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# Noncombatant Deaths: Weighing the Consequences

Most major ethical traditions have struggled over the centuries with the conflict between their assumption that killing is wrong and an idea that wars, even with their attendant violence, are at times morally justifiable. Results of the struggle often include principles intended to define and limit the circumstances under which leaders may go to war and to define what may be done in the course of fighting.

One of the most crucial issues shows few signs of disappearing. Wars have always killed not only members of the armed forces, but noncombatants. What modern technology has done, however, is to make possible civilian deaths on a massive scale -- before the military defeat of the enemy. Sometimes, as in strategic bombing in World War II or even General Sherman's March to the Sea in the U.S. Civil War, the killing is intended as a means to produce a military effect. Other times, civilians happen to be in the wrong place at the wrong time. They die because they live near munitions factories, or in besieged towns, or near active fronts.

The 1991 Gulf War raised the possibility that some time in the future "smart weapons" may be able to reduce the second category of civilian deaths to the lowest possible level. Weapons would go precisely where they were intended, and the so-called collateral damage could be kept to an absolute minimum. However, even with precision munitions, there could be mistakes about the nature of a

target: A "command post" might really turn out to be a milk factory. Nor can smart weapons prevent civilian deaths if a cynical leader such as Saddam Hussein deliberately places military targets in the midst of homes, schools, and hospitals. Other weapons, even if delivered precisely on target, have such a destructive radius that civilians in the general vicinity would be killed in the explosion. And finally, in theory at least, a smart weapon could be deliberately delivered on a civilian target. This would, of course, in most cases be an expensive and unnecessary use of the technology. Thus, the moral problem of civilian deaths in war is one that will not disappear for the foreseeable future.

The task of setting limits once war -- whether morally urgent or morally reprehensible -- has broken out seems to many almost a contradiction in terms. As Immanuel Kant wrote in the 18th century:

> "The question of justice and rights during a war presents the greatest difficulty, inasmuch as it is difficult without contradicting oneself even to form such a right and to think of there being any law in a condition that is itself lawless."[1]

Deontologist Kant went on to specify a number of rules for fighting wars, but he is far from the only ethicist to perceive the problem. This paper represents one attempt to work out some of the implications of the similarities and differences in the ways three different strands of Western moral tradition deal with the question and to sketch some of the factors that might be considered by a person trying to decide whether civilian deaths are morally justified in a particular case.

## MORALITY AND WAR: REALISTS, UTILITARIANS, AND JUST WAR THEORISTS

The tragedy of civilian deaths in war cuts directly to the heart of the whole problem of trying to justify wars at all. To even begin to understand how the West has come to terms with the death of innocents it is thus necessary to briefly survey the ways in which the decision to go to war has been explained in ethical terms and how this relates to the morality of tactics and strategies.

Two of the most important broad approaches to the issues of morality are consequentialism and deontology. For consequentialists, the intended end is what determines morality or immorality of an act. Deontologists believe following rules or having right motives produces right behavior internationally as well as for an individual.

In dealing with the questions of war and peace, one of the most important of the strands of consequentialism is known as realism. Although some realists simply deny the applicability of morality to state behavior, others believe leaders, acting as trustees for their citizens, are morally required take actions to promote their nation's good, even at the expense of foreigners. They have strong doubts about the possibility and even propriety of placing moral limits beyond the councils of prudence on leaders' decisions in a world shadowed by violence.[2] For a realist, net benefit to the citizens of the state should govern the decision to go to war -- or to harm foreign noncombatants once the war has begun.

Utilitarians also weigh good versus ill in terms of outcome, but usually do not permit advocates to weigh the future of their own state and its citizens more heavily than those of the world at large, at least not without an argument as to why particularity promotes net happiness and minimizes net unhappiness.[3] For a utilitarian, as with the realists, a moral decision to go to war is one that meets the standard of positive net effects. The difference is that leaders are expected to leave the world at large better off, after the costs and benefits (both of fighting the war and of its aftermath) have been set off against one another.

The Just War tradition or doctrine is more specific. It advances jus ad bellum criteria that present conditions when resort to war may be permissible. A typical list includes the requirements of a just cause, (sometimes more justice than the other side's), proportionality of moral benefits to costs, right intent in prosecuting the war, reasonable probability of success, declaration of the war by an appropriate authority, and that the decision to fight the war be a last resort.[4] The Just War tradition also advances two jus in bello principles that must be followed in order to prosecute wars justly. The principle of discrimination requires that no act of war be intentionally directed at noncombatants. Proportionality, this time applied to conduct in the war, requires that each element of tactics and strategy produce more good than harm. The associated sub-principle of double effect specifies further that an actor is not considered blameworthy, or as blameworthy, for harm inflicted entirely as an

unsought side effect of a permissible military action, provided that the harm involved is not out of proportion to the good that is sought.[5]

Substantial controversy surrounds each of Just War's criteria. Moreover, debate continues on the question of whether modern technology means that modern wars can ever be just.[6] Nevertheless, the very level of debate about Just War and the contemporary world shows the vitality of the doctrine today. Nicholas Fotion notes perceptively that not all Just War theorists are traditionalists or even deontologists[7]. However, the orientation towards rules and lists of criteria lends the doctrine a strongly deontological flavor even for those who justify their acceptance of it on other grounds.

It is important to note that civilians are not accorded blanket protection under any of the three approaches. Utilitarians and realists do not forbid killing noncombatants per se even intentionally. Such an act would require clear justification for utilitarians in terms of net utility, or, for realists, contribution to the good of the state. Just War theorists also permit some killing or harming of noncombatants, but only if the damage is not intended either as an end or as a direct means to an end, and only if the harm does not exceed the bounds of proportionality.

Paradoxically, even in the rule-oriented Just War doctrine, the traditional standard bearing on collateral deaths and other harm is thus related to expected consequences, although in a more

limited way than for realism and utilitarianism. If the deontological hurdle of direct intention has been successfully negotiated, the standard for any given act becomes the expected ratio of harm to good. A clear difference between the Just War and the consequentialist approaches is that the civilian deaths allowed could only be collateral, however, never be a direct aim of Just War theorists.

**WHICH CONSEQUENCES?**

The question becomes how to perform the complex weighing of values in determining whether a decision that will involve the deaths of civilians is permissible. Since in each case a decisionmaker must weigh expected consequences, the most obvious place to begin is with the goals of the war, the most significant of the intended consequences. Fighting is a means, not an end in itself. Even victory is intended to serve some other purpose. Thus the main moral value of a military tactic or strategy for a state lies in its contribution to the good represented by the end being sought. In those cases where winning the war (or at least forcefully resisting an enemy) will bring about a significant moral good, then contributing to that end has moral value too.

Concentrating on the aim of the war creates two quite different problems, however. First, rules pertaining to fighting wars have been thought to apply equally to aggressor and victim, to a soldier fighting a war whose cause is just and one whose government initiated a wrongful military action.[8] So too, the

international law pertaining to war applies equally to both sides.[9] But where is the justificatory weight to come from for an army fighting a war whose moral benefits do not outweigh its costs or that does not correspond to the dictates of jus in bello?

Second, focusing on the goals presents a temptation not to go beyond thinking about just cause. The potential for abuse of such thinking is obvious. If an army is fighting a just war should it be permitted virtually any means to that end? Are armies fighting unjustified wars already so compromised that there is no point in respecting any limits? Limiting the focus to victory represents an incomplete understanding of the consequences of fighting any war. If the standard is consequentialist net benefit, even for a realist, victory and its benefits narrowly defined should not be the only value to pursue. It is important to add that tactics and strategies may also have less tangible benefits or negative effects that must be weighed in the total accounting.

The conclusion that some noncombatant deaths may be justified even by military decision makers fighting a war whose overall cause cannot be justified makes moral sense even within a consequentialist framework. This is because for individual soldiers, fighting may also contribute to lesser but still significant moral ends. Soldiers may protect their fellows, protect noncombatants in their own country from the depredations of enemy soldiers, perhaps sacrifice themselves for others, defend themselves, fulfill duty and promises, apply skills conscientiously in the service of others, perfect their own virtues, etc. The

consequentialist justifying power these values possess is certainly less than for the same aims combined with a war being fought to promote significant moral good, but they are not negligible, especially taken together. These limited goods present a limited weight with which to balance some harm to noncombatants.

Of these individual goods, some values could not be used to justify the deaths of noncombatants. For example, it is difficult to conceive how individual self defense, or even self sacrifice, for example, (much less fulfilling duty and promises, applying skills conscientiously or, perfecting their own virtues) could be used to overwhelm a presumption against killing civilians, even as a side effect. Why is my preservation of <u>more</u> weight than the life of some third party, or, worse, a number of third parties, with at most a passive role in endangering me? To use the classic example, should I shoot through a baby strapped to a tank coming at me alone?

Protecting my comrades has substantially more face validity. For one thing, if I am their commanding officer, I am actually responsible for them in a kind of trustee relationship. In addition, as individuals, their lives clearly have value. Only realists have a clear mandate to protect their own soldiers at the expense of enemy noncombatants, however. Utilitarians could not justify <u>preferring</u> the lives of the soldiers to those of the civilians in the absence of other factors. How is one to choose between the two groups? Just War theorists would have to give preferential treatment to civilians. For them, of the individual

values, only protecting a different group of noncombatants would seem to have the kind of moral weight needed to overturn a presumption against allowing bystanders to come to harm.

When proportionality is the standard, the importance of winning a just war does offer a clear -- but limited -- justification of noncombatant deaths (or collateral deaths for Just War theorists). Net "good" in the terms of the particular framework intended outweighs harm. For Just War theorists and utilitarians the consequentialist weighing of the value of the end is relatively straightforward when fighting a war in reasonably well-founded hope of producing a substantial good. (Examples of substantial good would be promoting a world order in which disputes over borders are not unilaterally resolved by force, defeating an aggressive Nazi-like enemy, defending one's own community from aggression, and so on.) Justification would be even more easier for a classical realist for whom any victory is by definition a good.

The permission created does not, however, expand proportionately to the value of the goal pursued, even in a consequentialist framework. Countervailing values and difficulties in the weighing process intervene. There is, for example significant value to limiting means that must be weighed into any decision on civilian casualties. This value applies whether or not one's government was originally in the right. At least in a world where the peace expected is not that of the graveyard[10] -- i.e. where one expects to have to deal on a more

neutral if not friendly basis later with one's present enemy -- Immanuel Kant's argument that one should moderate the means of war in order that both victor and vanquished be willing and fit to be part of the same future world community[11] makes considerable sense. In addition, a strategy or tactic leading to substantial civilian casualties, particularly if they are intentional or incurred over long periods of time, may well have a corrosive effect on morale or on the social values held by soldiers and the societies that support them, as in the Vietnam War. A leader must also consider the effects of tactics involving the deaths of civilians on the other side during the war. Avoiding enemy civilians may well encourage reciprocal limits by the other side. Similarly, other states note strategies leading to heavy civilian casualties -- as in the Iran-Iraq war -- and may well prosecute future wars against a state that initiates them accordingly -- as in the Gulf War. It is thus clear that initiating a policy that produces noncombatant casualties almost certainly will have important negative consequences that must be considered in the weighing process.

Another issue is, of course, the difficulty of assessing whether the particular war one is fighting is a "good" war. This is a notoriously slippery issue under any circumstance, given the human capacity for self-delusion on the one hand and hypocrisy on the other. Nevertheless, a good faith effort to make such a judgment is required to give proportionality of moral benefits to moral costs sufficient moral weight to act as a justification.

However, uncertainty should give a degree of modesty to the conclusions about allowable means.

**UNCERTAIN BALANCE**

Even if one could be certain that the goal of the war is worthwhile, the weighing process itself is far from straightforward. There is no fully satisfactory solution to the problem of incommensurate values, for example. How is a decisionmaker to compare the value of, for example, resisting aggression to the value of noncombatant lives? The moral cost of taking noncombatant lives is both substantial and final, but how does it compare to other values?

One obvious tactic is to try to convert to a common denominator, perhaps quantitatively expressed, for utilitarian net happiness, Just War's proportionality of "good to ill," and the realist's state good. But how can the value of a life or a death be established with any validity in a consequentialist framework? For example, dead people have neither happiness or unhappiness, at least on earth; left alive they would have experienced both happiness and unhappiness. Does this mean that desire to remain alive of a noncombatant caught in the line of fire cannot be factored in -- and only the suffering of family and friends or of the society that loses a potential contribution counts? That hardly seems reasonable.

The problem of comparing the deaths of one's own citizen soldiers compared to enemy civilians has already been noted. Even

if one can agree within a framework which group is to be accorded greater weight, how much of a "discount" should the disadvantaged group receive? Then there is the problem of inter-coder reliability in assigning the scores. Any weighing based on even a common scale would be highly subjective.

One might give up the effort to convert lives and other values and simply project the costs in lives in alternate scenarios, or even limit the discussion to costs civilian lives. This approach has the benefit of clarity, but it clearly leaves values left over. Some ways of life are clearly preferable to others. And for a strict Just War theorist, intentional killing of noncombatants cannot be permitted, no matter what the benefit.

## WEIGHING THE BALANCE: THE CONTRIBUTION

Leaving aside the vexing problem of how to weigh incommensurable values, it is important to note that the value either of goal or of costs are not the only issue. Equally important is the question of how tightly and how certainly a given strategy or tactic producing the costs of noncombatant deaths relates to the goal.

The contribution any given military activity or even a pattern of activities may make even to a crucial victory may be great or small, necessary or contributory. Furthermore, because estimates of expected contribution to the good are made before the military activity takes place, they are, obviously, estimates of probabilities. Thus, when weighing the good and bad consequences

of any given military engagement, one cannot simply say that because the overall cause is laudatory -- even essential -- any means to that end is permitted, however horrifying. How necessary a contribution, how great a contribution to victory, how certain a contribution the particular act represents all must be taken into account in the already complicated weighing process.

Necessity is the tightest possible connection between act and outcome. Goal X is not available without action Y. This role in connection is what gives the concept of military necessity moral importance.

R. B. Brandt is an example of a "rule utilitarian" who argues persuasively for a presumptive rule of thumb against deliberately attacking noncombatants. He offers a telling exception, however: "good evidence that it will significantly enhance the prospect of victory."[12] In reasoning that should appeal to realists as well as utilitarians, Brandt argues that following such a rule is morally sensible since it would minimize human suffering on both sides without endangering victory.[13] Utilitarian Brandt is thus advancing an argument for protecting noncombatants, except when the dictates of military necessity require such an attack. For realists from Thucidides to Machiavelli, from Sherman to Morganthau, military necessity as a justification for otherwise questionable actions is a time-honored concept. For Just War theorists, necessity to victory would not ordinarily create permission to violate the rule of discrimination.[14] It could, however, affect decisions about collateral deaths.

Paradoxically, military necessity is both more and less permissive than the concept of proportionality. Using the concept of proportionality, a general might estimate (accurately) that the contribution to a just victory of a particular action, a nighttime bombing raid on a munitions factory, for example, was small or highly questionable. At the same time she might know that the expected incidental harm to civilians was very low. Under the principle of proportionality, the good expected is in proportion to the ill, and hence the activity ought to be acceptable. (If, on the other hand, the expected contribution to victory is small but the incidental harm is likely to be high, the activity would be forbidden.)

Military necessity, on the other hand, specifies the probability of the means actually producing the goal: victory or preventing defeat. By definition, if something is "necessary" it is required before another event or state can occur. The term "necessity" is often used in practice when "utility" is all that the author intends. This distorts the meaning of the term necessity.

Because of the instrumental nature of military tactics and strategies, militarily necessary actions are those actions that must happen for victory to occur or to prevent defeat. At minimum, they should be part of a pattern of activities that is so required. Thus, a general applying the principle of military necessity could not accept even a low level of harm to noncombatants unless a bombing raid were part of a pattern of activities needed for

victory or to avoid defeat. Whatever the proportionality of good to ill, the closeness of the connection would not be sufficient. In addition, because necessity is an all-or-nothing concept -- ultimately, something is or is not necessary -- a well-founded expectation, not mere hope, should be the standard of estimating probability.

To use means that cause negative consequences that are also unnecessary is a moral problem even when the end is good. Desirable consequences of the end are available without the negatives of the means. Thus unnecessary deaths subtract from the utilitarian's net good, the Just War theorist's net good, and even, if the arguments above about the value of moderation are correct, the realist's state good.

Sometimes a strategy or tactic with negative effects or side effects has utility in prosecuting a war but is not necessary. In that case, the goal can be obtained without those negative side effects, but there may also be costs of not engaging in the tactic or strategy: decreasing the chances of victory or avoiding defeat, or forcing some other path to the goal of victory. In such a case, the decision maker would have to balance the costs and benefits of the alternate strategies. The outcome would differ from case to case.

Even when the goal is morally urgent, the balance is unlikely to come out in favor of a merely useful strategy or tactic when the cost is deaths to noncombatants. The higher level certainty of necessity would probably be necessary on virtually every occasion

because the costs are so high. First, the costs incurred by the individual noncombatant in such a case are both substantial and final. Second, even if the only standard applied is prudence, as for the realists, the Kantian and other argument about the costs of killing civilians suggests that one not lightly set in motion actions that could have a highly significant effect on future international relations. And finally, at least for utilitarians and Just War theorists, there is an important prima facie moral presumption being violated. This requires a substantial and certain contradictory weight to set aside even when the standard is consequentialist.

Not all military engagements need live up to the high standard of necessity, even if one uses the concept to justify other military acts. If there is no prima facie moral presumption being violated--for example in the case of destroying an abandoned battleship at sea in wartime--or if the action in question can be fully justified by some other concept--perhaps, self-defense, narrowly construed, as in the case of repelling an attack--then the lesser standard of utility is sufficient.

Satisfying a condition of military necessity does not free a consequentialist weighing civilian deaths or a Just War theorist justifying collateral deaths from the chains of measuring proportionality. Military necessity alone would not automatically produce a balance in favor of the act. Even with a necessary strategy or tactic, the decision maker would have to resolve the

issues discussed earlier of the moral importance of the goals being sought -- and of weighing lives and other values.

## IN LIEU OF CONCLUSIONS

It should surprise no one that, of the three doctrines examined here, realism is the one most likely to permit civilians to die, intentionally as well as the result of collateral damage. From the perspective of a utilitarian or a Just War theorist, realism is dangerous because it elevates the goal of victory by the state -- any state -- to the same level of justificatory importance they would reserve for more cosmopolitan ends. At the same time, Just War theorists would condemn both realists and utilitarians' willingness to allow civilians to be killed intentionally, rather than as a tragic side effect.

Yet, Just War doctrine, too, allows ends to justify means when it comes to some noncombatant deaths, by the principles of proportionality and double effect. Taken together, as they must be, these two jus in bello principles allow collateral harm, a very major exception to the otherwise strict rule of discrimination between combatants and noncombatants. So, weighing of ends versus lives comes into the heart of even the deontological system.

With such a stark choice, it becomes very important to begin thinking about what is really unthinkable, or at least unspeakable, the deaths of bystanders.

Several things seem to follow, even from this limited consideration based simply on the implications of the meaning of

the various terms and the structure of justification. First, even a very urgent victory does not give enough reason to justify any and all levels of noncombatant death that might have some bearing on it, even for a realist. Countervailing values, and uncertainties in weighing both goals and costs should induce a healthy dose of caution. Moreover, probabilities and contributions must be weighed on an act-by-act basis. This weighing must constitute a good-faith effort to come to terms with the moral paradoxes of war. Second, at least for utilitarians and Just War theorists, although members of the armed forces should not be held individually liable for fighting for a cause that is not just, the state and its decisionmakers in such a case have only the narrowest of ledges on from which to make a moral argument justifying any noncombatant deaths. Third, even for realists, the argument of military necessity is a two-edged sword: even a few civilians must be preserved unless their deaths are literally a required part of a pattern that is needed to ensure victory or to prevent defeat. Mere utility is not sufficient.

**NOTES:**

[1]Immanuel Kant, Metaphysical Elements of Justice, trans. John Ladd (NY: MacMillan, Library of Liberal Arts, No. 72, 1965), p. 119.)

[2]See, for example, Raymond Aron, Peace and War: A Theory of International Relations, trans. by Richard Howard and Annette Baker Fox; abridged by Remy Inglis Hall (Garden City, NY: Anchor Books, 1973), p. 301-337.

[3]See, for example, Gregory S. Kavka, Moral Paradoxes of Nuclear Deterrence (New York: Cambridge University Press, 1987), p. 58-59.

[4]See, for example, U.S. Catholic Bishops Conference, The Challenge of Peace: God's Promise and Our Response (Washington, D.C.: U.S. Catholic Conference, 1983), p. 28-30.

[5]Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, (New York: Basic Books, 1977), p. 21, 41-44, 53; and Catholic Bishops, p. 26-34, are, respectively, well-known secular and religious examples of just war doctrine today.

[6]See, for example, James Turner Johnson, Can Modern War Be Just? New Haven and London: Yale University Press, 1984; and Nicholas G. Fotion, Military Ethics: Looking Toward the Future (Stanford California, Stanford University Press, 1990).

[7]Fotion, Military Ethics, p. 13.

[8]Walzer, p. 36-40.

[9]See, for example, Sidney Axinn, A Moral Military (Philadelphia, Temple University Press, 1989), p. 3.

[10]Immanuel Kant, Perpetual Peace: A Philosophical Sketch, in Kant's Political Writings, ed. Hans Reiss (Cambridge: Cambridge University Press, 1970), p. 96.

[11]ibid., p. 120; see also Axinn, p. 9.

[12]R. B. Brandt, "Utilitarianism and the Rules of War," in Marshall Cohen, Thomas Nagel and Thomas Scanlon, eds., War and Moral Responsibility (Princeton: Princeton University Press, 1974), p. 36. See also p. 34-40 for his extended argument.

[13]ibid., p. 36.

[14]For an argument to the contrary in a "supreme emergency," see Walzer, p. 251-268.