

# Guns, Food, and Liability to Attack in War\*

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## I. INTRODUCTION

The principle of noncombatant immunity, whereby noncombatants ought not to be targeted in the course of a war, is a cornerstone of *jus in bello*. Although noncombatants are often thought to encompass all civilians, the latter (as has often been noted) often participate in the war: as citizens, they sometimes vote for warmongering political leaders; as taxpayers, they provide the funds which finance the war; as journalists, they can help sway public opinion in favor of the war; as political leaders, they take the country into war. Last, but not least, as workers, they provide the army with the material resources without which it could not fight, such as weapons, transports, construction units, but also food, shelter, protective clothing, and medical care.

This article addresses the latter contributions—an issue which has become more salient in the last few years as professional armies increasingly rely on civilian private contractors for help of the aforementioned kinds: current conflicts in Iraq and Afghanistan are but two examples of the growing intermeshing of army and civilian personnel

\* This article was presented at various seminars in Glasgow, Edinburgh, and Nuffield College, Oxford. In its penultimate form, it received thorough scrutiny at a conference on Jeff McMahan's recent work on war, organized in October 2009 by the Oxford Institute for Ethics, Law, and Armed Conflicts (ELAC). I am very grateful to participants at those events for stimulating discussions, as well as to Alejandro Chehtman, Liz Cripps, Lynn Dobson, Helen Frowe, Pia Halme, Tony Lang, Dan McDermott, Michael Otsuka, Jonathan Quong, Massimo Renzo, and Mark Rigstad for their written comments on earlier drafts. Tamar Meisels and Adam Swift both deserve special thanks for encouraging me, at crucial junctures, not to give up on the paper altogether. David Miller and two editors and referees for *Ethics* have supplied many pages of feedback, to which I can only hope to have begun to do justice here.

in war zones.<sup>1</sup> Interestingly, there is a remarkable degree of consensus, in war ethics, on the liabilities of civilians who make a material contribution to the war. Civilians who provide combatants with military resources such as guns (civilians<sub>m</sub>) are widely deemed liable to attack, whereas civilians who provide them with welfare resources such as food and medical care (civilians<sub>w</sub>) are widely deemed to be immune from it.<sup>2</sup> That claim—which I shall call the functionalist view—has a long pedigree in just war theory. Thus, medieval theologians and canon lawyers routinely claim that peasants are immune from being killed, even if they supply food to armies. Likewise, Grotius avers that those who provide nonmilitary resources to combatants must be spared by the enemy.<sup>3</sup>

In this article, I shall reject the claim that civilians<sub>m</sub> directly participate in the war whereas civilians<sub>w</sub> do not. On the contrary, civilians<sub>w</sub> can sometimes be regarded as direct participants in war (Sec. II). However, it does not follow that they are liable to attack. For as I shall then claim, whether a civilian is liable to attack depends on the extent to which he is causally and morally responsible for wrongful enemy deaths. As we shall see, many civilians who materially assist in the commission of unjust war killings do not display the requisite degree of responsibility and thus are not liable to attack, irrespective of the nature—military or welfarist—of their contribution (Secs. III–V).<sup>4</sup>

Before I begin, some preliminary remarks are in order. First, by the claim “A is liable to being killed/attacked by B,” I mean that A has lost his right not to be killed by B, so that B would not wrong him were he to attack him. There might be cases, however, in which someone who has not lost his right not to be killed may nevertheless be targeted

1. The range of services which civilian contractors currently provide to professional armies is described in, e.g., Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (London: Profile, 2007); Deborah D. Avant, *The Market for Force—the Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005); and Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003), esp. chap. 1.

2. My use of the phrase ‘welfare resources’ to denote food, shelter, clothing, anti-dehydration tablets, medical care, and so on, might seem odd. I borrow it from the literature on distributive justice, which sometimes calls rights to such resources ‘welfare rights’.

3. For the medieval view, see Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, 1965), chap. 11. For Hugo Grotius’s view, see his *The Right of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), bk. 3, chaps. 1 and 11. See also Thomas Nagel, “War and Massacre,” *Philosophy & Public Affairs* 1 (1972): 123–44, 139–40; Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic, 2006), 146; C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), 111–14.

4. As we shall see at the close of Sec. III, civilians who contribute to just war killings are not liable to attack, irrespective of the nature (military or welfarist) of their contribution.

by the enemy. My aim is not to show, widely, that civilians who provide welfare or military assistance to combatants generally may not be killed; more narrowly, it is to suggest that they are not (on the whole) liable to being killed, even if they provide assistance to unjust combatants. Note that I shall sometimes say that they are immune from attack. In a wide sense, to say that someone is immune from attack means that others ought not to attack him. In a narrow sense, it means that he is not liable to being attacked (i.e., that he has not lost his right not to be attacked), which is compatible with the view that there might be countervailing reasons, for example, of the lesser evil kind, for attacking him (in which case we will say that his right has been permissibly infringed). Throughout this article, I will use ‘immune’ in the narrow sense.<sup>5</sup>

Second, I take it as fixed that there is a presumptive case in favor of not intentionally targeting civilians who do not take part in the war. The principle of noncombatant immunity itself is not in question here. What is in question is the location of the cut between the civilians whom it protects and those who are legitimate targets. In addition, it is assumed throughout that the war killings at issue respect the requirements of proportionality (so that the harm which those acts inflict is outweighed by the good which they bring about) and of necessity (so that those acts are required by their authors’ [just] war aims and are not, e.g., punitive).

Third, I focus on civilians who provide combatants with military and welfare assistance by working in organized economic structures specifically directed to combatants alone. I do not address the case of civilians who are called on to help the army at war by, for example, sending them warm clothes or making donations in charity shops. Nor do I address the issue of the extent to which, if at all, taxpayers are liable for financing, albeit perhaps unwillingly, an unjust war. Nor, finally, do I tackle the normative difficulties raised by dual-use material contributions—contributions, in other words, which help both combatants and noncombatants. My reasons for not embarking on those tasks are twofold. First, the standard view on material assistance (whereby providing military assistance is a basis for liability, whereas providing welfare resources is not) is well entrenched and worth examining in its own right. Second, the considerations which I deploy in Section V to show that most civilians<sub>m</sub> and civilians<sub>w</sub> are immune from attack (to wit, the extremely marginal nature of their individual contributions together with their typically very low degree of moral responsibility for them)

5. For the view that one may sometimes infringe someone else’s rights, see, e.g., Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), and *Rights, Restitutions and Risks* (Cambridge, MA: Harvard University Press, 1986).

apply, a fortiori, to the aforementioned three cases of civilian contribution to the war effort.

Finally, it is important to bear in mind that the account of civilian immunity which I defend here belongs to what McMahan has called the deep morality of war, whose principles are very different from, and inapplicable to, the laws of war, even when the latter are morally justified. The claim that there is such a thing as the deep morality of war is not uncontroversial: in fact, it has come under sustained attack from a number of commentators.<sup>6</sup> Yet, the relationship it posits between the deep morality of war and (morally justified) laws of war is similar to that between practically unfeasible first-best principles of distributive justice, such as, for example, Rawls's difference principle and Dworkin's resource egalitarianism, and second-best distributive principles which we have moral or morally directed pragmatic reasons to adopt when designing a taxation regime. If one accepts that it is appropriate to conceive of the fundamental requirements of distributive justice as independent from constraints such as epistemic feasibility, then it is appropriate to conceive of the fundamental principles of a just war as being similarly unconstrained. To be sure, that view of distributive justice is controversial as well.<sup>7</sup> I take it, however, that whether justice, as pertaining either to the distribution of resources or to war, is so constrained is a matter for reasonable disagreement. As my account of civilian immunity leans on the side of 'unconstrained justice', it runs the risk of alienating those who expect a theory of the just war to be directly related to the world as it is or directly action guiding. Still, this article does contain a useful lesson even for less abstract, more pragmatically oriented theories of the just war, to wit, that functionalist distinctions between military and nonmilitary contributions are far less plausible a basis for protecting some categories of civilians than is widely thought to be the case.

## II. REJECTING THE FUNCTIONALIST VIEW

According to the functionalist view, civilians<sub>m</sub> are liable, while civilians<sub>w</sub> are immune, on the grounds that the former's contribution (weapons),

6. See, e.g., Henry Shue, "Do We Need a 'Morality of War'?" and Adam Roberts, "The Principle of Equal Application of the Laws of War," in *Just and Unjust Warriors*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 87–111, 226–54.

7. As evidenced by recent debates between one of its best known proponents, i.e., G. A. Cohen, and his critics. See G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008); and, e.g., David Miller, "Political Philosophy for Earthlings," in *Political Theory: Methods and Approaches*, ed. David Leopold and Marc Stears (Oxford: Oxford University Press, 2008), 29–48; Andrew Williams, "Incentive, Inequality and Publicity," *Philosophy & Public Affairs* 27 (1998): 225–47. For an interesting discussion of how best to approximate, in practice, the aforementioned principles of distributive justice, see Will Kymlicka, *Contemporary Political Philosophy*, 2nd ed. (Oxford: Oxford University Press, 2002), 88–96.

unlike the latter's (food, medical care, shelter, etc.), is of a kind such as to count as direct participation in the (unjust) war. The functionalist view has been advanced by Walzer as follows:

The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what combatants need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. . . . An army, to be sure, has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. . . . Those men and women who supply its belly are doing nothing peculiarly warlike. Hence their immunity from attack: they are assimilated to the rest of the civilian population.<sup>8</sup>

The notion of direct participation is central to the functionalist view. It is also at the heart of some of the most important clauses of the laws of war. According to the First Protocol Additional (PA) to the Geneva Conventions (GC), combatants are members of the armed forces, except for chaplains and medical personnel (PA I, art. 43.2).<sup>9</sup> As for civilians, they are not legitimate targets, "unless and for such time as they take a direct part in hostilities" (PA I, art. 51.3; PA II, art. 13). More specifically, the following individuals ought not to be regarded as noncombatants (GC III, art. 4.A.4), which implies that they are liable to attack: "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany." According to the Conventions, thus, civilians' geographical proximity to the war is decisive for assessing whether they are direct participants, irrespective of the nature of their contribution. However, a series of reports on direct participation commissioned by the International Committee of the Red Cross (ICRC) takes a rather different view. Although the reports focus on the laws of war, they are a useful starting point for understanding why munitions factory workers are regarded as direct participants by the functionalist view. A fortiori, that framework also applies to civilian contractors who maintain the army's weaponry on the battlefield, provide military logistical support in com-

8. Walzer, *Just and Unjust Wars*, 146. See also Michael Walzer, "Response to Jeff McMahan," *Philosophia* 34 (2006): 19–21; and sources cited in n. 3.

9. I shall refer to the Geneva Conventions as GC I, GC II, etc., and to their Protocols Additional as PA I, PA II, etc. See "The Geneva Conventions of 1949," <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>.

bat, and so on. As we shall see, to the extent that the functionalist view implicitly relies on that plausible account of direct participation (as I believe it does), then it cannot distinguish as it does between military and welfare needs.<sup>10</sup>

According to the ICRC reports, then, an account of direct participation by civilians in hostilities (where hostilities are defined as acts of war) must deal with the following two issues: that to which civilians specifically contribute, termed by the reports as the ‘nexus’, and the causal relationship between their contributions and the harm suffered by the enemy.<sup>11</sup> With respect to the nexus, the ICRC reports stipulate that a civilian directly participates in hostilities if, and only if, his acts contribute to an armed conflict: thus, “stealing a rifle in order to go hunting and stealing it in order to use [it] in hostilities” are two very different acts, only the second of which could conceivably count as direct participation.<sup>12</sup> By that token, a civilian is a direct participant only when he is actively making a contribution to the war and not, for example, in between work shifts.

Direct participation also requires that there should be some significant connection between the civilian’s act and the harm suffered by the enemy. The ICRC reports focus on three different interpretations of the notion of significant contribution, none of which is satisfactory. On the geographical-proximity interpretation (which is at play in GC III, art. 4.A.4), a soldier who directs a long-range missile from the safety of his Pentagon office thousands of miles away from the battlefield does not count as a direct participant, which is absurd.<sup>13</sup> On the so-called direct-causation approach, the agent must harm (or try to harm) the enemy, as opposed to facilitate the harm, in order to be regarded as a

10. The reports, all five of which are entitled “The Notion of Direct Participation in Hostilities under International Humanitarian Law,” can be found at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709>. I shall refer to the first report as ICRC I, to the second report as ICRC II, etc. The ICRC compiled the reports into a final document which, I am told by an anonymous referee for *Ethics*, most military experts who had participated in the study refused to sign—evidence that interpreting the notion of direct participation remains extraordinarily contentious. See ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” *International Review of the Red Cross* 90 (2008): 991–1047.

11. See ICRC II, 24ff. The ICRC reports briefly consider whether an agent must have hostile intentions toward the enemy in order to count as a direct participant. They conclude that she need not: to claim otherwise would imply, counterintuitively, that someone who is coerced into blowing up a railway line (and would not do so otherwise) is not participating in the conflict.

12. *Ibid.*, 25.

13. ICRC III, 35. Note that geographical proximity would not accord with the functionalist view, which regards munitions factory workers as direct participants even if they operate far behind the front line.

direct participant. By that token, the intelligence analyst whose findings point shooters toward enemy sites is not a direct participant, although the shooters themselves are: that, however, seems unduly narrow.<sup>14</sup> On the “but-for” approach to causation, by contrast, a direct participant is anyone whose contribution to the war effort is one without which the enemy would not be harmed. That account is unduly broad, for the familiar reason that it would regard as a legitimate target anyone whose contribution to the war is a necessary condition for the harm done to the enemy, from the lecturer whose teachings in theoretical physics inspire her students to join the military industry, to the soldier’s children whose unconditional love sustains him in battle and makes him a more effective combatant. At the same time, it is unduly narrow, as it cannot regard as direct participants agents whose contribution is not, strictly speaking, necessary to the infliction of harm on the enemy but is yet significant. Nor can it regard as direct participants agents who make a negligible contribution to the harm inflicted on the enemy but who nevertheless intuitively ought to be regarded as taking part in the war.

The latter problem is particularly acute in the cases at hand, involving as they do a multiplicity of small contributions to lethal threats. The connection between one combatant’s act of shooting and his target’s death is one of direct causation; by contrast, the connection between that death and the acts of the many individuals who each contributed to making his machine gun is both very tenuous and overdetermined. What we need, thus, is an explanation of the objective features of civilians’ war-related acts which makes sense of the intuition that some civilians significantly contribute to combatants’ threats even if their individual contributions are small. Take the case of twenty individuals who together make a machine gun. One pours the mix of whichever ingredients are used for the body of the gun into the relevant moulds; another worker assembles the butt; another worker screws the trigger onto the body of the gun; yet another checks the proper calibration of the barrel; yet another ensures that the cartridge holder is properly affixed onto the body of the gun. Each of their contributions is small and, taken on its own, not particularly significant. Yet, each of those contributions overlaps with all others into the making of the gun. Taken together, those overlapping contributions amount to a significant contribution to the combatant’s ability to kill. Whether the contribution of any given worker is necessary to the manufacture of the gun is irrelevant. And whether workers intend either to make a gun or to contribute to the war is irrelevant as well. What matters, rather, is that those workers make something which is designed to enable combatants to fight and which is made, at that point in time, so that they can fight.

14. ICRC II, 25.

I believe that this account of direct participation in war—whereby one participates if one’s actions are directed to the war effort—best captures the intuition which is at the heart of the functionalist view with respect to weapons factory workers.<sup>15</sup> Even though each of their contributions is very slight, to the extent that they all intend to do their part toward the realization of a joint end (e.g., manufacturing a tank or screwing together machine guns which will then be sold to the army), they collectively make a significant contribution to the war. A fortiori, civilian contractors who deploy weapons to the front line are also direct participants. And it is precisely because those civilians participate in the war in the indicated ways that they are liable to attack.

Now, according to the functionalist view, civilians<sub>w</sub> are not legitimate targets because they are not direct participants in the war. Yet, if my account of civilians’ military contributions to the war is sound, the functionalist distinction is not sustainable. For in many cases, civilians<sub>w</sub> clearly provide combatants with what they need to fight. Even though their individual contributions are very small (helping to cook some of the specialized rations, working on a packaging chain, applying wound dressing, etc.), they are (at least sometimes) directed to the continuation of the war and, when taken together, are clearly significant.

Some will object to the foregoing points that civilians<sub>w</sub>, unlike civilians<sub>m</sub>, cannot plausibly be regarded as contributing to the joint end best described as producing the resources which enable combatants to fight and, in so doing, help prolong the war. This is because (they might say) one kills with a gun, not with food or wound dressing. Accordingly (they might insist), manufacturing guns does count as direct participation precisely because it constitutes direct help, whereas producing specialized rations does not precisely because it merely facilitates the imposition of a harm. But that (putative) claim is implausible. For although it is true that, strictly speaking, it is the guns as used by combatants which kill, not their specialized rations or wound dressing, it is equally true that combatants are not able to kill if hunger or untreated

15. Which is not to say that this is the best account of direct participation in war in general. But my aim here is not to provide such an account; it is to make sense of the functionalist view of wartime material assistance to the army. As an aside, an editor for *Ethics* raised the following interesting thought: Are civilian weapons factory workers liable to attack, on the functionalist view, if the weapons they produce are inefficient, thus blunting combatants’ ability to fight, and if they produce those weapons precisely for that reason? Does sabotage make one less liable to attack, on the functionalist view? I am not sure. As a first cut, it seems to me that a proponent of the view could say that if the weapons are so inefficient that combatants cannot fight, then the workers are not liable since they cannot be described as making a contribution to the enemy’s war effort. But if the weapons are somewhat efficient, then workers are liable since they do participate in the war.



wounds make it impossible for them to lift their arms and train those guns on the enemy. Generally, meeting combatants' material need for food, shelter, appropriate clothing, and medical care goes a long way toward enabling them to kill in war, even if the resources in question do not in themselves constitute a threat.

To be sure, the foregoing account of direct participation does not license us to infer, from that last point, that those who provide those resources are thereby to be regarded as direct participants: enabling someone to fight does not mean that we take part in the war. One's contribution must also be directed to the war. And so at this juncture, proponents of the functionalist view are likely to insist that even if feeding soldiers enables them to fight, there nevertheless is an important difference between providing them with resources, such as a gun, which one would not give them were it not for the fact that there is a war, and providing them with resources, such as food, which they need anyway.<sup>16</sup> *Pace* the functionalist view so interpreted, however, those considerations do not support the conclusion that civilian munitions workers are, but that medics or food providers are not, direct participants. Clearly, everybody needs food, water, shelter, and medical treatment, whether they engage in combat or not. But as any student of World War I could attest, denying soldiers the basic resources which we all need is a sure way to weaken the physical and psychological effectiveness of the armed forces (as Germany found in the closing stages of the war), and it is with a view to improve effectiveness that those resources are typically sent to, and distributed among, soldiers. Thus, medics who treat combatants will do so in such a way as to ensure that the latter are ready for battle as soon as possible and in as great a number as possible. That, in turn, may well lead them to treat relatively minor conditions (whether incurred in battle or on leave) more efficiently and better than they would in a civilian context.<sup>17</sup>

Moreover, it is misleading to say that combatants' need for those resources, unlike their need for a gun, is one which they only have as human beings. To need a shelter to protect oneself from the cold is one thing, but to need a shelter to escape from one's enemy's self-defensive attack so as to better kill them at some later stage is quite another. Likewise, to need food in order to survive tout court is one thing: to need food which is appropriate to survival under combat conditions (such as, e.g., meals prepared and packaged specifically for desert combat or long-range surveillance flying) is quite another. In other words, the claim that the need thus met is one which all human beings have is plausible only if one ignores the circumstances under which it

16. See Coady, *Morality and Political Violence*, 112.

17. I owe this last point to Michael Otsuka.

arises. In the cases at issue here, those who have that need do so precisely because they are actively engaged in lethal fighting, and those who supply them with the required material resources are (on that count) making a contribution which is clearly directed to the war.

To be clear, my point is not the absurd one that meeting someone's basic needs counts as direct participation in war just if that person then goes on to fight. A doctor who treats a seventeen-year-old boy for injuries sustained in a motorcycling accident six months before the latter enlists in an army at war does not count as a direct participant.<sup>18</sup> Nor does a doctor who treats a soldier for injuries sustained in battle which are serious enough to warrant discharging him on medical grounds or manufacturers of food and civilian clothing whose goods combatants buy and consume while on leave count. But on the account of direct participation which, I believe, is a plausible argument in support of the view that munitions workers are direct participants, the following categories of civilians can be regarded as participants—to wit, those who operate on the battlefield as part of support services for the army or who work behind the front line for army suppliers of equipment such as field tents, protective clothing, food rations, field medical equipment, and so on.<sup>19</sup>

To recapitulate, I have argued, against the functionalist view, that supplying combatants with welfare resources sometimes turns providers into direct participants in the war effort. If direct participation of that kind is a sufficient condition for liability to attack (as most proponents of the functionalist view suggest), then both civilians<sub>w</sub> and civilians<sub>m</sub> are liable. In the remainder of this article, however, I shall argue that direct participation in war is not a sufficient condition for liability and that most civilians<sub>m</sub> and civilians<sub>w</sub> are not liable. I shall first sketch out recent arguments in favor of the claim that the moral status of the war in which combatants and civilians participate is relevant to their liability to attack (Sec. III). I shall then reject an attempt to rescue the distinction between civilians<sub>w</sub> and civilians<sub>m</sub>, as made by some proponents of those arguments. According to that rescue move (which I shall call the “moralized

18. I owe this example to an anonymous referee for *Ethics*. As some participants at the aforementioned ELAC conference pointed out to me, the functionalist view so interpreted could only commit itself to the deliberate targeting of civilians who produce military equipment during the war. Yet, tanks, battleships, etc., often take years to produce, from design to completion. By contrast, food, field tents, etc., can easily be produced and manufactured during the war itself. It would seem, therefore, that the functionalist view must endorse the deliberate targeting of civilians<sub>w</sub> in a greater range of cases than of civilians<sub>m</sub>.

19. Note, however, that in the latter case (that of ‘home front’ civilians<sub>w</sub>) they are participants only while they are actually working, not when they have returned home from work. The same point applies, of course, to munitions factory workers.

functionalist view”), civilians<sub>w</sub>—although not civilians<sub>m</sub>—act permissibly, indeed, fulfill a duty, even when they help combatants pose unjust threats to the enemy, which in turn lessens their liability to attack (Sec. IV). Finally, I shall defend the view that neither civilians<sub>m</sub> nor civilians<sub>w</sub> are (in their overwhelming majority) liable, even if they participate in an unjust war (Sec. V).

### III. THE TRADITIONAL ACCOUNT OF LIABILITY TO ATTACK

In mainstream contemporary just war theory, posing a lethal threat to the enemy is a necessary and sufficient condition for losing one’s right not to be killed or, as I shall say here, for being liable to direct attack. On that view, which informs much of the laws of war and finds widespread support among war ethicists, combatants on opposing sides are liable to being killed by one another irrespective of the justness, or lack thereof, of their war.<sup>20</sup> Yet, some prominent theorists of the just war, most notably Tony Coady, Jeff McMahan, and David Rodin, have recently sought to revive an older account of combatants’ liability to attack, of which Augustine, Aquinas, Vitoria, Suarez, and Grotius are perhaps the best known proponents. On that view, combatants who fight on the unjust side lose their right not to be killed, precisely because they kill in the prosecution of an unjust war, whereas combatants who fight on the just side, and who thus kill in the prosecution of a just war, do not lose their right. The former are liable to attack, but the latter are not.<sup>21</sup> That view (which because of its ancient roots and chronological primacy I shall call, throughout the article, the “traditional account of liability”) can be set out as follows. All individuals have a prima facie right not to be attacked. However, if an attacker (call him A) subjects someone else (call her B) to a lethal threat which B has done nothing to warrant and if he does so without justification, he unjustifiably infringes her right

20. See, e.g., Walzer, *Just and Unjust Wars*; Roberts, “The Principle of Equal Application of the Laws of War”; Christopher Kutz, “Fearful Symmetry,” in Rodin and Shue, *Just and Unjust Warriors*, 69–86; Yitzhak Benbaji, “A Defense of the Traditional War Convention,” *Ethics* 118 (2008): 464–95. That view is commonly known as the moral equality of soldiers thesis.

21. See, e.g., Coady, *Morality and Political Violence*, esp. chap. 6, and “The Status of Combatants,” in Rodin and Shue, *Just and Unjust Warriors*, 153–75; Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114 (2004): 693–733, “The Morality of War and the Law of War,” in Rodin and Shue, *Just and Unjust Warriors*, 19–43, and *Killing in War* (Oxford: Oxford University Press, 2009); David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002). On the development and tenets of the view in the Middle Ages and the Renaissance, see Gregory M. Reichberg, “Just War and Regular War: Competing Paradigms,” in Rodin and Shue, *Just and Unjust Warriors*, 193–213. For an excellent set of essays on issues raised by the traditional account of liability, see, e.g., Rodin and Shue, *Just and Unjust Warriors*. The traditional account as set out here will be further qualified in Sec. V.

not to be attacked and thus loses that very same right, as a result of which he himself becomes liable to attack. Analogously, if country A unjustifiably goes to war against country B—say in the absence of a just cause for war—the acts of killing which its soldiers commit against B’s soldiers are ones to which the latter are not liable since they have a justification (*ex hypothesi*) for resisting A’s act of aggression. By contrast, the acts of killing carried out by B’s soldiers against A’s soldiers in the service of their just cause are justified. A’s soldiers are liable to attack, whereas B’s are not. On that account, combatants are liable to being killed if, and only if, they unjustifiably infringe the enemy’s right not to be attacked.

A full defense of the traditional account is beyond the scope of this article, but for our purpose here, it is worth mentioning some of the ways in which we must qualify it and which (as we shall see in Secs. IV and V) are relevant to our overall task. First, insofar as infringing the enemy’s right not to be attacked is a necessary condition for liability, only those who are rational and moral agents at the time at which they are posing or contributing to posing a threat are liable. A passive lethal threat such as a hapless human projectile who has no control over his movements cannot properly be described as infringing the right of the person on whom he will land. Nor can an agent be so described if he acts in complete and unavoidable ignorance of the fact that he is posing a threat. Nor can he be so described if he acts in complete and unavoidable ignorance of the fact that the threat which he is posing is unjustified. On the traditional account, thus, moral responsibility is a necessary condition for liability.

Second, combatants are liable only if they unjustifiably infringe the enemy’s right not to be attacked. A terror bomber who deliberately targets civilian populations unjustifiably infringes the latter’s right not to be attacked and, in so doing, loses his own right. Contrast that with a tactical bomber who targets a factory located in a densely populated area. Although he is posing to civilian inhabitants a threat which they have not done anything to warrant, there might be strong reasons for permitting him to do so, of “the lesser of two evils” kind or drawn from the doctrine of double effect. Insofar as the civilians have not lost their right not to be killed or maimed, the pilot does infringe their right. Yet, as he has a moral justification for so acting, he himself has not lost his own right not to be killed. In that particular conflict, parties may kill each other in self-defense, although neither is liable to direct attack at the hands of the other.<sup>22</sup>

The claim that one is not liable to self- or other-defensive attack on the part of others if one has a justification for attacking them raises

22. McMahan, *Killing in War*, 38–42.

the issue of what constitutes such a justification. On the traditional account, neither duress nor lack of information does. The duress argument has been rebutted on the grounds that duress sometimes provides an excuse or partial justification for acting wrongly but cannot provide a full justification for unjust killings—except perhaps in those very rare cases (in war) in which it is so extreme as to deprive agents of the minimal degree of intentional agency that is required for the ascription of responsibility.<sup>23</sup> I shall say no more on that issue here. The epistemic argument, on the other hand, is regularly deployed against the traditional account of combatant liability (most notably McMahan's defense of it) as follows: it simply is not possible for combatants to evaluate morally the threat which their enemy poses; consequently, to say that they lack a justification for defending their lives when faced with such a threat is unduly harsh.

The epistemic objection has elicited the following replies from proponents of the traditional account.<sup>24</sup> For a start, combatants—even poorly educated ones—can and do reach judgments about the overall status of the war. At the very least, even if the conditions of battle are such as to preclude such judgments during the fighting, the decisions to enlist in the army and, indeed, to stay and fight in it once the war starts are not themselves made in the heat of battle and in many instances are made in the light of available information about the facts of the case. Moreover (McMahan counters) given that most wars are unjust and known to be so, agents who agree to join the army can reasonably be expected to realize that they are incurring a very high risk of wrongfully killing some other combatants. Under conditions of uncertainty and on the plausible assumption that one ought to err on the side of not acting wrongfully, particularly when lives are at stake, agents ought to have a justifiably high degree of confidence that the war in which they are asked to participate is just, as a condition for joining it. Epistemic uncertainty (as opposed to unavoidable ignorance) at best constitutes a partial excuse, and certainly not a justification, for combatants' decisions to participate in an objectively unjust war and, by implication, for killing just enemy combatants. Note that, as Coady persuasively argues, the point is compatible with the empirical claim that individuals who participate in a war, either by combating or by assisting combatants, are, on the whole, disposed to believe, often mis-

23. *Ibid.*, chap. 3; See also Cheyney Ryan, "Moral Equality, Victimhood, and the Sovereignty Symmetry Problem," in Rodin and Shue, *Just and Unjust Warriors*, 131–52; and Coady, *Morality and Political Violence*, 113–14.

24. See, e.g., McMahan, *Killing in War*, esp. 137ff.; and David Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry Is Half Right," in Rodin and Shue, *Just and Unjust Warriors*, 44–68.

takenly but understandably, that they are taking part in a just war. The traditional account can thus accept that they have an excuse for taking part in an objectively unjust war and for killing enemy combatants who pose a lethal threat to them. Acknowledging that fact about participants in a war is a very good reason for, in practice, treating both sides of a conflict as morally on a par. But it remains the case that, in principle, combatants who unjustifiably infringe the enemy's right not to be attacked are liable, whereas those who do not do so are not.<sup>25</sup>

Finally, although the account implies that the *ad bellum* justness, or lack thereof, of the war is a decisive consideration for evaluating combatants' *in bello* rights and liabilities vis-à-vis one another, it does not entail that combatants who take part in an unjust war may never kill the enemy. There are two cases in which they may do so: when enemy combatants prosecute their *ad bellum* just war by unjust means and when they pursue a just cause in an otherwise unjust war (thus, although A lacks a just cause for going to war against B at time *t*, it might acquire a just cause for continuing with the war at *t*<sub>1</sub>).<sup>26</sup>

So far, I have focused on combatants. Yet, combatants cannot fight unless they are provided with the required resources. If one believes that moral responsibility for a wrongful threat which one unjustifiably poses is a necessary condition of liability to attack, then those who provide those resources, and who thus merely enable the threat, are not liable, whether they contribute military or welfare resources. Nor, by that token, are those who authorize the threat liable. However, proponents of the traditional account agree that some agents are liable even though they do not actually pose a lethal threat to the enemy. According to McMahan and Coady, for example, political leaders who take their country into an unjust war are liable to attack.<sup>27</sup> Rodin, for his part, is less willing to assign liability to civilians who participate in an unjust war but nevertheless concedes that, in a chain of command, those who order soldiers into fighting an unjust war are liable.<sup>28</sup> On the traditional account, then, an agent is liable to attack if, and only if, he is morally responsible for an unjust lethal threat by way of an unjustifiable action. By that token, civilians who make a significant material contribution to a just war and its constitutive just lethal threats are not liable to attack, irrespective of the nature of their contribution. Conversely, civilians who unjustifiably make a significant contribution to an unjust war and its constitutive unjust lethal threats on the lives of the

25. Coady, "Status of Combatants"; and McMahan, "The Morality of War and the Law of War," 27–28.

26. See McMahan, "Ethics of Killing in War," 712–13.

27. McMahan, *Killing in War*, chap. 5; and Coady, *Morality and Political Violence*, 112–14.

28. Rodin, "Moral Inequality of Soldiers."

enemy, and who are responsible for their actions, can be said unjustifiably to contribute to the wrongful infringement of the right of enemy combatants not to be attacked and, thus, become liable to direct attack themselves. The question, then, is what counts as a significant contribution to an unjust war.

#### IV. REJECTING THE MORALIZED FUNCTIONALIST VIEW

As we saw in Section II, one ought to reject the functionalist view for affirming that civilians<sub>m</sub>, unlike civilians<sub>w</sub>, are liable to attack since (some) civilians<sub>w</sub> are direct participants in the war. As we saw at the outset, moreover, (most) proponents of the functionalist view also affirm that direct participation is a sufficient condition for liability. Yet, at the bar of the traditional account of liability to attack in war, that assertion is not sound. Is this to say, then, that proponents of the traditional account must accept that both civilians<sub>w</sub> and civilians<sub>m</sub> are liable if they participate in an unjust war? Perhaps not. In fact, they might be tempted to rescue the distinction between civilians<sub>w</sub> and civilians<sub>m</sub>, along the following lines.<sup>29</sup> All human beings, irrespective of what they may have done in the past or may do in the future, are owed basic material resources, by their state among others, as a matter of justice, particularly when their survival is at stake. Civilians<sub>w</sub>, who in effect help the state discharge its duty of justice toward its combatants, thus have a very strong justification for so acting, even if they thereby contribute to unjust threats. Insofar as, on the traditional account, individuals are liable to attack in the course of a war only if they unjustifiably contribute to the unjust infringement of the enemy's right not to be killed, civilians<sub>w</sub> are not liable. By contrast, I suspect that few would argue that weapons factory workers are acting justifiably, let alone doing their duty, when providing unjust combatants with the guns they need to commit unjust killings.

On that account of civilian immunity, which I shall call the "moralized functionalist view," one need not deny that meeting combatants' welfare needs is crucially important to the war. As Kamm puts it, "if a doctor saves combatants, he makes possible the continuation of the war." And according to McMahan, the medic's act of treating wounded unjust combatants "directly thwarts the military action of the opposing just combatants, whose goal is to eliminate the threat posed by unjust com-

29. The arguments I examine in this section have been presented to me by many readers and seminar participants. I record them here in what I take to be their strongest form. For the view that civilians such as medics act permissibly when treating unjust combatants, see McMahan, "Ethics of Killing in War," 711.

batants.”<sup>30</sup> Rather, the moralized functionalist view claims that there is a moral difference between the act of providing food and the act of providing guns: while the latter can be tainted by the moral status of that to which it contributes (in that instance, the lethal threat posed by the combatant), the former is permissible no matter what. Put differently, even if the fact that civilians<sub>w</sub> contribute to an unjust war by meeting combatants’ welfare needs decisively counts in favor of regarding them as direct participants, it is the fact that they meet those needs, and not the contribution to the unjust war which they thereby make, which decisively counts against regarding them as liable to attack.

Can the traditional account of liability to attack endorse the moralized functionalist view? It might be tempting to answer in the negative, on the grounds that the threats to which civilians are contributing are (ex hypothesi) wrongful and that civilians themselves are therefore wrongfully infringing the enemy’s right not to be killed. But that would be too quick. For as we saw in Section III, the traditional account holds that one can be deemed to infringe someone else’s right if, and only if, one has rational and moral agency. In the case at hand, and on the assumption (sketched out in Sec. III) that enabling someone to pose a wrongful threat can sometimes be regarded as contributing to infringing the victim’s right, that in turn requires that one should not be unavoidably ignorant either of the fact that one is enabling someone to pose a threat or of the fact that the threat is wrongful.<sup>31</sup>

Now, as we shall see in Section V, many civilians<sub>w</sub> are in fact unavoidably ignorant of both facts and so, in fact, are many civilians<sub>m</sub>.

30. Frances M. Kamm, “Failures of Just War Theory: Terror, Harm, and Justice,” *Ethics* 114 (2004): 650–92, 689; McMahan, “Ethics of Killing in War,” 711. Interestingly, Kamm believes that agents’ rights and liabilities on the battlefield differ depending on the moral status of their war. As for McMahan, he briefly notes that a medic who treats unjust combatants acts permissibly but that, in principle, he may nevertheless be liable to attack if his contribution is significant enough. As far as I am aware, McMahan does not specifically address the issue of weapons factory workers, but it is entirely consonant with his overall view to hold that they act unjustifiably if they (knowingly) provide unjust combatants with the military equipment required for (wrongfully) killing the enemy. If their contribution is significant enough, then, on that view, they too are liable to attack. My disagreement with McMahan (in this section) pertains to the moral status of civilians’ welfarist contributions to unjust war killings.

31. Some might insist that other considerations matter for deciding whether an agent, S, who causally contributes to the wrongful threat which P poses to V, acts wrongly. Such considerations might include whether S intends that P should pose that threat, how likely it is that P will pose the threat, whether P is himself an autonomous agent (and thus has control over whether he will pose the threat) or a highly psychotic individual known to harbour fantasies of murdering women, etc. But those considerations are not readily available to the traditional account of liability, insofar as the latter tends to rely on accounts of wrongdoing which confer relatively little weight on features of agents’ states of mind. I am grateful to David Miller for pressing me on this issue.



However, the traditional account is committed to the view that some civilians are not ignorant in the relevant sense. Suppose that A wages an unjust war of aggression against B at *t*, and suppose that the medic who treats A's wounded combatants in the very first stages of that war can be reasonably expected to know both that he is helping unjust combatants get back to the battlefield and that the acts of killing which they will subsequently commit are wrongful. According to the traditional account, the medic must be deemed to infringe the right to life of B's soldiers. But that does not suffice for deeming the medic liable: for if he has a justification for infringing B's right, he is not liable. The question, then, is whether he acts justifiably.

Here is a case in which an agent, S, clearly lacks a justification for contributing to a wrongful threat. P—a not-so-bright foot soldier in Don Corleone's family—has been ordered to kill V, who is neither impressed by Corleone's 'unrefusable offer' nor intimidated by its threatening undertones. S, who (let us assume) is not related to P, cannot help but to feel some sympathy for P and wants to give him a chance to survive V's self-defensive threat. To that end, S gives P a bullet-proof jacket, even though he knows that P will thereby have a much greater chance, not merely of surviving the gunfight but also of killing V. S, in other words, chooses to intervene on the side of the wrongful attacker rather than the side of the latter's victim: I for one find it hard to discern what justification he could possibly have, in this case, for so doing.

Civilians who work in industries whose outputs are essential to the conduct of an unjust war (or an unjust phase of the war) or who are deployed as private contractors with an army engaged in unjustified hostilities are, in effect, conferring greater weight on the needs of unjust combatants than on the lives of the latter's victims.<sup>32</sup> Insofar as those victims, *ex hypothesi*, have not done anything to lose their right not to be killed, any argument to the effect that civilians<sub>w</sub> act justifiably must identify plausible grounds on which they justifiably make that particular choice. I can think of three arguments to that effect, which I discuss here in ascending order of plausibility.

The first argument claims that civilians' decision to provide for the material needs of their fellow combatants, at the expense of the lives of enemy combatants, is justified on grounds of patriotic partiality.

32. Some might be tempted to object that the case of S cannot in any way help us with that of civilians, as the context within which they act is radically different: the Mafia clearly is a criminal organization, whereas an army at war is not; thus, while P can and ought to be arrested by the police, there are no police to arrest unjust combatants. Salient as those differences may be, the objection is not one which proponents of the traditional account can raise since it targets their own argumentative strategy, to wit, the construction of analogies between domestic killings and war killings. I am grateful to Tamar Meisels for helping me clarify this point.

These, after all, are our combatants—the argument goes—and we do have a justification for helping them, even if we thereby enable them to pose unjust lethal threats to the enemy. However, the argument proves too much, for by that token, it would allow unjust combatants to kill just enemy combatants in defense of their comrades. And that, obviously, is not a claim which proponents of the traditional account can accept. Patriotic partiality, therefore, does not suffice to establish that civilians<sub>w</sub> may justifiably choose to help unjust combatants who are their fellow citizens to the detriment of the enemy. One must show, in addition, that it justifiably applies to the act of enabling the unjust threat as opposed to directly posing it.

The second of the aforementioned three arguments aims to do precisely that—insofar as it holds that civilians are under a quasi-contractual duty materially to support combatants who fight on their behalf, irrespective of the moral status of the war and of its constitutive threats (a view which, in the United Kingdom, is expressed in the so-called British Covenant—a set of obligations and rights which link the army to the nation). Again, however, the claim is too strong. For while citizens may well be under a duty (via general taxation) to provide combatants with care (at least once the war is over), surely they cannot be held under a moral duty to choose jobs in specialized food or clothing—which are the kinds of contribution at issue here. Generally, individuals are not under a duty to choose occupations which consist in producing what people need to survive, even when the needs are incurred in the course of an enterprise which serves just communal ends.<sup>33</sup> Thus, as a community, we need, and want, well-functioning fire services, and we may well be under an obligation to pay for their maintenance, but we are not under a duty to work in companies which supply firefighters with their protective clothing. If we are not under such a duty when our contributions are not directed to unjust ends, it is not clear at all how we can be held under such a duty when those contributions are directed to such ends.

The third argument, which I draw from Kamm's works, also appeals to the notion of a duty and is more convincing, at least at first sight. A medic who treats combatants, Kamm tells us, clearly is contributing to prolonging the war and, in fact, might properly be regarded as making an unjust threat possible. However, he might well be under a duty to do so, which in turn (to repeat) would diminish his liability to being killed.<sup>34</sup>

33. For considerations to the contrary, see Cohen, *Rescuing Justice and Equality*, esp. chap. 5.

34. Kamm, "Failures of Just War Theory," 689–90. It is not entirely clear whether, on Kamm's view, the medic's liability to attack in part depends on the moral status (as wrong or somehow justified) of the threat which he enables. On the one hand, she suggests that

Now, I suspect that many would agree that a medic is under a duty to, or at the very least may, treat combatants, even if the latter are taking part in an unjust war, on what one might call Hippocratic grounds: a doctor, they might say, is under an obligation to treat the sick and wounded, whoever they are, whatever they have done, and whatever they are likely to do. In the words of the 1948 Declaration of Geneva, adopted by the World Medical Association, a physician will not permit “considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or *any other factor* to intervene between [her] duty and [her] patient” (my emphasis). The argument is intuitively powerful: faced with a combatant screaming in agony from a bullet wound, surely a doctor must attend to his need, even if she knows that she will thereby enable him to commit unjust acts of killing; surely, as a doctor, she ought not to let him suffer, let alone die. And that is why—one might think—the Geneva Conventions explicitly confer on medical personnel the status of non-combatants, which, under the laws of war, implies that they are immune from direct attack.

To the extent that it adverts to role-based, professional duties, the argument does not apply to civilians,<sup>w</sup> who, for example, work in food or protective clothing factories. In any event, a doctor’s duties to others do not only include her professional obligations: they also encompass general duties which all agents have, irrespective of the roles which they occupy.<sup>35</sup> One such duty is a duty not to contribute to a wrongdoing unless one has a justification for so doing. The Hippocratic Oath argument aims at providing just such a justification, but it must show that the doctor’s professional obligation to her patient is weightier than her general duty not to enable the latter wrongfully to kill enemy combatants. It is not clear that it is. For were she not to treat her patient (in violation of the Hippocratic Oath), she would omit to help him; were she to help him, however, she would thereby act in such a way as to

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a combatant might have a justification for posing the unjust threat which the medic enables: “Then the doctor who saved these lives (*if not the lives of clearly malicious aggressors*) may not have reduced immunity just because of making the unjust threat possible” (ibid., 690; my italics). On the other hand, the italicized clause lends support to the thought that, on her view, medics who, e.g., saved the life of the morally culpable SS soldiers while the latter went on the rampage in the Ukraine in 1941, thereby enabling them to continue killing and raping defenseless civilians, did have reduced immunity. As should be clear, Kamm is right, at the bar of the traditional account, that just making an unjust threat possible is not sufficient for liability to attack. One must, in addition, make a significant contribution to the threat and lack a justification for so acting. I agree with Kamm’s conclusion but take issue with what counts as such a justification.

35. For a fascinating discussion of conflicts between role-based duties and general duties, see Arthur I. Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton, NJ: Princeton University Press, 1999).

enable him (wrongfully) to harm enemy combatants. Given that wrongfully failing to help is generally thought to be morally preferable to harming wrongfully and, I submit, to significantly contributing to the imposition of a wrongful harm, there is a *prima facie* reason for thinking that she should not help him.<sup>36</sup>

Note that the foregoing remarks also serve to undermine a weaker variant of the second and third arguments in support of the claim that civilians<sub>w</sub> are immune from attack even if they contribute to an unjust war, to wit, that individuals generally may (as opposed to must)<sup>37</sup> help those in need of material resources—such as food, shelter, health care—without which they could not survive, irrespective of what those individuals are thereby enabled to do. By that token—the weaker variant goes—civilians<sub>w</sub> may materially contribute to meeting the needs of combatants, even if the latter will thus be enabled to carry on killing unjustly. However, we have already seen that patriotic partiality cannot support a permission to help: the general claim about the permissibility of providing help cannot do so either. For the permission thus affirmed surely is only a *prima facie* permission, which is overridden by duties we have to third parties—in that instance, duties owed to unjust combatants' victims not to assist in the threats to which they are wrongfully subjected.

To be clear, my point is not that a doctor should never help combatants who take part in an unjust war. Thus, as we shall see in Section V, some of those combatants might in fact take part in a just phase of that war. Moreover, others will not be able to resume fighting anyway and should certainly be provided with care. Nor is my point that a doctor is morally and causally responsible for subsequent unjust killings to a degree which warrants killing him: in fact, I shall provide reasons, in Section V, for not holding those civilians liable. Rather, my point is that, *pace* the moralized functionalist view, it is not clear at all that the mere fact of providing medical care to combatants provides the doctor with a moral justification for so acting irrespective of what those combatants will thereby be enabled to do. The intuitive power of the Hippocratic Oath argument is much diminished once one brings into view the fact that, in the cases that occupy us here, the doctor's decision to treat the

36. It seems to me, thus, that other things equal, not sending food to those who starve to death is not as bad as helping a third party send them poisoned food.

37. Interestingly, according to some theories of distributive justice, those who are responsible for the fact that they are needy or worse off have no claim to distributive transfers at the bar of justice. Those theories, it seems, would reject the view that there is a duty (of justice) to provide unjust combatants with welfare assistance—at least in those cases in which the latter could have acted in such a way as to not incur such needs or be made worse off (e.g., by refusing to fight for an unjust side). Clearly, those theories are not thereby committed to endorsing the killing of civilians<sub>w</sub>.

unjust combatant proves highly costly for the latter's enemy, namely, the cost of being subject to a lethal threat to which they are not liable.<sup>38</sup>

To recapitulate, I have rejected standard reasons for thinking that civilians<sub>w</sub> who contribute to wrongful threats are acting justifiably. To be sure, there might be other more plausible reasons for believing otherwise. Note, though, that one such obvious reason, to wit, the necessity for those workers of earning a living, is not available to proponents of the traditional account since they reject the view that duress provides combatants with a justification for killing enemy combatants who have not lost their right not to be attacked. Moreover, if the account is wrong on that particular point, then it would have to accept that workers who manufacture weapons for the army do have a justification for significantly contributing to the latter's unjust attacks and thus are not liable to being killed. In any event, as we shall now see, at the bar of the traditional account, 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.

#### V. GUNS, FOOD, AND CIVILIAN IMMUNITY FROM ATTACK

The Red Cross reports to which I referred earlier explicitly rule out, in law, the direct targeting of both civilians<sub>m</sub> and civilians<sub>w</sub>. In that respect, they are more restrictive than standard views on military assistance.<sup>39</sup> By and large, they are correct. According to the traditional account, it is a necessary condition for liability that one should be morally responsible for posing, or for significantly contributing to the posing of, a wrongful lethal threat to some other party, by way of an unjustifiable action. In the context of war, the account is often described as the view that combatants who take part in an unjust war are liable to being killed by the

38. Two points. First, the claim made in this paragraph applies whether the medic is a military doctor or a civilian doctor who happens to be on the scene or has volunteered to help the army. Second, one might think that the reasons why the medic ought not to help the injured unjust combatant, thereby enabling him to carry on committing unjust acts of killing, are also reasons for prescribing him, or at least permitting him, to incapacitate him. That, however, would be too quick. For it does not follow from the claim that one may not provide assistance to unjust killings that one must, or may, kill the unjust threat in defense of his victim. If, however, one believes that agents are under a duty, or are permitted, to kill in defense of others, then it may well be that the medic is under a duty, or is permitted, to kill the unjust combatant in defense of his victims. I lack the space to address those complications here, although I have defended the right and the duty to kill culpable attackers in defense of their victims in, respectively, "Permissible Rescue Killings," *Proceedings of the Aristotelian Society* 109 (2009): 149–64, and "Mandatory Rescue Killings," *Journal of Political Philosophy* 15 (2007): 363–84.

39. ICRC III, 15; ICRC II, 6. Some of the experts argued that a civilian truck driver deploying weapons to the front line could be regarded as a legitimate target while on his way to the front (see ICRC III, 32). I shall touch on those cases below.

enemy, whereas those who take part in a just war are not liable. But that description is an oversimplification. For (as we saw in Sec. III) although the traditional account does indeed confer on the moral status of the war *ad bellum* a decisive role when determining combatants' liabilities, it also admits of a much more nuanced reading. Unlike domestic, private, one-to-one cases of self-defensive killings, a war contains many phases, consists in iterative acts of killing, and is typically fought for various causes, to various ends, and by various means—some of them just, others unjust. Both the multifaceted character of the war *ad bellum* and its various phases *in bello* suggest that the moral status of a combatant (as just or unjust) is not fixed, once and for all, at  $t$  but depends on the specific phase(s) in the conflict in which he or she is involved. Suppose that B has a just cause for waging a war of self-defense against A but goes into war for additional unjust reasons—such as the seizure of A's oil fields over which (let us assume) it has no legitimate claim. Some of B's combatants will be deployed to repel the invasion and, in so doing, will act justly, while others will be sent deep into A's territory to take control of the fields and, in so doing, will act unjustly. Those of A's combatants who oppose B's self-defensive steps act unjustly, but those who kill B's combatants in protection of the oil field act justly.<sup>40</sup> Or suppose that, although A went to war against B at  $t$  without a just cause, it subsequently acquired a just cause for continuing with the war at  $t_1$ . Correspondingly, A's combatants who, at  $t$ , posed a wrongful threat to their enemy act justifiably at  $t_1$ , and so on.<sup>41</sup>

The foregoing considerations testify to the bewildering complexity of the deep morality of war and have provided ammunition to critics of the traditional account who believe that a morality of war should be able to guide combatants in their decisions.<sup>42</sup> Setting aside what proponents of the traditional account might say in response to that particular objection, those considerations also entail that civilians who provide welfare resources to combatants whose acts of killing are not wrongful (although they take place in the context of an *ad bellum* unjust war) are

40. See McMahan, "The Morality of War and the Law of War," 31. Some might say that, as A's army relies on regular supplies of oil to prosecute its unjust war, B might be wholly justified in seizing its fields. Others might counter that, as oil fields serve a dual purpose (fueling the war and meeting innocent civilians' need for oil in their daily lives), they are off limits. I set aside those complications.

41. The claim that it might be permissible for an unjust side *ad bellum* to continue to fight might seem odd. But if a deteriorating situation is created, at least in part, by the unjust side's decision to wage war, then it behooves on that side to help restore peace, even if it means carrying out further acts of killing (against opponents, in other words, who are impermissibly taking advantage of the chaos of the war to further their unjust ends). For the view that continuing and ending wars raises specific ethical issues, see Darren Moellendorf, "Jus ex Bello," *Journal of Political Philosophy* 16 (2008): 123–36.

42. See, e.g., Shue, "Do We Need a 'Morality of War'?"

not liable to being killed. By that token, neither are civilians who provide guns and tanks at  $t_1$  to combatants who, although they fought an unjust war of aggression at  $t$ , kill permissibly at  $t_1$ .

Moreover, and relatedly, although some civilians are deemed by the traditional account to make a wrongful contribution to wrongful lethal threats, many of them cannot be regarded as morally responsible for their contributions and the consequences thereof. Insofar as moral responsibility for a wrongful threat is the basis for liability to attack, those civilians are not liable. For consider that, as we saw in Section III, combatants can be said to infringe the enemy's right not to be killed if, and only if, they can be described as morally responsible for the threat which they pose. Unavoidable ignorance either of the fact that they are posing a threat or of the threat's wrongfulness negates moral responsibility, from which it follows that combatants who are unavoidably ignorant of either fact are not liable to being killed. Similarly, civilians who are unavoidably ignorant either of the fact that they are contributing to lethal threats or of the wrongfulness of those threats are not liable either. Conversely, civilians can be held morally responsible for their contribution to an unjust war if, and only if, they can reasonably be expected to know that they are contributing to an unjust war. By implication, they can be held morally responsible for their contributions to unjust threats if, only if, they can reasonably be expected to know that they are contributing to such threats. But the epistemic burdens faced by civilians are absolutely enormous—so much so, in fact, that those civilians can plausibly be regarded, in many cases, as unavoidably ignorant of the relevant facts. For a start, the resources used by an army on the battlefield are given, not merely to combatants who will continue to fight but also to wounded combatants who will be discharged from the army. Thus, workers whose company manufactures insulation material for army tents simply cannot know whether the tents which they help produce will be used to shelter incurably injured combatants or fighting-fit soldiers. Medical staff, at the point at which they treat an injured soldier, might not even know whether he will make it back to the front line, and so on. Furthermore, unlike combatants, those civilians whose contributions take place on the home front (e.g., in factories) are not directly faced with the physical and moral challenge of having to decide whether to use force in self-defense. As a result, the heat-of-battle argument, which claims that combatants cannot morally evaluate enemy threats, does not apply to them. By that token, however, their geographical distance from the battlefield might make it much harder for them to know whether they are contributing to specific wrongful threats since they are too far away from the threats to assess them. In addition, more often than not, welfare infrastructures and their agents will, in wartime, help both just and unjust combatants. Civilians whose factory is under contract to sup-

ply the army at war with food are in no position whatsoever to know where those rations will be shipped. To the extent that they are unavoidably ignorant of the moral status of the threat to which they contribute, they cannot be held morally responsible for making a contribution to what will turn out to be a wrongful threat, from which it follows that they are not liable to being killed. The same can be said, *mutatis mutandis*, of munitions factory workers.

Some proponents of the traditional account might object to the foregoing points that civilians can reasonably be expected to judge whether they are contributing to an unjust war in toto, particularly at the start of a war and, once the war has started, particularly those civilians<sub>w</sub> who, although not fighting themselves, nevertheless accompany army units at the front. Suppose that A decides to invade B, on the publicly expressed grounds that the latter has weapons of mass destruction. Suppose further that A's government does not provide evidence of such claims and fails to prepare for the aftermath of the war. Suppose, also, that both failures (to provide evidence of its just cause and to prepare for *post bellum* challenges) are amply discussed and debated in the weeks leading up to the war. In such a case, there is a very high degree of uncertainty about the justness of the war—too high, in fact, to exonerate combatants who accept to participate in it from the charge of wrongdoing. By that token (the objection might go), the degree of uncertainty is too high to exonerate from that same charge civilians whose factory manufactures the material resources required for the war. To be sure, one might suppose that there is a high degree of uncertainty about the unjustness of that war. But one must err on the side of not acting wrongfully, particularly when lives are at stake, and so one ought not to contribute to a war unless it is more likely to be just (at the very least) than it is to be unjust. If and when there is enough information to suggest that no such degree of confidence is warranted, and if civilians do have the mental capacities to access such information, then they can be expected to judge that they ought not to contribute. Similar considerations apply, *mutatis mutandis*, to civilians who work with the army on the front line. In addition, those civilians are in a better position to assess, on the basis of broad consideration, whether the threats to which they are contributing are wrongful. For example, private military contractors who are tasked with deploying nonmilitary and military logistical resources to B's troops as the latter are advancing toward A's oil fields can be reasonably expected to reach a judgment about the likelihood that the threats posed by B's combatants to A's, in this particular phase of the war, are unjust, and so on.<sup>43</sup>

43. For considerations which would support an objection along those lines, see, e.g., McMahan, *Killing in War*, 165–67, and 176–78.



The objection has bite with respect to civilian participation in the incipient stages of an unjust war. But it is less powerful as the war goes on because the longer it lasts, the more likely it is that the *ad bellum* unjust side will acquire subsidiary just ends and have to thwart unjust retaliatory killings on the part of the enemy. As a result, civilians will end up contributing to both just and unjust threats. Even if (as I suggested in Sec. IV) running the risk of wrongfully harming someone (as civilians would do by contributing to an unjust war) is morally worse than running the risk of not helping someone thwart an unjust threat (as civilians would do by not participating in an unjust war, some phases of which would nevertheless be just), it does not follow that they are liable to attack. For on the traditional account, liability depends on what individuals do and on their moral responsibility for their actions. But if 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 being killed merely in virtue of knowingly taking the risk of wrongfully contributing to unjust lethal threats, given (a) that they cannot know either way how their contribution will be used and (b) that they must also know that there is a strong chance that they will in fact either contribute to just threats or not contribute to any threat at all (when, e.g., they help injured soldiers who will be discharged from the army), does not, it seems to me, pass the 'fittingness test'.

There is a further, and related, point to be made in support of the claim that both categories of civilians often escape liability. As we saw in Section II, both civilians<sub>m</sub> and civilians<sub>w</sub> collectively make a significant contribution to the war effort, even though their individual contribution is, more often than not, marginal—particularly when they work in large-scale infrastructures such as munitions factories, specialized food processing plants, and so on. To the extent that the collective venture in which they are direct participants is wrongful (in this case, for consisting in a wrongful infringement of the enemy's right not to be killed), their own individual contribution to it is itself wrongful (in that it is a contribution to a wrongful right infringement). However, it does not follow that they are liable to being killed. To claim otherwise implies that the costs which people are liable to suffering for their actions are determined solely by the significance of their individual contributions when considered collectively. That, however, is not a view which sits comfortably with the traditional account. To repeat, on that account, agents' liability derives from what they do as individuals and not from their membership in a group engaged in war: indeed, the claim that liability derives from group membership is one of the main targets of the tra-

ditional account.<sup>44</sup> To the extent that the account seeks to connect liability to individual agency, it must pay attention to what it is exactly that individuals do. In other words, it cannot regard mere (wrongful) participation in a wrongful venture as a sufficient condition for liability to direct attack. Rather, a contribution must, on its own individual terms, meet a threshold of causal significance in order for its author to be liable. Tightening screws on tank engines, testing the sweat-absorbing capacities of the clothes which soldiers will wear in the desert, and adjusting the speed level of food-packaging machines do not, it seems to me, pass the threshold. Nor, for that matter, does designing a tiny piece of equipment which goes into a gun do so. By contrast, taking overall responsibility for negotiating and drafting sales contracts between one's factory and the army might; so might driving a truckload of munitions or protective clothing to an armory division, and so on. Civilians<sub>w</sub> and civilians<sub>m</sub> who individually make very small, marginal contributions are not liable to being killed, although they might be liable to incurring other lesser harms (such as more onerous reconstruction burdens once the war is over). Those whose contributions are highly significant (a tiny minority, one should think) might be liable, provided that they also pass the threshold for moral responsibility (which the driver and the sales negotiator might not do, for reasons adduced in the previous paragraph).

The view that individuals' liability to attack must in part depend on the extent to which their contributions pass a certain threshold of causal and moral responsibility has been rejected by McMahan on the following grounds.<sup>45</sup> Imagine a conscientious driver who takes very good care of her car, drives carefully, and so on. However conscientious she is, she knowingly chooses to expose other drivers and pedestrians to a very small risk of being run over. One day she unavoidably loses control of her car, in a freak accident which she could not have foreseen. Unless she is killed, a pedestrian will die. Although she bears a high degree of causal responsibility for the pedestrian's death, morally speaking she is only minimally responsible for it. On a threshold view of liability, surely she is below the threshold and thus is not liable to self-defensive attack on the part of the pedestrian (in the sense that she has not acted in such a way as to lose her right not to be killed). If she is not liable, and if one believes (as most would) that the pedestrian may kill her, then their conflict must be read as a case of symmetrical self-defense, in which neither party has lost the right not to be killed and in which they may thus permissibly infringe each other's right. Yet, according to McMahan, this is not the best way to regard such a conflict, for "one must explain

44. See, e.g., *ibid.*, esp. 79ff.

45. *Ibid.*, 165–67, 176–78, and 230–31.

how the presumption against intentional killing is overridden in the absence of either liability on the part of the Threat or a lesser evil justification.<sup>46</sup> Given that there is no such explanation, one ought not to regard the conflict between the driver and the pedestrian as a symmetrical defense case. It follows that one should jettison the idea of a responsibility threshold in general, which in turn entails that civilians' liability to attack cannot depend on the location of their contribution to unjust lethal threats in relation to such a threshold.

But this is too quick. For there is a justification other than liability or lesser evil for conferring on both driver and pedestrian the permission to kill each other, to wit, that under those circumstances, in which they are almost on a par morally speaking, they may both confer greater weight on their life than on the life of the other party. Call that the partiality argument for self-defensive killing, according to which (a) there are limits to the sacrifices which one can reasonably expect agents to make for the sake of others and (b) expecting them to sacrifice their life for the sake of the agent who is posing a lethal threat to which they are not liable lies beyond the bounds of reasonableness. On that view, the conflict between the conscientious driver and the pedestrian is relevantly similar to that between the just tactical bomber and the civilians who live near his target: neither party is liable to direct attack at the hands of the other, and both are permitted to infringe the other's right not to be killed. Insofar as the case of the driver is a case of symmetrical defense, it gives us no reason to reject the notion of a responsibility threshold for liability to attack.<sup>47</sup> Accordingly, civilians whose material contributions fall below the threshold are not liable. By the same token, of course, the traditional account of liability to attack must allow for the possibility that, in principle at least, some civilians are liable, if their material contributions are placed above the threshold.

46. *Ibid.*, 180. McMahan advances a second reason against regarding some conflicts between victims and threats as symmetrical self-defense cases, to wit: "Nonresponsible Threats do not seem to threaten their victim's *rights* when the threat they pose does not derive from their agency at all" (*ibid.*). Insofar as the conscientious driver does act in such a way as to threaten the pedestrian, that argument does not apply to her case (nor does it apply, by implication, to the case of civilians who make a material contribution to the war).

47. In his "Self-Defense and the Problem of the Innocent Attacker" (*Ethics* 104 [1994]: 252–90), Jeff McMahan rejects the partiality justification for self-defensive killing on the grounds that it cannot account for the prohibition on killing bystanders. For an argument to the effect that it can do so, see my "Permissible Rescue Killings." See also Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009): 507–37. In a recent article, Seth Lazar argues that the pedestrian, too, is responsible for a situation in which a forced choice arises between her life and the driver's since she has chosen to expose herself to the risk of being run over. See Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119 (2009): 699–728. My argument here does not presuppose such a view.

I say “in principle” because (as McMahan in fact notes in his *Killing in War*) there are good reasons for endorsing the view that we ought not to target civilians who materially contribute to an unjust war. In order to be liable, a civilian must unjustifiably contribute to a wrongful threat and, in addition, must pass a certain threshold of moral and causal responsibility for the threat. Determining whether civilians meet those conditions is almost impossible.<sup>48</sup> Insofar as, in serious doubt, one should err on the side of not harming, particularly if our potential target is not herself directly posing a lethal threat to us or even is in a position to do so (as is the case with unarmed civilians, as opposed to combatants), one should desist from treating her as if she were liable. Moreover, standard claims, such as the lack of effectiveness of such attacks and the impossible task of differentiating between civilians who do contribute to the war and those who do not, provide a strong basis for protecting civilians in general. Crucially, however, those points apply, not merely to those who provide combatants with specialized food, clothing, and medical care but also to those who provide them with guns.

## VI. CONCLUSION

In this article, I have argued that the functionalist distinction between civilians<sub>m</sub> and civilians<sub>w</sub> does not offer a convincing basis for holding the former, but not the latter, liable to attack. Rather, at the bar of the traditional account of liability to attack, only those civilians whose contributions pass a certain threshold of causal and moral responsibility are liable, whether their contributions to unjust lethal threats are military or welfarist. Determining exactly which contributions pass the threshold under what circumstances is beyond the scope of this essay. Still, that theoretical point leaves the door open, in principle, for regarding some civilians as liable. That will undoubtedly strike many as a repugnant conclusion, particularly in the case of welfare contributions. But even if the traditional account is committed to that conclusion, it can, indeed must, also endorse the view that epistemic uncertainty as to the moral status of those civilians dictates us to treat them, in practice, as if they were not liable, irrespective (here again) of the nature of their contributions to the war. In other words, whether food or guns are at issue is neither here nor there.

48. Concerns relevant to the formulation of the threshold might include, nonexhaustively, the degree of destructiveness to which one contributes, the temporal location of one’s (destructive) contribution to the actual killings, the amount of information at one’s disposal as to the precise ends to which one’s contributions are directed, etc. I am grateful to an editor for *Ethics* for inviting those remarks.