

ETHICS OF CIVILIAN PROTECTION

By

SHUNZO MAJIMA

A thesis submitted to
the University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY

Centre for the Study of Global Ethics
School of Philosophy, Theology and Religion
The University of Birmingham
December 2010

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.

ABSTRACT

In this thesis, I discuss the ethics of civilian protection in armed conflict from the perspective of applied ethics. Specifically, I attempt to explore a way to supplement the limitations of just war theory in civilian protection by providing a fundamental case for civilian protection, by way of considering insights gleaned from David Hume's conception of justice, and from the perspective of professional military ethics. Moreover, I will further defend my argument for the protection of civilians in armed conflict by demonstrating the immorality of torture. In Chapter 1, I discuss the status of civilians by examining legal and ethical concepts. In Chapter 2, I critically discuss the scope and limitations of just war theory in civilian protection. In Chapter 3, I analyse how civilian protection was considered and how civilians were harmed in the Israeli–Palestinian conflict. In Chapter 4, I critically examine civilian protection as part of just conduct in armed conflict by referring to Hume's conception of justice. In Chapter 5, I examine civilian protection from the perspective of military ethics. In Chapter 6, I make a case against the moral justifiability of torturing civilians in order to illustrate how civilians should be protected in an extreme situation.

ACKNOWLEDGEMENTS

I am grateful to several people for the help and encouragement which they have given me while writing this thesis. I am indebted to my ex-supervisors, Drs. Christian van den Anker, Sirkku Helsten, and Pedro Tabensky, who greatly helped me in my exploration of issues surrounding war and ethics at the formative stage of my thesis-writing at the Centre for the Study of Global Ethics, the University of Birmingham. I am also grateful to Ms Lydia Wanstall for proofreading the drafts of the thesis. Above all, I wish to thank my last supervisors Dr. Heather Widdows and Dr. Jethro Butler who painstakingly read the drafts of this thesis many times and gave detailed comments and suggestions on them during each stage of writing. Without their advice and kind support, I could not have completed this thesis. However, if any errors remain, I am solely responsible for them.

CONTENTS

INTRODUCTION.....	1
Thesis Outline.....	15
Key Concepts.....	20
Methodology.....	32
Literature Review.....	39
CHAPTER 1: EXPLORING THE STATUS OF CIVILIANS IN LEGAL AND ETHICAL CONTEXTS	
Introduction.....	49
1. 1. The Legal Status of Civilians.....	50
1. 1. 1. Legal Protection of Civilians in Armed Conflicts.....	51
1. 1. 2. Conditions of Protection.....	56
1. 1. 3. Limitation of the Legalistic Approach to Civilian Protection.....	59
1. 2. Concepts for Distinction of Civilian Status and for Justification for Protection.....	66
1. 2. 1. Moral Innocence.....	66
1. 2. 2. Innocence as Harmlessness.....	72
1. 2. 3. Responsibility.....	76
1. 2. 4. Rights.....	78
1. 2. 5. Personal Project.....	80
Concluding Remarks for Chapter 1.....	85
CHAPTER 2: CIVILIAN PROTECTION IN THE FRAMEWORK OF JUST WAR THEORY	
Introduction.....	88
2. 1. Civilian Protection in Just War Theory.....	89
2. 2. Just War Principles in relation to Civilian Protection.....	94
2. 2. 1. The Principle of Non-combatant Immunity.....	94
2. 2. 2. The Principle of Proportionality.....	99
2. 2. 3. The Principle of Double Effect.....	104
2. 2. 4. Responsibility to Protect: A Modern Version of	

Just War Theory.....	112
2. 3. Lack of Reparation to Civilian Victims in the Just War	
Framework.....	121
2. 3. 1. Just War Theory and Reparation to Civilian Victims.....	122
2. 3. 2. Reparation to Civilian Victims in IHL.....	124
2. 3. 3. The Principle of Reparation in the <i>Jus in Bello</i>	
Framework.....	127
Concluding Remarks for Chapter 2.....	135

CHAPTER 3: CIVILIAN PROTECTION AS POLITICAL RHETORIC?

Introduction.....	137
3. 1. An Overview of Civilian Protection in the Israeli–Palestinian	
Conflict.....	139
3. 2. Civilian Protection: Cause, Justification, and Excuse.....	144
3. 2. 1. Self-defence.....	145
3. 2. 2. Pre-emption and Prevention.....	149
3. 2. 3. Punishment, Reprisal, and Means of Resistance.....	154
3. 2. 4. Human Shields.....	161
Concluding Remarks for Chapter 3.....	170

CHAPTER 4: JUSTICE, UTILITY AND CIVILIAN PROTECTION

Introduction.....	173
4. 1. A Hume-Inspired Conception of Justice: Justice as an Artificial	
Virtue.....	174
4. 2. Utility as an Ethical Foundation for Civilian Protection.....	177
4. 3. The First Scope of Utility: Utility as a Mutual Benefit between	
Warring Parties.....	180
4. 4. A Critical Examination of Reciprocity-based Utility.....	185
4. 5. Non-reciprocal Factors for the Utility of Civilian Protection.....	190
4. 6. The Second Scope of Utility: Utility at the Global Level.....	197
Concluding Remarks for Chapter 4.....	207

CHAPTER 5: CIVILIAN PROTECTION AND THE PROFESSIONAL ETHICS

Introduction.....	210
5. 1. Four Reasons that Civilians are not Always Protected in War.....	212
5. 2. Incorporating Civilian Protection into Military Ethics.....	219

5. 2. 1. Reason to Include Civilian Protection in Military	
Ethics.....	220
5. 2. 2. Military Education and Training.....	225
5. 2. 3. One Possible Problem with Incorporation.....	236
5. 3. Role of the Government, Tasks of the Military for Assuring	
Civilian Protection.....	238
5. 3. 1. Role of the Government.....	239
5. 3. 2. Tasks of the Military.....	241
Concluding Remarks for Chapter 5.....	246

CHAPTER 6: MORAL JUSTIFIABILITY OF CIVILIAN PROTECTION: A CASE AGAINST TORTURE

Introduction.....	249
6. 1. Arguments surrounding the Ethics and Practice of Torture.....	250
6. 2. Legal Definitions and Regulations of Torture.....	252
6. 3. Ethical Issues surrounding Torture.....	255
6. 4. From Just War to Just Torture: the Principles against Torture.....	264
Concluding Remarks for Chapter 6.....	278

CONCLUSION.....	280
-----------------	-----

BIBLIOGRAPHY.....	301
-------------------	-----

INTRODUCTION

Civilian protection during armed conflicts¹ is one of the most discussed and debated topics in war/military ethics as well as international ethics, both of which are branches of applied ethics. In these fields, it is one of the most important issues in the discussion of the ethical aspects of war and international relations, not only because war usually causes civilian casualties, but also because the number and proportion of civilian casualties has dramatically increased over the past one hundred years.² Some of the most ferocious recent campaigns are, for example, the Rape of Nanjing by the Imperial Japanese Army, the Allied bombings of German and Japanese cities and the nuclear bombings in Hiroshima and Nagasaki during the Second World War. Despite the fact that civilian protection is stipulated in the laws and customs of armed conflict, a large number and high proportion of civilian casualties are observed in many contemporary armed conflicts.³

In the fields of war/military ethics and international ethics, there are at least

¹ In this thesis the terms *armed conflict* and *war* are used synonymously.

² Richard M. Garfield and Alfred I. Neugut, 'Epistemological analysis of warfare: a historical view', *Journal of American Medical Association*, 266:5 (1991), pp. 688–92; Ruth Sivard, *World Military and Social Expenditures 1985* (Washington D.C.: World Watch Institute, 1985), p. 11; and Mary Kaldor, *New and Old Wars: Organised Violence in a Global Age* (Cambridge: Polity, 1999), p. 8.

³ David Southall and Kamran Abbasi, 'Protecting civilian from armed conflict: The UN Convention needs an enforcing arm', *British Medical Journal* 316 (1998), pp. 1549–50; and D. R. Meddings, 'Civilians and war: a review and historical overview of the involvement of non-combatant populations in conflict situations', *Medical Conflict Survival* 17:1 (2001), pp. 6–16.

two different, yet widely overlapping and promising, approaches to the ethical issues concerning civilian protection: one is *just war theory*, a set of ideas to restrain ‘war by legitimating certain types of actions and de-legitimizing others’⁴, which is primarily based on macro (collective entities) level analysis; and the other is the professional ethics of military personnel in Western industrial democracies such as the United Kingdom and the United States, which is primarily based on meso (group-focused) and secondarily on micro (individual-focused) level analysis. Ethical issues surrounding civilian protection are predominantly debated in the context and discourse of just war theory, in which civilian protection is discussed as part of the overall consideration for the morality of war.⁵

Just war theory is useful for macro level analysis of the (un)justifiability of a particular war undertaken by states and other political communities; however, this theory does not sufficiently serve to provide adequate protection for civilians. While many just war theorists focus on the requirements of civilian protection to a greater or

⁴ Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity, 2006), p. 5.

⁵ See, for example, Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 2nd ed. (New York: Basic Press, 1992), pp. 138–75; Richard Harries, *Christianity and War in a Nuclear Age* (London: Mowbray, 1986), pp. 76–88; Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), *passim*; Richard Regan, *Just War: Principles and Cases* (Washington D.C.: Catholic University of America Press, 1996), pp. 87–99; A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), pp. 235–72; David Oderberg, *Applied Ethics: A Non-Consequentialist Approach* (Oxford: Blackwell, 2000), pp. 215–24; Anthony Hartle, ‘Discrimination’, in Bruno Coppieters and Nick Fotion (eds.), *Moral Constraints on War* (Lanham, MD: Lexington Books, 2002), pp. 141–58; Brian Orend, *The Morality of War* (Peterborough, Ontario: Broadview Press, 2006), pp. 105–37; Frederik Kaufman, ‘Just War Theory and Killing the Innocent’, in Michael W. Brough, John W. Lango, and Harry van der Linden (eds.), *Rethinking the Just War Tradition* (Albany: State University of New York Press, 2007), pp. 99–114.

lesser degree in their different arguments, civilian protection is often submerged under the other principles in just war theory. The reason for this is that in just war theory, civilian protection is just one of the necessary conditions to be met, along with several others, all of which are used together for the overall consideration of the rightness and wrongness of war. As a result, civilian protection is often sidelined by other considerations such as military necessity and politico–military objectives.

This shortcoming of just war theory towards civilian protection may also draw attention to the other promising approach to civilian protection; that is, the professional ethics of military personnel, which is more focused on the conduct of individual commanders and soldiers in combat situations. The volume of literature about the professional ethics of military personnel has recently increased in the United Kingdom and the United States,⁶ but among these texts there are few which deal directly with the ethical issues concerning civilian protection as a major topic: most discuss civilian protection only as part of just war theory and/or the laws of armed conflict.

⁶ See, for example, N. Fotion and G. Elfstrom, *Military Ethics: Guidelines for Peace and War* (Boston: Routledge & Kegan Paul, 1986); Sydney Axinn, *A Moral Military* (Philadelphia: Temple University Press, 1989); Patrick Mileham, *Value, Values, and the British Army: A Seminar Report* (Edinburgh: Institute for Advanced Studies in Humanities, University of Edinburgh, 1996); Iain Torrance, *Ethics and Military Community* (Camberley: Strategic and Combat Studies Institute, 1998); J. Carl Ficarrotta (ed.), *The Leader's Imperative: Ethics, Integrity, and Responsibility* (West Lafayette, IN: Purdue University Press, 2001); Patrick Mileham and Lee Willett (eds.), *Military Ethics for the Expeditionary Era* (London: Royal Institute of International Affairs, 2001); Patrick Mileham (ed.), *War and Morality* (London: Royal United Services Institute, 2004); Anthony E. Hartle, *Moral Issues in Military Decision Making* 2nd ed. (Lawrence, KS: University Press of Kansas, 2004); and Martin Cook, *The Moral Soldiers: Ethics and Service in the US Military* (Albany, NY: State University of New York, 2004).

It is worthy of note that civilian protection is explicitly or implicitly codified in the professional code of ethics of the UK and Israeli Armed Forces, although Maxwell Taylor, a US general, argued at the twilight era of the Cold War that ‘there are no official texts or authoritative codes [of military ethics] to which to refer, and possibly there never will be’.⁷ In our time, 25 years after his remarks, one of the most explicit codifications of civilian protection in a professional code of military ethics is found in the Israel Defence Forces’ doctrine entitled ‘Ethics’, in which the protection of non-combatants is envisaged as one of the values of ‘purity of arms’. The document reads: ‘The IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property’.⁸ Less explicit, yet equally indicative of the same codification is the British Army’s ‘Core Values’, which lists ‘respect for others’, among whom civilian victims of war are included, as one of its main values.⁹

The two approaches of just war theory and professional military ethics

⁷ Maxwell D. Taylor, ‘A Do-it-Yourself Professional Code for the Military’ in Lloyd J. Matthews and Dale E. Brown (eds.), *The Parameters of Military Ethics* (Washington D.C.: Pergamon Brasseys, 1986), p. 126; quoted in Patrick Mileham, ‘Military Ethics: Questions for a New Chapter’, in Patrick Mileham (ed.), *War and Morality*, pp. 157–64 at p. 157.

⁸ <http://dover.idf.il/IDF/English/about/doctrine/ethics.htm>, accessed on 15/8/2007.

⁹ UK Army, *The Values and Standards of the British Army: Commanders’ Edition* (Army Code No 63813, 2000), p. 11, para. 18.

examined above do not necessarily oppose or contradict each other on civilian protection: although their primary focuses are different, these two approaches have the potential to concur on the support and promotion of civilian protection. However, it seems that this does not occur in practice, especially given the current situation, in which civilian protection is marginalised in both approaches.

As a result, the purpose of this thesis is to link these two partly overlapping approaches to the issue of civilian protection by filling the gap left by their shortcomings in dealing with this issue. Specifically, this thesis aims to explore a way to supplement the limitations of just war theory concerning civilian protection by providing a fundamental case for civilian protection, by way of considering insights gleaned from David Hume's conception of justice, and from the perspective of professional military ethics.

This is not to deny, however, the validity of just war theory for civilian protection; rather this thesis points towards the importance and need for just war theory to be supplemented by these sorts of considerations, which it does not incorporate, because it is primarily concerned with the macro level protection of civilians. In order to explore how it can be supplemented, I will consider civilian protection from the perspective of military ethics.

In order to discuss the ethical issues concerning civilian protection, a number of *why* and *how* questions need to be considered. The first question is: why do civilians matter? The initial response is that there are differences between the status of civilians and that of combatants, which characterise the protected status of the former group of people. In order further to explore this question, I need to examine the legal and moral status of civilians and civilian protection. The purpose of my investigation into this *why* question is to show *how* civilian protection is morally significant. I will explore this question in detail in Chapter 1.

I will also consider a second *why* question: why is just war theory inadequate as a framework for civilian protection? In order to explore the answer to this question, I will critically examine the theory and its approaches to civilian protection in Chapter 2. The purpose of my investigation into this *why* question is to show *how* just war theory is limited as a theory for civilian protection.

I will further investigate the second *why* question by examining the Israeli–Palestinian Conflict as a case study. In the course of my investigation into the practice of civilian protection among warring parties in Chapter 3, I will clarify why just war theory is inadequate to ensure civilian protection by showing *how* it is difficult to put this into practice both at the collective and individual levels.

The third *why* question is raised in Chapter 3: why do I consider the Israeli–Palestinian Conflict in particular as my case study, rather than another conflict? The reason is that not only is the Israeli–Palestinian Conflict a kind of asymmetrical war in which national armed forces (in this case, the Israeli Defence Forces or IDF) and non-regular members of national armed forces (members of various Palestinian militant groups) are involved, but also the stakes of national security and survival are incredibly high for the both sides. This characteristic of the conflict is epitomised by the fact that, in a particular period of this conflict, the idea of civilian protection was almost entirely ignored by both sides and civilians were directly or indirectly harmed in tit-for-tat attacks by both the IDF, one of the most advanced armies in the world in terms of their professional code of military ethics, and Palestinian militant groups that did not always commit themselves to protect civilians. As a result, civilians in the occupied territories were particularly at risk of being harmed by both warring parties. This characteristic of the Israeli–Palestinian Conflict validates my choice of this conflict specifically as a case study in order to show that the protection of civilians in the operational theatre is a particularly fragile rule in an armed conflict in which national survival is a high stake for both sides. If I can show this characteristic of military conduct in regard to civilian protection through the case study in Chapter 3, this could point to possible ways that

civilian protection should be incorporated as part of a professional code of ethics for the military personnel of Western industrial democracies' armed forces. I will consider this further, drawing examples primarily from the UK and US armed forces, in Chapter 5 of the thesis.

In the first part of the thesis (Chapters 1, 2 and 3), therefore, I will clarify the issues surrounding civilian protection and how the approach of just war theory is inadequate to ensure this. In the second part of the thesis (Chapters 4, 5 and 6), I will explore further *how* and *why* questions. When considering a Hume-inspired conception of justice in Chapter 4 in order to explore *how* to supplement just war theory on civilian protection, two more *why* questions may arise. Firstly, I need to examine why I should reconceptualise justice as utility – a public good. The answer to this question is that the conception of justice is not explicitly discussed in discourse on just war theory, and the lack of such discussion may prevent civilian protection being exercised as part of just conduct in war, as revealed in the analysis of the Israeli–Palestinian conflict. In Chapter 4, I therefore attempt to reconceptualise justice as utility in order to explore a concept which may further ensure civilian protection.

Secondly, I also need to address another, related *why* question: why do I use the Hume-inspired conception of justice? Hume's theory of justice is controversial, just

as his moral theory is also debated. His theory of justice is also unique in that utility is considered to be the foundation of justice, and this conception is useful and advantageous to reconceptualise civilian protection as utility. It is not the purpose of this thesis, however, to debate Hume's theory of justice *per se*, or to explore the philosophical position that underpins his theory. The purpose is, by using a Hume-inspired conception of justice, to conceptualise justice as a human artifice and thus as a societal utility, in order to demonstrate *how* this conception of justice serves to help us to understand civilian protection as utility. Hume's recognition of the foundation of justice in utility is useful to conceptualise civilian protection as part of justice in war at a macro level. I will draw material from Hume's works as well as those of several commentators to underpin this argument.

In order to open up the discussion in Chapter 5, I need to clarify another *why* question: namely, why do I discuss one example of professional ethics among Western industrial democracies' armed forces in order to explore an assurance of civilian protection? Having discussed the limitations of the macro level approach of just war theory to civilian protection in Chapter 2, in Chapter 5 I will explore the professional ethics of military personnel as a primarily meso level and secondarily micro level approach to civilian protection that emphasises its focus on the professional group (i.e.

the armed forces) and its members (individual military personnel). The reason for this is that although I have defended my position that civilian protection should be understood, recognised and exercised as utility at the global level by using the macro level approach of Hume's conception of justice, I have not discussed concrete ideas or specific prescriptions to implement civilian protection. Indeed, the meso and micro level approaches do not compete with the macro level approach, but supplement and reinforce the idea and ideal of civilian protection envisaged in just war theory, as well as Hume's conception of justice.

In addition to this I will suggest, using examples, possible ways that the armed forces in so-called Western industrial democracies such as the United Kingdom and the United States could uphold civilian protection as part of their code of ethics. I use these examples, not only because membership of the armed forces is considered to be a profession in those countries,¹⁰ but also because UK and US military personnel have increasingly been sent as expeditionary forces to foreign lands where the protection of civilians in the operational theatre is one of the top mission priorities. The armed forces of these two countries have become involved in military operations on foreign soil that are not necessarily directly linked to national defence, let alone major war-fighting in

¹⁰ Cook, *The Moral Soldiers*, p. 56.

and around their homeland, whereas the Israeli and Palestinian sides examined in Chapter 2 were fighting over and across the neighbouring borders that roughly divided these two groups. The difference between these two kinds of armed conflict indicates that the US and UK Armed Forces cannot avoid moral culpability if and when they breach the code of civilian protection. The reason for this is that many of the wars in which the US and UK have become involved over the last 60 years were expeditionary ones, to which their national survival was not necessarily directly linked. In other words, these two countries have fought many extravagant wars, not only in terms of (human, material and financial) resources, but also in the sense that they conducted expeditionary wars in which their national survival was not immediately at stake. If the US and UK Armed Forces are engaged in armed conflicts in which the survival of their own nations is not so seriously at stake, unlike the Israelis and Palestinians in that conflict, and if this factor of the basic need for national survival is part of the reason that civilian protection was often breached in the Israeli–Palestinian conflict, then the US and UK Armed Forces may be expected or even required to hold a higher standard for the protection of civilians when fighting in conflicts outside their national boundaries. Furthermore, since these two armed forces have often conducted joint operations with other NATO member countries, many of whose member states may also be categorised

as Western industrial democracies, their ethics of conduct might imply that the examples drawn from these two armed forces are also applicable to those of other Western industrial democracies. In order to discuss these issues, I will primarily focus on the UK and US Armed Forces as examples of agents who commit to and promote civilian protection in armed conflict.

I will then consider another *how* question: how can civilian protection be incorporated into military professionalism so that the protection of civilians can further be ensured? In Chapter 5, I will consider civilian protection in relation to the professional code of military ethics in Western industrial democracies' armed forces by drawing examples primarily from the UK and US Armed Forces as promising examples, possibly among many, of opportunities to improve civilian protection. This individual-focused approach on moral education may be a way to illuminate an imperative to force individual professionals to comply with the code envisaged in professional ethics in Western industrial democracies' armed forces. In this context, the professional ethics approach to civilian protection may raise awareness among military professionals of the requirement to follow the professional code of military ethics in order further to promote and sustain the threshold of civilian protection once recognised and understood in depth.

Lastly, in Chapter 6, I need to clarify the final *why* question: why do I examine torture as an example of the need for civilian protection in order to defend my position that civilians should be protected? The reason for this is that torture and other cruel, inhuman, or degrading treatment are performed for the purpose of interrogation on civilians, other non-combatants and combatants alike. While these activities can occur in peacetime, it is at times of armed conflict that there is often the greatest danger of such mistreatment of civilians. Indeed, the torture of civilians is one of the most horrendous acts, which completely opposes the idea of civilian protection if conducted at a time of armed conflict. Furthermore, if those kinds of ill treatment are conducted against civilians by members of armed forces, this raises a serious concern about the ethics of civilian protection by the military, as well as the professional ethics of military personnel. In this thesis I hope to demonstrate the moral unjustifiability of arguably the least controversial case of torture against a possibly culpable person; as a result, I can defend my position against any form of torture of civilians in armed conflict. In addition, I will show that the moral unjustifiability of any torture against civilians prescribes an addition to the professional ethics of military personnel, requiring their protection of civilians from torture.

In order to argue against the moral justifiability of torturing civilians in armed

conflict, I also need to consider the final *how* question: how can I demonstrate the moral unjustifiability of torture against civilians? Although just war theory might not be the best framework from which to consider the protection of civilians in armed conflict because it is primarily concerned with a macro level analysis, the spirit of the theory inspires a framework of moral judgment and reasoning on civilian protection at the meso and micro levels. By extending the core idea of just war theory – namely, prevention, prohibition and restraint of a certain kind of violence – I can modify the original just war framework and adjust it to a set of moral principles for an individual agent who might be engaged in using violence against another.

In the latter part of the thesis (Chapters 4, 5 and 6), therefore, I will demonstrate that these two ideas, one based on a Hume-inspired conception of justice and the other based on the professional code of ethics, balance the shortcomings of just war theory in civilian protection by showing ways for further ensuring this protection. In addition, I will also demonstrate that I can revitalise the spirit of just war theory by adjusting the just war framework as an ethical guideline against torture and other inhuman treatment, which civilians are often faced with in armed conflicts.

Thesis Outline

This thesis is divided into six chapters. In Chapter 1, I examine the status of civilians in legal and ethical contexts, which will provide the basis for my investigation of the ethics of civilian protection in armed conflict. In order to examine this status, I explore the legal and ethical sources that address the status of civilians. Initially, in order to consider how the status of civilians and their protection are addressed in the legal context, I focus on the provisions of the Geneva Conventions of 1949 and the 1977 Additional Protocols to the Fourth Geneva Convention of 1949. Secondly, I proceed to consider the ethical reasons that civilians should be protected in armed conflict by examining concepts that could differentiate civilians from combatants and justify civilian protection. In order to assess how the status of civilians can be characterised and their protection justified by ethical concepts, I examine the five following concepts: moral innocence, innocence as harmlessness, responsibility, rights, and personal project. When combined, investigation of these concepts allow me to clarify the complex issues concerning the legal and ethical status of civilians.

In Chapter 2 I critically examine just war theory in relation to civilian protection in order to consider the scope and limitations of the theory. Specifically, I investigate how civilian protection is envisaged in the framework of just war theory,

which is currently a dominant framework for deliberating and contemplating ethical issues concerning civilian protection in armed conflict, in order to assess whether or not it provides an adequate ethical framework for considering civilian protection. Chapter 2 is divided into three sections. Initially, in Section 2. 1, I outline the structure of just war theory in order to demonstrate how civilian protection is envisaged in this framework. Secondly, in Section 2. 2, I examine the problems of ambiguity in the principles used to judge the issue of civilian protection in just war theory, to explore whether or not it provides an adequate framework to consider these ethical issues. Finally, in Section 2. 3, in order further to demonstrate the limitations of just war theory in civilian protection, I consider the issue of reparation for the loss of civilian life, injury to civilians and damage to civilian objects caused as a result of military operations.

In Chapter 3, in order to consider whether and how civilian protection is practised in an armed conflict, I examine the Israeli–Palestinian Conflict as a case study. Specifically, I focus on one of the bloodiest periods (2002–3) during the Second Intifada period (2001–5). Chapter 3 is divided into two sections. In Section 3. 1, I explore the overall pattern of military operations between warring parties in the Israeli–Palestinian Conflict during this period of Second Intifada, in order critically to examine whether or not civilian protection was properly practised and how civilians were harmed in the

conflict. In Section 3. 2, in order to consider how civilian protection is used not only as a rhetorical method for justifying military operations, but also as a means of excuse for harming civilians, I investigate four different occurrences of these practices.

In Chapter 4, I explore one of the two potentially promising ways to supplement the macro level approach of just war theory in civilian protection; namely a Hume-inspired conception of justice, another macro level approach, in order to propose a global utility-based understanding of civilian protection as part of just conduct in armed conflict. Chapter 4 is divided into six parts. Initially, I discuss a Hume-inspired conception of justice as an *artificial virtue*, and its relevance regarding civilian protection, in order to explore a possible method of justifying civilian protection as part of just conduct in armed conflicts. Secondly, I examine utility as an ethical case for civilian protection as part of just conduct in times of war, in order to consider whether or not this concept contributes to civilian protection. Thirdly, I examine the first of the two interpretations of the *utility of civilian protection* – utility as a mutual benefit between warring parties – in order to consider whether or not this interpretation of utility contributes to civilian protection. Fourthly, I critically examine the issues presented by the first interpretation of reciprocity-based utility for the parties to the conflict, in order to consider whether or not this interpretation of utility leads to the

protection of civilians. Fifthly, I examine the concept of non-reciprocity-based utility between the warring parties, in order to consider whether or not this interpretation of the utility of civilian protection can be appropriate. Finally, I examine the second interpretation of utility as the ethical foundation of civilian protection – namely the utility of civilian protection at the global level – in order to consider whether or not this interpretation of utility contributes to civilian protection. Through the discussion in Chapter 4, I consider these six issues in turn, in order to portray how the concept of utility as a way of justifying civilian protection plays a role not only to justify civilian protection, but also to ensure the better protection of civilians during armed conflicts.

In Chapter 5, I examine the professional ethics of military personnel in Western industrial democracies' armed forces, by drawing examples primarily from the UK and US Armed Forces as examples of agents that commit to and promote civilian protection as utility at the global level, in order to consider how civilians could be better protected within this framework. The reason for this is that although I defend my position that civilian protection should be understood, recognised and exercised as utility at the global level by using the macro level approach of Hume's conception of justice in Chapter 4, I have not yet discussed concrete ideas or specific prescriptions to implement civilian protection. In order to conduct my research on civilian protection from the

viewpoint of military ethics, I draw on theoretical and empirical discussions and materials, primarily from the examples of the UK Armed Forces and its coalition partner, the US Armed Forces. These armies are usually considered to be two of the most modern military bodies in our time, and have also played an active and important role in international expeditionary interventions in the contemporary international arena. Chapter 5 is divided into three sections. Initially, in order to consider why civilians are not always protected in armed conflicts, I explore the four reasons that combatants fail to protect civilians from a moral–psychological point of view. Secondly, I proceed to examine military professional ethics by drawing examples primarily from the UK and US Armed Forces with regard to civilian protection in order to conclude whether or not it is possible to incorporate civilian protection into a professional code of military ethics in Western industrial democracies’ armed forces. Finally, in order to explore possible ways that civilian protection could be promoted within the framework of military ethics, I consider the role of the government and the tasks of the military in Western industrial democracies when incorporating civilian protection as part of a professional code of military ethics.

In Chapter 6, I examine the moral unjustifiability of torturing civilians in order to demonstrate the moral justifiability of civilian protection in an extreme situation.

More specifically, I develop and analyse a theory of ‘just torture’ by reference to the framework of just war theory, which is based on a moral presumption against war, in order that I can critically consider the morality or otherwise of torture; even that undertaken for interrogation purposes against civilians. Chapter 6 is divided into four sections. Initially, I open up my discussion on the ethics of torture by briefly addressing the ethical concerns surrounding torture brought up by current practice. Secondly, in order to recognise the presumption against torture, I explore the legal definitions and regulations of torture. Thirdly, in order to demonstrate the moral unjustifiability of torture, I investigate several ethical aspects of torture. Finally, in order further to demonstrate the moral unjustifiability of torture against civilians, I establish a framework of just torture, by reference to which I argue that torture is never justified in practice.

Key Concepts

Before embarking on the journey to explore the ethics of civilian protection, it seems beneficial briefly to outline the key concepts which are relevant to the discussion of this thesis; namely, international humanitarian law and just war theory.

International Humanitarian Law

According to the document created by the International Committee of the Red Cross (ICRC), the guardian of international humanitarian law (IHL), IHL 'is a set of rules, which seeks, for humanitarian reasons, *to limit the effect of armed conflict*'.¹¹ IHL is also called the law of war or the law of armed conflict, in the sense that IHL is applicable in time of armed conflict. IHL has two main objectives: the first is the protection of people who do not, or who no longer, take a direct part in hostilities, and the other is to limit the means and methods of war-fighting.

The origins of IHL go back to the rules and customs of war in antiquity, and a set of rudimentary ideas for IHL can be found in the works of classical just war theorists such as Augustine of Hippo and Thomas Aquinas in the Christian just war tradition. Aquinas's ideas concerning the rules of war were further developed by natural law scholars and jurists such as Francisco de Vitoria, Alberico Gentili, Francisco Suarez, Hugo Grotius, Samuel Pufendorf and Emerich de Vattel between the sixteenth and eighteenth centuries, in the same way that just war theory has developed in the modern context.

It was in the mid-nineteenth century that an initial set of rules recognisable as

¹¹ ICRC, 'What is International Law?' (7/2004), p. 1. Obtained from the ICRC webpage; [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf), accessed on 21/1/2008.

modern positive IHL, characterised by its focus on the scope of application to matters concerning *jus in bello*, was codified. The first of these was the Declaration Respecting Maritime Law or the Treaty of Paris (1856), which stipulates the rules concerning maritime practice in time of war. A more direct origin of IHL can be traced to the establishment of the ICRC in 1859, according to Michael Byers: ‘when the Swiss businessman Henri Dunant witnessed the aftermath of the Franco–Austrian Battle of Solferino – in which 40,000 men died, many as the result of untreated wounds – and initiated a movement that became the International Committee of the Red Cross’.¹²

Further codification of the rules of war can be found in the Instructions for the Government of Armies of the United States in the Field (the Lieber Code) adopted in 1863. Although the Lieber Code might not be considered to be IHL in a strict sense, because it was prepared during the American Civil War and applied to forces solely in the United States, it may well be considered to be the first explicit codification of a set of rules concerning the restrictions of war conduct, including the protection of non-combatants, in modern positive humanitarian law. Indeed, the idea of civilian protection can be found in Article 23 of the Lieber Code, which stipulates the general protection of non-combatant citizens, requiring that: ‘private citizens are no longer

¹² Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005), p. 115.

murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war'. Article 25 also confirms that the protection of non-combatants is considered a general rule of warfare, asserting that: 'in modern regular wars of Europeans, and their descendents in other portions of the globe, protection of inoffensive citizens of the hostile country is the rule'. According to the ICRC, the Lieber Code played a very important role in the development of IHL because it 'strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states'.¹³ The ideas of this code were reflected and further developed into the Hague Convention of 1907, which primarily regulates the means and methods of warfare.

The most systematic legal attempt to limit human suffering was undertaken after the Second World War. Contemporary IHL is found primarily in the four Geneva Conventions of 1949, and the protection of civilians is codified in the Fourth Geneva Convention. The ideas and ideals of the Fourth Geneva Convention to mitigate the effect of war were further developed and articulated in its Additional Protocols of 1977, in which the current legal source of the codification of the protection of civilians is

¹³ ICRC webpage: <http://www.icrc.org/ihl.nsf/INTRO/110?OpenDocument>. Accessed on 23/1/2008.

found. Details of the legal framework for civilian protection will be examined in Chapter 1.

Just War Theory

Just war theory is a set of ideas concerning rightness and wrongness of conduct appertaining to war. Its origins can be traced back to the teachings of Augustine of Hippo, who is often considered to be the father of just war theory. A general form of just war theory consists of a set of criteria or principles with which to form a moral judgement of war itself and also of conduct within the theatre of war. There is a distinction, which is usually accepted when considering conditions of just war, between *jus ad bellum* (justice of war) and *jus in bello* (justice in war), into either of which categories several criteria fall.¹⁴ In the words of James Turner Johnson, *jus ad bellum* is a set of ‘concepts relating to the justification for going to war’, and *jus in bello* is a set of concepts concerning the ‘restraining or limiting of war once begun’.¹⁵ The number of criteria varies according to the theorist, and the numbers usually range between six and

¹⁴ Nigel Dower *World Ethics: The New Agenda* (Edinburgh: Edinburgh University Press, 1998), pp. 121–2. It is worthy of note that not every just war theorist agrees on the distinction between *jus ad bellum* and *jus in bello*. For example, John Finnis argues that the distinction ‘is scarcely part of the Catholic natural law tradition’ and that it is not a ‘helpful distinction’, in ‘The Ethics of War and Peace in the Catholic Natural Tradition’, in Terry Nardin (ed.), *The Ethics of War and Peace* (Princeton, NJ: Princeton University Press, 1996), pp. 15–39, at p. 25

¹⁵ James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton Princeton University Press, 1981), pp. xxii-xxiii.

nine; at most eleven.¹⁶ The criteria are not independent of one another, but rather a set of principles which are inter-connected and interactive when being applied and operated for moral judgement. Below is a brief introduction to the seven most commonly used just war criteria (five for *jus ad bellum*: just cause, proper authority, right intention, last resort, proportionality in ends, and probability of success; and two for *jus in bello*: non-combatant immunity and proportionality in means).

Just Cause: the criterion of just cause states that war must be waged on rightful grounds. Self-defence, for example, is almost always accepted as a just cause,¹⁷ and the self-defence justification against aggression coincides with international law as stipulated in Article 51 of the UN Charter. Punishment and restitution are also regarded as just causes.¹⁸ Johnson argues that in the classical just war tradition, in contrast to

¹⁶ For example, nine criteria are listed in 'The Challenge of Peace: God's Promise and Our Response', the Pastoral Letter on War and Peace of the US Catholic Bishops. Seven conditions are for *jus ad bellum*: (1) Just Cause, (2) Competent Authority, (3) Comparative Justice, (4) Right Intention, (5) Last Resort, (6) Probability of Success and (7) Proportionality; and two are for *jus in bello*: (8) Proportionality and (9) Discrimination. Reprinted in Jean Bethke Elshtain (ed.), *Just War Theory* (New York: New York University Press, 1992), pp. 77–168. See also Richard B. Miller (ed.), *War in the Twentieth Century: Sources in Theological Ethics* (Louisville, KY: Westminster/John Knox Press, 1992), pp. xiv-xv. On the other hand, David Fisher counts six in total: four for *jus ad bellum* (competent authority, last resort, just cause, and proportionality), and two for *jus in bello* (proportionality and non-combatant immunity). David Fisher, *Morality and Bomb: An Ethical Assessment of Nuclear Deterrence* (London: Croom Helm, 1985), p. 16. In another example, John Howard Yoder lists eleven; six criteria for *jus ad bellum*: (1) Legitimate Authority, (2) Just Cause, (3) Right Intention in objective sense, (4) Right Intention in subjective sense, (5) Due Process, and (6) Necessary, and five for *jus in bello*: (7) Proportionality, (8) Immunity of the Innocent, (9) Discrimination, (10) Dignity of Humankind as Rational and Social, and (11) Compliment of Positive Law and Treaty. John Howard Yoder, *When War is Unjust: Being Honest in Just-War Thinking, Second Edition* (Maryknoll, NY: Orbis, 1996), pp.147–161. Richard Norman, among others, counts a 'formal declaration of war' as a *jus ad bellum* criterion, in *Ethics, Killing and War*, p. 118.

¹⁷ An exception is pointed out by Fisher: 'a state, even if attacked, does not *eo ipso* have a just cause, if its threatening and provocative or genocidal behavior invited such attack'. Fisher, *Morality and Bomb*, p. 23.

¹⁸ Harries, *Christianity and War*, p. 65.

positive international law, ‘retaking something wrongly taken’ and ‘punishment against evil’ may also be included in this heading.¹⁹ Contrary to this view, the contemporary Catholic natural law version of just war tradition is inclined to justify war only for self-defence purposes.²⁰ Recent ‘representatives’ to the Catholic natural law tradition (such as Pius XII, John XXIII and the Second Vatican Council) ‘have spoken as if the only justifying ground for war were defense’, observes Finnis.²¹ Conversely, Johnson argues that the two classical ideas of punishment and restitution ‘have been absorbed into a broadened concept of defense in contemporary international usage’.²² Protection of human rights is also suggested as a just cause by David Luban, who argues that infringement of ‘socially based human rights’ would be a just cause.²³ Fisher conditionally agrees to include the protection of human rights, such as stopping genocide, as a just cause, ‘provided it is kept as minimal as possible’.²⁴ However, it may be a matter of interpretation whether the protection of human rights may be included in the criterion of just cause.

¹⁹ James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), pp. 26–7.

²⁰ Jean Bethke Elshtain, *Women and War* (Chicago: University of Chicago Press, 1987), pp. 152–4.

²¹ Finnis, ‘The Ethics of War and Peace’, p. 23.

²² Johnson, *Morality and Contemporary Warfare*, pp. 29–31.

²³ David Luban, ‘Just War and Human Rights’, *Philosophy & Public Affairs*, Vol. 9, No. 2 (Winter 1980), reprinted in Charles Beitz (ed.), *International Ethics* (Princeton: Princeton University Press, 1985), pp. 195–216. A ‘socially based human right’ is a ‘right whose satisfaction is necessary to the enjoyment of any other rights’, according to Luban, who employs this concept from Henry Shue. Luban, ‘Just War and Human Rights’, pp. 209–10, and p. 209n24

²⁴ Fisher, *Morality and Bomb*, p. 23.

Proper Authority: the criterion of proper authority, sometimes also called *proper*, *legitimate* or *competent* authority, stipulates that war must be waged by a legitimate sovereign authority. Traditionally the legitimate authority to wage war is limited to sovereigns. However, in contemporary international relations, it is usually understood to mean a state or group of states, and exceptionally, some non-state agents such as self-determination movements. One remarkable development in modern history is that the UN Security Council is sanctioned by its resolutions to use, or to authorise a state or a group of states to use, force. Johnson argues that the ‘core concept of right authority has the *prima facie* effect of favoring certain interventionary uses of force in the interest of internationally recognized standards of justice’.²⁵ One extreme interpretation may be a ‘conservatively interpreted’ one, which is ‘to rule out all non-state or unofficial resort to physical force (other than by individuals in self-defence)’ and therefore ‘serves to justify all *de facto* government and leads to political quietism’, as Coates warns.²⁶ However, it is a matter of debate whether states alone are qualified as legitimate authorities to use force. Whether or not it actually would result in maintenance of the status quo depends on the interpretation of other criteria, such as that of just cause. If the protection of human rights and some forms of

²⁵ Johnson, *Morality and Contemporary Warfare*, p. 31.

²⁶ Coates, *The Ethics of War*, p. 128.

pre-emptive attack were accepted as just causes, then it does not necessarily mean that some states, such as those which are tyrannical or expansionist, are not safe from attack by other states. By contrast, the chances of war might increase if a state or group of states decided to diffuse certain values (say, democracy and freedom) by force or took up a war on oppression.

Right Intention: the criterion of right intention stipulates that war must be waged for an appropriate purpose, which is, as commonly understood, to achieve peace. Michael Donelan argues that the principle of right intention is the cornerstone of just war ethics:

The mistress principle of all the six principles of Just War is Right Intention: from the first to last in war there must be no other aim than enforce justice and make peace. If this is not our sole intention, and we are moved by greed, envy, pride and other such passions our authority is questionable, our Cause is suspect, and we lose sight of Discrimination and Proportion.²⁷

It is always difficult to determine a state's true intention for waging war, not least because national interest is always involved, and thus there are always suspicions and doubts about the true intention. A question may arise: is the war really waged along with

²⁷ Michael Donelan, 'Minimum Force in War', *International Relations*, vol. 12 no. 5 (August, 1995), pp.37-45, at p. 37.

the right intention in accordance with just cause? One might argue that this criterion leaves room for accommodating national interest as long as it does not override or damage the right intention but keeps it in accordance with just cause. Warning that a ‘puritanical’ interpretation of the criterion of right intention is wrong, as a ‘common assumption that the only just war is a *disinterested* one is not shared by the just war tradition’, Coates argues that ‘justice and interest are not mutually exclusive’ and therefore the ‘real issue is whether the interest that is present is itself legitimate, and whether the legitimate interest is relevant to the case of war’.²⁸

Last Resort: The principle of last resort states that war should only be waged as a final necessity after all possible peaceful means to solve the conflict have been exhausted. This principle appears to be standard practice, according with international law, deontological reasoning, and perhaps common sense. However, it could be argued that there are some cases in which the use of military force at the very first moment brings a better outcome in terms of justice in war, and consequently reduces injustices, such as preventing the killing of a huge number of civilians. There are two ways in which just war theorists could respond to this challenge. One response may be to lower the threshold of last resort or abandon the principle entirely on the above grounds. The

²⁸ Coates, *The Ethics of War*, p. 162.

other may be to move the ideal of a just war towards the end of the absolutists; that is, to keep the threshold at the high level and make the justification for war more restrictive. Again, the position one takes seems to depend on how to interpret this criterion by itself and/or in relation to other criteria.

Proportionality in Ends: the criterion of proportionality in ends stipulates that the use of force must be appropriate in terms of ends and means, or the proper cost-effectiveness of war. The total evil of a justifiable behaviour cannot outweigh the good achieved by its execution. Proportionality possesses a feature characteristic of consequentialist ethics. Harbour comments: ‘The just war tradition completely forbids intentionally causing wrongful harm, but the tradition switches to a consequentialist mode to justify foreseeable but unintended harm’.²⁹ The problem is, in Coates’s words, that ‘the application of the principle in an exaggerated and uncritical way is commonplace’. Perhaps Coates’s suggestion is correct that ‘inclusively and evenly’ applying the criterion of proportionality is a ‘key element in the moral assessment of war’.³⁰ However, again, whether and how the criterion may be applied ‘inclusively and evenly’ may be a matter of interpretation.

Probability of Success: the criterion of reasonable hope of success is, like the

²⁹ Frances V. Harbour, *Thinking About International Ethics: Moral Theory and Cases from American Foreign Policy* (Boulder: Westview, 1999), p. 122.

³⁰ Coates, *The Ethics of War*, pp. 182, 184.

criterion of proportionality in ends, a consequentialist one. This criterion is based on ‘prudential calculation of the likelihood that the means used will bring the justified ends sought’.³¹ Harries argues that this criterion is an ‘extension’ of the principle of proportionality in ends.³² As does Fisher, who expounds his reasoning: ‘because any assessment of the overall balance between benefits and disbenefits likely to accrue from a war must inevitably be weighted by the probabilities of the various outcomes, and, hence, take into account the probability of success’.³³ Coates also observes the ‘interlocking’ of the criteria of probability of success and proportionality.³⁴

Non-combatant Immunity and Proportionality in Means: in just war theory, civilian protection is discussed in the *jus in bello* framework as the principle of non-combatant immunity or the principle of discrimination, together with the other principle of proportionality. The principle of non-combatant immunity ‘emerged, as a formal ethical rule, rather late in the tradition’, according to Richard Harries.³⁵ Details of these two *jus in bello* principles will be discussed in Chapter 2.

³¹ Jonson, *Morality and Contemporary Warfare*, p. 29.

³² Harries, *Christianity and War*, p. 65.

³³ Fisher, *Morality and Bomb*, p. 24.

³⁴ Coates, *The Ethics of War*, p. 179.

³⁵ Harries, *Christianity and War*, p. 76.

Methodology

The methodology used in this thesis combines different types of methodology common to the field of applied ethics, as the thesis is situated within this discipline; more specifically, within the discipline of war/military ethics and international ethics. Applied ethics is a branch of ethics primarily concerned with our practices and activities, such as medicine, business, science and technology and war.

The term ‘applied ethics’ might imply a simple model; namely, applying an ethical theory to issues that may cause ethical concerns. This methodological model can be called a high-level approach. However, there are other methodological models of applied ethics such as a mid-level approach, a contextualist approach and casuistry. Ruth Chadwick’s definition categorises different methodological models of applied ethics (see Table 1).

Table 1: Methodological Models of Applied Ethics

1. Top-down models
 - a. theory application such as fruits of theory approach
 - b. mid-level principle application
2. Various forms of contextualism
3. Bottom-up model such as casuistry³⁶

³⁶ Ruth Chadwick, ‘What is “applied” in Applied Ethics?’ *Journal of Applied Ethics and Philosophy* Vol.1 (2009), pp. 1–7 at p.2.

The fruits of theory approach is, according to Chadwick, based on the view that ‘applied ethics must involve application of *some* ethical theory’, and is one of the most commonly used methodological models of applied ethics. Indeed, some of the most influential works of war ethics in the early period of applied ethics in 1970s, such as those of Thomas Nagel and George Mavrodes, are written from this methodological model, as I will consider in the Literature Review section.

The strength of this approach is that it often provides a clear-cut moral judgment and reasoning, by applying a theory when considering the moral rightness or wrongness of a particular act. For example, imagine a case in which killing an innocent person would save the lives of five innocent people. On the one hand, if we apply deontological ethics – one of the two dominant approaches in applied ethics that prescribes following obligations – if not killing an innocent person is considered to be an obligation we should perform, then deontological ethics prescribes not killing the innocent, despite the fact that such an omission causes the death of the other five. On the other hand, if we apply consequentialist ethics – the other dominant approach, which prescribes bringing out the best consequence possible from all options – and if saving the maximum number of lives is considered to be the best consequence, then

consequentialist ethics prescribes killing the single innocent person in order to save the lives of the five others.

The weakness of this latter approach is that it often overlooks particularity of a situation and context in which an action is undertaken. Let us consider the consequence: if killing the innocent person is a one-off situation, then the judgment can be considered to be right for a short-term consequence, at least; however, what if we were to consider that killing a small number of innocent people in order to save a large number of innocent people could become common practice. If it becomes common practice, it might bring about detrimental long-term consequences, such as insecurity of society and instability of law and order. If we use the fruits of theory approach, it is indispensable for us to take into account the background and context in which theories are applied to judgment of a particular act.

The mid-level principle approach attempts, again, in Chadwick's words, 'both to be in accordance with the "common morality" and to be reconcilable with different underlining theories'.³⁷ One of the most important works in applied ethics that employs this mid-level principle approach is *Principles of Biomedical Ethics* written by Tom Beauchamp and James Childress, in which they propose four principles; namely,

³⁷ Chadwick, 'What is "applied" in Applied Ethics?' p. 3.

autonomy, beneficence, harm, and justice.³⁸ By reference to these four principles, they consider ethical dilemmas in medical treatment and healthcare policy.

One of the greatest merits of employing the mid-level principle approach for constructing an argument is that when considering ethical dilemmas by reference to principles, it is relatively more simple and straightforward than employing the fruits of theory approach, in which an ethical theory is involved. However, a problem with the mid-level principle approach occurs inherently when two or more principles conflict. One solution to the above problem is to compare and assess the conflicting principles by reference to the moral significance of the various situations, and then to decide to employ one against others. The question remains whether or not the same principle is employed by anyone else in the same situation. The mid-level approach does not give us a clear answer, but responds that principles provide a common language so that we can locate, understand, communicate and consider ethical dilemmas with others. Indeed, that is the strength of this approach.

Contextualism is, according to Chadwick, ‘more concerned to apply traditions of reflection that emphasise context’, and ‘exercises a stronger role in discussions of the

³⁸ Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* 5th ed. (Oxford: Oxford University Press, 2001).

responsibility of professionals’.³⁹ In this thesis, I will primarily focus on professional ethics for meso (or group-focused) level analysis, which can appropriately be categorised as contextualism. In Chapter 5, in order to explore civilian protection from the perspective of the professional ethics of military personnel, I use this meso level approach,

Chadwick briefly defines casuistry as a ‘case analogy’ approach, in the sense that it ‘starts from cases and principles (analogous to case law), and emerges from these’.⁴⁰ In order better to understand this methodological approach as used in this thesis, however, I need to examine further the concept of casuistry, not only because Chadwick discusses casuistry as a form of anti-theory particularism, to which I do not fully commit in the thesis, but also because I find it of greatest benefit to use casuistry as a method of discussion to explore *grey areas* in which moral judgments are involved.

The most fruitful form of casuistry, from which this thesis benefits most, can be characterised in the following way: in Hugo Adam Bedau’s words, casuistry is a ‘multiple triangulation of the region in which the best answer lies, the parameters or boundaries of the region being determined by the relevant ethical principles’.⁴¹ Its

³⁹ Chadwick, ‘What is “applied” in Applied Ethics?’ pp. 3–4.

⁴⁰ Chadwick, ‘What is “applied” in Applied Ethics?’ p. 4.

⁴¹ Hugo Adam Bedau, *Making Mortal Choices: Three Exercises in Moral Casuistry* (Oxford: Oxford University Press, 1997), p. vii.

method is, again in Bedau's words: 'the solution to a morally problematic case is obtained by comparing and contrasting its features with various paradigm cases whose moral status is settled', and then the 'solution to the problem cases rely both on moral principles and maxims that express the received wisdom concerning such paradigms and on analogies to them'. Casuistry will therefore proceed in the following way:

One thus attempts to find the best advice for the decision-makers by canvassing a wide range of possibilities, no one of which is dispositive – no one of which zeros in precisely on the target. The principles in question and the counsel they provide (given the facts of the case) emerge, bit by bit, at various stages of analysis.⁴²

Indeed, casuistry is not very popular as a methodological tool for discussion in applied ethics in general and in ethics of civilian protection in particular. Michael Walzer employs casuistry in his work *Just and Unjust Wars*, arguing that 'the proper method of practical morality is casuistic in character'.⁴³ Casuistry used in this thesis is thus a methodological framework for discussion, in the sense that this approach starts from clear-cut cases and examples on which no or few moral disagreements are involved, and then proceeds to not-so-clear ones on which moral judgments may or may not differ, then further to ambiguous ones on which moral agreement might rarely be attainable.

⁴² Bedau, *Making Mortal Choices*, pp. 101, vii.

⁴³ Walzer, *Just and Unjust Wars*, p. xxx.

The primary role of casuistry envisaged in this thesis is to elucidate some of the most morally ambiguous and ambivalent cases and examples so that moral judgments can be reflectively attained by reference to the theories or principles concerned.

In order to explore how the issue of civilian protection can best be discussed, this thesis uses several different methodological approaches of applied ethics; namely, a fruits of theory approach, a bottom-up approach or micro level analysis, casuistry, and an approach of professional ethics as a contextualist approach or meso level analysis. However, these methodological approaches are not exclusive to each other when discussing the ethical issues of civilian protection. In order to consider the moral status of civilians in Chapter 1, for example, I consult not only with ethical concepts and principles, but also with contextualist and casuistic approaches. More specifically, in order to argue that the concept of moral innocence cannot fully explain the moral status of civilians, I take a casuistic approach by comparing a pacifist conscript with enthusiastic war-supporting civilian. In Chapter 4, I primarily consult with a top-down approach, but also use a contextualist one; first, in order to understand civilian protection as justice in war, I apply Hume's theory of justice by extending the scope of justice from a domestic level to an international one, and then, in order to defend the revised Humean perspective on civilian protection as utility at the global level, I draw

attention to the context in which civilian protection is actually exercised, implemented and enforced at international and domestic levels.

To summarise, the methodology used in this thesis might be called a reflective equilibrium in a broader sense, which is aimed at searching for a point of equilibrium between theories and principles, and producing a considered moral judgment by reference to contexts, cases and examples.

Literature Review

There is a large quantity of literature concerning the ethics of civilian protection: just as one of the main concerns in the study of normative ethical theories is exemplified in a debate between consequentialism and deontology, war ethics is also discussed on the same axis. The majority of the literature of war ethics is written from the consequentialist approach, and most of the rest from the deontological approach.

There is a huge volume of literature on non-combatant immunity argued from a consequentialist approach. Several works on war ethics employ just war criteria, especially a *jus in bello* criterion of non-combatant immunity. One of the most acclaimed and influential works on this subject matter is Walzer's *Just and Unjust War*, which is written from a consequentialist perspective, despite the fact that he uses

casuistry as a methodology for discussion. Although Walzer argues for the distinction between combatants and non-combatants as two classes of which one is immune from attack and the other not, his consequentialist idea of civilian protection appears to be epitomised in his concept of ‘supreme emergency’, which allows agents to break the code of non-combatant immunity if and only if this prevents ‘imminent’ and ‘serious’ disaster. In other words, in what he calls the situation of ‘extremity’, Walzer, although cautiously, permits the requirement of discrimination to be relaxed or even broken when the stakes are high, such as when the survival of a nation, let alone the oblivion of civilisation, is at stake. Walzer argues:

Can a supreme emergency be constituted by a particular threat—by a threat of enslavement or extermination directed against a single nation? Can soldiers and statesmen override the rights of innocent people for the sake of their political community? I am inclined to answer this question affirmatively, though not without hesitation and worry. What choice do they have?

Walzer does not single-handedly support breaking the code of civilian immunity. Indeed, he seems to make the possibility of exceptions very rare by making the requirement that constitutes the situation ‘supreme emergency’ very strict, and actually points out the dangers of abuse in that ‘the mere recognition of such a threat is not itself coercive; it

neither compels or permits attacks on the innocent, so long as other means of fighting and winning are available'.⁴⁴ However, by the same token, this shows that Walzer, albeit reluctantly, concedes that the killing of the innocent is permissible as a last resort.

The debate on war ethics is not necessarily limited to contemporary just war thinkers. Many consequentialist moral philosophers, including utilitarians, are concerned about war ethics, primarily out of their interest to demonstrate that their theory can better be applied to worldly matters. The methodology which these philosophers prefer is thus a top-down, fruits of theory approach. There are a substantial number of works on the subject matter from the early 1970s, and one of the most interesting is R. M. Hare's discussion of the rule of non-combatant immunity examined from an utilitarian viewpoint.⁴⁵ He suggests on utilitarian grounds that breaking the rules of war might not be always unjustified.⁴⁶ From an utilitarian point of view, there would be a limitation of the rules, even though the rules are useful most of the time. Hare's two-way utilitarian moral thinking leads to the same conclusion. Similarly, J. E. Hare and Carey Joynt also argue that breaking the rules is sometimes justified, and they call the rule of non-combatant immunity a '*prima facie* rule'.⁴⁷

⁴⁴ Walzer, *Just and Unjust Wars*, pp. 254–5.

⁴⁵ R. M. Hare, 'Rules of War and Moral Reasoning', *Philosophy and Public Affairs*, 1.2 (1972), pp. 166–81.

⁴⁶ *Ibid.*, p. 177-8

⁴⁷ J. E. Hare and Carey B. Joynt, *Ethics and International Affairs* (London: Macmillan, 1982).

The protection of non-combatants is also argued from the rule-utilitarian point of view. One of the most interesting attempts to apply a rule-utilitarian ethical framework to war ethics is undertaken by Richard. B. Brandt.⁴⁸ Brandt argues that the code of civilian immunity could be broken for victory, which he thinks is an intrinsic, absolute value of utility. He then argues that the code of non-combatant immunity is wrong if the killing of civilians to stop the war means that the operation ends swiftly, thereby saving numerous lives which would otherwise have been lost in an extended war.

George Mavrodes uses utilitarian reasoning to discuss a moral obligation to comply with war conventions, by arguing that the combatant/non-combatant distinction is a convention-dependent obligation:

[The moral obligation of non-combatant immunity] is convention-dependent if and only if (1) given that a certain convention, law, custom, etc., is actually in force one really does have an obligation to act in conformity with the convention, and (2) there is an alternative law, custom, etc. (or lack thereof) such that if that had been in force one would not have had the former obligation.⁴⁹

⁴⁸ R. B. Brandt, 'Utilitarianism and the Rules of War', *Philosophy and Public Affairs* 1:2 (1972): pp. 145–65.

⁴⁹ George Mavrodes, 'Conventions and the Morality of War', in Beitz et al, *International Ethics*, pp. 75–89, at p. 84.

There are two problems with Mavrodes's argument. One is the logical ambiguity concerning the justification of which moral obligations are convention-dependent and which convention-independent. The other is his discussion of the moral relevance of such killings. Mavrodes sets out his discussion on the premise that war could be fought with the minimum moral requirements such as 'justice and proportionality', independent of conventions if these conventions were not in force. In his reasoning, the moral requirements of justice and proportionality are convention-independent obligations. However, without further clarifying the reason that civilian immunity can be regarded as a convention-dependent obligation, Mavrodes regards the protection of civilians as one of the attempts 'in the long struggle, in the western world at least, to limit military operations to "counter-force" strategies'.⁵⁰

Another issue is that his discussion falls short of explicitly showing a clear utilitarian reasoning on the moral relevance of killing non-combatants. Mavrodes seems to suppose that it is plausible for him to 'have a moral obligation to refrain from wantonly murdering my neighbours',⁵¹ but, again, he gives no further reasoning. It might be possible, although he does not expressly so argue, to assume by extendedly following his line of argument, that murdering the neighbours would be justified if it

⁵⁰ Mavrodes, 'Conventions and the Morality of War', p. 83.

⁵¹ *Ibid.*, p. 84.

were the way to prevent the deaths of the same number plus more than one. In the same manner, his act of killing would be judged wrong if he saved fewer than the number of the neighbours killed by his act. Presumably, this is because the number calculation in the consequence of these cases is the essence and the virtue of the utilitarian approach.

If this is correct, then it seems that the utilitarian approach has no rules but the rule of utility, which can be regarded as absolute. Mavrodes argues that the moral relevance of the convention is determined by the generalisation test. In utilitarian ethics, the moral duty to abide by the convention-dependent obligation is determined by whether the convention is ‘actually in force’ or not.⁵² By this formula, acting in conformity with a preferable convention which is less abided by is worse than acting in conformity with a less preferable but more abided-by convention, if the result of the former is worse than that of the latter. If the convention is operative, then it has a moral importance and thus becomes an obligation. The utilitarian approach leads to the conclusion that it is right for agents to abide by the convention-independent obligation if so doing maximises the aggregation of well-being as a whole, but that it is wrong for them to abide by the convention-independent obligation if so doing does not bring about a better state of affairs. Mavrodes, however, concedes that there might be a more

⁵² Mavrodes, ‘Conventions and the Morality of War’, p. 86.

general, convention-independent law. His recognition that there are absolute rules is, in fact, his justification of utilitarianism. In utilitarian ethics, the maximisation of utility is the only convention-independent general moral obligation. For this reason, presumably, Mavrodes has to concede that there might be convention-independent obligations in order to defend his argument. This is because by doing so he can justify the utilitarian rule of maximisation of aggregate well-being.

Other texts on war ethics are written from a deontological approach, and many of them refer to the just war formula.⁵³ Thomas Nagel, for example, argues for non-combatant immunity from an ‘absolutist’ point of view. Nagel states that the absolutist position prescribes that ‘hostility or aggression should be directed at its true object’ (that is a combatant, not a civilian) because a civilian is ‘peripheral’.⁵⁴ Richard Norman also discusses civilian immunity from a deontological, or what he calls ‘pacifist’ point of view, arguing that all killings in war are wrong, but some are ‘worse’ than others, because the difference between killing combatants and non-combatants is ‘a difference in degree, not a difference in kind’, and concluding that ‘indiscriminate attacks on the civilian population are worse than attacks on the armed

⁵³ See, for example, Oderberg, *Applied Ethics*, pp. 215–24.

⁵⁴ Thomas Nagel, ‘War and Massacre’, in Beitz et al, *International Ethics*, pp. 53–74, at p. 67.

forces of enemy'.⁵⁵ However, the position of calling all killings in war wrong seems untenable; either it simply aligns itself with Nagel's premise or collapses into pacifism when it is faced with hard cases. In the event that there are two choices between one wrong act (such as killing a combatant in Norman's framework) and a worse (such as killing a civilian) one of them must be chosen to avoid the result that both people perish as a consequence of inaction. Norman's pacifism might mean that he passively sticks to giving moral judgement, refusing to act in the death of either person, or it might mean that he would choose to act to kill the combatant in order to save the civilian thereby opting for the lesser evil, in which case his reasoning may be considered to be the same as Nagel's.

One of the most interesting works written from a deontological just war approach to civilian protection is found in James Turner Johnson's *Morality and Contemporary Warfare*, written from the perspective of a pluralist version of the deontological approach, which is called ethical pluralism or intuitionism. On the issue of civilian protection considered as part of international obligations to 'protect the victims of conflicts', Johnson argues the 'international community' and individual states have 'obligations to those who are in a target state' in the context of military

⁵⁵ Norman, *Ethics, Killing and War*, pp. 188–9.

intervention.⁵⁶ Johnson further argues that the obligation to protect the victims must be considered together with other obligations such as ‘obligations to international order’, and ‘obligation to political communities which may contribute to the ending conflicts and the succor of victims’. These competing obligations appear to cause the ‘clash of obligations’, which he calls a ‘serious problem’. Although this appears the most critical part of his moral reasoning, Johnson does not explicitly present a method to resolve the moral dilemmas brought by the conflicting obligations, and can only concede that ‘how to find the balance’ between these competing obligations, ‘unfortunately, can only be found case by case’.⁵⁷ This suggestion seems very attractive in general terms, but fails to offer specific options to deal with individual cases. This aspect of Johnson’s framework does not go further than what IHL already prescribes, and is likely to lead to the same conclusion that the consequentialist approach recommends; that is, if other obligations are considered to outweigh the obligation to protect non-combatants, then civilian protection can at best be understood as a second order rule, and may therefore be more frequently breached for the sake of discharging the superior obligations. Johnson does not consider or answer this potential problem which his argument raises.

Having surveyed some of the most influential and leading works on war ethics,

⁵⁶ Johnson, *Morality and Contemporary Warfare*, p. 102.

⁵⁷ Johnson, *Morality and Contemporary Warfare*, pp. 102–3, 112.

I have found that those works do not develop a systematic analysis or argument on ethics of civilian protection or succeed in establishing a fully committed strong case for their protection. What the relevant literature overlooks is the consideration of the ethics of civilian protection from different perspectives at different levels such as macro, meso and micro ones. More specifically, the relevant literature often commits itself to either utilitarianism or deontology in constructing an argument; in addition, the deontological arguments do not offer a sufficiently strong case for providing adequate protection for civilians in warfare.

CHAPTER 1: EXPLORING THE STATUS OF CIVILIANS IN LEGAL AND ETHICAL CONTEXTS

Introduction

In Chapter 1, I will examine the status of civilians in the legal and ethical contexts, which will provide the basis for my investigation of the ethics of civilian protection in armed conflict. In order to examine this status, I will explore the legal and ethical sources that address the status of civilians. Initially, in order to consider how both the status of civilians and civilian protection are addressed in the legal context, I will focus on the provisions of the Geneva Conventions of 1949 and the 1977 Additional Protocols to the Geneva Conventions of 1949. Secondly, I will proceed to consider the ethical reasons that civilians should be protected in armed conflict by examining ethical concepts that could differentiate civilians from combatants and justify civilian protection. In order to assess how the status of civilians can be characterised and their protection justified by ethical concepts, I will examine the five following concepts: moral innocence, innocence as harmlessness, responsibility, rights, and personal project; the first four are very frequently cited in literature on just war theory and ethics of war, while the last one is less so. When combined, investigations of these concepts will allow

me to clarify the complex issues concerning the legal and ethical status of civilians.

1. 1. The Legal Status of Civilians

In Section 1. 1, I will not only clarify the status of civilians who are protected under international humanitarian law (IHL), but also explore whether or not there is a workable definition of the status of civilians in the legal context. In other words, I will explore how IHL dictates civilian protection, to understand under which conditions civilians are entitled to protection in the legal context. The relevant legal literature potentially assists us to make sense of how civilians should be protected, because IHL clarifies some ambiguities concerning civilian protection. Although IHL might not be helpful when it comes to the issue of clarifying *why* civilians should be protected, it is a logical starting point when initially exploring the definition of civilians and the methods, procedures and conditions of protection under IHL, to give a general understanding of the status of civilians and their protection. In order to clarify the legal definition of civilians and their protection in the legal context, I must first explore the overall concept of civilian protection in armed conflict within IHL by focusing on the two basic principles of *distinction* and *proportionality*, by which the lawfulness or otherwise of harming civilians is judged. Secondly, I will examine the conditions under which the

legal code of civilian protection is applied. Finally, I will consider the limitations of the legalistic approach to civilian protection.

1. 1. 1. Legal Protection of Civilians in Armed Conflicts

In order to shed light on the foundational ideas about civilian protection in the legal context, in Section 1. 1. 1, I will examine the two basic principles for the protection of civilians. The legal protection of civilians in situations of armed conflict is codified in the provisions of IHL, in which civilian protection is based on the two basic principles of distinction and of proportionality, which are both confirmed in customary IHL as well as formal treaty-based IHL.

Firstly, I will consider the principle of distinction, which stipulates the basic rule that ‘the parties to the conflict must at all times distinguish between civilians and combatants’, that ‘attacks may only be directed against combatants’, and that ‘attacks must not be directed against civilians’.⁵⁸ According to the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, which clearly states the official view of the International Committee of the Red Cross (ICRC) on the Additional Protocols, this principle of distinguishing civilians from

⁵⁸ ICRC, *Customary International Humanitarian Law, Vol. 1: Rules*, (eds.) Jean-Marie Henckaert and Louise Doswald-Beck (Cambridge, Cambridge University Press, 2005), p. 3.

combatants is a ‘basic rule’ for the protection of civilians because it is the ‘foundation on which the codification of the laws and customs of war rests’. It reads:

In order to ensure respect for and protection of the civilians population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁵⁹

The principle of distinction in the case of international armed conflict is codified in Articles 48 and 51 of the 1977 Additional Protocol I to the Geneva Conventions of 1949. Article 48 stipulates the basic rule of distinction: ‘the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’.⁶⁰ Subsequently, Article 51 codifies the protection of civilian population in detail. In Paragraph 1, protection of civilians is spelled out as ‘general protection against dangers arising from military operations’.⁶¹ Attacks against civilians are prohibited in Paragraph 2, and indiscriminate attacks against civilians are prohibited

⁵⁹ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (eds.) Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, with Jean Pictet (Geneva: Martinus Nijhoff, 1987), p. 598.

⁶⁰ Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I, 1977), Art. 48.

⁶¹ AP(I), Art. 51, para. 1.

in Paragraph 4. Article 51 is, according to the *Commentary*, ‘one of the most important articles in the Protocol’ because it ‘explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities’.⁶² Thus the principle of distinction sets out the fundamental guideline for the protection of civilians in international armed conflict.

In addition, the principle of distinction is also applicable to non-international armed conflicts. General protection of civilians in non-international armed conflicts is codified in Article 13 of Additional Protocol II, which reads that civilians ‘shall not be the object of attack’.⁶³ According to the *Commentary*, the ‘absolute prohibition of direct attacks’ against civilians in times of non-international armed conflict is essential. ‘To ensure general protection for the civilian population consequently implies’, according to the *Commentary*, ‘an absolute prohibition of direct attack against the civilian population as such, or against civilians’.⁶⁴ It can therefore be concluded that the principle of distinction has been developed with the purpose of providing legal protection of civilians in both international and non-international armed conflict, which is the basic premise of IHL.

⁶² ICRC, *Commentary*, p. 615.

⁶³ Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II, 1977), Art. 13.

⁶⁴ *Commentary*, pp. 1448–9.

The second basic principle for civilian protection in the legal framework is the principle of proportionality, which stipulates that the use of military force should not be disproportionate in relation to incidental civilian losses. The principle can be explained in the following way: ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited’.⁶⁵ In the same vein, the *Commentary* stipulates that combatants and military objects ‘may be attacked whatever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage’.⁶⁶ This view of the interpretation of the principle of proportionality for civilian protection to prevent unnecessary civilian losses and minimise unavoidable incidental civilian losses can also be found in literature such as the *Manual of the Law of Armed Conflict*, commissioned by the UK Ministry of Defence. It reads: ‘The principle of proportionality is a link between the principles of military necessity and humanity. It is most evident in connection with the

⁶⁵ ICRC, *Customary IHL*, p.46. Similar wordings are also found in AP (I) Art. 51, para. 5(b).

⁶⁶ ICRC, *Commentary*, p. 620.

reduction of incidental damage caused by military operations'.⁶⁷ This principle is also reflected in the provisions codifying precautionary measures in Article 57(2)(a)(iii) of Additional Protocol I, which stipulates that the military planners and commanders shall 'refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians damage to civilian objects, or combination of thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁶⁸ In support of this view, Article 57(2)(b) stipulates that 'attack shall be cancelled or suspended if it becomes apparent...that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination of thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁶⁹ Thus, the principle of proportionality has been created with the intention of limiting harm and damage inflicted upon civilians.

In Section 1. 1. 1, I have outlined the two basic principles of distinction and proportionality in order to clarify how civilian protection is envisaged and codified in the legal framework relating to armed conflicts.

⁶⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 2.6.2, p. 25.

⁶⁸ AP (II), Art. 57, para. 2(a)(iii).

⁶⁹ AP(II), Art. 57, para 2(b).

1. 1. 2. Conditions of Protection

In Section 1. 1. 2, I will proceed to examine the conditions of civilian protection in order to consider under which circumstances civilians forfeit, retain and/or regain their legal status as protected people. In order to clarify this point, I will consider the conditions under which civilians are entitled to the status of protected people.

The protected status of civilians in IHL depends on the basic condition that they do not directly participate in hostilities: this is confirmed in national by-laws of the UK, for example, as well as in IHL. Article 51(3) of Additional Protocol I stipulates: ‘Civilians shall enjoy the protection afforded by this Section, unless and for such times as they take a direct part in hostilities’.⁷⁰ In other words, civilians are entitled to protected status as civilians unless and until they commit ‘hostile acts’ which are ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’. This viewpoint is reinforced in the *Commentary*, which states that the ‘immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts’.⁷¹ Similarly, in non-international armed conflicts, individual civilians are entitled to ‘general protection

⁷⁰ AP(I), Art. 51. para. 3.

⁷¹ ICRC, *Commentary*, p. 618.

against the dangers arising from military operations'.⁷² At the level of national by-law, civilian immunity is guaranteed in several countries. For example, in the UK Army's *Manual of the Law of Armed Conflict*, civilian protection is prescribed: 'Those who do not take an active part in hostilities are to be spared from direct attack and, so far as possible, from the incidental effects of military operations'.⁷³ Similarly, the US Army's Field Manual implicitly confirms that civilian individuals who do not participate in hostilities are entitled to protection under the Geneva Conventions of 1949, by stating that they nevertheless lose their right to protection if and when taking part in hostilities.

It reads:

Where, in a territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspect of or engaged in activities hostile to the State, such individual person shall not be entitled to claim such rights and privileges under the present Conventions as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.⁷⁴

These legal provisions indicate that non-participation in direct hostilities is the key condition under which civilians are entitled to protection.

⁷² AP (II), Art. 13.

⁷³ UK Ministry of Defence, *Manual*, p. 389.

⁷⁴ US Department of the Army, *Field Manual* 27-10 (Washington D.C., 18/71956), ch. 5, section 1, para. 248a.

While no provisions of the Geneva Conventions and their Protocols explicitly stipulate under which circumstances civilians forfeit their right to protection, the *Commentary* mentions that they do so when they take a direct part in hostilities. Commentaries on Article 13(3) of Additional Protocol II clearly state the conditions in which civilians forfeit their right to protection: ‘civilians lose their right to protection under this Part if they take a direct part in hostilities and throughout the duration of such participation’. The rationale for this is, according to the *Commentary*, that ‘there is a sufficient causal relationship between the act of participation and its immediate consequences’.⁷⁵ These commentaries indicate that civilians retain their legal status as protected people until and unless they take part in hostilities, and that those civilians who are deprived of their legal status as protected people due to direct participation in hostilities regain their legal status as protected people once they cease to play their part in hostilities.

In Section 1. 1. 2, I have outlined the conditions under which civilians are entitled to protected status. In addition, I have explained the fundamental condition under which civilians forfeit their right to this status.

⁷⁵ ICRC, *Commentary*, p. 1453.

1. 1. 3. Limitation of the Legalistic Approach to Civilian Protection

In Section 1. 1. 3, I will assess the limitations of the legalistic approach to civilian protection. As has been clarified in Sections 1. 1. 1 and 1. 1. 2, the provisions of IHL are useful to shed light on the complex issues concerning the definition of civilians, the status of civilians and the condition of their protection. However, there are problematic issues in the legalistic approach, in that IHL does not always give a clear-cut distinction between civilians and combatants applicable to the realities in the battlefield. There are two main points worthy of examination in order to reveal the limitations of the legalistic approach to civilian protection: one is technical and the other subjective. The first problematic issue to consider is the applicability of the principle of distinction; the second is the interpretation of the legal provisions concerning civilian protection.

The first problem arises because the legalistic approach leaves some ambiguities in applying the provisions, in which the definition of civilians and the condition of their protection are codified, to the actual, specific situations in armed conflict. The problem regarding the applicability of distinction between civilians and combatants in contemporary modes of warfare is acknowledged by lawyers and practitioners. For example, Jacob Kellenberger, the then ICRC President, conceded in an official statement that the application of the legal provisions to actual practice ‘has

often proved problematic'. In Kellenberger's words:

The implementation of the principle of distinction is further challenged by the trend of the military to use civilian infrastructure, telecommunications and logistics also for military purposes. Such practices may be difficult to reconcile with states' obligations to 'avoid locating military objectives within or near densely populated areas' and to 'take the other necessary precautions to protect civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations' to the maximum extent feasible.⁷⁶

In the same vein, this type of concern was expressed in the *Commentary* more than 15 years prior to the statement above. It states:

There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.⁷⁷

When discussing the case of non-inter-state/intra-state armed conflict, the applicability

⁷⁶ ICRC, an official statement by Jacob Kellenberger, 'International Humanitarian Law at the Beginning of the 21st Century', at the 26th Round Table in San Remo on current problems of international humanitarian law 'The two Additional Protocols to the Geneva Conventions: 25 year later - challenges and prospects' (5/9/2002).

⁷⁷ ICRC, *Commentary*, p. 619.

of the principle of distinction becomes even more ambiguous. State practice is, according to *Customary International Humanitarian Law*, ‘ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians’.⁷⁸ This is not only because Additional Protocol II does not contain a definition of civilians or the civilian population, but also because most military manuals ‘define civilians negatively with respect to combatants and armed force and are silent on the status of members of armed opposition groups’.⁷⁹

In addition to the above discussed difficulties, the second major problem surrounding the legalistic approach to civilian protection is the interpretation of the legal provisions concerning this protection. This is not only because there are competing interpretations of the legal provisions, but also because these interpretations are often contested. In order to illustrate how the legal provisions concerning civilian protection are differently interpreted, I will look at the two different interpretations of the principle of proportionality, explored in Section 1. 1. 1 as one of the two principles that are IHL’s backbone on civilian protection. The principle of proportionality, codified in Article 51(5)(b) of Additional Protocol I, prohibits ‘an attack which may be expected to cause

⁷⁸ ICRC, *Customary IHL*, p. 17.

⁷⁹ *Ibid.* One notable exception is, according to *Customary IHL*, the military manual of Colombia, in which the term civilians are defined as ‘those who do not participate directly in military hostilities (internal conflict, international conflict)’.

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.⁸⁰

The core issue of this provision for civilian protection is how to interpret incidental losses as being *not excessive* in relation to military advantage. There are at least two points of view on the interpretation of the principle of proportionality. The first view contends that humanitarian considerations prevail over military considerations when they are in conflict or in question, and the second view considers that military interests override humanitarian interests. The first view is, for example, expressed in the *Commentary*, which states that humanity prevails over military necessity when these two are in conflict. It states:

Of course, the disproportion between losses and damages caused a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interest of the civilian population should prevail...⁸¹

This restrictive interpretation safeguards the principle of proportionality against sliding down the scale of being proportionate towards the less restrictive side. Evidence of this

⁸⁰ AP (I), Art. 51, para. 5(b).

⁸¹ ICRC, *Commentary*, p. 626.

can also be observed in the *Commentary*, which states that the idea that ‘civilian losses and damages may be justified if the military advantage at stake is of great importance’ is ‘contrary to the fundamental rules of the Protocol’ concerning civilian protection. The *Commentary* sets the threshold of prohibition very high, arguing that ‘the Protocol does not provide any justification for attacks which cause extensive civilian losses and damages’ and that ‘incidental losses and damages should never be extensive’. Thus, in this limiting interpretation of the principle of proportionality, according to the *Commentary*, the principle ‘only intervenes when it is not possible to ensure the total immunity of the population’.⁸²

Contrary to this restrictive interpretation of the principle of proportionality, the second interpretation is less restrictive and inclined to take the *sliding scale* into consideration. By sliding scale, I mean an utilitarian calculation to justify such ideas as ‘the greater the justice of my cause, the more rules I can violate for the sake of the cause—though some rules are always inviolable’, in Michael Walzer’s words. When this sliding scale is applied, as Walzer points out, this ‘leaves only the restraint of usefulness and proportionality’ and ‘makes way for those utilitarian calculations that rules and rights are indented to bar’.⁸³ A. P. V. Rogers, for example, argues in the line of

⁸² ICRC, *Commentary*, pp. 626, 1450.

⁸³ Walzer, *Just and Unjust Wars*, p. 229–30.

the sliding scale framework, that the scale and degree of the principle of proportionality interpreted and applied are determined by the nature of military objective: ‘Clearly, the more important the military objective, the greater the incidental losses before it could be said that the rule of proportionality had been violated’.⁸⁴ In the same vein, Michael N. Schmitt argues that ‘the extent of harm and damage is relevant only in relation to the military advantage reasonably expected as the attack was launched’ because the ‘standard’ for the principle of proportionality ‘is “excessive” (a comparative concept), not “extensive” (an absolute concept)’.⁸⁵ In order to consider this interpretation, take the US bombing in Baghdad at the beginning of the 2003 Iraq War. The so-called *shock and awe* bombing campaign using cruise missiles aimed at various targets in and around Baghdad at the beginning of war in March 2003 reportedly caused substantial damage to civilians and their property.⁸⁶ This level of damage might be considered to be acceptable collateral damage if the stakes of war are high. This line of thought is succinctly expressed in the words of Donald Rumsfeld, then US Secretary of Defence; ‘Ultimately, if it’s a high enough value target, you accept a higher risk of casualties’.⁸⁷

⁸⁴ A. P. V. Rogers, *Law on the Battlefield* 2nd ed. (Manchester: Juris Publishing, 2004), pp. 21–2.

⁸⁵ Michael N. Schmitt, ‘Precision attack and international humanitarian law’, *International Review of Red Cross* 859 (2005), pp. 445–66 at p. 457.

⁸⁶ John F. Burns, ‘A Nation at War: Baghdad; Officials in Iraq voice defiance after airstrikes’, *New York Times* (23/3/2003), A1; and Suzanne Goldenberg, ‘War in the Gulf: Rogue Missile wrecks home: Target miss reduces five Baghdad houses in rubble’, *Guardian* (24/3/2003), p. 10.

⁸⁷ Quoted in Eric Schmitt, ‘A nation at War: Civilians; Rumsfeld says dozens of important targets have been avoided’, *New York Times* (23/3/2003), B12.

These two different interpretations of the principle of proportionality show us that methods of interpreting the fundamental principle of IHL are still contested among legal experts. This in turn implies that the legal concepts and terms used for civilian protection in IHL are capable of, and indeed at risk of, being misused and abused for purposes other than the protection of civilians (i.e. military and political advantage).

In Section 1. 1, in order to understand civilian protection outlined in the legal context, I have considered the legal status of civilians and their protection in IHL. Initially, I have considered the overall concept of civilian protection in armed conflict in IHL by focusing on the two basic principles of distinction and proportionality for the protection of civilians. Secondly, I have considered the conditions under which the legal code of civilian protection is applied. Finally, I have argued that the limitation of the legalistic approach to civilian protection is that the degree of protection of civilians depends on the interpretation of proportionality envisaged in IHL. I have also argued that this characteristic of proportionality potentially becomes harmful to civilians if proportionality is loosely interpreted and applied in favour of military and political agendas that do not coincide with the maximum protection of civilians. I have also discovered that IHL is less helpful for explaining why civilians should be protected. In Section 1. 2, therefore, in order to explore the reasons for civilian protection, I will

examine ethical concepts that can characterise the status of civilians and justify their protection.

1. 2. Concepts for Distinction of Civilian Status and for Justification for Protection

Having discussed the status of civilians and the condition of their protection in the legal framework in Section 1. 1, in Section 1. 2 I will explore the reasons that civilians should be protected in armed conflict. In order to consider why civilians should be protected, I will explore five concepts emerging from the literature of war ethics and just war theory that could characterise the status of civilians and justify their protection in the ethical context; namely, moral innocence, innocence as harmlessness, responsibility, rights, and personal project.

1. 2. 1. Moral Innocence

Initially, I will examine moral innocence in order to assess whether or not this concept could potentially characterise the status of civilians as protected people.

It has been widely accepted in literature on the ethics of war, as well as on just war theory, that the distinction between being morally innocent (or ‘morally pure’ in Thomas Nagel’s words) and being morally guilty does not necessarily coincide with the

distinction between civilians and combatants. If such a distinction were made by the concepts of moral innocence and moral guilt, according to Nagel, the army 'would be justified in killing a wicked but non-combatant hairdresser in an enemy city who supported the evil policies of his government, and unjustified in killing a morally pure conscript who was driving a tank toward us with the profoundest regrets and nothing but love in his heart'.⁸⁸ That is to say, being morally innocent does not confer immunity from attacks on combatants, and being morally guilty does not deprive civilians of protected status. To make this case, let us consider a civilian war supporter and a conscript. If we subscribe to the idea that being morally innocent predicates the protected status and being morally guilty predicates the loss of that status, we might feel uneasy about the legal prescription that the morally guilty (on the grounds that he supports the war for a racial reason, for example) civilian war supporter enjoys his protected status, whereas the morally innocent (on the grounds that he opposes the use of military force, for example) conscript could not be afforded the same protection as a civilian.⁸⁹

Indeed, some conscripts would be willing to go to war, whereas others, for whom initially joining the military was against their will, would become attuned to the

⁸⁸ Nagel, 'War and Massacre', p. 69.

⁸⁹ NB This does not mean that combatants are not entitled to protection at all in combat. They are still entitled to protection under the First, Second and/or Third Geneva Conventions of 1949.

cause of the military through training, part of the purpose of which is to align their mentality and attitude with those of the military. Jonathan Glover argues that: 'Military training has to make people do things which they would not do in civilian life'⁹⁰ If successful, military training can fit the conscripts for soldiering and make them harmful to the enemy while maintaining moral innocence such as a sense of self-dedication and selflessness for the defence of others. In an extreme case, there might be a conscript described by George Mavrodes;

A young man of limited mental ability and almost no education may be drafted, put into uniform, trained for a few weeks, and sent to the front as a replacement in a low-grade unit. He may have no understanding of what the war is about, and no heart for it. He might want nothing more than to go back to his town and the life he led before.

Although such a conscript's moral innocence might be qualified, the person in question is, as Mavrodes rightly describes, a 'without doubt a combatant' who is considered to be a legitimate target in combat.⁹¹

To clarify this point further, we can take the example of a conscript who is a pacifist but was conscripted against his will, and who in combat deliberately shoots over

⁹⁰ Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (London: Jonathan Cape, 1999), p. 51.

⁹¹ Mavrodes, 'Convention and the Morality of War', p. 81.

the head of an enemy in order to avoid harming him. This pacifist conscript may be considered to be a morally innocent person. Suppose also that there is an enthusiastic war-supporting civilian who donates as much money as he can afford to contribute the war effort. To borrow a case from Mavrodes again, this civilian can be more precisely characterised by the following descriptions:

A person may be an enthusiastic supporter of the unjust war and its unjust aims, he may give to it his voice and his vote, he may have done everything in his power to procure it when it was yet but a prospect, now that it is in progress he may contribute to it for both his savings and the work which he knows best how to do, and he may avidly hope to share in the unjust gains...⁹²

If we apply the concept of moral innocence to the distinction between the protected and the unprotected, then the civilian might be considered a legitimate military target, whereas the conscript might be entitled to protection.

However, this line of argument on moral innocence does not necessarily help to clarify the protected status of civilians. As several commentators argue, it is problematic to apply the distinction between moral guilt and innocence too readily to combatants and civilians.⁹³ Jeffrie G. Murphy points out a moral dilemma brought about by the

⁹² *Ibid.*, p. 80.

⁹³ See, for example, Nagel, 'War and Massacre', p. 69; Mavrodes, 'Conventions and Morality of War',

concept of innocence in war:

Suppose, then, we try to make use of notions of moral innocence *of the war* and moral guilt *of the war* (or something within the war). Even here we find serious problems. Consider the octogenarian civilian in Dresden who is an avid supporter of Hitler's war effort (pays taxes gladly, supports warmongering political rallies, etc.) and contrast his case with that of the poor, frightened, pacifist frontline soldier who is only where he is because of duress and who intends always to fire over the heads of enemy. It seems reasonable to say that the former is much more morally guilty of the war than the latter...⁹⁴

Geoffrey Best also poses a series of critical questions on the awkward relationship between the concept of innocence and civilians:

but what about the adult who shared in the political and psychological encouragement and support of war? Was it reasonable, was it right that they should be spared all but accidental ill-effects of a war for which they did not conceal their support or for which, as was usually the case, their support was credibly claimed by their ruling representatives?⁹⁵

These arguments show that although the concept of moral innocence might give us

pp. 80–1; Norman, *Ethics, Killing and War*, pp. 166–9; and Coates, *The Ethics of War*, pp. 234–5.

⁹⁴ Jeffrie G. Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (D. Reidel: Dordrecht, 1979), p. 6.

⁹⁵ Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), p. 260.

some important *prima facie* insights concerning the rights and wrongs of killing in armed conflict, the concept of moral innocence is not always useful when it is used as a means of distinguishing civilians from combatants. There are morally innocent combatants who are conscripted and not engaged in military activities. As discussed above, it seems rather doubtful whether we can accept that their moral innocence can be considered the primary reason for making civilians immune from direct attack. In many ways, some civilians, such as infants and children, are morally innocent. However, it seems less clear whether or not moral innocence as a concept can be used to characterise the status of civilians and to differentiate them from combatants when we consider, for example, civilian war-supporters.

In Section 1. 2. 1, I have argued that being morally innocent cannot be seen as grounds for affording protected status to combatants, and that at the same time, being morally guilty does not deprive civilians of their protect status.

1. 2. 2. Innocence as Harmlessness

Having raised the argument in Section 1. 2. 1 that being morally innocent does not necessarily characterise the status of civilians as protected people and thus cannot be the

only reason to justify their protection, in Section 1. 2. 2 I will explore the second of the five concepts – namely *innocence as harmlessness* – in order to consider how this concept characterises the status of civilians as protected people and justifies their protection.

In just war theory and the ethics of war, those who are immune from attack are distinguished from those who are not by the concept of innocence as harmlessness.⁹⁶ Nagel, for example, argues that “‘innocent’ means ‘currently harmless’”.⁹⁷ People who are called innocent are people who are not harmful: literally, as Hugo Slim points out, the ‘word innocent comes from Latin *nocens*’ (meaning harmful).⁹⁸ Indeed, as Best also argues, those people who were entitled to protection were usually harmless to others; useful from the military, political and/or economic points of view, or helpless; such as clerics, peasants, pregnant or nursing women, and young children.⁹⁹

The concept of harmlessness is not an axiomatic concept that distinguishes civilians from combatants, however. Indeed, not every commentator on the ethics of war necessarily agrees that harmlessness is a valid concept to characterise civilians and

⁹⁶ See, for example, Norman, *Ethics, Killing and War*, p. 69; Walzer, *Just and Unjust Wars*, p. 235; and David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 84.

⁹⁷ Nagel, ‘War and Massacre’, p. 69.

⁹⁸ Hugo Slim, ‘Why Protect Civilians? Innocence, Immunity and Enmity in War’, *International Affairs*, 79:3 (2003), p. 499.

⁹⁹ Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (London: Weidenfield and Nicholson, 1980), p. 55.

justify their protection. For example, Jenny Teichman argues that the legitimate and illegitimate targets in war are not differentiated by a single dichotomy of guilt and innocence because there are other concepts necessary to distinguish legitimate targets from illegitimate ones, although she does not specify what constitutes those other concepts.¹⁰⁰ The problem of the concept of innocence as harmlessness is that it does not necessarily guarantee civilian status *qua* civilians as protected people, because civilians are not necessarily harmless in war. It is incontestable that some civilians, such as babies and the senile, are generally harmless in war. But, let us consider a test case, which can be used throughout Section 1. 2: a bishop who blesses military conduct that involves the killing of harmless civilians. It is arguable whether or not he is really innocent as harmless. We can agree that the clergyman is physically harmless in the sense that he does not harm civilians by himself. However, what is obviously a different matter is whether or not he acts in a harmful way by abetting atrocities against civilians. Let us consider another test case: an *hors de combat* trooper who used to serve in an unpopular war of indiscriminate attacks. After being injured in combat, he was captured as a prisoner of war and tortured by interrogators, but finally succeeded in escaping from the enemy and came back alive, although permanently disabled. His story about

¹⁰⁰ Jenny Teichman, *Pacifism and the Just War: A Study in Applied Philosophy* (Oxford: Basil Blackwell, 1986), pp. 63–8.

his ordeals and the trauma inflicted upon him was so inspiring that people began supporting the war enthusiastically enough to push the government to increase the scale and degree of indiscriminate offences against the enemy population. It is questionable whether or not he can be considered a harmless person. The above illustrated clergyman and ex-trooper are not considered harmful in just war terms because they do not take a direct part in hostilities. However, it seems difficult to regard these people as entirely harmless because they may appear greatly to contribute to the war effort while enjoying their protected status as harmless.

It therefore seems that the concept of harmlessness does not give a clear insight regarding the distinction between those people who are entitled to protected status and those who are not. Although it is a useful concept to the extent that we might gain a general sense of who should be protected and who should not, being harmless is not enough to characterise the status of civilians as protected people. This is because being harmless does not precisely correspond to the definition of civilians as protected people within the commonly understood just war theory that non-combatants include not only civilians, but also *hors de combat* people such as the wounded, the sick, and prisoners of war. This additional complication indicates that the distinction between the harmless and the harmful does not coincide with the distinction between civilians and

combatants.

Thus far, my argument has revealed that the distinction between the innocent as harmless people and the guilty as harmful people is not identical with the distinction between civilians and combatants. In other words, harmlessness is not necessarily a clear-cut concept that can be used to distinguish civilians from combatants: as discussed, if guilt is based on harmfulness, a bishop who rallies moral support for war might be seen as a legitimate target because of his presumed harmfulness to the enemy as being a moral/ideological leader to war effort. Upon examination of these cases, therefore, it has been found that the concept of innocence as harmlessness is not a useful definition to characterise the protected status of civilians.

In Section 1. 2. 2, I have considered the concept of innocence as harmlessness, arguing that the idea of innocence as harmlessness does not always clarify the protected status of civilians or justify their protection. If innocence as harmlessness is not able to offer a clear-cut justification for civilian protection, some other concept is required to characterise more completely the status of civilians, which could aid the cause of civilian protection.

1. 2. 3. Responsibility

Having considered in Section 1. 2. 2 that harmlessness does not necessarily characterise the protected status of civilian protection, in Section 1. 2. 3, in order to consider how being responsible for the conduct of war characterises the status of civilians and justifies their protection, I will examine the concept of responsibility.

Responsibility – whether or not a person in question is responsible for military action – is often considered to be a means of characterising the status of civilians and justifying their protection, and is supported by commentators such as G. E. M. Anscombe.¹⁰¹ In the same vein, Richard Hartigan claims that whether or not a person in question is a civilian is determined by his responsibility for military actions. According to Hartigan, the protection of civilians is justified on the grounds that a civilian is ‘not responsible in any personal way for the conduct of war.’ Hartigan also argues that the concept of responsibility for military actions coincides with the contemporary characterisation of civilians: ‘The modern classification of the civilian, the non-combatant who should be treated in some special, protective fashion, rests on an assumption of nonresponsibility’.¹⁰²

Although the concept of responsibility seems to make sense as one of the

¹⁰¹ G. E. M. Anscombe, ‘War and Murder’ in G. E. M. Anscombe, R. A. Markus, P. T. Geach, Roger Smith, and Walter Stein, *Nuclear Weapons and Christian Conscience* (London: Marlin Press, 1961), pp. 45–62 at p. 49.

¹⁰² Richard Shelly Hartigan, *The Forgotten Victims: A History of the Civilian* (Chicago: Precedent Publishing, 1982), pp. 90, 35.

definitional criteria for civilian status, this concept has a parallel limitation to the concept of harmlessness, in the sense that both assume that a person in question is entitled to protected status as a civilian, even if he is responsible for the conduct of war. This implies that by their action in taking a direct part in hostilities, combatants are entitled to their combatant status, and by their action in not taking a direct part in hostilities, civilians are entitled to their protected status. If so characterised, there is little difference in the assumption of civilian status between the concepts of responsibility and of harmlessness. If this is the case, then we are still shadowed by the same theoretical problem mentioned previously; that is, whether or not the war-abetting bishop is immune from attacks. The bishop may be considered not to be responsible for military action in the sense that he does not directly participate in any military action – such as taking up arms, commanding terror bombing campaigns, or ordering extrajudicial executions of prisoners of war – and therefore he may be considered entitled to protection, according to the concept of responsibility. However, more importantly, the bishop is indeed responsible for military action taken by the combatants, if it is committed as a result of their inspiration by his blessing.

In Section 1. 2. 3, I have argued that the concept of responsibility is not necessarily a more useful concept than innocence as harmlessness when attempting to

define the status of civilians. This is because both concepts assume that civilians do not take a direct part in hostilities, and fail to take into account some of the ways in which civilians can have influence on a war, without directly participating by bearing arms. In Section 1. 2. 4, I will explore the concept of rights, the fourth of the five concepts which could potentially help to characterise the status of civilians and justify their protection.

1. 2. 4. Rights

In ethical terms, one of the staunchest defenders of the moral relevance of the concept of rights concerning the distinction between civilians and combatants is Michael Walzer. In Walzer's argument, soldiers forfeit their rights to life and liberty in the sense that even if they do not or are unwilling to fight, they 'gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemy. Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty'.¹⁰³

The concept of rights seems neatly to characterise the protected status of civilians and justify their protection. However, if this concept may trigger doubt, it is probably because there is an issue of concern about its relevance to the borderline cases

¹⁰³ Walzer, *Just and Unjust Wars*, p. 136.

which I have already discussed. The concept of rights does not fully cover non-combatants who greatly contribute to the war effort while not taking a direct part in hostilities. Recall the octogenarian civilian in Murphy's case discussed earlier, the bishop who blesses the indiscriminate use of military force against the enemy population, and the ex-trooper who influences public opinion and government policy. According to the concept of rights, they are entitled to protected status as civilians in the same way as other civilians who do not in any way contribute to the war effort. In other words, the concept of rights does not give any just reason to see a difference in protection between these war-supporting civilians and other civilians who have no direct part in hostilities. If the concept of rights has a limitation when addressing the ethical issue concerning civilian protection, it is likely to be found in these cases.

In Section 1. 2. 4, I have argued that we might find limitations in the concept of rights since this concept provides blanket protection to those civilians who do not take a direct part in hostilities, despite the fact that some of them nevertheless contribute greatly to the war effort. In Section 1. 2. 5, I will consider the concept of personal project.

1. 2. 5. Personal Project

Thus far, I have discussed four concepts that might characterise the status of civilians and argued that it cannot be perfectly characterised by any of these four concepts. However, if there is one clue that is needed to unlock the complexity concerning the status of civilians, it might be found in the concept of personal ‘project’,¹⁰⁴ which primarily flows from the concept of the meanings of life and death in war of combatants and non-combatants. Barrie Paskins and Michael Dockrill point out that a ‘non-combatant is a person who is not a combatant’, while a combatant is a ‘person who (i) is engaged in activity which has a military dimension which (ii) is among the activities which confer, if anything does, meaning on the person’s life’. They argue that the distinction derives from the difference in meaning and implication of their deaths in war between a combatant and a non-combatant. In their words:

Because of an internal connection between combatancy and being killed, a combatant has the option and opportunity to regard the prospect of death in war as meaningful: written into what he is doing is a connection with being killed that gives his own death a meaning...But death in war of a non-combatant does not have any such guaranteed meaning: it may be something better than a

¹⁰⁴ J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), p. 116–7. Although Williams does not provide any definition of personal project, he uses the concept of personal project for his criticism on utilitarianism by pointing out that ‘the distinction between my killing someone, and its coming about because of what I do that someone else kills them’ is based ‘on the distinction between my project and someone else’s project’ (p. 117). The reason for this is, according to Williams, that a person ‘is identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about’ (p. 116).

meaningless episode but if this is so then that is for some other reason than that the relation of the person's activity to war makes it so.¹⁰⁵

This seems to indicate that soldiers are more likely to find their death in war meaningful because it is part of their prospect when going to war. Contrary to the case of combatants, civilians are likely to have a much slighter chance of finding their death in war meaningful because they have not been able to give the prospect such due consideration.¹⁰⁶ If we see a difference in the meanings found in death between soldiers and civilians when following the same line of thought, we can also see a clear difference in personal project between them. To shed light on this point, let us consider the case of the 9/11 aircraft. We can assume that there were two categories of people aboard the hijacked commercial aircraft that eventually crashed into the World Trade Centre, the Pentagon, and the ground in Pennsylvania on 11th September 2001. One was a group of hijackers and possibly sympathisers for their cause, and the other was the bulk of crew and passengers. Although this distinction might seem somewhat oversimplified, if there is any difference between two groups, part of this is in the difference in their personal project. This can be seen when we consider that the first group would be likely to regard their act as part of their own personal project, whereas the second group would be

¹⁰⁵ Barrie Paskins and Michael Dockrill, *The Ethics of War* (London: Duckworth, 1979), pp. 222, 225.

¹⁰⁶ Paskins and Dockrill, *The Ethics of War*; p. 225.

highly unlikely to regard their own tragic death as such.

The significant role of the concept of personal project is to reinforce the justification of the protection of civilians, in that the vast majority of ordinary civilians who have no direct part in hostilities do not see the prospect of death in war as part of their personal project, but as something that destroys it. Presumably there are civilians who regard the prospect of death in war as part of their own personal project. This does not mean, however, that they forfeit their right to be protected as civilians, as long as they do not take a direct part in hostilities.

There are two reasons to support blanket immunity of civilians, regardless of their personal project: one is that it is technically impossible to confirm whether or not each individual civilian holds the view that death in war is part of their personal project and then to target only those civilians who hold such a view; and the other reason is, more fundamentally, that attacking civilians who are entitled to protection could blur the distinction and consequently undermine the foundation of the idea of civilian protection.¹⁰⁷ When considering the concept of personal project, it is less important that there may be civilians who regard the prospect of death in war as part of their own

¹⁰⁷ This idea is implied in AP (I) Art. 50(3), which reads: ‘The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character’.

personal project than that the vast majority of ordinary civilians do not see it as such.¹⁰⁸

There is the possibility of a strong objection to this line of argument, however. If we recall the pacifist conscript and the war-supporting civilian discussed previously, the pacifist conscript is not ready to fight or die. We may consider that this is mainly because he does not regard the prospect of death in war as part of his personal project. However, we might consider that the war-thirsty civilian may indeed regard the prospect of death in war as part of his own personal project. Although what seems to be the definitive answer depends on their own personal state of mind, it seems not necessarily incorrect to assume that the pacifist conscript might not regard his own death in war as part his personal project. Moreover, it could be concluded that the chance that the conscript regards the prospect of death in war as part of his personal project is probably smaller than the chance that the professional soldier does.

From this discussion it has been revealed that the concept of personal project does not necessarily characterise the status of civilians or justify their protection. This is due to the possibility that a pacifist conscript could potentially have a smaller chance of regarding the prospect of death in war as part of his personal project than a civilian war-supporter might have. However, we have to bear in mind that a pacifist conscript,

¹⁰⁸ Paskins and Dockrill, *The Ethics of War*.

during the course of his military training and service, could potentially change his personal project and envisage that being a soldier and going to war *was* part of his personal project, whereas the prospect of the same change is not likely in the vast majority of civilians.

Despite the fact that the concept of personal project is limited in being able independently to determine the status of civilians and justify their protection, it could help to explain the reasons that it is sometimes permissible to kill or maim some civilians, using military force if necessary. Through this concept we can argue that the death of the war-abetting civilian is somewhat different from the deaths of the bulk of non-war-supporting civilians, primarily because the war-abetting civilians have a greater chance of envisaging the prospect of their injury and death in war, caused by a legitimate attack as part of their personal project, and associated with their active contribution to the military aspect of the war effort. We can find a fairly direct and straightforward connection in the war-abetting civilians and their prospect of death in war, whereas we cannot find it in non-war-supporting civilians who have nothing to do with the war effort. In other words, the death of the war-abetting civilians is different from the death of non-war-supporting civilians in terms of personal project.

During the course of my discussion, therefore, I have found that the concept of

personal project might not stand by itself as a determining concept that characterises the status of civilians, but it certainly aids in the clarification and complements the idea of civilian protection. If there is a key advantage in using the concept of personal project, it is that this concept explains the reason that harming war-abetting civilians, such as the war-supporting civilian and the war-instigating bishop, is less impermissible than harming ordinary civilians. This is because, according to the concept of personal project, the former group of civilians could have a greater likelihood of envisaging their death in war, whereas the latter group could be less likely to see their death in war as part of their own personal project. To conclude, the concept of personal project seems to reinforce the idea of the protection of civilians who have no connection with the military aspect of the war effort.

Concluding Remarks for Chapter 1

In Chapter 1, I have discussed the status of civilians by examining legal and ethical concepts concerning civilians such as moral innocence, innocence as harmlessness, responsibility, rights, and personal project. I have shown that although the distinction between civilians and combatants is usually held to be the concept of harmlessness, this concept is limited in its ability correctly to address the status of civilians, which is very

complex in contemporary armed conflicts. In order to address the issues regarding the protected status of civilians in armed conflict, I have explored the legal and ethical sources regarding this status. Initially, I examined the legal status of civilians by reference to the relevant legal sources, primarily to the Geneva Conventions. Secondly, I discussed the status of civilians by referring to the five ethical concepts which could differentiate civilians from combatants and justify civilian protection: moral innocence, innocence as harmlessness, responsibility, rights, and personal project. During the course of this discussion, I established that the concepts often regarded as means for the moral distinction of civilians from combatants seem to fail to grasp fundamental issues concerning the status of civilians, such as active contributions to the military aspect of the war effort.

Similarly, when considering the ethical dimension, I established that none of the five concepts which I examined is an axiomatic, clear-cut concept available to characterise the status of civilians and to justify their protection, let alone to differentiate morally justifiable or permissible killings of civilians from unjustifiable or impermissible ones. Thus, I have discussed the issue that the status of civilians cannot fully be explained by existing legal and ethical concepts alone. I have also argued that the status of civilians can be more clearly understood through the use of the concept of

personal project, which explains the reason that civilians in general have to be protected, but that some civilians may have a weaker claim to protection, in that ordinary civilians are unlikely to see their death in war as part of their own personal project, while war-supporting civilians may be more likely to consider death in war as a possible outcome of their involvement. The concept of personal project could further strengthen the claim of ordinary civilians to their protection, if used together with the previously discussed concepts of harmlessness and responsibility. Having explored the status of civilians and their protection in the legal and ethical context in Chapter 1, in Chapter 2 I will critically examine just war theory, in order to consider how civilian protection is considered within this theory.

CHAPTER 2: CIVILIAN PROTECTION IN THE FRAMEWORK OF JUST WAR THEORY

Introduction

Having discussed in Chapter 1 the status of civilians in the legal and ethical contexts, in Chapter 2 I will critically examine *just war theory* in relation to civilian protection, in order to consider the scope and limitations of the theory. Specifically, I will investigate how civilian protection is envisaged in the framework of just war theory, which is currently a dominant framework through which to deliberate on and to contemplate the ethical issues concerning civilian protection in armed conflict, in order to assess whether or not it provides an adequate ethical framework for considering civilian protection.

Chapter 2 is divided into two sections. Initially, in Section 2. 1, I will outline the structure of just war theory in order to demonstrate how civilian protection is envisaged in this framework. Secondly, in Section 2. 2, I will examine the problems of ambiguity in the principles used to judge the issue of civilian protection in just war theory, in order to explore whether it provides an adequate framework to consider these ethical issues. Finally, in Section 2. 3, in order further to demonstrate the limitations of

just war theory concerning civilian protection, I will consider the issue of reparation for the loss of civilian life, injury to civilians and damage to civilian objects caused as a result of military operations.

2. 1. Civilian Protection in Just War Theory

Initially, in order to explore the definitions of just war theory, I will survey several variations of this theory made by different commentators. I will then outline just war theory in relation to civilian protection in order to demonstrate how the framework of this theory is related to it.

The first and foremost question on just war theory is this: what is a just war? Answers vary according to different approaches to the morality of war and peace, which are roughly divided into three categories: the realist approach, the pacifist approach and the just war approach. In the realist approach, justice of war and justice in war are often considered to be optional and not of vital importance. Although justice might exist in war, it bears little relation to war conduct. In the pacifist approach, just war is an oxymoron. In this approach justice is considered to be a concept inherently incompatible with the use of military force. A pacifist argues that a just war does not exist because war is never justified. The common feature in the realist and pacifist

approaches is that justice in war is not considered to be of great importance. Conversely, in the just war approach justice is considered to be an important moral element in war because it is based on the premise that any war must be just.

There are several answers to the question ‘what is just war theory?’. Oliver O’Donovan argues that just war theory is a ‘proposal of practical reason’, which is concerned with ‘how we may enact just judgement even in the theatre of war’.¹⁰⁹ He also argues that just war theory, as a ‘practical proposal for the radical correction of the praxis of war’, offers moral guidance ‘for those who wish to learn *how to engage in the praxis of judgement—to engage in it in these days and these circumstances, where we actually find ourselves, here and now*’.¹¹⁰ In the same vein, James Turner Johnson considers it a ‘mode of reasoning attached to religious, legal military and political discourse’.¹¹¹ From a slightly different perspective, Chris Brown comments that just war theory provides the framework of a communication kit, like a common moral language, to discuss the moral and ethical aspects of war.¹¹² Jean Bethke Elshtain describes just war theory as a ‘complex amalgam of normative principles and pragmatic

¹⁰⁹ Oliver O’Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), pp. 6–7.

¹¹⁰ O’Donovan *The Just War Revisited*, pp. 12–13.

¹¹¹ Johnson, *Morality and Contemporary Warfare*, p. 25.

¹¹² Chris Brown, ‘Selective Humanitarianism: In Defence of Inconsistency’, in Deen K. Chatterjee and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), pp. 31–50 at p. 45.

evaluation'.¹¹³ Indeed, according to Terry Nardin, just war theory is a 'label that embraces a diversity of views holding that war is subject to moral constraints'.¹¹⁴ The diversity of the just war theory is succinctly described by David Rodin, who comments that the tradition 'includes a large number of diverse yet related positions stretching from the theological writings of Augustine and Aquinas, via the legal treatises of Grotius and his contemporaries, to modern secular account found in writers such as Michael Walzer'.¹¹⁵

Most just war thinkers generally hold the view that some wars or some parts of war (such as war conduct) cannot be morally justified, while others might be. It is a means of ethical deliberation aimed at restraining war and the acts associated with it.

Elshtain argues:

Just war imposes constraint where it might not otherwise occur; and it promotes ongoing skepticism and queasiness about the use and abuse of power without opting out of political reality altogether in favor of utopian fantasies and projections. It requires action and judgment in a world of limits, estrangement, and partial justice...¹¹⁶

¹¹³ Jean Bethke Elshtain, 'Just War as Politics: What the Gulf War Told Us About Contemporary American Life', in David E. Decosse (ed.), *But Was It Just?: Reflections on the Morality of the Persian Gulf War* (New York: Doubleday, 1992), p. 44n1.

¹¹⁴ Terry Nardin, 'Introduction', in Terry Nardin (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NY: Princeton University Press, 1996), p. 9.

¹¹⁵ Rodin, *War and Self-Defense*, pp. 103–4.

¹¹⁶ Elshtain, 'Just War as Politics', p. 54.

The purpose of just war ethics is, according to Richard B. Miller, ‘to distinguish some forms of killing (war) from murder, and to keep the killing in war from becoming murderous’ and ‘to classify some human acts as morally acceptable, and to assign limits beyond which those acts become unacceptable’.¹¹⁷ The starting point of just war theory may be, in David Fisher’s words, that it ‘presupposes that there is a prima facie moral presumption *against* war: war stands in need of justification’.¹¹⁸ Elshtain points out that the ideas of just war are based on the two presumptions: ‘a belief in the existence of universal moral dispositions’ and ‘an insistence on the need for moral judgments, for being able to figure out who in fact in this situation is more or less just or unjust and more or less victim or victimizer’. Thus the upshot of just war theory may be a global ethic with a cosmopolitan aspiration. Elshtain argues:

Just war thinking...is a product of Western ethics, but it is also a proposal concerning the nature of the international system. If we think of just war in this way, we can more readily urge its consideration upon those who do not share our own tradition.¹¹⁹

Just war thinking fundamentally ‘sustains a worldview that construes human beings as

¹¹⁷ Richard B. Miller, *Interpretations of Conflict: Ethics, Pacifism, and the Just War Tradition* (Chicago: University of Chicago Press, 1991), p. 13.

¹¹⁸ Fisher, *Morality and Bomb*, p. 16.

¹¹⁹ Jean Bethke Elshtain, *Power Trips and Other Journeys; Essay in Feminism as Civic Discourse* (Madison, Wisconsin: University of Wisconsin Press, 1990), pp. 157–8.

innately and exquisitely social’, and it ‘follows that all ways of life are laced through with moral rules and restrictions that provide a web of social order’ over all human beings.¹²⁰

Just war theory can be divided into two main parts: the first part is concerned with the ethical considerations that need to be taken into account when choosing to go to war (*jus ad bellum*) and the second deals with the ethical considerations of just conduct within war (*jus in bello*).¹²¹ Ethical issues concerning civilian protection can be examined with reference to the two principles of non-combatant immunity and of proportionality in the *jus in bello* framework.¹²² In addition to these two criteria, the principle of double effect, which will be discussed in greater detail in Section 2. 2. 3, can also be used as an ethical framework when considering in the *jus in bello* framework.¹²³

In Section 2. 1, I have briefly outlined the definition and concepts of just war theory in general and its structure as an ethical framework in relation to civilian

¹²⁰ Elshstain, ‘Just War as Politics’, p. 55.

¹²¹ See Johnson, *Morality and Contemporary Warfare*, p. 27; Coates, *The Ethics of War*, p. 98; Regan, *Just War*, p. 18; Dower, *World Ethics*, p. 122; and Jeff McMahan, ‘The Ethics of Killing in War’, *Ethics* 114:4 (2004), pp. 693–733, at p. 693. Recently, the third part of just war, which is concerned with the ethical considerations for the post-war situation (*jus post bellum*), has been discussed by several commentators. See for example, Walzer, *Arguing about War* (New Haven: Yale University Press, 2004); Orend, *War and International Justice: A Kantian Perspective* (Waterloo: Wilfrid Laurier University Press, 2000); and more recently, Orend, *The Morality of War*. I do not contemplate *jus post bellum* in this thesis because it is not my main purpose to join the debate surrounding this newly proposed third tenet of just war theory. It is more important for my argument to point out that civilian protection is primarily discussed in the *jus in bello* framework.

¹²² Johnson, *Morality and Contemporary Warfare*, pp. 18–9; 36–8.

¹²³ Walzer, *Just and Unjust Wars*, pp. 151–6.

protection. I have also observed that ethical considerations concerning civilian protection are undertaken in the *jus in bello* framework.

2. 2. Just War Principles in relation to Civilian Protection

In Section 2. 2, I will examine in detail the principles used for considering civilian protection in the *jus in bello* framework in order to consider how the ethical issues concerning civilian protection can be contemplated and judged in just war theory. In Sections 2. 2. 1 and 2. 2. 2, I will examine the principles of non-combatant immunity and proportionality, in order to demonstrate that the main problem of just war theory in relation to civilian protection is in the flexibility of interpretation and application of these principles. In Section 2. 2. 3, I will investigate how the principle of double effect is applicable when considering ethical issues concerning civilian protection, in order further to demonstrate the limitation of just war theory in civilian protection.

2. 2. 1. The Principle of Non-combatant Immunity

The principle of non-combatant immunity, or discrimination, as it is often known, stipulates that non-combatants should not be *directly* attacked.¹²⁴ It is worthy of note,

¹²⁴ See Harries, *Christianity and War*, p. 76; Dower, *World Ethics*, p. 123; Johnson, *Morality and Contemporary Warfare*, p. 36; Regan, *Just War.*, p. 87; and Coates, *The Ethics of War*, p. 239.

however, that this does not prohibit incidentally harming non-combatants in military operations. This principle, working in tandem with the principle of proportionality, which stipulates that needless harm and destruction should be avoided in order to achieve justified ends, implicitly allows that non-combatants may be harmed incidentally on condition that the harm inflicted is proportionate to the military advantage anticipated. This raises the question: to what extent is the principle of non-combatant immunity considered to be independent of the principle of proportionality?

Regarding this question of the principle of non-combatant immunity, some just war theorists see it as being only slightly dependent on the principle of proportionality, whereas others see the two principles as clearly interlinked.¹²⁵ The first group of commentators may be referred to as ‘rule-oriented just war thinkers’, since they tend to emphasise the value of rules and principles over considerations of consequence when making judgements on civilian protection in the *jus in bello* framework. They often place greater emphasis on the idea that it is wrong to kill harmless people (i.e. civilians) than on the idea that civilian lives may sometimes need to be accepted as collateral damage in order to gain military advantage. For example, Harries emphasises the

¹²⁵ For example, Richard Harries and James Turner Johnson may be included in the first of the two groups of commentators, while William O’Brien may be categorised in the second group.

importance of the principle of non-combatant immunity as a rule to be strictly observed in war. He argues:

The harmless on the side of the enemy have just as much right to protection as the harmless on one's own side. Killing a harmless person on one's own side without due cause would be a murder. Killing a harmless person on the enemy side is no less murder.¹²⁶

These comments do not necessarily mean that all rule-oriented just war thinkers argue for an absolute prohibition on harming civilians. By referring to the principle of proportionality, many consider that harming civilians may be permitted under such conditions that the harm is incidentally caused as an unintended consequence and is considered to be proportionate to the military advantage gained. Johnson justifies this position on the grounds of *lesser evil*:

The horrible events and actions confronted in war must be divided between those evil in all aspects and those that can be set into a relationship of priorities along with other relative evils. When this is done, one may still be outraged at a particular horror of war, yet may morally accept it in order to avert or control a worse evil.¹²⁷

Nevertheless, from this rule-oriented point of view, the principle of non-combatant

¹²⁶ Harries, *Christianity and War*, pp. 85–6.

¹²⁷ Johnson, *Morality and Contemporary Warfare*, p. 18.

immunity is considered to be largely independent of the principle of proportionality. This point of view is confirmed by supporters who consider that the idea of the protection of non-combatants in the *jus in bello* framework is not primarily aimed at justifying a certain war conduct that risks harming non-combatants, but at reining it in. For example, Bailey argues that ‘just war ethics is composed of restriction and prohibition rather than permission’.¹²⁸ In the same vein, Harries also argues that the ‘purpose of just war is to protect the harmless [i.e. non-combatants]’, not primarily to justify military operations.¹²⁹

Contrary to the rule-oriented just war theorists, there is another group of just war thinkers who predominantly emphasise the ethical values of consequence over the values of rules and principles, whom we may call ‘consequence-oriented just war thinkers’.¹³⁰ These theorists tend to apply the principle of non-combatant immunity less strictly in the light of consequences than the rule-oriented just war thinkers. For example, William O’Brien argues that ‘the moral, just-war principle of discrimination is not an absolute limitation on belligerent conduct’, because this principle has not been ‘seriously advanced by the church, and it is implicitly rejected when the church

¹²⁸ Sydney Dawson Bailey, *War and Conscience in the Nuclear Age* (Basingstoke, MacMillan, 1987), p.

3

¹²⁹ Harries, *Christianity and War*, p. 86.

¹³⁰ These include William O’Brien and David Fisher, among others.

acknowledges the continued right of self-defence, a right that has always been incomparable with observance of an absolute principle of discrimination'. Following this line of argument, O'Brien suggests that 'discrimination is best understood and most effectively applicable in light of the *interpretations* of the principle in the practice of belligerents'.¹³¹ This consequence-oriented point of view implies that the principle of non-combatant immunity is considered by these just war thinkers not to be independent of the principle of proportionality, and thus it is more likely to be subject to it.

To summarise, the gap between these two views on the principle of non-combatant immunity indicates that this principle has the potential to be flexibly interpreted and applied. In addition, this flexibility is likely to give rise to ambiguity in the *jus in bello* framework in relation to civilian protection. Therefore, although just war theory is supposed to protect civilians, this theory does not do so adequately in practice, because the ambiguity of the principle of non-combatant immunity can allow this principle to be used for political or military purposes that are not necessarily compatible with civilian protection.

In Section 2. 2. 1, I have considered the principle of non-combatant immunity in order to understand the limitations of just war theory on civilian protection. Through

¹³¹ William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), p.45. The stress is mine.

examination of the two different points of view on the principle, I have found that this principle can be flexibly interpreted and applied; a key limitation that can lead to ambiguity. Ambiguity in the principle can allow too many civilian casualties if and when this principle is tempered by the principle of proportionality. In Section 2. 2. 2, I will consider the other *jus in bello* principle, the principle of proportionality.

2. 2. 2. The Principle of Proportionality

The principle of proportionality stipulates that incidental damage to civilians and civilian objects must be proportionate to the military advantages anticipated if and when attacks against military targets are considered or actually undertaken.¹³² The purpose of this principle is to incorporate considerations of the values of consequences in relation to civilian protection in just war theory.

The key problem with the principle of proportionality, just as with the principle of non-combatant immunity, can be found in the ambiguity arising from its flexible interpretation and application, because this principle only stipulates that incidental damage to civilians must be proportionate to the military gains. Because of this flexibility, the principle can be seen as ambiguous, since it does not indicate any

¹³² Johnson, *Morality and Contemporary Warfare*, p. 36.

definitive ideas about the degree and scale of what may be considered proportionate. Bailey explains that the judgement of proportionality 'is inevitably a subjective test', which 'requires difficult decisions by military commanders'; consequently, 'a cool Cartesian calculation' is required.¹³³ In this sense, the equilibrium of the cost-benefit calculation of proportionality is subject to the users' interpretations and applications of the principle. This characteristic of the principle of proportionality allows a wide range of interpretations, and can lead to arbitrary judgements concerning the permissibility of the scale and degree of harm inflicted upon civilians. Take the NATO bombing of dual installations such as power plants during the Kosovo crisis in 1999.¹³⁴ According to Carl Ceulemans, the bombing caused not only the direct destruction of the installations themselves, but also 'unintended casualties and material damage in the immediate proxy of the object'. The destruction of the electricity plants meant that 'power would be cut off in hospitals, babies' incubators, and water-pumping installations'.¹³⁵ Whether or not such plants are targeted in favour of military advantages ultimately depends on how military planners interpret and apply the principle of proportionality when considering or directing attacks that could cause collateral damage.

¹³³ Bailey, *War and Conscience*, pp. 28–9.

¹³⁴ This case is borrowed from Carl Ceulemans's article, 'The NATO Intervention in the Kosovo Crisis: March June 1999', in Bruno Coppieters and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002), pp. 205–28 at pp. 223–4.

¹³⁵ Ceulemans, 'The NATO Intervention', p. 225.

In addition to these potential consequences, the ambiguity of the principle in interpretation leaves the application of this principle open to manipulation. In fact, the ambiguity of the principle of proportionality raises serious concerns about the potential for politically motivated use of this principle to justify causing harm to civilians in military operations. In practice, the principle of proportionality is often at risk of being manipulated by users who intend to exploit it for political and/or military purposes. Coates points out that ‘the application of the principle in an exaggerated and uncritical way is commonplace’.¹³⁶

In order to shed light on the problem of the political or military manipulation of the principle of proportionality, let us consider the legal principle of proportionality in IHL, whose structure is almost identical to the *jus in bello* principle, making the problems outlined applicable to either. In IHL, the judgment of the principle of proportionality – how incidental losses are considered proportionate in relation to the military advantage anticipated – is ‘based to some extent on a subjective evaluation’, according to the ICRC *Commentary*.¹³⁷ The subjective nature of the legal principle of proportionality is somewhat problematic, at least in the legal-exegetical context, because IHL is based on the presumption that legal provisions are correctly interpreted

¹³⁶ Coates, *The Ethics of War.*, p. 182.

¹³⁷ ICRC, *Commentary*, p. 683.

and applied on a *bona fide* basis.¹³⁸ This position of IHL is described in the *Commentary*: ‘the interpretation [of the principle of proportionality] must above all be a question of common sense and good faith for military commanders’, who ‘must carefully weigh up the humanitarian and military interests at stake’.¹³⁹

This prescription for the principle of proportionality, however, raises a concern about an arbitrary application of the principle in favour of military necessity. Take the issue of so-called collateral damage, a euphemism for ‘excusing civilian casualties as an unintended but foreseen side effect’¹⁴⁰ of legitimate military operations. Apologists in the armed forces might argue that the military takes the maximum care over the protection of civilians. For instance, commenting on the Iraq War, a spokesman for the UK Ministry of Defence was quoted as saying: ‘During the conflict we took great pains to minimise casualties among civilians’.¹⁴¹ Contrary to this assertion, it is alleged that thousands of Iraqi civilians were killed during the major combat phase (March to May 2003) and thereafter by the Coalition forces.¹⁴² It would be arguable whether that scale

¹³⁸ The principle of bona fide application of the provisions is stated in the commentary to the Fourth Geneva Convention of 1949, Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* vol. 4 (Geneva: ICRC, 1952–60), p. 308.

¹³⁹ ICRC, *Commentary*, pp. 683–4.

¹⁴⁰ Norman, *Ethics, Killing and War*, p. 203.

¹⁴¹ Quoted in Simon Jeffery, ‘War may have killed 10,000 civilians, researchers say’, *Guardian* (13/6/2003), p. 18.

¹⁴² It is extremely difficult to determine the exact number of civilian casualties during that period. Indeed the number is a matter of some dispute. However, according to one report published by the Iraq Body Count, 6,616 civilians were killed by the US-led forces between 20th of March and 9th of April 2003. Iraq Body Count, *A Dossier of Civilian Casualties 2003–2005*. http://www.iraqbodycount.org/analysis/reference/pdf/a_dossier_of_civilian_casualties_2003-

of civilian victims could be justified on the grounds of the principle of proportionality. We might also have to consider whether or not the principle of proportionality was indeed undertaken in *bona fide*, which IHL expects. In fact, there are several allegations against the US-led coalition forces in Iraq over the harming of non-combatants, such as the killing of Iraqi civilians in Haditha by the US Marines in November 2005.¹⁴³ This example, just one of many, seems to indicate difficulties in *bona fide* applications of the principle of proportionality in military operations.

In Section 2. 2. 2, I have critically investigated the principle of proportionality for civilian protection articulated in the *jus in bello* framework of just war theory. Through this investigation, I have found that the principle of proportionality is envisaged as a principle to limit the number and proportion of civilian casualties in armed conflicts. However, I have also found that this principle does not set any definitive scale or ratio that constitutes being proportionate. I have then argued that the judgement of proportionality, therefore, is subject to the interpretation and application of the users of this principle. I have also argued that the flexibility of the principle of proportionality gives rise to ambiguity in the interpretation and application of this

[2005.pdf](#), accessed on 12/9/2007.

¹⁴³ Tim McGirk, 'One Morning in Haditha', *Time* (27/3/2006); and Suzanne Goldberg, 'Marines may face trial over massacre', *Guardian* (27/5/2006), <http://www.guardian.co.uk/frontpage/story/0,,1784387,00.html>, accessed on 3/6/2006.

principle, which in turn puts it at risk of being hijacked and manipulated for political and/or military purposes. To clarify the problem of the principle of proportionality, the issue is not that this principle would not be applicable in practice, but that it is open to interpretation and manipulation and can potentially be abused.

2. 2. 3. The Principle of Double Effect

In Section 2. 2. 3, in order further to demonstrate whether or not just war theory is an adequate framework for the protection of civilians, I will consider the principle of double effect, which allows a morally adverse effect to be caused by taking a morally approvable act, under certain conditions. This principle has often been used in Christian ethics, but is also put forward in just war theory when arguing for civilian protection.

The principle of double effect, also known as the doctrine of double effect, was formulated by Thomas Aquinas and incorporated into Catholic ethical thought thereafter. In the ethics of war and just war theory, this principle is often used in tandem with the two *jus in bello* criteria to justify war conduct that may involve civilian casualties. While there are a number of variations, one of the most frequently cited versions of the principle of double effect in relation to civilian protection may be found

in Paul Ramsey's definition.¹⁴⁴ He spells out four conditions of the principle of double effect:

(1) the action itself must be good in its nature and object, or at least sufficient, (2) a good effect and not an evil effect must be intended, (3) the good effect must not be produced by means of the evil effect, but both effects must arise simultaneously from the (at least) morally indifferent action as cause, and (4) there must be in the good effect a proportionately grave reason for permitting the evil effect.

Ramsey argues that these four conditions of the principle must be met concurrently in order that an agent is not 'to be held accountable' for 'the evil consequence of his action'.¹⁴⁵ In the *jus in bello* framework, the principle of double effect, together with the principles of non-combatant immunity and proportionality, can be used to justify harming civilians under certain conditions. Rationalisations for harming civilians are divided into three stages. Initially, the principle of non-combatant immunity stipulates that civilians should not be unjustly harmed. At this stage, directly harming civilians is considered wrong under any circumstances and impermissible. Secondly, the principle of double effect stipulates that harming civilians (an evil effect) is permissible under the

¹⁴⁴ Variations of the principle of double effect can also be found, for example, in Michael Walzer's 'double intention', Walzer, *Just and Unjust Wars*, p. 155–6. David Fisher suggests a modified version that makes a moral distinction between 'the consequences which are held to be within the agent's control and consented to by him' and those which are not. Fisher, *Morality and Bomb*, p. 37.

¹⁴⁵ Paul Ramsey, *War and Christian Conscience: How shall Modern War be conducted justly?* (Durham, NC: Duke University Press, 1961), pp. 47–8.

condition that such harm is unintended when an attack against legitimate military targets is undertaken with the intention to neutralise them (a good effect). At this stage, indirectly harming civilians can conditionally be permitted if it leads to a good effect (i.e. neutralising enemy targets) with a proportionately grave reason – such as the incapacitation of a strategic command and control structure – that overrides the evil effect. Thirdly, the principle of proportionality gives a further condition for permitting harm to civilians: the unintended harm is permissible, provided it is in proportion to military advantages. To summarise: the principle of double effect, combined with the principles of non-combatant immunity and of proportionality, stipulates that the harming of civilians is permissible if and when such harm is an unintended side effect of a legitimate military attack and is proportionate to the military gains made by the attack.

The principle of double effect in relation to civilian protection imposes a set of strict conditions to be met. Initially, the principle rejects directly harming civilians not only as an end but also as a means of military operations. The principle prohibits targeting civilians as an end of military operations because direct attacks against civilians cannot be considered to be a good action as outlined in condition 1, or a good effect outlined in condition 2. Indeed, such attacks may be called acts of terror. The

principle of double effect also prohibits directly targeting civilians as a means to a good end in condition 3. Despite the prospect that direct, intentional attacks against civilians may lead to victory, for example, the principle prohibits harming civilians as a means of winning the war. Thirdly, the principle imposes on attackers a further burden of proof by requiring them to provide a proportionately grave reason for permitting the evil effect in condition 4. In the case of civilian protection, a reason of such gravity is expounded by the principle of proportionality to be one in which the military advantages are proportionate to the harm on civilians. Again, take the bombing of power plants in Yugoslavia during the NATO 1999 intervention in the Kosovo crisis: NATO intended to bomb the power plants in order to affect the capabilities of the Yugoslav Armed Forces, but the destruction of the power plants not only incapacitated the Yugoslav military, but also caused power shutdowns that affected civilians. Ceulemans argues that this bombing can be justified on the grounds of the principle of double effect:

one can interpret NATO's use of these soft bombs, which create no substantial material damage, as an important indication that NATO had no real intention of destroying Yugoslavia's economic potential. Furthermore, the satisfaction of the Double Effect Principle's condition of necessity (in order to obtain good, we cannot avoid doing the evil) seems obvious in the case of targeting mixed installations like power plants.¹⁴⁶

¹⁴⁶ Ceulemans, 'The NATO Intervention', p. 225.

The principle of double effect is considered a useful framework for civilian protection in the *jus in bello* framework by several just war thinkers.¹⁴⁷ For example, Richard Harries argues that the principle of double effect is ‘a crucial tool for moral analysis’ when it is used in tandem with the principles of non-combatant immunity and proportionality in the *jus in bello* framework. The reasons for this are, according to Harries, as follows:

Certain actions are to be judged intrinsically wrong, for example the direct killing of non-combatants. On the other hand, the rightness or wrongness of the foreseen but unintended consequences of an action which is legitimate itself, e.g. the deaths of civilians brought about from the bombing of a munitions factory, is to be judged by the principle of proportion.¹⁴⁸

The followers of the principle often hold the premise, which is common to the principle of non-combatant immunity, that it is ‘a moral certainty that the unjustified taking of human life is evil’, and ‘common human characteristics – age, gender, physical

¹⁴⁷ Richard Regan is one of the supporters of the principle of double effect in the framework of just war theory in his *Just War*, pp. 95–6. However, not all just war thinkers consider that the principle of double effect is indispensable for ethical reasoning within the framework of just war theory. For example, Gordon Graham argues that the principle ‘is not an integral part of the theory of the Just War’ in *Ethics and International Relations*, (Oxford: Blackwell, 1997), p. 69.

¹⁴⁸ Harries, *Christianity and War*, p. 94.

condition, mental capacity – can never be justification for killing’.¹⁴⁹ However, war almost inevitably causes harm to human beings, and civilians are often killed despite the fact they are supposed to be immune from attack. If this is the case, then those supporters of the principle of double effect who hold the above view need an ethical guideline to consider under what circumstances the taking of human life can be justified. They may regard the principle of double effect as one of the most promising ethical tools for the justification for harming civilians because this principle allows the harming of civilians under certain conditions. Fisher argues: ‘The doctrine of double effect has thus enabled modern just war theorists to soften the otherwise unyielding rigour of the absolute status accorded non-combatant immunity’.¹⁵⁰ By incorporating the principle of double effect into the *jus in bello* framework, those just war thinkers who hold the view that the innocent may not be killed can avoid such a possible dilemma between the absolute prohibition of killing the innocent and the frequently repeated practice of killing them in many armed conflicts. C. A. J. Coady also supports the principle of double effect, since if just war theorists ‘speak of the need for the evil foreseen side effect not to be disproportionate to the good sought by the action, they clearly have in

¹⁴⁹ John N. Noonan Jr., ‘Three Moral Certainties’, in Ficarrota (ed.), *The Leader’s Imperative: Ethics, Integrity, and Responsibility*, pp. 3–14 at p. 10.

¹⁵⁰ Fisher, *Morality and Bomb*, p. 30.

mind the matter of likelihood as well as danger of evil'.¹⁵¹ In this context, the principle of double effect may be seen to be indispensable to justify harming non-combatants in just war theory.

Contrary to the positive account developed above, however, the problem of the principle of double effect in civilian protection arises from the issue of how the principle is used in practice. In other words, the problem of this principle also seems to be that it is open to manipulation and can be misused and even abused. In particular, when the principle of double effect is used to judge the permissibility of harm to civilians, the interpretation and application of proportionality are often likely to vary according to the users of the principle. What may be considered proportionate is often ambiguous, and can be subject to the interpretations and applications of its users

The problem of ambiguity in the principle of double effect, moreover, may amount to an idea contrary to the spirit of just war theory – to limit causing harm to civilians – because this principle is excessively user-friendly when being applied by people who have a political objective that does not coincide with the idea of civilian protection. For this reason, the principle can be used not primarily to protect civilians, but to justify harming them. For example, O'Brien argues that the principle of double

¹⁵¹ C. A. J. Coady, 'Escaping from the Bomb: Immoral Deterrence and the Problem of Extrication', in Henry Shue (ed.), *Nuclear Deterrence and Moral Restraint: Critical Choice for American Strategy* (Cambridge: Cambridge University Press, 1989), pp. 163–225 at p. 176.

effect can effectively be used if the principle of non-combatant immunity is not regarded as an absolute prohibition on direct attacks against civilians; he envisages that direct, intentional attacks against civilians are permissible within this principle. In O'Brien's words:

But if the principle of discrimination is viewed as a relative principle enjoining the maximization of non-combatant protection, it seems possible to employ double-effect explanations for actions wherein the major intention is to effect counterforce injury on military objectives while acknowledging an inescapable intention of injuring countervalue [i.e. civilian] targets and thereby predictably violating the principle of discrimination to some extent.¹⁵²

O'Brien's comments indicate that the principle of double effect can be used to make direct, intentional attacks against civilians legitimate, or at least morally acceptable. This way of interpreting the principle of double effect seems debatable because the crux of the principle is based on the prohibition of causing any intentional harm (i.e. direct attacks against civilians) despite the fact that a good outcome may result, or be expected to result, from these evil actions. Furthermore, O'Brien's comments on the principle of double effect seem to countermand the crux of just war theory on civilian protection,

¹⁵² O'Brien, *The Conduct of Just and Limited War*, p. 47. Supporting O'Brien's argument, Regan also interprets the principle of non-combatant immunity as a relative one and contends that the 'difference between the traditional formation of the principle of discrimination and O'Brien's may be largely one of terminology'. Regan, *Just War*, p. 93.

which prohibits direct, intentional attack against civilians.

To summarise, the principle of double effect raises an issue of concern in relation to civilian protection because it raises the question of application; whether or not the principle is correctly applied for the purpose of civilian protection is widely subject to the intention of the person who uses this framework. As a result, the principle of double effect is capable of being flexibly applied, which raises the possibility of its misuse and abuse for promoting political or military ends that are not compatible with the standard idea of civilian protection envisaged in just war theory.

In Section 2. 2. 3, I have critically examined how the principle of double effect works for civilian protection in the *jus in bello* framework in order to demonstrate the limitations of just war theory. I have argued that the problem with the principle is that not only is it likely to be subject to misuse and abuse, but it also risks being manipulated for political or military purposes. As a result, I can conclude that the principle of double effect is in danger of being politically hijacked and not serving civilian protection in practice.

2. 2. 4. Responsibility to Protect: A Modern Version of Just War Theory

In Section 2. 2. 4, in order further to consider the practical implications of the argument for civilian protection in the just war framework, I will examine so-called responsibility

to protect (R2P), a modern version of just war theory for civilian protection and humanitarian intervention.

R2P is a framework for the protection of civilians in humanitarian intervention, and this framework originates in a report called *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Report)*,¹⁵³ which was produced in 2001 by the International Commission on Intervention and State Sovereignty under the auspices of the Canadian Government. Its unique proposition is that state sovereignty, traditionally recognised as a right of the state, is reconceptualised as responsibility of the state. In this framework, responsibility to protect is divided into three phases; namely, responsibility to prevent, responsibility to react, and responsibility to rebuild. Among these three phases, although all three are interconnected, the phase most relevant to my current discussion of civilian protection during armed conflicts is that of responsibility to react, because when human rights violations on a large scale occur in a state, R2P prescribes the use of military force for the purpose of preventing or mitigating such an inhumane situation. In other words, the use of military force by other states within the borders of a state that is unable and/or unwilling to protect its civilian population is considered to be permissible as an exceptional case, not only because such

¹⁵³ International Commission on Intervention and State Sovereignty, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

a state can be considered not to be discharging its responsibility to protect, but also because these intervening states *can* be considered to be discharging that responsibility otherwise exercised by the state conventionally supposed to have sovereign authority over its territories and population.

R2P seems a useful and effective idea for the protection of civilians when dealing with the situations in which human rights violations occur. We can consider the examples of Cambodia under the Khmer Rouge regime in early 1970s and Rwanda in early 90s: in these situations, R2P would not only have justified military intervention but also required other states to intervene using military force, if necessary.

However, since the Iraq War in 2003, a large number of states and individuals have been becoming more suspicious of the idea of R2P, as well as military humanitarian intervention in general. Bellamy points out that the legacy of the Iraq War is that ‘a large majority of the world’s states believe that the coalition abused humanitarian justifications to suit their own purposes’, and further argues that this situation ‘will set back attempts to galvanize a global consensus on the necessity of action when basic rights are violated on a massive scale’.¹⁵⁴

Despite this trend, R2P seems the most promising idea for civilian protection

¹⁵⁴ Bellamy, *Just Wars*, p. 221.

currently available, not only because there are few competing theoretical frameworks for civilian protection, but also because R2P's framework for the phase of responsibility to react overlaps greatly with just war theory. In fact, R2P argues: 'The connections between just war thinking and overarching criteria for humanitarian intervention are clear'.¹⁵⁵ If this is the case, then we might consider that R2P also has similar limitations to those which just war theory is faced with. Before concluding so without further examination, let us investigate R2P's properties as a theoretical framework for civilian protection.

If R2P is considered to be a rationale for military intervention for the protection of civilians, the scope of protection which R2P envisages needs to be clarified. According to the *Report*, the people who are eligible for protection are civilians who 'are threatened with massacre, genocide or ethnic cleansing on a large scale'. When executing military intervention, the *Report* dictates firstly, that 'the conduct of the operation must guarantee maximum protection of all elements of the civilian population', and secondly, that 'strict adherence to international humanitarian law must be ensured' as part of the 'doctrine for human protection operations'.¹⁵⁶

¹⁵⁵ International Commission on Intervention and State Sovereignty, *Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001), p. 140.

¹⁵⁶ International Commission on Intervention and State Sovereignty, *Report*, pp. 31, 66, 67.

When military force is used in humanitarian operations, inhumane consequences – creating war victims, for example – are almost inevitable, regardless of the principles for civilian protection. In these cases, one of the most important questions is: who would become the victims as a result of the action? This question presents two kinds of dilemma: one is that of risking the lives of the soldiers of the intervening force in order to protect civilians in a target country or area, and the other is that of risking the lives of some civilians in order to protect other civilians. Let us examine these two dilemmas in detail so that R2P's structure for civilian protection can be clarified.

The former dilemma – to risk the lives of the soldiers of the intervening force in order to protect civilians in a target country or area – is primarily a domestically controversial issue for the intervening countries, because the nationals of the intervening countries often wonder whether such intervention is worth risking the lives of soldiers who are also their fellow nationals. Walzer points out that people in modern democratic countries are often inclined to be negative towards the use of military force in which the lives of their fellow soldiers are risked, and their perception of threat in the conflict is frequently weak. He argues:

There are no 'lower orders', no invisible, expendable citizens in democratic states today, and in the absence of a clear threat to the

community itself, there is little willingness in even among political elites to sacrifice for the sake of global law and order or, more particularly, for the sake of Rwandans or Kosovars.¹⁵⁷

In the same vein, the *Report* presents a similar concern about the dilemma: it states that ‘whether the West were willing to risk the lives of its soldiers in order to stop war crimes, human rights abuse, and forced migration’ is ‘the real question’.¹⁵⁸

This dilemma for the intervening force – accepting casualties among the soldiers for the sake of the protection of civilians of another country – can be reconstructed in a morally acute way. That is, whether the combat force of intervening countries should be permitted to victimise (kill or allow to die) civilians who are supposed (originally designated in an initial planning stage, to be more precise) to be protected, for the sake of the force’s own protection. In many armed conflicts, this might be a mode of military operations. Compromising a combat force for the sake of civilian protection might not be considered a military priority in ordinary combat situations. Although force protection may be considered to be a legitimate military activity for the intervening countries, this may raise a serious moral concern in humanitarian operations by military means because it reveals a fundamental contradiction of humanitarian intervention if force protection is prioritised over civilian

¹⁵⁷ Walzer *Arguing about War*, pp. 28–9.

¹⁵⁸ International Commission on Intervention and State Sovereignty, *Report*, p. 63.

protection. This tendency of the intervening countries, and thus our concern about civilian protection, may be amplified if and when the intervening countries feel more negative about risking the lives of their soldiers on the field for the purpose of civilian protection.

In fact, when ground troops are deployed, the intervening force is often required to impose dangers on its soldiers, and we can imagine a situation in which the intervening force is militarily overwhelmed by local hostile powers. The issues thus arising may be presented in the following way: whether or not the government of the intervening force will have the political will to protect the local civilian population in the target region or country by risking their fellow combatants; and if they have, then to what extent they can tolerate this risk. Srebrenica in 1995 is one of the most famous cases in which the intervening force gave up the protection of the local civilian population for the sake of force protection, by handing over the control of the town to the Bosnian-Serb Armed Forces.

The *Report* is prepared for this potential problem of force protection; it admits an ‘acceptance that force protection cannot become the principal objective’ as one of the operational principles for military intervention.¹⁵⁹ A similar wording can be found in

¹⁵⁹ International Commission on Intervention and State Sovereignty, *Report*, p. xiii.

another part of the *Report*, which states that ‘force protection for the intervening force must never have priority over the resolve to accomplish the mission’ as one of the principles for the ‘doctrine for human protection operations’. This does not mean that force protection is not seriously taken into account in the *Report*, which suggests a drastic measure – withdrawal of the intervening force – in a carefully constructed section:

Force protection of the intervening force is important, but should never be allowed to become the principal objective. Where force protection become the prime concern, withdrawal—perhaps followed by a new and more robust initiative—may be the best course.¹⁶⁰

This is a sound policy recommendation. However, given that military operations are inevitably influenced by domestic and international politics of the government of the intervening force, and that the political decision to protect the civilian population by risking the lives of soldiers is affected by these variables, then the recommendation quoted above does not seem to be a very practical one.

The second dilemma is whether to victimise some civilians in order to save others; in other words, to protect some civilians by killing (or more often allowing to

¹⁶⁰ International Commission on Intervention and State Sovereignty, *Report*, pp. 67, 63.

die) others. Military humanitarian intervention is almost always faced with this dilemma. When force is used, regardless of mission objectives, harming civilians is almost always unavoidable, directly or indirectly. Human protection operations are not exceptions. In fact, it is not very difficult to envisage a situation in which the intervening force causes collateral damage to the local civilian population, as the interveners use military force against civilians due to their misunderstanding, ignorance and/or errors – indeed similar events have occurred in many military humanitarian operations. It is probable that such an attack against local militant groups would also bring adverse results to the protection of civilians by further escalating the persecution of the local civilian population. Conversely, it is also fair to assume that the persecution of civilians by local militant groups would be left uncontrolled or even promoted if the intervening force were not deployed for the purpose of protecting civilians. From the viewpoint of civilian victims, any attacks that cause harm to them are unacceptable, whereas any military operations almost always cause civilian casualties. These contradicting points are not addressed in the *Report*. Indeed, the shortcoming of the *Report* is that it fails to address a solution for the second dilemma of military humanitarian intervention.

This shortcoming raises two important questions: can this dilemma be resolved? And if it cannot, then how can we address it to mitigate the inevitable harm

done? The answer to the first question is, sadly, 'no'. In armed conflict some civilians are protected while others are not, and there are invariably some civilians who cannot enjoy the protection they deserve. The answer to the second question, however, allows some hope of mitigating the problem. The fact that the dilemma cannot be solved completely does not indicate that there is no way to deal with it to ameliorate the situation, and the best solution available is to introduce the idea of restorative justice to the discourse of the ethics of civilian protection. In Section 2.3, in order to substantiate this idea, I will examine restorative justice in detail.

2.3. Lack of Reparation to Civilian Victims in the Just War Framework

In Section 2.3 I will now consider the issue of reparation for the loss of civilian life, injury to civilians and damage to civilian objects caused as a result of military operations, in order further to demonstrate the limitations of just war theory in civilian protection. Section 2.3 is divided into three parts. In Section 2.3.1, I will consider the issue of reparation in order to demonstrate that the just war theory is not adequate as an ethical framework for civilian protection. In Section 2.3.2, I will explore the provisions of IHL in order to consider whether or not the lack of provision for restorative justice to civilian victims in just war theory can be amended by incorporating an idea of

reparation into the just war framework. In Section 2. 3. 3, I will critically assess the possible outcome of incorporating the idea of reparation into the just war framework in order to consider whether or not such a recommendation can solve the problem of injustice to civilian victims.

2. 3. 1. Just War Theory and Reparation to Civilian Victims

As discussed in Section 2. 2, civilian protection is addressed in the *jus in bello* framework in just war theory. If properly applied, the *jus in bello* principles would safeguard the civilian population against the risk of being harmed in military operations by prohibiting attacks against military targets if harm to civilians is disproportionate to the military advantage achieved by these attacks. In this context, we can observe that just war theory shows why civilians should be protected and, to a certain extent, who should receive this protection and how.

However, one point worthy of note is that a fundamental limitation of just war theory is that it does not envisage any restorative or reparatory measures for the remaining civilians who are harmed in military attacks justified by the *jus in bello* principles. The lack of accountability for the civilian victims is exemplified by the fact that just war theory does not make any general or specific recommendations for a

post-attack situation in which the loss of civilian life, injury to civilians and/or damage to civilian objects are caused as a result of the attacks. The lack of accountability for harm caused to civilian victims gives rise to an issue of concern, which is that the principle can be interpreted in such a way that just war theory denies the rights of civilian victims to reparatory justice. In this respect, it seems correct to assume that just war theory has a limitation as an adequate framework for civilian protection because it does not take into consideration civilian victims harmed in attacks justified by the *jus in bello* principles.

If this is the case, then the issue to be explored here is the idea of restorative justice to civilian victims of military operations. Margaret Walker argues that ‘restorative justice keeps the victim’s plight central, orienting the process and outcome toward genuine repairs of harm victims have suffered’. The purpose and method of restorative justice are, according to Walker, ‘repairing relations through acknowledging the needs of victims and requiring accountability of those responsible for harm, through truth-telling, apology, and restitution or compensation’.¹⁶¹ The concept of restorative justice obliges attackers responsible for causing harm to civilians to take restorative measures.

¹⁶¹ Margaret Urban Walker, *Moral Repairs* (Cambridge: Cambridge University Press, 2006), pp. 217, 15.

In Section 2.3.1, I have considered the issue of reparation for civilian victims in relation to just war theory, and revealed that it is not taken into account in the *jus in bello* framework.

2.3.2. Reparation to Civilian Victims in IHL

In Section 2.3.2 I move on to explore the provisions of IHL for reparation to civilian victims in order to consider whether or not these provisions can be used to ameliorate the limitation in the *jus in bello* framework.

IHL seems useful as a source for retrieving the idea of reparatory justice concerning civilian protection because it codifies state responsibility for unlawful acts, and sets out that a state is obliged to take reparatory or compensatory measures for the loss or damage caused. The responsibility of warring parties for reparation to the victims is codified in Article 91 of Additional Protocol I, which reads: ‘A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.¹⁶² In terms of customary IHL, this rule is generally observed in the practice of those states which adhere to IHL, and

¹⁶² AP (I), Art. 91.

establishes that a state responsible for violations of IHL is required to make full reparation for the loss or injury caused ‘as a norm of customary international law applicable in both international and non-international armed conflicts’.¹⁶³ State responsibility for reparation to the victims of armed conflicts who are injured or killed by an unlawful act is also confirmed in national by-law; for example, in *The Manual of the Law of Armed Conflict*, the issue of compensation is stated in the following way:

It is a principle of international law that a state responsible for an internationally wrongful act is obliged to make full reparation for the injury caused by that act. This principle extends to the law of armed conflict in that a state is responsible for violations of the law committed by persons forming part of its armed forces and, if the case demands, is liable to pay compensation.¹⁶⁴

One example of this principle being applied in practice occurred when the British Army reportedly offered financial compensation to the families of Iraqi civilian victims who were unlawfully killed by its servicemen and women in Iraq. In the case of Baha Mousa, who died while in the British Army’s custody, the army allegedly offered a cash payout to his family for his death.¹⁶⁵ On another occasion, when the British Army stormed into

¹⁶³ ICRC, *Customary IHL*, p. 537.

¹⁶⁴ UK Ministry of Defence, *Manual*, p. 418.

¹⁶⁵ Quoted in Andrew Johnson, Francis Elliott and Severin Carrell, ‘Iraq Abuse Scandal: Ministry of Defence Accused of Buying Silence of Families’ over Civilian Deaths’, *Independent on Sunday* (20/6/2004), p. 13.

a local police station in order to rescue fellow soldiers in Basra in 2005, both the British Consulate in Iraq and the local congress in Basra issued statements saying that the UK Government would pay compensation to the Iraqi civilian victims of the military operation.¹⁶⁶ These cases, in which compensation was offered to civilian victims for unlawful killings by the army, can be interpreted as examples in which the idea of reparation codified in IHL is usually, if not always, practised in the field.

IHL might seem to offer an incentive for improving the framework of just war theory by suggesting a blueprint for the principle of reparation as the third principle in the *jus in bello* framework. However, the limitation of IHL *per se* is that no provision is made for reparation for loss of civilian life or damage to civilian property incidentally caused as a result of legitimate attacks against military targets. This indicates that parties to the conflict do not legally have to take responsibility for civilian loss or damage in these circumstances. In other words, in the framework of IHL, parties to the conflict are exempt from reparation to civilian victims for their loss or damage as long as such loss or damage is incidentally caused and proportionate to the concrete and specific military advantage anticipated in such attacks. This line of reasoning, by extension, can lead to the conclusion that a relatively small degree of loss and damage

¹⁶⁶ Ben Russell, 'UK offers payout for victims of Basra raid', *Independent* (12/10/2005), p. 23.

to civilians is legally permissible and that parties are thus exempt from legal obligations for reparation for this. Extending this argument further, we find that the civilian victims in these attacks do not have the opportunity to claim to justice, with some exceptions in cases of occasional official apologies and condolence.

In Section 2.3.2, I have examined the provisions of IHL, and revealed that the provisions do not envisage reparation to the civilian victims who are harmed in attacks justified by the principles of non-combatant immunity and proportionality.

2.3.3. The Principle of Reparation in the *Jus in Bello* Framework

In Section 2.3.3 I will now explore how this idea works in the *jus in bello* framework in order to consider whether it compensates for the limitations of just war theory in regard to civilian protection.

One promising way to solve the problem of providing justice for civilian victims who are killed or maimed in lawful attacks is to introduce the idea of restorative justice within the *jus in bello* framework in order to eliminate, or at least to mitigate, any injustice which the interveners inflict upon civilians during military operations. Walker suggests four potential means to achieve restorative justice; namely, 1) restitution, 2) compensation, 3) rehabilitation, and 4) satisfaction and guarantees of

non-repetition. These four elements are interrelated, and all four are necessary conditions to restore justice. Walker cites the Committee for Truth and Reconciliation in post-Apartheid South Africa and the National Commission for Reception, Truth and Reconciliation in East Timor as two successful examples of restorative justice using these methods.¹⁶⁷

When considering these four restorative measures as potential means to eliminate or mitigate injustice which civilian victims have suffered, it must be noted that the implementation of restorative measures is usually assumed to be undertaken in a post-conflict phase when the conflict has already ended and the recovery process has begun to function.¹⁶⁸ In the same vein, in the just war tradition, restorative measures are envisaged in the framework of *jus post bellum*.¹⁶⁹ However, it must also be noted that reparatory measures or, more importantly perhaps, immediate measures to help and support civilian victims, are often more urgently required *during* the armed conflict. In this regard, restorative measures need somehow to be incorporated within the *jus in bello* framework, despite the possibility that they can at best work as ad hoc measures while an armed conflict is still in progress.

¹⁶⁷ Walker, *Moral Repairs*, pp. 14–5.

¹⁶⁸ See Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Cambridge University Press, 2002), p. 173–8; Christopher Kutz, ‘Justice and Reparations: The Cost of Memory and the Value of Talk’, *Philosophy and Public Affairs* 32:3, pp. 277–312; and Asa Kasher and A. Yudlin, ‘Military Ethics of Fighting Terror: An Israeli Perspective’, *Journal of Military Ethics* 4:1, pp. 3–32.

¹⁶⁹ Orend, *The Morality of War*; and Walzer, *Arguing about War*.

If and when reparatory measures are undertaken during an armed conflict, such measures may be restricted, in terms of practicality, to reparation and limited satisfaction. The reason for this is that two of the other measures which Walker lists – restitution and rehabilitation – would face many difficulties for implementation in terms of opportunity, cost and resources available in a combat zone. Take the restoration of a house destroyed by an airstrike: rebuilding a house while hostilities continue does not seem a very promising prospect (there is a likelihood that the house may be damaged again by future airstrikes, and the means and methods of procuring human and material resources for construction also raise a number of issues and problems). Take rehabilitation, then: medical rehabilitation for civilian victims needs constant and continuous treatment and care, as well as appropriate facilities, which require a large amount of human and material resources not always available while military operations continue. The most realistic and customarily practised measures seem to be financial reparation or compensation and an official apology from the intervening government for damages which the intervening force has caused to civilians. Walker argues that when exercised in combination, apology and compensation ‘enhance significantly the perceived fairness’,¹⁷⁰ and this combination seems a useful way to achieve ad hoc

¹⁷⁰ Walker, *Moral Repairs*, p. 216.

restorative justice during the conflict.

Taking the above elements into consideration, a new operational principle for just military conduct, which I propose may be called the principle of reparation (or compensation), might stipulate that reparatory measures must be taken for civilian victims who are harmed in attacks justified by the principle of proportionality. On the principle of compensation, Kasher and Yadlin argue that the ‘democratic state has...the moral obligation to eventually appropriately compensate people when reversible damages have been caused to them’.¹⁷¹ The principle of reparation to civilian victims appears to play a crucial role in the *jus in bello* framework when we recognise the fact that wars seldom perfectly satisfy the just war criteria, and that a state or group of states is sometimes forced to resort to the use of military force on humanitarian grounds, which almost inevitably causes civilian casualties. This act of injustice – causing harm to civilians – frequently occurs in military operations, as has been documented in many armed conflicts. Within the *jus in bello* framework, such an act of injustice against civilians might not automatically negate the overall justice of military operations. In this regard, Fernando Tesón is correct to argue that ‘humanitarian intervention understood as a morally constrained form of help to others accepts that sometimes causing harm to

¹⁷¹ Kasher and Yudlin, ‘Military Ethics of Fighting Terror’, p. 27.

innocent persons is justified'.¹⁷² However, harm to civilian victims caused in legitimate attacks remains unresolved unless and until it is redressed and somehow compensated. From the viewpoint of civilian victims, it matters very little whether they are harmed in direct or indirect attacks, although there is a crucial difference between the two types of attack in terms of the law of armed conflict as well as in the just war tradition. The most important issue for civilian victims is that they are victims of military intervention and therefore entitled to claim justice, which they deserve. In this sense, some measure to compensate civilian victims for loss and damage inflicted in military operations is not only desirable but also essential, so that the attackers can claim that they have upheld just conduct in war. Indeed, such measures seem necessary, not only to strengthen the claim to justice in military operations and the justification for the use of military force within the *jus in bello* framework, but also, perhaps more importantly, for the sake of civilian victims and their families, relatives and friends who suffer from unjust acts being inflicted upon them.

There may be several problems and difficulties when exercising reparation: we have to consider, for example, what criteria are applied to determine eligibility for and the amount of compensation. One of the most troublesome problems is how to value

¹⁷² Fernando R. Tesón, 'Eight Principles for Humanitarian Intervention', *Journal of Military Ethics* 5:2, pp. 93–113, at pp. 103–4.

civilian loss or damage. Christopher Kutz seems correct to argue that ‘compensating victims at a generally devalued rate for the particular loss they suffered is ethically awkward’.¹⁷³ However, these difficulties and problems do not remove the obligation of the interveners to take reparatory measures to civilian victims. Indeed, these considerations have to be taken into account regardless of difficulties in terms of theory and practice, so that the principle cannot be used as an excuse for conducting military operations that are likely to cause a number of civilian casualties. When reparatory measures are undertaken, what must be avoided is the possibility that reparation could be abused as a mere excuse for harming civilians, and that unprincipled leaders of armed forces could exploit it for political and military purposes. To offer a comparison, parking tickets are taken by some offenders to be a type of fee for an allowable behaviour, rather than a fine imposed upon illegal activity. Political and military leaders, therefore, must be reminded that the exercise of reparation does not automatically justify harming civilians, while it nevertheless gives them the opportunity to claim justification for the use of military force, by showing their respect for justice for civilian victims.

We should also consider the converse argument that from the viewpoint of the

¹⁷³ Kutz, ‘Justice and Reparation’, p. 292.

attackers: the principle of reparation might raise a serious concern about its practical impact on military conduct. Once introduced, would this principle inhibit the attackers from carrying out lawful attacks or prevent them from executing their necessary duties and unduly damage military effectiveness? An extreme difficulty in answering this kind of question is that the principle has not been established as having a formal status in the law of armed conflict or the *jus in bello* framework, let alone exercised, so we cannot pre-judge its implications for military conduct in the operational theatre. Nevertheless, it must be remembered that the principle of reparation is not primarily envisaged as a restrictive principle such as those of distinction or of proportionality, but as a remedial one, which would be expected to complement the shortcomings of the existing *jus in bello* framework as a guideline for just conduct. In other words, the principle of reparation would act not only as a last safety net for civilian victims to reclaim justice, but also as a measure to reinforce a claim to legitimacy of attacks and to exemplify responsible conduct by the attacking forces. If so understood and implemented, the principle would be unlikely to prevent the attacking forces from carrying out legitimate attacks necessary from a military point of view. Indeed, it would potentially act as a morale-booster for armed forces as responsible attackers.

In fact, the principle of reparation, if properly applied, could potentially be

beneficial not only to civilian victims but also to policy-makers and military practitioners who want the use of force to be considered justifiable. The principle contributes to states' claims to justice in military operations in such a way that an ethically controversial act could at least be mitigated by reparatory measures, if not completely vindicated. Furthermore, state practice on reparation to civilian victims could mitigate charges against soldiers who had caused harm to civilians.

In Section 2. 3, I have examined whether and how the issue of reparation to civilian victims could ameliorate the limitations of just war theory in relation to civilian protection. I have argued that just war theory is limited in that the reparatory element of justice to civilian victims is not sufficiently emphasised in this theory. I have considered how the provisions of IHL could reduce this limitation by incorporating the idea of reparation to civilian victims in the *jus in bello* framework. However, I have also argued that this measure for improvement does not entirely solve the problem of just war theory, mainly because the incorporation of the concept of reparation still allows the possibility of problems arising such as those I have already considered: manipulation and abuse of this principle for political or military ends.

Concluding Remarks for Chapter 2

In Chapter 2, I have critically discussed the scope and limitations of just war theory in civilian protection, by focusing on how the prohibition on, as well as justifications for, harming civilians are examined in the *jus in bello* framework. Initially, in Section 2. 1, I have set out general observations of just war theory and how this theory is related to civilian protection. I have observed that just war theory is an ethical framework for considering whether war is just or not and that ethical considerations concerning civilian protection are undertaken in the *jus in bello* framework. Secondly, in Section 2. 2, I have critically examined how civilian protection is undertaken in the *jus in bello* framework, by considering the principles in this framework. During the course of my discussion, I have shown that the key problem of just war theory in relation to civilian protection can be found in the ambiguity of the principles used, and that such ambiguity arises from the flexibility of interpretation and application of these principles. I have also argued that the ambiguity of the principle of proportionality can be problematic because this characteristic can potentially lead to manipulation of the principle for political or military ends. Furthermore, by examining R2P, I have clarified the dilemmas about civilian protection which just war theory is faced with. Finally, in Section 2. 3, I have considered the issue of reparation to civilian victims in order to demonstrate the

limitations of just war theory in relation to civilian protection. I have argued that a key limitation is that the reparatory element of justice to civilian victims is not sufficiently emphasised in this theory. I have also argued that this measure for improving the *jus in bello* framework does not entirely solve the problem of just war theory, because the incorporation of the concept of reparation still leaves available the problems which I have previously considered: manipulation and abuse of this principle for political or military ends. In Chapter 3, in order to demonstrate how civilian protection is or is not undertaken in practice in armed conflicts, I will examine the Israeli–Palestinian Conflict as a case study.

CHAPTER 3: CIVILIAN PROTECTION AS POLITICAL RHETORIC?

Introduction

Having assessed in Chapter 2 the limitations of just war theory as an ethical framework for civilian protection, in Chapter 3, in order to consider whether and how civilian protection is undertaken in practice in an armed conflict, I will examine the Israeli–Palestinian Conflict as a case study. Specifically, I will focus on one of the bloodiest phases (2002–3) during the Second Intifada period (2001–5) because this is one of the most militarily active periods of the conflict, during which the norm of civilian protection was frequently breached by both sides.

The reason that I focus on this conflict, as briefly explained in the introductory chapter, is not only because the conflict was a kind of asymmetrical war in which the fighting took place between the IDF (the national armed forces of Israel) on the one side and members of various Palestinian militant groups (non-regular national armed forces) on the other side, but also because the stakes of national security and survival were high for both parties. Neither the IDF as an occupying force of the Palestinian territories nor the Palestinian militant groups committed themselves to the protection of civilians deemed to be enemy civilians, despite the fact that civilian protection is a requirement

of the laws, customs and ethics of armed conflict. In fact, the practice of civilian protection was almost entirely ignored during the given period: civilians were directly and indirectly harmed in tit-for-tat attacks by both the IDF – one of the most advanced armies in the world in terms of its professional code of military ethics – and the various Palestinian militant groups. This characteristic of the conflict validates my choice of the Israeli–Palestinian Conflict as a case study in order to show that the protection of civilians in the operational theatre is a particularly fragile rule in an armed conflict over the highest of stakes – national survival for both sides. If I can show this characteristic of military conduct regarding civilian protection through the case study, then this may carry profound implications for the ethics of civilian protection when we consider the ethics and conduct of the UK and US Armed Forces in Chapter 5. The reason for this is, according to David Rodin, that with regards to human rights and fairness, the stronger side is required to ‘take exceptionally rigorous steps to ensure that they do not harm non-combatants or expose them to risk of incidental harm in the course of military operations’.¹⁷⁴ In the Israeli–Palestinian Conflict, the category *the stronger side* may be applicable to the State of Israel, which possessed conventional armed forces, whereas *the weaker* may be the Palestinian militant groups that did not.

¹⁷⁴ David Rodin, ‘The Ethics of Asymmetric War’ in Richard Sorabji and David Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions*, pp.153–68 at p. 161

Chapter 3 is divided into two sections. In Section 3. 1, I will explore the overall pattern of military operations between warring parties in the Israeli–Palestinian Conflict during this Second Intifada period, in order to examine whether or not civilian protection was properly practised and how civilians were harmed in the conflict. In Section 3. 2, in order to consider how civilian protection is used not only as a rhetorical method for justifying military operations but also as a means of excuse for harming civilians, I will investigate four different occurrences of these practices.

3. 1. An Overview of Civilian Protection in the Israeli–Palestinian Conflict

In Section 3. 1, I will explore how civilians were, directly or indirectly, harmed by both the IDF and the Palestinian militant groups in the Israeli–Palestinian Conflict in order to examine critically whether and how civilian protection was practised.

In the Israeli–Palestinian conflict, a general pattern of failing to undertake civilian protection can be observed, within which civilians on both sides have been frequently and repeatedly harmed to such a degree that it appears that the distinction between civilians and combatants has completely disappeared. This observation is supported by the ICRC report, which argues that the ‘normative and behavioural barriers that are supposed to protect civilians’ have broken down, and as a consequence,

the conflict ‘has engaged entire societies and left the distinction between combatants and civilians in tatters’. The report goes on to say that this collapse of the norm of civilian protection is caused by the fact that many of the people involved in this conflict have a ‘perception of this conflict as a total one [i.e. total war]’.¹⁷⁵ In such situations, the distinction between civilians and combatants and the idea of civilian protection might seem to have little meaning, particularly in the eyes of those Palestinians and Israelis who accept the distinction between the *fellow* and *enemy* foremost.

The collapse of the norm of civilian protection in the Israeli–Palestinian Conflict is also described in a UN report concerning the combat between the IDF and Palestinian militants in the Jenin camp in the West Bank in April 2002. According to the report, both sides put civilians in danger during the course of military operations:

Of particular concern is the use, by combatants on both sides, of violence that placed civilians in harm’s way. Much of the fighting during the Operation Defensive Shield occurred in areas heavily populated by civilians, in large part because the armed Palestinian groups sought by IDF placed their combatants and installations among civilians. Palestinian groups are alleged to have widely booby-trapped civilian homes, acts targeted at IDF personnel but also putting civilians in danger. IDF is reported to have used bulldozers, tank shelling and rocket firing, at times from helicopters in populated areas.¹⁷⁶

¹⁷⁵ ICRC, *Country Report: Israel, the Occupied Territories and the Autonomous Territories: ICRC Worldwide Consultation on the Rules of War* (Geneva: ICRC, 1999), p. v.

¹⁷⁶ United Nations, ‘Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10’, A/ES-10/186 (30/7/2002), p. 8, para.32.

The main point to note in the UN report is that combatants on both sides ignored, and indeed actively violated, the measures necessary to ensure civilian protection. The IDF allegedly used means and methods of fighting in populated areas of the refugee camp that were not considered compatible with the idea of civilian protection, whereas the Palestinian militant groups allegedly used their fellow civilians as a means of fighting by putting them in danger and at risk of being harmed.

The fact that the parties to the conflict did not fully respect the protection of civilians is further confirmed by Amnesty International's report, which claims that there were constant allegations of the 'unlawful killings' of civilians and that those perpetrators were allowed to remain 'with impunity'.¹⁷⁷ In the Amnesty report, the IDF is accused of several 'unlawful killings' of Palestinian civilians, one of which took place during the IDF's military operation in Jenin on 21 June 2002, which left two children dead and two wounded. The report reads:

Following an IDF announcement that the curfew was lifted, six-year-old Ahmed Ghazawi took a shekel from his father to buy candy. He went with his brothers, Jamil, aged 12, and Tareq, aged 11.

<http://daccessdds.un.org/doc/UNDOC/GEN/N02/499/57/IMG/N0249957.pdf?OpenElement>, accessed on 3/5/2006.

¹⁷⁷ Amnesty International, 'Israel / Occupied Territories: End collective punishment of Palestinians in Occupied Territories', MDE/15/121/2002 (22/7/2002).

The area where the family lives is a residential area on the edge of Jenin city, in Area C (under full Israeli control). Part of the incident was caught on video by a neighbour on a rooftop. The film showed Dr. Samer al-Ahmed's car and seven children (aged between six and 12) four of them riding about on bicycles. There was no sound of firing, but suddenly there was a red flash and a blast. Ahmed was dead with one leg severed and the other almost severed. Jamil was covered in cuts and blood and Tareq lay near an electricity pole with a hole in his side and stomach.

The Amnesty report goes on to conclude that the IDF's use of military force 'did not meet two primary obligations – to protect the civilian population and to use force that is proportional to perceived threat'.¹⁷⁸

The report does not suggest that the IDF was actively engaged in direct or indiscriminate killings of Palestinian civilians in a systematic way. However, it does suggest that the IDF was insensitive to the treatment of civilians in the operational theatre, despite the fact that the attacks were claimed to be indirect or discriminate. This tendency toward insensitive treatment regarding civilian protection can also be identified earlier in the report, where it is alleged that the IDF 'frequently used explosive to open doors of homes and buildings' without taking precautionary measures to protect potential civilian inhabitants inside. It states:

¹⁷⁸ Amnesty International, 'Shielded from scrutiny: IDF violations in Jenin and Nublus' (4/11/2002), pp. 21–2.

On 5 April 'Afaf al-Desuqi, 59, was killed when an explosive was used on the door of her home as she went to open it. She had been called to open the door by her neighbour, Ismahan Abu Murad, who was used as a 'human shield' by the IDF to lead the way to the house. Ismahan Abu Murad confirmed the account given by 'Afaf's sister, 'Aisha 'Ali Hassan al-Desuqi, who told Amnesty International:

'My family was at home on Friday 5 April. It was about 3 or 3.15 in the afternoon. We heard the knocking and calling for us to open the door. My sister, 'Afaf said, "Just a moment". She said this right away. At that time, we were in the salon, which faces the street. 'Afaf left to answer the door; we were following her. When she reached the door, she had just put her hand out to touch the handle of the door and it exploded. The door exploded in on her and the right side of her face was blown off. Her left hand was injured as well as left part of her chest. I think she must have died instantly. We started shouting. The soldiers were just outside that door. The IDF began to shoot at the walls as if to try and scare us...'

Amnesty International visited the site and was able to examine the door, as well as the explosive device, which the family kept. The impression on the door clearly indicates that the door had been blown in from an explosion outside; this evidence is consistent with the testimony cited above.¹⁷⁹

This Amnesty report cites several examples which show that the IDF was not always sensitive enough to take appropriate precautionary measures to ensure civilian protection in its military operations.

In Section 3. 1, I have developed an overview of how civilians were, directly or

¹⁷⁹ Amnesty International, 'Shielded from scrutiny: IDF violations in Jenin and Nublus' (4/11/2002), pp. 15-16.

indirectly, harmed by both the IDF and the Palestinian militant groups in the Israeli–Palestinian Conflict. Through my investigation, I have found not only that the protection of civilians was not always respected, but also that civilians were directly or indiscriminately targeted by combatants, partly because the distinction between civilians and combatants had virtually collapsed in this conflict. In Section 3. 2, I will shed light on how civilian protection was used as a cause for military operations.

3. 2. Civilian Protection: Cause, Justification, and Excuse

Having observed several instances that demonstrate examples of civilian protection being breached or violated by the warring parties in Section 3. 1, in Section 3. 2, I will investigate several different forms of rhetorical justification and excuses for harming civilians in order to assess how civilian protection was used as a rationale for military operations. The forms of rhetorical justification and/or excuses for harming civilians can mainly be categorised, according to the patterns of military operations and of rhetoric observed in the conflict, under four headings: namely, self-defence; pre-emption and prevention; punishment, reprisal and means of resistance; and human shields.

3. 2. 1. Self-defence

Self-defence is widely recognised as a legitimate rationale for the use of military force and is guaranteed as an ‘inherent right’ in Article 51 of the UN Charter, which reads: ‘Nothing in this present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security’.¹⁸⁰ A senior Israeli official, commenting on the Israeli State’s use of military aggression in response to the Palestinian attacks, stated that: ‘If attacked, Israel reserves the right to self-defense’.¹⁸¹ In practice, states consider civilian protection to be an integral part of self-defence, because states and other political communities often regard the protection of their own people as one of their primary *raison d’être* and responsibilities. This pattern is not only observed in international customs and practice but also outlined in public statements made by the Israeli Government. For example, as a response to the comments by British Chief Rabbi Jonathan Sacks, who criticised the practice of the State of Israel against Palestinians in the Occupied Territories, the Israeli Embassy in London published a statement to justify its military operations, arguing that the State of Israel has been ‘forced to fight for its

¹⁸⁰ UN Chapter, Art. 51.

¹⁸¹ Quoted in Corinna Da Fonseca Wollheim, Janine Zacharia, David Rudge, and Herb Keinon, Philip Chein, ‘Accidental Hero’, *Jerusalem Post* (25/10/2002), p. 3.

existence as a Jewish state and to protect its citizens'.¹⁸² This argument seeks to justify the military operation on the grounds that that the State of Israel was engaged in a war of self-defence against the Palestinian militant groups that allegedly and publicly claim that their aim is the 'destruction of the Jewish State'.¹⁸³ To provide another example, when defending its military operations in the Occupied Territories in March 2002, the IDF justified the military operation as a 'defensive campaign to protect the citizens, the cities and the State of Israel'.¹⁸⁴ These comments indicate that the State of Israel considers civilian protection to be a part of self-defence. However, these comments also imply that the scope of such protection is limited to its fellow Israeli civilians.

In a second line of argument, self-defence is often considered to be a means to maintain national security, and civilian protection is likewise often considered to be a part of national security. National security is frequently used as a motive for military operations by political communities, mainly because states often consider the protection of their subjects or fellow citizens to be an integral part of national security. In this case, the Israeli Government claimed its right to security against the attacks upon civilians by the Palestinian militant groups. Referring to its military operations as a security measure

¹⁸² Quoted in Douglas Davis, 'Israel's UK embassy rebukes British Chief Rabbi', *Jerusalem Post* (29/8/2002), p. 3.

¹⁸³ Quoted in Douglas Davis, 'Israel's UK embassy rebukes British Chief Rabbi', *Jerusalem Post* (29/8/2002), p. 3.

¹⁸⁴ Harvey Morris, 'Israeli forces seize Ramallah in biggest offensive for 20 years: UN chief urges both sides to step back from disaster as Palestinians retaliate', *Financial Times* (13/3/2002), p. 1.

against suicide bombings, an IDF spokesman described the protection of Israelis as a duty of the State of Israel, and confirmed that the IDF would ‘continue to operate everywhere and every time to ensure the security of Israeli civilians and soldiers’.¹⁸⁵

This view that a state has a right to security is widely supported. For example, the then UK Foreign Secretary, Jack Straw, pronounced at the Labour party conference that ‘Israel has every right to its security’, which it cannot enjoy ‘as long as the unimaginable daily threat of suicide bombings against innocent civilians continues’.¹⁸⁶

On another occasion, regarding the Palestinian attacks against Israeli settlers, Dore Gold, an Israeli Government spokesman, made this position clear: ‘Israel will do what is necessary to defend its civilian population from these attacks’.¹⁸⁷

The concerning characteristic of military operations undertaken in the name of self-defence or national security is that these operations do not necessarily ensure the protection of civilians as a global category in the operational theatre. This concern becomes more serious if and when the use of force causes unnecessary harm to civilians to a disproportionate degree and/or by prohibited means and methods. Although civilian protection as part of self-defence is frequently used as a rationale for the use of military

¹⁸⁵ Quoted in John Kifner, ‘Israel surrounds Arafat compounds in a predawn raid’, *New York Times* (10/6/2002), p. A1.

¹⁸⁶ Quoted in Douglas Davis, ‘Blair: Mideast situation is ugly’, *Jerusalem Post* (2/10/2002), p. 1.

¹⁸⁷ Quoted in John Kifner, ‘Israelis bury 6 terror victims as angry Cabinet meets’, *New York Times* (30/5/2002), p. A8.

force, as explained above, what matters here is the target population for protection. Indeed in the Israeli–Palestinian Conflict, what the warring parties meant by the protection of civilians was not, in fact, the protection of *civilians as a global category*, but that of *citizen (or fellow) civilians with whom they stand*. The interpretation of civilians only as fellow civilians is also observed in the words of Yasser Arafat, the then President of the Palestinian Authority, who was reported to have argued that attacks against ‘armed Jewish settlers’ in the Occupied Territories was an ‘act of self-defense’ on the part of Palestinians.¹⁸⁸ Indeed this statement seems a further step forward from the self-defence justification of military operations that cause civilian casualties among the civilian population on the enemy side: it indicates that the Palestinian side officially justified attacks against *enemy* (i.e. Israeli, in this context) civilians as a means of self-defence.

In Section 3. 2. 1, I have examined self-defence in order to consider how civilian protection is used not only as a motive for military operations but also as a way of justifying such military operations. I have found that parties use civilian protection as a justifiable cause to activate military operations mainly because they usually consider civilian protection to be part of the self-defence of a state as well as an issue of national

¹⁸⁸ Khaled Abu Toameh, ‘Arafat: Attack on settlers are acts of self-defense’, *Jerusalem Post* (10/12/2002), p. 2.

security. I have also argued that military operations undertaken for the purpose of civilian protection do not always lead to civilian protection; parties to the conflict usually limit the scope of civilian protection to their fellow civilians, excluding civilians from the enemy side. My discussion in this section has confirmed that the practice and the rhetoric of warring parties indicate that military operations conducted in the name of civilian protection as self-defence or national security have often not, in fact, served the protection of civilians on the other side, because the definition of civilians envisaged by the warring parties was primarily limited to fellow civilians. As a result, enemy civilians were not primarily considered to be an object of protection. In sum, self-defence may not be considered to be a plausible rationale for military operations, because these operations did not envisage the protection of civilians on the enemy side, and thus violated the idea of the protection of civilians as a global category. In Section 3. 2. 2, I will consider pre-emption and prevention as another category of excuse used to justify harming civilians.

3. 2. 2. Pre-emption and Prevention

Having assessed self-defence in Section 3. 2. 1, in Section 3. 2. 2, I will consider the pre-emptive and preventive use of military force in order further to explore how civilian

protection has been used as a justification for military operations and how, nevertheless, civilians were harmed in such operations.

Pre-emption and/or prevention has often been used as a rationale to justify military operations. For example, the Israeli air strike on July 22, 2002 is a case in point, which left a dozen civilians dead and more than a hundred wounded, as well as assassinating Hamas senior leader Salah Shehadeh. This air strike was reportedly aimed at Shehadeh, who was allegedly behind ‘hundreds of terror attacks in the last two years against Israeli soldiers and civilians’, according to a statement by the IDF.¹⁸⁹

This military strike might have been justified on the grounds that the attack was a pre-emptive measure to prevent possible future attacks by neutralising Shehadeh. From a military point of view, the assassination of Shehadeh was considered to be ‘purely pre-emptive’, according to an anonymous IDF general.¹⁹⁰ This way of justifying the military operation was confirmed in the comments made by an anonymous senior Israeli military official: ‘We did not target him simply to retaliate or as punishment. We did it as a pre-emptive operation’.¹⁹¹ The justification on the basis of pre-emption

¹⁸⁹ Quoted in Suzanne Goldberg, ‘UN anger at killing of children’, *Guardian* (25/7/2002), <http://www.guardian.co.uk/GWeekly/Story/0,,762311,00.html>, accessed on 26/6/2006.

¹⁹⁰ Quoted in John Kifner, ‘Gaza mourns bombing victims: Israel hastens to explain’, *New York Times* (24/7/2002), p. A6.

¹⁹¹ Quoted in John Ward Anderson and Molly Moore, ‘Palestinians vow revenge after Gaza missile strike: Militants said to be poised for truce before Hamas figure, 14 others died’, *Washington Post* (24/7/2002), p. A13.

further indicates that the attack to neutralise Shehadeh was aimed at preventing future Israeli civilian casualties which might otherwise have been caused under his command or authority. This was said to be because Shehadeh had allegedly been ‘planning a terror attack, perhaps the biggest ever against Israel’, which was a ‘mega-terror attack’, in the words of then Israeli Defence Minister Binyamin Ben-Eliezer, such as a ‘truck loaded with one ton of explosives, the aim of which was to jolt the nation and kill hundreds of people’.¹⁹²

This method of justification might be approved on the consequentialist grounds that the rightness or wrongness of an act is judged by reference to the consequences of action taken, by comparison with the consequences of action not taken.¹⁹³ Following this line of thought, Jonathan Glover raises a hypothetical question, which is nevertheless similar enough to shed light on the core issue in the case currently being discussed. The key question is whether or not a pre-emptive/preventive military operation that certainly involves civilian casualties can be justifiable. Glover asks whether or not it could be justifiable to bomb a hospital that Hitler was visiting in order to assassinate him, if it was the only means to stop future atrocities otherwise being

¹⁹² Quoted in David Rudge, ‘Shehadeh was planning mega-attack’, *Jerusalem Post* (26/7/2002), p. 2A

¹⁹³ Stephen Darwall, *Consequentialism* (Oxford: Blackwell, 2003), p. 1.

committed by the Nazis.¹⁹⁴ If such an attack had been undertaken, it is possible that dozens of civilians might have been killed or injured, regardless of the mission success or failure of the attack. However, from this point of view, this concern might seem to be secondary, because the expected consequence brought by the success of the attack to assassinate Hitler in order to end the hostilities is often considered to be more valuable than the consequence of not bombing the hospital and allowing the Nazi war effort to continue. This method of reasoning to justify the harming of civilians can be accounted for on the grounds that such an assassination might consequently have resulted in sparing more lives and destruction, not only on the side of the Allies but also on the side of the Axis, if such an attack had succeeded in assassinating Hitler and resulted in a ceasefire.

If we accept this method of reasoning to justify a military strike that involves unnecessary civilian casualties on the grounds of pre-emption, we have to consider carefully how we can be so certain about the resultant future events. To raise one potential problem regarding this consequentialist reasoning, we might have to take into account the complex nature of the consequentialist argument in terms of the calculation

¹⁹⁴ Glover, *Causing Death and Saving Lives*, p. 279. A similar example is also found in Glover, *Humanity*, pp. 83–5.

of the future.¹⁹⁵ The point here is that in the argument illustrated above, both the success of the mission (the assassination of Hitler) and its immediate causal consequence (the termination of further atrocities) are merely premises of argument. We might agree that military operations involving potential civilian casualties can be justified on the grounds that a pre-emptive attack could prevent further civilian casualties otherwise caused if future events were certain. The key issue to be taken into account is, however, the uncertainty of the future. As I will examine in detail in the following section, the assassination of Shehadeh did not stop further attacks against Israeli civilians by Hamas. In addition, in the discourse of the Hamas leadership, it seems to have triggered, or at least provoked, an intensification of retaliatory attacks against Israeli interests. The fact that the military strike against Shehadeh, which caused a large number of civilian casualties, did not succeed in preventing future attacks against Israeli civilians seems to discount the claim made by the Israeli officials, who attempted to justify the military strike on the grounds of pre-emption. In the Shehadeh case, the anticipated pre-emption did not succeed in preventing future Hamas attacks, and so the civilians incidentally harmed in the strike could be seen to have been killed or injured under a false assumption, and therefore unjustifiably.

¹⁹⁵ For details, see, for example, Oderberg, *Applied Ethics*, pp. 67–8.

In Section 3. 2. 2, I have considered how pre-emption and prevention have been used as rationales to initiate military operations and that these operations were justified on the grounds of civilian protection. I have found that such military operations in the case of Shehadeh, as one example, resulted in harming civilians in the operational theatre. I have also argued that pre-emption and prevention do not necessarily justify military operations, not only because an estimation of the future consequence involves a risk of miscalculation, but also because such military operations do not prevent future civilian casualties. In Section 3. 2. 3, I will examine punishment, reprisal, and means of resistance.

3. 2. 3. Punishment, Reprisal, and Means of Resistance

In Section 3. 2. 3, in order further to explore how civilian protection is used as a means to justify or an excuse for harming civilians, I will examine punishment, reprisal, and means of resistance.

On the Israeli side, punishment of, and reprisals against, enemy violations of civilian protection were used as reasons for military operations, and these operations were undertaken and justified on the grounds of civilian protection. The Israeli authorities supported the use of force as a means of punishment in order to protect

Israeli citizens from attacks by the Palestinian militant groups. For example, Effi Eitham, a leader of the National Religious Party and member of the security cabinet of the Israeli Government argued: 'We shall punish the Palestinian Authority for every attack by taking some territory that Israel will hold for a very long time'.¹⁹⁶ Reprisals by Israel against Palestinian militant groups were also one of the grounds for military operations. David Baker, an official in the Israeli Prime Minister's office, hinted at the Israeli Government's future reprisals against the Palestinian militants if they were to attack Israelis in retaliation to the military operation by the IDF in Gaza: 'No people can be expected to tolerate this terror and Israel will certainly not do so'.¹⁹⁷

The Israeli attack to assassinate Shehadeh might have been justified on the grounds of punishment and/or reprisal in that he had masterminded several direct or indiscriminate attacks against Israeli civilians. David Rudge claimed that Shehadeh was such a terrorist that 'there was nobody bigger, stronger, or more brutal than him'.¹⁹⁸ If this allegation is correct, then such a military operation might be justified on the grounds of reprisal and punishment. The issue we have to consider here is, however, that the military operation that killed Shehadeh also caused a dozen deaths and injury to

¹⁹⁶ Quoted in John Ward Anderson and Molly Moore, 'Jerusalem hit again by blast: In response, Israel expands seizures of Palestinian areas', *Washington Post* (20/7/2002), p. A1.

¹⁹⁷ Quoted in Graham Usher, 'Gunmen kill four settlers in road attacks: Hebron shootings claim three family members, including a child, as fury rages over Gaza raid', *Guardian* (27/7/2002), p. 15.

¹⁹⁸ Rudge, 'Shehadeh was planning mega-attack', p. 2A.

more than one hundred, most of them assumed to be civilians. The key issue is that those civilians who were harmed in the military operation were not legitimate targets for punishment. It might be a matter of discussion whether or not the State of Israel conducted collective punishment against the Palestinian population on that occasion. However, it is certain that if Israel accepts this premise, then its acceptance means that it must also accept the arguments of the Palestinian militant groups; that is, that there is no difference between civilians and combatants, and that civilians are legitimate targets in military operations.

From the viewpoint of the Palestinian militant groups, reprisal was considered to be a means of resistance against the Israeli occupation. In particular, reprisals were used by the militant groups orchestrating indiscriminate or direct attacks against Israeli civilians, not only as a cause for undertaking military action but also as a way of justifying the harming of Israeli civilians. This justification for harming civilians was the official policy of one of the Palestinian militant groups (at least), and supported and blessed by the leaders of many of these organisations. For example, Sheikh Ahmed Yassin, then leader of Hamas, commented that the Palestinian attacks against Israeli civilians were undertaken as a reciprocal retaliatory measure: ‘When they harm and hurt

Palestinian civilians their civilians will be harmed'.¹⁹⁹ In the same vein, Ismail Abu Shanab, a Hamas spokesman in the Gaza Strip, contextualised the Hamas military strategy as a war of attrition in terms of lives of civilians, claiming that Palestinians 'are willing to pay the price so that we reach the point where fatigue in Israeli society will eventually too great'. Shanab also emphasised that the attack against Israeli civilians was a reprisal: 'We have told Israelis that if they kill our civilians, they have set the rules for this game. It is a tooth for a tooth, an eye for an eye. That is the equation'.²⁰⁰ Such a view that harming civilians is justified on the grounds of reprisal is also shared by other Palestinian militant groups. For example, as a response to the IDF air strike against Shehadeh, the Al-Aqsa Martyrs Brigades made the following comment: 'We will hit everywhere, even their children, to make them understand how our children suffer'.²⁰¹ This remark clearly indicates that the Palestinian militant group held the view that harming civilians was justifiable on the grounds of reprisal.

The question to be asked here is whether or not targeting civilians can be justified on the grounds of reprisal. In IHL, as discussed in Chapter 1, direct and indiscriminate attacks against civilians, as well as reprisals against them, are prohibited.

¹⁹⁹ Quoted in Lamia Lahoud, 'Arafat orders forces to fight terror', *Jerusalem Post*, (9/5/2002), p. 2

²⁰⁰ Quoted in Phil Reeves, 'Hamas waits defiantly as Israel plots its revenge', *Independent* (25/7/2002), p. 11.

²⁰¹ Quoted in Anderson and Moore, 'Palestinians vow revenge after Gaza missile strike'.

In this respect, it might be seen as remarkable that Hamas issued a statement on the bombing at the university campus: ‘We are so sorry for every innocent killed in that operation’, said then senior Hamas member Abdel Aziz Rantisi. This indiscriminate attack was, in Rantisi’s words, aimed at Israeli occupation as the ‘bomb was clearly against occupation’.²⁰² However, this justification for attacking civilians by Rantisi is questionable in the sense that many of those casualties were university staff or students, who were presumably not actively involved in making the government’s policy of occupation.

In order further to clarify the issues surrounding reprisals, let us now consider how such retaliatory attacks against civilians were undertaken in the chronological context. In a pair of tit-for-tat attacks between the IDF and the Palestinian militant groups, the assassination of Shehadeh triggered (or at least the Palestinian militant group claimed that it did so) a reprisal by Hamas against Israeli civilians. As a response to the attack against Shehadeh, Hamas immediately made a statement in which the group declared that it would conduct a series of retaliatory attacks indiscriminately or directly targeting Israeli civilians and civilian objects in the territory of Israel. Rantizi stated: ‘Hamas’s retaliation will come very soon, and there won’t be only one attack’,

²⁰² Quoted in John Kifner, ‘Death on the Campus: The Bombers; Hamas says it regrets American toll in attack, but hails bombing as success’, *New York Times* (2/8/2002), p. A10.

and continued; 'After this crime, even Israelis in their homes will be the target of our operations'.²⁰³ His words soon became realised in a bombing at the campus of the Hebrew University on July 31, which left seven dead and dozens wounded. Referring to the Israeli air strike against Shehadeh and the bombing at the university, Hamas leader Yassin said: 'When Israel bombs a civilian building full of women and children, and kills 15 people, this is the response they should expect'.²⁰⁴ Echoing Yassin's comments, Hamas issued a statement, which reportedly read: 'It's a part of a series of responses that will take a long time and teach all Israelis'.²⁰⁵ This kind of events from the assassination of Shehadeh to the suicide attack against Israeli civilians by Hamas showed that retaliatory attacks were used as a rationale for harming civilians by the Palestinian militant group.

Having clarified that punishment and reprisals have been used as means to justify harming civilians, let us move on to assess the justification for harming civilians on the grounds that attacks against civilians are a means of resistance against occupation. In the discourse of the Palestinian militant groups, indiscriminate or direct attacks against Israeli civilians by suicide bombing are considered to be just and legitimate

²⁰³ Quoted in Margot Dudkevitch, 'Hamas vows to avenge killing of top terrorist', *Jerusalem Post* (24/7/2002), p. 1.

²⁰⁴ Suzanne Goldenberg, 'Bomb kills seven at university: three US citizens among dead after Hamas attack', *Guardian* (1/8/2002), p. 2.

²⁰⁵ Quoted in Justin Huggler, 'Murder in campus: Bombing of university dining hall leaves 7 dead and 70 injured', *Independent* (1/8/2002), p. 1.

means of resistance against the illegitimate Israeli occupation. Rantisi justified a Hamas sponsored suicide bombing on the grounds that Palestinians are militarily inferior to the IDF: 'Hamas uses these tactics and means of struggle because it lacks F-16s, Apaches, tanks and missiles, and so we use any means that we have', and for justifying suicide attacks against civilians he gave the following reason: 'we are under occupation and are weak'.²⁰⁶ The issue we have to consider here is whether or not indiscriminate or direct attacks can be justified on the grounds of resistance. At face value, the words of the Palestinian militant group might simply imply the need for the protection of civilians under the Israeli occupation. However, in this case, Hamas's definition of civilians as protected people was again limited to their fellow Palestinian civilians only, and the Palestinian group was little concerned about the protection of civilians in the Israeli territory, just as the State of Israel implied that civilian protection meant Israeli civilians only.

In Section 3. 2. 3, I have considered that punishment, reprisal and a means of resistance were used as ways of justifying military operations, despite the fact that these operations often caused civilian casualties to a degree that breached the principle of proportionality normally envisaged and used in moral judgment of war conduct. I have

²⁰⁶ Quoted in Suzanne Goldenberg, 'The man behind the suicide bombs: Every death is the product of a well-oiled killing machine', *Guardian* (12/6/2002), p. 12.

argued that such military operations could not be justified on any of these grounds if the military operations based on these justifications either directly or indiscriminately targeted civilians or caused unnecessary harm to civilians to a disproportionate degree.

3. 2. 4. Human Shields

Having considered in Section 3. 2. 3 how civilians were harmed in the name of punishment, reprisal or a means of resistance by the warring parties, in Section 3. 2. 4, in order to examine further whether or not the use of human shields could justify harming civilians, I will consider the ethical issues surrounding human shields.

Human shields are defined in general as ‘non-combatants whose presence protects certain objects or areas from attack’. Human shields are categorised into ‘voluntary human shields’, ‘involuntary human shields’, and ‘proximity human shields’, according to Daniel Schoenekase.²⁰⁷ In order to assess whether or not the use of human shields can justify and/or excuse harming civilians, I will now consider how human shields are used as an excuse for, as well as a justification for, harming civilians. Specifically, I will consider the three categories of human shields and how they are an issue of concern, in order to clarify the complex nature of the ethical issues surrounding

²⁰⁷ Daniel P. Schoenekase, ‘Targeting Decisions Regarding Human Shields’, *Military Review* (September-October, 2004), pp. 26–31 at p. 26.

human shields.

The first category I will examine is voluntary human shields. This consists of individual civilians who voluntarily use themselves as human shields in order to protect other civilians. Cases of this type of human shield are found in the activities of so-called peace activists in the Occupied Territories. There are several instances in which peace activists were killed or injured by the IDF, and in this discussion I will consider two cases in order to explore the concept of voluntary human shields fully. The first case involves American activist Rachel Corrie, who was crushed to death by an Israeli bulldozer in Gaza on March 2003 while she knelt down in front of it in order to prevent the destruction of a Palestinian village by the IDF.²⁰⁸ To justify its action, the IDF published a report in which it denied any responsibility for her death and called her behaviour 'illegal, irresponsible and dangerous'.²⁰⁹ The other case in which a peace activist acted as a human shield and was killed as a consequence was that of Tom Hurndall, who was directly targeted and shot by an IDF soldier on April 2003 when he tried to move Palestinian children out of the line of fire.²¹⁰ In this case, the IDF soldier

²⁰⁸ Chris McGreal and Duncan Campbell, 'Israeli army bulldozer crushes US peace activist in Gaza Strip', *Guardian* (17/3/2003), <http://www.guardian.co.uk/international/story/0,,915711,00.html>, accessed on 12/7/2006.

²⁰⁹ Quoted in Conal Urquhart, 'Israeli report clears troops over US death: Peace activist killed by bulldozer acted "illegally and dangerously"', *Guardian* (14/4/2003), p. 12.

²¹⁰ Audrey Gillan, 'UK activist returns from Israel in coma', *Guardian* (20/5/2003), <http://www.guardian.co.uk/israel/Story/0,,966860,00.html>, accessed on 12/7/2006.

who allegedly shot Hurndall was convicted of manslaughter by an Israeli military court in 2005.²¹¹

In these two cases, voluntary human shields were killed by the IDF, either indirectly or directly. However, more importantly, these cases in which peace activists were harmed are different from other cases in which civilians were harmed due to being used as human shields by combatants. The difference is in that the peace activists acted voluntarily as human shields to help civilians, whereas other civilians might have been used involuntarily, or indeed forced to act, as human shields. These incidents of peace activism might be seen tragic, and their courage and solidarity with Palestinian civilians might be praiseworthy. However, the point is that those activists acted on their volition as autonomous agents who were responsible for their actions. Presumably they knew well the danger and risk of behaving in such a way and the possibility of lethal consequences. In this sense, these cases of voluntary human shields seem less problematic than the cases which I will consider later in this section because the peace activists who acted as human shields were at least partly responsible for the harm inflicted upon them, whereas other civilians are often used as human shields involuntarily or by force and thus have little or no influence over their actions and the

²¹¹ Coral Urquhart, 'Eight year jail term for Israeli who shot Briton', *Guardian* (12/8/2005), <http://www.guardian.co.uk/international/story/0,,1547443,00.html>, accessed on 12/7/2006.

consequences following their use as human shields.

The second of the three categories of human shields which I will explore is involuntary human shields. An example of this is the coercive use of civilians for military purposes, as presented in the earlier example when the IDF allegedly used Palestinian civilians as human shields in order to protect their soldiers. This type of human shield is clearly prohibited by Article 51(7) of Additional Protocol I of the 1949 Geneva Conventions, which reads:

The presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.²¹²

In the Israeli–Palestinian Conflict, the State of Israel appeared to be aware of unlawfulness of the use of civilians as a human shield.²¹³ For example, on the 24th of April, 2004, a photograph of a Palestinian boy on the bonnet of an Israeli police jeep

²¹² AP(I), Art. 51(7).

²¹³ On 6th of October 2005, The Israeli High Court of Justice ruled that it was illegal for the IDF to use Palestinian civilians during military operations. Donald MacIntyre, 'Israeli Use of "Human Shield" is judged Illegal', *Independent* (7/10/2005), p. 31.

was published in the *Independent*, the caption to which reads: ‘Mohammed Bedwan was tied to a jeep to serve as human shield’.²¹⁴ In response to this incident, Gil Kleiman, a police spokesman was quoted as saying:

As a general rule we do not willingly expose civilians to physical damage. In this case there was *prima facie* evidence that procedures were carried out which were incorrect, and this has been passed to the Justice Ministry.²¹⁵

This incident seems to show that the State of Israel did not tolerate the use of civilians as human shields, presumably accepting the legal prohibition of this conduct. However, as I will examine in due course, the IDF, contrary to the above quotation and court ruling, did use Palestinian civilians as human shields in combat situations.

Despite its claim of compliance with the prohibition on the use of civilians as human shields for military purposes, the IDF is alleged to have used Palestinian civilians in this way in military operations. According to an Amnesty International report, a typical use of human shields by the Israeli military would involve the soldiers ‘compel[ling] an adult male in their military operation to search property in each area of

²¹⁴ Donald MacIntyre, ‘Inquiry after Israeli Forces caught using Boy as shield’, *Independent* (24/4/2004), p. 31.

²¹⁵ *Ibid.*

the refugee camp'.²¹⁶ The Israeli soldiers allegedly forced Palestinian civilians to 'enter buildings to check whether they are booby-trapped or to expel their occupants', 'remove suspicious objects from the road', 'stand inside houses that the IDF has turned into military positions, so that Palestinians will not fire at soldiers', and 'walk in front of soldiers to shield them from gunfire'.²¹⁷ One example of this occurred when a Palestinian civilian, who had reportedly been given a flak jacket and been sent into a building occupied by Hamas militants, was shot dead when he approached the compound.²¹⁸ The report prepared by Amnesty International gives another example in the testimony of Faisal Abu Sariya, a Palestinian civilian who was used as a human shield by the IDF:

I was then taken from this house and told to go to another house alone, and to knock on the door. I did this but no one answered. They told me to come back. I saw that they had a type of metal box that they were carrying and they brought it to the door. I then heard an explosion. I was then told to go back to the house and to go in and if there were any people in the house to tell them to go to one room. When I went back, I found another door. Again, I knocked but no one replied. The soldiers exploded this door. At this time, they sent in a dog and then told me to go in and if I was to find any closed door, to open them. The soldiers then came in after me.

²¹⁶ Amnesty International, 'Without distinction—attacks on civilians by Palestinian armed groups' (MDE 02/003/2002), p. 24.

²¹⁷ B'Tselem Press Release, 'IDF is Responsible for Death of "Human Shield"' (B'Tselem: Jerusalem, 14/8/2002).

²¹⁸ Stephen Farrell, 'Israel's "human shield" is killed', *Times* (16/8/2002), p. 18.

...The soldiers were searching the house and then we went to the bottom floor of the house where they put a hole in the wall between this house and next. I was taken by the soldiers and told to go through the hole first. There were six or seven soldiers that followed behind me. From there, I was taken to another house...When we leaving this house, Eitan [an Israeli officer] grabbed me by the neck and put his machine gun against my right hip. I walked about 20 meters like this.

According to the report, Abu Sariya was later ordered by the unit accompanying him to check another building and was consequently shot in the leg by a soldier from another IDF unit when he crossed a road to approach it.²¹⁹

Although it is not the same as a human shield in the strictest sense, the IDF soldiers often resorted to the 'neighbour procedure', which involves the 'use of Palestinians to arrest other Palestinians or to order them to leave their house'.²²⁰ From a military point of view, this act might be justified on the grounds that local civilians as emissaries are more likely to persuade Palestinian combatants to surrender or to let other civilians evacuate before combat starts, and therefore this procedure could give both Israelis and Palestinians a chance to prevent military confrontation and/or avoid unnecessary casualties.²²¹ However, the issue we have to take into account here is that

²¹⁹ Amnesty International, 'Without distinction', p. 25.

²²⁰ B'Tselem, *2002 Activity Report* (Jerusalem: B'Tselem, 2007), p. 7.

²²¹ Chris McGreal, 'Israel's human shield drew fire: Human rights groups return to court over Army's use of Palestinian civilians', *Guardian* (2/1/2003), p. 11.

the IDF used Palestinian civilians for military purposes in the name of neighbour procedures, which, according to a B'Tselem report, are 'not significantly different from other ways in which the IDF used civilians as human shields' in terms of danger to civilians.²²²

Having considered the second of the three categories of human shield, I will consider the third type of human shield; namely, proximity human shields. The use of this type of human shield is exemplified by Palestinian militants allegedly used their fellow civilians as human shields against an Israeli attack, by mingling themselves among the civilian population for the purpose of self-protection. Again, let us consider the case of the assassination of Shehadeh. The Israeli authorities accused Shehadeh of using the civilian population in a refugee camp as human shields by placing himself within it: 'Regretfully, this is what can happen when a terrorist uses civilians as a human shield and their homes as places of refuge'.²²³

If the allegation that the Palestinian militants used their fellow civilians as human shields to deter Israeli attacks were true, the culpability of the Israeli authorities for harming civilians could have been diminished on the grounds that the Palestinian

²²² Yael Stein, *Human Shield: Use of Palestinian Civilians as Human Shields in Violation of High Court of Justice Order* (Jerusalem: B'Tselem, 2002), p. 4.

²²³ Quoted in Suzanne Goldenberg, 'Sharon hails raid as great success: International criticism of attack that killed 9 children', *Guardian* (24/7/2002), p. 1.

militants abandoned their obligation to protect fellow civilians by breaching international laws and customs on the protection of civilians. Article 28 of the Fourth Geneva Convention of 1949 reads: ‘The presence of a protected person may not be used to render certain points or areas immune from military operation’.²²⁴ An editorial in the *Jerusalem Post* encouraged the Israeli Government not to be reluctant to pursue Palestinian militants despite the civilian casualties that might be caused by their illegitimate use of human shields. It reads:

Israel should obviously attempt to kill or capture these men [i.e. Palestinian militants] as surgically as possible, without unduly risking the lives of our soldiers. But we should not be deterred by their deliberate use of civilians as human shields.²²⁵

If the Palestinian militants used their fellow civilians as human shields, then the militants might be blamed for their unlawful act and the Palestinian Authority might also be blamed for its failure to stop the militants using Palestinian civilians as human shields. However, as we have seen so far, it is clear that military action against the Palestinian militants did not automatically justify harming Palestinian civilians, despite the fact that these civilians were deliberately used as human shields and/or such harm

²²⁴ See also AP(I), Art. 51(7).

²²⁵ Editorial, ‘Annihilate Hamas’, *Jerusalem Post* (5/8/2002), p. 6.

was incidentally caused.

In Section 3. 2. 4, I have considered how human shields become a matter of concern regarding civilian protection by examining three different types of human shields. I have argued that the last two types – involuntary and proximity human shields – raise concerns about whether or not these uses of human shields which result in harming civilians might be justified. I have also revealed that the IDF used Palestinian civilians as human shields for the purpose of protecting combatants, which resulted in casualties among Palestinian civilians, and found that Palestinian militants used their fellow civilians as proximity human shields against the Israeli attack, by mingling themselves among the civilian population for the purpose of self-protection. These examples of human shields seem to confirm that civilian protection has been breached on many occasions by both sides, to the degree that the legal and ethical principles of non-combatant immunity and proportionality were absent from war conduct in the Israeli–Palestinian Conflict.

Concluding Remarks for Chapter 3

In Chapter 3, I have analysed how civilian protection was considered and how civilians were harmed in the Israeli–Palestinian Conflict. In Section 3. 1, I have investigated the

overview of how civilians were, directly or indirectly, harmed by both the IDF and the Palestinian militant groups in the Israeli–Palestinian Conflict. Through my discussion, I have found that there was a pattern of attacks in which civilians were harmed to a disproportionate degree and/or by prohibited means and methods of using military force against them. I have also revealed that the distinction between civilians and combatants virtually collapsed in this conflict. I have found not only that the protection of civilians was not always respected, but also that civilians were often directly targeted by combatants. In Section 3. 2, I have considered the main causes for military action undertaken in the name of civilian protection, in order to consider how civilian protection was used as a way of justifying and/or excusing military operations. I have also revealed that these causes for military action did not necessarily justify such military operations in which civilians were harmed disproportionately or directly. My observations from discussing the case of the Israeli–Palestinian Conflict have led to four conclusions: firstly, that civilians were frequently targeted in indiscriminate or direct attacks by both the IDF and the Palestinian militant groups; secondly, that civilian protection had little meaning in this armed conflict; thirdly, that neither the Palestinian militant groups nor the IDF complied with civilian protection; and finally, that although the IDF did not take an official strategy to target civilians in military operations, it

nevertheless does not seem to have been sensitive enough to take measures to ensure the commitment of its units and members to civilian protection in the operational theatre. The Israeli–Palestinian Conflict may therefore draw our attention to the need for measures to ensure civilian protection at the level of individual combatants, which I will examine in greater detail in Chapter 5. Before that, however, moving away from this specific conflict and back to a theoretical analysis for the protection of civilians, in Chapter 4 I will explore how a Hume-inspired conception of justice can reconceptualise civilian protection in armed conflict.

CHAPTER 4: JUSTICE, UTILITY AND CIVILIAN PROTECTION

Introduction

Having considered in Chapter 3 how civilians were not well protected in the Israeli–Palestinian Conflict, in Chapter 4 I will explore one of the two potentially promising ways to supplement just war theory in civilian protection – namely, a Hume-inspired conception of justice – in order to propose a global utility-based understanding of civilian protection as part of just conduct in armed conflict.

This chapter is divided into six parts. Initially, I will discuss a Hume-inspired conception of justice as an artificial virtue, and its relevance regarding civilian protection, in order to explore a possible explanation for justifying civilian protection as part of just conduct in armed conflicts. Secondly, I will examine utility as a moral case for civilian protection as part of just conduct in times of war, in order to consider whether or not this concept contributes to civilian protection. Thirdly, I will examine the first of the two interpretations of the utility of civilian protection; utility as a mutual benefit between warring parties, in order to consider whether or not this interpretation of utility contributes to civilian protection. Fourthly, I will critically examine the issues presented by the first interpretation of reciprocity-based utility for the parties to the

conflict, in order to consider whether or not this interpretation of utility leads to the protection of civilians. Fifthly, I will examine the concept of non-reciprocity-based utility between the warring parties in order to consider whether or not this interpretation of the utility of civilian protection can be appropriate. Finally, I will examine the second interpretation of utility as the ethical foundation for civilian protection; namely the utility of civilian protection at the global level, in order to consider whether or not this interpretation of utility contributes to civilian protection. Through the discussion in Chapter 4, I will consider these six issues in turn, in order to portray how the concept of utility as a way of justifying civilian protection may play a role not only to justify civilian protection but also to ensure that civilians are better protected in armed conflict.

4. 1. A Hume-Inspired Conception of Justice: Justice as an Artificial Virtue

In Section 4. 1, I will explore a Hume-inspired conception of justice as an artificial virtue, and its relevance to civilian protection, in order to explore a possible explanation to justify civilian protection as part of just conduct in armed conflict.

The reason I will consider civilian protection as justice in war from a Humean point of view is that the Hume-inspired conception of justice as an artificial virtue provides a way to conceptualise civilian protection as utility at the global level.

Although the Hume-inspired conception of justice may not be the only viable approach to justify civilian protection as part of just conduct in war, my attempt to consider civilian protection from a Humean perspective may be sufficient if I can demonstrate that the Hume-inspired conception of justice works viably when attempting to understand civilian protection as part of just conduct in war, and that this understanding leads to the better protection of civilians.

From a Humean point of view, as outlined in his *Treatise of Human Nature*, justice, or to act justly, can be considered to be an artificial virtue in the sense that it is a socially constructed and contextualised human artifice for moral approval and disapproval.²²⁶ This conception of justice indicates that the system to achieve and maintain justice has developed in the process of living with others, and consequently varies in accordance with specific ‘circumstances and necessities’, in Hume’s terms. In this vein, Hume defines justice as one of the artificial ‘virtues, that produce pleasure and approbation by means of an artifice or contrivance, which arises from the circumstances and necessities of mankind’. Justice was invented as, in Hume’s words, ‘a remedy to this inconvenience’ of instability and scarcity of goods.²²⁷ This Hume-inspired understanding of justice as an artificial virtue directs our attention to the notion that

²²⁶ David Hume, *Treatise of Human Nature*, (ed.) L. A. Selby-Bigge (Oxford: Clarendon Press, 1888), pp. 478–96.

²²⁷ *Ibid.*, pp. 478, 488.

there is no internal force in human nature to motivate people to act justly or to approve of justice; only such diverse motives as narrow self-interest, a ‘regard to public interest’ and ‘private benevolence’ motivate people to act justly. In Hume’s words:

From all this it follows, that we have naturally no real or universal motive for observing the laws of equity, but the very equity and the merit of that observance; and as no action can be equitable or meritorious, where it cannot arise from some separate motive, there is here an evident sophistry and reasoning in a circle. Unless, therefore, we will allow, that nature has establish’d a sophistry, and render’d it necessary and unavoidable, we must allow, that the sense of justice and injustice is not derived from nature, but arises artificially, tho’ necessarily from education and human convention.²²⁸

This position regarding justice as an artificial virtue implies that the original motive to establish the system of justice flows from the self-interest of people to secure and protect their own possessions as well as limited generosity to their nearest and dearest. As he continued, ‘tis only from the selfishness and confine’d generosity of man, along with the scarce provision nature has made for his wants, that justice derives its origin’.²²⁹ In the Hume-inspired conception of justice, therefore, people need a moral motivational force other than self-interest and limited generosity; for example, extended sympathy to all human beings, through convention and education, so that they can act

²²⁸ Hume, *Treatise*, p. 483.

²²⁹ *Ibid.*, p. 495.

justly.

4. 2. Utility as an Ethical Foundation for Civilian Protection

Having introduced in Section 4. 1 the Hume-inspired conception of justice as an artificial virtue, in Section 4. 2 I will consider utility as a possible explanation for the value of acting justly – in this case, protecting civilians in war – in order to explore how the concept of utility contributes to civilian protection.

Drawing on Hume, if we take the position that there is no natural motive to approve of the system of justice in human nature, as discussed in the previous section, we might wonder what sort of motivational force makes people approve of justice as an artificial virtue. From a Hume-inspired point of view on justice, utility can be understood as the values attached to justice for the following reason: members of society approve of justice that serves not only themselves individually but also society as a whole.²³⁰ According to Hume, people find values of justice in utility in the socio-psychological way that people seek the system of justice out of necessity and for convenience, because such a system is advantageous to society as well as its members. People thus approve of justice as a virtue because it serves ‘public utility’ and ‘is useful

²³⁰ David Miller, *Philosophy and Ideology in Hume's Political thought* (Oxford: Clarendon Press, 1981), p. 72.

to society'. In his later work, *Enquiries concerning the Human Understanding and concerning the Principle of Morals*, Hume writes that:

The necessity of justice to the support of society is the sole foundation of that virtue; and since no moral excellence is more highly esteemed, we may conclude that this circumstance of usefulness has, in general, the strongest energy, and most entire command over our sentiments.²³¹

This characteristic of justice as a human contrivance implies that people in society learn to have a concern for public interest by recognising and understanding that the rules of justice serve utility for both society as a whole and its individual members. For this reason, Hume argues that people obtain 'an idea of justice and injustice' only after the system of justice is established.²³²

Following the same line of argument, civilian protection can be considered to be one of the rules of justice in war in the sense that it can be recognised and understood as a feature of just conduct in armed conflict. This leads me to infer that the values of civilian protection are connected to utility since civilian protection delivers utility for the individual members of society as well as society as a whole. This line of thought

²³¹ David Hume, *Enquiries concerning the Human Understanding and concerning the Principle of Morals*, 2nd ed. (ed.) L. A. Selby-Bigge (Oxford: Clarendon Press, 1892), pp. 183, 203–4.

²³² Hume, *Treatise*, pp. 486– 490.

further implies that civilian protection could be justified if it were considered to be serving utility.

If utility can be understood as a value for justifying civilian protection, then one of the most important issues to consider is the scope of utility which the rule of civilian protection is expected to serve. In other words, who are the stakeholders concerned with the utility of civilian protection? We may have at least two possible answers to this question: one is the inter-warring parties of a specific conflict, and the other is all parties at a global level. The former interpretation is often closely associated with the conventional discussion of the ethics of war which may be found in the works of Richard Brandt and George Mavrodes.²³³ These works have a fundamental limitation in that they understand utility at a national level, and thus fail to grasp another possibility of understanding utility at the global level, as envisaged by contemporary utilitarians such as Peter Singer.²³⁴ As will be discussed in detail in a later section of Chapter 4, the reason for this is that in the former interpretation of stakeholders, the scope of utility of civilian protection is limited, and its value is therefore underestimated. In other words, this interpretation suggests that the value of civilian protection cannot be recognised by non-parties to a conflict.

²³³ Brandt, 'Utilitarianism and the Rules of War', pp. 145–65; Mavrodes, 'Conventions and Morality of War'.

²³⁴ Peter Singer, *One World: The Ethics of Globalisation* (New Haven, CT: Yale University Press, 2002).

In the following four sections (Sections 4. 3 to 4. 6), I will examine both different scopes of utility as a framework for civilian protection.

4. 3. The First Scope of Utility: Utility as a Mutual Benefit between Warring Parties

Having discussed in Section 4. 2 utility as the moral value of civilian protection, in Section 4. 3 I will examine an interpretation of the scope of utility of civilian protection – namely utility as a mutual benefit between warring parties – in order to consider whether or not this interpretation of utility contributes to civilian protection.

The understanding of utility at the level of inter-warring parties is often considered to be the basis of utility of the rules of war, in which the idea and ideal of civilian protection are embodied. For example, Brandt argues that morally justifiable rules of war are ones that ‘maximize expectable long-range utility for nations at war’. In his argument, it is apparent that Brandt refers to utility as inter-belligerent by limiting its scope of application ‘in the circumstance that two nations are at war’.²³⁵ In other words, in the Brandtian context, the utility of the laws of war is considered to be the utility for the warring parties.

²³⁵ Brandt, ‘Utilitarianism and the Rules of War’, pp. 150, 152.

Following this line of argument in which the stakeholders of utility are limited to the warring parties, the utility of civilian protection is considered to be justified on the grounds of mutual advantage. If this is the case, then the government would not protect enemy civilians *except* in circumstances where so doing leads to the protection of its fellow civilians to its own benefit.²³⁶ In this sense, the motive of the government to protect enemy civilians can be considered to originate from the expectation and calculation of reciprocal benefits. Suppose that governments A and B are at war and government A implements the protection of government B's civilians and government B acts similarly. By directly protecting government B's civilians, government A could indirectly protect its fellow civilians and *vice versa*. This equilibrium can be achieved as long as both parties to the conflict hold a commonly shared view that the utility of civilian protection is based on their mutual benefit. Part of the reason that the utility of civilian protection can also be understood in terms of mutual benefit between warring parties is explained from the Hume-inspired conception of the origin of justice, which considered it to be established for the reciprocal benefits of individual members of society.²³⁷ Hume argues that people accept and approve of the rules that achieve and maintain justice as a result of their concern for themselves as well as for society,

²³⁶ Mavrodes, 'Conventions and Morality of War', p. 86, 87.

²³⁷ Hume, *Treatise*, p. 495.

because such rules are ‘absolutely requisite to the well-being of mankind and existence of society’.²³⁸

This Hume-inspired conception of the utility of the rules of justice may be found in Hume’s idea concerning the laws of war between warring parties. Hume argues that the laws of war are broken when a party to the conflict does not see them as useful or advantageous for its execution of a war because these rules are a product ‘calculated for the *advantage* and *utility* of that particular state’. In Hume’s words:

The rage and violence of public war; what is it but a suspension of justice among the warring parties, who perceive, that this virtue is now no longer of any *use* or advantage to them? The laws of war, which then succeed to those of equity and justice, are rules calculated for the *advantage* and *utility* of that particular state, in which men are now placed.²³⁹

This line of argument suggests that one way to understand that the laws of war can be justified is on the grounds of mutual benefit between the parties to the conflict.

In order further to consider how the utility between warring parties works as a rationale for civilian protection, my argument will benefit from further consideration of Hume’s argument on the laws of war. In Mackie’s interpretation, Hume expects the laws

²³⁸ Hume, *Enquiries*, p. 199.

²³⁹ *Ibid.*, p. 187.

of war to provide ‘the function only of mitigating conflicts and making it easier to maintain intervals of non-fighting within the lasting state of war, not that of establishing justice and genuine peace between nations’.²⁴⁰ If Mackie’s interpretation is correct, this feature of the laws of war as a remedy to mitigate the misery and plight of victims in war might be considered similar to the purpose of IHL, in that both avoid the utopian views that war can be totally abandoned, that total disarmament can occur, or that perpetual peace is achievable, but hold the realistic view that war does occur, but that unnecessary harm must be avoided.

If this understanding of Hume’s conception of the laws of war is correct, however, we notice immediately the divergence between IHL and the Humean conception of the laws of war. Whereas Hume’s conception of utility of the rules of war is simply based on mutual benefits between warring parties in a particular war, IHL does not rest on this premise. IHL is more concerned with the long-term utility of the laws of war at a global level. In other words, the utility of the laws of war envisaged in IHL cannot substantially be undermined by a breach of a set of rules in war. The difference between Hume’s conception of the scope of utility in the laws of war and IHL’s is evident in Hume’s writings that civilised nations must abandon the laws of war

²⁴⁰ J. L. Mackie, *Hume’s Moral Theory* (London: Routledge and Kegan Paul, 1980), p. 115.

when ‘barbarians’ who do not observe these rules wage war against them. In Hume’s words:

And were a civilized nation engaged with barbarians, who observed no rules even of war, the former must also suspend their observance of them, where they no longer serve to any purpose; and must render every action or encounter as bloody and pernicious as possible to the first aggressors.²⁴¹

These comments confirm Hume’s theory that the utility of the laws of war is sustained by reciprocity between warring parties because, this line of argument goes, if no reciprocal benefits between warring parties are expected in observing the laws of war, neither party would see the utility in so doing. This line of argument indicates the limitation of Hume’s original conception of the laws of war because it suggests that a lack of reciprocal benefits between warring parties would make them abandon the code of civilian protection. This conclusion seems to go against the spirit of the Geneva Conventions that may be described by the phrase ‘of virtually universal application’, according to *The Manual of the Law of Armed Conflict*.²⁴²

In Section 4. 3, I have examined the first interpretation of the scope of utility of civilian protection from a Humean point of view, and found that utility of the laws of

²⁴¹ Hume, *Enquiries*, pp. 187–8.

²⁴² UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, p. 14.

war can be justified on the grounds of reciprocal benefits between parties to the conflict. I have found that civilian protection can be understood through the same line of thought. However, I have also argued that the conclusion derived from Hume's original conception of the laws of war raises a concern. In Section 4. 4, in order to revise Hume's original conception of the law of war, I will critically examine the implications of this first interpretation of utility for civilian protection.

4. 4. A Critical Examination of Reciprocity-based Utility

To restate the first interpretation of the scope of utility discussed in the previous section, if the utility of the laws of war is justifiable solely on the grounds of reciprocal benefits between warring parties, the imperatives and incentives to sustain civilian protection as a rule of war may be considered solely based on the mutual benefits of the parties concerned. In this utility-as-reciprocal-benefits framework, civilian protection can be justified as part of just conduct in war on the condition that warring parties protect the civilian population in enemy territories on the understanding that the other party will act in the same way. However, there are two points worthy of critical examination in order to consider whether or not the first interpretation of utility actually serves the protection of civilians. The first point to consider is the characteristic of civilian protection as a

rule of war, and the other is the possibility that the concept of the utility of civilian protection is not subscribed to, and that civilian protection is no longer observed by warring parties.

Firstly, let us consider the characteristic of civilian protection as a rule of war. If we follow the idea that the utility of the laws of war is justified solely by reciprocal benefits, we find that it diminishes when reciprocal benefits are not expected. This line of argument seems something of an oversimplification of the whole set of issues regarding the laws of war, because some sets of codes might rather be considered directly based on reciprocal benefits whereas others might not be. According to Mackie, Hume assumes that diplomatic immunity, the declaration of war, and the prohibition of the use of poisoned weapons are among the laws of war.²⁴³ These rules might be seen as directly based on reciprocity, mainly because these rules are aimed at mutual benefits in force protection. Contrary to these rules, in IHL, civilian protection can be seen less directly based on reciprocity. This idea is codified in Article 51(8) of Additional Protocol I, which reads: ‘Any violation of these prohibitions [i.e. direct attacks against civilians, indiscriminate attacks, reprisals against civilians, and human shields] shall not release the Parties to the conflicts from their legal obligations with respect to the

²⁴³ Mackie, *Hume's Moral Theory*, p. 113.

civilian population and civilians'.²⁴⁴

In certain situations, civilian protection might bring rather a negative impact on force protection. To shed light on this point, we have to recognise that some military operations are undertaken in the form of expeditions on foreign soil, and in such situations where civilians on the side of expeditionary forces are not normally present in the operational theatre. In other words, the expeditionary force often does not have any obligation to protect its own nationals in the operation unless it is an exceptional rescue mission of its nationals. Furthermore, military capabilities and mission objectives of deployed force are two issues to be taken into account when we consider whether or not armed forces have the capability, and their political masters have the political will, for the protection of civilians. Indeed, civilian protection can be significantly impeded by a lack of capability and/or political will, especially in the case of the UN-mandated expeditionary forces – their forces are often small and under-equipped – even though in some cases the protection of civilians itself becomes part of the mission for military operations. One case that might help to illustrate the issues set out above is found in Srebrenica in July 1995. At this time, 400 lightly armed Dutch forces under the auspices of the UN were stationed to secure the city, which was declared to be a UN-sanctioned

²⁴⁴ AP (I), Art. 51(8).

safe area. The Dutch forces, for the sake of the protection of their own soldiers, had to allow the Bosnian Serb forces to enter the city, where they massacred thousands of Bosnian Muslim civilians. This case shows that Hume's original, reciprocity-based conception of the laws of war is not only inapplicable to civilian protection as a rule of war in some current conflicts, but also contradicts the principle of IHL and practice of warring parties.

Let us move on to consider the other of the two points: that is, what are the consequences if the utility of ensuring civilian protection collapses? In the reciprocity-based framework, if civilian protection does not serve mutual benefits between the warring parties, parties to the conflict might choose to disregard it for military and/or political purposes. The loss of the utility of civilian protection gives one party to the conflict a reason to abandon its commitment to civilian protection, with the rationale that the enemy no longer abides by it. The collapse of the utility of civilian protection also means that one party to the conflict is enabled to opt for reprisals once the other violates the rule of civilian protection. Instances in which the rule of civilian protection has totally collapsed are readily found in the history of warfare. Indeed, civilian protection has been violated numerous times in many contemporary armed conflicts. During the Second World War, for example, there are many episodes of

violations of civilian protection; such as the Rape of Nang King and other atrocities committed in China by the Japanese Imperial Army, the Allied bombings of German and Japanese cities, and the use of atomic bombs, to name but a few. One of the most serious problems potentially arising from the total abandonment of the rule of civilian protection in war may be called ‘reversion to barbarism’²⁴⁵ in F. J. P. Veale’s words: that is, self-denial of civility by civilised nations. Up to this point of the argument, it is clear that the reciprocity-based conception of the utility of civilian protection is limited, since within this conception the rule of civilian protection is destined to collapse if and when one party to the conflict ceases to observe the rule. This limitation may well draw our attention to another, more global, conception of utility, which I will consider in Section 4. 6.

In Section 4. 4 I have critically examined the implications of the first interpretation of the scope of utility of civilian protection: utility between warring parties. I have examined two key points concerning this interpretation of utility in order to consider whether or not the interpretation actually contributes to civilian protection. Through the examination of these two issues, I have found that civilian protection would eventually fail if the utility of civilian protection were solely assumed in a

²⁴⁵ F. J. P. Veale, *Advance to Barbarism: The Development of Total Warfare from Sarajevo to Hiroshima* (London: Mitre Press, 1968), p. 23.

reciprocity-based conception of utility between warring parties. In Section 4. 5, I will consider non-reciprocal factors that force parties to the conflict to sustain the utility of the laws of war.

4. 5. Non-reciprocal Factors for the Utility of Civilian Protection

To summarise the argument developed in the previous section, it is assumed in the first interpretation of the scope of utility of civilian protection that if a government abided by the rule of civilian protection for the reason of reciprocity only, it would abandon complying with the rule once the enemy ceased to observe it. This line of thought raises the question of whether the utility of civilian protection should be considered solely to be based on a reciprocity-based conception of utility. The view that civilian protection is undertaken solely on the basis of reciprocity between the parties concerned seems very different from the fundamental assumption and practice of contemporary IHL. In contrast with the Humean idea of the laws of war discussed earlier, proposing that a civilised nation (a defender) may violate the laws of war in order to punish a barbaric nation (aggressor) for its act of aggression, IHL forbids the warring parties to abandon civilian protection as part of their legal obligations under any circumstances, even though another party to the conflict may not follow such a rule. The non-reciprocity

legal principle of civilian protection also seems to be practised by civilised states, at least if their governments claim to be, and want to be regarded as, civilised by other states and political communities.

The issue that a government often undertakes the protection of an enemy civilian population beyond reciprocity seems to indicate the limitations of the system of justice as proposed by Hume. In practice, any system of justice sometimes brings injustice to some individuals and/or societies. Examples of this include the forcible acquisition of private property by authorities and, arguably, the death penalty.²⁴⁶ However, the key point is that these miscarriages of justice, if they occur, do not necessarily lead to the total collapse of the system of justice. From a Humean point of view, the overall system of justice serves utility for individuals as well as society in the long term.²⁴⁷ In the same context, the overall, long-term utility for society as well as its individual members is the grounds for the rules of justice because the overall scheme of justice would generally contribute to maintaining society and make its members better-off in the long term. In Hume's words:

But however single acts of injustice may be contrary, either to public or private interest, 'tis certain, that the whole plan or scheme is

²⁴⁶ In the UK, capital punishment for murder in time of war was not outlawed until as recently as October 2003 when the government acceded to the 13th Protocol of the European Convention of Human Rights.

²⁴⁷ Hume, *Treatise*, p. 580.

highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual.²⁴⁸

This argument appears to be based on the idea of utility, which accepts that the presence of the system of justice is still better for members of society than its total absence, and that people do come to recognise and understand the advantage of the system of justice.

Hume writes:

And every individual person must find himself a gainer, or balancing the account; since, without justice, society must immediately dissolve, and every one must fall into that savage and solitary condition, which is infinitely worse than the worst situation that can possibly in suppos'd in society. When therefore men have had experience enough to observe, that whatever may be the consequence of any single act of justice, perform'd by a single person, yet the whole system of actions, concurr'd in by the whole society, is infinitely advantageous to the whole, and to every part; it is not long before justice and property take place. Every member of society is sensible of this interest: Every one expresses this sense to his fellows, along with the resolution he has taken of squaring his account by it, on condition that others will do the same...This becomes an example to others. And thus justice establishes itself by a kind of convention or agreement; that is, by a sense of interest, suppos'd common to all, and where every single act is perform'd in expectation that others are to perform the like.²⁴⁹

This Humean explanation of utility brought by the system of justice seems to imply that

²⁴⁸ Hume, *Treatise*, p. 497.

²⁴⁹ Hume, *Treatise*, pp. 497–8.

civilian protection is not primarily based on reciprocity-based utility between parties to the conflict, but on utility at the global level, taking other stakeholders into account. This understanding of justice also implies that in the case of civilian protection, the scope of utility might not necessarily be limited to the parties to the conflict only. I will consider this issue in detail in Section 4. 6.

If state practice does not support the idea that the utility of civilian protection is solely justified by reciprocity between warring parties, one possible explanation for this is that the principle of reciprocity may only give the warring parties an option to comply with civilian protection but does not determine their decision by itself alone. There are several factors that a warring party may consider when it decides whether or not to comply with civilian protection. The warring party might conduct a cost–benefit calculation to sustain the credibility of civilian protection as a rule in war and the credibility and political legitimacy deriving from its commitment to civilian protection. It could be beneficial to the warring party and its members in the long run to sustain the credibility of civilian immunity as a rule in war, and the warring party might also come to find civilian protection beneficial.

Suppose that one government continues its commitment to civilian protection although the enemy does not. Civilian protection might impose certain restraints on war

conduct, and possibly obstruct the optimal use of military force, bringing tactical, operational and even strategic disadvantages in the short term or in a particular campaign. However, the trade-off is that the government could obtain moral and legal leverage, in addition to its moral high ground against the enemy, in a broader context, usually in the longer term. The government may thus claim political legitimacy by being a governing authority, as well as by being a party to the conflict, by abiding by IHL. The observance of civilian protection may also appeal to international public opinion and mobilise various international pressures by illustrating this party's military as a moral army fighting against illegitimate armed groups that do not comply with international law. It may eventually depend on each particular situation whether or not the opposing force opts unilaterally to abandon its commitment to civilian protection or reciprocally to continue to abide by it, but the point to be clarified is that the decision does not solely derive from the principle of reciprocity.

In addition to this argument, the unilateral practice of restraint in war can also provide an additional explanation that the utility of civilian protection cannot solely be based on reciprocity for the warring parties. Mavrodes argues that unilateral restraint on the side of one party might work as a constructive way to forge and reinforce the rules and customs of war because it might 'signal his willingness to abide by such a

convention. He continues: 'If the opponent does not reciprocate, then the offer has failed and it goes no further. If the opponent does reciprocate, then the area of restraint may be broadened, and a kind of mutual respect and confidence may grow up between the belligerents'.²⁵⁰ This line of thought appears to be envisaged in IHL. For example, Article 96, Paragraph 3 of Additional Protocol I, stipulates that a non-state party may unilaterally declare the application and compliance of the Geneva Conventions of 1949 and Additional Protocol I so that it benefits from the restraints and prohibitions codified in these laws of war. It reads:

The authority representing a people engaged against a High Contracting party in an armed conflict of the type referred in Article 1, Paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all

²⁵⁰ Mavrodes, 'Conventions and the Morality of War', p. 88.

Parties to the conflict.²⁵¹

The unilateral declaration codified in this provision has been practised by non-state parties to various conflicts. Examples may be found in African non-state parties to conflicts such as the rebel Biafran authorities in 1968, the African National Congress and the Zimbabwean African People's Union (ANC-ZAPU) in 1977, the União Nacional para a Independencia Total de Angola (UNITA) in 1980, the African National Congress (ANC, South Africa) in 1980, South West Africa People's Organization (SWAPO) in 1981 and 1988, and the Rwandese Patriotic Front in 1992.²⁵²

In Asia, another example can be found in the declaration by the National Democratic Front of the Philippines (NDFP), undertaking to apply the Geneva Conventions of 1949 and Additional Protocol.²⁵³ This example does not necessarily mean that NDFP has actually committed itself to IHL as a whole. However, these are examples that demonstrate that parties to conflicts may on occasion find it beneficial to commit themselves to the provisions of IHL, in order to claim political legitimacy, for example.

In Section 4. 5, I have considered whether or not a non-reciprocity-driven

²⁵¹ AP (I), Art. 96(3).

²⁵² Churchill Ewumbue-Monono, 'Respect for International Humanitarian Law by Armed Non-State Actors in Africa', *International Review of Red Cross* 88:864 (2006), pp. 905–24 at pp. 907–8.

²⁵³ <http://www.hartford-hwp.com/archives/54a/036.html>, accessed on 24/11/2006.

conception of utility serves the protection of civilians. During the course of my discussion I have found that one party to a conflict does not always abandon civilian protection even in the situation that the other ceases to observe it, contrary to a reciprocity-based assumption of utility. I have also found that the parties to a conflict sometimes find it beneficial unilaterally to observe the rules of war, again contrary to a reciprocity-based assumption of utility. These two findings appear to indicate that the first interpretation of utility of civilian protection – reciprocity-based utility between warring parties – does not necessarily contribute to civilian protection. However, I have also demonstrated that non-reciprocity-based utility *can* contribute to civilian protection. In Section 4. 6, I will explore the second interpretation of the scope of utility of civilian protection; the utility of civilian protection at the global level.

4. 6. The Second Scope of Utility: Utility at the Global Level

Having discussed in Section 4. 5 the non-reciprocity-based conception of utility of civilian protection by reference to state practice, in Section 4. 6 I will examine the other less discussed yet constructive interpretation of the scope of utility of civilian protection; namely at the global level, as proposed by commentators such as Singer, for example, in order to consider whether or not this interpretation of utility contributes to

civilian protection.

In this interpretation of the utility of civilian protection, utility can be defined as ‘a belief in the common good’, which ‘means that one subscribes to a given norm, even if it is likely that observing it will not always be in any short term or narrowly defined (in other words, selfish) interest and even if it may happen that other actors will not observe it, because one believes that this norm is right or that it is essential for the common welfare and happiness of international society’, according to Stanley Hoffman.²⁵⁴ If we follow Hoffman’s definition of utility as a global common good, civilian protection can be understood as part of the global common good because civilian protection serves utility at the global level. This understanding of utility as a global common good indicates that the utility of civilian protection is determined not only by the parties concerned in a particular armed conflict but also by other stakeholders such as other states and non-state parties, inter- and trans-national organisations and non-governmental organisations. In fact, there could be a vast majority of other states that are not directly involved in conflict but remain signatories to the Geneva Conventions.

In order to consider the scope of utility, we have to examine a key question: to

²⁵⁴ Stanley Hoffmann, ‘Ethics and Rules of the Game between the Superpowers’, in Henkin, Louis, *et al*, *Right V. Might: International Law and the Use of Force* (New York: Council of Foreign Relations, 1989), pp. 71–93 at p. 73.

whom is civilian protection useful and advantageous? Civilian protection is obviously useful and advantageous to the civilians affected by war. Civilian protection can also be seen as useful and advantageous to warring parties for political, economic and military reasons. By following the rule of civilian protection and thus sparing the lives of civilians, warring parties could save military force and resources necessary for the continuation of the war. In addition, by following the rule of civilian protection, warring parties could earn trust from other states as well as members of the public, which could be used as a political currency for claiming the legitimacy of their use of force. These military resources and political currency are often necessary for the continuation of the ongoing conflict and the preparation for possible future ones, as well as for effective post-war reconstruction and sustainable peace.

Some commentators might, however, argue against this argument for the second interpretation of the scope of utility of civilian protection – utility at the global level. There is almost always a segment of society which does not observe rules. In this current discussion, those perpetrators may be called ‘barbarians’ in Hume’s terms. As I have already mentioned, in Hume’s original point of view on the laws of war, the rules are supposed to collapse if one party to the conflict does not observe them because they

‘no longer serve to any purpose’.²⁵⁵ However, the central question we must consider is whether or not civilian protection becomes useless or disadvantageous to all of us in any sense once it is breached by one side.

In order to understand the problem of barbarians who do not observe the rules of war, Hume’s argument of the ‘sensible knave’ seems to be helpful. Suppose that a party to the conflict who violates the code of civilian protection is a ‘sensible knave’, who in Hume’s words is someone who ‘cheat[s] with moderation and secrecy’ for his own gains.²⁵⁶ In this framework, despite the fact that there are some such malefactors, people in general still follow the rule of justice, because reciprocal self-interest is not the only reason that people follow the rules of justice. There are other moral motivations such as sympathy for society, concerns about reputation, personal commitment, the sense of moral approval of acting justly and disapproval of acting unjustly. If these moral motivational forces influence political/military leaders to act justly, then civilian protection can be complied with as part of just conduct in war, despite the fact that the enemy violates the rule of civilian protection.

The most important issue regarding the second interpretation of the scope of utility – utility at the global level – is whether or not the warring parties subscribe to an

²⁵⁵ Hume, *Enquiries*, p. 187.

²⁵⁶ Hume, *Enquiries*, pp. 283–4.

idea and ideal of the long-range utility of civilian protection at a global level. This question becomes most acute if and when significant losses and damage are inflicted upon warring parties in the ongoing armed conflict, despite the fact that they commit themselves to civilian protection in the prospect of expected long-range utility at the global level. Furthermore, the question is seriously challenged if and when their enemies benefit from their non-compliance with civilian protection. The worst case scenario in this line of argument is that committing to civilian protection could lead to the annihilation of a state/nation. As a safety valve against such a national disaster, Brandt argues that ‘it is conceivable that ideal rules of war would include one rule to the effect that anything is allowable, if necessary to prevent absolute catastrophe’; in other words, ‘if basic values of society are threatened nations are possibly released from all restrictions’.²⁵⁷ If the abandonment of civilian protection is considered to be part of ‘all restrictions’, then Brandt’s argument is a serious challenge to the interpretation of the utility of civilian protection at the global level, in that a government can be allowed to resort to any means to survive, and if so determined, civilian protection could be seen as a peripheral issue.

In order to defend my argument for the utility of civilian protection at the global

²⁵⁷ Brandt, ‘Utilitarianism and the Rule of War’, p. 147n3.

level, I will bring to the discussion six critical responses to Brandt's challenge. The first response is to what Brandt calls the 'basic values of society': we have to ask ourselves whether or not civilian protection can be considered to be one of these values. If the protection of civilians is considered to be one such value, then we should not abandon civilian protection. I have posited reasons in my discussion so far that civilian protection can be considered to be one of these basic values which it is in everyone's interest universally to endorse: civilian protection is beneficial to the vast majority of stakeholders, both individual and collective, and it is our last stand for the sake of our civilisation and its moral values against the reversion to barbarism.

The second response is concerned with how probable it is that we will be faced with national annihilation. In other words, we have to check the actual situation carefully by considering whether or not the threat of national annihilation is so serious and imminent that civilian protection has to be abandoned. There have been few wars since the Second World War which have escalated to the degree that a civilisation or basic values of community are at peril, whereas there have been a number of wars that have led to the overthrow of a regime/government.²⁵⁸

The third response considers the moral values of the government under whose

²⁵⁸ One notable exception might be the genocide in Rwanda, which seems to have broken the basic values of society, if not civilisation as a whole.

jurisdiction we live. This issue can be rephrased as the question of whether or not it is worth keeping allegiance to a government that abandons its responsibility to protect civilians. This is the point that Michael Donelan considers the *raison d'être* of a state. Donelan argues: 'A state that defends itself by intentionally killing the innocent is defending nothing'.²⁵⁹ The key issue here is to what extent we have a moral obligation to keep political allegiance to a government that is not responsible for the protection of its citizens and residents. Although the answer may depend on individuals and circumstances, the question at issue here appears to be a matter of the moral values of the government.

The fourth response states that international intervention to stop the violations of human rights has been customarily practised, most notably since the 1990s. Adam Roberts argues:

In crises and conflicts since the end of the Cold War considerations specifically identified as "humanitarian" have been repeatedly designated by States and international bodies as ground for threatening, and embarking on, international military action. Such considerations have been given greater prominence in international decision-making than in previous eras.²⁶⁰

²⁵⁹ Michael Donelan, *Elements of International Political Theory* (Oxford: Clarendon Press, 1990), pp. 168–9.

²⁶⁰ Adam Roberts, 'Humanitarian Issues and Agencies as triggers for International Military Action', *International Review of Red Cross* 839 (2000), pp. 673–98, at p. 637.

Let us suppose that a nation faces the brink of annihilation, despite the fact that its government and armed forces comply with civilian protection when in armed conflict, while its counterpart does not observe civilian protection. If this were the case, then it is arguable that the international community would somehow intervene, if not militarily then often more likely economically and/or diplomatically, in order to stop the annihilation of the nation at risk as well as the collapse of the fundamental norm in armed conflicts. This stance is, for example, explicitly mentioned as a foreign policy in *The Responsibility to Protect*, which reads:

While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there. This responsibility also requires that in some circumstances action must be taken by the broader community of states to support populations that are in jeopardy or under serious threat.²⁶¹

This trend seems to confirm that armed humanitarian intervention has been more widely

²⁶¹ International Commission on Intervention and State Sovereignty, *Report*, p. 13.

accepted in contemporary international relations than ever.

The fifth response states that agents' motives for civilian protection are not solely based on utility at the global level, but may also be affected by the existence of a reciprocity-fuelled motive. To clarify this point, the motive for reciprocal benefits in a particular armed conflict may coexist with the prospect and conviction of long-range utility at the global level. Indeed, if parties to the conflict have motives to protect civilians on the enemy side in order to receive the same benefit on their own side, then their motives do not deny the practice of utility at a global level but support the system of justice at a global level, because they come to understand that the system is useful to support and sustain their interest in reciprocal benefits of civilian protection. In other words, the sense and actual result of mutual benefits serve further to reinforce the warring parties' convictions of the utility of civilian protection at the global level.

The sixth response concerns international non-governmental organisations that have been acting as driving forces to disseminate the concept of civilian protection as utility at the global level. An example of such a force is the International Committee of the Red Cross (ICRC), which disseminates the idea of the need for civilian protection as part of IHL so that the idea and ideal of civilian protection can be better recognised and

understood by military professionals as well as civilians.²⁶² The multi-layered activities of ICRC on civilian protection can be found operating at different levels. At the field level, ICRC acts as a silent witness for civilian protection in many armed conflicts, and at the international and diplomatic level, ICRC works as a mediator/facilitator for legislating a series of humanitarian laws so that civilians can gain further protection in armed conflicts. Furthermore, ICRC also often discreetly urges warring parties to comply with civilian protection.²⁶³

In Section 4. 6, I have considered the concept of the utility of civilian protection at the global level. I have argued that this interpretation of utility actually contributes to civilian protection. I have also critically considered the argument that parties to the conflict do not have to protect civilians when they perceive that so doing may lead to a catastrophe (i.e. the destruction of the basic values of society and/or national annihilation). In order to demonstrate that this argument against the utility of civilian protection at the global level cannot be substantiated, and to defend my position, I have raised six points that have supported my argument for the utility of civilian protection at the global level.

²⁶² ICRC's stance on dissemination is clearly stated in the *Commentary*, which reads: 'dissemination will contribute to the promotion of humanitarian ideals and a spirit of peace among nations'. ICRC, *Commentary*, p. 960.

²⁶³ Nicholas O. Berry, *War and the Red Cross: The Unspoken Mission* (Basingstoke, MacMillan, 1997), pp. 68, p. 32.

Concluding Remarks for Chapter 4

In Chapter 4, I have critically examined civilian protection as part of just conduct in armed conflict in order to consider what sort of scope of conception may better serve civilian protection. Initially, from a Hume-inspired perspective, I have examined justice as an artificial virtue in order to conceptualise civilian protection as part of just conduct in war. I have argued that there is no moral motivational force in human nature to follow or approve the system of justice. This position appears to indicate that there must be some motivational force by which we are still convinced of appreciating and following justice, and that such a moral motivational force flows from the moral values of justice. Secondly, I have considered utility as a moral value regarding civilian protection from a Humean perspective. I have argued that the moral value regarding civilian protection as just conduct in war can be found in utility. I have also raised the question of the scope of the utility of civilian protection, and pointed out that there are at least two different answers to the question. Thirdly, I have examined the first interpretation of the scope of the utility of civilian protection from a Humean point of view; in this first interpretation, I have found that the utility of the laws of war can be justified on the grounds of reciprocal benefits between parties to the conflict. I have also revealed that civilian

protection can be understood along the same line of thought as the laws of war. Fourthly, I have critically examined the implications of the first interpretation of the scope of the utility of civilian protection; utility between warring parties. I have discussed two key points concerning this interpretation of utility in order to consider whether or not the interpretation actually contributes to civilian protection. Through the examination of these two issues, I have found that civilian protection would eventually fail if the utility of civilian protection were solely assumed in a reciprocity-based conception of utility between warring parties. Fifthly, I have considered whether or not the non-reciprocity-driven conception of utility serves the protection of civilians. During the course of this discussion I have found that one party to the conflict does not always abandon civilian protection even in a situation where the other ceases to observe it, contrary to the reciprocity-based assumption of utility. I have also discovered that parties to a conflict sometimes find it beneficial unilaterally to observe the rules of war, again contrary to the reciprocity-based assumption of utility. These two findings seem to indicate that the first interpretation of the utility of civilian protection – reciprocity-based utility between warring parties – does not necessarily contribute to civilian protection. Finally, I have considered the conception of the utility of civilian protection at the global level. I have argued that this interpretation of utility actually

contributes to civilian protection. I have also critically considered the argument of whether or not parties to the conflict do not have to protect civilians when they perceive that so doing may lead to a catastrophe (i.e. the destruction of the basic values of society and/or national annihilation). In order to demonstrate that this argument against the utility of civilian protection at the global level cannot be substantiated and to defend my position, I have raised six points that support my argument for the utility of civilian protection at the global level.

In Chapter 4, having made a case for the utility of civilian protection at the global level, the question to be considered is: how can civilian protection be undertaken in practice? In order to explore this question, in Chapter 5, I will examine the role of the government and the tasks of the military in ensuring civilian protection in order to consider how civilian protection can be ensured by both bodies. I will therefore consider civilian protection from the perspective of the typical professional ethics of military personnel in Western industrial democracies, primarily by drawing examples from the UK Armed Forces and its coalition partner, the US Armed forces.

CHAPTER 5: CIVILIAN PROTECTION AND PROFESSIONAL ETHICS

Introduction

Having argued in Chapter 4 that to recognise and understand civilian protection as utility at the global level is a promising way to ensure the better protection of civilians, in Chapter 5 I will examine one example of the professional ethics of armed forces in Western industrial democracies with regard to civilian protection, in order to consider one possible way that civilians could be better protected within this framework. This is because although I defend my position that civilian protection should be understood, recognised and exercised as utility at the global level by using the macro level approach of Hume's conception of justice in Chapter 4, I have not yet discussed concrete ideas or specific prescriptions to implement civilian protection. Indeed, this is the reason that I primarily draw examples from the UK and US Armed Forces' professional ethics when considering ways to improve civilian protection; these are forces which could act as agents who commit to and promote civilian protection as utility at the global level, not only because they have been deployed in many different conflict areas, but also because they are supposed to act as guardians of the code of civilian protection.

In order to conduct my research on civilian protection from the viewpoint of

military ethics, I will draw on theoretical and empirical discussions and materials, primarily from the examples of the UK Armed Forces and its coalition partner, the US Armed Forces, which are usually considered to be two of the most modern militaries in contemporary international relations, and are thus expected to commit to and promote the code of civilian protection. Furthermore, in order to construct my argument for the further promotion of civilian protection at the global level, I will primarily focus on the professional ethics of the UK and US Armed Forces as examples, among many, of agents who commit to and promote civilian protection as utility at the global level.

Chapter 5 is divided into three sections. Initially, in order to consider why civilians are not always protected, I will explore four main reasons that combatants fail to protect civilians from a moral-psychological point of view. Secondly, I will proceed to examine the professional ethics of the UK and US Armed Forces with regard to civilian protection, in order to consider whether or not it is possible to incorporate civilian protection into a professional code of military ethics. Finally, in order to explore possible ways that civilian protection could be promoted within the framework of military ethics, I will consider the role of the government and the tasks of the military when incorporating civilian protection as part of a professional code of military ethics.

5. 1. Four Reasons that Civilians are not Always Protected in War

In Section 5. 1, in order to consider why civilians are not always protected by combatants in armed conflict, I will examine the main reasons that combatants often fail to protect civilians from a moral-psychological point of view. These reasons can be summarised under four headings, which are: lack of respect, incompatible emotional responses, the consequence-oriented military mindset, and the psychological effects and impacts of combat.

The first of the four main reasons that civilian protection has often failed is due to the combatants' lack of respect for civilians, because a lack of respect for other people often creates a mindset that has the potential to commit atrocities. In Glover's words: 'Atrocities are easier to commit if respect for the victims can be neutralized'.²⁶⁴ If respect for civilians is not recognised, or at least not seriously considered, by members of the armed forces, then they are likely to be more disposed to commit atrocities upon civilians.

It might be arguable, therefore, that the respect of soldiers for civilians not only needs to be considered seriously, but also to be recognised as part of the professional code of military ethics by the armed forces. Take the British Army as an example. In an

²⁶⁴ Glover, *Humanity*, pp. 35–6.

official statement by the British Army on military ethics and professional codes of conduct, soldiers' respect for civilians is enshrined in one of its 'Core Values': 'Respect for Others'.²⁶⁵ This 'Core Value' is emphasised in the Military Covenant, which states that respect for others 'must remain a hallmark of the Army'. This document, *Soldiering: The Military Covenant*, reads:

It [i.e. respect] also extends to the treatment of all human beings, especially the victims of conflict, the dead, the wounded, prisoners and refugees. The responsibility of bearing arms and using lethal force makes it vital that all soldiers act properly under the law and maintain the highest standards of decency and a sense of justice at all times, and to all people, even in the most difficult of conditions.²⁶⁶

This statement implies that the protection of civilians is recognised as part of the professional code of military ethics among military professionals in the UK.

Even granted that civilian protection has been recognised as part of the professional code of military ethics, however, there is still a question as to how this respect for civilians is exhibited and practised by combatants at the operational level.

One puzzling question about the practical implementation of this idea can be found in

²⁶⁵ UK Army, *The Values and Standards of the British Army: Commanders' Edition*, (Army Code No 63812, D/DPS(A)/3/290/PS2(A), 2000), p. 11.

²⁶⁶ UK Army, *Soldiering: The Military Covenant* (Army Doctrine Publication Vol. 5: GD&D/18/34/71 Army Code No. 71642, February 2000), obtained through the Army website; http://www.army.mod.uk/servingsoldier/usefulinfo/valuesgeneral/adp5milcov/ss_hrpers_values_adp_5_0_w.html, accessed on 13/1/2007, ch. 3, para. 12.

the British Army's different stance on respect for others as described in the alternative material provided for soldiers of different ranks on the subject. Specifically, the clause that states that respect extends to 'all people' is not found in *The Values and Standards of the British Army - Soldiers' Edition*, a booklet 'issued to every soldier'²⁶⁷ in the British Army. In this booklet, the nuance of the explanation of 'Respect for Others' is somewhat different from that in the Military Covenant and in *The Values and Standards of the British Army – Commanders' Edition*. The *Soldiers' Edition* reads:

As a soldier you have the exceptional responsibility of bearing arms, and when necessary of using controlled lethal force. In addition, you will sometimes have to live and work under extremely difficult conditions. In such circumstances, it is particularly important that you show the greatest respect, tolerance, and compassion for others because comradeship and leadership depend on it.²⁶⁸

This statement seems to imply that the object of soldiers' respect is assumed to be their fellows in the chain of command. Although this text does not necessarily prohibit soldiers from having respect for civilians, the omission of the clause outlining the idea that respect extends to the victims of conflict could potentially blur the message that

²⁶⁷ UK Army webpage; http://www.army.mod.uk/servingsoldier/usefulinfo/values_and_standards/index.htm, accessed on 13/1/2007.

²⁶⁸ UK Army, *The Values and Standards of the British Army: Soldiers' Edition*, p. 3.

soldiers are expected and required to have respect for civilians. It therefore seems that respect for civilians, which may well lead to the protection of civilians, is not sufficiently explicitly manifested as part of the professional code of military ethics in the British Army among the lower ranks. If this is the case, then there is a concern that the idea of respect for civilians might not sufficiently be understood among the rank and file.

The idea of respect for civilians as part of the professional code of ethics might further be undermined by a less restrictive interpretation and application of the principle of proportionality. The principle of proportionality, which I examined in Chapter 2, dictates that military force should be used proportionately to achieve military goals so that any unnecessary suffering of non-combatants can be avoided, and so that harm to them must be minimised as much as possible. The underlying idea of the less restrictive interpretation of the principle is such that a *prima facie* obligation to avoid unnecessary suffering by civilians loses its imperative when the military advantage significantly outweighs the cost (damage to civilians). Furthermore, the principle of proportionality is not a principle that gives definitive answers for every single decision-making process, nor does it function as a clear guideline for the selection of the means and methods of the use of force. Rather, at the operational level, the interpretation and scope of

application of the principle are almost always subject to the role and capacity of individual combatants on the field.

The second of the four main reasons that civilian protection fails in armed conflict is concerned with emotional responses that are incompatible with respect for civilians. Soldiers are likely to be tempted to attack unarmed civilians by non-respectful emotional responses, such as hatred, lust for power, and aggressiveness. John Keegan argues that arms-bearers often have a desire to subjugate non arms-bearers. In his words: 'The possession of superior force is a perpetual temptation to behave badly... The strong kills the weak as if by a rule of human nature and can actually be stimulated to kill by the victim's weakness'.²⁶⁹ Michael Walzer also points out an aspect of soldiers' mentality by arguing that some soldiers can get rid of the psychological restraints on committing atrocities and other unlawful acts in war under the influence of emotional responses which are in conflict with the idea of respect for others.²⁷⁰ These emotional responses may well be considered to be an additional force that further prevents soldiers from having respect for civilians and thus more easily tempts them to commit atrocities upon civilians.

²⁶⁹ John Keegan, *War and Our World: Reith Lecture 1998* (London: Pimlico, 1999), p. 50.

²⁷⁰ Michael Walzer, 'World War II: Why Was This War Different?', in Marshall Cohen, Thomas Nigel and Thomas Scanlon (eds.), *War and Moral Responsibility* (Princeton: Princeton University Press, 1974), p. 103.

The third main reason that the protection of civilians is not always ensured on the battlefield is found in the military mindset that characterises soldiers' 'the ends justify the means' mentality. Thomas Nagel argues that the attitude of public office holders tends to be consequentialist in that agents are expected and required to provide outcome-oriented performances. Nagel further argues:

the impersonal morality of public institutions, and the moral specializations that inevitably arise given the complexity of public actions, lead naturally to the establishment of many roles whose terms of reference are primarily consequentialist.²⁷¹

The consequentialist-oriented attitude is also found among military personnel who execute public policy with military nature. Jacques van Doorn describes the transformation process of a soldier's mentality towards the consequence-oriented way of thinking as that of the 'erosion of his own professional code'. He continues:

the professional military man feels compelled, or permits himself to be compelled, to counter this violence with similar measures. His wish to succeed leads him to use force against civilians, to torture of prisoners, and to deploy organised terror methods...²⁷²

²⁷¹ Thomas Nagel, 'Ruthlessness in Public Life', in Stuart Hampshire (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), pp. 75–91 at pp. 84, 90.

²⁷² Jacques van Doorn, 'The Military and the Crisis of Legitimacy', in Gwyn Harries-Jenkins and Jacques van Doorn (eds.), *The Military and the Problem of Legitimacy* (London: Sage, 1976), pp. 17–39 at p. 32.

If soldiers were overzealous or reckless in the pursuit of military success, which is determined by ‘military effectiveness in terms of fighting power’,²⁷³ and achieved through effective ‘management’ concerning ‘the allocation and control of resources (human, material and financial) to achieve objectives’,²⁷⁴ then the possibility of breaching civilian protection could be high. Thus we may well consider the tendency of soldiers to be preoccupied by the consequence-oriented military mindset as another main reason that civilian protection cannot always be respected by soldiers.

The fourth main reason that civilians are killed or harmed in armed conflict is related to the psychological conditions of soldiers in combat situations. Thomas Weiss and Cindy Collins observe a likelihood of behavioural disorder among combatants who are under the pressure of combat for a long period. They argue:

The longer a combatant and others touched by a conflict are exposed to horrible images of war and unbearable living conditions, the greater the chances of developing combat stress disorder - a syndrome that renders its victims unable to maintain self-discipline.²⁷⁵

²⁷³ UK Army, *Values and Standards: Commanders' Edition*, p. 3.

²⁷⁴ UK Army, SO1 Leadership Development, RMAS, *Soldier Management, A Guide for Commanders* (AC 64286, 2004), p. 3.

²⁷⁵ Thomas G. Weiss and Cindy Collins, *Humanitarian Challenges and Intervention* (Boulder: Westview Press, 1997), p. 123.

According to Weiss and Collins, combat stress disorder is one of the ‘new factors’ that may trigger ‘preventing some combatants from adhering to international norms protecting the life and livelihood of non-combatants’.²⁷⁶ Soldiers’ psychological conditions may thus be considered to be an additional imperative that prompts violations of civilian protection.

5. 2. Incorporating Civilian Protection into Military Ethics

Having discussed in Section 5. 1 four main reasons that civilians are not always protected by combatants, in Section 5. 2, in order to consider how civilians could be better protected, I will explore a potential solution by considering substantially incorporating civilian protection into the professional code of military ethics. Section 5. 2 is divided into three parts. Initially, I will examine the responsibility of soldiers as arms-bearers and the current trend of military missions in order to clarify the reason that the military needs to include civilian protection in its professional code of ethics. Secondly, in order to consider how civilian protection can be included into military ethics, I will examine two possible vehicles; namely, military education and training, which could potentially contribute to this inclusion. Finally, I will examine one possible

²⁷⁶ Weiss and Collins, *Humanitarian Challenges*, p. 123.

problem that may be caused by the inclusion of civilian protection into a professional code of military ethics in order to discover whether or not the potential problem is in fact plausible.

5. 2. 1. Reason to Include Civilian Protection in Military Ethics

In Section 5. 2. 1, I will examine the responsibility of soldiers as arms-bearers and the current trend of military missions in order to discover the reason that the military needs to include civilian protection in its professional code of ethics.

Although it has long been a matter of debate whether or not soldiering is a profession, strictly speaking, the officer corps in some national armed forces, including the British Army, may be regarded as a professional group.²⁷⁷ Being considered to be a profession in some contemporary Western industrial democracies, members of armed forces are expected and required to have a professional code of ethics.²⁷⁸ John Keegan describes this as a ‘particular ethic, a readiness by the individual to risk his – or her – life not simply for any of the traditional values by which warriors fought but for the cause of peace itself’.²⁷⁹ Continuing this line of argument, Fotion and Elfstrom argue that codes of ethics are useful for the military and its members in that they play a role as

²⁷⁷ Patrick Mileham, ‘Military Ethics’, in Mileham (ed.), *War and Morality*, pp. 157–64, at p. 162.

²⁷⁸ Cook, *The Moral Soldiers*, p. 56.

²⁷⁹ Keegan, *War and Our World*, p. 59.

‘practical devices for controlling people’s behavior in recurring situations’.²⁸⁰ By analogy, just as a single act of misconduct by a physician could affect the reputation of the medical profession as a whole, a single act of misconduct by an individual soldier could not only damage the reputation of the military but also undermine its legitimacy and public trust.

A particular profession is bound by its professional codes of conduct.²⁸¹ The British Army seems no exception to this rule. From the viewpoint of professional ethics, however, one of the most salient differences between military professionals and members of traditional professional groups such as physicians and lawyers is that the soldiers have such privileges as the knowledge, skills, means, right and duty to use lethal force against enemy combatants.²⁸² In addition to this difference, it can also be counted as a fundamental difference between military professionals and the traditional professional groups that the former group routinely deals with matters of life and death concerning their fellows as well as their enemies. In fact, soldiers are armed and trained to use weapons in order to exercise controlled violence that could be lethal to others. This characteristic of the profession of arms is manifested, for example, in the British

²⁸⁰ Fotion and Elfstrom, *Military Ethics*, p. 75.

²⁸¹ See, for example, the handbook of legal guidelines for physicians: British Medical Association, *Rights and Responsibilities of Doctors* (London: BMJ Publishing, 1992).

²⁸² Obviously, there are also other differences; in terms of the degree of autonomy, for example.

Army's Military Covenant, which states that soldiers have 'the legal right and duty to fight and if necessary, kill, according to their orders'. According to this Covenant, soldiers' 'grave responsibilities' derive from the fact that they are 'weapon bearer[s]' and 'must be prepared personally to make the decision to engage an enemy or to place themselves in harm's way'.²⁸³ These privileges as professionals in the armed forces, in turn, seem to predicate soldiers' responsibility for civilian protection as part of the professional code of military ethics. This further indicates that soldiers have a duty of care toward civilians as part their core professional duties.

Despite the fact that soldiers are expected and required to exercise responsibilities and obligations as arms-bearers to protect civilians from the perspective of military ethics, some Western industrial democracies' armed forces have often failed to regard civilian protection as part of the professional code of ethics in the history of warfare. For more than a hundred years until the early twentieth century, civilian protection used to be part of the professional code of military ethics, according to Best, mainly because the distance between soldiers and civilians was generally wide and their differences were distinct. In his own words:

The 'regular' armies for whom and indeed, until our contemporary

²⁸³ UK Army, *Soldiering*, ch. 1, para. 1.

epoch, by whose representatives exclusively the law of war was made, were conscious of the distinction between themselves and civilian populations and sought to maintain it; their professional ethic taught them to spare civilians, they liked their appearance and behaviour to differ as much as possible from that of civilians, and they preferred to get their fighting done, though not necessarily their campaigning, in places where there were no civilians to get in their way.²⁸⁴

Best's comments imply that some of today's combatants do not subscribe to civilian protection as part of the professional code of military ethics, unlike their predecessors who apparently used to do so, because the distance between combatants and civilians has become smaller than ever in the battlefield. This tendency could be explained by the fact that the number and proportion of non-members of national armed forces involved in warfare – such as guerrillas, members of terror organisations and private military contractors – has been growing, and their roles and activities have expanded in many contemporary armed conflicts. These irregular combatants do not always consider civilian protection to be ethical conduct because the harming of civilians has often become a military objective in conflicts. Furthermore, in many contemporary intrastate armed conflicts, the parties to the conflict, that may consist of members of armed forces as well as irregulars, actually target civilians.²⁸⁵

In the contemporary milieu of global security, however, civilian protection has

²⁸⁴ Best, *War and Law Since 1945*, p. 335.

²⁸⁵ Weiss and Collins, *Humanitarian Challenges*, p. 34.

gained momentum towards being considered to be part of the professional code of military ethics because it has increasingly been one of the mission objectives of multilateral, UN-led or -authorised humanitarian military operations.²⁸⁶ In these humanitarian operations, military personnel are required to recognise, understand and exercise civilian protection as an operational principle in order that they can accomplish their mission objectives. In the current strategic climate, members of armed forces backed by the political will and military capability for expeditionary military operations are required not only to prepare for fighting a full-scale war and conducting major combat operations, but also to prepare for ever-growing, post-Cold War era military and non-military humanitarian operations, such as relief supply delivery, policing, peacekeeping, peace enforcement, and the protection of the civilian population.²⁸⁷ In these humanitarian operations undertaken by third-party military forces or intervening expeditionary forces, civilian protection is frequently emphasised as one of the mission objectives and sometimes practised as part of a *de facto* professional code of ethics.

In Section 5. 2. 1, I have examined soldiers' responsibility as arms bearers and the current trend of military missions as two reasons that justify incorporating civilian protection as part of the professional code of military ethics of Western industrial

²⁸⁶ Weiss and Collins, *Humanitarian Challenges*, p. 33.

²⁸⁷ *Ibid.*, p. 123.

democracies' armed forces. Through the discussion I have argued that the bearing of arms necessitates soldiers' responsibility for the protection of civilians, although combatants do not always exercise this responsibility for civilian protection. I have also found that it is advantageous for the military as well as civilians to incorporate civilian protection into the professional code of military ethics because civilian protection has increasingly been considered to be a mission objective and soldiers have been required to comply in many military operations with humanitarian purposes. Having concluded that it is advantageous and indeed necessary for the armed forces to incorporate civilian protection as part of their professional code of ethics, in Section 5. 2. 2 I will consider how this could be achieved.

5. 2. 2. Military Education and Training

Having considered in Section 5. 2. 1 the reasons for incorporating civilian protection into the professional code of military ethics, in Section 5. 2. 2, in order to consider how this could be done, I will examine two possible vehicles that could contribute; namely, military education and training.

If it is advantageous to the military to incorporate civilian protection into its professional code of ethics, as I have argued in Section 5. 2. 1, then the vehicles to

achieve this objective can be found in the education and training provided for military personnel. Thus, through military education and training, civilian protection could be recognised and understood as part of just conduct in armed conflict, which the military is expected and required to comply with and enforce. In this sense, military education and training may be expected to function as leverage to avoid or minimise the mental and physical breakdown of soldiers even in the most demanding situations and to enable them to uphold the values and standards of the armed forces.

Education for military personnel is potentially a promising way to incorporate civilian protection into the professional code of military ethics, because it is through education that military personnel can learn to recognise and understand the requirements of civilian protection in the context of professional ethics. Fotion and Elfstrom argue that the most important part of education in the military is to make its members understand and acquire this code of ethics.²⁸⁸ The need for and importance of education among military professionals are also endorsed by George Lee Butler, who points out that the failure of soldiers' integrity occurs 'because they lack education and a personal code' and 'because they fail to keep their minds on what education and moral code require'.²⁸⁹ To assure civilian protection, the armed forces therefore need to make

²⁸⁸ Fotion and Elfstrom, *Military Ethics*, p. 66.

²⁸⁹ George Lee Butler, 'Some Personal Reflections on Integrity', in Ficarrota (ed.), *The Leader's*

their members understand and adhere to civilian protection as part of the professional code of ethics which they are expected and required to implement.

Military education is provided at two different levels. One is at the level of career officer corps and the other is at the level of non-commissioned officers and soldiers. Education in the military, according to Fotion and Elfstrom, starts with drills of military codes of ethics, which represent intuitive moral thinking, especially among the lower military echelons, and then proceeds to supplementary exercises of critical thinking, especially among the upper military echelons, which is aimed at helping to ‘fill whatever the moral gaps are left open by the codes’.²⁹⁰ In the case of officer corps education in the British Army, for example, Mileham argues that professional education as a career officer is as ‘lengthy and rigorous’ as that in the traditional professions such as medicine and law, pointing to the Advanced Command and Staff Course (ACSC), which is considered to be the ‘full professional qualification’ for a member of the profession of the management of violence.²⁹¹ Civilian protection is incorporated into the officer education programme in ACSC for senior officers (for Majors and Lt. Cols), who are about to take up staff appointments and have ‘the potential for Col and above’.²⁹²

Imperative, pp. 73–83 at pp. 81–2.

²⁹⁰ Fotion and Elfstrom, *Military Ethics*, p. 83.

²⁹¹ Patrick Mileham, *Ethos: British Army Officership 1962–1992: The Occasional Number 19* (Camberley, Strategic and Combat Studies Institute, 1996), p. 14.

²⁹² UK Army, SO1 Leadership Development, RMAS, *Soldier Management*, p. 24.

Military education is also aimed at ordinary soldiers. Education for soldiers is particularly important because they are generally more disposed than career officers to deviate from ethically and legally acceptable behaviour in combat, which can be of significant concern, since they exercise lethal force in the battlefields. As Fotion and Elfstrom argue:

Being less trained in the military traditions than the professionals, and less educated generally than their leaders, they will have more of a tendency either not to know what to do when faced with an ethical problem or to do the wrong thing intuitively.²⁹³

If this is the case, then it seems correct to assume that the armed forces need to educate their members so that they can recognise, understand and exercise civilian protection as part of their professional code of ethics.

If education holds the key to ensuring that military personnel understand that civilian protection should be part of their professional code of ethics, then the next question to be addressed is whether or not such education may effectively be undertaken through military training. On the one hand, there are some commentators who argue that education about civilian protection should not be included as part of military training.

²⁹³ Fotion and Elfstrom, *Military Ethics*, p. 73.

Richard Holmes, for example, argues that the instructions concerning restraint towards civilians in combat given to the soldiers are ‘both confusing and impracticable’. He characterises the main function of military training as a process to remove moral restraint on killing so that soldiers do not hesitate to kill the enemy on the battle field. In his words: ‘The legitimate need to de-fuse deep-seated cultural and psychological taboos against killing is an inseparable part of military training’. He also argues that the ‘almost obligatory dehumanisation of the enemy’ is involved in the process to remove taboos against killing. For these reasons, Holmes might be correct to argue that ‘to train soldiers in the exercise of deliberate restraint’ in the use of force is incompatible with the need ‘to imbue them with combative zeal’.²⁹⁴ On the other hand, however, it is not necessarily impossible, although it might be a long process, to train military personnel to recognise, understand and exercise civilian protection as part of their professional code of ethics. This is because the possibility of military training working as a vehicle to incorporate civilian protection into the professional code of ethics depends on the content of this training. If civilian protection was included in the content of their training, soldiers would be required to recognise, understand and exercise it as part of their professional code of ethics.

²⁹⁴ Richard Holmes, *Firing Line* (London: Jonathan Cape, 1985) p. 366, 367.

When military personnel are educated and trained to recognise, understand and exercise civilian protection as part of their professional code of ethics, one question to be addressed is what level of education is needed to achieve the desired outcome. Fotion and Elfstrom answer that the codes ‘would have to be so ingrained into the consciences of military personnel as to be unforgettable’ or ‘into their general memory with the added thought that violations would be met by sanctions from those above them in rank’. Minimum standards of the codes in the military are, according to Fotion and Elfstrom, such that they ‘help military avoid committing gross moral errors such as those at My Lai in Vietnam’.²⁹⁵ In the same vein, Sydney Axinn also argues that the laws and customs of armed conflict need to be thoroughly thought out to ensure that soldiers cannot commit war crimes.²⁹⁶

One of the most promising ways to make military personnel recognise, understand and exercise civilian protection – not only as part of their professional code of ethics, but also as operational guideline in combat situations – is education and training of rules of engagement (ROE). In the US Department of Defense’s *Dictionary of Military and Associated Terms*, the ROE are defined as ‘directives issued by competent military authority that delineate the circumstances and limitations under

²⁹⁵ Fotion and Elfstrom, *Military Ethics*, p. 73.

²⁹⁶ Axinn, *A Moral Military*, p. 169.

which United States forces will initiate and/or continue combat engagement with other forces encountered'.²⁹⁷ In a similar way, Adam Roberts and Richard Guelff define the ROE as 'the specific instructions issued by armed forces regarding the conduct of particular military operations', arguing that the ROE 'can be among the closest links between the laws of war and belligerent armed forces in the field'.²⁹⁸

The ROE provide military personnel with a standard of how force should and should not be used. As Roberts and Guelff argue, the ROE 'contain evidence of what states consider to be basic rules of lawful conduct'.²⁹⁹ However, the ROE are not fixed as a static set of rules or independent of policy and missions. Indeed, the specific rules are determined by reference to the nature, mode and mission objectives of military operations as well as military policy and national and international political situations. Roberts and Guelff explain the functions of the ROE:

Rules of engagement are meant to be brief directives which *inter alia* emphasize critical aspects of the laws of war relevant to a specific mission rather than being a general restatement of the law. They also reflect operational concerns (e.g. where, for operational reasons, commanders do not wish to destroy roads, bridges, railway lines, communication centres, and other potential targets and wish to

²⁹⁷ *DOD Dictionary of Military and Associated Terms*,

http://www.dtic.mil/doctrine/dod_dictionary/data/r/6783.html, accessed on 3/12/2010.

²⁹⁸ Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* 3rd ed. (Oxford: Oxford University Press, 2000). P. 561.

²⁹⁹ *Ibid.*, p. 14

ensure that subordinates are aware of this), international concerns (e.g. to limit the use of certain weapons or targeting certain areas in view of international public opinion and diplomatic pressure), and domestic policy and political concerns (e.g. to attempt to prevent casualties due to 'friendly fire').³⁰⁰

Although Roberts and Guelff point out that the ROE are often not made publicly available, some are publicly available. Given this situation, let us examine the US Army's Rules of Engagement for Operation Desert Storm in the 1991 Gulf War as an example. My justification for this is twofold: the ROE are categorised as classified documents by the British Army and I cannot therefore gain access to the British Army's ROE publicly; while the US Army's ROE for Operation Desert Storm are publicly available and 'prepared by an international organization such as the UN or NATO', according to Roberts and Guelff.³⁰¹ Below are the relevant points concerning the protection of civilians in the Pocket Card of the US ROE for Operations Desert Storm:

B. Avoid harming civilians unless necessary to save US lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.

G. Avoid harming civilian property unless necessary to save US lives...

H. Treat all civilians and their property with respect and dignity...

³⁰⁰ Roberts and Guelff, *Documents on the Laws of War*, p. 561.

³⁰¹ *Ibid.*, p. 14.

REMEMBER

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.³⁰²

In the Pocket Card, the protection of civilians is explicitly stated, although the instructions are far from detailed.

Although the ROE reflect the principle of civilian protection, some commentators argue against further reinforcement of civilian protection. Eric Pattison argues ‘in cases of military humanitarian intervention that onerous rules of engagement so restrain peacekeepers as to actually incite the belligerents to greater bloodshed’ and then proposes to introduce ‘robust rules of engagement’.³⁰³ Thomas Smith also argues that the ROE are expected to be flexible, balancing military demands and civilian risks.³⁰⁴ In this line of thought, the ROE seem to be considered to be a simple version of the *jus in bello* framework, in which the general prohibition on harming civilians is codified in the principle of distinction and the exception is in the principle of

³⁰² Reprinted in Roberts and Guelff, *Documents on the Laws of War*, pp. 562–3.

³⁰³ Eric Pattison, *Just War Thinking: Morality and Pragmatism in the Struggle against Contemporary Threats* (Lexington Books: Lanham, MD2007), pp. 28, 114.

³⁰⁴ Thomas W. Smith, ‘Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq’. *International Studies Perspectives* 9 (2008):pp. 144–164 at p. 148.

proportionality. Hence, even if relatively high standards of care could be maintained, civilian casualties cannot be eliminated, and harm suffered in attacks meeting the standards cannot be addressed under the ROE scheme.

Against these pessimistic opinions about the protection of civilians, I can argue that if civilian protection is considered to be the mission objective of military operations as well as part of professional ethics of military personnel, then those arguments cannot be considered to be persuasive as they stand. Indeed, if members of the armed forces subscribe to this idea, then the idea of civilian protection is firmly sustained. If this is the case, then military personnel can provide protection for civilians at a maximum level in the operational theatre, and civilians can hugely benefit from this.

In summary, typical Western industrial democracies have a professional code of ethics and their members are expected and required to comply with it. Once the recognition of a need for civilian protection is acquired through military education and training, it can be promoted and reinforced by virtue of acting justly in accordance with military professionalism. Contrary to this, violations of civilian protection may be considered to be deviations from the professional code, and therefore not only considered to be blameworthy, but also subject to punishment, which as a measure of deterrence could contribute to preventing or lessening the degree or scale of misconduct.

For this reason, if military professionals acquire a recognition of the need for civilian protection as part of their military professionalism, then the degree, scale, and frequency of harming civilians are more likely to be minimised, if not completely eliminated. The upshot of the incorporation of civilian protection into the professional code of military ethics is that an act of civilian harm would thereby be subject to scrutiny, checks and balances by reference to this professionalism. If this process of education succeeds, then civilian protection would eventually be incorporated into the professional ethos of the military. Indeed, the ROE would play an important role further to generate this process.

In Section 5. 2. 2, I have considered military training and education as two possible vehicles for incorporating civilian protection into military ethics. I have argued that military training and education could enable members of the armed forces to recognise, understand and exercise civilian protection as part of their professional code of ethics. I have also argued that education and training are imperative because once civilian protection is incorporated in military ethics, it can be seen as a virtuous act to be promoted and reinforced as an aspect of professionalism. I have also argued for the promising role of the ROE. In Section 5. 2. 3, I will examine one possible problem caused by the incorporation of civilian protection into military education and training.

5. 2. 3. One Possible Problem with Incorporation

If civilian protection were to be incorporated into a professional code of military ethics, a problem might arise; namely, what soldiers who subscribe to civilian protection as part of military ethics should do when faced with enemy combatants who do not subscribe to it. Ignatieff points out that in many contemporary armed conflicts, the intervening forces (implying those of the US, the UK and other NATO members) fought following the rules of armed conflict, whereas local armed forces and groups did not necessarily respect the rules and customs of war:

we seem to be playing by rules but the other side does not...Sometimes this happens, as in Somalia, because the other side consists of the tribesmen, ultimate paramilitaries, and of non-regular units, teenage thugs, kids, bandits - the Mogadishu scenario. Sometimes - and this is where ethical decisions get tough - the other side knows that we play by the Geneva Convention rules and exploits the fact that we do...They put their tanks and command posts near the civilians. This happened in Kosovo; the Serbs were exploiting our observance of the Geneva Convention rules.³⁰⁵

In such a situation, the question that needs to be answered is whether or not the military should comply with civilian protection despite the fact that the enemy does not.

³⁰⁵ Michael Ignatieff, 'Handcuffing the military? Military judgment, rules of engagement and public scrutiny', in Patrick Mileham and Lee Willett (eds.), *Military Ethics for the Expediency Era* (London: Royal Institute of International Affairs, 2001), pp. 25–32 at p. 31.

The answer is that the cycle of violations of civilian protection might be less likely to occur if civilian protection becomes an aspect of military professionalism, because military ethics require military personnel to keep high moral standards even in the most difficult of situations. This idea is, for example, confirmed as a normative imperative – the way it ought to be – in the Military Covenant of the British Army, which states that military success ‘depends on moral strength – in war moral dominance over an enemy – not just to overcome the adversary, but to establish the conditions for the lasting peace’.³⁰⁶ This normative imperative means that soldiers ought to comply with the laws and customs of armed conflict even when enemy forces do not. Once it becomes a normative imperative, through the military education and training described in Section 5. 2. 2, civilian protection is less likely to be abandoned in war, even against an enemy who does not respect it.

In Section 5. 2, I have examined civilian protection from the perspective of professional military ethics in order to consider how civilian protection could be assured by the military. Initially, I have argued that military professionals need to recognise and understand the value of civilian protection as part of the professional code of military ethics which they are expected and required to comply with and enforce. Secondly, in

³⁰⁶ UK Army, *Soldiering*.ch. 1, para. 8.

order to examine a way to incorporate civilian protection into a code of military ethics, I have examined military education and training as two possible vehicles. I have found that military education and training could work effectively as vehicles to enable military personnel to recognise, understand and exercise civilian protection as part of their professional code of ethics. Finally, I have considered the potential dilemma that could occur when armed forces that subscribe to civilian protection as part of their professional code of ethics are faced with an enemy which does not so subscribe. I have argued that the enemy's violation of civilian protection should not make the military abandon civilian protection if and when it is incorporated into their code of military ethics. In Section 5. 3, I will examine the role of the government and tasks of the military in ensuring civilian protection.

5. 3. Role of the Government, Tasks of the Military for Assuring Civilian Protection

Having considered, in Section 5. 2, that military training and education could help the military incorporate civilian protection into a professional code of military ethics, in Section 5. 3, I will examine the role of the government in Western industrial democracies and the tasks of their armed forces in order to consider how civilian

protection could be better assured in future armed conflicts in which those armed forces are deployed.

5. 3. 1. Role of the Government

In Section 5. 3. 1, in order to consider how civilian protection could be assured, I will examine the role of the government in Western industrial democracies when addressing civilian protection. This is an important point to consider because governments of Western industrial democracies represent the ultimate authorities responsible for any violations of the laws and customs of war committed by members of their military forces.

The first function of the government in Western industrial democracies regarding civilian protection must be to make civilian protection a political objective in military operations. In many of the states commonly referred to as *Western, developed, and democratic*, it is assumed that the military is subordinate to the government, and hence the role of the military is to deliver military means for political ends. This command structure predicates the authority of the government over the military. Indeed, it is the government that makes military policy and commissions the military to execute it. If this is the case, the primary function of the government should be to set civilian

protection as one of the political-military objectives in military operations which it commissions so that civilian protection can be assured at operational as well as policy levels.

The second function of the government in Western industrial democracies regarding civilian protection must be to help the military recognise, understand and exercise civilian protection within their code of professional ethics. Part of the reason that governments should be expected and required to take this initiative is that they are ultimately responsible for the protection of civilians. This responsibility predicates an obligation to ensure that the military understands and exercises civilian protection as part of its code of professional ethics. State responsibility to ensure that the military understands civilian protection is confirmed in IHL. Paragraph 1, Article 83 of the Additional Protocol I to the Fourth Geneva Convention of 1949 reads:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the [Geneva] Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction...³⁰⁷

The second role of the government in Western industrial democracies is thus to create

³⁰⁷ AP(I), Art. 83, para. 1.

and employ political initiatives for the purpose of ensuring that the military understands and exercises civilian protection through military education and training.

In Section 5. 3. 1, I have considered two functions of the government in Western industrial democracies in assuring civilian protection. I have proposed that the first function of the government is to set civilian protection as one of the political objectives in military operations which it commissions so that civilian protection can be assured at operational as well as policy levels. I have also proposed that the second function of the government is to create and employ political initiatives for the purpose of ensuring that the military understands and exercises civilian protection through military education and training. In Section 5. 3. 2, I will examine the tasks undertaken by the armed forces in Western industrial democracies.

5. 3. 2. Tasks of the Military

Having considered the role of the government in Western industrial democracies in assuring civilian protection in Section 5. 3. 1, in Section 5. 3. 2, I will examine the tasks of the armed forces in those countries for assuring civilian protection, in order to consider how civilians could be better protected. The military is responsible for two tasks regarding civilian protection: the first is to make its members recognise and

understand the benefits of civilian protection, and the second is to work as a guardian of civilian protection when the government imposes military policies that offset the protection of civilians against other political/military objectives.

The first task of the armed forces in Western industrial democracies is to make their members aware of the benefits of civilian protection. There are at least two types of benefit for the armed forces which occur as a result of protecting civilians; one is the benefit brought by the general observation of a set of war conventions and the other is the benefit derived from the prevention of demoralisation.

The first of the two types of benefit from civilian protection for the military is that blanket compliance with civilian protection, together with other rules in IHL, entitles the military and its members to the benefits enshrined in IHL. Axinn argues that not only civilians but also soldiers in current and future conflicts are beneficiaries of the Geneva Conventions in which the protection of *hors de combat* people as well as of civilians is codified.³⁰⁸ If the military understood the benefits of complying with civilian protection as part of the conventions of war, then its members would have incentives to comply with civilian protection. One of the ways to ensure observance is to educate military personnel, as discussed in Section 5. 2. 2.

³⁰⁸ Axinn, *A Moral Military*, pp. 164–5.

The other benefit which the armed forces may find in the protection of civilians springs from the fact that violations and breaches of civilian protection sometimes deteriorate soldiers' morale. One such example can be found in the case of Dennis Conti in the My Lai massacre, who, according to Glover, first tried to evade the order to kill civilians and then 'was in tears and could not go on'; this is a moral reaction that Glover calls the 'breakthrough of conscience or of sympathy' by which Conti avoided obeying a superior order that directly targeted civilians.³⁰⁹

Morale of soldiers can be lowered by their own acts as well as those of their fellows, which might contradict their idea of military honour and their ideal self-image as soldiers, or simply go against their consciences. Demoralisation of soldiers by harming civilians seems to be more likely to happen to members of professional armed forces than to irregulars and members of militant groups who might be more accustomed to deliberate attacks on civilians, as was illustrated by an incident in which IDF reservists refused to serve in the West Bank and Gaza Strip. In the petition published in *Yedioth*, an Israeli daily newspaper, a group of reservists reportedly accused the IDF of mistreatment and persecution of Palestinians in the occupied territories.³¹⁰ The reservists claimed that they were willing to accept regular reserve

³⁰⁹ Glover, *Humanity*, p. 62.

³¹⁰ Graham Usher, 'Army Objectors add to Sharon's Woes as Approval Ratings Slide', *Guardian*

duty, but refused to serve in the Occupied Territories, in which the IDF has frequently and repeatedly been alleged to oppress the Palestinian population.

In addition to the first task which I have discussed, the second task of the armed forces in Western industrial democracies for civilian protection is to work as guardians of civilian protection against political manoeuvres. This task becomes important particularly when the mission-setting of military operations at the level of political decision becomes incompatible with, or even contradicts, the protection of civilians. Even having recognised and understood civilian protection as part of its professional code of ethics, the military could still be vulnerable to violations of civilian protection when politics interfere with military matters. The armed forces might be compromised or compelled to breach civilian protection for a politically-decided *greater good*, the overall consequence, or mission objectives.

The task of the armed forces in Western industrial democracies is, therefore, to shield itself from political pressure against civilian protection. Although military policy in Western industrial democracies is made and decided in the domain of politics, military professionalism cannot single-handedly be modified by politics. The reason for this is that professionalism is an expression of the self-realisation of professionals and is

(2/2/2002), p. 17; and Phil Reeves, 'Rebellion grows among Israeli reserve officers', *Independent* (1/2/2002), p. 17.

an integral part of their identity. If civilian protection is an aspect of military professionalism, then the conduct of professionals regarding civilian protection is not only monitored by other stakeholders of civilian protection such as ICRC, human rights organisations, mass media, other governments, and, above all, civilians, but is also subject to self- and peer-regulation. In Kenneth Boyd's words: 'The nature of professional work means that its potential for mutual encouragement to better practice is realised through day to day negotiation between professionals themselves, taking into account the interests and reactions of those they serve'.³¹¹ By exerting civilian protection as part of their professionalism, the military professionals in the armed forces of Western industrial democracies would become more concerned and self-regulating regarding civilian protection and would be more cautious of breaching it.

In Section 5. 3. 2, I have examined the tasks of the armed forces in Western industrial democracies for civilian protection in order to clarify what the armed forces could and should do to protect civilians better in armed conflict. I have argued that one of the two tasks of the armed forces is to make its members aware of the benefits of civilian protection, in order to recognise incentives to sustain civilian protection as part of the professional code of ethics. I have then argued that the second task of the armed

³¹¹ Kenneth M. Boyd (ed.), *The Ethics of Resource Allocation in Health Care* (Edinburgh: Edinburgh University Press, 1979), p. 95.

forces is to work as guardians of civilian protection against political manoeuvres by exerting military professionalism on civilian protection so that it cannot be violated for political reasons.

Concluding Remarks for Chapter 5

In Chapter 5, I have examined civilian protection from the perspective of military ethics in order to consider how civilians could be better protected in this framework. In order to construct my argument that the incorporation of civilian protection into professional codes of ethics of military personnel would further promote civilian protection and hugely benefit armed forces as well as civilians, I have primarily focused on the professional ethics of the British Army as an example. In Section 5. 1, I have explored the four reasons that combatants fail to protect civilians from a moral-psychological point of view. I have found that soldiers' respect for civilians often lapses in armed conflicts. I have also found that the three other reasons that soldiers may potentially commit atrocities; namely emotional responses that overwhelm respect for civilians, the consequence-oriented military mindset, and physical and psychological combat stress, indicate that civilian protection is likely to be marginalised in combat situations. These four main reasons for the failure to protect civilians appeared to indicate that some

measures need to be introduced to ensure the better protection of civilians by armed forces in combat situations. In Section 5. 2, I have examined the professional ethics of the armed forces with regard to civilian protection in order to consider how to incorporate civilian protection into a code of military ethics. I have argued that military professionals need to recognise and understand the value of civilian protection as part of the professional code of military ethics through military education and training. I have then argued that military education and training work effectively as vehicles to enable military personnel to recognise, understand and exercise civilian protection as part of their professional code of ethics. I have also proposed that the enemy's violation of civilian protection should not necessarily make the military abandon civilian protection if and when civilian protection is incorporated into military ethics. In Section 5. 3, I have considered the role of the government and the tasks of the military for incorporating civilian protection as part of the professional code of military ethics. I have argued that the role of the government is to set civilian protection as one of the political objectives in military operations and to exert political initiatives to lead the military to ensure civilian protection through education and training. I have also argued that the tasks of the military are to make its members aware of the benefits of civilian protection and to work as guardians of civilian protection against political manoeuvres.

Having argued and made the case that civilian protection should be incorporated into the professional ethics of military personnel in Chapter 5, in Chapter 6 I will examine torture as an extreme example of the need for civilian protection, in order to defend my position that civilians must be protected and that torture is completely against the professional ethics of military personnel.

CHAPTER 6: MORAL JUSTIFIABILITY OF CIVILIAN PROTECTION:

A CASE AGAINST TORTURE

Introduction

Having considered the role of the government and tasks of the military for incorporating civilian protection as part of the professional ethics of military personnel in Chapter 5, in Chapter 6 I will examine the moral unjustifiability of torture and other forms of inhuman treatment³¹² of civilians in armed conflict through meso and micro level analysis, in order to demonstrate the moral requirement of civilian protection in an extreme situation. More specifically, I will develop and analyse a theory of ‘just torture’ by reference to the framework of just war theory, which proposes moral presumptions against war, in order that I can critically consider the morality or otherwise of torture, even that undertaken for interrogation purposes against civilians. In the chapter, if I succeed in demonstrating the moral unjustifiability of torture against any person, I can further make a strong case against the torture of civilians, and therefore for the moral requirement of civilian protection. Furthermore, this demonstration of the moral unjustifiability of torture will prove that such an act is totally against the idea of civilian

³¹² In this thesis the term *torture* means broadly defined torture, in which both narrowly defined torture and other forms of ill treatment are included, unless otherwise stated.

protection and therefore contrary to the ideal of the professional ethics of military personnel.

Initially, I will open up my discussion on the ethics of torture by briefly addressing the ethical concerns surrounding torture brought up by current practice. Secondly, in order to recognise this presumption against torture, I will explore the legal definitions and regulations of torture. Thirdly, in order to demonstrate the moral unjustifiability of torture, I will investigate several ethical aspects of torture. Finally, in order to further demonstrate the moral unjustifiability of torture against civilians, I will establish a framework of just torture, by reference to which I will argue that torture can never be justified in practice.

6. 1. Arguments surrounding the Ethics and Practice of Torture

Few doubt that torture is wrong. However, we cannot entirely eliminate torture once and for all, despite the fact that the vast majority of us believe it to be wrong, because there are people who think that torture can occasionally be morally justified. In fact, torture is conducted around the world, often by military and security professionals, which is a clear deviance from the professional ethics of military personnel in Western countries, at

least.³¹³ One high-profile recent case involved the torture of ‘high value’ terror suspects by the Central Intelligence Agency (CIA). According to the report prepared by the ICRC, some of the ill-treatment of prisoners and the methods and means of interrogation undertaken in CIA-controlled detention facilities in undisclosed places ‘constitute torture’, and others ‘constitute cruel, inhumane, degrading treatment’.³¹⁴ Furthermore, there is some evidence that not only terror suspects but also innocent civilians have been tortured or inhumanely treated by members of the armed forces. One such example is the case of Baha Mousa, who died due to ill treatment by members of the British Army while in its custody.³¹⁵

Jessica Wolfendale points out that commentators who believe that torture can sometimes be morally justified give their reason for this justification as one of national security.³¹⁶ Thus, torture sponsored by government agencies which take charge of national security cannot be entirely eliminated until and unless all major threats to national security, actual or perceived, vanish. Nevertheless, the fact that torture is undertaken in the noble cause of national security does not necessarily mean that it can

³¹³ van Doorn, ‘The Military and the Crisis of Legitimacy’, p. 32.

³¹⁴ ICRC, ‘ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody’ (Geneva: ICRC, 2007), p. 26.

³¹⁵ Quoted in Andrew Johnson, Francis Elliott and Severin Carrell, ‘Iraq Abuse Scandal: Ministry of Defence Accused of Buying Silence of Families’ over Civilian Deaths’, *Independent on Sunday* (20/6/2004), p. 13.

³¹⁶ Jessica Wolfendale, *Torture and Military Profession* (Basingstoke, Hampshire: Palgrave MacMillan, 2007), p. 104.

be morally justified. The fact that torture is still conducted at all, despite the fact that the vast majority of us share the view that it is wrong, is of major concern. This concern gives rise to a vital question: whether it can ever be morally permissible for agencies responsible for national security to allow their agents to conduct torture on suspects for interrogation in the name of national security. We do not yet seem to have a fully-fledged ethical framework to consider the immorality of torture. Given this situation, in the following sections, I will consider the moral unjustifiability of torture against the innocent in order to demonstrate that civilian protection is our moral imperative.

6. 2. Legal Definitions and Regulations of Torture

Torture is prohibited and regulated by various international legal arrangements including international/multinational treaties and declarations. For example, the Universal Declaration of Human Rights states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.³¹⁷ Similarly, the European Convention of Human Rights outlines the prohibition of torture in the following way: ‘No one shall be subjected to torture or to inhuman or degrading treatment or

³¹⁷ Universal Declaration of Human Rights (1948), Article 5.

punishment'.³¹⁸

The first point to establish is the legal definition of torture. According to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment:

torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³¹⁹

Furthermore, the Convention elaborates on the prohibition of torture under any exceptional circumstances in the following way: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture' in Article 2, Section 2. This Convention also clearly states that superior order in the public chain of

³¹⁸ European Convention of Human Rights (1950), Article 3.

³¹⁹ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), Article 1, Section 1.

command does not justify the exercise of torture: ‘An order from a superior officer or a public authority may not be invoked as a justification of torture’.

Similarly, in the Rome Statute of the International Criminal Court (1998), torture is defined as acts of the ‘intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions’ (Article 7, Section 2-e). In Article 7, Section 1, torture can be considered to constitute a ‘crime against humanity’ when ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’; and in Article 8, ‘torture or inhuman treatment, including biological experiments’ can be considered to be ‘grave breaches of the Geneva Conventions of 12 August 1949’, which therefore constitute ‘war crimes’, over which ‘the Court shall have jurisdiction...in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.

As seen in this section, torture and other ill treatment are prohibited in various different legal texts. However, these legal texts do not explicitly provide sufficient reasons for the proscription of torture so that we can fully understand why torture is wrong. In the next section, let us consider in detail the reasons against the use of torture.

6. 3. Ethical Issues surrounding Torture

In the previous section, I have examined the legal definitions and regulations of torture, and found that it is prohibited in various ways. Nonetheless, there have been many cases of torture all over the world, despite our moral conviction that torture is wrong, and that we usually consider torture to be morally blameworthy. In Section 6.3, in order to demonstrate the moral unjustifiability of torture, I will consider the ethical issues surrounding torture within this paradoxical situation.

Many commentators stand by the claim that torture can never be morally justified, and this claim can be vindicated by reference to conventional normative ethical theories. Using simplistic versions of these theories, let us briefly demonstrate why this is so. Initially, according to Kantian deontology, torture cannot be morally justified if an individual's humanity and dignity are denied through torture and the torture victim is used merely as a means for achieving the purpose of torture (regardless of what that purpose is). Secondly, considered from the standpoint of Rossian pluralism, torture cannot be morally justified if a duty not to torture becomes an absolute imperative. Finally, various versions of consequentialism argue against the moral justification of torture; for example, from a rule-utilitarian point of view, Michael

Skerker argues that torture cannot be justified.³²⁰

Let us further contemplate the morality of torture: can we say that all kinds of torture are equally wrong, since we have established that torture is inherently wrong? In order to consider this question, let us focus initially on the purposes of torture. Michael Davis defines six categories of torture according to the reasons for its infliction:

- 1) to obtain a confession ('judicial torture')
- 2) to obtain information ('interrogational torture')
- 3) to punish ('penal torture')
- 4) to intimidate or coerce the sufferer or others to act in certain ways ('terroristic' or 'deterrent' torture).
- 5) to destroy opponents without killing them (what we may call 'disabling torture')
- 6) to please the torturer or others ('recreational torture')³²¹

These reasons are not exclusive, and multiple reasons sometimes co-exist when torture is conducted. Although what we are most concerned with in this thesis is interrogational torture, in order to demonstrate the immorality of torture conducted for various reasons, let us briefly examine each one.

Initially, regarding categories 5 (disabling torture) and 6 (recreational torture),

³²⁰ Michael Skerker, 'Interrogation Ethics in the Context of Intelligence Collection', in Jan Goldman (ed.), *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham, MD: Scarecrow Press, 2006), pp. 141–70.

³²¹ Michael Davis, 'The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment', *International Journal of Applied Philosophy* 19:2 (2005), 161–78.

it is not possible to find any moral rectitude in these types of torture, because causing pain and suffering to the victim, or indeed the act of torture itself, is deemed to be its purpose – in these cases, we may doubt the moral status of the motives of a torturer. If someone finds torture entertaining or has a proclivity for enjoying torture, we may consider that they lack morality and humanity or have a defective personality, and are thus blameworthy. On the other hand, with regard to disabling torture in particular, what if this torture is conducted as a precautionary measure? Suppose someone who has been identified as a serious threat to national/international security in the future is being tortured; in order to prevent a future disaster, should we incapacitate a potential threat through torture? If there is absolutely no doubt that the individual will cause an apocalyptic atrocity, perhaps it might be worth considering pre-emptive torture and incapacitation. However, the probability that they will become a serious threat must be offset by the fact that they are not a threat at the moment and the possibility that they will not become a threat.

Secondly, to take category 4 – terroristic or deterrent torture – if terrorism is morally unjustifiable, as many commentators argue, terroristic torture must also be morally unjustifiable, since it also causes its victim and others to feel fear and intimidation through torture, and can therefore count as an act of terrorism itself. From

the perspective of Kantian deontology, Henry Shue argues against the moral permissibility of terroristic torture:

The victim's suffering—indeed, the victim—is being used entirely as a means to an end over which the victim has no control. Terroristic torture is a pure case—the purest possible case—of the violation of the Kantian principle that no person may be used only as a means...³²²

Thirdly, let us examine categories 1 (judicial torture) and 3 (penal torture).

These two types of torture share a common characteristic in that the reason for inflicting the torture is retrospective: it is based on a past crime committed by the tortured person.

With regard to these two types of torture, two questions arise: one is whether guilt can justify torture, and the other is what levels of harshness and duration, and what means and methods of torture, can be considered to correspond to the degree and seriousness of guilt. If a claim is made that guilt justifies torture and a specification of torture according to the degree and seriousness of guilt can be provided, then the torturer and the agency sanctioning the torture carry the burden of proof to defend the claim. No decisively persuasive reason to justify these types of torture can be found, however.

Finally, to consider category 2: interrogational torture. In this type of torture,

³²² Henry Shue, 'Torture', in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004), pp. 47–60, at p. 53.

national and international security – understood as the protection of the members of the public – are at issue, and torture is conducted to extract information from the torture victim in order to prevent a catastrophic situation. When considering interrogational torture, a ‘ticking bomb’ scenario is often used. A standard version of this hypothetical case is provided by Shue:

Suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures—the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it.

Shue concedes that there is ‘no way to deny the permissibility of torture in a case *just like this*’; however, he opposes any legalization of torture by arguing that ‘artificial cases make bad ethics’. Indeed, in the real world, the ticking bomb scenario is unlikely to occur. Situations are usually murky and compromising: judgments might be formed on limited, unconfirmed and even unreliable information and influenced by both known and unknown elements; decisions might be made within the unpredictability of the future event and consequence. In the hypothetical case, meanwhile, key elements and factors for moral deliberation are clearly set up. Shue continues:

The proposed victim of our torture is not someone we suspect of planning the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated.³²³

Davis also argues that torture in the real world can never be morally justified. From the standpoint of ‘practical moral absolutism’, he argues that there is no morally justifiable torture in practice:

we now have no clear example of morally justified torture – and, more importantly, that we are unlikely ever to have one. While the possibility of such an example remains, it should be of no more comfort to potential torturers than other possibilities we can imagine but do not expect to see realized, for example, that the world will end tomorrow. We are not entitled to act on such bare possibilities. Absent some unlikely experience, torture can *in practice* never be morally justified.³²⁴

In this argument, it is worth noting that Davis defends the position that torture cannot be morally justified in practice, but does not deny the possibility that morally permissible torture exists at a theoretical level. This line of thought does not nullify the construction of a framework of just torture by invoking the just war framework in order to constitute

³²³ Shue, ‘Torture’, p. 57.

³²⁴ Davis, ‘The Moral Justifiability of Torture’, p. 147.

just torture theory at an ideological level.

Before exploring this topic in the next section, let us examine one of the fundamental ethical puzzles which we cannot avoid considering if we are to make a serious argument on the morality of torture: do ends justify means? Rephrasing this query to align with our current subject, can it ever be justified to resort to evil means (torture) in order to bring about a good end (preventing a catastrophe)? In the ticking bomb scenario, there are three premises: 1) the victim of torture is the *perpetrator* who set a nuclear device by himself for the purpose of destroying Paris; 2) there is *no time* to evacuate innocent people or movable art treasures; and 3) the *only hope* to avoid the disastrous consequence is to torture the perpetrator, find the device, and deactivate it. Given these premises, the ticking bomb scenario might be one of the few cases in the hypothetical world in which an act based on consequentialist moral judgment – i.e. to torture the perpetrator – can be justified when we take all the following elements into account: limited time and means, an emergent situation, the magnitude and seriousness of the consequences, and necessity. In this regard, we might consider that it is morally justified, although exceptionally, to resort to evil means in order to bring about a good end.

However, it is worth mentioning that this ticking bomb scenario is one

designed to demonstrate the justifiability of consequentialist moral judgment and reasoning in a straightforward, clear-cut manner, provided that we take these three premises at face value, without taking into account any ancillary conditions. If we modify these premises, however, the consequentialist moral judgment and reasoning lose their theoretical ability to defend the torture of the perpetrator. In order to demonstrate this, let us consider a modified ticking bomb scenario:

Suppose a **suspect** has allegedly set a hidden nuclear device to explode in the heart of Paris, according to unconfirmed intelligence reports. There is **little time** to evacuate the innocent people or even the movable art treasures—**the most effective and efficient method** to extract information from the suspect to prevent the tragedy may be torture, to gain the information to find the device, and deactivate it.

In this variant of the original ticking bomb scenario, we can identify three main changed premises: 1) the prospective victim of torture is a *suspect* who is alleged to have set a nuclear device to explode in the heart of Paris – we are not entirely sure whether he is the perpetrator or not; 2) it is impossible to evacuate all the innocent people and the movable art treasures, but *possible to evacuate some*; 3) *the most effective and efficient method* to extract information from the suspect to prevent the tragedy *may be* torture, to gain the information to find the device, and deactivate it, but this is not the only hope –

there are other alternatives, even though some of them may not be as effective or efficient to achieve the goal. In conclusion, the consequentialist moral judgment and reasoning lose their ability to justify torture if we take into account elements that mitigate or negate the absolute necessity for torture. Furthermore, in this scenario, the torturer might have some moral uneasiness about torturing the suspect, and must have a chance to choose a lesser evil than torture; this is also an additional factor, if taken into account, for reconsidering the persuasiveness of the consequentialist moral judgment and reasoning for justifying torture.

If we have moral uneasiness about or objections to the torture of a suspect, a civilian or another non-combatant, then we can argue that civilians should not be tortured. The reason for this is straightforward: if a civilian actually committed a serious offence, then he will forfeit his claim to protection and considered to be a perpetrator and therefore, in time of armed conflict, to be a legitimate target to be neutralised. In this situation, might the civilian in question be tortured? Having considered the earlier discussion in this section, we must give a negative answer to this question. Under such a hypothetical situation as one which Shue described, torture against the perpetrator can in theory be morally justified. However, in practice, torture against the perpetrator cannot be morally justified. If this is the case, then torture against civilians, whether

innocent or suspect, can never be morally justified.

In Section 6. 3, I have discussed the moral unjustifiability of torture. I have argued that although torture in a hypothetical situation might in theory be morally justified, in almost all practical cases it cannot be justified. In fact, since such a hypothetical situation is never likely to occur in the real world, then torture cannot in practice ever be morally justified. If this is the case, then I have succeeded in demonstrating the moral unjustifiability of torture against civilians. In Section 6. 4, in order to demonstrate further the moral unjustifiability of torture against civilians, I will codify a set of principles for just torture, which will show that it can never be justified in practice.

6. 4. From Just War to Just Torture: the Principles against Torture

Having demonstrated the moral unjustifiability of torture against civilians in Section 6. 3, in Section 6. 4, in order further to demonstrate the moral unjustifiability of torture against civilians, I will establish a framework of just torture, by reference to which I argue that torture can never be justified in practice.

The framework of just war theory seems to be a useful way to consider different kinds of violence at the meso and micro levels, since it can be applied to a

variety of situations where violence is used, although as already discussed, the just war framework does not provide sufficient protection for civilians at a macro level. The reason for this can be found in the very nature of just war theory, which starts from a presumption against war and then shifts its mode of contemplation to a critical investigation by reference to the ideal of a ‘just war’, which in turn can be characterised, analysed, and judged by a set of conditions established by different principles at different stages (i.e. before, during, and after the war). Indeed, the flexible applicability of the framework of just war theory at the meso and micro levels, backed by the abundant accumulation of thought on moral judgment and reasoning for war, can be exemplified by David Perry’s seminal work, in which he applies the just war framework to an examination of the CIA’s intelligence and covert operations.³²⁵ In the same manner, and by applying the same framework, we can make a case for considering the ethics of interrogational torture. Indeed, several ethical issues we have examined in the ticking bomb scenario and its modified version in the previous section share common structures with the principles of the just war framework, which focus on motives, the act itself, and the consequence for moral reasoning and judgment.

By following the framework of just war, which is broadly divided into three

³²⁵ David L. Perry, *Partly Cloudy: Ethics in War, Espionage, Covert Action, and Interrogation* (Lanham, MD: Scarecrow Press, 2009), pp. 94–6.

clusters (*jus ad bellum*: justice of war, *jus in bello*: justice in war, and *jus post bellum*: justice after war), each of which consists of a set of principles, I will consider the ethics of torture by framing it in the same structure (*jus ad cruciamentum*: justice of torture, *jus in cruciamento*: justice in torture, and *jus post cruciamentum*: justice after torture). If every principle of just torture is satisfied at once, such torture could in theory be morally justified; however, more importantly, such a situation cannot in practice be morally justified from the perspective of practical moral absolutism which Davis proposes. In other words, torture cannot be morally justified unless and until a torturer, carrying the burden of proof, demonstrates that torture in a certain case satisfies every principle at once. This can, however, again from the perspective of practical moral absolutism, never occur in practice.

Below are the principles for a just torture framework, which I will develop by reference to the just war framework which I described in the introductory section:

1. *Jus Ad Cruciam*

- 1-1. Just cause: torture must be undertaken under rightful grounds.
- 1-2. Legitimate authority: torture must only be conducted by a legitimate authority.
- 1-3. Right intention: torture must be undertaken for an appropriate purpose.
- 1-4. Last resort: torture must be conducted as a final resort after all other means of coercion, as well as all peaceful means to solve the situation, are exhausted.
- 1-5. Reasonable prospect of success: torture must be conducted with a reasonable chance of achieving its aim.

- 1-6. Proportionality in ends: the overall advantage brought by torture must be proportionate to the overall harm it causes.

2. *Jus In Cruciamento*

- 2-1. Distinction: perpetrators, suspects and innocents must be distinguished; torture against the first two groups of people is not unconditional but torture against the last group should be subject to much more extremely strict conditions and qualifications. The last should be protected and immune from torture under any circumstances.
- 2-2. Proportionality in means: the specific advantage brought by torture must be proportionate to the specific harm caused; appropriate means, methods, duration, intensity, and degree of pain, suffering and stress applied must be chosen.
- 2-3. Recording: details of torture, including means, methods, duration, intensity, degree of pain, suffering and stress, and health of the torture victim, must be recorded.

3. *Jus Post Cruciamentum*

- 3-1. Rehabilitation: medical care and treatment, as well as other necessary means, must be taken for recovering the mental/physical health of the torture victim, regardless of his guilt or innocence.
- 3-2. Disclosure: the entire process of the decision-making leading to torture, as well as the procedures and conduct of the torture, must be disclosed to the public.

1. *Jus Ad Cruciamentum*

Having listed the prospective candidates for the potential principles, let us consider the justifiability of these principles. Initially, I will consider the principles for *jus ad cruciamentum*. The principle of just cause stipulates that torture must be undertaken under rightful grounds. In the framework of just torture, protection of the innocent or defence of others by avoiding a serious and imminent catastrophe is the only condition

that can be counted as just cause. Unlike the corresponding principle in just war theory, punishment of wrongdoers and recapturing of things wrongly taken cannot be counted as elements that constitute just cause, because these are aimed at retribution, which, as demonstrated earlier, would not be considered a justifiable reason for torture.

What about self-defence, which is first and foremost considered to be a just cause in the just war framework? There could not be a situation in which interrogational torture is conducted *solely* for the purpose of self-defence. The idea that one person can torture another is based on the premise that the torturer or his superior perfectly controls the situation. If the torturer finds himself in a situation where self-defence is necessary to save his own life, he will still have alternatives to torture available. Imagine a situation in which torture is to be conducted in a closed chamber of a dungeon in an undisclosed location. The prospective torture victim has confessed that he has hidden a micro-explosive device somewhere in the room but has not divulged its location, and the device will bring an explosion powerful enough to destroy the entire dungeon. In this situation, the prospective torturer would be highly likely to defend himself by evacuating the dungeon without torturing the perpetrator, in order to find the place where the device is placed. If torture is conducted for the purpose of protecting others in and around the dungeon, the reason for torture is not only self-defence but also the

defence of others. In this sense, the just cause of torture is primarily considered to be the defence of others and secondarily self-defence, only under the condition that an act of self-defence accompanies the defence of others.

In fact, self-defence *could* be a just cause, but it is unlikely, except in highly unusual circumstances, to stand alone as the sole reason for torture to take place. Imagine another situation in which a crew of two is in a spaceship equipped with no emergency evacuation system. Imagine also that one of the crew has informed the other that he has placed a micro-explosive device somewhere in the spaceship but has not divulged its location, and the device will bring an explosion powerful enough to destroy the entire spaceship. In this case, if torture was conducted for the purpose of extracting information about the location of the device, then self-defence could well be counted as just cause. However, in addition, as a result of successfully extracting the information, finding the device and deactivating it, the spaceship, which can be seen as a common/public good, as well as the lives of the two crew members would be saved. In this spaceship case, we can find the element of the defence of others in an extended sense, as well as self-defence, as the reasons for the torture to take place. In other words, there might be exceptional cases in which the element of self-defence could be found to be a just cause for torture; however, even in this very extreme and unlikely case,

self-defence is contingent on the defence of others, and by itself cannot be considered to be a just cause. Therefore, while the proposed theory of just torture can be used to set out a list of strict criteria under which torture for self-defence might be permissible, it is clear that there is virtually no possibility of all these criteria being met at once in the real world, and thus no way to justify torture for self-defence reasons in practical terms.

With regard to the principle of legitimate authority, let us remind ourselves that our discussion of torture is limited to torture for the purpose of preventing a disastrous situation that causes a serious and imminent threat to national security, understood as the protection of people who are under the jurisdiction of a state. If torture is conducted for that purpose, potential candidates to be agents of legitimate authority to conduct torture are the government agencies that take charge of national security; namely the military, police, intelligence agencies, and other security and law-enforcement agencies. In other words, other government agencies, such as the Inland Revenue or tax agencies, are not considered legitimate authorities which could authorise the torture of, for example, tax-dodgers for the purpose of extracting information about their secret offshore bank accounts. Should their tax-avoidance cause a disaster that amounts to a serious threat to national security, the case would be taken over and dealt with by those government agencies that take charge of national security.

What could we denote as the principle of right intention in the framework of just torture? In the just war framework, the right intention for waging war is to recover or achieve peace. In the case of torture, the right intention may be to prevent a catastrophe that causes a disastrous situation to national security. Other reasons, such as criminal investigations and police/judicial interviews in ordinary cases, cannot be considered right intentions.

The principle of last resort in the framework of just torture also aligns with the corresponding principle in that of just war. As with the use of military force, torture is an act causing physical and/or mental pain and suffering forcibly against the will of the victims; therefore, precisely as in the just war framework, the principle of last resort can be stipulated as: torture must be conducted as a final means after all other means of coercion, as well as all peaceful or non-violent means to solve the situation, are exhausted. The purpose of the principle is to set and sustain the threshold for opting for torture higher, so that it will not be chosen as a means to resolve a situation prematurely, while other means, even though less effective or efficient, are still available, and while the given situation is not extremely serious, and a disaster is not imminent or even probable.

For the principle of having a reasonable prospect of success, we must consider

what this success would be. The definition of success through torture is that it achieves its purpose; that is, to extract the information necessary to prevent a catastrophic situation. If the prospective torturer, and/or his superior, does not have a reasonable prospect of such success, then the principle dictates that the would-be torturer must withhold torture and/or the superior order him to do so.

The principle of proportionality in ends stipulates that the overall advantage brought by torture must be proportionate to the overall harm it causes. The questions to be explored regarding this principle are what we may consider to be the overall advantage and what exactly harm means; i.e. the prevention of a disaster and the physical and mental harm inflicted upon the victim of torture. Just as the corresponding principle in the just war framework does not provide or suggest exact numbers or ratios of people at stake, or degrees of magnitude of a disaster which could constitute this proportionality, neither is it useful or practical – and it could even be counterproductive – to set or work out these parameters mathematically. The message which this principle suggests is, rather, a critical question that can be phrased in the following way: are we convinced, and are we really ready to claim that the advantage brought by torture is proportionate to the harm it causes?

2. Jus In Cruciamento

In *jus in cruciamento*, three principles are envisaged: distinction, proportionality in means, and recording. The first two are common with those in the just war framework but the last is probably unique in similar frameworks. Let us examine what these principles prescribe and how they constitute part of the framework of just torture. As with the corresponding principle in the just war framework, the principle of distinction in the just torture framework prescribes a discrimination between those people who should be protected and those who should not. In the just torture framework, the principle may stipulate that perpetrators, suspects and innocents must be distinguished; torture against the first two groups of people is not unconditional, but torture against the last group should be subject to much more extremely strict conditions and qualifications. The innocent should be protected and immune from torture under any circumstances. The reason for this is that the moral status of these three groups can be considered to be different according to their culpability for a crime which they had committed, which they were suspected of committing, or which they had been falsely accused of, but had never committed. In other words, besides moral intuition, we might feel moral uneasiness and concern at finding equal acceptance given to the torture of a perpetrator, a suspect and an innocent person. This uneasiness and concern is perhaps derived from

moral convictions on desert as an element of justice. One of the most serious concerns about torturing a suspect is that the charge on which they are accused may be false, and thus the treatment based on it would be unjust and undeserved; in the case of interrogational torture, just as in ordinary cases of criminal justice, the burden of proof must be on the side of the torturer, and until proven, the prospective candidate of torture should be considered to be and treated as innocent.

This argument leads us to the following conclusion: proof of the perpetrator's guilt may lower the threshold of the degree of inviolability of his rights (such as bodily freedom) or annulment of his rights (such as the right not to be tortured), and we might consider that torture of a guilty person could morally be permissible under certain circumstances if and when certain conditions are met.

The second of the three principles of *jus in cruciamento* is the principle of proportionality in means, which can be stipulated as follows: the specific advantage brought by torture must be proportionate to the specific harm caused: appropriate means, methods, duration, intensity, and degree of pain, suffering and stress applied must be chosen. This principle is aimed at ensuring the maximum protection for the victims and prospective candidates of torture, just as the protection of civilians is envisaged the corresponding principle of the just war framework. The principle not only makes torture

extremely exceptional, but also provides the victims with humane treatment and the highest level of care, should torture be conducted. The principle instructs that torture should be most effectively and efficiently conducted and that the means and methods applied must meet these criteria while minimising the infliction of pain, suffering and stress upon the torture victim. Specifically, in this principle, some kinds of extremely cruel and inhuman means and methods of torture – such as amputation (cutting off hands and feet), and acts that cause irreversible effects to neuro-nervous systems – are absolutely prohibited. Besides, the principle also prescribes taking precautionary measures to closely and constantly monitor the health of the torture victim in order to prevent him experiencing rapid health deterioration or unexpected death. If necessary, according to the health condition of the torture victim, a change to the means and methods of torture, or a suspension or temporary termination of torture, should be considered from a medical point of view, and appropriate medical care and treatment should be provided. Finally, if and when the purpose of torture – to extract the information necessary to prevent the national security disaster – has been achieved, torture should immediately be terminated.

The third principle is the principle of recording, which is probably unique to the just torture framework. The principle of recording can be stipulated as follows:

details of torture, including means, methods, duration, intensity, degree of pain, suffering and stress, and health of the torture victim, must be recorded. This principle ensures transparency, which is closely connected not only to the principles of rehabilitation and of disclosure in *jus in cruciamento* listed above, but also to the supplementary principles for *jus post cruciamentum*, which – I will propose later – are aimed at restorative justice for the victims of torture. Records of torture can be most favourably used as something similar to those of police interviews in the UK, in which both the police and the suspect hold one of two copies on which the same content is recorded. If a case demands, either or both sides may use the record as evidence at judicial trials.

3. Jus Post Cruciamantum

The third cluster of which the framework of just torture consists is *jus post cruciamantum*. The victim of torture, regardless of his culpability, is entitled to rehabilitation. The principle of rehabilitation, which may be considered to be one of the two principles of *jus post cruciamantum*, can be stipulated as follows: medical care and treatment, as well as other necessary means, must be given to assist with the recovery of the mental/physical health of the tortured person, regardless of his/her guilt or

innocence. In this principle, we can find a parallel structure with the corresponding principle of reconstruction in the just war framework. Once the purpose is achieved, the tortured are no longer considered a means for extracting information; they should instead be considered victims, and they are entitled to reclaim their rights either as innocents, suspects or guilty parties. If the termination of torture recovers the rights of victims, the torturers have an obligation to remove the pain, suffering and stress inflicted and to enable their victims to recover their health and any other damages inflicted.

The other principle in *jus post cruciamentum* is the principle of disclosure, which can be stipulated as: the entire process of the decision-making leading to torture, as well as the procedures and conduct of the torture, must be disclosed to the public. This principle is closely connected with, and indeed based upon, the principle of recording, which we have examined as one of the *jus in cruciamento* principles. The principle of disclosure ensures transparency of the series of events and procedures regarding an instance of torture. This principle not only clarifies the decision-making process that led to the torture and the responsibility of the torturers for their acts, but also reveals the procedures of the torture – how it was conducted and which means and methods were applied. Disclosure of the sequence of events that culminated in torture

and of the operational procedures of the torture ensures procedural justice, and leads to restrictions of any torture disproportionate to the principle of proportionality in means. The significance of the principle of disclosure can thus be found in those advantages.

If a certain kind of torture satisfied all of the principles listed above, then such a kind of torture could be called ‘just torture’; however, as I have already outlined, no torture in practice could satisfy every principle at once, and this being the case, then no torture can ever be morally justified.

Concluding Remarks for Chapter 6

In Chapter 6, in order to demonstrate that civilians should be protected from torture and other ill treatment, I have considered the ethics of torture in primarily meso and micro level analysis. More specifically, I have proposed a just torture theory: a new framework for contemplating the ethics of torture, by establishing a set of principles for moral reasoning and judgment, inspired by the just war framework. I have argued that there might not be such a thing as just torture in practice, but only at a theoretical level, in order to defend my moral objections to the torture of civilians. In the same way that just war theory is a critical theory against war, just torture theory will function as a critical theory against torture. Furthermore, just torture theory will play an important role to

provide a useful common language for contemplating the ethics of violence with coercion. The *raison d'être* of the just torture framework is to be a first step from which we can continue and expand discussions on the ethics of civilian protection, in order to explore why and how torture against civilians cannot be morally justified and to develop critical arguments against the torture of civilians.

CONCLUSION

In this thesis, I have discussed the ethics of civilian protection in armed conflict. Specifically, I have attempted to explore ways to supplement the limitations of just war theory on civilian protection by providing a fundamental case for civilian protection by way of considering insights gleaned from David Hume's conception of justice and from the perspective of professional military ethics. Furthermore, I have discussed the ethics of torture so that I can further reinforce my argument for the protection of civilians from harm and violence in armed conflict by demonstrating the unjustifiability of torture of the innocent and suspects alike.

Taken together, I have made a case for the protection of civilians at the maximum level and defended my position by considering both the moral significance of civilian protection and the moral impermissibility of killing civilians from different angles. In order to make my case, I have used a number of different methodologies; namely, case studies, the 'fruits of theory' approach, contextualism or professional ethics for meso level ethical analysis, and casuistry. This is what the existing literature in the fields of war/military ethics and international ethics has not yet done.

In Chapter 1, I opened up my investigation on the ethics of civilian protection by examining the legal and ethical definitions and concepts of civilians, their status and conditions of protection. By analysing the accepted legal definitions, and considering five ethical concepts emerging from the literature of war ethics and just war theory that differentiate civilians from combatants and justify civilian protection; namely moral innocence, innocence as harmlessness, responsibility, rights, and personal project, I consolidated claims and counter-claims for the moral importance of the protection of civilians in armed conflict. Through the discussion in Chapter 1, I argued that while civilian protection is perceived to be a moral imperative in armed conflict, none of the available legal and ethical frameworks for considering civilian status is sufficient alone to uphold this perception. Indeed, there are in practice people who might fall within a 'grey area' and who cannot straightforwardly be categorised as civilians or combatants; however, this does not mean that civilians should not be protected in armed conflict. It is only by taking together all the possible definitions and classifications of civilian status that the moral justification for the protection of civilians can be established.

In Chapter 2, I critically examined the framework of civilian protection set out in just war theory, and concluded that it has a fundamental limitation in that it overlooks civilians who are killed or maimed in legitimate attacks. By introducing the possibility

of offering restorative justice to those victims, I attempted, at least partially, to overcome this shortcoming of the current just war framework. This does not mean, however, that the conventional version of just war theory can sufficiently ensure the protection of civilians.

In Chapter 3, I considered the Israeli–Palestinian Conflict as a case study to see whether and how civilian protection has been practised in an actual armed conflict. Through this exploration I found that the protection of civilians was primarily meant and practised as the protection of fellow civilians, and the protection of non-fellow civilians was often overlooked by both warring parties. My investigation in Chapter 3 revealed that one of the fundamental ethical issues surrounding civilian protection is that warring parties do not always commit to the protection of civilians when those civilians are on the enemy side, and indeed, warring parties sometimes directly target civilians on the opposing side.

In Chapter 4, I explored the Humean conception of justice, in a primarily macro level analysis, in order to reconceptualise and expand the scope of justice at a global level. By locating the foundation of justice upon utility, I argued that utility should be employed at a global level as one of the key foundations of the ethics of civilian protection, and defended my position. This way of understanding justice as

utility at a global level opens up further possibilities; for example, broadening the argument could make a case for the protection of other non-combatants, including prisoners of war, although this is not the topic of the thesis. The discussion of utility introduced concerns about how such utility can be secured. In other words, who is required to sustain and promote the utility of civilian protection? This issue was addressed in Chapter 5, where military professionals were considered as the appropriate responsible agents.

In Chapter 5, I examined civilian protection as set out in examples of the professional ethics of military personnel, in a primarily meso level analysis, in order to contemplate ways of further promoting and ensuring civilian protection in Western industrial democracies' armed forces. I constructed an argument that the incorporation of civilian protection into the professional ethics of military personnel would further promote civilian protection and hugely benefit armed forces as well as civilians. To do this, I primarily focused on the UK and US Armed Forces as examples of agents which can promote civilian protection as the utility at the global level. I also argued that the protection of civilians is beneficial not only for the civilians themselves, but also for governments and military professionals. The upshot of the argument in Chapter 5 is that it is imperative for Western industrial democracies' armed forces both to ensure that

their members enforce such protection by incorporating it into their codes of practice, and to stand by this rule if political manoeuvring occurs that attempts to motivate the forces to abandon civilian protection.

In Chapter 6, I further argued for the protection of civilians by contemplating the ethics of torture as an extreme example of the need for civilian protection, in micro and meso level analysis, considering some of the most horrific and horrendous acts of violence which civilians might be faced with in armed conflict as well as in peacetime. By examining the moral unjustifiability of torturing civilians, suspects or the innocent, I aimed to show that civilian protection should be a moral imperative under any circumstances. Furthermore, I attempted to salvage one of the core ideas of just war theory – i.e. the protection of civilians – by modifying the just war framework as a ‘just torture’ framework; this could be used to set out ethical guidelines for an individual agent who was considering torturing another person. My argument is that just torture theory would play an important role to provide a useful common language for contemplating the ethics of violence with coercion against civilians. The *raison d’être* of the just torture framework is to be a first step from which we can continue and expand discussions on the ethics of civilian protection, in order to explore why and how violence of any sort against civilians in armed conflict cannot be morally justified, and

to further develop critical arguments for civilian protection.

In order to contemplate the moral issues surrounding civilian protection, the thesis employed a number of different methodological approaches, as described in the Methodology section, all of which fall within applied ethics; namely, a fruits of theory approach, a top-down approach or macro level analysis, a bottom-up approach or micro level analysis, casuistry, and an approach of professional ethics as a contextualist approach or meso level analysis. In each chapter, these approaches were used, often in combination. The approaches, as well as the findings and conclusions to which they led, had strengths and weaknesses that were also interlocked and interconnected.

The strength of the methodological approach of casuistry with regards to the investigation of the moral case for civilian protection which we conducted in Chapter 1 was twofold: it successfully clarified the moral status of civilians with different moral attributes and features, and also located, narrowed down and delimited the grey area in which the protected status of civilians could be considered to be doubtful; for example, the cases of the combative, warmongering bishop and the veteran who inspires and boosts the morale of a nation and its citizens. More specifically, by employing casuistry as a methodological tool, I clarified the difference in the moral status of civilians between the above-illustrated examples and the morally innocent and harmless persons

who are not held responsible for war or war conduct, such as young children. However, the weakness of casuistry as a methodological approach when considering the moral status of civilians is that the closer a person or a group of persons in question is to the heart of the grey area, the less clear its moral status by employing casuistry, since this method relies on considering a wide range of arguments and paradigm cases to consider the point in hand, none of which can give a precisely considered answer since none was addressing the exact topic at issue. Indeed, there are certain kinds of person that could be categorised as ‘borderline cases’, and their protected status in moral terms cannot be determined by simply employing casuistry, which otherwise provides a clear yes or no answer on each case. One such example would be seven-year-old *child soldiers* who are engaged in combat under coercion and possibly under the influence of mind-altering substances (such as alcohol, cocaine, cannabis and its related products, or heroin and other opiates). Since the child soldiers might not be considered to be full-fledged moral agents who are capable of exerting their free will, their protected status in moral terms would better be understood in a different way; although harmful and potentially lethal, it might be considered that they should be taken into care and offered protection. The limitation of casuistry in reaching a definitive conclusion is that opinions on such borderline cases can be widely divided among commentators; for example, some

commentators might consider that the above-described child soldiers are entitled to some kind of protection, and that therefore they should somehow be immune from attack, even in combat situations; whereas others might consider that they have forfeited their claim to protection by entering the war as fighters, and therefore it is morally permissible to attack them in combat.

With such widely divergent opinions on offer, ‘triangulation’ to reach a definite answer becomes more problematic. Nevertheless, despite this limitation, the casuistry approach was useful in general as, except in these borderline cases, it did enable a distinction to be drawn between those civilians who are entitled to protection and those who are not.

The bottom-up approach was primarily employed in Chapter 3, which explored a series of events in which Palestinian civilians were harmed by the IDF and Israeli civilians were harmed by Palestinian militants. A primary strength of this bottom-up approach with regards to the investigation of the ethics of civilian protection is that it provides a detailed account of each specific event, which allows the mapping of cases and examples in order to illustrate the claims. These cases, in which civilians on both sides were killed or injured by military attacks, clearly show the dubious nature of the moral legitimacy claimed by both warring parties. However, the weakness of the

bottom-up approach is that the findings and conclusions to which it leads are inherently limited in a spatial–temporal sense due to the peculiarity of each event, case and example; in other words, those findings and conclusions are seriously challenged by the demand of generalisation and universalisability tests. The weakness of the bottom-up approach is similar to that of an inductive method, and can be summarised in the following question: could the pattern and manner of harming civilians, witnessed in a specific period of the Israeli–Palestinian conflict, be applicable to those in different periods and/or those in different armed conflicts in different places?

Nevertheless, the overall benefits brought by employing the bottom-up approach when analysing the practice of civilian protection in the Israeli–Palestinian conflict were two-fold: first, the bottom-up approach provides very important examples of a lack of civilian protection in armed conflict, showing, as addressed above, that warring parties do not always commit to the protection of civilians on the hostile side, a fact sadly also observable in many other conflicts; and second, the shortcomings of the bottom-up approach draw attention to the need to employ other approaches, such as a top-down approach and meso level analysis, to reinforce the argument. Thus, the findings and conclusions of the bottom-up approach are complemented by the other approaches, so strengthening the overall claims.

The fruits of theory approach, top-down approach or macro level analysis, which I primarily employed in Chapter 4, provided us with one possible, overarching, global understanding of civilian protection; that of justice in war from a Humean perspective. The fruits of theory approach also provided a descriptive overview of one universally applicable hypothetical idea with regard to civilian protection, by reference to justice, human nature and utility; this approach demonstrated one potential way to recognise how the moral world surrounding civilian protection is constructed. Indeed, the fruits of theory approach described possible ways to improve civilian protection as utility at a global level by applying a Humean understanding of human nature, justice as an artificial virtue, utility, and the dynamics of moral motivational force in order to commit to and promote utility as the essential practice of agents in international relations. By employing this approach, the thesis examined the theoretical foundation of the utility of civilian protection as justice in war at the global level. However, the fruits of theory approach revealed a shortcoming by failing to address the question of which agents could and should commit to, sustain and promote the utility of civilian protection as justice in war at the global level, and how they should undertake this in practice. This shortcoming would inherently occur when the fruits of theory approach is employed: this is because the theory is more concerned with an understanding of the world as a

system or institution, and less with the rules and functions of those individual agents who are the integral parts of in the system or institution. In other words, the fruits of theory approach does not explain each specific case or agent that does not perfectly fit in its overarching ethical theory; for example, one might legitimately argue that there are less morally conscious agents who might not always act in the way the Humean moral understanding describes, and there are also agents who might act as free riders by taking advantage of the moral consciences of others. Just as we could not deny that there are such agents in reality, so there might be agents whose actions cannot be explained by the fruits of theory approach.

However, these shortcomings of the fruits of the theory approach were somewhat redressed by the use of the contextualist approach or meso level analysis, which focused on the roles and functions of the very agents who commit to, sustain and promote civilian protection as justice in war at a global level, examined in Chapter 5 using the UK and US Armed Forces as the primary examples. The use of the contextualist approach in Chapter 5 allowed the exploration and illustration of what is morally expected and required in terms of the actual roles and functions of governments and military personnel. The strength of the contextualist approach was that it focused on particular institutions and organisations, and by doing so, it was able to take into

account the methodology, mode of action and ethos peculiar to those institutions and organisations. By taking this approach, we can consider one of the most important elements that dictates the role of governments in Western industrial democracies to be civilian control of armed forces, for example, and investigate it on a case by case basis. However, that said, a weakness of the contextualist approach, similar to the bottom-up approach, is that its findings and conclusions are context-specific and cannot be imported directly into another context. However, the contextualist approach does contribute to providing specific recommendations for institutions and organisations and also provides useful models for them to follow. More particularly, by employing the contextualist approach in Chapter 5, recommendations for Western industrial democracies' governments and their armed forces to further commit to, sustain and promote the norm of civilian protection were made, and the expectation that other armed forces and governments would be morally required to follow those recommendations was implied.

An overall strength of using this mixture of methodologies was that it allowed an investigation of a number of different supporting arguments and an exploration of the issues from theory to practice. By using the combined methodology, the thesis offers a broader understanding of the morality of civilian protection as a whole and devises

more useful approaches to the issue than would have been possible with one methodology alone.

Throughout this thesis, I have discussed the protection of civilians in armed conflicts, and the civilians at issue are usually those who do not belong to the side of the attacking force. This is because the protection of fellow civilians is a *raison d'être* of the government and armed forces of a state: they have a perfect obligation for their protection. Meanwhile, attention is not always sufficiently paid to the protection of non-fellow civilians, as the protection of fellow civilians usually takes precedence. Perhaps the reason for this is that the protection of non-fellow civilians is often considered, however wrongly, to be an imperfect obligation or charitable act. Indeed, a member of the armed forces or military professional does not act as an agent of non-fellow civilians, according to Walzer, since 'no legal or bureaucratic procedures make him answerable' to the civilians of other countries. However, Walzer also points out that a military officer comes to recognise the 'interest and rights' of these civilians when 'he looks outward, away from his hierarchical responsibility deriving from the chain of command'. If and when this happens, the civilians of the countries where conflicts are occurring can be offered protection by the intervening or occupying forces, and in return for this, the officer 'may well have to turn away from his hierarchical

responsibilities and diminish the care and protection he afford to his own soldiers – that is, he may have to impose added risks on the soldiers for the sake of civilians’.³²⁶

This dilemma – whether to allow casualties among the soldiers under his command for the sake of the protection of civilians of other countries – is a real and serious one in an actual combat situation. However, the protection of civilians of other countries is not always considered to be out of an officer’s hierarchical responsibility. In other words, civilian protection has been to some extent incorporated as part of accepted military conduct as shown in the LOAC (law of armed conflict) manuals of the UK Armed Forces. This does not deny that military commanders do face this dilemma when they conduct military operations that put their soldiers and civilians at risk. However, the point to be stressed here is that force protection should not always be prioritised over civilian protection, even though these two opposing exercises are often in conflict. Once civilian protection is enshrined in military professionalism, this opens a way for it to be better emphasised in relation to force protection, and the balance may be shifted more toward the protection of civilians than ever. This is applicable as demonstrated in the examples of the UK and US Armed Forces discussed earlier, but it is equally applicable to the armed forces of other Western industrial democracies, and potentially

³²⁶ Walzer, *Arguing about War*, p. 29.

further afield too.

This argument may further be reinforced if we consider the current trend of military operations; that is, West-led expeditionary operations in which the immediate national survival of a participating state or group of states is not directly at stake, unlike, for example, the Second World War, in which many of the parties to the conflict experienced an actual or perceived threat to national survival. Indeed in the post-Cold War era, we have observed a series of military expeditions that were partly motivated and initiated on humanitarian grounds, such as those Somalia, Haiti, Bosnia, Kosovo and Sierra Leone. In these military expeditions, the missions and objectives of the expeditionary forces were not primarily assigned for major war fighting, but for the limited use of military force for well-specified mission objectives, such as peace enforcement, peacekeeping including policing and riot control, and various activities concerning humanitarian assistance such as convoy guarding and the distribution of humanitarian aid.³²⁷

This trend points to a future direction of research into civilian protection in armed conflict: civilian protection in a broader perspective; namely, the protection of civilians beyond the *jus in bello* framework. In this thesis, I have primarily focused on

³²⁷ Weiss and Collins, *Humanitarian Challenges*, pp. 30–37.

the protection of civilians *during* an armed conflict; in other words, civilian protection has been investigated mainly within the *jus in bello* framework. What I have not discussed is civilian protection *after* an armed conflict. In the just war tradition, in addition to the two existing, well-established frameworks – namely, *jus ad bellum* and *jus in bello* – *jus post bellum* has been put forward as the third framework for just war theory. Indeed, the protection of civilians should continue once hostilities cease. The major combat operations (March–May 2003) and their aftermath in the Iraq War remind us of the importance and necessity of the protection of civilians both during and after a conflict

One promising topic for future research is to explore the protection of civilians in a broader sense: protection as prevention of harm, care and restoration, the last of which I briefly mentioned toward the end of Chapter 2. There are several ways to protect civilians after the end of hostilities. For example, the protection of civilians from paramilitary threats and violence by armed militants and militias could be considered to be one of the most urgent priorities for the intervening force and local political authorities if a power vacuum was caused in the post-conflict situation. If and when the situation becomes stable, other measures – such as retribution for any breaches and violations of the rules and customs of armed conflict against perpetrators, reparation and

rehabilitation for civilians who were physically and/or psychologically traumatised, repatriation of evacuees, refugees and internally displaced people, reconstruction of infrastructure damaged or destroyed during the conflict, and reconciliation of people who were in hostilities during the conflict – would be more easily undertaken.

In this thesis, by employing several approaches in applied ethics, I argued that civilian protection should be sustained and promoted by various agents (armed forces, governments, members of the military profession and other combatants) at various levels (macro, meso and micro ones). The vast majority of existing literature in applied ethics does not use this mixed methodological approach. Rather, it tends to employ a single methodology for exploring moral issues on the subject matter. Examples, as introduced in the literature review section in the introductory chapter, include Hare and Brandt, who use the fruits of theory approach to examine the ethics of war, whereas Nagel employs a casuistry approach. In addition, in *Just and Unjust Wars*, Walzer employs the contextualist approach by drawing moral issues from several key events in the history of warfare. In this sense, from the perspective of the various fields of applied ethics – including war/military ethics and international ethics in which this thesis would be situated – this thesis might be seen as a more comprehensive approach to the ethics of civilian protection, since it considers the subject from a wide variety of angles and

perspectives. The mixed methodology approach is a promising one which could be useful in other areas of applied ethics when contemplating moral issues, because this approach makes it possible to investigate and analyse the subject matter in question from different perspectives at different levels, including macro, meso and micro ones. The practice of quarantine in the ethics of emergency medicine and public health is one promising example of another subject area which could benefit from consideration using this mixed methodology approach. A brief strategy outline would include several areas of focus: when considering quarantine from the perspective of the fruits of theory approach, moral judgments might tend towards the consequentialist – what are the possible outcomes when using quarantine procedures, and what are the consequences of abandoning them? Casuistry then provides an additional moral foundation to consider who should be quarantined; should the quarantine include only those already infected, or should it also encompass those who are suspected of having come into contact with the infection? Furthermore, the contextualist approach provides guidance to consider who should implement and enforce the quarantine, and who should have responsibility for authorising its implementation. A similar approach might also be useful to consider the subject areas of triage and of the ethics of public policy in the public health sector.

In the field of war/military ethics and international ethics, civilian protection is

not a minor topic, and there is ongoing discussion on the ethics of civilian protection. Arguments range between absolute protection – such as the deontological position exemplified by absolute pacifism – and contingent protection – such as the instrumentalist position exemplified by various forms of consequentialism – just as discussions on many other topics in this and other fields of applied ethics are explored and driven by those two mainstream ethical theories, as discussed in the literature review section of the introductory chapter.

However, the strength and originality of this thesis are found in its use of a mixed methodology, which allows consideration of different approaches to support the claim made in the thesis. Indeed, the thesis attempts to demonstrate the usefulness of this mixed methodological approach in exploring moral issues surrounding civilian protection. If this approach is plausible and promising as an alternative to the other current major approaches, such as the use of individual methodologies like the fruits of theory approach, the contextualist approach and casuistry, then it could also contribute an analytical tool to establish argument and develop claims on topics other than civilian protection in the field of war/military ethics and international ethics, as well as other subjects in the broader field of applied ethics.

The aim of this thesis is to show the necessity of making the rule of civilian

protection more stringent and rigid, by making consequence-oriented agents such as the armed forces, governments and their individual members (who often emphasise an instrumental value in civilian protection) recognise that civilian protection is not an idea that contradicts statecraft and soldiering. If the argument of this thesis – which is that subscription to and further promotion of the rule of civilian protection are beneficial to armed forces and governments – is plausible, then it will provide an incentive, and indeed an imperative for policy-makers and military practitioners to further commit to, sustain and promote civilian protection as one of the roles of the armed forces and the functions of the government.

It is my hope that this thesis will contribute to the ongoing contemporary discussion of war/military ethics and international ethics in general, and the ethics of civilian protection in particular. It is also my hope that this thesis will prompt further discussion, not only among academics in these fields, but also among a wider audience, such as policy-makers who are concerned about civilian protection and interested in a theoretical justification of their protection, and academics who are also concerned and interested in bridging the gap between theoretical aspects and practice with regard to the protection of civilians and indeed to other subject areas. I believe that this thesis has succeeded in providing ample and sufficient grounds to defend my conviction of the

necessity to protect civilians in times of armed conflict, and I hope that it will assist with the further promotion and discussion of the idea and ideal of civilian protection at the global level.

BIBLIOGRAPHY

Monographs, Anthologies, and Articles

- Anscombe, G. E. M., 'War and Murder' in G. E. M. Anscombe, R. A. Markus, P. T. Geach, Roger Smith, and Walter Stein, *Nuclear Weapons and Christian Conscience* (London: Marlin Press, 1961), pp. 45–62.
- Anscombe, G. E. M., R. A. Markus, P. T. Geach, Roger Smith, and Walter Stein, *Nuclear Weapons and Christian Conscience* (London: Marlin Press, 1961).
- Axinn, Sydney, *A Moral Military* (Philadelphia: Temple University Press, 1989).
- Bailey, Sydney Dawson, *War and Conscience in the Nuclear Age* (Basingstoke, MacMillan, 1987).
- Beauchamp, Tom L., and James F. Childress, *Principles of Biomedical Ethics* 5th ed. (Oxford: Oxford University Press, 2001).
- Bedau, Hugo Adam, *Making Mortal Choices: Three Exercises in Moral Casuistry* (Oxford: Oxford University Press, 1997).
- Beitz, Charles, Marshall Cohen, Thomas Scanlon and John Simmons (eds.), *International Ethics* (Princeton, NJ: Princeton University Press, 1985).
- Bellamy, Alex J., *Just Wars: From Cicero to Iraq* (Cambridge: Polity, 2006).
- Berry, Nicholas O., *War and the Red Cross: The Unspoken Mission* (Basingstoke, MacMillan, 1997).
- Best, Geoffrey, *War and Law since 1945* (Oxford: Clarendon Press, 1994)
- , *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (London: Weidenfield and Nicholson, 1980).

- Boyd, Kenneth M. (ed.), *The Ethics of Resource Allocation in Health Care* (Edinburgh: Edinburgh University Press, 1979).
- Brandt, R. B., 'Utilitarianism and the Rules of War', *Philosophy and Public Affairs* 1:2 (1972), pp. 145–65.
- British Medical Association, *Rights and Responsibilities of Doctors* (London: BMJ Publishing, 1992).
- Brough, Michael W., John W. Lango, and Harry van der Linden (eds.), *Rethinking the Just War Tradition* (Albany: State University of New York Press, 2007).
- Brown, Chris, 'Selective Humanitarianism: In Defence of Inconsistency', in Deen K. Chatterjee and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), pp. 31–50.
- Butler, George Lee, 'Some Personal Reflections on Integrity', in Carl Ficarrotta (ed.), *The Leader's Imperative: Ethics, Integrity, and Responsibility* (West Lafayette, Indiana: Purdue University Press, 2001), pp. 73–83.
- Byers, Michael, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005)
- Ceulemans, Carl, 'The NATO Intervention in the Kosovo Crisis: March June 1999', in Bruno Coppeters and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002), pp. 205–28.
- Chadwick, Ruth, 'What is "applied" in Applied Ethics?', *Journal of Applied Ethics and Philosophy* Vol.1 (2009), pp. 1–7.
- Chatterjee, Deen K., and Don E. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), pp. 31–50.
- Coady, C. A. J., 'Escaping from the Bomb: Immoral Deterrence and the Problem of Extrication', in Henry Shue (ed.), *Nuclear Deterrence and Moral Restraint: Critical Choice for American Strategy* (Cambridge: Cambridge University Press,

1989), pp. 163–225.

Coates, A. J., *The Ethics of War* (Manchester: Manchester University Press, 1997).

Cohen, Marshall, Thomas Nigel and Thomas Scanlon (eds.), *War and Moral Responsibility* (Princeton: Princeton University Press, 1974).

Cook, Martin, *The Moral Soldiers: Ethics and Service in the US Military* (Albany, NY: State University of New York, 2004).

Coppieters, Bruno, and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002).

Darwall, Stephen, *Consequentialism* (Oxford: Blackwell, 2003).

Davis, Michael, 'The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment', *International Journal of Applied Philosophy* 19:2 (1995), pp. 1–34.

Decosse, David E., (ed.), *But Was It Just?: Reflections on the Morality of the Persian Gulf War* (New York: Doubleday, 1992).

Department of Defence, *Dictionary of Military and Associated Terms*.
http://www.dtic.mil/doctrine/dod_dictionary/data/r/6783.html, accessed on 3/12/2010.

Donelan, Michael, 'Minimum Force in War', *International Relations*, vol. 12 no. 5 (August, 1995), pp.37–45

———, *Elements of International Political Theory* (Oxford: Clarendon Press, 1990).

Dower, Nigel, *World Ethics: The New Agenda* (Edinburgh: Edinburgh University Press, 1998).

Elshtain, Jean Bethke, *Just War Theory* (New York: New York University, 1992)

———, 'Just War as Politics: What the Gulf War Told Us About Contemporary

- American Life', in David E. Decosse (ed.), *But Was It Just?: Reflections on the Morality of the Persian Gulf War* (New York: Doubleday, 1992).
- , *Power Trips and Other Journeys: Essay in Feminism as Civic Discourse* (Madison: University of Wisconsin Press 1990).
- , *Women and War* (Chicago: University of Chicago Press, 1987).
- Ewumbue-Monono, Churchill, 'Respect for International Humanitarian Law by Armed Non-State Actors in Africa', *International Review of Red Cross* 88:864 (2006), pp. 905–24.
- Ficarrotta, J. Carl (ed.), *The Leader's Imperative: Ethics, Integrity, and Responsibility* (West Lafayette, IN: Purdue University Press, 2001)
- Finnis John, 'The Ethics of War and Peace in the Catholic Natural Law Tradition', in Terry Nardin (ed.), *The Ethics of War and Peace* (Princeton, NJ: Princeton University Press, 1996).
- Fisher, David, *Morality and Bomb: An Ethical Assessment of Nuclear Deterrence* (London: Croom Helm, 1985).
- Fotion, N., and G. Elfstrom, *Military Ethics: Guidelines for Peace and War* (Boston, MA: Routledge & Kegan Paul, 1986).
- Garfield, Richard M. and Alfred I. Neugut, 'Epistemological analysis of warfare: a historical view', *Journal of American Medical Association*, 266:5 (1991), pp. 688–92.
- Goldman, Jan (ed.), *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham, MD: Scarecrow Press, 2006).
- Glover, Jonathan, *Humanity: A Moral History of the Twentieth Century* (London: Jonathan Cape, 1999).
- , *Causing Death and Saving Lives* (London: Penguin, 1977).

- Graham, Gordon, *Ethics and International Relations*, (Oxford: Blackwell, 1997).
- Hampshire, Stuart (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978).
- Harbour, Frances V., *Thinking About International Ethics: Moral Theory and Cases from American Foreign Policy* (Boulder: Westview, 1999).
- Hare, J. E. and Carey B. Joynt, *Ethics and International Affairs* (London: Macmillan, 1982).
- Hare, R. M., 'Rules of War and Moral Reasoning', *Philosophy and Public Affairs*, 1.2 (1972), pp. 166–81.
- Harries, Richard, *Christianity and War in a Nuclear Age* (London: Mowbray, 1986).
- Harries-Jenkins, Gwyn, and Jacques van Doorn (eds.), *The Military and the Problem of Legitimacy* (London: Sage, 1976).
- Hartigan, Richard Shelly, *The Forgotten Victims: A History of the Civilian* (Chicago: Precedent Publishing, 1982).
- Hartle, Anthony E., *Moral Issues in Military Decision Making* 2nd ed. (Lawrence, KS: University Press of Kansas, 2004).
- , 'Discrimination', in Bruno Coppieters and Nick Fotion (eds.), *Moral Constraints on War* (Lanham, MD: Lexington Books, 2002), pp141–58.
- Henkin, Louis, *et al.*, *Right V. Might: International Law and the use of Force* (New York: Council of Foreign Relations, 1989).
- Hoffmann, Stanley, 'Ethics and Rules of the Game between the Superpowers', in Henkin, Louis, *et al.*, *Right V. Might: International Law and the use of Force* (New York: Council of Foreign Relations, 1989), pp. 71–93.

- Holmes, Richard, *Firing Line* (London: Jonathan Cape, 1985).
- Hume, David, *Enquiries concerning the Human Understanding and concerning the Principle of Morals*, 2nd ed., (ed.) L. A. Selby-Bigge (Oxford: Clarendon, 1892).
- , *Treatise of Human Nature*, (ed.) L. A. Selby-Bigge (Oxford: Clarendon Press, 1888), pp. 478–96.
- ICRC, *Customary International Humanitarian Law, Vol. 1: Rules*, (eds.) Jean-Marie Henckaert and Louise Doswald-Beck (Cambridge, Cambridge University Press, 2005).
- , *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (eds.) Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, with Jean Pictet (Geneva: Martinus Nijhoff, 1987).
- Ignatieff, Michael, ‘Handcuffing the military? Military judgment, rules of engagement and public scrutiny’ in Patrick Mileham and Lee Willett (eds.), *Military Ethics for the Expediency Era* (London: Royal Institute of International Affairs, 2001), pp. 25–32.
- Johnson, James Turner, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999).
- , *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981).
- Kaldor, Mary, *New and Old Wars: Organised Violence in a Global Age* (Cambridge: Polity, 1999).
- Kasher, Asa., Yadlin, A., ‘Military Ethics of Fighting Terror: An Israeli Perspective’, *Journal of Military Ethics* 4:1 (2005), pp. 3–32.
- Kaufman, Frederik, ‘Just War Theory and Killing the Innocent’, in Michael W. Brough, John W. Lango, and Harry van der Linden (eds.), *Rethinking the Just*

- War Tradition* (Albany: State University of New York Press, 2007).
- Keegan, John, *War and Our World: Reith Lecture 1998* (London: Pimlico, 1999).
- Kutz, Christopher, 'Justice and Reparations: The Cost of Memory and the Value of Talk', *Philosophy and Public Affairs* 32:3 (2004), pp. 277–312.
- Levinson, Sanford (ed.), *Torture: A Collection* (Oxford University Press, 2004).
- Luban, David, 'Just War and Human Rights', *Philosophy & Public Affairs* Vol. 9, No. 2 (winter 1980), reprinted in Charles Beitz (ed.), *International Ethics* (Princeton, NJ: Princeton University Press, 1985).
- Mackie, J. L., *Hume's Moral Theory* (London: Routledge and Kegan Paul, 1980).
- Mani, Rama, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity, 2002).
- Mavrodes, George, 'Conventions and the Morality of War', in Charles Beitz, Marshall Cohen, Thomas Scanlon and John Simmons (eds.), *International Ethics* (Princeton, NJ: Princeton University Press, 1985).
- McMahan, Jeff, 'The Ethics of Killing in War', *Ethics* 114:4 (2004), pp. 693–733.
- Meddings, D. R., 'Civilians and war: a review and historical overview of the involvement of non-combatant populations in conflict situations', *Medical Conflict Survival* 17:1 (2001), pp. 6–16.
- Mileham, Patrick, 'Military Ethics: Questions for a New Chapter', in Patrick Mileham (ed.), *War and Morality* (London: Royal United Services Institute, 2004).
- Mileham, Patrick (ed.), *War and Morality* (London: Royal United Services Institute, 2004).
- Mileham, Patrick, *Ethos: British Army Officership 1962–1992: The Occasional Number 19* (Camberley, Strategic and Combat Studies Institute, 1996).

- , *Value, Values, and the British Army: A Seminar Report* (Edinburgh: Institute for Advanced Studies in Humanities, University of Edinburgh, 1996).
- Mileham, Patrick, and Lee Willett (eds.), *Military Ethics for the Expeditionary Era* (London: Royal Institute of International Affairs, 2001).
- Miller, David, *Philosophy and Ideology in Hume's Political Thought* (Oxford: Clarendon Press, 1981).
- Miller, Richard B. (ed.), *War in the Twentieth Century: Sources in Theological Ethics* (Louisville, KY: Westminster/John Knox Press, 1992).
- Miller, Richard B., *Interpretations of Conflict: Ethics, Pacifism, and the Just War Tradition* (Chicago: University of Chicago Press, 1991).
- Murphy, Jeffrie G., *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (D. Reidel: Dordrecht, 1979).
- Nagel, Thomas, 'War and Massacre', in Charles Beitz, Marshall Cohen, Thomas Scanlon and John Simmons (eds.), *International Ethics* (Princeton, NJ: Princeton University Press, 1985).
- , 'Ruthlessness in Public Life', in Stuart Hampshire (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), pp. 75–91.
- Nardin, Terry, 'Introduction', in Terry Nardin (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NY: Princeton University Press, 1996).
- Nardin, Terry (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NY: Princeton University Press, 1996).
- Noonan, John N. Jr., 'Three Moral Certainties', in Carl Fucarotta (ed.), *The Leader's Imperative: Ethics, Integrity, and Responsibility* (West Lafayette, Indiana:

- Purdue University Press, 2001), pp. 3–14.
- Norman, Richard, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995).
- O'Brien, William V., *The Conduct of Just and Limited War* (New York: Praeger, 1981).
- Oderberg, David, *Applied Ethics: A Non-Consequentialist Approach* (Oxford: Blackwell, 2000).
- O'Donovan, Oliver, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003).
- Orend, Brian, *The Morality of War* (Peterborough, Ontario: Broadview Press, 2006).
- , *War and International Justice: A Kantian Perspective* (Waterloo: Wilfrid Laurier University Press, 2000).
- Paskins, Barrie, and Michael Dockrill, *The Ethics of War* (London: Duckworth, 1979).
- Pattison, Eric, *Just War Thinking: Morality and Pragmatism in the Struggle against Contemporary Threats* (Lexington Books: Lanham, MD, 2007).
- Perry, David L., *Partly Cloudy: Ethics in War, Espionage, Covert Action, and Interrogation* (Lanham, MD: Scarecrow Press, 2009).
- Pictet, Jean, (ed.), *The Geneva Conventions of 12 August 1949: Commentary vol. 4* (Geneva: ICRC, 1952–60).
- Ramsey, Paul, *War and Christian Conscience: How shall Modern War be conducted justly?* (Durham, NC: Duke University Press, 1961).
- Regan, Richard, *Just War: Principles and Cases* (Washington D.C.: Catholic University of America Press, 1996).

- Roberts, Adam, 'Humanitarian Issues and Agencies as triggers for International Military action', *International Review of Red Cross* 839 (2000), pp. 673–98.
- Roberts, Adam and Richard Guelff (eds.), *Documents on the Laws of War* 3ed ed. (Oxford: Oxford University Press, 2000).
- Rodin, David, *War and Self-Defense* (Oxford: Oxford University Press, 2002).
- , 'The Ethics of Asymmetric War', in Richard Sorabji and David Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Oxford: Oxford University Press, 2005), pp. 153–68.
- Rogers, A. P. V., *Law on the Battlefield* 2nd ed. (Manchester: Juris Publishing, 2004).
- Schmitt, Michael N., 'Precision attack and international humanitarian law', *International Review of Red Cross*, 859 (2005), pp. 445–66..
- Schoenekase, Daniel P., 'Targeting Decisions Regarding Human Shields', *Military Review* (September-October, 2004), pp. 26–31.
- Shue, Henry (ed.), *Nuclear Deterrence and Moral Restraint: Critical Choice for American Strategy* (Cambridge: Cambridge University Press, 1989).
- , 'Torture', in Levinson, Sanford (ed.), *Torture: A Collection*, Oxford University Press (2004), pp.47–60.
- Singer, Peter, *One World: The Ethics of Globalization* (New Haven, CT: Yale University Press, 2002).
- Sivard, Ruth, *World Military and Social Expenditures 1985* (Washington D.C.: World Watch Institute, 1985).
- Skerker, Michael, 'Interrogation Ethics in the Context of Intelligence Collection', in Jan Goldman (ed.) *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham, MD: Scarecrow Press, 2006), pp. 141–70.

- Slim, Hugo, 'Why Protect Civilians? Innocence, Immunity and Enmity in War', *International Affairs* 79. 3. (2003), pp. 483–501.
- Smart, J.J.C., and Bernard Williams, *Utilitarianism For and Against* (Cambridge: Cambridge University Press, 1973).
- Smith, Thomas W., 'Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq'. *International Studies Perspectives* 9 (2008): pp. 144–164.
- Sorabji, Richard, and David Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Oxford: Oxford University Press, 2005),
- Southall, David, and Kamran Abbasi, 'Protecting civilian from armed conflict: The UN Convention needs an enforcing arm', *British Medical Journal* 316 (1998), pp. 1549–50.
- Taylor, Maxwell D., 'A Do-it-Yourself Professional Code for the Military' in Lloyd J. Matthews and Dale E. Brown (eds.), *The Parameters of Military Ethics* (Washington D.C.: Pergammon Brasseys, 1986).
- Teichman, Jenny, *Pacifism and the Just War: A Study in Applied Philosophy* (Oxford: Basil Blackwell, 1986).
- Tesón, Fernando R., 'Eight Principles for Humanitarian Intervention', *Journal of Military Ethics* 5:2, pp. 93–113
- Torrance, Iain, *Ethics and Military Community* (Camberley: Strategic and Combat Studies Institute, 1998).
- US Catholic Bishops, 'The Challenge of Peace: God's Promise and my Response', reprinted in Jean Bethke Elshtain (ed.), *Just War Theory* (New York: New York University Press, 1992), pp. 77–168.
- van Doorn, Jacques, 'The Military and the Crisis of Legitimacy', in Gwyn Harries-

Jenkins and Jacques van Doorn (eds.), *The Military and the Problem of Legitimacy* (London: Sage, 1976).

Veale, F. J. P., *Advance to Barbarism: The Development of Total Warfare from Sarajevo to Hiroshima* (London: Mitre Press, 1968).

Walker, Margaret Urban, *Moral Repairs* (Cambridge: Cambridge University Press, 2006).

Walzer, Michael, *Arguing about War* (New Haven: Yale University Press, 2004).

———, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 2nd ed. (New York: Basic Press, 1992).

———, 'World War II: Why Was This War Different?', in Marshall Cohen, Thomas Nigel and Thomas Scanlon (eds.), *War and Moral Responsibility* (Princeton: Princeton University Press, 1974).

Weiss, Thomas G., and Cindy Collins, *Humanitarian Challenges and Intervention* 2nd ed. (Boulder: Westview Press, 2000).

Wolfendale, Jessica, *Torture and Military Profession*, (Basingstoke, Hampshire: Palgrave Macmillan, 2007).

Yoder, John Howard, *When War is Unjust: being Honest in Just-War Thinking* 2nd ed. (Maryknoll, NY: Orbis, 1996).

Legal Documents

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984)

Declaration Respecting Maritime Law or the Treaty of Paris (1856)

European Convention of Human Rights (1950)

Hague Convention IV Respecting the Laws and Customs of War on Land (Hague Convention of 1907)

Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)

Geneva Convention II for the Amelioration of the Condition of the Sick, Wounded and Shipwrecked Members of Armed Forces at Sea (1949)

Geneva Convention III Relative to the Treatment of Prisoners of War (1949)

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949)

Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I, 1977)

Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II, 1977)

Instructions for the Government of Armies of the United States in the Field (Lieber Code, 1863)

Rome Statute of the International Criminal Court (1998)

Universal Declaration of Human Rights (1948)

Reports, Official Documents and Statements

Amnesty International, 'Shielded from scrutiny: IDF violations in Jenin and Nablus' (4/11/2002).

———, ‘Israel / Occupied Territories: End collective punishment of Palestinians in Occupied Territories’, MDE/15/121/2002 (22/7/2002).

———, ‘Without distinction—attacks on civilians by Palestinian armed groups’ (MDE 02/003/2002).

B’Tselem, *2006 Activity Report* (Jerusalem: B’Tselem, 2007).

———, Press Release, ‘IDF is Responsible for Death of “Human Shield”’ (B’Tselem: Jerusalem, 14/8/2002).

ICRC, *Country report: Israel, the occupied territories and the autonomous territories: ICRC worldwide consultation on the rules of war* (Geneva: ICRC, 1999).

———, ‘ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody’ (Geneva: ICRC, 2007).

International Commission on Intervention and State Sovereignty, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

———, *Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001)

Iraq Body Count, *A Dossier of Civilian Casualties 2003–2005*.

http://www.iraqbodycount.org/analysis/reference/pdf/a_dossier_of_civilian_casualties_2003-2005.pdf, accessed on 12/9/2007.

Kellenberger, Jacob (ex-President of ICRC), ‘International Humanitarian Law at the Beginning of the 21st Century’, at the 26th Round Table in San Remo on current problems of international humanitarian law ‘The two Additional Protocols to the Geneva Conventions: 25 year later - challenges and prospects’ (5/9/2002).

NDFP, *Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977*.

<http://www.hartford-hwp.com/archives/54a/036.html>, accessed on 24/11/2006.

UK Army, *Soldiering: The Military Covenant* (Army Doctrine Publication Vol. 5: GD&D/18/34/71 Army Code No. 71642, February 2000).

———, *The Values and Standards of the British Army: Commanders' Edition* (Army Code No. 63813, 2000).

———, *The Values and Standards of the British Army: Soldiers' Edition* (Army Code No. 63812, D/DPS(A)/3/290/PS2(A), 2000).

UK Army, SO1 Leadership Development, RMAS (Royal Military Academy Sandhurst), *Soldier Management: A Guide for Commanders* (Army Code No. 64286, 2004).

UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004).

United Nations, 'Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10', A/ES-10/186 (30/7/2002), p. 8, para.32. <http://daccessdds.un.org/doc/UNDOC/GEN/N02/499/57/IMG/N0249957.pdf?OpenElement>, accessed on 3/5/2006.

US Department of the Army, *Field Manual 27-10* (Washington D.C., 18/7/1956).

Yael Stein (B'Tselem), *Human Shield: Use of Palestinian Civilians as Human Shields in Violation of High Court of Justice Order* (Jerusalem: B'Tselem, 2002).

Newspaper Articles (including Online Articles)

Anderson, John Ward, and Molly Moore, 'Palestinians vow revenge after Gaza missile strike: Militants said to be poised for truce before Hamas figure, 14 others died', *Washington Post* (24/7/2002), p. A13.

- , 'Jerusalem hit again by blast: In response, Israel expands seizures of Palestinian areas', *Washington Post* (20/7/2002), p. A1.
- Burns, John F., 'A Nation at War: Baghdad; Officials in Iraq voice defiance after airstrikes', *New York Times* (23/3/2003), A1
- Da Fonseca Wollheim, Corinna, Janine Zacharia, David Rudge, Herb Keinon and Philip Chein, 'Accidental hero', *Jerusalem Post* (25/10/2002), p. 3.
- Davis, Douglas, 'Blair: Mideast situation is ugly', *Jerusalem Post* (2/10/2002), p. 1.
- , 'Israel's UK embassy rebukes British Chief Rabbi', *Jerusalem Post* (29/8/2002), p. 3.
- Dudkevitch, Margot, ' Hamas vows to avenge killing of top terrorist', *Jerusalem Post* (24/7/2002), p. 1.
- Editorial, 'Annihilate Hamas', *Jerusalem Post* (5/8/2002), p. 6.
- Farrell, Stephen, 'Israel's "human shield" is killed', *Times* (16/8/2002), p. 18.
- Gillan, Audrey, 'UK activist returns from Israel in coma', *Guardian* (30/5/2003), <http://www.guardian.co.uk/israel/Story/0,,966860,00.html>, accessed on 12/7/2006.
- Goldenberg, Suzanne, 'UN anger at killing of children', *Guardian* (25/7/2002), <http://www.guardian.co.uk/GWeekly/Story/0,,762311,00.html>, accessed on 26/6/2006.
- , 'Marines may face trial over massacre', *Guardian* (27/5/2006), <http://www.guardian.co.uk/frontpage/story/0,,1784387,00.html>, accessed on 3/6/2006.
- , 'War in the Gulf: Rogue Missile wrecks home: Target miss reduces five Baghdad houses in rubble', *Guardian* (24/3/2003), p. 10.

———, ‘Bomb kills seven at university: three US citizens among dead after Hamas attack’, *Guardian* (1/8/2002), p. 2.

———, ‘Sharon hails raid as great success: International criticism of attack that killed 9 children’, *Guardian* (24/7/2002), p. 1.

———, ‘The man behind the suicide bombs: Every death is the product of a well-oiled killing machine’, *Guardian* (12/6/2002), p. 12.

Huggler, Justin, ‘Murder in campus: Bombing of university dining hall leaves 7 dead and 70 injured’, *Independent* (1/8/2002), p. 1.

Jeffery, Simon, ‘War may have killed 10,000 civilians, researchers say’, *Guardian* (13/6/2003), p. 18.

Johnson, Andrew, Francis Elliott and Severin Carrell, ‘Iraq abuse scandal: Ministry of Defence accused of buying silence of families’ over civilian deaths’, *Independent on Sunday* (20/6/2004), p. 13.

Kifner, John, ‘Death on the campus: The bombers; Hamas says it regrets American toll in attack, but hails bombing as success’, *New York Times* (2/8/2002), p. A10.

———, ‘Gaza mourns bombing victims: Israel hastens to explain’, *New York Times* (24/7/2002), p. A6.

———, ‘Israel surrounds Arafat compounds in a predawn raid’, *New York Times* (10/6/2002), p. A1.

———, ‘Israelis bury 6 terror victims as angry Cabinet meets’, *New York Times* (30/5/2002), p. A8.

Lahoud, Lamia, ‘Arafat orders forces to fight terror’, *Jerusalem Post* (9/5/2002), p. 2

MacIntyre, Donald, ‘Israeli use of “Human Shield” is judged illegal’, *Independent* (7/10/2005), p. 31.

- , ‘Inquiry after Israeli Forces caught using Boy as shield’, *Independent* (24/4/2004), p. 31.
- McGirk, Tim, ‘One morning in Haditha’, *Times* (27/3/2006).
- McGreal, Chris, and Duncan Campbell, ‘Israeli army bulldozer crushes US peace activist in Gaza Strip’, *Guardian* (17/3/2003), p. 2.
- McGreal, Chris, ‘Israel’s human shield drew fire: Human rights groups return to court over Army’s use of Palestinian civilians’, *Guardian* (2/1/2003), p. 11.
- Morris, Harvey, ‘Israeli forces seize Ramallah in biggest offensive for 20 years: UN chief urges both sides to step back from disaster as Palestinians retaliate’, *Financial Times* (13/3/2002), p. 1.
- Reeves, Phil, ‘ Hamas waits defiantly as Israel plots its revenge’, *Independent* (25/7/2002), p. 11.
- , ‘Rebellion grows among Israeli reserve officers’, *Independent* (1/2/2002), p. 17.
- Rudge, David , ‘Shehadeh was planning mega-attack’, *Jerusalem Post* (26/7/2002), p. 2A
- Russell, Ben, ‘UK offers payout for victims of Basra raid’, *Independent* (12/10/2005), p. 23.
- Schmitt, Eric, ‘A nation at War: Civilians; Rumsfeld says dozens of important targets have been avoided’, *New York Times* (23/3/2003), B12.
- Toameh, Khaled Abu, ‘Arafat: Attack on settlers are acts of self-defense’, *Jerusalem Post* (10/12/2002), p. 2.
- Urquhart, Coral, ‘Eight year jail term for Israeli who shot Briton’, *Guardian* (12/8/2005), p. 11.

———, ‘Israeli report clears troops over US death: Peace activist killed by bulldozer acted “illegally and dangerously”’, *Guardian* (14/4/2003), p. 12.

Usher, Graham, ‘Gunmen kill four settlers in road attacks: Hebron shootings claim three family members, including a child, as fury rages over Gaza raid’, *Guardian* (27/7/2002), p. 15.

———, ‘Army Objectors add to Sharon’s woes as approval ratings slide’, *Guardian* (2/2/2002), p. 17.

Websites

Amnesty International, <http://www.amnesty.org>

B’Tselem, <http://www.btselem.org>

Guardian, <http://www.guardian.co.uk>

Independent, <http://www.independent.co.uk>

ICRC, <http://www.icrc.org>

Iraq Body Count, <http://www.iraqbodycount.org>

Israel Defence Forces, <http://www.idf.il>

UK Army, <http://www.army.org.uk>

US Defense Technical Information Center, <http://www.dtic.mil/dtic>