CHAPTER 9

Collateral Damages – Military Necessity and the Right to Life

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I. INTRODUCTION

The term ‘collateral damage’ obviously arouses strong sensibilities in public opinion. As soon as somebody dares to use this term, public opinion as well as many journalists tend to fall intuitively into perceptions of ‘bad guy’ and ‘good guy’ - and somebody thinking in terms of collateral damage must be a bad guy, a cold technocrat being ready to sacrifice innocent lives on the altar of military efficiency. The sensibility behind this emotional reaction is understandable – from a perspective of human rights protection it is difficult to imagine that it may ever be justified to make innocent human beings the victims of calculated military force. The protection of innocent human life is one of the central cornerstones of modern human rights law – and why should we sacrifice this central dogma for arguments of military necessity? The point could also be illustrated, in a parallel scenario, with the recent judgment of the German Constitutional Court of 2007 concerning the Aviation Security Law (‘Luftsicherheitsgesetz’), where the underlying legal issue was the question whether it could ever be legitimate to sacrifice the lives of dozens, perhaps even hundreds of passengers in a civilian airplane if shooting down the airplane would be the only possibility for preventing a terrorist attack according to the 9/11 model.¹ The German Constitutional Court insisted in its judgment on the primordial value of human dignity (‘Menschenwürde’) and deduced from the protection of human dignity an absolute prohibition

¹ Bundesverfassungsgericht, Judgment of 15 Febr. 2006 –1 BvR 357/05 –, published in the official collection of judgments of the Constitutional Court, BVerfGE 115, 118 et seq. (paras. 118-139).

One may argue a lot about such a robust – one could also say: naïve – line of arguing: if one links the protection of ‘innocent’ civilian lives so intimately with primordial constitutional values such as the respect for human dignity, it becomes difficult, if not impossible, to sacrifice the lives of innocent victims for collective values, such as the security of the state. Even balancing some losses among ‘innocent’ persons with the protection of the lives of large groups of other ‘innocent’ human beings, thus protecting the rights of these others, becomes doctrinally impossible, since human dignity is not open to balancing according to mainstream constitutional doctrine in Germany.

Accordingly, politicians tend to avoid terms such as ‘collateral damage’ and take refuge in verbal euphemisms that try to hide the problem. But does the underlying legal problem really perish? Clearly not – it is only obfuscated and attention is diverted. But should we not cope with the underlying issues – the question whether and to what degree it is conceivable to grant an absolute protection to the life of ‘innocent’ human beings? Human rights doctrine has serious problems in taking up such moral dilemma, of really coping with the tragic features of certain decision-making situations. That is why this essay concentrates upon humanitarian law doctrine.

Traditional laws of war, and even modern humanitarian law, rest on the assumption that military necessity may require the incidental killing of ‘innocent’ civilians and that some losses of the civilian population may be unavoidable in military operations, a lesson that military experience has shown again and again. If such ‘collateral