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SUPREME EMERGENCIES AND THE CONTINUUM PROBLEM

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Many believe that in 'supreme emergencies' collectives are granted what I elsewhere call 'special permissions', permissions to carry out self-defensive acts which would otherwise be morally forbidden. However, there appears to be a continuum between non-emergency, emergency and supreme-emergency situations, which gives rise to the following problem: If special permissions are granted in supreme emergencies, they should apply, mutatis mutandis, to less extreme cases too. If, to save itself from wholesale massacre, a collective is allowed to kill thousands of noncombatants on the side of the aggressor, then to save itself from a less murderous campaign, a collective should be allowed to kill several hundreds of noncombatants, and so on. But this conclusion seems to undermine the most fundamental ideas of just war theory. The purpose of the paper is to discuss possible solutions to this problem (the 'continuum problem'). I contend that a contractarian view of the war convention offers the most attractive solution, though, at the end of the day, I am not sure that it will work.

KEY WORDS: Supreme emergency, special permissions, just war, contractualism

1. Introduction

Following the philosophical account proposed by Michael Walzer in *Just and Unjust Wars*, Churchill's expression 'Supreme Emergencies' has become a technical term to name a normative doctrine according to which, if some collective is under a very grave threat from another collective, it is allowed to violate the accepted rules of warfare if this is the only way to defend itself (Walzer 1977: ch. 16). In supreme emergencies, threatened collectives are granted what I call elsewhere (Statman 2006a) 'Special Permissions,' permissions to carry out actions which would otherwise (namely, in non-emergency situations) be manifestly immoral and unequivocally forbidden. As shown by other writers (Hendrickson 1997 and Orend 2001: 27), Walzer is not entirely clear about the kind of threats that give rise to such permissions. To present the doctrine in its best light, I shall assume that what he has in mind is what he refers to at one point as 'a threat of enslavement or extermination' (Walzer 1977: 254). (We shall later see what happens when this assumption is relaxed.) Confronted with such grave threats, I believe that many people – philosophers, politicians and laypeople alike – would support Special Permissions. 'What other choice is there?' they would no doubt ask. This support for Special Permissions seems to me quite natural, and I suspect that the supporters would have little patience for those holding an opposing view, whom they would see as naïve, hypocritical, or self-righteous – or some annoying combination of all three.¹

This support notwithstanding, the doctrine is very hard to justify as is evident from the recent philosophical literature on the topic (See, for example, Orend 2001, Toner 2005, Statman 2006a and 2006b, Cook 2007, Sandin 2009, Lund 2011, and Primoratz 2011). One of its most troubling aspects is its apparent incompatibility with the central tenets of just war theory. The incompatibility grows out of what I shall call *The Continuum Thesis*, according to which there is a continuum between non-emergency, emergency and supreme-emergency situations. If this thesis is accepted, then if Special Permissions are granted in supreme emergencies, they should apply, *mutatis mutandis*, to less extreme cases, too. If, to prevent murder on a very large scale, a collective is allowed (intentionally) to kill thousands of noncombatants on the aggressing side, then surely, to save itself from a less murderous attack, a collective should be allowed to kill several *hundreds* of noncombatants, and so on. The Continuum Thesis embodies *The Proportion Thesis*, according to which if collectives have a special permission to carry out an otherwise immoral action, A, in the face of a very grave threat, T, then they have a similar permission to carry out an otherwise immoral action A' in the face of a weaker threat, T', such that $(T/A = T'/A')$.

The Continuum Thesis seems hard to resist, but, once Special Permissions are admitted, its implications are devastating to the fundamental principle of *jus in bello*, namely, the immunity of noncombatants. As if that is not enough, it also undermines the Separation Thesis, according to which *jus in bello* is separate from *jus ad bellum*. If the Continuum Thesis is accepted, then the graver the threat to the attacked collective, the wider the permissions granted to the collective to protect itself. Such implications encourage the troubling thought that the moral aspirations of the rules of warfare are a sham; that they are binding upon collectives only insofar as the collectives can hope to gain by so binding themselves. When such hope becomes unreasonable, when keeping the rules of engagement demands a significant toll, the rules are thrown to the wind, in a way that leaves the threatened collective wide leeway to select the means to defend itself. This is what I shall call *The Disturbing Thought*: the suspicion that the war convention is nice to have, but has no serious and stable moral authority.

Thank heavens, full-fledged supreme emergencies are quite rare, but our strong intuition about them – the license of Special Permissions – coupled with the force of the Continuum Thesis make them very disturbing situations indeed. We are thus not talking of a narrow difficulty in some marginal doctrine which is rarely applicable in practice. Small wonder that the morality of supreme emergencies has attracted more and more attention from moral philosophers.

A further reason for this growing interest in the topic is the assumed connection between supreme emergencies and terrorism. Since what characterizes terrorism is its blatant disregard for the war convention, it is tempting to think that the way to justify terrorism, if one exists, is by arguing that terrorism is a response to situations of supreme emergency, situations in which such disregard is justified (see e.g. Steinhoff 2004). Since the war *against* terror organizations is often also thought to require a breach of the rules of warfare, the idea of supreme emergencies is recruited in this context as well, in order to justify the otherwise immoral and illegal measures used against such organizations.

The goal of this article is not to offer a full analysis of supreme emergencies, but to discuss at length the particularly bothersome challenge posed for this doctrine by the Continuum Thesis. In Sections 2–4, I present three possible responses to this challenge

and show that none of them are convincing. In Section 5, I make a few comments connecting this discussion of supreme emergencies to terrorism and to the notion of asymmetric wars.

2. Quantity Makes Quality

The first answer I shall discuss argues that the difference in magnitude between threats that create supreme emergencies and other kinds of threat in the international arena is so great that it creates a difference in quality between them. Let me call this *The Quantity Makes Quality* argument.² When the difference between kinds of threat becomes one of quality, so the argument assumes, it is no longer possible to move from the permission to do A in the face of T to the permission to do A/2 in the face of T/2, hence the Proportion Thesis is false. To illustrate this idea in more concrete terms: Since the evil of genocide is qualitatively worse than the sum of the evils of killing each of the individual members of some ethnic or religious group, it is not the case that if, to prevent a genocide, the group under threat is allowed to kill N innocent people of the attacking group, then, to prevent a tenth of a genocide (so to speak), the group is allowed to kill N/10 innocent people of the attacking side. If the Quantity Makes Quality argument is sound, then the Continuum Thesis is refuted and the threat to the fundamental principles of *jus in bello* removed.

But is the argument sound? I suspect that even if we accept that the magnitude of the evil makes a difference, it does not make *such* a difference as supporters of the present solution would like us to believe. To take the example of massacre, even if the massacre of N/2 people of some collective is not as evil as half the evil involved in the massacre of N people of the collective, it is still awful enough, which makes it hard to believe that in T/2 no (or almost no) otherwise immoral action would be permitted. Moreover, one could formulate a modified version of the Proportion Thesis which would contain the quality test but still lead to unacceptable implications:

If collectives have a special permission to carry out an otherwise immoral action, A, in very threatening circumstances, C, then they have a similar permission to carry out A' in less threatening circumstances, C', in proportion to the magnitude *and quality* of the threat posed to them.

Instead of $(C \rightarrow PA) \rightarrow [(C/2 \rightarrow P(A/2))]$ (If, in circumstance C, it is permissible to carry out A, then, in circumstances half as bad as C, it is permissible to carry out an action which is half as bad as A) we get $(C \rightarrow PA) \rightarrow [C/2 \rightarrow P(A/3)]$ (If, in circumstance C, it is permissible to carry out A, then, in circumstances half as bad as C, it is permissible to carry out an action which is, say, *a third* as bad as A). While the Modified Proportion Thesis would be less devastating to just war theory than the unmodified thesis, it would be devastating enough, as it would still allow the intentional killing of innocents in circumstances in which such killing would evidently be ruled out by the theory.

3. Threshold to the Continuum

Deontologists contend that the moral value of actions does not depend on their consequences; that some actions, such as killing the innocent, are forbidden even when they lead to a better state of affairs than the one that would exist otherwise. Hence, to recycle an old example, one ought not to kill an innocent person even if harvesting his

organs could save the lives of ten others. However, most deontologists concede that such prohibitions are not absolute. If the price of not carrying out the forbidden act is especially high, then the deontological constraints lose their force, and consequentialist considerations regain authority in determining what ought to be done. This view is known as 'threshold deontology' and it stands at the center of much discussion in deontological theory.³

The idea of a threshold seems to be exactly what we need in order to solve the continuum problem. Think of thresholds in the natural world. Various metals melt at a certain temperature, their 'melting point'. Below this temperature, they simply do not melt, hence it is false to say that if some metal melts at N degrees then it 'half-melts' at $(N/2)$ degrees. Thus, if supreme emergencies are a kind of threshold, the permissions granted in them are immune to the threat posed by the Continuum Thesis. The permissions are granted only beyond the threshold.⁴

Analogies, however, can mislead. The fact that thresholds in nature – or *some* thresholds in nature – function in a certain way is no proof that thresholds in ethics function similarly. In particular, there is no reason to assume a priori that the kind of threshold which is expressed by the melting case is the same kind of threshold expressed in deontology. What I have in mind is the distinction between what we might call thresholds of magnitude (some transformation occurs above a certain magnitude, like in the melting case) and thresholds of ratio (some transformation occurs above a certain ratio). Which of these notions is the one assumed by supporters of threshold deontology? Like Larry Alexander (2000), I too think that it is the ratio threshold. First, the examples they typically use refer to torturing or killing one individual in order to save the lives of thousands of innocents, implicitly assuming that a ratio of, say, $1/1000$ is required to justify the violation of deontological constraints. Second, the magnitude model would imply that above the threshold (for instance, when the lives of 10,000 innocents are at stake) all constraints are removed. But surely there is some maximum number, N , of innocents that one would be allowed to kill in order to save the 10,000, which means that the threshold at work here is a ratio one. 'Under this conceptualization', as Alexander put it, 'one may kill one person to save N , two people to save $2N$, three people to save $3N$, and so on' (Alexander 2000: 899).

Once the idea of deontological thresholds is understood in the ratio model, it loses its attraction as a potential solution to the continuum problem. On this understanding, deontological thresholds are just a different way of expressing the Proportion Thesis, which, to recall, was part of the *problem*, hence cannot serve as a solution to it.

4. Contractarianism

I turn now to the most advanced attempt to solve the continuum problem, developed recently by Yitzhak Benbaji (2010, 2011) as part of his contractarian defense of just war theory. Benbaji's solution comprises two main moves. The first seeks to explain how killing the innocent in supreme emergencies might be permissible at all. The second seeks to explain how this permission can be prevented from spilling over to less desperate situations, i.e., how the Continuum Thesis can be rejected. Let me take these two moves in turn.

In supreme emergencies, the threatened collective is allowed to kill many innocent members on the aggressive side. Moreover, it is allowed to take more innocent lives on the

aggressor's side than those that would thereby be saved on its own side. How could this mass killing of the innocent be morally justified? To answer this question, Benbaji utilizes a distinctive form of consequentialism developed by Amartya Sen, namely, rights consequentialism. According to this theory, the morality of our actions derives from their consequences, but these include not only states of affairs but also rights violations. Assume that one of those asteroids that philosophers like so much is about to kill 100 innocent people unless I push 100 other innocent people in its track in order to block it. Although the end result would be just as bad in both scenarios, namely 100 innocents killed, *my* action would involve also a violation of rights, hence would be morally worse. Furthermore, once we factor in the rights violations, I would be prohibited from blocking the asteroid even by killing fewer than 100 innocent people. Thus, the feature of rights violation exacerbates the moral evil of acts which are already forbidden. The exact degree is impossible to determine, though I would assume it is somewhere around 50%, because Benbaji says that 'an outcome that contains harms involving rights-violations is *much* worse than outcomes containing the same amount of harm but no rights violation' (2011: 349). On this view, other things being equal, a state of affairs in which 100 innocent people are killed by an asteroid is better than a state of affairs in which, say, 101 people are murdered by human agency.

So far the account seems of little help in understanding supreme emergencies because in supreme emergencies there are severe rights violations on *both* sides. The attacked collective violates the rights of innocents on the aggressor's side in order to prevent violations of the rights of innocents on its own side. How, then, might the attacked group kill more innocents on the enemy side than those it hopes to save on its own side? In reply to this question, Benbaji proposes that rights violations come in degrees, and, in calculating the degree, we must take into consideration not only the number of individuals whose rights are violated, but the level of disrespect and dehumanization which this violation expresses. Although all rights violations express disrespect towards their victims, the disrespect expressed by intentional murder, for example, is more severe than that expressed by reckless killing. Hence, other things being equal, from an impartial, consequentialist point of view, it is worse if 100 people are *intentionally* killed than if 100 people are recklessly killed and the same remains true even when there are more than 100 people (say, 101) intentionally killed.

As stated above, supreme emergencies are situations in which the aggressive side poses a threat of massacre or enslavement to the other side. Massacre is not simply mass killing. It is killing driven by a denial of the victims' humanity. It therefore represents *radical* evil, an extreme case of dehumanization. Since defensive killing aimed at preventing such radical evil does not express such manifest and unequivocal denial of their victims' humanity, such killing, evil though it might be, is less evil than the killing intended by the aggressor. And this means that the option of killing more innocent people on the aggressive side than those saved on the attacked side might be the lesser evil, hence morally permitted. This – finally – explains how, in supreme emergencies, a small-but-decent collective might be permitted to kill many thousands of innocent people in the great-but-evil collective that threatens it, even if the number of innocents that would be saved by such a defensive act is smaller than those killed. In Benbaji's view, then, the rationale for Special Permissions is not self-defense, but consequentialism properly understood.

I shall comment briefly on one aspect of this view and then move to the second part of Benbaji's account, i.e., his rejection of the Continuum Thesis. According to rights consequentialism, killing innocents of the aggressive collective is morally permissible because it leads to a less evil result. It is better that N innocents be killed in self-defense than fewer than N innocents be killed in a dehumanizing manner. But this line of argument fails to differentiate between innocents of the aggressive party and innocents of other parties. Thus, *if* it is the case that the only way to protect itself from a grave threat is for a state to target innocents of a third party, then – given that in terms of their innocence, there is no difference between those third-party innocents and the innocents of the aggressive collective – such targeting seems permissible, a result which is very hard to swallow. It is hard enough to swallow the idea that the mass killing of innocents on the *aggressive* side is permissible. That this might be permitted in the case of a third, non-aggressive, side borders on complete moral bankruptcy. (One might regard this as another continuum problem, or as another version of it. It argues that there is a continuum between killing innocents of the aggressive side and killing innocents of the less aggressive or non-aggressive side, which the theory under discussion has no resources to block.)

Benbaji's reply to this challenge is that attacking a third party would be morally worse than attacking the aggressive state because it would include more rights violations: First, attacking a non-aggressive state would violate its right as a *state* not to be attacked, in addition to the rights of its innocent citizens not to be attacked. By contrast, attacking the aggressive state does not violate its rights as a state not to be attacked because 'a state that poses an existential threat to another nation loses its legitimacy'. Second, in order to minimize the risk that massacre and enslavement would ever occur, it is tacitly agreed that states carrying out such atrocities would be legitimate targets of extreme measures by the collectives they attack, thereby providing the citizens of these states with strong motivation to change the policy of their states. Thus, citizens of evil states – states involved in massacre and enslavement – have no *conventional* right not to be attacked, while citizens of other states do have such a right.

I accept that killing innocents of a third party is morally worse than killing innocents of the aggressive party, which means that *if* the attacked collective has a choice, it should target the latter rather than the former. Still, if it does not have a choice, if the only way the attacked collective can defend itself is by attacking a third party, then, according to rights consequentialism, it would be allowed to do so – a result which seems hard to digest. The analogy in the domain of individual self-defense would be a permission granted to two would-be victims to kill an innocent bystander if that is the only way they could defend themselves. Surely such killing would be ruled out.

I turn now to the way in which the contractarian interpretation of the morality of war is supposed to solve the Continuum Problem. According to this interpretation, 'the morality of the war convention follows from two facts: first, states actually agreed on them; second, decent states whose aim is minimizing the harm inflicted on innocents in wars would agree on them' (Benbaji 2011: 341). When would states not agree on the war convention *ex ante*? (a) In cases where the keeping of the war convention would not be mutual; (b) More relevant to the present context, in cases where the price of keeping the war convention would be a defeat resulting 'in dehumanization, enslavement and/or systematic murder and/or ethnic cleansing of the community in question' (*ibid.*: 357), i.e., in those very circumstances that fall under the heading of supreme emergencies. One way to describe what happens in supreme emergencies is to say that in such situations, the war

convention breaks down together with all the rights and duties embodied in it, which explains how states might have Special Permissions to do things that would be forbidden in non-emergency situations. A different way of describing supreme emergencies within the contractarian framework, which Benbaji seems to prefer, would be to say that the war contract itself includes a clause about supreme emergencies to the effect that, in such circumstances, the threatened party is granted Special Permissions to prevent the catastrophe that might befall it.

We can now see how the contractarian view seeks to avoid the problem emerging from the Continuum Thesis. In regular, non-emergency situations, states would prefer a rule-governed war even if it carried the risk of defeat, just as teenagers would prefer rule-governed fights – fist fights: yes, knives: no; kicks: yes, broken bottles: no – even if it meant that in some fights they would be defeated. On balance, such *ex ante* mutual self-restriction would be mutually advantageous. However, in supreme emergency situations, the assumed advantage from the war convention would be offset by the prospect of massacre and enslavement, hence in such situations, and *only* in such situations, the war convention breaks down and Special Permissions become available.

The crux of the solution to the problem raised by the Continuum Thesis is, then, that while states would not commit themselves *ex ante* to an arrangement that might doom them to massacre and enslavement, they *would* commit themselves to rules that carried lighter risks to themselves, in order to enjoy the advantages of such rules in terms of minimizing the harm inflicted on civilians. While it is in the interest of states to subject themselves (on the basis of mutuality) to the rules of war even at the risk of having to pay a price for doing so, it is not in their interest to subject themselves to such rules if the price of doing so is too high (massacre and enslavement).

For the sake of argument, let us accept the contractarian account. Does it succeed in blocking the continuum between supreme emergencies and other, less-desperate exigencies? For this to work, one must assume, as Benbaji does, that only in the face of grim prospects such as massacre and enslavement does the war convention break down, not in the face of other risks, grim as these might be. In particular, states would prefer rule-governed wars over total wars *even if the price of adhering to such rules would be defeat in war* – provided that the defeat did not carry the risk of radical dehumanization or collective elimination. However, I doubt whether this captures accurately the interests of states. It seems to me that when the very existence of states is in danger, they would prefer a regime with no rules if they estimate that such a regime might improve their chances of protecting themselves. Or, to put it in contractarian terms, states would prefer total war over rule-governed war in case their very existence is under threat.⁵

Interestingly enough, Benbaji himself seems to be sympathetic to this suggestion. Though his 'official' definition of supreme emergencies refers to the threat of 'dehumanization, enslavement and/or systematic murder and/or ethnic cleansing of the community in question' (ibid.: 357), he also mentions less radical threats, circumstances in which 'the very existence of the just state and the way of life of the communities that this state protects are seriously threatened' (ibid.). But that last definition would carry the implication that defeats resulting in the loss of sovereignty would often be regarded as cases of supreme emergency, even if they did not lead to systematic murder, enslavement and the like.⁶

One of the main questions recently debated in just war theory concerns the moral legitimacy of ordinary national-defense wars. Some thinkers, notably David Rodin, doubt

whether the threat of losing political sovereignty is enough to justify going to war even if the war contemplated is fought in full accordance with the war convention (Rodin 2002). Against this background, one can see how radical the above conclusion is: While Rodin forbids (or is very close to forbidding⁷) the employment of even *ordinary* measures of warfare in order to defend a political community, Benbaji seems to permit the employment of even *extreme* measures, including mass killing of the innocent, if necessary to protect 'the very existence of the just state and the way of life of the communities that this state protects.' As Martin Cook rightly argued, since 'most human communities that have ever existed have at some point disappeared, often as a result of conquest, invasion, or loss of political autonomy, such a generalized permission [to disregard to war convention] would be a recipe for rather frequent supreme emergencies' (Cook 2007: 147).

But all this brings us back to the concern I expressed at the beginning of the paper in the guise of the Disturbing Thought. According to the contractarian interpretation of supreme emergencies, states are subject to the rules of war only insofar as doing so does not jeopardize their chances of victory, in which case they are allowed to shift gears and violate these rules – which seems to imply that the constraints imposed by the rules of warfare are weak and superficial. The contractarian account of the morality of war seems to get too close to the realist position, by which I mean the view that although morality is valuable on the international level too, its value diminishes or evaporates once it prevents states from protecting their most vital interests.

A natural response to this criticism of the contractarian solution would be to adopt a stricter approach with regard to the conditions that constitute supreme emergencies, and argue that only when defeat is expected to end in mass murder or enslavement are Special Permissions granted, and not in cases of plain defeat which do not carry such a prospect. The problem with this move, however, is that it seems to misrepresent the interests of states, and, consequently, to misconceive the kind of contract that states would, *ex ante*, agree to. States would not consent to an agreement that would deprive them of the last measures available to them to defend their very existence as separate political entities. And the reason they would not accept such an agreement is that their interest in not losing their sovereignty is stronger than their interest in conquering other states and ending *their* sovereignty. They would prefer an agreement that granted them Special Permissions to protect *their* very existence even at the price of granting such permissions to *all* states, which would make it harder for them to take over other states if they so willed. Hence the contractarian account seems committed to extending the notion of supreme emergencies to cases of plain defeat as well, which, as indicated above, is hard to swallow.

This problem notwithstanding, contractarianism does at least seem to solve the continuum problem because it manages to explain why states are granted Special Permissions only in the face of grave threats, but not in the face of non-emergency situations – namely, in regular circumstances of warfare. In the latter circumstances, when there is no immediate threat of defeat, the war convention is assumingly fully valid as are the constraints it poses on the targeting of innocents.

Yet I am not sure that even this can be granted. In my previous paragraph, for the first time, I inserted the term 'immediate' to characterize the kind of threat regarding which states might be granted Special Permissions, suggesting that when the threat is not immediate, namely in regular warfare circumstances, such permissions are not available. But why should immediacy carry any intrinsic moral importance in the present context? After all, the justification for launching war in the first place is self-defense, which, in classic

national-defense wars, means the right of states to protect their sovereignty against those who threaten it. In many wars, definitely 'old' ones (see Kaldor 2006), states go to war in order to protect themselves from defeat resulting in loss of sovereignty. But if that is the case, it is hard to see why the permitted measures for this protection should not apply from the first day of war. If the protection of sovereignty is so valuable that it justifies Special Permissions, and if the very justification for war is the protection of sovereignty, then Special Permissions seem to be valid from the very beginning, which means the collapse of the traditional distinctions that constitute the ethics of war.

5. Supreme Emergencies, the Continuum Thesis and Asymmetric Wars

Let me now connect my discussion of supreme emergencies to the notion of asymmetric wars. Some assume that what is crucial to such wars is a radical disproportion between the military forces of the parties engaged in an armed conflict. But if that is the meaning of the expression, then many wars in the past were asymmetric too, such as the war of Nazi Germany against Luxemburg, the war of the Roman Empire against the Jewish rebellion in Judea, and so on, while the term 'asymmetric wars' is used today in a different sense, to characterize specifically the contemporary 'new wars'.

Moreover, if supreme emergencies included threats to the very existence of political communities, then, on this understanding, asymmetric wars would almost by definition be supreme emergencies, because they are situations in which, due to its military inferiority, one party to the war is doomed to lose unless it uses measures which are usually forbidden. Yet I doubt whether those using this definition have such an implication in mind.

According to a different understanding of asymmetric wars, what is special about them is that they are not wars carried out on the battlefield between armies. In these wars, while one side – a state – has a regular army and employs it more or less according to the conventions of war, the other side has no such army and instead utilizes a combination of guerilla fighting and terror attacks with no regard, or only minimal regard, for the conventions of war and for international law. Thus, referring to a war as 'asymmetric' says nothing about which side, in the final analysis, is more powerful and with a better chance of prevailing. Within this understanding, both sides in asymmetric wars could be granted Special Permissions: The state could help itself to Special Permissions if the threat posed to it is grave enough and there is no other way of countering it, and the non-state actor could do so too if the use of Special Permissions was critical to protect itself from the aggression of the state.

In contemporary asymmetric wars, the threat to the state will hardly ever be loss of sovereignty, for the simple reason that non-state agents have no army to actually conquer the state's territory. Rather, the threat would typically be one of murder and of a drastic interference in normal life brought about by indiscriminate attacks on residential areas, using rockets, bombs and other devices. Thus, from the point of view of the states involved in asymmetrical wars, such wars often create supreme emergencies. As for the other side to the conflict, i.e., the non-state agent, the threat it faces is typically oppression in various degrees and denial of the right to sovereignty. Whether we should regard such threats, or such wrongs, as constituting supreme emergencies depends to a great extent on the correctness of the Continuum Thesis. Does the non-state group have to face a threat of massacre and enslavement to be granted Special Permissions, or could lighter threats be

sufficient? Should enslavement be understood in a strict and literal manner, or could it be taken to include many kinds of oppression and domination, in varying degrees? You can immediately see how a permissive answer to these questions relies on something like the Continuum Thesis, and opens the door to the problematic implications mentioned above.

6. Conclusion

To conclude, some believe that if the only way for individuals to defend themselves from a serious attack is to directly kill innocent bystanders, who bear no moral or causal responsibility for the attack, then the former are doomed for they have no permission to do so. The same would be said about states, i.e. if the only way states have to defend themselves from a grave threat is to directly kill innocents who bear no moral or causal responsibility for the attack, states have no permission to do so. Others – I would estimate most people – would say that at least with regard to states, they are granted ‘Special Permissions’ to defend themselves in cases of supreme emergency. However, such permissions give rise to the Continuum Problem and to the Disturbing Thought. They raise the suspicion that the war convention rests on a very shaky basis. I discussed three solutions to this problem: The ‘Quality Makes Quantity’ solution, the threshold deontology solution, and the contractarian one. The latter seems to me the most promising, though, at the end of the day, I am not sure that it works. Although contractarianism does establish a distinction between supreme emergencies and less dramatic situations, the price of accepting this distinction means conceding that the category of supreme emergencies includes all (or most) cases of defeat in national-defense wars, even cases that do not result in massacre and enslavement. Moreover, it seems committed to the view that if Special Permissions are granted, they can be granted from the first day of war. These results are bothersome and give rise to the Disturbing Thought which has not yet been removed: Does the war convention rest on firm moral ground, or is it to be held only so long as the price of observing its dictates is not too high, in which case it might be jettisoned? At present I do not feel I have a satisfactory answer to this question.

NOTES

1. I am not familiar with research on attitudes towards supreme emergencies, but some insight into public opinion can be gained from the attitudes of respondents towards the use of the atomic bomb in the war against Japan. Immediately after the war, an overwhelming majority of Americans – 85% – approved of this use, while only 10% disapproved. Surveys in subsequent years showed a decrease in this support, but it has remained unequivocal: In reply to the question ‘Would you say you approve or disapprove of using the atomic bomb on Japanese cities in 1945?’, in 2005 57% of Americans said that they approved of this use with only 38% disapproving (see <http://www.gallup.com/poll/17677/majority-supports-use-atomic-bomb-japan-wwii.aspx>). If most Americans support the mass killing of innocent people just to save the lives of American *soldiers*, in a war that they were no doubt winning, one can assume that they would support even harsher measures to protect their country from a potential defeat, or to defend their *civilians* from mass murder or enslavement. Common attitudes towards the use of torture in interrogation might also give some indication as to people’s readiness to divert from accepted moral and legal standards when they identify a threat to national

security. In 2009, 55% of Americans thought that such use of torture in the war against terror was justified, with only 36% objecting; see Jones 2009. For philosophers who believe that if a supreme emergency ever occurred, Special Permissions would be available to the threatened side, see, for instance, Walzer 1977, Orend 2001, and Lund 2011.

2. The argument seems to be made by Primoratz (2011: 382), when he says, in direct response to the continuum problem, 'that the difference in scale between the two surely has considerable moral significance'.
3. Some philosophers believe that it is misleading to call this deontology, and that these threshold deontologists are *normative pluralists*. See Smilansky (2003).
4. I have argued (Statman 2006a) that threshold deontology is insufficient to support the full scope of what is meant by Special Permissions. For the sake of the present argument I shall ignore this argument. My point is that even if threshold deontology *is* the best framework to understand Special Permissions, it does not escape the Continuum Problem.
5. One of the reviewers for this journal objected to this claim, arguing that many countries that could have violated the rules of war in order to defend themselves from defeat nevertheless refrained from doing so. For instance, the Germans could have massacred British and American POWs at the end of WWII but did not, Saddam could have used chemical weapons against American soldiers but did not, and so on. But in these cases it must have been obvious to the defeated sides that such measures would not have prevented their defeat, hence their reluctance to take them shows nothing about their commitment to the war convention. I think it is actually quite hard to come up with cases in which countries preferred the option of defeat over the use of otherwise immoral or illegal measures.
6. As indicated above, Walzer at times lends himself to this understanding. See Hendrickson 1997 and Orend 2001: 27.
7. The 'official' conclusion that Rodin correctly infers from the arguments he develops is that wars of national-defense cannot be morally justified. Both strategies to provide such justification – 'reduction' and 'analogy' – fail. Nonetheless, in the last pages of the book, Rodin resists this conclusion and tries to show that such wars are in some sense morally acceptable (or, at least, not unacceptable). In Statman (2006b), I express some doubts about this move.

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