

## Introduction

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If there is anything so fixed and unchanging that it can be regarded as inherent to war, then it is certainly that war causes immense human suffering. Countless soldiers who endure combat are killed or sustain debilitating wounds. Those who survive the ordeal without physical scars may be left with the psychological trauma that comes from watching friends die, being attacked, and killing others. Although civilians are spared the experience of killing, a burden that weighs heavily on soldiers,<sup>1</sup> they too suffer innumerable physical and psychological injuries. They are killed and incapacitated. They lose friends and family members. Their homes and workplaces are destroyed. They are tortured and sexually abused. And even those who escape these forms of intense suffering experience radical declines in their quality of life. They may lose their jobs, become malnourished, or live without important services like electricity and water. When hostilities cease, civilians must live in areas affected by the long-term consequences of fighting. They are exposed to unexploded munitions and land mines, higher levels of violence due to the easy access to military hardware, and the possibility of continuing violence caused by the disruption of the local society and governing institutions.<sup>2</sup>

Just war theorists have sought to impose restrictions on war that are aimed at minimizing the suffering of soldiers and civilians alike. They have proposed *jus ad bellum* restrictions on when wars can be initiated to prevent anyone from suffering in unnecessary or unjustified conflicts. They have created *jus in bello* restrictions on how wars may be fought to discourage the use of weapons or tactics that needlessly magnify the horrors of war. More recently, they have developed *jus post bellum* norms of conflict resolution to promote justice after a war has ended and prevent the resurgence of fighting. Among the restrictions

<sup>1</sup> For a description of the psychological costs killing can have on soldiers, see Jonathan Shay, *Achilles in Vietnam* (New York: Scribner, 1994); Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Back Bay Books, 2009).

<sup>2</sup> James A. Tyner, *Military Legacies: A World Made by War* (New York: Routledge, 2009), p. 40; Chris McNab and Hunter Keeter, *Tools of Violence: Guns, Tanks and Dirty Bombs* (New York: Osprey, 2008), p. 42; Michael J. Boyle, *Violence after War: Explaining Instability in Post-Conflict States* (Baltimore, MD: Johns Hopkins University Press, 2014).

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that contemporary just war theorists have most consistently sought to establish is a prohibition against targeting civilians. Civilians are distinguished from those who fight and are, at least in principle, supposed to be spared from the horrors of war as much as possible.

The prohibition against attacking civilians, which is often called the principle of noncombatant immunity (PNCI) or the principle of civilian immunity (PCI), affirms that civilians cannot be intentionally targeted or recklessly endangered, although they may be justifiably accidentally or incidentally harmed under certain circumstances. The PNCI rests on the belief that civilians or noncombatants – terms that I will use interchangeably throughout the book – retain their right to life during war because they do not engage in activities that would make them liable to attack. The PNCI is therefore meant to affirm and protect the right to life during war by separating civilians from the combatants who forfeit that right.

There is widespread disagreement over why civilians are entitled to immunity and how this immunity should be understood.<sup>3</sup> There are also those who argue that the PNCI is misguided and that noncombatants should not be entitled to any special privileges.<sup>4</sup> However, even with this disagreement over exactly what class of people is protected during war, and with some challenges to the PNCI's relevance, noncombatant immunity remains a core value of just war theory, perhaps even *the* core value. Igor Primoratz says that the PNCI establishes “an almost absolute right of the vast majority of civilians.”<sup>5</sup> Michael Gross argues that, “short of supreme emergencies, that is, genocidal threats, no one argues it is morally permissible to attack civilian targets directly.”<sup>6</sup> Similarly, Martin Cook goes so far as to place the PNCI at the heart of the concept of just war, claiming that “the central moral idea of just war is that only the combatants are legitimate objects of deliberate attack.”<sup>7</sup>

The strength of the PNCI is most evident in the *jus in bello* principles that govern the use of force during wars. The principle of discrimination (also known as distinction), which states that civilians cannot be targeted, is a direct manifestation of the PNCI. The principle of proportionality, which requires that belligerents only use the level of force necessary to achieve military objectives,

<sup>3</sup> Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2010).

<sup>4</sup> Michael Green, “War, Innocence, and Theories of Sovereignty,” *Social Theory and Practice* 18(1) (1992), 39–62; Richard J. Arneson, “Just Warfare Theory and Noncombatant Immunity,” *Cornell International Law Journal* 39 (2006), 663–668.

<sup>5</sup> Igor Primoratz, “Civilian Immunity in War: Its Grounds, Scope, and Weight.” In *Civilian Immunity in War*, edited by Igor Primoratz (New York: Oxford University Press, 2007), 21–41, p. 39.

<sup>6</sup> Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge, 2010), p. 175.

<sup>7</sup> Martin L. Cook, *The Moral Warrior: Ethics and Service in the US Military* (Albany, NY: State University of New York Press, 2004), p. 33.

does not specifically protect civilians, yet one of its most important functions is to prohibit the kind of excessive violence that would inflict civilian “collateral damage.” The principles of *jus ad bellum*, which govern the justice of initiating or continuing a war, and *jus post bellum*, which govern the resolution of war, likewise reflect the PNCI, albeit less directly. *Jus ad bellum* restrictions prohibit wars that are waged with the intent of terrorizing civilians, as well as wars that risk inflicting disproportionate harm on civilians. And *jus post bellum* is often interpreted as including obligations to build just political institutions and to repair infrastructure – measures that improve the quality of life for civilian populations.

The just war tradition’s consensus about the necessity of protecting civilians is significant, as just war theory is increasingly accepted as the normative basis for regulating war, and this influences international norms regarding the treatment of civilians. Over the past half-century, just war theory has undergone a profound accession in its legitimacy and power to shape policy. Policymakers and members of the armed forces are expected to abide by the tenets of just war theory, and they are sometimes punished for failing to do so. As Walzer points out, “justice has become, in all Western countries, one of the tests that any proposed military strategy or tactic has to meet – only one of the tests and not the most important one, but this still gives just war theory a place and standing that it never had before.”<sup>8</sup> Similarly, Coates notes that “[just war theory’s] idiom has become the most popular moral idiom of war, an idiom frequently employed by those engaged either as practitioners of war or as media commentators upon it.”<sup>9</sup> These comments are particularly apt when it comes to just war theory’s recommendations about the treatment of civilians, as the PNCI is among the elements of just war theory that has been most effectively codified in international law.

The PNCI is affirmed by the Fourth Geneva Convention’s prohibitions against deliberately attacking noncombatants, taking hostages, or abusing prisoners. Some of those violating that agreement have been brought to trial for, and convicted of, war crimes on the grounds that they have deliberately victimized noncombatants.<sup>10</sup> Support for the PNCI is also evident in the United Nations Development Program’s (UNDP) 1994 report, which emphasizes the importance of human security.<sup>11</sup> Although there is extensive debate between proponents of broad and narrow conceptions of how human security should be

<sup>8</sup> Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), p. 24.

<sup>9</sup> A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p. 2.

<sup>10</sup> Ruti G. Teitel, “Humanity’s Law: Rule of Law for the New Global Politics,” *Cornell International Law Journal* 35 (2002), 355–387; Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Westport, CT: Praeger, 2006).

<sup>11</sup> United Nations Development Program (UNDP), *Human Development Report* (New York: Oxford University Press, 1994).

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realized, advocates of human security share a commitment to protecting individuals from violence. This includes the enactment of substantive protections for civilians during armed conflicts.<sup>12</sup> The doctrine of Responsibility to Protect (R2P), which has recently become extremely influential in international law and moral theory, is likewise informed by the PNCI and its underlying assertion of the right to life.<sup>13</sup> R2P aims at protecting people who are victims of attacks perpetrated by domestic violent actors and can be seen as authorizing the defense of civilians even when this goal is at odds with state sovereignty.

With such a high level of agreement among multiple actors, including academics, policymakers, members of the military, and the general public, one might expect that civilians would be protected from the horrors of war. However, the pervasiveness of civilian victimization in contemporary conflicts provides clear evidence that this is not the case. The just war tradition's effort to establish norms discouraging civilian victimization has failed to give civilians the level of protection they require. This should lead us to question whether the just war theory framework that has become so widely accepted is adequate for theorizing civilian immunity.

### Reassessing Just War Theory

The level of civilian victimization in wars over the past century, combined with an increasing commitment to just war thinking during that same time period, raises an imperative theoretical puzzle. Just war theory has greater legitimacy than ever, is widely invoked by policymakers and members of the military, shapes the development and implementation of new weapons and tactics, informs new programs for military ethics training, and serves as the basis of international humanitarian law, yet wars continue to inflict unimaginable devastation on civilians around the world. Moreover, as casualty figures and field reports from the wars in Iraq and Afghanistan attest, even armed forces that have made concerted efforts to reduce civilian casualties, like those of the United States and Britain, have been responsible for wounding and killing thousands of civilians.<sup>14</sup> The problem of persistent civilian victimization at a time when norms protecting civilians appear to be stronger than ever is my entry point into the discussion of noncombatant immunity.

<sup>12</sup> Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples* (New York: Polity, 2001).

<sup>13</sup> Alex J. Bellamy, *Responsibility to Protect* (Malden, MA: Polity Press, 2009) and *Global Politics and the Responsibility to Protect: From Words to Deeds* (New York: Routledge, 2010); Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: The Brookings Institution, 2008).

<sup>14</sup> Colin H. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and US Conduct in Iraq," *International Security* 32(1) (2007), 7–46.

Initially, it may seem that violence against civilians is simply a problem of noncompliance with the laws and moral norms of war. And to some extent, this is true. There is ample evidence that armed forces intentionally target civilians.<sup>15</sup> Many of the worst atrocities inflicted on civilians over the past half-century, such as the genocides in Cambodia, the Balkans, and Rwanda, were deliberate mass killings.<sup>16</sup> Those responsible for these attacks showed little regard for civilians' right to life and clearly had no intention of complying with the legal and moral restrictions aimed at protecting that right. Noncompliance is also a problem on an individual level. Soldiers may disregard their rules of engagement and attack civilians against the orders issued by their superiors.<sup>17</sup> Such actions show that laws and norms sometimes fail to constrain combatants' behavior, regardless of whether the states or armed forces the combatants represent wish to abide by those laws and norms.

Although noncompliance with the PNCI is a serious problem that deserves more research, this explanation cannot account for all of the violence against civilians. The international consensus in favor of the PNCI is such that it seems implausible that the commitment to it is purely rhetorical or that all attacks on civilians can be explained in terms of noncompliance. More importantly, many of the signs of just war theory's growing influence are not merely superficial. Efforts to improve legislation protecting civilians, develop more precise weapons, and train more ethical soldiers suggest a genuine interest in waging wars that adhere to just war guidelines. There must therefore be some additional reasons for the persistence of high rates of civilian casualties during war and the civilian suffering that continues long after wars have ended.

I contend that some of the blame for civilian suffering in war lies with the just war tradition itself. And unlike the problem of noncompliance, just war theory's faults are conceptual errors that can be corrected on a theoretical level. Revising just war theory therefore offers a more manageable starting place for attempts to promote greater respect for civilian lives and can inform efforts to influence the conduct of war. As I will demonstrate, the just war tradition is guilty of two fundamental errors that make it an ineffective theoretical foundation for

<sup>15</sup> Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War," *International Security* 30(4) (2006), 152–195, "Restraint or Propellant? Democracy and Civilian Fatalities in Interstate Wars," *The Journal of Conflict Resolution* 51(6) (2007), 872–904, and *Targeting Civilians in War* (Ithaca, NY: Cornell University Press, 2008); Christopher Gelpi, Peter D. Feaver, and Jason Reifler, *Paying the Human Costs of War: American Public Opinion & Casualties in Military Conflicts* (Princeton, NJ: Princeton University Press, 2009).

<sup>16</sup> Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press, 2003); Adam Jones, *Genocide: A Comprehensive Introduction* (New York: Routledge, 2006).

<sup>17</sup> Devorah Manekin, "Violence against Civilians in the Second Intifada: The Moderating Effect of Armed Group Structure on Opportunistic Violence," *Comparative Political Studies* 25(10) (2013), 1273–1300.

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protecting civilians. Each of these problems arises from a failure to recognize the implications of the civilian right to life, which is the theoretical foundation for the PNCI.

First, much of the harm inflicted on civilians falls within the scope of what is permitted by the PNCI. The PNCI, as it is commonly interpreted, is a surprisingly weak doctrine that allows many types of civilian victimization. There is a consensus among just war theorists that incidental and accidental violence against civilians is excusable and that such violence is an unavoidable fact of war. While just war theorists may be right in thinking that the perpetrators of incidental and accidental violence are not morally blameworthy, these theorists have failed to acknowledge that a permissive PNCI is inadequate for truly protecting civilians. Their right to life cannot function as a right if it can be easily revoked by those against whom it is supposed to offer protection.

Second, just war theory does not give enough attention to corrective justice for individual victims of war. None of the conventional principles of just war theory attend to the pressing need to repair the harm individual civilians sustain. Civilians are treated as a protected class up to the point when they are attacked, but then they are ignored by just war theory, which contains no requirements for assisting them as individual victims. Civilians are therefore left with little security when recovering from the horrors of war, which may result in the long-term persistence of suffering and in the aggravation of untreated injuries. At best, civilians may hope to receive some assistance from group-based forms of corrective justice, which are insensitive to individual needs and the demand of vindicating individual rights. Without a strong framework of corrective justice for *individual civilians*, the norms of just war theory have little internal capacity for discouraging violence against civilians and promoting corrective justice for civilian victims of war.

### Protecting the Right to Life with a Positive Duty

The PNCI's weakness and just war theory's inadequate attention to corrective justice for civilians have a single underlying cause: a failure to recognize the implications of the right to life that just war theory assumes all civilians possess. The right to life is conventionally understood by just war theorists as *only* creating a first-order duty to not harm civilians. That duty is reflected in the PNCI and in the existing principles of just war theory that address civilians' protections. These are restrictive measures that are directed at ensuring compliance with the first-order duty by preventing belligerents from violating civilians' right to life with intentional or reckless violence. The first-order duty to not harm civilians and the restrictive principles that operationalize that duty are essential manifestations of the right to life, but they are inadequate. A first-order duty by itself is incapable of offering meaningful protection for those to

whom the duty is owed. If a first-order duty can be violated without penalty – without creating some additional duty for the violator – then it lacks the force needed to compel obedience or protect the right-bearer.

Whenever civilians are harmed during wars – regardless of whether the harm is intentional, incidental, or accidental – their right to life is breached. The circumstances of an attack, and particularly the attacker's intent, help to determine whether the attacker acted immorally. An attacker who intentionally harms civilians deserves moral condemnation, while one who harms civilians in an attack that falls within the scope of the principles of discrimination and proportionality may be excused. Nevertheless, regardless of the morality of the action that leads to the breach of a civilian's right to life, the result is the same: a belligerent has failed to abide by the first-order duty to not inflict harm. The breach of rights may or may not be morally wrong, but the moral status of a breach of rights does not alter the fact that any time a belligerent fails to respect a civilian's right to life, that belligerent has failed to perform the duty that is required.

My central argument in the first part of the book is that the logic of rights demands that belligerents must be held responsible for repairing the harm they inflict on civilians. The right to life is a claim right, which during war protects its bearers by creating a correlative duty for combatants to not harm civilians. This correlative duty is a first-order duty in the sense that it is a basic duty arising from the right to life. The duty to not inflict harm must exist alongside the right to life to give that right the force it needs to compel respect. I will describe this first-order duty as a "negative duty" because it is a duty that does not contain any *positive* steps that must be taken to assist civilians who are harmed. The duty specifies what combatants cannot do to civilians, without requiring that they take any steps to improve the condition of civilians. This much is assumed by the PNCI and explains why civilian protections have such an important place in just war theory. However, it is necessary to go further in exploring the implications of the right to life and its correlative duty to not harm civilians.

Any harm that is inflicted on a civilian wrongs that person by depriving him of the protection to which he is entitled as a bearer of the right to life. This harm may be inflicted immorally or in a way that is morally and legally excusable. The differences between immoral and excusable harm matter when determining the attacker's culpability, but they do not alter the underlying fact that any violence wrongs the right-bearer. Moreover, the attacker's moral culpability does not change the fact that any violence perpetrated by a duty-bearer constitutes a failure to abide by the first-order duty to not inflict harm. My contention is that any failure to perform the negative duty must give rise to a second-order duty to repair the damage resulting from that failure. This second-order duty is one that I describe as a "positive duty" because its aim is to repair harm that



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has been inflicted, thereby restoring those who have been wronged, as nearly as possible, to their condition before being harmed. In most cases, the harms inflicted during war will be too serious to fully repair, but short of this we can hope for “morally adequate”<sup>18</sup> reparative justice that affirms the importance of victims’ rights and promotes trust in those rights.

I argue that the positive duty is borne by any belligerent that is responsible for killing or wounding a civilian, or for causing damage to property that is essential to a civilian’s survival. This duty is a form of corrective justice, as it is concerned with restoring justice by repairing harm that was sustained by a person who did not deserve it. Unlike forms of group-based post-war corrective justice that have been proposed by others,<sup>19</sup> the positive duty that I advocate here provides grounds for correcting the injuries of *individual victims of war*. This individualized form of corrective justice has greater potential for redressing injustices and vindicates individual rights that are too often neglected during war – even in purely theoretical accounts of the morality of war.

To be clear, belligerents do not take on the positive duty because of moral fault, and the positive duty is not meant to repair any moral infraction. Rather, belligerents have this second-order/positive duty when they harm a civilian despite having a first-order/negative duty to not inflict that harm. Thus, I argue that the demand of treating civilians justly during wars requires that just war theory undergo a radical shift in its understanding of what the right to life entails. Belligerents should not only be held to the negative duty to avoid harming noncombatants but should also be required to repair the harm that they cause. I argue that when belligerents, whether they are states or non-state actors, inflict harm on noncombatants, they become responsible for repairing that harm to the greatest extent possible, regardless of whether the harm is morally excusable.

### The Principles of Restorative Care and Recompense

The existence of a second-order duty for belligerents to repair the harm they inflict on civilians does not entail a specific mechanism for providing assistance. One might imagine multiple different strategies for addressing civilian suffering that could be capable of vindicating individual rights. Thus, while the positive duty can be derived from the right to life, strategies for acting on that duty must be formulated with careful attention to the many competing moral and pragmatic considerations that arise during war. Any principles that are meant

<sup>18</sup> Margaret Urban Walker, “Restorative Justice and Reparations,” *Journal of Social Philosophy* 37(3) (2006), 377–395, p. 384.

<sup>19</sup> Pablo Kalmanovitz, “Sharing Burdens after War: A Lockean Approach,” *The Journal of Political Philosophy* 19(2) (2011), 209–228; James Pattison, “*Jus Post Bellum* and the Responsibility to Rebuild,” *British Journal of Political Science* 45(3) (2015), 635–661.



to enact the positive duty must be framed to provide effective mechanisms for repairing the harm done to noncombatants without imposing demands so onerous that they make adherence to them a practical impossibility.

It is critical to avoid making too many concessions to the “necessities of war,” as this can lead back to the problem of states and other violent actors escaping their moral duty toward civilians. Moral norms must be capable of acting as effective restraints on belligerents’ conduct even when this prevents them from fighting as they might wish. However, it is equally important for the additional responsibilities to be ones that belligerents can reasonably be expected to follow in the midst of war.

I propose two new principles of just war that are capable of operationalizing the positive duty while still being practically realizable: the principle of restorative care and the principle of recompense. Although these are not the only possible ways of encouraging compliance with the positive duty, they hold the greatest potential as principles for repairing the damage caused by the breach of civilians’ right to life.

The principle of restorative care establishes that belligerents must provide medical assistance to the civilians that they harm during military operations. This care is restorative because it is meant to restore those who are injured to the same level of health they had before being attacked, or at least to bring them as close to that level as possible. I argue that restorative care must be provided either directly by the state or violent non-state actor (VNSA) that inflicted the harm or with the help of a reliable intermediary contracted by the offending belligerent. I acknowledge that this assistance may be difficult to provide in practice, and respond to this by providing a framework for thinking about restorative care that is sensitive to the realities of war without losing its normative force.

The principle of recompense establishes that belligerents must pay pecuniary compensation to those who suffer serious injuries, the destruction of essential property, or the death of a family member as a result of actions taken by their security forces. Although this may seem to cheapen human life by placing a monetary value on it, framing compensation in this way is in the best interest of civilian victims of war for practical reasons. First, money is a fungible good that can be paid by any belligerent and that can be used to repair a broad range of harms. Second, using money as the medium of compensation facilitates the adjudication of claims for damages and makes it easier to ensure that civilians receive the payments they are owed.

Although the two principles I introduce are analytically separable, they are best seen as interlocking principles that can compensate for each other’s limitations and that may often be applied in conjunction to repair civilians’ injuries. The principle of restorative care is the more fundamental of the two and should therefore be given precedence whenever the principles come into conflict. This

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is because restorative care plays an important role in minimizing and containing the harm inflicted on civilians. Medical care can prevent the wounded from dying, reduce the magnitude of injuries, and help to rehabilitate the injured so they do not suffer lasting harm.

The principle of restorative care's greatest limitation is that it will often be difficult to enact. First, it may be impossible for belligerents to provide medical care to civilians during intense wars when the injured are located behind enemy lines or when their injuries are not immediately evident. Second, many of those who are injured or killed in attacks are beyond medical assistance. No amount of restorative care can save those who are dead or can fix damage for which no medical treatments have been developed. This makes restorative care inappropriate for those civilians who sustain mortal or untreatable injuries. Finally, some types of harm cannot be addressed with any form of medical assistance. This is the case with damage to essential property, such as food, water, and other means of subsistence. When restorative care cannot repair the harm inflicted on civilians, it is necessary for the harm to be minimized with the financial assistance covered under the principle of recompense.

Financial compensation has the advantage of being a flexible method of repairing harm that can be used to help civilians recover from a broad array of injuries that may not be addressable under the principle of restorative care. Compensation is essential whenever the nature of an injury or the circumstances of war make it impossible to repair the injury with medical assistance. However, just as the principle of restorative care is much less effective if it is forced to stand alone, recompense is weakened if it is employed in isolation. In particular, recompense must be applied in conjunction with the principle of restorative care, because medical treatment can limit the extent of civilians' injuries.

Ideally, the two principles I propose should be applied sequentially to each injury inflicted on a civilian. Whenever a belligerent harms a civilian, that belligerent should first make an effort to repair the harm according to the principle of restorative care. If the harm is not fully repaired, the belligerent should then provide adequate financial compensation. Nevertheless, I acknowledge that the morality of war must remain within the boundaries of what is possible for belligerents to do in practice. In some instances the challenges of providing medical care may be so prohibitive that financial compensation after a war has ended may be the only route by which a civilian can seek reparation for a breach of rights. It is also important to note that although I link these principles to the positive duty of assisting civilian victims, they provide compelling mechanisms for promoting justice for civilians even when they are taken independently. Each principle is designed to protect civilian welfare to the greatest extent possible under the difficult circumstances of war – a goal that is worthwhile even for those approaching the morality of war from other theoretical traditions that do not assume that civilians have a right to life.