

## THE PRINCIPLE OF NON-COMBATANT IMMUNITY – INTERPRETATIONS, CHALLENGES, SUGGESTIONS

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**Abstract:** The article deals with one of the most problematic principles of just war theory. It looks at the usage of the terms civilian, innocent and non-combatant and suggests how they can be interpreted. The principle of non-combatant immunity remains a real challenge for just war theory in the 21<sup>st</sup> century as it is designed to protect a specific group of people in times of war. The article considers the problematic issue of targeting non-combatants in war times as well as suggesting how we might better comprehend the problem.

**Key words:** just war theory; non-combatant immunity; civilians; war; terrorism.

### Introduction

Non-combatant immunity is an important issue in the just war tradition. Just war theory sets out a relatively wide range of criteria that must be satisfied if a war is to be morally justified. It distinguishes between the principles of *jus ad bellum* and *jus in bello*.<sup>1</sup> The former are concerned with the morally justifiable conditions for entering into war, while the latter deals with the conditions determining how one should act and behave in a war. The principle of non-combatant immunity (or the principle of discrimination) is intended to prevent us from deliberately attacking innocent people and this paper is concerned with defining what it means to be an innocent civilian or non-combatant and which term should

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<sup>1</sup> Recently, another category of principles has been discussed in the literature by various academics and researchers which they prefer to call *jus post bellum* principles i.e. criteria on post-war settlements, treatment of prisoners of war, establishing peace etc. that must be followed once the war conflict has ended. According to Gary J. Bass “it is important to better theorize postwar justice—*jus post bellum*—for the sake of a more complete theory of just war” (Bass, 2004, p. 384). David Fisher claims that “the rationale for this would be to remind political and military leaders of the need to take the *post bellum* settlement fully into account in the overall reckoning of the balance of consequences to be achieved by war” (Fisher, 2011, p. 80). For more information on the subject, see *Jus post bellum: Towards a law of transition from conflict to peace* (Stahn & Kleffner, 2008).

be used in permanent conflict like war. It also explains the nature of the principle and how it can be interpreted and looks at the consequences of following these interpretations. I believe that it is of crucial importance to distinguish between those who are directly involved in the mechanism of war and those who are protected from the harm and damage caused by war, as by doing so we may be able to clearly distinguish between justifiable deaths and unjustifiable war crimes and possibly between war and terrorism. This is also the main hypothesis of the article—that there has to be a group of people in society who are immune from being the target of military operations and attacks.

Theorists usually use the terms “legitimate” and “illegitimate” targets of violent acts. This fundamental distinction is one based on the civilian—soldier dichotomy. A civilian is a person who is not connected in any way to war and has no special importance in it. A soldier is therefore someone engaged in military service. I believe, as do many others (Guthrie & Quinlan, 2007; Slim, 2007), that the distinction is not clear enough and is likely to fall short. A soldier is someone who presents a threat, possesses a weapon and is allowed to use it in certain situations. By contrast, a civilian usually does not constitute a threat, does not possess a gun and therefore cannot be a legitimate target of our violent actions. Just as the principle of non-combatant immunity is of crucial importance, so too is the distinction regarding legitimate/illegitimate targets which ought to be clear-cut, objective and effective. Relying on the above mentioned distinction concerning the roles and professions of people in society may be hazardous. A soldier is definitely not always a threat and even a civilian population may directly contribute to the horrors of war and mass killing in the name of their own values, religion, ideology, culture, etc. Their contribution might even be of greater importance than the contribution of professional soldiers. A civilian arms dealer is definitely more dangerous than an ordinary soldier on active duty in the middle of an armed conflict.

### **Civilian, innocent or non-combatant?**

The significance of the principle of non-combatant immunity lies in the fact that it directly relates to human lives—analyzing their contribution to war mechanisms and the extent to which they are a potential threat, consequently dividing them up into untouchable targets, legitimate targets of killing, and according to some authors, targets that are generally protected but may be attacked under very special (or extreme) circumstances. The terms that should be used are still under discussion and polemicized. Often the words used are civilians, innocent and non-combatants. As I have mentioned above, using an inappropriate term may be hazardous if there are no clear-cut definitions on who is to be called a civilian or innocent. If I am a civilian, does that mean I cannot possess a gun or be a potential threat to the lives of others? Is the concept of innocence understood in terms of killing in war or does it involve breaking the law in times of peace as well? What I suggest is that if our definition of legitimate targets is too narrow (e.g. soldiers and army personnel on active duty), then it is also impractical and ineffective, and if it is too wide (e.g. anyone who represents a threat to someone’s life), then it does not exclude anyone and therefore protects no one. On the other hand, my assumption is that there has to be a group of people in every society that has to be excluded from intentional killing. The principle itself suggests that non-combatant is the most appropriate term. A non-combatant is a person who is not involved in any way in battle/combat.

Daniel D. Novotny writes about three different interpretations of understanding the legitimate targets of violence, war and terrorism. He also differentiates between civilians, innocents and non-combatants and suggests the best choice is to use the term non-combatant<sup>2</sup> as it directly excludes people not involved in the military activities of a particular country without the capabilities to defend themselves. These are most often targets of terrorism. The term civilian is too restrictive since targeting off-duty non-civilians (soldiers, policemen, etc.) is considered by most people to be a terrorist act and the term innocent does not mean innocence from all wrongdoing (Novotny, 2007, p. 28). Non-combatants are not only civilians but also soldiers not engaged in war. Off-duty or imprisoned soldiers do not pose a direct threat to our lives. If we identify them as legitimate targets, we not only violate the principle of non-combatant immunity, but also the principle of proportionality. The principle of proportionality is the use of proportionate means to achieve military goals and prohibits the use of disproportionate force. A line has to be drawn between the harm done and the good achieved and the utilitarian argument must be put under permanent consideration.

Hugo Slim, in his *Killing Civilians*, suggests using the terms *civilian* and *civilian identity*. In addition to using different terminology, he is well aware of the fact that there has to be a group of people who must somehow be set apart from the fury of battle and protected from the killing and wounding of war. Their blood should not be shed. They should be given safe passage and help and are to be shown mercy. It seems that this distinction has never been clear and purposeful (Slim, 2007, pp. 1-2). Moreover, he also claims that to “call a whole enemy population ‘civilians’ is a massive generalization because it includes a wide spectrum of different interests, roles and views in the war. It is a fallacy to suggest that all these people are equally harmless” (Slim, 2007, pp. 187-188). This is just another argument in support of the idea that certain kinds of civilians are involved in war and Slim attempts to define the term *civilian identity* which he argues may be the solution to this everlasting perplexity. Despite the fact that it might be very useful to define the concept of real civilian identity, I believe that the term non-combatant is less ambiguous as it precisely specifies the group of people immune from war attacks and it tries to overcome the soldier—civilian dichotomy.

### **Intention, causality and “being a threat”**

According to the majority of authors dealing with these issues, active participation as a system of waging war against someone is the fundamental criterion for distinguishing between legitimate and illegitimate targets in war, terrorism or any other armed conflict. Nonetheless most of them also neglect to explain what can be considered active participation and struggle to explain how it differs from passive participation in waging a war. Charles Guthrie and Michael Quinlan refer to notable participation in war, but they fail to answer the question of what it is and is not. For them attacking a military factory is a disputable case, but they strictly condemn the bombing of German cities in the Second World War. There is

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<sup>2</sup> The opposite term *combatant* refers to a person actively participating in military operations. A combatant is for example a military cook, medic etc. (Kapitan, 2007, p. 4). Using the terms *combatants* and *non-combatants* therefore eliminates any potential criticisms that might arise when using the terms *civilian* and/or *innocent* whose meaning is more vague and ambiguous.

a crucial difference between foreseeing something and intent. The deaths of innocent people must truly be an unwelcome side effect—“collateral damage”—and, if our enemy attacks innocents on our side, we are not released from our normal obligations and we are still bound by the principles of basic moral conduct (Guthrie & Quinlan, 2007, p. 39).

It is an undeniable fact that every war brings casualties on the side of non-combatants, but the only war that can be justified is one in which these deaths were not intentional and thus do not violate the principle of non-combatant immunity. Similarly, Igor Primoratz writes about foreseeing casualties and if such casualties occur but were not intended on the side of non-combatants, the principle of non-combatant immunity is not violated. He claims that

if the principle ruled out unintentional harming of civilians too, given the conditions of modern warfare, the theory would enjoin renunciation of all war. It would no longer deserve the name of just war theory, since it would turn out to be, for all practical purposes, indistinguishable from pacifism (Primoratz, 2002, p. 20).

Although the argument is based upon the existence and non-existence of a just war theory and how it is distinct from pacifism, I must agree with Primoratz, as I think that certain specific or very extreme conditions might enable us to justify the unintentional killing of non-combatants.

One partial problem in all of this lies in blaming someone else for the wrongdoings that happen in war. This is the usual practice of terrorists—the mechanical blaming of others and attributing only wrong motives to their actions. Something similar happens in times of war as well. An army is not capable of fighting for a long time until the soldiers start blaming someone (usually the soldiers on the other side of the battlefield) for all the wrongdoing, killing, pain and suffering happening on their side. This tendency to blame someone who is simply a means and the executor of someone else’s motives and goals is just another aspect encouraged by continuous news and reports of inhumane behaviour against the wounded or imprisoned enemy soldiers in military camps and/or prisons in certain areas and military zones. However, this unnatural image of justice is what turns soldiers into terrorists and whole armies into terrorist groups. Collateral damage is the phrase used to justify the “necessary” deaths of non-combatants based on a peculiar image of justice being restored. But solving conflicting opinions, values and ideas in this way is an immoral and unjustifiable act of pure retaliation. It is immoral because of the erroneous motives that precede it and the negative social consequences that follow it.

Reciprocally, we (the inhabitants of Western countries) make the same mistake and we judge and blame people of non-Western countries because they lead a totally different way of life, worship different gods and follow different religions and cultural (and moral) traditions. This makes it impossible for change to occur and eliminates any potential doubts about what is right, moral, wrong and immoral. Deepening the polarity of “us” vs. “the others” is therefore an inevitable consequence that accompanies the act of attributing wrong intentions as well as responsibility for anything bad that happens to others.

Simply ‘the other’ is the person or group with whom you find it hardest to practice inclusivity, the group from whom you feel the most separation. This may be a person of different ethnicity, class, religion, and/or ideology. All of us have someone who is, for us, the ‘other’ (Abdullah, 2002, p. 135).

I believe that it is our moral duty to be able to attribute even good intentions to the ‘others’, even though the nature of their actions is violent. We often make the same mistake—we believe that all violent actions against our values, religion, culture or ideology are acts of terrorism and that these ‘terrorists’ are immoral, cruel and violent beasts. We think of their actions as intolerable, but Umberto Eco warns us that if something is intolerable, it is always intolerable in connection to certain values, usually the values of the victorious side in times of war. It is necessary to respect the values of others and not judge them according to newly established rules based on a diametrically different value system (Eco, 2004, pp. 91-93).

James Turner Johnson examines the concept of non-combatant immunity more closely and considers three challenges to the combatant—non-combatant distinction found in contemporary discussion. First, the degree of integration between military and civilian functions is too tight to enable us to distinguish between the two. The problem is the argument over the actual degree of civilian-military cooperation. Second, denial of the distinction as a whole that one’s enemies are all assumed to support the war, and thus can all be rightly targeted. According to Johnson, this position loses sight of what it is in war that confers the right on one person to do harm to another. The third challenge is that the inherent destructiveness and indiscriminate nature of modern weaponry and warfare means one cannot distinguish between combatants and non-combatants (Johnson, 2000, p. 424). These challenges to the idea of discrimination share a common mistake in that they overgeneralize—by assigning the whole population of the enemy and all weaponry the same degree of threat and destructiveness. They also fail to acknowledge the inevitability that certain groups of people at least must be protected according to their age, health or degree of participation in the decision-making process in the country.

I think that the crucial criterion for distinguishing between legitimate and illegitimate targets of war, i.e. between combatants and non-combatants, is the actual degree of threat presented by those involved. Eliminating a possible threat may be allowed under some circumstances while killing someone who does not constitute a threat is always a wrong and immoral act. A similar distinction is made by Gordon Graham who also provides some practical examples of combatants and non-combatants. He differentiates between people who intentionally contribute to war (e.g. workers in munitions factories) and people whose contribution to war is only causal i.e. they do not contribute to war directly in the sense of the previous group (e.g. farmers who grow the food an army eats). Combatants are therefore people whose purpose is to contribute to the threat; non-combatants are those who do not actively contribute in this sense, though they may constitute part of a causal chain (Graham, 2008, pp. 70-72). According to this distinction, bombing cities and places that are not connected with the military actions of an enemy violates the principle of non-combatant immunity and should be called terrorism rather than an act of war. War has to be regulated by certain rules and standards e.g. Geneva Conventions, International Humanitarian Law, etc. The just war theory is one such set of rules to limit war’s hellishness and cruelty.

On the other hand, Graham is quite aware of the problems arising from such a distinction and of the fact that in many cases it is not clear where the line between a combatant and a non-combatant should be drawn. He provides some historical instances in which food supplies have simply been commandeered or others where the farmers would have grown

the food anyway, and would just have sold it to other purchasers. There are cases in which a “land army” was created precisely in order to sustain or increase food production for military purposes. Graham tends to call the agricultural workers in the first two cases non-combatants, but not in the third (Graham, 2008, p. 72). This is another example of the difficulties we face in applying the principle.

In addition to Graham’s distinction between intentional action and causal contribution, I suggest we use the criterion of threat mentioned above. Combatants are a threat to someone’s life, while non-combatants are not. Fisher agrees that this distinction “does not correspond to the distinction between civilians and military personnel, since some civilians may be involved in prosecuting the harm, while some soldiers, incarcerated, in prisoner-of-war camps, may have ceased so to do” (Fisher, 2011, p. 78). There will also inevitably be grey areas. But the fact that there are grey areas and hence difficult choices to be made does not mean, as some have claimed, that, with the immense destructiveness of modern warfare and weaponry, the distinction between combatants and non-combatants has broken down (Fisher, 2011, pp. 72-73). The cooperating function of the two proposed criteria (intentionality and degree of threat) is the key to delimiting legitimate and illegitimate targets of war i.e. the workers in a factory producing tanks are combatants while those who make the steel from which the tanks are made are not. It is justifiable to attack a military base full of military personnel, but we can never do so if it is too close to buildings which are highly likely to contain non-combatants. You can assassinate the highest army leader of the enemy, but you can never execute prisoners of war and justify it as a “just cause”.

### **Killing non-combatants**

It is clearly justifiable to attack civilians who pose a threat because they are no longer non-combatants. The Rwanda genocide in 1994 serves as a perfect example of civilians becoming combatants. On the other hand, it is also a perfect example of the ineffectiveness of the veto power of the Security Council of the United Nations.<sup>3</sup> Moreover, the attack would not be an act of humanity, but it would be a just and justifiable intervention in the affairs of another sovereign state, and one that I tend to call “non-humane justice”. Solving the problem of the non-combatant immunity principle and how it is interpreted is not an easy task, but if we are capable of differentiating between the status of a combatant and that of a non-combatant, one important question has to be answered: Is it ever possible (under special and extreme circumstances) to sacrifice the lives of non-combatants i.e. is their immunity absolute and permanent?

Michael Walzer assumes that the answer is yes and he identifies these special and extreme circumstances as a state of ‘supreme emergency’ which is the only case in which we can deliberately attack non-combatants. A supreme emergency can be constituted by

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<sup>3</sup> According to Guthrie and Quinlan: “it seems very desirable that the membership of the United nations should make more headway both in defining the conditions under which the external use of force beyond the situation of self-defense can be legitimate and in solving or easing the problems posed by the combination of the Security’s Council current composition and the operation of veto power” (Guthrie & Quinlan, 2007, p. 30).

a particular threat—by a threat of enslavement or extermination directed against a single nation and in such cases, soldiers and statesmen override the rights of innocent people for the sake of their own political community (Walzer, 2006, p. 254).<sup>4</sup> To disagree might also mean to deny the idea of non-humane justice, but the reality is that a situation requiring such action would have to be very extreme. The bombing of German and Japanese cities at the end of the Second World War can never be justified as these were not situations of supreme emergency. Clearly, there were situations of supreme emergency during the Second World War but not at the end when the victory of the Allied Forces seemed inevitable. Bombings that killed millions of non-combatants were unjustifiable and immoral and meet most of the conditions that we generally ascribe to terrorism i.e. killing non-combatants for political reasons, intentional killing, randomness, etc. Shannon French considers the existence of a threat to be a major factor in making this distinction, but she also realizes that killing in war is morally permissible, although it can never be good or indifferent (French, 2003, p. 40).<sup>5</sup>

Walzer's ideas are the subject of strong criticism from many authors with Joe Cole being one of them. His main objection is that "Walzer accepts the massive violation of human rights and large-scale killing of civilians in a situation of supreme emergency" (Cole, 2013, p. 1). Cole identifies 11 problems including internal inconsistency, the point of view problem, the human sacrifice problem, inadequate account of the relation between rights of individuals and political communities, etc. He also accuses Walzer of promoting political community over the individual, though he does not explain why the former has a higher value (Cole, 2013, p. 19). Walzer, in his more recent work, argues that this additional value comes down to a "commitment to continuity across generations" (Walzer, 2004, p. 122). The threat of moral and physical extermination is a sufficient argument to justify the violation of war rules and conventions. But "once a community has committed massive human rights violations already, hasn't its moral character changed?" and "hasn't the community suffered moral extinction at its own hands—a form of 'moral suicide'?" (Cole, 2013, p. 20). The competencies and legitimacy of the community naturally decrease, especially in connection with its moral and historical continuity and only the estimated consequences might further justify the action of the community and its worthiness of preservation.

The issue of supreme emergency has been analyzed by Briand Orend in *The Morality of War* in which he calls for the use of other, more humane, means in times of moral disaster and he suggests alternative tactics e.g. the use of prohibited weapons occurring before

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<sup>4</sup> John Rawls had a similar idea but he specified the conditions under which a political community could survive as he identified it with liberal constitutional democracy or at least with a decent and respectable non-liberal body politic. For more information, see: *The Law of Peoples* (Rawls, 1993).

<sup>5</sup> Walzer also addresses the issue of killing soldiers in war which he sees as being normal and natural since it results from a mutual vulnerability: using deadly means to protect them from the deadly means of their enemy. But this vulnerability is a valid argument only on the battlefield and this is the main reason he strongly criticizes the principle of discrimination as it enables us to kill soldiers who look funny, who are taking a bath, holding up their pants, reveling in the sun or smoking a cigarette (Walzer, 2006, pp. 138-143). Josef Velek believes that the universal equality of soldiers in battle is one of the headstones of the just war theory. It means that soldiers have an equal right to threaten or even kill enemy soldiers. The second headstone is the idea of universal equality of "innocent" civilians that should not be deliberately attacked or killed (Velek, 2013, p. 498).

civilians are targeted (Orend, 2006, p. 157). Orend overlooks the problem that banned weapons are often banned because they are indiscriminate, disproportionately destructive, or excessively cruel (Cole, 2013, p. 22). Using prohibited weapons such as nuclear bombs, biological or chemical weapons should never be perceived as a more humane tactic or as a lesser evil that is used to eliminate greater evils (killing non-combatants). Their potential to kill millions of non-combatants and the impossibility of differentiating between combatants and non-combatants thus make it an example of an even greater violation of human rights, war conventions and it is definitely not a better alternative as a reaction to extreme moral evil. This is not an example of non-humane justice, since it should be reasonably limited and under constant supervision. Using weapons of mass destruction exceeds the limits of any justice and the destruction they bring cannot be justified by any means.

## **Conclusion**

The principle of non-combatant immunity is a complex principle that can be (mis)interpreted and modified such that its applicability in practice can be strengthened or diminished rendering it impracticable. Adjusting the principle to fit 21<sup>st</sup> century conditions of warfare must be a key task in eliminating wrong and immoral actions arising from its misuse. Such adjustments are usually made by reflecting on the civilian—soldier dichotomy mentioned above. I suggest that it is not the role (profession or position) of a person in society that might put them in danger. Rather it is our actions and we must bear responsibility for them and face the consequences of them in the future. The criteria of intentionality and threat are crucial and they may serve us even in the harsh conditions of 21<sup>st</sup> century warfare which is often very sophisticated, technologically advanced and totally destructive. Finding the circumstances under which we can deliberately kill non-combatants is an attempt to provide further justification for the many unjust atrocities and slaughter happening around us. Concentrating on strengthening and modifying certain principles of the just war theory is essential as this may eliminate ambiguities and misunderstandings. Human life has a specific value which has to be worth preserving and protecting. As Ragnar Ohlsson once observed, “killing a man means causing an irreversible end to his life and is apprehended as the greatest evil by the majority. Death does not only mean the loss of a human life, but its unique and valuable experiences as well” (Ohlsson, 1979, p. 96).

It is inherently wrong and immoral to attack non-combatants who pose no threat to the lives of others or who put up no resistance in armed conflict. It is important to maintain and abide by the rules of certain moral traditions and the conduct of war. The just war theory and its principles should never be discarded as obsolete rules that cannot be applied to the situation of modern warfare. There is always a place for strengthening its principles through various interpretations, modifications and revitalizations. The assumption that war is hell is right, but even in times of war there has to be a right way and a wrong way of doing something. The existence of certain limits of what can and cannot be done is necessary and inevitable. I believe it is our moral duty to challenge the principles of the just war theory and reconsider them in order to make them less ambiguous and more effective as the 21<sup>st</sup> century makes this request a moral imperative.



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