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Research Essay

**JUS IN BELLO AND MILITARY NECESSITY**

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“Unfortunately we have to make war as we must and not as we should like to.” (Lord Kitchener)

## INTRODUCTION

From the above statement, a cynic may well conclude that despite the Law of Armed Conflict, the ultimate object of war is the “overpowering of the opponent”. Therefore, what Generals are in fact told by their political masters is: “Succeed, by war according to its laws, if you can, but at all events and in any way, succeed.”<sup>1</sup> This implies that the more vital the issue of the war, the more ferocious and extreme combat will become. This is often referred to as “military necessity”.

It is not possible for commanders to do anything they want in war. From the legal point of view, “military necessity” does not conflict with the Law of Armed Conflict, nor can it override that law. What commanders do must be justified by the military requirement to undertake the desired course of action, and be legal. The Law of Armed Conflict, however, recognizes the potential impracticability of full compliance with legal norms in certain circumstances. Nevertheless, the doctrine of “military necessity” is limited to particular events and circumstances and does not have a “general suspensory effect upon the Law of Armed Conflict.”<sup>2</sup>

This paper will confront the notion of “military necessity” to the principles of discrimination and proportionality enunciated in the jus in bello, which refers to the justly conduct of the war. The critical issue both legally and morally is whether there are circumstances where it is permissible to kill non-combatants. The paper will examine two arguments. The first

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<sup>1</sup> Sheldon M. Cohen, Arms and Judgment. Law, Morality, and the Conduct of War in the Twentieth Century (Boulder, Colorado: Westview Press, 1989), 36.

<sup>2</sup> A. P. V. Rogers, Law on the Battlefield (Manchester: Manchester University Press, 1996), 6.

regards the use of “military necessity” as a justification for killing non-combatants in order to limit the amount of risk it is reasonable to expect a soldier to take. The second will consider the “necessity of success”, which subordinates the jus in bello principles of discrimination and proportionality to military imperatives, both in the case of “supreme emergency” at the strategic/political level, and at the operational/tactical level. The thesis of this paper is that the doctrine of “military necessity” applies less at the tactical level than it does at the strategic and operational levels of war, especially in Operations Other Than War. In all cases, however, usefulness and proportionality must restrain its application.

According to the Law of Armed Conflict, the concept of “military necessity” has three aspects:<sup>3</sup>

- a. No action may be taken which is not military necessary;<sup>4</sup>
- b. The Law of Armed Conflict sometimes allows exceptions to its rules for good military reason; and
- c. The rule of proportionality tries to achieve a balance between the sometimes conflicting aims of military success and humanitarian protection.

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<sup>3</sup> Rogers, 6.

<sup>4</sup> Canada, Conduct of Hostilities. Collection of Hague Conventions, Other Treaties and Related Canadian Statutes (Ottawa: Office of the Judge Advocate General, 1998), pp. 179-181. The 1998 Rome Statute of the International Criminal Court refers to “military necessity”. Article 8, 2 (a) (iv) defines “extensive destruction and appropriation of property, **not justified by military necessity** and carried out unlawfully and wantonly” as a war crime. Article 8, 2(b) (xiii) states that destroying or seizing the enemy’s property in the context of an international conflict is “a serious violations of the laws and customs applicable in international conflict unless such destruction or seizure be **imperatively demanded by the necessity of war.**” Finally, Article 8, 2 (e), which applies to “conflicts not of an international character”, defines other serious violations of the laws and customs any of the following acts: (viii) “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or **imperative military reasons so demand**”, and (xii) “destroying or seizing the property of an adversary unless such destruction or seizure be **imperatively demanded by the necessity of the conflict.**”

Michael Walzer pictures the tension between the Law of Armed Conflict and military imperatives in terms of a sliding scale: the more justice, the more right.<sup>5</sup> The greater the justice of your cause, the more rules one can violate, though some rules are always inviolable. The extreme form of the sliding scale argument is the claim that combatants fighting for a just cause can do anything to win. That corresponds to the position of George Habash, leader of the Popular Front for the Liberation of Palestine: “In the age of revolution of peoples oppressed by the world imperialist system there can be no geographical or political boundaries or moral limits to the operations of the people’s camp.” (Time, April 1970.)

In other words, the only kind of justice that matters is the justice of the cause or the *jus ad bellum* (the just decision to resort to war). To resist the slide some will adopt a position of moral absolutism, which states that “the rules of war are a series of categorical and unqualified prohibitions, and that they can never rightly be violated even in order to defeat aggression.”<sup>6</sup> These people emphasise that the war must be conducted in a justly manner, more so when the cause is just, i.e., the *jus in bello*. The tension between *jus in bello* and *jus ad bellum* can be resolved in four different ways:<sup>7</sup>

- a. The Law of Armed Conflict is simply ignored;<sup>8</sup>

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<sup>5</sup> Michael Walzer, Just and Unjust Wars (New-York: Basic Books, 1977), 229.

<sup>6</sup> Walzer, 230.

<sup>7</sup> Walzer, 231-232.

<sup>8</sup> Yehuda Melzer, Concepts of Just War (Leyden: A.W. Sijthoff International Publishing Company, 1975), 61. In 1950 at the request of the United Nations General Assembly, the Nuremberg Tribunal formulated a series of principles on the elements of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Principle VI defines war crimes as “violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation **not justified by military necessity**.”

- b. The law yields slowly to the moral urgency of the cause: the rights of the righteous take precedence over those of the enemy;
- c. There is no exception to the law, rights are strictly respected, whatever the consequences; and
- d. The law is overridden, but only in the face of an imminent catastrophe.

## DISCUSSION

### **Jus in bello**

The Just War theory differentiates rules that determine when it is permissible or obligatory to begin a war (jus ad bellum) from rules that determine how a war should be fought, once it has begun (jus in bello). There are six primary rules concerning jus ad bellum: the cause must be just, war must be declared by a lawful authority, war must be a last resort, there must be a reasonable chance of success, political objectives must be proportionate to the human costs of war, and finally a state must have a right intention, i.e., that “a just war be a war for the right, fought for the sake of the right.”<sup>9</sup> Jus ad bellum rules apply mainly to political leaders; jus in bello rules apply mainly to officers and soldiers. This paper is concerned mainly with jus in bello and the friction between jus ad bellum and jus in bello.

Concerning jus in bello, the overall principle is that “destruction of life and property... is inherently bad, therefore military forces should cause no more destruction than strictly necessary to achieve their objectives. Wanton destruction is forbidden. More specifically, the principle of

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<sup>9</sup> Douglas P. Lackey, The Ethics of War and Peace (New Jersey: Prentice-Hall Inc, 1989), 31. For a complete discussion of the jus ad bellum rules, see Lackey pp.28-52.

necessity specifies that a military operation is forbidden if there is some alternative operation that causes less destruction but has the same probability of producing a successful military result.”<sup>10</sup>

There are two fundamental principles that govern the just war conduct: the principle of discrimination and the principle of proportionality. The first dictates that “just warriors may directly target personnel participating in the enemy nation’s wrongdoing but should not directly target other enemy nationals.”<sup>11</sup> Before WW I, it was relatively easy to differentiate between combatants and non-combatants, but since WW II, it has become more difficult to differentiate between combatants and non-combatants. In 1924, Douhet wrote in *Command of the Air*: “Any distinction between belligerents and nonbelligerents is no longer admissible today either in fact or theory. Not in theory because when nations are at war, everyone takes part in it: the soldier carrying his gun, the woman loading shells in the factory, the farmer growing wheat, the scientist experimenting in his laboratory. Not in fact because nowadays the offensive may reach anyone, and it begins to look now as though the safest place may be the trenches.”<sup>12</sup>

Obviously, the Law of Armed Conflict does not allow such extreme, but it is legally accepted that it is just to target the enemy’s war-production centres and industrial infrastructure whose products are destined to the enemy’s armed forces. Therefore, ordinary citizens, housewives, children, and the elderly are not directly participants in the enemy’s war effort, as long as they are not engaged in war-related activities. The principle of non-combatant immunity provides that civilian life and property should not intentionally be subjected to military force,

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<sup>10</sup> Lackey, 59.

<sup>11</sup> Richard J. Regan, *Just War. Principles and Cases* (Washington, D. C.: The Catholic University of America Press, 1996), 87.

<sup>12</sup> Lackey, 68; see also Regan, 89-90. “The distinction between military combatants as the guilty enemy and civilian non-combatants as the innocent enemy has become obsolete. Civilians produce the weapons and equipment integral to the waging of modern war, and civilians maintain a modern belligerent’s industrial infrastructure...which is also integral to the waging of modern war.”

which must be directed only at military objectives. There is an objective and subjective version of the principle of non-combatant immunity. "The objective version holds that if civilians are killed as a result of military operation 0 12 233.96912. e6ec

**So the central issue is whether there are circumstances where it is morally permissible to kill non-combatants?** “The principle of discrimination requires military combatants to weigh carefully the effects of their actions on ordinary civilians.”<sup>15</sup> The degree of risk that is permissible will vary with the nature and importance of the target, the urgency of the moment, and the military technology available. Because modern war, even when conducted with discrimination, will likely result in the death of non-combatants, the principle of proportionality needs to be applied to the conduct of the war. In fact, the principle of proportionality is impossible to dissociate from the principle of discrimination. The principle of proportionality is incorporated into the law of double effect. This involves practical judgements about the likely outcomes of military actions. In other words, how important is the military target to the enemy’s war effort in relation to the resulting number of non-combatant casualties? The amount of destruction permitted must be proportionate to the importance of the objective. The principle of proportionality has to do with the distinction between direct killing and indirect killing, between death as a means or end and death as a side effect. The death of non-combatants is morally acceptable only when death is an indirect effect and not an end or a means in itself.<sup>16</sup> But if we cannot distinguish morally between direct and indirect killing, the principle of non-combatant immunity is invalidated. Therefore, there is a relationship between discrimination between combatants and non-combatants and the principle of proportionality.

We will now examine in more detail the concept of “military necessity” and its applicability to various circumstances. First, we will define the concept itself, then we will discuss two arguments. The first one will deal with the justification for killing non-combatants to

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<sup>15</sup> Regan, 94.

<sup>16</sup> Lackey, 66.

reduce one's own casualties; the second argument will look at the concept of "supreme emergency" or the "necessity of success" at the strategic, operational and tactical levels.

### **Military Necessity**

Dr Francis Lieber defined "military necessity" in 1863 as "those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war."<sup>17</sup> In other words, "military necessity" justifies as a last resort all measures which are indispensable for securing the submission of the enemy; provided that they are not inconsistent with the Law of Armed Conflict. "Military necessity" specifically refers to the tension inherent in attempting to minimise suffering through rules while at the same time employing violent means that necessarily cause suffering. "Military necessity does not admit of cruelty...and does not include any act of hostility which makes the return to peace unnecessary difficult."<sup>18</sup> As described above, under the existing Law of Armed Conflict, the prohibition against harming non-combatants may be overridden by military necessity. Consequently, we will examine the concept of "military necessity" to determine those conditions, if any, where the principles of jus in bello might be overruled. The most problematic aspect is to try to determine when, if ever, non-combatants can be intentionally targeted (killed).

Modern history gives us many examples in which civilians have been intentionally targeted. During the Gulf War, Iraq used Scud missiles to target civilians; the Allied coalition targeted communications and electrical power facilities. During the Vietnam War, President Nixon ordered the Christmas bombing of Hanoi to force the North Vietnamese to negotiate and end the war. During World War II, both Germany and the Allies targeted each other's cities. The

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<sup>17</sup> Rogers, 4.

<sup>18</sup> Paul Christopher, The Ethics of War & Peace. An introduction to legal and moral issues (New Jersey: Prentice-Hall, Inc., 1994), 166.

United States employed nuclear weapon against Hiroshima and Nagasaki in order to break the will of the Japanese people. What is less clear is whether these actions could be justified by the criteria of “military necessity”.

The basis of our discussion is the assumption that human beings have a moral obligation not to harm innocent persons intentionally. Strictly speaking, the line between legitimate and illegitimate targets does not correspond to the distinction between soldiers and civilians, as the latter may contribute directly to the enemy’s war effort. To be a defenceless civilian is not sufficient either, since that civilian may be a scientist working on a new weapon system. Here, the term “innocent” refers to the non-combatant, i.e. whether or not a person is a source of danger. In other words, “there is no justification for intentionally harming those who are not involved in attempting to harm others.”<sup>19</sup> To shoot a prisoner or to refuse to give quarter to someone offering to surrender is against the Law of Armed Conflict, because these people are no longer a threat. But to target a tank factory whose workers are unarmed civilians is legitimate. The crucial distinction is “not whether the person is military or civilian, defenseless or armed, but whether he is a source of danger.”<sup>20</sup>

Christopher argues that to understand the justification for combatants intentionally harming one another will help to distinguish those who are legitimate targets from those who should not be attacked.<sup>21</sup> The Just War theorists consider that a state’s right to engage in hostilities is grounded in the fundamental individual right to defend one’s person, one’s property, and one’s family or community from an unjust attack. Soldiers act as agents of the state, and

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<sup>19</sup> Christopher, 170; see also Walzer, 133.

<sup>20</sup> Cohen, 26.

<sup>21</sup> Christopher, 170.

because the state's right of self-defence is derived from the rights of individual citizens, soldiers cannot perform any action on behalf of the state that would be wrong for an individual to do in his or her self-defence. In practical terms, the term "combatant" refers to those opponents who can legitimately be attacked in wartime, and the term "innocent" or "non-combatant" refer to the categories of persons who are protected from attack under the Law of Armed Conflict. Earlier, we mentioned the moral obligation that human beings have not to intentionally harm non-combatants. Christopher<sup>22</sup> adds another moral precept: one is sometimes obligated to use force to protect innocent persons from harm. Since every soldier, no matter to which side he belongs, believes his cause to be just; every soldier is justified to harm enemy combatants in order to protect members of his own community. In wartime, the two prescriptions often come into conflict. The notion of "military necessity" originates from the resulting conflict between two morally good obligations; namely to win the war and at the same time to do everything to minimise destruction and human suffering.

"We are now in a state of necessity, and necessity knows no law."<sup>23</sup> Consequently, "to its penultimate limit, the doctrine of military necessity would justify any act that was required for victory."<sup>24</sup> The Law of Armed Conflict rejects the notion that whatever helps bring victory is permissible. It even rejects the claim that whatever is necessary for victory is permissible. It forbids some things absolutely. Yet, it recognises military necessity as a legitimate consideration. From the legal point of view, military necessity can justify only what the Law of Armed Conflict says it can justify. For instance, the destruction or seizure of enemy property can sometimes be

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<sup>22</sup> Christopher, 172.

<sup>23</sup> German Chancellor von Bethmann Hollweg, defending the German invasion of neutral Belgium in August 1914.

<sup>24</sup> Cohen, 35.

justified by military necessity; but killing prisoners is absolutely forbidden. “The notion of military necessity lends itself to abuse, but every use of it is not abusive.”<sup>25</sup> For instance, during the Gulf War, the U.S. Air Force manual stated that the concept of “military necessity” has four basic elements: that force needs to be regulated; that force is necessary to achieve as quickly as possible the partial or complete submission of the adversary; that force is no greater than needed to achieve this; and that it is not otherwise prohibited.<sup>26</sup>

### **Military necessity and Reducing Risks**

We will now examine the applicability of the notion of “military necessity” to two scenarios, namely as a possible justification to reduce friendly casualties and in the case of supreme emergency. One possible justification for resorting to military necessity is to reduce risks to our own soldiers. The argument is that a particular action is justified by military necessity if and only if:<sup>27</sup>

- a. Its performance will reduce the risk to one’s own soldier’s lives;
- b. No alternative action will result in less risk to their lives; and
- c. The amount of increased risk to non-combatants is proportional to the amount of reduced risk to soldiers.

Christopher and Walzer object to this rationale. Walzer questions the practice used by American troops in Korea, whereby upon coming under enemy fire and being pinned down they would automatically use the tanks to return fire into the hillside, and then call artillery fire and air support. Such tactics resulted in saving American soldiers’ lives, but civilian men, women,

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<sup>25</sup> Cohen, 32.

<sup>26</sup> Rogers, 6.

<sup>27</sup> Christopher, 174.

and children were killed indiscriminately. Walzer argues that soldiers should have sent a patrol out instead, and accepted greater risks.<sup>28</sup> Christopher argues that the ethos of the soldier demands that he behaves courageously and he protects innocents. He must be prepared to risk his own life and to assume greater personal risk in the performance of his duty. He adds further that the risks to the lives of combatants should not be weighed equally against the risk to the lives of non-combatants because it is the nature of the soldier to take risks. His rationale is that all soldiers have a moral duty to refrain from intentionally harming innocents, regardless of nationality, and they also have a moral duty to protect the members of that society. In other words, the soldier's right to safety should not become more fundamental than anyone else, including enemy civilians. Therefore, "the argument that military necessity may be invoked to reduce risk to combatants improperly subordinates the humanitarian principles of *Kriegsmanier* or just in bello to tactical considerations... must be rejected."<sup>29</sup> In other words, war is morally acceptable only if one harms enemy soldiers only. If one cannot guarantee that no civilians will be harmed, then fighting is immoral.<sup>30</sup>

Such an argument is simply not acceptable because what is required from commanders is to buy the lives of enemy soldiers with the lives of their own troops. A distinction should be made between one's own innocents and the innocent citizens of an enemy nation in terms of the moral duty not to intentionally harm non-combatants. Certainly, soldiers do not have the same positive duty to protect innocents among the enemy population, as they have to protect their own population, although they have an obligation not to harm innocents intentionally regardless of

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<sup>28</sup> Walzer, 154-155.

<sup>29</sup> Christopher, 177.

<sup>30</sup> Cohen, 29.

their nationality.<sup>31</sup> Cohen notes judiciously that doing what Christopher and Walzer demand would ask far more of soldiers than what the Hague Conventions require. The American tactics are pretty fundamental and widely accepted ones. The Law of Armed Conflict “allows troops under fire to return fire without ascertaining that there are no civilians mixed with the troops who are engaging them. Actually, it allows troops under fire to fire back even if they know civilians are mingled with the enemy.”<sup>32</sup> He points out that “there are limits to what we can expect men to endure.” The rule is, “I suggest, that the attacker may, given the presence of innocents **in a combat zone**, do anything that it would be permissible to do if there were no innocents there—subject to the restrictions entailed by the principles of proportionality. This rules out discriminatory (selective) attacks on innocents but allows the indiscriminate shelling or bombing of **defended areas** containing innocents.”<sup>33</sup>

In other words, if the objective is a legitimate military target, i.e. a defended locality, and this objective is subjected to indiscriminate bombing or shelling, attacking troops are not under a moral obligation not to attack innocents. According to Cohen, “the law of war implies that soldiers are not obligated to raise their already high risks to even higher levels in order to lower further the risk to innocents in combat zones. The rights of innocents are ‘defeasable’ when honoring those rights would push the soldiers’ risks beyond what it is reasonable to expect any group to endure.” As an example, he cites the case of the Ninetieth Division during the Normandy campaign where a rifleman could expect to last fourteen days before becoming a

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<sup>31</sup> Cohen, 127.

<sup>32</sup> Cohen, 28.

<sup>33</sup> Cohen, 33.

casualty. By contrast, a civilian in heavily bombed German cities had only a one in seventy chance of being killed or seriously wounded by a bomb during the six years of the war.<sup>34</sup>

Going a step further, Cohen provides a practical rule when he argues that “an appeal to military necessity is a subterfuge for what is actually a mere military advantage, and not a necessity at all, if the commander would cancel the attack were the casualties friendly. Where the perception of real military necessity is at work, a commander may, though with reluctance, engage in a practice even if the civilians who are being put in harm’s way by it are friendly.”<sup>35</sup> A case in point is the massive air and artillery bombardment of the French town of St-Lô during the Normandy campaign. St-Lô was selected because the roads leading out of western Normandy ran through it. “The town was attacked on July 25, by 1,500 heavy bombers, 380 medium bombers, and 550 fighter bombers, one of the largest air attacks in World War II. Panzer Lehr was virtually wiped out, and the town was turned into rubble. But in the next few days Americans, advancing through the hole created by the bombardment, drove more deeply into France than they had in the seven weeks that had passed since D Day, reaching the base of Normandy peninsula at Avranches. They did not stop until they reached the German border. The bombing of St-Lô led to victory not only in the battle of Normandy but in the battle of France as well.”<sup>36</sup>

In the drive to St-Lô, the U.S. Thirtieth Infantry Division took over 90 percent casualties in its rifle platoons in fifteen days. The Twenty-Ninth Infantry Division took 58 percent casualties in its rifle platoons, and the Thirty-Fifth took almost 40 percent. The U.S. Ninetieth Infantry Division suffered 100 percent casualties in enlisted men, and 150 percent in officers.

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<sup>34</sup> Cohen, 33.

<sup>35</sup> Cohen, 33.

<sup>36</sup> Cohen, 29-30.

Statistically, every rifle platoon in the division had been wiped out and rebuilt with replacements three times in six weeks. In the three-day battle for Goodwood, the British and Canadians lost 36 percent of their tank strength in France.<sup>37</sup> It is against such staggering figures that the argument put forward by Christopher and Walzer, that soldiers because they are soldiers should be ready to take greater risks to save enemy civilians, should be evaluated. The Law of Armed Conflict is explicit as to what could be done against a defended locality, while prohibiting any bombardment against undefended localities. Nobody has the right to ask more from soldiers who are putting their lives on the line. The principle of double effect, which stipulates that the death of non-combatants is morally acceptable only when death is an indirect effect and not an end or a means in itself, provides the moral guidance necessary in such circumstances.

Furthermore, the Gulf War is indicative of what the future could be in regard to the military necessity argument to reduce risks. Françoise J. Hampson writes<sup>38</sup>: “One particular aspect of the potential public reaction in the United States also played an important part in shaping the way in which the conflict was handled. The public and the authorities alike were haunted by the specter of Vietnam. This resulted in less political interference in the conduct of the conflict, the immediate use of overwhelming air power, rather than a gradual escalation in its use, the postponement of contact between the two land forces until the Iraqi forces had been ‘softened up’ by massive aerial bombardment and, above all, an overwhelming desire to avoid American military casualties, body counts and body bags.”

In an interview during the Gulf War, General Schwarzkopf talking about the burdens of command admitted: “My nightmare is anything that would cause mass casualties among the

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<sup>37</sup> Cohen, 31.

<sup>38</sup> Françoise J. Hampson, “Means and methods of Warfare in the conflict in the Gulf,” in The Gulf War 1990-1991 in International and English Law, Peter Rowe, ed. (London: Sweet and Maxwell, 1993), 89.

troops. I don't want my troops to die. I don't want my troops to be maimed. Therefore, every walking and sleeping moment my nightmare is the fact that I will give an order that will cause countless numbers of human beings to lose their lives."<sup>39</sup> Although General Schwarzkopf was very much concerned with limiting civilian casualties and suffering (the so-called collateral damage), his position on minimizing friendly casualties contrasts with the callous indifference of General Haig, the British commander at the battle of La Somme. General Haig lost 57,470 soldiers the first day of the offensive; the biggest loss ever suffered by the British Army in a single day. On July 2, 1916 he wrote in his diary: "I also visited two Casualty Clearing Stations at Montigny...The A.G. reported today that the total casualties are established at over 40,000 to date. This cannot be considered severe..."<sup>40</sup>

The argument put forward by Christopher and Walzer conflicts with military logic and the psychology of command. "In the mind of a military commander there can be little room for compassion towards the enemy, since compassion would yield the military advantage, put his own troops at risk, and at best prolong the conflict, at worst lose it."<sup>41</sup> Such was the rationale behind the strategic bombing offensive mounted by coalition forces in the Gulf War. The overall objective was to ensure that when the ground offensive did take place it was as successful and economical in terms of friendly casualties as possible. "Such a calculation is so intrinsic a part of warfare that to exclude it on moral grounds would be to subvert the activity of war itself (something that the just war approach, with its acknowledgement that war should be fought with

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<sup>39</sup> A. J. Coates, The Ethics of War (Manchester: Manchester University Press, 1997), 214.

<sup>40</sup> Coates, 216.

<sup>41</sup> Coates, 221.

military efficiency as well as moral probity, is not intended to do)”.<sup>42</sup> It would have been contrary to the very nature of war for the allies to have ensured a “level killing field”; war is not a sport.

### **The Necessity of Success or Supreme Emergency**

The notion of “necessity of success” could be stated as follows: “An action is justified by military necessity if it will contribute significantly to the success of the mission.”<sup>43</sup> The most problematic aspect is that success can be defined at the tactical, strategic and political levels. Thus, the “necessity of success” would allow soldiers at every level to ignore the rules of war in order to be successful. Doing so is tantamount to doing away with the rules altogether. Furthermore, if one accepts that the “necessity of success” justifies setting aside the Law of Armed Conflict, then these laws will obligate only the winning side. The losing side will be justified to invoke “military necessity” to resort to atrocities.<sup>44</sup> Thomas Nagel points out that “in situation of deadly conflict, particularly where a weaker party is threatened with annihilation or enslavement by a stronger one, the argument for resort to atrocities can be powerful, and the dilemma acute. There may exist principles, not yet codified, which would enable us to resolve such dilemmas. But then again there may not.”<sup>45</sup> He argues that it is naïve to believe that there is a solution to every moral problem. A declaration of war is a declaration that the requirements of justice are so great that innocent citizens will intentionally be put at risk for the common good of the state.

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<sup>42</sup> Coates, 225-226.

<sup>43</sup> Christopher, 178.

<sup>44</sup> Christopher, 181-182.

<sup>45</sup> Thomas Nagel, “War and Massacre,” in War and Moral Responsibilities. Ed. by Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton, N.J.: Princeton University Press, 1974): 23.

When “absolute” principles conflict with one another in such a way that all available alternatives violate these same principles, there is no choice but to decide on the basis of the probable consequences. In this situation, the lesser evil assumes the character of the good.<sup>46</sup> The British Bomber offensive against Germany in 1942 is a good example of this dilemma. Starting in September 1939, both Britain and Germany attempted to abide by the guidelines of The Hague established in 1923. The Royal Air Force (RAF) discovered quickly that striking specific targets on the ground amounted practically to a death sentence. Night navigation was difficult, fighter resistance was stiff, and the attrition rate became very severe. At the end of 1941, it became clear that the British Bomber Command had suffered terrible losses, with apparently no effect on the German war effort. It was discovered in August 1941 that less than one-third of British aircraft were dropping their bombs within five miles of their objectives although one-third of British war production, which was badly needed elsewhere, was devoted to the bomber offensive.<sup>47</sup>

According to the official historians, the choice for the RAF in January 1942 was between area bombing and no bombing at all. Churchill reached a decision on 14 February. It was decided that the primary objective for Bomber Command would be the morale of the enemy civilians, and in particular the industrial workers. Though the new policy was never publicly announced the British public was not fooled and a public debate followed. “From February 1942 to May 1945, the Allied air offensive destroyed 3.7 million German homes and killed 593,000 German civilians, 80,000 or more in the city of Dresden on the single night of 12 February 1945. The destruction of Dresden provoked sufficient revulsion in England to give even Churchill pause.”<sup>48</sup>

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<sup>46</sup> Christopher, 184.

<sup>47</sup> Lackey, 71.

<sup>48</sup> Christopher, 74.

What is interesting about the moral debate that took place about innocent civilians, side effects, and primary intentions is that the debate virtually made no reference to the principles of necessity and proportionality. Was the bombing offensive necessary for victory? If so, what about proportionality? Michael Walzer presents thoughtful guidelines for determining when military necessity would justify setting aside the laws of war.<sup>49</sup> He believes that the laws of war must be obeyed “until the heavens fall.” He calls such an extreme situation a supreme emergency. He sees the British situation in 1942 as an example of such a calamity. He argues that only in the case of imminent defeat, with “backs to the wall,” the Western Allies may have been justified in bombing German population centers because of military necessity, although only during the early part of the conflict when the outcome of the war was doubtful. So for Walzer, military necessity is in fact political necessity. Supreme emergencies as he defines them do not exist at the tactical or operational levels. At those levels the prohibitions of *jus in bello* are absolute. Only in cases where a nation faces imminent defeat, which would likely result in enslavement or genocide, may military necessity be invoked. In other words, only when self-defence applies to the whole of society does “necessity knows no law.”

According to Christopher,<sup>50</sup> the only justification for going against the fundamental principal that “it is wrong to intentionally harm innocent persons” is to satisfy the second principle that “one is sometimes obligated to protect innocent persons from harm.” Therefore, only the same *jus ad bellum* criteria that justify resorting to force in the first place would satisfy the conditions when military necessity might be invoke to violate the laws of war. It follows that such a decision can only be political, and made by a lawful authority. The importance of the end must be proportional to the amount of human suffering that will be incurred. In other words, the

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<sup>49</sup> Walzer, pp. 251-68.

decision-makers must be prepared to sacrifice the same number of lives of their own citizens to achieve their objectives. Furthermore, the means used must be both necessary and sufficient to attain the desired end. Necessary means that overriding the prohibition against the killing of innocents must truly be a last resort and sufficient because the means employed must guarantee a reasonable chance of success. For instance one cannot argue that bombing of a city is necessary to achieve a specific objective and then after the initial bombing has failed to argue that a bombing of a second city is justified to achieve the same objective, and so on indefinitely. Christopher believes that adopting such a criterion would eliminate the ambiguity inherent in the international laws of war without eliminating the use military necessity as a justification at the national or strategic level, but it would exclude the use of “military necessity” at the tactical level.<sup>51</sup>

### **The Necessity of Success at the Operational Level**

I believe that the case for resorting to the “necessity of success” can be made at the operational level, although in that case there is no reference to “supreme emergency”. “In applying the criterion of proportionality, military objectives are to be understood strategically and not just tactically. Though in isolation from the context of the war as a whole a particular use of force may well appear cruel and excessive, it may still be judged proportionate and therefore morally justifiable in relation to the overall objective of destroying the military capacity of the enemy and winning the war.”<sup>52</sup>

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<sup>50</sup> Christopher, 186.

<sup>51</sup> Christopher, 187.

<sup>52</sup> Coates, 209.

A UN official visiting Iraq after the Gulf War claimed that it had been bombed back to a pre-industrial age.<sup>53</sup> Allied bombing of the Iraqi infrastructure was the result of carefully targeted attacks. “The damage to power and communications facilities, sometimes in areas remote from the conflict, affected hospitals, sanitation plants, with consequent risk of disease from untreated sewerage, food supplies, where road communications were disrupted, and the ability of the system to restore these services. The situation for the civilian population is exacerbated by the continued imposition of sanctions.”<sup>54</sup> Legally, there is no requirement to take into account the cumulative effect of attacks against targets whose destruction greatly affect civilians. The only requirement is whether power plants and communications centres are military objectives. There is no general rule for roads, bridges, or telephone exchanges. If the target meets the criteria for a military objective, it can be attacked subject to the protection of civilians from excessive collateral damages. Is the potential target military significant in terms of supporting the enemy’s war effort? Is its total or partial destruction or neutralisation offer a definite military advantage? The more technologically advanced a state, the more likely power stations will be targeted, wherever they may be situated.

However, a legitimate military target may become an unlawful objective where the harm to civilians is disproportionate to the military advantage sought; for instance, attacks against nuclear plants, or drinking water installations if the primary reason is to target the population. Attacks against such installations are not prohibited where the target is used in direct support of military action, unless it could result in the starvation or forced movement of the civilian

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<sup>53</sup> Hampson, 97.

<sup>54</sup> Hampson, 98.

population.<sup>55</sup> For instance, during the Gulf War, the airfield near the town of Mosul was bombed, but not the dam, because a breach of the dam would cause devastation to low-lying Baghdad and much of southern Iraq.<sup>56</sup> Although there is no legal requirement, Hampson suggests that better protection would be afforded to civilians if the potential target had to satisfy “two cumulative requirements: first that its destruction offers a definite tactical military advantage and second that it be necessary to the achievement of the strategic war aim.”<sup>57</sup>

A good example of this would be the U.S. air attack on a hydroelectric plant at Lang Chi during the Vietnam War in 1972. The plant was supplying up to 75 per cent of Hanoi’s industrial and defence needs. It was thought, however, that if the dam at the site was breached, as many as 23,000 civilians would die, presumably in the resulting floods. President Nixon was advised that the use of laser-guided bombs would give a 90 per cent chance of accomplishing the mission without breaching the dam. On that basis, the President authorised the attack, which successfully destroyed the electricity plant without breaching the dam.<sup>58</sup> This seems a good example where the target was a legitimate military objective whose destruction afforded a definite military advantage and was necessary to the achievement of the war aim. But in this case, the rule of proportionality dictated the use of precision ammunition in order to lessen the impact on innocent civilians.

The criteria suggested by Hampson do not mean that whatever helps bring about victory is permissible. “They forbid gratuitous or superfluous harm that does not provide a military advantage, but they do not require that the harm be proportional to the benefit. For instance, the

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<sup>55</sup> Hampson, 99.

<sup>56</sup> Coates, 224.

<sup>57</sup> Hampson, 100.

<sup>58</sup> Rogers, 15.

rules of bombardment allow the bombardment of a defended locality and forbid the bombardment of an undefended one. These rules do not additionally require that the bombardment be proportional either to the strength of the defense or to the military value of the town.”<sup>59</sup> This is the difference between law and morality. “Law require strict guidelines in a way in which morality cannot. For the law to require that the harm be proportional to the military would establish a very inexact criterion and would raise questions about the legality of countless individual bombardments....The raising of all these questions every time a commander calls for an airstrike or artillery support would not, in practice, result in a gentler approach to bombardment. It would result in endless charges of criminality. So the law takes a different track: It absolutely forbids bombardments if the town is undefended and allows it in all other cases. From a moral point of view this solution is unsatisfactory.”<sup>60</sup>

From a moral point of view, we want some principle of proportionality. “It would not be morally justifiable to level a city, however large, to destroy a military target, however minor- a single jeep, for example.... It is not the destruction of enemy forces, but he imposition of the nation’s will on the enemy that is the ultimate goal in warfare, and this can sometimes be accomplished by neutralising enemy forces without destroying them. Under certain circumstances it may be possible to capture them, or to isolate them, or even to ignore them, at no significant military cost. In these cases to harm them may be gratuitous or completely out of proportion to the military gain...However, where there is a military gain, it is not morally

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<sup>59</sup> Cohen, 40.

<sup>60</sup> Cohen, 41.

incumbent upon the attacker to pursue these alternatives (and it is never legally incumbent on the attacker to do so).”<sup>61</sup>

“Military necessity” refers to the rationale justifying actions that must be taken if military objectives are to be achieved with minimum loss of time, life, and resources. Proportionality refers to the moral limitation on action that requires that injury and cost incurred by the means employed to achieve the objective be proportional to the importance of that objective. An example is Operation Pointblank, the Allied bombing campaign to destroy or interdict the rail lines leading into Normandy in preparation and support of Operation Overlord. Pointblank required attacks on rail marshalling yards in France and Belgium that were generally located in the centre of cities. The Allied could not bomb these objectives without inflicting heavy damage on the cities and the resulting French and Belgian casualties. A total of 12,000 civilians were killed in that operation, although initial estimates had anticipated higher civilian casualties. Interestingly enough, the justification for the bombing was not based on the estimate that it would save 5,000, 10,000 or 50,000 Allied soldiers. In fact, no one knew at the time what contribution Pointblank would make other than that it would reduce the German’s ability to reinforce Normandy. No one knew how effective Pointblank would be in its stated aim, or even whether it would turn out to be a gain or a loss. For instance, if the Germans had decided not to fight in Normandy and opted for a mobile defence in the interior of France, which would have advantaged their Panzergrenadier divisions, the destruction of the railway system would have hurt the Allies more than the Germans.

Then, why was Pointblank carried out? Because the worst fear of the Allies was that the invasion would be repulsed or contained. This could have become a second Dunkirk, and would

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<sup>61</sup> Cohen, 125.

have required another year at least before the Allies could try again. A lot can happen in one year. Maybe the Russians would have suffered a defeat and withdrew from the war as they did in World War I. Or maybe, the war would have lasted a decade. So Pointblank was carried out because it was military necessary to the success of Overlord. The loss of 12,000 or 25,000 civilians would be regrettable, but a defeat of the invasion would have been the worst disaster of the war.<sup>62</sup> This case illustrates that the “necessity of success” can be used as a legitimate justification at the operational level and not only in the case of “supreme emergency” where the survival of the state is at stake. This requires though that military objectives be understood strategically and not just tactically.

In all cases, however, the concept of proportionality plays a central role. There must be a firm commitment to minimise non-combatant casualties. Therefore, the commander’s responsibilities can be defined as follows:<sup>63</sup>

- a. When planning military operations always take into account the effect they will have on the civilian population and civilian objects, including the environment;
- b. Do everything feasible to verify that the target is a military objective;
- c. Take all feasible precautions to reduce collateral damage and loss;
- d. Observe the rule of proportionality. This requires a calculation of the likely casualties, both military and civilian, and damage compared with the expected military advantage. Factors to be taken into account are: the military importance of the target, the density of the civilian population in the target area, the likely collateral effects of the attack, including the possible release of hazardous substances, the types of

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<sup>62</sup> Cohen, 127-128.

<sup>63</sup> Rogers, pp. 19 and 70.

- weapon available and their accuracy, whether the defenders are deliberately exposing civilians to risk, the mode of attack and the timing of the attack. For instance, during the Gulf War, allied attacks on dual-use facilities were normally scheduled at night because fewer people would be inside or on the streets;
- e. Be ready to cancel or suspend an attack, if necessary. This also involves weighing military gains against humanitarian considerations;
  - f. Give warnings, if circumstances permit; and
  - g. Ensure that targets lists are constantly revised in the light of changing circumstances, as this was done during the Gulf War.

### **The Necessity of Success at the Tactical Level**

The argument about “supreme emergency” is based on the premise that “states as corporate entities are held to have an absolute moral obligation to act in self-preservation, or to be so constituted that they can act in no other way when their existence is threatened. When necessity is used in that sense, the clear implication is that no other action is possible, from either a moral or literal point of view- hence the notion of inevitability.”<sup>64</sup> What about the individual soldier or unit? Does the necessity of success at the soldier’s level make it permissible to intentionally kill non-combatants? The obvious general answer is no, otherwise the massacre of My Lay would be justified. I will not examine all possible facets of the question, but I will limit my discussion to the case where a patrol may have to kill non-combatants to accomplish its mission.

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<sup>64</sup> Anthony E. Hartle, Moral Issues in Military Decision Making (Lawrence, Kansas: University Press of Kansas, 1989), 166.

In January 1991, during the Gulf War, a secret mission had taken a Green Beret commando 150 miles inside Iraq. A Bedouin shepherd walked by the A-team. Sgt First Class Colson realised that they had been discovered. He asked Sgt Seideman whether he should shoot the shepherd. Sgt Seideman said no on the basis that he was a non-combatant. The shepherd ran away screaming and alerted Iraqi soldiers, who within minutes captured the team. Sergeants Seidman and Colson did not shoot because the Rules of Engagement stated: "Should a civilian come across Special Operations Forces during a reconnaissance mission, the civilian may not be attacked unless they commit a hostile act or show hostile intent."<sup>65</sup> In this case, one can argue that screaming was indeed a hostile act or as a minimum an act showing hostile intent resulting in the A-team being taken prisoners or possibly being killed (they could not be sure that the Iraqi would not kill them right away). We see that at the tactical level the notion of "military necessity" as a justification for killing non-combatants is more difficult to apply.

In the last example, is the fact of knowing that one would be taken prisoner and not be killed a sufficient justification for not killing the shepherd? The answer is yes. What if the American soldiers had good reasons to believe that they would have been executed immediately instead of being taken prisoners? What if the shepherd had been a child? One can appreciate how complex the situation may become. No doubt that the decision is easier if one knows that the enemy side also abides by the Law of Armed Conflict. However, when one knows that the enemy makes no prisoner. Or as in the case of the French Legionnaires, during the North African campaign in the XIX century, who knew that if taken prisoners they would be tortured slowly and methodically until death by the tribe's women, then the answer becomes yes.

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<sup>65</sup> James G. II, Zumwalt, "The Law of War- Bringing Civility to the Battlefield." Marine Corps Gazette 79 (February 1995), 45.

As one goes up the one level at the operational level, the consequences are such that in a way the decision seems more straightforward, and at the strategic level in the case of supreme emergency, it is even more obvious. It is so, because as you go up the hierarchy including the political leaders, the level of responsibility increases dramatically, and the consequences are such that they dictate your decision, which then becomes a choice between two evils. Again, the “lesser evil assumes the character of the good.” The notion of “military necessity” is also more difficult to apply at the individual level because the Law of Armed Conflict is very specific about what is illegal in terms of protecting and discriminating between combatants and non-combatants, leaving very little ambiguity regarding the combatants’ obligations towards civilians and prisoners.

But going back to our example, let’s assume that the discovery of the A-team would have resulted not only in the team being taken prisoners but also in the whole land campaign, the turning movement and the envelopment by Allied ground troops, being compromised. Such an eventuality could have resulted in heavy casualties on both sides and possibly in turning the land phase into a long attrition battle. I would argue that “military necessity” (the operational and strategic consequences) would have made it imperative for the A-team to either capture or to kill the shepherd. This is so because going back to our initial definition of a non-combatant (p.9) as being someone who is not harming others, the reaction of the shepherd would in fact harm a lot of people on both sides. The consequences of his gesture would then become totally disproportionate to the value of one individual life.<sup>66</sup>

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<sup>66</sup> Telford Taylor, “War Crimes” in Malham M. Wakin ed., War, Morality, and the Military Profession (Boulder, Colorado: Westview Press, 1984), 426. The chief prosecutor at the Nuremberg trials, Telford Taylor, referring to small detachments on special missions, having in mind the safety of the unit and the success of the mission, wrote: “The prisoners will be killed, by operation of the principle of military necessity, and no military court has been called upon, so far as I am aware, to declare such killing a war crime.”

However, in the case of an ordinary patrol making a prisoner, as in the movie “Saving Private Ryan”, the right choice then is to release the prisoner, assuming that he could not be brought back or given into custody to someone else. This is so because killing him once he had been captured and disarmed would be both immoral and illegal. Furthermore, in that case, releasing the prisoner could not compromise the outcome of the Normandy campaign. In other words, “military necessity” did not justify the killing of a disarmed enemy soldier. It seems that at the tactical level, a workable principle is to use the minimum force and only the force necessary to achieve your mission in order to minimize suffering and unnecessary casualties. However, when the actions of non-combatants are clearly a source of danger, in all likelihood resulting in the soldiers being killed or when the success of the mission at the tactical level is critical to the overall success of the campaign at the operational level, then non-combatants by virtue of their actions lose their immunity and become legitimate targets.

## CONCLUSION

Overall, based on the premise that soldiers are entitled to win the wars they fight, “it is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money.” However, commanders are not allowed to do anything to achieve their aim. Assuming that the war goals are legitimate, the means to achieve them must also be legitimate. We said at the beginning that there are four ways to deal with the inherent tension between *jus ad bellum* and *jus in bello*:

- a. The Law of Armed Conflict is simply ignored;
- b. The law yields slowly to the moral urgency of the cause: the rights of the righteous take precedence over those of the enemy;

- c. There is no exception to the law, rights are strictly respected, whatever the consequences; and
- d. The law is overridden, but only in the face of an imminent catastrophe.

Option a is illegal, therefore unacceptable; option c is totally unrealistic, in fact impossible to achieve. We are therefore left with options b and d. Option d refers to what Walzer calls “supreme emergency”, or when “heavens fall”; it is the only option acceptable to him. As discussed, this option becomes a necessity and is unavoidable when the survival of the state is threatened. It is the only time when “military necessity” is so vital that the Law of War may be overridden, and it becomes **morally permissible to intentionally kill non-combatants**. However, such cases are fortunately rare. Such an emergency arises only when fighting against a totalitarian regime whose victory would destroy civilisation as we define it. This was the case against Hitler’s Germany and against global communism, the so-called “Evil Empire”. But today’s strategic situation would not justify such an extreme.

In an era of Operations Other Than War and limited wars, option b is the only alternative acceptable. As discussed, both at the operational and tactical levels, either to minimise one’s own casualties or to achieve the overall strategic aim of the war, there are cases where it is **morally permissible to kill non-combatants, but only as a side-effect and not as a primary goal in itself**. In every case, usefulness and proportionality will apply to restraint the level of destruction. In other words, the law yields slowly to the moral urgency of the cause. At the tactical level, cases where one would be justified to intentionally kill a non-combatant will be rare. This is so because at that level the case for “military necessity” is less compelling. Also, at both the individual and unit levels, the Law of Armed Conflict is very precise and does not allow the

intentional killing of non-combatants as long as they do not participate to the fighting or contribute directly to the war effort.

Since the concept of proportionality plays a central role, there must be a positive commitment to minimise non-combatant casualties. I believe that modern technology, specifically precision guided weapons, opens such a possibility. During the Gulf War, strict precision bombing was the rule against military target located in non-combatant areas; thus demonstrating that “military necessity” does not conflict with the law.

Actually, it is probably fair to say that no war was ever fought with so much attention paid to minimising both friendly and non-combatant casualties, and collateral damages. Today the immediate broadcasting of events around the globe, the critical importance of public support, the obligation to minimise casualties, and the available technology combine to generate a new awareness and sensitivity about the morality and legality of using military force. Such awareness and public sensitivity apply to both the *jus ad bellum*, the resort to military force, and to the *jus in bello*, the way force is being applied. I agree with Walzer that only limited wars are just wars. First, it reduces the total amount of suffering, but also it keeps open the possibility of a better peace.<sup>67</sup> Bitterness resulting from military conduct thought to be unnecessary, brutal or unfair or simply “against the rules” may lead to a bad peace, which eventually will bring another war.

Finally, once all the considerations on all sides of a difficult choice have been identified, the final decision will still amount to a matter of judgement and conscience. As General Forand said at a seminar on military ethics in 1996 in Ottawa, conscience once aroused defines a line one dares not cross and deeds one does not commit regardless of orders, because those very deeds would destroy something in him which he values more than life itself.

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<sup>67</sup> Walzer, 132-133.



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