

**Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They
Would Endanger Their Own Civilians?**

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When soldiers engage in war they should be careful not to harm enemy civilians. However, the question remains how careful should they be and, in particular, to what degree should they be willing to risk their lives in order not to harm enemy civilians? One way of answering these questions is to posit that soldiers should be willing to risk their lives in order not to harm enemy civilians to the same degree they would in order not to harm their own civilians. Consider the following argument made in an article for the *New York Review of Books* by Avishai Margalit and Michael Walzer.¹

According to Margalit and Walzer, if Hezbollah were to take over a Kibbutz in northern Israel and hold civilian hostages as human shields (for example by intermingling with them so that it

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¹ Michael Walzer and Avishai Margalit, "Israel: Civilians and Combatants", *The New York Review of Books* 56, no. 8: pp. 21-22 (May 14, 2009) (hereafter *ICC*). An earlier and shorter version of the article appeared in the Israeli newspaper, *Haaretz*: Michael Walzer and Avishai Margalit, "This is not the Way to Wage a Just War," *Haaretz*, (April 8, 2009) [in Hebrew].

would be impossible to hurt Hezbollah people without hurting the civilians) Israeli soldiers should risk themselves to the same degree in order not to harm the civilians if:

- 1) The civilians were Israeli Kibbutz members.
- 2) The civilians were foreign citizens that happened to be in the Kibbutz (either pro-Israeli volunteers, or anti-Israel protesters).
- 3) The civilians were residents of southern Lebanon which Hezbollah brought with them to Israel for use as human shields.

I shall refer to this as the “equality” principle.

But what degree of risk should this be? Walzer and Margalit provide an answer also to this question. They argue that, regardless of the identity of the civilians, the degree of risk that soldiers should be willing to take upon themselves should be higher than the degree of risk that they impose on the civilians. To this I shall refer as the “altruism” principle.²

² Margalit and Walzer make this claim explicitly in their article for *Haaretz*: “How, therefore, can Israel prove to itself and to others its resistance to the practices of its enemies? Well, it is not enough that its soldiers not intentionally kill civilians: they should intend not to kill civilians. This active intention can be credible only if Israeli soldiers take upon themselves higher risks than the risk that their actions impose on civilians. Without taking risks, Israel’s condemnation of Terrorism is hollow.” (Margalit and Walzer, “This is not the Way to Wage a Just War” (My Translation.)). They reformulate this claim in their article for the *New York Review of Books*. Margalit and Walzer argue that every soldier should be told that: “by wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto

The equality principle is based on the notion that civilians are equally innocent, whether they are co-civilians, enemy civilians, or third party civilians. The inherent value of every human life command that people's lives should not be treated with less respect only because they are not members of one's own community or country. Furthermore, the true regard for human lives would be manifested when the subject we contemplate is a member of our own community so that we can reasonably identify with her, and see ourselves in her shoes. When we ask a soldier to consider enemy and stranger civilians as if they were civilians of her own country, we impose on her a Rawlsian veil of ignorance as to the identity of the civilians she might hurt, which would make her decision just and fair rather than biased.

those who haven't been trained, who lack the capacity to injure; whether they are others or brothers." (ICC 22)

They also criticize army guidelines that would "allow 'our' combatants to jump the queue for their own safety – so that their safety comes before the safety of civilians (whoever they are)". (Ibid. 22) In another part of their article, Margalit and Walzer argue that soldiers should not take "suicidal risks", (Ibid. 22) which seems to conflict with the altruism principle. However, read in view of their other claims in the article, it seems that what they mean is that soldiers should not take futile or excessive risks, rather than that they should not be willing to risk their lives more than the risk they impose on civilians. See also a similar statement by Walzer regarding the bombing missions in the Kosovo war: "Of course, it is legitimate to balance the risks; we cannot require our pilots to fly suicidal missions. They have to be, as Camus suggests, prepare to die, but this is consistent with taking measures to safeguard themselves" (Michael Walzer, "The Triumph of Just War Theory (and the Dangers of Success)," *Social Research* 69 [2002]: 925-944, 938.)

The altruism principle, regarding the obligation of soldiers to risk their lives more than the lives of civilians, seems to follow from our belief that a distinction should be made between civilians and soldiers in war situations, particularly because soldiers engage in a dangerous activity that poses risks to civilians (and to themselves), while civilians do not pose similar risks to soldiers.³

In this article I would like to question both the equality and the altruism principles, based on an argument from individual self defense. Note, that these two principles are not necessarily interconnected. However, as the above mentioned examples show, they are sometimes made in conjunction, and for the purposes of my argument this conjunction would be helpful.

I would like to outline first one type of argument that I would not rely on. One common way for people to object to the equality principle is to argue that enemy civilians are not completely innocent and that they rather bear some responsibility for their plight. Therefore they should be treated differently than completely innocent civilians. For example, it is often the case that enemy civilians identify with their leaders' cause, cheer the enemy's success in warfare, and do nothing to stop the enemy from achieving its goals. These civilians may even actively extend moral or financial support to the enemy, may be responsible for electing the enemy government knowing his intentions, and may be accomplices to his plan to hide his combatants among them in order to avoid being targeted. In addition, since enemy civilians may benefit from the gains of the enemy's success (at least from their own perspective) it might be

³ See Part IV.

permissible to subject them to the risks ensuing from the enemy's campaign, at least more so than completely innocent civilians.

In short, the equality principle fails, since enemy civilians are not equally innocent as other civilians. Let us call this the "unequal innocence" criticism of the equality principle. Alan Dershowitz has promoted a form of unequal innocence criticism, arguing for different levels of innocence among civilians depending on parameters similar to those mentioned above.⁴

The unequal innocence criticism, however, suffers from several difficulties. In the first place, it faces practical difficulties. It would be very hard to ascertain whether, and to what extent, particular enemy citizens are indeed responsible for their situation in the way just described. Especially during battle, it would be very hard to know which of the civilians is responsible for her situation in the way described and which is not, and to adapt one's behavior toward each of them accordingly. In addition there is the problem of children and of people who are not

⁴ Alan M. Dershowitz, "Civilian casualty? That's a gray area", *Los Angeles Times*, (July 22, 2006). ("There is a vast difference -- both moral and legal -- between a 2-year-old who is killed by an enemy rocket and a 30-year-old civilian who has allowed his house to be used to store Katyusha rockets. Both are technically civilians, but the former is far more innocent than the latter.") Note, however, that one may argue that the unequal innocence argument presupposes moral innocence rather than only innocence in the sense of not being involved in the war effort. According to such view, if the enemy engages in a moral or just war, let us say in response to an unjust attack by my country's army, the fact that the enemy's civilians take part in the enemy's war effort does not matter, since they would still be innocent in the moral sense. It is the conjunctions of both being involved in a war effort, and the war effort being immoral, that makes the civilians who are engaged in the war effort less innocent, than civilians who are not involved the war effort.

responsible for their actions, such as the mentally ill. Obviously these would never be responsible for their situation. How therefore could one justify not upholding the equality principle with regard to children and to the mentally ill? Finally this line of criticism would not hold the distinction between stranger civilians and co-civilians. To the extent that one feels some intuitive force to the claim that soldiers should prefer their own civilians over any other civilian, this line of criticism would not help.

I do not wish to claim in this article that the unequal innocence criticism is necessarily doomed to failure. It may be that some of its difficulties could be overcome, and that it may be worth pursuing despite these difficulties. However, all other things being equal, it would be better if the criticism of the equality principle could be based on an argument that is abstracted from these difficulties, and that would also address the possible distinction between one's fellow civilian citizens and foreign civilians.

In this article I therefore accept as my premise that enemy civilians are as innocent as co-civilians, and that third party civilians are also equally innocent.

My argument begins with an example of individual self defense and then makes the analogy to the situation of war. The gist of the argument is the following: in situations in which an aggressor holds an innocent person as a human shield, the defender may kill the human shield in order to save his life, because the human shield is morally equivalent to an innocent aggressor. That is, her well being poses a risk to the defender's life, although she is in no way responsible or culpable for that risk. In such situations, the defender has an agent-relative permission to prefer his own life over the life of the human shield (hence the rejection of the

altruism principle). However, if the human shield is someone close to the defender, such as his son, or his lover (or possibly his countryman) he may choose to risk his life more than the minimal moral requirement that would apply to any other human shield; that is he may choose to risk his life more than what he would be required to if the human shield were a stranger (hence the rejection of the equality principle).

I will proceed in the following order: Parts I-III will concentrate on the rejection of the altruism principle. In Part I, I will argue that a defender has an agent-relative permission to kill an innocent aggressor (or aggressors) in self defense. In Part II I will argue that in terms of the defender an innocent aggressor is morally equivalent to an innocent human shield. I will then discuss, in Part III, one possible objection to my argument, namely that it would permit a person to kill an innocent bystander in order to save her life, and argue that in some instances this is indeed allowed. In Part IV I will address the rejection of the equality principle, and in Part V and VI I will question whether my rejection of both the altruism and the equality principles applies to the situations of soldiers in war. In Part VII I will address two additional issues that go beyond the scope of the original question posed in this article.

I. Innocent Aggressor

I begin with an innocent aggressor, since this is the case where it seems that our intuitions are most clear about the permissibility of killing another innocent person in order to save our own life. This is also where the law universally (that is in all legal systems) permits killing an innocent person. Two kinds of innocent aggressors are mentioned in the philosophical literature: someone who reasonably believes that he has a justification for attacking me but is mistaken

about that belief (e.g. he has every reason to believe that I am about to kill 10 people without any justification but is wrong about that belief), and someone who attacks me but has no control over, or responsibility for, his actions (a baby playing with a gun, a lunatic in a homicidal rage, an epileptic in a seizure who holds a gun in his hand).⁵ For the purposes of this paper I will discuss only the second type of innocent aggressors. I will therefore define an innocent aggressor as someone who attacks me, but is no way culpable or responsible for that attack.⁶

⁵ There may also be a third category of innocent aggressor, which I am not sure was clearly spelled out in the literature – a person who is responsible for and in control of his actions, but is unaware of the fact that the nature of his actions constitute an attack against another person. For example, someone who thinks all he is doing is mowing the lawn, but is unaware of the fact that you were buried head up in the grass so that mowing the lawn would actually cause chopping off your head. Or, to give a more realistic example, someone who thinks that he is backing up his car innocently, but without any fault on his part, he will be killing you by backing up his car, unless you kill him first. Or, finally, an example from the philosophical literature: a person believing he is firing a toy gun at you, but actually firing a real gun. The law might distinguish between these cases and the other cases of innocent aggressor along the line of *mens rea*: they would be cases of negligence, rather than cases of having criminal intent (plus one of the available defenses against criminal charges, such as insanity or immaturity).

⁶ Some scholars might regard the entire class of what I term innocent aggressors as “innocent threats” (for the definition of innocent threat see n. 17 and accompanying text), and view innocent aggressors as the class of cases that I exclude from my definition of innocent aggressors (i.e. mistake). Jeff McMahan uses the term “Non-Responsible Threats” (See Jeff McMahan, *Killing in War*, [New York: Oxford University Press, 2009], 167-173), which is similar to my definition of innocent aggressors, but includes also instances of innocent threats and other categories. I think that the term nonresponsible threat is more accurate than innocent aggressor, and that the distinction between innocent threat and innocent aggressor (the way I define it, i.e., without responsibility for

Intuition, as well as the law, tells us that in all such instances you (the defender) are permitted to kill an innocent aggressor if this is the only way for you to escape certain death. That is, if you have no option of retreat or a less harmful means available, you may kill a lunatic, a baby playing with a gun, or an epileptic in a seizure, who would otherwise kill you. The law permits this, since all of these instances will be cases of self defense, and would not violate the limitations of imminence and proportionality.⁷ Our moral intuitions also seem to support this result although the moral reasoning for it may vary. Many believe that this is part of your right not to have your bodily integrity, or autonomy, violated by another person, no matter how innocent he or she may be. Another intuition comes from the basic right of self preservation that at least Hobbes would view as something that you never give up, no matter what you had agreed to.

A different question pertains to the status of this permission to kill an innocent aggressor, that is, whether one is justified in doing so or only excused for doing so. This question is relevant to determining: a. whether third parties may help you kill the innocent aggressor or not and b. whether you are held to be doing the right thing or whether you are held to be in a position of weakness of the will because you are overpowered by something you cannot resist (such as preserving your own life). George Fletcher argues that you are justified in using self defense against innocent aggressors, and this means that third parties may help you, and furthermore

one's actions) is unnecessary, but I nevertheless use the terminology that is more commonly used in the literature in order to review more easily some of the positions in the legal and philosophical literature.

⁷ See Model Penal Code, § 3.04(2)(a)(i).

that you are doing the right thing when you are resisting.⁸ Others argue that you are only excused in such cases, and therefore third parties cannot help you kill the innocent aggressor, and rather than thinking that you are doing the right thing, we only think that you should not be held accountable for your actions since it is unreasonable to expect people's will to be so strong as not to protect their own lives.⁹

I will argue that what applies to the case of innocent aggressors is neither justification in the regular sense nor excuse. Rather, the defender has an “agent-relative permission” to kill an innocent aggressor.¹⁰ Permission is a form of justification rather than excuse, since if you are permitted to do something there is nothing to be excused for. But an agent-relative permission shares with excuse the agent-relative perspective and the fact that third parties cannot help you or use self defense in your shoes.¹¹

⁸ See George P. Fletcher, “Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory,” *Israel Law Review* 8 (1987): 367-[]. For a similar view see also David Wasserman, “Justifying Self-Defense,” *Philosophy and Public Affairs* 16 (1987): 356-[], 356.

⁹ See. e.g., Boaz Sangero, *Self Defense in Criminal Law* (Oxford: Hart Publishing, 2006): 49-60.

¹⁰ See Larry Alexander “Justification and Innocent Aggressors,” *Wayne Law Review* 33 (1987): 1177-1189; Larry Alexander, “Self-Defense, Justification and Excuse”, *Philosophy and Public Affairs* 22 (1993): 60-[]. Alexander uses the term “weak justification” but in term of its application it is equivalent to “agent-relative permission”.

¹¹ More accurately one should say that third parties may not help you because of the mere fact that the other side is an aggressor. According to a utilitarian account at least, they may be permitted to help you if, for example, you hold the cure for cancer and the innocent aggressor does not.

The reason that third parties cannot help you lies in the equal innocence of yourself and of the innocent aggressor. From a third party perspective you are both caught in a tragic conflict in which, despite your innocence, only one could survive. This is similar to a situation in which you and a stranger are caught on a bridge that only one will be able to cross safely, while the other will fall over to his death. From a bystander's perspective, there is no reason to prefer one life rather than another, or to intervene in the way things will play out.

The reason this is permission rather than excuse lies nevertheless in the allure of a moral system that, in Larry Alexander's words, "would permit persons to prefer their own lives, and perhaps the lives of persons with whom they have special relationships, over the more numerous and equal innocent lives of others when those lives are directly threatened, even if the general balancing of interests would not authorize that preference."¹² Note that such equal innocence does not occur in the case of a culpable aggressor. There is no symmetry between the aggressor and the defender in cases of culpable aggressor. The culpable aggressor has intentionally, or knowingly, created a situation in which the defender has to choose between his life and the aggressor's. In such a case it would be fully justified for the defender to kill the

¹² Alexander "Justification and Innocent Aggressors," 1189 . For the related discussion on agent-relative norms agent-centered options and Supererogation, see e.g. Douglas Portmore, "Position-Relative Consequentialism, Agent Centered Options, and Supererogation" *Ethics* 113 (2003): 303- []. In the philosophical literature such position is sometimes referred to as an "agent-relative" position. It is usually identified with a deontological framework. However, as several commentators have argued such a position could also be defended from a consequentialist perspective also. See also Part IV.

aggressor, and third parties would also be allowed to help the defender, and will not be allowed to help the aggressor. Put differently, if self defense has to do with the just distribution of risk, then, from a third party's perspective, in the case of innocent aggressor the risk should be distributed equally, since neither the aggressor nor the defender is responsible for creating the risk, but in case of culpable aggressor, since the aggressor has intentionally, or knowing created the risk to the defender, he should bear all the risk, and the defender is justified in shifting the risk back to him.¹³

II. Innocent Aggressor and Human Shield

In the previous part I argued that a defender has an agent-relative permission to kill an Innocent Aggressor if this is the only way for her to escape certain death. In this part I will argue that human shields are morally equivalent to Innocent Aggressors.¹⁴ The following chain of examples is brought to illustrate this point:

¹³ See Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker" *Ethics* 104 (1994): 252–290. See also, Kimberly Ferzan, "Justifying Self Defense," *Law and Philosophy* 24 (2005): 711-749. Other implications also follow from of the culpable/innocent aggressor distinction. For example, since the defender can shift the risk back to the culpable aggressor, she is justified in killing the culpable aggressor even when the risk of her being killed by him is less than 1 (for example if the culpable aggressor is playing a Russian roulette on the defender and has one chamber loaded out of 6). The defender can also kill more than one culpable aggressor to defend her life.

¹⁴ For a similar claim, albeit arriving at the opposite conclusions see Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life*, and Michael Otsuka, "Killing the Innocent in Self-Defense," *Philosophy and Public Affairs* 23 (1994): 74-94.

- 1) A man is strapped in the driver seat of a car in a straight jacket that controls his movements and will make him steer the car at you and run you over unless you shoot him first. You shoot the man.
- 2) A man is strapped in the back seat of a car headed without control toward you, and about to run you over, unless you blow up the car, or divert it over a cliff. You blow up the car.
- 3) A man is sitting in the back seat of car steered by your enemy toward you, and about to run you over, unless you blow up the car, or divert it over a cliff. You blow up the car.
- 4) A man is held by your enemy who is pointing a gun at you so that the only way you could save your life is by shooting at your enemy through the man. You shoot at your enemy.

In example 1 we have a case of an innocent aggressor.¹⁵ Example 4 is an example of a human shield. I would argue that moving from example 1 through the other three examples nothing is lost in terms of relevant moral criteria. That is, in all of these examples the choice is between your life and the life of another innocent person, and therefore in each of them, you have an agent-relative permission to kill the other person.

The crucial point seems to be the move from example 1 to example 2. In both cases the man is innocent, and has no culpability for the threat nor control over it, but in example 1 the threat

¹⁵ See my definition of innocent aggressor, n. 6 and accompanying text.

comes from the man (he is driving the car at you) while in example 2, the man only sits in the car, and poses no threat to you at all. Shouldn't this make a difference?

There are rights-based accounts that make threat rather than innocence, the determinative moral factor in self defense. According to Judith Jarvis Thomson, for example, you have a right not to be killed by another person, and this means that when another person becomes a threat to your life he loses his right not to be killed by you. Therefore, an aggressor (whether innocent or culpable) loses his right not to be killed, but the man sitting in the car, who poses no threat to you, does not, and you may not kill him, even not in order to save your own life.¹⁶

To make her point even stronger, Thomson argues that one loses one's right not to be killed not only by being an innocent aggressor, but also by being what is termed an "innocent threat". An innocent threat, following Robert Nozick's example, is a man thrown at you down at the bottom of a deep well and about to kill you. Can you fire your vaporizing ray and kill him (assuming that otherwise he will survive the fall)?¹⁷ According to Thomson you can. Although,

¹⁶ Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20 (1991): 283-310; Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990).

¹⁷ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974): 34. Thomson's example is slightly different. In her example the question is, can you change your owning so that he will be deflected away from you and be killed. Her answer is in the positive. Note that according to my definition of innocent aggressor, innocent threats would be a subcategory within the category of innocent aggressors. Otsuka also contemplates the following example: when the man is falling you are holding a flagpole. If you keep on holding it the man will be impaled and you will be saved, if you let it down, you will be killed but he will survive the fall. Otsuka holds the

unlike a lunatic in a fit for example, the falling man cannot be said to “act” in any way in order to attack you, he nevertheless poses a threat to you, just by falling on you, and therefore you have a right not to be killed by him, while he loses the right not to be killed by you.

However it seems to me that it would be hard to justify the distinction that Thomson would make between the falling man (who she argues may be killed) and the man sitting in the back seat of the car (who she argues may not be killed, since he poses no threat), if we make a small change in the example. Consider that the falling man is surrounded by a metal frame so that this metal frame rather than his body will hit you and kill you. The change seems inconsequential, but the example now becomes very similar to that of the man sitting in the car. The man sitting in the car can also be regarded as sitting in a metal frame that will hit you and kill you. Could the metal frame around the falling man’s body, make all the moral difference?

This seems like a strange emphasis put on the human body qua physical object. After all, the falling man’s body will probably be covered with clothes so that it will not be his body that will hit you directly but his clothes. Suppose that in the example of the falling man, he will hit you with his shoe and kill you. Now suppose that he is falling from such a height that if his shoe were to be detached from his leg in mid air and hit you a second before his body does (assume that it has better aerodynamics than his body), the shoe alone would kill you (in both cases if

radical view that under such circumstances you must let down the flagpole, since otherwise you would be sustaining an action that will knowingly bring about the death of an innocent person.

you do nothing he will survive the fall). This would make it the case that you are allowed to shoot your vaporizing ray at the man whose shoe is well fastened to his foot, but not at the man who you know will have his shoe drop and kill you a second before he hits the ground.¹⁸

Rather than the threat posed, it is the choice between an innocent person's life and your own which makes the difference. This aspect is present in the case of the human shield just as it is in the example of the man sitting in the car and that of the innocent aggressor. Therefore, I would argue that they should all be judged according to a similar standard.

III. Bystander

There is one objection to be made to the moral standard that I support, namely that: "you are allowed to kill an innocent person when you are confronted with a choice between his life and yours". The objection is that this would allow you to "initiate a sequence of events that you know will kill" an innocent bystander.¹⁹ Michael Otsuka, among others, argues that it would be obviously wrong to initiate such a sequence of events, even if you know that your survival may depend on it. For example, it would be obviously wrong for you to grab an innocent person standing beside you, and put him between you and a javelin headed at you, so that he will get

¹⁸ A similar example is given by Michael Otsuka in his "Killing the Innocent in Self-Defense", 86.

¹⁹ Ibid. 77.

killed instead of you. But, according to Otsuka, it would be also obviously wrong²⁰ for you to fire a missile at the javelin, if you know that by doing so you would kill an innocent bystander that just happened to stand nearby.²¹

Based on a version of The Doctrine of Double Effect, termed the principle against appropriation, I argue that my position indeed commits me to the view that one has an agent-relative permission to kill a bystander in the example of firing a missile at the javelin, but it does not commit me to the view that one has an agent-relative permission to kill a bystander in the example of grabbing a person as a shield from the javelin.

According to the principle against appropriation, there is a distinction between using someone harmfully as a means to our ends and not using him in the same way. Another similar formulation would distinguish between viewing the bystander's presence in the situation as an opportunity or an obstacle.²² In the case of grabbing a person and putting him between me and

²⁰ Although it may not be as wrong as grabbing the person.

²¹ Otsuka, "Killing the Innocent in Self-Defense", 76-77 (I altered Otsuka's second example slightly. He contemplates hurling a bomb at a projectile headed at you that will kill a bystander). Like me, Otsuka criticizes Thomson's distinction based on threat rather than innocence, and argues that innocent aggressors and innocent threats are morally equivalent to innocent bystanders, but he draws an opposite conclusion than mine, namely that Thomson is wrong about allowing the killing of innocent threats and innocent aggressors, rather than being wrong about not allowing the killing of innocent bystanders.

²² Larry Alexander who has coined the term "appropriation" in this context defines the norm against appropriation as follows: "Do not appropriate another's existence without her consent to make yourself better off than you

the javelin, I am appropriating the innocent bystander since I am using him harmfully as a means for my survival and his presence there is an opportunity for me. In the case of firing the missile at the javelin, and in the case of the human shield, the innocent bystander is of no use to me, and his presence there is not an opportunity for me (in the case of the human shield he may even be an obstacle since it might have been easier to defend myself had he not been there.). Human shield is therefore not a case of appropriation.²³

To summarize, I should therefore rephrase my principle as the following: “you are allowed to kill an innocent person when you are confronted with a choice between his life and yours, unless in doing so you are appropriating the other person.”

would be had she not existed, and her worse off than she would be had you not existed”, see Larry Alexander, ““With Me, It's All er Nuthin”: Formalism in Law and Morality,” *University of Chicago Law Review* 66 (1999): 530- [], 559. This norm is usually considered a version of the Doctrine of Double Effect. For an earlier, albeit somewhat different, version of the norm against appropriation see Warren Quinn, “Actions, Intentions and Consequences: The Doctrine of Double Effect,” *Philosophy and Public Affairs* 18 (1989), 334-351, 334-335.

²³ Otsuka argues for another distinction, between diverting an existing risk and creating a risk. This allows him to distinguish between the javelin example, which, he argues, is a forbidden case of killing of a bystander, and the famous Trolley example, (in which one operates a switch that diverts a trolley from running over five persons to running over one person), which he argues is a permitted action not involving killing bystanders. (See Otsuka, “Killing the Innocent in Self-Defense”, 77 n. 11). But this view would commit him to the following strange position: it would not be allowed to send a missile at a javelin headed at two people expecting that it would kill a bystander, but it would be allowed to send a missile at the javelin in a way that would deflect its course from two people to a bystander.

IV. Human Shield that I Strongly Care For – The Rejection of the Equality Principle

So far for the rejection of the altruism principle as applied to human shields in the context of individual self defense. The above discussion tried to establish that, contrary to the altruism principle, a defender has an agent-relative permission to kill one (and possibly more than one) human shield, without appropriation, if this is the only way in which she can save her life.

Now I move on to the equality principle according to which one is morally required to apply the same standard of self risk, regardless of the identity of the human shield.

This raises the following question: since in the case of an innocent human shield the minimal moral standard applying to a defender is, as I argued, a permission to kill the human shield, can a defender apply a different, higher moral standard, if the human shield is someone close to her, such as her son, her lover, her friend, (or her countryman) rather than a stranger? That is, could she, for example, choose not to defend herself against an aggressor that would certainly kill her, in order not to kill her son, even though she would act in defense if the human shield were another person? It seems to me obvious that she can.

This answer can follow from either of three types of reasons. One type of reasoning would be that, no matter for what the reason, a person is always permitted to choose a higher moral standard than the one required by the minimal moral threshold. Since the defender is not required to sacrifice her life for the sake of the human shield, if she chooses to do so, she could do so for any reason, and for any types of persons.

This reason needs to contend with the following objection: what if the defender would have discriminatory or otherwise morally objectionable reasons for applying heightened self risk, as in adopting the following rule: "I am willing to sacrifice myself more than is required by the minimal moral standard, for everyone except for Chinese people, whom I particularly don't like"? There are two possible answers to this contention. First, it may matter whether the defender is acting as a private person in a private situation (as when he is adopting the rule "I date only Chinese women"), or whether he assumes public duties by acting in the public sphere (as when he is adopting the rule "I hire only Chinese women"). Secondly, even if the person assumes public duties one may argue that the defender is allowed to opt for self sacrifice in some cases, even if her reasons for doing so are morally repugnant. If we assume that by opting for self sacrifice the defender is acting under a higher moral standard than required, then the reasons for doing so should not matter. Conversely we might say that, to the extent that choosing a discriminatory rule is a moral bad, it is outweighed by the fact that the defender is choosing to sacrifice himself when he is not obliged to do so. Alexander and Ferzan make a similar point with regards to the irrelevance of motivation for pulling the switch in the Trolley problem. We do not care whether Man at the Switch is pulling the switch for bad reasons, such as because he hates the one person and is neutral about the five, as long as he is opting for the morally superior alternative - saving net lives by diverting the trolley from the five to the one.²⁴

²⁴ One may raise the following concern: is choosing to sacrifice one's life instead of killing the human shield indeed morally superior to choosing to kill the human shield? Under a deontological framework, the answer would obviously be yes. This is so, since killing the human shield involves infringing her rights, and not killing her, does

The second type of reasoning applies specifically to people you hold dear, such as family members. This type of reason is based on the same premise that gave rise to the agent-relative permission in the first place. We argued for an agent-relative permission to kill an innocent person, even if the balance of reasons were neutral, because we allowed persons to prefer their own lives or “the lives of persons with whom they have special relationships” over the lives of others, when those lives are directly threatened. Therefore, the same reason for which we would have allowed a person to prefer her life over the life of an equally innocent stranger, would apply in a similar hypothetical scenario where the person were to prefer her son’s life over the life of a stranger.

To put it differently, in a “stranger” human shield situation, the defender is caught in a tragic dilemma between his life and the life of another innocent person. In a human shield situation of

not. Classifying the permission to kill the human shield as an excuse, also presupposes that it would be otherwise wrong to kill the human shield, and that therefore not killing her is morally superior to killing her. But maybe, under a utilitarian framework one might argue that both options are morally comparable, since the outcomes in both cases would be the same – one person is killed. If that were the case, and if having a discriminatory rule for when to choose self sacrifice over killing adds moral badness to the world, then we might have a utilitarian reason against making distinctions among human shields for bad reasons. However, we will still be allowed to make such distinctions (and hence reject the equality principles) for good or neutral reasons. Note, that we would also be allowed to make such distinctions for bad reasons (and hence reject the equality principle) if we interpret the excuse for killing human shields to be more permissive and to allow a defender to kill more than one human shield in order to save her own life. This is so, since in such a case not using the excuse would clearly result in a greater moral good, and therefore the reasons for doing so should not matter.

a “loved-one”, the defender may choose to view the loved-one as an extension of himself. In that case it would be a dilemma between two parts of one’s self. This makes for a relevant difference between a stranger human shield and a loved-one human shield.

How far can this justification be extended? Should it apply also to second degree relatives, friends, countrymen? Should we view a person that would be willing to jump into a raging river to save his countryman but not a stranger as using the “discrimination at whim” justification, or as using an extension of the “loved-one” justification? A full exploration of these questions is beyond the scope of this paper. However, there seems to be an intuitive pull towards the view that preferring along the lines of one’s co-civilians is not simply discriminating at whim. Thomas Hurka argues for a similar position: “The relations among citizens of a nation are not as close as between parents and children, and the partiality they justify is not as strong. But common sense still calls for some partiality toward fellow citizens and certainly demands that partiality of governments.”²⁵ The answer may further depend on circumstances and cultural perspectives. One may imagine societies or special situations (such as war) in which social solidarity within a society and the ties between co-civilians are especially strong, and other societies or circumstances in which they are weaker.

A third type of reasoning would apply only to circumstances in which the defender has a duty of care for the well-being of the human shield or in which she acts as his agent, as in the case of a mother and son, or bodyguard and the person being protected by him. Such duty of care may

²⁵ Thomas Hurka, “Proportionality and the Morality of War,” *Philosophy and Public Affairs* 33 (2005): 34-66, 59-60.

provide another reason why one may have a rule that distinguishes between different hypothetical human shields for whom one can sacrifice oneself. I will expand on this in the next Part.

V. Human Shields and Soldiers – The Altruism Principle

We now reach the final stage of our discussion, in which I wish to use the analogy of self defense by an individual to discuss self defense by soldiers in an armed conflict. I will discuss self defense as it applies to individual soldiers and civilians, rather than use it in a collectivist approach to describe the right of self defense of states.²⁶

Consider therefore, as our starting point, a town consisting of one soldier (call him “home soldier”) and one civilian of a foreign country who just happened to visit the town (call him “stranger civilian”), and a town across the border consisting of one enemy soldier (call him “enemy soldier”). The enemy soldier culpably crosses the border, aims his gun at home soldier and grabs stranger civilian as a human shield. May the soldier kill stranger civilian if this is the only way for him to save his life? The altruism principle having been rejected, as argued in this article, it would seem that he may. Are there any modifications we must make in our previous discussion due to the fact that this is now a soldier rather than just any person? Is there something that distinguishes soldiers from other persons so that they should not have the same

²⁶ The leading scholar associated with the collectivist approach is Michel Walzer. See generally Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), and the leading scholar associated with the individualist approach is Jeff McMahan. See, e.g., Jeff McMahan, “The Ethics of Killing in War” *Ethics* 114 (2004): 693 –733.

agent-relative permission for preferring their own lives over the lives of other innocent people (civilians in particular), as other persons have?

Two possibilities come to mind, both involving the notion of risk. A relevant difference between soldiers and other persons may lie either in the fact that soldiers, unlike other persons, are involved in an activity that inherently poses risks to others, or in the fact that they are involved in an activity which inherently poses risks to themselves.

Soldiers Risking Others: Suppose I have a hobby of walking on high ledges when people are below me, because I like the excitement. Now I trip and can either fall to my right in which case I will die or fall to my left in which case I will fall on a person standing below me and kill her but save myself. Should it not follow from the fact that I chose to engage in an activity that puts others at risk that I should not have the option to fall to my left? Should not soldiers be analogized to people walking on high ledges, since they also chose to engage in an activity that puts others at risk?

The main factor doing the work in this example is culpability, rather than risk. I was culpable for creating the situation in which a choice had to be made between my life and another persons' life, because I chose, unjustifiably, to create the risk for the other person. Therefore the risk should be shifted back to me. But, unless we adopt the view that soldiers, qua soldiers, are always unjustified in imposing risks on civilians (a view that would seem to lead us to pacifism), there should be no reason to assume that a soldier, qua soldier, is more culpable than a civilian for a given situation in which a choice has to be made between their respective lives. In particular, it is hard to see why home soldier, qua soldier, is more culpable than stranger

civilian, for the situation in which only one of them could survive. Neither of them is culpable for that situation. Rather it is enemy soldier who is culpable for it. Indeed this exact equivalence of non-culpability for the situation of choice is the underlying premise of Walzer and Margalit's example opening this article, and also a leading line in Walzer's work in general.²⁷

We are therefore left only with the notion of risk. Walzer seems to argue that risk alone, even if it is justified, can account for a moral obligation for soldiers: "when it is our action that puts innocent people at risk, even if the action is justified, we are bound to do what we can to reduce those risks, even if this involves risks to our own soldiers."²⁸ He makes a similar point in his article together with Margalit, using the notion of training: "by wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto those who haven't been trained, who lack the capacity to injure; whether they are others or brothers."²⁹

But, as the first part of this article has tried to show, risk (or threat) alone, cannot account for a moral difference between similarly situated persons in cases of self defense. Falling man is

²⁷ See e.g. Jeff McMahan putting to question the assumption that the rules of war, and proportionality in particular, are independent of the question of whether one is participating in a just or in an unjust war.

²⁸ Michael Walzer, *Arguing about War* (New Haven, CT: Yale University Press, 2004), 17. Walzer similarly criticizes the fact that in the Kosovo war "we imposed risks on others and refused to accept them for ourselves." Michael Walzer, "The Triumph of Just War Theory (and the Dangers of Success)", 938.

²⁹ Margalit and Walzer, *ICC*, 22

morally equivalent to human shield, and falling man with his shoe well strapped to his leg is morally equivalent to falling man with a loose shoe. If we reject Thomson's Threat Principle, it would seem to follow that Walzer's reliance on risk alone as distinguishing between soldiers and civilians should also be rejected.³⁰

There are two more issues involved in the question of soldiers imposing risk. The first is the question of choice. Not all soldiers choose to wear uniforms and become soldiers. Some are conscripted. Soldiers furthermore are not free to obey or disobey orders. This might make it the case that conscripted soldiers are innocent about creating situations of choice between their

³⁰ Many would object to my position that imposing justified risks on others does not create new moral obligations towards those others. This question is more complicated than I have room to address here, however, I would like to mention one point briefly. To my mind, when one acts justifiably it is not always clear in what way it is he, rather than another person, or no one at all, who imposes risks on the others. Consider, for instance, the following change of circumstances in the example we are discussing: instead of holding stranger civilian as a human shield against home soldier's bullets, enemy soldier has now strapped stranger civilian to a tank charging across the border and aiming at running over home civilian, unless he blows up the tank killing stranger civilian. It seems to me that nothing important has changed in the original example; however, I would argue that it will be very counterintuitive to say that home soldier poses a risk to stranger civilian. If at all it is stranger civilian that now poses a risk to home soldier. Rather than talk about who imposes the risk - home soldier or stranger civilian - I would ask if either of them is culpable for the situation by his own choice. Since both of them are not (enemy soldier is) they should be treated equally. This line of argument may also be used to reject another objection: that the soldier is responsible for his actions and therefore should bear some of the risks that ensue from his actions, while human shield and falling man, are not. The Tank example, I hope, shows that home soldier, despite being responsible for his action, should not be distinguished morally from human shield strapped to the tank.

lives and the lives of civilians, even if their actions unjustifiably impose risk on others.

Commanders, however, would not be excused for creating the situation of choice for soldiers, and might be held accountable for it, if it amounts to an unjustifiable imposition of risk.

The second issue is the issue of training and likelihood. As Walzer and Margalit tell us, soldiers are trained to injure and to protect themselves from danger and civilians are not. It is therefore less likely that soldiers will get hurt in situations of combat, and more likely that civilian will. But questions of likelihood and training should be calculated at the outset of our problem. Home soldier has already taken into account the fact that he wears a protective vest and is trained in combat, when he arrived at the conclusion that unless he kills stranger civilian, he will be killed by enemy soldier. Taking all these considerations into account, the question remains if he is allowed to kill stranger civilian in order to save his own life.

Soldiers Risking Themselves: Paul Christopher argues for a difference between soldiers and civilians stemming from the fact that soldiers regularly take risks to their own lives.

“The risk to lives of combatants should not be weighed equally against the risk to the lives of non-combatants, because it is in the nature of the soldier to take risks – risking one’s life is part of what it means to be a soldier. Talking the position that minimizing the risks to soldiers is the basis of choosing among alternatives undermines the very notion of distinguishing between combatant and non-combatant. An analogous domestic example might be to hire a police

officer to prevent crime and limit her duty to times or places where there was little crime so that she would not be put in risk.”³¹

The mere fact that someone’s activity involves risk to herself does not account for any special obligations she might have to prefer other people’s life over her own. A speed car racer is regularly involved in a life threatening activity, but this does not mean that if she happens to be faced with the choice between her life and a life of another innocent person in a human shield situation, she should act any differently than, let us say, an accountant. Suppose the race car driver were about to make a similar choice, but one that is based on her own risky behavior. Suppose her breaks fail and she can either steer her car to where she will kill another person but then survive, or to where she will not kill anyone, but will certainly die. Should she have an agent-relative permission to prefer her own life? This question would depend on the previous question we addressed, that of imposing risks on others, and on the justifiability of imposing risk, and is not dependant on the fact that the driver is regularly involved in an activity that puts her own life at risk.

What Christopher must mean, therefore, is something different. He seems to refer to the fact that soldiers take risks to themselves “for the sake” of civilians. This is what the analogy of a police officer seems to convey. Police officers also risk their lives, but, unlike racecar drivers, they do so in order to protect civilians. If a police officer comes to a crime scene and is now

³¹ Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, second ed. (Upper Saddle River, N.J.: Prentice-Hall, 1999).

faced with a choice between his life and that of a human shield held by a criminal, should it not follow from the fact that his job involves risking his life in order to protect civilians, that he should not have an agent-relative permission to prefer his own life? As I will discuss in the next part, I believe this is not an easy question. But the crucial point in terms of the analogy is that a soldier's job is not to protect any civilian, qua civilian, but only to protect his co-civilians. He is required to go to war and take risks to his life in order to protect the civilians of his country, not in order to protect civilians of other countries.

Therefore, there is no protection-related reason, based on the job of being a soldier, to give preference to the lives of civilians, qua civilians, over one's own life. At most there can be such a reason with relation to co-civilians, or other civilians under one's protection.

VI. Human Shields and Soldiers – The Equality Principle

The rejection of the altruism principle seems therefore to apply to soldiers as well as to other persons. Does the rejection of the equality principle also apply to soldiers? In cases where a soldier has an agent-relative permission to defend himself and prefer his own life over that of a civilian, can he choose not to defend himself, and therefore sacrifice his life, only in order not to harm a home civilian and not a stranger or an enemy civilian?

Recall that we contemplated three justifications why individuals are not subject to the equality principle: 1. they can decide at whim for whom they will forfeit their agent-relative permission to kill in order to save themselves, since they are not required to do this for anyone. 2. They can choose to forfeit the agent-relative permission for loved-ones and not for other persons. 3.

They can choose to forfeit the agent-relative permission for persons under their protection, and not for other persons. Let us review each of these justifications as it applies to soldiers.

One may object to the application of the discrimination at whim justification for soldiers for the following reason: unlike private persons, soldiers who act as representatives of the state carry with them some public law obligations, such as abstention from any discrimination. A private person may discriminate at whim and favor one friend or roommate rather than another but a state may not discriminate in the same way. However, as discussed earlier, the second and third justifications may be used to argue that discriminating in favor of one's co-civilians is not discrimination at whim. Even if this would be considered discrimination at whim, one would still have to show that the badness of such discrimination (this time by a public entity) outweighs the goodness of the soldier deciding to sacrifice herself in some cases (namely for her co-civilians) rather than in no cases at all.

As to the second justification, the question would be whether a soldier can regard his co-civilian as a 'loved-one' and use the 'loved-one' justification for the rejection of the equality principle? As argued earlier, such a possibility exists even for civilians in relation to their co-civilians. In the case of soldiers, the ties with her co-civilians can be even stronger than in the case of civilians, because of the special nature of their office. However, as before, I do not claim to provide here a full argument for the extension of the loved-one justification to co-civilians generally, and to the relations between soldiers and their co-civilians in particular.

Finally, the justification regarding persons under one's protection seems to apply especially well to soldiers with regard to their co-civilians. A soldier, like a mother to her child, has a special

duty to protect the citizens of his state. She even has a duty to sacrifice her life for their protection. If one has a duty to protect another person, and is confronted with the choice between her own life and the life of that person, should she be obliged to prefer the other persons' life? I am not sure that she is bound by such a moral obligation (although there might be valid legal or professional obligation to that effect), However, it seems at the least to follow that one may have a rule according to which one will choose to sacrifice one's life, despite an available permission for not doing so, only for the sake of the person whose protection one is in charge of and not for the sake of other persons.

Think of a bodyguard and the person he protects. Let us call them Kevin Costner and Whitney Houston, (based on the characters they play in the movie "The Bodyguard"). Suppose Kevin Costner is faced with a situation in which Whitney Houston and another woman are at peril, and he can save only one of them, but in each he would lose his own life doing that. Kevin Costner may have no moral obligation to save any of the women in such a situation, but wouldn't it be reasonable to argue that if he chose to save any of them, it should be Whitney Houston? In particular it seems obvious to me that if Kevin Costner adopted the rule that he would sacrifice his life for the protection of Whitney Huston but not for the protection of a stranger woman, such a rule would be morally unobjectionable. If we accept that the analogy of a bodyguard applies to the relationship between a soldier and her co-civilians, and furthermore accept that this analogy does not apply to the relationship between a soldier and enemy civilians or stranger civilians, there seems to be a good case for the rejection of the equality principle as applied to soldiers, based on the third justification.

Taken together, the three justifications seem to provide a good case for the claim that the rejection of the equality principle can be extended to soldiers as well. While I have not provided a full argument for the extension of the 'loved-one' justification to soldiers, I have suggested that there might be ways to do so. The justification based on discrimination at whim, and especially the justification based on persons under one's protection seem to be even more promising in terms of extending them to soldiers also.

VII. Two Additional Questions

The next two sections discuss briefly two questions that exceed the original question posed in this article, but have considerable importance in real life.

A. A Soldier Acting as Third Party

Can soldiers act as third parties helping home civilians against innocent aggressors? Consider now a more complicated example. In this example, there are two home civilians in the home town. The enemy soldier crosses the border, aims his gun at home civilian 1 and uses home civilian 2 as a human shield against the possible attack by home soldier. What are the implications on the altruism principle and on the equality principle?

Acting as a third party, home soldier has no preference between home civilian 1 and home civilian 2. They are both in a tragic situation in which only one would survive. He can therefore draw a die, or do nothing.³²

³² Note that the same result is achieved if both civilian 1 and civilian 2 are strangers or enemy civilians.

But suppose now that instead of home civilian 2, enemy soldier uses as human shield stranger civilian whom he brought with him from across the border. Now the situation is quite different, because in this case the soldier has the duty of protection and care for home civilian 1 which he does not have for stranger civilian. As a soldier he is acting as the agent of home civilian 1 but not as the agent of stranger civilian. It follows, I would contend, that he is not allowed to refrain from acting or draw a die, and must kill stranger civilian in order to save the life of the home civilian.

This claim seems to me to follow from the rejection of the altruism principle combined with the rejection of the equality principle. It is based on the idea that you may choose to act according to a higher moral norm than the one required from you, but you may not choose to do so for someone else for whom you are an agent. If civilian 1 were able to defend himself against enemy soldier, at the price of killing stranger civilian who is a human shield, he could have chosen not to kill him and suffer death instead, (this follows from the rejection of the altruism principle). However, the soldier, who is his agent, cannot make for him the choice of sacrifice. He is required to act by the most protective moral norm available for the person on whose behalf he is acting as an agent.

However, the following problem may arise with regards to soldiers as agents of their co-civilians. The reason why the defender was allowed to kill the human shield was described as an agent relative permission. This raises the question whether the defender can contract this agent relative permission to a third party, such as to a soldier (or a bodyguard). Suppose I am weak, or crippled, or not well trained - can I sign a contract with another person saying that if I

am faced with a situation in which I will have to kill another person to save my own life, and will be permitted to do so, he will kill that person for me? Or suppose a person threatens to kill my son if I do not kill another boy, and I will be excused for killing that other boy, under a theory of duress, for killing that other boy. Can I contract killing that other boy to another person (if, for example, I am too weak to do this myself?). These are difficult questions that may have implications to criminal theory in general. They become especially difficult if we allow a defender to kill more than one innocent person if his or his loved-one's life is threatened - a case that was only contemplated, but not defended in this article.

I think there is a strong intuition that such contracting should not be permissible. Such conclusion would have an interesting implication with regards to soldiers acting as third parties in the protection of their co-civilians. This might mean that soldiers are not allowed to prefer their co-civilians when the conflict is between the life of the co-civilians and the life of stranger or enemy citizens, merely because of having a contractual obligation. However, they may still have such preference if they can regard their co-civilians as analogous to family member, or friends. In that case they themselves will have the agent relative permission to kill the human shield. This would make for an interesting difference between mercenaries and regular soldiers, and might even make for a difference between paid soldiers, and conscripted soldiers.

B. Repeat Players

A final note pertains to a situation that extends beyond Walzer and Margalit's example, but is very pertinent to real life war situations. Margalit and Walzer have based their example on a singular event – Hezbollah entering the Kibbutz and taking hostages. However human shields

may be used in situations of repeat players. This may make for a considerable moral difference between enemy civilians who are more likely to be used as human shields in repeat player situations, and stranger or home civilians who are used usually in one shot situations.

Consider the following example, in which we have enemy soldier and enemy civilian in the enemy town, and home soldier in the home town.

Enemy soldier aims a rocket at home soldier and holds enemy (or stranger) civilian as a human shield. Enemy soldier's missile has a probability of 1 out of 10 of killing home soldier, but home soldier's missile is more accurate and will certainly kill both enemy soldier and enemy civilian.

Can home soldier launch the missile? I argued that sending the missile, thus killing enemy civilian in order to save his life would be excused rather than justified, and this may mean that if the probability of risk to his life is less than 1 he may not be permitted to save himself. (If in our example we lower the odds to 1 to 1000 or 1 to a million, it becomes obvious that he may not be even excused for killing the enemy civilian).

However, what if the enemy soldier would now continue firing more and more missiles using enemy civilian as human shield all that time? In such a case the probability of killing home soldier would become 1, and he would then be permitted to defend himself, even beginning from the first missile.

We can of course use more examples and increase the numbers so that the use of civilians in repeat player situations would make a great difference. Since enemy civilians, in real life, are

more readily available to be used in repeat player situations, their case seems to be different than co-civilians.³³

VIII. Conclusion

I have tried to show that preferring one's own civilians in cases of human shield over hypothetical enemy civilians, or stranger civilians, may be morally permitted. If my attempt is successful, it shows that this could be established without diminishing in any way the innocence of enemy civilians, or attributing to them any responsibility for their situation. One interesting implication of the discussion was that when soldiers act in defense of their co-civilians they cannot have the same preference for their co-civilians as when they act in their own self defense, unless we assume a special relationship between soldiers and their co-civilians, one that exceeds a contractual relationship. Another interesting conclusion was that a situation of

³³ Here is another example: suppose there are one home soldier and 100 home civilians in home town, and one enemy soldier and 10 enemy civilians used as human shields in enemy town. Enemy soldier fires a missile that will hit only 1 home civilian. The only way to stop this is for home soldier to fire a missile that would kill all 10 enemy civilians. May he fire the missile? Presumably he may not. As a third party, he may act only if the defender is justified in using self defense. But home civilian is not justified in cases where it is his life against the life of 10 innocent people so that home soldier is not permitted to act in self defense in his shoes (unless we add here an excuse for the soldier as well, since we view this as a loved-one in threat situation, but even then, at a certain point – 1000 enemy civilians will die – he will not be even excused). However, suppose the enemy keeps on firing more and more missiles, killing one home civilian at a time until he kills all 100 home civilians. Now it is obvious that home soldier can fire the missile, and it is also obvious that he can do this, knowing of the enemy soldier's intentions, even before the first killing takes place.

repeat players (in terms of the use of civilians as human shields), might change the picture considerably in comparison to a one shot situation.