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Michael Walzer

PROPORTIONALITY AND RESPONSIBILITY

ABSTRACT
This article examines two versions of the proportionality constraint in just war theory, one minimalist, prohibiting almost no military acts, and one maximalist, prohibiting pretty much everything. I argue that neither one meets the needs of the theory and that they should be supplemented and modified by an ethic of responsibility.

I

In this paper, I want to rehearse an argument that I have made before and then apply it to the new circumstances of asymmetric warfare.[1]

Proportionality arguments are very old, and they have always been highly elastic, easily stretched to cover a lot of whatever needs to be covered. It is mostly civilian casualties that need to be covered, unintended but foreseeable collateral damage. The argument is well known; I will provide only a single (and a standard) example. Here is a factory making tanks for the German war effort during World War Two. The factory is located in a working class neighborhood—it wasn't put there in order to benefit from the civilian cover; that's where factories were built before workers had cars. The factory just is where it is. The Allies believe that it is very important to stop the production of tanks; they do not intend to kill civilians, but they know that some number, possibly (given the aiming devices available in 1943) a large number, of civilians living nearby will be killed if they bomb the factory. They believe that this number is "not disproportionate" to the value of destroying or even seriously damaging the factory. In fact, almost any number could plausibly be described in that way; it is hard to set a limit on how high the numbers can go, given the importance of the military mission. Proportionality was, or used to be, a very permissive doctrine. So long as the injuries and deaths were not intended, there could be a large number of them, and no-one would complain—I mean no-one except the injured civilians and the families of the dead. But there is something wrong

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1   See my *Just and Unjust Wars* (1977) and, for an early effort at the application, Walzer 2009.

Michael Walzer: Professor Emeritus, Institute for Advanced Study, Princeton, New Jersey; walzer@ias.edu.

with a limit that isn't limiting, that doesn't give us any clear sense of what to do and when to stop—or, more exactly, doesn't do that in any effective way.

So I argued (thirty years ago) that not intending the foreseeable deaths was not enough; it was necessary to intend that those deaths would not occur and to take positive measures that would minimize their number—even if these positive measures had costs.[2] Well, they would certainly have costs; even something as simple as warning civilians to get out of the way has the obvious cost of warning enemy soldiers to get ready for an attack, and then your own soldiers will have to deal with an enemy that is alert and prepared. And there, in that simple example, is the issue that I meant to raise, and have been arguing about (and worrying about) ever since: the issue of risk. What risks should soldiers take to reduce the risks they are imposing on civilians? And then there is an additional issue: should this last question be answered differently for different groups of civilians—fellow citizens, enemy citizens, and citizens of neutral states; complicit civilians and innocent bystanders?[3] There are many possible classifications of the noncombatant population: should they make a difference? But I am not going to address that latter issue here, at least not directly; it doesn't often arise in the circumstances of asymmetric warfare, where insurgent forces hide among their own civilians, and it is these civilians, "enemy" civilians, who are at risk in the ensuing military operations. We can ask simply, what risks should be taken when their lives are at stake?

It is important to emphasize that I am not asking what risks soldiers should take to protect or to rescue civilians—as in the Israeli raid on the Entebbe airport in 1976 (where passengers on an Israeli plane were being held) or the American effort to rescue hostages in Iran in 1980. In cases like these, the civilians are clearly one's own, and the object of the military mission is to protect them from attack or to rescue them when they are being held as hostages. Here the obligation to take risks derives from the fact that these are fellow citizens. Israel would have had no obligation to go to Entebbe, or America to Iran, if the hostages there had been Swedes. The issue that I am addressing in this paper has nothing to do with protection or rescue; it has to do with the avoidance of killing—that is, with reducing the risks that *we are imposing* on enemy civilians in the course of an attack launched by us on a military target. The point is not to protect them from hostile forces but from our own forces, from ourselves; the point is to avoid killing them, if that is possible. What risks should be taken for that purpose?

Questions about risk are not easy, and I hope that I have never suggested that they are. The main point of my argument 30 years ago was simply to generate some resistance to the elasticity of proportionality calculations. I wanted soldiers and their officers to think about how to minimize civilian

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2   Walzer 1977: 152–159. This is a proposed revision of the doctrine of double effect. For further discussion, see Woodward 2001.

3   For a controversy about the question of risk, see Kasher and Yadlin 2005; 2006 and Margalit and Walzer 2009. Also, Kasher 2009.

casualties—which they didn't have to do, in the old days, once they decided that the number of likely deaths was not disproportionate to the value of the military target. And that was easy to decide--as I have just argued, it was too easy to decide that the likely deaths were "not disproportionate".

The key phrase in the last paragraph is "some resistance" to the old elasticity. My argument certainly didn't make the key factors any more precise. I can't do that now. What positive measures should soldiers take, with what care, at what cost, at what risk? These were and are judgment calls. There is no possibility of saying: the risk should be 9 or 17 or 33. And, even without precision, we also need to think about the limits to my limits. Since soldiers are already taking risks for the sake of their military mission, any additional risks can't endanger the mission, else the first set of risks would be pointless. What is called "force protection" is crucial to the success of the mission and to the possibility of future missions, and so this must be given its proper weight. That means more judgment calls, more necessarily rough estimates of probabilities, but these difficult judgments and estimates are morally necessary. Officers making decisions in the field have to think about something besides proportionality—call it "responsibility." They have to take responsibility, for their own soldiers, of course, but also for the civilians they put at risk, and for the deaths they cause, even in legitimate military operations. As morally responsible actors, they should try to reduce the numbers. And in judging their conduct, we should always ask: Who is responsible for putting these civilians in harm's way?

II

Now, let's set risk and responsibility aside for a moment and turn back to proportionality. Something very strange has happened to the proportionality argument. The elastic has snapped back, and now it doesn't justify too much; it hardly justifies anything at all. The highly permissive doctrine has become a highly restrictive doctrine. Indeed, sometimes it seems as if proportionality arguments have become the functional equivalent of pacifism: their purpose is to make it impossible to fight. However, they don't do that in an evenhanded way, as we will see if we consider the reasons for the change.

The reasons have to do with the increasing number of asymmetric conflicts and what we might call the "moral/political surround" of those conflicts. I mean by asymmetry a war or a series of engagements between small insurgent forces, on one side, who claim that they have no choice but to fight from civilian cover and to attack vulnerable civilian populations – terrorism isn't their last resort but their only resort—and, on the other side, modern high tech armies. In the contemporary world, the high tech armies tend to be the armies of democratic states and the insurgent/terrorist forces are commonly hostile to democracy, but this is obviously a contingent, not a necessary, fact. (Actually, I think that there is a contradiction between terrorism and democracy,

though not between insurgency and democracy—but that is another subject, for another time.) In any case, the newly restrictive proportionality argument works against the high-tech armies.

Assume that the terrorist attacks on civilians are unsuccessful; few civilians are killed (which is what we hope for)—then it will turn out that most of the killing is done by armies responding to the attacks. The ratio of army killing to insurgent killing may get as high as 100-1, as it did in the 2008=09 Gaza war, and this looks disproportionate and is quickly criticized, denounced is more accurate, as disproportionate – in two different ways.

The first way is common but certainly wrong: think of how proportionality works in, say, a family feud in Kentucky between those famous families, the Hatfields and the McCoys. The Hatfields kills two McCoys, and then the McCoys are entitled to kill two Hatfields—that's a proportionate response, nothing more is permitted, and then the feud is over (at least temporarily), and everybody goes home. Any number higher than two will be called disproportionate and will continue the feud. Here proportionality is a backward looking measure, and that's the way a lot of people understand it. That's the way the UN's Secretary General seemed to understand it when he called the Israeli response to Hezbollah's 2006 raid "disproportionate" during the first week of the Lebanon war. He seemed to think that the IDF should kill the same number of fighters as the Hezbollah raiders had killed (8), and capture the same number (2), and that would be, that should be, the end of the story.[4] But this wasn't a family feud.

In war, proportionality is a forward-looking measure. Unintended civilian deaths are supposed to be measured against the value of seizing or destroying a particular target – as in stopping the production of tanks in my earlier example, which seemed to justify or allow a large number of civilian deaths. But if the target is a single terrorist cadre hiding in a village (in Pakistan, say), or a rocket-launching team firing from the front of an apartment building (in Gaza), as it often will be in asymmetric warfare, even a low number of civilian deaths will seem hard to justify. And it is in this context that proportionality arguments have become highly restrictive. We might argue for a cumulative measure: What is the military value not of hitting this cadre or this team but of stopping or slowing down the terrorist attacks overall? Or, what is the value of preventing the terrorists from acquiring and deploying more and more deadly weapons? Those are better questions and, if taken seriously, they might provide a useful standard. But, still, if the attacks have been radically ineffective, proportionality can still be, or can be used as, a highly restrictive doctrine. So this is the second way, better than the family feud model but still wrong, of condemning the high tech army's response to insurgent and terrorist attacks.

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4   See Walzer 2009: 44–45 for an assessment of Kofi Annan's comment on the Lebanon War.

III

At this point, we need to turn back to the responsibility argument. Who is putting these civilians at risk? The immediate answer is that they are being put at risk by the insurgents or terrorists who hide among the civilian population or fire from civilian cover. It is a hard argument to make politically these days, though it is readily understood in the starkest cases. If civilian hostages are strapped to tanks that then drive into battle, the soldiers who fire at the tanks and kill the hostages are not responsible for the deaths they cause. The killing of innocent persons is their work but not their fault. On the other hand, if there were a way of disabling the tanks without killing the hostages, that is what the soldiers should do, even if doing it is (marginally) more risky for them – and they should do it without regard to the nationality or religion or political allegiance of the hostages. Similarly, in responding to attacks from civilian cover, soldiers must make some effort to find out how many civilians are at risk (so that proportionality can be calculated, at least roughly) and some effort to get close enough to aim at the insurgent or terrorist cadre. They are not without responsibility in cases like these, but it is critically important to insist on the initial shift of responsibility to the other side. This shift has not been sufficiently recognized in political and legal judgments of the Gaza war (see, for example, the Goldstone Report[5]) or in the arguments about the killing of civilians in Afghanistan.

When we think about the risks that soldiers must take in asymmetric warfare, there is a relevant political argument that I want to note but not focus on. Often the insurgents are not hiding among civilians for their own protection (the phrase "human shields" may be misleading). They are hiding among civilians in order to expose the civilians to attack – because they believe, and they are probably right, that the death of these civilians will work to their advantage. So that would suggest that the risks soldiers take to minimize civilian deaths may well be required by their military mission. The rules of engagement promulgated for American soldiers in Afghanistan in 2010, for example, were probably politically motivated—aimed, that is, to win "the battle for hearts and minds".[6] They were not the product of mere morality. But my own interest here is in mere morality.

The insurgents, of course, don't acknowledge that they are deliberately exposing civilians; they claim that if they don't fight from civilian cover, they will increase the risks to themselves—and to their cause. Suppose their cause is just, as in, say, the national liberation struggle of Algerians against the French in the 1950s (an early example of asymmetric warfare), what risks must the Algerian (FLN) insurgents accept? They certainly can't put bombs in cafes and bus stations, as they did[7]; the deliberate killing of innocent people is ruled out from the beginning. They must seek alternative ways of fighting, even if the

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5   Moshe Halbertal (2009) provides a useful critique.
6   I heard discussions of the new rules of engagement at a conference at the US Naval Academy, "Ten years Later: Warfare Ethics since 9/11", held in April 2011.
7   On the Algerian war, see Horne 2006.

risks of failure are greater (I don't think that they actually are greater, but that is, again, a subject for another time).

Fighting from civilian cover is a harder question. Clearly, the responsibility for the dangers that civilians now face lies first of all with the insurgents who are using them. How far can they reduce their own risks in this way? But the attacking soldiers must also answer questions about the dangers their attack produces. What risks are they bound to accept to minimize that danger? At this point in the argument, we need to think about whether there is any kind of baseline for our (nonmathematical) calculations of risk. The importance of doing this was suggested to me by Noam Zohar, who has written well on these questions.[8] In order to think about baselines, I am going to do what I usually don't like to do – describe a series of hypothetical situations. I will try to make them as realistic as I can.

So, imagine a military attack by insurgent forces from a camouflaged position in a forest or a field on the outskirts of a city (I take this example from a documentary about the French resistance in World War Two—so it's not entirely hypothetical[9]). The attack is directed against a passing army unit. There are some risks, obviously, for the attackers, and a small number of civilians living or working nearby may be endangered—not a disproportionate number, according to the insurgents' calculations of military benefit. Take this as the standard or baseline case. It doesn't involve terrorism, and the cover is vegetative, not human; the insurgents are hiding in a field, not a city. They aren't wearing uniforms, but they are otherwise adhering to the rules of just warfare: they are not attacking civilians, and they are not deliberately exposing civilians to harm. Now, if they move from this position into the city, and hide, and fight, attacking their enemies from the midst of the civilian population, they would reduce the risk to themselves at the expense of the civilians among whom they are hiding. They would, so to speak, be offloading risk from themselves to noncombatant men, women, and children (their fellow citizens or fellow nationals). I think we should say flatly that they are not allowed to do that; it is unjust; it is morally wrong; and, if they do it, they are responsible for civilian casualties caused by any counter-attack—or, at least, by any careful and well-aimed counter-attack

But suppose we change the baseline. The insurgent/terrorist forces are in the city center because that's where they live; that's where they have always lived. And, anyway, the open spaces around the city are controlled by the army. Surely the insurgents can fight from where they are—here the case is akin to the factory in the working class neighborhood. But it might be the case that they could readily move into more sparsely inhabited parts of the city and fight from there. If they do that, they will reduce the risk to civilians in the densely populated neighborhoods and take on greater risks for themselves. Are they bound to do that? I want to say yes, to some extent at least (we can argue about how strong the obligation is). Offloading risk seems worse than refusing to take

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8   See, for example, Zohar 2014.
9   The film is "The Sorrow and the Pity (1971), directed by Marcel Ophuls.

positive measures that would reduce risk, but both seem wrong to me. And if they are wrong for the insurgents, then they must be wrong for soldiers too.

Now imagine an army planning an attack on a legitimate military target. Its strategists and tactical experts have worked out a plan that involves some degree of risk for the soldiers, but given the importance of the target, the risks are acceptable. And there are foreseeable civilian deaths, but the number is "not disproportionate" to the value of the target. Now a junior officer comes along and says that he has a plan that will reduce the risks to soldiers but increase the risks to civilians (though not to a level that violates the proportionality rule). If this officer's proposal is adopted, it would be soldiers, not insurgents, who are offloading risk. Is that the right thing to do? They wouldn't be using civilians as shields; I am not suggesting a simple equation here. But they would be benefiting from a strategy that deliberately put civilians in harm's way for the sake of the benefit, and I don't think we would want them to do that.

Now imagine another junior officer who has a plan that will greatly reduce the risks to civilians but increase slightly the risks to soldiers (without endangering the mission). Should the soldiers be asked to accept the added risk? Once again, I find it easier to say no to my first question (about offloading risk) than yes to the second (about adding it on), but both those answers are probably right. They suggest what responsible people, moral agents, ought to do in the circumstances of war.

But these hypothetical examples, while they are usefully illustrative, are also highly artificial. In practice, in the actual circumstances of warfare, we don't have a baseline, and we don't know at any moment in real time if the question soldiers face is about offloading risk or adding it on. So perhaps we needn't work very hard to distinguish between the two—we should just notice that there are these two possible ways of describing the situation. And then all we need is an argument about risk itself—and that argument should go this way: in planning and conducting military operations that endanger civilians, strategists and soldiers (and insurgents too) must take care and take risks to reduce the dangers. They have choices to make, and the lives of unarmed and vulnerable civilians, men, women, and children, have to figure significantly in those choices.

I won't make any effort to specify how much risk soldiers (or insurgents) ought to accept. But if we can't say how much, we can sometimes say: not enough. Warning civilians to leave a specified area, for example, and accepting the risk of also warning soldiers—these are not enough to justify indiscriminate attacks afterwards. As the American experience with free-fire zones in Vietnam indicates, many civilians don't leave. Despite the warnings, they stay on because they are old and sick, because they are caring for relatives who are old or sick, because they are afraid that their homes will be looted, or because they have no place to go.[10] It is a good thing to issue the warnings, but there will be work, and possibly risky work, that still has to be done to figure out how many civilians remain in the area and to look for ways of reducing the risks imposed on them by an attack.

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10   Walzer 1977: 188–196 (on free fire zones in the Vietnam war).

Exactly how much of this sort of work is morally necessary is, as I have already said, a judgment call, and the judgments have to be made by field officers or, at least, by officers who know the field. International law and just war theory can only provide rough guidelines. Still, the guidelines are important, and the training of soldiers, and especially the professional training of officers, should include a serious engagement with those guidelines--a discussion of their meaning and a study of actual cases in which they were applied, well or badly; and it should also include exercises that prepare soldiers to apply them well. It is incompetence, above all, that produces brutality,[11] and so we need soldiers who are trained to act competently in these difficult situations.

Only this kind of training can give us some confidence in the judgment calls to come. And since we are all of us civilians at some point in our lives, and many of our friends and relatives are civilians right now, we need that confidence.

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Majkl Volzer

Proporcionalnost i odgovornost

Apstrakt

Ovaj članak ispituje dve verzije ograničenja proporcionalnosti u teoriji pravednog rata, jednu minimalističku, koja ne zabranjuje gotovo nijedna vojna dejstva, i jednu maksimalističku, koja zabranjuje gotovo sve. Tvrdim da nijedna ne zadovoljava potrebe teorije i da bi ih trebalo dopuniti i modifikovati etikom odgovornosti.

Ključne reči: proporcionalnost, odgovornost, asimetrično ratovanje, teorija pravednog rata

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11   I owe this line to an Israeli soldier with some knowledge of Middle Eastern battlefields.