Human Sacrifice in Walzer’s Just War Theory

The Conflict between Civilian Protection and the Rules of War

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The violence of Ares [brutal and supernaturally powerful] is a sacred violence because authorized by its inhuman proponent and ritualized in the altered states of the battlefield . . . . Battlefield as place of sacrifice; participation in a sacrament. The whole bloody business reveals a god, therewith placing war among the authentic phenomena of religion. And that is why war is so terrible, so loved, and so hard to understand. i

INTRODUCTION

War threatens human life with terrible risks. Increasingly, not only soldiers, but civilians too bear these risks. In the late 20th Century, 75% of all war deaths were civilians. ii In Iraq from 2003-2006, there were at least 150,000 war-related civilian deaths, and 4 million refugees. iii Given such a context, I want to ask: does Walzer’s Just War Theory adequately protect human rights, or is he too willing to sacrifice civilian lives on the altars of war and national sovereignty?

Michael Walzer is the author of the most influential contemporary work on Just War Theory, Just and Unjust Wars (JAUW). Though Walzer grounds his version of Just War Theory (JWT) on a foundation of human rights, he ultimately fails to protect human rights and civilian lives in two notable ways: first, he follows convention in accepting civilian casualties as a normal part of war; and second, he accepts the massive violation of human rights and large-scale killing of civilians in a situation of Supreme Emergency.
How does Walzer justify the violation of human rights and the breaking of international law? After a discussion of the background for civilian protection in war, I will survey Walzer’s arguments for basing JWT on a foundation of human rights, and then examine cases where Walzer accepts the killing of civilians and the breaking of war rules as legitimate. Next I will describe several criticisms I have of Walzer’s argument for Supreme Emergency (SE) exemptions to the rules of war. I will examine Walzer’s more recent comments on these issues, along with a few attempts by other philosophers to revise the SE exemption. My conclusion is that the concept of a SE exemption is a moral disaster that reveals broader problems of civilian protection in Walzer’s work and in JWT. I will argue that the SE exemption should be eliminated, that massive violation of human rights or large-scale killing of civilians should never be allowed, and that we should improve protections for civilians in JWT and the rules of war.

Though there are two types of human sacrifice during wartime—the sacrifice of soldiers and of civilians—in this paper I won’t address the question of the rights of soldiers or the moral argument that makes killing soldiers acceptable during war. I’ll focus on the two cases where Walzer views the sacrifice of civilian rights and lives to be justified: civilian casualties resulting from legitimate military actions in war, and the direct targeting of civilians in a situation of SE.

BACKGROUND TO CIVILIAN PROTECTION

The principle of civilian protection in war blossomed in the middle ages through the early modern period as writers like Aquinas, Grotius, and Vattel sought limits on the killing and destructiveness of war, while also justifying the power of sovereigns and states to
Vattel agreed with Grotius that all those not involved in “the business of fighting” deserved immunity from direct violence. At the same time, these authors applied Aquinas’ concept of Double Effect (where a good act done with good intention can have a bad effect that is morally acceptable) to the context of war. In otherwise good and proportionate military operations, the Double Effect could be used to justify the indirect killing of civilians. Hence, the principle of civilian immunity “could yield to the requirements of military success: civilians were to be immune only as military circumstances permitted.”

In the contemporary era, International Humanitarian Law (IHL) has developed on the fundamental principle of distinguishing between combatants and non-combatants. Combatants are legally privileged to take part in hostilities without being subject to prosecution but may be targeted at any time (unless wounded, captured, or surrendering). Only combatants and military objects can be attacked. In IHL, the basis of civilian immunity is “a function of their lack of privilege to take part in fighting, not of their lack of moral responsibility for the armed conflict.” Though IHL requires military planners to take precautions in order to spare civilians, immunity is not absolute and the principle of Proportionality allows for civilian casualties to be weighed against the objectives of both specific military operations and the overall war.

Though non-combatant immunity is widely recognized, civilian casualties as an indirect result of military operations are commonly accepted. Take the U.S. military as an example. In 1974, the U.S. Department of Defense adopted the principles of Military Necessity, Distinction between combatants and noncombatants, and Proportionality as legal standards governing rules of engagement to guide commanders and soldiers in
These rules of engagement prohibit intentional killing or abuse of civilians. At the same time, U.S. rules of engagement also place great emphasis on the protection of U.S. forces by minimizing risks to soldiers and by holding commanders responsible for anticipating and countering potential threats. In 2000, the U.S. Department of Defense developed guidelines that authorized the use of lethal force against anyone demonstrating “hostile intent” or “hostile action” towards U.S. forces or their allies.

When noise, running, proximity to a battle zone, or even ethnicity can be interpreted as threatening, such guidelines offer troops an easy rationale and moral/legal cover for killing civilians.

As Thomas W. Smith notes, the current context is an “uneasy liaison” between the rules of war and civilian protection. The demands of war often lead to a breakdown of respect for human rights and terrible devastation for civilians. Meanwhile, military and political leaders employ humanitarian rhetoric to defend their operations and bolster public support for their war.

Keeping in mind this context and the concrete challenges of protecting civilian lives in war, I will now offer an overview of Michael Walzer’s approach to JWT.

WALZER’S APPROACH TO JUST WAR THEORY

Walzer aims to build his JWT on a foundation of human rights. He believes that common human experiences of war reveal a shared vocabulary and values and “a more or less systematic moral doctrine.” For Walzer, the best way to express this common moral framework, what he calls the “moral reality of war”, is through respect for human rights. “The arguments we make about war are most fully understood (though other
understandings are possible) as efforts to recognize and respect the rights of individual
and associated men and women.*** Walzer claims that we should treat human rights,
especially the rights to life and liberty, “as something like absolute values.”**

According to Walzer, “individual rights (to life and liberty) underlie the most
important judgments that we make about war.”*** Walzer claims that individual rights are
“a palpable feature of our moral world,” while the rights of states are “simply their
collective form.”*** States and national boundaries protect not only individual lives, but
also “their shared life and liberty, the independent community they have made, for which
individuals are sometimes sacrificed.”*** The moral standing of a state depends upon the
quality of the common life it protects.*** Under threat of war or invasion, “what is at
stake is not only the lives of individuals but also the common life that they have
made.”*** Hence “political association” is one of the things people value the most.

An unjustified war is an act of aggression, and it “is a singular and
undifferentiated crime because, in all its forms, it challenges rights that are worth dying
for.”*** Aggression violates territorial integrity and political sovereignty, rights that
belong to states but “derive ultimately from the rights of individuals.”*** In the standard
view of war and international relations, what Walzer calls the “Legalist Paradigm,”
aggression is a crime that justifies violent self-defense and punishment of the aggressor.
In this framework, war is only justified in response to aggression. Walzer finds this limit
too strict, and he proposes the following revisions that permit war in other circumstances
in order to protect rights: Sufficient Threat, where a nation may strike first when it faces a
serious threat from another nation; Secession/revolution, when a legitimate group fights
to create a separate political community; Counter-intervention, when a foreign nation has
unjustly intruded, and a third nation may intervene to restore balance to protect lives and rights; and finally, *Humanitarian Intervention*, where a state is committing massive human rights violations against its own people and a foreign state can intervene to protect lives and human rights.

With these revisions, Walzer provides a broader framework for justifying war, no longer limited to self-defense against aggression, and one that is based on support for human rights. He states, “The defense of rights is a reason for fighting. I want now to stress again, and finally, that it is the only reason.”

For Walzer, “just wars are limited wars,” and leaders must abide by these limits.

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. They are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle.

Limits are upheld through convention but best established on a foundation of human rights, which provides “the most effective limit on military activity . . . precisely because it rules out calculation and establishes hard and fast standards.” Walzer claims that human rights offer the strongest basis for prohibiting excessive harm and “purposeless or wanton violence.” Based in human rights, the rules of war recognize that people possess “a moral standing independent of and resistant to the exigencies of war”, and according to this standard, “a legitimate act of war is one that does not violate the rights of people against whom it is directed.”

THE WAR CONVENTION AND PROTECTION FOR CIVILIANS

The devastations of war are limited by the War Convention, a “the set of articulated norms, customs, professional codes, legal precepts, religious and
philosophical principles, and reciprocal arrangements that shape our judgments of military conduct.”xxxiii The War Convention describes “the duties of belligerent states, or army commanders, and of individual soldiers with reference to the conduct of hostilities.”xxxiv Under the War Convention (WC), soldiers can be killed at any time and civilians must not be attacked. Killing soldiers is not a violation of individual rights, because combatants give up their right to be killed during war, unless they are wounded or captured. By contrast, civilians “are men and women with rights and that they cannot be used for some military purpose.”xxxv

Leaders often claim justice is on their side and seek to escape the constraints of the WC in order to secure victory. xxxvi Yet claims to justice do not provide an exemption from the rules of war, which apply equally to all. The duties of the WC “are precisely the same for states and soldiers fighting wars of aggression and wars of defense. In our judgments of the fighting, we abstract from all consideration of the justice of the cause.”xxxvii For Walzer, any attempt to claim exemptions from the rules because one is fighting a Righteous War “effectively annuls the war convention and denies or suspends the rights that the convention was designed to protect.”xxxviii In response to attempts to justify violations of the WC via the language of necessity, Walzer argues that there are always tactical and strategic alternatives.xxxix

Guerrilla war is a particular context where leaders are tempted to violate the WC. Traditional armies face great difficulties in fighting against guerrilla forces embedded in a civilian population. Yet Walzer writes, “It is always in the interest of the anti-guerrilla forces to insist upon the soldier/civilian distinction.”xli If the conventional army cannot isolate the guerrillas from the people, then such a war “is no longer an anti-guerrilla war
but an anti-social war, a war against an entire people, in which no distinctions could be possible in the actual fighting.” In his discussion of the Vietnam War, Walzer strongly condemns the U.S. military for using rules of engagement that included the bombing of villages and the creation of free-fire zones where soldiers were not required to discriminate between civilians and combatants. Walzer believes that the overall American strategy in Vietnam “put civilians at risk in unacceptable ways” and this strategy was immoral, criminal, and ineffective. He also expresses concern about the broader implications of such an indiscriminate approach. “In any struggle, conventional or unconventional, the 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, however, they would have no value at all.”

Even under the stress of battle, soldiers and officers must work to protect civilian lives. Walzer insists that individual soldiers respect and protect civilian lives, even at the cost of risking their own lives. Soldiers cannot kill civilians to improve their own odds of survival “because that no man can do.”

WALZER ON DOUBLE EFFECT AND DOUBLE INTENTION

The WC asserts that civilians or noncombatants “can never be the objects or targets of military activity.” Yet civilians are often endangered because of their closeness to military operations. Walzer follows the traditional view of JWT that sees civilian casualties as troubling, but acceptable. When civilians are endangered by proximity to battle, “What is then required is not that the battle be stopped, but that some
degree of care be taken not to harm civilians—which means, very simply, that we recognize their rights as best we can within the context of war.\textsuperscript{xlvi}

Though Walzer in this passage seems ready to set aside strict respect for human rights, he acknowledges that JWT and the WC do not provide a satisfying answer to the question of how much care should be taken to protect civilians during war.\textsuperscript{xlvii} The standard framework for justifying civilian casualties is the Doctrine of Double Effect (DDE), which states that civilian casualties are permissible under four conditions: (1) the civilian casualties are the result of a legitimate military action; (2) the direct effect of the military action is morally acceptable; (3) the actor’s intentions are good and he does not intend harm on civilians; and (4) the good effects of the action compensate sufficiently for the harmful consequences.\textsuperscript{xlviii} DDE incorporates both the Principle of Noncombatant Immunity and the Principle of Proportionality in an attempt to limit damage to civilians without severely constraining military operations.

Walzer is aware that DDE can be used all too easily to rationalize the destruction of civilian lives, and thus he proposes to go beyond DDE and hold military planners and soldiers to a higher standard of responsibility. As an alternative to DDE, Walzer offers the Doctrine of Double Intention (DDI) that not only achieves the good effects required in DDE, but also works to reduce foreseeable negative effects like civilian casualties. DDI includes a “positive commitment to save lives” and a responsibility from soldiers to protect civilians even when it means risking their own lives. To his credit, Walzer stresses that the commitment to civilian protection requires obligations to all civilians, not just members of our own political community. “The structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak,
to humanity itself and to particular human beings and not merely to one’s fellow citizens."xliv However, even this commitment has its limits. Walzer writes,

There is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.

Even with his focus on Double Intention, Walzer does not stray too far from DDE. lx While soldiers and commanders must take due care in planning operations, train their soldiers to respect the War Convention, and even risk soldiers’ lives before risking civilian lives, Walzer does not believe they are required to treat civilian life with absolute care or abandon military operations in order to protect civilians.

LIFTING CONSTRAINTS, BREAKING RULES: SUPREME EMERGENCY

Though Walzer rejects many attempts to justify breaking the rules of war, he is not a moral absolutist. There are times when Walzer believes that breaking the rules of war is justified. He writes, “When to lift the constraints is one of the hardest questions in the theory of war,” and he claims that there are “special cases where victory is so important or defeat so frightening that it is morally, as well as militarily, necessary to override the rules of war.”lxi Walzer’s maxim is “do justice unless the heavens are (really) about to fall.”lxiv In a situation of extremity and imminent catastrophe, Walzer allows that rights and the rules of war can be overridden.

Walzer categorizes such a situation where human rights and the War Convention can be overridden as a “Supreme Emergency.” He argues that overriding the convention must be both morally and strategically necessary when faced with a danger that is both imminent and unusually horrifying.
Can a supreme emergency be constituted by a particular threat—by a threat of enslavement or extermination directed against a single nation? Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry. . . . Faced with some ultimate horror, their options exhausted, they will do what they must to save their own people.\textsuperscript{lv}

While Walzer warns us to be skeptical of leaders who overuse the vocabulary of crisis and emergency to justify criminal behavior, he does see the Nazis posing such a danger in World War II. Facing a threat like the Nazis, Walzer believes that soldiers and political leaders are justified in breaking the rules of war. He argues that these leaders ought to violate human rights in order to protect their political communities. And yet he struggles to find an explanation and justification for this break.

Communities, in emergencies, seem to have different and larger prerogatives. I am not sure that I can account for the difference, without ascribing to communal life a kind of transcendence that I don’t believe it to have. . . . We might better say that 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. For 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.\textsuperscript{lvi}

While Walzer denies that political communities have transcendent value, he does grant them higher value than individual lives and rights when a community is facing an emergency, and he concludes that human lives and rights may be sacrificed to protect the political community.

According to Walzer, the British faced a SE and were justified in bombing German civilians in the early years of the war, when Nazi victory seemed near.

Here was a supreme emergency, where one might well be required to override the rights of innocent people and shatter the war convention. Given the view of Nazism that I am assuming, the issue takes this form: should I wager this determinate crime (the killing of innocent people) against that immeasurable evil (a Nazi triumph)? Obviously, if there is some other way of avoiding the evil or even a reasonable chance of another way, I must wager differently or elsewhere. But I can never hope to be sure; a wager is not an experiment. Even if I wager and win, it is still possible that I was wrong, that my crime was unnecessary to victory. But I can argue that I studied the case as closely as I was
able, took the best advice I could find, sought out available alternatives. And if all this is true, and my perception of evil and imminent danger not hysterical or self-serving, then surely I must wager. There is no option; the risk otherwise is too great. My own action is determinate, of course, only as to its direct consequences, while the rule that bars such acts is founded on a conception of rights that transcends all immediate considerations. It arises out of our common history; it holds the key to our common future. But I dare say that our history will be nullified and our future condemned unless I accept the burdens of criminality here and now.\textsuperscript{lvii}

In the face of a SE, Walzer believes leaders must wager on committing war crimes, in the hope that such crimes are both necessary and effective in helping the community survive. So, in order to protect a political community based in rights, Walzer believes it is sometimes necessary to violate rights on a massive scale.

During a SE, Walzer accepts utilitarian calculations to justify the breaking of the WC and the prohibition against targeting civilians. Yet once the SE has ended, we must shift back to honoring rights and respecting the rules of war.

Utilitarian calculation can force us to violate the rules of war only when we are face-to-face not merely with defeat but with a defeat likely to bring disaster to a political community. But these calculations have no similar effects when what is at stake is only the speed or the scope of victory.\textsuperscript{lviii}

On Walzer’s account, Britain faced a SE from 1940-1942. Once conditions had changed and the Nazis were no longer a threat to invade Britain, the SE had passed and the terror bombing of civilians was no longer necessary or justified. However, Britain and the United States escalated the bombing of cities throughout the war. Hence, after 1942, Walzer condemns the Allied terror bombing of Germany (as well as the bombing of Japanese cities). “It is the acknowledgement of rights that puts a stop to such calculations and forces us to realize that the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments.”\textsuperscript{lix}

Even though Walzer finds the British bombing of German civilians justified from 1940-1942, he describes it as a “radically ineffective” strategy for winning or shortening
the war. In addition to being ineffective, there were terrible repercussions from the strategy of bombing civilians. The bombing resulted in widespread violation of human rights and massive civilian casualties; it provoked the Germans to retaliate by bombing British cities; it probably extended the fighting when other tactics like targeting military installations, industry, oil refineries, and rail lines to the death camps, may have shortened the war; it set a precedent for large-scale bombardment of civilians that influenced the U.S. bombing of Japanese cities, including use of atomic bombs; and it set a precedent for later U.S. bombardment of civilians in Vietnam.

At the end of JAUW, Walzer returns to the discussion of SE and asks what to do with commanders who override the rules of war and kill innocent people. He writes, “The deliberate killing of the innocent is murder. Sometimes, in conditions of extremity, commanders must commit murder or they must order others to commit it. And then they are murderers, though in a good cause.” Walzer believes such people have killed unjustly for the sake of justice, and must be condemned morally, though not punished legally. “Decent men and women, hard-pressed in war, must sometimes do terrible things, and then they themselves have to look for some way to reaffirm the values they have overthrown.” Walzer notes that such situations of dire necessity generate a conflict between “collective survival and human rights” and also between “utilitarian and absolutist modes of thought.” Facing such situations of necessity and emergency, Walzer believes that political leaders “must opt for collective survival and override those rights that have suddenly loomed as obstacles to survival.” Later they must accept the guilt and the moral agony of their choices. They have committed crimes, though Walzer also wants to insist that the crimes were justified.
In supreme emergencies our judgments are doubled, reflecting the dualist character of the theory of war and the deeper complexity of our moral realism; we say yes and no, right and wrong. That dualism makes us uneasy; the world of war is not a fully comprehensible, let alone a morally satisfactory place. And yet it cannot be escaped. Walzer believes we must accept this paradox of committing moral crimes in order to preserve a community where morality is possible.

MY CRITICISMS OF WALZER’S POSITION

Here are eleven problems I see in Walzer’s defense of a SE exemption:

1. No Compelling Example: Walzer has not provided an example, either historical or theoretical, of a SE where massive human rights violations worked to protect the community. By his own admission, Britain in WWII is a case of terror bombing that was ineffective in winning and shortening the war. The burden of proof in the SE debate is on those who wish to justify the mass killing of civilians. Without an actual historical example or even a compelling hypothetical case, the SE exemption seems implausible.

2. Internal Inconsistency: Walzer’s advocacy of a SE exemption clashes with his approach to JWT. Throughout JAUW, Walzer makes strong claims in defense of human rights and the integrity of the WC: he states that human rights are something close to absolute; that rights establish obligations to all people, not just our fellow citizens; that a legitimate act of war does not violate rights; that the WC applies to all sides equally, regardless of the justice of their cause; that just wars are limited wars, and armies are not permitted to do anything necessary to win; and that if we can break the rules of war in order to win, then the rules have no real value. Building such a case for human rights and the WC seems inconsistent with his attempt to justify a SE exemption to the rules of war.

3. Return of the Sliding Scale: Walzer rejects a Sliding Scale argument that allows the “good” side in a conflict to claim exemptions from the rules while demanding that the
“bad” side adhere strictly to the rules. Yet the SE exemption ends up being just this kind of Sliding Scale argument. The bad guys are threatening to do so much bad that the good side is permitted to break the rules of war.

4. The Point of View Problem: In spite of his skepticism towards leaders and their claims of necessity throughout JAUW, Walzer suddenly trusts the political leadership to adequately represent the interests of the political community when it comes to the decision to violate human rights and break the War Convention in a SE. Walzer neglects questions of representation, diverse interests, and marginalized groups within the larger community, and he suddenly accepts the rhetoric of leaders claiming to do what is necessary to defend the community. He grants them unproblematic authority to speak and act for the whole, and conflates leaders with an idealized political community.

5. Impossible Dance: How can a nation at war shift from honoring the WC, to breaking the WC, to once again honoring it when there is no longer a SE? Walzer’s example of Britain is just such a case, and he accuses them of war crimes for not stopping attacks on civilians in 1942. It is difficult to imagine how a nation fighting a war could navigate such changes and know when to follow and when to break the rules of war.

6. Too Vague and Permissive: The conditions for a SE exemption are vague, unquantifiable, and open to manipulation. In some places he mentions the threats of extermination and enslavement, while at other he invokes “moral costs” and “loss of a way of life” alongside concerns about destruction of a political community. Could such conditions be used as a rationalization for terrorism, both by state and non-state groups?³⁶⁶
7. **The I Don’t Want to Live There Problem:** If our community must commit massive human rights violations and large-scale killing of civilians in order to survive, does a reasonable and ethical person want to live in such a community? Is it really justified for the community to do anything to survive? I would argue that a community that violates the WC is no longer Minimally Just.\(^{l_xvii}\) Brian Orend offers the following criteria of a Minimally Just State: the state “1) is recognized as legitimate by its own people and most of the international community; 2) avoids violating the rights of other legitimate states; and 3) makes every reasonable effort at satisfying the human rights of its own citizens.”\(^{l_xviii}\) For Orend, only Minimally Just States deserve protection and defense. Can a state that violates human rights and breaks the rules of war, even in response to a SE, still claim to be Minimally Just? It is not worth sacrificing moral integrity and justice for the survival of the political community.

8. **The Human Sacrifice Problem:** Consistent with traditional JWT, Walzer is willing to accept massive civilian casualties and civilian suffering as a regular part of war. In addition, Walzer and JWT accept the mass killing of soldiers in war.\(^{l_xix}\) On top of that, Walzer creates a SE exemption that permits the mass targeting and killing of civilians. Why is Walzer so willing to accept so much killing?

9. **The Human Rights vs. JWT Problem:** How is a human rights-based approach to JWT compatible with any civilian casualties? JWT has a moral blind spot: writers in this tradition too easily accept the tragedy of civilian casualties as legitimate result of war. Yet this problem needs to be addressed as a serious moral challenge to the legitimacy of wars. As Walzer’s attempt to build a JWT on the foundation of human rights collapses under the weight of the SE exemption, it is clear that the foundation was already rotten
because of its failure to adequately protect civilians in wartime. Does this failure illuminate larger problems with JWTh in general? JWT fails to adequately address the impact of war on people and the human suffering that results from war, though these questions deserve much more discussion than I can offer here.lxx

10. Inadequate account of the relation between rights of individuals and political communities: By breaking the rules of war in order to protect political communities, Walzer reveals a bias in his theory towards nation-states as entities more important and deserving of protection than human persons. Does Walzer’s JWT privilege the rights of political communities, and especially the nation-state?lxxi Does he believe that nation-states somehow deserve the sacrifice of individual rights and lives? While the death of a political community may indeed be a great tragedy, how can it justify the mass killing of civilians and the violation of human rights? Walzer does not offer a satisfying explanation, and I am left wondering whether he is indeed treating states as divine or transcendent entities worthy of human sacrifice.lxxii

11. The Complacency Problem: Walzer is too content with the current manifestation of the War Convention. Why not push for a progressive and humanitarian evolution of WC for greater protections for civilians? Why not improve the sensitivity and consideration for the devastation that civilians face as a regular consequence of war?

RECENT RESPONSES BY WALZER

The criticisms above are in response to Walzer’s work in JAUW, first published in 1977. How does he address the issues of SE and civilian protection in his more recent work? In “Emergency Ethics”, written in 1988, Walzer returns to the topic of SE.
A supreme emergency exists when our deepest values and our collective survival are in imminent danger, and that was the situation in those years [the Nazi threat during WWII]. Can moral constraints have any hold upon us at such a time? . . . . There are moments when the rules can and perhaps have to be overridden. They have to be overridden precisely because they have not been suspended. And overriding the rules leaves guilt behind, as a recognition of the enormity of what we have done and a commitment not to make our actions into an easy precedent for the future.\textsuperscript{lxiii}

Walzer still proposes a paradox—the rules of war and morality have not been suspended but must be overridden to meet a grave danger to a community’s values and survival.

In addition, Walzer explains that his doctrine of SE is an attempt to find a balance between “the absolutism of rights theory, according to which innocent human beings can never be intentionally attacked” and “the radical flexibility of utilitarianism, according to which innocence is only one value that must be weighed against other values in the pursuit of the greatest good of the greatest number.”\textsuperscript{lxxiv} For Walzer, absolutism fails to address what happens when we rigidly follow the rules and a community is destroyed. Resisting mass murder might entail becoming murderers, a response that absolutists won’t allow. On the other hand, utilitarianism permits too much flexibility in our moral calculations to justify almost anything via speculation about consequences.

Yet it is still not permitted for individual soldiers on the battlefield to break the rules for personal survival. “A moral person will accept risk, will even accept death, rather than kill the innocent. But a moral president or prime minister or military commander will not accept the risk or the fact of communal death. Why not?”\textsuperscript{lxv} According to Walzer, an individual may accept risks to himself, but leaders have responsibility for protecting others. “No government can put the life of the community itself and of all its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risk.”\textsuperscript{lxvi} Walzer acknowledges that this argument faces difficulties explaining how governmental representatives possess rights to
kill the innocent if individuals don’t. So Walzer adds “the value of the community” to consideration; beyond individual rights, there is value in “the collective entity—religious, political, or cultural—that the individuals compose and from which they derive some portion of their character, practices, and beliefs.”

Yet Walzer is still left struggling to explain why the community has a higher value without invoking some transcendent status for political communities that he vowed to avoid in JAUW. Here Walzer argues that this additional value comes down to a “commitment to continuity across generations”, a common life created by ancestors that 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 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. By contrast, when we tell an individual soldier that he can’t make the same break, we are telling him that he must risk death and even die within the moral limits so that his children and his children’s children can hope to live within them.

For Walzer, this threat of the moral and physical extinction of the community is enough to justify breaking the rules of war.

Walzer offers here a new emphasis on the continuity of the community and its traditions, but I don’t believe he has escaped the I Don’t Want to Live There problem. Once a community has committed massive human rights violations in order to survive, hasn’t its moral character changed? Unless it was committing massive human rights violations already, hasn’t the community now suffered “moral extinction” at its own hands—a form of “moral suicide”? Even if the gambit works and the community survives, its moral character has fundamentally transformed. Now it is a community that
has committed massive human rights violations. And won’t continuity with the past be broken, if key moral values are violated? How far into the realm of immorality and war crimes can a community go, and still claim to retain its moral and political identity with the past? One option for people would be to live with a mythology about their communal identity, forgetting their crimes, in order to sustain belief in the moral continuity and identity with the past. Would such a community really be worth defending?

In the same essay, Walzer also addresses concerns about whether his theory privileges political communities and the nation-state over individual rights and lives.

The strongest argument against supreme emergency is that it makes a fetish of the political community. Not, I want to stress, of the state: the state is nothing more than an instrument of the community, a particular structure for organizing collective action that can always be replaced by some other structure. The political community (the community of faith too) can’t be similarly replaced.

So Walzer doesn’t wish to limit the political community to the state, and he doesn’t mean for the community to become a fetish, an object of irrational reverence. Since it is the community that can sustain life, identity, and morality, it may act immorally under “absolute necessity” when its survival is threatened.

Here is the final provocation and paradox: moral communities make great immoralities possible. But they do this only in the face of a far greater immorality, as in the example of a Nazi-like attack on the very existence of a particular community, and only at the moment when this attack is near success, and only insofar as the immoral response is the only way of holding off that success.

I still see problems here. Merely stating “I’m not making a fetish out of the political community” doesn’t mean it is true. While Walzer has done more to explain the special character of political communities, he still hasn’t provided a convincing account of what makes contemporary political communities and nation-states so special that they can commit war crimes. How does the destruction of a political community justify the massive violation of human rights? In the absence of a clearer explanation, it seems that
Walzer does indeed attribute some type of fetish or transcendent status to political communities, and especially to modern nation-states.

Though Walzer’s essay offers more details in defense of SE, I still find the argument unconvincing. He still hasn’t provided a compelling example; the position still clashes with his commitment to human rights; and he is still too willing to sacrifice human lives for the survival of the political community.

ATTEMPTS TO REVISE SUPREME EMERGENCY

Brian Orend and Igor Primoratz offer their own attempts to defend SE. Following Walzer, Orend is also attempting to build a JWT on a foundation of human rights, and he embraces SE measures when a nation faces defeat and possible massacre and enslavement. However, Orend reframes the SE exemption in order to highlight the tragedy of the situation while avoiding Walzer’s claims of a paradox. For Orend, nations facing a SE may legitimately choose to violate the rules of war. However, they do not possess the right to do something wrong. Instead, they choose to break the rules of war and do wrong in order to survive, and their choice is both a “moral tragedy” and a “prudential strategy.” Orend places additional conditions on supreme emergency measures, including last resort, public declaration, appeal for international assistance, and reasonable probability of success. Further, Orend expresses skepticism about whether targeting civilians will lead to success, and he suggests alternative tactics that might prove more useful, for example, employing prohibited weapons. Orend believes that countries which use SE measures are “forced to do terrible things in order to
survive,” and thus should not be subject to punishment, shame, or war crimes trials after the war.\textsuperscript{lxxxiii}

How does Orend’s approach fare compared to Walzer? While Orend is more skeptical about the use of SE, and is concerned about the choice to target civilians, his conditions still allow leaders to target civilians and violate human rights and the laws of war. While his suggestion to try banned weapons first before targeting civilians might seem more humane, he misses the problem that banned weapons are often banned because they are indiscriminate, disproportionately destructive, or excessively cruel, so we’re back with the potential of grave violations of human rights. Overall, Orend’s approach suffers from similar problems to Walzer’s account: lack of a convincing example, internal conflict with human rights standards, and permissiveness in allowing massive destruction of civilian lives in service to the political community.

Primoratz tries to address other problems in Walzer’s account. Primoratz limits the conditions under which SE measures are allowed to what he terms “moral distaster”: threats of extermination, enslavement, or ethnic cleansing.\textsuperscript{lxxxiv} For Primoratz, these limitations narrow the scope, protect the rareness of the exemption, and avoid some of the vagueness and permissiveness of Walzer’s account. In addition, Primoratz grants the SE exemption to peoples, nations, and political communities in order to avoid what he sees as a pro-state bias in Walzer. Finally, Primoratz believes that the SE measures can only be used when the group has no other alternative and no other way to survive.\textsuperscript{lxxxv}

How do Primoratz’s revisions fare compared to Walzer’s position? Primoratz addresses certain problems in the SE argument, including vagueness and permissiveness and the pro-state bias. However, by retaining a SE exemption, Primoratz still carries the
problems of complacency, undermining human rights, and legitimizing human sacrifice. In spite of Orend and Primoratz’s attempts to revise and improve it, I still find the concept of SE to be a moral disaster.

MY CONCLUSIONS

Why are philosophers working so hard to provide a justification for killing civilians, for war crimes, and for atrocities? Why not work harder to stretch the War Convention, Just War Theory, and International Humanitarian Law to provide more protection for civilians? Instead of weakening the principle of civilian immunity and the WC with excuses, exemptions, and overrides, why not make the principle and the convention stronger? Why not build in more sensitivity and consideration for the devastation civilians face as a regular part of war? Following Thomas W. Smith, I’d like to see philosophers contribute to “a critical human rights movement” that “can press militaries to make IHL more meaningful, expose hypocrisies in the exercise of violence, offer alternatives to ticking time-bomb narratives, and account for the true cost of war.”

For me, the question of civilian casualties remains the most pressing challenge to the legitimacy both of war and of JWT, and I feel that Walzer fails to adequately address this crucial question. JWT, including Walzer’s work, does not provide enough protection for civilian rights and lives. JWT sets important limits on war, yet is incomplete and largely functions as a tradition that empowers nation-states to go to war under moral cover. Walzer’s claims to base his JWT on a foundation of human rights are not convincing, and this failure raises questions about whether JWT is even compatible with human rights.
Human rights and lives should not be so readily sacrificed in the service of political communities. Modern nation-states are morally suspect given the history of their formation and the ongoing misbehavior of their governments and leaders. Given the historical legacy of arbitrary borders, colonialism, genocide, slavery, conquest, and economic exploitation, we must be very careful in offering excuses for nations or communities to commit massive human rights violations. Instead, I recommend that we abolish any exemptions or overrides that rationalize war crimes and atrocities; develop moral standards that condemn all civilian casualties in war regardless of intent or targeting; and enhance legal protections for civilians in war.

As philosophers, a central question must be, how can we foster improvement and facilitate change so that civilians face less devastation in war?

SOURCES


NOTES

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2 Figures from Kofi Annan, UN, 1998; cited by Dr. Daniel Rothbart, George Mason University, in his talk “Civilians in War,” March 2012.

3 World Health Organization; cited by Rothbart.

4 Walzer says the first principle of the war convention is that soldiers give up their normal right to life and may be killed at any time.


6 Ibid., p. 77.

7 Ibid., p. 77.


9 There are complexities and debates about how to distinguish combatants and noncombatants, and civilian objects and military objects, but these issues are beyond the scope of the present discussion.

10 Kretzmer, p. 90.

11 Ibid., p. 112. Such principles have been codified in the Geneva Convention of 1949 and Additional Protocols of 1977, which specifically address the protection of civilians from attack and threat. The International Criminal Court began operating in 2002 as a permanent international tribunal that prosecutes war crimes and grave breaches of the Geneva Conventions. However, the ICC has limited jurisdiction, only focuses on the most serious crimes, and not all nations are signatories (the U.S. is a notable non-participant.) According to David Kretzmer, “the result is a huge enforcement deficiency, which leads to wide-scale impunity for violators of civilian immunity.”

12 C.A.J. Coady, “Collateral Immunity in War and Terrorism,” p. 136, in *Civilian Immunity in War*, ed. Igor Primoratz. Oxford University Press, Oxford, 2007. It has become so normal to accept civilian deaths in war that a euphemism like “collateral damage” is used widely and without critical questioning in the military, the media, and across our culture. As C.A.J. Coady points out, euphemisms like “collateral damage,” “surgical strike,” and “neutralizing assets” function to “sanitize the horrible reality of war.”


17 Ibid., p. 15.

18 Ibid., p. xxii-xxiv.

19 Ibid., xxiv.

20 Ibid., p. 54.

21 Ibid., p. 54.

22 Ibid., p. 54.

23 Ibid., p. 54.

24 Ibid., p. 57.

25 Ibid., p. 53.

26 Ibid., p. 53.
This failing is one of my main criticisms of just war theory. By contrast, Brian Orend limits the Doctrine of Double Effect and Proportionality as justifications for civilian casualties only to states that have a just cause. For aggressor states, any civilian casualties are criminal and unjustified. Orend also rejects the principle of the moral equality of soldiers, and holds soldiers of aggressor states accountable for unjust wars. See *The Morality of War*.

Though there are many problems with DDE and DDI, I don’t have the space to discuss them here. I discuss these issues at more length in another paper, “Too Bad You’re Dead: The Failure of Just War Theory to Protect Civilians.”

Another question to ask about Walzer’s use of this historical example: was the survival of Britain even at stake? The Germans had invaded and occupied other nations, and while they were brutal, the Germans were not obliterating them as political communities. Certainly the Germans were violating both the territorial integrity and political sovereignty of these nations, yet all of these nations continued to function in some way until they were able to reclaim their territorial integrity and political sovereignty after the war. Walzer anticipated and addressed this concern ten years after *JAUW*. “Would terrorism be justified in a ‘supreme emergency’? . . . It might be, but only if the oppression to which the terrorists claimed to be responding was genocidal in character. Against the imminent threat of political and physical extinction, extreme measures can be defended, assuming that they have some chance of success. But 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.” Michael Walzer, “Terrorism: A Critique of Excuses”, p. 54, in *Arguing About War*. Yale University Press, New Haven, 2004.
Though I am about to use Orend’s criteria for Minimally Just States to condemn states who use Walzer’s Supreme Emergency exemption to violate human rights, note that Orend himself accepts the Supreme Emergency exemption, though for reasons slightly different from those of Walzer.


For example, in a war where both sides are unjust, and millions of soldiers die, traditional JWT concludes that all of those deaths are acceptable and moral—nothing wrong occurred in the killing of millions. Yet as C.A.J. Coady points out, most people find this level of killing morally reprehensible. JWT can only respond that while the war was unjust, the killing (including deaths of untargeted civilians) was just. See C.A.J. Coady, “Terrorism, Morality, and Supreme Emergency,” p. 776. *Ethics* 114 (July 2004) 772–789.

I teach an undergraduate course on Ethics and War, and Walzer’s book JAUW is a big part of the course. For each reading, I give a take-home quiz due at the beginning of class. For the chapter on Supreme Emergency, one of the questions is: TRUE/FALSE: Walzer argues that soldiers and statesmen can override the rights of innocent people to protect the survival and freedom of their own political community. Another question is: TRUE/FALSE: Walzer believes that murdering the innocent is sometimes necessary in a good cause. Consistently, about half or two-thirds of the class answer False to both, which is incorrect. It’s a take-home quiz, so they have the opportunity to look carefully at the reading while answering. So what explains the wrong answers? I don’t think it’s one of those cases where everyday people with common sense views are befuddled with the superior reasoning of the philosopher. Instead, I see it as a case of readers expecting a philosopher who has been advocating human rights to remain consistent; it’s a case of a philosopher outsmarting himself, and coming up with a scenario that is inimical to both common sense moral thinking and to his own position developed through his book.

Walzer’s discomfort with non-state communities like guerrilla movements is a further indication that he is biased towards traditional nation-states as the privileged form of political community.

Perhaps Supreme Emergency is a conflict between the rights to life and to liberty. If so, shouldn’t the right to life trump the right to liberty?

Ibid., p. 33-34.

Ibid., p. 35.

Ibid., p. 41.

Ibid., p. 42.

Ibid., p. 42.

Ibid., p. 43.

Ibid., p. 49.

Ibid., p. 50.

Orend, p. 154-155.

Ibid., p. 156.

Ibid., p. 157.


Ibid., p. 383-384.


Further in this essay, Walzer suggests two issues arising from recent wars that “require the critical edge of justice”: the use of technology to kill at a distance and lessen risks to soldiers, and the question of how to end wars through occupations and political reconstructions. While these questions are important, it is remarkable that only the first issue connects to the moral problems around civilian casualties.

Following Andrew Fiala in *The Just War Myth*, I agree that a just war of self-defense is possible and that most wars are immoral.

Like Walzer, Brian Orend claims to build his JWT on human rights but fails to offer adequate protection to human lives. Orend writes that the standards of Just War Theory “fulfill the human rights of persons as best as they can be fulfilled during warfare,” which indicates a ready willingness to sacrifice human rights in the service of war. See Brian Orend, *The Morality of War*, p. 40.