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JUST AND LAWFUL CONDUCT IN WAR: REFLECTIONS ON MICHAEL WALZER

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> "(T)he structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself…"
>
> "There is no right to commit crimes in order to shorten a war."
>
> Michael Walzer[1]

"*Jus in bello*" is the Latin term just war theorists use to refer to justice in war, to right conduct in the midst of battle. American political theorist Michael Walzer has developed an account of *jus in bello* which has been influential and subject to much debate, though not much resolution. This paper will offer an updated, critical and thorough examination of Walzer's account, seeking thereby to further work on the ethics of war and peace. The subject of wartime justice has enjoyed something of a renaissance in philosophical interest, no doubt owing to controversial events in such recent wars as the Bosnian and Rwandan civil wars, Russia's campaigns in Chechnya, and NATO's armed intervention in Serbia over Kosovo.

Walzer insists that *jus in bello* is a category separate from *jus ad bellum*, which concerns the justice of resorting to war. A war begun for the right reasons is, for Walzer, a war fought in response to aggression, defined as "(a)ny use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another…"[2] Such state rights are themselves founded, ultimately, upon individual human rights to life and liberty. The most obvious example of an act of aggression would be an armed

[1] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2nd ed., 1991), 158, 210.

[2] Walzer, *Wars*, 62.

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invasion by one state, bent on taking over another, much as Iraq did to Kuwait in August 1990. But this requirement of just cause, in terms of resisting aggression, is not the only rule just war theorists like Walzer insist on being followed prior to the resort to war. They also stipulate that the war in question must be begun as a last resort, be publicly declared by a proper authority, have some probability of success, be animated by the right intention of resisting aggression and also be expected to produce at least a proportionality of benefits to costs.[3] Walzer reasons that we have not finished our normative labour once we have determined whether a state has resorted to war justly, using these principles. For even if a state has resorted to war justly, it may be prosecuting that war in an unjustified manner. It may be deploying decrepit means in pursuit of its otherwise justified end. Just war theory insists on a fundamental moral consistency between means and ends with regard to wartime behaviour. Since Walzer views just war theory as the best interpretation of our shared discourse on the ethics of war and peace, it follows for him that we must likewise be committed to this core consistency: justified ends may only be pursued through justified means.[4]

Concern with consistency, however, is not the only, or even the main, reason behind our endorsement of separate rules regulating wartime conduct. Such rules are also required to limit warfare, to prevent it from spilling over into an ever-escalating, and increasingly destructive, experiment in total warfare. If just wars are limited wars, designed to secure their just causes with only proportionate force, the need for rules on wartime restraint is clear. Even though modern warfare has displayed a disturbing tendency towards totality – particularly during the two World Wars – it does not follow that the death of old-time military chivalry marks the end of moral judgment. As Walzer proclaims, "(w)e still hold soldiers to certain standards."[5]

Walzer claims that our shared war convention commits us, at its deepest level, to three standards of *jus in bello*. The first is one of

[3] For more on *jus ad bellum*, see: Walzer, *Wars*, 3–33 and 51–1125; R. Regan, *Just War: Principles and Cases* (Washington, DC: Catholic University of America Press, 1996), 3–86; J. B. Elshtain, ed. *Just War Theory* (Oxford: Blackwell, 1992); and D. Luban, "Just War and Human Rights", *Philosophy and Public Affairs* (1980), 160–81.

[4] Walzer, *Wars*, 3–20.

[5] Walzer, *Wars*, 34–35.

discrimination: armies are to discriminate or distinguish between military and civilian targets, and aim their lethal force only at legitimate military, and military supply, targets. The second standard commits armies to launch only proportionate force at these legitimate targets. Finally, armies are not to employ methods which are intrinsically heinous; they may not commit actions which "shock the moral conscience of mankind." Walzer is emphatic that we hold *all* soldiers to these three standards. Unlike our *jus ad bellum* judgments, which tend to be binary, condemning one side and justifying the other for resorting to war, our judgments about right conduct apply across the board during wartime. Since *jus in bello* and *jus ad bellum* are separate, it is an error to link the justice of conduct to the justice of cause: soldiers fighting for a just cause can just as readily run afoul of *jus in bello* as those prosecuting an unjust war. We expect no more, no less, from soldiers of all sides than that they adhere to the three standards of right conduct.[6]

Before examining Walzer's understanding of the content of these three standards, it is worth stressing how for him responsibility for fulfilling *jus in bello* differs from the responsibility inhering in *jus ad bellum*. Responsibility for the justice of resorting to war rests on those key members of the governing party most centrally involved in the decision to go to war, particularly the head of state. Responsibility for the conduct of war, by contrast, rests on the state's armed forces. In particular, responsibility for right conduct rests with those commanders, officers and soldiers who command and control the lethal force set in motion by the political hierarchy. In general, anyone involved in formulating and executing military strategy during wartime bears responsibility for any violation of the *jus in bello* standards, whose content will be specified below.

I. DISCRIMINATION AND NON-COMBATANT IMMUNITY

Walzer insists repeatedly that the requirement of discrimination is the most important *jus in bello* rule. Soldiers charged with the deployment of armed force may not do so indiscriminately; rather, they must exert effort to discriminate between legitimate

[6] Walzer, *Wars*, 34–49, 127–224.

and illegitimate targets. How are soldiers to know which is which? Walzer answers: a legitimate target in wartime is anyone or anything "engaged in harming". All non-harming persons or institutions are thus immune from direct and intentional attack by soldiers. Since the soldiers of the enemy nation, for instance, are clearly "engaged in harming", they may be directly targeted, as may their equipment, their supply routes and even some of their civilian suppliers. Civilians not engaged in the military effort of their nation may not be targeted with lethal force. In general, Walzer asserts that "(a) legitimate act of war is one that does not violate the rights of the people against whom it is directed."[7] In response, one might ask: how is it that armed force directed against soldiers does not violate their rights, whereas that directed against civilians violates theirs? In the chaos of wartime, what exactly marks the difference?

One of the murkiest areas of Walzer's just war theory concerns the moral status of ordinary soldiers. His references to them exhibit, on the one hand, a humane sympathy for their "shared servitude" as "the pawns of war." On the other, his references occasionally display a glib callousness, as when he concurs with Napoleon's (in)famous remark that "soldiers are made to be killed."[8] How can soldiers be made to be killed when, as human beings, they enjoy human rights to life and liberty? If it is our shared ideas about human personality which (somehow) justify human rights, how can Walzer claim that these possessors of personality be directly and intentionally targeted with lethal force?[9] The answer must be that soldiers do something which causes them to forfeit their rights, much as an outlaw country forfeits its state rights to non-interference when it commits aggression. This is indeed the case for Walzer: "(N)o one can be forced to fight or to risk his life, no one can be threatened with war or warred against unless through some act of his own he has surrendered or lost his rights." One could be forgiven for inferring from this principle that only soldiers of an aggressor nation

[7] Walzer, *Wars*, 42–43, 135.

[8] Walzer, *Wars*, 37, 40, 136. James Dubik seems the first to note and explain this murkiness, in his "Human Rights, Command Responsibility and Walzer's Just War Theory", *Philosophy and Public Affairs* (1982), 354–371. See also Lackey, "Theory", 540–542.

[9] Walzer, *Wars*, xxx; M. Walzer, "The Moral Standing of States", *Philosophy and Public Affairs* (1979/80), 209–229.

forfeit their rights, since they are the only ones engaged in the kind of rights-violative harm which grounds a violent, punitive response. Interestingly, and perhaps problematically, Walzer denies this. He believes that *all* soldiers forfeit their right not to be targeted with lethal force, whether they be of just or unjust nations, whether they be tools of aggression or instruments of defence.[10]

Walzer's concept here is of "the moral equality of soldiers." The first "war right" of soldiers is to kill enemy soldiers. We do not, and should not, make soldiers pay the price for the injustice of the wars they may be ordered – perhaps even conscripted – to fight. That, Walzer emphasizes, is the logically and morally separate issue of *jus ad bellum*, which focuses on the responsibilities of political leaders. But lawyers like the chief British prosecutor during the Nuremberg trials, and philosophers like Thomas Pogge, ask: why shouldn't we hold soldiers responsible for the justice of the wars they fight? If we held soldiers responsible in this regard, wouldn't that constitute an additional bar against aggressive war? Wouldn't that account for the fact that, even though the war was set in motion by others, soldiers remain its essential executors? Wouldn't that impose and highlight an important responsibility for soldiers, namely, to refuse to participate in the prosecution of aggressive war?[11]

Walzer experiences difficulty in answering this argument fully. As an opening gambit, he contends that soldiers "are most likely to believe that their wars are just." But this alone cannot justify their actions, since their beliefs may not be well-grounded, especially considering the incentive they have to believe such justification in the first place. Walzer also says that soldiers rarely fail to fight, owing to "(t)heir routine habits of law-abidingess, their fear, their patriotism [and] their moral investment in the state."[12] But the fact that soldiers rarely fail to fight does not demonstrate that they are always justified in fighting, especially if the cause is unjust. Walzer next suggests that knowledge about the justice of the wars soldiers fight is "hard to come by." This is a surprising claim from a just

[10] Walzer, *Wars*, 135.

[11] Walzer himself notes the British prosecutor's arguments in his *Wars*, 38. This point has also been emphasized to me in conversation with Thomas Pogge, philosophy professor, Columbia University in New York City.

[12] Walzer, *Wars*, 127, 39.

war theorist devoted to making that knowledge more accessible and comprehensible. Perhaps, then, this is a reference to the soldier's general lack of higher education, as well as to government tendencies towards secrecy. Fair enough, but ignorance at best constitutes an excuse, and not a justification, for wilfully fighting in an unjust war: it seems a stretch to assert that such ignorance can morally ground a "war right" to kill enemy soldiers. Walzer's subsequent move appeals to the authority of Vitoria, who suggested that if soldiers were allowed to pick and choose the wars they were willing to fight in, the result would be "grave peril" for their country. But this empirical generalization is speculative: why wouldn't the result actually be the preferred one, namely, that states would be seriously hampered only in their efforts to prosecute an aggressive war which they couldn't justify to their soldiery?[13]

Walzer turns to his conventionalist methodology for assistance in this regard: as a matter of fact, he suggests, we do not blame soldiers for killing other soldiers. We blame soldiers only when they deliberately kill either civilians or enemy soldiers kept by them as disarmed prisoners of war. We extend to all soldiers caught in the midst of battle the right to deploy armed force on behalf of their own country.[14] This is a true legal contention, and not an implausible moral one, but the latter is not so obvious as Walzer suggests. Do we really believe that those soldiers who fought for Hitler, for example, were utterly blameless for their bit part in the execution of his mad aggression? No doubt, we tend to exonerate conscripts like The Hitler Youth in the closing days of the war, presuming they were far too young, gullible and propagandized to have made a free choice. But what about those mature German soldiers who invaded Poland, or France, at the war's outset? It is not so clear to me that, as a matter of fact, we do not blame them for fighting on behalf of their country.

Walzer stresses more generally the pervasive socialization of soldiers of *any* nation, their relative youth, their frequent conscription, and their usual background as members of underprivileged classes as grounds for not holding soldiers responsible for the wars they fight. While soldiers "are not . . . entirely without volition", he

[13] 13. Walzer, *Wars*, 39.
[14] Walzer, *Wars*, 128.

says, "(t)heir will is independent and effective only within a limited sphere." This sphere contains only those tactics and manoeuvres soldiers are engaged in. It would thus constitute unfair "class legislation" for us to hold soldiers like these responsible for the justice of the wars they fight. We should focus on those most to blame, the leaders who set the war in motion.[15] But from the fact that political leaders are *mostly* to blame for the crime of aggression, does it follow that they are *solely* to blame, as Walzer insists? Perhaps a compelling alternative would be to suggest that, for reasons Walzer mentions, there should be a presumption against holding soldiers responsible for the crime of violating *jus ad bellum*. But this presumption does not preclude us from concluding, in particular cases based on public evidence, that some soldiers of a particular aggressor state either did know, or really should have known, about the injustice of the war they were fighting, that they could have refused to participate in it, and thus that they may be held responsible, albeit with lesser penalties than the head of state. Such soldiers would be like minor accomplices to a major crime. Walzer's belief about the absolute separateness of *jus ad bellum* from *jus in bello* cannot, I suggest, be sustained in light of these considerations.

Walzer, in a tantalizing footnote, appears to flirt with a similar linkage between the two traditional just war categories. With specific reference to the soldiers of a democratic country engaged in aggressive war (such as, he says, America during Vietnam), Walzer stipulates that, as citizens, the soldiers should vote against the war but, as soldiers, "they fight as members of the political community, the collective decision having already been made, subject to all the moral and material pressures…" referred to in the preceding paragraphs, like their mediocre education, etc. Walzer says that any soldier with courage enough to refuse to fight such a war does "act very well" and should be not only tolerated but honoured by a just society. "That doesn't mean, however, that the others [i.e. the soldiers who still fight] can be called criminals." Why not? Walzer's limp reply is to reiterate the socialization of most soldiers and to comment that "(p)atriotism …is the ordinary refuge of ordinary men and women, and it requires of us another sort of toleration." What precise sort Walzer fails to specify, yet it would seem a

[15] Walzer, *Wars*, 40, 138.

dangerous kind, as it weakens our condemnation and deterrence of the very kind of aggressive war Walzer so strongly rejects.[16]

Even if we agree with the anti-Walzer proposal that some soldiers may be held responsible for *jus ad bellum* violations, can we still concur with Walzer's idea that all soldiers *generally* remain legitimate targets during wartime? After several false starts, Walzer offers us a compelling reason to do so: soldiers, whether just or unjust, are "engaged in harm."[17] They bear arms effectively, are trained to kill for political reasons and are "dangerous men": they pose serious threats to the lives and interests of those they are deployed against, whether for a just cause or no. Walzer suggests that an armed man trying to kill me "alienates himself from me . . . and from our common humanity" and in so doing he forfeits his right to life. This establishes, I believe, a strong *prima facie* case that soldiers targeting other soldiers with lethal force is justified. Soldiers, whether for just or unjust reasons, remain among the most serious and standard external threats to life and vital interests during wartime. Only public, compelling and accessible knowledge about the injustice of the cause of his own country can undermine a soldier's entitlement, in the face of such a threat, to respond in kind.[18]

One implication of this general principle – namely, that a target is legitimate only if it is engaged in harm – is that those who are not "engaged in harm" cannot be legitimate targets during wartime. Walzer suggests this is the most plausible, and publicly accessible, sense of "innocence" in wartime. Its first application has to do with soldiers themselves: when soldiers no longer pose serious external threats – notably by laying down their weapons and surrendering – they may no longer be targeted and should, in fact, be extended benevolent quarantine for the duration of the war. He squares this with his remarks about forfeiture thusly: "(T)he alienation [of the right to life] is temporary, the humanity imminent." Thus, ceasing to

[16] Walzer,*Wars*, 299–300 in the note.

[17] See Dubik, "Command", 359–361, for an excellent analysis of Walzer's difficulties in this regard. See also Walzer, *Wars*, 138–160.

[18] Walzer, *Wars*, 142.

pose an external threat ceases the forfeiture, and the soldier's human rights spring forth intact.[19]

The second application of Walzer's harm principle deals with civilians. Even though some civilians may inwardly approve, or even have voted in favour of, an unjust war effort, they nevertheless remain externally non-threatening. They do not bear arms effectively, nor have they been trained to kill, nor have they been deployed against the lives and vital interests of the opposing side. Civilians are not in any material sense "dangerous men." Thus, "they have done nothing, and are doing nothing, that entails the loss of their rights." So they may not be made the direct and intentional objects of military attack.[20] This is clearly controversial. Some thinkers argue that the fact that civilian taxes fund the military renders null and void any pretence of their being "innocent." Civilians are causally involved in financing the harm soldiers do. Others view nationality as shared destiny, or suggest that modern warfare is totalizing anyway and so wonder what the point of discrimination really is in our age. These are not trivial arguments, especially the first regarding taxation, but they fail to persuade. It is hard to see, for example, how infants could be anything other than innocent during wartime. Only the most dogmatic believer in collective responsibility could deny this, and then at the cost of his credibility. There is, moreover, little evidence that modern warfare is intrinsically totalizing: the Persian Gulf War of 1991, for instance, did not escalate into an indiscriminate slaughter. No doubt there are searching questions about the exact specification of "innocents" in wartime but I follow Walzer in believing that it remains an important just war category, needed not only to restrain violence but also to express our strong moral commitment to punish only those who deserve it. In the midst of what Clausewitz called "the fog of war", one of the most concrete and verifiable ways to cash out such desert is to define it in terms of external engagement in serious harm.[21]

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[19] Walzer, *Wars*, 142, 46. Both the Hague and Geneva Conventions enshrine these claims. See W. Reisman and C. Antoniou, eds. *The Laws of War* (New York: Vintage, 1994), 149–231.

[20] Walzer, *Wars*, 146–151.

[21] D. Lackey, "A Modern Theory of Just War", *Ethics* (1983), 540–542; T. Nagel, "War and Massacre", *Philosophy and Public Affairs* (1971/72), 123–144;

Owing to these contentions, civilians should be thought of as "innocent" of the war, and thus entitled not to be made the objects of direct, intentional attack. That this norm of noncombatant immunity is, as Walzer claims, the subject of very widespread, cross-cultural concurrence is revealed by the fact that it is the most frequently and stridently codified rule in the international laws of armed conflict, especially the Hague and Geneva Conventions. "Noncombatants", Walzer emphasizes, "cannot be attacked at any time. They can never be the objects or targets of military activity."[22] Difficulties arise, though, when we consider those people who seem, simultaneously, to be both civilians and engaged in harming, such as civilian suppliers of military hardware. What is the status of such people? Walzer suggests that "the relevant distinction is . . . between those who make what the soldiers need to fight and those who make what they need to live like all the rest of us." So targeting farms, schools and hospitals is illegitimate, whereas targeting munitions factories is legitimate. Walzer stresses, however, that civilians engaged in the military supply effort are legitimate targets *only* when they are engaged in that effort, so to target them while at home in residential areas would be illegitimate: "Rights to life are forfeit only when particular men and women are actually engaged in war-making or national defence." Walzer agrees with Thomas Nagel's eloquent explanation that "hostile treatment of any person must be justified in terms of something *about that person* [his italics] which makes the treatment appropriate." We distinguish combatants from noncombatants "on the basis of their immediate threat or harmfulness." And our response to such threats and harms must be governed by relations of directness and relevance.[23]

Walzer's overall judgment on targeting is this: soldiers may target other soldiers, their equipment, their barracks and training areas, their supply and communications lines and the industrial sites which produce their supply. Presumably, core political and bureaucratic institutions are also legitimate objects of attack, in particular things

and R.K. Fullinwinder, "War and Innocence", *Philosophy and Public Affairs* (1976), 90–97.

[22] Walzer, *Wars*, 151. For the Conventions, see Reisman and Antoniou, eds. *Laws*, 47–132. See also G. Best, *War and Law since 1945* (Oxford: Clarendon, 1994).

[23] Walzer, *Wars*, 146, 219; Nagel, "Massacre", 133–141.

like the Defence Ministry. Illegitimate targets include residential areas, schools, hospitals, farms, churches, cultural institutions and non-military industrial sites. In general, anyone or anything not demonstrably engaged in military supply is immune from direct attack. Walzer is especially critical of targeting basic infrastructure, particularly food, water, medical and power supplies. He criticizes American conduct during the Persian Gulf War on this basis, since very heavy damage was inflicted on Iraq's water treatment system, and presumably would also frown upon NATO's targeting the Serbian electric power grid during its 1999 armed intervention on behalf of the ethnic Albanian Kosovars. While soldiers cannot fight well without food, water, medicine and electricity, those are things they – and everyone else in their society – require as human beings and not more narrowly as externally threatening instruments of war. Thus, the moral need for a direct and relevant response only to the source of serious harm renders these things immune from attack.[24]

Another serious perplexity about targeting concerns the close real-world proximity of illegitimate civilian targets to legitimate military and political ones: munitions factories, after all, are often side-by-side with non-military factories, and at times just around the corner from schools and residential areas. This leads us to the complex issue of the Doctrine of Double Effect (DDE). The core moral problem here is this: even if soldiers intentionally aim only at legitimate targets, they can foresee that taking out some of these targets will involve collateral civilian casualties. And if civilians do nothing to lose their human rights to life and liberty, doesn't it follow that such acts will be unjust? Furthermore, since such acts are constitutive of warfare – the very stuff and substance of the conduct of war in our world – doesn't it follow that war itself can never be fought justly, and thus should never be resorted to, as the pacifist concludes?

Though Walzer is initially suspicious of the DDE, in the end he endorses one version of it as a plausible method for "reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity." The DDE stipulates that an agent A may perform an action X, even though A foresees that X

[24] Walzer, *Wars*, xx.

will result in both good (G) and bad (B) effects, provided all of the following criteria are met: 1) X is otherwise permissible; 2) A only intends G and not B; 3) B is not a means to G; and 4) the goodness of G is worth, or proportionate to, the badness of B. Assume now that A is an army and X is an otherwise permissible act of war, such as taking aim at a military target. The good effect G would be destroying the target, the bad effect B the collateral civilian casualties. The DDE stipulates that A may do X, provided that A only intends to destroy the military target and not to kill civilians; that A is not using the civilian casualties as means to the end of destroying the military target; and that the importance of hitting the target is "worth" the collateral dead.[25]

The first serious objection raised against the DDE concerns its controversial distinction between intending Z's death and "merely foreseeing" that one's actions will result in Z's death. Many have contended that the DDE is so elastic as to justify anything: all an agent has to do, to employ its protective moral cloak, is to assert: "Well, I didn't intend *that*; my aim, rather, was this. . . " On Walzer's behalf, it is clear that intentions are not infinitely redescribable, nor irreducibly private, as this criticism seems to imply. Agents are not free to claim whatever laudable intention they want in order to justify their actions, however heinous. Intentions must meet minimal criteria of coherence and, moreover, must be connected to patterns of action which are publicly accessible. The criminal justice system of most countries is predicated on these ideas: for such serious crimes as murder, the case must be made by the prosecution that the accused had *mens rea*, or the intent to kill. This is done by offering third-person, publicly-accessible evidence tied to the accused's actions, behaviour and assertions leading up to the time of the murder, as well as considering whether he had both incentive and motive to commit the crime. Juries, as reasonable and experienced persons, are then invited to infer the accused's state of mind. The plausibility of this procedure undermines the popular academic claim that the DDE can be used to justify any heinous action, whether in war or peace. Walzer agrees, suggesting that we know the intentions of agents through their actions: "(T)he surest sign of good intentions in war is restraint in its conduct." In

[25] Walzer, *Wars*, 153–154.

other words, when armies fight in strict adherence to *jus in bello* – taking aim only at legitimate targets, using only proportionate force, not employing intrinsically heinous means – they cannot meaningfully be said to intend the deaths of civilians killed collaterally. Their actions, focusing on military targets and taking due care that civilians not be killed, reveals their intentions.[26]

What exactly constitutes "due care" by armies that civilians not be killed during the prosecution of otherwise legitimate military campaigns? For Walzer, it involves soldiers accepting more risks to themselves to ensure that they hit only the proper targets: "We draw a circle of rights around civilians, and soldiers are supposed to accept (some) risks in order to save civilian lives." This principle might, for instance, entail that soldiers use only certain kinds of weapons (eg. "smart" bombs, laser-guided cruise missiles), move in more closely on the targets (eg. flying lower on a bombing raid), gather and analyze intelligence on the precise nature of suspected targets, perhaps provide some kind of advance warning to nearby civilians, and certainly plan the tactic in advance with an eye towards minimizing civilian casualties. Walzer suggests we locate the limits of additional risk-taking that soldiers can and should shoulder on behalf of those civilians they endanger at that point where "any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated."[27]

Walzer maintains that civilians are not entitled to some implausible kind of fail-safe immunity from attack; rather, they are owed neither more nor less than this "due care" from belligerent armies. Providing due care is equivalent to "recognizing their rights as best we can within the context of war." Interestingly, Walzer concedes that the requirements of due care – in particular, to formulate strategies designed to minimize civilian casualties – reveal that, in some respects, "utilitarian arguments and rights arguments . . . are not wholly distinct." We should note that a deontological pacifist would disagree, and insist that real respect for rights involves rejecting this kind of aggregative thought about due care constituting

[26] M. Walzer, "War and Peace in The Jewish Tradition" in T. Nardin, ed. *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton: Princeton University Press, 1996), 106.

[27] Walzer, *Wars*, 151, 157.

full respect for them. Civilians, the pacifist would conclude, *are* entitled to fail-safe immunity and, since it cannot be provided to them, war must forever remain unjust.[28]

What about the second criterion in Walzer's DDE? Can it ever be met to our satisfaction in the real world? On Walzer's behalf, it seems possible to discern whether a belligerent, such as country C, is employing civilian casualties as a means both to its immediate end of hitting the legitimate target and to its final end of victory over rival country D. If there were greater civilian than military casualties in D, for example, it would be clear which group of people was bearing the brunt of C's attack. Relatedly, if there were systemic patterns – as opposed to unavoidable, isolated cases – of civilian bombardment by C on the civilians of D, it would also be compelling to conclude that C was directly targeting the civilian population of D. Conversely, if the systemic pattern of C's war-fighting indicates its targeting of D's military capabilities, with only incidental civilian casualties resulting, then it would be reasonable to infer that C was not trying to use civilian casualties as a pressure tactic to force D to retreat and admit defeat.

The truly difficult aspect of Walzer's DDE is the third criterion: contending that the goodness of hitting the legitimate military target is "worth", or proportional to, the badness of the collateral civilian casualties. A pacifist, for example, will always deny this. Is the need to hit a source of harm sufficient to justify killing people whom Walzer admits have done nothing to deserve death? Does the source of harm have to pass some threshold of threat before one can speak of the need for its destruction outweighing civilian claims? If so, how to locate that threshold? More sharply, can one refer to the ultimate "worth" of hitting the target to justify collateral civilian casualties without referring to the substantive justice of one's involvement in the war to begin with?

Walzer does not confront these potent queries directly, though one gains the impression from his work that the "worth" in question refers simply to the target forwarding the war aims of the country in question. Provided only that hitting the legitimate target will contribute (how much?) to victory, the collateral civilian casualties will be "worth" it. I do not believe that such an agnostic attitude

[28] Walzer, *Wars*, 152 and 156, in the note.

with regard to war aims will here suffice. I fail to grasp how it can be morally justified to foreseeably kill innocent civilians in order to hit a target that only serves the final end of an aggressive war. The only justification sufficient, in my mind, to justify the collateral civilian casualties would be that the target is materially connected to victory in an otherwise just war. This suggests that aggressors not only violate *jus ad bellum*, but in so doing face grave difficulties meeting the requirements of *jus in bello* as well. To be as clear as possible: to satisfy the *jus in bello* requirement of discrimination, a country when fighting must satisfy all elements of the DDE. But it seems that only a country fighting a just war can fulfil the proportionality requirement in the DDE. Thus, an aggressor nation fighting an unjust war may, for that very reason, also violate the rules of right conduct. Here too we see that Walzer's insistence on the separateness of *jus ad bellum* and *jus in bello* may not be sustainable. Kant may well have been more correct when he insisted on the need for a consistent normative thread to be run though conduct during all three phases of war: beginning, middle and end.[29]

II. PROPORTIONALITY

The *jus in bello* version of proportionality mandates that soldiers deploy only proportionate force against legitimate targets. Walzer is uncertain about the precise content of this requirement. He notes that while the rule is designed to prohibit "excessive harm" and "purposeless or wanton violence" during war, "there is no ready way to establish an independent or stable view of the values" against which we can definitively measure the costs and benefits of a tactic. One case where he talks about, and endorses, a form of proportionality involves the Persian Gulf War. During the War's final days, there was a headlong retreat of Iraqi troops from Kuwait along a road, subsequently dubbed "The Highway of Death." So

[29] See my *War and International Justice: A Kantian Perspective* (Waterloo, ONT: Wilfrid Laurier University Press, 2000), and my shorter article, "Kant's Just War Theory", *Journal of the History of Philosophy* (April 1999), 323–353. The most relevant primary source is I. Kant, *The Metaphysics of Morals*, trans, by Mary Gregor (Cambridge: Cambridge University Press, 1995), especially 114–124.

congested did that highway become that, when American forces descended upon it, it was a bloodbath whose aftermath was much photographed and publicized. Although the Iraqi soldiers did not surrender, and thus remained legitimate targets, Walzer suggests that the killing was "too easy." The battle degenerated into a "turkey shoot", and thus the force deployed was disproportionate. Perhaps another example, from the same war, would be Saddam Hussein's very damaging use of oil spills and oil fires as putative means of defense against an amphibious invasion of Kuwait by the Allies.[30]

Walzer insists that the "chief concern" in wartime is the question of who may be targeted with lethal force. The question of what means may be employed in the targeting is "circumstantial." He suggests that the elaborate legal rules defining what means may, and what others may not, be employed during war is beside the point. These rules – such as those prohibiting the use of chemical weapons on the battlefield – may be desirable, he says, but are not morally obligatory. After all, if solders may be killed, how much can it matter by what means they are killed? While that is a persuasive way of putting the matter, Walzer should not be flippant about setting these rules aside, or assigning them second-place status in *jus in bello*, behind discrimination. For the robust and elaborate set of legal rules banning the use of certain weapons in wartime is, at the very least, an important piece of evidence for any account of wartime ethics which purports to be conventionalist. There is a vast number of relevant conventions on this issue, aside from the canonical Hague and Geneva Conventions, such as those banning the use of chemical (1925 and second protocol 1996), biological (1972) and "excessively injurious weapons" (1980). Also relevant are the conventions against genocide (1948) and against methods of warfare which alter the natural environment (1977).[31]

In addition to the thickly textured legal conventions, one might suggest that there is a widely shared moral convention which stipulates that even though soldiers may be targeted with lethal force, some kinds of lethal force – such as burning them to death with flame-throwers, or asphyxiating them with nerve gas – inflict so much suffering and express such cruelty that they are properly

[30] Walzer, *Wars*, 129, xxi.

[31] Walzer, *Wars*, 42, 215; Reisman and Antoniou, eds. *Laws*, 35–132.

condemned. Moreover, the reasoning which distinguishes between legitimate and illegitimate weapons is very similar to the reasoning which generates the combatant/noncombatant distinction. For example, there is a legal ban on using bullets which contain glass shards. These shards are essentially impossible to detect. If the soldier survives the shot, and the bullet is removed by surgery, odds are that the glass shards will remain in his body. These shards can produce massive internal injuries, long after the soldier has ceased being "a dangerous man" to the other side. Parallel reasoning was behind the 1999 passing into law of the International Treaty Banning Land Mines: land mines, too frequently, remain weapons of destruction long after the conflict is over. Finally, restrictions on weapons can play a causal role in reducing destruction and suffering in wartime, something which *jus in bello* as a whole is designed to secure. Walzer doesn't even explicitly object to particular weapons on grounds that they are more likely than not to have serious spillover effects on civilians, and thus run afoul of discrimination. Biological weapons would fall under this category, as would many land mines. Such a stance would be consistent with other judgments one might expect, but does not hear, from him, such as criticizing America's extensive use of napalm and Agent Orange in Vietnam, which inflicted long-term damage to Vietnamese agriculture. Walzer is curiously unreflective about these considerations.[32]

Walzer recovers his reflectiveness about weaponry only when he considers nuclear arms, which for a number of reasons have not been declared illegal by ratified international treaty. "Nuclear weapons explode the theory of just war", Walzer famously declares.[33] This is a graphic but unfortunate formulation, for it seems to endorse the popular academic view that just war theory is out of date in the post-Hiroshima era. But Walzer cannot believe this, for he takes the time to explain, using just war concepts, how the atomic bombing of Japan was unjust.[34] Thus, what his dramatic declaration must

[32] Regan,*Cases*, 87–99, 136–150.

[33] Walzer, *Wars*, 282. While there have been two UN General Assembly resolutions, in 1961 and 1972, banning the use of nuclear weapons (see Reisman and Antoniou, eds. *Laws*, 66–67), these do not carry the binding force of a ratified international treaty. Obviously, the fact that the world's most powerful countries are also nuclear powers inhibits the passing of such a treaty.

[34] Walzer, *Wars*, 263–268.

really mean is that nuclear weapons can never be employed justly. Why not? First, and most crucially for Walzer, they are radically indiscriminate weapons. Perhaps only a handful of the most volatile biological weapons are more uncontrollable in their effects. Second, nuclear weapons are unimaginably destructive, not just in terms of short-term obliteration but also long-term radiation poisoning and climate change, so that their use will always run afoul of proportionality. Finally, there is the hint in Walzer that, owing to these two factors combined, deliberate use of nuclear weapons – and emphatically an all-out nuclear war – is an act evil in itself.

III. NO MEANS "MALA IN SE"

The most general rule of *jus in bello* which Walzer endorses is that armies may never employ acts or weapons which "shock the moral conscience of mankind." This seems to be Walzer's equivalent of the traditional ban on "means *mala in se*", or "methods evil in themselves." The imprecise yet interesting idea here is that some weapons and means of war are forbidden not so much because of the terribleness of the consequences they result in but, more importantly, because they themselves are intrinsically awful. Is this anything more than rhetorical heightening, an especially emphatic banning of indiscriminate and/or disproportionate targeting? Walzer believes so. Perhaps the most fruitful way to cash out his concept of an intrinsically corrupt means is to define it as being rights-violative in itself. Using rape as a tool of warfare is a plausible example. Rape is ruled out here not so much because of all the pain it produces, or because it is aimed at civilians, but because the act itself is rights-violative, a disgusting disregard for the humanity of the woman raped: a coercive violation of her bodily integrity and her entitlement to choose her own sex partner(s).[35] We might infer that, for Walzer, methods like campaigns of genocide and ethnic cleansing probably also fall under this category. We don't have to do a cost-benefit analysis to determine whether such acts are impermissible in

[35] Walzer, *Wars*, 129–137; C. MacKinnon, "Crimes of War, Crimes of Peace" in S. Shute and S. Hurley, eds. *On Human Rights* (New York: Basic Books, 1993), 83–110.

warfare: we already judge such acts to be heinous crimes. The intentional destruction, and/or forcible displacement, of whole peoples, as Walzer suggests, is something we find "literally unbearable." Indeed, the international community passed a convention in 1948 banning genocide, and recently resorted to armed force over Kosovo in Serbia to punish its practice. Nuclear weapons may also fall under this category for Walzer because use of them implies deliberate killing of the innocent, and on a wildly destructive scale. There cannot be much doubt that nuclear weapons have indeed "shocked mankind" and are the objects of continued fear and loathing.[36]

IV. REPRISALS

Walzer allows for reprisals in his just war theory. And this in spite of his acknowledgment that "(n)o part of the war convention is so open to abuse, is so openly abused, as the doctrine of reprisals." Such a doctrine permits a violation of *jus in bello* rules but only in response to a prior violation by the opposing side. To his credit, Walzer refuses to condone any violation of the principle of discrimination as part of reprisal: "we must condemn all reprisals against innocent people." What of proportionality and no means "*mala in se*"? While he does not explicitly say so, one supposes Walzer cannot countenance a violation of the latter rule for mere reprisal purposes. His single example of a justified reprisal focuses on proportionality and prohibited weapons. He claims that Winston Churchill was "entirely justified when he warned the German government early in World War II that the use of [poison] gas by its army would bring an immediate Allied reprisal." Such threats by heads of state have apparently become rather commonplace, since American President George Bush warned Iraq in 1991 that, should it deploy chemical weapons on the battlefield, America would reserve the right to deploy other weapons of mass destruction, up to and including nuclear armaments. It is important to note here that, presumably, Walzer means that not only the threat but also the threatened action are grounded by his doctrine of reprisal.[37]

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[36] Reisman and Antoniou, eds. *Laws*, 84–94; Walzer, *Wars*, 257, 323.

[37] Walzer, *Wars*, 207–22; Regan, *Cases*, 172–178.

Walzer justifies his permission for retaliations on the need to enforce the rules of the war convention during battle: "(i)t is the explicit purpose of reprisals . . . to stop the wrongdoing *here* [his italics] with this final act" of *jus in bello* violation. Reprisals are designed to make the enemy stop its own *jus in bello* transgressions: state S violates proportionality, say, and state T responds in kind so as to punish S and hopefully prevent future violations.[38] Can we come up with relevant modern examples here? Walzer might, on these grounds, commend America's 1986 bombing of Libya as retaliation for the latter's involvement in terrorist strikes, or America's 1998 bombing of suspected terrorist sites in Sudan and Afghanistan as reprisals for presumed involvement in American embassy bombings throughout Africa. After all, with the important exception of the Lockerbie jet bombing in 1988, Libya has seemed to stop being a major state sponsor of terrorism since the American attack. And failure to respond to the embassy bombings in Africa would have only invited further violence by anti-American extremists.

Walzer's reprisal doctrine is worrisome. It ignores the serious likelihood that reprisals, far from chastening the state which originally violated *jus in bello*, will actually spur further violations. To put it in just war terms, reprisals have dubious probability of success. After all, what government is likely to just sit there and suffer a violation of *jus in bello*? If it is the government that committed the first (unbidden) violation, why would it hesitate to commit a second one in response? If it is the government that received the first violation, then it will, not implausibly, fear that a failure to respond in kind will only whet its opponent's appetite for more destruction. Reprisal, in short, is a recipe for escalation, at its extreme risking the onset of total war, a phenomenon just war theory utterly rejects.

Walzer might contend that a certain kind of reprisal may well succeed in stopping escalation. Of course, it *may*, but what kind of reprisal is that likely to be? Realistically, it seems, only a very severe, disproportionate one. And while Walzer extends his reprisal permissions solely in terms of relaxing proportionality (and not, thankfully, in terms of relaxing discrimination), we can still ask: how much is too much relaxation? Is there such a thing as "too much

[38] Walzer, *Wars*, 207.

relaxation" when it comes to reprisals? Might Walzer, for example, condone the Gulf War "turkey shoot" incident on the Highway of Death if it were in reprisal, say for Iraq setting Kuwait's oil wells on fire? Or if state T were to lose one brigade of its soldiers to nerve gas unleashed unbidden by state S, does that mean for Walzer that, to ensure an effective enforcement of the rules, T should now gas two, or more, brigades of S's soldiers in response? Or perhaps deploy a tactical nuclear device against S's battlefield positions? For me, these are rhetorical questions. They also underline the precarious position of the ordinary soldier in Walzer's theory, subject as he is to all of these measures.

Reprisal is a very tempting option in warfare, especially when one notes that, given its nature, the aggressor nation will most likely be the one which first violates *jus in bello*. And while relaxing proportionality against legitimate targets may feel like a fitting response to prior violations of a principle as important as discrimination – for instance, gassing enemy soldiers who engaged in civilian massacre – it is unlikely to achieve its more reasoned goal of deterring future violations. As deterrence, reprisal is dubious. As retribution, reprisal may seem elemental, yet it is unlikely to achieve more than a modest, temporary satisfaction of popular outrage. It would thus seem far better to adhere to the following policy on reprisals, adopted from a familiar phrase: winning well is the best revenge. But what if, Walzer would ask, one cannot put the first two together: what if winning cannot be had, in the real world, by fighting well and by resisting the sinful pleasures of revenge? What if, ultimately, violating *jus in bello* seems the only way to stave off devastating loss?

V. SUPREME EMERGENCIES

Walzer notes that, when it comes to war, "we want to have it both ways: moral decency in battle and victory in war; constitutionalism in hell and ourselves outside."[39] We are therefore confronted with a grave dilemma when it looks as though we can win the war only by setting aside the rules of right conduct. Walzer, to his credit, refuses

[39] Walzer, *Wars*, 47.

to indulge the fantasy that such situations cannot actually happen. His way out of this dark dilemma, however, is one of the most difficult and controversial aspects of his just war theory. It is his doctrine of supreme emergency and it permits not merely violation of proportionality against enemy soldiers but even of discrimination against enemy civilians. It is something like the ultimate, no-holds-barred reprisal against the ultimate threat. How does Walzer pose, and then respond to, the problem?

Walzer stipulates that soldiers cannot appeal to military necessity to set aside the three rules of right conduct, as elaborated above, because these laws have already been structured with military necessity in mind: "Belligerent armies are entitled to try to win their wars, but they are not entitled to do anything that is or seems to them necessary to win."[40] Furthermore, the threat of suffering run-of-the-mill military defeat in wartime is not sufficient for a country to set aside *jus in bello*: "(T)he rules of war may at some point become a hindrance to the victory of one side or another. If they could then be set aside . . . they would have no value at all. It is precisely then that the restraints they impose are most important." But sometimes a country at war is faced with something much more dangerous than run-of-the-mill military defeat. A country can sometimes suffer what Churchill called a "supreme emergency." Walzer suggests that when "the very existence of a community may be at stake", "the restraint on utilitarian calculation must be lifted. Even if we are inclined to lift it, however, we cannot forget that the rights violated for the sake of victory are genuine rights, deeply founded and in principle inviolable."[41]

There is more than a mere taste of powerful paradox in this doctrine of supreme emergency. Its full flavour is captured by Churchill himself: "(W)e have a right, indeed are bound in duty, to abrogate for a space some of the conventions of the very laws we seek to consolidate and reaffirm." Why did Churchill believe that the British enjoyed such a remarkably permissive right during WWII? He suggested that the British were "fighting to re-establish

[40] Walzer, *Wars*, 131. It should be noted that, in most of the laws themselves, the appeal to military necessity is explicitly ruled out as grounds for violation. See Reisman and Antoniou, eds. *Laws*, xvii–xxxii.

[41] Walzer, *Wars*, 195, 228.

the reign of law and to protect the liberties of small countries. Our defeat would mean an age of barbaric violence and would be fatal, not only to ourselves, but to the independent life of every small country in Europe." "It would not be right", Churchill averred, "that the aggressive power should gain one set of advantages by tearing up all laws, and another set by sheltering behind the innate respect for law of its opponent. Humanity, rather than legality, must be our guide."[42] Walzer's supreme emergency doctrine has affinities with Churchill's. Walzer stresses that, since appeals to emergency and crisis are inherent in the overheated wartime atmosphere, any appeal to supreme emergency must be subjected to the most rigorous public scrutiny. A supreme emergency exists only when there is proof of a serious threat which is not only close and imminent but also "unusual and horrifying." There is an important ambiguity with regard to what Walzer means by "unusual and horrifying." On the one hand, he suggests that the "ultimate horror" in question is a serious threat to a people's "survival as an independent nation", to "the survival and freedom of political communities." The emphasis, in other words, is on the grievous threat to the *sovereignty* of the community in question. On the other hand, the "ultimate crisis of collective survival" denoted by supreme emergency refers to "entire peoples being enslaved and massacred", i.e. the emphasis is not merely on losing sovereignty but more on being subject to a further set of appalling measures, like widespread murder, by an unjust regime.[43]

Walzer's only example of a real world supreme emergency conflates both senses. It is Churchill's Britain between mid-1940 and late 1941. Walzer argues that Britain was justified during this period in engaging in deliberate saturation bombing of residential areas in Germany, even though such acts violated noncombatant immunity. For Germany's blitzkrieg had left it triumphant throughout Western Europe and the controversial Molotov-Ribbentrop pact for now secured peace with the Soviet Union in Eastern Europe. America, of course, had not yet entered the European war during this time. Ignoring the massive assistance Britain was receiving from its Commonwealth, Walzer concludes

[42] Churchill quoted in Walzer, *Wars*, 245.
[43] Walzer, *Wars*, 241, 251–254, 257.

that the UK stood alone against the Nazi menace. And it was a menace in both senses: to the sovereignty of the British people collectively and to the individual human rights of many Britishers, should the Nazis conquer their island nation. He asks: "(C)an one do *anything* [his italics], violating the rights of the innocent, in order to defeat Nazism?" He answers yes, and justifies himself thusly: "Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful. We see it – and I don't use the phrase lightly – as evil objectified in the world."[44]

Is Walzer implying that both senses must be met for the imminent threat to be truly "unusual and horrifying"? He never says so explicitly but is not inclined to make sharp distinctions between a people's collective right to political sovereignty and individual rights to personal security, believing that the two bear close causal connections in the real world. This indeed seems the most comprehensive reading of Walzer: a supreme emergency exists only when there is proof of a close, potent and imminent threat of losing sovereignty and then being subjected to massacre or enslavement. One crucial consequence of this conception for Walzer is that only just states may avail themselves of the supreme emergency escape clause; only those who have met *jus ad bellum* may invoke supreme emergency. And this for at least two reasons. The first is explicit textual references to "a nation fighting a just war" invoking supreme emergency, and as a result committing murder, "though for a just cause."[45] The second, unstated by Walzer, is that both by fact and definition a just state would not put another in a condition of supreme emergency: only a brutal, aggressive, rights-violative regime would do that. Though he resists it, and leaves it unstated, it seems that Walzer has no choice but to acknowledge some kind of deep connection between *jus ad bellum* and *jus in bello*.

Since Britain in 1940–1 was confronted by the Nazis with both the loss of its sovereignty and the serious risk of being subjected

[44] Walzer, Wars, 253; M. Walzer, "World War II: Why Was This War Different?" *Philosophy and Public Affairs* (1971/72), 3–21.

[45] Walzer, *Wars*, 323, 325.

to massacre or enslavement, it was appropriate for it to use its RAF bombers to lash out against the civilian population of Nazi Germany, in the hopes that such might have some quelling effect on the Nazi war machine. Walzer stresses, however, that these conditions of supreme emergency evaporated by 1942, since by then both the USA and USSR had joined the battle, turning the tide against Hitler. This may be a bit strict, on his own terms, with regard to the dating: the war's outcome was arguably still in contention throughout 1942 and even early 1943. It is clear, though, that by mid-1944 the Allies could have expected eventual victory. In any event, Walzer concludes that continued Allied bombing of German residential centres – most graphically the razing of Dresden in 1945 – was unjust, since it targeted civilians and the supreme emergency exemption no longer applied.[46]

Consider the quandaries regarding Walzer's doctrine of supreme emergency. What exactly is the status of this supreme emergency "loop-hole" Walzer discerns in our shared war convention? Is it a *moral* loop-hole, suggesting that it is just for a nation to set aside the rules of justice for the sake of "a greater good", like collective sovereignty or a world without genocide? If so, then how can Walzer appeal at the final moment to an aggregative, consequentialist concept like "a greater good", when throughout his just war theory he ferociously denounces aggregative, consequentialist conceptions of wartime morality, in particular utilitarianism? *Just and Unjust Wars*, after all, is a systematic contrast between a rights-based, and a utility-based, conception of wartime morality, and the bulk of it is devoted to arguing in favour of the former. Rights, Walzer suggests, "cannot simply be set aside; nor can they be balanced, in utilitarian fashion, against this or that desirable outcome." Indeed, when we are "(c)onfronted by those rights, we are not to calculate consequences, or figure relative risks, or compute probable casualties, but simply to stop short and turn aside." Most clearly: "rights and rules are intended to bar utilitarian calculation."[47]

[46] Walzer, *Wars*, 258–263.

[47] Walzer, *Wars*, 228, 268 and 230. See also M. Walzer, "Standing", 222, n. 24: "Nozick goes on to argue, on Kantian grounds, that rights must be understood as constraints on action rather than as goals of a maximizing politics. Though I don't share his views as to the substance of a rights theory, the same conception of its structure underlies my own position in *Just and Unjust Wars*."

How can Walzer, at the last moment, suggest that the need for a fundamental consistency between the means and ends of warfare be put aside? And how can he permit, at the international level, something which we would not commonly endorse in the interpersonal case? Walzer himself, after all, admits that we do not think it morally justified when person P, to prevent his own death at the hands of murderous attacker R, reaches out and drags innocent person S into the fray, using S as a shield between him and R. Walzer has trouble squaring our condemnation of the interpersonal case with our purported condoning of the interstate case: "(C)ommunities, in emergencies, seem to have different and larger prerogatives. I am not sure I can account for the difference, without ascribing to communal life a kind of transcendence that I don't believe it to have. Perhaps it is only a matter of arithmetic . . . [perhaps rather] it is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are enslaved or massacred is literally unbearable."[48]

The reference to arithmetic is startling, and makes us mindful of the utilitarianism Walzer is otherwise at pains to criticize. His supreme emergency doctrine, in fact, bears a striking similarity to one form of rule-utilitarianism: during ordinary conditions of war, we are to adhere absolutely to the rules of *jus in bello*. However, when confronted with the hardest case, we are to set aside these rules and do what we must to prevail. The fact that human rights protections can ultimately be set aside may reveal what, for Walzer, is really the primary political commitment: "the survival and freedom of political communities – whose members share a way of life, developed by their ancestors, to be passed on to their children – are the highest values of international society." Perhaps what supreme emergency reveals about Walzer's theory, like rule-utilitarianism confronted with a hard case, is that individual human rights are not as fundamental for him as shared ways of life. Alternatively, one might ask Walzer: if the rules can be put aside here, why not elsewhere? If in the end the triumph of the just state is what matters most, then why have separate rules of *jus in bello* at all? Why not let

[48] Walzer, *Wars*, 254.

the just state avail itself of any means to crush the unjust aggressor right from the start?[49]

Walzer, in some sense, feels the sharpness of these questions. He admits they force him into a paradoxical position: it is moral to set aside the rules of morality during a supreme emergency. "(I)n supreme emergencies", he says, "our judgments are doubled, reflecting the dualist character of the theory of war and the deeper complexities of our moral realism; we say yes *and* no, right *and* wrong [his italics]. That dualism makes us uneasy; the world is not a fully comprehensible, let alone a morally satisfactory place." The deliberate killing of innocents, though murder, can nevertheless be justified in a supreme emergency: it is simultaneously right and wrong. At the same time, with respect to the same action, we say yes and no. Bomb the residential areas deliberately – murder those civilians – but do so only because you are "a nation fighting a just war [which] is desperate and survival itself is at risk." Walzer even suggests that soldiers and statesmen really have no other choice but to opt for the collective survival of their own communities. They have no choice but to get their hands dirty, availing themselves of brutal, rights-violative measures for the sake of the long-term survival and rights-satisfaction of their own people.[50]

Calling this paradoxical position a "utilitarianism of extremity", though, is most unhelpful on Walzer's part. For utilitarianism implies a commitment to an overall greatest good, i.e. to an all-things-considered justification, to a conviction that it's better to ensure long-term freedom and survival than to avoid the serious stain of committing murder. Walzer talks like this when he stresses that rights are "overridden" in a supreme emergency, presumably by the "highest values" of shared and just communal existence. Moreover, the utilitarian reference denies what Walzer previously insisted on: the total separation and equal importance of *jus ad bellum* and *jus in bello*. When push comes to shove, it is better to "wager this determinate crime (the killing of innocent people) against that immeasurable evil (a Nazi triumph)."[51] *Jus in bello*, in

[49] Walzer, *Wars*, 254.

[50] Walzer, *Wars*, 325–328, 251–268; M. Walzer, "Political Action: The Problem of Dirty Hands", *Philosophy and Public Affairs* (1973), 160–180.

[51] Walzer, *Wars*, 231, 259.

a supreme emergency, is of lesser import than *jus ad bellum*. But if this is true, then how is it wrong to violate *jus in bello* during a supreme emergency? In other words, his reference to utilitarianism does not fit together with his reference to paradox: utilitarianism is designed to avoid paradox by offering up a coherent ranking of the alternatives based on the goal of maximizing best overall consequences.

It seems to me, on the basis of these considerations, that Walzer's doctrine of supreme emergency is muddled in conception and dangerous in consequence. Sorting out the fragmented remarks, we come to the conclusion that Walzer's doctrine here is one of two forms: it is either a form of consequentialism, not unlike rule-utilitarianism, or it is a form of moral paradox. If it is a form of consequentialism, mandating the ultimate survival of just political communities, then it is at odds with either: 1) his own emphasis on the inviolability of rights; 2) our conventional condemnation of the same kind of action in the interpersonal case; or 3) his insistence on *jus in bello* and *jus ad bellum* being totally separate. If on the other hand it is a form of paradox, then it runs afoul of Walzer's own insistence that the best interpretation of our political commitments during wartime must at least be logically coherent.[52]

Supreme emergencies, I believe, are not instances of genuine paradox. They are, rather, cases of moral tragedy. A moral tragedy occurs when, all things considered, every viable option one is confronted with involves a serious moral violation. In a supreme emergency, this is clear: if one violates *jus in bello*, one commits murder and perhaps other crimes. On the other hand, if one does not violate *jus in bello*, one's omissions may contribute causally to the death and devastation of one's people at the hands of a brutal, rights-violative aggressor. While the aggressor, of course, would bear the biggest burden of blame for this, I think we would still criticize a regime that stood by and did nothing for the sake of principle while such destruction was meted out on its people.[53] Thus, in a rare case

[52] Walzer, Wars, 3–20; M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994); M. Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987).

[53] I concur with Walzer's notion that "let justice be done though the heaven's fall" is a rather hard doctrine for people to accept during a supreme emergency, since here it really means what it says. Walzer, *Wars*, 230.

of genuine supreme emergency we are not truly confronted with options that are both right and wrong, rather, we are confronted with options ***all of which are wrong***. It is a moral blind alley: there is no where to turn and still be morally justified.[54] In other words, I suggest we understand supreme emergency as a case where we exit the moral realm and enter the harsh Hobbesian realm of pure survival, where brutal, "do-or-die" measures will be taken and may accordingly be excused but never morally justified. It is the only realm of true necessity in wartime. The suggested alternative, then, is this: in a supreme emergency, a just state will commit actions which are morally wrong in order to save itself. While wrong, such actions may nevertheless be excused on grounds of extreme duress.[55]

VI. SUMMARY

Walzer defends three rules of right conduct during wartime: discrimination and noncombatant immunity; proportionality; and a ban on means *mala in se*. His defense of noncombatant immunity is eloquent and formidable, but his insistence on it leads him to underestimate the question of prohibited weaponry. His allowances for reprisals and supreme emergency strikes which violate right conduct are very interesting yet deeply problematic. They are the darkest and most dangerous aspects of his just war work. In my mind, these allowances are far too permissive of actions which, at best, can be excused on grounds of severe duress and, at worst, constitute

[54] I believe this is the deepest meaning of the article which Walzer mistakenly cites in favour of his own paradoxical reading of supreme emergency: Nagel's "Massacre", 123–144. The DDE, it should be noted, cannot justify actions which violate *jus in bello* during a supreme emergency. And this for at least two reasons. First, the DDE stipulates that the action which produces both good and bad effects must be otherwise permissible. But actions which violate *jus in bello*, like murder, are not otherwise permissible. Furthermore, the DDE stipulates that the bad effects cannot be the means whereby the good effects are to be achieved. But in a supreme emergency, the bad effects (like massive civilian casualties) are intended to bring about the good effects (to make the aggressor cease and desist).

[55] For other views on Walzer's supreme emergency escape clause, see: Lackey, "Modern", 540–542; and T. Nardin, *Law, Morality and The Relations of States* (Princeton: Princeton University Press, 1983).

some of the most appalling crimes which can ever be committed. An underlying theoretical point throughout this piece has been that Walzer cannot sustain his sharp distinction between *jus ad bellum* and *jus in bello*. Kant's older insistence that there be one just war theory, woven into a consistent whole, thus appears to be an important improvement on the most influential just war theory of our time.[56]

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