

Killing Civilians: Thinking the Practice of War¹

Maja Zehfuss

There is something peculiar about war. It is a social practice that openly offends against one of the most widely accepted ethical prohibitions - the injunction against killing - and yet this practice, though doubtless controversial, is a mainstream occupation. Notwithstanding the fact that there is a small number of countries that do not have a military, being able to conduct war is considered a central function of the state. What is more, we are all involved: as taxpayers we finance the machinery of war, and when there is an actual war on, we are, by and large, expected to appreciate and support the soldiers who get their hands dirty on our behalf. For it is getting their hands dirty. No one seems to seriously deny that. Whichever way we look at it: war involves killing and therefore, though somehow apparently acceptable and even at times required, it remains problematic.

As killing is central to making war problematic, thinking about war – and in particular thinking about the ethics of war – often revolves around the legitimacy of such killing.² There are those, generally labelled pacifists, who reject war altogether because killing is *a priori* unacceptable. For those who are able to discuss war as potentially legitimate there seems to be a hierarchy of acceptability when it comes to killing. Two distinctions are crucial: that between civilians and combatants and that between intended and unintended deaths. It is on the whole considered acceptable to kill enemy soldiers, both intentionally and accidentally, unless they are *hors de combat*. Civilians, in contrast, must not be killed intentionally, though incidental or accidental killings may be justified.

It is difficult to overstate the centrality of the prohibition against the intentional killing of civilians in scholarship that positions itself as on the ethics of war, and intuitively this principle of discrimination or non-combatant immunity seems attractive. If we are to have wars, it is

arguably preferable that the killing should be limited. Put more strongly, it seems “blindingly obvious that we should protect as many of our fellow human beings as possible from the horrors of war” (Slim, 2003: 501). Trying to ensure that non-combatants caught up in war do not become the subject of deliberate attacks seems as good a plan as any to achieve this, not least because this might protect a large number of people. Yet if we are to critically engage with the ethics of war, then what is accepted as commonsensical constitutes a significant site of critique; for we easily lose sight of how common sense constitutes the problem it claims merely to negotiate.

While a growing body of critical scholarship has sought to rethink the ethico-political stakes of war in the contemporary context,³ the more traditional thinking on the ethics of war appears to remain largely unaffected by this critique. This is not altogether surprising: much of the critique reconceptualises the problem so profoundly that it does not directly engage with key ideas and concepts of traditional ways of thinking the ethics of war.⁴ This article, in contrast, focuses on the prohibition against the intentional killing of civilians that is at the heart of such thinking in order to challenge and hence potentially dislodge it. It starts by showing that, despite its intuitive appeal, there is no accepted justification of the principle of non-combatant immunity. The point of demonstrating this is not to argue that it is good or even just acceptable to kill civilians; rather, it is to show that the organising centre of much thinking on the ethics of war rests on nothing but itself and hence fails to constitute the sort of obvious foundation that it is represented as. The article then examines the implications of endorsing the principle; it argues that – contrary to the way the principle is generally presented – it actually works to confirm the devaluation of the civilian in war. The principle of non-combatant immunity ultimately emerges as part of the problem rather than the solution: it enables the very practice it seems designed to restrain. More bluntly, it makes it possible to justify war in the first place.

The distinction

The problematic of war and violent conflict has received much attention over the last decade or so, not least due to a perception that 'we' (meaning more precisely the armed forces of Western countries) are increasingly involved in wars or differently labelled military operations (again). This involvement is generally not celebrated by the political and intellectual elites. It is, rather, construed as a necessary evil or indeed opposed. At least part of the reason why war is ostensibly unpopular is that it involves killing. Killing civilians in particular is seen as objectionable. Mark Grimsley and Clifford J. Rogers (2002: ix) summarise this state of affairs:

If war is the scourge of humanity, the killing of the helpless is its worst manifestation. The deaths of thousands, even millions, of young servicemen are mourned but accepted. But the deaths of even a few women, children, or elderly people can provoke outrage when they die at the hands of soldiers. The cry from time immemorial has been that such killings are pointless, vicious, immoral, atrocious. Ethical prescription and international law alike have condemned the evil and sought to restrict it if they could not eliminate it altogether.

Concerned and even outraged reactions to civilian casualties as well as, for example, determined attempts by non-governmental groups to at least account for the civilian dead in war underline the particular opprobrium that attaches to the killing of civilians. Even those who approve of particular wars are often unhappy with the killing of civilians that is inevitably involved.

There is, then, widespread agreement that killing non-combatants is bad. Yet it is actually difficult to articulate precise reasons for why they should be entitled to special protection. Colm McKeogh (2002: 5-11) notes seven common responses to the question of why non-combatants may not be killed in war. First, killing non-combatants is impermissible because they have done no wrong. Second, they do not take part in the fighting. Third, they are not capable of defending themselves. Fourth, it is not militarily necessary to kill non-combatants. Fifth, exempting non-combatants from harm reduces the overall casualties of war. Sixth, protecting women and children makes species survival possible. Seventh, killing non-combatants is against the 'war convention'. What is interesting is that although

McKeogh's list identifies numerous reasons given in the debates on this issue, it actually illustrates the lack of a coherent basis for the principle. Indeed, he observes that none of the reasons "can give a fully satisfactory explanation for the difference we see between combatants and non-combatants in war" (McKeogh, 2002: 5). And nor does the list add up to such an explanation.

That civilians are entitled to special protection in war often seems to be *assumed* rather than shown. This is particularly evident in A.C. Grayling's examination of the bombing of cities during the Second World War, which makes little attempt to reason in favour of the principle, even though his book is subtitled *Is the targeting of civilians in war ever justified?* As Grayling's argument progresses it becomes clear that he does not actually seek to discuss and interrogate civilians' special claim to protection. What is at issue for him is whether, *given* the validity of this claim, competing moral claims may have overruled or at least limited it under the circumstances ruling at the time.

Grayling's interest in the particular circumstances and their ethical significance makes it necessary for him to contextualise his moral argument within a detailed historical narrative of the events linked to the bombing of German and Japanese cities in the Second World War. On the basis of this examination, he dismisses the claim that the Allies might simply not have known what they were doing. Interestingly, Grayling (2007: 279) comes to the conclusion that Allied bombing, like the September 11 attacks, were "moral atrocities" because the "centre-piece is an attack on a civilian population aimed at causing maximum hurt, shock, disruption and terror."

Although his exploration of the historical context introduces the complexity of actual circumstances, Grayling's argument, like other endorsements of non-combatant immunity, has at its heart a categorical and apparently straightforward differentiation between combatants and non-combatants. In the only passages that might be seen as attempts to justify the principle of non-combatant immunity, he draws attention to the different relationships civilians and soldiers have to war:

Soldiers are contracted, trained and armed for battle, and although they are placed in danger, their commanders usually try to keep as many of them unharmed as possible, by appropriate tactics. Civilians are in a very different situation from soldiers. Many, whether or not in a minority, will not be willing parties to the war that affects them. Civilians also have efforts made on their behalf to protect them, but the conditions of modern war – especially in respect of bombs and missiles from the air – place them in great hazard despite all that defence measures can do (Grayling, 2007: 249).

In a similar - briefer, but more revealing - explanation of why civilians ought not to be targeted Grayling (2007: 205, italics added) says: “the reason why it is worse to kill civilians than soldiers is that the latter are contracted and trained *to kill us and ours*, and are armed for the purpose, whereas civilians are not.” Put differently, soldiers may be targeted because they are a danger to us (or our soldiers), while civilians are not.

Michael Walzer (1992: 43) makes the same point when he asserts that those who “are not currently engaged in the business of war” are to be protected. In other words, the distinction is “between civilians who are ‘harmless’ and combatants who are engaged in the activity of ‘harming’ others” (Norman, 1995: 168). The terminology that is often used to articulate this point is that it is wrong to kill non-combatants because they are ‘innocent’. ‘Innocence’ is here used in a way that draws on a literal interpretation of its linguistic root. Grayling (2007, 215) explains:

The concept of ‘innocence’ is very important here: *nocens* is the Latin for ‘engaged in harmful activity’; the prefix *in-* means ‘not’ or ‘un’; thus *in-nocens* means ‘not engaged in harmful activity’. This idea imposes an obligation on anyone engaged in fighting a war to distinguish between combatants and non-combatants, and they must not intend to cause harm to the latter either as a means to their ends, or as an end in itself, in their conduct of the war.

A.J. Coates (1997: 235) similarly notes: “In line with its etymological derivation from the Latin *nocere* (‘to harm’), ‘innocent’ in this context means ‘harmless’ rather than ‘blameless’.” And Walzer (1992: 146) claims that ‘innocent’ is “a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights.” Simply put, the idea that ‘innocents’ should be protected in warfare means that soldiers may harm only those who are attempting to harm them.⁵

The upshot of this line of thinking is that enemy soldiers pose a threat that may be countered by violent means. On a closer look, however, things are not that straightforward. Most obviously, some civilians make a real contribution to the war effort and thus may be seen to pose an equivalent threat. The question of who may be said to be in the business of harming has therefore given rise to complicated arguments about whether *some* civilians may not actually constitute targets that would be no less legitimate than combatants. Traditionally, a frequently cited example has been about those who work in the armaments industry (Norman, 1995: 159; Walzer, 1992: 145-6). Coates (1997: 237) highlights the resulting argument that “it no longer seems appropriate to speak of civilian immunity” because civilians make such significant contributions to war. The issue lies not least in the centrality of the economy and its production to modern war (Coates, 1997: 238).

While contemporary Western wars are not actually ‘modern wars’ in this sense as they may not involve the entire economies of all the countries deploying troops,⁶ the problem of categorisation is now compounded by the multiple ways in which civilians have taken up combat-related functions. As David Kennedy (2006, 114) points out, there are “civilians all over the battlefield – not only insurgents dressed as refugees, but special forces operatives dressing like natives, private contractors dressing like Arnold Schwarzenegger, and all the civilians running the complex technology and logistical chains ‘behind’ modern warfare.” That is, what is sometimes called the ‘privatisation’ of war means that an increasing number of civilians are involved in the business of harming.

Conversely, debate about the distinction has acknowledged that some individuals in the armed forces have always performed essentially civilian functions (Norman, 1995: 159). And recently, even the idea that combatants are engaged in the business of harming has become problematic as it is no longer necessarily the case that enemy combatants are able to harm those fighting in the technologically advanced militaries of the Northern industrialised countries. This point attracted attention in the wake of the Kosovo operation, in which NATO forces did not suffer a single combat death, while causing an estimated 1,000 enemy military

fatalities (Shaw, 2005: 10). Michael Ignatieff (2000, 101) expressed concern that what he refers to as the “tacit contract of combat” had “always assumed a basic equality of moral risk: kill or be killed”, but that in operations such as the NATO Kosovo campaign this no longer applied because the combatants on one side were actually out of reach for those on the other and thus could not be hurt by them. In a short piece on Kosovo, Walzer (2004, 101) similarly claimed: “*You can’t kill unless you are prepared to die.*” Allegedly, NATO troops were not prepared to die, or at least their commanders – both military and civilian – were no longer willing to risk their lives. For Ignatieff and Walzer doubts therefore arise as to whether these troops were morally justified in killing enemy combatants. Given that these combatants could not be said to be, in any meaningful sense, in the business of harming them the most common justification for the permissibility of directing violence at them was no longer applicable.

The specific point of contention was that NATO not only did not put troops on the ground but also required its planes to fly at an altitude that was beyond the reach of the former Yugoslavia’s weapons. Thereby NATO, according to this line of reasoning, undermined the ‘contract of combat’ that had played a role in the moral justification for killing enemy combatants. That the inability of enemy combatants to cause any actual harm to Western combatants may be perceived as a moral problem was also illustrated by the objections raised against the so-called “turkey-shoot” on 26 February in the 1991 Gulf War, in which retreating and arguably defenceless Iraqi troops were killed from the air by US armed forces (Gregory, 2004: 165; see also McInnes, 2002: 73).

These issues put in question whether it is possible to make “a clear and morally relevant division between the two categories of people” (Norman, 1995: 159). What matters for the argument here is that combatants and non-combatants cannot be said to be distinguished by their involvement in the infliction of harm or lack thereof. Thus, the existing way of establishing innocence and non-innocence – namely on the basis of involvement in the business of harming – does not line up neatly along the distinction between combatants and

non-combatants and therefore 'innocence' fails as a potential justification for the principle of non-combatant protection. Put differently, the most common explanation, namely that it is permissible to kill those who are in the business of harming, does not work because the distinction between those who harm and those who do not is not identical with that between combatants and non-combatants. As Jeff McMahan (2009: 208) succinctly puts it, it "is false that all soldiers pose a threat, and false that no civilians do."

One may think that the principle of non-combatant immunity is retained simply as a practical rule, but McKeogh (2002: 4) stresses that it is seen as "a principle with a moral foundation" because killing non-combatants is considered "worse" than killing combatants. This point is underlined by the significance of the principle within the just war tradition; it is one of the central *ius in bello* criteria. Alex Bellamy (2004: 830) refers to it as "arguably the most significant element of the just war tradition's constraints on contemporary war." Summarising the work of Paul Ramsey, James Turner Johnson (1981: 350) notes that the "heart of the matter of ethics in war [...] is the immunity of noncombatants from direct, intentional harm." Indeed, the principle of civilians' special claim to protection is considered so central that it is often taken as an obvious starting point that itself requires little justification beyond the assertion of civilians' innocence, something that in itself, as we have seen, cannot be convincingly established. Bellamy (2004, 845), for example, merely asserts that the "idea that non-combatants may be intentionally targeted is simply not countenanced by contemporary international society", as though that settles the matter.

In sum, what has emerged from the analysis so far is that while the principle of non-combatant protection is widely endorsed and considered obvious, there does not seem to be any reasoning on which this endorsement could be based. The principle represents an unfounded foundation; it is the organising principle of an entire way of thinking about the ethics of war, that, however, cannot be justified in terms of what it itself justifies in the first place. What is at stake in retaining the principle is the system of thought revolving around it. This might explain why the principle is endorsed even by those who recognise the issues

with it. McMahan (2009: 235), for example, concludes his analysis of killing in war by stating: “While absolute civilian immunity is false as a moral doctrine, it remains a legal necessity.”

Intention

Commitment to the principle of non-combatant protection is by no means limited to scholars and activists. Rather, its endorsement is reflected not least in the frequent reassurances especially by Western politicians and military commanders that it is at the forefront of their minds at all times. What does seem puzzling is that these declarations of strict observance of the principle coincide with significant numbers of civilian deaths caused by Western forces in current wars. This discrepancy might be associated with the practical difficulties of counterinsurgency war - or as Rupert Smith (2005) calls it, highlighting the challenge, “war amongst the people”. More interestingly, though, it points to a further dimension of the conceptual problem. What has been considered so far and what appears to be the focus of much debate is how we think about *who* may be harmed or killed. What is actually at stake, however, is who may be *deliberately* harmed, that is, *with intent*. This is clear in Grayling’s (2007: 215) discussion of just war principles: “This formulation – ‘they must not intend to harm the innocent’ – accepts that innocents might be harmed in the course of military activity, as a by-product of it; the current euphemism for this is ‘collateral damage’.” Thus, the principle of non-combatant immunity is about not *intending* to kill civilians, not about not killing them. This is a significant difference.

For just war thinkers the doctrine of double effect, which permits the killing of civilians as an unintentional side-effect of a permissible military action (Walzer, 1992: 152-159; Coates, 1997: 239-264), is significant in assessing the morality of any killing of civilians. This doctrine is paralleled by the regulations of international law which forbid the targeting of civilians, but not their killing as such. Indeed, the moral principle and the legal rule are often, though problematically, presented as one and the same (see, for example, Bellamy, 2004: 839).⁷ Bellamy (2004: 835) claims that we “use the doctrine of double effect to judge the difference between unjustified (intentional) killing and justified (unintended but foreseen)

killing.” The upshot of the double effect doctrine is therefore, in Bellamy’s words, that the “first question that anyone who kills another (either within or without war) needs to answer is: ‘What is my intent?’” (Bellamy, 2004: 847). The problem with this is, as Bellamy (2004: 832) acknowledges, that Thomas Aquinas’s formulation of the doctrine “leaves it open to the charge that the difference between *intending* harm and merely *foreseeing* it – which is integral to the doctrine – is a facile one that does not in practice afford protection to non-combatants.”

Unsurprisingly, then, both Holmes, a critic of just war thinking, and Walzer, one of its key proponents, stress that it is not enough to simply intend correctly. Holmes goes further than Walzer and rejects the significance of intentionality altogether. He argues that “whether or not they are understood to be part of the acts with which they are associated, intentions are of questionable relevance to the moral assessment of acts” (Holmes, 1989: 198). He asks us to consider the following:

suppose two pilots fly over a military target surrounded by schools, hospitals, and recreation areas. Both have orders to destroy the military target. But one drops his bombs intending only to destroy the target even though he knows that in the process he will kill innocent persons, the other does so intending as well to kill those persons. But the one act, according to double effect, is permissible, the other impermissible (Holmes, 1989: 197).

This, of course, appears nonsensical. Walzer (1992: 153) acknowledges the potential criticism that it “can hardly matter to the dead civilians” whether their deaths were intended, a point that he identifies as significant not least because the number of unintended but nevertheless foreseeable deaths can be considerable. He states, unequivocally, that “[s]imply not to intend the death of civilians is too easy” (Walzer, 1992: 155), but, unlike Holmes, he wants to rescue the test of intention by making it more demanding. He argues for the need to revise the doctrine of double effect so that it involves a double intention, that is, not only an intention to achieve the good effect but one that also involves “that the foreseeable evil be reduced as much as possible.” Put differently, Walzer wants to see the protection of civilians cashed out in some active attempt at the reduction of foreseeable harm, not least by accepting risks for soldiers. That is, he calls for “due care” (Walzer, 1992:

156). He also suggests that we need to examine how those civilians “came to be in a battle zone in the first place” (Walzer, 1992: 159), that is, who put them at risk.

Coates (1997: 243; see also 251) drives at similar issues when he argues that “[o]bjective corroboration of moral claims (especially with regard to intentionality) is an essential requirement.” He claims that the “acid test, perhaps, is whether or not the agent has anything to gain from the evil effect itself” (Coates, 1997: 244). This might be seen as an intuitively sensible test: if the agent does not expect a gain – that is, if the military does not expect to gain an advantage by killing particular civilians – then it is unlikely that the agent intends the evil effect. Yet there are at least two problems here. The first is that this does not address Holmes’s concern as in his example the pilots expect no gain from the civilians’ deaths. In fact, this is probably a common situation. Killing civilians does not, after all, always or even usually contribute to achieving military objectives.⁸

The second problem is that this test merely assists us in determining the probable intention of the agent; it does not provide us with an answer as to whether, or why, intention is or should be morally relevant here in the first place. In order to think through this latter question, it is important to note what the focus on intention does: it privileges the armed forces as agent and reduces civilians to mere objects whose *actual* deaths count for little. The civilians in question will be just as dead, whether or not their deaths were intended. In fact, ironically, the implication of this line of thinking is that civilians’ deaths are permissible *if* they do not come into the calculations. That is, actions involving indifference towards civilians’ lives become acceptable.

In the context of Operation Enduring Freedom Anthony Burke (2004: 344) notes with some irritation that it appears that allied forces were construed as innocent of crimes because they did not intend to kill and asks: “Is *carelessness* really a defence?” He describes ‘just war’ rhetoric in the US after 9/11 as “a land where, as the phrase suggests, morally acceptable slaughter, suffering and chaos are described as ‘regrettable’, but occur because they are ‘unintentional’, ‘collateral’ or ‘necessary’” (Burke, 2004: 332). Derek

Gregory takes this line of thinking further, making use of Giorgio Agamben's notion of bare life, of life that may be extinguished without consequences. In his words, "[m]ost of these men, women, and children were killed or maimed 'not by design,' as a horrified Noam Chomsky put it, 'but because it [did not] matter'" (Gregory, 2004: 70). Chomsky (2002: 150), of course, continues: "if we step on an ant while walking, we have not purposely killed it." Chomsky (2002: 150) here seems to establish a category somewhere between intentional and unintentional, something that is not openly intentional nor really 'collateral damage' but what he considers to be the "conscious and deliberate", yet silent, destruction of Afghans.

Patricia Owens tackles a similar issue in her important analysis of the distinction between intentional and unintentional killing. She draws our attention to the way in which non-combatant deaths as a result of Western military action are represented as accidental, and therefore 'beyond intention'. Owens (2003: 606) recognises that "a strong case can be made that adherence to standards *higher* than international law is increasingly the norm", yet she significantly aims to "raise questions about the very idea that some acts are 'beyond intention' and what that allows." She points out that, in the prevailing argument, because "specific non-combatant deaths were not wilfully intended as unique events, they should be classed as 'accidents'; the United States and its allies cannot be held responsible (or even criticised)" (Owens, 2003: 596). Her concern is that the notion of accident, as it is used in the current discourse on war, serves to make civilian deaths permissible (Owens, 2003: 597).⁹

What Owens therefore examines in detail is what we mean when we call something an accident. Having explored the literature on technology, accident and risk, she concludes that we might need to rethink the concept: "What is an accident? We tend to view accidents as destructive, as unthought, random, events that occur against our best intentions. But what if we saw accidents as integral dimensions of events themselves?" (Owens, 2003: 597).¹⁰ This question is so crucial because 'accidents' in war have serious consequences and we need to know how to respond to them. The key question then becomes: "How do we assign responsibility when 'accidents' involve death to non-combatants?" (Owens, 2003: 600).

This question is particularly urgent as the notion of accident is, as Owens suggests, used precisely to evade responsibility. Owens's argument serves to question to what extent so-called accidental collateral damage is usefully understood as unintended. If lethal accidents are an integral dimension of war, then to what extent is it even an intelligible statement to say that such collateral damage is unwilled? In the larger context of the inescapable lethality of war, to what extent does it make sense to classify killings that may not have been intended as individual events as 'unintended'? And does it matter for our assessment of this question that Western militaries have been taking war to others' countries, away from their own civilians and towards 'their' civilians? After all, even Walzer wants us to consider who put the civilians into the battle zone in the first place.

Even Coates, who is sympathetic to the just war tradition, has raised the need to ask what is meant by 'intention'. He explains, citing John Finnis's work:

What informs the principle of double effect is a certain concept of intentionality according to which 'an action or aspect of an action is intentional if it is part of the plan on which one freely acts. That is to say, what one tries to bring about in acting, whether it be the goal one seeks to realize or the means one chooses to realize that goal, is intended. Other features of one's acts are not intended'. Thus, one does not intend (or, perhaps less misleadingly as far as common usage is concerned, one does not intend *in the same way*) what one accepts as a side-effect of promoting a chosen object. At the same time, the principle openly acknowledges the active role of the agent in bringing about side-effects, which are 'foreseen, accepted (and thus *voluntarily* caused)'. Though not part of the agent's plan or object, they are not brought about inadvertently or accidentally (that is, fortuitously).¹¹

So, in Coates's distinction, some unintended deaths are nevertheless 'voluntarily caused' and therefore not 'accidental' in the sense that would make them not the responsibility of the agent whose actions led to them. One might say that they are incidental rather than accidental. Differently put, Coates admits that intention may be understood in different ways and that in 'common usage' acts that are described as 'not intended' by just war thinkers might in fact be more appropriately classified as 'intended', if perhaps 'not in the same way'.

Nevertheless Coates (1997, 241) defends the double effect principle as useful in reaching sophisticated moral judgements. He does not agree that the principle might allow

for evading difficult moral questions but rather asserts that its “analytical utility” lies in “its capacity to complicate rather than simplify moral judgements.” For this to hold, Coates has to argue that the test of intention is not an easy one. As we have already seen, he is keen to stress that intention must be corroborated in some way, that it is not enough to merely claim that one did not mean to. More importantly, he does not think that determining intention settles the question of responsibility: “Not only does the agent retain responsibility for the unintended harmful effects of his or her act; but that responsibility may outweigh the responsibility that the agent has for intended effects” (Coates, 1997: 246). In Coates’s view, the principle of double effect serves to underline this. Yet Coates (1997, 239) also contends that “the requirements of the principle of noncombatant immunity must not be exaggerated.” This means, he clarifies, that the “moral difficulty arises only when noncombatant deaths are the foreseen (or foreseeable) consequence of a proposed course of action” (Coates, 1997). Hence, he implies that there are some – somehow unforeseen – civilian deaths that are not morally problematic. Following Owens, however, so-called accidents in war have to be considered foreseen inasmuch as they are an inevitable feature of warfare – an integral part of the practice or structural possibility -, and hence Coates’s distinction is impossible.

These differences of position are not surprising. Intention is, after all, a contentious category. That understanding acts through their intention is problematic, not least because intention can never be fully conscious and, moreover, does not exhaust the meaning of an act, has been established in other contexts.¹² Hence, distinguishing intended from unintended deaths is problematic. Thus, justifying the principle of non-combatant immunity relies not only on an impossible, and in the context of its rationale spurious, distinction between combatants and non-combatants; it is also based on intention, the meaning and significance of which is fundamentally contested.

Thinking the practice of war

The principle of non-combatant immunity is thus doubly problematic. On the one hand is the difficulty of meaningfully distinguishing between the two categories of people; thus the

question of whether to protect one group over the other is flawed from the start. On the other hand is the privileging of an aspect of action – intention - the meaning and implications of which are much more problematic than is acknowledged in most discussions of the ethics of war. Despite this, the principle remains central to much thinking in this area. Thus we must ask why it is so significant, what work it does in arguments about war.

Bellamy recognises that drawing the distinction between combatants and non-combatants is at times difficult but he rejects the claim that this undermines the principle. He acknowledges what he calls “grey-area questions” (Bellamy, 2006: 140), but says that

they do not undermine the idea of a distinction between combatants and non-combatants because, firstly, they are a minority of cases and, secondly, the very fact that they are considered grey areas is a product of the combatant/non-combatant distinction. Removing or downplaying the distinction simply removes the dilemma and lessens the normative significance of these questions.

Bellamy is right to observe that the idea of ‘grey area’ only acquires meaning in relation to the distinction. However, he takes as given that marginality – ‘a minority of cases’ – implies insignificance; this is problematic.¹³ Nevertheless, I want to follow his line of reasoning for the moment. Bellamy wants to resist devaluing the distinction because this would, he thinks, play “into the hands of one of the central justifications of terrorism: that there are no non-combatants” (Bellamy, 2006: 140). That is, if there were no distinction between combatants and non-combatants, this would, Bellamy claims, aid the justification of terrorism.

In other words, what is at stake for Bellamy (2006, 133) is that “it would be difficult – if not impossible – to distinguish meaningfully between war as a social practice and mass murder/brute force if it were considered permissible to kill non-combatants deliberately in some circumstances.” That is, the core of the matter is not actually the possibility of justifying terrorism, but rather the very opposite. What is at stake is the possibility of clearly delineating war from mass murder, and hence of investing it with legitimacy. What is at stake is the very possibility of justifying war.

The identification of terrorism as violating the most sacrosanct principle of the ethics of war plays a crucial role as it makes it the Other of legitimate war. Terrorism thus becomes the constitutive outside of war. This is particularly obvious in arguments that explicitly identify 'our' observance of non-combatant immunity as what sets 'us' apart from 'terrorists' (Elshtain, 2003: 20; French, 2003: 234-5). In the absence of the principle of non-combatant immunity, 'we' might collapse into one category with the terrorists, and that is seen as unacceptable and horrific. Yet we have seen the impossibility of the distinction and hence endorsing the principle creates nothing more than an illusion of being able to separate between our legitimate wars and their illegitimate terrorism. Even Bellamy himself incongruously asserts that "politicians and soldiers may sometimes break the rules legitimately" (Bellamy, 2006: 133), undermining his own point that war could not be distinguished from mass murder "if it were considered permissible to kill non-combatants deliberately in some circumstances" (Bellamy, 2006: 133).

Given the principle's continuing popularity, it is interesting to consider the emergence of the impossible distinction it is based on and its alleged benefits a little more. The civilian, of course, is "an invention of recent date" (Gregory, 2006: 633). In international law, rules relating to the treatment of civilians, as we now understand the category, started emerging at the close of the 19th century, with the Hague conventions, but the concept of civilian was only formally defined in the 1977 Additional Protocols to the Geneva Conventions, which distinguished between civilians and combatants (Gregory, 2006: 633). Although this distinction might be considered progress, Gregory raises a number of problematic implications of this categorisation that are interesting in light of the widespread assumption that distinguishing between civilians and combatants must be a good thing. Drawing on Helen Kinsella's analysis of the gendered character of the laws of war (Kinsella, 2006), Gregory highlights the political implications of the (gendered) distinction. He refers to the "humanist rhetoric [...] retained in horrified media reports of the deaths of women and children, which thus works to render the deaths of men and teenage boys somehow less

worthy of remorse or grief” (Gregory, 2006: 634). That is, the distinction encourages us to consider of less consequence the deaths of men and teenage boys.

Whether such an attitude is desirable seems to require more consideration than is generally found in the work of those endorsing the principle; for this attitude seems vital to the possibility of considering war an acceptable political practice. Kinsella further argues, and Gregory underlines this, that the distinction is not benign for civilians, either. Kinsella (2006: 185) notes the way in which to “be innocent in war, in the terms set by the laws of war, is to be deficient or lacking in a multitude of ways that in the end, implicitly if not explicitly, cites an incapacity for politics.” Gregory (2006: 634) drives this point home:

They retain a voice – they can certainly express pain – but they are denied language. More prosaically, the protections of international law are extended to innocent civilians on condition that they are placed outside the political process. They cannot represent themselves, it seems, they must be represented.

Civilians are objects of the violence of war, but never *subjects*. They are, in the frequently used phrase, ‘innocent victims’. Agency is all on the side of the armed forces; ethics of war is thought from their perspective, in terms of what armed forces may do and in terms of what may be done to civilians. Civilians may be blown up in the course of events as long as this is not part of the plan. This objectification of civilians is compounded by thinking the permissibility or otherwise of violence against particular categories of people on the basis of the (alleged) intentions of those perpetrating the violence. Put differently, the principle of non-combatant immunity – despite its aspiration of putting the welfare of the civilian at the heart of the rules and ethics of war – produces civilians as mere objects and hence in an important sense as insignificant. The principle thus does the opposite of what its defenders appear to think it does.

This devaluation of the civilian is crucial to the larger context of the justification of warfare. More broadly, the trouble with the principle of non-combatant immunity is precisely that it, as Bellamy correctly points out, makes possible the distinction between war and illegitimate uses of violence. It enables us to think of war as a legitimate practice – a practice

that is unpleasant, to be sure, but justifiable nevertheless if certain conditions are observed. War is all right: we don't (mean to) kill civilians after all. In the practice of contemporary Western war, expressions of support for the principle have played an increasing role and the illusion that our technology enables us to protect civilians in warfare has underlined this commitment (Zehfuss, 2011). Owens (2003, 616) hence argues that "describing civilian casualties as 'accidents' forms an integral part of the project of justifying war."

The obvious position to take in order to avoid this implicit justification of war seems to be that of the pacifist rejection of war. So rather than seeing the difficulty of distinguishing between war and other forms of violence as playing into the hands of the terrorists, as Bellamy does, pacifists seek to argue that all forms of political violence are illegitimate because all life is equally worthy of protection and hence no group of people can be singled out as targets for violence. That is, all persons should be treated as civilians are and hence not considered to be legitimate targets of attack. Martin Shaw, for instance, might agree that war and mass murder are not easily distinguished; for Shaw (2003: 26) argues - against the conventional wisdom - that distinctions between war and genocide are only ever partial. He points out that civilian deaths are actually "normal" in the West's recent wars (Shaw, 2005: 86). While Shaw (2005: 137) acknowledges that Western warfare has attempted to reduce civilian casualties, he argues that it is "time to face the truth that war and civilian safety are not generally compatible." In Shaw's view, we need to find alternatives to war.

Of course, such arguments are often rejected on the basis that since we have wars already, we need to address how to appropriately behave within them rather than merely wish them away. Pacifism might thus be seen as a desirable normative position, but one that has little purchase in our empirical world.¹⁴ It is seen as preferable to promote restraint, and here the distinction between civilians and combatants is produced as invaluable. Hugo Slim, whose work is grounded on empirical analysis, considers how one might persuade politicians and fighters who are not yet in support of the principle to adjust their behaviour to ensure civilian protection. He argues that the "civilian idea can be a very difficult one to sustain in

practice, but it is a deeply important moral idea and one that needs championing at all times in situations of conflict” (Slim, 2003: 481; see also 483). Slim acknowledges that there are few ideas that can be used to persuade those who act and think in anti-civilian ways, but he makes an effort to set out in detail those he can think of. They “hinge on the preciousness and vulnerability of human life; the fairness of a fight; innocence; the duty of civilians to actually be civilians; tolerance and compassion” (Slim, 2008: 260). Yet elsewhere he seems to simply dismiss the complexity of the issue as somehow irrelevant to the problem at hand:

At one level, the civilian idea is one of considerable ideological and practical complexity. But at another it seems blindingly obvious that we should protect as many of our fellow human beings as possible from the horrors of war and should be wary of the ease with which we construct extreme types of enmity (Slim, 2003: 501).

This idea that it is simply ‘blindingly obvious’ that civilians ought to be protected gels with what Grimsley and Rogers (2002, ix) point out, namely that even a few civilian deaths “can provoke outrage”. People react strongly to civilian deaths and particularly to those of women and children; they do not ask whether their outrage has a defensible rational basis. This reaction has perhaps been strengthened in the current political climate where the events of September 11 were considered so shocking not least because the main target was civilian (Lawler, 2002: 152) and terrorism has subsequently been identified as the key security threat in Western societies.

The sort of ethics offered by those who endorse the principle of non-combatant immunity tells us that war and in particular killing is problematic, but that it is justifiable if certain conditions – among them the aspiration to protect non-combatants - are met. Put differently, such an ethics makes us feel better about the violence committed by our militaries within the context of properly rule-following wars. What is interesting is that this scheme ultimately fails to work. The preciousness of others’ lives, as highlighted by Slim, remains troubling. That is, deep down we appear not to be reassured or satisfied. Deaths in war, even if ‘accidental’ or ‘unforeseen’ bother many of us, including, it appears, those of us who subscribe to just war thinking. This is illustrated by the discomfort many feel both at the deaths of service

personnel and at the considerable civilian casualties at the hands of Western militaries in the so-called 'war on terror', which occur despite the apparent commitment to the principle of non-combatant immunity of the militaries involved and their use of precision weapons and other measures to reduce such casualties.

Those who are wary of ethics as a system of rules and principles often prefer to think in terms of responsibility vis-à-vis others (Derrida, 1995; Campbell, 1993, 1998; Campbell and Shapiro, 1999; Jabri, 1998; Zehfuss, 2007).¹⁵ Thinking along those lines, the problem of killing is not one of following the correct rule but rather one of how to act in the face of others' singularity, that is, in response to the prospect of being responsible for ending their irreplaceable lives. Slim draws attention to this when he says: "Enemies never stop being human beings. They are still people. Their lives are precious. They are like us" (Slim, 2003: 485). Ethical and legal rules regarding warfare may at times allow us to focus on aspects other than this preciousness – their status as combatants, for example, or their danger to us and others. We may even avoid thinking about the preciousness of their lives, but this does not mean that the problem has gone away; rather we are faced with a decision about whether to engage in courses of action that might end individuals' lives. Since decisions cannot be determined by rules and principles, the principle of non-combatant immunity is unhelpful at this crucial point.

Conclusion

The principle of non-combatant immunity provides the possibility of ethical differentiation between different uses of violence on the grounds of perpetrators' intentions and at the same time reduces the horror of the killing by objectifying and hence devaluing the apparent centre of attention. This is problematic inasmuch as it aids the justification of war in the first place. Therefore, the principle that is meant to protect civilians may be seen to rather put them at risk. Recognising not just the problematic implications of the distinction between civilians and combatants but its very impossibility may, however, strike some as politically problematic. After all, this leaves us unable to muster one of the most popular arguments

against terrorism and might be seen to direct us towards the well-intentioned but some think ultimately unhelpful position of pacifism. It will come as no surprise that I do not agree with such an assessment. Above all, clinging to this impossible distinction in the hope that it somehow makes things better strikes me as problematic given its role in justifying war.

Rather than privileging either civilians or combatants in our discussions of the ethics of war, we need to think through the implications of the impossibility of the distinction. Some might say that both are persons with equivalent claims to life. Taking seriously what the attempted distinction revolves around – namely the question of the involvement in harm - one might, alternatively, not start from entitlements but simply begin to acknowledge the way in which we are always potentially harmful to each other. 'Innocence', in this view, marks an impossible separation from politics. Living together means having effects on one another; some of these may be harmful.

This is why the vulnerability of human life, which is noted by Slim, is a crucial site from which a critique of war is attempted. Judith Butler's recent work might be seen as most prominent in this endeavour. Responding first to the events of September 11 and the response to them she has sought to think through the implications of our vulnerability to each other (Butler, 2004; 2009) and articulated her hope that recognising this predicament might motivate us to embrace a position of non-violence (2009: chapter 5). What I am interested in here is the corollary of mutual vulnerability, namely that we are (potentially) harmful to each other. We cannot opt out of this disconcerting aspect of our world but must rather ask ourselves how to respond to it. Arguments of the ethics of war that revolve around the centrality of the non-combatant distinction arguably work to obscure this difficult predicament. Acknowledging it would mean to recognise that violence is less special than is suggested; the use of force is part of that which we commonly call politics. Recognising this does not trivialise violence and its effects but is rather necessary to enable us to confront the problematic of political violence more directly. Such recognition would not least undermine the possibility of taking a view, once and for all, on the basis of some absolute categorisation,

on the justifiability of some uses of violence and the illegitimacy of others; rather this would become something that we would have to confront in each particular instance, accepting responsibility for whatever decision we make.

If there is war, civilians get killed. No one disputes this. There will always be debate about how to respond to this most appropriately. What has been shown here are the shortcomings of the way of thinking that is treated as commonsensical and as without alternative. The principle of non-combatant immunity is a central part of the argument that produces civilian deaths as acceptable if they are not intended. One does not have to be a pacifist or otherwise 'idealist' theorist to be bothered by this and to struggle with aspects of the problem that seem to be either unresolved, or indeed resolved in the wrong way, by the principle. Those who promote and underline the principle of non-combatant immunity as central to ethical questions surrounding war seem to think that it is, at the very least, the best we have to prevent all-out barbarity. That is, it is an ideal worth striving towards. What we have seen, however, is that this ideal is part of the problem rather than the solution. Despite apparently putting civilians at the heart of considerations, it does so by objectifying them and hence ends up enabling the very thing it would seem to wish to protect against: making the killing of civilians acceptable.

References

Anscombe, Elizabeth (1970), "War and Murder", in: Richard A. Wasserstrom (ed.), *War and Morality*, Belmont: Wadsworth.

Bellamy, Alex (2004), "Supreme emergencies and the protection of non-combatants in war", *International Affairs* 80: 829-850.

Bellamy, Alex J. (2006), *Just Wars: From Cicero to Iraq*, Cambridge: Polity.

Bourke, Joanna (1999), *An Intimate History of Killing: Face-to-Face Killing in Twentieth-Century Warfare*, London: Granta Books.

- Burke, Anthony (2004), "Just war or ethical peace? Moral discourses of strategic violence after 9/11", *International Affairs* 80 (2004): 329-353.
- Butler, Judith (2004), *Precarious Life: The Powers of Mourning and Violence*, London: Verso.
- Butler, Judith (2009), *Frames of War: When Is Life Grievable?* London: Verso.
- Campbell, David (1993), *Politics Without Principle: Sovereignty, Ethics, and the Narratives of the Gulf War*, Boulder: Lynne Rienner.
- Campbell, David (1998), *National Deconstruction: Violence, Identity and Justice in Bosnia*, Minneapolis: University of Minnesota Press.
- Campbell, David and Michael J. Shapiro (1999), "Introduction", in: David Campbell and Michael J. Shapiro (eds.), *Moral Spaces: Rethinking Ethics and World Politics*.
- Chomsky, Noam (2002), *Pirates and Emperors, Old and New*, London: Pluto.
- Coates, A.J. (1997), *The ethics of war*, Manchester: Manchester University Press .
- Derrida, Jacques (1982), *Margins of Philosophy*, Chicago: University of Chicago Press.
- Derrida, Jacques (1988), *Limited Inc*, Evanston: Northwestern University Press.
- Derrida, Jacques (1995), *The Gift of Death*, Chicago: University of Chicago Press.
- Der Derian, James (2009), *Virtuous War: Mapping the Military-Industrial-Media-Entertainment Network*, 2nd ed., New York: Routledge,
- Dillon, Michael and Julian Reid (2009), *The Liberal Way of War: Killing to Make Life Live*, Abingdon, Routledge.
- Diplomatic Conference of Geneva (1977), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June, available at <http://www.icrc.org/ihl.nsf/INTRO/470>.
- Elshtain, Jean Bethke (2003), *Just War Against Terror: The Burden of American Power in a Violent World*, New York: Basic Books.

- Finnis, J., J. Boyle and G. Grisez (1987), *Nuclear Deterrence, Morality and Realism*, Oxford: Oxford University Press.
- French, Shannon E. (2003) *The Code of the Warrior: Exploring Warrior Values Past and Present*, Lanham: Rowman and Littlefield.
- Grayling, A.C. (2007), *Among the Dead Cities: Is the Targeting of Civilians in War Ever Justified?* London: Bloomsbury.
- Gregory, Derek (2004), *The Colonial Present: Afghanistan, Palestine, Iraq*, Oxford: Blackwell Publishing.
- Gregory, Derek (2006), "The death of the civilian?", *Environment and Planning D: Society and Space* 24: 633-638.
- Grimsley, Mark and Clifford J. Rogers (2002), "Introduction", in: Mark Grimsley and Clifford J. Rogers (eds.), *Civilians in the Path of War*, Lincoln: University of Nebraska Press.
- Holmes, Robert L. (1989), *On War and Morality*, Princeton, NJ: Princeton University Press.
- Ignatieff, Michael (2000), *Virtual War: Kosovo and beyond*, London: Chatto & Windus.
- Jabri, Vivienne (1998), "Restyling the Subject of Responsibility in International Relations", *Millennium: Journal of International Studies*, 27/3: 591-611.
- Jabri, Vivienne (2007), *War and the Transformation of Global Politics*, Houndsmills: Palgrave.
- Johnson, James Turner (1981), *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton: Princeton University Press.
- Kennedy, David (2006), *Of War and Law*, Princeton: Princeton University Press.
- Kinsella, Helen (2006), "Gendering Grotius: Sex and Sex Difference in the Laws of War", *Political Theory* 34: 161-191.
- Lawler, Peter (2002), "The 'Good War' after September 11", *Government and Opposition* 32.

- McInnes, Colin (2002), *Spectator-Sport War: The West and Contemporary Conflict*, Boulder: Lynne Rienner Publishers.
- McKeogh, Colm (2002), *Innocent Civilians: The Morality of Killing in War*, Basingstoke: Palgrave.
- McMahan, Jeff (2009), *Killing in War*, Oxford: Clarendon Press.
- Norman, Richard (1995), *Ethics, Killing and War*, Cambridge: Cambridge University Press.
- Owens, Patricia (2003), "Accidents Don't Just Happen: The Liberal Politics of High-Technology 'Humanitarian' War", *Millennium: Journal of International Studies* 32 (2003): 595-616.
- Shaw, Martin (2003), *War and Genocide*, Cambridge: Polity Press.
- Shaw, Martin (2005), *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq*, Cambridge: Polity Press.
- Slim, Hugo (2003), "Why protect civilians? Innocence, immunity and enmity in war", *International Affairs*, 79/3: 481-501.
- Slim, Hugo (2008), *Killing Civilians: Method, Madness, and Morality in War*, New York: Columbia University Press.
- Smith, Rupert (2005), *The Utility of Force: The Art of War in the Modern World*, London: Penguin.
- Walzer, Michael (1992), *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 2nd edition, New York: BasicBooks.
- Walzer, Michael (2004) *Arguing about War*, New Haven: Yale University Press.
- Wheeler, Nicholas J. (2002), "Dying for Enduring Freedom: Accepting Responsibility for Civilian Casualties in the War Against Terrorism", *International Relations* 16: 205-225.
- Wortham, Simon Morgan (2010), *The Derrida Dictionary*, London: Continuum.

Zehfuss, Maja (2007), *Wounds of Memory: Politics of War in Germany*, Cambridge: Cambridge University Press.

Zehfuss, Maja (2011), "Targeting: Precision and the Production of Ethics", *European Journal of International Relations* 17: 543-556.

¹ For critical and insightful comments on earlier versions of this paper I would like to thank Dan Bulley, Helen Dexter, Helen Kinsella and Angie Wilson.

² However, killing is at the same time de-emphasised in thinking about war. For the argument that this is problematic see Bourke, 1999 and Zehfuss, 2007: 251.

³ See, for example, Campbell, 1993; Burke, 2004; Butler, 2009; Der Derian, 2009; Dillon and Reid, 2009; Gregory, 2004; Jabri, 2007.

⁴ Exceptions include Gregory, 2006 and Kinsella, 2006 who discuss the problematic of the civilian as will be seen later on.

⁵ This is the predominant modern way of thinking about innocence in war. While there is an alternative line of reasoning that interprets innocence as a moral category, this is seen as problematic in a number of senses (see, for example, Coates 1997: 234; Holmes 1989: 185-7) and hence this position does not seem to attract much support in contemporary debate.

⁶ For a forceful argument that war is no longer 'modern' in this sense see Smith (2005).

⁷ It should be noted that while the legal grounds for excusing killings bear some resemblance to the moral rules in that intention plays a role, they are not the same as they also involve a judgement on military necessity (see Diplomatic Conference of Geneva, 1977: Article 57).

⁸ Of course, civilians may nevertheless become targets. This may be because they are mistaken for combatants or find themselves in proximity to military objectives, but also because it may be considered that targeting civilians will aid achieving objectives insofar as doing so may undermine the will of the people. See Smith, 2005: 278.

⁹ Nicholas J. Wheeler (2002: 212) suggests something similar about the related notion of 'mistake'.

¹⁰ This is similar to Jacques Derrida's observation that "the accident is never an accident"; it is rather a structural possibility (1988: 62). That is, the possibility of the accident is inherent in the system. In Derrida's example, there is no communication without the possibility of miscommunication,

and hence the 'accident' of miscommunication is part of the structure of communication rather than something that befalls it from outside.

¹¹ Coates, 1997: 244, quoting Finnis, Boyle and Grisez, 1987: 79.

¹² In *Limited Inc* Derrida (1988) shows that intending consciousness does not control the outcome of communication and, vice versa, is not even necessary. This is possibly his most obvious critique of intentionality. Yet a range of his work may be understood as questioning whether intentionality is as significant as is commonly thought. Hospitality and forgiveness do not happen, for example, just because they are intended. For a very brief summary of this aspect of Derrida's thinking see Wortham, 2010: 183-189.

¹³ The idea of the insignificance of the margin presupposes the ability to distinguish between the centre and the margin in the first place. Derrida's thought challenges this very possibility (see not least Derrida, 1982). His analysis of how the exclusion, as marginal, of insincere communications by J.L. Austin in his examination of speech acts comes to undermine Austin's argument in that all speech acts turn out to have the properties constituting the marginality of those that have been excluded is one illustration of this argument (Derrida, 1988: 13-19 and 70)

¹⁴ It should be noted that not everyone sees the position even as desirable. Pacifism has been accused by those defending the moral permissibility of war of having "a great share" in the "universal forgetfulness of the law against killing the innocent". See Anscombe, 1970: 50.

¹⁵ Also note that Coates refers to responsibility remaining with the agent in his discussion of double effect, as discussed above.