PROTECTING STATE SOLDIERS, COMPATRIOT CIVILIANS OR FOREIGN CIVILIANS: PROPORTIONALITY’S MEANINGS AT THE TACTICAL, OPERATIONAL AND STRATEGIC LEVELS OF WAR

By Ziv Bohrer*

McNamara: … do you mean to say that instead of killing 100,000… Japanese civilians in that one night, we should have… had our soldiers cross the beaches in Tokyo and been slaughtered in the tens of thousands? … Proportionality should be a guideline in war… [but] the human race… has not really grappled with what are… 'the rules of war'. Was there a rule [against killing]… 100,000 civilians[?]… 'If we'd lost the war, we'd all have been prosecuted as war criminals.'… But what makes it immoral if you lose and not immoral if you win?1

How many foreign civilians could be collateral harm when a State is fighting to defend its own? How far may a State go in order to protect its soldiers, even at the expense of harm to civilians, whether foreign or compatriot? International law seems unable to offer clear answers, and the resulting ramifications are proving to be more perplexing today than ever before. Legal scholars are increasingly turning to just war morality in their attempts to resolve this legal ambiguity. But that philosophical discourse often fails to sufficiently grasp the situational complexities under which wartime proportionality judgments are made. By drawing from recent experiences of different armed forces, this essay attempts to show how current legal scholarship, as a result of its reliance on just war morality, fails to fully grapple with the differing proportionality judgments necessary at the tactical, operational, and strategic levels of war. If international law is ever to prevail over war’s inescapable moral complexities, it must be interpreted in light of existing distinctions between the decision-making made at each of

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the levels of war. Otherwise, the ‘law in the books’ will fail to reflect State practice and may even become impractical.

INTRODUCTION

The following wartime dilemmas of “proportionality” are passionately debated: “Force Protection”: to what extent may a State act to protect its soldiers (“State/compatriot soldiers”), even when it may result in greater civilian harm? “Compatriot Partiality”: to what extent may a State act to insure the safety of civilians under its effective control, such as its citizens (“compatriot/the State’s civilians”), over the safety of other civilians, such as those found on the enemy’s side (“foreign civilians”)? “The Combined Dilemma”: should the level of risk taken by soldiers in order to reduce potential harm to civilians differ in accordance with the civilians’ identity (compatriots v. foreigners)?

The debate regarding how to resolve these dilemmas has intensified in recent years. Due to the horrors of modern wars, many have become ever wearier of casualties to compatriot forces and to civilians on both sides. This effect is often referred to as “casualty aversion”. The increasing recognition of human rights has also furthered casualty aversion, including the aversion to military casualties. Unfortunately, while the aspiration to protect these three categories of people (namely, “compatriot soldiers”, “compatriot civilians” and “foreign civilians”) has intensified, new practical obstacles have obscured attaining the sought protection. Due to developments in combative technologies that extend weapons’ ranges and harmfulness, urbanization and the growth in human population, it has become increasingly difficult to isolate the field of battle from civilian inhabitation. Further, certain enemies (most notably non-State actors) purposely disperse their bases and fighters among the civilians on their side, as well as indiscriminately attack soldiers and civilians of the other side.

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