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Partiality and Weighing Harm to Non-Combatants: Abstract

The author contests the claim made independently by F.M. Kamm and Thomas Hurka that combatants ought to assign greater weight to collateral harm done to their compatriot non-combatants than they assign to collateral harm done to enemy non-combatants. Two arguments by analogy offered in support of such partiality, one of which appeals to permissible self/other asymmetry in cases of harming the few to save the many, and the second of which appeals to parents' justifiable partiality to their children, are found wanting. The author also rebuts Kamm's argument that combatants should assign greater weight to collateral harm done to neutrals than to compatriot non-combatants. However, he contends that in some cases a neutral state's right to sovereignty may entail that a combatant ought to choose the act that will collaterally kill a greater number of compatriot non-combatants over one that involves collaterally killing a lesser number of neutrals.

Key Words: collateral damage, just war, non-combatants, partiality, sovereignty

Partiality and Weighing Harm to Non-Combatants

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Suppose that under certain conditions, combatants waging a just war are morally permitted to engage in acts that cause collateral damage; that is, harm done to non-combatants as a side effect of an attack on a morally permissible target.¹ Does it matter morally whether those non-combatants who will be harmed are citizens of the same state as the combatants who carry out the attack, or are instead citizens of the state against whom these combatants are waging war? Frances Myrna Kamm and Thomas Hurka each claim that it does.² They argue that combatants ought to be partial to their compatriot non-combatants, assigning greater weight to harm done to them than they assign to harm done to enemy non-combatants. This entails that in some cases whether a collateral damage causing act of war satisfies the *jus in bello* criterion of proportionality depends

¹ For purposes of this paper, I will assume that no non-combatant is morally liable to attack as part of the conduct of a just war; combatants are not morally permitted to deliberately or negligently harm them. Both Kamm and Hurka note (rightly, in my view) that degree of moral culpability for an unjust war may provide a superior criterion for distinguishing those who are morally liable to attack from those who are not than does the combatant/non-combatant distinction. But since they carry out their discussion in terms of the latter distinction, I do so here as well.

For discussion of various attempts to provide a moral justification of acts of war that cause collateral damage, see Lefkowitz "Collateral Damage," in *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008): 145-64.

² F.M. Kamm, "Terror and Collateral Damage: Are They Permissible?" *Journal of Ethics* 9 (2005): 381-401; F.M. Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114 (July 2004): 650-692; Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33:1 (2005): 34-66.

on the citizenship of the non-combatants harmed by it.³ Moreover, Kamm suggests that combatants ought to assign even greater weight to harm done to neutral non-combatants than they assign to their own compatriot non-combatants. In some cases, and holding all else equal, a combatant ought to carry out an attack that will cause a greater number of compatriot non-combatant deaths as collateral damage, rather than one that will collaterally kill a lesser number of neutral non-combatants. As Kamm puts it, “non-combatants in one country have a higher degree of inviolability than those in another country.”⁴ In what follows, however, I will demonstrate that neither Kamm nor Hurka provide a plausible justification for their conclusions. Absent further argument, combatants ought to treat all non-combatants impartially, weighing harm to them equally regardless of their citizenship.

I begin by describing several ways in which partiality to compatriot non-combatants affects the moral permissibility of acts that cause collateral damage. I then refute Kamm’s attempt to defend partiality to compatriot non-combatants by appeal to an alleged asymmetry between the sacrifice one must make to save others, and the sacrifice one may impose on a third party in order to save those same people. Next I focus on both Kamm’s and Hurka’s efforts to defend partiality to compatriot non-combatants by appeal

³ Throughout this paper, I write as if harm to non-combatants is the sole factor to be taken into account when assessing whether a given act of war meets the *jus in bello* criterion of proportionality. In fact, other factors, such as the destruction of infrastructure or harm to the natural environment, may also be relevant. But whether there are other relevant factors, and whether their relevance is simply a matter of the effect that harm to them will have on people’s well-being, makes no difference to the issues under examination in this paper.

⁴ Kamm, “Failures of Just War Theory,” 673.

to an analogy with parents' justifiable partiality toward their children. I contend that Kamm and Hurka employ the wrong analogies, and that the proper ones generate less or no intuitive support for the conclusion they seek to defend. Finally, I argue that Kamm fails to provide a compelling reason to believe that neutral non-combatants enjoy a higher degree of inviolability than do compatriot or enemy non-combatants. Nevertheless, I suggest that given a certain understanding of the nature and moral value of state sovereignty, it is possible to provide a non-instrumental justification for Kamm's claim that given a choice between causing a greater number of compatriot non-combatant deaths and a lesser number of neutral deaths, a combatant ought to choose the former over the latter.

Partiality and *Jus in Bello* Proportionality

Practically all contributors to the just war tradition argue that only those acts of war that meet the criteria of discrimination and proportionality are morally permissible. Discrimination requires those who carry out military operations to distinguish between combatants, whom they are morally permitted to target, and non-combatants, whom they may not target, and whom they should make reasonable efforts to avoid harming. Discrimination does not absolutely prohibit engaging in acts of war that cause harm to non-combatants, however. Many just war theorists contend that attacks on legitimate targets that also involve or result in unintended harm to non-combatants may still be morally permissible if the harm done is proportional to the good achieved by that act.⁵

⁵ Two additional criteria must also be met. First, the act the agent does intentionally, and which causes the unintended harm, must be one he is morally permitted to do, and second, the unintentional harm must be no more than is necessary to achieve the good end. Together with the requirements that the harm to non-combatants be unintended and proportional, these criteria constitute the doctrine of double effect. Only the

Though proportionality has applications in just war theory other than to acts that inflict collateral damage, it is with these cases that I am concerned here, for it is the moral permissibility of such acts that is affected if partiality to compatriot non-combatants is morally justifiable. Hurka argues that such partiality warrants engaging in acts of war (and so, ultimately, an entire war) even if it is foreseen that the number of enemy non-combatants killed as collateral damage will exceed the number of compatriot non-combatants whose deaths the war prevents. Thus with respect to military attacks undertaken by the United States and Israel to prevent terrorist attacks against them (or their citizens), Hurka contends that U.S. and Israeli combatants ought to assign less weight to the harm done to Pakistani, Afghan, or Palestinian non-combatants killed as a side effect than we should assign to the harm prevented to Israeli or American non-combatants.⁶ If Hurka is right about this, then the claim that Israel's 2006 attacks on

proportionality criterion will be at issue here; I will assume that all of the examples under discussion satisfy the other conditions for the doctrine of double effect's applicability – or whatever alternative principle justifies collateral damage.

With respect to justifying collateral damage, Kamm rejects the doctrine of double effect in favor of what she labels the principle of permissible harm. See F. M. Kamm, *Morality, Mortality Volume II* (New York: Oxford University Press, 1996): 143-204. Exactly what justifies acts of war that cause collateral damage is unimportant for the issue under discussion in this paper, since Kamm, Hurka, and I all argue under the assumption that some principle does. See Kamm, "Failures of Just War Theory," 673; Hurka, "Proportionality," 61.

⁶ Hurka, "Proportionality," 59-60.

Hizbullah forces in Lebanon caused a disproportionate amount of collateral damage may not be as obvious as numerous commentators around the world have thought.⁷

Kamm claims that in a case where a combatant waging a just war can achieve the same good by conducting one of two aerial bombardments, both of which qualify as permissible, but where bombardment A will result in the death of 100 compatriot non-combatants, while bombardment B will result in the death of 200 enemy non-combatants, the combatant ought to choose B over A.⁸ Though Kamm's example may seem artificial, it is not difficult to conceive of an actual scenario with the same essential features. For example, members of the Free French Air Force during World War II might have faced a choice between bombing a German munitions factory located in occupied France, or one in Germany proper, with the expectation that attacking the latter would result in twice as many non-combatant casualties as attacking the former. According to Kamm, the Free French would not only have been permitted to bomb the factory located in Germany, they would have acted incorrectly had they bombed the French plant instead, even though doing so likely would have produced fewer non-combatant casualties.

Partiality to compatriot non-combatants also permits warriors to bear less risk of harm to themselves at the expense of greater risk of harm to non-combatants if those non-combatants are enemy ones rather than compatriots. As Michael Walzer writes,

⁷ See, for example, "Too High a Price" *The Nation*, July 14, 2006; Larry Derfner, "Flirting with State Terrorism" *The Jerusalem Post*, August 17, 2006. Hurka does not believe Israel's 2006 invasion of Lebanon met the *jus in bello* proportionality condition (personal communication).

⁸ Kamm, "Failures of Just War Theory," 672; "Terror and Collateral Damage," 397. It would beg the question against Kamm to assert that, given the possibility of carrying out bombardment A, bombardment B violates the no more harm than necessary condition on the applicability of the doctrine of double effect.

if saving [non-combatant's] lives means risking soldier's lives, the risk must be accepted. But there is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking [harming?] civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.⁹

The idea that soldiers ought to seek to minimize the risk of harm to non-combatants, even at the cost of increasing their own chances of suffering harm, suggests that combatants' lives and/or well-being have value proportionate to that of non-combatants' lives and/or well-being.¹⁰ If combatants ought to assign greater importance to the lives of compatriot non-combatants than they do to enemy ones, it follows that the number of enemy non-combatant lives "equal" to the life of a combatant will be less than the number of compatriot non-combatant lives "equal" to the life of a combatant. Assuming that risk to the combatant varies inversely with the likelihood of harm to non-combatants, it follows that combatants may bear less risk of harm to themselves when carrying out an attack that will cause collateral damage to enemy non-combatants than when carrying out one that will collaterally harm compatriot non-combatants. Thus were the French pilots to attack

⁹ Michael Walzer, *Just and Unjust Wars*, 3rd Ed. (New York: Basic Books, 2000 (1977)): 156. Walzer claims that "the degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on" (Walzer, 156). As will become clear below, however, Walzer does not believe that the nationality or citizenship of the at risk non-combatants affects the degree of risk combatants may permissibly impose upon them. See fn. 27.

¹⁰ See also Kamm, "Failures of Just War Theory" and Kamm, "Terror and Collateral Damage"

the munitions factory in Germany, they would be morally permitted to fly higher, and so likely inflict more harm on non-combatants, than they would be permitted to fly were they to attack the plant in occupied France.¹¹

As these examples indicate, if partiality to compatriot non-combatants were morally justifiable, it would significantly shape the form that the morally permissible conduct of war may, or must, take. As I will demonstrate, however, neither Kamm nor Hurka provides a plausible defense of such partiality.¹²

Self/Other Asymmetry and Partiality to Compatriot Non-Combatants

One argument Kamm offers to buttress her claim that combatants ought to be partial to compatriot non-combatants rests on the alleged permissibility of imposing on a third party the cost of saving others where one is not morally required to bear the same cost in order to achieve the same end. Call this permissible self-other asymmetry.

Kamm contends that an agent who confronts a scenario in which she can prevent a trolley from killing five people only by directing it down either a second track, on which she stands, or a third track, on which one (or two) strangers stand, may choose to direct it down the third track, rather than the second one (or flipping a coin). Individuals enjoy “a

¹¹ As Pierre Mendes-France, a Free French pilot, writes: “It was... this persistent question of bombing France itself which led us to specialize more and more in precision bombing – that is, flying at a very low altitude. It was more risky, but it also permitted greater precision...” (quoted in Walzer, *Just and Unjust Wars*, 157).

¹² Note that I will not be arguing that partiality to compatriots is never morally justifiable, but only that neither Kamm nor Hurka demonstrate that combatants ought to be partial to their compatriot non-combatants when choosing between various collateral damage causing acts of war.

prerogative not to make big sacrifices in order to aid others.”¹³ Kamm then draws an analogy between this case, and the permissible self-other asymmetry she claims applies in it, and the example of a state (or state official, such as a bomber pilot) faced with a choice between carrying out bombardment A, which will kill 100 compatriot non-combatants, and bombardment B, which will kill 200 enemy non-combatants. She writes,

one may conceive of the situation as one in which country A must decide whether to harm itself or harm someone else, both options involving (assumed) permissible ways to harm non-combatants. It may simply be supererogatory... to direct a threat to oneself rather than send it to someone else to whom it is also permissible to send it.¹⁴

Unfortunately for Kamm, several disanalogies between the two cases she considers undermine her attempt to extend the application of permissible self/other asymmetry from the above variation on the trolley problem to the bombing example.¹⁵

First, Kamm’s argument ignores the difference between the threat facing the agent on the second track, and the threat facing the state if it opts to carry out bombardment A. Choosing to direct the trolley down the second track will result in an enormous loss to the agent who stands on it, namely her death; it is the “ultimate” nature of the sacrifice that likely leads many people to form the intuition that the agent is permitted to direct the trolley down track three rather than track two. The potential loss to the state in the

¹³ Kamm, “Failures of Just War Theory,” 674.

¹⁴ Ibid.

¹⁵ For the sake of argument, I accept permissible self/other asymmetry in the trolley problem, though in fact I am skeptical of it even in this case.

bombardment example, however, is of nowhere near the same magnitude. In practically every scenario, the state will continue to exist even if the bomber pilot chooses bombardment A over bombardment B. Nor is it clear that harm to some of the state's subjects will necessarily harm the state. It is conceivable, at least, that the individuals the bombing will kill are engaged in acts that interfere with the proper functioning of the state, such that their deaths actually benefit the state, rather than harming it.¹⁶

Second, Kamm describes the trolley problem as an instance of deciding whom to save from harm. But that is not the question the bomber faces; his choice is a matter of deciding whom to harm, not whom to save from an independently originating harm. Even if we assume that either bombardment is morally permissible, it could be that partiality to compatriots is morally justifiable in the case of preventing harm, but never in the case of causing it. Given that many moral theorists think there is an important moral distinction between causing harm and giving aid, this discrepancy between the two cases Kamm considers should raise a red flag regarding her extension of a moral principle from one to the other.¹⁷

¹⁶ The reader might take this objection to Kamm's argument, together with some of the criticisms set out later in this paper, as reasons to reject the use of domestic analogies as a method for defending particular moral principles for the just conduct of war. I do not believe the wholesale rejection of this method is necessary, though as the text indicates, careful attention must be paid to specific disanalogies between domestic and war scenarios that may have morally important implications.

¹⁷ It should be noted, however, that Kamm is unlikely to find in this disanalogy a compelling objection to her argument, since she does not think the distinction between causing harm and giving aid a morally relevant one. See her principle of permissible harm, which she defends as the true governing principle for cases like the trolley problem, the munitions factory, and so on (and on). Kamm, *Morality, Mortality Volume II*.

A third disanalogy between Kamm's two examples involves the moral conclusions she draws in them. In the trolley problem, Kamm defends *permissible* self/other asymmetry; agents are permitted, but not required, to forgo making big sacrifices in order to aid others. In the bombing example, however, Kamm claims that it would be *incorrect* to carry out bombardment A rather than bombardment B, and also speaks of a "*duty* not to harm one's own non-combatants rather than non-citizens, if someone must be harmed in a permissible manner."¹⁸ Permissible self/other asymmetry cannot give rise to a duty to be partial, nor can it entail that an agent who elects not to be partial acts incorrectly. Thus even if the two cases Kamm considers are sufficiently analogous to warrant the extension of the principle of permissible self/other asymmetry to the bombing example, that principle does not justify the conclusion Kamm draws.

Parental Partiality and Partiality to Compatriot Non-Combatants

Kamm's second argument in defense of partiality to compatriot non-combatants also takes the form of an argument by analogy. She begins with the assumption that it is generally permissible for an agent to direct a runaway trolley away from a track with five people on it and toward a track occupied by only one person. However, Kamm contends that if the one person is the agent's child, then the agent has a special duty to the child not to direct the trolley down the track he occupies. Similarly in the bombing example, both bombardment A and bombardment B are of a type assumed to be morally permissible. But just as the parent owes a special duty to his child, so too the bomber pilot owes a special duty to his compatriot non-combatants, one that requires him to give their lives and well-being greater weight than he assigns to the lives of enemy non-combatants.

¹⁸ Kamm, "Failures of Just War Theory," 674, italics mine.

Thus it is the existence of a special duty to compatriots that requires the pilot to choose bombardment B, and the resulting death of 200 enemy non-combatants as collateral damage, over bombardment A, and the 100 compatriot non-combatant collateral deaths it will cause.

Hurka also rests his case for partiality to compatriot non-combatants on an analogy to special duties parents owe their children. He describes a scenario in which the only way for an agent to save an innocent victim from a fatal attack by an aggressor involves the use of a grenade that will kill the aggressor, but also kill an innocent bystander. Hurka concedes that it is arguable whether the agent may throw the grenade in this scenario, sacrificing one innocent person's life (albeit unintentionally) for another's. He draws a different conclusion, however, if the innocent victim threatened by the aggressor is the child of the agent in position to carry out the rescue.

It seems to me that he [the father] may throw the grenade, and may do so even if this will kill some number of bystanders greater than one. If he is not aiming at the bystanders but killing them collaterally, he may show some preference for his daughter.¹⁹

Hurka suggests that a combatant may display an analogous partiality by unintentionally killing a greater number of innocent enemy non-combatants in order to prevent the killing of a lesser number of his compatriot non-combatants.²⁰

¹⁹ Hurka, "Proportionality," 61.

²⁰ Hurka's use of the term 'may' implies a *permission* to give greater weight to the lives of compatriot non-combatants over enemy non-combatants, but in an earlier article where he develops a general account of partiality to compatriots, he talks of *duties* of partiality (Thomas Hurka, "The Justification of National

Both Kamm's and Hurka's arguments depend on the extension of an intuition from a non-war scenario to a war one.²¹ I suggest, however, that they employ the wrong non-war scenarios. Take Kamm's argument: if the question concerns the extent of the partiality compatriots may justifiably display to one another, then a more closely analogous non-war scenario involves the following variation on the trolley problem. Suppose that a runaway trolley will run over and kill either one person who is a compatriot, or five people who are foreigners, but who are alike in all other morally relevant respects. Are you permitted, or even required, to direct the trolley toward the five people, rather than the one? The intuition that you may, or must, do so would provide the kind of intuition in a non-war scenario that would best support partiality in a case like the bombing example, since it more closely mirrors the choice the bomber pilot confronts than does Kamm's parent/child variation. For what it is worth, my intuition is that the compatriot relationship does not justify directing the trolley so that it kills the five foreigners rather than the one compatriot. Interestingly, David Miller, one of the most prominent defenders of partiality to compatriots, agrees. He writes:

If we think about cases modeled on the trolley problem made famous by Judith Thomson, I don't think it would be justifiable to switch the trolley from a track on which it was hurtling towards a compatriot on to a track

Partiality." *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan, (New York: Oxford University Press, 1997): 152).

²¹ They also depend, of course, on the transfer of an intuition regarding parents' obligations to their children to compatriots' obligations to one another. This transfer may also be challenged, though I will not do so here. See Christopher Heath Wellman, "Associative Allegiances and Political Obligations," *Social Theory and Practice* 23 (1997): 181-204.

on which it would hurtle towards a foreigner. Nor do I think, if one takes the view that when the difference between the numbers on the two tracks becomes large enough, one ought to switch the trolley, that there should be any additional weighting in favor of compatriots. If one should switch the trolley to kill one in order to save ten, then the identity of the ten and the one is irrelevant. At this level, morality appears to me to require strict impartiality at least as far as nationality is concerned.²²

At a minimum, then, employing the more closely analogous variation on the trolley problem weakens the argument for partiality to compatriot non-combatants, and it may well undermine it altogether.²³

As for Hurka's non-war scenario, a variation on it more closely analogous to choosing between harm to compatriot or to enemy non-combatants would involve throwing a grenade that will kill one or even several foreigners in order to save one compatriot. I contend that such an act is not morally justifiable. The moral duty not to kill an innocent person is commonly thought to be stronger than the moral duty to save an

²² David Miller, "Reasonable Partiality Towards Compatriots," *Ethical Theory and Moral Practice* 8 (2005): 75

²³ Exactly when, and with what detail, to pose this variation on the trolley problem raises some difficult questions regarding the weight we ought to assign to people's intuitions, and what counts as a genuinely considered judgment. For example, asking current citizens of the United States whether it would be permissible or required to direct the trolley at five Iraqis rather than one American might elicit a different response than if "Irishmen" or "Canadians" were substituted for "Iraqis." It may also make a difference if the question is posed while a state is at war, since feelings of nationalism (compatriotism) tend to be highest at such times.

innocent person from being killed. It follows, then, that holding all else equal, the duty a combatant has to her compatriots not to kill them is stronger than the duty she has to save them from being killed by a third party. Supposing that to be the case, if it is not justifiable to kill a greater number of enemy non-combatants in order to avoid killing a lesser number of compatriot non-combatants, as I maintain against Kamm, then surely it is not justifiable to kill a greater number of enemy non-combatants in order to save a lesser number of compatriot non-combatants from being killed by a third party.

Note, too, that Hurka's original grenade throwing example seems closely akin to (if not an example of) cases of duress that practically all theorists agree provide an excuse, but not a justification, for an agent's conduct. I am slightly more sympathetic to the claim that agents may point to the fact of common membership in a political community as a partial excuse, rather than justification, for giving greater weight to the lives of compatriot non-combatants in comparison to enemy ones. I suspect, however, that whatever it is about being a parent, or the parent-child relationship, that provides the basis for an excuse will be realized to a significantly weaker degree in the case of compatriots, and so the degree of exculpation it provides will be far less.

It may be that the compatriot/foreigner variation on the trolley problem, while better than the one Kamm employs, still contains an important disanalogy to the kind of wartime scenarios that are of concern in this paper. The actors on whom we focus in the latter scenarios are state officials. Therefore, in order to maintain the analogy, we ought to consider whether a state official is permitted, or even required, to turn the trolley toward five foreigners rather than one subject of her state, or whether in the above variation on Hurka's example, the addition of the fact that the agent in position to affect a

rescue is a state official makes any difference to the intuition we form. I suggest that the answer is no in both cases. Surely we do not think a New York City policeman would be justified in killing three innocent German tourists, even unintentionally, in order to save one innocent American. Suppose, however, that I am wrong about this, and that some of those who consider this last variation on Hurka's example act reasonably when they conclude that the official should save the American, though in doing so he will unintentionally kill the Germans. Their intuition may follow not from the belief that partiality to compatriots is morally justifiable in this case, but rather from certain views about what follows from the agent's status as a state official. It is at least conceivable that an agent might occupy a state office without himself being a citizen of that state; indeed, in countries where military service is a path to citizenship, a significant number of combatants may not bear the relationship of compatriot to non-combatant citizens of that state.²⁴ The question would then be why occupying the role of state official permits or requires that, when he engages in a permissible act that will cause collateral damage, the agent should give greater weight to avoiding harm to citizens of the state he serves than he gives to avoiding harm to foreigners. One reason to think that being a state official makes no difference in this case is Thomas Pogge's observation that it would be bizarre if agents could circumvent moral prohibitions on certain types of acts simply by

²⁴ As this example illustrates, the relationship between legal citizenship and the relationship of compatriot is somewhat unclear. Suppose that in Kamm's bombing example, the 100 people who would be killed by bombardment A lived in the territory of the combatant's state, but were not citizens of it. Should the combatant still be partial to them? Does it matter whether they arrived in the territory legally or illegally, or whether they are guest workers or resident aliens?

having officials do those acts for them.²⁵ If I am right to think that an individual may not appeal to the compatriot relationship to justify throwing a grenade that kills three innocent foreigners as a side effect of saving one compatriot, then it should not be permissible to circumvent this prohibition by having a state official carry out the same act.

Both Kamm and Hurka recognize that all non-combatants have a (possibly defeasible) claim not to be targeted by combatants as part of the latter's conduct of a war. Given that none of the non-combatants have done anything to make themselves liable to attack, they enjoy an equal claim against all combatants that they not be intentionally harmed, as well as a claim that all combatants exercise due care to avoid harming them unintentionally.²⁶ However, Kamm and Hurka both go on to claim that combatants have an additional reason to avoid harming their compatriot non-combatants, one that they do not have vis-à-vis enemy non-combatants. This reason is the compatriot relationship, which in the paradigm case consists of being full members, or citizens, of the same political community. In virtue of this reason, combatants may, or must, assign a greater weight to harm done to a compatriot non-combatant than they assign to harm done to an enemy non-combatant. As I have tried to show, however, neither Kamm nor Hurka provides a plausible case for the claim that merely because they are members of the same political community combatants ought to be partial to their compatriot non-combatants. If my arguments succeed, then it follows that Kamm and Hurka should accept that

²⁵ Thomas Pogge, *World Poverty and Human Rights* (Oxford: Blackwell, 2002): 126. Note that Pogge's claim is compatible with officials enjoying moral entitlements to do certain things that private individuals are forbidden from doing.

²⁶ But see fn. 1.

combatants ought to be impartial with respect to the morally permissible collateral damage they cause. This is so because the prohibition on targeting non-combatants follows from a property had by all non-combatants, namely their not having done anything to make themselves liable to attack.²⁷ Therefore, holding all else equal, when deciding between two munitions factories a pilot ought to choose to bomb whichever factory's destruction will result in less collateral harm to non-combatants. And when engaging in a war justified at least in part as necessary to prevent future attacks on their state and its citizens, as in the case of Israel's 2006 war against Hizbullah, combatants must at the very least refrain from causing more harm to enemy (and neutral) non-combatants than they prevent their enemy from inflicting on their compatriot non-combatants.

All else may not be equal, however. Suppose, for instance, that the enemy combatants are responsible for placing the enemy non-combatants at risk. That is, had the enemy combatants not chosen to take cover in the middle of a village, it would have been possible for our combatant to attack them without posing a risk of harm to either compatriot or enemy non-combatants. In this case, the enemy combatants' responsibility for placing their compatriot non-combatants at risk, when, let us assume, it was not morally permissible to do so, may provide a consideration sufficient to justify our combatant choosing the act that will collaterally harm a greater number of enemy non-

²⁷ Walzer agrees, though with his typical lack of clarity: "the structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and not merely to one's fellow citizens. The right of German civilians [during WWII] – who did no fighting and were not engaged in supplying the armed forces with the means of fighting – were no different from those of their French counterparts..." (Walzer, *Just and Unjust Wars*, 158).

combatants, rather than a lesser number of compatriot non-combatants.²⁸ I am not sure that the enemy combatants' (share of?) responsibility for putting the enemy non-combatants at risk does provide such a consideration.²⁹ All I wish to claim here, though, is that *if* it does, then the rejection of partiality to compatriot non-combatants does not entail that combatants are never morally permitted to collaterally kill a greater number of enemy non-combatants, rather than a lesser number of compatriot non-combatants.

Another possibility is that all (adult? voting?) members of an aggressor state share collective responsibility for their state's aggression, and that therefore non-combatant members of that state are either (a) liable to attack by just combatants (though perhaps less liable than unjust combatants, who may bear a greater degree of responsibility for the unjust war), or (b) not liable to attack, but left with a weaker claim not to be collaterally harmed than is had by those who do not share in the collective responsibility for launching or perpetuating an unjust war. The former implication of collective responsibility for an unjust war threatens to undermine the distinction between legitimate and illegitimate target of war that is essential to the very notion of collateral damage, and so I set it aside here. If it can be successfully defended, the latter implication of collective responsibility for an unjust war may warrant a just combatant's collaterally killing a greater number of enemy non-combatants, rather than a lesser number of compatriot non-combatants. The justification in this case, however, does not involve

²⁸ As this example illustrates, combatants' duty to reduce the risk of harm to non-combatants, even at the cost of increasing the risk to themselves, affects not only the permissibility of various modes of attack, but also various modes of defense.

²⁹ For discussion of this point, see Hurka, "Proportionality," 46-50, and Walzer, *Just and Unjust Wars*, 158-96.

appeal to the compatriot relationship as a reason to give greater weight to the harm that will likely be suffered by compatriot non-combatants than to the harm that will likely be suffered by enemy non-combatants. Instead, it involves an appeal to the enemy non-combatants' collective responsibility for an unjust war as a reason to give less weight to the harm that will likely be done to them than they would merit had they not acted wrongly. As with the foregoing discussion of responsibility for placing non-combatants at risk of being collaterally killed, I take no stand here on the correctness of the argument from (alleged) collective responsibility for an unjust war to a lesser claim against being collaterally harmed.³⁰ Once again, I aim only to make clear that rejecting Kamm's and Hurka's defense of partiality to compatriot non-combatants does not necessarily entail that combatants are never morally justified in collaterally killing a greater number of enemy non-combatants, rather than a lesser number of compatriot non-combatants.³¹

In the remainder of this paper, I consider another reason (in addition to the two just mentioned) that may morally permit, or even require, a combatant to carry out an

³⁰ For a defense of non-combatant liability in virtue of collective responsibility for an unjust war, see Erin Kelly, "The Burdens of Collective Liability," in Deen K. Chatterjee and Don E. Scheid *Ethics and Foreign Intervention* (New York: Cambridge University Press, 2003): 177-92. For a critique of this argument, see Larry May, *Aggression and Crimes Against Peace*, chapter 13 (New York: Cambridge University Press, forthcoming).

³¹ Yet another possible justification for collaterally killing more enemy non-combatants, instead of fewer compatriot non-combatants, is if each of the former bear a degree or type of *individual* culpability for an unjust war that warrants giving less weight to harm done to them than would be the case had they not acted wrongly (or wrongly enough). How often such cases would arise depends on what type or degree of individual responsibility for an unjust war renders a non-combatant liable to attack. For discussion of this issue, see Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114:4 (2004): 693-733.

attack that will result in collateral harm to a greater number of non-combatants than would have been harmed by an alternative, equally effective, attack. I do so by way of a critical discussion of Kamm's claim that given a choice between two courses of action, equally desirable from a military standpoint, a combatant ought to choose the one that will inflict collateral harm on a greater number of compatriot non-combatants, rather than the one that will collaterally harm a lesser number of neutral non-combatants.

Weighing Harm to Neutrals

While Kamm claims that compatriot non-combatants have a greater inviolability than do enemy non-combatants, she also suggests that their inviolability is less than that enjoyed by neutral non-combatants.³² Kamm briefly notes two arguments that might be given in support of this claim. The first is an argument by analogy:

War by its nature involves engagement between designated parties who are expected to absorb all costs. The appropriate analogy for war is a prize fight; people in the audience are not liable at all to being punched.³³

As stated, there is one obvious disanalogy between a war and a prize fight, namely that audience members at a prize fight are said not to be liable *at all* to being harmed by the

³² It may be that the claim should be stronger – neutral combatants may enjoy a greater degree of inviolability than do compatriot non-combatants.

³³ Kamm, "Failures of Just War Theory" 675. The first sentence in this quote suggests an analytic argument for the claim that neutrals enjoy a greater degree of inviolability (indeed, total inviolability) than do members of the states or groups at war with one another. Such an argument seems implausible, since many paradigm examples of war have been fought by parties who had no expectation that they would absorb all of the costs. Perhaps the parties to a war *should* expect to absorb all of the costs, but this is a moral claim, not an analytic one regarding what it means (or is) to wage war.

fighters, while Kamm claims only that neutrals enjoy a high degree of, but not absolute, inviolability. This disanalogy can be addressed easily enough, however, by weakening the claim regarding the inviolability of the audience members at a prize fight. If a prize fighter can save himself from death at the hands of his opponent only by causing a relatively minor harm to one of the audience members, doing so seems permissible. If so, then audience members enjoy a (very) high degree of inviolability vis-à-vis the prize fighters, but not total inviolability.

A more significant difficulty with Kamm's suggested argument by analogy is that many non-combatants in the warring states are also like audience members at a prize fight, in that they are not involved in the fight itself, but simply bystanders caught up in it.³⁴ Moreover, unlike the typical audience member at a prize fight, many non-combatants in warring states (as well as most neutrals) have not voluntarily chosen to "attend" the fight; indeed, some of them may have actively opposed it (and continue to do so). Non-combatant members of a warring state may be *designated* as participants in the war (as the first sentence in the above quote suggests), but that they have the legal status of citizen in a state that happens to be at war does not ipso facto entail that they are participants in the fight itself. Were it to do so, then it would be impossible to distinguish between combatants and non-combatants, a distinction that Kamm wishes to retain.

The defense of the greater inviolability of neutrals by appeal to an analogy with audience members at a prize fight may seem more compelling if we focus on states rather than individuals. But even states may not be voluntary participants in a war. As Walzer points out, "the wrong the aggressor [state] commits is to force men and women to risk

³⁴ Or at least this is so if the collective responsibility argument mentioned earlier proves to be false.

their lives for the sake of their rights.”³⁵ States (or their members) may choose to sacrifice the enjoyment of their rights or to risk their lives to defend them, but in either case their choice is not a free one. If what accounts for the fact that the prize fighters are liable to be harmed, while audience members are not so liable, is that the former but not the latter have voluntarily chosen to participate in the fight, then members of a state that has not voluntarily chosen to wage war should enjoy the same level of inviolability as neutrals. Such a conclusion conflicts, however, with Kamm’s claim that compatriot non-combatants enjoy a lesser degree of inviolability than do neutrals, at least on the assumption that the former are citizens of a state that declares and wages war justly.

Moreover, as I noted earlier in this paper, harm to some members of the state is not the same thing as harm to the state itself. One can imagine, for instance, that the neutrals who will be killed are members of a minority political or ethnic group that is complicating the governance of the neutral state, so that their deaths actually strengthen the state, rather than harming it. This is not to say that these neutrals ought to be killed, of course, but only to point out that harm done to some of the state’s subjects need not equate to harm done to the state itself. If so, then the argument that neutral states ought not to be harmed by the participants in the war does not necessarily rule out an attack that collaterally kills some members of the neutral state.

Kamm briefly notes a second, instrumental, argument for the claim that neutrals enjoy a higher degree of inviolability than do compatriot non-combatants. According to this line of argument, the weightier prohibition on causing harm to neutrals is justified because it reduces the likelihood that the neutral state will be drawn into the conflict, with

³⁵ Walzer, *Just and Unjust Wars*, 51.

the likely consequence that even greater harm and/or wrong will occur. It seems that such an argument will often provide a sufficient moral justification for not carrying out an attack that will harm neutrals, even when the only other permissible option is an attack that will harm a greater number of compatriot non-combatants. However, Kamm does not think this argument identifies a necessary condition for the assignment of greater inviolability to neutrals in comparison to compatriot non-combatants. She writes that “even if C [the neutral state] were weak and posed no threat to A [the state whose combatants carry out the attack], it seems to have greater inviolability.”³⁶ For Kamm, then, the greater inviolability enjoyed by neutrals is not simply a matter of the consequences that may follow from an attack that causes harm to them.

Once again, the description of states as if they were individuals misleads. Even if the neutral state enjoys greater inviolability than the warring states, it does not follow that the latter states’ non-combatants enjoy a lesser degree of inviolability than do the members of the neutral state. It might mean only that the combatants of the neutral state enjoy greater inviolability than that enjoyed by combatants of the warring states (or at least those of the warring state without a just cause for war). Alternatively, or in addition, it might mean (only) that the neutral state enjoys a greater degree of inviolability with respect to the use of its territory by the warring states than does either of those states vis-à-vis their opponent. For example, it could mean that state A’s seizure of some of its enemy’s public assets – e.g. bridges and highways – would not violate the moral constraints on war, but A’s seizure of a neutral state’s public assets would. Whatever the details, the general point should be clear enough: there is no obvious

³⁶ Kamm, “Failures of Just War Theory” 675.

inference from the claim that a neutral state enjoys a greater degree of inviolability than do warring states to the claim that the non-combatant members of a neutral state enjoy a greater degree of inviolability than do non-combatant members of warring states.

Is it the case, then, that when faced with a choice between permissible collateral damage causing acts of war, a combatant ought to select whichever one will result in the fewest number of non-combatant deaths, regardless of the citizenship of those non-combatants? In particular, is Kamm mistaken when she claims that a combatant ought to collaterally kill a greater number of compatriot non-combatants rather than collaterally kill a lesser number of neutrals, at least up to a point? Perhaps not. Given a certain understanding of the value and nature of state sovereignty, Kamm's claim may still be correct, though not on the basis of the reasoning she employs. Space does not permit a thorough defense of this understanding of state sovereignty, nor am I at all certain that a satisfactory defense of it can be offered. Therefore my argument is conditional: if a certain understanding of the value and nature of state sovereignty can be defended, then in some cases combatants ought to choose a course of action that will result in the death of a larger number of compatriot non-combatants, rather than one that will result in the death of a lesser number of neutrals, and the violation of the neutral state's sovereignty.

Suppose that the neutral state enjoys a morally justified claim to sovereignty, understood to consist in a particular status I will characterize vaguely as a right to self-government, or self-determination. A self-governing state is the final arbiter of its affairs, in principle and (usually) in fact, and it exercises this normative and de facto authority

within a given territory.³⁷ Perhaps this notion of state sovereignty should be understood reductively, in terms of the individual rights of the state's members, or perhaps it must be understood non-reductively, in terms of moral entitlements held collectively by the state's members or by the group as a whole. However it is understood, though, any act that violates the neutral state's sovereignty wrongs it because it fails to respect the states' status as self-governing. In wronging the neutral state, the warring state either wrongs the individual members of the neutral state, or wrongs the members of that state as a group. But just as in the case of a violation of individual self-determination, it is not essential to the wrong at issue that the state whose sovereignty is violated be harmed by that violation. The complaint is not 'we are worse off because of what you did,' but rather 'you are not entitled to do what you did; you have encroached upon our moral dominion.' Thus, in the case of an attack that impacts the territory and/or citizens of a neutral state, even if the ability of the neutral state to govern itself is not reduced at all, and even if no one in the neutral state is harmed, the warring state still wrongs it.

Suppose that something like this account of state sovereignty as a moral status can be fleshed out and defended. If it can, then we have a possible explanation for why state A ought to choose a course of action that collaterally kills more of its own subjects rather than one that will result in collateral harm to a lesser number of neutrals. Every non-combatant (and perhaps neutral combatant) enjoys the same level of inviolability, since none have done anything to make themselves liable to being targeted as part of the

³⁷ This characterization of sovereignty is consistent with both the voluntary transfer of authority, so that the final arbiter over some of a state's affairs may be a body created by an international treaty with other states, and with the scope of a state's moral claim to sovereignty being limited by, and conditional upon respect for, principles of justice.

conduct of war. However, an attack that causes harm to neutrals also violates the neutral state's sovereignty; the latter is a particular kind of wrong that does not occur if the combatant elects the course of action that involves collaterally killing some of his compatriot non-combatants. It may be, then, that the moral prohibition on violating a state's sovereignty provides a justification for Kamm's intuition that the combatant has a non-instrumental moral reason to choose the act that will result in a greater number of compatriot non-combatant deaths, instead of the one that will result in a lesser number of neutral deaths and the violation of the neutral state's sovereignty. Of course, the neutral state surely does not enjoy an absolute right not to have its sovereignty infringed; for example, a combatant with the choice between killing a far greater number of compatriot non-combatants or a very few neutrals, but violating the neutral state's sovereignty, may still be morally permitted (or even required) to choose the latter course.

What about a choice between killing a larger group of enemy non-combatants or a lesser number of neutrals? The correct answer to this question depends on whether the enemy state has a just cause for war. If it does (e.g. it is fighting in self-defense), then regardless of which act the combatant chooses, he violates the sovereignty of the state whose citizens he harms. More importantly, it is extremely unlikely that the combatant will have a just cause for war if the enemy state has one (indeed, this may even be conceptually impossible), in which case I believe the combatant is not morally permitted to kill anyone, collaterally or not.³⁸ Suppose, however, that the just conduct of war does

³⁸ For a defense of the claim that in order for an agent to wage war in conformity with the criteria of *jus in bello*, he or she must have a just cause for going to war (or be part of a political organization that has a just cause for going to war), see McMahan, "The Ethics of Killing in War."

not depend on the justice of one's cause (or on having met all six of the *jus ad bellum* criteria). Then holding all else equal, the deciding factor is the number of people harmed who are not morally liable to being harmed by an act of war.³⁹ However, if the enemy state does not have a just cause for war, then it is unlikely that the harm done to enemy non-combatants will also constitute the violation of the enemy state's sovereignty.⁴⁰ In that case, the same reasoning that applies in the case of a choice between killing a larger number of compatriot non-combatants or a lesser number of neutrals holds in the case of a choice between killing a larger number of enemy non-combatants or a lesser number of neutrals.

In sum, Kamm is wrong to think that combatants ought to be partial to their compatriot non-combatants, assigning greater weight to harm done to them than they assign to harm done to enemy non-combatants. All non-combatants enjoy the same degree of inviolability, and so holding all else equal, a combatant ought to choose whichever course of action will result in the fewest number of non-combatant deaths. Kamm may well be correct, however, when she asserts that a combatant ought to kill a greater number of compatriot non-combatants rather than a lesser number of neutrals. But the reason for this is not that the lives and well-being of compatriot non-combatants

³⁹ All else may not be equal, of course. If the violation of the neutral state's sovereignty would bring it into the war, and thereby increase the amount of harm and/or number of wrongs done, then this would count in favor of an attack that harmed a greater number of enemy non-combatants over an attack that harmed a lesser number of neutrals (at least up to a point).

⁴⁰ Without a fully fleshed out account of the moral justification for state sovereignty, it is not possible to be certain of this. But, for example, if a state enjoys a moral claim to sovereignty only if it does not wage unjust wars, then harm done to its non-combatants will not count as a violation of the state's sovereignty.

count for less than those of neutrals. Rather, it is because an attack that causes harm to neutrals involves a distinct moral wrong absent from an attack that harms only compatriot non-combatants, namely a violation of the neutral state's sovereignty. The disvalue of this wrong is great enough that, at least up to a point, it requires choosing an act that will result in more non-combatant deaths than would result from committing the alternative act under consideration.⁴¹

⁴¹ I wish to thank Craig Derksen, Tom Hurka, and Scott James for their comments on an earlier version of this paper.