

## KILLING NON-COMBATANTS IN WAR A CRITIQUE OF THE JUSTIFICATIONS AND EXCUSES

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### INTRODUCTION

Since 1945, there has been as many as 150 wars involving more than 60 member States of the United Nations and at least seven million military personnel have been killed during this period. For each military personnel killed, four civilians have died, bringing the death toll to over 33 million.<sup>1</sup> Expenditure for the military worldwide exceeds \$2 billion a day, totalling a minimum of \$700 billion a year. This amount is 35 times the amount of money necessary to eliminate starvation and malnutrition worldwide.<sup>2</sup>

Albert Camus was eerily prescient in his newspaper essays collected under the banner, *Neither Victims Nor Executioners*.<sup>3</sup> Written over 50 years ago, the several extracts from various parts of his book reproduced below<sup>4</sup> communicate the importance of studying the rationale used to justify or at least explain the killing of innocent people during war.<sup>5</sup>

Before the terrifying prospects now facing humanity, we see even more clearly that peace is the only goal worth struggling for. This is no longer a prayer but a demand to be made by all peoples to their governments...a demand to choose definitively between hell and reason.

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This is the essential political problem of our day; before we worry about the rest, we must first answer two questions. Do we or do we not, directly or indirectly, want to be killed or be a victim of violence? All those who answer "No" to both questions are automatically

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<sup>1</sup> Toffler A and anor, *War and Anti-War* (1995, Warner Books, New York) 12-13.

<sup>2</sup> See Fisher RJ, *Interactive Conflict Resolution* (1997, Syracuse University Press, New York) 1-3.

<sup>3</sup> Refer Camus A, *Between Hell and Reason – Essays from the Resistance Newspaper 'Combat', 1944-1947* (selected and translated by De Gramont A) (1991, Wesleyan University Press, Hanover, New Hampshire).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 111, 119-120, 122, 125 128-129, 136, 139-140.

committed to a series of consequences which will change the way in which these (very) questions are posed.

...

Thinking in such terms, provided it is done without fear and without pretension, can help create the conditions of clear thought and a provisional agreement among people who want to be neither victims nor executioners.

...

Yet sincerity is not enough in itself, it is not a virtue. The problem of our day is not how to speak with words from the heart, but how to think clearly.

...

We know today that there are no more islands and that borders are meaningless. We know that in a world, which moves faster and faster...we are forced into either fraternity or complicity. There is no suffering, no torture anywhere in the world, which does not affect our everyday lives.

...

We all know, then, beyond the shadow of a doubt, that the new world order we seek can be neither national nor even continental, and certainly not Western or Eastern. It must be universal. Yes, the question of a world order is the most important question facing us. This problem demands all the resources of our intelligence and willpower.

...

The movement toward peace of which I speak could start internationally as intellectual communities [which] would try to define the values by which the international community would live, and also plead its cause on every occasion. More precisely, the [intellectual's] task would be to oppose the confusion of terror with clear language, while at the same time defining the values, which are indispensable to a peaceful world.

...

For the moment, all I can ask in the midst of a murderous world is that we agree to reflect on murder and to make a choice. Since this terrifying dividing line actually exists, it will mark progress if we can at least make it clear. In the coming years an endless struggle will be waged across five continents, a struggle in which either violence or dialogue will prevail. Granted, the former has a thousand times the chances of the latter. Henceforth, the only honour will lie in

obstinately holding to a formidable gamble: that words are stronger than bullets.

## WAR AND ITS JUSTIFICATION

In 1996, James Turner Johnson made the following statement:<sup>6</sup>

All wars, *of course*, produce non-combatant casualties. (*emphasis added*).

“Of course” is a phrase that shocks one into pacifism or realism. If the conclusion is reached that killing an innocent person can never be justified, war as an activity cannot be pursued. On the other hand, the realist argues that since the killing of innocent people and war are inevitable in the real world (while war can be limited, it cannot be eliminated), so they must be permissible. However, since “protecting the innocent from certain harm has been for centuries an overriding *causus belli*”,<sup>7</sup> this becomes a fundamental paradox for the realist, if not a contradiction.<sup>8</sup>

The moral and legal aspects of the laws of war regulate decisions to go to war (*jus ad bellum*) and on how wars are fought (*jus in bello*). John Howard Yoder’s list of the basic criteria for “just war” is among the best and most analytical of presentations. He divides the major criteria into several sub-criteria as follows:<sup>9</sup>

- War must be waged only by a legitimate authority.
- A war may be fought only for a just cause.
- A war may be fought only with a right intention in an objective sense – namely, *finis operis*.
- A war may be fought only with right intention in a subjective sense – namely, *finis operantis*.
- A war is illegitimate unless the criteria apply with procedural integrity – namely, due process.

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<sup>6</sup> Johnson, “War for cities and non-combatant immunity in the Bosnian conflict” in Davis GS, *Religion and Justice in the War over Bosnia* (1996, Routledge, New York) 65.

<sup>7</sup> Elshtain, “Nationalism and self-determination: the Bosnian tragedy” *ibid* 45, 49.

<sup>8</sup> See generally, McCormick RA and anor, *Doing Evil to Achieve Good – Moral Choice in Conflict Situations* (1978, Loyola University Press, Chicago).

<sup>9</sup> Yoder JH, *When War is Unjust – Being Honest in Just-War Thinking* (1996, 2<sup>nd</sup> edition, Orbis Books, New York) 147-160.

- Means must be necessary and indispensable.
- The means must be proportional.
- The means used must respect the immunity of the innocent.
- The means used must be discriminating, namely, subjected to measured control.
- The means used must respect the dignity of humankind as rational and social.
- The means used must not be forbidden by positive law or treaties.

This skeletal outline of the basic laws of war reveals the fundamental fact that it is sometimes legal to kill innocent people in war. Yet, something in most of us recoils from such an assertion and from an easy rationalisation of this reality. Even when we have turned another into an enemy, there seems to be an innate disinclination to kill them, to pull the trigger. Dave Grossman, a former Colonel in the United States Army and professor of military service, summarises the statistics on the percentage of infantry troops who fired their rifles at the enemy. In World War II, only 15-20% of infantry did so. In Korea, the number had risen to about 50%. In Vietnam, the figure was over 90%.<sup>10</sup> From these statistics and other psychological studies, he concludes that there is a powerful, innate human resistance towards killing another person. However, powerful psychological mechanisms have now been developed to overcome this resistance.<sup>11</sup>

## THE REASONS

In this article, it is assumed that war is inevitable and that the war being fought is just. It does not address the important questions posed by these assumptions. Instead, it focuses on the reasons, excuses or justifications for the killing of innocent people in war. How does one explain such killing?

### *Inevitability*

Noted Catholic ethicists, John Finnis, Joseph Boyle and Germain Grisez state that:<sup>12</sup>

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<sup>10</sup> Grossman D (editor), *On Killing – The Psychological Costs of Learning to Kill in War and Society* (1996, Little Brown, Boston, Massachusetts) 4, 35.

<sup>11</sup> *Ibid* xxix.

<sup>12</sup> Finnis J and others, *Nuclear Deterrence, Morality and Realism* (1987, Oxford University Press, Oxford) 292.

one cannot act at all without accepting some bad side effects. One sometimes can accept bad side effects as inevitable concomitants of a fully reasonable response to a situation.

Vitoria saw this inevitability specifically in the context of war and argued that:<sup>13</sup>

sometimes it is right...to slay innocents even knowingly [and] the proof is that war could not otherwise be waged against even the guilty...

Inevitability arises from epistemological difficulties. For instance, in criminal trials to determine guilt or innocence, even the most complete procedural protection and a conscientious jury do not, and cannot, guarantee with moral certainty that an alleged criminal who is proven beyond a reasonable doubt a wrongdoer, is in fact guilty.<sup>14</sup> The implied argument that there should be no punishment of criminals because of the risk of error is not an argument for killing innocent people. Instead, it is an argument against capital punishment.

### ***Denial of the Problem***

In war, there are no innocents and no non-combatants. The argument that everyone on the “other” side is guilty rests on three bases: (i) authorisation; (ii) facilitation; and (iii) identification.

#### **(i) Authorisation**

James Madison asserts that “all governments rest on opinion.”<sup>15</sup> Similarly, Mahatma Gandhi’s view is that no government can subsist if the people cease to serve it. He states that:<sup>16</sup>

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<sup>13</sup> Johnson, “War for cities and non-combatant immunity in the Bosnian conflict” in Davis GS, *Religion and Justice in the War over Bosnia* (1996, Routledge, New York) 75.

<sup>14</sup> Gerber, “The punishment of the innocent” [1975] *American Journal of Jurisprudence* 46, 48.

<sup>15</sup> Hamilton, MJ, *The Federalist Papers* (1961, Penguin Books, New York), Volume 49, 313-314.

<sup>16</sup> Sharp G (editor), *Gandhi as a Political Strategist with Essays on Ethics and Politics Extending* (1979, Horizons Books, Porter Sargent Publishers Inc, Boston) 44.

even the most despotic government cannot stand except for the consent of the governed, which is often forcibly procured by the despot. Immediately the subject ceases to fear the despotic force [its] power is gone.

In a democracy, the guilt by authorisation argument would be stronger. But is the argument valid? Questions on the link between the people's opinion and war and peace are raised by the current interdisciplinary debate on "democratic peace". This is the theory that democracies do not go to war with each other,<sup>17</sup> and in some forms of the theory, democracies are inherently pacific.<sup>18</sup> Miriam Fendius Elman states that there are:<sup>19</sup>

several paths that lead to war and several that lead to peace – and some that can lead to either. In the final account our analysis of democratic, democratic/non-democratic, and non-democratic war and peace decision-making suggests that we may/need to go beyond the democratic peace [to end war].

More may be written on the responsibility of people when their government is allegedly doing "bad things". However, suffice it to say that there is an enormous range of opinion, both on the question of one's duty to one's leader or State, and on how one asserts one's dissent from or non-acquiescence in any particular act of government.<sup>20</sup>

## **(ii) Facilitation**

Modern war is not possible without a modern economy and all those who make the economic machine run also make the war machine run. Thus, attacking a State's economic infrastructure amounts to attacking its military structure and capability. The assumption underlying this view is that everything is connected with everything else.<sup>21</sup> In a much narrower sense, the

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<sup>17</sup> See Russett B, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993, Princeton University Press, Princeton, New Jersey).

<sup>18</sup> See Ray JL, *Democracy and international conflict: an evaluation of the democratic peace proposition studies* (1998, University of South Carolina Press, United States).

<sup>19</sup> Elman MF (editor), *Testing the Democratic Peace Theory in Paths to Peace – Is Democracy the Answer?* (1997, MIT Press, Cambridge, Massachusetts) 473, 505-06.

<sup>20</sup> See generally Cromartie M (editor), *Caesar's Coin Revisited – Christians and the Limits of Government* (1996, Wm B Eerdmans Publishing Co, Grand Rapids, Cambridge).

<sup>21</sup> Refer Lovejoy AO, *Great Chain of Being* (1970, Harvard University Press, Cambridge, Massachusetts).

various parts of the economy that support directly the war effort are in turn supported by the rest of the economy. The input-output analysis discussed by Nobel Laureate, Wassily Leontief, illustrates the interlocking aspects of a modern economy.<sup>22</sup> Even those who view the distinction between combatants and non-combatants as basic to any normative system that limits the means of war recognise the reality of the economic linkages. John Bassett Moore, chair of the Commission of Jurists appointed by the 1921 Washington Conference on the Limitations of Armaments, states:<sup>23</sup>

It is hard to believe that the world is prepared to concede that, in the “next war,” first and legitimate measure of the belligerent forces will be to bomb or otherwise destroy producers of foodstuff and other contributory classes heretofore considered as non-combatant; and yet if the distinction between combatants and non-combatants has ceased to exist, such a measure would be legally justified and strategically correct... No one contributes more to this essential military gesture than the grower of grain... The most dangerous fighter is the tiller of the soil. It is, however, gratifying to reflect upon the fact that there is not a single government today that is either accepting or supporting such a theory.

It should be noted that the “facilitation” notion of non-innocence is not similar to United States President Eisenhower’s military-industrial complex that extended the reach of combatant or military target and recognised the limit condition of non-combatants. On the contrary, it is more akin to the nation-in-arms that recognises no such distinction.

### (iii) Identification

The argument here is that a person may be deemed guilty, not innocent, and thereby subject to attack, because that person is merely different. Religious, racial and ideological bigotry justifies the aggression in these terms and wartime nationalism and “patriotic” propaganda reinforce such “we-they/good-evil” thinking.<sup>24</sup>

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<sup>22</sup> Leontief W, *The Structure of the American Economy 1919-1929* (1941, ME Sharpe, New York).

<sup>23</sup> Quoted in Nurick, “The distinction between combatant and noncombatant in the law of war” (1945) 39 *American Journal of International Law* 680, 694.

<sup>24</sup> See generally Keen S, *Faces of the Enemy – Reflections of the Hostile Imagination* (1986, Harper and Row, San Francisco).

### *The Causation Denied*

“We didn’t kill them”. Perhaps the most recent and clear example of this kind of thinking is exemplified by the response of United States Secretary of State, Madeleine Albright, to the question about the causative relationship between the United Nations/United States led embargo and the death of tens of thousands of Iraqi children. Albright was reported widely to have said that this was not the fault or responsibility of the United States nor the United Nations. On the other hand, the only one causing the harm was Saddam Hussein by refusing to comply with United Nations resolutions.

Michael Walzer addresses this argument directly. He asks in cases like the current United Nations embargo against Iraq, “who is it who inflicts this suffering, the army that destroys food stocks (namely, the United Nations) or the army that seizes what remains for itself (namely, the Iraqi elite)?”<sup>25</sup> He concludes that “the extended form of the...blockade and every sort of strategic devastation, except in cases where adequate provision can be made, and is made, for non-combatants” must be ruled out.<sup>26</sup>

### *Double Effect*

The third basis discussed above, identification, denies any causative responsibility in the actor. This item acknowledges a causation, but says that the killing of the innocent is not intended, and thus is indirect, and therefore legitimate. Before proceeding further, it must be said that this area is the most morally, ethically and philosophically complex of the several rationalisations or justifications discussed. It seeks to incorporate the full range of human experience with situations where achieving one fundamental good requires the unavoidable sacrifice of another fundamental good.

Thomas Aquinas, unlike many others who accept it as a given, has struggled with the question of self-defence.<sup>27</sup> Doesn’t such self-defence require the doing of an impermissible act wilfully, intentionally, voluntarily

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<sup>25</sup> Walzer M, *Just and Unjust Wars – A Moral Argument with Historical Illustrations* (1992, 2<sup>nd</sup> edition, Basic Books, New York) 172.

<sup>26</sup> *Ibid* 174.

<sup>27</sup> Sigmund PE (editor), “Aquinas, *Summa Theologies*, II-II, Question 64, Answer 7” in *St Thomas Aquinas on Politics and Ethics* (1988, WW Norton & Co Inc, New York) 70-71.



and immediately harming another? In reflecting on this and similar situations where the goods are conflicting, moralists and ethicists, especially Roman Catholics, have elaborated on Aquinas' approach and developed what is commonly called the principle of "double effect".

At its core, the principle holds that "evil should never be the object of direct intention whether as an end (*per se et propter se*) or as a means to a good end (*per se sed non propter se*)."<sup>28</sup> Thus, the principle of double effect allows actions that would certainly result in the death of innocent people. However, to apply the principle of double effect legitimately, four conditions must be met. The first three have to do with the act or actor (deontological aspects) while the fourth focuses on the totality of the effects of all the acts and consequences (teleological aspects).

First, the act itself must be morally good, or at least morally indifferent. Secondly, the actor's intention must encompass only the good and not the bad effect of the act. Thirdly, the evil effect must not be the means through which the good is accomplished. Fourthly, there must be a proportionate relationship between the act and its bad or evil consequences.<sup>29</sup>

A frequently used example to illustrate the principle is that of an ectopic pregnancy where the foetus develops outside the uterus. If the fallopian tube where the foetus is lodged is deemed pathological, it is permissible to remove the life-threatening organ despite the fact that the foetus would be killed. It is said that excising a life-threatening organ is good, while the death of the foetus is an oblique side effect not directly willed. On the other hand, if the doctor removes the foetus from the fallopian tube leaving the woman's ability to give birth unaffected, that is morally impermissible. This is because it is an intrinsically evil act that wills the bad effect of killing the foetus as a means to the good of saving the woman's life despite being proportionate. In other words, it is the "direct" and not the "indirect" killing of the innocent life.<sup>30</sup>

To clarify the relevance of this example to the topic under discussion, it must be acknowledged that death is not, in itself, a moral concept. It may well be evil, in a sense, but it is a non-moral or pre-moral evil. Further, to

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<sup>28</sup> Di Ianni, "The direct/indirect distinction in morals" (1977) 41 *Thomist* 350.

<sup>29</sup> *Ibid* 350-51.

<sup>30</sup> See Devine, "The principle of double effect" (1974) 19 *American Journal of Jurisprudence* 44-45.

the people of the Book at least, killing a person is not intrinsically evil because Yahweh killed and authorised killing and God can do no wrong.

If conventional warfare, as generally understood today, is just in its initiation (*jus ad bellum*) it is just in its implementation (*jus in bellum*) even though it is known to a moral certainty, that is, innocent people will be killed because:

1. killing is morally neutral;
2. the combatant's intentions are to defend themselves, not to kill anybody, even the other side's combatants;
3. killing the innocent is not the means used to accomplish the end of hostilities; and
4. presumably the means/ends relationship is proportionate.

Each of these elements in turn opens a series of questions that leaves one less than satisfied that all that needs to be said, has been. The questions are:

1. Is killing truly morally neutral? Maybe so, but should not the question be whether killing the innocent is morally neutral? Almost certainly not, is the answer now.
2. Just what is the intention of a warrior or nation at war? Does not human intention (almost) always encompass many things? It leads to statements such as "I want to stop your aggression, restrain those actually harming me, discourage such behaviour in the future, punish you for the transgression" and so forth.
3. What do we mean when we say killing the innocent is not the means to a proper end? Don't we feel badly about such consequences? Isn't it recognised as a cost, perhaps unavoidable, but a cost nonetheless?
4. In conventional warfare there may be a proportionality of means and ends. The moral calculus becomes very complex. Even if the quantitative aspects remain in balance, such means raise questions about item 2 (intention) and item 3 (using the killing as a means) above.

In the recent United States debate on the Enola Bay exhibit at the Smithsonian Institute, supporters of the Hiroshima bombing argued that it saved many more American and Japanese lives than those killed or harmed by the bombing. Yet it is argued from the historical record that the purpose

or intent of the bombing was to show Japan that its society, not just its military, was at risk of being destroyed as the United States was prepared to kill non-combatants on a massive scale to end the war.<sup>31</sup>

The notions of victory and unconditional surrender come to mind. Is victory the same as stopping the aggression? Is either the same as ending the war? And does not unconditional surrender encompass more loss to the aggressor and his people than is justified by the wrongs committed? In light of these complications, it seems significant to mention Mahatma Gandhi again. It has been said that he:<sup>32</sup>

seems to stand alone among social and political thinkers in his firm rejection of the rigid dichotomy between ends and means and in his extreme moral preoccupation...with means [as] the standard of reference.

Means and ends are convertible terms... We have always control over the means but not over the end... I feel that our progress towards the goal will be in exact proportion to the purity of our means... They say 'means are after all means,' I would say 'means are after all everything.' As the means, so the end.

Regardless of precisely how each of the above questions is answered, if it is accepted that there are some things that cannot morally be done, that there are acts that are intrinsically evil, then as Jacques Maritain argued in *Man and the State*, the "means" and "end" problem is the principal problem of political philosophy.<sup>33</sup>

This summary cannot approach the nuanced and sophisticated development and application of these concepts in *Nuclear Deterrence, Morality and Realism* by John Finnis, Joseph Boyle and Germain Grisez.<sup>34</sup> This book is highly recommended despite the present writer's conviction that their views, which permit the use of lethal force in cases in which human life is not threatened, are too permissive.

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<sup>31</sup> Nobile P (editor), *Judgment at the Smithsonian* (1995, Marlowe & Co, New York).

<sup>32</sup> Iyer R (editor), *The Moral and Political Thought of Mahatma Gandhi* (1978, Oxford University Press, Oxford) 361-362.

<sup>33</sup> Maritain, J, *Man and the State* (1951, University of Chicago Press, Chicago) 54.

<sup>34</sup> (1987, Oxford University Press, Oxford) 292.

### *Military Necessity*

Military necessity, as understood by modern civilised nations, consists in the necessity of those measures that are indispensable for securing the ends of the war, and that are lawful according to the modern law and usages of war. This is found in General Order No 100, Instructions for the Government of Armies of the United States in the Field. Unofficially, the General Order is known as the Lieber Code because Francis Lieber, Professor of Law at Columbia College then, had drafted it. President Lincoln promulgated this Code in 1863. It is the first official governmental codification of the laws of war and represents the central dimension of the modern laws of war (*jus in bello*).<sup>35</sup>

However, what does “necessity” or “indispensable” mean? Lieber and Lincoln illustrate what is permitted and what is prohibited as follows:<sup>36</sup>

Art. 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 16. Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of

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<sup>35</sup> Carnahan, “Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity” (1998) 92:2 *American Journal of International Law* 213.

<sup>36</sup> Schindler D and anor, *The Laws of Armed Conflicts* (1998, 3<sup>rd</sup> edition, Henry Dunant Institute, Geneva) 3.

maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility, which makes the return to peace unnecessarily difficult.

This means that anything that is not cruelty is permitted, including the destruction of life or limb of unarmed persons whose destruction is incidentally unavoidable in the armed contests of the war. This permissive attitude is incorporated into the modern positive law of war. For instance, in *In re List and Others (Hostages Trial)*, the Nuremberg Tribunal stated:<sup>37</sup>

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war... Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations.

While what is allowed under both the Lieber Code and contemporary statements as military necessity is subject to "International Law," innocent people are still at risk. Certain weapons and targeting practices are expressly prohibited today, but the notion of military necessity tends to be the ultimate law. For instance, as seen in the above quotation, there is no limit on the incidental or unavoidable killing of innocent people.<sup>38</sup>

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<sup>37</sup> Lauterpacht H (editor), 1948 Annual Digest and Report of Public International Law Cases (1953, Butterworths & Co Ltd, Great Britain) 632.

<sup>38</sup> Refer Article 85 of the 1977 Protocol (I) Additional to the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 United States Treaty Series 3516.

*Utilitarianism*<sup>39</sup>

The greatest good for the greatest number. The utilitarian calculus has always been recognised as lacking in any absolutes beyond the formula. It advocates that nothing is permitted or prohibited absolutely, whether in or of itself, and that everyone is subject to being “used” or victimised by this logic, innocence notwithstanding. It seems that implicit in this calculus is the assumption that victory has a greater value than the interests owned by warriors and civilians caught up in the war. The end – victory – justifies the means, including the wilful death of innocent people. But clearly, there are more factors or values than just efficiency in the use of resources and victory.

A shared abhorrence of murder and a sense that there are some things that just ought not to be done are among such values. For instance, Michael Walzer refers to “the bizarre accounting [of utilitarianism] that makes [Hiroshima] ‘morally’ possible.”<sup>40</sup> He thinks that the generally recognised rules of war, acknowledging rights to be protected, override any utilitarian calculus. The exception is the rare instance of a State or people being “face-to-face, not merely with defeat, but with a defeat likely to bring disaster to a political community” that he calls a “supreme emergency.”<sup>41</sup>

*A Supreme Emergency*

Michael Walzer presents this issue within the context of Britain’s bombing of German cities as having no military value other than the bombing having an effect on the morale of the people.<sup>42</sup> He suggests that:<sup>43</sup>

unless the bombers were used in this way the probability that Germany would eventually be defeated would be radically reduced... It is not just that such a victory was frightening, but also that it seemed in those years very close; it is not just that it was close, but also that it was so frightening. Here was a supreme emergency, where one might well be

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<sup>39</sup> See Brandt “Utilitarianism and the rules of war” (1972) 1 *Philosophy and Public Affairs* 145.

<sup>40</sup> Walzer M, *Just and Unjust Wars – A Moral Argument with Historical Illustrations* (1992, 2<sup>nd</sup> edition, Basic Books, New York) 262.

<sup>41</sup> *Ibid.*

<sup>42</sup> Generally, *ibid* 251-268.

<sup>43</sup> *Ibid* 262.

required to override the rights of innocent people and shatter the war convention.

He concludes as follows:<sup>44</sup>

I dare to say that our history will be mollified and our future condemned unless I accept the burdens of criminality here and now.

Walzer views as “terror” the continuation of the British and Allied bombings of civilian centres that have no special military value, setting the limits to the category of “supreme emergency.” He finds the Hiroshima and Nagasaki bombings a double crime. Not only did the bombings terrorise and kill civilians after the threat of defeat had passed, the bombings did not permit the Japanese an opportunity to negotiate surrender that would have fulfilled all the Allies’ legitimate war aims. He finds also that the Japanese military adventurism and governmental policies had been fundamentally different from those of the Nazis’.<sup>45</sup>

Walzer addresses the temptation to see the civilians in the enemy country as lesser in value or worth than the civilians in one’s own or allied countries. This assimilation of ordinary men, women and children to their governments is a manifestation of what he calls “totalitarian” thinking. At worst, it adopts the likely premise of the enemy that some people are unworthy or, at least, that some are less worthy than others as people.

### ***Consent***

Some may argue that it cannot be denied that professional soldiers in some meaningful sense consent to being killed in future combat. Soldiers are by hypothesis not innocent, so it is assumed that their killing is not an issue on the questions that this article is trying to develop answers to.

The classic fact situation that may arise is a siege. If the army holding the city under siege offers the city’s inhabitants the opportunity to leave with impunity but they choose voluntarily to remain, does it mean that they “consent” to being killed? Assuming that the war is justifiable in the first

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<sup>44</sup> Ibid.

<sup>45</sup> See *ibid* 262.

place and a siege with the escape option is available, it follows that their killing becomes justifiable if they choose to remain. From a perspective that gives lesser reign to personal autonomy, suicide is not permissible. Thus, consent is not an option for the inhabitants in this hypothetical.

### *Reciprocity*

If the shared norm of the warring entities is one of reciprocity, an eye for an eye, then the infliction of harm may require a reciprocal infliction of a similar harm. This is similar to the reprisal concept. If one side commits a wrong, the other side may respond in kind. The concept justifies violation of the admonition that two wrongs do not make a right. It permits an action that would otherwise be impermissible because someone else did it first. Yet, just as *lex talionis* has a second purpose to deter escalations and future violations, so does reprisal. Thus, fundamentally, reciprocity is not an argument to explain or justify the killing of innocent people. Instead, it is an argument about proportionality.

### *It Matters Not*

It is not clear how one should evaluate the views of Augustine. Richard Hartigan found “an unexpected degree of harshness and seeming indifference to the fate of the innocent” in Augustine.<sup>46</sup> According to Hartigan, Augustine’s view is that:<sup>47</sup>

no moral guilt is attached to the slaughter of any particular persons. The innocence or guilt of those attacked is of no consequence in determining the guilt of the attacker; the only factors which constrain him are the subjective ones of his own intent and his estimation of military necessity.

Ronald Bainton, the historian on Christian attitudes towards war and peace, says this of Augustine:<sup>48</sup>

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<sup>46</sup> Hartigan R, Saint Augustine on War and Killing (1967) 27 *Journal of the History of Ideas* 195.

<sup>47</sup> *Ibid* 203.

<sup>48</sup> Bainton R, *Christian Attitudes Toward War and Peace – A Historical Survey and Critical Re-Evaluation* (1960, Abingdon Press, Nashville, New York) 92.



the inwardness of Augustine's ethic served to justify outward violence, because right and wrong were seen to reside, not in acts, but in attitudes.

James Turner Johnson, one of the most important historians on war and peace, confirms the basic correctness of these interpretations. He states:<sup>49</sup>

[T]hose Authorities who have traced Christian just war theory back to its Augustinian and medieval roots have overlooked one simple yet devastating fact: there is no just war doctrine, in the classic form as we know it today, in either Augustine or the theologians or canonists of the high Middle Ages. This doctrine...including BOTH a *jus ad bellum*...and a *jus in bello*...does not exist prior to the end of the Middle Ages...

More pointedly, the following two doctrines help in understanding Augustine:<sup>50</sup>

a religious...one largely limited to the right to make war (*jus ad bellum*) and a secular one whose almost total content related to the proper mode of fighting (*jus in bello*).

Ultimately, Augustine's view may be a theological variation of the "there are no innocents" argument found in the biblical concept of the original sin.

### ***A Final Solution***

In the words of Isaiah Berlin:<sup>51</sup>

One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals – justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere in the past or in the future, in divine

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<sup>49</sup> Johnson JT, *Ideology, Reason, the Limitation of War – Religious and Secular Concepts 1200-1740* (1975, Princeton University Press, Princeton, New Jersey) 7-8.

<sup>50</sup> Ibid.

<sup>51</sup> Berlin I, *The Proper Study of Mankind – An Anthology of Essays* (1998, Farrar, Straus and Giroux, New York) 237-38.

This is the belief that somewhere in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution.

## THE NEXT STEP

There is no denying certain truths behind several of the reasons dealt with above. As Finnis and others have argued, all actions involve choice, and in choosing to do a good, other good may be left undone and unintended consequences may be inevitable. However, the intended consequences should be distinguished from the unintended consequences. The reasons that permit the intentional killing of innocent people should be set aside and condemned. Those are the doctrines of necessity, utilitarianism, consent and reciprocity.

Necessity seems to be just another form of utilitarianism that recognises no limits other than proportionality and discrimination.<sup>52</sup> Necessity sacrifices innocent life for victory in a just war. Phrased this way, utilitarianism is the more restrictive as it requires consideration of more good than just victory. Speaking from the floor of the British House of Commons in November 1783 on the pending India Bill, William Pitt was right when he said this in his well-known quote that “necessity is the plea of every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves”.

Supreme emergency, even if it is just a narrower form of necessity and utilitarianism, seems different. It permits one side to take innocent human life only when a victory by the other side results in the total destruction of the first side’s way of life. This situation would probably only arise if one is defending against an aggressor in an unjust war; and the aggression’s stated or reasonably perceived goal is some form of genocide. It is this notion of a religious or ideological war to the death that Isaiah Berlin refers to in his condemnation of the argument that there is a final solution.<sup>53</sup>

Both consent and reciprocity permit the intentional killing of innocent

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<sup>52</sup> Supreme emergency is not discussed here, acknowledging the possibility that one or other values may override the protection of innocent life.

<sup>53</sup> Berlin I, *The Proper Study of Mankind – An Anthology of Essays* (1998, Farrar, Straus and Giroux, New York).

is of a different nature.<sup>55</sup> Reciprocity permits killing only in response to a prior killing and thus, at least in theory, means no more killing. On the other hand, once the killing starts, again in theory, it may never stop.

It is not possible to discuss further these two reasons, and for that matter, the other reasons in this article. Instead, the focus has been on fully conscious acts chosen either because of or in spite of the fact that innocent people will die. The identification of reasons and their isolation are necessary to begin to see the assumptions that support each reason and the implications if they are acted upon. The inevitability and lack of significant reasons seem to surrender to the complexity of the problem and both of them give little or no weight to the inviolability of innocent life.

This leaves the two reasons that deny the problem exists, namely, (1) there are no innocent people and one is not responsible for the deaths that occur; and (2) the principle of double effect. Each one raises questions on what is meant by causation and the consequences of one's acts that one is responsible for. Also, each assumes that reasons of State are different from and more permissive than reasons available to individuals. The contrary view, that States and individuals are to be held to the same standards, has an honoured history in international law. Hugo Grotius bases his principles of international law in large measure on the concept of the natural law binding individuals, and Westlake and Oppenheim have brought the same notion forward to the present.<sup>56</sup>

Joan D Tooke suggests that the Roman Catholic position evolved from the Augustinian position on a lesser standard for the State to one that held the State to the same higher standard applicable to the people. She states that:<sup>57</sup>

since society exists for man, it follows that communities and states are subject, as moral persons, to the same moral laws that exist for men. Public conduct, social and national and international must be judged by the same canons as private conduct.

If the application of private law standards to public bodies and their actions becomes the norm, the reasons offered as the justification or excuse for

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Press, Chicago).

<sup>55</sup> Axelrod R, *The Evolution of Cooperation* (1984, Basic Books, New York).

<sup>56</sup> Tooke JD, *The Just War in Aquinas and Grotius* (1965, SPCK, London) 228-29.

<sup>57</sup> *Ibid* 310 note 215, quoting Pope Pius XII.

killing innocent people would be diminished in their reach. For instance, the principle of double effect, which may be considered the most powerful of the arguments, collapses. This principle may be stated in several ways, all of them understood as saying that it is permissible to act for some good purpose despite foreseeing as a consequence the death of an innocent person; a consequence that one is not permitted to intend. However, the private law principle as stated in the words of Glanville Williams, a leading criminal law scholar, holds the actor responsible for foreseeable consequences regardless of intent:<sup>58</sup>

To say that intention includes foresight of the certainty of consequence is not always true for ordinary speech and ordinary life. If a conscientious objector to the military service denies the call-up, he may realise that prison is the inevitable outcome, but he would not in ordinary speech be said to intend to go to prison. However, ordinary language is not decisive for legal use. When law prohibits the procuring of a consequence, a person who so conducts himself that he brings about the consequence, realising that his conduct will inevitably have the result, must be taken to intend it, ie. he must be regarded as caught by a prohibition against intentionally causing the result. This may be a departure by legal language from ordinary usage, but it is dictated by common sense.

## CONCLUSION

If the list of reasons becomes a widespread agenda, a reduction in the killing of innocent people will be facilitated. Initially, the list itself needs to be elaborated and enlarged as it is drawn only from legal sources published in the English language. It is also necessary to see how every listed reason works in practice, to find out how the acts that have resulted in the killing of innocent people have come about.<sup>59</sup>

The fact that a proposed course of action may result in the death of innocent people should encourage the decision-maker to evaluate the situation more critically. There should be constant reminders that innocent

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<sup>58</sup> Williams G, *The Mental Element in Crime* (1965) is quoted in Devine, "The principle of double effect" (1974) 19 *American Journal of Jurisprudence* 44, 50.

<sup>59</sup> For an example of a study that uses this general approach to foreign policy and security matters see Harbour F, *Thinking About International Ethics: Moral Theory and Cases from American Foreign Policy* (1999), Westview Press, Boulder, Colorado).

people exist. Demonisation of the enemy is a highly developed and well-studied phenomenon<sup>60</sup> and as such should be prohibited, including government propaganda and policy directives that legitimise total war.

Additional Protocol I to the 1977 Geneva Convention requires those planning a military operation to adhere to certain standards. The standards relate to the gathering and evaluation of information on the location to be attacked to verify that it is a military objective, the minimisation of civilian casualties, and refrain from the operation if it is likely to cause disproportionate damage.<sup>61</sup> In fact, such monitoring and review functions of the planners should be institutionalised.

In conclusion, institutions developed and/or created to insure that punishment would be more certain for violations of international norms needs to be supported. The re-conceptualisation of international intervention from either a military or monitoring model to a police model is an important breakthrough that should be considered.<sup>62</sup> If the world is truly committed to reducing the number of innocent victims, prevention should be the goal.<sup>63</sup>

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<sup>60</sup> See Keen S, *Faces of the Enemy – Reflections of the Hostile Imagination* (1986, Harper and Row, San Francisco).

<sup>61</sup> Additional Protocol I to the Geneva Convention, 1125 United Nations Treaty Series 29; (1977) 16 *International Legal Materials* 1416.

<sup>62</sup> Perritt, "Policing international peace and security: international police forces" (1999) *Wisconsin International Law Journal* 281-324.

<sup>63</sup> A recent article "demonstrates how the rhetorical use of law by all belligerents in the World Wars to justify terror attacks against civilians, and the refusal to condemn such attacks at Nuremberg, underscore the law's capacity to legitimate rather than restrict wartime violence": see af Jochnik and anor, "The legitimisation of violence: a critical history of the laws of war" (1994) 35 *Harvard International Law Journal* 49, 51.