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Terrorism, Supreme Emergency and
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Terrorism, Supreme Emergency and Killing the Innocent

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Abstract: Terrorist violence is often condemned for targeting innocents or non-combatants. There are two objections to this line of argument. First, one may doubt that terrorism is necessarily directed against innocents or non-combatants. However, I will focus on the second objection, according to which there may be exceptions from the prohibition against killing the innocent. In my article I will elaborate whether lethal terrorism against innocents can be justified in a supreme emergency. Starting from a critique of Michael Walzer's account of supreme emergency, I will argue that the supreme emergency exemption justifies the resort to terrorism against innocents to avert moral disasters such as genocide and ethnic cleansing, provided that the criteria of last resort, proportionality and public declaration are satisfied.

Key words: terrorism, supreme emergency, Michael Walzer, Igor Primoratz, Brian Orend, killing the innocent

INTRODUCTION

To most people, it is perfectly clear that terrorism is immoral. And indeed, there are many good reasons for sharing this view. Terrorism, as it is usually defined, includes a variety of morally reprehensible actions, such as exploiting fear or horror, using violence or force against persons or property, intimidation and coercion. The most common argument for morally condemning terrorism is that it infringes the prohibition against killing the innocent. Sometimes a very similar argument is brought up, namely that terrorism infringes the principle of non-combatant immunity. Both approaches share the intuition that terrorism targets those who may not rightfully be targeted, i.e. illegitimate targets, and is therefore morally reprehensible. This claim can be challenged in two ways. First, one may doubt that terrorism always targets so-called innocents.¹ Second, one may argue that in certain extreme situations, innocents may rightfully be targeted. In this paper, I will leave the first problem aside and focus on the second. In the context of war, violence against innocents or non-combatants is sometimes considered justified if it helps to avert a supreme emergency. But could this apply to the context of terrorism too?

PRELIMINARIES

To start with, it must be clarified in which way the terms 'terrorism' and 'innocents' will be used in this article. I will use the term 'terrorism' as describing *an indirect strategy of using fear or terror induced by violent attacks or force (or the threat of its use) against one group of people (direct target) or their property as a means to intimidate and coerce another group of people (indirect target) and influence their actions in order to reach further political objectives*. Terrorist acts are the violent acts that form part of such a strategy. I will furthermore distinguish between strong and weak terrorism: *When the direct targets are so-called innocents, it is strong terrorism; in any other case it is weak terrorism.*²

Obviously, defining terrorism is a delicate issue. There are problematic elements in every definition of terrorism and this one is no exception. As my objective is to focus on the ethical implications of terrorism and not on the definition, I will merely point out the two main difficulties. I will not go into much detail here, as I believe that they are not decisive for my argument. The first difficulty is that to some scholars, the definition may appear to be too wide, meaning that it includes acts typically considered acts of war and not terrorism. This is not very problematic, though, as in my understanding, certain acts of war may constitute acts of terrorism. The second difficulty lies in the distinction between weak and strong terrorism. Some scholars (e.g. David Rodin, Igor Primoratz, Tony Coady, Uwe Steinhoff, Peter Sproat, Michael Walzer, Jenny Teichmann) claim that violence against innocents is *the* distinctive feature of terrorism in contrast to other forms of collective violence and thus opt for a so-called narrow definition of terrorism. Others share the view that the direct targeting of 'innocents' is very often an element of terrorist violence, but not a necessary one (e.g. Georg Meggle, Tony Dardis, Virginia Held, Seumas Miller, Angelo Corlett, Robert Young, Simon Keller, Olaf Müller) and thus prefer a wider definition of terrorism. However, as I said before, I will not discuss this issue here. In this paper I will focus on strong terrorism, i.e. terrorism which falls under both narrow and wide definitions.

According to my definition, strong terrorism is characterised by violent acts that are intentionally directed against so-called *innocents*, i.e. people who cannot be held responsible for the problem the terrorists are fighting and are thus immune from attack. Innocents are all those who do not expect to be targets of attack, and with good reason. This may be because they do not participate in the business of violence, as soldiers or policemen do, or simply because they do not intend a threat to any other person's life. In war conditions these persons would be immune to aggression and protected, as they are not contributing to the act of war. Clearly, there are a few problems with the term 'innocent', as it seems to indicate moral immaculateness, as opposed to moral 'guilt'. But this is not how the term should be understood in this context. The notion of innocence in this context refers to their not being contributors to harm and not being responsible for the problem the terrorist actors

combat. Innocents are those who have not engaged in actions which would justify lethal violence against them. There is a considerable moral difference between the targeting and careless harm of innocents and that of non-innocents. Innocents are persons not responsible, either on the grounds of individual or accountable collective actions or on the grounds of individual or accountable collective omissions, for the significant injustice the terrorist fights or claims to fight. Innocents are therefore not liable to lethal attack by terrorists.

In general, violence against non-innocents differs from violence against innocents inasmuch as it targets people with respect to what they do or have done, rather than arbitrarily. Thomas Nagel argues:

'[...] hostile treatment of any person must be justified in terms of something *about that person* which makes the treatment appropriate. Hostility is a personal relation, and it must be suited to its target.' (Nagel, 1972: 133)

Nagel continues:

'[w]hatever one does to another person intentionally must be aimed at him as a subject, with the intention that he receive it as a subject. It should manifest an attitude to *him* rather than just to the situation, and he should be able to recognize it and identify himself as its object.' (Nagel, 1972: 136)

Nagel's claim illustrates the moral distinction between targeting innocents and targeting non-innocents. In a Kantian sense, Nagel holds that targeting non-combatants in war signifies a lack of respect for them as persons. In this particular case, a parallel can and should be drawn between war and terrorism. I assert that what Nagel says about the former is also true for the latter. Killing non-combatants in war and innocents in strong terrorism is failing to respect them as persons. Strong terrorism uses people as means to an end and fails to treat them as subjects. It is 'depersonalised' killing. Nagel states that:

'A coherent view of this type will hold that extremely hostile behavior toward another is compatible with treating him as a person.' (Nagel, 1972: 134)

Consequently, the term 'innocents' makes the most sense in this context as referring to those persons which have nothing 'about them' which would justify hostile behaviour.

Terrorism very often involves the killing of innocents. In fact, this is often claimed to be the feature which primarily makes terrorism wrong. When scholars argue that terrorism should be condemned because it targets innocents, they mostly implic-

itly, rarely explicitly, refer to a general moral principle against killing innocents, or prohibition against killing innocents. Strong terrorism infringes the moral prohibition against killing the innocent. However, there can be exceptions to this prohibition. Even though ending another person's life is usually morally condemnable, it may sometimes be justifiable. The objective of my considerations here is to discover whether in a supreme emergency it may be justified, or morally right, to kill an innocent person, and whether terrorist violence may ever be one of these exceptions. I herewith challenge the claim made by many scholars (e.g. Coady, Meggle, Rodin) that terrorism in the narrow sense is always morally reprehensible. I am going to assume that, generally speaking, there are strong moral reservations against killing in general and against killing innocents in particular, which in most moral theories come very close to a prohibition against killing innocents. However, unless one adheres to moral absolutism, there are exceptions to these rules.

My reflections, however, should not be understood as an attempt to excuse or defend terrorist acts in general, or to advocate terrorism. Rather, they are intended to reject both unconsidered affirmations of terrorism, which hold that a noble objective may justify any means, and unconditional condemnations of terrorism while, at the same time, war and other forms of political violence are judged more indulgently.

SUPREME EMERGENCY

This paper comprises an argument on a famous approach to the question of the permissibility of killing innocents currently discussed in moral philosophy, namely the supreme emergency exemption.³ I will eventually outline whether it is a plausible approach for morally justifying terrorist killing. The supreme emergency exemption has been most prominently advanced by Michael Walzer in his 1977 book on 'Just and Unjust Wars' and has provoked extensive debate since. As Brian Orend, one of the protagonists of this debate, points out, 'it is Walzer who is fundamentally responsible for the structure of this exemption: Churchill merely inspires it, and Rawls merely apes it.' (Orend, 2005: 134)

Walzer's account has raised not only attention, but also a lot of criticism, which will be rehearsed in part here. It must be noted that his argument does not refer to the morality of terrorism, but to the justifiability of violence against civilians in war. However, I will examine its applicability to the realm of terrorism. The following rather comprehensive discussion of supreme emergency is aimed at clarifying what constitutes a supreme emergency, whether it really allows for an exception from the prohibition against killing the innocent, and if so, what kind of exception that is.

WALZER ON SUPREME EMERGENCY

Michael Walzer, otherwise a strict adherent to the satisfaction of *jus in bello* conditions in war, especially to the condition of non-combatant immunity, argues that in supreme

emergencies, a state actor can infringe upon this principle and directly target enemy civilians. What is a supreme emergency? According to Michael Walzer it is:

‘... 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.’ (Walzer, 2000: 253)

Hence, a supreme emergency is an exceptional and threatening situation that collectives may be facing. For a situation to count as such, the danger has to be imminent and it ‘must be of an unusual and horrifying kind’ (Walzer, 2000: 253). Furthermore, ‘a supreme emergency exists when our deepest values and our collective survival are in imminent danger.’ (Walzer, 2005: 33)

Walzer holds that Great Britain was facing such a supreme emergency during a certain period of World War II when it was under attack from Nazi Germany, which constituted an ‘evil objectified in the world’. Walzer holds that, at least in the first years of the war while Germany was undefeated, the situation was a supreme emergency because a German victory would have constituted an ultimate threat to Britain. However, Walzer claims that after it became clear that Germany could no longer win the war, there no longer was a supreme emergency (Walzer, 2005: 46).⁴ In a supreme emergency situation, it is morally permissible to directly and intentionally target and kill innocents, or non-combatants. In Walzer’s example, it was justified to bomb residential areas of German cities, thus directly targeting the civilian population.

He nevertheless insists that although the prohibition against killing innocents is overridden by more important considerations, it is not being suspended: ‘There are limits on the conduct of war, and there are moments when we can and perhaps should break through the limits (the limits themselves never disappear).’ (Walzer, 2005: 40) To Walzer, a supreme emergency constitutes a dilemma: it is a situation where one can only choose between two evils and should opt for the lesser one. Thus the political leader facing a supreme emergency ought to choose the ‘better’ alternative, although the act which follows this choice is in itself morally condemnable. Walzer emphasizes that ‘The effect of the supreme-emergency argument should be to reinforce professional ethics and to provide an account of when it is permissible (or necessary) to get our hands dirty.’ (Walzer, 2005: 47) He thus advocates for choosing the lesser evil, even if it means to infringe the prohibition against killing the innocent. To Walzer, in the face of a disaster, it would be irresponsible to adhere to a moral rule if the only way to stop or prevent the disaster from happening lies in breaking this rule. He argues that moral absolutism ‘represents... a refusal to think about what it means for the heavens to fall. And the history of the twentieth century makes this refusal very hard to justify.’ (Walzer, 2005: 37)

Furthermore, resorting to targeting innocents in a supreme emergency is only allowed for if the criteria of military necessity and proportionality are satisfied:

“Supreme emergency” describes those rare moments when the negative duty that we assign – that we can’t help assigning – to the disaster that looms before us devalues morality itself and leaves us free to do whatever is militarily necessary to avoid the disaster, so long as what we do doesn’t produce an even worse disaster.’ (Walzer, 2005: 40)

Also, the requirement of last resort must be fulfilled.⁵

It is important to note that the concept of supreme emergency only applies to collectives, not to individuals:

‘... individuals cannot kill other individuals to save themselves, but to save a nation we can violate the rights of a determinate but smaller number of people.’ (Walzer, 2000: 254)

Walzer does not apply his concept to all kinds of collectives. Here, he speaks of the individual collective as a ‘nation’. One is only entitled to violate the rules of war when facing ‘a defeat likely to bring disaster to a political community’. (Walzer, 2000: 254)

OBJECTIONS TO WALZER

Walzer’s concept of supreme emergency has given rise to numerous objections, of which I do not intend to provide a full account. I will only consider those objections relevant to the debate on justifying terrorism.⁶ Some scholars, (especially Brian Orend, but also Igor Primoratz) criticize certain inconsistencies in the argument and in the concept itself. Steinhoff suggests that Walzer does not see a possible justification for terrorism by resort to supreme emergency. (Steinhoff, 2007: 133) Others, such as Cook and Coady, argue against supreme emergency as such by claiming that a permission to kill innocents in extreme situations always runs the risk of being applied too indulgently and should not form part of a moral theory of war or political violence (Cook, 2007; Coady, 2004a). Walzer has also been found to give too strong a preference to the political community by Coady, Steinhoff, Primoratz, Valls and Cook. (Steinhoff, 2007: 132f; Valls, 2000: 73; Coady, 2002: 19 & 2004a: 88; Cook, 2007: 146ff; Primoratz, 2007: 19) Toner holds that the supreme emergency exemption applies to individuals too and is therefore unacceptable. (Toner, 2005) The last two objections will not be reviewed here.

Inconsistencies

a) The two-in-one objection: Both Orend and Primoratz hold that the concept of supreme emergency is ambiguous, as it contains two different notions of emer-

gencies which are not explicitly distinguished.⁷ Walzer justifies the overriding of the rules of war with the following argument:

‘... a world where entire peoples are enslaved or massacred is literally unbearable. For the survival and freedom of political communities [...] are the highest values of international society.’ (Walzer, 2000: 254)

Igor Primoratz counters that ‘it is one thing to suffer the fate the Nazis had in store for peoples they considered racially inferior, and another to have one’s polity dismantled.’ (Primoratz, 2007: 19)

I believe Primoratz to be correct when claiming that Walzer’s notion of supreme emergency in fact contains two different concepts, between which he does not sufficiently distinguish: (1) moral disaster, such as genocide or enslavement; and (2) the threat to the survival of a political community.⁸ Primoratz holds that:

‘... whereas genocide, expulsion, or enslavement of an entire people might be thought a *moral* disaster that may be fended off by any means, its loss of political independence for a political community is, at most, a *political* disaster.’ (Primoratz, 2007: 19)

Walzer indeed fails to separate the two notions, sometimes using one, and sometimes the other. However, I assume that Walzer holds that it is precisely the combination of both which constitutes a supreme emergency, even though he sometimes describes it as a moral disaster and sometimes as a political disaster (in Primoratz’s terms). This strong sense of political community is founded in Walzer’s communitarian approach and has raised some criticism which I am not going to reflect here. Yet, I agree with Igor Primoratz and Brian Orend that it is rather the moral disaster, the danger of genocide or expulsion of an entire people, which creates the supreme character of this emergency, but not the threat to the survival of a political community as such.

b) Brian Orend furthermore notes a certain inconsistency in Walzer’s methodological approach: *Just and Unjust Wars* is overall committed to a deontological perspective and is clearly dismissive of consequentialism, in particular utilitarianism. Yet, when it comes to supreme emergencies, Walzer, to Orend’s surprise, appeals to consequentialist concepts such as the ‘greater good’. (Orend, 2000: 25) Orend claims that the supreme emergency doctrine ‘bears a striking similarity to one form of rule-consequentialism: during ordinary conditions of war, we are to adhere absolutely to the rules of *jus in bello*. However, when confronted with the hardest case, we are to set aside these rules and do what we must to prevail.’ (Orend, 2000: 26) According to Orend, ‘part of Walzer endorses Churchill’s consequentialism, while another part

of him supports Kant's deontology.' (Orend, 2005: 146) With regard to supreme emergency, Orend argues, Walzer is clearly inclined towards consequentialism.

Let me briefly comment on Orend's methodological criticism. If one accuses Walzer of failing to argue within a coherent normative framework, one must consider that the just war tradition itself draws on deontological as well as consequentialist principles, and Orend explicitly acknowledges this elsewhere. (Orend, 2008) Moreover, Walzer's manoeuvring between consequentialism and deontology is in fact a struggle for a plausible normative account which would avoid the shortcomings of both utilitarianism and moral absolutism:

'The doctrine of supreme emergency is a way of manoeuvring between two very different and characteristically opposed understandings of morality. The first reflects the absolutism of rights theory, according to which innocent human beings can never be intentionally attacked. [...] The second understanding reflects 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.' (Walzer, 2005: 35)

Yet it is right that Walzer does not succeed in providing a convincing normative framework to embed the supreme emergency exemption. Starting from his entirely accurate observation that utilitarianism and an absolutism of rights cannot be reconciled, Walzer arrives at a 'utilitarianism of extremity': in a supreme emergency, 'our deepest values are radically at risk', and the war constraints which depend on these values 'lose their grip and a certain utilitarianism reimposes itself'. (Walzer, 2005: 40) The dichotomy between the two understandings of morality Walzer presents here ignores the fact that there are moderate deontological approaches which do not submit to an absolutism of rights but are still categorically opposed to utilitarianism in that consequences are not the only factor in the moral evaluation of an action. If he had assumed a more flexible, moderate deontological concept instead of a rigid absolutism, Walzer would not have had to carry out such a balancing act. He could simply endorse a deontological position according to which the fact that innocents are being killed always counts as a reason against the respective act. Consequently, this nearly always leads to a condemnation of acts in the process of which innocents are killed. Yet, sometimes consequences can deliver a strong reason for the killing of innocents to be permissible, which would overpower the reasons against. One could then specify what kinds of consequences deliver reasons that are strong enough to justify the killing of innocents. The advantage of this line of reasoning lies in the fact that it does not force us to resort to pure utilitarianism in a supreme emergency simply because our deontological position cannot accommodate exceptions.

As a result of his twofold approach, Walzer has difficulties mediating between allowing for overriding *jus in bello* and nevertheless maintaining that the infringement of non-combatant immunity is wrong. His remedy is to consider supreme emergency a paradoxical concept which combines the rightness of the consequentialist responsibility for the outcome of the act and the wrongness of the infringement of the deontological principle (Walzer, 2005: 50). He argues that:

'... 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.'
(Walzer, 2000: 326–327)

It is precisely this dualism which Brian Orend rejects: 'In the final analysis, Walzer leans a bit towards consequentialism, and this allows him at least to offer coherent advice, but it comes at the cost of some of the moral controversy attaching to that attitude.' (Orend, 2005: 147–148) On the one hand, for a political leader facing a supreme emergency, there is a duty to get one's hands dirty, as it were, to avert it; on the other hand, one is acting wrongly and must personally shoulder the burden of this crime, according to Walzer.

Orend offers the following alternative to Walzer's dualism: he proposes viewing supreme emergency analogously under the moral *and* the prudential perspective. While morally it is a 'terrible tragedy', prudentially it is a struggle for survival.⁹ From the moral point of view, says Orend, in a supreme emergency, all options are wrong. It is a full-blown tragedy in which one runs out of permissible options: one is forced to do wrong. He characterizes the moral tragedy in a supreme emergency in the following way: 'It is a moral blind alley: there is nowhere to turn and still be morally justified. Colloquially speaking, "you're damned if you do, and damned if you don't."' (Orend, 2005: 148–149) He holds that there is no supreme emergency exemption, and thus no moral loophole, because in a supreme emergency, all options are just wrong. Orend claims that at the most, one of them is excusable (see also Orend, 2005: 151).

However, there is a difference between the concept of 'dirty hands' and that of a moral dilemma, a moral blind alley, or a moral tragedy, which Orend fails to account for. Tony Coady describes the difference between the dirty hands tradition and the moral dilemma idea, first characterized as a 'moral blind alley' by Thomas Nagel (Nagel, 1972: 143), in the following way:

'This position [the "moral blind alley"-position, A.S.] has some affinities with the dirty hands tradition but strikingly differs from it in not coming down on

the side of the necessity to violate the absolute prohibition. For Nagel, it would be just as “right” or “necessary” to adhere to the prohibition, but that is quite against the spirit of the dirty hands tradition in either its ancient or contemporary forms.’ (Coady, 2004c: 780–781)

Without wanting to go into much detail on the concept of ‘dirty hands’,¹⁰ I argue that Orend must decide which of the two concepts he adheres to. In fact, he clearly holds that in a supreme emergency, a political community must infringe the rights of innocent victims. Hence, according to Coady’s characterisation, Orend’s approach is not an account of a moral blind alley, or a moral dilemma, insofar as it clearly demands that the respective political leader infringe the principle of non-combatant immunity.

As to the prudential perspective of supreme emergency, Orend holds that there are still rules which apply to the conduct of the struggle for survival. Five conditions should set limits to the actions of the political leader who is forced to commit rights violations in a violent struggle: (1) last resort; (2) public declaration; (3) appeal to international community; (4) right intention; and (5) prospect of success. (Orend, 2005: 149–150) I will come back to these criteria and discuss later whether or not Orend’s account can serve as the basis for a moral evaluation of terrorism.

With regard to Orend’s criticism of Walzer’s normative dualism, it is difficult to reconcile how the dichotomy between the prudential and the moral offered by Orend differs substantially from the paradoxical concept by Walzer, who cannot see a particular difference either:

‘[...] his [i.e. Brian Orend’s, A.S.] effort to avoid the paradox that I describe – when “the right thing to do is the wrong thing to do” – seems to me only to confirm the paradox, in slightly different (less provocative?) language. ... But the paradox remains, given the fact that political leaders are morally bound to act prudently (because they are acting for others) – and so they may be morally bound to do what it is morally wrong to do.’ (Walzer 2007: 168)

Walzer, I believe, is right in claiming that Orend’s account does not overcome the paradoxical nature of the supreme emergency exemption, but merely reformulates it.

To sum up what has been discussed so far, both Walzer and Orend hold that in a supreme emergency, a political leader is excused for attacking civilians, but the aggressive act itself nevertheless remains wrong. With Orend and Primoratz, against Walzer, I hold that the decisive aspect for considering a situation a supreme emergency is the threat of genocide, enslavement or ethnic cleansing to a collective, but not necessarily the threat to the ‘ongoingness’ of a political community. Furthermore, in a supreme emergency certain rules continue to apply and must be satisfied.

This revision of Michael Walzer's supreme emergency doctrine and Brian Orend's criticism of it were meant as the first step in examining whether terrorism against innocents could ever be justified in terms of supreme emergency. As such, we must examine whether the concept of supreme emergency is actually applicable to terrorism against innocents. Yet, there remains the problem of the paradoxical moral nature of the exemption. This, I believe, is in fact related to the question of whether the respective violent measures are merely excusable or in fact justifiable. It is important to investigate whether the measures taken in a situation of supreme emergency are justified rather than merely excused. This is the view held by Igor Primoratz (Primoratz, 2007b) and it will be discussed further down.

WALZER ON TERRORISM

Walzer constructed the doctrine of supreme emergency with the purpose of excusing extraordinary measures in times of war, but not terrorism. In the following, I will show that even though Walzer has sometimes been very categorical about the inapplicability of the supreme emergency exemption to terrorism, he is less strict on this than it would seem at first glance. Furthermore, the reasons he gives cannot survive detailed scrutiny.

Walzer's view on supreme emergency and terrorism is not without contradictions, which makes it difficult to discuss. This is, above all, caused by his using the term 'terrorism' in two different ways. On one hand, he uses it to denominate a certain strategy employed by non-state or sub-state actors, characterized by the deliberate violation of ethical and political norms, and thereby indefensible. (Walzer, 2000: 197–206) On the other hand, he also sees the bombing of German cities by the Allies in World War II as an example of 'terrorism' (e.g. Walzer, 2000: 260), this time partially defending, or at least excusing, the strategy. Walzer is, therefore, not entirely consistent in his approach to terrorism. At one point in his 1988 article *Terrorism: A Critique of Excuses*, he claims that:

'No one these days advocates terrorism, not even those who regularly practice it. The practice is indefensible now that it has been recognized, like rape and murder, as an attack upon the innocent.' (Walzer, 2005: 51)

He must, then, have a different example in mind when, four pages later in the same article, he claims that terrorism may be justifiable:

'Would terrorism be justified in a "supreme emergency" as that condition is described in "Emergency Ethics" (Chapter 3)? It might be, but only if the oppression to which the terrorist claimed to be responding to was genocidal in character. Against the imminent threat of political and physical extinction, ex-

treme measures can be defended, assuming that they have some chance of success. But his kind of 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, 2005: 54)

In his 2006 article *Terrorism and Just War*, Walzer argues again that terrorism may, at the most, be excusable:

'In rare and narrowly circumscribed cases, it may be possible, not to justify, but to find excuses for terrorism. I can imagine myself doing that in the hypothetical case of a terrorist campaign by Jewish militants against German civilians in the 1940s – if attacks on civilians had been likely (in fact they would have been highly unlikely) to stop the mass murder of the Jews.' (Walzer, 2006: 7)

Accordingly, I assume that Walzer is not as categorical about the moral evaluation of terrorism against innocents, and about the possibility of it being defensible, as he appeared to be in the first instance. Yet, the second statement cited gives rise to confusion regarding whether he holds terrorism as justifiable or as merely excusable. Given that Walzer considers targeting civilians in a supreme emergency excusable, but not justifiable, I assume that he does not consider terrorism justifiable either and that in the above quotation, he is simply inaccurate in the choice of his terminology.

Walzer furthermore argues that terrorism, apart from murdering the innocent, denies men and women the freedom from fear and targets people because of their membership in a certain community. (Walzer, 2006: 7) However, I hold that not all terrorism is of this kind. But even if it were, Walzer's criticisms of terrorism hold just as true for war against innocents and for the Allied bombings, which, in Walzer's view, can be excused.

He further expounds that terrorism can never be excused because it never is the last resort. He claims that if people run out of all other options and terrorism is the only one remaining, the 'easy response is to insist that, given this description of their case, they should do nothing at all; they have indeed exhausted their possibilities.' (Walzer, 2005: 53) However, Walzer is not as restrictive with regard to excusing direct violence against innocents in war: he does not measure terrorism and war with the same moral yardstick.

Taken all in all, it can be said that Walzer's claim about terrorism and supreme emergency is unconvincing. Walzer's account of supreme emergency is based deeply in his communitarian political approach. (Walzer 2005: 33–50) Part of the reason for why he is more sceptical of excusing terrorism than of excusing the targeting of innocents in war is his account of (political) communities and the prefer-

ence he gives to these, in contrast to collectives who do not act on behalf of such a community. This undeniable bias has been criticized by numerous scholars (Coady, Steinhoff, Primoratz, Valls, Cook), but it will not form a part of my reflections. All in all, there is no convincing reason why supreme emergency should not be applicable to terrorist violence.

TERRORISM AND SUPREME EMERGENCY

In the following, I will apply a revised version of the supreme emergency exemption to strong terrorism. Let me therefore briefly return to Orend's account of the exemption. He holds the resort to violence against civilians in war excusable if, in the face of a supreme emergency, the following criteria are satisfied: (a) last resort; (b) public declaration; (c) appeal to international community; (d) right intention; and (e) probability of success. Both Walzer's and Orend's arguments on the morality of attacking civilians in war are based on the assumption that these civilians are innocents in the sense that they are not engaged in any hostilities and not attacking anyone. Hence, these civilians fall under my definition of innocents, and it appears unproblematic to use the term 'innocents' instead of 'civilians' in the following elaboration. As for the five criteria Orend implements, not all of them are necessary. Conditions (b) and (c) are significant because they are not usually included in accounts of just war or justified violence. Particularly the appeal to international community in condition (c) is a convincing requirement because it reflects the demand that the community in danger attempt to mobilise support, even if such attempts are not always successful. However, it is actually a sub-aspect of last resort, in my view, because as long as an agent has not considered requesting help from third parties, he has not really run out of options. Last resort is an important criterion which already formed a part of Walzer's account. As to the criterion of public declaration, it is important inasmuch as it forces the violent agent to pause, recapitulate and publicly reconsider his project and the reasons for it before resorting to extreme measures. Orend regards this requirement to be closely linked to last resort (Orend, 2005: 150), but I cannot see how there is a strong connection between these two. Rather, the demand that the political agent publicly declare his or her intentions is an independent criterion for averting hasty decisions and a lack of political transparency. I will come back to the criteria of right intention and probability of success shortly.

Another approach to examining the justifiability of infringing the prohibition against killing the innocent in extreme situations is Igor Primoratz's account of moral disaster, which is structurally similar to Walzer's, but more restrictive. Primoratz considers only two situations to be a moral disaster: (the threat of) genocide and (the threat of) ethnic cleansing. He holds the satisfaction of the following two criteria to be necessary: (a) last resort, (b) prospect of success (Primoratz, 2005b: 58). In con-

trast to Orend, he considers the employment of violence against innocents as justified in a morally disastrous situation rather than merely excused.

The kind of supreme emergency exemption I want to offer comprises elements of all three accounts. What is missing in both Primoratz's and Orend's accounts, but present in Walzer's, is the notion of proportionality. The just war tradition distinguishes two different notions of proportionality, *ad bellum* and *in bello*. While the former requires the positive results or moral benefits of resorting to violence to outweigh the negative results or moral costs, the latter claims that the agent must employ no more violence than necessary to achieve the required objectives. Though *proportionality* is a criterion notoriously difficult to assess, I consider it a necessary component of the moral evaluation of violent acts. One could argue that the question of proportionality is redundant in this context because the supreme emergency exemption only applies to situations so horrible that almost anything may be undertaken to prevent them. Yet I would disagree with this reasoning: even a supreme emergency does not justify any available means. It is obvious that the supreme emergency exemption may only be allowed for if it does not cause an even greater emergency. If the only way to prevent the ethnic cleansing of a group from its land is to expel another group or several other groups, then the *ad bellum* proportionality requirement is not met.

The criterion of prospect of success is in fact a sub-criterion of proportionality *ad bellum*. Given that in order to assess proportionality *ad bellum*, the prospective positive results must be weighed against the prospective negative results, a violent campaign which is not likely to succeed, i.e. which is not likely to bring about the desired positive outcome, cannot meet this requirement. Hence, the condition of proportionality *ad bellum* renders the condition of prospect of success redundant.

The *in bello* proportionality, or necessity requirement, is an essential condition to ensure that no more innocents are killed than necessary to achieve a cessation of the supreme emergency situation. Admittedly, it is impossible to determine exact numbers in this context, and yet, there are cases of clear disproportion. In Walzer's account this requirement is reflected in the criterion of necessity.

As to the requirement of *right intention* suggested by Orend, it is important to demand that the violent actor not abuse the supreme emergency exemption and act with an inclination to destroy. However, one could argue that it does not change the moral status of the act if the agent acts for revenge or bloodlust, as long as these actions remain within the limits of proportionality. These require the agent not to cause more harm than benefit, and to employ no more violence than necessary to achieve the aspired for justified goal. The restrictions of proportionality together with the demand that the situation be a genuine supreme emergency (this corresponding to the just cause criterion in just war theory) make the requirement of right intention negligible.

Moreover, the supreme emergency exemption should not only excuse the employment of violence against innocents, but justify it, in my view. Walzer appears to be indecisive with regard to the justifiability of killing innocents. He argues that 'there are moments when the rules can be and perhaps should be overridden' (Walzer, 2005: 34) and that the deliberate killing of innocent people in order to prevent a Nazi triumph was 'morally defensible'. (Walzer, 2005: 35) Orend claims that in a supreme emergency, one is 'forced to do terrible things to survive' (Orend, 2005: 151) and can therefore be excused, but never justified. Therewith Orend situates the violent agent's actions in a supreme emergency outside the realm of morality: obviously one cannot be judged morally for something that he or she was forced to do or something that he or she had to do as there was no other choice. Yet here Orend appears to create precisely the moral loophole he rejected earlier. While he is right in presenting the killing of innocents as a tragedy from the victim's perspective, he is not accurate, however, in describing it as a necessity or forced choice from the agent's perspective. The agent clearly has a choice in a supreme emergency: that between killing a (limited) number of innocents on one side and allowing for a moral disaster to occur on the other side. Not only does the agent have this choice, but it is also clear that only one of the two options is right, namely the former. In contrast to Orend, I hold that in order to avert a supreme emergency, an agent is not only excused for killing innocents – given the satisfaction of the conditions discussed so far – but actually morally required to do so. Hence, if one has a moral obligation to act in a certain way, then one is morally justified in so acting.

On the basis of the previous review of the supreme emergency and the moral disaster exemption, I hold that an agent is justified in resorting to terrorism against innocents if the following criteria are met:

1. Last resort (including the appeal to international community);
2. Proportionality (*ad bellum & in bello*); and
3. Public declaration.

One might still insist on the immunity of innocent people from attack being an absolute moral principle which can never be justifiably infringed. Indeed, any possible justification of a terrorist killing of innocents is facing the problem of disregarding the victims' right to life and integrity. If the prohibition against attacking the innocent is considered absolute, i.e. that it must not be disobeyed under any thinkable circumstances, strong terrorism can never be justified. Under certain circumstances, however, such a moral attitude is entirely irresponsible: In the case that the targeting of innocents can prevent a moral disaster, it would be morally wrong not to take these appropriate steps.

Moreover, the above presented account does not clear the way for justifying all varieties of strong terrorism. In the overwhelming majority of situations, the killing

of innocents is prohibited. Only in morally extreme (and rare) situations can such measures be justified. Even in the face of extreme consequences, the demand to satisfy a set of strict conditions remains. Hence, there are still major obstacles to legitimizing terrorism, namely the conditions of last resort & proportionality, but above all the condition that the situation in question must constitute a genuine supreme emergency. These conditions will be very difficult to satisfy for strong terrorist actors.

The supreme emergency exemption derives a lot of its persuasive power from the claim that given their enormity and finality, extreme situations such as genocide and ethnic cleansing are a category apart. However, one could object that it may be difficult or even impossible to consistently and unequivocally determine whether or not a given situation is a supreme emergency. The concept of genocide has been extensively dealt with in academic debate, and the UN has agreed on a definition that can arguably be considered binding. Yet the definition of 'ethnic cleansing' in particular, a term sometimes used to denote a preliminary stage to genocide, is still a moot point.¹¹ Demanding accuracy when labelling a situation as a supreme emergency is certainly justified. Nevertheless, there are many cases which are doubtlessly recognizable as cases of ethnic cleansing and genocide.

Tony Coady has brought forward a slippery-slope argument in which he asserts that when people begin justifying their actions by resort to supreme emergency, other parties might be encouraged to do the same, and 'there is likely to be an increased tendency for the scope of resort to supreme emergency.' (Coady, 2005: 150) In a similar manner, Martin Cook objects to the supreme emergency exemption with the argument that extreme cases usually do not lead to good rules:

'There is a common saying in law in the English-speaking world: "Hard cases make bad law" ... The point of the saying is that it is often a mistake to attempt to derive normative guidance from the fortunately very rare and extreme case. Attempting to state a normative standard for the extreme often results in creating permissions and restrictions that will be applied in circumstances where they are not really intended.' (Cook, 2007: 140)¹²

Both scholars are right. Such misapplications of the supreme emergency exemption can and will certainly take place. Yet the criteria for such an exemption are very difficult to satisfy. In general, no theoretical concept is immune to misapplications. Yet, it is a necessary risk which can be minimized by elaborating such concepts scrupulously and amending them if necessary to impede misapplication of the permissions they give.

CONCLUSION

In this article I hope to have shown that it is not accurate to condemn strong terrorism on the grounds of its infringement of the prohibition against killing the inno-

cent: there are exceptions to this prohibition. I have demonstrated that the supreme emergency exemption justifies the resort to terrorism against innocents to avert a moral disaster such as genocide and ethnic cleansing, provided that the criteria of last resort, proportionality and public declaration are satisfied.

ENDNOTES

¹ In fact, many scholars reject the notion that terrorism is necessarily directed against innocents: Georg Meggle, Tony Dardis, Virginia Held, Seumas Miller, Angelo Corlett, Robert Young, Simon Keller, Olaf Müller.

² The distinction between strong and weak terrorism is similar to the corresponding distinction Georg Meggle makes, but it is not the same. To Meggle, strong terrorism is all terrorism that is strongly reprehensible, and everything else is weak terrorism. Meanwhile, my distinction does not include a moral judgment. See Meggle, 2005b.

³ There certainly exist more publications on exceptions to the prohibition against killing the innocent. Virginia Held's account of justly distributing rights violations has raised a lot of attention, but it cannot be examined here. Nevertheless, most of the arguments brought forward in those discussions are not applicable to the context of terrorism, such as the discussion of the innocent attacker, which is why they are not being considered here. On the problem of the innocent attacker, see, e.g., McMahan, Jeff (1994), 'Self-Defense and the Problem of the Innocent Attacker', in *Ethics* 104(2), pp. 252–290; Fullinweider, Robert K. (1985), 'War and Innocence', in *International Ethics: A Philosophy and Public Affairs Reader*. Princeton, NJ: Princeton Univ. Press; Fritze, Lothar (2004), *Die Tötung Unschuldiger*, Berlin: de Gruyter; Thomson, Judith Jarvis (1991), 'Self-Defense', *Philosophy and Public Affairs* 20, pp. 283–311; Uniacke, Suzanne (1994), *Permissible Killing*. Cambridge: Cambridge University Press; Steinhoff, 2007.

⁴ This view is generally shared by Garrett and Primoratz, though their opinions differ concerning the moment the situation ceased to constitute a supreme emergency. Garrett argues that 'At the dawn of 1942 ... it appeared that Russia had survived, the vast might of the Americans was now engaged, and the entire strategic situation had been dramatically transformed. Under the circumstances, the only supreme emergency that loomed was the one the Germans would face sooner or later. If any vestige of supreme emergency had passed by February 1942 then this concept cannot be used to justify the initiation of the area offensive.' (Garrett, 2004: 150)

Igor Primoratz holds that 'The supreme emergency argument may have been valid only during the first year of the campaign: in 1942, the victory of Nazi Germany in Europe – a major moral disaster by any standard – might have been thought imminent. However, after German defeats at El Alamein (November 6, 1942) and at Stalingrad (February 2, 1943), that was clearly no longer the case'. (Primoratz, 2005a: 76)

⁵ Walzer clearly holds that the criterion of last resort must be satisfied. With regard to World War II, he argues that 'if there was no other way of preventing a Nazi triumph, then the immorality – no less immoral, for what can the deliberate killing of the innocent be? – was also, simultaneously, morally defensible.' (Walzer, 2005: 34-35) Elsewhere he argues that one is allowed to resort to an immoral response under the condition of 'every legitimate alternative having been exhausted' (Walzer, 2005: 47).

⁶ One of the objections which I will not discuss here is that Walzer's WWII example does not, strictly speaking, satisfy the conditions for supreme emergency and thus undermines Walzer's original argument. (Orend, Coady, Steinhoff, Cook, Garrett)

⁷ A slightly different point, which will not be discussed here, has been brought forward by Cook: 'Walzer seems to be arguing that any time any community faces the loss of its way of life, it is faced with a supreme emergency, and therefore is entitled to disregard the war convention [...] Given the historical reality that most human communities that have ever existed have at some point disappeared, often as a result of conquest, invasion, or loss of political autonomy, such a generalized permission would be a recipe for rather frequent supreme emergency.' (Cook, 2007: 147)

⁸ Brian Orend makes the same point in Orend, 2001: 23.

⁹ This is the part of Orend's analysis in which he singles out five different ways to conceive the concept of supreme emergency: (1) One can hold that the concept of supreme emergency constitutes a bastardization of just war theory, and should be generally rejected. According to this perspective, there is no such thing as supreme emergency. (2) In supreme emergency, only *jus ad bellum* matters, but *jus in bello* may be set aside. Orend calls this 'Churchill's (Jus ad Bellum) Consequentialism'. (3) Even in supreme emergencies, the rules of *jus in bello* apply. (Briefly summarized, Orend dismisses these three accounts as ignorant of the existence of real supreme emergencies (1), as ignorant of the rights violations against the innocents (3), and as unrealistic and irresponsible (3).) (4) The 'paradoxical account of dirty hands', which is what Orend considers Walzer's actual approach to be. (5) Orend's own account of supreme emergency. (Orend, 2005: 146–151)

¹⁰ For a more detailed account on supreme emergency and dirty hands, see Coady, 2004c: 781f.

¹¹ The term 'ethnic cleansing' is usually applied to describe the practice of forced emigration in order to render an area ethnically homogeneous. However, the term's definition is a moot point. (See, e.g., Bell-Fialkoff, Andrew (1993), 'A Brief History of Ethnic Cleansing', *Foreign Affairs*, Vol. 72, No. 3, pp. 110–121.)

According to Article 2 of the UN Convention on the prevention and punishment of the crime of genocide, genocide is defined as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹² Tony Coady has made a similar point against Walzer, whose concept he thinks is too permissive, as it could be applied to completely different areas to justify violence against innocents, e.g., for the sake of a corporation: 'Yet, in the context of public discourse about war and terrorism, we should be particularly worried about allowing exemptions from profound moral and legal constraints under categories that are, at the very least, so open to divergent interpretations. ... Why not allow that the

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exemption can apply to huge corporations, the existence of which is central to the lives and livelihoods of so many?' (Coady, 2004a: 91f) Walzer gives strong preference to the political community, but not to other kinds of collective entities, such as commercial institutions. Though political entities to a certain degree, commercial corporations would certainly not be considered by Walzer as indispensable to our existence as political communities. Under certain circumstances, it may occur that a threat to a corporation would also threaten a political community which is closely linked to the corporation. But in such a case it would still be the threat to the political community, not the menace to the corporation, that would be the main reason for a supreme emergency. As such, I cannot see how Walzer's concept may be extended to corporations, as Tony Coady suggests.

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