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Source: *The Journal of Ethics*, December 2011, Vol. 15, No. 4 (December 2011), pp. 371-386

Published by: Springer

Stable URL: <https://www.jstor.org/stable/41486937>

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## Civilian Immunity, Supreme Emergency, and Moral Disaster

Igor Primoratz

Received: 13 October 2009 / Accepted: 11 June 2010 / Published online: 23 July 2010  
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**Abstract** Any plausible position in the ethics of war and political violence in general will include the requirement of protection of civilians (non-combatants, common citizens) against lethal violence. This requirement is particularly prominent, and particularly strong, in just war theory. Some adherents of the theory see civilian immunity as absolute, not to be overridden in any circumstances whatsoever. Others allow that it may be overridden, but only in extremis. The latter position has been advanced by Michael Walzer under the heading of “supreme emergency.” In this paper, I look into some of the issues of interpretation and application of Walzer’s “supreme emergency” view and some of the criticisms that have been levelled against it. I argue that Walzer’s view is vague and unacceptable as it stands, but that the alternatives proposed by critics such as Brian Orend, C.A.J. Coady, and Stephen Nathanson are also unattractive. I go on to construct a position that is structurally similar to Walzer’s, but more specific and much less permissive, which I term the “moral disaster” view. According to this view, deliberate killing of civilians is *almost* absolutely wrong.

**Keywords** Civilian immunity · “Dirty hands” problem · Just war theory · Moral disaster · Non-combatant immunity · Walzer, Michael · Supreme emergency · War

Philosophers agree that the immunity of civilians (or non-combatants) against deadly violence in war must be the centerpiece of the *jus in bello* part of any ethics

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of war. Unsurprisingly, they disagree about everything else concerning this immunity: about its ground, scope, and stringency.

The division in ethics into consequentialist and nonconsequentialist theories is replicated in the ethics of war in the division into consequentialist and nonconsequentialist accounts of the morality of war. The former treat civilian immunity as a rule justified by the good consequences of its adoption. It prohibits targeting a large group of humans by lethal violence, and thereby helps reduce the killing, mayhem, and destruction wrought by war. The latter treat it as a matter of rights and justice. Human beings have a right not to be killed or maimed; unlike soldiers, civilians have done nothing to waive or forfeit this right, and justice demands that it be respected.<sup>1</sup>

Both accounts are exposed to serious queries. The consequentialist interpretation of civilian immunity—just like such interpretation of any other moral rule—seems to make it much too tenuous. Whenever the best consequences attainable under the circumstances will be attained by disregarding civilian immunity, that will be the right thing to do; civilians are made hostage to the vagaries of war, rather than provided strong protection against them. Nonconsequentialist accounts of civilian immunity invite the question: Is this immunity absolute? Must we always abide by it, whatever the consequences of doing so? If the answer is “yes,” then these accounts may be said to err in the opposite direction and to be just as unacceptable as the consequentialist view, albeit for a very different reason. Surely Hegel was right to warn that “*fiat justitia* should not be followed by *pereat mundus*” (Hegel 1965: 87). If the answer is “no,” the next question for the nonconsequentialist is: Just what amounts to a reason weighty enough to override civilian immunity?

The answer to the latter question offered by Michael Walzer in his book *Just and Unjust Wars* reads: supreme emergency. Walzer’s supreme emergency argument has received considerable discussion, much of it highly critical.<sup>2</sup> This paper is a contribution to that discussion. I will look into some recent critiques of Walzer’s position, and go onto offer an alternative and, I hope, more convincing view.

## 1 Supreme Emergency

Walzer introduces the argument of supreme emergency in the context of presenting and elaborating his account of *jus in bello*, and against the background of his analysis of “the problem of dirty hands”; he understands the former predicament as a special, and extreme, case of the latter.

We sometimes face a situation where different moral requirements pull us in opposite directions, and we can act as required by one only at the price of going against the other. This is sometimes not very difficult to resolve, as one moral requirement can have more weight than the other, whether in general or at least in the particular case. When we decide accordingly, we are not left with a sense of

<sup>1</sup> On the history, grounds, and scope of civilian immunity, see McKeogh (2002); Primoratz (2007).

<sup>2</sup> Apart from the writings discussed in this paper, the literature includes: Bellamy 2004; Brown 1983; Cole 2002; Cook 2007; Kaufman 2007; Lammers 1983; Mara 1986; Nardin 1986; Shue 2004; Statman 2006a, b; Toner 2005.

great unease or even guilt. But sometimes the conflict is deep and vexing: it presents us with a moral dilemma, defined by Walzer as “a situation where [one] must choose between two courses of action both of which it would be wrong for him to undertake” (Walzer 1973: 160). We face such a dilemma whenever we can prevent something extremely bad from happening only by breaking a stringent moral rule. People in all walks of life may have to deal with such a predicament, but those in politics are particularly likely to have to do so. As thinkers such as Machiavelli, Weber, and Sartre have pointed out, one cannot govern “innocently”—at least not successfully and for long. Walzer concurs, and adds that we would not want to be governed by those whose primary concern was to keep their hands “clean” by strict adherence to moral rules, rather than to safeguard and promote the common good. In politics “sometimes it is right to try to succeed, and then it must also be right to get one’s hands dirty. But one’s hands get dirty from doing what it is wrong to do. And how can it be wrong to do what is right? Or, how can we get our hands dirty by doing what we ought to do?” (Walzer 1973: 164). This looks paradoxical, but Walzer embraces the apparent paradox: a political leader facing such a quandary should indeed break the moral rule in order to prevent a development that would be extremely detrimental to the community. His action will be wrong, in that it will be a breach of a stringent moral rule, and it will also be right, in that it will stave off the threat to the community. It will leave him with dirty hands and a sense of guilt, yet he ought to do it; if he does not, he will fail to live up to the duties of his office.

Quandaries of this sort are particularly dramatic in wartime. Such was the predicament Britain seemed to be facing in early 1942. The government feared an impending defeat; it also feared that there was nothing its military could do about it, at least as long as they were fighting “clean.” Moreover, Britain’s defeat was not going to be yet another defeat of a country by another, entailing such things as loss of some territory, war reparations, political concessions, and the like. Britain was perceived as the only remaining obstacle to the subjugation of most of Europe by the Nazis. Now the rule of the Nazis over most of Europe would have meant, as Churchill put it, “an age of barbaric violence” (quoted in Walzer 2000: 245). It would have involved extermination of some peoples and something very much like enslavement of others. In Walzer’s words, “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.” It was “evil objectified in the world ... in a form so potent and apparent that there could never have been anything to do but fight against it” (Walzer 2000: 253).

Thus Britain was thought to be facing what Walzer (borrowing the term from Churchill) calls “supreme emergency”: an (a) imminent threat of (b) something utterly unthinkable from a moral point of view, a moral catastrophe. In such an emergency, and in such an emergency only, we may act in breach of such a basic and weighty moral rule as that of civilian immunity, if that is the only way we can hope to prevent the catastrophe. Accordingly, Churchill’s government decided that Britain would no longer fight “clean,” and unleashed its air force on the civilian population of Germany. The onslaught continued almost to the last days of the war. Most of that killing and destruction cannot be defended by this line of argument,

since it soon became obvious that Germany was not going to win the war. But in its first stage, in Walzer's judgment, the terror bombing of Germany was morally justified (albeit a crime too). It was morally justified as the only possible response to the supreme emergency Britain was facing.

What if it is only one country, rather than many, that is facing a threat of enslavement or extermination? Walzer holds that the argument of supreme emergency would still apply. He writes:

Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer the question affirmatively, though not without hesitation and worry. [...] ... It is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are sometimes massacred is literally unbearable. For the survival and freedom of political communities – whose members share a way of life, developed by their ancestors, to be passed onto their children – are the highest values of international society. Nazism challenged these values on a grand scale, but challenges more narrowly conceived, *if they are of the same kind*, have similar moral consequences. (Walzer 2000: 254)

Walzer ends his chapter on supreme emergency by emphasizing that the rules of war in general, and the rule of civilian immunity in particular, may not be breached in the face of defeat *simpliciter*, but only in the face of defeat “likely to bring disaster to a political community” (Walzer 2000: 268).

## 2 Some Recent Criticisms of the Supreme Emergency View

Walzer's statement of just war theory has generated much critical discussion, which shows no signs of abating. The issue of supreme emergency looms large in this discussion. In this section I review and comment on some recent criticisms of Walzer's position on the matter. This should prepare the ground for sketching an alternative view of the limits of civilian immunity in the final section of this paper.

Some of the critics are somewhat uncharitable, and Walzer's position can easily be defended against their objections. A notable example is Brian Orend, who has written a book-length study of Walzer's ethics of war and has subsequently revisited the issue in an essay dealing specifically with the problem of supreme emergency.

Orend first seeks to highlight some ambiguities and inconsistencies in Walzer's argument. One is that Walzer permits at the inter-state level what he would never permit at the interpersonal level. The supreme emergency view allows a state to fend off the emergency by deliberately killing many innocent people, whereas “it is not usually said of individuals in domestic society ... that they morally can strike out at innocent people, even in the supreme emergency of self-defense” (Walzer 2000: 254). When trying to explain this different treatment, one of the things Walzer says is: “perhaps it is only a matter of arithmetic” (Walzer 2000: 254). Orend takes this to be a symptom of utilitarianism. Indeed, one of the ways Walzer describes his supreme emergency position is “the utilitarianism of extremity” (Walzer 2000: 231). Yet what he is presenting is a version of just war theory, which is the main

competitor of utilitarian accounts of the morality of war. Accordingly, time and again he expressly rejects utilitarian arguments and positions. Orend's next objection is that Walzer's recourse to utilitarianism belies his own insistence on "the total separation and equal importance of *jus ad bellum* and *jus in bello*" (Orend 2001: 132). For in utilitarian ethics of war the distinction is merely one of convenience; *jus in bello* is completely subservient to *jus ad bellum*. Finally, Walzer portrays supreme emergency as paradoxical; but if we deal with it by applying "the utilitarianism of extremity," that removes all appearance of 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." Orend's conclusion is that "Walzer's doctrine of supreme emergency is muddled in conception and dangerous in consequence" (Orend 2001: 132).

Orend, too, seeks to remove the paradox, but not by resorting to utilitarianism. What we are facing in a supreme emergency is a predicament where we have two options, each involving a "serious moral violation," and we must choose one. In his view, this predicament is best described as a "moral blind alley" or "moral tragedy." Whatever we do will be wrong. For this reason alone one might say that in such a case we are beyond morality: morality can offer no guidance and no justification. Yet we must choose. Moreover, the options we face in supreme emergencies are matters of life and death; therefore our choice will inevitably be determined by the irresistible pull of survival, and we will be forced to use deadly violence against innocent people as the way to survival. Accordingly, "while wrong, [our] actions may nevertheless be excused on grounds of the most extreme duress" (Orend 2001: 133).

In his essay "Is There a Supreme Emergency Exemption?" Orend explains this in some detail. He starts with an interpersonal analogy: A attacks B in an attempt to murder him, and B seeks to save his life by using C, an innocent bystander, as human shield. Our first response to this would be to say that B acted as "a selfish and despicable coward." Yet, upon reflection, we may come to understand that B made a "desperate choice" in the face of an extremely terrifying threat. Thus our more considered moral judgment of B and B's action may be more discerning and less harsh:

... We might be willing to excuse B's actions, on grounds that the terrible duress and mortal fear operative on him in the situation drove him to make the terrible choice he did. Like any animal filled with mortal terror, he desperately reached out for any means necessary to stave off death. This doesn't make his choice *right* or morally justifiable; it makes it *understandable* and, depending on the exact circumstances, *excusable* from criticism or punishment. It will be excusable if we determine that the pressure ... was so extreme that B acted more out of animal instinct than out of a morally culpable decision-making capacity. We would say ... that *he was forced to do something terribly wrong*. (Orend 2005: 144)

The same applies to those who act on behalf of a polity that is facing a supreme emergency. In such a plight, Orend writes, "as a matter of fact any country ... will do whatever it can to prevail. The animal instincts are going to kick in, just as in our

inter-personal analogy” (Orend 2005: 149). Like Walzer, Orend too has a single historical example, that of terror bombing of German cities by the RAF.

The view of supreme emergency as a moral tragedy that takes us beyond the realm of morality, into a Hobbesian struggle for survival in which we resort to *any* means whatsoever, is claimed to have the additional advantage of eliminating all appearance of paradox. “Walzer suggests that, in a supreme emergency, you have a right to do wrong, and/or a duty to violate duty, whereas no such claims are here made, resulting in a more coherent understanding. You don’t have the right to do wrong, or a duty to violate duty; if you do wrong, you do wrong, even under the pressure of supreme emergency conditions” (Orend 2005: 149).

I find Orend’s criticism of Walzer largely misguided, his proposed alternative less plausible than the view it is meant to supplant, and the historical example he uses to illustrate it poorly chosen. To be sure, Walzer’s way of stating his position contributes to some of the misunderstanding involved. Some of his wordings seem deliberately paradoxical, and the sense of paradox is reinforced when he portrays supreme emergency as a case of “dirty hands” conundrum (Walzer 2000: 323–325). Yet he also writes of utilitarianism and utilitarian considerations as carrying the day. But things can be made clearer and more coherent by stating the same position in a somewhat different, more careful way. The problems generated by discussing utilitarianism can be avoided by referring to considerations of consequences instead. Walzer is entitled to take such consequences into account alongside considerations of rights and justice; what ethics of war (or, indeed, of anything else) can ignore consequences of actions? Rejection of utilitarianism or consequentialism is not tantamount to rejection of all consequential considerations, but rather of the utilitarian or consequentialist claim that it is *only* such considerations that count. Indeed, some of the requirements of just war theory in both its prongs involve considerations of consequences. As I will argue in the next section, supreme emergency can be sufficiently described without any reference to the contentious issue of dirty hands, a right to do wrong, or a duty to violate duty. Finally, Walzer is not committed to “total separation” of *jus ad bellum* and *jus in bello*. They are logically independent of one another and *normally* “equally important” in the sense that (a) if our war is to be morally justified, we must live up to both sets of requirements, and (b) even if we do not live up to the requirements of *jus ad bellum*, we still ought at least to live up to those of *jus in bello*; that is, the latter bind both combatants who do and those who do not have a just cause. But this does not rule out the possibility that, under certain circumstances, the tension between *jus ad bellum* and *jus in bello* might be resolved by the former overriding the latter, except on the question-begging assumption that the requirements that make up the latter are absolute.

The main question, though, is whether Orend’s understanding of supreme emergency is superior to that of Walzer’s. Walzer considers a difficult *moral* conflict, in which extremely weighty consequential considerations lead the agent to decide against extremely weighty deontological considerations. The right decision in such a case makes one’s action morally *justified*, all things considered. Orend sees the same predicament as a conflict *beyond morality*, in which an irresistible survival instinct prevents the agent from settling the issue by rational moral thinking, and

makes her decide under duress. Once she does, her action cannot be justified—it is morally wrong—but she can be *excused* for having performed it.

I do not mean to deny that some situations in war fit this description. A soldier on the battlefield might fall into the grip of the survival instinct to the extent that he can no longer think rationally or act in a significantly voluntary way and, say, kill some civilians in order to save his life. But supreme emergency is not something that faces a single soldier on the battlefield. It is rather a problem facing a nation at war or, more accurately, those who lead the nation and decide on its behalf whether to go to war and how to fight it. Again, we can imagine a case where a nation's leaders find themselves under duress in some Dr. Strangelove-type situation. But that sort of thing hardly ever happens. What *is* likely to happen is that the option to resort to intentional large-scale killing of enemy civilians gets discussed in high political and military committees, in conditions reasonably conducive to rational thinking, on the assumption that such thinking will be engaged in in appropriate detail and without undue haste, and that the pros and cons of that option will be carefully assessed and weighed against alternatives. Should a political or military leader involved show signs of thinking, feeling, or acting “like [an] animal filled with mortal terror,” he or she would be excused from the deliberations, rather than allowed to help determine their outcome. Both Walzer and Orend offer the same historical example of deliberate killing of a large number of enemy civilians justified, or excused, by a supreme emergency: that of the bombing of German cities in World War II. The decision-making process that led to that campaign is well documented, not least in the voluminous writings of the person who bears the greatest part of the overall responsibility for it, Prime Minister Churchill. We know that its participants were not “filled with mortal terror” and did not “act out of animal instinct,” but rather exercised their “morally culpable decision-making capacity.”

There is one important point of concurrence between Orend and Walzer: both—albeit for different reasons—refuse to condemn morally those who in a supreme emergency resort to large-scale killing of civilians. Other critics of Walzer reach a different conclusion: they insist that civilian immunity must be respected even in such an emergency, and that those who fail to do so are to be morally condemned.

One is C.A.J. Coady, who takes Walzer to task for his bias in favor of the state. Several critics have highlighted a certain degree of statism in Walzer's ethics of war in both its prongs. In Walzer's account of *jus ad bellum*, it comes to the fore in particular in his restrictive view of the legitimacy of military intervention, based on an argument about the “fit” between the state and the political community's traditions and way of life. In his account of *jus in bello*, it is apparent in his restrictive view of the availability of the supreme emergency argument to various agents, which is the question on which Coady focuses. Walzer presents this argument in his *Just and Unjust Wars*, which for the most part deals with war between states; and he discusses it solely in that context, as an option political and military leaders of a state may have to consider. In his discussion of non-state terrorism in that book and in a later essay, titled “Terrorism: A Critique of Excuses,” supreme emergency is never mentioned. Walzer argues that non-state terrorism can never be justified or excused. If it is engaged in in a liberal and democratic state, it is not justified because it is not necessary: there are ample



opportunities and venues for voicing and addressing grievances without recourse to violence. If employed in the struggle against a totalitarian state, it is not justified because it is bound to fail; totalitarian states are “immune” to resistance of any kind, including terrorism.<sup>3</sup> And yet the sole historical instance of wholesale deliberate killing of civilians Walzer considers justified as a response to supreme emergency, the bombing of German cities in World War II, is a case of (state) terrorism employed against a totalitarian state. “... Why,” asks Coady, “should states enjoy the supreme emergency license when other groups do not?” (Coady 2004: 784). To reply, as Walzer does, that the “survival and freedom of political communities” are “the highest values of international society” will not do, if this society is understood—as it is in Walzer’s account—as comprised of established and internationally recognized political communities.

Some insurgent organizations, too, can reasonably claim to be acting on behalf of political communities. In certain extreme circumstances, such an organization might mount a supreme emergency argument in favor of resort to terrorism. Then again, “why not allow that the [supreme emergency] exemption can apply to huge corporations, the existence of which is central to the lives and livelihoods of so many? Or ... to individuals when they are really against the wall?” (Coady 2004: 787). So long as he has produced no good argument for restricting the exemption to states, Walzer seems bound in consistency to make it available to non-state agents as well. But if he did, that would compromise the “rarity value” of the exemption:

As the name suggests, the supreme emergency story ... gets its persuasiveness from the idea that its disruptive power to override profound moral prohibitions is available only in the rarest of circumstances. Any broadening of the reach of these circumstances tends to reduce the rarity value of the exemption and hence increase the oddity of the idea that it can be right to do what is morally wrong. [...] ... The more we move in this direction, the more the currency of supreme emergency is devalued. (Coady 2004: 787)

Thus we are facing a choice: we can either concede that the supreme emergency exemption applies more generally than Walzer allows—to states, but also to a range of non-state agents—or decide that it applies to no-one, and that civilian immunity is an absolute moral rule. Coady opts for the latter choice: “My own conviction is that we surely do better to condemn the resort to terrorism outright with no leeway for exemptions, be they for states, revolutionaries, or religious and ideological zealots of any persuasion” (Coady 2004: 789).

Now Coady is clearly right as far as Walzer’s bias in favor of the state is concerned. A stateless people and an organization fighting on its behalf should in principle be as entitled as an established and recognized state to consider resorting to deliberate attacks on civilians, when facing a supreme emergency. Corporations and individuals, on the other hand, seem to be in a different position in this respect.

<sup>3</sup> When reprinting the essay in a recent book, Walzer inserted a bracketed remark on this. His amended view is that non-state terrorism might be justified in a supreme emergency, but only in the face of threat of genocide. As a matter of fact, though, “this kind of a threat has not been present in any of the recent cases of terrorist activity. Terrorism has not been a means of avoiding disaster but of reaching for political success” (Walzer 2004b: 54).

It may yet be possible to argue for restricting the exemption to the former and deny it to the latter without inconsistency and while preserving its rarity value.

Stephen Nathanson, too, takes a critical look at Walzer's position and reaches the conclusion that the supreme emergency argument should not be allowed to undermine our absolute commitment to civilian immunity and consequent rejection of all terrorism. Nathanson first takes a close look at the ways in which Walzer describes such emergency. This brings to the fore two different conceptions of supreme emergency: a broad and, to a significant degree, subjective conception, and a specific and objective one. When focusing on the Nazi threat, Walzer uses a broad brush and lays on highly emotional colors: Nazism presented a threat to civilized values, to civilization itself, to "everything decent in our lives," and this threat properly evoked responses such as abhorrence and horror. When looking beyond that particular case, Walzer portrays supreme emergency as "a threat of enslavement or extermination directed at a single nation."

The first, broad and subjective version of supreme emergency is much too flexible and open-ended to provide the kind of ethical guidance we expect of such a criterion. Walzer focuses on World War II and highlights Nazi atrocities, while placing the atrocities committed by the Japanese armed forces in the same war at a lower point on the atrocity scale, where they fall short of supreme emergency. Yet the latter atrocities, too, were systematic and large-scale, and when portrayed vividly and in detail tend to evoke the same emotional response as those committed by the Nazis. They, too, strike us as incompatible with civilized values and a threat to "everything decent" in our lives. Vivid and detailed accounts by survivors of the terror bombing of German and Japanese cities in that war will also evoke a response of horror and abhorrence in a decent person. Moreover, "if people are subjected to brutal rule over many years and cannot live normal, secure lives, they are likely to see their own situation as a supreme emergency for them. [...] It is not clear that Walzer could show why these people are mistaken since any form of extended oppression is a threat to civilized values" (Nathanson 2006: 22).

Should we, then, discard the first, broad and subjective approach to supreme emergency and adopt the second, specific and objective conception, according to which only the prospect of extermination or enslavement of a nation amounts to such an emergency? Nathanson finds this version of the supreme emergency criterion clear enough, but faults it for two reasons. First, it does not support Walzer's account of the British predicament at the early stage of war, since Britain was not facing such a threat. Second, it is likely to be rejected as too demanding by people facing the threat of lesser, but still huge disasters. Generally, Nathanson submits, people are likely to perceive any urgent, threatening situation as a supreme emergency:

Consider the American reaction to the September 11 attacks. Though serious and frightening, these come nowhere near satisfying Walzer's criterion, and yet many people would find the expression "supreme emergency" quite apt to describe the post-September 11 situation. They feel that their way of life is threatened, that their civilization is threatened, that any means of combating future acts of terrorism are justified. Likewise, supporters of Bin Laden and

the September 11 attackers probably see both the United States and Western culture generally as “an ultimate threat to everything decent” in *their* lives. (Nathanson 2006: 23–24)

The supreme emergency criterion, then, does not provide clear and reliable ethical guidance. Those who adopt it are stepping on a very slippery slope, and are liable to end up violating civilian immunity in many cases in which Walzer himself would not condone doing so. Therefore we should rather endorse this immunity as an absolute rule of morality.

Now the first, broad understanding of supreme emergency is indeed unacceptably subjective. If it were all we had to go by, such emergency would be in the eye of the beholder. On the other hand, Nathanson’s objections to the narrow conception are not very damaging. That conception may not apply to the historical illustration of supreme emergency Walzer offers, the terror bombing of German cities in World War II, but then so much the worse for that particular illustration.<sup>4</sup> People facing a major crisis that falls short of extermination or enslavement are indeed liable to feel, and claim, that theirs is a supreme emergency too. But any moral rule can be misunderstood, misinterpreted, and misapplied. I will come back later to the slippery slope argument Nathanson grounds on his second point.

I am thus in agreement with some of Coady’s and Nathanson’s objections to Walzer’s supreme emergency view, but cannot endorse others, and want to resist their conclusion that civilian immunity must be upheld as an absolute moral rule. I will now sketch a position that is structurally similar to Walzer’s view, but is not exposed to the objections of bias in favor of the state, loss of the rarity value of the exemption, its vagueness, and the slippery slope. I propose to term this position the moral disaster view.

### 3 Moral Disaster

Let me retrace some of my steps. Just what kind of choice is at issue?

Put in the most general terms, it is a choice between two *prima facie* moral requirements, both applying to the circumstances we find ourselves in, but pulling us in opposite directions. We cannot act in accordance with one without at the same time going against the other, and thereby, in that respect, doing something wrong. Yet that is exactly what we must do; there is no third option. This is a case of moral conflict. Walzer, however, calls this a moral dilemma; but his definition of “moral dilemma,” quoted in Sect. 1 above, although perhaps in tune with everyday usage, is much too wide for purposes of philosophical discussion. Not every moral conflict is a moral dilemma; the latter term is better reserved for a certain type of such conflict. In any case of moral conflict whatever we do, we do something that is in certain respect wrong. But in some such cases the two courses of action are not equally wrong: one is more so than the other, whether in general or only in that particular

<sup>4</sup> Elsewhere I have argued that the bombing campaign cannot be morally justified by a supreme emergency nor, indeed, any other argument—that it was an utterly indefensible and unmitigated atrocity that deeply compromised the just cause for which the Allies were fighting (see Primoratz 2010).

case. Accordingly, there is a solution to the conflict: we ought to choose the other course of action. When we do that, we do what, all things considered, we ought to do. But this does not wipe out the *prima facie* wrongness of our action as a violation of the moral requirement that has been overridden; that accounts for the conceptual room and the moral call for awareness of the moral price paid and regret that it had to be paid. This is moral conflict *simpliciter* (see Ross 2002, Chap. II).

Sometimes, however, the conflicting moral requirements are equally weighty, the two possible courses of action equally wrong. There is no solution to the conflict, nothing that, in the end, we ought to choose. This is a moral dilemma, as the term is usually used in philosophy (see Sinnott-Armstrong 1988, Chap. 1). In this sense, cases that Walzer presents and discusses as instances of dirty hands, including that of supreme emergency, are not moral dilemmas, but rather instances of moral conflict *simpliciter*.

Moreover, it is not clear just what is gained by portraying a case of supreme emergency as one of dirty hands. Walzer's discussion of the dirty hands problem, seminal though it is, fails to tell us what is *distinctive* of the problem: what distinguishes it from any case of very serious moral conflict, that is, moral conflict in which the conflicting moral requirements are very weighty indeed. None of the possibilities suggested by Walzer's discussion—conflict between public and private morality, or between role morality and universal moral requirements, or between deontological and consequential considerations—seems to capture that. Stephen de Wijze (2007) seems to come closer: he argues that cases of dirty hands are those of very serious moral conflict in which our choice is forced by the circumstances created by an immoral person or persons, so that we end up collaborating with them, furthering their evil project. In this sense, however, a supreme emergency is *not* an instance of dirty hands.

What is it, then? Rather than wade any further into ethical theory and try for a general account of supreme emergency, I will stay within the bounds of the ethics of war and focus on the rule of civilian immunity. Just what would it take for us to be justified in overriding this immunity and engaging in deliberate large-scale onslaught on civilians?

A careful reading of Walzer's book and his more recent essay "Emergency Ethics" shows that, although he promises a "touchstone against which arguments about extremity might be judged" (Walzer 2000: 253), what he offers under the heading of supreme emergency is actually a range of answers to this question. (a) At one end, we find Walzer speaking of a crisis in which morality itself seems to be at stake. How, he asks, "can we, with our principles and prohibitions, stand by and watch the destruction of the moral world in which those principles and prohibitions have their hold?" In such a crisis, "our deepest values are radically at risk," and the prospect we are facing "devalues morality itself and leaves us free to do whatever is militarily necessary to avoid [it]" (Walzer 2004a: 37, 40). (b) Then there is the prospect that was facing Great Britain and much of Europe in the early stages of World War II: that of entering an age of barbaric violence, in which entire peoples are exterminated or enslaved. (c) The next point on this scale of enormity is the prospect of extermination or enslavement facing a single nation. (d) Finally, there is a threat to "the survival and freedom of a political community."

We should put both the first and the last understanding of supreme emergency to one side. I find the idea of a threat to “morality itself” unintelligible, because I cannot envisage human existence, however damaged and constrained, bereft of all morality. An essential part of being human is being capable of, and given to, moral deliberation and action. Human beings demonstrate this even in the most trying circumstances; there is, for example, ample evidence that even in Nazi and Soviet camps, both inmates and guards engaged in moral thinking and acted accordingly.

The notion of a threat to “survival and freedom” of a political community, on the other hand, is unhelpful, because ambiguous. In one sense, it is a threat of extermination or enslavement of its people. This takes us back to the third understanding of supreme emergency to be found in Walzer. In another sense, it is a threat to political independence of a state. This kind of threat, however, can hardly have the moral weight required by Walzer’s supreme emergency argument. A state may or may not have moral legitimacy. If it does not, its demise may well be morally preferable to its continued existence. But even if it does, its loss of political independence, however deplorable, surely does not amount to the loss of “everything decent in our lives,” something that must be staved off by means of wholesale killing and maiming of civilians.

We are left, then, with extermination or enslavement of entire peoples. If such a prospect facing a single people is enough to put onslaught on enemy civilians on the agenda, the same prospect facing a number of peoples will provide an even more compelling reason to do so. However, the expression “extermination or enslavement” needs to be unpacked, for the two differ in important respects. First, it is clear what “extermination” of a people amounts to, whereas “enslavement” can refer to different things: the status of slaves in the ancient world, or the fate the Nazis had in store for the “racially inferior” peoples of Eastern Europe, or a less extreme type of totalitarian oppression (as in the Cold War phrase “the enslaved nations of Eastern Europe”). Any such fate, appalling as it is, would still be seen as preferable to extermination. Second, extermination, once perpetrated, cannot be reversed, while those enslaved (in any sense of the word) can always hope to be set free. Enslavement of a people, then, is not quite in the same class of moral enormity as extermination; nor does it have the finality that defines the latter.

I believe that extermination of a people amounts to a moral disaster, and that its prospect may put deliberate killing of civilians on the agenda. But if so, why not the same prospect facing a smaller group? Why not extend the same moral exemption to a single individual who is about to be murdered and could save his life by using an innocent bystander as a human shield? Part of the answer is: both individual and mass murder is *murder*, but the difference in scale between the two surely has considerable moral significance. Part of the answer is the moral import of continued existence of a large and comprehensive community such as a people, a nation, that is, the community that provides the framework and resources for human life in all its aspects, and relates the life of the individual to a collective past remembered and a collective future hoped for. Walzer puts this point well. He cites Burke’s famous portrayal of the political community as a partnership between the living, the dead, and those yet to be born, and goes on to say:

This commitment to continuity across generations is a very powerful feature of human life, and it is embodied in the community. When our community is threatened, not just in its present territorial extension or governmental structure or prestige or honor, but in what we might think of as its *ongoingness*, then we face a loss that is greater than any we can imagine, except for the destruction of humanity itself. We face moral as well as physical extinction, the end of a way of life as well as of a set of particular lives, the disappearance of people like us. And it is then that we may be driven to break through the moral limits that people like us normally attend to and respect. (Walzer 2004a: 43)

However, a people can be threatened in its “ongoingness” in a way that falls short of extermination, but may be no less effective: by being ethnically cleansed from its land. Strangely enough, Walzer never adverts to this. A people needs a homeland, in which it can evolve and maintain its way of life, its traditions and cultural and political institutions. Uprooting a people from its land puts an end to its “ongoingness” almost as effectively as does its extermination. Indeed, the two are closely related: more often than not, those seeking to annex another people’s land, but not its inhabitants, carry out massacres with a view of terrorizing those who survive into fleeing. But while ethnic cleansing is by definition carried out by means of violence, this violence need not reach wholesale extermination of a people. Therefore ethnic cleansing cannot be subsumed under extermination, but constitutes a moral disaster in its own right.

The moral disaster position, then, is structurally similar to that of supreme emergency. Both uphold civilian immunity as an extremely weighty moral rule, which expresses the demands of justice, as it applies in wartime, and determines the rights of civilians. Both also concede that this immunity may be overridden *in extremis*, that is, when extremely weighty consequential considerations enjoin that it give way. But the idea of moral disaster differs from that of supreme emergency in its contents and scope. While supreme emergency ranges from “threats to morality itself” to threats to political independence of a state, moral disaster includes only extermination and ethnic cleansing of an entire people from its land.

The moral disaster view refers to peoples, rather than states or political communities; therefore it cannot be charged with pro-state bias. Nor is it exposed to the charge of being vague and overly inclusive; for its crucial terms are, I believe, sufficiently clear. While “genocide” is a legal term whose definition is a matter of some disagreement, “extermination” is an ordinary language word, but nonetheless quite unequivocal. So is the phrase “extermination of a people.” “Ethnic cleansing” is by now a legal term. It is also used in ordinary discourse, much too often in loose and sometimes plainly irresponsible ways. But that is not to say that it cannot be properly defined. I find the following definition, offered by Bosnian legal scholar Dražen Petrović, quite helpful: “Ethnic cleansing is a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin. Such a policy involves violence and is very often connected with military operations” (Petrović 1994: 351).

By restricting the notion of moral disaster to extermination or ethnic cleansing of entire peoples—two wrongs that, in view of their enormity *and* finality, constitute a category apart—the present view goes a long way in preserving the rarity value of the exemption it proffers.

Its rarity value is further ensured by attending to an issue that Walzer deals with only very briefly, and that has been completely neglected by his critics. The meaning of “supreme emergency” is defined by two criteria: the nature of the danger and its imminence. But for such an emergency to amount to a justification of deliberate large-scale attacks on civilians, a third condition must be met: such attacks must be the way, and the only way, of staving off the danger. Just how certain must we be of that? One might argue that when *in extremis*, we cannot apply stringent epistemic standards in deciding how to cope—that if we cannot really know what will work, we must take our chances with what might. This is Walzer’s view. In such a predicament, he argues, there can be no certainty. Nor is it a matter of calculating probabilities, for there is no method of quantifying them. What we can, and must, do is study the situation closely, take the best available advice, and then “wager” the “determinate crime” of large-scale killing and maiming of civilians against the “immeasurable evil” that is otherwise in store for us. “There is no option; the risk otherwise is too great” (Walzer 2000: 260).

I do not accept this position. It highlights the enormity of the threat, while failing to give due weight to the enormity of the means proposed for fending off the threat—the enormity of deliberately killing and maiming innocent people. When that is taken into account, the conclusion should rather be that even *in extremis*, if deliberate onslaught on civilians is to be justified, the reasons for believing that it will work and that nothing else will must be very strong indeed. If we lack such reasons, we must desist. Even in a desperate plight, we should not “wager” with the lives of people who are enemy civilians, but *innocent* civilians nonetheless.

In a recent reassessment of civilian immunity in just war theory, Frederik Kaufman writes: “Just shy of absolutism, the supreme emergency is a threshold view; it requires that we refrain from intentionally killing innocent people until the costs of doing so become too high plausibly to do anything else” (Kaufman 2007: 105). I have sought to show that, as a characterization of the supreme emergency view, this is only half true. That view is, indeed, a threshold view; but because the threshold it sets is neither clear enough nor high enough, it is not *just* shy, but rather *well* shy of absolutism. The moral disaster view *is* just shy of absolutism: it maintains that deliberate killing and maiming of civilians in war is *almost* absolutely wrong.

Is the moral disaster view vulnerable to the slippery slope objection? If we allow *any* departure from civilian immunity, do we not make a dent in the prohibition which is likely to become ever wider? Once the rule is no longer absolute, even if some departures from it are justified, there are likely to be others, which are not. The exemption will lend itself to misapplications—both those made in good faith, as a result of mistaken beliefs, and those not so made.

I do not think this type of argument can be assessed in the abstract. Its force rather varies with the circumstances in which it is deployed. In general, it seems to me that, other things equal, slippery slope arguments become less convincing as the

cost of keeping to the rule at issue becomes higher. Thus in some cases a slippery slope argument may carry great weight, while in others its force may be doubtful. Indeed, in truly extreme cases, such an argument may no longer seem to the point. Think of a people facing the prospect of extermination, or of being ethnically cleansed from its land, and unable to defend itself against an overwhelmingly stronger enemy while fighting in accordance with *jus in bello*. Suppose we said to them: “Granted, what you are facing is an imminent threat of a true moral disaster. Granted, the only way you stand a chance of preventing the disaster is by breaching the rule of civilian immunity and attacking enemy civilians. But you must not do that. For if you do, that will make a dent in the rule, and that, in turn, will make possible, and indeed likely, other, unjustified breaches.” Would that be a good moral reason for them to acquiesce in the fate their enemies have in store for them?

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