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International Relations 2002; 16; 205
DOI: 10.1177/0047117802016002003

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Dying for 'Enduring Freedom': Accepting Responsibility for Civilian Casualties in the War against Terrorism

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Abstract

This article examines what moral theories are available to justify the harming of the innocent in war. Focusing on US conduct of the war against the Taliban and al-Qaeda, the article examines how far the US is responsible for the deaths of Afghan civilians. Although US actions have been justified in terms of respect for the Just War principle of non-combatant immunity, the article shows how this principle rested uneasily with alternative moral theories of war that influenced the process of target selection. These are the realist doctrine of necessity in war and Michael Walzer's theories of 'supreme emergency' and 'war is hell'. Just War theory, realism and 'supreme emergency' acknowledge moral responsibility for a state's conduct of war. But the doctrine that 'war is hell' seeks to transfer any responsibility for the cruelty of war to the enemy. The article argues that, whilst the Taliban and al-Qaeda are responsible for exposing Afghan civilians to US attacks, this does not absolve US political and military leaders of responsibility for their conduct of the war.

Keywords: *Just War, moral responsibility, non-combatant immunity, pacifism, realism, supreme emergency*

Perhaps what shocked the world most about the events of September 11 was that the perpetrators of this act deliberately set out to kill innocent civilians. No doubt, it was for this reason (among others) that the US declared 'war' between civilization and the forces of global terror represented by the al-Qaeda network. Less than a month after the attacks on New York and Washington, the Bush administration responded by launching an air and ground war against the Taliban government in Afghanistan. The intervention, primarily justified on grounds of self-defence, had three key objectives: to remove from power the Taliban that had provided a safe haven for Osama bin Laden's terrorist organization; to cripple the capacity of al-Qaeda to strike again; and to send a clear signal to other governments that similar attacks would be visited on them were they to provide a base for global terrorism. President Bush and his senior advisers were in no doubt that they were fighting a just cause, but questions were raised about whether the war was being conducted with just means: put bluntly, why should innocent Afghans die for justice? While the US admitted that civilians were killed as a consequence of its bombing campaign, this was justified on two grounds: the deaths were an unintended consequence of attacks against legitimate targets and the US could not be blamed for these because responsibility rested solely with those who had initiated war on September 11. This has led some commentators to assert a moral equivalence between the killings of September 11 and the deaths of Afghan

civilians: it does not matter to those who were killed whether their deaths were intended or unintended. If the US knows that the means it employs will cause innocent people to die, then is it responsible for these deaths?

The article sets out to investigate this question by considering what moral arguments are available to justify the harming of civilians in war. My starting point is to consider two opposed moral theories of war, namely, pacifism and Just War. The former starts from the premise that it is never permissible to kill anyone in war and that as a consequence war itself is not justifiable. Pacifism is frequently dismissed in discussions of war and intervention. But, against the frequently heard claim that all peaceful means have been exhausted and force is the last resort, it reminds us that we always have moral choices as to whether to fight or resist our enemies non-violently. It is beyond the scope of this article to explore the possibilities of a non-violent strategy in dealing with the threat posed by the Taliban and al-Qaeda. My general contention is that pacifism is too disarming in terms of both preventing states from using force in legitimate self-defence and for purposes of human protection beyond borders. This is the starting point of Just War theory, which is predicated on the view that it is never permissible to deliberately harm the innocent in war. Focusing on Michael Walzer's interpretation of Just War, I examine in relation to 'Operation Enduring Freedom' whether it is possible to reconcile the use of violence with Just War's stipulation that the innocent be protected.

US officials claimed that America's conduct of the war exhibited 'great care' for the lives of Afghans. This judgement is critically assessed in the second part of the article. The norm of non-combatant immunity, which has deep roots in western and non-western traditions of moral thought, and which is enshrined in international humanitarian law, served as a constant legitimating argument for US military strategy. As I show below, there is evidence that this norm constrained targeting policy. On the other hand, it is also the case that the US attacked a range of targets that placed Afghan civilians at great risk. I consider how far US rhetoric of fidelity to the Just War conflicted with its application of alternative moral theories that challenge the idea of restraint in war. The first is the realist doctrine of necessity in war; the other two – 'supreme emergency' and 'war is hell' are taken from Walzer. All these moral conceptions of war justify overthrowing the Just War principle of non-combatant immunity, but only the first two accept responsibility for the deaths of innocents. The latter seeks instead to transfer this solely to the enemy.¹ The article exposes these opposed conceptions of responsibility and considers how far they shaped the conduct of Operation Enduring Freedom.

Protecting the innocent in war

Since all pacifists establish a very strong moral presumption against killing, it follows that there must be an equally strong presumption against engaging in war itself. Killing is terrible, but critics of pacifism argue that the deontological

requirement not to take life has to be set against the moral consequences of refusing to take up arms. The awful dilemma is framed as doing nothing and allowing innocents to die or taking actions that will knowingly kill others in the name of achieving a greater good. The latter is the position adopted by Just War theory. It determines that a war is just if it satisfies the conditions of the *jus ad bellum*: just cause, last resort, right intention, reasonable prospect of success leading to a just peace and right authority. However, states that go to war whether for just or unjust reasons must also meet the requirement of the *jus in bello*. This establishes the absolute and overriding constraint that states are not permitted to deliberately harm the innocent.

How does Just War theory decide who counts as an innocent? The answer rests upon a complex moral distinction that is drawn between combatants and civilians in terms of their capacity to harm others. According to Walzer, those who do not pose a threat to anyone else have a basic and inalienable right to life that should not be violated. Soldiers on the other hand belong to a very different class of persons who have put themselves in a position (he acknowledges that often they may have little choice in this) where they can impose death and destruction on others. Combatants forfeit the right to life once they take up arms and they only regain this right if they lay down their arms and surrender. The problem arises in deciding at what point civilians become so integral to the war-making process that they lose the protection normally granted them. Walzer argues that, 'The relevant distinction is . . . between those who make what soldiers need to fight, and those who make what they need to live, like all the rest of us'.² Thus, Bomber Command was permitted to attack German munitions factories during World War II, but it should not have been assigned the mission of area bombing against German cities. Civilians only lose their immunity from direct attack, according to Walzer, whenever they 'are actually engaged in activities threatening and harmful to their enemies'.³ The problem is that separating out innocent civilians from legitimate combatants is very difficult to sustain when the survival of nations is on the line. In the eyes of political and military leaders, and among wider public opinion in the UK and US, German civilians – whether involved in war-making activities or not – were the enemy.⁴

Despite the bedrock commitment of Just War to protect innocent civilians in war, this protection can never be absolute.⁵ Even if states only attack strictly legitimate military targets, it is impossible – even with the most advanced precision weapons – to avoid the unintentional killing of the innocent: there can be no guarantee against human error in programming complex weapon systems; that guidance systems will not malfunction; that targets will prove to have been mistakenly identified; and that the enemy will not place 'human shields' around military installations. Just War accepts that the protection given to civilians cannot be total unless states were to renounce war. However, this position is rejected because it is maintained that those who refuse to fight self-defence or to protect others bear responsibility for the injustice and harm that might have been prevented by using violence. Pacifists mobilize two key responses to this proposition.

The first is to argue that there is a fundamental moral difference between choosing actions that kill civilians in war and refraining from war that has the consequence that others die. Robert L. Holmes writing from a pacifist standpoint asks 'why should I be held accountable if *someone else* kills that same person in circumstances in which I could foresee that by refusing to kill yet another person his death would result?'⁶ The second reply to the charge of moral abdication is to challenge the claim 'that the deaths of innocents at the hands of an aggressor are among the consequences of the refusal of [pacifists] *themselves* to kill innocents in the course of responding violently to the aggression'.⁷ This reasoning can be applied to the counterfactual case where the US after September 11 had ruled out war on pacifist grounds. The logic of Holmes' position is that it would be wrong to hold the US Government directly accountable for any subsequent deaths of US citizens as a result of terrorist attacks because it refused to kill innocent Afghans in its quest to destroy al-Qaeda. Put differently, would the response of the terrorists in striking the US be a direct consequence of the US decision not to attack Afghanistan?

Yet, if US decision-makers believe that there is a high risk that Osama bin Laden's network will strike again, perhaps with biological, chemical or even nuclear weapons, and there is the prospect of severely reducing this threat by attacking the territory of Afghanistan, could the Bush administration have absolved itself of responsibility for any subsequent deaths of civilians caused by terrorist attacks if it had refused to hit back? On the other hand, given that Just War is premised on protecting the innocent, how can the use of force be justified against al-Qaeda if this places Afghan civilians at risk? The morally uncomfortable answer that Just War provides is to argue that it all comes down to a balancing of evils. Many Just War theorists invoke the doctrine of 'double-effect' that was developed by Catholic theologians in the Middle Ages. It is claimed that it is permitted to perform an act which has both good and evil consequences if the following conditions are satisfied: the evil outcome must not be intended; the adverse effect must not serve as a means to the good achieved; and, crucially, the negative consequence of the act must be outweighed by its good result in preventing further death and suffering.⁸ In pressing into service the argument of 'double-effect', Just War comes perilously close to moral incoherence. The principle of non-combatant immunity rests on the proposition that civilians are not engaged in the business of harm. Yet, having done nothing to justify forfeiting their right to life, the theory allows in Theodore J. Koontz's words that '*Non-combatants may be killed but not attacked*'.⁹

The only practical constraint on the doctrine of 'double-effect' is the proportionality rule. It is important to distinguish between the *jus ad bellum* and the *jus in bello* when considering this. According to the former, proportionality relates to whether the use of force produces more good than harm overall; with regard to the latter, it refers to the good of specific military attacks as against the harm imposed by such actions on innocents. The proportionality rule in relation to the *jus in bello* is given its most explicit moral and legal formulation in Additional

Protocol 1 to the 1949 Geneva Conventions (hereafter Protocol 1). Although the US is not a signatory to Protocol 1, the latter is customary international law and hence is binding on all states. This legal instrument enshrines Just War's absolute prohibition against the deliberate killing of civilians. Under Article 52(2), states have a legal obligation to only attack 'objects which by their nature, location, purpose or use make an effective contribution to military action'.¹⁰ And, even if a target is defined as a legitimate military one, Article 51(5)(b) prohibits attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.¹¹

The problem is that international humanitarian law (or the laws of war) provides little or no guidance as to what constitutes 'excessive' civilian casualties or 'concrete and directly military advantage' in specific cases. What is clear is that the door is left sufficiently open under Protocol 1 that states can justify the killing of innocent civilians as an unintended consequence of attacks against legitimate military targets. The proportionality rule is the Achilles heel of Just War theory. Walzer's own dissatisfaction with it can be seen in the following passage:

But we have to worry . . . about all those unintended but foreseeable deaths, for their number can be large, and subject only to the proportionality rule – a weak constraint double effect provides a blanket justification. The principle for that reason invites an angry or a cynical response: what difference does it make whether civilian deaths are a direct or an indirect effect of my actions? It can hardly matter to the dead civilians, and if I know in advance that I am likely to kill so many innocent people and go ahead anyway, how can I be blameless?¹²

He insists that those who take up arms should do more than satisfy themselves that civilian losses are proportionate to the military advantage gained from attacking particular targets. This is a minimal requirement but he argues that political and military authorities incur a positive responsibility to protect those civilians whom their military operations inadvertently threaten. The latter cannot be granted complete protection from the horrors of war, but they have a right that 'due care'¹³ is taken with their safety.

A responsibility falls upon military commanders to accept greater risks to their armed forces if this protects civilians who have done nothing to deserve being placed in harm's way. As Walzer puts it, 'if saving civilian lives means risking soldier's lives, the risk must be accepted'.¹⁴ At the same time, he acknowledges that there must be limits to the risks that we can reasonably ask military personnel to run in order to protect the innocent. He suggests that these are 'roughly at that point where any further risk-taking would certainly doom the military venture or make it so costly that it could not be repeated'.¹⁵ Unfortunately, he does not develop his notion of 'due care' beyond the generality that the tolerable level of risk will vary depending upon the target in question, the necessities imposed by the situation and the character of the weapons technology.¹⁶ To try and explore

what is entailed by 'due care' in a practical moral context, the next section examines whether the US bombing campaign against al-Qaeda and the Taliban met this standard of civilian protection in war.

Operation Enduring Freedom and the requirement of 'due care'

US officials repeatedly emphasized America's caution in avoiding civilian casualties. For example, Department of Defence spokesperson, Victoria Clarke, stated on 23 October 2001 that 'US forces are intentionally striking only military and terrorist targets. We take *great care* in our targeting process to avoid civilian casualties'.¹⁷ According to Under-Secretary of State for Political Affairs, Marc Grossman, 'when the military aspect of the struggle is over, it will be clear that the number of civilian casualties is very, very low'.¹⁸ Secretary of Defence Donald Rumsfeld even went so far as to assert that 'I can't imagine there's been a conflict in history where there has been less collateral damage, less unintended consequences'.¹⁹ He pointed to the recent history of Afghanistan where the struggle for power had been characterized by enormous suffering on the part of the population, considering that the war against the Taliban had replaced 'a repressive government . . . with the fewest civilian casualties of any time in recent decades'.²⁰ These statements show how the norm of non-combatant immunity has become the legitimating standard against which military operations have to be justified.

Concerns about the public reaction to high levels of collateral damage (the military's euphemism for civilian casualties) can be traced back to the wars in Korea and especially Vietnam. In the case of the latter, President Lyndon Johnson and his advisers exercised very tight control over the selection of strategic targets in North Vietnam. In the eyes of military commanders, this severely handicapped the war effort, but Johnson believed that public opinion at home and abroad would not tolerate high levels of civilian destruction in the North.²¹ The development of precision-guided weapons in the last decade has opened up new possibilities for reducing the risks of civilian casualties without sacrificing military effectiveness. The injunction to avoid high levels of civilian casualties was a key feature of the targeting plans developed by Air Force commanders during the 1991 Gulf War. Nevertheless, no matter how tight the controls, there was still a public outcry when the US attacked the Al Firdos bunker killing 200 Iraqi civilians. The target was identified as a command and control centre, but American intelligence was unaware that civilians were also using the facility as a shelter. The presence of civilians in a legitimate military target does not necessarily render such an attack illegal, but, as Ward Thomas points out, it was recognized by senior military commanders that the attack was a public relations disaster. Colin Powell, then Chairman of the Joint Chiefs of Staff, worried that further mistakes of this sort risked losing the moral high ground for the US.²²

Compared to the deaths of civilians in the Second World War from American and British strategic bombing, the numbers of non-combatants killed in the Gulf War were very low indeed.²³ But, as Thomas argues, what has changed is that the norm of non-combatant immunity has become stronger, raising expectations that war can be fought in a relatively bloodless manner for civilians in the target state.²⁴ A key consequence of this consensus that unites governments in the developed and developing world (advocates of terrorism remain, of course, outside of this consensus) is that military planners have become increasingly conscious of the requirement that war be fought humanely. The goal of minimizing civilian casualties was an integral part of the operational planning determining target selection in the Kosovo war of 1999. All targets were assessed for their likely collateral damage, and lawyers attached to United States European Command and in alliance capitals scrutinized targets to ensure they were in conformity with international humanitarian law.²⁵

President Bush described the limitation of civilian casualties as a key requirement of Operation Enduring Freedom. As in the Gulf War and Kosovo, collateral damage concerns were an integral part of the targeting process. Lawyers in the Pentagon and at the Combined Air Operations Centre at Prince Sultan Air Base in Saudi Arabia scrutinized targets for their legality. Each morning and evening during the operation, General Tommy Franks, Head of US Central Command in Tampa, Florida, and overall commander of the war effort, held a videoconference with Rumsfeld and Chairman of the Joint Chiefs of Staff, General Richard Myers, to discuss the progress and planning of the war. Avoiding civilian casualties was a key factor in these discussions, indicating how the norm of non-combatant immunity had become internalized in the thinking of high-level military leaders.²⁶ According to one Air Force commander speaking off the record, 'There's been a decision by the people running this war to rely on the advice of lawyers to a greater degree than they have before'.²⁷ There is evidence that this process went too far for some Air Force commanders who were frustrated that concerns about civilian casualties hampered legitimate military operations. One report cited Air Force officials privately complaining that they were unable to attack 'some of the big boys' because, by the time pilots had gone through the complex approval process, the opportunity was lost.²⁸ In a normative context where controversial targeting decisions are subject to microscopic scrutiny, one senior officer was reported as saying that concerns about civilian casualties 'become more than considerations. They become the first thing people think about'.²⁹ As another Air Force official put it, 'When everybody's telling you a civilian structure is nearby . . . there might be refugees in that column . . . we end up not bombing the bad guys'.³⁰

The impression that emerges from these insights is of a Pentagon that was exercising 'due care' towards innocent Afghans. The US admitted that civilians had been unintentionally killed during the campaign, but it refused to give any figures claiming that, in the absence of a detailed investigation on the ground, it was impossible to provide reliable figures. This did not deter other commentators.

The most controversial assessment was provided in a highly critical report based on a survey of news reports compiled by Marc W. Herold who claimed that as many as 3000–3600 Afghans had died between 7 October 2001 and 6 February 2002.³¹ An alternative study also based on media sources, produced by Carl Conetta of the Project on Defense Alternatives, concluded that 1000–1300 civilians had been killed in the bombing campaign as of January 2002. What is important about Conetta's analysis is that, despite an increased reliance on precision-guided weapons compared to the Kosovo war (60 percent as against 30 percent), he shows that there was a significant increase in the number of civilian casualties compared to NATO's bombing campaign against Yugoslavia. He explains this in terms of the following three factors: first, the switch from laser-guided weapons to the use of smart weapons guided by the Global Positioning System (GPS). These are cheaper than laser-guided weapons, can be used in all weather conditions, but are less accurate.³² Second, the campaign objectives involved targeting leadership figures hiding in residential areas; third, engaging mobile targets required pilots on occasions to rely on the use of 'dumb bombs' in the absence of laser designation or GPS coordinates.³³

The above arguments did not figure in Pentagon accounts of civilian casualties. Instead, the US military sought to explain the deaths of innocent Afghans as mistakes in targeting. Fifty percent of the GPS guided Joint Direct Attack Munitions (JDAMs) are expected to land within 32–42 feet of their target. But this does not account for the other 50 percent of the weapons that fall outside this CEP). Several thousand JDAMs were dropped during the campaign, and several of these missed their target and killed civilians. On 12 October, a JDAM missed its designated military target owing to human error and hit a residential area in Afghanistan;³⁴ 12 days later, a 1000lb bomb dropped by an F-18 airplane missed a vehicle storage depot and hit an old people's home 300 feet away;³⁵ on 26 October, American planes accidentally destroyed a Red Cross warehouse;³⁶ and two days later, a further mistake in targeting led to 13 civilians being killed in a neighbourhood in northern Kabul.³⁷ The fact is that no matter how sophisticated weapons technology becomes, it is impossible to eliminate the risk of machine and human error. One ex-pilot has estimated that 'around five per cent [of these smart weapons] will miss because their guidance systems fail'.³⁸

By framing the deaths of innocents as mistakes, the US sought to avoid the deeper moral and legal questions as to whether it was attacking legitimate military targets; whether such actions satisfied the proportionality rule; and whether its air and ground forces were placing themselves at sufficient risk in order to mitigate the horrors of war for innocent Afghans. In reflecting on these questions, it is worth pausing to consider that even a correctly aimed 2,000 lb bomb 'could cause death and casualties for hundreds of yards around the target site'.³⁹ Thus, even if the vehicle depot attacked on 24 October was a legitimate target, and assuming that it had been successfully hit, would the resulting civilian destruction have been outweighed by the military advantage gained? Balancing these conflicting concerns was the moral and legal challenge faced by American political and military

leaders. Subject to the proportionality rule, a grouping of military vehicles is a legitimate target, but what about civilian conveniences that contribute to a state's war making capabilities?

According to Herold, the US 'directly targeted certain civilian facilities deemed hostile to its war success'.⁴⁰ This claim directly challenges Rumsfeld's statement on 19 October that the US was 'focused totally on military targets'.⁴¹ To accept the latter statement, it would be necessary to show that the attacks against the main telephone exchange in Kabul; the electrical grid in Kandahar; and the hydroelectric power station adjacent to the Kajaki dam constituted targets that made an 'effective contribution to military action' as defined under Article 52(2) of Protocol 1. The problem is that these facilities are dual-purpose ones that serve the needs of the civilian population but also contribute to the military effort of enemy forces. In the case of the Gulf War, it is estimated that US targeting of Iraq's power-generating facilities resulted in the subsequent deaths of as many as 100,000 Iraqi civilians through the loss of power, water and sewage facilities.⁴² The same controversy occurred during the Kosovo campaign. NATO initially refrained from attacking the electrical grid, but, as pressure for a result mounted, it claimed that the military advantage in depriving the Serbian armed forces of electricity justified the resulting disruption to civilian life.⁴³ The argument that military necessity outweighed concerns about the consequences for civilians clearly persuaded Rumsfeld, Myers and Franks to give the go-ahead for attacks against power-generating stations. Nevertheless, if we apply Walzer's principle that civilians only lose their immunity when they contribute directly to war-making activities, it is hard to justify US attacks against Afghan facilities that directly sustain civilian life.⁴⁴ Had US planes not attacked the electrical grid in Afghanistan, the Taliban and al-Qaeda might have proved a more effective fighting force against US and UK forces on the ground. However, if the consequence of reducing the harm imposed on Afghans by not striking the power plants was to increase the exposure of US forces to danger, should military commanders have accepted this in order to protect civilians?

Operation Enduring Freedom raised this question vividly because the Taliban and al-Qaeda forces tried to escape attack by seeking shelter in the homes of civilians, and it was alleged in mosques and hospitals.⁴⁵ One of the perverse consequences of the norm against killing non-combatants is that unscrupulous enemies will manipulate for their own ends the reluctance on the part of western states to incur such deaths. Although the US was careful not to attack mosques where it suspected that enemy forces were hiding, it did attack Taliban and al-Qaeda personnel hiding in residential areas. For example, in the first two weeks of November, US planes attacked heavily populated residential areas in Khanabad, one of the last towns still under Taliban control. It is claimed that more than 100 civilians died in these raids. Fleeing refugees said that Taliban fighters were hiding in some of the houses, but others who remained in the town disputed this.⁴⁶ In one of the most controversial attacks of the war, dozens of civilians were killed in the village of Qalai Niazi on 29 December. Acting on the basis of intelligence

from local allies, US planes attacked with laser-guided bombs six houses where it believed senior Taliban and al-Qaeda leaders were hiding. All of the houses were destroyed, but journalists who arrived on the scene only found evidence of ammunition in three of the destroyed mud-brick houses. The other three on the other side of a ravine about 100 metres away appeared to be civilian dwellings where a feast to end a marriage ceremony had ended only hours earlier. The Pentagon's explanation for the attack was that the target was a legitimate one because it 'housed Taliban and al-Qaeda leadership' who were present in the village at the time of the attack.⁴⁷ Local people and village elders denied this, maintaining that rival factions deliberately provided false intelligence to the US in order to bring down air strikes against their enemies. From what reports have emerged so far, it seems that Taliban commanders dumped weapons in the village after fleeing Kabul in mid-November, but had left the village by the time the US attacked in late December.⁴⁸ Even if it were accepted that three houses in the village contained Taliban and al-Qaeda forces, would the unintended but foreseeable damage to the houses 100 metres away outweigh any military advantage gained from these attacks? Applying Walzer's standard of 'due care', it should also be asked whether there were other ways of securing the military objective that would have reduced the risks to civilians even if this increased the risk to the US military. Could US ground forces have done more to verify the accuracy of the intelligence acquired from local leaders? The fundamental difficulty confronting the US was distinguishing between members of the Taliban and al-Qaeda and innocent Afghans.⁴⁹

Realism argues that states should override the norm against the killing of civilians if this conflicts with the imperatives of state survival. As Robert Osgood and Robert Tucker put it, 'The appeal to necessity is not incompatible with the acceptance of restraint on state action, so long as these restraints do not jeopardize independence and survival'.⁵⁰ This ethic of statecraft accepts moral responsibility for such decisions and acknowledges in David C. Hendrickson's words that breaching the norm of non-combatant immunity should 'not be accepted without the greatest misgivings'.⁵¹ Pentagon spokespersons were careful not to claim that eliminating senior al-Qaeda and Taliban leaders justified jettisoning the principle of civilian immunity in war, but Rumsfeld provided a strong indication that US military strategy was driven by the gravity of the threat facing America after September 11. In response to questions about civilian casualties at a press briefing on 16 October, he denied that the US had any choice in the military strategy it had adopted given the basic requirement to 'defend the United States from the kinds of terrorist attacks which we've experienced'.⁵² It is not hard to detect in these words the realist plea of necessity. Is this the answer that the Bush administration would give to those like 14-year-old Jawad who lost his parents, five sisters and a step-brother in one US strike against a Taliban military radar and anti-aircraft batteries? A woman passing by the graves remarked to journalists when asked whether she was a relative, 'That doesn't matter . . . What matters is that they were innocent, and they died'.⁵³

An alternative moral argument available to the US to justify overriding the rules of the *jus in bello* is Walzer's idea of 'supreme emergency'. He defines this as 'a threat to human values'⁵⁴ that is so horrifying in its nature and so imminent in terms of the danger it poses that any means can be employed to defeat it. The emergency does not only exist for a particular political community as in realism; rather it confronts humanity itself.⁵⁵ Walzer cautions that declaring such an emergency does not automatically permit states to override the prohibition against the killing of innocents.⁵⁶ If other military strategies are available that stand a good chance of avoiding defeat without breaking the rules of war, then these must be exhausted first.⁵⁷ Realism makes no apologies for invoking the doctrine of necessity when the survival of the state is at stake and it offers no feelings of guilt about the actions involved. By contrast, Walzer is emphatic that when leaders override the rule of non-combatant immunity in the name of supreme emergency they are not 'free of guilt [because] were there no guilt involved, the decisions they make would be less agonizing than they are . . . A moral theory that made their life easier . . . would repress the reality of war'.⁵⁸ He gives the example of Nazism as a supreme emergency considering that it posed such a threat to the values of humanity that Britain was right to take the decision in November 1940 to begin bombing German cities.⁵⁹ Bomber Command was not capable of precision bombing in 1940–2 and the only effective use of the force was as a weapon of terror against German civilians. Walzer wants us to put ourselves in the shoes of British political leaders who had to weigh up the evil of the 'killing of innocent people' as against 'that immeasurable evil (a Nazi triumph)'.⁶⁰ As he points out, no one can know whether, had Britain refrained from using Bomber Command, Nazism would have triumphed. All that can be reasonably asked of political and military leaders is that they carefully consider whether there are alternatives to the use of indiscriminate means that do not increase the likelihood of the threat to humanity represented by the supreme emergency succeeding.

Does the scale of the threat posed by Osama bin Laden's network of global terror – including the risk that the organization might eventually acquire weapons of mass destruction – constitute 'a threat to human values' so radical that it creates a supreme emergency? The justification of US political leaders provides strong support for the proposition that America and the world face an existential threat from the forces of global terrorism. President Bush in his address to Congress on 20 September 2001 made a direct parallel with the threat posed by Nazism:

Our war on terror begins with al-Qaida but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . By sacrificing human life to serve their radical visions . . . they follow in the path of Fascism, Nazism and totalitarianism . . . We will direct every resource at our command . . . to the destruction and the defeat of the global terror network.⁶¹

A month later, after the war against the Taliban and al-Qaeda in Afghanistan had begun, Vice-President Dick Cheney stated: 'We cannot deal with terror. It will

not end in a treaty. There will be no peaceful co-existence, no negotiations, no summit, no joint communiqué with the terrorists. The struggle can only end with their complete and permanent destruction'.⁶² Yet this declaration of an apocalyptic threat to civilized values did not lead to the claim that the US was justified in overriding the rules of war. As I discussed earlier, senior Air Force commanders believed that opportunities to destroy Taliban and al-Qaeda leaders were missed because concerns about civilian casualties inhibited prompt and effective action.⁶³ The argument of these officials was that, whilst a less restrained campaign would lead to higher levels of collateral damage, this would shorten the war and hence save more American and Afghan lives in the long term. This is the type of consequentialist argument that was invoked to justify the dropping of the atomic bomb on Hiroshima and Nagasaki: it saved more lives (American and Japanese) than had the war carried on. Walzer categorically rejects this argument, considering that permission to override the principles of the *jus in bello* only exists in cases of supreme emergency. He writes that 'Deliberately killing civilians in the belief that more civilians will be saved is a fantastic, godlike, frightening and horrendous act'.⁶⁴

The development of precision-guided weapons has ameliorated the awful moral choices that faced American and British decision-makers during World War II. The Bush administration was not required in the 21st century to choose between the deliberate killing of Afghan civilians or risk losing the war against global terrorism. However, what modern technology cannot help the US evade is the balance that it draws between protecting the innocent on the one hand and the destruction of the enemy on the other. If US leaders believed they faced a supreme emergency on the scale of Nazism, then they could have been expected to interpret the proportionality rule in such a way as to define securing their key military objectives as being worth the price in civilian casualties. Having decided that the goal of eliminating al-Qaeda and Taliban forces hiding in civilian areas justified the resulting harm to non-combatants, could these military operations have been carried out differently so as to minimize the risks imposed on civilians?

Given the moral conflict between protecting the lives of NATO aircrews and reducing the risks to Serb civilians that had arisen during the Kosovo conflict,⁶⁵ it would not be surprising if this dilemma repeated itself during Operation Enduring Freedom. Herold claims that the US was so obsessed with reducing the risks to its own military personnel that it chose to employ tactics and strategies that maximized the suffering inflicted on innocent Afghans.⁶⁶ This critique might have had greater credibility had those Air Force officials who wanted to slacken collateral damage constraints in the belief that this would save the lives of American soldiers won the debate inside the Pentagon. According to Thomas E. Ricks, these officers expressed frustration that 'US Special Forces [were] being forced to go into Afghanistan on the ground to pursue the al-Qaeda terrorist network and Taliban leaders who could have been killed from the air earlier in the campaign'.⁶⁷ The difficulty with this assessment is that more extensive use of Special Force operations might have secured US military objectives with less risk of

accidentally killing innocent Afghans. It is noteworthy in this respect that in the latter stages of the campaign the US sent in ground forces rather than rely on air strikes in situations where commanders were not confident about the reliability of local intelligence.⁶⁸ This suggests that greater use of ground forces in the earlier stages of the campaign might have reduced the numbers who were killed in air raids where the intelligence was wrong or where enemy forces were located in close proximity to civilians. Special Force operations of this kind increased the risk to US ground forces, bringing us back to the hard moral question of how political and military leaders should weigh the lives of their soldiers against those of innocents.

Just War theory is constructed around the moral imperative to protect the innocent. But the reality of war is that the killing (as against the deliberate targeting) of civilians cannot be avoided. Theorists like Walzer try to rescue Just War by attributing a direct responsibility to political and military leaders for the exercise of 'due care'. Without this ascription of responsibility, worries about civilian casualties expressed from the President down during Operation Enduring Freedom would make no sense. Moreover, neither the realist argument of necessity nor the claim of supreme emergency removes responsibility from leaders who decide to sanction actions that break the rules of war. Yet there was an alternative discourse of responsibility at work during Operation Enduring Freedom that can be glimpsed in the occasional public statements of Rumsfeld. In response to questions at a news briefing as to whether the US should have done more to reduce civilian casualties, he retorted: 'We did not start this war. So understand, responsibility for every single casualty in this war, whether they're innocent Afghans or innocent Americans, rests at the feet of the al-Qaeda and the Taliban'.⁶⁹ How far this conviction shaped the thinking of senior administration figures is difficult to gauge, but this conception of responsibility represents an even greater challenge to Just War than realism or the theory of supreme emergency.

Walzer named blaming your enemy for the cruelty of war as the 'war is hell' doctrine. He traced the idea to General Sherman's moral justification for the forced evacuation of the population of Atlanta as he razed it to the ground during the Civil War. Sherman claimed to be completely innocent of the harm he and his men had imposed on the citizens of Atlanta, considering that sole responsibility for this rested with those who had started the war, namely, the leaders of the Confederacy. In response to General Hood's plea for restraint on the part of the Unionist forces, Sherman replied: 'War is cruelty and you cannot refine it . . . those who brought war into our country deserve all the curses and maledictions a people can pour out'.⁷⁰ The attraction of this conception of war to US decision-makers is that it transfers sole responsibility for any civilian casualties caused by the US bombing campaign to the Taliban and al-Qaeda. An important illustration of the different understandings of responsibility contained in the doctrines of Just War and 'war is hell' can be seen in the response to the Taliban and al-Qaeda using civilians as human shields.

International humanitarian law prohibits belligerents from hiding military forces in civilian areas or seeking sanctuary among the civilian population. But, if such actions take place, combatants are not relieved of their responsibility to honour the principle of civilian immunity. Rather, they still are required to only aim at legitimate military targets and to adhere to the proportionality rule. By contrast, 'war is hell' argues that, if the Taliban choose to put innocent Afghans at risk in this way, then the fault for any deaths of civilians caused by US bombing raids rests with the Taliban alone.⁷¹ Set against this, Just War theory claims that civilians only lose their immunity if they engage in war-making activities that are threatening to the other side. Even if Afghans sympathetic to the Taliban or al-Qaeda voluntarily shelter members of these organizations in their homes, they do not lose their protection as civilians.⁷² They can be killed if this is an indirect effect of an attack against a legitimate target, but such strikes would have to satisfy the proportionality rule. It would have to be shown that killing x number of al-Qaeda and Taliban justified the unintended but foreseeable deaths of y number of Afghan civilians. The Pentagon has justified such attacks on the grounds that they were legitimate targets, but it is clear that the definition of legitimacy at work here is wider than Just War. Rumsfeld, Myers and Franks have interpreted what is militarily justified in the context of Bush's declaration that the war against terrorism is a supreme emergency that pits civilization against evil.

Conclusion

The Bush administration rejected a non-violent response to the events of September 11, believing that the war against terrorism was a just cause that legitimated the use of force. War always involves harming the innocent but does it matter whether civilians are deliberately killed or that they die as the unintended consequence of attacks against legitimate military targets? Just War doctrine would totally reject the equating of terrorist acts like September 11 with the unintended deaths of Afghan civilians in Operation Enduring Freedom. It would claim that these civilian casualties were accidental and did not serve as a means to secure military victory in the war against terrorism. By contrast, the deliberate intention of the terrorists was to kill civilians in their attack on the World Trade Centre: the terrible crime committed on September 11 was a direct means to the ends sought by al-Qaeda. Nevertheless, the moral picture is not as clear-cut as this because the deaths of innocents – however unintended – are always foreseeable in war. The only way to prevent the killing of innocents is to follow pacifism and refuse war itself. Having ruled this position out, Just War seeks to guarantee as high a level of protection as possible by establishing the proportionality rule through the doctrine of 'double-effect'. This has its modern legal expression in Protocol 1.

The problem is that, far from demonstrating the constraint that this imposes on military operations, Operation Enduring Freedom reveals, as did the NATO

bombing campaign during the Kosovo conflict, how permissive international humanitarian law can be when it comes to identifying what counts as a legitimate target.⁷³ Legal advisers have been intimately involved in the process of target selection ensuring that collateral damage concerns were actively considered at all stages of the targeting process. And those Air Force officials who lobbied for the relaxation of targeting restraints were overruled on the grounds that increased numbers of civilian casualties would undermine political support for the war in the international community, especially in the Islamic world. In this respect, the war against the Taliban and al-Qaeda appears to confirm the constraining effect of the norm of non-combatant immunity on US military operations evident in the Gulf War and Kosovo. However, it would be unwise to exaggerate this constraining effect. What is also apparent is that the legal framework in Protocol 1 enabled the US to take on a whole range of targets that look very dubious from the moral standpoint of Just War.

A good illustration is the Pentagon's view that a state's electricity plants constitute a legitimate military target. If one defines the effect on civilians of destroying power plants in indirect terms, then, as Kenneth R. Rizer suggests, 'it might be very difficult to find a concrete and direct military advantage that outweighed the tens of thousands of civilian deaths that might be indirectly caused from loss of electricity'.⁷⁴ Given this, it is not surprising that the US Air Force has opted for a definition of civilian harm that only includes the direct injury inflicted by such strikes. This makes it easier to argue that it meets the requirement in Article 51(5)(b) of Protocol 1 that the harm imposed by such strikes is not 'excessive' compared to the direct military advantage of such an attack. Walzer argued that targeting the Iraqi electrical grid during the Gulf War violated the principle of civilian immunity, and would presumably say the same about the attacks on these facilities in Kosovo and Afghanistan. The fact that Protocol 1 does not explicitly prohibit such attacks highlights how involving the lawyers in the process of target selection does not necessarily guarantee greater civilian protection. As Michael Ignatieff puts it, 'moral questions stubbornly resist being reduced to legal ones, and moral exposure is not eliminated when legal exposure is'.⁷⁵ Attacks on dual-purpose facilities like electricity plants might be legally justifiable under Protocol 1, but are they defensible in terms of the rules of the *jus in bello*?

The US sought to justify the conduct of the bombing campaign by claiming that the war against terrorism was a supreme emergency. However, given that the attacks against the US on September 11 represented a direct assault on the principle of civilian immunity, the Bush administration could not be seen to be disregarding Just War restraints and retain moral credibility. At the same time, Rumsfeld, Myers and Franks were sufficiently cognizant of the necessity to destroy the Taliban and al-Qaeda that they applied a very permissive interpretation of what counted as a legitimate military target. The problem they faced was balancing the protection of innocent Afghans against the twin moral imperatives of defeating the terrorists and protecting the lives of American soldiers. Until we

have more information about the conduct of the operation, judging how well the US reconciled these conflicting moral claims must be a provisional assessment. If the war against terrorism constitutes a supreme emergency on the scale of Nazism, then the decision to attack al-Qaeda personnel hiding in civilian dwellings in the knowledge that innocent civilians would be killed might be justifiable. But can it really be claimed that the threat posed by this network of terror matched the imminence of the Nazi threat to human values in 1940? Moreover, Britain's use of Bomber Command against German cities did not run the risk that it would serve to increase the danger facing Britain from Nazism. However, there are good grounds for worrying that some of those innocent Afghans whose families suffered at the hands of US bombing will seek to extract revenge against the Americans. Put differently, the means employed by the Bush administration to end the threat posed by global terrorism could paradoxically serve to increase the risks facing US citizens.

Having taken the decision to accept whatever level of civilian casualties were necessary to destroy al-Qaeda in Afghanistan, the US was not obviated from meeting Walzer's requirement of 'due care'. It is entirely reasonable that the armed forces should seek to reduce their risks; the problem arises when this has the effect of harming civilians. Is there any evidence that US forces could have done more to protect innocent Afghans even if this meant increasing their exposure to danger? For example, should Special Forces have been tasked with attacking enemy forces in close proximity to civilian areas? Would this have significantly reduced collateral damage as against bombing strikes? Such missions would clearly have been dangerous and it would have to be shown that they did not place US soldiers at undue risk. Moreover, the success of such operations would still have relied on local intelligence, and without reliable information mistakes were inevitable. There is no mathematical formula for quantifying and assessing these risks, and this illustrates how deciding in particular cases what counts as 'due care' will be open to differing interpretations. One way forward is to begin a dialogue between the human rights and military communities on how to balance values of non-combatant immunity and force protection.⁷⁶

In asking whether US military leaders could have done more to protect Afghan civilians, I do not mean to imply that they bear sole responsibility for the deaths of civilians killed during the campaign. They share that responsibility with al-Qaeda and the Taliban because, as Walzer puts it, 'When we judge the unintended killing of civilians, we need to know how those civilians came to be in a battle zone in the first place'.⁷⁷ Without the attacks on September 11, there would have been no Operation Enduring Freedom. But what must be rejected is Rumsfeld's assertion that responsibility for the deaths of Afghan civilians rests solely with the terrorists and their supporters. The fact that US planes flew on missions day after day with political and military leaders knowing that civilian deaths were foreseeable means that responsibility for this suffering must also be accepted by US decision-makers. The unintended killing of civilians might be defended on grounds of either Just War, supreme emergency or the realist doctrine of necessity in war. But what is

crucial is that none of these justifications seeks to shift sole responsibility for the deaths of innocents to the Taliban and al-Qaeda. The latter are responsible for placing the Afghan people in the hell that is war, but this does not absolve US political and military leaders of their responsibility to protect civilians endangered by the war against terrorism.

Notes

I wish to thank Alex Bellamy, Mick Cox, Ian Clark, Cori Dauber, Tim Dunne, Toni Erskine, Anne Harris, Andrew Linklater and Colin McInnes for their comments on earlier versions of this article.

- 1 I owe the idea that responsibility can be viewed as being transferred to the enemy to a conversation with Toni Erskine.
- 2 Cited in Brian Orend (2000) *Michael Walzer on War and Justice*, p117. Cardiff: University of Wales Press.
- 3 Michael Walzer (1978) *Just and Unjust Wars*, p146. London: Allen Lane.
- 4 I wish to thank Colin McInnes for alerting me to this point.
- 5 Orend, p120 (see note 2).
- 6 Robert L. Holmes (1989) *On War and Morality*, p202. Princeton, NJ: Princeton University Press.
- 7 Holmes, p208 (see note 6).
- 8 A good example of this is Elizabeth Anscombe's classic defence of the killing of the innocent where this is the unintended consequence of one's action. She wrote: 'But if I am answerable for the foreseen consequences of an action or refusal, as much as for the action itself, then these prohibitions [against the killing of the innocent] will break down. If someone innocent will die unless I do a wicked thing, then on this view I am his murderer in refusing: so all that is left to me is to weigh up evils'. Cited in Holmes, p194 (see note 6).
- 9 Theodore J. Koontz (1997) 'Noncombatant Immunity in Michael Walzer's *Just and Unjust Wars*', *Ethics and International Affairs*, 11: 59 (original emphasis).
- 10 Cited in A. Roberts and R. Guelff (2000) *Documents on the Laws of War* (3rd edn), p450. Oxford: Oxford University Press.
- 11 Cited in Roberts and Guelff, p449 (see note 10)
- 12 Walzer, p153 (see note 3).
- 13 This idea of Walzer's is discussed at length in Orend, pp75, 119–20 (see note 2). For Walzer's original discussion of 'due care', see *Just and Unjust Wars*, p156 (see note 3).
- 14 Walzer, p156 (see note 3).
- 15 Cited in Orend, pp119–20 (see note 2).
- 16 Walzer, p156 (see note 3).
- 17 Quoted in 'Fact Sheet: US Military Efforts to Avoid Civilian Casualties', US Department of State, 25 October 2001 (emphasis added).
- 18 Under-Secretary of State for Political Affairs Marc Grossman, US Department of State, digital interview with London-based journalists of Arab dailies, 19 October, 2001.
- 19 Cited in William Arkin (2002) 'Fear of Civilian Deaths may have Undermined Effort', *Los Angeles Times*, 16 January, [<http://www.latimes.co>], visited on 16 January 2002. This phrase 'collateral damage' has become a euphemism for the death and destruction in civilian areas inadvertently caused by a correctly aimed weapon hitting its intended military target.
- 20 Secretary of Defence, Rumsfeld, interview with C-Span, [<http://www.defenselink.mil/Jan2000>], visited on 9 January 2002.
- 21 Ward Thomas (2001) *The Ethics of Destruction: Norms and Force in International Relations*, pp147–58. Ithaca, NY: Cornell University Press.
- 22 Thomas, pp87–9 (see note 21).
- 23 Estimates vary from between 1000 and 15,000, with most commentators agreeing on a figure of 3000. See Thomas, pp158–9 (see note 21).
- 24 Thomas, p160 (see note 21).

- 25 Michael Ignatieff (2000) *Virtual War: Kosovo and beyond*, pp197–201. London: Chatto and Windus.
- 26 Eric Schmitt (2001) 'A Nation Challenged: The Chiefs; Bush's War Troika Seeking Blend of Military and Civilian Decision-making', *New York Times*, 24 October, [http://www.NYTimes.com], visited on 2 November 2001.
- 27 Esther Schrader (2002) 'War, on Advice of Counsel', *Los Angeles Times*, 15 February, [http://www.latimes.com], visited on 15 February 2002.
- 28 Thomas E. Ricks (2001) 'Target Approval Delays Cost Air Force Key Hits', *The Washington Post*, 18 November, [http://www.washingtonpost.com], visited on 14 February 2002.
- 29 William M. Arkin (2002) 'Fear of Civilian Deaths may have Undermined Effort', *Los Angeles Times*, 16 January, [http://www.latimes.co], visited on 15 February 2002.
- 30 Cited in Arkin (see note 19).
- 31 Marc Herold (2002) 'Afghan Killing Fields', letter to *The Guardian*, 13 February. Herold published a controversial study of the civilian casualties during the war in early December. See Marc W. Herold (2001) 'A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting', 3 December, [http://www.pubpages.unh.edu/~mwhero], visited on 2 January 2002. Other independent commentators have challenged these figures. See Macer Hall and David Wastell, 'Truth and Lies of Taliban's Death Claims', *Electronic Telegraph*, [http://www.portal.telegraph.co.uk], visited on 5 January 2002; Michael Smith, 'Bombing is Successful despite Claims of "Civilian Genocide"', *Electronic Telegraph*, [http://www.portal.telegraph.co.uk], visited on 5 January 2002.
- 32 Conetta points out that laser-guided bombs achieve a Circular Error Probable (CEP) of 3–8 metres compared to 10–13 metres for GPS guided bombs, and he estimates that this 'equates to being able to put 50 per cent of expended weapons within a 2100 square foot circle versus being able to put them in a circle of 3300 feet. Should an intended target sit among a cluster of buildings, the difference between these two circular areas is significant'. Carl Conetta (2002) 'Operation Enduring Freedom: Why a Higher Rate of Civilian Bombing Casualties', Project on Defense Alternatives, Briefing Report No. 11, 24 January, p3, [http://www.comw.org/pda/0201oef.html], visited on 25 January 2002.
- 33 Conetta, pp3–6 (see note 32).
- 34 'Satellite-guided Bomb Misses Target, Kills 4 Afghan Civilians', *Space.Com*, [http://www.space.com], visited on 2 January 2002.
- 35 Rupert Cornwell (2001) 'Pentagon Admits US Jets Bombed Old People's Home in Afghan City', *The Independent*, 24 October, [http://www.independent.co.uk], visited on 4 November 2001; Paul Richter and Peter Pae (2001) 'High-tech US Bombs are Precise but not Perfect', *Los Angeles Times*, 24 October, [http://www.latimes.com], visited on 28 October 2001.
- 36 Elizabeth Becker and Eric Schmitt (2001) 'US Planes Bomb a Red Cross Site for Second Time', *New York Times*, 27 October, [http://www.NYTimes.com], visited on 4 November 2001; James Palmer (2001) 'Kabul Red Cross is Bombed again by American Jets', *The Independent*, 27 October, [http://www.independent.co.uk], visited on 4 November 2001. A senior military official claimed that the first strike on the Red Cross building was legitimate because 'it is not immediately clear that the warehouse that the ICRC used was not also being used by the Taliban'. Cited in Esther Schrader (2002) 'War, on Advice of Counsel', *Los Angeles Times*, 15 February, [http://www.latimes.com], visited on 15 February 2002.
- 37 Andrew Buncombe (2001) 'Another 13 Civilians Die in Bungled Bomb Attack', *The Independent*, 29 October, [http://www.independent.co.uk], visited on 1 November 2002.
- 38 Michael Smith (2001) 'Bombing is Successful Despite Claims of "Civilian Genocide"', *Electronic Telegraph*, 30 October, [http://www.portal.telegraph.co.uk], visited on 15 February 2002.
- 39 John Nichol (2001) 'The Myth of Precision', *The Guardian*, 29 October, [http://www.guardian.co.uk], visited on 30 October 2001.
- 40 Herold (2001) 'A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan', December, [http://www.pubpages.unh.edu/~mwhero], visited on 2 January 2002.
- 41 Quoted in 'Fact Sheet, US Military Efforts to Avoid Civilian Casualties', US Department of State, 25 October 2001.
- 42 The estimate of Iraqi civilians killed by the US strike is cited in Thomas, p166 (see note 21).
- 43 As NATO spokesperson Jamie Shea put it at a press briefing, 'Command and control or a computer in military hands without electricity simply becomes a mass of metal, wire and plastic'. Quoted in M.R. Gordon (1999) 'NATO Air Attacks on Power Plants pass a Threshold', *New York*

- Times*, 4 May. Also See Ivo H. Daalder and Michael E. O'Hanlon (2000) *Winning Ugly: NATO's War to Save Kosovo*, pp144–5. Washington DC: Brookings Institution.
- 44 In the case of the Gulf War, Walzer disagreed that the Iraqi power grid constituted a legitimate target, considering that it did not contribute directly to Iraq's war-making activities. See Orend, p117 (see note 2).
- 45 Martin Bentham (2001) 'Militia Use Civilians as a Shield', *Electronic Telegraph*, 11 November, [http://www.portal.telegraph.co.uk], visited on 13 February 2002; William Branigin (2001) 'Taliban's Human Shields', *The Washington Post*, 24 October, [http://www.washingtonpost.com], visited on 12 February 2002. Branigin cites one refugee, Mohammed Ali, who claimed, 'the Taliban come at night to the houses of the people and bring their equipment into civilian places'. According to Branigin, Ali said that the Taliban had parked 10 tanks in one mosque.
- 46 Justin Huggler (2001) 'Legacy of Civilian Casualties in Ruins of Shattered Town', *The Independent*, 27 November, [http://www.independent.co.uk], visited on 15 February 2002.
- 47 'Terrorists were in Village during Air Attack', *The Washington Post*, [http://www.washingtonpost.com], visited on 16 January 2002.
- 48 'US Silence and Power of Weaponry Conceal Scale of Civilian Toll', *SMH.com.au*, [http://www.smh.com.au/news/0201/26/world/world3/.html], visited on 25 January 2002.
- 49 The US had faced exactly this problem in Vietnam: how to identify members of the Vietcong from the civilian population.
- 50 Robert E. Osgood and Robert W. Tucker (1967) *Force, Order and Justice*, p269. Baltimore, MD: The Johns Hopkins Press.
- 51 David C. Hendrickson (1997) 'In Defense of Realism', *Ethics and International Affairs* 11: 26.
- 52 'Rumsfeld Blames Regime for Civilian Deaths', *Guardian Unlimited*, 16 October 2001, [http://www.guardian.co.uk], visited on 3 January 2002.
- 53 Laura King (2002) 'Review: Afghan Civilian Deaths Lower', *Los Angeles Times*, 11 February, [http://www.latimes.com], visited on 8 March 2002.
- 54 Walzer, p259 (see note 3).
- 55 Walzer is frequently interpreted as making a realist argument with his idea of supreme emergency. For example, Michael Smith argues that Walzer 'recognizes the force of the realist argument about necessity because he does intrinsically value the survival of the political community' (Michael Joseph Smith [1997] 'Growing up with Just and Unjust Wars', *Ethics and International Affairs*, 11: 9). However, Walzer's position is more complex than this and his text embodies two distinct understandings of supreme emergency. Walzer can be read as separating out 'a threat to human values' that involves all of us from a specific threat to the survival of a particular political community. He concedes that supreme emergencies can exist for particular states, but does so in a more cautious way than when it comes to describing a threat to the values of humankind that is both close and terrifying. In a telling passage he writes: 'Can a supreme emergency be constituted by a particular threat – by a threat of enslavement or extermination directed against a single nation? Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry' (Walzer, p254 [see note 3]). In this passage, Walzer succumbs to a realist ethic of statecraft, but this should be distinguished from his contention that supreme emergency should be defined in terms of a threat to humanity that is so imminent and frightening that the rules of war can be overthrown. In either case, Walzer argues that there is nothing inevitable about such a momentous choice, but considers that few state leaders would be able to resist such a decision (Walzer, p254 [see note 3]). I am grateful to Toni Erskine for suggesting the significance of these two understandings of supreme emergency in Walzer's work.
- 56 Michael Joseph Smith argues that 'Not only must the proscribed action . . . be the only viable alternative to losing, the action must in some clearly demonstrable way prevent an imminent defeat' (Smith, p10, [see note 55]). Also see Walzer, pp254–55 (see note 3).
- 57 Walzer is persuaded that Britain had no other realistic military strategy to avoid defeat than area bombing against Germany in 1940. However, Michael Joseph Smith questions this judgement. He writes, 'I wonder whether even in 1940 it [area bombing] was the only way for the British to survive' (Michael Joseph Smith, p10 [see note 55]).
- 58 Walzer, p326 (see note 3). By arguing that the plea of necessity cannot wipe away the guilt for the evil actions performed in the name of it, Walzer breaks with the consequentialism that underpins

- the realist defence of necessity in war. This idea that Walzer's theory of supreme emergency belongs to the tragic is developed by Joseph Boyle (1997) 'Casuistry and the Boundaries of the Moral World', *Ethics and International Affairs* 11: 97.
- 59 Walzer, pp255–63 (see note 3); Thomas, pp130–6 (see note 21).
- 60 Walzer, p259 (see note 3).
- 61 Text of Bush's speech to Congress, *Los Angeles Times*, 20 September 2001, [<http://www.latimes.com>], visited on 4 November 2002.
- 62 Cited in Colin Wight, 'Pre-postmodern Terrorism', paper presented at QuinetiQ Workshop, Aberystwyth.
- 63 Thomas E. Ricks (2001) 'Target Approval Delays Cost Air Force Key Hits', *The Washington Post*, 18 November, [<http://www.washingtonpost.com>], visited on 14 February 2002. This position echoed Lt Gen. Mike Short's criticism of the air campaign during Operation Allied Force. As commander of the NATO air campaign, Short complained bitterly about the restrictions imposed on his targeting of the Milosevic regime in the early stages of the war. He recognized that his plan risked higher levels of collateral damage, but argued that such a decisive use of force against the 'head of the snake' would have forced the Serbian leader to capitulate much earlier reducing the overall level of suffering (Short's position is cited in A.F. Tully [1999] 'France Faulted for Limiting Targets during Kosovo Conflict', BosNet article, 24 October, [<http://www.bosnet.org/archive>], visited on 28 June 2001).
- 64 Walzer, p262 (see note 3).
- 65 NATO imposed a 15,000 feet limit on air operations to reduce the risks of aircrew being shot down. However, this was criticized on the grounds that it made it difficult to clearly distinguish military from civilian targets, contributing to mistakes like the hitting of the refugee convoy in Kosovo that pilots mistook for armoured vehicles on 14 April 1999. A further illustration of the hard choices that have to be made between the goal of force protection and imposing excessive levels of harm on the civilian population can be seen in the decision to attack Yugoslavia's electrical grid. The US initially used a new specialized CBU-munition that shorts out electrical lines but does not damage the power transmission stations themselves, hence reducing the civilian impact of the strikes. However, as Thomas points out, keeping the power down 'required repeated strikes . . . and such a predictable pattern of sorties against fixed targets was seen as posing an increasing threat to the safety of NATO pilots' (Thomas, p166 [see note 21]). On 24 May, the decision was taken to use heavier munitions and knock out the five major power transmission stations creating damage that took weeks to repair. The effect of this strike on the civilian infrastructure was to disrupt electricity and water supplies in many cities, threatening the Serb people with the loss of essential services (Daalder and O'Hanlon, p145, see note 43). For criticisms of this attack as a breach of international humanitarian law, see 'Civilian Deaths in the NATO Air Campaign', Human Rights Watch report, [www.hrw.org/reports/2000], visited on 11 January 2000; Kenneth Roth (2000) letter to *The Guardian*, 1 December.
- 66 Herold (see note 40).
- 67 Thomas E. Ricks (2001) 'Target Approval Delays Cost Air Force Key Hits', *The Washington Post*, 18 November, [<http://www.washingtonpost.com>], visited on 14 February 2002.
- 68 Employing ground forces to verify intelligence was no guarantee against mistakes. In one incident on 23 January, 16 Afghan fighters who were wrongly identified as members of the Taliban or al-Qaeda were killed. For several weeks, US forces watched the compounds and, according to Rumsfeld, the information was 'persuasive and compelling'. However, it was not sufficiently strong to justify calling in air strikes. Or, perhaps it was believed that the operation could be accomplished at less risk to innocent civilians if it was conducted on the ground rather than from the air. The incident is discussed in Richard T. Cooper (2002) 'Rumsfeld Addresses "Unfortunate" Attack', *Los Angeles Times*, 22 February, [<http://www.latimes.com>], visited on 8 March 2002; Thom Shanker (2002) 'US Says 16 Killed in Raids Weren't Taliban or Al Qaeda', *The New York Times*, 22 February, [<http://www.nytimes.com>], visited on 8 March 2002.
- 69 'Rumsfeld says Taliban to Blame for Casualties', briefing by Donald H. Rumsfeld, US Department of State, 29 October 2001, [<http://www.usinfo.state>], visited on 3 January 2002.
- 70 Walzer, p32 (see note 3).
- 71 This argument is made by Jeffrey Tiel in 'Civilian Casualties as Psychological Warfare', Guest Commentary, October 2001, www.ashbrook.org/tools/printit2.cfm, visited on 13 February 2002.
- 72 For an excellent discussion of these issues see Koontz, pp65–82 (see note 9).

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- 73 For a discussion of how NATO and its critics interpreted international humanitarian law in the Kosovo conflict see Nicholas J. Wheeler (2003, forthcoming) 'The Kosovo Bombing Campaign: The Limits of Civilian Protection in International Humanitarian Law' in Paul Keal and Christian Reus-Smit (eds) *The Politics of International Law*.
- 74 Kenneth R. Rizer, 'Bombing Dual-use Targets: Legal, Ethical, and Doctrinal perspectives', [<http://www.airpower.maxwell.af.mil/airchronicles/cc/Rizer.html>], visited on 15 February 2002.
- 75 Ignatieff, p199 (see note 25).
- 76 A welcome development in this respect is the launch of a project by Sarah Sewall, Project Director at the Carr Centre for Human Rights Policy, who plans to investigate the humanitarian implications of military intervention strategies by organizing a series of meetings between human rights groups and the military.
- 77 Walzer, pp158-9 (see note 3).