

# Non-Combatant Liability in War<sup>1</sup>

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## *Introduction*

The principle of non-combatant immunity holds that it is impermissible to target non-combatants in war. The principle is thought to hold universally: it covers all non-combatants in all conflicts. Most just war theorists argue that this is because non-combatants are not *liable to defensive killing*, by which they mean that non-combatants have done nothing to lose their rights against intentional attack. Intentionally killing them will therefore wrong them. But of course, just war theorists usually allow that it *is* permissible to target combatants during war. The traditional explanation of why combatants have lost their rights against intentional attack is that, unlike non-combatants, combatants threaten.

But these days, not many people think it plausible to claim that non-combatants don't pose threats in war. Non-combatants make substantial causal contributions to their country's war effort. I suggest that when they are morally responsible for making these contributions, they can be liable to defensive killing if their war is unjust. In Section One of this paper, I explain what I mean by an indirect threat, and argue that posing an indirect threat can render a person liable to be killed. In Section Two, I draw attention to the various ways in which non-combatants pose indirect threats in war.

Sections Three, Four, Five and Six deal with various attempts to show that non-combatants are not liable to be killed even if they indirectly contribute to their country's war. I begin with David Rodin's argument that the contributions that non-combatants make lie too far down the causal chain to render their authors liable (Rodin, 2008: 44 - 68). I then tackle Jeff McMahan's and Cécile Fabre's arguments that non-combatant contributions are causally insufficient to ground liability to defensive killing (McMahan, 2009: 225, Fabre, 2009, 36 - 63). I also consider Fabre's argument that non-combatants are not morally responsible for

their contributions because they are ignorant with respect to whether they pose an unjust threat or a just threat.

I find that none of these arguments successfully undermine the idea that non-combatants are liable to defensive killing. The generally accepted ground of the principle of non-combatant immunity – that non-combatants have done nothing to render themselves liable to intentionally killing – is false. I suggest that if we want to offer grounds for protecting non-combatants in war, we would do better to turn our attention to alternative strategies. In Section Six, I argue that to show that a person is liable to a harm is not to show that it is permissible to inflict that harm upon her. Permissibility and liability are not two sides of the same coin. So, it is possible to concede non-combatant liability, as is consistent with many people's broader accounts of defensive killing, without granting a permission to intentionally kill non-combatants. I suggest that one argument against such a permission is that killing non-combatants serves no military purpose. However, this is simply a contingent fact about the nature of war, and ought not to be mistaken for a deep principle about the moral status of non-combatants.

### ***I. Preliminaries***

My view of defensive killing in war endorses four main claims. The first is that the rules of self-defence underpin the rules of killing in war. The second is that people who pose what I call *indirect threats* can be liable to defensive killing. The third is that non-combatants often pose indirect threats in war. The fourth is that non-combatants are often liable to defensive killing in war. In this paper, I will assume the first claim, and say something about the others.

A person poses a *direct threat* to you if she is going to inflict harm upon you, for example by falling on you, poisoning you, shooting you and so on. A person poses an *indirect threat* to you if she isn't going to inflict harm upon you, but rather endangers you in

some other way. For example, a person who blocks an escape route of which you need to avail yourself counts as an indirect threat. A threat of harm is *unjust* if it is aimed at someone who is not liable to bear harm. When I say that an agent is *liable to bear harm*, I mean that harming her does not wrong her. (Some people like to describe this as the claim that she has no right not to be harmed, but I generally eschew rights-talk.) In my view, a person who is liable to a harm is not permitted to defend herself against that harm.

## ***II. War***

We can think of many ways in which non-combatants contribute to their country's war effort. They contribute politically, perhaps by voting for the war, or writing pro-war newspaper articles. They contribute materially, by producing weapons, clothing and food for the armed forces. They also make technological contributions to war, by designing and testing weapons and machinery. And, of course, the war is financed by taxes paid by combatants and non-combatants alike.

In the light of these contributions, it is hard to credit the idea that non-combatants are not part of the threat that their country poses: that they are 'not harming'. But current international law prohibits the intentional targeting of, for example, a person working in a factory making the guns and bombs that will kill enemy combatants. The UK Manual on the Laws of Armed Conflict stipulates that such people are civilians, and do not count as playing a 'direct part' in the war.

Only combatants are permitted to take a direct part in hostilities. It follows that they may be attacked. Civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack. Taking a direct part in hostilities is more narrowly construed than simply making a

contribution to the war effort. Thus working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing. However, munitions factories are legitimate military targets and civilians working there, though not themselves legitimate targets, are at risk if those targets are attacked. Such incidental damage is controlled by the principle of proportionality. (UK Ministry of Defence, 2004: 2.6.3)

Setting aside for a moment the pragmatic reasons for why we might want to endorse this view as a matter of policy, I think it clearly mistaken as a picture of liability to defensive harm. The use of the phrase ‘hostilities’ to try to distinguish parts of the war, such that one might contribute to a ‘war effort’ without playing a part in the ‘hostilities’ seems wholly artificial. If being directly involved in the hostilities means firing weapons on the front line, then most combatants will not be involved in the hostilities either. And if we broaden the meaning of ‘hostilities’ to include the military activities behind the front line that provide intelligence, training and supplies, so that we cover all combatants, it seems arbitrary to exclude the non-combatants playing comparable roles.

Of course, this is not a new observation. Many just war theorists have pointed out that there doesn’t seem to be any principled – or *morally significant* – difference between the contributions of combatants compared to those of non-combatants (Mavrodes, 1975: 117 – 131; Alexander, 1976: 408 – 415). And yet the distinction between combatants and non-combatants is supposed to give rise to an important moral difference in how members of these two groups may be treated. If the distinction between combatants and non-combatants is not underpinned by a distinction between harming and not harming, what are our grounds for insisting upon this different treatment?

Several contemporary writers have tried to answer this question. Faced with the above-mentioned difficulties with the traditional ground of the principle of non-combatant immunity, these writers have focused their efforts on showing not that non-combatants don't contribute to wars, but that they are not liable to be killed *even if* they contribute. I want to show why we should not adopt the solutions that these writers have offered.

For the sake of simplicity, I will assume in what follows that we are talking about a war that is an unjust war of aggression on one side and a just war of defence on the other. My claim about liability to defensive killing applies only to the non-combatants who contribute to the unjust side of the war.

### ***III. Intervening Agency***

David Rodin's suggested ground for non-combatant immunity relies upon the idea that causally proximity is relevant to liability. Whilst non-combatants do threaten, the threats they pose are not causally proximate to deaths of enemy soldiers.<sup>2</sup> Rodin suggests that it is a necessary condition of liability to defensive force that one be currently engaged in an unjust attack. Of course, it isn't clear how we ought to cash out this idea of being 'currently engaged' in an attack. Rodin cites and dismisses various attempts at specifying a temporal measure of this condition. In their place, he argues for a *principle of intervening agency* to identify agents who are liable to defensive force.

This principle holds that if two or more agents create an unjust threat between them, and both meet a threshold of minimal moral responsibility, only the agent whose action came last in the causal chain counts as engaged in an unjust attack. Rodin further argues that only this agent – the proximate cause – is a permissible target of defence (Rodin, 2008: 52). Rodin offers two examples to illustrate this principle.

*Naughty Minister:* Criminal has been released from prison as a result of financial cuts in the prison system. The cuts are a direct result of fraudulent mismanagement of the finances by Minister, who acted in the full knowledge that his actions would endanger the public. Criminal is trying to kill Victim, who can save his life either by killing Criminal, or by lethally trampling over Minister.

*Provocation:* Villain culpably provokes Attacker into attacking Victim. Victim can save his life either by killing Attacker, or by lethally trampling over Villain.

Rodin argues that it would be impermissible for Victim to save himself by killing either Minister or Villain in these cases. Rodin acknowledges that Minister and Villain bear perhaps greater moral responsibility for the unjust threat to Victim's life than do the intervening agents in each case. But neither Minister nor Villain is currently engaged in an unjust attack, their engagement having been 'superseded' by that of the intervening agent. This intervening action transfers liability from the causally remote agents, Minister and Villain, to the causally proximate agents, Attacker and Criminal.

Rodin thinks that it is these sorts of cases that should inform our understanding of the combatant / non-combatant relationship. Non-combatants are causally remote threats, and combatants are causally proximate threats. Since both combatants and non-combatants meet the threshold of minimal responsibility, it follows that that non-combatants are not liable to attack in war, even if we grant that non-combatants can bear greater moral responsibility for a war than do combatants. Non-combatants are not currently engaged in attacks, as required

for liability, because the combatants intervene further down the causal line. Intervening agency thus gives us a principled way of sustaining non-combatant immunity in war, even if we grant the role of non-combatants in initiating and sustaining war.

I think that many people would endorse arguments along these lines, thinking that by enlisting in the armed forces combatants ‘take on’ liability to harm in a way that protects their country’s civilians. But I think that Rodin’s argument is nonetheless mistaken. For a start, it isn’t clear that this view will capture all combatants in the liability net. A combatant who loads the bullets into a gun whilst his comrade does the firing will not be liable to be killed on Rodin’s account. Both combatants seem like legitimate targets (and certainly, if Rodin is defending the distinction between combatants and non-combatants, he will want to have (at the very least) frontline combatants on the liable side of the distinction).

Rodin acknowledges that his principle would require “some finessing” to deal with these cases, along with the high-ranking military commanders who certainly seem liable to attack, but who might never go near a battlefield (Rodin, 2008: 52, n. 14). He suggests that a plausible form of this finessing would be to, “claim that those persons who play a defined role within the command structure of an organization engaged in the infliction of harm are deemed to participate in equal measure in the proximate agency of delivery unjust harm.” (Rodin, 2008: 52, n. 14) This rather *ad hoc* response seems to amount to nothing more than a stipulation that the principle doesn’t apply to non-combatants. Why would we define the ‘organization engaged in the infliction of harm’ as the military, rather than the government? Indeed, given that the government head the command structure of the military, it doesn’t look like we *can* so define it. But once we include those acting at the behest of the government, it’s not clear how we can exclude munitions workers employed at government-owned factories. These workers have a defined role. They operate within what can be plausibly described as a command structure (there is a hierarchy within which orders are issued). And

the end they pursue is clearly that of furthering the unjust war. Unless we arbitrarily and implausibly hold that the ‘organisation involved inflicting harm’ is identical with ‘the military’, Rodin’s suggestion implies that non-combatants making weapons are participating in equal measure to combatants in the delivering of unjust harms.

More generally, I don’t think Rodin’s principle can be sustained as an account of liability to defensive force; indeed, I think that it is undermined by Rodin’s own earlier work. In *War and Self-Defense*, Rodin offers a critique of Alan Gewirth’s view of moral responsibility. Gewirth argues that moral responsibility attaches to the proximate cause of a threat, because intervening agency rids those further back in the causal chain of responsibility for the threat. In effect, he says about responsibility what Rodin says about liability. But Rodin argues that we can see that Gewirth’s principle is false by thinking about cases like Cheyney Ryan’s *Coercion* (Ryan, 1983: 515).

*Coercion:* The German army capture a town. Nazi forces Mayor to shoot Citizen, on pain of Nazi shooting a much greater number of citizens.

Rodin points out that Gewirth’s principle generates the result that Mayor’s intervening agency supplants Nazi’s responsibility for the killing. This is clearly wrong: as Rodin says, moral responsibility is not exclusive, but can be shared by a number of people (Rodin, 2002: 63). Mayor may take on some responsibility for the killing, but his doing so does not free Nazi of *his* responsibility. Both are morally responsible for the killing of Citizen.

But what also seems clear, and what Rodin overlooks, is that the same is true of these characters’ liability to defensive harm. If Citizen has a gun with which he can lethally defend himself, both Nazi and Mayor seem like legitimate targets. Indeed, it would be preferable that Citizen shoot Nazi, even though Mayor clearly meets Rodin’s threshold of minimal

agency, and it is his action that is most proximate to the threat. If so, Rodin's principle is defeated by the very objection that he levels at Gewirth: why think of liability as an exclusive attribute, rather than a plastic, shareable attribute?

I think Rodin is mistaken, then, to think that liability is based upon this idea of being 'currently engaged in an unjust attack', such that liability can be erased by the intervention of other agents. Rather, what matters for liability is whether the threatening situation *to which one contributes* is current. What makes Nazi a legitimate target is his prior contribution to the threat currently facing the unlucky citizen. Thus, the claim that causal proximity is key to liability is false.

Again, Rodin himself commits himself to this idea in his discussion of the following case:

*Goading:* Villain hates Victim. He thus deliberately goads Victim into attacking him in order that he may then kill Victim on grounds of self-defence.

Rodin argues that Villain cannot invoke a right of self-defence against Victim (Rodin, 2002: 79). Why not? Well, Rodin says, because Villain is "at fault for the creation of the threatening situation to which he now responds." (Rodin, 2002: 79) If, as Rodin claims, Villain is not permitted to defend himself against Victim, this suggests that Villain is liable to the harm that Victim will inflict. But then, what matters is not whether Villain is currently provoking Victim – whether he's 'currently engaged in an unjust attack' – but whether the threatening situation that Villain has helped create is current. With respect to non-combatants, then, our focus in determining liability should not be their causal proximity to a current threat, but their responsibility for having helped create that threat.

We might try to rescue a version of Rodin's idea by arguing that an intervening agent can voluntarily take on liability to defensive killing. This another pretty popular idea with respect to the relationship between combatants and non-combatants. We talk of combatants 'assuming risks' on behalf of their non-combatants: by donning a uniform, a person invites enemy combatants to target them instead of the non-combatants. But I doubt that this will do the trick. It would be very odd if those posing an unjust threat got to decide amongst themselves who was liable to be killed to avert that threat, making it impermissible for their victim to aim defensive force at some group members rather than others. Liability to defensive harm doesn't seem like something we get to allocate by agreement.

This is not to deny that it is sometimes possible for a person to take on another's liability. One can insure against tort law risks, for example. But one cannot insure against liability to defensive killing, because there are some forms of liability that cannot be transferred. Even if a person volunteers to bear a defensive harm in your stead, this does not rid you of liability nor make it impermissible for your victim to kill you. Defensive liability is like criminal liability. A person cannot stand trial for murder in your place or undertake your prison sentence on your behalf. This is no less true in cases where two or more people conspire to bring about a murder. They are all liable to prosecution, irrespective of whose action came where in the causal chain.

Of course, whilst it might not be philosophically defensible, we might nonetheless think that there are pragmatic reasons for combatants to agree amongst themselves not to target non-combatants. Just combatants probably do not want their own non-combatants killed, and might thus agree not to kill non-combatants on the unjust side. But such an agreement, even if it were binding on the just combatants, would not eradicate non-combatant liability on the unjust side of the war. Such an agreement would be nothing more than an

agreement not to inflict the harms *to which those non-combatants are liable*. As I say, we don't get to choose by agreement who is liable to defensive harm.

So, intervening agency, even combined with consent on the part of the intervening agent, doesn't give us a plausible way to sustain non-combatant immunity. That non-combatant contributions are causally remote does not show that they cannot be rendered liable to defensive killing by them. Indeed, parts of Rodin's own work seem to suggest that causally remote agents are liable to defensive killings if they are morally responsible for contributing to a current unjust threat.

#### ***IV. Causal Thresholds and Proportionality***

One common objection to the idea that non-combatants might be liable to defensive killing is that killing them is nearly always disproportionate to the threat they pose. So, for example, even though McMahan and I agree that being morally responsible for an indirect threat can render a person liable to be killed, McMahan argues that when it comes to non-combatants, intentional attack would be a disproportionate response to the threat they pose. This is because McMahan's model of proportionality pays attention to the moral responsibility of the person posing the threat and, according to McMahan, non-combatants are typically only weakly morally responsible for the threats posed by their country in war (McMahan, 2009: 197).<sup>3</sup>

I find the idea that proportionality is sensitive to moral responsibility quite puzzling, especially in light of what McMahan says about the permissibility of killing even fully excused threats self-defence. For example, McMahan thinks it permissible to kill Homeowner in the following case.

*Mistake:* Homeowner sees on the news that a notorious murderer has escaped

from the local prison. The murderer's innocent, identical twin brother breaks down near Homeowner's farm, and knocks on Homeowner's door to use the phone. Homeowner mistakes Twin for the murderer, and, in terror, lunges at him with a knife.

McMahan thinks that Twin may permissibly inflict defensive harm upon Homeowner even though Homeowner is fully excused, and thus has only a low degree of moral responsibility for the threat that she poses. Given the apparent permissibility of killing weakly morally responsible people in cases like this, it's hard to see why non-combatants who are weakly morally responsible for an unjust threat are off limits.

Moreover, McMahan argues that variations in moral responsibility amongst combatants are largely irrelevant when the harm to be averted is sufficiently great. If it is proportionate to kill weakly responsible combatants because of the magnitude of the harm to be averted, it is surely proportionate to kill weakly responsible non-combatants to avert that very same harm.

It seems to me that this aspect of McMahan's proportionality calculation – the degree of responsibility – is being used in two distinct ways in his work. With respect to unjust combatants, the condition is interpreted as *the extent to which the combatant is morally responsible* for posing a threat – that is, whether he is culpable, negligent, or excusably ignorant and so on. And we are told that, given sufficient gravity of the harm, it doesn't matter very much which category of responsibility the combatant falls into. But with respect to non-combatants, the responsibility aspect of the proportionality condition seems to refer to the non-combatant makes *enough of a causal contribution* to render killing her proportionate (irrespective of whether she makes it culpably, ignorantly and so on). Hence, when McMahan says that non-combatants are only weakly responsible for threats they pose, he

supports this claim not by invoking ignorance on the part of the non-combatants, but by emphasising the causal triviality of the contributions they make.

In some unjust wars, many civilians do bear some responsibility but the degree to which most of them are responsible is very slight... They may pay their taxes, vote or even campaign for particular political candidates (sometimes on the basis of general sympathy with their overall positions on matters of policy but seldom because of the advocacy of war), participate in the culture from which the country's political leaders have emerged, fail to protest their country's unjust war, perhaps because they correctly believe that to do so would be ineffective, or perhaps because they approve of the war, and so on; but none of these things, nor even all of them together, is ordinarily sufficient for the forfeiture of a person's right not to be attacked and killed. Military attack exceeds what a person may ordinarily be liable to on the basis of these comparatively trivial sources of responsibility. (McMahan, 2009: 225)

What makes killing non-combatants disproportionate, then, is not that they are only weakly morally responsible for their contributions, but that they don't contribute *enough*.

Of course, we might think that facts about causal contribution are indeed relevant to determining proportionality (and thus liability). This could explain why McMahan thinks it permissible to kill weakly responsible Homeowner in cases like *Mistake*. Homeowner's causal contribution is very significant. In contrast, as McMahan emphasises, non-combatants typically make only small contributions to their country's unjust war. Even if McMahan's presentation of this argument conflates causal contributions with moral responsibility, he might nonetheless be right that these contributions are just too insignificant to render their

authors liable to be killed.

Cécile Fabre advances a similar view in her recent work. Fabre argues that any kind of liability-based account of defensive killing must look at what non-combatants do as individuals, not merely invoke the results of group endeavours (Fabre, 2009: 61). And, in order to render their authors liable, these individual contributions must pass a threshold of causal significance. Fabre argues that most non-combatant contributions will fall below this threshold: she suggests that even if the overall output of a munitions factory constitutes a significant contribution to the war, making pieces of guns is not enough to render an individual liable to be killed.

But it seems to me a mistake to understand liability as subject to this sort of casual threshold. Such a view tells us that merely spreading the causal load for an unjust threat dissolves liability for that threat. This is pretty unattractive as a moral principle. Consider a case like *Hit*.

*Hit:* Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss has a whip-round amongst all the members of his mob, none of whom really like Victim. Everyone coughs up a few pounds for the assassination fund.

Each member of the mob plays only a small role in hiring Assassin. Their contribution is slight – a few pounds out of Assassin’s hefty price. But if killing a member of the mob is necessary to save Victim’s life, I do not think that such a killing would be ruled out on grounds of being disproportionate. Rather, I think that each member of the mob is liable to defensive killing. Victim would be permitted to kill any member of the mob (or even more than one) to save his own life. That each mobster makes only a small contribution to the

threat cannot protect them from liability to defensive harm. This suggests to me that proportionality concerns the gravity of the threatened harm, and the gravity of the force used to avert it. It does not pay attention to the amount that a person contributes to a threat.<sup>4</sup> And, I think that cases like *Hit* suggest that what matters for liability is whether one contributes, and not how much one contributes. Since the members of the mob responsibly contribute to a lethal threat, they are liable to lethal defence.

I think the same is true of those making weapons in munitions factories. Stipulating the existence of a causal threshold that protects non-combatants from liability just doesn't seem plausible as a general account of liability. The idea of a threshold also commits us to differences in liability in cases that should strike us as morally similar. For example, imagine that a munitions factory owner can run his factory in one of two ways. He can have a standard assembly line, in which each worker fits a particular component of every gun. Or, he can have a tandem system, where each worker independently produces an entire gun. Either way, he ends up with two hundred guns at the end of each day. Let's assume that Fabre's threshold lies somewhere between making pieces of guns and making complete guns. The workers on the assembly line model don't pass the causal threshold with respect to any particular weapon, whereas those working in tandem to produce complete weapons do.<sup>5</sup> Fabre's account therefore suggests that whilst the assembly line workers are not liable to be killed, the workers in the second are so liable.

But this difference in liability hardly seems plausible. What matters, surely, is that they are contributing weapons for the unjust side of the war. It is this fact that grounds the liability of those making entire guns from scratch. If they were not sending their weapons to the war effort, or if they were not on the unjust side of the war, their contributions would not render them liable. And since those making pieces of guns are also contributing weapons for the unjust side of the war, those workers must be similarly liable. Those who conspire or

collude in the creation of unjust threats cannot rid each other of liability simply by working as part of a team. And if it is not disproportionate for Victim to use force against individual members of the mob in *Hit*, I do not think it disproportionate for just combatants to use lethal force against individual workers who contribute to the unjust lethal threats that they face.

### ***V. Ignorance***

A third strategy for defending the claim that non-combatants aren't liable to be killed is familiar from debates about the moral equality of combatants. People frequently invoke the *ignorance* of combatants to argue that unjust combatants are not morally responsible for posing unjust threats. Fabre claims that this also applies to non-combatants, arguing that, "even if civilians who provide unjust combatants with the material resources which they need are unjustifiably contributing to wrongful killing, they are not, on the whole liable to attack." (Fabre, 2009: 56) Fabre and I agree that one can be liable to be killed only if one is morally responsible for an unjust threat. But Fabre argues that if one is unavoidably ignorant of either the fact that one poses a threat, or the fact that the threat is unjust, this negates moral responsibility (Fabre, 2009: 58).<sup>6</sup> So, if non-combatants are unavoidably ignorant of the fact that they pose an unjust threat, they are not morally responsible for posing that threat, and are not liable to be killed.

Fabre argues that we can see that non-combatants are unavoidably ignorant by noticing the mixed character of war. Wars often have both just and unjust phases. For example, what began as a war of aggression might become a partial war of defence if the opposing army is breaching the rules of *jus in bello*. Non-combatants who contribute to the just threats posed by combatants during these just phases of a war do not act wrongly, on Fabre's view, and are not liable to be killed.<sup>7</sup> Because of this mixed character of the war, a non-combatant on even the *ad bellum* unjust side of a war cannot know whether the

equipment she makes will be used for the just or the unjust ends of the war. She therefore cannot know whether she is contributing to an unjust threat, and her unavoidable ignorance protects her from liability to defensive killing.

Fabre acknowledges an obvious objection to this line of argument that finds its roots in the distinction between doing and allowing. The doing / allowing distinction gives rise to a presumption of erring on the side of *not causing* unjust harm, even if one will *allow* unjust harm as a result. So, non-combatants should not contribute to what might be an unjust threat, even at the risk of failing to rescue others from unjust harm. But Fabre argues that this objection “has bite” only at the beginning of a war (Fabre, 2009, 60). As the war goes on, the more likely it is to acquire additional, just ends like thwarting retaliatory killings. As the chances of contributing to a just threat improve, the presumption against contributing becomes correspondingly weak. And, Fabre argues, even if non-combatants do unjustifiably contribute to unjust threats, going against this presumption, they are still not liable to defensive killing.

[I]f *individuals*' rational and moral agency is decisive for their liability, then there should be some fit between the costs which agents, as individuals, are liable to incur for acting wrongfully, and their degree of moral responsibility for their actions. To deem them liable to be killed merely in virtue of knowingly taking the risk of wrongfully contributing to unjust lethal threats, given (a) that there is a strong chance that they will in fact either contribute to just threats or not contribute to any threat... and (b) that they cannot know either way how their contribution will be used, does not pass the fittingness test. (Fabre, 2009: 61)

Fabre is not denying that there is a duty to avoid wrongfully harming people that outweighs the duty to help people. Indeed, she explicitly endorses this duty (Fabre, 2009: 55). But she says that choosing wrongly under the epistemic constraints described cannot render a person liable to be killed. The degree of moral responsibility that attaches to non-combatants who choose to contribute is too low to render them liable to lethal harm.

But this reply fails to hit its target. Fabre is meant to be tackling the objection that non-combatants ought to err on the side of not contributing to a war when they lack information about the justness of the war. This objection suggests that those who do not so err render themselves liable to be killed. Fabre's response is that even those who choose to contribute will lack moral responsibility for contributing and so will not be liable. But her explanation of *why* they lack moral responsibility as laid out in (a) and (b) above seems to amount to little more than the claim that the non-combatants cannot know whether they will be contributing to an unjust threat. And surely the presumption that if a non-combatant doesn't know how her contribution will be used then she ought not to contribute cannot be undermined by pointing to the fact that she doesn't know how her contribution will be used. This presumption is designed to guide agents in the face of precisely the sorts of epistemic constraints to which Fabre draws attention. It thus cannot be defeated by invoking those same constraints. When an enterprise is morally mixed and one cannot know whether one will be contributing to the right parts, one must prioritise not harming the innocent over aiding the innocent. Non-combatants who opt to contribute to wars without knowing whether they will be posing just or unjust threats cannot plead ignorance in order to escape liability.

## ***VI. Liability and Military (In)Effectiveness***

A possible source of protection for non-combatants is the *jus in bello* rule of military necessity. The rule of military necessity stipulates that harm done in wartime must produce a

military advantage. Since killing non-combatants isn't usually very helpful, such killings will often fail this requirement, and will thus be impermissible. McMahan makes use of this rule in his attempt to limit a permission to kill non-combatants. However, McMahan's argument is intended to show, again, not just that it's impermissible to kill non-combatants, but that the requirement of necessity shows that non-combatants aren't liable to be killed (McMahan, 2009, 225). McMahan thinks that liability itself has a kind of internal necessity condition, such that a person can be liable to a harm only if that harm is instrumental in averting an unjust threat for which she is morally responsible (McMahan, 2009: 9). So, a non-combatant might be morally responsible for an unjust threat, for example by having voted for a war-mongering politician. But if that is her only contribution, and it lies in the past, killing her now will not be instrumental in averting the threat. Targeting non-combatants on the basis of these past contributions will serve no military purpose. McMahan argues that therefore non-combatants cannot be liable to such killings.

I think we ought to reject McMahan's claim that liability is subject to this sort of internal necessity condition. It seems to me that whether a person is liable to defensive harm rests upon facts about them, not on external facts about necessity. Consider *Lucky Escape*:

*Lucky Escape*: Murderer chasing Victim and trying to kill him. Victim happens to have a parachute. He can simply jump to safety without needing to kill Murderer in self-defence.

It seems pretty implausible that Murderer, who would clearly be liable to be killed if Victim did not have a parachute, is not so liable if Victim happens to have a parachute. Murderer is, after all, maliciously trying to kill Victim, chasing him with a gun and shooting at him. If that doesn't render a person liable to be killed, I'm not sure what does. I do not think that if

Victim kills Murderer in *Lucky Escape*, he wrongs Murderer. Murderer has no legitimate complaint if Victim decides uses force against him rather than use his parachute. Nor could Murderer permissibly defend himself if Victim decided to use force rather than use his parachute.

Yet killing Murderer is no longer necessary for saving Victim's life. If we think that a person can be liable only to necessary force, Murderer cannot be liable to defensive killing. An upshot of this claim, on both my view and McMahan's, is that Murderer can, therefore, permissibly defend himself against Victim should Victim employ defensive force rather than jump with the parachute.

Of course, McMahan might point out that his account stipulates that defensive harm must be *instrumental* in averting a threat. Killing Murderer still meets this condition, since Victim can save his life either by jumping, or by killing Murderer. Perhaps McMahan's account pronounces Murderer liable to be killed after all. But I would have thought that since Victim can save his life without killing Murderer, McMahan will want to say that Victim ought not to kill him. But if so, McMahan will need to invoke a separate necessity condition that operates independently of Murderer's liability, making it impermissible for Victim to kill Murderer *even though* Murderer is liable to be killed. If he does this, McMahan's view seems to collapse into mine, and the idea that necessity is internal to liability drops out of the picture. There can be cases in which a person's liability to defensive killing persists even though killing them is unnecessary and therefore impermissible. With respect to non-combatants, then, merely pointing to the necessity condition will not show that non-combatants are not liable to defensive harm. It just shows that even though they are liable, killing them can still be impermissible.

Adopting this picture of liability better captures the nature of liability – that it is backwards-looking – and better explains why Victim would suddenly be permitted to kill

Murderer if, for example, he discovers that his parachute is not working. It strikes me as odd to think that a person's liability to defensive killing could pop in and out of existence like this as a result of factors entirely beyond their control. Liability is based on facts about what a person has done, and these facts are not changed by variations in the usefulness of killing them. But what *is* plausible is that whilst a person's liability to harm persists, the permissibility of inflicting that harm can vary as a result of factors beyond her control.

### **Conclusion**

I have argued that many of the arguments commonly assumed to ground the idea of non-combatant immunity fail. They fail because they seek to defend non-combatant immunity by showing that non-combatants cannot be liable to defensive killing even if they contribute to unjust wars. This position is simply implausible. Non-combatants are sometimes liable to defensive killing, because they are sometimes morally responsible for unjust lethal threats. But, as I have argued, liability is distinct from permissibility. There can be other reasons, aside from the absence of liability, that make killing a person impermissible. One such reason is that killing them serves no purpose. It will sometimes be true that killing a non-combatant achieves no military advantage, and is thus impermissible, even though she has, through her actions, rendered herself liable to be killed. But this is, of course, a simply contingent fact. Sometimes, it *will* serve the purposes of the just war to kill a non-combatant. And if she is liable to be killed, killing the non-combatant is not wrong.

### **References**

Alexander, L. (1976) 'Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider', in *Philosophy and Public Affairs*, 5/4: 408 - 415

Fabre, C. (2009), 'Guns, Food and Liability to Attack in War', in *Ethics*, 120: 36 – 63

- Frowe, H. (2008) 'Equating Innocent Threats and Bystanders', *Journal of Applied Philosophy*, 25/4: 277 – 290
- (2011), 'Self-Defence and the Principle of Non-Combatant Immunity', in *Journal of Moral Philosophy*, 8/4: 530 – 546
- (forthcoming) *Defensive Killing: An Essay on War and Self-Defence*, (Oxford: OUP)
- Fullinwider, R (1975) 'War and Innocence', *Philosophy and Public Affairs*, 5/1: 90 – 97
- Mavrodes, G. (1975) 'Conventions and the Morality of War', in *Philosophy and Public Affairs*, 4/2: 117 - 131
- McMahan, J. (2009) *Killing in War*, (Oxford: OUP)
- Rodin, D. (2008), 'The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right', in Rodin, D and Shue, H (eds.), *Just and Unjust Warriors*, (Oxford, OUP): 44 - 68
- Rodin, D. (2002), *War and Self-Defense*, (OUP)
- Ryan, C. (1983) 'Self-Defense, Pacifism, and the Possibility of Killing', in *Ethics*, 93/3: 508 – 524
- UK Ministry of Defence. (2004), *The Manual of the Law of Armed Conflict* (UK Ministry of Defence)

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<sup>1</sup> Versions of this paper were presented at the Nordic Network on Political Ethics conference on the Ethic of War, Copenhagen; Seminar on killing in war, Harvard University; Department Reading Group, Boston University; 13<sup>th</sup> Annual International Laws and Ethics Conference Series, Belgrade; Departmental seminar, MANCEPT; Nuffield College Political Theory Reading Group, Oxford, Research Seminar, Glasgow University Symposium on The Ethics of War and Self-Defence, University of Hull. Many thanks to the audiences for their helpful comments.

<sup>2</sup> Rodin's view has echoes of Robert Fullinwider's claim that killing non-combatants is ruled out because such killings cannot be justified by the Principle of Self-Defence ('War and Innocence', *Philosophy and Public Affairs*, Vol. 5, No. 1 (Autumn, 1975), pp.90 – 97). Fullinwider does not develop the intervening agency line, but rather stipulates that self-defence permits the killing only of direct threats. I argue against this view in Frowe (2008), Frowe (2011) Frowe (forthcoming). Larry Alexander offers a rebuttal of Fullinwider's view (Alexander, 1976) in which he suggests that, "Although causal remoteness is relevant to the questions of whether a threat exists and whether a person is a necessary or sufficient cause of it, it is irrelevant to the right of self-defence once the threat, the necessary or sufficient causal relation, and the lack of superior alternatives to remove the threat are posited." (p. 413) Alexander considers the possibility that Fullinwider might think intervening agency relevant, and rejects this argument in the grounds that "only the likelihood of harm, not the

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number of choices required to bring it about, is directly relevant.” (p. 414) Alexander’s alternative view of permissible defence, however, seems alarmingly permissive (even to me).

<sup>3</sup> McMahan goes on to say that variations in responsibility ‘are likely to have comparatively little significance, provided that the Threat is morally responsible, and particularly if he is culpable to some extent’.

<sup>4</sup> In fact, I don’t think proportionality even pays attention to whether a person contributes to a threat. If I face a lethal threat, killing a bystander to avert that threat is not *disproportionate* (even though it is impermissible for other reasons).

<sup>5</sup> We can vary what the workers produce depending on where we think the threshold lies (maybe they make a tank a week, or a plane a year).

<sup>6</sup> It isn’t obvious that equal ignorance about these two facts is equally corrosive of liability. Ignorance that one poses a threat at all seems to preclude liability, but ignorance that the threat that one knowingly poses is unjust does not. However, let us grant for the sake of argument that unavoidable ignorance about a threat’s justness might preclude liability as well.

<sup>7</sup> It isn’t obvious to me that this is true. Providing support for one part of a war can facilitate the fighting of another part of that war. If, as I argue below, the onus is on agents to not contribute to unjust harm even at the risk of failing to prevent unjust harm, Fabre’s argument will not undermine the liability of non-combatants contributing to the just parts of an unjust war if they thereby facilitate other, unjust parts of the war.