror organization must eschew military action, in these situations the responsibility of the terror organization for the fate of the civilians cannot be removed due to the reason of inability to act.

#### 2.4 The Argument for Transferring Responsibility due to Unwillingness to Act

Let us assume that the entity with the greatest effective control has the ability to act but declines to do so. Should responsibility then be transferred to the entity with the next greatest effective control? We must distinguish between two questions: (1) Who is the primary obligatee and who is the secondary obligatee? (2) Who is the actual obligatee? These are different questions. It may be that the entity bearing the primary duty

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<sup>45</sup> *Id.* at 21.

<sup>46</sup> *Id.*

bears the actual duty as well, but this is not always necessarily true. Sometimes it is the secondary obligatee.

The question of the primary or secondary duty is determined by the question of who bears the duty detached from the issue of what other potential agents might do (primary obligatee) and who bears the duty when others have not fulfilled their duty, i.e., who bears the duty when the bearer of the primary duty fails to act (secondary obligatee).

In other words, the assumption in this distinction is that there is regular obligatee who is the primary, and if he fails to fulfill his duty, it falls to the secondary obligatee.

The question of actual duty is who bears the duty in practice. In light of the above, it is obvious that sometimes the primary obligatee may be the actual obligatee, and this is when it is unclear that the primary obligatee will shirk his duty. On the other hand, it may be that the secondary obligatee will be the actual obligatee, when the primary obligatee will clearly shirk his duty.

The primary duty precedes the secondary duty, but when the former is unfulfilled, the latter becomes the actual duty. Shafran Gittleman illustrates this with the stolen supper: the foremost actual duty is to get the food back or to prepare a new meal, borne by the thief; however, if the thief fails to act, the actual duty devolves to the parent, the secondary obligatee, to make a new meal.<sup>47</sup>

If we apply this to the issue of harming civilians, the primary and actual duty towards the welfare of the civilians is upon the terror organization. If the terror organization shirks its duty, then the actual duty is transferred to the secondary obligatee, the military power or the state which fights terror. The civilians do nothing to sacrifice their right to life. Their basic rights still exist. They are not responsible for the primary obligatee's refusal to do his duty. After this occurs, there is still an agent with effective control of their fate: the military power fighting terror. Therefore, the army or state should be seen as secondary obligatees, so that when the primary obligatee (the terrorist organization) shirks its duty not to endanger civilians, the actual duty towards civilians takes center stage.

From a utilitarian perspective, the primary obligatee's refusal to fulfill his duty does not exempt the secondary obligatee, who has effective control, from applying utilitarian calculation. The secondary obligatee, like every person, must maximize the utility and minimize the

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<sup>47</sup> *Id.*

damage or harm independent of the question of whether others are fulfilling their duty.

It should be noted that the secondary duty towards civilians is a *prima facie* duty, and not necessarily a decisive duty. The duty towards civilians is an apparent duty in the sense that the military power or state must take into account the impingement on their rights, first and foremost in the lives of civilians; but the considerations of the success of the mission in order to protect its citizens must also be taken into account. This is a question of balance, and the solution will not always be not to harm civilians. They do not have immunity from harm in anti-terror operations. Everything we have shown up until now indicates that they have the right to enter the moral calculus, but this is not necessarily decisive, certainly not always.

An additional question: does the weight to be given to the rights of civilians change if the primary obligatee is unable or unwilling to act?

This question depends on empirical assumptions of whether the primary obligatee will do his duty. If he generally does, then the secondary obligatee may be justified in relying on this tendency and neglecting the duty, as it is reasonable to assume that the primary obligatee will tend to it. If the empirical pattern usually observed is that states and organizations take care of their citizens and nationals, and if there is no reason to assume that in this case they will diverge from this—i.e., if it is reasonable that the terror organization will take care of its people and not expose them to danger by using them as human shields—then the secondary obligatee (the military power engaged in counterterrorism) may ignore the presence of civilians with the assumption that the enemy will evacuate them from the dangerous area.

However, there may be situations in which this is not the case, and there is even reason to believe that this is not the case in known actual situations. For the most part, the soldiers know that the enemy does not fulfill its primary duty, as it endangers civilians even to the point of death. There is an interest in terror organizations to use civilians as human shields, such as influencing public opinion for propaganda purposes and leveraging international pressure. Therefore, it is logical that the enemy will ignore its primary duty.<sup>48</sup>

We concur with Shafran Gittleman that when the enemy is expected to ignore his primary duty, we must give weight to what he is expected to actually do, not what he should do.<sup>49</sup> We cannot rely on what is

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<sup>48</sup> *Id.* at 24.

<sup>49</sup> *Id.*

appropriate when what is expected falls short, so that relying on the former has no rational basis.<sup>50</sup>

However, does this mean that no weight is to be given to the primary obligatee's abrogation of his duty? Let us assume that all of the pros and cons of harming civilians are in gross equivalence, excluding the consideration of the primary obligatee to protect them. What is appropriate to do when the lone consideration for harming civilians is the consideration of the terror organization's abrogation of its duty to protect them? Can this break the tie and tip the scales towards harming civilians?

A possible argument is the motivational argument: in order to motivate the primary obligatee in this case or primary obligatees in general to fulfill their duties, we must give weight to the fact that the primary duty has been abrogated, even if it was foreseeable.

However, as Shafran Gittleman claims, this argument is limited to cases in which there are a series of wars or anticipated wars in the future.<sup>51</sup> This argument does not apply to a war after which no further combat is anticipated, and therefore there is no reason to address coming wars.<sup>52</sup>

In our view, one may give some weight to abrogation of the primary duty, even when this is anticipated, as dependent on the psychological ramifications of the fact that a primary duty has been abrogated. In the absence of psychological ramifications, or when these are grossly equivalent, gross equivalence does indeed exist, and there is no weight to the abrogation of the primary duty.

However, we may consider psychological ramifications of the abrogation of the primary duty: first, it is reasonable that the number of people who expect that the state will give weight to the abrogation of the primary duty to the benefit of the state will be greater than the number who would expect that such weight would not be given, or applied in the opposite direction. This is a second-order consideration. Even if we assume that as a first-order consideration, such anticipation has no moral basis, the very fact that the anticipation exists is a utilitarian consideration which can be a tie-breaker for harming civilians. When the number of those who anticipate that a certain decision will be made is greater than those who expect that the reverse decision will be made, and this is the lone consideration to the benefit of the decision, this consideration must have dispositive weight. From an empirical point of view, it is logical to think that people expect that states will give preference to their interests

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<sup>50</sup> *Id.* at 26.

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

<sup>52</sup> *Id.* at 15.

more than they expect the opposite. In addition, it is logical to assume that the greater number will expect the state to give negative weight to the fact that a primary obligatee has shirked his duty or to give positive weight to a decision perceived as harming his interests. Similarly, it is logical to assume that the greater number will expect that the violator of his primary duty will bear the responsibility for the fate of the victims. This is based on the idea that common, popular morality dictates that each state give preference to its interests and that people who abrogate their primary duty should have their interests harmed and that the responsibility for such harm due to abrogation will be on their shoulders.

However, as stated above, this consideration is a tie-breaker. As long as considerations of human life support avoiding harming civilians, it is wrong for abrogation of primary duty to tip the scales to justifying the harm.

### 2.5 The State's Duty to Protect Citizens Based on the Social Contract

In the context of pre-empting terror attacks, Kasher and Yadlin argue that the duty of the state under attack to protect its citizens may be based on the social contract; the state commits to safeguard its citizens' security, but not that of the rest of the world.<sup>53</sup>

Does this relationship create a duty? The analogy to parenthood is imperfect, as parents choose to bring children into the world, while the national decision-makers do not bring the citizens into existence. The argument is that these decision-makers declare (at least implicitly) that they pledge to safeguard the security of the citizens, and this pledge is binding.

However, a contract can only be binding on those who are parties to it. A third party cannot be bound by a contract, and this is what the civilians are. An agreement or guarantee which disadvantages a third side has no more normative power than the decision of an individual to harm another. If A is forbidden to harm another, this remains true even if A and B agree to harm that person. In fact, this may make the endeavor more morally objectionable, as a conspiracy.

Another argument based on agreement and consent does not flow from moral authority, but rather the expectation that commitments will be honored, even if they are invalid. People may still think erroneously that these commitments are valid, so that if they are not honored, there

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<sup>53</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 20; Elaine Scarry, *The Difficulty of Imagining Other People*, in *FOR LOVE OF COUNTRY?* 98, 101 (Joshua Cohen ed., 1996).

will be psychological harm due to the frustration of expectations, even if this anticipation is unjust. In utilitarian thought, this psychological harm must have weight.

As for the contractual argument, in a situation which all other conditions are equal and the considerations for and against harming civilians is grossly equivalent, the contractual argument might be the decisive tie-breaker. Does the contractual argument have any weight? This must be distinguished from a situation in which the reason not to harm civilians overpowers the reason to harm them, ignoring the contractual argument. Does it then have the power to reverse the situation, justifying harming civilians?

In the former case, we believe that the contractual argument has neutral moral value in terms of consensual justification. If the pledge is not valid, if the contract is void because it stands to harm a third side, it has zero weight and cannot break a tie. However, if this argument is not based on the moral power of the pledge, but rather on the psychological harm of that which is erroneously perceived as breaking a contract, on the utilitarian plane a decision may be justified to give some weight to what people see as nullifying a commitment to them; when the other consideration are grossly equivalent, we should not flip a coin, but consider this injury.

Still what is the power of the utilitarian argument when aside from it, considerations of human life and human rights support avoiding harming civilians? In our view, in such a situation, the utilitarian argument fails due to our reasons for rejecting the argument for expectation of relation. If it is just not to take into account the expectations based on belonging and relation, it is just not to take into account the expectation based on the pledge.<sup>54</sup> The argument of consent is applicable to hypothetical consent. However, hypothetical consent is

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<sup>54</sup> See *supra* Section 2.1.2.2; ENOCH ET AL., *supra* note 9, at 93 (consent cannot justify harming a third party). On the utilitarian plane, an argument may be made that when many agree to harm a certain person, the fact that there are many may change the result to justify the harm: if this person is not harmed, many others will suffer. See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 118 (1988). Since utilitarianism is cumulative, the disappointment of every one of the many may outweigh the suffering of the individual whom they seek to harm. See *id.* This is a widespread argument against utilitarianism generally, but it is misguided. Utilitarianism is not obligated to assume the additive nature of suffering. If A feels  $x$  amount of suffering and B feels  $y$  amount, the cumulative suffering is not  $x + y$ , since A does not experience B's suffering and vice versa. No person experiences the sum total of suffering. If a person suffers a loss five times, his position is worse than that of five different people who each suffer such a loss once independently.



consent which has not actually been given; its normative power emerges from the argument that we should consent.<sup>55</sup>

As Halbertal rightly claims, we should not confuse the risk of harming civilians (agency risk) with the risk which soldiers assume in order to protect their countrymen (relational risk).<sup>56</sup> The agency risk is the risk discussed here and is the risk that the soldiers take upon themselves by harming the uninvolved.<sup>57</sup> Concerning this risk, there is no difference between citizens of the soldiers' country and civilians from the enemy entity. Every human being is equally entitled to life and limb, regardless of citizenship or nationality. On the other hand, relational risk is about the justification of endangering soldiers' lives in light of some goal or value.<sup>58</sup> Here exists a moral distinction between soldiers' lives being endangered for citizens of their state and for civilians of another. Due to the special relationship among citizens of a given country, its soldiers are ready to lay down their lives for their countrymen—but not for others. However, the fact that soldiers are not obligated to lay down their lives for foreigners since they do not share citizenship does not mean that they should not give weight to the agency risk that perhaps in their operation, without endangering their lives, they will harm civilians.<sup>59</sup> Similarly, it does not mean that they should avoid endangering their lives in order not to harm civilians, as a result of the fact that their activity will harm civilians. This is because of the difference between a situation demanding that soldiers lay their lives down for civilians and a situation in which the soldiers take part in creating the danger to civilians. The former is done without the likelihood that their actions will lead to the deaths of civilians and without the soldiers taking part in creating the risk to those civilians. It also demands that soldiers endanger themselves for civilians of another state when the soldiers do not take part in creating the risk to those civilians and are unlikely to harm those civilians. The latter is entails opening fire at terrorists when civilians may be hit as well, and are likely to cause harm to civilians, which is the collateral damage to them due to an attempt to attack terrorists.

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<sup>55</sup> ENOCH ET AL., *supra* note 9; CHAIM GANS, *PHILOSOPHICAL ANARCHISM AND POLITICAL DISOBEDIENCE* 50 (1992).

<sup>56</sup> MOSHE HALBERTAL, *PRESERVING HUMANITY: MORAL CHALLENGES IN ASYMMETRIC WARFARE* 18-19 (2014).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*



### 3. Deontological Justifications

A deontological moral approach claims that it is not always justifiable or appropriate to attempt to achieve the best results. Here, even if we assume that the best results will be achieved if civilians are not harmed, relationships of belonging and relation mean that it is permitted or allowed to harm civilians, despite the fact that the outcomes will be worse than if civilians are not harmed. Another way of phrasing this is to say that the right overpowers the good—even though maximizing good results means avoiding harming civilians, it is right to do that which is less good, i.e., to harm civilians.<sup>60</sup>

The deontological approaches may be divided thusly: sometimes there is a duty not to act in order to bring about the best results, and there is a duty to act in a manner which will not produce the best results. Another approach proposed by Scheffler is the hybrid, that the agent is sometimes allowed, but not required, to act in the manner which does not yield the best results. In other words, according to this approach, avoiding maximization of the results is an option for the agent.<sup>61</sup>

#### 3.1 Scheffler's Deontological Approach of Moderating the Moral Duty

Scheffler proposes a deontological approach which expresses the moderation of the moral requirements, an agent-centered approach. According to this approach, it is permissible for the agent to give greater weight to his interests, and to the interests of those close to him, without bending himself to general utilitarian considerations and maximizing good results.<sup>62</sup> The agent has a "safe space" in which he has the prerogative to maximize his self-interest, and those of his intimates, even if his personal benefit and the benefit of those closest to him do not maintain proportion between self-interest and some impersonal values. It is permissible for an agent to deviate from strict proportionality and give excess weight to his interest, because it is his interest.<sup>63</sup>

The principle of the centrality of the agent, as distinguished from universal egoism, a principle which is limited and balanced by the interests of others and the preference that the agent is allowed to give himself, is partial and local. This means greater weight for self-interest, but not decisive weight; sometimes, the interest of the agent will retreat

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<sup>60</sup> SCHEFFLER, *supra* note 54, at 5; JOHN RAWLS, A THEORY OF JUSTICE 24-25, 30-31 (1971).

<sup>61</sup> SCHEFFLER, *supra* note 54.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 14, 17; SAMUEL SCHEFFLER, HUMAN MORALITY 103-104 (1992).

as compared to other interests, even based on the centrality of the agent.<sup>64</sup> The argument of the centrality of the agent tries to justify this despite the concept of human equality. Even though the projects of many humans are equal in value, it is permissible for any agent to prefer himself and those close to him.<sup>65</sup>

Based on the approach of centrality of the agent, it may be expanded from the individual level to the collective level. Just as a person is allowed to give preference to a self-interest, similarly a group is allowed to choose leadership to represent it by giving preference to the interest of the group over others.<sup>66</sup>

Scheffler is of the view that the deontological justification for the centrality of the agent comes from the argument that it is preferable for moral requirements to be moderate.<sup>67</sup> Scheffler distinguishes between three stages of relationship between ethics on one side and self-interest on the other:

1. Morality as self-interest — Morality is subject to self-interest or self-interest subject to morality.<sup>68</sup>
2. Stringent morality — Morality is expressed independently of self-interest; the moral requirements are high (requiring sacrifice).<sup>69</sup>
3. Moderate morality — On the one hand, morality does not coincide with self-interest and can sometimes require sacrifice. On the other hand, the demands of morality take into consideration the constraints of self-interest, and morality starts from the point of view of the individual and his needs.<sup>70</sup>

Scheffler's one reason for morality being moderate is that it emerges from common sense.<sup>71</sup> On the deontological plane, we believe that the argument for common sense is based on an Aristotelian view that the golden mean is the best, between two polar positions: namely, morality as self-interest and stringent morality, which is difficult to uphold.

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64 SCHEFFLER, *supra* note 54, at 21.

65 *See id.* at 118.

66 *See id.* at 34-35.

67 *Id.*

68 *Id.*

69 *Id.*

70 *See id.* at 4-6, 100.

71 *Id.* at 124.

Scheffler wants to derive the centrality of the agent from the argument of moderate morality.<sup>72</sup> If the assumption is that morality must be moderate, then this affects the nature of morality with a view to taking into account the constraints of self-interest.<sup>73</sup> The argument of the centrality of the agent is that the agent is allowed to give greater, disproportionate weight to self-interest, for himself and those close to him. On the one hand, morality does not coincide with self-interest, so the agent is not allowed to do whatever he wishes for his self-interest. On the other hand, morality is not stringent, and therefore the agent's self-interest is not fully subject to impersonal demands. Stringent morality makes demands of the agent which are too high, a life of extreme sacrifice. For morality to be moderate, one must allow the moral agent, within certain boundaries, the prerogative of self-interest.<sup>74</sup>

One criticism to be leveled at Scheffler is that if the demands of morality are too difficult, then either there is a justification for the demands, hard though they may be, or there is not. If they don't have sufficient justification, naturally these demands are against morality, and therefore we cannot say that it is morality which is too difficult. If they have a justification, why are people allowed not to fulfill them? The entirety of the argument against the difficulty of fulfilling demands has already been taken into account at the point of justification. If, ultimately, we reach the decision that the demands are just, claiming that they are too hard undermines their justification. It is obvious that if the demands are unjust, these cannot be the demands of morality.

We may say that the question of whether these demands are or are not too difficult is a question of balance, and it is always a comparative one. What will be the result if the demands go unfulfilled? It may be that the moral demand is extremely difficult, but if it is ignored, the results will be even worse. In this case, fulfilling the difficult demands is the minimization of bad. However, the comparative question of what is more difficult is the question of utilitarian balance. If according to utilitarian balance, which already takes the difficulty of all of them into account, the decision is to justify the difficult demand, then it is not clear how a non-utilitarian consideration about a demand which is too difficult can change anything. This is a case in which the difficult demand has already been justified while taking everything into account. Therefore, it is not clear how to call into question justification once again.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 101-02.

<sup>74</sup> *Id.* at 122.

Here, we may respond that even if the difficult demand is justified, people are too weak to carry it out, and morality is meant to take human nature into account when making moral demands. However, this is not a claim of justification but a claim of excuse. The difference between the two relates to this point. If a person is emotionally incapable of carrying out what is morally just, or the difficulty to carry out the morally just action is too high, he should be excused to act according to what is just. Claims of the agent's weakness differ from claims that the act is unjust. Arguments focused on the agent and his difficulties in carrying out the act rather than the act itself are arguments of excuse, not justification. Therefore, Scheffler's arguments that morality does not need to be overly difficult for the agents do not justify but merely excuse.<sup>75</sup>

If we apply the principle that morality should not be overly demanding to the subject of harming civilians, it would mean that avoiding harming civilians when fighting terror is asking too much. If the argument relates to avoiding harming civilians at all, this is beyond the pale of our discussion. We are not discussing whether harming civilians can be just, but whether this harm can be justified by their not being citizens or nationals. Our assumption is that there may be justification to harm civilians, for example for utilitarian reasons, which are not tied to any preference of citizenship or nationality; the question we are faced with is whether there is justification to harm civilians in concerns of belonging and relation beyond the utilitarian justification—or beyond the justifications unconnected to belonging and relation.

Thus, applying Scheffler's claim means that the demand not to harm civilians beyond the just amount—not based on reasons of belonging and relation—is overly hard and worthy of rejection.<sup>76</sup> Civilians may be harmed, with a scope beyond just harm, as mentioned above. In our view, this demand is not overly difficult. Unlike the emotional stakes involving a first-degree family member, such as a child, spouse or parent, in this case we are speaking about people whom we might otherwise consider strangers; there is a huge difference between the emotional responses to the loss of a first-degree family member versus the loss of a fellow citizen or countryman. This reinforces the conclusion that the demand is not too great, which means according to Scheffler this is not a case in which a person can give precedence to his group and avoid impersonal balance. Scheffler too agrees that it is just for morality to make demands which are not easy, which are opposed to self-interest, as long as they are not

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<sup>75</sup> See generally *id.*

<sup>76</sup> See generally *id.*

too difficult.<sup>77</sup> This demand does not seem to be especially hard—no more so than other moral demands such as paying taxes or engaging in combat, or even refusing to subsidize an expensive medication, which may lead to the deaths of certain patients.

In addition, the difficulty in fulfilling the demand not to harm civilians depends on ethical and ideological personal positions. One who feels morally bound to harm civilians obviously will find it emotionally difficult to do the opposite, but this is due to his preconceived notions of morality. If he is in error, then perhaps were he thinking correctly, he would not hold such beliefs and would find it easier to avoid harming civilians. In other words, the difficulty emerges, at least partially, from the moral errors of those complaining. Taking such a difficulty into account is problematic. We can illustrate this in the following manner: imagine that those on the political right claim that it is too hard to carry out the policy of a left-wing government, or those on the left say the same about a right-wing government. If our ideology may be realized despite the objections of those who oppose it and find it difficult to accept, then, in this case, difficulty based on ideological differences should not grant a veto.<sup>78</sup>

A difficulty of this sort has the character of opposition based on conscience or personal integrity. We considered this above in the utilitarian context<sup>79</sup> and rejected it. If it is just not to consider the argument of emotional difficulty as an excuse, then it is not clear how it could be a claim of (non-utilitarian) justification for harming civilians. A fortiori, if it just to punish someone who harms civilians in such situations, obviously he is acting without justification.

In our view, concerning Scheffler's approach as well, it is just to claim that when other conditions are equal, i.e., the reasons to harm civilians and the reasons not to harm civilians—aside from the consideration that avoiding harming civilians makes things more difficult for the decision-makers, but harming civilians does not—that the scales be tipped towards harming civilians. Here, we may apply what we wrote

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<sup>77</sup> *Id.* at 100-102.

<sup>78</sup> This does not mean that psychological considerations have no weight at all, nor does it mean that they have no weight when people are in moral error and ignoring or failing to tolerate that error will make their psychological situation worse. Similarly, this argument does not negate the duty to show tolerance towards those who hold a mistaken view. This is a specific argument stating that even when we give weight to such psychological states, it is unreasonable that a democratic state decision will not be made which will reject certain ideologies as a basis for policy.

<sup>79</sup> See *supra* Section 2.1.2.1.

concerning a situation in which the other conditions are equal in the context of utilitarian arguments.<sup>80</sup>

### 3.2 Moral Conclusion in Light of Kant's Deontology

The deontological moral theory which is most insignificant is that of Immanuel Kant. We will consider what arises from it concerning justifying harming civilians based on preferences of citizenship and nationality.

#### 3.21 The Absolute Prohibition to Harm Civilians in Deciding Among Competing Duties

The categorical imperative forbids bodily harm to another person's life or limb. This argument does not apply to people who have earned punishment by committing immoral acts, because Kant does acknowledge the role of punishment. However, we are talking about civilians, who deserve no punishment and thus no harm.

To consider the categorical imperative, let us consider its first formulation: "Act only according to that maxim by which you can at the same time will that it should become a universal law."<sup>81</sup> Any harmful act means that an assailant is taking advantage of his greater power over the victim. Because it is impossible to give everyone greater power, there is no way that both assailant and victim can have greater power. Consequently, no universal maxim can be promulgated which will allow everyone to use to his greater power, simultaneously, to harm each other. This law requires a situation in which there are people (the victims) who cannot use it, and thus universality does not exist in this law. The attempt to formulate a universal maxim of compulsion creates a contradiction in the concept of greater power—necessary for harm—and it is therefore impossible, unreasonable, and contradictory to the categorical imperative.

Now let us consider the second formulation of the imperative: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."<sup>82</sup> According to this formulation, every person as a reasonable being must see his rationality as an end, not merely a means to an end. Since one perceives their

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<sup>80</sup> See *supra* Sections 2.1.2.1, 2.1.2.2, 2.1.2.4.

<sup>81</sup> IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (Lewis White Beck trans., Liberal Arts Press 1959) (1785).

<sup>82</sup> *Id.* at 39.

rationality thus, according to the rule of consistency, he must see every other rational being as an end and not as a means, since all those with reason are similar to each other in their rationality. If A harms B, he does not respect B's rationality, in that he does not allow B to consider and decide based on his desires, but rather A compels him to carry out A's desire. Does protecting A's life and limb justify harming B's life and limb, when B is not responsible for the harm and when this harm is necessary in order to protect A's life and limb? Here we have a situation of competing duties. On the one hand, Kant claims a duty to save people in distress,<sup>83</sup> on the other hand, Kant claims a duty to avoid harming another.<sup>84</sup> What if harming B is the only way to save A?

In cases of competing duties, Kant claims that a perfect duty supersedes an imperfect duty.<sup>85</sup> A perfect duty allows no expectation, while an imperfect duty allows exceptions.<sup>86</sup> Since the duty to rescue is an imperfect one, while the duty to avoid harming others is a perfect duty, and since a perfect duty beats an imperfect one when they come into conflict, the decision should be in favor of not harming others and the duty to rescue should be rejected.

We should note that this does not mean that Kant rejects a human prerogative to protect one's relatives. However, according to Kant, this cannot be universalized in a sweeping manner.<sup>87</sup> For example, we cannot propound a rule that if one's relative is in desperate need of cash, one may rob a bank.

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<sup>83</sup> *Id.* at 41.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 39. This indicates that Gross's approach ought to be rejected. Gross associates with Kant the idea that dilemmas in which the state must choose between the lives of its citizens and soldiers on the one hand and the lives of civilians belonging to the nation engaging in terror on the other are unsolvable. *See GROSS, supra* note 2, at 354. Gross argues that since Kant believes that all people have the same value, we should relate to each person as having inherent value and an end in himself. *See id.* Gross does not relate to the criterion which Kant sets out to resolve the competition between duties, based on the classification of the duties as perfect or imperfect, a source on which Gross relies. *See id.* Kant claims that what has internal value is a person of moral ability. KANT, *supra* note 81, at 53. Moral ability is the ability to formulate partial rules of will, but the content of these rules themselves allows one to decide when duties compete, if we read this passage together with Kant's note. *Id.* at 39. We should note that Kant does not claim that because a person has inherent value, then it is forbidden in any case to let him die. He even claims the opposite, that there are circumstances in which the moral duty is to let a person die. *See IMMANUEL KANT, On a Supposed Right to Lie from Altruistic Motives, in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346, 346-50 (Lewis White Beck, trans., Garland Pub. 1976) (1873). Kant claims that it is forbidden to lie in order to save an innocent person from a pursuer who wants to kill him. *See id.*

<sup>87</sup> KANT, *supra* note 81.

The limits on the ability to universalize are tied to the distinction between perfect and imperfect duties. Since a perfect duty is defined as a duty without any exceptions, this means that perfect duties cannot conflict with each other, because if perfect duties are in conflict, then one of them must lose, and then that perfect duty has an exception, which is inconceivable, by definition. This means that it is forbidden according to Kant to create a situation in which the prerogative towards relatives would be in conflict with some total duty.<sup>88</sup> For example, bank robbery for a relative creates conflict with the perfect duty not to harm another's body or property.

### 3.22 Do Relations to Citizens or Nationals Change the Decision?

The answer is negative. The idea on which the categorical imperative is based is that of universalization of rationality, so that every rational being is an end in itself. Universalization does not allow a person to make himself an exception or to give himself preference over others because "he is he." All rational beings share equality, and therefore every practical rule must be subject to the test of universalization: can this practical rule be a universal maxim? To give preference to oneself is to do the reverse of what the principle of universalization requires. Since every rational being must be seen as an end in himself, this reason would forbid a preference for oneself or using another as a means to benefit him, for the very reason that the other is not "he," and only he is he.

If this is the situation of the prohibition to indulge personal preference, the same applies to preference for a group. A group of citizens or nationals under terrorist attack which gives precedence to self-defense over the prohibition to harm civilians, for the sake of its citizens or nationals, undermines the idea of universalization, of seeing the civilians as ends in their own right; instead, it sees them as means to an end for the group, only because the group's members love each other more.

The argument that a state must first and foremost protect its citizens, due to consent or guarantee, is based on the duty to fulfill commitments or agreements, which Kant also accepts. However, such a duty does not apply when the commitment is to hurt third parties. In this case, the commitment contradicts the categorical imperative itself, and so Kant's philosophy would contain internal contradictions. For the sake of

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<sup>88</sup> *See id.*



consistency, Kant's philosophy would require rejecting commitments which include harm to others.<sup>89</sup>

Whenever a result is contradictory, this means that the process is in error, as a contradiction is irrational. Rational morality must not be contradictory, and therefore claims of a contractual duty to rescue cannot be explained in such a way as to lead to a contradiction but must be otherwise explained.

### 3.23 Attempts to Justify Harming Civilians in the Context of Kant's Morality

Hill claims that a conclusion which justifies harming civilians while harming a terrorist does not necessarily emerge from Kant's philosophy, but it is not unreasonable either.<sup>90</sup> Orend claims that military history provides no documentary evidence of any war in which the civilian populace was not harmed.<sup>91</sup> Since, according to Orend, Kant supports the idea of just war,<sup>92</sup> and any war inevitably involves harming civilians and would thus be unjust, it turns out in practice that every war in our world would be unjust. Due to the tension, we must explain Kant so as to permit harming noncombatants.<sup>93</sup>

One way to justify this suggested by Orend is based on Kant's example of two survivors near a board after their boat sinks. If both climb on the board, the board will sink, and they will both drown; if only one climbs on the board, it will not sink. Kant claims that if one pushes the other away from the board, this is not morally justifiable, but it is morally forgivable.<sup>94</sup> In this case, the primal fear of drowning in the sea is so strong that the perpetrator should not be punished for acting on a survival instinct.<sup>95</sup> This leads Orend to conclude that when State A invades State B and State B cannot defend itself without harming civilians, in this case too we may say that the survival instinct does not justify killing civilians morally, but it is the basis for not punishing one who does so.<sup>96</sup>

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<sup>89</sup> See generally *id.*

<sup>90</sup> Thomas E. Hill, *Making Exceptions Without Abandoning the Principle: or How a Kantian Might Think About Terrorism*, in *VIOLENCE, TERRORISM, AND JUSTICE* 196, 215 (Raymond Gillespie Frey & Christopher W. Morris eds., 1991).

<sup>91</sup> Brian Orend, *Kant on International Law and Armed Conflict*, 11 *CAN. J. L. & JURIS.* 329, 372 (1998).

<sup>92</sup> *Id.* at 372-74.

<sup>93</sup> *Id.* at 372.

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

<sup>95</sup> *Id.* at 361-62.

<sup>96</sup> *Id.* at 372.

In our view, this analogy works, but with some reservations. First of all, this is not a claim for justification; morally, Kant believes harming civilians can never be just.<sup>97</sup> Second, its application is limited to very extreme cases of imminent mortal peril; thus, a soldier involved in an anti-terror operation would not be able to use this argument unless he himself were involved—danger to others would not constitute a psychological condition of immediate, primal survival instinct.<sup>98</sup> Even if we expand this to danger to close family members, as we noted above, this cannot be expanded to include strangers who share nationality and citizenship.<sup>99</sup>

The second form of justification is based on Kant's example of the duty not to lie even when a potential murderer is trying to find one's friend. Kant argues that it is still forbidden to lie, even if his friend may die.<sup>100</sup> Hill claims that, as Kant lays the blame for the murder at the feet of the murderer, not the one who reveals his friend's location, we may conclude that the terrorists bear responsibility for any harm to civilians, as they create the situation, not those who engage in self-defense and injure civilians.<sup>101</sup> Orend argues that this example indicate that Kant embraces the doctrine of double effect, according to which the murder of this friend is a foreseeable result, but not one which is desirable or intended.<sup>102</sup> Analogously, a state defending itself is allowed to harm civilians when it is foreseeable, but not when it is desired or intended.<sup>103</sup>

We dispute the arguments of Hill and Orend, who use Kant's example about revealing a friend's location to a potential murderer to prove that he believes in the doctrine of double effect. Kant's claim concerning the duty not to lie, emerges as a perfect duty, while the duty to save a friend is an imperfect duty; when a perfect duty and an imperfect duty compete, the former must always win.

On the other hand, harming civilians may be seen as abrogating a perfect duty, the duty not to injure people; while the duty to rescue (even at the cost of hurting others), is an imperfect duty. Hill and Orend ignore Kant's distinction between perfect duties and imperfect duties as a criterion when duties conflict.<sup>104</sup>

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97 KANT, *supra* note 81.

98 *See id.*

99 For a discussion of Scheffler's approach, see *supra* Section 2.1.3.1.

100 KANT, *supra* note 81.

101 Hill, *supra* note 90.

102 Orend, *supra* note 91 (discussing the doctrine of double effect).

103 *See id.* at 372-73.

104 Hill, *supra* note 90.

Nevertheless, can harming civilians be justified according to Kant's approach by the doctrine of double effect? We may say that Kant rejects saving certain people by killing others who are innocent, but the defensive war is not a situation of the duty to rescue, but rather the duty to defend oneself. When a soldier eliminates a perceived danger to the citizens of his country or to his fellow soldiers, he is not saving an individual; he is engaged in collective self-defense. In order for the individual soldier to succeed in his mission, he needs comrades to fight alongside him or to constitute potential for future combat as a reserve force, as well as civilians on the home front to maintain a wartime economy and to reinforce his morale and maintain the human, economic and physical infrastructure to allow him a reasonable postwar life. These are all part of the ends of self-defense, so any harm to them, harms him; thus, we may say that he is not rescuing strangers, but protecting personal resources as part of the duty to defend oneself.<sup>105</sup>

If the duty is to defend oneself rather than save others, it is a perfect duty brooking no exceptions, as any concession means an irreversible outcome of the agent's death. It is true that the duty not to harm others is a perfect duty, but harming civilians does not abrogate this duty, as violating it would require malicious intent. If the harm is a foreseeable result, but not one which is intended, this is not an abrogation; thus, the duty of self-defense with foreseeable harm to civilians does not conflict with the duty not to harm others. In this situation, there is no contradiction between the prohibition to lie to a potential murderer, which relates to the duty to rescue, an imperfect duty, and the allowance to harm civilians, which relates to the duty to defend oneself, a perfect duty.

Benvenisti claims that Kant's philosophy would forbid endangering soldiers in an anti-terror campaign in order to protect civilians,<sup>106</sup> since this would make the soldiers a means, in opposition to the categorical imperative of man's being an end.<sup>107</sup> We believe this is correct as long as harming civilians is not seen as an abrogation, because the harm is foreseeable but not intended.

First, were we to see harming civilians as at least an apparent abrogation, then it would be improper to see the soldiers protecting

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<sup>105</sup> See Orend, *supra* note 91, at 372-73. Kant's approach speaks of duties rather than rights, and thus we speak of the duty of self-defense rather than the right of self-defense. This is the mirror image of the prohibition of suicide. It is the core basis of the duty to develop one's talents; a fortiori, we may say, if one must develop his talents, one must certainly defend himself).

<sup>106</sup> Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *ISR. L. REV.* 80, 90 (2006).

<sup>107</sup> See KANT, *supra* note 81.

civilians as a means only. Kant recognizes the duty to rescue another in crisis.<sup>108</sup> If this is true of an imperfect duty, all the more so it would be for a perfect duty, not to harm another. Second, the duty of not harming civilians is a case of a universal duty not to harm another, which is a perfect duty, which brooks no exceptions.<sup>109</sup> Hence, we cannot conceive of an instance in which there would be a duty to harm another. Thus, according to Kant, the categorical imperative requires not harming another under any conditions, so that conditions in which it is morally forbidden to avoid harming another contradicts that which Kant sees as emerging from the categorical imperative.<sup>110</sup> Third, if Kant believes that surrendering one's friend to a murderer is required rather than lying<sup>111</sup> (as it is a perfect duty), it is inconceivable that surrendering one's friend would be using him as means; thus, endangering soldiers to avoid harming civilians (also a perfect duty) would not be perceived as using them as a means. Fourth, what Benvenisti sees as a duty to avoid using soldiers as mere means, namely the duty not to endanger them to avoid harming civilians, is an activity which, according to Kant, makes the civilians mere means, when avoiding endangering soldiers is harming civilians.<sup>112</sup> Let us consider Kant's own words:

The ground of this principle is: rational nature exists as an end in itself. Man necessarily thinks of his own existence in this way; thus far it is a subjective principle of human actions. Also every other rational being thinks of his existence by means of the same rational ground which holds also for myself.<sup>113</sup>

The meaning of this formulation of the person as an end is that just as each person sees himself as an end in himself, so do all other rational beings. Thus, just as a person has a duty to himself as an end in himself, the same applies to others. In our case, just as each soldier must see himself as an end in himself and not harm himself, he must see the civilians and their rationality as ends and must not harm them. Harming a person means he cannot realize his rationality and use it to make decisions.

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<sup>108</sup> *Id.* at 41.

<sup>109</sup> *Id.* at 39.

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See Benvenisti, supra* note 106.

<sup>113</sup> *Id.* at 47 (emphasis added).

However, as mentioned above, we believe that Kant's philosophy allows harming civilians; still, this cannot be derived simply by using the general principle forbidding using people as mere means; the doctrine of double effect is also needed, as harm to civilians is a foreseeable but not intended result, so that it is not an abrogation of the duty not to harm others.

*B. Moral Considerations to Justify Harming Civilians in the Course of Pre-Emption and the Place of Considerations of Belonging and Relation*

In this section, we will present general considerations other than those of belonging and relation when it comes to pre-empting terror attacks which may endanger those who are not involved in terrorism; we will then see how these considerations relate to those of belonging and relation.

1. The Low Weight of Harm to Civilians in Relation to Harm to Citizens of the Defending State and Its Soldiers: the Lack of Duty Towards Foreigners

Kasher and Yadlin claim that, although a state involved in counterterrorism does have duties towards foreigners outside of its effective control, they are far weaker than its duties towards its own citizens and residents and those within its area of effective control.<sup>114</sup> This is because a state has no responsibility to protect people who are not its citizens and are not in its area of effective control, nor is there any need for them to be in its area of effective control. The state has responsibility towards those in its area of effective control: citizens, residents and anyone in its territory. As mentioned, the state has duties towards those who are not its citizens or not in its territory if its actions affect these people and put them in extremity and crisis when the state (more so than others) has a unique ability to help them, but these are weaker duties.<sup>115</sup> This means that for Kasher and Yadlin, utilitarian calculations should not give equal weight to the distress of civilians and the distress of citizens and soldiers; a priori, the duty is weaker as regards the former.<sup>116</sup> Similarly, this means considerations of proportionality between the

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<sup>114</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1.

<sup>115</sup> *See id.* at 16.

<sup>116</sup> *Id.*

damage to civilians and soldiers of the state fighting terror and the damage to the non-involved are not assessed on an equal basis.

## 2. Opposition to the Argument of Lack of Duty towards Foreigners: Distinction between Omission and Commission

The argument of Kasher and Yadlin for giving lesser weight to harming civilians due to the lack of responsibility towards foreigners faces opposition: some argue that although the state is not required to initiate operations to save innocent foreigners, it is forbidden for it to cause harm (certainly death) to such people by its own operations.<sup>117</sup> There is a moral distinction between omission on the state's part, a failure to help foreigners, and commission, an act on the part of the state which harms them. Bias in favor of civilians can justify a passive policy, but it cannot allow an active policy of killing civilians.<sup>118</sup> This opposition is based on the difference of causal relation: the difference between causing harm by doing or allowing it to be done on the one hand, and the difference between killing others and letting others die on the other.

## 3. Counterargument Based on Omission and Commission: the Insufficiency of the Ethical Distinction in the Context of Fighting Terrorism

Kasher and Yadlin claim that in the context of fighting terrorism, the difference between killing others and letting others die does not hold dispositive moral significance.<sup>119</sup> The decision to let citizens die when they can be saved is like the decision to kill them.<sup>120</sup> It is even a causal component in the chain of causes of the event. When the state lets its citizen die, it is failing in its duty to protect them. It gives unjust preference to foreigners over its citizens.<sup>121</sup> Shafran Gittleman demonstrates that in certain cases, the difference between commission and omission is less, if it exists at all.<sup>122</sup> Thus, the distinction between an adult who drowns a child in a bath and an adult who sees a child drowning in a bath and does nothing out of a desire to kill the child is a distinction

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117 Halbertal, *supra* note 56, at 10.

118 Danny Statman, *Mussar ha-Milchamah v'Oferet Yetsuka [Military Ethics and Operation Cast Lead]*, TCHELET, Winter 2010, at 3, 5; Halbertal, *supra* note 56, at 10.

119 Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 20.

120 *Id.*

121 *Id.*

122 Shafran Gittleman, *supra* note 32, at 21-22.

lacking moral significance; in both cases, the adult's behavior is indefensible. Similarly, if a military force encounters a tunnel allowing the carrying out of terrorist attacks which is already in operation, so that it cannot be destroyed without hurting civilians, then the decision not to take action means deciding to allow terror attacks against citizens, so the conceptual distinction does not yield a significant moral difference, if at all.<sup>123</sup>

In our view, this argument is successful, but it does not justify what is required. This undermines the argument that deciding in favor of civilians and against citizens is just by the distinction between omission and commission.

However, this argument does not demonstrate why equal weight should not be given to the lives of citizens and of civilians. If omission is equal to commission, then these options are morally equivalent when the former is letting citizens die and the latter is killing civilians. While there is no initial inferiority to the interests of the citizens to allow them to die, the argument also does not show that they have an advantage.

#### 4. Counterargument Based on Omission and Commission: the Lack of Duty to Sacrifice Oneself

An additional opposing argument to giving equal weight to civilians on the one hand and citizens and soldiers on the other is that the difference between omission and commission misses the point—namely, in this context, the lack of any duty to sacrifice oneself even in a case of omission.

The argument is that the state is neither required nor permitted to sacrifice its citizens and soldiers in order to save civilians. It is neither required nor permitted to sacrifice, even if the self-sacrifice is accomplished by inaction rather than action. According to this argument, the reason that a state is neither required nor permitted to go rescue foreigners who are in crisis for which it is not responsible is not because such activity is a positive duty and not a negative duty, but because such activity would be an act of self-sacrifice.

Thus, for example, in a case of individual self-defense when the defender can save his life by attacking only at the cost of an innocent third party's life, the defender is allowed to do so and need not sacrifice his

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123 *Id.*



life, even though this means actively taking the innocent third party's life.<sup>124</sup>

According to this argument, the lesser weight to give civilians emerges from the general principle that no person or state is required to exhibit self-sacrifice for foreigners, while self-sacrifice for those who are not foreigners is wholly appropriate. Such an act is based on the mutual reciprocity existing among citizens of a given state.<sup>125</sup> Similarly, if a bodyguard sees that his principal has been attacked and, realizing that there is no way to save his principal without killing an innocent third party, chooses to intervene, he must show preference for the life of his principal, even at the cost of an innocent third party.<sup>126</sup>

##### 5. The Argument for the Lack of Duty to Sacrifice Oneself Differs from the Argument for the Lack of Duty to Help Foreigners Outside its Effective Control

As mentioned above, Kasher and Yadlin derive the relatively lower weight of avoiding harming civilians from the fact that the state is not obligated to act in the interest of foreigners that are not under its effective control.<sup>127</sup> However, in our view, these considerations are not identical to the considerations of the lack of duty to sacrifice oneself.

One reason that the state should not intervene on behalf of foreigners outside its effective control is the duty not to intervene in the internal affairs of other countries. However, this reason does not contradict the duty to give equal weight to civilians on one hand and citizens and soldiers on the other. When a state is already engaged in a conflict and terrorism is being used against it, it is not intervening in the affairs of others, but rather in a conflict which concerns it.

Another reason for a state not to intervene on behalf of foreigners outside its effective control is its resources in international conflicts. Once a state involves itself in armed conflicts abroad, including faraway ones, such engagement in a foreign physical and cultural environment constitutes a burden upon it, upon its citizens, upon its military and soldiers, upon its economy—a massive burden sapping all its reserves

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<sup>124</sup> See Halbertal, *supra* note 56, 11-12 (concerning a person's ability to show preference to his life over other's); Porat & Bohrer, *supra* note 12, at 110-114 (justifying individual self-defense by killing the "innocent aggressor" or neutralizing the culpable aggressor by killing the third party, if this is the only one to save his life).

<sup>125</sup> Halbertal, *supra* note 56, at 10.

<sup>126</sup> Porat & Bohrer, *supra* note 12, at 126-28.

<sup>127</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1.

while it makes prolonged sacrifices. On the other hand, if a state avoids only killing civilians, it of course, finds itself in conflicts forced upon it, and only in such conflicts in which the price of protecting civilians is much lower than the real costs when the state intervenes in international armed conflicts as they are.

A third distinction between nonintervention for foreigners outside effective control and a situation of pre-empting terror attacks is the amount of responsibility upon the state and the extent to which the fates of other people depend on it. When the state does not intervene in another armed conflict, the question of the fate of victims is less dependent on it than when pre-empting terror attacks. In a case of nonintervention in an armed conflict, the fate of potential victims depends on the sides of the conflict in which the state is not involved. On the other hand, when it comes to pre-empting terror attacks, the state exerts far greater control over people's fates, as it has a spectrum of options for military decisions, each of which carries different consequences for the future victims. This situation justifies the conclusion that in pre-empting terror attacks, the state has much greater responsibility than when it does not intervene in a conflict outside its effective control.

The conclusion is that there is no analogy to be made between a case of pre-empting terror attacks amongst civilians and the lack of duty to act on behalf of civilians in various places across the globe. Granted, even in a situation of pre-empting terror attacks amongst civilians, the argument may be made for a lack of duty of self-sacrifice, but this argument is different than that of a lack of duty to intervene in conflicts outside the area of effective control.

## 6. Critical Analysis of the Argument of Lack of Duty to Sacrifice

### 6.1 The Argument of Lack of Duty to Sacrifice in Individual Self-Defense

Let us begin with a simple case of individual self-defense: an individual is attacked by someone who is innocent, or by someone who is culpable but who can only be neutralized by killing an innocent third party. What is the reason that a person may prefer his life over another innocent's? A central question is whether this is just or excused.

Let us consider the former option. One argument is based on the right to personal autonomy and bodily integrity as a right independent of the issue of whether the person whose autonomy is at risk is culpable or

innocent. Another argument originating with Hobbes is based on the human right of self-preservation.<sup>128</sup>

These arguments do not overcome the difficulty based on the fact that the innocent aggressor also has rights of autonomy, bodily integrity and self-perseveration, no less than the defender. It is not clear why the defender's claim to these rights outweighs that of the aggressor.

Another argument is based on Scheffler's approach presented above which requires that morality be moderate, as the demand of sacrifice is inconsistent with moderate morality; however, as long as we understand the argument as a justification and not an excuse, in our view, this approach should be rejected, as we said above concerning Scheffler's approach.<sup>129</sup>

An additional argument is based on gross equivalence. According to this argument, when we balance the interest of the defender to survive and not to have his rights violated against the interest of the innocent to survive and not have his rights violated, there is no reason to show preference to either (e.g., by utilitarian balance). This situation is one of gross equivalence between the defender on the one hand and on the other, the innocent aggressor or third party who must be harmed in order to neutralize the aggressor. In a case of gross equivalence, the moral situation is that it makes no difference what the decision may be, to carry out self-sacrifice or to kill the innocent aggressor or the innocent third party; every decision will be equally permissible morally. In this situation, the defender is allowed to choose his own life rather than sacrifice it, as there is no justification not to do it i.e., there is no justification to sacrifice oneself. Self-defense is one of the optional activities which is within the area of moral authorization.<sup>130</sup>

We agree in principle with the argument from gross equivalence, with some caveats. This argument applies when there is truly gross equivalence, in terms of outcome and utility. Gross equivalence exists only when the severity of the expected harm is more or less equal. In other words, the severity of the harm due to self-defense towards the innocent aggressor or the innocent third party is more or less equal to the severity of harm due to self-sacrifice. The measure for the severity of

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<sup>128</sup> Porat & Bohrer, *supra* note 12, at 111.

<sup>129</sup> See *supra* Section 2.1.3.1.

<sup>130</sup> See DANIEL STATMAN, *MORAL DILEMMAS* 11-12 (1995). Statman claims that there are two situations in which the options are equal: (1) symmetric options, namely that one option is identical in its givens to another option (practically speaking, this is nonexistent); (2) gross equivalence, namely that the options are not equivalent, but the reasons supporting each option have equal strength. See *id.*

harm is expected disutility. Gross equivalence exists when expected disutility due to an act of self-defense equals the expected disutility due to harm from self-sacrifice and avoiding self-defense. In other words, according to the argument, it is just to act in self-defense when the expected disutility of harm due to self-defense is equal to or less than the expected disutility of avoiding self-defense. However, one should not act in self-defense if the expected disutility due to self-defense is higher than the expected disutility of avoiding self-defense.

Expected disutility means to weigh the magnitude of the damage by the probability of the damage occurring. The magnitude of the damage is composed of two elements: (1) the severity of the damage and (2) the number of people who will be harmed.<sup>131</sup> Thus, the expected disutility has three elements: the severity of the harm, the anticipated number of people harmed and the probability of the harm.<sup>132</sup>

Concerning the severity of the harm, the significance of the component is that harms are divided by their severity according to their type. Bodily damage is worse than property damage, when all other conditions are equal. Concerning our discussion, the severity of the damage on both sides is harm to life and limb, so that the severity is more or less equal. This means that the question of the gross equivalence or the lack thereof will be determined according to the number of people harmed and the probability of such harm.<sup>133</sup>

The argument of gross equivalence does not justify self-sacrifice when the outcome-utility balance shows that the expected disutility due to self-defense is higher than the severity of the damage due to self-sacrifice. In other words, the argument of gross equivalence does not apply to all situations of sacrifice, at least when claims of justification are at issue.

Indeed, there is a claim according to which, from an objective point, all innocents have an intrinsic value as ends in themselves, and therefore in a case of self-defense against an innocent aggressor or an innocent third party, proportionality does not allow a ratio greater than 1:1. In other words, the cause of self-defense does not allow killing a greater number of innocents than the number of people in danger, assuming that the

<sup>131</sup> *Glossary*, SOCIETY FOR RISK ANALYSIS (June 22, 2015), [http://www.sra.org/sites/default/files/pdf/SRA\\_glossary\\_20150622.pdf](http://www.sra.org/sites/default/files/pdf/SRA_glossary_20150622.pdf).

<sup>132</sup> John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 L. & SOC'Y REV. 7 (1991); see also DORON MENASHE & EYAL GRUNER, MACHUT HESPEK HASBBIR [THE ESSENCE OF REASONABLE DOUBT] 147-48 (2017).

<sup>133</sup> John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789 (2007).

probability of harm to those innocents is no lower than the probability of harm to those defended. Thus, one person engaged in self-defense is forbidden to kill two innocents when the probability of killing two innocents is not lower than the probability of harm to the one engaged in self-defense.<sup>134</sup>

There are those who claim that it is just for a person to be biased towards himself or his family, putting those lives above others<sup>7</sup> — even if those others are greater in number, in other words, even when based on unbiased considerations (such as outcome-utility considerations) there is no justification to prefer self-defense to self-sacrifice.<sup>135</sup> There are those who claim that despite the equivalence between innocents, the ratio need not be 1:1, but rather in a limited way, we may be biased in favor of ourselves, our loved ones and those whom we are duty-bound to protect. There is a perspective that the ratio for to concepts of severity and probability of damage, where we or our relatives are concerned, is more limited than where a culpable aggressor is concerned, but less limited than 1:1. Thus, a defender may kill more than one innocent to save his life or the life of a relative, but unlike the situation of a culpable aggressor, the number must still be limited.<sup>136</sup>

As we have said, in our view, we should not accept the argument according to which the ratio for bias must be higher than 1:1 as long as considerations of justification are at issue. We have found no rational argument to justify deviating from the principle that every person has equal human value.

Until this point, we have discussed justification, but what about excuse? As long as we are talking about a situation of individual self-defense, we agree that there are strong considerations of excuse that a person will prefer his life to that of others, and therefore the defender should be exempt from moral responsibility should he put his life first and kill an innocent aggressor or an innocent third party. It is reasonable that in such a situation, when the defender experiences a direct threat on his life, his ability to exhibit heroism or to employ proper deliberation is in doubt; this is a classic example of a case in which a person may be forgiven for not acting with due deliberation or rising above his very desperate situation. Excuse, in our view, does not depend on questions of proportionality; even if the defender kills a disproportionate number of people, even if he does not take into account or miscalculates the

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<sup>134</sup> See Porat & Bohrer, *supra*, note 12, at 132.

<sup>135</sup> *Id.* at 113.

<sup>136</sup> *Id.* at 133.

probabilities in a severe case in which his life is in danger—or it is reasonable to think that his life is in danger—it would be unjust to condemn him, from an ethical standpoint, for acting automatically and emotionally to maximize his survival.

## 6.2 The Argument for a Lack of Duty to Sacrifice Oneself When Pre-empting Terror among Civilians

In the case of a pre-empting terror attacks, the argument for the lack of duty to sacrifice oneself means that the state is not obligated to sacrifice its citizens and soldiers in order to preserve the lives of foreigners. If we apply the conclusions of our discussion of individual self-defense, then on the plane of justification, we believe that the argument fails. As long as the rights of autonomy, bodily integrity and self-preservation are the basis, it cannot succeed in a case of pre-empting terror attacks, for the same reasons.

If the argument is based on gross equivalence, this is also a case in which the severity of the harm to civilians is more or less equal to the severity of the harm to citizens of the defending state and its soldiers. As for expected disutility, if we assume that the severity of damage is more or less equal on both sides (death or serious injury, whether for the citizens and soldiers on the one hand or civilians on the other), so the expected disutility to compare is the anticipated number of civilian casualties weighing the probability of harm to a certain number of civilians, versus the anticipated number of citizen or soldier casualties weighing the probability of harm to a certain number of citizens or soldiers of the defending state.<sup>137</sup>

The gross equivalence argument justifies the outcome-utility balance between the interest of the civilians and the interest of the citizens and soldiers, based on the number of casualties, weighing the probability of harm. However, while this is an argument based on first-order considerations, that in a case of gross equivalence is just to harm civilians, in a case of pre-empting terror attacks among civilians, there are second-order considerations. Due to the difficulty of evaluating the odds and risks and the uncertainty, and due to the fact that decision-makers tend to prefer their state's citizens and soldiers, there is a risk that too much weight will be given to pre-empting terror attacks and too little weight to defending foreign civilians. This risk grows considerably as a result of the inclination of office-holders in the security establishment seeing their job

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<sup>137</sup> *Id.* at 133, 154.

as preventing terror attacks rather than protecting human rights. In light of this concern, in order to balance it out, it is just to formulate a general rule that in a case of gross equivalence, pre-empting terror attacks should not be carried out. In other words, such operations should be carried out only if there is compelling evidence for a reasonable conclusion that failure to do so will lead to a terror attack with a higher casualty count than the number of civilians who will be harmed if the operation is carried out; or if the soldiers endanger themselves by minimizing the harm to civilians, the number of soldiers who will be harmed will be more than the number of civilians who will be harmed if such a method is not employed.<sup>138</sup>

In a case of pre-empting terror attacks amongst civilians, the argument for lack of duty to sacrifice oneself is further weakened compared to individual self-defense. In individual self-defense there is no duty to sacrifice oneself at all, but in the case of pre-empting terror attacks among civilians, sacrifice is an essential part of the soldiers' mission; they put their lives on the line for their countrymen and women. In other words, the argument that no person must sacrifice his life for another has no purchase in the context of soldiers and the citizens they defend. Thus, the lack of such a duty may be said to apply only in terms of foreigners. This means that the arguments for defending autonomy, bodily integrity and self-preservation are not applicable; were they applicable, soldiers would not be expected to lay down their lives for their countrymen.

In order to justify the duty of soldiers to sacrifice themselves for their countrymen, we use the argument of special relations among citizens of a state, a relationship of mutual reciprocity based on the social contract or the argument of the duty of fairness in order to overcome the problem of joint action, a problem created due to a situation in which in a collective action which benefits everyone, people are ready to cooperate in an activity on the condition that others will join them. There is a temptation for individuals not to act and contribute their part in order to benefit from the fact that others will act on their behalf, and such a case is opposed to the duty of fairness. Thus, if the citizens benefit from the fact that certain people protect their lives but pay for it in a risk to their

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<sup>138</sup> See ENOCH ET AL., *supra* note 9, at 57-58 (justifying a second-order rule in the case of pre-empting terror attacks among civilians in light of the inclination mentioned in the text) Nevertheless, Segev suffices with evidence that an attack will take place, regardless of the number of casualties. See *id.* For a general argument regarding institutional bias against human rights as a justification for recognition of constitutional rights, see Oren Gazal-Ayal & Amnon Reichman, *Public Interests as Constitutional Rights*, 41 MISHPATIM: THE HEBREW U. L. J. 97 (2011).



own lives, all the citizens must, for the sake of fairness, contribute their part to protect the collective.<sup>139</sup>

The argument is that the considerations of the social contract for mutual reciprocity and the arguments of fairness do not apply to foreigners. This is correct, but there is another type of argument to sacrifice for foreigners, namely that it is forbidden to kill others when the harm is worse than the harm of self-sacrifice. This combines the argument forbidding killing others with the general outcome-utility argument that the greater harm should be avoided when there is an alternative of lesser harm. Therefore, one must not kill others who outnumber those who would die should the former not be killed; no operation should be carried out if the probability is great that more will die as a result of it than if it is not executed. This argument is based on the assumption that each person has intrinsic worth, and when others are killed despite the greater number of casualties and the despite the greater probability of their deaths, this is a failure to give equal weight to the life of every human being.

All this relates to justifying the act, but what about excusing it? In our view, an excuse is not applicable in the context of fighting terrorism, in which soldiers are the ones endangering themselves. This is what combat soldiers train for: life-or-death missions. It is understood that no excuse of mortal risk can apply, in a sweeping manner, as long as the soldiers put their lives at risk for their countrymen; this is because such a risk is exactly what the soldiers are trained to deal with. If soldiers can handle such risks for their countrymen, they can do so for foreigners as well. The different status of the people in peril should not change anything: whether it is the status of their nationality (nationals of the state with which the soldier self-identifies versus nationals of another state) or their citizenship (citizen, resident or tourist), it makes no difference, and so it should make no difference even if these people are foreigners who are not within the area of the state's effective control.

### *iii. Duty to Sacrifice Oneself: Prohibition to Intentionally Cause Harm*

Up to this point, we have dealt with the argument that a person need not give up his life. Now we will address the counterargument, which forbids a person from saving his life by intentionally killing an innocent. This prohibition is deontological, independent of the result of any

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<sup>139</sup> Halbertal, *supra* note 56, at 18-19; Porat & Bohrer, *supra* note 12, at 136-37.

utilitarian calculation.<sup>140</sup> Innocents do not exist to save other people's lives. They have rights of their own, and the fact that a person or persons may be saved if these rights are abrogated does not justify doing so.<sup>141</sup>

For example, let us assume that a healthy person walks into a clinic where there are five patients waiting for organ transplants, each for a different organ, each imminently facing death. As it happens, the healthy person is a match for every one of these five patients. According to the deontological argument, it is forbidden to kill this person in order to take his organs and transplant them, even if we assume that the utilitarian calculation will show that the harm of not doing so outweighs the harm of doing so, i.e., five people will die in the former case and only one in the latter.<sup>142</sup> According to this argument, every one of the five patients must give up his life rather than kill the person whose organs are a match.

If so, if we accept the deontological argument, then it is incorrect that there is no duty for self-sacrifice even in the absence of special relationships among the citizenry in the framework of mutual reciprocity.<sup>143</sup> There is a duty of self-sacrifice for every person, even a stranger, when intentional killing of a stranger will save the killer's life.<sup>144</sup>

The deontological argument forbids intentional killing, but what does this mean? Deontological philosophy distinguishes between intentional harm and foreseeable harm.<sup>145</sup> Intentional harm is harm that the agent desires and is essential to his plan; it is the aim in itself or a means to achieve another aim, while foreseeable harm is harm which the agent does not want, which is not essential to his plan, which is not an aim in itself, nor a means to another aim; rather, the harm is an unwanted side effect which the agent foresees may happen but would be happy to avoid.<sup>146</sup>

The deontological approach does not forbid an activity to save lives when the harm resulting is only foreseeable, not intended. If the harm is only foreseeable, there is no demand to sacrifice one's life.<sup>147</sup> The distinction between intentional harm and foreseeable harm is expressed

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140 Halbertal, *supra* note 56, at 11-12.

141 Porat & Bohrer, *supra* note 12.

142 *See id.* at 119-20.

143 ENOCH ET AL., *supra* note 9.

144 *Id.*

145 *Id.*

146 *See id.*

147 *See id.*

in the doctrine of double effect.<sup>148</sup> According to the doctrine, the act of killing is just if and only if: (1) the act in itself is not forbidden, e.g., self-defense; (2) the act causes unintentional harm; (3) resources are invested to reduce the harm; (4) the harm does not constitute a means to achieve a desirable goal; and (5) the harm is proportionate to the importance of the activity.<sup>149</sup>

According to the doctrine of double effect, harming civilians is foreseeable, not intentional, and therefore, we are not talking about intentional harm; thus, if we accept that intentional harm is invalid—even to save life—then harming civilians is not invalid due to intentionality. On the other hand, one of the elements of the doctrine of double effect is proportionality, and here we may explain the condition of proportionality as an outcome-utility consideration: it is forbidden to cause greater harm to civilians than the harm expected to be caused by failing to pre-empt terror attacks.<sup>150</sup>

#### 7. Intermediate Summary and Segev's Approach: Weak and Exceptional Justification for Harming Civilians

Until this point, we have supported Segev's approach, according to which suggests that pre-empting terror attacks amongst civilians justifies the outcome-utility balance between harm to civilians and harm to citizens and soldiers, who endanger themselves in order to minimize harm to civilians.<sup>151</sup> The deontological consideration of applying the doctrine of double effect includes this outcome-utility consideration within a demand of proportionality which is part of the doctrine. As for the outcome-utility consideration, taking into account the weighing of the severity of harm to both sides (harm to life and serious harm to bodily integrity), we must decide based on comparing the anticipated number of casualties and the probability of harm. As for the consideration of the number of casualties, Segev argues that when terror attacks are at issue, the casualty count can be staggering, such as the thousands who died on September 11, 2001, but most often it is far lower.<sup>152</sup> The number of innocent civilians killed in anti-terror operations may be great, but

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<sup>148</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 19.

<sup>149</sup> *Id.*

<sup>150</sup> See ENOCH ET AL., *supra* note 9, at 66 (supporting this interpretation of the doctrine of double effect).

<sup>151</sup> *See id.*

<sup>152</sup> *Id.*

generally it is quite small. Therefore, Segev believes that the numbers offset each other, and thus the consideration of the number of casualties is not generally dispositive; the casualties among citizens and the casualties among civilians are approximately the same.<sup>153</sup>

In this situation, the decisive consideration, Segev holds, is that of probability.<sup>154</sup> Is the risk towards civilians lower than the odds that the operation will prevent harm to innocents? The anticipated harm to civilians is certain or highly probable; on the other hand, the danger of a terror attack which is not pre-empted is far lower, as there is no certainty that it will be carried out, and it may even be improbable. Even if it is carried out, it may be unsuccessful. Moreover, even if a given pre-emptive operation is cancelled, there may still be another opportunity to eliminate the terrorists when civilians will not be imperiled or will be in lesser danger. Similarly, there is a possibility to stop the attack at a later stage. Therefore, Segev maintains that the probabilistic consideration will not support pre-empting terror attacks among civilians, but in fact reject it.<sup>155</sup>

Segev believes that harming civilians can be justified only if: (1) the anticipated casualties of the terror attack are much greater than the number of civilians who may be harmed in the operation; (2) the odds are very much in favor of the operation; or (3) both conditions apply.<sup>156</sup> Segev considers such cases to be exceptional.<sup>157</sup>

Moreover, Segev applies second-order considerations according to which the decision-makers have a favorable bias towards pre-emptive terror attacks despite the harm to civilians, and therefore he proposes that such operations may be allowed only if there is compelling evidence which constitutes the basis for a reasonable conclusion that if such an operation is not carried out, a concrete terror attack will occur within a short span of time.<sup>158</sup>

#### 8. Criticism of the Weak Justification Approach to Harming Civilians: Targeted Assassination of Terrorists versus Pre-Emptying Terror Attacks

Segev's analysis assumes, about pre-empting a single terror attack, that the number of citizen casualties is not greater than the civilian

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153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 54-56.

158 *Id.* at 56-58.

casualties.<sup>159</sup> However, this is not always the case. First, sometimes it is a targeted assassination of known, “wanted” terrorists. We are talking about people who, the evidence shows, are at the apex of their terroristic careers. Not eliminating them poses not the risk of a single terror attack, but multiple terror attacks in their future. Thus, we must calculate the cumulative effect in terms of numbers of citizen casualties. Does it not make sense that it would be greater than the civilians harmed in one pre-emptive operation?

Similarly, even when we are speaking of a pre-emptive operation, it can serve two purposes: preventing a given attack and eliminating certain terrorists. If the attack is not thwarted, then the terrorists will not be eliminated and will be free to carry out such attacks in the future. Therefore, at times, the pre-emption of a terror attack may prevent not only that incident, but other incidents that the perpetrators might execute in the future.

Segev claims that there may be an option of eliminating the terrorist later,<sup>160</sup> but this is merely a possibility, not a certainty. The question of future opportunities to eliminate a given terrorist depends on locating him based on actionable intelligence. This may happen; this may not happen. Even if it does, at some later date, we must take into account all the attacks the perpetrator may execute in the meantime. In any case, the potential for multiple terror attacks must be taken into account, not just the single instance.

Moreover, there is no reason to think that the number of civilians around the terrorist the next time he is located will be fewer. Even if it is, Segev maintains that only in exceptional cases would it be justified to eliminate him while causing collateral damage. In other words, according to Segev, as long as the terrorist is among civilians, so that neutralizing him will incur innocent casualties, he is free to commit multiple acts of terror; in such a case, Segev’s consideration of the number of casualties is no longer justified.<sup>161</sup>

On the other hand, if the terrorist is not neutralized and continues to commit acts of terror, he may next be located when he is among a greater crowd of civilians; if the decision is then made to eliminate him, the result will be a higher number of citizens harmed in the meantime as well as more civilians being harmed. In other words, the decision not to eliminate a terrorist but to wait for the next opportunity may not necessarily reduce

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<sup>159</sup> *See id.* at 55.

<sup>160</sup> *See id.* at 56.

<sup>161</sup> *See id.*

the number of casualties among citizens or among civilians. Ultimately, the delay may cause greater harm to innocents on both sides. Waiting is not necessarily a utilitarian advantage; it entails its own risk of harm.

Even if we assume that there is little utility to eliminating a given terrorist, as another will take his place, a program of targeted assassination eliminating many terrorists will still weaken the infrastructure and prevent future attacks. However, there is no way to eliminate “many terrorists” without killing the first or the second, even if they are among civilians. While Segev’s calculation is specific, it need not be.<sup>162</sup> We must take into account the cumulative effect of targeted assassinations and operations, beyond the specific calculus of each act. If the cumulative effect of eliminating many terrorists is significant in terms of weakening the terroristic infrastructure, there is no way to express this on a case-by-case basis.

Additionally, the number of casualties in each terror attack is itself the result of previous pre-emptive operations, which weaken the terroristic infrastructure. A stronger network might commit more attacks with more casualties, and thus we must take into account that fewer targeted assassinations out of concern for civilian casualties will strengthen the terroristic infrastructure, leading to more attacks with more victims.

#### 9. Criticism of the Weak Justification Approach to Harming Civilians: Danger of an Act of Terror in a Series

Segev holds that harm to civilians in pre-emptive operations is highly probable, almost certain, but the odds of preventing a terror attack are much lower.<sup>163</sup> Here as well, in our view, Segev misses the point of the real threat of terrorism by evaluating each attack individually and not cumulatively.<sup>164</sup> Even if we assume that the risk to citizens in a given instance is much lower than the risk to civilians, we must consider the ramifications of such a policy in the long term: if pre-emptive operations are not undertaken, the probability of an increasingly greater attack grows exponentially, in a feedback loop.

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<sup>162</sup> *Id.*

<sup>163</sup> *See id.* at 55.

<sup>164</sup> *See id.*

## 10. Criticism of the Weak Justification Approach to Harming Civilians: Manipulation of Civilians as Human Shields

In our view, the strongest argument against using pre-emptive operations which may harm civilians only in exceptional circumstances is that terrorist organizations may use civilian as human shields, making it impossible to attack them without collateral damage.

In this case, it is not appropriate to utterly eschew harming civilians, as such a policy would give immunity to terrorists by the very fact of their being in the proximity of civilians. If in even such case, it is decided not to attack the terrorists to avoid harming civilians, this will be an impetus for terror organizations to operate in civilian areas, allowing the terrorists free rein, without worrying about targeted assassination.

In a situation in which terrorists act freely, shielded by the civilians, it is a mistake to evaluate the number of casualties as a result of targeted assassination in terms of one operation. If the terrorists act freely shielded by civilians, then they can commit terrorist acts over and over, for a prolonged period, with more and more citizens killed and an exponentially increasing probability of yet more citizen casualties. For example, if terrorists fire a rocket towards a population of citizens while shielded by civilians, then the proper balance is to be found not by considering how many casualties, on average, will result from the launching of one rocket; rather, we must consider how many will be injured by all of the rocket launches which will occur without response due to the presence of civilians. When rockets are launched with impunity because of the presence of civilians, they will increase; thus, the number of casualties will increase, as will the probability of harm.<sup>165</sup>

In a case in which the terrorist organizations use civilians as human shields, is it really appropriate to use outcome-utility balance in which the number of casualties on each side are given equal weight? In our view, it is inappropriate to balance the targeted assassination of an individual as compared to an individual act of terror. Such a policy motivates terror organizations to operate among civilians more numerous than the potential victims of a lone act of terror. The terrorists acquire immunity whenever they locate themselves among civilians who outnumber the casualties expected from the act of terror. With such a policy of immunity, fighting terror is impossible.

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<sup>165</sup> Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1, at 20-21.



If the state defending itself against terrorism carries out a pre-emptive policy using a conversion ratio according to which the counterterrorism operation will be carried out if and only if a certain number of civilians are expected to be harmed, then even this is a policy that motivates the terrorist organizations to buy themselves immunity by means of a policy of placing civilians around them in numbers high enough to dissuade the state from acting.

Is outcome-utility balance appropriate if the terrorists' ability to continue is limited, even if the civilians are shielding them? Let us assume that the terrorists have the capability to carry out one act of terror only. Should we balance this based on the anticipated number of casualties from this act (combined with the factor that the terrorists will be able to carry out future acts of terror if they are not eliminated now)? Let us assume that the terrorists are capable of continuing to carry out acts of terror shielded by civilians, but only to a limited extent, due to finite resources such as arms and ammunition, effort and exhaustion due to limitations of manpower and the lack of reserve forces—should it be balanced not by an individual act of terror, but by the sum total of all the terror that the terrorists are capable of due to this immunity (combined with the factor that the terrorists will be able to carry out future acts of terror if they are not eliminated now)?

In our view, the answer is no. Even if the terrorists have limited capabilities, outcome-utility balance between the numbers of potential casualties from the act of terror and the number of civilians is inappropriate. This is because such a policy will still constitute an impetus for terror organizations to increase the number of civilians around them, so that according to the criterion of the number of victims from the sum total of their terrorist activity, the state will not be able to employ its pre-emptive policy.

Moreover, even if the terrorists do not succeed in placing a number of civilians around them which is greater than the expected number of victims from the sum total of their acts of terror, the pre-emptive policy still paradoxically provides an impetus to increase their numbers, thus increasing civilian casualties. A policy which eschews pre-emptive action based on the criterion of the number of civilian casualties will encourage increasing the number of civilians; thus, even if after this increase, the number of potential victims is greater, at the end of the day, more civilians will be harmed by the very fact that more of them are being placed near the terrorists, as motivated by the policy.

On the other hand, a pre-emptive policy which does not avoid harming civilians according to their numbers ultimately protects civilians

and allows fighting terror. Such a policy creates a disincentive (or at least, does not create an incentive) for terror organizations to increase the number of civilians in their immediate vicinity, since there is no number of civilians which would grant them immunity. This will save civilian lives, as they will not be placed near terrorists, since their proximity does not grant any immunity, nor does the state fighting terror take their number into account. On the other hand, a policy which shuns pre-emption based on the criterion of the numbers of civilians is a policy expected to injure and kill civilians who would otherwise not suffer that fate, due to the impetus to place civilians near terrorists.

Does this mean that it is never appropriate to cancel a pre-emptive operation due to the number of civilians around the target? We think it is still justified under certain circumstances.

First, analysis may show that the presence of civilians is not the result of manipulative use of them as human shields, and if an ability exists to distinguish between the presence of civilians as human shields and the presence of civilians incidentally, the outcome-utility balance on an equal basis is appropriate, if the latter is the case. However, in this situation as well, the balance must be calculated in terms of the total anticipated terrorism. If a lone terror attack is anticipated, this is the balance to be struck. However, if there is a series of attacks anticipated (e.g., numerous rocket launches) if the pre-emptive operation does not happen, this must be balanced against the number of casualties expected from a series of attacks rather than a single one. Additionally, this must be balanced against not only the terror attacks, but also the terrorists themselves; in other words, if the terrorists are not neutralized, they will have the ability to carry out more attacks.

The justification for outcome-utility balance, in the absence of use of human shields, emerges from the fact that taking into account the number of civilians in this case does not provide an impetus to use them as human shields.

Second, as long as the analysis says that if the pre-emptive operation is not carried out now, it will still be feasible later under conditions in which fewer civilians will be harmed<sup>166</sup>, it is appropriate to pre-empt under conditions in which it is anticipated that fewer civilians will be attacked, taking into account that there will be no impingement on the military mission, or that the impingement will be minor. Such a rejection

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<sup>166</sup> E.g., it is possible to attack the wanted individual when he will be alone or when fewer civilians will be around him or it will be possible to pre-empt the terror attacks in more advanced stages of preparation when there will not be civilians around or fewer civilians will be around.

of pre-emptive operations does not create an impetus to increase the number of civilians because it is certain that such increase will not protect terrorists, who will be attacked in any case.

Third, as long as the analysis says that the great number of civilians will likely not recur, and it is an uncommon event at which so many civilians are present, then it is justified to apply outcome-utility balance. Since the analysis says that the situation will not recur, there cannot be an incentive to increase the number of civilians. However, in this case as well, the balance must take into account the sum total of anticipated terror, as mentioned above.

Fourth, the analysis says that of course terror organizations will be motivated to increase the presence of civilians, due to other reasons, such as propaganda for international consumption to generate support due to the innocent victims and negative propaganda against the state engaged in fighting terrorism. Further, that a pre-emptive policy which takes into account the number of civilians does not generate additional impetus which does not exist naturally to increase the number of civilians so that in this situation the motivational risk due to taking into account civilians does not exist. Therefore, an outcome-utility balance is appropriate. However, an assumption concerning the impetus with the same strength that exists naturally is an assumption which requires evidence, and without this evidence, we should assume that naturally there is no such impetus. The anticipated utility of increasing the presence of civilians for propaganda purpose is indirect and less concrete than the utility of increasing the presence of civilians to give immunity to the terrorists by protecting their lives and directly allowing them to continue acts of terror. Common sense shows that the impetus of the latter type is stronger in its ramifications on reducing the mortal threat for terrorists and direct freedom of action for terror, unlike the indirect influence of international support. It is appropriate not to gamble on the lives of civilians as long as there is no evidence that they are exposed to that danger regardless.

#### 11. Second-Order Considerations: Additional Weight Against Harming Civilians due to Concerns of Bias

Should concerns of bias make decision-makers give more weight to eschewing harm to civilians? As long as we are talking about an argument against outcome-utility balance due to the concern of an impetus to increase the number of civilians, there is no place to give such weight. The argument for discounting the number of civilians due to the concern of incentivizing increasing the number of civilians is not part of the

balancing between civilians and citizens. If naturally there is no balancing, then there is no place to give greater weight, because the only reason for doing so is to strike a balance. Here, the argument is that no balancing should take place. Moreover, the consideration of giving greater weight due to concerns of bias is essentially appropriate in cases of gross equivalence between the considerations. However, when we reach the conclusion that considerations of human life support a certain option rather than oppose it, any additional interference based on reasons not of the first order raises the concern that there will be unjust harm to human life, as far as we understand the situation.

On the other hand, in those exceptional cases in which we justify outcome-utility balance, we agree that if the result is gross equivalence, then we should avoid harming civilians out of a bias to their disfavor. We concur that in cases in which harm to civilians is certain, while the harm to citizens from a terror attack is uncertain, it is appropriate, in a case of gross equivalence, to decide in favor of eschewing harm to civilians, based on the probabilistic reason too.

## 12. Decision in a Case of Outcome-Utility Gross Equivalence

As stated, in a case of outcome-utility gross equivalence, the severity of the harm to civilians in a pre-emptive operation is more or less the same as the severity of harm to citizens, so should the operation be cancelled? The expected disutility on both sides is equal—the weight given to the magnitude of the damage, the number of casualties and the probability of harm create a general severity of harm which is the same.

In such a case, is there a “tie-breaker” in favor of one of the options? If a number of such considerations exist, but they point in opposite directions, which should be dispositive?

In the course of the argument, we presented a number of considerations, concerning each of which we argued that in a situation of gross equality in all considerations except for the one at issue, the same consideration would prevail in favor of harming civilians.

The considerations are these: the interest of bias in favor of one’s fellow citizens and nations, the anticipation of assistance from one’s fellow citizens and nationals, the majority’s support of the idea that one who has committed to help certain people cannot shirk this obligation and the majority’s perception (though it is erroneous) of promises being broken.

There is a distinction between a situation of gross equivalence which we dealt with in the cases enumerated above and outcome-utility gross

equivalence. The latter encompasses magnitude of damage, number of casualties and probability of harm. On the other hand, the gross equivalence we have dealt with in this argument is not merely expected disutility, but all relevant considerations save one (that one consideration differs from cases to case). For example, decision-makers' bias in favor of their countrymen is not part of outcome-utility gross equivalence, but it is part of gross equivalence in other cases. Thus, when it is claimed that there is gross equivalence excluding the consideration of bias in favor of one's countrymen, the conclusion that gross equivalence exists already takes into account the consideration of bias. On the other hand, outcome-utility gross equivalence does not take into account the consideration of bias.

We will now discuss the question of what should be dispositive in a case of outcome-utility gross equivalence. In particular, should the decision be made based on the consideration of preferring citizens and nationals due to reasons of belonging and relation? This consideration supports deciding in favor of harming civilians. Alternatively, if the consideration is the bias of decision-makers, this would militate towards avoiding harm to civilians and cancelling the pre-emptive operation.

We believe that the bias consideration is more decisive than the consideration of belonging or others militating towards harming civilians, such as the considerations presented above. The reason for this is that the former takes into account that the process leading to gross equivalence is erroneous, due to cognitive biases. On the other hand, considerations of belonging do not take into account errors of deliberation arriving at gross equivalence. However, in our view, such a risk of error exists, very strongly, to the disfavor of civilians. Such a concern of error has significance in concepts of human life, and therefore the excessive caution required for capital cases demands that we take into account the risk of bias and decide based on it.

These biases are institutional in nature. Gazal-Ayal and Reichman claim that institutional biases exist to harm the rights of the individual which justify recognition of constitutional rights and constitutional judicial review.<sup>167</sup> We believe that these biases form the basis for deciding to eschew civilian harm.

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<sup>167</sup> Gazal-Ayal & Reichman, *supra* note 138.

### 13. Balance Between Risking Soldiers to Minimize Civilian Harm and Eschewing Civilian Harm

Until this point, this Article has focused on the citizen-civilian balance. However, we must consider the additional question of justifying danger to soldiers involved in fighting terror in order to reduce the threat or harm to civilians.

A partial discussion of this question appears above: we reached the conclusion that, in principle, we cannot reject the duty of soldiers to sacrifice themselves to save the lives of civilians.<sup>168</sup> However, even so, this does not mean that such a duty exists when considering specific factors of operations amongst civilians pre-empting terrorism.

Sometimes soldiers can reduce the risk of harm to civilians by endangering themselves. For example, an enemy is hiding in a house among civilians. The soldiers have two choices: they can call in an air strike and level the home or they can enter it on foot. In the first option, the soldiers eschew risk to themselves and instead endanger civilians in the structure. In the second option, the soldiers minimize the risk to civilians but put themselves in greater danger.<sup>169</sup> A second example is low-altitude aerial bombardment, which allows greater precision, protecting civilians, but puts the pilot in peril. On the other hand, high-altitude bombardment keeps the pilot out of danger, but it is less precise and may lead to civilians being killed along with terrorists.<sup>170</sup>

### 14. Not Endangering Soldiers and Risking the Mission

Kasher and Yadlin claim that soldiers need not endanger themselves for civilians, because this will risk the success of the mission, which has already been found to be just and proportionate.<sup>171</sup> Such a risk will threaten a just, proportionate mission.<sup>172</sup>

We agree that if there is a reasonable chance that the mission will fail because soldiers endanger themselves, this option should be rejected. However, if the analysis says that there is no such reasonable possibility—that at most some soldiers will be lost, but the mission will succeed—then what Kasher and Yadlin say is not applicable.

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168 Porat & Bohrer, *supra* note 12, at 54.

169 Halbertal, *supra* at note 56, at 15; Porat & Bohrer, *supra* at note 12, at 99-100.

170 Halbertal, *supra* at note 56, at 8-9.

171 Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1.

172 Asa Kasher and Amos Yadlin, *Human Life in the War on Terrorism: A Response to "the Risk Dilemma" by Michael Walzer*, 44 *PHILOSOPHIA* 295, 304-305 (2016) [hereinafter Kasher & Yadlin, *Human Life in the War on Terrorism*].

## 15. Not Endangering Soldiers — No Reply to the Soldier's Question

Kasher and Yadlin argue that when soldiers are put at risk in order to protect civilians, there is no reply to the soldier's challenge to the state which sends him into a dangerous situation: how can you justify risking my life, not to carry out a mission, but to minimize the harm or threat to civilians?<sup>173</sup>

In our view, there is an answer to this question, though the specific circumstances of a targeted assassination may not necessarily permit it: human beings uninvolved in terrorist activity retain the right to life, bodily integrity and autonomy; as such, these rights should be honored as they would be for any other person, no less than you, soldier (and no more than any other or than you)!

Therefore, it can be described as an outcome-utility balance. When the number of soldiers expected to be harmed by undertaking the mission in a more dangerous way is less than the number of civilians expected to be harmed by undertaking the mission in a less dangerous way, and when undertaking the mission in a more dangerous way does not undermine the mission's chances of success, then the choice to undertake the mission in a way which is more dangerous for the soldiers but less so for the civilians expresses the basic idea of equal value of and equal respect for every human being. Equality whether he is a soldier fighting terror or a civilian uninvolved in terror.

16. The Incentive for Manipulation of Civilians as Human Shields:  
Reference Note

We believe that there is a compelling reason to avoid endangering soldiers due to a consideration similar to that supporting not taking into account the outcome-utility balance in weighing civilians versus citizens. This is an argument which says that if the policy will be that if enough civilians are endangered, soldiers will put themselves at risk, and this will incentivize the terror organizations to place more civilians around them, the potential civilian casualties will outnumber the potential soldier casualties. Thus, terror organizations will accomplish their goal manipulatively: endangering soldiers, thereby maximizing casualties among them. We set out this argument in detail above, in the context of harming civilians, and it applies also to the justification to avoid endangering soldiers.<sup>174</sup>

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<sup>173</sup> *Id.* at 305.

<sup>174</sup> *See infra* Section 2.2.10.



Nevertheless, we believe that exceptions to the principle that soldiers cannot be endangered even when an outcome-utility balance makes this possible, and which exist in the balance between civilians and citizens and exist with necessary differences in the balance between civilians and soldiers. In our view, it is justified to endanger soldiers in circumstances described in the discussion of the exceptions above.<sup>175</sup>

#### 17. Deciding in a Case of Gross Equivalence: Reference Note

The discussion above concerning the balance between civilians and citizens to decide in a case of gross equivalence applies here as well. As long as there is no justification for the outcome-utility consideration, there is no place for a decision in favor of civilians justifying endangering soldiers due to concerns of bias. As long as there is a place for outcome-utility balance, there is a place for deciding in favor of the civilians justifying endangering soldiers due to the counterweight of concerns of bias. This is for the reasons specified above.<sup>176</sup>

#### 18. Justifying Endangering Soldiers: Trained and Armed Soldiers Versus Vulnerable and Panicked Civilians

Walzer argues that soldiers must accept a certain risk without endangering the mission.<sup>177</sup> Walzer's reason is that the civilians are panicked, unarmed and vulnerable, unlike the soldiers who are trained and armed, and who assume the risk in an active way.<sup>178</sup>

We dispute this. In light of our discussion above, the reason not to endanger soldiers emerges from the consideration that the mission may fail and the consideration that this may incentivize terrorist organizations to increase the number of civilians. Even when soldiers have the advantage over civilians, this does not mean that they have a sufficient advantage over the terrorists in order to carry out their mission. The comparison need not be only between soldiers and civilians, but between soldiers and terrorist, as the citizens of the state fighting terror are inferior to terrorists in their vulnerability, and is it not clear to them that their vulnerability is greater than that of the civilians? Additionally, taking civilians into account creates an impetus to endanger more civilians, so that ultimately the civilian casualties will be greater, or due to the

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<sup>175</sup> See *infra* Section 2.2.10.

<sup>176</sup> See *infra* section 2.2.12.

<sup>177</sup> See Michael Walzer, *The Risk Dilemma*, 44 *PHILOSOPHIA* 289, 292 (2016).

<sup>178</sup> See *id.* at 292–93.

manipulation of increasing civilians present, more soldiers and citizens will be in danger.

#### IV. CONCLUSION

In this Article, we have analyzed the question of the moral weight of belonging and relation on the basis of citizenship or nationality in a pre-emptive counterterrorism operation while incurring collateral damage to civilians. In the first part, we dealt with different justifications for the reasons of belonging and relation, and its application in a case of pre-emptive operations among civilians. We began with the argument that additional allegiances do not contradict allegiance to humanity as a whole, but there is tension among them, which we analyzed. Afterwards, we discussed utilitarian justifications for belonging and relation. We analyzed five of these arguments. These were based on the following: the interest to protect fellow citizens and nationals as justifying harming civilians; the interest of citizens and nationals to receive protection from their fellow citizens and nationals as creating a duty to harm civilians; the idea that eschewing harming civilians will impinge on the political and social fabric of the community fighting terror; the idea that harming civilians is a response to the violation of the effective division of labor in the international system and the terrorist organizations' abrogation of their duty to protect civilians and not place them as human shields, so that responsibility is transferred to the terrorist organizations if they do; and finally, the duty to protect the citizens of a state subject to terrorist attacks as part of the social contract between the state and its citizens.

As for the argument of the interest to protect relatives and the interest of relatives to receive protection, we argued that this writing justifies harming civilians, at most, only in a case of gross equivalence in which the other considerations for and against harm are more or less equal. However, if the other considerations support eschewing harming civilians, then these arguments do not justify harming civilians. As for the social fabric argument, we pointed to the fact that this is only a second-order claim, and even so it fails because it makes unreasonable empirical assumptions.

As for the division of labor argument, we argued that this does not suffice to transfer responsibility to terror organizations when these bodies cannot protect civilians. Responsibility does pass to these organizations when they have the ability, but if they shirk their duty, the state fighting terror cannot avoid its own duty to civilians. We argued that the consideration of harming civilians due to terror organizations' shirking

their duty is appropriate only in a case of gross equivalence, when the other considerations for and against are more or less equal, but not in a situation in which the considerations against harm are overwhelming.

As for the social contract argument, we maintained that it cannot justify harming a third party, so this argument fails to justify harming civilians. However, only in a case of gross equivalence, when all other considerations for and against such harm are equal, the very fact that the majority supports this consideration may justify such an operation.

After this, we addressed deontological justifications for harming civilians. One argument is that of Scheffler, who holds that morality must make moderate, not harsh, demands.<sup>179</sup> This argument, at best, can only provide an excuse, we maintained, not a justification to ignore duties.<sup>180</sup> In any case, we held, avoiding harming civilians should not be considered a difficult duty. Another argument is two interpretations of Kant's philosophy to derive justification to harm civilians.<sup>181</sup> We critically examined these interpretations, and in our view, Kant's approach does yield an allowance to harm civilians.<sup>182</sup>

In the second part of the essay, we dealt with general considerations justifying harming civilians in the course of fighting terrorism, as well as the role of the argument for belonging and relation in this framework. We addressed the argument proposed by Kasher and Yadlin as to the lack of duty on the part of a state towards foreigners.<sup>183</sup> We rejected one objection based on the distinction between omission and commission, however we maintained that giving low or no weight to this distinction does not justify harming civilians. A stronger version of the argument by Kasher and Yadlin is the one based on the lack of duty of self-sacrifice towards foreigners independent of omission or commission.<sup>184</sup> However, even this argument, in our view, does not stand up to criticism.

First, we pointed out that a general lack of duty of self-sacrifice is not a necessary condition for the argument for states' having no general duty to protect foreigners. Second, the general argument for a lack of duty of self-sacrifice as an argument for justification can be based solely on the fact that in a situation of gross equivalence, when the arguments for and against harming others are more or less equal, it is just not to require

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179 See SCHEFFLER, *supra* note 54.

180 See *infra* section 2.1.3.1.

181 See *infra* section 2.1.3.2.

182 See SCHEFFLER, *supra* note 54.

183 See Kasher & Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, *supra* note 1.

184 See *id.*; see also Kasher & Yadlin, *Human Life in the War on Terrorism*, *supra* note 172.

sacrifice; but the argument does not justify a lack of duty of sacrifice when the arguments against harm are overwhelming. In such a case, the argument can only excuse, not justify, the lack of duty to sacrifice oneself. However, in a case of a pre-emptive operations among civilians, the argument for excuse fails, in our view. Similarly, as long as we are speaking of soldiers' duty to sacrifice themselves to protect their countrymen, there is no argument for a lack of duty of self-sacrifice. We maintained that there is no reason for such a lack of duty to sacrifice oneself as regards citizens, but the justification is different.

Another argument we discussed was the argument from the deontological prohibition to kill people in order to save oneself. However, an exception to this prohibition is collateral damage based on the doctrine of double effect. Nevertheless, this doctrine requires considerations of proportionality, and in our view this proportionality can and needs to be explained as outcome proportionality.

Finally, we discussed the criterion for undertaking a pre-emptive operation in the presence of civilians. We disputed Segev's contention that only in exceptional cases may harming civilians be justified.<sup>185</sup> In our view, generally speaking, we should not take into account the number of civilians who will be harmed except in specific cases which we can formulate. We argued that we should take into account the risk due to the fact that the terrorists will be free to act, and we should not weigh one act of terror only. We argued that the probability of harm from terrorism must take into account a series of acts of terror, not a lone example. Finally, we argued that taking into account the number of civilians incentivizes terror organizations to increase the number of civilians who will be harmed in the pre-emptive operation. This is a reason not to consider the number of civilians, *inter alia* in order to protect them. Nevertheless, we presented a number of cases in which the incentive argument does not apply, and in those cases, a balance of outcomes must be struck, with impartial consideration of the number of civilians who will be harmed compared to the number of citizens who will be harmed. We also claimed that in a case of gross equivalence among the considerations, it is appropriate not to harm civilians due to the risk of bias in preferring one's own citizens and nationals.

We briefly discussed the justification for endangering soldiers to lower the risks for civilians. We argued that the consideration of impinging on a mission which has already been determined to be proportionate succeeds, but it does not apply when the risk to soldiers

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185 ENOCH ET AL., *supra* note 9, at 64, 67.

does not endanger the execution of the mission. We claimed that there is an essential response to the soldiers' question of why he is being sent to risk his life for civilians. Nevertheless, the specific considerations about endangering soldiers do not support such risks, due to the incentive argument we presented concerning the danger to civilians, excluding those exceptions which we noted when the incentive argument does not apply. Finally, we rejected Walzer's claim that soldiers should be endangered because civilians are untrained and panicked.<sup>186</sup>

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<sup>186</sup> See Walzer, *supra* note 177, at 292–93.