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Supreme Emergencies? They Don't Exist. And Even If They Did...

Abstract: In this paper, I discuss non-combatant immunity in extreme wartime situations. Contra several well-known just war theorists, I argue that intentionally attacking non-combatants, even in cases of apparent supreme emergency, is never morally justified. I argue that this is the case because, in the actual world, there are always other morally better options (in the context of the just war tradition). And furthermore, even if it were to be the case that there is no morally better option, I argue that the relevant commander-in-chief would not be justified in ordering an intentional attack on non-combatants, because such a situation would be epistemically identical to a situation wherein other morally better options are available. Given such epistemic uncertainty, and the extraordinarily high stakes involved, the commander-in-chief is not morally justified in ordering an intentional attack on non-combatants.

Keywords: supreme emergency, war, just war theory, necessity requirement, terror bombing, discrimination requirement, Walzer, Rawls

I. Introduction

Supreme emergency is the name given to those situations when a commander-in-chief of a state at war with another state comes to regard the intentional attacking of enemy non-combatants (i.e., enemy civilians) as the only possible way to prevent the imminent, morally catastrophic victory of the other state.¹ Two eminent political philosophers who are proponents of the just war tradition,² Michael Walzer and John Rawls, both famously argue that, if certain circumstances pertain, it is morally justified for the commander-in-chief to order the intentional attack of non-combatants in order to prevent the other state from winning the war.³ This conclusion is quite

¹ Normally, the non-combatants at issue are the non-combatants of the enemy state. But, this need not be the group of non-combatants at issue; we can imagine an (admittedly odd) scenario where deliberately attacking some other group of non-combatants would prevent the enemy state from winning the war.

² I follow, among others, Michael Walzer and Jeff McMahan in referring to the just war tradition rather than the just war theory. This is meant to acknowledge the fact that, while there are common threads tying various conceptions of just war together, there is not a dominant unified theory that all contemporary just war theorists espouse. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2006), and Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009).

³ Walzer, *Just and Unjust Wars*, esp. ch 16, and Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs* 2.2 (1973): 160-80, and John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* (Cambridge: Harvard University Press, 2001), 98-105, and John Rawls, "Fifty Years After Hiroshima," in *Collected Papers*, edited by Samuel Freeman, (Cambridge: Harvard University Press, 1999), 565-72.

contentious because it contravenes one of the cornerstones of the just war tradition, the discrimination requirement. The discrimination requirement holds that it is a necessary condition of some military action's being morally justified that it a) discriminates between combatants and non-combatants and b) intentionally attacks only combatants.⁴ Perhaps unsurprisingly, the discrimination requirement is also referred to as the principle of non-combatant immunity in the contemporary literature.⁵

In this paper, I wish to elide the problems inherent in spelling out the discrimination requirement; as Larry May and others have ably demonstrated, because the categories of “combatant” and “non-combatant” are not stable, it is difficult to work out precisely what grounds the discrimination requirement and what it entails.⁶ Nevertheless, the basic idea of the discrimination requirement is, I think, clear. War is generally understood as “combat between combatants,” and military actions that altogether fail to respect this general conception are, according to the just war tradition, morally impermissible.⁷ This is reflected not only in the discrimination requirement of the just war tradition, but also in international law.⁸ However, it is important to note that the discrimination requirement does not rule out all killing of non-combatants in war; non-combatants may permissibly be killed as an unintended side-effect of intentionally attacking combatants. Such unintentional killing is commonly referred to as “collateral damage,” and while it must be minimized as much as possible for the relevant military action to be morally justified, foreseen but unintended

⁴ Walzer, *Just and Unjust Wars*, 41-43 and chapter 9. See also Larry May, “Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants,” *Ethics and International Affairs* 19.3 (2005): 39-53, and Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy and Public Affairs* 33.1 (2005): 36.

⁵ See, among others, Richard Arneson, “Just Warfare and Noncombatant Immunity,” *Cornell International Law Journal* 39.3 (2006): 663-88, Helen Frowe, “Self-Defence and the Principle of Non-Combatant Immunity,” *Journal of Moral Philosophy* 8.4 (2011): 530-46, and David Duquette, “From Rights to Realism: Incoherence in Walzer's Conception of *Jus In Bello*,” in *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, edited by S.P. Lee, (The Netherlands: Springer, 2007), 41-57.

⁶ May, “Killing Naked Soldiers.” See also Thomas Nagel, “War and Massacre,” *Philosophy and Public Affairs* 1.2 (1972): 123-44, and Jeffrie Murphy, “The Killing of the Innocent,” *The Monist* 57.4 (1973): 527-50.

⁷ Walzer, *Just and Unjust Wars*, 42.

⁸ The Fourth Geneva Convention, adopted in 1949, explicitly outlaws the intentional attacking of non-combatants.

collateral damage is regarded as not contravening the discrimination requirement. What contravenes the discrimination requirement, or, put another way, what violates the general conception of war as combat between combatants, is the intentional, indiscriminate attacking of non-combatants.

Such military actions—e.g., the intentional bombing of a civilian center in order to hasten an enemy's surrender—are widely regarded by the just war tradition to be morally impermissible because they violate the discrimination requirement. And yet, two proponents of the discrimination requirement and the just war tradition, Walzer and Rawls, argue that in cases of supreme emergency such military actions are morally justified. While the details of their views differ, the main thrust of both of their arguments is that it would be morally justified for the commander-in-chief of one state to intentionally attack, or order the intentional attack of, non-combatants during war if and only if a) it would be a true moral disaster if the enemy state were to win the war, b) the enemy state's winning the war is imminent, and c) the intentional attacking of the non-combatants in question is the only way to prevent the enemy state from winning the war.⁹ In such a situation, the necessity of preventing an imminent moral catastrophe can, in Walzer's memorable phrase, "make it right to do wrong."¹⁰ In other words, when it comes to supreme emergencies, normally morally impermissible military actions are morally justified.

While this argument can be difficult to grasp in the abstract, it has a great deal of intuitive pull when put into context. The most commonly used example in discussions of supreme emergency is the early years of World War II, when Great Britain stood more or less alone against Nazi Germany. If we accept the counter-factual claim that Nazi Germany winning the war would have been a moral disaster, in that it would have led not only to the deaths of many millions but also to

⁹ Walzer, *Just and Unjust Wars*, esp. ch 16, and Walzer, "Political Action: The Problem of Dirty Hands," and Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* 98-105, and Rawls, "Fifty Years After Hiroshima."

¹⁰ Walzer, "Political Action: The Problem of Dirty Hands," 174.

the “end of moral civilization” as we know it, the historical-factual claim that a Nazi victory was imminent in 1940, and the necessity claim that the only way for Great Britain to prevent the imminent Nazi victory, at that point in time, was to indiscriminately fire-bomb predominately civilian cities in Germany, then, I think, it is difficult to resist the conclusion that Great Britain's intentional bombing of German civilian centers in 1940 was morally justified.¹¹ It is hard to maintain that Churchill, in ordering the bombing of German cities in order to prevent an imminent, immeasurably awful Nazi victory, acted impermissibly. More compelling is the conclusion that Walzer and Rawls come to, that Churchill made the hard, but morally justified or right, decision.

The question that many theorists have wrestled with since Walzer and Rawls introduced the topic of supreme emergencies is whether it is possible to provide a satisfactory normative argument in favor of this conclusion. Unsurprisingly, some theorists conclude yes, intentional attacks on non-combatants in cases of supreme emergency are morally justified, some theorists conclude no, intentional attacks on non-combatants in cases of supreme emergency are not morally justified and are in fact morally impermissible, and some theorists maintain that supreme emergencies are moral dilemmas.¹² What the various members of the debate have in common, however, is their acceptance of the initial claims about the nature of supreme emergencies. Their subsequent moral arguments are predicated on the truth of these claims or conditions. In this paper, I want to focus on one of these initial conditions, specifically, on what I refer to as c) above, that the intentional attacking of the non-combatants in question is the *only* way to prevent the enemy state from imminently winning the war. The truth of this claim is crucial to the success of the arguments that indiscriminate military

¹¹ Walzer, *Just and Unjust Wars*, ch. 16.

¹² For arguments that claim that intentionally attacking non-combatants in cases of supreme emergency is morally justified, see Walzer and Rawls, as well as R.M. Hare, “Rules of War and Moral Reasoning,” *Philosophy and Public Affairs* 1.2 (1972): 166-81. For arguments that claim that such attacks are morally impermissible, see Daniel Statman, “Supreme Emergencies Revisited,” *Ethics* 117 (2006): 58-79, and C.A.J. Coady, “Terrorism, Morality, and Supreme Emergency,” *Ethics* 114.4 (2004): 772-789. For an argument that supreme emergencies present insoluble moral dilemmas, see Nagel, “War and Massacre.”

attacks on civilians in cases of supreme emergency are morally justified, and is also the biggest sticking point for those who argue that such military actions are morally impermissible. If there is truly no other way to prevent an imminent moral catastrophe, the thought goes, oughtn't we do what is necessary to save the day? Even though that involves intentionally attacking non-combatants? As we learn from Walzer, it is the *necessity* of the indiscriminate, intentional military attack on civilians that encourages the conclusion that it is morally acceptable.¹³ Note that necessity here does not mean inevitable; rather, it means indispensable and unavoidable. As David Rodin puts it, necessity “expresses the requirement that one may only take a harmful measure...if there is no less costly course of action available that would achieve the same result.”¹⁴ Intentionally attacking non-combatants is harmful, but if it is the only way to achieve the result of preventing a catastrophic outcome, that is, if it is necessary to prevent a disaster, then, we might think, doing so is morally justified. The truth of the necessity claim appears to put the burden of proof on those who argue that, even in cases of supreme emergency, intentionally attacking non-combatants is morally impermissible.

Given the importance of c)'s being true for the moral arguments surrounding supreme emergency, relatively little attention has been paid to it. So, in this paper, I focus my attention on c). I will argue first that c) is never satisfied in the real world. The intentional attacking of non-combatants is never the only way to prevent a moral catastrophe from occurring; to think that it is reflects a lack of awareness of just how many action-options there are in the real world. I will argue that c) is never satisfied in the real world first by presenting an intuitive argument, and then by pointing out its similarity to another hard case in moral philosophy, Foot's famous (or infamous)

¹³ Walzer, *Just and Unjust Wars*, chapter 16.

¹⁴ David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 40.

trolley problem.¹⁵ Just as it is plausible to resist the trolley problem on the grounds that it is entirely unrealistic, so it is plausible to resist c). Then, I will argue that even if c) were to obtain in the real world, commanders-in-chief could not be in a position to know that c) is true, because such a situation would be epistemically identical to a situation wherein c) is not true. Given such epistemic uncertainty, as well as the high stakes involved, I argue that commanders-in-chief can never justifiably conclude that they are in a situation of supreme emergency. So, I maintain, commanders-in-chief ought never to act as though they are in a situation of supreme emergency (even when, as a matter of fact, they are); they ought never to order the intentional attacking of non-combatants. Doing so, *pace* Walzer, Rawls, and others, is never morally justified.

II. 'The Only Option' Clause

In this section, I argue that c) is never satisfied in the real world; it is never the case, in our world, that intentionally attacking non-combatants is the only way to prevent an imminent moral disaster. I will first present an intuitive argument in support of this claim, which should make it clear that accepting c) as true is simply due to a failure to appreciate the complexities of the real world. When we carefully consider the matter, we see that c) is never actually true. Then, I will argue that c) is relevantly similar to the trolley problem, and so can be rejected as false (i.e., as never obtaining in the real world) on the same grounds that the trolley problem is often rejected as false.

II.1 The Intuitive Argument

To begin, consider Churchill's position in 1940. The armies of Nazi Germany were advancing throughout Europe, and the Allied forces, comprised of the militaries of Great Britain, France, Australia, New Zealand, India, and South Africa—all of which declared war on Germany when German military forces invaded Poland in 1939—seemed unable to stop, or even slow down,

¹⁵ Phillipa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review* 5 (1967): 5-15.

the German war machine.¹⁶ The horrors of Nazi rule were becoming apparent, and an Allied defeat, at least in Europe, seemed very close. In the face of such imminent, disastrous defeat, consider Churchill's options. Churchill could have sent an assassination team into Germany to kill the German High Command. While this may seem like Hollywood conjecture, in fact, Churchill was famous for his insistence on the creation and utilization of so-called "Commando units" during his time as First Lord of the Admiralty under Prime Minister Chamberlain in the early stages of the war.¹⁷ Given this, it is not far-fetched to think that an assassination attempt was a possible, and indeed possibly effective, option at the time.¹⁸ Alternatively, Churchill could have sent ambassadors to Germany to play for time. While this might well have been a politically difficult move, given the mood of the people of Great Britain, it could have provided Churchill with precisely what the bombing of the German cities was ostensibly supposed to accomplish, namely, it could have given Britain time to build up its industrial ground and air forces. The use of diplomacy as a delaying tactic was well-established in international politics by this time, and so again, it is not far-fetched to think that this was a possible, and possibly effective, option at the time. Crucially, neither of these options would have violated the discrimination requirement, and thus both, (in the context of the just war tradition), were morally better options than intentionally bombing predominately civilian German cities.

My point here is to demonstrate that Churchill had several militarily acceptable options—i.e., options that did not violate the discrimination requirement—at the time when he ordered the indiscriminate bombing of German cities, and to think otherwise, that is, to think that Churchill's only option for stopping the Nazis was to bomb the German cities, is to be caught in a false

¹⁶ Winston S. Churchill, *The Second World War: The Gathering Storm* (Boston: Houghton Mifflin Company, 1986).

¹⁷ Winston S. Churchill, *The Second World War: The Gathering Storm* and *The Second World War: Their Finest Hour* (Boston: Houghton Mifflin Company, 1986).

¹⁸ We can add to this the background knowledge that Churchill surely had that assassination attempts had succeeded many times in the past, from Julius Caesar to Archduke Ferdinand.

dichotomy. The world is a complex place at the best of times, and during wartime, it is even more so. The decision of what to do in the early months of 1940 was not *either* indiscriminately bomb German cities (intentionally attack non-combatants) and prevent the Nazis from winning, *or* refuse to intentionally attack non-combatants (hold to the discrimination requirement) and let the Nazis overrun Europe. There were—and, I maintain, in the real world always are—a number of other action-options that a commander-in-chief could take in order to prevent a moral catastrophe that do not violate the discrimination requirement.

Although it may seem as though I am quibbling about one example, I think that the intuitive point, that other action-options always exist, can be generalized. The situation, in the real world, is never simply a choice between option A *or* option B; it is a choice between option A, option B, *and* a number of other options. Of course, some of these other options may not be morally better than either option A or option B; it is possible that option A, for instance, really is the morally best option of the action-options available. However, it is clear that we cannot know that option A is the morally best option without at least considering the other action-options available. To screen off the other action-options (as though they do not exist) without considering them is to make a mistake; it is to inaccurately portray, or mis-characterize, the nature of the real world. When we carefully consider the matter, we see, intuitively at least, that c) is never satisfied in the real world.

Furthermore, returning to supreme emergencies specifically, I have attempted to demonstrate, in drawing out this particular example, that not only are there always other action-options available in cases of supreme emergency, but also that at least some of these available action-options will be morally better than intentionally attacking non-combatants, because they do not violate the discrimination requirement.¹⁹ One of the defining aspects of the just war tradition is

¹⁹ We can imagine a defender of c) saying that what he meant by c) is that intentionally attacking non-combatants is the morally better, or best, option in the situation.

the discrimination requirement; as Hurka puts it, “the discrimination condition...[is] the first of the *in bello* conditions,” and by “first” here he seems to mean most important.²⁰ As I said above, I do not want to digress into a discussion of the discrimination requirement; I merely want to take it as given that it is one of the deep moral principles of the just war tradition, and so that, insofar as we are working within the just war tradition, we ought not to advocate violating the discrimination requirement unless there are no action-options available that do not violate the discrimination requirement. But, as I have tried to show, in cases of supreme emergency, at least some of the available action-options (i.e., action-options that could very well prevent the moral catastrophe in question) do not violate the discrimination requirement. Thus, there are—intuitively, at least—always some available action-options, in cases of supreme emergency in the real world, that are morally better than intentionally attacking non-combatants. Now, I have not proven this with a deductive argument; so far, what I have done is present an intuitive argument that the real world is not as morally simple as some just war theorists would have us believe, and have argued that a failure to attend to this fact, especially in cases of supreme emergency, can lead to grave moral error, because it can lead to violations of the discrimination requirement when doing so is neither necessary nor the morally better option.

Additionally, it is important to notice that accepting c), that is, accepting that intentionally attacking non-combatants is the only option for preventing an imminent moral disaster, depends on thinking that intentionally attacking said non-combatants *will actually prevent* (or, at the very least, has a non-negligible chance of preventing) the relevant moral disaster.²¹ More broadly, to think that some action is a live, or available, option is to think that it has some non-negligible chance of

²⁰ Thomas Hurka, “Proportionality in the Morality of War,” 36.

²¹ We can imagine a defender of c) saying that what he meant by c) is that intentionally attacking non-combatants is the only option with a non-negligible chance of success in the situation.

success. Exactly how much of a chance of success an option must have in order to be an available option, though, is a difficult, perhaps impossible-to-answer-precisely question. On the one hand, it seems implausible to claim that an option, in order to count as an available option, must be certain to succeed. On the other hand, it seems equally implausible to claim that extraordinarily far-flung options (for example, trying to radio aliens for help) are available options in the relevant sense. In line with the earlier options that I introduced as available action-options for Churchill in 1940, I maintain that for an option to count as an available action-option it must be plausible for the agent to think, given his background information about the world and his current evidence about the situation, that the option in question could feasibly succeed. I realize that this is not entirely satisfactory; it would be more helpful to be able to argue for some objective threshold of probable success that an action-option must meet in order to count as an available option. However, I do not think that any such argument is available, in no small part because any probability of success calculation will depend on the agent's subjective interpretation of the overall evidence available to him. So, I think the best we can do is to say that, for an action-option to be available, it must be plausible to think that the option could feasibly succeed. Given this general rule, we can then consider the various action-options for any situation and try to make salient the features of those options that make it plausible or implausible to think that they could feasibly succeed. This is what I attempted to do above when I raised the possibilities of assassination and of using diplomacy as a delaying tactic; I listed the features of these options that make it plausible to think that they could have succeeded.

Conversely, we can also list the features of an action-option that make it implausible to think that the option has a feasible chance of success. Insofar as we conclude that the option has either no chance or only a negligible chance of success, it is less of an available option. Applying this to the

situation of supreme emergency, it is not at all clear why one should accept that intentionally attacking non-combatants has a feasible chance of preventing the imminent moral disaster. Consider the sort of enemy regime whose imminent victory would constitute a moral disaster: such an enemy regime would need to be unusually cruel, callous, and evil, and in general immune to the sorts of moral motivations and concerns that underwrite acting with empathy, compassion, and decency. Many people thought, and think today, that the Nazi regime was just this way.²² Such an enemy, it seems, would not be moved by the indiscriminate bombing of their non-combatant population; their unusual callousness (which is part of why their imminent victory would be a moral catastrophe) would lead them to ignore such losses, or use them, in pursuit of their military and political goals of domination. And in fact, this is precisely what occurred in World War II; the British RAF attacks on German cities galvanized Hitler and the German population to fight more fiercely, rather than leading them to cease their pursuit of European domination.²³ Put more broadly, one essential aspect of what makes some situation a supreme emergency, namely, the nature of the enemy regime, makes it implausible to think that intentionally attacking that enemy's non-combatant population would have the desired effect of preventing its imminent victory. Insofar as this action-option does not appear to have a feasible chance of success, it seems that we should not accept it as an available option in such extreme wartime situations. This gives us even more reason to reject c). Not only is intentionally attacking non-combatants never the only option, in the real world, for preventing the imminent victory of an enemy whose victory would be morally disastrous, but it is not even clear that it is an option that could plausibly be said to have a feasible chance of success.

At this point, I have presented an intuitive argument that c), as it stands, is never satisfied in

²² Walzer, *Just and Unjust Wars*, chapter 16, and Murphy, "The Killing of the Innocent." For first-hand accounts of Nazi rule, see Elie Weisel's *Night* and William Shirer's *Berlin Diary*.

²³ Horst Boog, *Germany and the Second World War. Volume VII: The Strategic Air War in Europe and the War in the West and East Asia, 1943-1944/5* (Oxford: Oxford University Press, 2006). See also Peter Hinchcliffe, *The other battle: Luftwaffe night aces versus Bomber Command* (Ramsbury, UK: Airlife Publishing, 1996).

the real world. I have also argued against two variations of c): the first claims that intentionally attacking non-combatants is the morally better option in the situation, regardless of how many options are available, while the second claims that intentionally attacking non-combatants is the only option in the situation in the sense that it alone has a feasible chance of successfully preventing the enemy regime's imminent victory. Neither of these two variations of c), I argue, is ever satisfied in the real world either. Thus, I conclude, commanders-in-chief in the real world ought not to act as though c) is true—they ought not to claim that, in extreme wartime situations, the necessity of doing so justifies their ordering an intentional attack on non-combatants.

II.2 Analogy With The Trolley Problem

I will now present a more general argument by analogy that c) is never satisfied in the real world. Consider Phillipa Foot's famous trolley case from moral philosophy. There is a runaway trolley coming up to a switch in the tracks; all the driver of the trolley can do is steer onto one track or the other. On the one track, there are five people, and on the other track, there is one person, and anyone on the track that the driver picks is bound to be killed.²⁴ Foot argues that we should conclude that the driver should steer for the less occupied track, because in a case where a person's negative duties (to avoid injuring others) conflict, “he should do the least injury he can.”²⁵ In other words, when a person must violate one of her negative duties, she should choose the lesser evil.

Whether we agree with either Foot's conclusion or her reasoning in favor of her conclusion is an argument for another day;²⁶ what I wish to focus on here is something that Foot mentions in passing in her discussion of the case. As she points out, “in real life it would hardly ever be certain that the man on the narrow track would be killed. Perhaps he might find a foothold on the side of

²⁴ Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” 7.

²⁵ Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” 9.

²⁶ Both have been debated extensively in the so-called “trolleyology” literature. See especially Judith Jarvis Thomson, Frances Kamm, and Peter Unger.

the tunnel and cling on as the vehicle hurtled by.”²⁷ Foot's point is that, despite the way the case is set up, our background knowledge of the real world disinclines us to accept the “bound to be killed” feature of the example. She dismisses this uncertainty in order to focus on the philosophical principles at work; however, I wish to focus on the uncertainty, because I think that it matters to our actual moral judgment of the case. The uncertainty involved, not only in regards to whether the people on the tracks are really bound to be killed, but also in regards to whether there is really nothing else that the trolley driver can do besides steer onto one track or another, and in regards to who will be killed in each case (are some of the people children? Gangsters? Future cancer-curers?) leads us to be, in the first instance, very non-committal about what the trolley driver ought to do. Non-philosophers, in fact, often resist the trolley case on these grounds. They argue first that they do not have enough information to make a practical moral recommendation, and then, when the case is fixed up so that they *do* have all of the relevant information, they argue that the case has become too unrealistic to consider, and will often refuse to pronounce moral judgment unless pressed to do so.

Now, it is of course true that people's actual reactions to difficult moral thought experiments cannot determine how we ought to think about difficult moral cases generally. I am certainly not advocating moral silence in the face of difficult real-world decisions! However, I do think that people's actual reactions to the trolley problem can point us towards an important philosophical consideration, one that is too easily overlooked. The underlying worry here, I think, is that the trolley case, as it is presented, forces people to idealize their epistemic situation beyond what could ever occur, or, at least, beyond what is likely to ever occur, in the real world. Our practical moral recommendations, in large part, depend on what we think people's epistemic situations are likely to

²⁷ Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” 10.

be like; thus, we often say that what a person should do depends on what information she has or should have.²⁸ In the trolley case, the presented epistemic situation is *so* idealized (those being asked to make a moral judgment are given all of the relevant information, i.e., all of the uncertainties mentioned above are put aside), that participants, rightly I think, resist making a moral judgment because such a judgment would be artificial. It would be artificial in the sense that it is so divorced from the real world—due to the epistemic situation on which it depends being so bizarre—that it is hard to see how it could have any meaningful impact on, or import for, people as they actually are.²⁹ The argument for rejecting the trolley case is thus that, whatever moral pronouncements are made about it, these pronouncements do not matter to us (*viz.*, people as they actually are) because they are rooted in an epistemic position that we could not possibly occupy in the real world. Colloquially, the trolley case is just too unrealistic to take seriously, and so we should not draw any practical moral conclusions from it.

Moving back to supreme emergencies, I maintain that c) is relevantly similar to the trolley problem in that it massively over-idealizes the epistemic situation of the person who is to make the practical moral recommendation or pronouncement. C), remember, claims that intentionally attacking non-combatants is the only way to prevent the enemy state from winning the war. But, to paraphrase Foot, in real life, it would hardly ever be certain that intentionally attacking non-combatants is the only way to prevent the enemy state's victory; perhaps such an intentional attack would hasten their victory, or have no effect on their victory, or perhaps some other option would also prevent their victory. In the real world, our epistemic situation is uncertain in these ways. When

²⁸ To see how much our moral recommendations depend on our epistemic situation, think about Rawls' persons in the Original Position. The principles of justice that they espouse are heavily dependent on, although not entailed by, the information that they have about the world. (In addition to a particular epistemic situation, the maxi-min principle is also needed to arrive at the relevant principles of justice.) John Rawls, *A Theory of Justice* (Harvard: Belknap Press of Harvard University Press, 1999).

²⁹In other words, bizarre cases make bad law.

we idealize completely away from these uncertainties, as c) asks us to do, there is a worry that any moral judgments that we make will be artificial. At best, such judgments might be correct, but they will be useless to us, because they are based on an epistemically ideal position that is not achievable by people in the real world, and at worst, they will be distortions that lead us into grave moral error. So, we should reject c) on the same grounds that people often reject the trolley problem; c) is too unrealistic to take seriously, and so we should not draw any practical moral conclusions on its basis.

At this point, I have argued that the trolley problem and c) are analogous insofar as both depend on massive epistemic over-idealization. If this is, as I have argued, a good reason to reject the trolley problem, then it is also a good reason to reject c). And, if c) is never satisfied in the real world, then neither we nor commanders-in-chief ought to act as though c) is satisfied; we ought not to conclude that intentionally attacking non-combatants is morally justified because it is the only way of preventing an imminent, morally catastrophic enemy victory.

III. But What If?

In this section, I assume that my two previous arguments are unsuccessful, and that c) can sometimes be satisfied in the real world. After all, were I to conclude at this point, an interlocutor might reasonably object that I have sidestepped the real issue, which is the question of what a commander-in-chief ought to do if c) were to obtain in the real world. Philosophers are always saying, “But just suppose...” and, given my argument, it is not unreasonable to say this, because I have not argued for c)'s metaphysical or logical impossibility. So let us suppose that it is, as a matter of fact, true in a particular situation in the real world that intentionally attacking non-combatants is the only way to prevent an imminent, morally disastrous enemy victory. I will argue that even if c) were to obtain in the real world, commanders-in-chief could not be in a position to know that c) obtains, because such a situation would be epistemically identical to a situation wherein c) does not

obtain. Given such epistemic uncertainty, as well as the high stakes involved, I argue that commanders-in-chief can never justifiably conclude that they are in a situation of supreme emergency. So, I maintain, commanders-in-chief ought never to act as though they are in a situation of supreme emergency (even when, as a matter of fact, they are); they ought never to order the intentional attacking of non-combatants.

To see that commanders-in-chief could not be in a position to know that c) is satisfied in the real world, let us consider what sort of evidence they could have to support the conclusion that c) is satisfied. They must have evidence that their military has the capacity to carry out intentional attacks against non-combatants, as well as evidence that such attacks have a feasible chance of preventing an imminent enemy victory. In addition, they must have evidence that intentionally attacking non-combatants is the only option with a feasible chance of success—i.e., they must have evidence that all of the other possible action-options are not really available options in their situation. It is difficult to even get a grip on what sort of information would constitute evidence of this sort, and even if we could spell out what such evidence would need to be like, it would certainly be extremely difficult to gather. Furthermore, as I have been emphasizing throughout, situations where c) is possibly satisfied are typically situations of massive and pervasive uncertainty, not only because of a lack of evidence, but also because war is an extraordinarily complex social phenomenon. Outcomes in war depend not only on what each side's military does and does not do, but also on unknowable variables such as the weather and the zeitgeist of the involved countries. Given the massive and pervasive uncertainty of such extreme wartime situations, as well as the difficulties involved in gathering the sorts of evidence that could justify such a claim, it seems that no commander-in-chief could be in a position to know that c) does obtain, because her evidence will not be good enough to justify her claim to know that c) is satisfied.

The massive and pervasive uncertainty that is involved in any real-world case of apparent supreme emergency makes it such that the situation where c) does obtain, from the commander-in-chief's point of view, looks epistemically identical to the situation where c) does not obtain. In both cases, the available evidence will be the same, and so the available evidence will not be good enough to justify the commander-in-chief's claim to *know* that c) is satisfied. Consider how good a person's evidence must be in order to justify a knowledge claim. In some kinds of cases, in particular, in cases where the stakes are not very high, we think that her evidence need not provide certainty, or even very high probability, in order to justify her claim to know something. For instance, say that a person claims to know that the barn she sees in the distance is a real barn, and not a barn-facade.³⁰ When asked how she knows that the barn is a real barn, she cites a number of pieces of evidence, including the fact that most objects that look like barns, in her experience, are barns, and the related fact that barn-facades are relatively rare. It seems that, in this case, she has good reason to claim that she knows that the barn she sees in the distance is a real barn. But now let us change the case: say that a person's life depends on whether she gets it right about the distant object being a real barn. In this high-stakes barn case, it seems that the evidence that she originally cited in defense of her knowledge that the distant object is a real barn no longer justifies her knowledge claim, and that she ought to, in the absence of further evidence, refrain from claiming that she knows that the object is a real barn. The point here is that it takes more, in the sense of needing better evidence, to know when the stakes are high. More broadly, to have knowledge when the stakes are high, a person must be less uncertain than she would otherwise need to be in order to count as having knowledge in a low-stakes situation.³¹

³⁰ This example is adapted from Alvin Goldman, "Discrimination and Perceptual Knowledge," *The Journal of Philosophy* 73.20 (1976): 771-91.

³¹ In epistemology, there are many variations of this view, the basic idea of which is that the stakes matter to whether a person has knowledge. Contextualism and subject-sensitive invariantism are two iterations of this kind of view.

Needless to say, in a situation where a commander-in-chief is trying to determine whether c) is satisfied, the stakes are very high; not only do hundreds of thousands of non-combatant lives hang in the balance, but also the wide-ranging repercussions of violating both the war convention and international law must be considered. In such a high-stakes situation, the thought goes, the available evidence, because it is pervaded with massive uncertainty, is not compelling enough to justify the commander-in-chief's claim to know that c) is satisfied. (Remember that one piece of evidence that the commander-in-chief has is that people often mistakenly think that they are in a situation where there is only one available action-option, when in fact their situation is such that there are a number of available action-options.) So, even if c) is satisfied, I think that the commander-in-chief is not justified in concluding that c) is satisfied; given the high stakes, her evidence does not support such a conclusion. Like the person in the high-stakes barn case, the commander-in-chief ought to refrain from claiming to know that c), that is, she ought to refrain from concluding that intentionally attacking non-combatants is, as a matter of fact, the only way to prevent an enemy victory. And if she ought to refrain from concluding that c), then she ought not to act as though c) is satisfied, i.e. she ought not to order the intentional attacking of non-combatants on the grounds that necessity demands it.

Now, it is possible to object that a commander-in-chief, regardless of whether she knows that c) is satisfied, ought to act as though c) is satisfied. In support of this claim, we might say that part of a commander-in-chief's job is to always assume the worst. However, I do not think that this can be correct; surely a commander-in-chief's job is to do the best he can, both for his citizens and for the foreign non-combatants affected by the war. Insofar as the commander-in-chief is a political leader, he has positive obligations to aid his citizens, and insofar as he is a person, he has obligations to refrain from injuring all (including foreign) non-combatants. Now, it is possible that these two

sets of obligations can come into conflict; however, notice that, in an apparent supreme emergency, they only come into conflict given the assumption that c) is satisfied. If the commander-in-chief refrains from concluding that c) is satisfied, as I have argued that he should, then his obligations do not come into conflict. Surely, a commander-in-chief can do better by both his citizens and foreign non-combatants if he operates on the assumption that he can fulfill all of his obligations, rather than on the assumption that these obligations are in conflict. So, a commander-in-chief ought not to operate on the assumption that the worst is true; rather, he ought to operate on the assumption that his obligations are not in conflict, unless he has compelling evidence against that assumption. And in the case with which we are concerned, the commander-in-chief does not, I have argued, have such compelling evidence; he does not know that c) is satisfied. So, he ought not to operate on its assumption.

At this point, I have argued that, even if c) is satisfied in the real world, commanders-in-chief cannot be in a position to know that c) is satisfied, given the lack of compelling evidence and the high stakes involved. Working from the quite general principle that people ought to act on the basis of what they know—which, as we saw above, is assumed by both Walzer and Rawls in their discussion of supreme emergencies—I conclude that commanders-in-chief, because they do not know that c) is satisfied, ought not to act as though c) is satisfied; that is, they ought not to order the intentional attacking of non-combatants. Put another way, because commanders-in-chief in the real world cannot be in a position to know that the necessity claim is satisfied, they cannot justify military actions that violate the discrimination requirement on the grounds of such necessity. Commanders-in-chief are thus never morally justified in ordering intentional attacks on non-combatants, even if, as a matter of fact, doing so is the only way to prevent an imminent, morally catastrophic enemy victory. Luckily, (assuming that my arguments in the first half of the paper are correct), it is never

true in the real world that intentionally attacking non-combatants is the only way to prevent such a moral catastrophe from occurring. In the real world, there is always something morally better (in the context of the just war tradition) that can be done, and to ignore this point, especially when the mass killing of non-combatants is a live possibility, is to make a grave moral mistake.