

Non-Combatant Immunity: A Necessary, Yet Versatile Condition for Just Warfare?

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Abstract

*Can a regime of warfare which employs deliberately indiscriminate violence towards civilians ever be regarded morally just? Both “common sense” and ethical arguments tend to clearly dismiss this sort of notion. In this paper, I intend to show through analysis of the 20th century and contemporary discourse on just war theory how the *prima facie* moral duty of sparing civilians has been constructed and upheld as a central condition of just warfare. In doing so, this paper aims to illustrate the conceptual differences several scholars and their theories employ regarding non-combatant immunity. This is hoped to become especially clear as I highlight not merely the more classical, state-centered approach to the ethics of war, but also deal with a very recent, cosmopolitan perspective on just warfare. Concluding, I propose that maintaining non-combatant immunity as an ethical necessity may depend on your perspective on how a “non-combatant” is distinguished, but still remains essential in terms of ethical regulation for actual warfare.*

Keywords

Civilians, Consequentialism, Cosmopolitanism, Just War Theory, Kantian Ethics, Killing in War, Non-Combatant Immunity

Introduction

“Killing Civilians is worse than killing soldiers. If any moral principle commands near universal assent, this one does.” (Lazar 2015: 91)

The question of whether there is a moral difference between killing combatants and killing civilians, or, more precisely, non-combatants, indeed appears to be settled. Not only does it strike one as a profound *prima facie* moral coercion, as most people are specifically, some even exclusively, appalled by war when it claims the lives of the innocent, but a multitude of arguments by various scholars demand a strong *ex post* claim of philosophical absoluteness to the notion that it is in fact morally worse to intentionally kill non-combatants than it is to intentionally kill soldiers; due to the limited length of this paper, it will disregard the issue of killing civilians in the context of collateral damage. However, as always within the ambiguous realm of philosophy, there are some counter-intuitive doubts about this that may jeopardize the coherence of just war theory. Are they justified? And if yes, do they declare traditional just war theory philosophically falsified? This paper seeks to answer these questions through systematic analysis.

Firstly, the line(s) of thought employed by those proposing the necessity of discrimination as a *ius in bello* condition is to be examined, with the explicit aim of clarifying why it is, by now, almost universally accepted as a central foothold of just war theory. Subsequently, some objections to the universal validity of discrimination will be illustrated. On the one hand, a limited objection by mainstream just war theory itself, the Supreme Emergency exemption, proposed mainly by Michael Walzer, will be introduced and analyzed. On the other hand, a rather recent conceptual objection by the more radical cosmopolitan approach to just warfare, embodied mainly by Cécile Fabre, will supply an element of rebellion against traditionalist just war theory whose reasoning I will depict accurately. While this paper is both pillowed by the great amount of analytical as well as descriptive research that has been conducted in regard to its central question, it simultaneously attempts to critically analyze the used literature along the way. In doing this, it finally aims to propose the possibility of upholding the principle of discrimination while making some concessions to those in enmity to employing it as an absolute and universal condition for morally just warfare. This can be done in a logically coherent fashion, I argue. I will start this examination by pointing out the moral arguments brought up in order to defend discrimination as an absolute and universal moral principle, and explaining which merits this point of view may have.

Non-Combatant Immunity as a Necessary Condition for *ius in bello*

In order to satisfy the purposes of this paper, it suffices to say that, while civilians are not in legal terms identical with non-combatants¹, we can treat both groups as morally identical, to both avoid the danger of getting stuck with debating legal semantics and the risk of unnecessarily confusing the reader. Thus, from now on, I may use both terms as synonyms, defining both as persons who are not engaged in warfare, regardless of whether they are involved with an armed force or not. This basically paraphrases and combines the Merriam Webster definitions of civilian and non-combatant. Having simplified the semantic intricacies, we may now move on to questions of philosophical substance. The concept that has arisen as the most relevant within the context of non-combatant immunity is the notion of innocence. It has been the central issue in debates about discrimination in just war discourse since the 1960s (Mavrodes 1975: 120ff.). While mostly defended as a central moral imperative prohibiting attacks on non-combatants, Mavrodes takes the stance that

“innocence, as used here [as a moral justification for discrimination, note], leaves out entirely all of the relevant moral considerations [...].” (Mavrodes 1975: 123)

He argues that it is not permissible to equate non-combatant with innocent, as a non-combatant may in some way bear a greater responsibility for the waging of war than a soldier actually engaged in it.

What is more, combatants do not act as individuals but as often involuntary agents of nations, which contributes to further eroding the moral classifications of criminality and innocence. Thus, this proposed notion of innocence does not coherently work and can not be plausibly applied to all non-combatants (same: 123). Fullinwider (1975: 92f.) takes on this criticism and develops a counterargument that disconnects the reasoning from notions of criminality. While he supports Mavrodes in his criticism of former arguments for discrimination, he builds up an argument for non-combatant immunity resting upon the principle of self-defense, foreshadowing a similar argument for discrimination that Michael Walzer would later on employ in his *Just and Unjust Wars*. It goes like this: Only entities that pose a direct and immediate threat to the lives of others become liable to be killed. This applies to individual self-defense as well as to the procedures of killing in war. Removing questions of moral guilt and respective punishment from the picture, this argument implicitly serves to further the notion of limited war by decidedly allowing killing only as a resort of self-defense and thereby protecting individuals and groups not engaged in warfare (same: 94f.). His argument can be summarized as follows:

“To intentionally kill non-combatants is to kill beyond the scope of self-defense. It is to kill

unjustifiably from the point of view of self-defense.” (Same: 94)

It also subtly anticipates another of Walzer’s proposals, the moral equality of combatants, a principle that has lately been the subject of various criticisms (Walzer 1977: 34-47, McMahan 2006: 377-393). Fullinwider’s emphasis on the reciprocal relation between a direct and immediate attack with a chance of lethality and the morally adequate response of using deadly force against said attack resembles Thomas Nagel’s writings on absolutist morality in the realm of warfare, in which he absolves any other targets than the one presenting a specific and immediate attack of any liability to be killed, thus furthering the notion of just warfare as inherently limited. The distinction between combatants and non-combatants is converted from near irrelevance in the actual exercise of some wars (Nagel explicitly refers to the Vietnam War) to a fundamental and necessary precondition for any war that wants to be regarded just (Nagel 1972: 138f., 127-130). We can observe in these attempts to justify discrimination a general endeavor to keep the category of morally allowed killings in war as narrow and linearly argued as possible; the argument mostly made in order to protect civilians stems, and surprisingly so, from consequentialist considerations. Non-combatant immunity is, in the case of the self-defense argument made above, an end in itself, but also simultaneously, and perhaps more subtly, a grave means to the end of limited overall suffering. Johnson writes:

“When no distinction is made between enemy combatants and enemy non-combatants, the non-combatants suffer disproportionately. When non-combatants are chosen as preferred targets, this burden of suffering becomes heaviest of all.” (Johnson 2000: 422)

Notice the subtle rhetorical consequentialist element of proportions: It gives reason to the assumption that, in the philosophical justification of non-combatant immunity, it is not simply a *prima facie* sense of inherent moral repulsiveness that condemns the killing of civilians, but a utilitarian consideration that aims to minimize physical suffering overall. Johnson goes on to refute different arguments in favor of abolishing the distinction between combatants and non-combatants in different ways, but his line of reasoning is heavily underpinned by one general concern: Turning down the notion that war is to either be total or abolished at all and setting the stage for the concept of just war as limited war. For instance, he essentially combats the argument that, sometimes, the military sphere and the civil sphere are so interconnected that distinguishing between them would be a mere charade by insisting that even in societies that may be constructed this way there are differences in the degree different people contribute to military causes, and that this difference, even if slight, is both morally meaningful and, if adhered to by war parties, contributes to the notion of

limited war (same: 422ff.). What is more, most literature proposing the principle of non-combatant immunity puts an emphasis on vocabulary that stresses words like *constraints* and *balance*. It is in search of the third way between absolute war and pacifism, and a concept like non-combatant immunity fits into the relative pragmatic agenda that the just war theory employs (O'Brien 1981: 45f.). It both fits into the moral need to limit warfare to the least amount of suffering possible and, being relatively vague in practice, recognizes certain realities of warfare. O'Brien stresses the necessity

“to balance the need to protect noncombatants with the need to recognize the legitimate military necessities of modern forms of warfare. In this process one may err one way of the other, but at least some relevant, practical advice may be offered belligerents.”

(Ibid.: 46)

Those efforts to relieve non-combatant immunity of a Kantian philosophical burden also serve to generally simplify the concept in order to enable a smooth integration with *ius in bello* and just war theory in general. Integrating the principle of non-combatant immunity with the overarching goal of keeping war limited and suffering minimal serves a central purpose: It helps to connect *ius in bello* imperatives with *ius ad bellum* conditions. As non-combatant immunity becomes a moral imperative, for both morally absolutist but mainly consequentialist reasons, it simultaneously becomes a necessary (but not sufficient) condition for *ius in bello* and thereby the overall waging of a just war; therefore, a war that is fought in order to suffice a just cause automatically becomes illegitimate as soon as civilians are deliberately attacked – the just cause vanishes. Thus, the *prima facie* axiomatic notion that deliberately killing non-combatants in war is a means *mala in se* and therefore morally repulsive also serves as an important headstone in the greater, consequentialist, structure that is *ius in bello* – it cannot be thought as autonomous of a greater, surrounding theoretical entity (Ibid. 44). In the next section, I will present exemptions from the concept of non-combatant immunity. As we have explored during the last few pages, non-combatant immunity comes with a heavy consequentialist underpinning that aims to secure more overall principles of just war theory; I will try to illuminate whether that means that these exemptions are *per se* unthinkable for anyone who does not wish the just war theory an untimely demise, or if the exemptions might actually be sensible and well thought-out.

The Supreme Emergency Exemption

The institutionalization of the concept of supreme emergency, previously a vague idea at most,

within just war theory was introduced by Michael Walzer in *Just and Unjust Wars* (1977: 251-268). Ever since it has been treated as part of a fixed canon of considerations within *ius in bello*, criticized by some but accepted within the greater discourse about morally just warfare, even provoking arguments in slightly different areas that clearly lean on its line of thought. All this might be surprising at first; Walzer's scenario of a supreme emergency explicitly allows and might even call for intentional, lethal and indiscriminate attacks against civilians. However, the *prima facie* moral inconceivability this argument provokes is dampened, and, some claim, even inverted by Walzer's thorough reasoning and, particularly, the narrowness of the scope within which human rights violations become justified. Employing the example of Nazi aggression, Walzer limits the eligibility of deliberate killings of civilians in war to cases that present

“an ultimate threat to everything decent in our lives, [...] a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful. We see it [...] as evil objectified in the world [...]”
(Walzer 1977: 253)

Thus, although this state-centered account of a supreme emergency case is more rhetorically emphatic than pragmatically scientific, we can justifiably conclude that such cases are of an evanescent rarity. Walzer's only example of a supreme emergency case is Nazi imperialism and the subsequent (last resort!) British indiscriminate bombing of German cities up until mid-1942; in the last two and a half years of World War II, the bombing was, in Walzer's opinion, not absolutely necessary and therefore transgressing against *ius in bello* requirements; there was no supreme emergency anymore (ibid.: 255-262). Neither existed reason to suppose supreme emergency in cases like the Japanese refusal to accept unconditional surrender that led to Hiroshima and Nagasaki, or the Korean War, the Vietnam War, and so on. Walzer realizes that the exemption of supreme emergency can only be thought a valid contribution to just war theory if its margin of eligibility is thought of as almost inconceivably small; else, it would jeopardize just war theory as a whole by undermining its very central notion of limited war, the principle that overarches all duties of *ius in bello* in quasi-consequentialist fashion. However, this still presents the issue that the concept of supreme emergency can, of course, be taken out of its original context of inter-state war to justify, for example, some form of terrorism. Such act utilitarianism is problematic, since it does the very thing the coherent survival of *ius in bello* is dependent on: converting moral arrangements like non-combatant immunity from near-absolute, profound and essential into mere, optional guides for proper warfare (Coady 2004: 777f.). This uncovers a profound flaw in the supreme emergency

exemption: Walzer's almost naive disregard for the possibility that his theory might be used within different discourses than his own, state-centered framework (same: 783). What is more, this flaw makes the supreme emergency exemption so susceptible to abuse by belligerents that it has to be asked whether scholars would not be better off by completely eliminating it. We are therefore confronted with the dilemma of deciding whether we dispose of a principle that surely has merits in some, extremely rare situations, or if we can endure to constantly defend it and possibly affected civilians against abuse by warmongers who lack any sort of moral compass. How this dilemma can be solved will be subject of great debates within the philosophy of morality (same: 787f.).

What we can say about the supreme emergency exemption within the context of exploring non-combatant immunity, however, is that it is a utilitarian consideration that, paradoxically, employs a sort of consequentialism that resembles the consequentialist nature embodied in non-combatant immunity as a necessary condition for *ius in bello*, but greatly differs from that in its relevance to non-combatants; but that seems to say more about consequentialist interpretations of morality than about the question if the supreme emergency exemption negates all foundations for non-combatant immunity. In fact, those notions are reconcilable. Naturally, supreme emergency provokes an exemption from the principle of non-combatant immunity that is grave and profound; however, both considerations originate from within the same framework of moral thinking about war. They follow the same fundamental notions of morality, and the elaborateness with which the supreme emergency exemption is introduced perhaps says more than anything else about the significance of non-combatant immunity in general.

Cosmopolitan War

I will now shift the focus from aspects of traditional just war theory to the more recent, cosmopolitan approach that Cecile Fabré has employed in her inquiry of the morality of war. She ventures into uncharted territory by supplying the first book-length theory of just war that is entirely thought from cosmopolitan perspective (Fabre 2014: 3). The revolutionary elements of this approach can easily be detected just by observing the structure of her book: the ethics of war cease to be absolute, but differ depending of the sort of war being fought: situations in a war of collective self-defense against unwanted aggression may provoke completely different moral verdicts than situations, for example, in a civil war (ibid.:contents, 5ff.). She defines cosmopolitanism as

"the view that human beings are the fundamental and primary loci for moral concern and respect and have equal moral worth. It is individualist, egalitarian and universal,

and insists that political borders are arbitrary from a moral point of view [...].

(ibid.: 16)

In other words, states and nations lose their moral significance, and are therefore no longer the focus of a theory of just war. This provides a new moral axiom that impacts all aspects of just war; it has great implications for the principle of non-combatant immunity, especially as cosmopolitanism, a Kantian position, must reject all notions of consequentialism.

Since, she draws different ethical conclusions from different scenarios of war, one need not be surprised that her conclusion on non-combatant immunity within the realm of the most traditional form of just war, collective self-defense, does not differ much from traditional just war theory. While she does employ a more elaborate position on collateral damage to civilians, allowing it to be inflicted only by the party fighting with just cause, her cosmopolitan narrative, in its sole emphasis on individuals, minimizes the ethical salience states supposedly possess, and therefore principally implies, in the case of inter-state war of self-defense, that there is no reason why individuals not engaged in war activities on either side should become liable to lethal, intentional harm as long as they actually stay non-combatants (ibid.: 82-95f.). But what about, for instance, civil wars? After doing away with the claim that intra-state wars do not belong within the field of just war theory by insisting that just war theory essentially grapples with massive uses of force between enemy groups that fight over some political end, a definition that arguably applies to civil wars, she goes on to discuss the issue of deliberate killings of non-combatants in such wars (ibid.: 131). In this case, her argument differs from the logic traditional scholars like Fullinwider employ: It is not just the mechanical act of self-defense that justifies killing in war, but also, to some extent, the graveness with which a civilian might support an unjust form of governance that oppresses their citizens' right to self-determination, or, in any case, their right to a minimally decent life – one might become liable to be killed, even if one never once picked up a weapon (ibid.: 157f., 118-125). Taking a sort of revisionist stance, this proposal falls back onto notions of innocence and criminality that early pioneers like Fullinwider or Nagel wanted to abandon; Fabre justifies this necessity to weaken the prohibition to harm civilians, counterintuitively on first look, by drawing from cosmopolitan axioms. When borders and nations become ethically irrelevant, it stands to reason that individuals have to directly be called accountable for their actions, irrespective of their being rich, poor, or any other feature that they might possess. This, in turn, leads to the conclusion that, to be regarded as morally just, everyone has to reflect on the consequences their actions impose not just on family or compatriots, but on the basic right to live a minimally decent life all individuals globally possess – a

conclusion that, when applied to the ethics of war, blurs the fine line between who is liable to be exposed to harm, and who is not, even further. Why should those non-combatants whose ignorant actions profoundly further the suffering of innocents not be liable to endure harm or death, if the force used against them is a means both necessary and of last resort to ensure that the deprived can actually seize their right to a minimally decent life? Fabre argues that this proposed liability to lethal harm is not at all disproportionate, as it is the result of the principle of self-defense, when applied globally in cosmopolitan fashion (ibid.: 31-38, 118-122). While this is a line of thought argued within the ethics of subsistence wars, there is no indication that it does not apply to civil wars in similar fashion. Note that all this does not imply that Fabre wants to dispose of the principle of non-combatant immunity. It merely means that non-combatant immunity assumes a different shape when constructed from cosmopolitan perspective. It loses its consequentialist function within the realm of *ius in bello* – in cosmopolitan war ethics, limited war is (supposedly) welcomed, but not the overarching principle other moral restraints are designed to adhere to. In fact, non-combatant immunity becomes a purely Kantian notion justified by the negative and positive human rights of all agents, but absolute only in so far as it can serve to further and accomplish these rights.

Her argument undoubtedly has its problems. One central issue criticized by Lazar, among others, is the arbitrary threshold between the amount of unjust harm caused that makes one become liable to (lethal) force and the amount of unjust harm caused that is just too little to justify one being killed (Lazar 2014: 411f.). This is one intricacy among others that will have to be thought out in a more differentiated fashion. While the amount of space I used here does, of course, not suffice to give a full account of cosmopolitan war ethics, the principles introduced in this section will go on to spark more controversy and deliberation within the field, and may just pose a small revolution in just war theory.

Conclusion

I hope to have adequately introduced the reader into the debate on non-combatant immunity, a topic so diverse that it arguably could be the subject of whole dissertations. Processing the history of non-combatant immunity as a notion central to *ius in bello*, I provided an account of how it fits into the overarching issue of keeping war limited and how, in traditional just theory, it derives from the understanding of the right to kill as a right to self-defense as a means that has to be necessary and of last resort. The implementation of non-combatant immunity in traditional just war theory essentially has to be understood as the attempt to institutionalize the reduction of suffering to be endured by only those who actually threaten others; a means, in other words, to provide war with a profound

moral prerequisite of conduct. This is a notion the supreme emergency exemption follows, designed only for times in which humanity itself and its basic moral accomplishments are at stake; a means of last resort and desperation, that has been criticized for its liability to misinterpretation and abuse, but still has a strong standing within the war ethics discourse because of its instrumental worth in showing just how bad war has to become if non-combatant immunity is to be annulled. And then there is the cosmopolitan approach to non-combatant immunity, a world view that detects all acting individuals as the only actors morally relevant and therefore personally liable to bear the consequences of their actions; a paradigm that may sometimes allow for a breach in non-combatant immunity, if, and only if, civilian actors are responsible for the profound and illegitimate suffering of others, and if those suffering can only end their plight by killing their civilian oppressors. This is a notion of ethics that is, as of now, susceptible to criticism because of the arbitrariness inherent in the criteria it sets, but also one that may come to greater influence in future discourse. All this merely presents a small extract of great liveliness of the discourse on non-combatant immunity. For reasons of length, I have deliberately ignored contributions by such scholars as Kamm, McKeogh, Seth Lazars latest book on this issue⁵ and others. However, I hope to have shown that my starting point for this paper, after all, still mostly holds up: Killing civilians is worse than killing soldiers.

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