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THE LESSER EVIL DILEMMA FOR SPARING CIVILIANS

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ABSTRACT. The rule I call ‘Civilian Immunity’ – the rule that prohibits targeting civilians in war – is the heart of the accepted *jus in bello* code. It prohibits targeting (viz., intentionally killing) civilians in a wide variety of war circumstances. Seth Lazar’s brilliant book, *Sparing Civilians*, attempts to defend Civilian Immunity. In this essay I show, first, that his ‘Risky-Killing based argument’ fails to provide civilians with the robust protection *Sparing Civilians* promises. I argue, secondly, that the moral framework that *Sparing Civilians* employs, a moral framework that centralizes the Deontological Clause (stating that one’s intentional killing is worse than enabling others to kill), leaves the immunity of civilians against Leaders unexplained.

I. INTRODUCTION

The rule I will call ‘Civilian Immunity’ – the rule that prohibits targeting civilians in war – is the heart of the accepted *jus in bello* code. It prohibits targeting (viz., intentionally killing) civilians in a wide variety of war circumstances.

Seth Lazar’s brilliant book, *Sparing Civilians*, defends Civilian Immunity in light of two convictions.¹ The first is central to the revisionist morality of war that Jeff McMahan has been elaborating over the last fifteen years. McMahan argues that an individual in war (and in every other context) is liable to defensive killing in virtue of his responsibility for creating an unjust threat. Lazar agrees with McMahan that liability is the most important determinant of per-

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¹ Seth Lazar, *Sparing Civilians* (Oxford University Press, 2015).

missible killing in war.² They further agree that an individual might be liable to defensive killing, even if he does not actually pose any threat himself, but (e.g.,) forces or convinces others to do so, and, vice versa, an individual who poses an unjust threat might be immune from defensive killing if he is not sufficiently responsible for the threat in question.

Lazar's case for Civilian Immunity is developed in light of another conviction: some civilians might be more responsible than soldiers for the unjust threat against which a just war is fought. A civilian 'may be an enthusiastic supporter of the unjust war and its unjust aims, he may give to it his voice and his vote' whereas a combatant might be a 'young man of limited mental ability and almost no education' who was 'drafted, put into uniform, trained for a few weeks, and sent to the front as a replacement in a low-grade unit'.³ Indeed, Lazar argues that, generally,

Overlap Hypothesis: A morally significant proportion of noncombatants are as responsible as a morally significant proportion of combatants for contributions to unjustified threats.⁴

Put together, McMahan's conception of liability and the Overlap Hypothesis imply that if most unjust combatants are liable to killing in war (viz., contingent pacifism is false), then a morally significant proportion of noncombatants are liable to killing in war as well. The task of *Sparing Civilians* is to explain why Civilian Immunity is a valid norm, despite this implication.

I will argue in this essay that Lazar's most elaborated and original argument – 'the risky killing argument' – is merely a partial explanation of the immunity of civilians.⁵ In particular, the risky killing argument offers no explanation of two crucial features of Civilian Immunity: (i) its (relative) numbers insensitivity: the fact that civilians are not to be intentionally killed even when the only alternative to killing them is killing many more soldiers, and (ii) its large scope, viz., the fact that not only defenders who perform the killing are subject to this rule, but also their commanders and leaders.⁶

² Jeff McMahan, *Killing in War* (Oxford University Press, 2009).

³ George I. Mavrodes, 'Conventions and the Morality of War', *Philosophy and Public Affairs* 4 (1975): 117–131, pp. 122–123.

⁴ *Sparing Civilians*, p. 19.

⁵ *Sparing Civilians*, chapter 4.

⁶ For a recent, lucid philosophical explication of this rule, see Adil Ahamad Haque, *Law and Morality in War* (Oxford University Press, 2017), Chapters 5–7. Haque's presentation of the legal rule of Civilian Immunity implies numbers insensitivity grounded in a moral right that trumps utility.

The discussion proceeds as follows. In Section II, I lay out some of the crucial moves in *Sparing Civilians*. Specifically, I present the ‘responsibility dilemma’ faced by McMahan’s revisionism, according to Lazar, and a risky killing based resolution of the dilemma. In Sections III and IV, I point out the limitations of this resolution. I conclude by tentatively suggesting that our considered judgments about the moral standing of civilians in war present Civilian Immunity as a *convention-dependent, moral* right.

II. SPARING CIVILIANS: THE RISKY KILLING ARGUMENT

A. The Responsibility Dilemma for Revisionism

The ethics of killing in war that *Sparing Civilians* elaborates is a modification of McMahan’s revisionism, the basic conviction of which can be summarized as follows:

Revisionism: Rare cases aside, targeting (viz., intentionally killing) a victim V in war (and in every other context) is permissible (in the fact relative sense) if and only if V is liable to be killed.⁷

The concept of liability is defined as follows:

Liability: V is liable to intentional killing if killing V is a necessary and proportionate means to avert an unjustified threat T, and if V is *sufficiently* responsible for T.⁸

These formulations leave a crucial question open. To what degree must a person be responsible for T if he is liable to a defense killing (viz., a killing whose aim is to avert T)? The following two answers suggest themselves:

High/Low Liability-Bar Revisionism: if necessary for averting a wrongful threat T, intentionally killing V is permissible (in the fact relative sense) if and only if it is a proportionate means to avert T, and the degree to which V is responsible for T is high/low.⁹

Conjoined with the Overlap Hypothesis, both the high liability-bar view and the low liability-bar view seem to imply unacceptable moralities of killing in war. According to the Hypothesis, a morally significant proportion of noncombatants are as responsible as a morally significant proportion of combatants for contributions to unjustified threats. Hence, the low liability-bar account is subject

⁷ In presenting the guiding ideas of *Sparing Civilians*, I use the deontological framework Lazar develops in his ‘Dubious Killing’ (unpublished manuscript). A detailed familiarity with this framework is inessential.

⁸ *Sparing Civilians*, p. 88.

⁹ Seth Lazar, ‘The Responsibility Dilemma for Killing in War’, *Philosophy and Public Affairs* 38 (2010): 180–213, p. 189; see *Sparing Civilians*, p. 9.

to the total war objection: many civilians bear responsibility for the unjust threat that their state imposes. They contribute to the war by ‘paying taxes that fund the war, supplying military necessities, voting, supporting the war, giving it legitimacy,... bringing up and motivating the sons and daughters who do the fighting’.¹⁰ If killing soldiers is permissible, because many of them are sufficiently responsible for the unjust threat their state poses, killing civilians is permissible as well, since many of them are *as responsible* as those soldiers for this unjust threat.

On the other hand, the high liability-bar account is subject to the contingent pacifism objection: ‘many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threats, or to the macro-threat posed by their side’. Most soldiers have only facilitating roles: ‘Military units rely on cooks, medics, mechanics, and engineers, who support their more lethal comrades’.¹¹ If killing civilians is impermissible because many civilians are not sufficiently responsible for the unjust threat their state poses, killing soldiers is impermissible since many of them are no more responsible than those civilians for the killing their side commits.

In other words, if the Overlap Hypothesis is true, McMahan’s revisionism faces a dilemma: it either rejects contingent pacifism *and* Civilian Immunity, or, accepts Civilian Immunity *and* contingent pacifism. There seems to be no middle ground.

B. *The Spare Cases: Spare and Fight and Spare and Surrender*

Sparing Civilians solves the responsibility dilemma by enriching McMahan’s revisionism. True, liability is ‘the most important determinant of permissible killing in war’,¹² and still the following proposition is a normative truth, despite the Overlap Hypothesis:

Moral Distinction: with rare exceptions, if all other things are equal, killing non-liable noncombatants in war is more seriously wrong (in the fact relative sense) than killing non-liable combatants in war.¹³

One important implication of Moral Distinction is that intentionally killing non-liable civilians is worse than intentionally killing non-liable soldiers, even in cases that will interest us here: where the

¹⁰ Lazar ‘The Responsibility Dilemma’, p. 192.

¹¹ *Ibid.*, p. 191.

¹² *Sparing Civilians*, p. 18.

¹³ *Ibid.*, p. 12.

killings are intentional but *not* manipulatively (or opportunistically) used as a means for, say, spreading terror.

Before presenting these cases in more detail, let me first present the concepts by which I characterize them. As I said, they involve *intentional* killings that are *eliminative* rather than *manipulative*. Suppose a sniper has a clear shot at an opposing combatant. Just as the combatant is about to move, a passing civilian unwittingly walks directly in the line of fire. Killing the civilian is necessary in order to give the sniper a shot to kill the combatant. Killing the victim is intentional but not manipulative: the killer is no better off from killing this man than she would have been had the man been absent.¹⁴ Killing the civilian is manipulative if, e.g., the combatant hides in a cave, and the defender kills the civilian, knowing that if the civilian drops dead, the combatant will leave the cave and the sniper will be able to target him. The killing is manipulative because the presence of the victim is essential to the sniper's plan.

A comment about Lazar's view of intentional killings is appropriate here. Suppose that aggressors are taking cover in a bunker. A civilian is trapped nearby. They now attempt to flee the bunker, and they disguise the civilian. The civilian is running with the aggressors and you cannot tell him from them. So you target him. 'You do intentionally kill *this* person, and this person is a civilian', but you did not intentionally kill a civilian. While such cases 'cause... trouble for the intention/foresight distinction', Lazar seems to believe that, *in some cases*, if you do *not* know that the person is *not* a civilian, your killing is morally equivalent to the intentional eliminative killing of a person you know to be a civilian.¹⁵

I am now in a position to introduce the following two types of case: '*spare and fight* cases' and '*spare and surrender* cases'. The term '*spare* cases' refers to both types. In all *spare* cases, the killings are intentional rather than merely foreseeable, and eliminative rather than manipulative/opportunistic. To illustrate a *spare and fight* case, suppose that to take over a strategic hill and thereby preempt a deadly aggression, defenders must either engage and kill enemy combatants at relatively close quarters, *or*, use an aircraft to attack enemy civilians whose presence on one of the routes leading to the

¹⁴ *Ibid.*, p. 64.

¹⁵ *Ibid.*, p. 71.

hill is an obstacle to its successful conquest. Any attempt to capture the hill by pushing civilians away would cause delay and eventually failure.

As implemented by the law, Civilian Immunity requires sparing civilians in *spare and fight* cases; defenders should attack enemy soldiers rather than enemy civilians. Importantly, the legal rule is numbers insensitive: subject to constraints of necessity and proportionality, the law instructs defenders to intentionally kill *ten* unjust combatants even if defenders can achieve the just cause by an eliminative killing of *one* noncombatant. That is, eliminative killing of civilians is impermissible in *spare and fight* cases even if killing soldiers is much more costly for the unjust side. Also, as it is understood within the legal system, Civilian Immunity is relatively insensitive to internal risk and costs: defenders should spare civilians even if engaging enemy combatants involves a greater death-toll for themselves.¹⁶

Civilian Immunity applies to a second type of case – *spare and surrender* – where killing soldiers is not an option. Suppose, for example, that in order to eliminate a deadly threat that aggressors pose, defenders must first kill civilians who constitute an irremovable obstacle for taking over a strategic hill (the hill being the only point from which a surprise attack on the aggressor is possible). Again, any attempt to push them away instead of killing them would slow down the invasion and ultimately lead to failure. As Civilian Immunity is understood, just combatants ought to withhold fire, and thereby enable the aggressor to kill innocents. And, even in such contexts, Civilian Immunity seems to entail a nearly number-insensitive prohibition on intentionally targeting civilians.

C. Risky Killing, Moral Distinction and a Resolution of the Responsibility Dilemma in Spare Cases

The argument I sketch out in this section – ‘the risky killing argument’ – also applies to intentional eliminative killing, and as such constitutes a resolution of the responsibility dilemma in the *spare*

¹⁶ Regarding the insensitivity to the numbers of soldiers killed, see Thomas Hurka, ‘Proportionality in the Morality of War’, *Philosophy & Public Affairs* 33 (2005): 34–66. As for the duty to bear risk in order to spare civilians see a summary of the debate, and an analysis of international law in David Luban, ‘Risk Taking and Force Protection’, in Yitzhak Benbaji & Naomi Sussmann (eds.), *Reading Walzer* (Routledge, 2013).

cases presented in the previous section. It supports Moral Distinction through the following proposition:

Risky Killing: If Defender kills two innocent people, N and C, and N was more likely, based on Defender's evidence, to be innocent than C was, then (other things equal) killing N is objectively worse than killing C just in case: either Defender believed C more likely to be liable than N, or, if she did not, that was because of her negligence.¹⁷

Lazar believes that Risky Killing follows from the core idea of any deontological morality: individuals are entitled to respect and concern. On Lazar's reading of this idea, if Defender is prepared to impose a higher risk of wrongful harm on N, Defender shows greater disrespect for N, compared to the disrespect involved in the harm she would impose on C.¹⁸

But Risky Killing can support Moral Distinction (according to which killing civilians is typically worse than killing soldiers) in *spare and fight* cases only if a further factual claim is true. Consider a case where Defender can avert a threat either by killing a noncombatant N or killing a combatant C. Suppose the pair <N, C> instantiates the Hypothesis: they are equally responsible for the wrongful threat Defender would avert by killing one of them. At this point, the factual claim comes into play: usually, the evidential probability for defenders that N is liable to killing is significantly lower (25%, say) than the probability that C is (50%). In this sense, killing N is 'riskier' than killing C.¹⁹ If this is so, killing combatants is typically less evil than killing civilians, even if the combatants in question are not liable to killing.

What about Civilian Immunity in *spare and surrender* cases? Lazar does not directly address them. This is surprising, in light of the 'cliché... [that] in irregular conflicts, concealing soldiers among civilians can be necessary to military success'. In such circumstances, 'telling civilians and soldiers apart is very difficult'.²⁰ If the cliché is correct, states fighting a just asymmetric war will probably face *spare and surrender* cases, where in order to avert deadly aggression, they must target enemy civilians.²¹

¹⁷ *Sparing Civilians*, p. 86.

¹⁸ *Ibid.*, pp. 78–86.

¹⁹ *Ibid.*, pp. 88–95.

²⁰ *Ibid.*, p. 101.

²¹ As previously noted, according to Lazar, if other conditions are met, killing randomly people who turn out to be civilians might be morally equivalent to intentionally killing civilians.

And yet, *Sparing Civilians* implicitly supports Civilian Immunity in these cases as well. Extending Risky Killing, Lazar observes that 'killing someone when you have no idea whether she is liable or not is as seriously wrongful as killing someone whom you know to be innocent... Selecting targets at random is as bad (in the fact relative sense) as intentionally aiming at the innocent'.²² Suppose, though, that just combatants can either kill indiscriminately, thereby saving innocents on the just side, or withhold fire, thereby enabling aggressors to kill these innocents. Enter the standard intentionally-killing/non-intentionally-letting-die distinction, as it figures in the 'Deontological Clause':

The Deontological Clause: Other things being equal, intentionally killing innocents is more seriously wrong for the potential killer (Defender) than unintentionally enabling Aggressor to kill innocents.²³

Based on the Clause, Lazar maintains that 'if the defender cannot find out whether her victims are combatants or noncombatants, she typically ought to withhold fire'.²⁴ True, 'sometimes killing those you know to be innocent is permissible,... as an intended lesser evil'. But 'these cases will be very rare'.²⁵

A final expository comment: as it stands, Moral Distinction entails no resolution of the responsibility dilemma even with respect to *spare and fight* cases. After all, (1) how wrongful it is for defenders to kill non-liable unjust combatants, and (2) how often the cause of the attack is so important such that killing non-liable combatants is a lesser evil, are two questions left open. Hence, as it stands, Moral Distinction is compatible with contingent pacifism: while killing civilians is worse than killing combatants, killing unjust but non-liable combatants might be so bad such that withholding fire and failing to achieve the just cause shall be deemed a lesser evil. Simi-

²² *Sparing Civilians*, p. 92.

²³ Interestingly, in his earlier 'The Responsibility Dilemma', Lazar downplays the role of the Clause in war contexts. He wonders, for example, whether the intentions of a combatant who unwittingly contributes to an unjust cause are worse than the intentions of those who unwittingly fail to contribute to a just cause. Lazar's doubts follow from the fact that soldiers fighting unjust wars are likely to justifiably believe they are acting justly, hence their intentions cannot be wrongful and cannot be all that different from those fighting just wars. Nor, argues Lazar, the acts/omissions distinction is as important in war as it is in other contexts: 'a combatant's contribution to his side's unjust cause depends on both actions and omissions, and someone who refuses to fight likewise must take actions to do so' ('The Responsibility Dilemma', p. 199).

²⁴ *Sparing Civilians*, pp. 101–102. The Clause is important for immunizing civilians in *spare and fight* cases as well. Suppose that sparing civilians involves internal costs, i.e., in sparing civilians, defenders enable aggressors to kill some of them. The clause explains why they should do so.

²⁵ *Ibid.*

larly, Moral Distinction does not remove the total war worry. This is because it offers no answer to a further question: how *much* worse is it for defenders to kill unjust noncombatants rather than unjust combatants? Possibly, if the internal or external costs of killing soldiers rather than civilians are sufficiently high, killing civilians might be, all things considered, better, despite being riskier.

A robust protection of civilians in *spare and fight* cases would intensify Risky Killing: an outcome in which Defender kills V in self- or other-defense becomes *much* (e.g., *exponentially*) worse for her the lower the probability that V is liable to killing. Similarly, to complete the (unarticulated) case for Civilian Immunity in *spare and surrender* cases, Lazar needs a parallel intensification of the Deontological Clause.

Properly enriched and explicated, *Sparing Civilians* entails that despite the costs that innocents on both the just and unjust side might have to bear in *spare* cases, typically, it is morally preferable for defenders to spare civilians. Intentionally indiscriminate killing and intentionally killing civilians are so bad for defenders that it is almost never a lesser evil.

III. THE LESSER EVIL DILEMMA FOR SPARING CIVILIANS

In this Section, I undertake two tasks. First (Section III–A), I point to two confusing ambiguities in the risky killing argument, and offer what I take to be its best reading. Second (Section III–B), I show that even under its best reading, the Risky Killing-based response to the total war objection is severely limited.

A. *Danger Risk vis. Liability Risk; De Dicto Risk vis. De Re Risk*

Lazar infers Risky Killing from the wrongfulness of endangerment: ‘Speeding through a residential neighborhood ... while drunk [is] wrong, even if one avoids a collision...’. Generally, more dangerous behavior is, other things equal, worse (in the fact relative sense) than less dangerous behavior.²⁶ Risky Killing emerges from a comparison between the wrongfulness of endangering innocents to the wrongfulness of imposing a risk of suffering wrongful harm. The latter risk is imposed ‘when the harm is certain but liability is in doubt’. Lazar

²⁶ *Sparing Civilians*, p. 79.

argues that intuitions about one type of risk, *danger-risk*, ‘carry over to the other’, viz., *liability-risk*.²⁷

This reasoning suggests that the extent to which an action v is risky (in a sense that implies *pro tanto* wrongfulness in the fact relative sense), is a function of how dangerous v is for the potential victim, and how likely it is that the victim is liable to the harm v might cause. Note, however, that danger-risks are unrelated to the civilians/soldiers distinction. Hence, if danger-risks and liability-risks are as weighty in determining the wrongfulness of an action, the moral significance of the fact that a certain noncombatant N is more likely to be innocent than a combatant C will be diminished if N is less likely than C to be harmed. To illustrate, consider the following case (that Victor Tadros offers and I modify for my own needs here):

Spare and Fight with Danger-Risks: 50% of the combatants (Cs) and 25% of noncombatants (Ns) on the unjust side are liable to defensive harm. A just bomber (Defender) can either bomb a group of 1,000,000 noncombatants, out of whom 1000 will certainly be killed, or bomb 10,000 combatants out of whom 1000 will be certainly killed.²⁸

How risky, in Lazar’s sense, is each killing? Supposedly, the extent to which killing N s is risky is $.0001 \times .75$. This is because (first) each non-combatant N is subject to a .0001 risk of being killed whereas (second) the wrongfulness of imposing such a risk is determined by the probability that N is non-liable, viz., 0.75. This analysis of the relation between danger- and liability-risks entails that the degree to which killing combatants in the case at hand is risky is 0.1×0.5 . Since $.0001 \times .75 < 0.1 \times 0.5$, killing soldiers in *Spare and Fight with Danger-Risks* is riskier than killing civilians. That is, risky killing principles favor killing 1000 noncombatants.

A different reading of Risky Killing is available that better captures Lazar’s idea. Risky Killing is based on a moral right of a victim not to

²⁷ *Sparing Civilians*, p. 81.

²⁸ The example is a variation on Tadros’s example in his contribution to this symposium. A referee for this *Journal* offers another (and perhaps less artificial) case whose resolution requires weighing danger risk and liability risk.

Bridge: Pilot must prevent enemy forces from crossing a bridge. If Pilot destroys the bridge at the West end, then there is a small risk that this will kill nearby Civilian. If Pilot destroys the bridge at the East end there is a large risk that this will kill nearby Combatant. Given Pilot’s evidence, it is much more likely that Civilian is innocent than that Combatant is innocent.

Bridge illustrates that an act that carries a low danger risk of harming civilians may be all things considered better than an act that carries a high danger risk of harming combatants. I agree, but believe that this considered judgement follows from a more basic intuition (that *Spare and Fight with Danger-Risks* illustrates) that the numbers should count.

be targeted, unless the probability that he is liable to the harm that Defender intends to inflict on him surpasses a high threshold. This right exists no matter what the chances of a successful targeting may be. Hence, intentionally killing the victim is worse the lower the defender's probability is that the victim is liable to this killing. The fact that the death of the victim was unpredictable because, e.g., the defender who committed it was merely a beginner, does not make the intentional killing less wrongful.

The case I call Closed Risk exposes another ambiguity in Risky Killings:

Closed Risk: In order to avert a threat, you must either kill four Cs or two Ns. You know that only three of the four Cs are liable to killing and that only one of the two Ns is liable to killing. (The three liable Cs are about to fire a rocket, which will certainly kill 10 innocent people; one of the Ns convinces the liable Cs that this is the right thing to do). Both possible killings would therefore be intentional and eliminative.

Under the '*de dicto* reading' of Risky Killing, since you end up killing one innocent person no matter what you do, killing the Cs and killing the Ns are *equally* risky. In contrast, according to the *de re* reading, what matters are individualized risks. Killing each N is riskier than killing each C, since your probability that each N is liable is .5, while your probability that each C is liable is .75. Under the *de re* reading, as we increase the number of liable people, assuming each individual in the group is equally likely to be any one of them, we increase the probability, for each individual, that she is liable to killing. Suppose a sniper must intentionally shoot a person she knows to be innocent in order to have a clear shot at three aggressors standing behind him. The sniper's killing is riskier than the Closed Risk killing of the Cs, despite the fact that just like the sniper, she killed four people knowing one of them was innocent.

According to the *de re* reading, the right to life includes a right not to be targeted by a defender, unless the probability that her potential victim is liable to the harm in question exceeds a high threshold. A loose analogy to criminal law might be helpful here: we have a right not to be punished unless found guilty beyond reasonable doubt. The fact that it is almost certain that innocents will be found guilty does not imply that the system is disrespectful toward them: this is not the intended outcome and, more importantly for my purpose

here, the individualized risk of finding these innocents guilty was very small.²⁹

On the face of it, the *de re* reading is less plausible than the *de dicto* reading as it yields counterintuitive results in Closed Risk. Suppose that at t_1 you must kill only two Cs in order to avert a threat, knowing that only one of them is innocent. Under its *de re* reading, Risky Killing supports a prohibition on killing the Cs at t_1 , but supports killing all four Cs later, at t_2 , when the other two liable Cs join the first two, and you cannot identify the original two. Intuitively, however, it is morally preferable to kill the two at t_1 , because more people would be killed at t_2 . Further, killing the two Cs at t_1 seems morally preferable for Defender, even if later she would have to kill two Cs and (merely) take a limb from another C in order to promote her just cause.

Having said that, it seems obvious that the *de re* reading better captures Lazar's fundamental conviction. After all, he insists that it is the Defender's attitude towards concrete individuals that makes the killing of these individuals worse, the more risky it is. This strongly suggest that the individualized liability risk determines how disrespectful a killing of an innocent is.

The *de re* reading can handle Closed Risk by giving sufficient weight to numbers-related considerations. Defender should minimize *de re* risk (that she imposes) as well as inquire whether the marginal decrease in the wrongfulness of killing the innocent person is great enough to outweigh the additional lives taken. I will assume that Closed Risk forces Lazar to the position that standard consequentialist reasons easily outweigh the Risky Killing-based reason for killing a greater number of liable people. In particular, all things considered, Defender ought to kill two people rather than four in Closed Risk, even if the killing of the two is riskier.

B. *The Lesser Evil Dilemma in Big Numbers Cases*

As I already noted, the risky killing argument is the most promising argument for Moral Distinction in *spare* cases, where killing civilians is non-manipulative and necessary for promoting the greater good.

²⁹ Frank Jackson and Michael Smith 'Absolutist Moral Theories and Uncertainty' *Journal of Philosophy* 103 (2006): 267–283, and R. Aboudi, A. Borer, and D. Enoch Deontology, 'Individualism, and Uncertainty: A Reply to Jackson and Smith'. *The Journal of Philosophy* 105 (2008): 259–272.

Alas, compared to the robust – nearly numbers insensitive – protection that international law offers to civilians in these cases, the protection of the risky killing argument is extremely poor. Indeed, neither the *de re* nor the *de dicto* reading can explain the number insensitivity of Civilian Immunity.

The *de dicto* reading fails to provide any *pro tanto* reason to distinguish between killing civilians and killing soldiers in the following case

Spare and Fight with Big Numbers: A bomber can save 1000 innocents from death, either by killing 400 unjust non-combatants or 600 unjust combatants. The evidential probability that a noncombatant is liable to killing is 25%, whereas the probability that a combatant is liable is 50%. Since the numbers are that big, the bomber can be almost sure that whatever she does, she will kill approximately 300 innocents. Both killings are intentional and eliminative rather than unintentional or manipulative.

Under this reading, killing civilians in *Spare and Fight with Big Numbers* is as risky as killing soldiers. Since the lives of liable people count, it would be better to kill 400 civilians than to kill 600 soldiers. The *de re* reading does a better job: killing civilians is riskier and therefore more disrespectful.

But this advantage of the *de re* reading is insufficient. A numbers-sensitive *de re* reading of the risky killing argument generates a lesser-evil dilemma in certain Big Numbers cases, if, as Closed Risk demonstrates, numbers matter more than (liability-) risk.

To see why, consider

Combatants Big Numbers: A bomber (Defender) can save 1000 innocents from deadly aggression by intentionally (but non-manipulatively) killing 600 unjust combatants. The probability that each unjust combatant is liable is 50%. Since the numbers are that big, the bomber can be almost sure that she will kill around 300 innocents.

The first horn of the dilemma – the total-war objection – premises that killing unjust combatants might be a lesser evil and therefore permissible. Since the cause in *Combatants Big Numbers* is just, the killing is necessary and (at least according to *standard* consequentialism) proportionate, this is one of the paradigmatic cases that falsify contingent pacifism.

Now, if killing soldiers is permissible in *Combatants Big Numbers*, risky killing principles cannot support Civilian Immunity in the following case:

Noncombatants Big Numbers: To save 1000 innocents from deadly aggression, Defender must intentionally (but non-manipulatively) kill 400 unjust noncombatants. The probability that each noncombatant is liable is 25%. Since the numbers are that big, the bomber can be almost sure that she will approximately kill 300 innocents.

Simply, if in Combatants Big Numbers, it is a lesser evil to kill 600 individuals out of whom around 50% are most probably liable, saving 1000 in Noncombatants Big Numbers is a sufficiently important cause to justify killing 400 individuals, out of whom (Defender can be almost sure that) around 75% are non-liable. True, the killing in Noncombatants Big Numbers is riskier; yet Closed Risk shows that numbers-related considerations are weightier than risk-related considerations. Hence, if killing soldiers is permissible in Combatants Big Numbers, killing civilians is permissible in Non-combatant Big Numbers.

The second horn of the dilemma – the contingent pacifism objection – premises that Civilian Immunity applies to Noncombatants Big Numbers and infers from this premise a prohibition on killing soldiers in Combatants Big Numbers – a prohibition that strongly supports contingent pacifism. If Civilian Immunity applies to Noncombatants Big Numbers, saving 1000 innocents from deadly aggression does not justify riskily killing 400 civilians, out of whom (we can be almost certain that) around 300 are innocent. Now, in Combatants Big Numbers the *same* just cause can only be achieved by the killing of *more* people, while Defender can be almost sure that around 300 of them are innocents. True, killing soldiers is less risky. But, as Closed Risk demonstrates, the numbers-related considerations are weightier than the risk-based considerations. Hence, if civilians are immune from intentional killing in Noncombatants Big Numbers where the cause is saving 1000 innocents, the intentional killing of around 600 soldiers cannot be justified by this cause. This prohibition strongly supports contingent pacifism.

A simple response suggests itself: Big Numbers cases are rare and therefore do not undermine the protection the risky killing principles provide to civilians. This is because risky killing principles apply primarily to the agent committing the killing at the time she uses force. And, in the overwhelming majority of cases, a *bomber* kills fewer than 20 people *at a time* (rather than hundreds) and, she runs a risk of killing less than 100 individuals. Hence, in the great majority of cases, the Overlap Hypothesis does not support a Defender's belief that whatever she does, she will kill hundreds of innocent people.

I disagree. Think of a high-ranking officer – Commander – in charge of a large military campaign who meticulously controls any

and every joint action of the operation. Suppose further that commanders are agents of the killings their subordinates commit. (At least from a legal perspective, this supposition seems self-evident: ‘when I act on your orders, my act is your act’.³⁰) Suppose finally that the only thing Commander actually *does* before the large-scale killings is *initiate* a large-scale operation; every move within the battlefield was pre-planned and approved. Now, supposedly, the riskiness of defenders’ killing is determined at the time they fire their weapons, whereas, the extent to which the Commander’s killings are risky should be determined at the time she gave the order to initiate the military operation. If the extent to which the Commander’s killing is risky is determined at the time of commanding, Commander might confront *Spare and Fight* with Big Numbers (where she can achieve a just cause by two different strategies, the first involves killing 400 civilians while the other involves killing 600 soldiers). At the planning stage, the Overlap Hypothesis supports her belief that whatever she does, she will most probably kill more or less 300 innocents.

Now, Lazar is not entitled to respond that the risks run by Commander when designing and initiating the overall operation are morally insignificant. It would be *ad hoc* to argue that morally significant risks are only those run by Commander and defenders closer to the time the trigger is pulled on the front line.

A different rarity response would appeal to a different empirical generalization by which *Sparing Civilians* supports Moral Distinction: typically, Lazar argues, killing civilians is more manipulative than killing combatants.³¹ Usually, the only conceivable purpose for harming civilians is spreading terror. Purely eliminative killing of civilians in *spare* cases is rare.

This seems wrong for a simple reason. An intentional killing of civilians is eliminative, if, e.g., targeting them is necessary because they are being used as human shields, or pose an obstacle in another way, etc. And, at least *prima facie*, this is quite common when regular

³⁰ Haque, *Law and Morality in War*, p. 44. Haque seems right that this is how international law conceives the relation between commanders and the actions of their subordinates. Christopher Kutz’s analysis of joint actions comes close to this view. See, Christopher Kutz, ‘Acting Together’ *Philosophy and Phenomenological Research* 61 (2000): 1–31. In Saba Bazargan, ‘Complicities Liability in War’, *Philosophical Studies* (2013): 177–195, Kutz’s view is employed in order to explain the ethics of killing in war. This view is far from being philosophically trivial: more theoretical work is needed in order to support the claim that, morally, the killings committed by defenders are the doings of their commander also.

³¹ *Sparing Civilians*, chap. 4.

armies fight non-state actors. Further, non-manipulative killing of civilians might be necessary for weak, non-state actors fighting a *just* independence war. As Michael Gross observes, compliance with the legal articulation of Civilian Immunity might eliminate the chances of non-state actors to achieve a just aim; their chance is significantly increased in cases where they use anti-civilian tactics. In particular, when fighting for a just cause, decent national liberation movements may have no choice but to try to change public opinion by spreading terror. But, as I elsewhere conjectured, terror can be spread without any manipulative killing – by e.g., destroying civilian infrastructure, symbolic sights, government buildings and other institutions that compose civil society. I conjectured, in other words, that freedom fighters can spread terror by attacking civil society rather than by targeting civilians. Such tactics involve *merely* eliminative killing of civilians.³²

IV. SHOULD LEADERS PREVENT DEFENDERS' VIOLATION OF CIVILIAN IMMUNITY?

Commanders violate Civilian Immunity if they command or allow defenders to violate it. Certain political leaders violate Civilian Immunity if they authorize (even implicitly) the violation of Civilian Immunity/knew about such a violation/should have known about it, and yet, failed to prevent it.³³ As a general rule, many role holders bear legal responsibility for a violation of Civilian Immunity carried out by their subordinates, unless the subordinates violated the chain of command.

This section shows that Lazar leaves unexplained this legal fact, viz., that certain role-holders violate Civilian Immunity in *spare and surrender* cases whenever they allow their subordinates to violate this rule.

A. *The No-Gap-Thesis*

Consider *spare and surrender* cases with respect to which the Deontological Clause supports Civilian Immunity: in these cases, it is

³² Michael I. Gross *Moral Dilemmas of Modern Wars* (Cambridge University Press, 2010), p. 183 and Yitzhak Benbaji, Justice in Asymmetric Wars: A Contractarian Analysis, Law and Ethics of Human Rights 6: 157–183, 2013.

³³ For Haque's treatment of Commanders and Leaders see, *Law and Morality in War*, pp. 48–52.

worse (and therefore impermissible) for defenders to intentionally kill (few) civilians (thereby preventing the aggressor from killing many innocents), than to enable the aggressor to kill (many) innocents. I argue in this section that even if the Deontological Clause supports Civilian Immunity against defenders, it cannot explain why certain role-holders (whom I call 'Leaders') are under the duty to prevent defenders from non-manipulatively killing civilians. The Clause, which renders intentionally killing innocents much worse than non-intentionally enabling aggressors to kill innocents, cannot explain Civilian Immunity against Leaders.

The argument relies on a distinction between jointly perpetrating use of force through others, on the one hand, and aiding and abetting uses of force by others on the other. A just war is made up of joint actions, in which many individuals take part; it is the morality of these joint actions that the *in bello* code should evaluate. Supposedly the risky killing argument should apply to the defender who 'pulls the trigger' but also to the one who drives the tank, the one who loads the rocket, etc. Suppose the role-holders who jointly killed the victim have identical evidence vis-à-vis the liability of the victim. To what extent are these individual actions disrespectful according to Risky Killing? Lazar offers no explicit answer to this question.

I leave this issue aside. Instead, I will focus on role-holders – Leaders – who are sufficiently distant from the joint actions that make up the operation, precisely because of their high position in the chain of command. Leaders do not take part in fighting; the killings defenders jointly commit are not the doing of Leaders. Leaders initiate a military campaign but the initiation of the war is *not* part of any collective action that constitutes the war. Defenders are under legal and professional duty (that they are very likely to respect) to inform Leaders about the nature and the targets of the attacks that they plan, whenever Leaders require this information. Leaders are entitled to supervise and call off any action taken within the war.³⁴

Consider again a *spare and surrender* case in which, in order to save 1000 innocents from deadly aggression, Commander and her subordinates must non-manipulatively kill 400 civilians. Enter the Deontological Clause and suppose (for the sake of the argument) that Civilian Immunity is true in this case, since risky killing around

³⁴ See, Haque, pp. 49–50.

300 innocents is worse for defenders than enabling the aggressor to kill 1000 innocents. Now, let us examine the following scenario from the Leaders' perspective. Assume that if Leaders remain passive, Commander will act in order to meet what she believes are the Leaders' expectations from her, i.e. kill 400 civilians. Assume, that is, that defenders believe that Leaders expect them to act according to standard consequentialist reasons, viz., to rank an outcome higher than another if and only if the number of innocents killed in the first is lower than in the second.

Should Leaders prevent defenders from intentionally killing few civilians in order to save many other innocents in this *spare and surrender* case? Legally, there seems to be no gap between defenders who actually do the killing in order to meet the expectations of their superiors and Leaders who allow them to commit the killing as part of their strategic plan. Leaders are subject to a legal duty to prevent any violation of Civilian Immunity; their voluntary failure to do so is a violation of this rule.

I call the considered moral judgment that underlies this doctrine 'The No-Gap-Thesis': there is no moral gap between the killing that defenders perform and the Leader's omission that enabled this killing. So, for example, the degree to which Leaders are responsible for the killing they allow defenders to perform is identical to the degree to which defenders are responsible for this killing. Or, more generally, identical moral considerations apply symmetrically to Leaders and their subordinates. In arguing for Civilian Immunity, Lazar should show that if defenders ought to withhold fire in a certain *spare and surrender* case, Leaders should force them to do so.

Now, it might be thought that Lazar can straightforwardly appeal to the Deontological Clause. This is because failing to prevent an object under one's control from harming a victim is equivalent to doing harm to the victim rather than to allowing harm to him. If by taking my foot off the accelerator and my hands off the wheel I knowingly allowed my car to hit a person, I killed this person (by letting him be hit by the car I am driving). 'Similarly, a military commander may control her soldiers to such an extent that her allowing them to intentionally kill civilians may be morally comparable to intentionally killing civilians herself.'³⁵

³⁵ I use the words of a referee for this Journal.

The analogy fails. First, soldiers are agents, so Leaders' control over them cannot be compared to a driver's control over a car she is driving. Moreover, Leaders in *spare or surrender* cases control both their own subordinates and their enemies. Leaders' options are either to allow aggressors to kill 'their' civilians (by preventing defenders from killing enemy civilians) or to allow defenders to kill enemy civilians.

B. Does Sparing Civilians Support the No-Gap-Thesis?

I will argue that generally, viewed from the standard deontological framework by which Civilian Immunity in *spare and surrender* cases is analyzed, the No-Gap-Thesis seems false. There is an important difference between intentionally killing and intentionally allowing others to kill. Even if it can constrain defenders, the Deontological Clause cannot constrain Leaders' pursuit of the greater good. As Victor Tadros observes, 'although it is much worse to kill a person than it is to let another person die, we do not have a much stronger reason to prevent a person being killed by a wrongful attacker than we have to prevent a person being killed by natural disaster'.³⁶ Similarly, deontological morality does not provide Leaders facing *spare and surrender* cases a weightier reason to prevent defenders from wrongfully killing civilians on the unjust side than to prevent aggressors from wrongfully killing innocents on the just side.³⁷ Hence, as far as the Deontological Clause is concerned, Leaders should be guided by lesser evil considerations in *spare and surrender* cases. They should allow their subordinates to kill few innocents rather than allow aggressors to kill many.

Before arguing to this effect, I have to concede that the Leaders/defenders gap does not exist in all cases in which standard lesser evil considerations favor allowing others to do wrong. Consider a case where I see you pushing a fat man onto the tracks in order to stop a trolley from killing five people. As your manager, I can prevent you from doing so. The means principle asserts that harmfully using a person to promote one's goals is much worse than harming this person non-manipulatively in pursuing the same goal. Under one

³⁶ Victor Tadros, *The Ends of Harm* (Oxford University Press, 2011), p. 161.

³⁷ Compare Re'em Segev, 'Should We Prevent Deontological Wrongdoing?' *Philosophical Studies* (2015): 1–20.

natural reading, this principle implies that I should prevent you from using the fat man, despite the fact that if I stay passive, I would save five people, rather than one. If saving the five is my goal, I harmfully use the fat man to stop the trolley by allowing my subordinate to push him. Hence, I cannot offer the saving of the five as a justification for failing to save the fat man. I ought, then, to save the fat man rather than the five. Similarly, Leaders might manipulatively use a person by allowing their subordinates to use him, in which case the means principle condemns the omission even if it promotes the greater good.³⁸

My point is that the Deontological Clause does not constrain Leaders whose aim is promoting the greater good, in many other cases. Consider cases in which I can either prevent an aggressor from killing one innocent, or prevent *a different* aggressor from killing ten other innocents. Many deontologists would agree that standard consequentialist considerations should function as a tie-breaker in such a case; I should allow the wrongful action with the preferable consequences, in terms of the number of innocents saved.³⁹ Similarly, suppose I can either (a) prevent one fat man from being wrongfully pushed onto a track, thereby allowing ten innocents to be killed by a trolley, or (b) prevent another fat man from being wrongfully pushed onto another track, thereby allowing twenty other innocents to be killed by a trolley. The means principle implies that I should save one fat man, because otherwise I harmfully use both in pursuing the greater good. But whom should I save? Clearly, I ought to bring about the better outcome, i.e. fail to save the fat man whose death will prevent the trolley from killing twenty. In all these cases, it is permissible to achieve 'good goals by failing to prevent a wrongful action'.⁴⁰

Lazar's case for Civilian Immunity should explain why from the Leaders' perspective, *spare and surrender* cases do *not* resemble the first case presented in the previous paragraph, where I can either prevent an aggressor from killing one innocent, or prevent *a different* aggressor from killing ten other innocents. At first glance, the resemblance is almost perfect. In *Spare* cases, bringing about the better outcome (in terms of numbers of innocents saved) does not

³⁸ See, Tadros, *The Ends of Harm*, p. 161.

³⁹ Some take deontological numbers insensitivity more seriously and believe that in order to be impartial, you should let a (certain) coin decide between these two options.

⁴⁰ Tadros, *ibid.*

involve harmfully manipulating innocents. And, Leaders in *spare* cases are forced to either allow defenders or to enable aggressors to wrongfully kill innocents.

It might be thought that Lazar's framework supports the No-Gap-Thesis through a completely different route: Leaders are under associative duty to prevent defenders' wrongful action; the special relation between defenders and Leaders, viz., the fact that defenders are the subordinates of Leaders, grounds such a duty.⁴¹

But, even if such a (*pro tanto*) associative duty exists, Lazar cannot rely on it to immunize civilians in the *spare and surrender* case under discussion. Leaders represent the individuals on whom aggressors impose a lethal threat. It is Leaders' role to take all permissible measures to eliminate any external threat posed to members of the society they lead. So, in the case under discussion, there seem to be two associative duties to consider.⁴² If Leaders allow defenders' wrongdoing, they eliminate the unjust threat posed by aggressors to *their* subjects. If they prevent *their* subordinates' wrongdoing, they enable aggressors to harm some of their subjects. They have a reason to do both, in virtue of their special role as leaders. Lazar cannot appeal to this type of associative-duties-based reasons, in order to support Civilian Immunity against Leaders in these cases.

Now, I do not argue that by Lazar's light, the gap cannot be closed. To the contrary. He might try to strengthen the relation between Leaders and their subordinates through the collective action route, denying my assumption that Leaders do not take part in the killings jointly committed by defenders. Alternatively, he might argue that Leaders are complicit in the killings of their subordinates because of their status as Leaders. It is as if Leaders in *spare and surrender* case are asked (by defenders who act on their behalf) whether defenders ought to kill innocents or whether they ought to enable the aggressor to kill innocents; Leaders should tell the truth in such a case. Finally, Lazar might appeal to the authority of the Leaders: in allowing the killing it is as if they legislate an immoral law or command an immoral policy.

⁴¹ See for example, Seth Lazar, 'Associative Duties and the Ethics of Killing in War' *Journal of Practical Ethics* 1 (2013):3–48.

⁴² Note that there is a sharp distinction between Leaders and soldiers in this respect. It is Leaders' institutional duty to keep their state safe. Soldiers have a duty to defend civilians, *if they are ordered to do so*.

As it stands, however, Lazar's *Sparing Civilians* (just like McMahn's *Killing in War*) uses a highly agent-relative framework, which draws a fundamental distinction between intentionally killing and unintentionally allowing others to kill, without making any progress in explaining the claims enemy civilians have against Leaders under international law. To repeat, this is because, first, defenders are performing killings, whilst Leaders are merely letting defenders kill. Second, Leaders represent the entity under attack, so they have an extra reason to allow defenders to save many of their subjects by letting them kill a lesser number of enemy civilians.

C. *The No-Gap-Thesis and the Risky Killing Argument*

One final point: On the face of it, the risky killing argument – viz., the attempt to support Civilian Immunity through Risky Killing – widens the gap between Leaders and their subordinates. To see why consider first,

Bad Trolley Driver: Maliciously intending to kill an innocent person V, a bad trolley driver turns a trolley onto a branch-line track on which V stands. Although the driver has no desire to save anyone, by turning the trolley, he will save five innocents who are standing on the main track. You are the driver's superior; it is your aim to save the five. If you were to order the bad driver to stay on the main track, he would obey, and you would jeopardize your aim of saving them.⁴³

Unlike Judith Thomson (who denies that intention is relevant to permissibility),⁴⁴ I will assume that killing V is wrongful in virtue of the bad intention of the killer, and that had she been a good trolley driver, killing V would have been permissible. Further, I assume that you should let the bad driver kill V since, after all, you do not harmfully use V, and unlike the bad driver's intention, your intention in letting the driver divert the trolley is rightful. Finally, I assume that it would be better if you can make the driver act out of a benevolent motivation to save the five.

This final (crucial) assumption implies that, according to Lazar's risky killing argument, if Leaders can make the killings committed by their subordinates less risky, they can make them less wrongful (in the fact-relative sense). Obviously, Leaders can make the killings less

⁴³ See Tadros *The Ends of Harm*, p. 156.

⁴⁴ Judith Jarvis Thomson in her 'Self-Defense', *Philosophy & Public Affairs* 20 (1991): 283–310, section V.

risky because Leaders have some control over the factual and normative evidence available to the defenders who act on their behalf.

Suppose Leaders can institutionalize a legal system, which permits defenders to be guided by a standard, numbers-oriented, consequentialist consideration, even if this involves violating the deontological constraint against intentional eliminative killing. Suppose further that compliance with the law in the just state we imagine is, typically, the right thing to do. Hence, because the law has legitimate authority over them, defenders might be somewhat *more* justified in believing that by targeting few enemy civilians, they do no wrong, providing this is necessary for eliminating the wrongful threat imposed on a large number of just (and innocent) noncombatants. The spirit of the risky killing argument is clear. This legislation would make the killings less wrong, in the fact-relative sense: defenders' evidence supports their belief that killing civilians is permissible.⁴⁵

Compare to Lazar's critique of McMahan's *Killing in War*. He suggests that if the law entitles combatants to fight, irrespective of their cause, 'there would be no compelling reason for them to re-search the war's morality'.⁴⁶ The legal permission is a valid excuse for participating in an unjust war, which diminishes the responsibility of soldiers for the unjust aggression they carry out on behalf of their state. Similarly, I argue, if combatants hold the view that intentionally killing or foreseeably enabling others to kill is an irrelevant distinction in war, and this view is taught to them as part of their training, they cannot be accused of negligence if they follow it. Under Risky Killing, those killings would not be as bad (in the fact-relative sense) as they would have been absent those excuses.

Causing a normative mistake is one strategy Leaders can use; the other is causing a factual mistake. Leaders who limit the information available to defenders, or actively mislead them, result in higher evidential probability that defenders' targets are liable. From defenders' perspective, the killings they commit are less risky, and therefore less wrongful in the fact-relative sense. Government-controlled media, censorship, and other types of regulations constitute

⁴⁵ Lazar raises what he calls 'the moral beliefs objection' and dismisses it. See *Sparing Civilians*, pp. 96–97, and p. 108. He might dismiss my objection here on the same grounds. But I find the reasons for Lazar's dismissal unconvincing.

⁴⁶ Lazar, 'The Responsibility Dilemma' pp. 195–196.

one of the means by which the riskiness of defenders' killings might be diminished.

Thus, the No-Gap-Thesis seems incompatible with Risky Killing: Leaders have a reason to mislead their subordinates; a reason that their subordinates lack.

V. CONCLUSION

This essay made two points. I showed, first, that the risky killing argument fails to provide civilians with the 'robust protection' *Sparing Civilians* promises. If the Overlap Hypothesis is true, and contingent pacifism is false, risky killing principles do not immunize civilians from intentional killing where standard numbers-related considerations favor killing them. I argued, secondly, that the moral framework that *Sparing Civilians* employs, a moral framework that centralizes the Deontological Clause, leaves the immunity of civilians against Leaders unexplained.

Lazar's thorough critique of McMahan's revisionism concludes with a radical thought: 'if we reject the ideal of the rights-respecting war altogether we might develop an alternative theory of justified warfare, which marries theoretical soundness with conclusions that we can more confidently support'.⁴⁷ Regrettably, Lazar seems to abandon this idea: his positive account heavily relies on McMahan's liability view. It should therefore come as no surprise that *Sparing Civilians* faces a version of the dilemma that was masterfully elaborated in Lazar's earlier 'The Responsibility Dilemma for *Killing in War*.'

An alternative approach to Civilian Immunity was sketched out by George Mavrodes a long time ago. Mavrodes famously argues that the right against intentional killing in war is a 'convention-dependent' moral immunity. In one important (but underexplored) sense, Civilian Immunity resembles the *moral* duty to drive on the right-hand side of the road in places where this is the convention. The explanation of this moral duty refers to a custom, a law or an accepted norm.

Mavrodes's guiding idea is simple. Civilian Immunity is a convention nations introduced in order to replace total wars (guided by deep morality, as the liability view understands it) with limited wars

⁴⁷ Lazar, 'The Responsibility Dilemma' p. 213.

(where war is agreeably structured as a clash between armies rather than a clash between nations). The convention is fair because if Civilian Immunity is accepted, nations could expect to win and lose the limited war 'in about the same proportion as it could now expect to win and lose wars guided by deep morality'.⁴⁸ Mavrodes insists that the right created by the agreement is moral, despite being convention-dependent: given that the law immunizes civilians, 'one really does have an obligation to act in conformity with that convention' even if 'there is an alternative law, custom, etc. (or lack thereof) such that if that had been in force one would not have had the former obligation'.⁴⁹

The conventionalist approach suffers from its own weaknesses. One of its important advantages is clear. It applies first and foremost to Commanders who face Big Numbers cases, and to Leaders who do not kill, but rather let others kill on their behalf.

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⁴⁸ Mavrodes, 'Conventions and the Morality of War' p. 126.

⁴⁹ *Ibid.*