

Supreme emergencies and the protection of non-combatants in war

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Is it ever justifiable deliberately to target non-combatants in war? If so, under what circumstances? The history of warfare is littered with cases where non-combatants were deliberately targeted. Such cases include, *inter alia*, the massacre of the Melians at the hands of Athens in 416 BC, the fire-bombing of German cities by the British Royal Air Force (RAF) during the Second World War, the Nazi and Soviet atrocities in the same war, the atomic attacks on Hiroshima and Nagasaki at the end of that war, and the genocide and ethnic cleansing witnessed in Bosnia and Rwanda in the 1990s.¹ All too often, war has deteriorated into generalized slaughter, leading some to argue that it is always thus.² When this has happened, the perpetrators justify their actions through a mixture of arguments. The Athenians famously argued that ‘right, as the word goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must’.³ In other words, it cannot be unjust for the strong to massacre the weak because questions of justice apply only between equals. In the 1990s, Rwandan Hutu and Bosnian Serb butchers insisted that what they did was necessary to preserve the security of their own nations. The British and American governments during the Second World War argued that targeting German and Japanese non-combatants was necessary to save lives and prevail in the struggle against fascism.

It is this last idea, that it is sometimes necessary to suspend the moral restrictions on targeting non-combatants, that is investigated in this article. Although it was Winston Churchill who first put the idea forward, when he argued that

* I would like to thank Rod Lyon, Brian Orend, Nick Wheeler and especially Sara Davies for sharing their ideas with me.

¹ Thucydides, *The Peloponnesian war*, trans. C. F. Smith (London: Loeb Classical Library, 1923), bk 4, p. 98. On terror bombing, see Hermann Knell, *To destroy a city: strategic bombing and its human consequences in World War II* (Cambridge: De Capo Press, 2003). On the atomic attacks on Japan, see J. Samuel Walker, *Prompt and utter destruction: Truman and the use of atomic bombs against Japan* (Chapel Hill: University of North Carolina Press, 1997). On Rwanda, see Linda Melvern, *A people betrayed: the role of the West in Rwanda's genocide* (London: Zed, 2000). On the wars in former Yugoslavia, see James Gow, *The Serbian war project and its adversaries: a strategy of war crimes* (London: Hurst, 2003).

² This argument is put forward by Martin Shaw, *War and genocide* (Cambridge: Polity, 2003).

³ Thucydides, *The Peloponnesian war*, bk 4, p. 98.

the 'supreme emergency' confronting Britain in 1940 necessitated the bombing of German cities, it was Michael Walzer who developed it fully in his doctrine of the 'supreme emergency' exception. Since Walzer, the exception has not received the attention it deserves, though John Rawls used it to condemn the atomic attacks on Japan, Terry Nardin criticized it, and Brian Orend has offered a reformulation based on the idea that the supreme emergency is a moral tragedy in the proper sense of the term.⁴

After outlining Walzer's case, I argue that there are at least four major problems with it. First, it contradicts Walzer's own deontological account of the just war tradition. It flirts with realism and succumbs to utilitarianism, both perspectives that Walzer himself denounces. Second, creating exceptions to the prohibition on direct attacks on non-combatants weakens arguably the most significant element of the just war tradition's constraints on contemporary war.⁵ It is particularly problematic because, by countenancing the deliberate targeting of non-combatants, it undermines the Augustinian insistence that outward acts of violence in war are legitimate only if accompanied by an inward disposition of love. Third, Walzer's case is based on a 'thought experiment' that is historically problematic.⁶ Fourth, Walzer's thought experiment is also strategically flawed. That is, the direct targeting of non-combatants cannot be required by military necessity because the strategic principles of war demand that one's forces be orientated towards the accomplishment of political goals, unified in their approach, and directed against the enemy's military.

I argue that as a result of these four problems the existence of a 'supreme emergency' cannot justify overriding non-combatant immunity. According to Brian Orend, however, this position should be colloquially labelled the 'let justice be done though the heavens fall' position.⁷ He argues that demanding compliance with non-combatant immunity in supreme emergencies is both unrealistic and unreasonable.⁸ These are important criticisms that challenge the practical utility and morality of complying with non-combatant immunity at all times. According to Orend, the supreme emergency exemption demonstrates the moral tragedy of war—that in some cases, no matter what one does, it will be wrong. It is a moral tragedy in the full sense of the term, because 'each viable option you face involves a severe moral violation'.⁹

⁴ John Rawls, *The law of peoples* (Cambridge, MA: Harvard University Press, 1999), p. 98; Terry Nardin, *Law, morality and the relations of states* (Princeton, NJ: Princeton University Press, 1983), pp. 292–5; Brian Orend, *Michael Walzer on war and justice* (Cardiff: University of Wales Press, 2000), pp. 127–34; Brian Orend, 'Is there a supreme emergency exemption?', MS, 2003, to be published as Brian Orend, 'Is there a supreme emergency exemption?', in M. Evans, ed., *Revisiting just war theory* (Edinburgh: Edinburgh University Press, forthcoming). I am very grateful to Brian Orend for permission to cite this paper.

⁵ The writings of Paul Ramsey certainly seem to suggest that he believed the concept of non-combatant immunity from direct targeting to be the cornerstone of the just war tradition. See Paul Ramsey, *War and the Christian conscience: how shall modern war be conducted justly?* (Durham, NC: Duke University Press, 1961), pp. 34–59.

⁶ Walzer describes it as a 'morally important fantasy': Michael Walzer, *Just and unjust wars*, 2nd edn (New York: Basic Books, 1991 [first publ. 1977]), p. 259.

⁷ Orend, 'Is there a supreme emergency exemption?', p. 10.

⁸ *Ibid.*, p. 11.

⁹ *Ibid.*, p. 14.

In the final part of the article, I will seek to defend the view that non-combatant immunity should not be violated even in supreme emergencies, and that this is not an unrealistic position: on the contrary, I argue, there are always morally better alternatives and these alternatives are also often strategically better as well. The proportionality principle allows political and military leaders considerable room for manoeuvre that permits them to meet the threat with significant military force without violating the principle of non-combatant immunity. When confronted with a supreme emergency, proportionality allows leaders to take greater risks with the lives of enemy non-combatants without violating the principle of discrimination so long as their deaths are only the foreseen consequences of attacks on military targets. This distinction is important, because on the one hand it preserves the idea, first found in Ambrose and Augustine, that it is one's intent in war that shapes the justice of a particular action; and on the other hand, much more importantly, it protects non-combatants from some of the worst excesses of war.

Walzer's supreme emergency exception

Walzer's ethics of the conduct of war is based on a deontological conception of human rights. He argues that a thin veneer of rules derived from legal norms, religious and philosophical ideas, professional codes, reciprocal agreements and public dialogue establishes a 'war convention' that permeates all international society.¹⁰ According to Walzer, the second principle of the war convention is that non-combatants may never be attacked.¹¹ The principle of non-combatant immunity plays an important role in most of the major religious perspectives on the ethics of war, is grounded in customary international law, and has been a part of the just war tradition in one form or another since the nineteenth century.¹² Walzer agrees that anyone who is not engaged in making war is immune from attack. Non-combatants, he emphatically argues, 'cannot be attacked at any time. They can never be the objects or targets of military activity.'¹³ For Walzer, this is not a matter of granting special privileges to certain classes on the basis of their social or economic function in peacetime,¹⁴ but a fundamental moral right that cuts across time and space.

¹⁰ Walzer, *Just and unjust wars*, p. 44. We know that this must be a *thin* community of rules because Walzer argues elsewhere that 'thick' systems of rule are possible only within political communities housed in states. See Michael Walzer, *Thick and thin: moral arguments at home and abroad* (Notre Dame, IL: University of Notre Dame Press, 1996).

¹¹ The first principle is that, once war starts, opposing soldiers may intentionally attack one another: Walzer, *Just and unjust wars*, p. 138.

¹² On the presence of non-combatant immunity in major religious perspectives, see Paul Robinson, ed., *Just war in comparative perspective* (Dartmouth: Ashgate, 2003). Non-combatant immunity is integral to the 1949 Geneva Conventions and is set out in common article 3: see Adam Roberts and Richard Guelff, *Documents on the laws of war*, 3rd edn (Oxford: Oxford University Press, 2000), pp. 195–365.

¹³ Walzer, *Just and unjust wars*, p. 151.

¹⁴ Early canon laws articulating the principle of non-combatant immunity tended to limit it to those groups, such as farmers and clerics, whose work was essential for the peacetime functioning of the society. The prohibition on killing non-combatants was often therefore based on instrumentalism rather

To overcome the pacifist argument that it is incongruent for a just war theory to justify war yet demand non-combatant immunity, since non-combatants are always killed in wartime, Walzer deploys a somewhat revised doctrine of the double effect.¹⁵ The doctrine of double effect, first articulated in the thirteenth century by Thomas Aquinas (see below), holds that an act carried out with good intentions may nevertheless have evil consequences such as the killing of non-combatants.¹⁶ This leaves it open to the charge that the difference between *intending* harm and merely *foreseeing* it—which is integral to the doctrine—is a facile one that does not in practice afford protection to non-combatants.¹⁷ Walzer agrees that this is a problem and argues that leaders must not only desist from intentionally targeting non-combatants but must also take measures to reduce the risks faced by non-combatants as far as possible. As Walzer put it, ‘simply not to intend the death of civilians is too easy ... What we look for in such cases is some sign of a positive commitment to save civilian lives ... And if saving civilian lives means risking soldiers’ lives, the risks must be accepted.’¹⁸ For Walzer, this obligation even overrides the proportionality principle that the good accomplished outweighs the evil inflicted, because it is derived from the fundamental (deontological) rights held by non-combatants.

Although Walzer sets up the principle of non-combatant immunity in strict deontological terms, he allows two possible exceptions. The first, which there is no space to explore here, concerns reprisals. Walzer argues that belligerents may sometimes legitimately conduct reprisals against prisoners if doing so persuades one’s enemies to cease committing the unjust acts that prompted the reprisals.¹⁹ The second is the idea that non-combatant immunity may be waived during supreme emergencies.

According to Walzer, there are situations where the danger confronted in war is so great that it requires the use of measures expressly forbidden by the ‘war convention’.²⁰ An emergency becomes supreme when two conditions are satisfied. First, the danger must be imminent. In this context, ‘imminence’ carries two connotations. The danger must be present and real (the fear of future danger is not sufficient); and the danger must be so imminent that leaders are left with *no alternative* but to waive the rights of enemy non-combatants.²¹ This latter point is crucial for the discussion that follows here, because its practical

than deontological principle. See Frederick Russell, *The just war in the Middle Ages* (Cambridge: Cambridge University Press, 1975) and Maurice Keen, *The laws of war in the Middle Ages* (London: Routledge & Kegan Paul, 1965).

¹⁵ The pacifist case in this respect is put forward most persuasively by Robert Holmes, *On the morality of war* (Princeton, NJ: Princeton University Press, 1992).

¹⁶ Walzer, *Just and unjust wars*, p. 153.

¹⁷ This argument is made throughout Colm McKeogh, *Innocent civilians: the morality of killing in war* (London: Palgrave, 2002). For an alternative critique of the doctrine of double effect, see Alison McIntyre, ‘Doing away with double-effect’, *Ethics* 111: 1, 2001, pp. 219–55.

¹⁸ Walzer, *Just and unjust wars*, pp. 155–6.

¹⁹ *Ibid.* Brian Orend has convincingly challenged Walzer on this: see Orend, *Michael Walzer on war and justice*, pp. 87–9.

²⁰ Walzer, *Just and unjust wars*, p. 251.

²¹ *Ibid.*, pp. 254–5.

application, I believe, actually undermines the idea of a supreme emergency exception. Walzer states that a threat ‘neither compels, nor permits attacks on the innocent, *so long as other means of fighting and winning are available*’.²² I argue that there is good reason to think that there are always better alternatives.

The second element of the supreme emergency is the nature of the threat. In wartime, every nation believes that it is confronting a supreme danger. This is not enough, however. The danger, Walzer tells us, ‘must be of an unusual and horrifying kind’; it must, in other words, shock the conscience of humanity.²³ Most wars, according to Walzer, are not concerned with the defence of ‘ultimate values’ but instead involve questions of relative gains. Nations face a supreme emergency only when the costs of losing are catastrophic—when massacre on a large scale would be the result.

Walzer demonstrates his point by considering Britain’s decision to begin targeting German population centres in 1940. For Walzer, the threat posed by Nazism constituted the ultimate supreme emergency. His analysis of the decision to bomb German cities is based on two convenient fictions, which he acknowledges as such. The first is that, in the second half of 1940, Britain stood alone against Germany. This is utterly untrue. Not to mention the partisan soldiers who opposed Germany throughout Europe, Britain in 1940 received considerable assistance from the Commonwealth (Australia, Canada and India especially).²⁴ Second, Walzer acknowledges that he is conducting a thought experiment, since it was not the case that the strategic bombardment of cities was the only possible course of action open to the British in the final months of 1940, an issue to which I will return later. However, on the basis of these two assumptions, Walzer proceeds to argue that Britain was justified in bombing Germany cities from 1940 until 1942 when the imminence of the Nazi threat receded with the entry of the United States and Soviet Union into the war and Germany’s first reversals on the battlefield. The continuation of city bombing thereafter and the destruction of Japanese cities by the US air force were, in Walzer’s eyes, unjustifiable because the supreme emergency had passed.

According to Walzer, although Britain was justified in breaking the rules, its decision to do so was a moral tragedy and the political leadership was quite correct to refuse to honour Arthur Harris, the head of the RAF’s Bomber Command, at the end of the war. The decision to bomb was legitimate because ‘utilitarian calculation can force us to violate the rules of war only when we are face-to-face not merely with defeat but with defeat likely to bring disaster to the political community’.²⁵ In such cases, Walzer seems to suggest, leaders lose their agency: they are simply compelled to do whatever they can to defend the political community against a supreme danger. Leaders who refuse to take this

²² *Ibid.*, p. 255 (emphasis added).

²³ *Ibid.*, *Just and unjust wars*, p. 253.

²⁴ This point has been made by both Nardin, *Law, morality and the relations of states*, p. 292 and Orend, *Michael Walzer on war and justice*, p. 197.

²⁵ Walzer, *Just and unjust wars*, p. 268.

decision err by placing their own moral values above the well-being of the political community they have a responsibility to protect.

The case for a supreme emergency exception appears convincing at first glance, particularly when the war against Nazism is used as a case in point. It is very difficult to argue that Churchill should have risked defeat to maintain his own moral purity. To do so would have been an abrogation of his responsibilities to the British people *and* a betrayal of his duty to humanity. Indeed, Augustine argued that failing to protect the innocent against grave injustice when one is able to do so is as much a crime as committing the injustice itself.²⁶ More recently, the Dutch peacekeepers at Srebrenica in 1995 were rightly condemned for their failure to protect the town's civilian population.²⁷ On closer inspection, however, the concept is fundamentally flawed. In particular, it is inconsistent with the rest of Walzer's theory of the ethics of war, it is historically and strategically untenable, and it is out of step with contemporary western understandings of legitimate conduct in wartime.

Four objections

This section identifies four principal flaws in Walzer's supreme emergency exception to non-combatant immunity. Taken together, I argue, they make it clear that the case for an exception cannot be sustained. However, the case for an absolute ban on the intentional targeting of non-combatants then has to be defended against the charge that it is both unrealistic (that is, so idealistic that it is out of step with what a political community ought to expect its leaders to do) and irresponsible (that is, it demands that a political leader sacrifice the welfare of the political community to satisfy his or her own moral beliefs). I shall go on to present such a defence in the remainder of the article.

Realism and utilitarianism

The first problem with Walzer's supreme emergency exception is that it contradicts the deontological basis of his own theory of the ethics of war. As noted above, Walzer's ethics of war is based on neither theology nor law (either natural or positive), but the 'war convention', which is by and large a product of custom. Within this customary convention, however, there are some basic principles that are founded on the fundamental human rights enjoyed by all people as a result of their very humanity. The most fundamental of these deontological rules, grounded in human rights not customary practice, is the principle of non-combatant immunity. This principle states not that non-combatants may never be killed in war, but that they may never be *intentionally* targeted. We use the doctrine of the double effect to judge the difference

²⁶ See Herbert A. Deane, *The political and social ideas of St Augustine* (New York: Columbia University Press, 1963), pp. 154–8.

²⁷ See Jan Willem Honig and Norbert Both, *Srebrenica: record of a war crime* (London: Penguin, 1997).

between unjustified (intentional) killing and justified (unintended but foreseen) killing. However, Walzer countenances the abrogation of these rights in supreme emergencies. This brings his overall theory dangerously close to two perspectives on the ethics of war that he expressly rejects elsewhere: realism and utilitarianism. Although the supreme emergency exception can be distinguished from realism (though not wholly satisfactorily), it is very difficult to distinguish it from utilitarianism because at its heart is the idea that the defence of a political community is more important than the fundamental rights of individuals.

Realists hold that the defence of the state and its vital national interests are reason enough to go to war, and that when the state's vital interest or very survival is at stake the only constraint on state action should be prudential considerations. Thus, classical realists tend to be conservative about supporting the use of force. Clausewitz's famous dictum that 'war is nothing but the continuation of policy by other means' does not so much give statesmen a free hand to wage war as implore them to calibrate their use of the military tool with precise policy objectives.²⁸ The politics of prudence calls for the application of traditional *jus ad bellum* criteria such as proportionality of ends, last resort (because waging war is always more costly than other measures) and likelihood of success. In relation to the conduct of war, realists argue that leaders may do anything to ensure victory. In limited wars, prudence may dictate that measures be taken to protect enemy non-combatants. In other wars, however, the protection of non-combatants must not be allowed to compromise the chances of success. As Steven Forde has put it, 'acting in accordance with the international common good when others refuse to do so is harmful, and perhaps even immoral, considering the state's obligation to the safety of its members'.²⁹

The idea that good statesmen sometimes have to get their hands dirty is one of the central characteristics of realism, particularly the Christian realism of Reinhold Niebuhr.³⁰ The Niebuhrian inflection of some of Walzer's thinking was evident prior to *Just and unjust wars* in his discussion of the 'dirty hands' principle. Here, Walzer argued that it is impossible to govern without occasionally overriding basic moral principles to accomplish a greater political good. Indeed, he insisted that there are instances where a ruler has a *duty* to do so, though doing so incurs moral guilt.³¹

Despite the similarities between Walzer and Niebuhr, *Just and unjust wars* begins with a denunciation of realism. He argues that an interests-based concept of war offers no coherent way of talking about war.³² Moreover, he points

²⁸ Carl von Clausewitz, *On war*, ed. and trans. Michael Howard and Peter Paret (London: Everyman's Library, 1993), p. 77.

²⁹ Forde, 'Classical realism', in Terry Nardin and David R. Mapal, eds, *Traditions of international ethics* (Cambridge: Cambridge University Press, 1992), p. 79.

³⁰ Reinhold Niebuhr, *Christianity and power politics* (New York: Charles Scribner's Sons, 1940), and *Moral man and immoral society* (New York: Macmillan, 1960).

³¹ Michael Walzer, 'Political action: the problem of dirty hands', in Marshall Cohen, Thomas Nagel and Thomas Scanlon, eds, *War and moral responsibility* (Princeton, NJ: Princeton University Press, 1974), pp. 63–83.

³² Walzer, *Just and unjust wars*, p. 14.

out that the discourse of war is an inherently moral discourse and that war is not an inevitable part of international life. Thus Walzer dismisses each of the cornerstones of realism: the idea that international life is amoral and interests-driven; that 'moralism' in world politics is dangerous; and that war is inevitable in an anarchical system.³³

However, the realist prescriptions that Walzer rejects sound very similar to his supreme emergency exception. Most realists accept the view that states will find it prudent broadly to follow the main elements of the laws of war in all but the most extreme of circumstances, owing to the power of reciprocity and the desire for foreign alliances. However, whenever necessity dictates, leaders would and indeed should override the rules. According to this view, all the supreme emergency does is offer a guide to the types of circumstances in which leaders will reject the rules. Any political leader, a realist would argue, can construct a plausible case that what he or she is facing is a supreme emergency.³⁴ Read this way, the 'exception' could be cast so broadly that the 'rule' of non-combatant immunity would cease to offer much protection.

Although the supreme emergency exception seems to have much in common with realism, there are important grounds for rejecting the idea that they are synonymous. First, Wheeler argues that Walzer is careful when defining the supreme emergency to distinguish between threats to all humanity and threats to individual states. Where the threat is felt only by a particular state, leaders should be more circumspect about breaking the rules.³⁵ However, Walzer is, as we have seen, quite clear on the point that a single political community may feel a supreme emergency when that community is under dire threat. While it may be *easier* to invoke the exception when the threat confronts all humanity, this argument does not really provide a clear distinction between Walzer's position and realism, for both concur that when a political community confronts a horrific danger, the exception may be invoked.

A second and more fundamental distinction is that in his discussion of the supreme emergency Walzer still holds that there are binding moral constraints on leaders which may be temporarily overridden in extreme cases but may never be ignored. This qualification reveals Walzer's discomfort with his own argument. Realists would feel no such discomfort because they argue that in such cases there are no binding moral constraints, and so no need for state leaders to justify their actions as warranted by a supreme emergency: military necessity and prudential arguments would suffice. However, although this argument may provide a clear intellectual distinction, it is not at all clear that it makes a difference in practice.

It is more difficult for Walzer to defend himself against the charge that the doctrine of the supreme emergency is a utilitarian doctrine and that it therefore

³³ This assessment mirrors, but differs from, Brian Orend's. See Orend, *Michael Walzer on war and justice*, pp. 62–3.

³⁴ This type of argument is put most eloquently in relation to sovereignty and intervention by Stephen D. Krasner, *Sovereignty: organized hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

³⁵ See Nicholas J. Wheeler, 'Dying for "Enduring Freedom": accepting responsibility for civilian casualties in the war against terrorism', *International Relations* 16: 2, 2002, p. 223, n. 55.

contradicts his own denunciation of utilitarianism. In the preface to the second edition of *Just and unjust wars*, Walzer emphatically rejected utilitarianism, arguing that ‘considerations of utility play into the scenario on many points, but they cannot account for it as a whole. Their part is subsidiary to that of rights; it is constrained by right’; and, he continues, ‘at every point, the judgments we make are best accounted for if we regard life and liberty as something like absolute values’.³⁶ In war, Walzer argued, there are certain rights that are inalienable. Specifically, he identifies the prohibition of rape as one such inalienable right, and we can suppose that non-combatant immunity is another.³⁷ ‘A legitimate act of war’, Walzer concludes, ‘is one that does not violate the rights of the people against whom it is directed.’ Moreover, ‘no one can be threatened with war or warred against, unless *through some act of his own* he has surrendered or lost his rights’ to life and liberty.³⁸ Thus Walzer clearly repudiated the utilitarian idea that if a cause is just one may use whatever means are necessary to secure victory, thereby securing the greatest good of the greatest number.³⁹ Indeed, in his discussion of supreme emergencies he concedes that ‘to kill 278,966 civilians (the number is made up) in order to avoid the deaths of an unknown but probably larger number of civilians and soldiers is surely a fantastic, godlike, frightening and horrendous act’.⁴⁰

But does not the doctrine of the supreme emergency force us to make such utilitarian calculations? Is it not founded on the very idea that in certain circumstances state leaders should prioritize the greater good over the (supposedly inalienable) rights of non-combatants? Walzer concedes that it does, and uses a utilitarian analysis to defend the British decision to bomb German cities in 1940 and criticize the American decision to launch an atomic attack on Japan in 1945: Britain faced defeat in 1940, the US did not face defeat in 1945. According to the doctrine of supreme emergency, utilitarian calculations do come into play and may override the rules when defeat and disaster are imminent, but not in other circumstances.⁴¹

It is clear that Walzer cannot avoid the charge of utilitarianism when it comes to the supreme emergency; and thus his ethics of war are inconsistent. More troubling, however, is the effect that permitting a limited right to override the rules has on the moral and legal quality of the rules. Seen in this light, the rights of non-combatants are conditional, not inalienable. They may be breached when a political community justifiably believes that it confronts a supreme emergency. Such an argument could have been used to justify Serbian tactics in both Bosnia and Kosovo. From a Serbian perspective there was every

³⁶ Walzer, *Just and unjust wars*, p. xxii.

³⁷ *Ibid.*, p. 134.

³⁸ Walzer, *Just and unjust wars*, p. 135 (emphasis added).

³⁹ This utilitarian argument can be found in some of the earliest attempts to outline a theory of justified war. It is even implied in some medieval canon law, which spent much more time explicating the conditions by which a war may be waged justly than it did exploring restraints on the conduct of war. See Russell, *The just war in the Middle Ages*, p. 71.

⁴⁰ Walzer, *Just and unjust wars*, p. 262.

⁴¹ *Ibid.*, p. 168.

reason to believe that defeat in Bosnia and Kosovo would lead to massacre and forced expulsion, however misplaced that belief. It would be quite feasible to argue that the Serbs believed that they faced a supreme emergency in the 1990s and that the defence of Serbian Bosnia and Kosovo required that the rights of Bosnians and Kosovars be overridden. However plausible we find this argument (I do not find it very plausible), we must accept that Walzer's formulation of the supreme emergency doctrine allows the possibility of making it. Moreover, the supreme emergency argument assumes that rule-breaking behaviour *will* produce the desired effect. How would we regard the terror bombing of cities in response to a supreme emergency if, in the end, the side conducting the terror bombing did not prevail?⁴² In this sense, the utility of a supreme emergency decision can only be assessed retrospectively; it cannot provide a moral guide to state leaders at the time of confronting the emergency.

The first problem with Walzer's doctrine of supreme emergency, therefore, is that it contradicts his broader ethics of war. Although it can be defended against the charge that it resembles realism, it has to be conceded that it is an essentially utilitarian doctrine. However limited the occasions where a valid supreme emergency argument can be made, it nevertheless has the effect of rendering conditional what Walzer elsewhere describes as fundamental rights. According to the supreme emergency doctrine, non-combatants lose their immunity because of the actions of others. This contradicts Walzer's claim—which underpins his concept of the double effect—that utilitarian claims are secondary to the deontological rights held by all non-combatants.

The rule of non-combatant immunity

The second reason for rejecting the supreme emergency argument flows from our discussion of utilitarianism: namely, the ethics and laws of war impose a complete ban on the direct intentional targeting of non-combatants. Moreover, under the Rome Statute of the International Criminal Court (ICC), the leaders of almost one hundred states would face criminal charges if they ordered the direct targeting of non-combatants, for whatever reason.⁴³

The idea that non-combatants should be immune from direct targeting is one of the fundamental elements of the 'war convention', however conceived. Sun Tzu, the renowned Chinese strategist of the fifth century, insisted that armies should treat prisoners and non-combatants with respect.⁴⁴ The ancient Hindu, Egyptian and Hebrew civilizations all produced customs relating to the humane treatment of prisoners and non-combatants in wartime.⁴⁵ In the western tradition, Plato insisted that armies refrain from burning habitations and should

⁴² I am very grateful to Sara Davies for raising this point.

⁴³ See Alex J. Bellamy and Marianne Hanson, 'Justice beyond borders? Australia and the International Criminal Court', *Australian Journal of International Affairs* 56: 3, 2002, pp. 417–33.

⁴⁴ Sun Tzu, *The art of war*, trans. Samuel Griffith (Oxford: Oxford University Press, 1963), pp. 76–8.

⁴⁵ Paul Christopher, *The ethics of war and peace: an introduction to legal and moral issues* (Englewood Cliffs, NJ: Prentice-Hall, 1994), pp. 9–10.

kill only those who are directly foes, and not all the men, women and children of the enemy state.⁴⁶ Although Augustine was ambivalent about the treatment of non-combatants,⁴⁷ virtually every other key member of the just war tradition forbade the direct killing of non-combatants. Medieval canon law prohibited the use of force against certain classes of people who performed important peacetime roles and played no role in hostilities (clerics, farmers, merchants), while the chivalric tradition forbade violence against the weak.⁴⁸

The principle of non-combatant immunity is arguably the most clearly understood and widely accepted element of the contemporary laws of war. The idea is enshrined in all four of the Geneva Conventions concluded on 12 August 1949. The central concern of all four conventions was the protection of the victims of war. Many of the specific articles were derived from proposals formulated by the International Committee of the Red Cross (ICRC) between 1945 and 1948. Because of the large number of signatories, these conventions are assumed to hold the status of customary international law—a point recognized by the UN Secretary General in 1993. The conventions were also embodied in the founding statutes of the criminal tribunals for former Yugoslavia and Rwanda, which also confirmed that they formed part of customary law.⁴⁹ Crucially, common article 3 of the conventions, which clearly sets out the rule of non-combatant immunity, is a peremptory rule of war. It demands that: ‘Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms, and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth.’⁵⁰

According to Colm McKeogh, the ethical and legal principle of non-combatant immunity is important for at least seven reasons. First, non-combatants have committed no wrong and therefore they may not have war waged upon them. Second, non-combatants are not participating in the fighting. Third, a reason developed from the chivalric tradition of the Middle Ages, non-combatants are unable to defend themselves. Fourth, killing non-combatants is militarily unnecessary. Fifth, maintaining non-combatant immunity reduces the casualties of war (a particularly pertinent question in the contemporary era when many more non-combatants than combatants die in war). Sixth, sparing women and children (and, we may add, those who perform essential peacetime services such as farmers) is important for species survival. Seventh, killing non-combatants is

⁴⁶ Plato, *The republic*, ed. Robin Waterfield (Oxford: Oxford University Press, 1998), bk V, p. 471.

⁴⁷ Richard Shelly Hartigan, ‘Saint Augustine on war and killing: the problem of the innocent’, *Journal of the History of Ideas* 27: 2, 1966, pp. 195–204.

⁴⁸ See Russell, *The just war in the Middle Ages*; Keen, *The laws of war in the late Middle Ages* (London: Routledge & Kegan Paul, 1965); Richard Barber, *The knight and chivalry*, rev. edn (Woodbridge: Boydell, 1974); Richard W. Kaeuper, *Chivalry and violence in medieval Europe* (Oxford: Oxford University Press, 1999).

⁴⁹ See G. J. Bass, *Stay the hand of vengeance: the politics of war crimes tribunals* (Princeton, NJ: Princeton University Press, 2000).

⁵⁰ Common article 3 of the Geneva Conventions in Roberts and Guelff, *Documents on the laws of war*.

contrary to the 'war convention', however understood.⁵¹

It is not necessary to labour this point. Suffice it to say that the supreme emergency exception endorses the suspension of one of the most fundamental rights permitted by the ethics and laws of war. Importantly, none of the sources cited here suggest that the right is conditional on the demands of military necessity.

The historical fallacy of the fateful choice

The third problem with the supreme emergency exception is that it is based on a fictitious worst-case scenario, from which it extrapolates a moral exception with practical import. The fallacy, I argue, is the claim that political and military leaders confront one of two possibilities in supreme emergencies: refuse to break the rules of war and face destruction; or directly target enemy non-combatants. The case that Walzer uses to make his point is the British decision to target German cities at the end of 1940. According to Walzer, 'the more certain a German victory appeared to be in the absence of a bomber offensive the more justifiable was the decision to launch the offensive'.⁵² This view is problematic for two reasons. First, it overlooks the extent to which British thinking had incorporated the targeting of non-combatants into its air strategy a long time before 1940. Acknowledging this suggests that the choice presented itself in 1940 not in the light of a moral tragedy, but because it reflected dominant thinking in British strategic circles. Second, by presenting the choice in an 'either-or' fashion, it overlooks the range of alternative strategies that Britain could have used to defend itself without terrorizing German civilians.

The idea of using the strategic bombing of cities and mass killing of non-combatants to achieve positive outcomes in war indirectly was a cornerstone of British thinking a long time before 1940. In 1918, the Chief of the British Air Staff, Major-General Frederick Sykes, supported the strategic bombardment of cities, insisting that 'the aim of such attacks would be to sow alarm, set up nervous tension, check output, and generally tend to bring military, financial, and industrial interests into opposition ... The wholesale bombing of densely-populated industrial centres would go far to destroy the morale of the operatives.'⁵³ After the war, the first head of the RAF, Hugh Trenchard, was a keen advocate of terror bombing. Immediately after the First World War, he complained that the only reason why he had been unable to destroy Germany's industrial centres had been the lack of resources.⁵⁴ Four years later, he made the same point more emphatically: 'Why is it that your [the RAF's] policy of attack from the air is so different from the policy of the Army, whose policy is

⁵¹ McKeogh, *Innocent civilians*, pp. 7–11.

⁵² Walzer, *Just and unjust wars*, p. 259.

⁵³ Cited by Sir Charles Webster and Noble Frankland, *The strategic air offensive against Germany 1939–1945*, vol. 1 (London: HMSO, 1961), p. 46.

⁵⁴ *Ibid.*, p. 46.

to attack the enemy's army, while yours is to attack the civilian population ... The Army policy was to defeat the enemy army – ours is to defeat the enemy nation.⁵⁵

Prior to the outbreak of the Second World War, Trenchard continued to insist that the RAF develop its ability to strike enemy population centres, even at the expense of other arms of the military.⁵⁶ Once war broke out, he argued that it was not the role of the RAF to provide close air support to the British Expeditionary Force in Belgium. This view stood at odds with the Luftwaffe's close relationship with the German army and its role in combat support.⁵⁷ The air force, Trenchard argued, should be deployed against the enemy's industrial and civilian centres in order to destroy production and morale.⁵⁸ Crucially, Trenchard's view was echoed across the RAF. A Staff College manual produced in 1922 discussed the crucial role played by strategic campaigns aimed at undermining the will of the populace through direct attack;⁵⁹ and Brigadier General Groves heralded the new air power that replaced the 'war of lines' with the 'war of areas', supporting strategic bombardment for its ability to have a significant psychological effect on the enemy population.⁶⁰

My point here is that by 1939–40 strategic thinking in the RAF was strongly predisposed towards the use of air power for the strategic bombardment of industrial and civilian population centres. Although none of the writers cited above actually called for the demolition of cities, each commended the psychological impact of strategic bombardment. Such psychological effects, Douhet had observed, are brought about by the direct targeting of civilian population centres.⁶¹ Thus, it is not the case that the strategic bombardment of German cities was a choice forced upon the British government by the supreme emergency it confronted. Indeed, one of the principal advocates of this policy, Trenchard, confessed that he was unsure whether strategic bombardment would be successful.⁶² However, he wielded what has been described as 'absolute' power over the RAF, and for more than two decades before the outbreak of war his focus had been on the importance of the offensive ability of the air force to attack civilian and industrial centres. It is unsurprising, therefore, that British politicians were presented with the tragic choice of either bombarding German cities or 'doing nothing' to reduce the likelihood of British defeat.

⁵⁵ Webster and Frankland, *Strategic air offensive*, vol. 4, p. 66 (emphasis added).

⁵⁶ H. W. Koch, 'The strategic air offensive against Germany', *Historical Journal* 34: 1, 1991, p. 123.

⁵⁷ *Ibid.*, p. 127. This view is supported by John Terraine, *The right of the line: the Royal Air Force in the European war 1939–1945* (London: Sceptre, 1988), p. 144.

⁵⁸ See Philip S. Meilinger, 'The historiography of airpower: theory and decline', *The Journal of Military History* 64: 2, 2000, p. 481.

⁵⁹ Allan D. English, 'The RAF Staff College and the evolution of British strategic bombing policy', *Journal of Strategic Studies* 16: 3, 1993, pp. 408–31.

⁶⁰ Brigadier General P. R. C. Groves, *Our future in the air: a survey of the vital question of British air power* (London: Hutchinson, 1922).

⁶¹ Giulio Douhet, *Command of the air*, trans. Dino Ferrari (London: Coward-McCann, 1942). There is evidence to suggest that Douhet's ideas were very popular in the UK. See Louis A. Sigaud, *Douhet and aerial warfare* (New York: Putnam's, 1941).

⁶² Koch, 'The strategic air offensive', p. 127.

That choice, however, was a product not of the essential moral tragedy of war, but of the strategic preferences of the RAF elite.

Were there alternatives to the strategic bombardment of German cities? It is certainly the case that the bombardment was ineffective: German production in July 1944 was more than three times that of February 1942.⁶³ Perhaps the most innovative and forward-thinking strategist in the RAF, Wing Commander John Slessor, believed that air power could be used more effectively. In a series of lectures to the Army Staff College between 1931 and 1934, Slessor argued that strategic bombardment was not a suitable way of supporting Britain's expeditionary land forces. Reflecting on scenarios similar to the First World War (a land war in Europe), he argued that air power could be most effectively used to isolate enemy forces in the field by attacking the enemy's military supply lines, its communications, transportation and headquarters, and by providing close air support to land forces. In place of the rigid separation of air and land commands supported by the focus on strategic bombing and Trenchard's belief that the army and air force had different objectives in war, Slessor argued that the two components had the same objective and should share command centres.⁶⁴ Slessor's ideas were not merely preferable in theory. His preferred strategy of targeting enemy supply lines was used with great effect by the US Air Force immediately before D-Day in 1944.

Had Slessor, not Trenchard, been the dominant figure in the RAF, and had the unfounded belief that strategic bombing of population centres produced significant and positive effects not become so integral to top-level thinking, the British government would not have confronted quite the same 'fateful choice' in late 1940. There would have been a much wider selection of options, including many that did not require the direct targeting of non-combatants. The so-called 'fateful choice', I argue, was a product not of the supreme emergency in which Britain undoubtedly found itself, but of the RAF's preferences. It presented itself in the terms it did because, at least twenty years earlier, the RAF leadership had taken the moral decision that it was legitimate to target non-combatants to make a psychological and economic impact upon the enemy. 'Fateful choices' are similarly constructed in other supreme emergencies. However, a military that refuses to countenance the direct targeting of non-combatants does not resign itself to inevitable defeat, but develops alternative strategies. Such strategies, the following section suggests, are consistent with modern ideas about the essentials of successful military strategy.

⁶³ Kenneth P. Werrell, 'The strategic bombing of Germany in World War II: costs and accomplishments', *Journal of American History* 73: 3, 1986, p. 711.

⁶⁴ His central ideas are set out in John C. Slessor, *Air power and armies* (London: Oxford University Press, 1936).

The strategic fallacy of the fateful choice

The fourth problem with the supreme emergencies exception is that, rather than being predicated on hard-nosed military reality, the idea that armed force should be used against non-combatants runs contrary to key aspects of contemporary strategic thinking, particularly those derived from Jomini. Specifically, using force against non-combatants contradicts the idea that militaries should employ an 'economy of force', should endeavour to defeat the enemy's armed forces and should attack the enemy's military 'centres of gravity'. Thus, with the exception of three notable approaches to strategy (Douhet's air strategy adopted by the RAF, Mao Zedong's 'people's war' strategy, and counter-city nuclear strategy⁶⁵), military strategy tends to reject the direct targeting of non-combatants on prudential grounds.

Both of the most renowned strategic theorists, Sun Tzu and Clausewitz, placed important prudential limits on the conduct of war. For both, the conduct of war should be determined by its objectives, and each act of war orientated towards its conclusion. Sun Tzu, for instance, emphasized the importance of the non-military aspects of war and argued that the enemy's army should always be given a road down which to retreat once victory had been secured.⁶⁶

Although Clausewitz was not very interested in the non-military aspects of war, his strategic ideas were based on two fundamental ideas. First, war is the continuation of policy by other means: that is, war is a means to an end and not an end in itself, and 'no other possibility exists, then, than to subordinate the military point of view to the political'.⁶⁷ Second, the way to prevail in war is to defeat the enemy's military forces. War, Clausewitz recognized, does not take place in isolation but within a wider political context. The way one fights has a direct bearing on that wider context. Fighting in an unrestrained fashion, by killing non-combatants, makes it much more difficult to accomplish the political goals that the war is being fought to achieve. As Colonel Kuhn observed, 'the quickest way of achieving and maintaining a lasting peace is to conduct hostilities humanely ... it is evident that humanitarian considerations cannot be disassociated from the strategic concept of military leaders'.⁶⁸ The conduct of war should be limited to accomplishing one's political goals by defeating the enemy's military forces. Moving beyond these limitations carries with it the risk of losing allies, raises the danger that the enemy will reciprocate in kind, and makes it much more difficult to build a lasting peace once the war is over.

There is an important question mark, however, over whether these prudential restraints on war are relevant in supreme emergencies. Sun Tzu argued that

⁶⁵ See Douhet, *Command of the air*; John Shy and Thomas Collier, 'Revolutionary war', in Peter Paret, ed., *Makers of modern strategy from Machiavelli to the nuclear age* (Princeton, NJ: Princeton University Press, 1986), pp. 845–52; Herman Kahn, *Thinking about the unthinkable* (New York: Horizon, 1962).

⁶⁶ Sun Tzu, *The art of war*, pp. 109–10.

⁶⁷ Clausewitz, *On war*, p. 607.

⁶⁸ Cited by Justin Morris and Hilaire McCoubrey, 'Law, politics and the use of force', in John Baylis, James Wirtz, Eliot Cohen and Colin S. Gray, eds, *Strategy in the contemporary world: an introduction to strategic studies* (Oxford: Oxford University Press, 2002), p. 54.

as a last resort it was legitimate to attack the enemy's cities, while Clausewitz argued that the destruction of the enemy's army was the foremost goal; and, although he acknowledged that the enemy's public opinion played an important part in shaping the outcome of war, Clausewitz did not argue that the destruction of cities would be necessary. The problem with Sun Tzu's position, as both Clausewitz and his Swiss predecessor Jomini implicitly recognized, is that targeting non-combatants in cities does little to diminish the fighting capacity of the enemy's fielded army. Indeed, firepower directed at cities is firepower not directed at the enemy's army, and unless one has firepower to spare (which is never the case in a supreme emergency), attacking the enemy's non-combatants cannot be the most effective way of inflicting military defeat.

Jomini, arguably the most influential strategist of the modern era, put forward a number of principles to guide the conduct of war, principles that still guide the planning process in many western militaries. The first is to take the initiative and attack the enemy's 'feeble' points. The second is to 'direct our movement against the most advantageous feeble part ... the one whose occupation will ensure us the most favourable opportunities and results'.⁶⁹ The third is to bring a combined effort to bear upon a single target. In the contemporary era, this means mounting joint operations that simultaneously combine land, air and sea components. The last of Jomini's principles relevant to this discussion is the requirement to follow up a military victory in order to deny the enemy an opportunity to regroup.

If we accept the proposition that these four principles contribute to the success of a military operation, it becomes apparent that directly targeting non-combatants in a supreme emergency is consonant with none of them and therefore not conducive to military success. Attacking the enemy's cities rather than its army awards the military initiative to the enemy. Once an army has been raised and deployed, such a strategy allows the enemy to marshal, organize and manoeuvre its forces with fewer restrictions than would be the case if military rather than non-combatant targets were given priority. Second, the 'advantage' to be gained by bombing the enemy's cities is at best indirect. It assumes, first, that it will damage the enemy's morale (whereas evidence from the Second World War suggests that the contrary is true) and, second, that it will have a negative impact on the war-fighting capacity of the enemy's army. While there is evidence to suggest that in the long run the destruction of cities and industrial centres has a negative impact on a state's war-fighting capacity, it is unlikely to diminish the capacity of the enemy's army in the short term and thereby avert the immediate supreme emergency. It was the Luftwaffe's inability to achieve command of the skies over Britain, not the destruction of German cities and industries, that averted the supreme emergency in 1940–41. Thankfully for Britain, Germany never massed an invasion army in northern Europe in preparation for an invasion. If it had done so (and recognizing the

⁶⁹ Antoine-Henri Jomini, *Treatise on grand military operations*, trans. S. B. Holabird (New York: Van Nostrand, 1965), p. 448.

danger of counterfactual arguments), Britain's strategic choices would have been shown lacking, because the bombardment of German cities would have done nothing to reduce the potency of the invading army.

Third, as noted in the previous section, the decision to use RAF Bomber Command for strategic purposes dramatically reduced the potential for improving operational effectiveness through joint and combined activities. Indeed, Trenchard advocated the complete separation of army and air force, insisting that the two fight *different* wars. Today, most advanced militaries follow the idea of 'joint warfare' implied by Jomini, the idea being that the greatest effect is accomplished when the different arms of the military operate simultaneously to achieve common goals.⁷⁰ Activating the supreme emergency exception means denying yourself the potential advantages of joint warfare. Finally, by its nature it is difficult to follow up successful strategic bombing attacks. Factories can be rebuilt and production sites can be moved.

There is therefore a good case to be made that it does not make strategic sense to violate the rights of enemy non-combatants when a state confronts a supreme emergency. A strategy of targeting non-combatants has very little effect on the immediate ability of the enemy to inflict the impending calamity, and may even reduce the capacity of the defenders to resist by drawing their fire away from the enemy's military forces and dividing the different components of the military.

Given these four problems, the idea that it is legitimate to suspend the principle of non-combatant immunity in supreme emergencies is brought into serious question. First, although it can be defended against the charge of realism, it is a clearly utilitarian doctrine that contradicts Walzer's rights-based approach to the ethics of war. There is a real danger that making what are otherwise considered to be fundamental rights conditional on criteria beyond the control of those in line to lose their immunity will have the effect of making rights secondary to utilitarian considerations. As in previous centuries, the right of non-combatant immunity would become instead a privilege bestowed by the opposing military on the condition that it did not contravene military necessity. Second, contemporary legal and moral thinking flatly rejects the direct targeting of non-combatants, in all circumstances. The idea that non-combatants may be intentionally targeted is simply not countenanced by contemporary international society.⁷¹ Third, Walzer's thought experiment, which suggests that governments face 'either-or' choices in supreme emergencies, is a historical fallacy. There are always alternative courses of action, and where those alternatives have been foreclosed, it is usually because of the prior moral choices of the people or institutions involved. This is clearly demonstrated by the British decision to bomb German cities in 1940, which was not a decision 'forced' upon

⁷⁰ Roger Beaumont, *Joint military operations: a short history* (London: Greenwood, 1993).

⁷¹ And it is the direct targeting of non-combatants that forms the basis for the global consensus against terrorism.

the RAF by necessity but a direct product of over two decades of strategizing. Finally, the idea that the direct killing of non-combatants can be *essential* to successful defence during a supreme emergency is strategically untenable. There is no evidence that the bombing of German cities staved off defeat or hastened victory. Indeed, it is difficult to recall a single case where killing non-combatants has won a war. In the 1990s, Bosnian Serbs and Rwandan Hutus both suffered military defeats in part because they directly attacked non-combatants. There is therefore good reason to reject Walzer's supreme emergencies exception to non-combatant immunity.

Proportionality and discrimination in supreme emergencies

Despite this, my claim that the principle of non-combatant immunity should be upheld remains vulnerable to the dual charge that it is unrealistic to expect leaders to do this and that to ask them to do so is to ask them to place their responsibility to their own political community second to their (or our) personal moral preferences. As Sidney Axinn put it, 'in order to govern an institution one must sometimes do things that are immoral', and 'we do not want leaders who are so concerned with their own personal morality that they will not do what is necessary to ... win the battle'. What is more, 'we have an inept leader if we have a person who is so morally fastidious that he or she will not break the law when that is the only way to success.'⁷²

Similarly, Brian Orend has argued that there are two principal flaws with the demand for strict adherence to non-combatant immunity. First, he argues that it is 'unrealistic'. In the real world, Orend argues, political leaders will not respond to supreme emergencies 'with one hand tied behind their back'. Second, echoing the 'dirty hands' doctrine discussed above, 'it is fundamentally irresponsible on the part of the victim country's government, which has a foremost duty to protect its country's citizens from massacre and enslavement'.⁷³ To fail to discharge that responsibility would be to fiddle while Rome burned.

Orend, Axinn, Walzer and others are correct to argue that political leaders will not respond to supreme emergencies with one hand tied behind their back and, more important, that they *should* not. It is one thing to use all necessary means to overcome the supreme emergency, however, and quite another directly to attack non-combatants. The latter two of my four criticisms of the supreme emergency exception suggest that the 'fateful choice' between defeat and revoking non-combatant immunity is a false one. Killing non-combatants is certainly not an essential component of military success and it seems strange that it is deemed to become so in supreme emergencies.

The problem is that the victim of a supreme emergency is often hard-pressed. By the time it confronts such an emergency, a political community is under immense stress. Its military, economy and vital networks are all heavily

⁷² Sidney Axinn, *A moral military* (Philadelphia, PA: Temple University Press, 1989), p. 189.

⁷³ Orend, 'Is there a supreme emergency exemption?', p. 11.

damaged. In this situation, it would be imprudent for military commanders to insist on strict adherence to non-combatant immunity, for doing so would place military personnel and equipment in greater peril, reducing the chances of a successful defence. This may be acceptable in a 'war of choice' or another type of 'normal' war, but not in supreme emergencies where men and *matériel* cannot be spared. In such circumstances, it is surely justifiable for victims to prioritize the safety of their soldiers over that of enemy non-combatants. This is a compelling argument, but one can accept it without countenancing the deliberate targeting of non-combatants. The key to doing so lies in the distinction between the principle of discrimination, which places an absolute prohibition on the intentional targeting of non-combatants, and the principle of proportionality, which places limits on the number of foreseen but unintentional non-combatant casualties. It is possible, I argue, to defeat a supreme emergency by deploying overwhelming force without breaking either the discrimination or proportionality principles.

The principle of proportionality has its roots in Thomas Aquinas's discussion of double effect. Aquinas argued that:

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended ... accordingly the act of self-defence may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in being ... And yet, though proceeding from good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defence, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defence will be lawful ... But as it is unlawful to take a man's life, except for the public authority acting for the common good, as stated above, it is not lawful for a man to intend killing a man in self-defence, except for such as have public authority, who while intending to kill a man in self-defence refer this to the public good.⁷⁴

As formulated by Aquinas, the doctrine of double effect has two fundamental elements. The first is that any act may have two consequences: one that is intended and one that is not. The first question that anyone who kills another (either within or without war) needs to answer is: 'What is my intent?' There are only two legitimate responses to this. If the question is asked of an individual, the only legitimate intent that one may have is self-preservation. Even then, it is incumbent upon the killer to demonstrate through his actions that he did not intend the death of his assailant. If the question is put in relation to a government and a war, the government must demonstrate that its intent is to promote the common good and that its cause is just. The second element of double effect focuses on the objective consequences of the action. Even if we

⁷⁴ Thomas Aquinas, cited by Ramsey, *War and the Christian conscience*, pp. 39–40.

intend good, we must be sure that the good achieved outweighs the possible negative consequences. As Ramsey put it, 'the evil, secondary effect ... must not be out of proportion to the good effect one intends to obtain'.⁷⁵

The principle of double effect went through many revisions before it developed into the coherent moral theory that Walzer cites approvingly. According to Ramsey, the principle legitimizes the use of force if four conditions are met:

- 1 The desired end must be good in itself.
- 2 The good effect and not the evil effect must be intended.
- 3 The good effect must not be produced by means of the evil effect.
- 4 The good of the good effect must outweigh the evil of the evil effect.⁷⁶

The principle of double effect therefore offers ways of responding to supreme emergencies that are both morally and strategically preferable to revoking non-combatant immunity.

In a supreme emergency, the protection of one's forces is paramount. In such a situation it makes no sense to insist that leaders place their soldiers and airmen at greater risk to protect enemy non-combatants. Thus, for example, leaders might insist that pilots fly at higher altitudes to avoid anti-aircraft fire, even though this makes it more difficult for them to hit their target and more likely that inaccurate bombs will kill enemy non-combatants. To compensate for the lack of accuracy, a leader may assign more aircraft and more bombs to attack a particular military target, increasing the collateral devastation. In a supreme emergency, such a strategy may be extended across the whole range of military activities: soldiers will not be required to ensure that there are no non-combatants in an area before firing and whenever in doubt they may be required to assume that someone is a combatant until proven otherwise. Through strategies such as these, leaders can maximize the security of their own soldiers. The cost is that more enemy non-combatants will die, because the lives of 'our' soldiers are prioritized over the lives of 'their' non-combatants. In a supreme emergency, the proportionality principle would permit almost any degree of collateral damage, so long as the destruction were a foreseen but unintended consequence of an attack on legitimate military targets, those targets were of sufficient importance, and the collateral damage was not the means of victory. According to this approach, a soldier is not required to place himself in danger to save enemy non-combatants as required by Walzer in cases other than supreme emergencies. However, neither is a soldier permitted to kill non-combatants intentionally.

To what extent does this tie the hands of political and military leaders confronting a threat to the very existence of their political community? Insisting that non-combatant immunity be upheld at all times does place important limits on the types of force that may be used. It rules out the fire-bombing of city centres and the use of weapons of mass destruction on populated areas. However,

⁷⁵ *Ibid.*, p. 43.

⁷⁶ *Ibid.*, pp. 48–9.

it may permit the use of small nuclear devices in areas where enemy troops are concentrated or aerial attacks on military sites housed in civilian areas where the destruction of significant military targets is the objective. As Paul Ramsey put it, 'this distinction is not determined by the amount of the devastation or the number of deaths, but by the direction of the action itself, i.e. by what is deliberately intended and directly done. This permits there to be foreseeable evil consequences acceptable among the multiple effects of military action.'⁷⁷ In a supreme emergency, the devastation that may be wrought proportionally but without intentionally targeting non-combatants is significant. Because the stakes are so high, soldiers may do whatever necessary to attack a military target. They are prohibited only from intentionally killing non-combatants.

Given the relative nature of proportionality and double effect, it is difficult to maintain the view that it is 'unrealistic' to suppose that non-combatant immunity could and should be upheld even in supreme emergencies. To justify an exception to non-combatant immunity it is necessary to demonstrate that the exception is essential to the success of the defender. Given the theoretical, legal, historical and strategic flaws with the supreme emergencies exception and the room for manoeuvre afforded by the proportionality principle, it is clear that the supreme emergency exception does not pass the 'essentialness' test.

There is, however, one final problem. Pacifists and others argue that there is little difference between non-combatant deaths that are intended and those that are merely foreseen. In both cases, non-combatants are killed in large numbers. By making the proportionality principle so permissive, there is a danger that the end result would be the same, in terms of non-combatant deaths, as if the supreme emergencies exception were applied. This is a powerful argument, and it is certainly not possible to prove that fewer non-combatants would be killed if these prescriptions were fulfilled. However, there are at least three reasons to support the practical efficacy and moral worth of abandoning the supreme emergency exception. First, it is certainly *likely* that fewer non-combatants would be killed, simply because some of the reckless carnage of strategic bombardment would be avoided. Furthermore, as Walzer's own account of the Second World War attests, once the decision is taken to strike cities, it creates a cycle of attack and revenge attack that is very difficult to break. Had non-combatant immunity not been revoked in 1940, some of the worst excesses of the war, such as the bombardment of Dresden, might have been avoided.⁷⁸ Second, by removing an exception to the rule of non-combatant immunity, we help to strengthen the rule as it comes under attack once again, this time by so-called 'new wars' and new forms of terrorism.⁷⁹ Finally, it

⁷⁷ Paul Ramsey, 'The case for making "just war" possible', in Paul Ramsey, *The just war: force and political responsibility* (Lanham, MD: Rowman & Littlefield, 1983), p. 154.

⁷⁸ Kenneth Hewitt, 'Place annihilation: area bombing and the fate of urban places', *Annals of the Association of American Geographers* 73: 2, 1983, pp. 257–84.

⁷⁹ On the former see James Turner Johnson, *Morality and contemporary warfare* (New Haven, CT: Yale University Press, 1999); on the latter see Richard Devetak, 'Violence, order and terror', in Alex J. Bellamy, ed., *International society and its critics* (Oxford: Oxford University Press, 2004).

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challenges the realist teaching, evident in Walzer's rendition of the supreme emergency doctrine, that war is a moral tragedy in which soldiers and politicians are forced to choose between a variety of morally bad options. Contrary to this, I suggest that there are always morally better and worse choices, and that it is certainly not the case that there is a zero-sum relationship between good morality and good strategy.