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Necessity and non-combatant immunity

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Abstract. The principle of non-combatant immunity protects non-combatants against intentional attacks in war. It is the most widely endorsed and deeply held moral constraint on the conduct of war. And yet it is difficult to justify. Recent developments in just war theory have undermined the canonical argument in its favour – Michael Walzer's, in *Just and Unjust Wars*. Some now deny that non-combatant immunity has principled foundations, arguing instead that it is entirely explained by a different principle: that of necessity. In war, as in ordinary life, harms to others can be justified only if they are necessary. Attacking non-combatants, the argument goes, is never necessary, so never justified. Although often repeated, this argument has never been explored in depth. In this article, I evaluate the necessity-based argument for non-combatant immunity, drawing together theoretical analysis and empirical research on anti-civilian tactics in interstate warfare, counterinsurgency, and terrorism.

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I. Introduction

The principle of non-combatant immunity holds that warring parties must distinguish between combatants and non-combatants and intentionally attack only the former.[1] Although catastrophically abused during the twentieth century, it remains the most important limit on how we fight. It draws support from most ages, and most cultures,[2] is central to the laws of war,[3] and is almost unanimously endorsed

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[1] Combatants are either members of armed forces, or directly participate in hostilities; non-combatants are not combatants (I say more on this in Section II). I refer to civilians and non-combatants interchangeably.

[2] For an overview, see Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (Basingstoke: Palgrave, 2002), p. 72. For the Western tradition see Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell, 2006), p. 131; (Raymond of Peñafort), p. 222; (Christine de Pisan), pp. 148–39; (Cajetan), p. 324; (Vitoria), pp. 162–33; (Suarez), p. 432; (Grotius), p. 174; (Christan von Wolff). For other traditions see Richard Sorabji and David Rodin, *The Ethics of War: Shared Problems in Different Traditions* (Aldershot: Ashgate, 2006).

[3] For example, the 'Basic Rule', in the first additional protocol to the Geneva Conventions, article 48. Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000).

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by national governments, international institutions, and global civil society.[4] Moreover, this theoretical consensus has often influenced military practice, at least among liberal democracies. The city-busting tactics of the recent past are now deprecated, replaced by an almost exclusively counterforce approach.[5] Even contemporary just war theory has few critics of non-combatant immunity – indeed, some regard it as 'a sort of touchstone of moral and intellectual health'.[6]

And yet, despite this near-universal endorsement, recent theoretical developments have left non-combatant immunity embarrassingly difficult to justify. In the canonical text of contemporary just war theory, Michael Walzer's *Just and Unjust Wars*, the argument was simple: all combatants lose their right to life because they threaten others' lives; all non-combatants, by definition non-threatening, retain that right.[7] But recent work has seriously undermined this account of how we lose the right to life, showing that justified and unjustified combatants should not enjoy equal permissions to non-consensually harm one another.[8] Merely posing a threat is not sufficient to lose one's right to life: the threat must be unjustified. Moreover, nor is posing an unjustified threat necessary for liability: a politician who culpably sends others to fight unjustifiably might be liable, despite posing no threats himself. Walzer's revisionist critics conclude that liability is grounded in responsibility for contributing to threats of unjustified harm.[9]

This responsibility-based view resonates strongly with familiar intuitions about the use of force in self- and other-defence, and has received compelling theoretical support from its advocates.[10] And yet, when applied to the practice of war, it seems incapable of sustaining our most familiar moral commitments. In particular, if individual responsibility is what matters, then many civilians will be liable to be killed. As much as 25 per cent of the population of industrialised countries works in war-related industries;[11] many of the rest of us foster public support for our state's military enterprises; we provide the belligerents with crucial financial and other services; we support and sustain the soldiers who do the fighting; we pay our taxes and in democracies we vote, providing the economic and political resources without which war would be impossible. In modern states arguably all adults bear some responsibility,

[4] Alexander Downes, 'Desperate Times, Desperate Measures: The Causes of Civilian Victimisation in War', *International Security*, 30:4 (2006), pp. 152–95, esp. 152.

[5] Colin H. Kahl, 'In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq', *International Security*, 32:1 (2007), pp. 7–46.

[6] Tony Coady, 'Terrorism, Just War, and Supreme Emergency', in Tony Coady and Michael O'Keefe (eds), *Terrorism and Justice: Moral Argument in a Threatened World* (Carlton: Melbourne University Press, 2002), pp. 8–21, esp. 19.

[7] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), pp. 42–5. There is also a statist dimension to Walzer's distinction between combatants and non-combatants, which is absent from the subsequent revisionist discussion. Thanks to an anonymous reviewer for pointing this out.

[8] See, for example, Tony Coady, 'The Status of Combatants', in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), pp. 153–75; Cecile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Jeff McMahan, 'Innocence, Self-Defense and Killing in War', *Journal of Political Philosophy*, 2:3 (1994), pp. 193–221; Lionel Mcpherson, 'Innocence and Responsibility in War', *Canadian Journal of Philosophy*, 34:4 (2004), pp. 485–506; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002).

[9] Liability is only one necessary condition for the justified infliction of harm; it must also be proportionate and necessary to avert an unjustified threat.

[10] Although for a theoretical critique, see Seth Lazar, 'Necessity in Self-Defense and War', *Philosophy & Public Affairs*, 40:1 (2012), pp. 3–44.

[11] Downes, 'Desperate Times', pp. 157–8.

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however attenuated, for the unjustified threats posed by our states. If that degree of responsibility is sufficient for liability, and liability is sufficient for being a permissible target, then the revisionist account would radically undermine the principle of non-combatant immunity, and threaten to legitimate such presumptively abhorrent practices as terrorism and total war.[12]

Revisionists might resist these worries by arguing that a higher degree of responsibility is required for liability; the problem is that many combatants are no more responsible for unjustified threats than many civilians. Whether because their role does not require it, or through incompetence, fear, or principle, their contributions to individual threats to life, and to the overall threat posed by their state, are at most negligible and unnecessary. If revisionists increase the threshold of responsibility required for liability to remove ordinary civilian adults from the liability net, they will render many enemy combatants non-liable as well. Since it would be impossible to discriminate between liable and non-liable enemy combatants, and since revisionists think that intentionally killing the non-liable is permissible only to avert unusual catastrophes, this move tends inexorably towards a form of pacifism.[13]

Unwilling to accept the radical implications of their views, a number of revisionist just war theorists have argued that we can ground wartime liability in a low degree of responsibility, without either undermining non-combatant immunity, or endorsing some form of pacifism. Although they pursue different strategies to this end,[14] one in particular has achieved a remarkable degree of support. The argument is simple: acts of war are not permitted unless they are necessary; targeting even liable non-combatants is (almost) never necessary; so targeting even liable non-combatants is (almost) never permissible. If true, this allows revisionists to endorse a low threshold of responsibility for liability – thus ensuring that all combatants are liable to be killed – without thereby rendering non-combatants permissible targets in war, and so opening the door to terrorism and total war.[15] This view has been endorsed by revisionists such as Jeff McMahan, Cécile Fabre, Gerhard Øverland, Helen Frowe, Michael Gross, Richard Arneson, and Lionel McPherson.[16] It has also received

[12] The risk of total war is limited, since there will always be some non-combatants who are not liable. However, the responsibility view threatens to move us much closer to total war than most would think acceptable.

[13] This is a much-abridged version of the argument that I make against revisionists in, for example, Seth Lazar, 'The Responsibility Dilemma for *Killing in War*', *Philosophy & Public Affairs*, 38:2 (2010), pp. 180–213.

[14] One response, of course, is simply to talk up the responsibilities of combatants, and talk down those of non-combatants. See, for example, Jeff McMahan, 'Who is Morally Liable to be killed in War', *Analysis* (2011); Cécile Fabre, 'Guns, Food, and Liability to Attack in War', *Ethics*, 120:1 (2009). This typically involves simply applying a double standard to get the desired result.

[15] Throughout this article I assume a low degree of responsibility suffices for liability, and accordingly that in most modern wars many non-combatants are liable to be killed. Only on this assumption is the necessity-based argument interesting and useful; since without some such argument, too many non-combatants would be liable for revisionism to be consistent with the conventional affirmation of non-combatant immunity.

[16] Richard J. Arneson, 'Just Warfare Theory and Noncombatant Immunity', *Cornell International Law Journal*, 39 (2006), pp. 663–88, p. 120; Cecile Fabre, 'Guns, Food', p. 63; Helen Frowe, 'Self-Defence and the Principle of Non-Combatant Immunity', *Journal of Moral Philosophy* (2011), pp. 19–20; Michael Gross, 'Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East', *Political Science Quarterly*, 120:4 (2005–6), pp. 555–79, esp. 566; Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), p. 225; Mcpherson, 'Innocence and Responsibility in War', p. 505; Gerhard Øverland, 'Killing Civilians', *European Journal of Philosophy*, 13:3 (2005), pp. 345–63, esp. 352, 360; Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs*, 20:4 (1991), pp. 283–310, esp. 297.

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support from contractarian and rule-consequentialist theorists of war, who are more sympathetic to the other Walzerian positions rejected by revisionists. They appeal to the same argument in a subtly different way: non-combatant immunity, they argue, reduces the suffering of war without ever denying belligerents a necessary means to success.[17]

In such a disputatious field as just war theory, this consensus is striking. Equally striking, however, is the failure by any of this argument's advocates to offer substantial support for either its normative theoretical premise, or its descriptive empirical premise. Each is treated as though it is true *a priori*. Elsewhere I offer a sustained analysis of just what necessity means in war and self-defence.[18] Here I test the necessity-based argument's empirical premise: that targeting non-combatants is almost never necessary in war. I start by developing a working model for assessing the necessity of anti-civilian attacks, then consider the evidence available from the history of armed conflict. My aspirations are both normative and methodological: to evaluate the necessity-based argument for the principle of non-combatant immunity, and to argue that just war theorists should support their empirical claims with appropriate evidence.

II. How do we test for necessity in war?

This section presents a working analysis of necessity, and a methodology for testing the empirical premise of the necessity-based argument. We must begin by clearing up some terminological ambiguity. In international law and military discourse, military necessity is typically understood as simply meaning military advantage.[19] On this view, anything that increases the likelihood and reduces the costs of victory is considered militarily necessary. Obviously it is not this understanding of necessity in war that grounds the necessity-based argument for non-combatant immunity. The argument depends instead on a more general normative principle, which is indeed frequently recognised in international law and military discourse, even if not always under this description. The principle of necessity is defined by its inverse: the infliction of unnecessary suffering is always impermissible. Undeserved, involuntary human suffering is without exception bad, and is *prima facie* proscribed; if it is unnecessary, then there is nothing to override this *prima facie* prohibition.[20]

[17] The rule-consequentialists argue that combatants should obey the rules that have the best overall outcomes: Judith Lichtenberg, 'War, Innocence, and the Doctrine of Double Effect', *Philosophical Studies*, 74:3 (1994), pp. 347–68, esp. 366; George I. Mavrodes, 'Conventions and the Morality of War', *Philosophy and Public Affairs*, 4:2 (Winter 1975), pp. 117–31, esp. 125; Henry Shue, 'Targeting Civilian Infrastructure with Smart Bombs: The New Permissiveness', *Philosophy and Public Policy Quarterly*, 30:3 (2010), pp. 2–8, esp. 3; Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St Petersburg Assumption', *Ethics and International Affairs*, 26:3 (2012), pp. 311–34. Contractarians argue that the rules of war constitute a fair agreement between states representing their peoples' interests. See Yitzhak Benbaji, 'A Moral Right to Undertake the Duty of Obedience', *Ethics*, 122:1 (2011), pp. 43–73.

[18] See Lazar, 'Necessity in Self-defense and War'.

[19] 'Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.' USA vs. List et al. (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253. See also the definition of necessity in US Army, 'Civilian Casualty Mitigation', *Army Tactics, Techniques and Procedures*, 3–37.31 (2012), pp. 1–8.

[20] Deserved or consenting suffering can also be bad, but it depends on the details of the case.

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The necessity constraint comprises three individually necessary and jointly sufficient conditions for ensuring that the infliction of some harm H, on a victim V, by an agent A, to achieve a goal G is necessary.

Condition 1: the harm done must advance some goal. This means two things. First, the harm must be aimed at achieving a goal – it must not be wholly wanton, or an end in itself. Second, it must be somewhat effective at achieving that goal. Harm that contributes nothing to achieving its objective is inescapably unnecessary.

Condition 2: there must be no less harmful course of action with equal or better prospects of achieving the goal. If A could have as good a chance of bringing about G by inflicting less than H harm, then the additional harm done by inflicting H serves no purpose, and so is unnecessary.

Condition 3: if there is a less harmful course of action available that is less likely to succeed, then the difference in prospects of success – or effectiveness – must be sufficiently weighty to justify the difference in harm inflicted.[21] Suppose that, if A inflicts H harm, he has a 0.8 chance of achieving G, but if he inflicts H/2 harm, he has a 0.3 chance of success. In this case, both H and H/2 are somewhat effective at achieving G, but the less harmful option involves costs to A. The more harmful option satisfies necessity only if the additional harm inflicted on V is justified by avoiding the cost to A of a 0.5 reduction in his prospects of success.

For the necessity-based argument for non-combatant immunity to be true we must show that harms inflicted on non-combatants in war (almost) never satisfy these three conditions.

With this working analysis of necessity in hand, the next step is to ask how it can be tested. This is no easy task. We must first formulate a clear sense of the type of anti-civilian attacks that are our focus; then consider the specific methodological issues raised by showing that each of the three necessary conditions for necessity is satisfied (or otherwise).

The first task is to find an operationalisable and morally plausible definition of non-combatant status. Revisionists might seek to defend a version of non-combatant immunity by redefining what is meant by a non-combatant, or proposing some alternative distinction, such as that between participants and non-participants, contributors and non-contributors, or indeed just liable and non-liable.[22] Whatever the merits of those moves, they are irrelevant to this article, since our interest is in whether revisionism is consistent with conventional beliefs about the protection of non-combatants in war, which presupposes the conventional classification of combatants and non-combatants. This is the line drawn by international law, according to which there are two jointly necessary and sufficient conditions for having non-combatant status: you must be neither a member of the belligerent armed forces, nor directly participating in hostilities. Operationalising this definition is not easy, since the notion of 'direct participation' admits of degrees – the familiar problem of how to classify an individual who is a farmer by day, and a guerrilla by night.[23]

[21] This condition illustrates the relationship between necessity and proportionality. A harm H is proportionate if and only if the harm inflicted is justified by the harm averted. This means comparing H against a baseline of inaction, and asking whether the difference in harm done is justified by the difference in harm averted. But inaction is just one of the 'less harmful courses of action available that is less likely to succeed', mentioned in condition 3. It follows that if H is disproportionate, then it cannot be necessary (so if it satisfies necessity, then it must be proportionate).

[22] Thanks to a reviewer for raising this point. For a similar move see McMahan, *Killing in War*, p. 232; Frowe, 'Self-Defence', p. 21.

[23] See, for example, Ibid., pp. 1–18.

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Having decided who the non-combatants are, we need next to consider what tactics the necessity-based argument proscribes. Here I think the laws of war are too inclusive for our purposes. The principle of non-combatant immunity in international law enjoins the protection of non-combatants against all indiscriminate attacks, where indiscriminate attacks fall into two main categories: those where the non-combatants are the intended target, and those

> 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.[24]

Revisionists do not invoke the necessity-based argument to protect non-combatants against these latter unintended, disproportionate harms, focusing instead on harms that are purportedly a means to achieve a military objective. Our focus, then, should be on the intentional attacks on non-combatants proscribed in the Basic Rule, article 48 of the first additional protocol:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[25]

It is worth noting, in passing, that revisionists' views have troubling implications for collateral harms to non-combatants, which cannot be resolved by appealing to the necessity-based argument. If many non-combatants are liable to be harmed intentionally, then they (and perhaps others) will also be liable to suffer equivalent, perhaps even greater harms when they are inflicted collaterally.[26] This means that a greater magnitude of harm can proportionately be inflicted to achieve the same end, than if we denied non-combatant liability. Those who worry about the implications of revisionism for non-combatant immunity should be equally concerned that it threatens to make the proportionality constraint on collateral harms to non-combatants (at least those who are liable to be harmed collaterally) so much more permissive. However, for the purposes of this article, and assessing the necessity-based argument, I will focus on intentional attacks on non-combatants. Notice that this includes what most people think of as acts of terrorism within its ambit.[27]

To satisfy the necessity-based argument's empirical premise we must consider whether anti-civilian attacks in war ever satisfy the three necessary and sufficient conditions for necessity in war. The first task is to ask whether anti-civilian attacks are ever effective at advancing states' goals in war. This again raises both descriptive and normative problems. First, how do we know whether a tactic is effective in war? How can we demonstrate the causal connection between the deployment of some tactic and the realisation of a strategic outcome? Obviously experimental verification is out of the question, so all we can do is interpret the historical and contemporary record. But how can we make the relevant causal attributions, given the over-determined nature of success and failure in war? Where anti-civilian attacks are followed by strategic success, how can we be sure of the role they played in bringing about that

[24] Article 51, 5(a.ii), of the first additional protocol to the Geneva Conventions, Roberts and Guelff, *Documents*, p. 449.
[25] Roberts and Guelff, *Documents*, p. 447.
[26] See, for example, McMahan, *Killing in War*, p. 218ff.
[27] Thanks to Jeff McMahan for helping to clarify this point.

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success? Where defeat follows, how can we know whether the anti-civilian attacks were to blame, or conversely whether they were effective, and defeat resulted from other factors? These are familiar problems with causal attribution, but they are all exacerbated by the confusion and empirical obscurity endemic to armed conflict.[28]

These descriptive problems are compounded by a difficult moral question, which the revisionist advocates of the necessity-based argument will feel particularly keenly. The necessity constraint outlaws unnecessary harms, because all human suffering (except perhaps when deserved or consented to), is a bad thing, which we have *prima facie* reasons to avoid. If that harm does not advance a goal, then we have no moral reason that can outweigh that *prima facie* prohibition. Notice, though, that this is also true if the harm will bring about a morally objectionable goal. Suppose A is a thief, V a security guard, and G is the outcome where A steals the contents of a jewellery shop. Even if there is no less harmful way to bring about G than to inflict H on V, since G is a morally objectionable goal A still has no moral reason that can outweigh the *prima facie* reason not to harm V. In other words, while H was necessary to bring about G in a value-neutral sense, it is in a broader sense still morally unnecessary.

We can call necessity 'morally neutral', when our focus is on bringing about G, without prejudice as to G's moral value or disvalue, and 'morally rich', when it is a necessary condition of some harm satisfying necessity that the goal aimed at be sufficiently morally valuable.[29] This contrast between morally neutral and morally rich necessity could have profound implications both for the necessity-based argument and for our attempt to evaluate it. If any attacks that serve an unjustified goal inescapably fail the relevant necessity constraint, then the necessity-based argument for non-combatant immunity must again be restricted in scope, and the task of assessing its empirical premise would become considerably more challenging.

If the necessity-based argument deploys the morally rich necessity concept, then it cannot support a neutral principle of non-combatant immunity, which applies to all sides in a conflict, regardless of whether their aims are justified. Since any force used to achieve an unjustified goal is *a priori* unnecessary, belligerents whose objectives are unjustified have no reason to refrain from attacking non-combatants which does not equally forcefully proscribe attacking combatants. This is a significant shortcoming – not only because it gives inadequate guidance to otherwise unjustified belligerents, but because it cannot support the very intuitive view that even if all the killing you do in war is wrongful, killing non-combatants is other things equal an especially egregious, aggravated form of wrongdoing.

This moralised understanding of necessity also raises problems for the argument's empirical claims. It implies that we should be interested only in cases of anti-civilian attacks that aim at justified goals. Should our dataset therefore include only cases where anti-civilian attacks are aimed at a good sufficient to justify that harm? This would pose serious problems for the argument's falsifiability. For each historical example, we would need to determine not only whether the war fought by a belligerent

[28] Colin S. Gray, *Modern Strategy* (Oxford: Oxford University Press, 1999), pp. 295–6; Matthew Adam Kocher, Thomas B. Pepinksy, and Stathis N. Kalyvas, 'Aerial Bombing and Counterinsurgency in the Vietnam War', *American Journal of Political Science*, 55:2 (2011), pp. 1–18, esp. 2; Robert Pape, 'The Strategic Logic of Suicide Terrorism', *American Political Science Review*, 97:3 (2003), pp. 343–61, esp. 351.

[29] Thanks to the reviewers for pressing me to clarify this.

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was justified as a whole, but also whether the specific aim of this attack was justified. Resolving either of these matters involves considerable controversy: indeed, to do it properly each example would require a book-length discussion of its own. We would need first to settle on the correct principles for assessing the attack, and then authoritatively determine whether the broader objectives of the belligerent were justified, and similarly for the specific objective attained by these tactics. Not only would this make our evaluation of the necessity-based argument contingent on first resolving moral questions that are each as complex and controversial as those around non-combatant immunity, it would also potentially reduce the dataset from which inferences could be drawn to an infinitesimally narrow field. This is especially likely to be true for revisionists if, as I have argued elsewhere, their view would render almost no actually existing wars justified.[30]

However, this worry can be overcome, if the core objectives of justified and unjustified conflicts (and the vast set that fall somewhere in between) are the same. More precisely, provided the goal at which a belligerent's tactics are aimed is the sort of objective that a justified belligerent could be aiming at, then if a given tactic is the necessary means of achieving that goal, then if most other things besides overall justification are equal, we can infer from its being necessary (in the morally neutral sense) in an unjustified or ambiguous conflict that it could also be necessary (in the morally rich sense) in a justified one. In many wars, the methods by which victory is achieved are the same – belligerents seek to capture strategically important assets and locations, and to subdue the adversary's ability to fight back. Moreover the outcomes are the same: one side seeks to establish a sufficient threat advantage over the other to force it to make further territorial and political concessions. Notice that this does not entail taking a position on the 'independence thesis', that assessments of *in bello* conduct can be formulated without regard to whether one's cause is *ad bellum* justified.[31] It is merely an empirical claim, that the intermediate objectives that must be secured for military victory to be achieved are the same in many wars, regardless of whether they are justified or unjustified.

Imagine (not implausibly) that the history of warfare offered only unjustified wars, but that we were faced, now, with the imperative to fight a war that is justified. Suppose you are the commander-in-chief of the justified belligerent, and you ask your generals to plan a strategy composed of tactics that satisfy military necessity. They could surely draw lessons from the history of warfare, from scenarios that were sufficiently similar to their own except that the relevant belligerent had unjustified goals, about what had proved necessary in the neutral sense and so would for them be necessary in the morally rich sense. The mere fact that the dataset differs in this way from their own experience is not sufficient to block the inference from one set of cases to the other.

Of course, sometimes there are specific reasons to block that inference. If the objective aimed at by the belligerent providing the data was the sort that could not possibly be aimed at by a justified belligerent, then the necessity of victimising civilians to achieve that objective is irrelevant to determining necessity in justified conflicts. This will most obviously be true when the belligerent's objective is itself to cause

[30] See, for example, Seth Lazar, 'Morality & Law of War', in Andrei Marmor (ed.), *Companion to Philosophy of Law* (New York: Routledge, 2012), pp. 364–79.
[31] Thanks to a reviewer for raising this possibility.

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harm to civilians – if the goal is genocide or ethnic cleansing, then obviously anti-civilian attacks will be necessary in the neutral sense, but since these objectives could not possibly be aimed at by justified belligerents, this is irrelevant to the necessity-based argument.

Provided the dataset only includes cases where the objectives are such as could be aimed at by a justified belligerent, we can infer from it conclusions about necessity in future justified wars. This means that instead of focusing only on cases where we can (*per impossibile*) show that the overall objectives of the conflict, and the specific near-term objectives of the tactical manoeuvre being assessed, were justified, we can draw on a much wider pool of evidence. Interstate conflicts over disputed territory, insurgencies against incumbent powers, and attempts to suppress violent insurgencies are conflicts where the objectives could be aimed at by a justified belligerent. This does not mean that all the specific historical cases discussed in what follows could have been justified – indeed, we need make no controversial claims along those lines at all. It is merely to say that if a future belligerent (FB) faces a situation like that faced by some historical belligerent (HB), which is sufficiently similar in all morally relevant respects except that FB's goals are justified, while HB's otherwise similar goals were not, then we can reasonably infer from it being necessary in the neutral sense for HB to use some tactic (T), that T can be necessary in the morally rich sense for FB.

To show that the first condition of necessity is satisfied, we need show only that anti-civilian attacks are effective at achieving the sort of goal that a justified belligerent could aim at. This is challenging enough; evaluating whether the second and third conditions for necessity are satisfied adds further empirical difficulties. An effective attack is unnecessary if there is either some other equally or more effective option available that would be less harmful, or if there is a less harmful option such the difference in effectiveness between them does not justify the additional harm inflicted. This means that to know whether a tactic satisfies necessity we should compare it with options that were not taken: counterfactual scenarios about which we can only speculate. Even in favourable conditions, counterfactuals are (to put it charitably) indeterminate. But in the chaotic context of war saying that some other strategy not taken would have been just as or more effective, and equally or less harmful, is extremely difficult, if not impossible.

Rather than engage in this sort of complex speculation, I think we should keep a tighter handle on our counterfactuals, and so I propose a correspondingly more modest research question. Does the historical record suggest that there can be situations where belligerents, aiming at the sort of objectives that justified belligerents might aim at, find anti-civilian attacks to be effective when no other effective option is available to them? Showing that such cases will not arise is a necessary condition for justifying the necessity-based argument; conversely a strong argument that they will would help refute it.[32]

The remainder of this article seeks to answer this question. I begin by asking whether anti-civilian attacks can be effective, considering in turn the case against and the case for this proposition. I then ask whether, in cases where anti-civilian

[32] This also allows reference to existing research on the strategic success of anti-civilian attacks. If just war theorists are to test their theories against the empirical record while remaining philosophers, then they had better be able to make use of the research by political scientists and international relations scholars who address these problems empirically.

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attacks do look effective, there might be no other effective alternatives. I conclude by considering how the necessity-based argument stands, in light of this enquiry.[33]

III. The case against anti-civilian attacks

It is harder to show that anti-civilian attacks are never effective than to show they sometimes work. And yet if they are ineffective in a range of conflicts, then absent countervailing evidence, that would support the necessity-based argument. In this section I discuss research that supports this response, looking at aerial bombing in interstate conflict, then at counterinsurgency and terrorism. In section IV, I respond to these arguments, and present the opposite case.

In *Bombing to Win* (1996), Robert Pape famously argues that aerial bombing of civilians is strategically redundant. Distinguishing between punishment and denial tactics – the former inflict civilian suffering to coerce concessions (either directly or through popular uprising); the latter neutralise the adversary's military capacities, from production, through supply line to battlefield – he shows that in 40 campaigns between 1917 and 1991, punishment did not work.[34]

Pape's principal target, besides mid-1990s' US strategic doctrine, is Giulio Douhet, whose 1921 book *Command of the Air* is the *locus classicus* of punishment-based aerial bombing in strategic theory.[35] In the Second World War, British Bomber Command explicitly endorsed this approach: the bombing of Germany left seven and a half million people homeless; 305,000 civilians were killed, and 780,000 wounded. Cologne, Hamburg, and Dresden were flattened, in the hopes of prompting the people to rise up against their leaders to stop the war.[36]

[33] In comments on this article, Jeff McMahan has raised the following challenge to the dataset from which the remaining discussion draws. He notes that the effectiveness of anti-civilian attacks 'depends to a very considerable extent on the nature of the regime against which it is used', in particular, on the target being a liberal democracy, since dictators are unlikely to care about whether their non-combatant citizens are harmed (McMahan, personal communication on file). He then notes that just wars are often fought by liberal democracies against tyrannical or authoritarian regimes, and in such cases anti-civilian tactics are likely to be less effective. This means that what we really need are data that give the rate of success of the use of anti-civilian tactics by liberal democracies fighting just wars against non-democratic states. Some research has been done on related topics – the broad consensus is that democracies are more likely to make concessions to terrorism than non-democracies (although there is strong dissent from Max Abrahms, see fn. 48 below); and Alexander Downes has shown that, whatever their success rates, liberal democracies are not less likely to use anti-civilian attacks than other polities: Alexander Downes, 'Restraint or propellant? Democracy and civilian fatalities in inter-state wars', *Journal of Conflict Resolution*, 51:6 (2007), pp. 872–904. I think, however, that the constraint that we focus only on just wars is problematic for the reasons given in the text above, concerning the great difficulties in reaching this sort of judgment. Additionally, even if anti-civilian tactics did prove typically ineffective against authoritarian regimes, liberal democracies fighting just wars might well face other adversaries – the democratic peace hypothesis could be tested in future, moreover liberal democracies are very likely to face insurgencies, and in counterinsurgency anti-civilian attacks can be effective not only as a coercive tool, but as a means of preventing civilians from helping the insurgents.

[34] Robert Pape, *Bombing to Win: Air Power and Coercion in War* (London: Cornell University Press, 1996).

[35] Giles Douhet, *The command of the air* (USAF warrior studies; Washington, DC: Office of Air Force History, 1983).

[36] Pape, *Bombing to Win*, p. 271.

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And yet, Pape argues that the anti-civilian bombing of Germany played little role in bringing about Allied victory. It neither compelled the Nazi regime to make concessions, nor prompted an uprising against them. Similarly, Pape's reading of internal records suggests that anti-civilian attacks in Japan (including the atomic bombs) were largely irrelevant to their surrender, which was determined more by the advancing Soviet army, rather than worries about continued civilian suffering. He offers detailed analysis of three other cases that might be thought counterexamples (Korea, Vietnam, Iraq (1991), all bombed by the US), and argues that in none did punishment bombing contribute to victory.[37] Bombing civilians, he concludes, has never led to uprisings against the adversary regime.[38]

Why does Douhet bombing fail? Regarding Germany, Pape notes that nationalist sentiment, government propaganda, and state repression stopped anti-civilian attacks leading to anti-war protests.[39] Additionally, terrible attacks on civilians leave them primarily concerned with survival, rather than bigger political issues; indeed, it may make them more loyal, since only their government can protect them from these attacks and their effects.[40] More generally, Pape argues that nation-states can tolerate high costs for their vital interests and national pride. They can also mitigate the bad effects of punishment bombing – perhaps not to the civilians' benefit, but enough at least to minimise their impact on fighting capacity.[41]

Some researchers of counterinsurgency have reached similar conclusions about the effectiveness of anti-civilian attacks, identifying three plausible objections.

First, counterinsurgents need the support of those whom the insurgents claim to represent. The US Counterinsurgency Field Manual notes that 'counterinsurgents that use excessive force to limit short-term risk alienate the local populace. They deprive themselves of the support or tolerance of the people. This situation is what insurgents want. It increases the threat they pose.'[42] Insurgents intend their adversaries to overreact, because that strengthens their position. Excessive force generates anger, which triggers high-risk behaviour.[43]

The second argument extends the first: the domestic population is not the only relevant audience; often, the international community is watching too. If the counterinsurgent is internationally regarded as illegitimate, that raises new obstacles to success. When counterinsurgents engage in anti-civilian attacks, international disapprobation, economic sanctions, even foreign intervention might ensue – Libya is the obvious recent example; Syria may be the next.

The third objection is more abstract. Counterinsurgents use force against civilians to compel compliance. But indiscriminate force is a blunt tool: if those who comply and those who refuse are equally likely to be killed, then why comply?[44] To work,

[37] Ibid., p. 315.
[38] Ibid., pp. 271–2. See also Michael Horowitz and Dan Reiter, 'When Does Aerial Bombing Work? Quantitative Empirical Tests, 1917–1999', *Journal of Conflict Resolution*, 45:2 (2001), pp. 147–73.
[39] Pape, *Bombing to Win*, pp. 271–2.
[40] Ibid.
[41] Ibid., p. 316.
[42] US Army, 'Counterinsurgency Field Manual' (Washington: United States Army and United States Marine Corps, 2006), § 7–24. This is also a consistent theme of Army, 'Civilian Casualty Mitigation'.
[43] Stathis N. Kalyvas, 'The Paradox of Terrorism in Civil War', *The Journal of Ethics*, 8:1 (2004), pp. 97–138, esp. 116.
[44] Alexander Downes, 'Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy', *Civil Wars*, 9:4 (2007), pp. 420–44, esp. 426; Kalyvas, 'Paradox of Terrorism', p. 104; David Mason, 'Insurgency, Counterinsurgency, and the Rational Peasant', *Public Choice*, 86:1/2 (1996), pp. 63–83, esp. 80.

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coercive sanctions must be prompt, focused, proportionate, and consistent. Indiscriminate attacks on civilians meet none of these criteria.[45] Far from compelling compliance, they are likely to force civilians into the insurgents' arms, as the only people who can offer protection.[46]

In counterinsurgency, scepticism about the efficacy of anti-civilian attacks is common. In research on terrorism, the dominant view is probably the reverse.[47] Those arguments are discussed below; here I focus on a prominent critique of this consensus.[48] It begins with a methodological objection: much of the research on terrorism's effectiveness 'rests on game-theoretic models, single case studies, or a handful of well-known terrorist victories', rather than broader empirical foundations.[49] In response, Max Abrahms examines 28 organisations classed by the US State Department as Foreign Terrorist Organisations before 2001, and assesses their success rate, as well as their methods. He identifies 42 policy goals for the 28 organisations, and concludes that only three were either partially or fully achieved.[50] He notes, further, that organisations that primarily target civilians achieve even limited successes only very rarely (again, he finds three examples).[51] He reasons that terrorists are more likely to succeed when they have limited territorial goals, but targeting civilians miscommunicates your policy objectives, suggesting that your aims are maximalist and ideological.[52] By killing civilians, terrorists engage the adversary's vital interests, and so invoke the same resilience and resistance that makes Douhet-style bombing so ineffective.[53]

IV. Anti-civilian attacks can be effective ...

Notwithstanding the arguments of the foregoing section, other evidence suggests that anti-civilian attacks can be effective in terrorism, counterinsurgency, and interstate conflict. The contrary conclusion is based in part on too restrictive conceptualisations of the relevant attacks, and of what it is for a tactic to be effective. In this

[45] Kalyvas, 'Paradox of Terrorism', p. 118.
[46] Jason Lyall, 'Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya', *Journal of Conflict Resolution*, 53:3 (2009), pp. 331–62, esp. 335. See also Reed M. Wood, 'Rebel Capability and Strategic Violence against Civilians', *Journal of Peace Research*, 47:5 (2010), pp. 601–14, esp. 603.
[47] Max Abrahms, 'Why Terrorism Does Not Work', *International Security*, 31:2 (2006), pp. 42–78, 44–5.
[48] Ibid.; Max Abrahms, 'Why Democracies Make Superior Counterterrorists', *Security Studies*, 16:2 (2007), pp. 223–53; Max Abrahms, 'What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy', *International Security*, 32:4 (2008), pp. 78–105; William Rose, Rysla Murphy, and Max Abrahms, 'Does Terrorism Ever Work? The 2004 Madrid Train Bombings', *International Security*, 32:1 (2007), pp. 185–92.
[49] Abrahms, 'Why Terrorism Does Not Work', p. 43.
[50] Hezbollah's expulsion of Israel from Southern Lebanon in 1984 and again in 2000 are coded as total successes, as is the Tamil Tigers' establishment of autonomy in Sri Lanka (the paper was written in 2006). Abrahms aimed to be generous, for example counting both partial and total successes as policy successes, and only complete failure as failure, and attributing all successes to terrorism rather than to any other intervening variables. Ibid., p. 51.
[51] The drawdown of US troops in Saudi Arabia post 9/11 is coded as a limited success, as is Israel's withdrawal from the Gaza strip.
[52] Abrahms, 'Why Terrorism Does Not Work', p. 56.
[53] Ibid., pp. 76–7.

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section I expand on these observations, before noting some cases where even by the criteria set out above, anti-civilian attacks appear effective.[54]

The work by Kalyvas, Abrahms, and Pape discussed above operates with too narrow an understanding of anti-civilian attacks to afford compelling support to the necessity-based argument (though that understanding was undoubtedly appropriate for their own research objectives). Each focuses on the efficacy of indiscriminate civilian attacks, but this is not the only relevant form: selective, or discriminate anti-civilian attacks are also possible, and are no less morally troubling. They can certainly be massive in scale. The Vietcong, for example, selectively assassinated as many as 50,000 people in 15 years.[55] In the Ukrainian resistance to Nazi Occupation selective killings by the Germans cumulatively rivalled the death toll in massacres.[56] Additionally, detailed research shows that what history classes as massacres are often in fact quite selective – as an observer of the 1997 massacres in Algeria noted: 'Massacres are not blind. They are planned and target specific families. They bypass other families.'[57] Terrorists and insurgents also often use selective anti-civilian attacks – witness the rise in assassinations of individual non-combatants by the Afghan Taliban in recent years.[58] Unfortunately there is not enough research to draw firm conclusions about the effectiveness of selective anti-civilian attacks, but *a priori* it has one obvious advantage over indiscriminate attacks: if your objective is to coerce a target audience into some set of actions, targeting specific civilians who help the adversary gives others clear incentives to defect to your side.[59]

Still more important than this narrow conceptualisation of anti-civilian attacks is a too-restrictive understanding of what makes a tactic effective. Kalyvas, Abrahms, and Pape all define effectiveness by contribution to overall strategic success. A tactic is not effective, on their view, unless it leads to victory. But this is obviously too restrictive – not only because of the difficulties identifying the causal contribution of one tactic to overall victory in war, the paucity of clear data in war, and the potential over-determination of every outcome, but also because tactics can be effective insofar

[54] A further observation about the Kalyvas/Pape/Abrahms conclusions: each of these arguments depends in part on how adversaries and bystanders respond to anti-civilian attacks. Pape stresses the resilience of nation-states, which rally around the flag when indiscriminately targeted; Kalyvas and the Field Manual argue that anti-civilian attacks delegitimises counterinsurgents among both domestic and international audiences; Abrahms emphasises the role responses play in rendering avas ineffective. These responses partly depend on the prior belief that attacks on civilians are unjustified. Otherwise attacking civilians would not delegitimise, or invite the same stoicism. Anti-civilian attacks are ineffective precisely because they are believed unjustified.

[55] Kalyvas, 'Paradox of Terrorism', p. 106.

[56] Ibid. Again, the overarching objectives of the Germans were obviously not such as a justified belligerent could have aimed at. However, putting a stop to a violent resistance is, I assume, the sort of goal that could be justified.

[57] Quoted in ibid., p. 107.

[58] UNAMA and AIHRC, 'Afghanistan', REF.

[59] Downes, 'Filling the Graves', p. 422. See generally Stathis N. Kalyvas, 'Wanton and Senseless? The Logic of Massacres in Algeria', *Rationality and Society*, 11:3 (1999), pp. 243–85. A reviewer for this journal notes that selective anti-civilian attacks should be of special interest to revisionists, whose focus is on the individual bases of liability. While this is true, the present article is working on the assumption that the threshold of responsibility for liability is sufficiently low that a large proportion of the adult population of a modern state would be liable to be killed, if doing so satisfied necessity. As I noted above, it is only on this assumption that the necessity-based argument is interesting and useful for revisionists. As such, even unselective attacks on civilians are relevant test cases.

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as they realise some intermediate objective, regardless of whether they ultimately yield strategic success.[60]

This is especially clear when intermediate goals are achieved, but strategic success is not – for example, capturing town X would help us win, and using tactic T_X we do capture it, but because we lose town Y, we lose the war regardless. It does not follow that T_X was ineffective.[61] It is also clear when victory is ultimately achieved through some other avenue. Suppose victory requires capturing the adversary leadership, who are hidden either in town X, Y, or Z. Tactic T_X helps us capture town X, T_Y helps capture town Y, and T_Z helps us capture Z. Our targets turn out to be in Z. Nonetheless clearly T_X and T_Y should count as effective.

In less general terms, there are clear intermediate goals that anti-civilian attacks can yield, which suffice to qualify them as effective. Consider asymmetric conflicts in which insurgents or other non-state groups confront a powerful incumbent. Anti-civilian attacks by insurgents can mobilise and galvanise their own community, empowering them despite the crushing imbalance of power with the adversary.[62] They attract financial backers, as well as possible fighters.[63] They can also use attacks on their own community to enforce compliance with their agenda – the Algerian civil war is an example.[64]

Insurgents can also use anti-civilian attacks as a means to win international support – this might seem counterintuitive, but when small-scale attacks on civilians provoke disproportionate responses from strong governments, insurgents can portray themselves as underdogs, victims of an unfair imbalance of power.[65] Regardless of whether they achieve overall strategic success – and their battles might be ongoing, or might be decided by other factors – this tactic of provoking the adversary can definitely be effective. The Kosovo Liberation Army, for example, increased solidarity among Kosovar Albanians by attacking Serbian police, leading to vicious crackdowns, which ultimately led to international intervention.[66] Kurdish attacks on Turkish targets, by prompting Turkish government repression, have slowed 'the assimilation of the Kurdish population into Turkish culture', which is a valuable intermediate goal of Kurdish nationalism.[67] Hindu nationalists have used terrorism to divide Hindus from Muslims in cycles of retaliation.[68] Hamas increased violence before

[60] Abrahms compounds this error by taking the stated goals of terrorist organisations at face value: 7 of the 42 goals he identifies are 'destroy Israel', alongside hopes to 'sever US-Israel relations', 'sever US-apostate relations', 'spare Muslims from "Crusader Wars"', and 'establish utopian society in Japan', among others. Should we judge terrorist tactics ineffective because they fail to realise a utopia, or should we rather infer that terrorists talk big?

[61] If it did, then it would mean that a huge proportion of the killing of combatants done in war would also prove unnecessary, and so impermissible.

[62] Pape, 'The Strategic Logic of Suicide Terrorism', p. 345. See also Mia M. Bloom, 'Palestinian Suicide Bombing: Public Support, Market Share, and Outbidding', *Political Science Quarterly*, 119:1 (2004), pp. 61–88.

[63] Bloom, 'Palestinian Suicide Bombing'; Assaf Moghadam, 'Motives for Martyrdom: Al-Qaeda, Salafi Jihad, and the Spread of Suicide Attacks', *International Security*, 33:3 (2008/2009), pp. 46–78, 56–8.

[64] Kalyvas, 'Wanton and Senseless?', p. 251.

[65] Gray, *Modern Strategy*, p. 295. This is a prominent theme in Army, 'Civilian Casualty Mitigation', for example, pp. 1–17 and 11–21.

[66] Peter Chalk, 'The Evolving Dynamic of Terrorism in the 1990s', *Australian Journal of International Affairs*, 53:2 (1999), pp. 151–68, esp. 152.

[67] James M. Lutz and Brenda J. Lutz, 'How Successful Is Terrorism?', *Forum on Public Policy, Online* (2009), pp. 1–22, esp. 15.

[68] Sikata Bannerjee, *Warriors in Politics: Hindu Nationalism, Violence, and the Shiv Sena in India* (Boulder: Westview Press, 2000), p. 120.

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Israel's 1996 and 2001 elections, encouraging support for Likud, who predictably responded with crackdowns that further galvanised Palestinian resistance.[69]

Besides provoking a vicious response, anti-civilian attacks by the militant wing of insurgent movements can enhance their negotiating factions' bargaining power. Irish and Basque nationalists, for example, have forced concessions from their adversaries, including regional autonomy and, for the IRA, political recognition for their leaders.[70] In Palestine, Hamas activists clearly regard Israel's withdrawal from the Gaza Strip as a victory, caused by their anti-civilian attacks.[71]

Finally, anti-civilian attacks can contribute to the intermediate goals of insurgency by rendering a territory ungovernable. As recent years in Iraq and Afghanistan have shown, this is particularly effective against an occupying military force whose objective is nation-building. Every attack demonstrates the occupier's inability to guarantee the most fundamental prerequisite of political life, that is, security from lethal attack, and so delegitimises them.[72] The incumbent's inability to regain control discredits it; it also uses resources on remedial measures, diverting them from prevention.[73]

States too can achieve important intermediate goals through anti-civilian attacks – contribution to overall strategic success is not the whole story. In counterinsurgency, anti-civilian attacks can help reduce casualties among the insurgents' forces. Jason Lyall has shown that indiscriminate artillery shelling (at random times, from random locations) by Russian counterinsurgents on Chechen villages was effective at reducing rebel attacks between 2000 and 2005.[74] Using the matching technique, he paired shelled villages with otherwise similar, but unshelled villages, to see the difference in insurgent response. One might expect them to be counterproductive, leading to more attacks from shelled than from control villages, but Lyall finds the opposite to be true. Shelled villages drop from a mean of 2.11 attacks to 1.5, in the 90 days before and after a Russian strike, while control villages drop from 2.15 to 2.05 during the same period.[75] This means shelling yielded a 24.2 per cent reduction in insurgent attacks.[76] He shows that this translates into 81 fewer attacks in the 90 days after shelling than would otherwise have taken place. Since the average insurgent attack killed 0.88 Russian soldiers and wounded another 1.21, the reduction in insurgent attacks attributable to shelling saved 71 soldiers' lives, and a further 107 escaped wounding.[77]

[69] Andrew H. Kydd and Barbara F. Walter, 'The Strategies of Terrorism', *International Security*, 31:1 (2006), pp. 49–79, esp. 74.
[70] Gray, *Modern Strategy*, pp. 295–6.
[71] Kydd and Walter, 'The Strategies of Terrorism', p. 63.
[72] Army, 'Civilian Casualty Mitigation', pp. 1–17.
[73] C. C. Harmon, 'Five Strategies of Terrorism', *Small Wars and Insurgencies*, 12:3 (2001), pp. 39–66, esp. 57.
[74] Lyall, 'Evidence from Chechnya', p. 13. Again, as objectionable as the Russian government's treatment of the Chechen people has been, their goal of defeating a violent rebellion is the sort of goal a justified belligerent could aim at.
[75] Ibid., pp. 18–19.
[76] Ibid.
[77] Ibid., pp. 20–1. With a 95 per cent confidence interval, the following ranges apply: 28 to 136 missing attacks; 25 to 120 soldiers' lives saved; 34 to 165 who escaped wounding. Note: Lyall found that 'the evidence does not support the claim that violence is redistributed to neighbouring villages', ibid., p. 24. In comments on this article, Jeff McMahan has noted that Lyall's research does not show that it was the anti-civilian component of the Russian shelling that led to the reduction in insurgent attacks – for example, by deterring the insurgents directly, or by leading other civilians to refuse to allow the

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Even in interstate conflicts anti-civilian attacks can yield intermediate dividends. Although non-combatants do not pose threats, they do contribute to the war effort, as noted in the introduction. Killing civilians can diminish the adversary's productive capacity, as well as divert resources away from offence towards defence.[78] Indeed, this was the intended goal of US firebombing of Japan in 1943 and 1944.[79] Of course, in short wars the fighting will be over before damage to production capacity can start to tell. But in drawn-out wars of attrition, belligerents are more likely to use up their stockpiles of materiel, so civilian productive capacity 'becomes directly relevant to success or failure on the battlefield'.[80]

Finally, there is some evidence that anti-civilian attacks can in fact contribute to overall strategic success, not only to intermediate goals. Insurgent groups that deploy terrorist methods in asymmetric conflicts can achieve strategic objectives by coercing their more powerful adversaries. Asymmetric conflicts are often asymmetric in two respects: the belligerents' relative military capacities, and their relative commitment to the issue at stake. The weak actor often seeks concessions from the strong that matter profoundly to the weak, but are peripheral to the strong.[81] Although nation-states are resilient when their vital interests are threatened, a disparity of interest makes coercive strategies more effective.[82] Some also argue that democratic states are particularly vulnerable to coercion, since they are more sensitive to casualties.[83]

Pape's research into the effectiveness of suicide bombing between 1980 and 2001 confirms this analysis. In the 1980s, there were 31 recorded suicide attacks world-wide; 104 in the 1990s, and 53 in 2000–1.[84] Since then this number has rocketed – Afghanistan alone saw 280 suicide attacks between 2009 and 2010.[85] Pape asks what explains this increase, and concludes that suicide terrorism is growing because terrorists – justifiably – believe that it works.[86] Suicide terrorists fighting the French and US in Lebanon in 1983, Israel in Lebanon in 1985, Israel in the occupied territories in 1994 and 1995, and Sri Lanka since 1990 made more gains after resorting to suicide operations than they did before.[87] Out of 11 campaigns completed in the test period, more than half 'closely correlate with significant policy changes by the target

insurgents to fight from their villages. It is also consistent with the random shelling having killed or injured the insurgents, interdicting future attacks. This is possible, but given that the Russians selected targets at random, without any attempt to identify specific insurgent targets, it is unlikely. The harms done to civilians could be construed as foreseen but unintended, but I think that random firing into civilian areas should be construed as a violation of non combatant immunity, even if it is intended to achieve a military objective.

78 Benjamin Valentino, Paul Huth, and Sarah Croco, 'Bear Any Burden? How Democracies Minimise the Costs of War', *The Journal of Politics*, 72:2 (2010), pp. 528–44, esp. 351. See also Barry Watts, 'Ignoring Reality: Problems of Theory and Evidence in Security Studies', *Security Studies*, 7:2 (1997), pp. 115–71, esp. 154.

79 Downes, 'Desperate Times', pp. 162–3.

80 Valentino et al., 'Bear Any Burden?', p. 357.

81 Kenneth F. McKenzie Jr., 'The Revenge of the Melians: Asymmetric Threats and the Next QDR', Institute for National Strategic Studies, National Defense University, McNair Papers No. 62 (2000), p. 4.

82 Ibid., p. 3.

83 Martin Shaw, *The New Western Way of War: Risk-Transfer War and Its Crisis in Iraq* (Cambridge: Polity, 2005). See also Paul W. Kahn, 'The Paradox of Riskless Warfare', *Philosophy and Public Policy Quarterly*, 22:3 (2002), pp. 2–8. For the contrary view, see Abrahms, 'Superior Counterterrorists'.

84 Pape, 'The Strategic Logic of Suicide Terrorism', p. 343.

85 UNAMA and AIHRC, 'Afghanistan', p. iii.

86 Pape, 'The Strategic Logic of Suicide Terrorism', p. 350.

87 Ibid., p. 344.

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state'.[88] Leaders of terrorist groups, other observers in their community, neutral analysts and adversary government leaders 'often agreed that suicide operations accelerated or caused the concession[s]'.[89] This is an impressive success rate, considering both the general ineffectiveness of military coercion (effective only 30 per cent of the time, according to Pape)[90] and the paucity of alternative options available to terrorists in these cases, faced with such powerful adversaries. Of course, many of the cases discussed by Pape were not anti-civilian – the attacks on the US barracks in Lebanon, for example. But some were, and those that were not still reveal the possibility of achieving success through spectacular coercion, which is the basic model for anti-civilian attacks.

Pape notes that suicide bombing works best when the bomber's objectives are limited and territorial. Ejecting an occupier is easier than overthrowing a government. This applies beyond just suicide terrorism. Campaigns of national liberation have often made good use of anti-civilian attacks – witness the anti-colonial struggles of the mid-twentieth century, such as the expulsion of (some) colonisers in Cyprus, Palestine, Aden, and Algeria. More recently, many regard Spain's withdrawal from Iraq after the 2004 Madrid bombings as a direct success for terrorism.[91] Others counter that Spaniards did not reject the ruling Popular Party because they were cowed by the terrorists, but because of the government's opportunistic handling of the bombings, and rush to blame them on ETA.[92] But this misses the point: that mishandling would not have occurred without the attack, which aimed not merely to coerce the Spaniards through punishment, but to sow discord and dissent, and invite just such a maladroit response.

States too can achieve strategic success through anti-civilian attacks in asymmetric conflicts. Insurgents depend on the civilian population for food, shelter, money, and recruits.[93] Sometimes this relationship is even formalised, as insurgents create parallel state structures, including a tax regime.[94] Equally important, non-combatants provide 'human camouflage', enabling rebels to evade detection.[95] Civilians hide weapons, and deliver messages for the insurgents. Guerrillas might also rely on civilian institutions, including 'financial, law enforcement, welfare, political, educational, and media institutions'.[96] Media are especially important, as are the homes and Internet cafes from where insurgents' grievances and achievements are broadcast to the world. Blocking this support can critically disrupt insurgent groups, denying them materiel, communication, and safe havens.[97] Civilian support for insurgency can be blocked in three ways: elimination, coercion, and division. Elimination is obvious: you cannot contribute to insurgency if you are dead. Coercion likewise: if civilians

[88] Ibid., p. 351.
[89] Ibid., p. 344.
[90] Ibid., p. 351.
[91] Rose et al., 'Does Terrorism Ever Work?', p. 187.
[92] Ibid.
[93] Hugo Slim, *Killing Civilians: Method, Madness and Morality in War* (London: Hurst, 2007), pp. 190–1.
[94] Downes, 'Filling the Graves', p. 423.
[95] Benjamin Valentino, Paul Huth, and Dylan Balch-Lindsay, '"Draining the Sea": Mass Killing and Guerrilla Warfare', *International Organisation*, 58:2 (2004), pp. 375–407, esp. 384. See also Downes, 'Filling the Graves', p. 423; Valentino et al., 'Bear Any Burden?', p. 355; Wood, 'Rebel Capability', p. 603.
[96] Gross, *Moral Dilemmas of Modern War*, p. 158.
[97] Downes and Cochran, 'Targeting Civilians to Win', pp. 30–1. See also Lyall, 'Evidence from Chechnya', p. 6.

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fear reprisals, they may learn to dissociate from the rebels. Division arises when civilians come to blame the rebels for inviting government attacks.[98] Underlying each approach is this core metaphor: if Mao was right, and the civilian population is the sea in which insurgent fish swim, then 'the surest way to catch the fish is by draining the sea'.[99]

Alexander Downes offers compelling analysis of ruthlessly effective anti-civilian attacks in the Second Anglo-Boer War (1899–1902).[100] The Boers were swiftly defeated in conventional combat, and turned to guerrilla warfare. The British responded by burning the Boers' farms, and imprisoning their families. Epidemics in the concentration camps killed over 45,000.[101] The guerrillas were weakened; even Boer Leader De Wet admitted that 'had not the English burnt the corn by the thousand sacks, the war could have been continued'.[102] The camps also coerced the Boers. Acting President of Transvaal, Schalk Burger, said that it was 'not the arms of the enemy which directly compelled us to surrender, but ... the sword of hunger and nakedness, and ... the awful mortality amongst our women and children in the Concentration Camps'.[103]

The Italians used similar tactics when suppressing the 1923–32 Sanusi uprising in Cyrenaica (now Libya).[104] After seven years of 'fruitless pursuit', they interned the entire population. The rebels had been well-supported, and the civilians' imprisonment both removed this support, and offered brutal leverage: between 85,000 and 100,000 entered the camps, but only 35,000 survived. These concentration camps were 'probably the key to [Italian] victory in Cyrenaica'.[105] Similar tactics paid equal dividends for the US in the Philippines at the turn of the twentieth century.[106] Anti-civilian attacks appear clearly effective in these cases. It is obviously a stretch to suppose that these are the sort of objectives that could plausibly be deployed in a justified war – partly because if it is necessary to lock up so much of the population in order to subdue them, then the whole project of counterinsurgency is unlikely to be legitimate. But there can be justified counterinsurgencies against a robust insurgent movement, and we can reasonably infer from the success of these tactics in the past that they could work again.[107]

Anti-civilian attacks can also yield strategic results in interstate conflicts. Sieges, for example, have a long history of success despite being avowedly and intentionally anti-civilian. Consider, for example, the sieges of Paris in the Franco-Prussian war, of Plevna in the Russo-Turkish War, Adrianople in the First Balkan War, and Beirut in the Lebanon War.[108] The headline success is probably the Allied blockade of

[98] Lyall, 'Evidence from Chechnya', p. 7; Wood, 'Rebel Capability', p. 604.
[99] Valentino et al., '"Draining the Sea"', p. 385. See also Downes, 'Filling the Graves'. For example, Spain in Cuba, France in Algeria, the Soviets in Afghanistan, and Sudan in Darfur. Alexander Downes and Kathryn McNabb Cochran, 'It's a Crime, but Is It a Blunder? The Efficacy of Targeting Civilians in War', Unpublished paper (2011), pp. 10–11.
[100] Were the British objectives the sort that a justified belligerent could aim at? This is a marginal case, but treated as another instance of an incumbent putting down a rebellion, I think it is close enough.
[101] Downes, 'Filling the Graves', p. 422.
[102] Quoted in ibid., p. 434.
[103] Ibid., p. 437.
[104] Ibid., p. 427.
[105] E. E. Evans-Pritchard, quoted in ibid.
[106] Ibid., p. 422. For more examples see Lyall, 'Evidence from Chechnya', p. 6.
[107] Thanks to Jeff McMahan for pressing me on this point.
[108] Downes and Cochran, 'Targeting Civilians to Win', p. 54.

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Germany and Austria-Hungary in World War I, which may have caused 400,000 civilian deaths, but surely hastened the German surrender.[109] Moreover, even Pape concedes that the threat of nuclear bombardment is a decisive coercive tool.[110]

Additionally, where territorial control is at stake, and the civilian population is united in opposition, their forced removal might itself be a military objective.[111] When two states contest a territory, in which part of the population shares characteristics with the dominant groups in each state, eliminating or evacuating the civilian population affiliated with the opponent can contribute directly to securing territorial control.[112] Indeed, ejecting the adversary population in part constitutes the military objective itself. It also reduces potential threats from those civilians, eliminating a seat of resistance, as well as a potential trigger for a future rescue mission by the adversary.[113] And it facilitates forming a cohesive nation-state, with a stronger claim to the territory, based on active possession.[114] The Arab/Israeli conflict is a particularly salient example. Downes cites a Zionist leader saying in 1938 'we cannot start the Jewish state with … half the population being Arab … Such a state cannot survive even half an hour.'[115] Expelling the Arab population from their villages was almost certainly wrong, but it is not plausibly described as ineffective in establishing a Jewish state.[116] Again, some might think this sort of objective could never be aimed at by a justified belligerent; I am less certain: I think there can probably be cases of justified colonisation in which such dilemmas would arise, whether or not we think this was one of them.[117]

Lastly, large-scale quantitative research into the strategic effectiveness of anti-civilian attacks over the last two centuries suggests that it is at least as effective as exclusively counterforce tactics in wars of attrition.[118] Working from their dataset of around 200 conflicts over 200 years, and focusing on tactics including both intentional attacks on non-combatants and obviously disproportionate collateral harms, Downes and Cochran find that these tactics were 'probably an important component of victory in 30 per cent of the wars of attrition (29 per cent of states) and at least partially contributed to victory in 45 per cent of such wars (50 per cent of states)'.[119] They then observe that 'relative to the rates of victory for states or sides that did not target non-combatants in wars of attrition – 40 per-cent – civilian targeting is not radically less (or more) effective than fighting more conventionally'.[120] As I argue in the next section, states attack civilians when they are already on the ropes, with few other alternatives. We should therefore expect anti-civilian attacks to correlate

[109] Ibid. For the number see Valentino et al., 'Bear Any Burden?', p. 352.
[110] Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005), p. 75.
[111] Downes, 'Filling the Graves', p. 420.
[112] Downes and Cochran, 'It's a Crime, but Is It a Blunder?', p. 10.
[113] Downes, 'Desperate Times', p. 154.
[114] Ibid., p. 167; Downes and Cochran, 'Targeting Civilians to Win', pp. 47–8.
[115] Downes, 'Desperate Times', p. 167.
[116] Ibid. One might also think of the Balkan states' expansion into areas controlled by the Ottoman Empire in 1912–3, the Israeli war of independence, and Turkey's intervention in Cyprus in 1974. Downes and Cochran, 'Targeting Civilians to Win', pp. 31–2.
[117] For one argument that colonisation can be justified in very limited historical circumstances, see Chaim Gans, *A Just Zionism* (Oxford: Oxford University Press, 2008).
[118] Obviously a dataset such as this does not allow for differentiating between belligerents according to their objectives. Nonetheless these are interesting and relevant results.
[119] Downes and Cochran, 'Targeting Civilians to Win', p. 55.
[120] Ibid.

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(much) more often with defeat than with victory.[121] Valentino *et al*. concur on this: belligerents 'are most likely to resort to killing civilians in the most difficult and desperate conflicts – when conventional military means are ineffective or too costly' so we can predict that 'victory in these circumstances will be relatively unlikely no matter what tactics a combatant employs'.[122] If states that victimise civilians in interstate wars achieve the same rate of success as those that do not, that itself strongly implies – given the typically direr straits faced by those who do take these extreme measures – that attacking civilians is militarily effective.

V. . . . But can it be necessary?

The preceding sections have shown that anti-civilian attacks can be effective in insurgencies and terrorist campaigns, counterinsurgency, and interstate armed conflict. If situations can arise in these conflicts when belligerents have no other effective options besides anti-civilian attacks, then those tactics satisfy necessity, and the necessity-based argument fails.[123] In this section, I show that in conflicts of these types, belligerents' option-sets can be sufficiently straitened that anti-civilian attacks become necessary. I discuss terrorist campaigns and insurgencies first, then counterinsurgency, and finally interstate conflict.

For insurgents with territorial objectives – aiming to take control of a territory from an occupying power, or an exogenous national group – the case that there are no other options besides anti-civilian attacks is perhaps weakest. After all, in territorial asymmetric conflicts the stronger actor generally has a significant military presence in the disputed territory, which affords the insurgents many other potential targets besides non-combatants. And one could certainly argue that, in Iraq and Afghanistan for example, counterforce tactics by insurgents have been very effective – partly owing to the occupying powers' discomfort with military casualties.[124] Moreover, in some asymmetric conflicts non-violent resistance would potentially be still more likely to succeed than either form of military response.[125] The question is not, however, whether anti-civilian attacks are generally the only means to prosecute insurgencies, but whether situations can arise where non-violent and counterforce alternatives are not available or, if available, are not effective. Suppose that we rule out non-violent measures, since if these were effective then there would be no basis at all for using lethal force. Why would we think that anti-civilian attacks might be available when counterforce ones are not? Simply put, because it is much easier to launch a terrorist campaign than a guerrilla war.[126] Confronting an adversary's armed forces requires a level of resources, personnel, and training that an insurgent group may lack. Direct confrontation would ensure a swift end to the insurgency. It

[121] Downes and Cochran, 'It's a Crime, but Is It a Blunder?', p. 21.
[122] Valentino et al., 'Bear Any Burden?', pp. 375–6.
[123] Also if there are other less harmful options but the difference in harm done is justified by the additional benefit achieved.
[124] Scott Sigmund Gartner and Gary M. Segura, 'War, Casualties, and Public Opinion', *Journal of Conflict Resolution*, 42:3 (1998), pp. 278–300; Shaw, *The New Western Way of War*.
[125] Erica Chenowith, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (New York: Columbia University Press, 2011).
[126] Herfried Münkler, *The New Wars* (Cambridge: Polity, 2002), p. 109.

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is considerably easier to attack targets that cannot fight back.[127] And it is very hard to defend a whole population against a few determined individuals (particularly when they are prepared to lose their lives).[128] It took fewer than twenty primary operatives to bring about the 9/11 attacks; the ten Mumbai attackers held India's economic capital to ransom for a day, killing 164 people; the Oklahoma bomber, Timothy McVeigh, killed 168 and injured 450 others acting with one accomplice. We have already seen that anti-civilian attacks in insurgencies and terrorist campaigns can be effective; now we see that they are easier, less costly than counterforce measures. It should follow that situations arise where the resources, personnel, and training required for an effective guerrilla campaign are lacking, but anti-civilian attacks are still possible. In other words, anti-civilian attacks become necessary.

In general, anti-civilian attacks are clearly not the only way to fight a counter-insurgency. Contemporary counterinsurgency doctrine favours winning hearts and minds, gathering intelligence, and focusing on highly targeted (and high-tech) counter-force measures.[129] The question is not whether anti-civilian attacks are the only way ever to win, but whether situations can arise where these other tactics are unavailable, so the only effective alternative is to turn on civilians.

One reason to think such situations possible is that counterforce and non-violent counterinsurgency are very hard to do. Winning hearts and minds requires enormous financial resources, taking additional risks, and a diplomatic skill-set that we can reasonably excuse soldiers for lacking.[130] Confining attacks to adversary combatants is particularly difficult when they avoid direct confrontations and hide among a civilian population from which they are indistinguishable.[131] Sometimes there are no military targets to hit; for example, Michael Gross observes that in the 2006 Hezbollah/Israel war, Hezbollah had only 83 command posts, which were destroyed within five days. Hezbollah continued to strike, but there was no way to strike back, he argues, besides aiming at the civilian institutions on which Hezbollah in part relied.[132] When civilian support for the insurgents is sufficiently high that hearts and minds tactics are doomed to fail, and that the insurgents can benefit from the tactical advantages of hiding among civilians and civilian objects, counterforce tactics can prove extra-ordinarily costly, in both lives and resources.[133] If anti-civilian attacks are less costly than counterforce measures, then in some cases anti-civilian attacks will be the only option.

The fact is that well-supported insurgencies are difficult to defeat;[134] all options are poor – even for strong states. Anti-civilian attacks can be effective, they risk little incidental harm to the attackers (because the targets cannot fight back), and they are

[127] Mckenzie Jr., 'Revenge of the Melians': 6; Pape, 'The Strategic Logic of Suicide Terrorism', p. 346. See also Münkler, *The New Wars*, p. 111; Slim, *Killing Civilians*, p. 158.
[128] Pape, *Dying to Win*, pp. 75–6.
[129] This is particularly clear in Army, 'Civilian Casualty Mitigation'.
[130] Valentino et al., '"Draining the Sea"', pp. 384, 403.
[131] Ibid., p. 384.
[132] Gross, *Moral Dilemmas of Modern War*, p. 158.
[133] Valentino et al., '"Draining the Sea"', pp. 384, 403.
[134] One might object that well-supported insurgencies are very likely to be justified, and so seeking to suppress them will be unjust, so this is irrelevant for revisionist just war theorists. Perhaps sometimes, but not always; the insurgency in Afghanistan appears well supported, but given its aims of reinstating Taliban rule, is probably not justified. Similar doubts can be raised about other extremist insurgent movements, for example the Mali rebels, who are well supported, but surely not justified in forcibly imposing *shari'a* law on North-Eastern Mali.

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an easy target – 'essentially immobile, almost impossible to conceal, and difficult for the guerrillas to defend'.[135] If counterforce measures fail, or become too costly, anti-civilian attacks might be the only viable options. In the Boer war and the Sanusi uprisings, for example, the British and Italians made anti-civilian attacks their focus only after their counterforce measures had failed. Moreover, research by Valentino *et al.* shows that this trend in fact applies generally.

Using a dataset of 147 wars between 1945 and 2000, they ask why some states mass killed civilians (defined as intentionally killing more than 50,000 over five years or less). Mass killing is most likely, they show, when states face grave threats from an adversary that cannot be defeated by conventional means, but depends on a civilian population.[136] Conflicts against guerrilla opponents who posed a major threat saw a sixfold increase in likelihood of mass killing; where guerrillas were strongly supported by civilians; mass killings were eight times more likely.[137] When guerrillas both posed a major threat, and were well supported, mass killings were 18 times more likely.[138] Although they note that mass killings seem rarely to lead to victory,[139] they conclude that, when states attack civilians,

> less violent strategies for counterinsurgency have proven at least equally costly and prone to failure … For leaders determined to stave off defeat and unwilling to make major political concessions to the opposition, therefore, mass killing simply may appear as the most attractive choice among a set of highly unattractive options.[140]

In other words, states engage in mass killing of civilians because their leaders believe it to be necessary. This should be a chilling conclusion for those who believe necessity grounds non combatant immunity. They may respond that, given the historical record, leaders were unreasonable to believe mass killings could work. However, examples such as Chechnya, the Anglo-Boer war, the Sanusi uprising, and the Philippines tell against this argument. Moreover, the key point is not whether anti-civilian attacks had high prospects of success, but whether they were more likely to be successful than the available alternatives. Even if they are unlikely to succeed, if there is no more promising option, they can still satisfy necessity.

The general point that anti-civilian attacks are less costly than counterforce measures, because the target is unable to defend itself, and unable to hide, and therefore that there can be situations where the additional costs of counterforce measures make them unavailable as options, holds for interstate conflict too. As does the observation that sometimes states adopt anti-civilian attacks after first trying and failing to achieve their objectives through counterforce measures. Even in Pape's analysis of British bombing of German cities in World War II, he notes that anti-civilian attacks were adopted only after attempts to bomb more accurately (for example, by flying during the day) had failed or proved too costly.[141] Even if the new strategy was ultimately unsuccessful, the lack of viable alternatives might have allowed it to meet necessity, *ex ante*.[142]

[135] Valentino et al., 'Bear Any Burden?, p. 355.
[136] For their research design, see Valentino et al., '"Draining the Sea"', p. 387ff.
[137] Ibid., p. 394.
[138] Ibid., pp. 397–8.
[139] Ibid., p. 401.
[140] Ibid., pp. 402–3.
[141] Pape, *Bombing to Win*, p. 269.
[142] See Downes, 'Desperate Times', p. 164. See also Valentino et al., 'Bear Any Burden?', p. 537.

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Valentino, Huth, and Croco support this general observation with specific data, showing that states attack civilians when they face great threats, and think they have no other options. Looking at all interstate wars between 1900 and 2003, they conclude that the decision to target civilians is based on 'incentives … created by the risks, threats, and opportunities associated with the particular conflict'.[143] Killing non-combatants 'is often a calculated military strategy'.[144] Even in war 'few states actively desire to kill enemy civilians in large numbers. But in certain circumstances combatants may come to believe that doing so is the best way to achieve victory at an acceptable cost.'[145]

They defend this theory by showing that states engaged in wars of attrition or counterinsurgency 'killed nearly six times more civilians than did states utilising other strategies'.[146] When attrition and counterinsurgency combine, the predicted number of civilian casualties jumps exponentially; when these combined with a long war and maximalist war aims, the numbers multiply still more.[147] The inference is clear: when states fight longer, more arduous wars, where the threats they face are grave, and where counterforce measures prove ineffective, they are more likely to engage in anti-civilian attacks, as a desperate measure that might be intrinsically unattractive, but is preferable to accepting defeat.[148]

As with the same arguments in counterinsurgency, this should worry advocates of the necessity-based view. Clearly, states frequently target civilians in war because they believe that doing so is effective, and that they have no other option – in other words, because they believe that doing so is necessary. If the principle outlawing anti-civilian attacks are grounded in necessity, then it denies non-combatants protection when they need it most.

Revisionists might respond that the leaders' beliefs about necessity are irrelevant – what matters is whether anti-civilian tactics were in fact necessary.[149] This raises some interesting and complex questions, that I cannot do justice to here.[150] However, two brief responses are possible.

First, regardless of how we should best interpret the necessity constraint, the fact that it provides so weak a bulwark against political and military leaders who believe attacking civilians to be necessary is a serious concern. If the necessity-based argument were the best argument for non-combatant immunity, we should conceal that fact, because it is so vulnerable to abuse by political leaders who believe attacking civilians will be effective.[151]

Second, if the necessity constraint is applied *ex post*, assuming all the facts are known, then it would have radical implications for the permissibility of killing combatants in war.[152] If all the facts were known, then many combatants killed in war

[143] Benjamin Valentino, Paul Huth, and Sarah Croco, 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War', *World Politics*, 58 (2006), pp. 339–77, esp. 340.
[144] Ibid.
[145] Valentino et al., 'Bear Any Burden?', p. 350.
[146] Ibid., p. 371.
[147] Ibid.
[148] Valentino et al., 'Covenants without the Sword', p. 376. See also Downes, 'Desperate Times', pp. 154, 174.
[149] Thanks to Jeff McMahan and a reviewer for this journal for pressing me on this.
[150] I consider them in depth in Lazar, 'Necessity in Self-defense and War'.
[151] Thanks to a reviewer for this observation.
[152] For a similar argument, see Daniel Statman, 'Can Wars Be Fought Justly? The Necessity Condition Put to the Test', *Journal of Moral Philosophy*, 8:3 (2011), pp. 435–51.

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die pointlessly – killing them neither averts a specific threat, nor helps avert the overall threat posed by their state. Even for those whose deaths have some use, it is highly likely that there was some other available alternative that would have had the same result, but done less harm.

An example I gave above is relevant here: victory requires capturing the adversary leadership, who are hidden either in town X, Y, or Z. Tactic T_X helps us capture town X, T_Y helps capture town Y, and T_Z helps us capture Z. Our targets turn out to be in Z. If the necessity constraint is applied *ex post*, then any deaths inflicted in T_X and T_Y with the aim of capturing the adversary leadership were impermissible.[153] Such a restrictive constraint on killing in war would render it all but impossible to fight permissibly. We must either conclude in favour of some form of pacifism, or weaken the necessity constraint. The most plausible way of doing so is applying it *ex ante*, and indexing it to reasonable beliefs.

VI. Conclusion

The goals of this article have been both substantive and methodological. I have sought to assess the necessity-based argument for non-combatant immunity in a manner that illustrates the importance for just war theorists of substantiating their empirical assumptions. My substantive conclusions are more preliminary than my methodological ones. Just war theorists should consult the relevant research to determine whether their empirical assumptions are true. Of this much I am sure. This article also suggests that social scientists researching war should consult just war theory more closely – assessing the effectiveness of anti-civilian attacks is undoubtedly a very useful contribution, but necessity is the morally more important criterion, and it has been striking how little the existing research has touched directly on this morally fundamental matter.[154]

On the substantive question, the foregoing arguments have not disproved the necessity-based argument for non-combatant immunity, but they certainly justify scepticism. I have discussed only one way in which anti-civilian attacks can satisfy necessity, and I have argued at a general level. I have sought to show only that anti-civilian attacks can be effective in insurgency, counterinsurgency, and interstate conflicts, and that sometimes, in some of these conflicts, there will be no effective alternatives, thus violating non-combatant immunity will be necessary.

The necessity-based argument always had the air of wishful thinking, like the view that cheaters never prosper, or that the best way to serve others is to serve yourself. On this view non-combatant immunity is scarcely even a constraint, since it never removes an option that belligerents really had to take. The moral reality of war is less accommodating than that: hard choices are the rule, not the exception. I conclude that the necessity-based argument does not adequately rescue non-combatant immunity from the parlous state that recent just war theory has left it in. Theorists of war now face their own hard choice: we must either come up with a better argument for non-combatant immunity, or reconcile ourselves to its falsehood.[155]

[153] Some might have been necessary to avert specific threats posed by the adversary combatants.

[154] Notable exceptions: Valentino et al., '"Draining the Sea"'; Valentino et al., 'Covenants without the Sword'.

[155] I present my own positive arguments in 'Distinction: Protecting Noncombatants in War', unpublished manuscript.

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